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# Professionalism, Gender and the Public Interest: The Advocacy of Protection

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**ESSAY**  
**PROFESSIONALISM, GENDER AND THE**  
**PUBLIC INTEREST: THE ADVOCACY OF**  
**PROTECTION**

MINNA J. KOTKIN\*

I. INTRODUCTION

When lawyers, particularly adversaries, begin to talk about professionalism around me, I sometimes still get anxious, even after more than twenty years of practice and teaching. My reaction has nothing to do with doubts about my ethical behavior but, rather, it relates to my gender: I wonder whether others think I am acting like a woman instead of like a lawyer.

Indeed, the term “professionalism,” as used in the legal community today, is not a gender neutral concept. When lawyers of both genders think about professionalism, they contemplate an aspirational vision: those lawyers who abide by the highest ethical standards, represent their client zealously, but with good judgment and good manners. This idealized “professional” looks beyond the profit motive and contributes to the greater good through public service, thereby finding true satisfaction in his or her chosen field.<sup>1</sup> The discourse about professionalism largely focuses on the line between appropriate zeal and bad manners.

But even a cursory look at the “professionalism” literature reveals gendered meanings in a surprisingly explicit fashion. The seemingly gender neutral vision of the professional is, in fact, a vision of a man. Anthony Kronman’s recent influential book, *The Lost Lawyer: Failing*

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1. See, e.g., ABA Commission on Professionalism, “. . . In the Spirit of Public Service:” A Blueprint for the Rekindling of Professionalism, 112 F.R.D. 243 (1986) [hereinafter Commission on Professionalism]. The ABA Commission embraced Dean Roscoe Pound’s definition of professionalism as: the pursuit of a “learned art . . . in the spirit of public service.” *Id.* at 261.

*Ideals of the Legal Profession*, is one example.<sup>2</sup> Kronman argues for a return to the days of the "lawyer-statesman," whose representation of a client is always tempered by sound judgment and strength of character, and who is a participant in a "political fraternity" of shared values.<sup>3</sup> Thomas Shaffer, another well known scholar in the field, harkens back to the time of the "gentleman lawyer" in tracing the decline of professionalism in the practice of law.<sup>4</sup> These gendered portrayals of the professional ideal, not coincidentally, use as their reference point an era preceding the influx of women into the legal world.<sup>5</sup> Perhaps, and again not by coincidence, the call for greater professionalism in the practice of law has coincided with a greater inclusion of women<sup>6</sup> and people of color in the profession.<sup>7</sup>

While women lawyers may voice the same concerns about the changing nature of the practice of law, many also view the concept of "professionalism" in a context that implicates gender roles. In the past ten years, a number of empirical studies have demonstrated that when women lawyers and law students talk about professionalism, the conversation is often personal. The question, "Am I acting professionally?," rarely relates to ethical norms or standards of civil behavior. Instead, the question translates into whether a woman feels she is acting in accordance with the role of the advocate, as conceived by men. Thus, the question becomes, "Am I too emotionally involved with my client, or not involved enough because I think that involvement is unprofessional; am I too aggressive or not aggressive enough; how can I match myself to the professional norm, and why does that norm often

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2. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

3. *Id.* at 20-21, 106-07.

4. Thomas L. Shaffer, *The Gentleman in Professional Ethics*, 10 QUEENS L.J. 1 (1984); see also Thomas L. Shaffer, *Lawyer Professional as a Moral Argument*, 26 GONZ. L. REV. 393 (1990-1991). Commenting on the ABA Commission on Professionalism, Shaffer notes that he suspects that its members "yearn for the return of the gentlemen-lawyer," but cannot admit to it, one reason being that nearly half of the profession is female and "speaking of women as gentlemen is problematic." He also suggests that it is "problematic to use that word for men who are not white Protestants." *Id.* at 400.

5. As the authors of the Report of the Commission on Professionalism pointed out, "Perhaps the golden age of professionalism has always been a few years before the time that the living can remember. Legend tends to seem clearer than reality." Commission on Professionalism, *supra* note 1, at 304.

6. CYNTHIA F. EPSTEIN, *WOMEN IN LAW* 4 (2d ed. 1993).

7. See Vincent R. Johnson & Virginia Coyle, *On the Transformation of the Legal Profession: The Advent of Temporary Lawyering*, 66 NOTRE DAME L. REV. 359, 360-61 n.4 (1990) (women and minorities comprise increasingly larger percentages of law school graduates); Henry Ramsey, Jr., *Affirmative Action at American Bar Association Approved Law Schools: 1979-1980*, 30 J. LEGAL EDUC. 377, 379-80 (1979-1980).

feel wrong?"

Starting from the proposition that the personal is the political, feminist legal theorists have explored this question of role conflict. Many, particularly those influenced by Carol Gilligan's work,<sup>8</sup> have concluded that a rights-based jurisprudence and rights-based, adversarial process leaves little room for the expression of the distinctively female values of care and connection. Because "law is male," women in the profession face an inherent role conflict.<sup>9</sup> While "relational" feminist theory has been widely criticized as essentialist and culturally determined,<sup>10</sup> it nevertheless seems to ring true for many women lawyers.

Feminist scholars have explored the transformative potential of viewing the law from a relational perspective. In virtually every substantive area, there have been efforts to envision how a doctrine that values an "ethic of care" would look different. The adversarial norm has also been questioned as the optimal method for dispute resolution. Transformation of the law is an ambitious and long-term agenda. Much of the current feminist scholarship offers hope, but not guidance, for women lawyers confronting an untransformed legal world.

In this Essay, I consider the interaction between relational feminist theory and women lawyers' concepts of professionalism, and I attempt to explore how relational values can be used in a legal world that still defines professionalism in an adversarial, rights-based context. Part II examines some of the empirical work on women in the profession that documents problems of role conflict. Part III looks at the theoretical foundation of that conflict. Part IV offers some personal observations on generational differences in women lawyers' experiences with role conflict that have led me to consider the impact of feminist theory on women's self-perception. Part V considers some views of professionalism that attempt to integrate an ethic of care. Finally, Part VI poses an alternative formulation of relational feminist theory that may help to address issues of role conflict. I suggest that an ethic of care does not require women to reject powerful and forceful advocacy. Rather, it can be seen as providing a different motivational source for that advocacy.

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8. See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

9. See Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); see generally Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

10. Catharine MacKinnon is a leading proponent of the view that the "women's voice" is simply the voice of any powerless and oppressed group, and that it is an adaptation to male domination. See, e.g., Lecture, *Feminist Discourse, Moral Values and the Law—A Conversation*, 34 BUFF. L. REV. 11, 27 (1985) [hereinafter *Feminist Discourse*] (remarks of Catharine MacKinnon).

Feminist theory can offer the foundation for an "advocacy of protection" that integrates care-based concerns with established professional norms. By exploring this alternate motivational source, I propose that we can find a professional role that feels like a true fit and alleviates the sense of role conflict that characterizes the lives of many women lawyers.

## II. DEFINING THE ISSUE

The influx of women into the legal profession, beginning in the 1970's,<sup>11</sup> was heralded as a triumph of feminism's second wave. Almost as soon as our presence was felt in larger numbers, we became the subject of research. It became apparent that there was something not quite right with the "fit" between women and traditional legal education and practice. Indeed, the issue of "fit" has been explored empirically, anecdotally and theoretically in many studies that document how women and men have distinct experiences with legal institutions. These works help frame the issue of why concepts of professionalism have a different meaning for women.

There is substantial evidence that women choose to attend law school out of motivations more connected to public interest norms—the desire to "serve society" and contribute to the public good.<sup>12</sup> Assuming that women may begin with a vision of the profession somewhat different from their male counterparts, there is even more evidence suggesting that they experience law school differently and in ways that contribute to alienation from the normative professional model. A recent empirical study of women at the University of Pennsylvania Law School (Penn Study)<sup>13</sup> concludes that women's academic performance is below equally qualified male students. The study found that women feel alienated by both the traditional teaching methodology, and the informal intellectual life of the law school community.<sup>14</sup> It also ap-

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11. See EPSTEIN, *supra* note 6, at 4 (information in Table I.1 shows that between 1970 and 1980, the proportion of women in the legal profession grew from 4.7% to 12%).

12. See Janet Taber et al., Project, *Gender, Legal Education and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1219, 1238-41 (1988) [hereinafter *Empirical Study of Stanford*] (citing various studies); see also Georgina W. LaRussa, *Portia's Decision: Women's Motives for Studying Law and Their Later Career Satisfaction as Attorneys*, 1 PSYCHOL. WOMEN Q. 350, 353-58 (1977); Suzanne Homer & Lois Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L.J. 1, 28 (1990).

13. Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994).

14. *Id.* at 3, 21-32. As a result, women garner fewer of the most prestigious jobs. Similar results have been reported at Yale, where in 1991, seven times as many men as women accepted federal appellate court clerkships, even though women represented 40% of the graduating

pears that women shed their desire to pursue public interest careers during their law school tenures and come to more closely mimic the aspirations of male classmates.<sup>15</sup>

The Penn Study, as well as an earlier anecdotal report of women's experiences at Yale Law School,<sup>16</sup> is replete with reports of conflict about women's professional roles. Women widely report that they feel a powerful pressure to conform to a professional model of dispassionate and objective advocacy, in a competitive milieu that values quick and assertive speech. Some women view the environment as just barely concealing an hostility towards women in general. Women see the law school experience as training them to be less emotional, to suppress feelings and to "put away" passionately held beliefs.<sup>17</sup> Aggressive and abrasive classroom behavior is met with approbation and it has been widely documented that women participate less than men.<sup>18</sup> The Penn Study refers to women who conform to the norm as feeling that they have submerged their former selves in the pursuit of succeeding as a "social male."<sup>19</sup>

Studies of female graduates reflect similar patterns of conflict over dispassionate aggressive advocacy. An article based on an empirical survey by Stacy Caplow and Shira Scheindlin reports that a majority of women feel that their gender has hampered their success.<sup>20</sup> One of the

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class. Sandra Torry, *At Yale Law, A Gender Gap in Who Gets Clerkships Sparks Debate*, WASH. POST, May 13, 1991, at F5.

15. Guinier, *supra* note 13, at 40-41. It appears that, as a general matter, law students' desires to practice public interest law significantly decrease over three years. See E. Gordon Gee & Donald W. Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 4 B.Y.U. L. REV. 695, 957-59 (1977). Robert Stover explains that the decline is, in part, the result of students' lack of exposure to public interest law, and a concomitant immersion in business practice. He suggests that law schools need to nurture a public interest subculture by: supporting student groups; faculty members setting an example through a commitment to pro bono work; providing law students with various opportunities to experience public interest practice; emphasizing, in ethics courses, pro bono obligations; integrating concerns, in classroom discussions, for the unrepresented. ROBERT V. STOVER, MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL 117-20 (Howard S. Erlanger ed., 1989).

16. Catherine Weiss & Louise Melling, Essay, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1299 (1988).

17. Guinier, *supra* note 13, at 49.

18. See, e.g., Taunya L. Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137, 141 (1988); Stephanie M. Wildman, *The Classroom Climate: Encouraging Student Involvement*, 4 BERKELEY WOMEN'S L.J. 326, 326 n.3 (1989-1990); *Empirical Study of Stanford*, *supra* note 12, at 1239.

19. Guinier, *supra* note 13, at 43. Lucinda Finley has commented that some women law students describe their experience as being forced to become "bilingual," fearing the loss of their native tongue. Lucinda M. Finley, *Breaking Women's Silence In Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 894 n.39 (1989).

20. Stacy Caplow & Shira A. Scheindlin, "Portrait of a Lady": *The Woman Lawyer In*

most repeated comments of respondents to the study was that the practice of law is unpleasant because it is characterized by conflict and confrontation.<sup>21</sup> Caplow and Scheindlin found that women practitioners are dissatisfied with adversarial methods of resolving disputes, and prefer problem-solving and conciliatory modes of resolution rather than methods based upon aggressive posturing.<sup>22</sup> Their study indicates that many women, close to a majority, are more dissatisfied than men with law practice. Other such findings have been widely reported,<sup>23</sup> as has evidence that women generally express a greater interest than men in leaving the profession.<sup>24</sup>

In one of the most extensive empirical efforts, Rand Jack and Dana Jack (a lawyer/psychologist team) explored the field of moral conflict for women in law practice, posing the question, "What is happening to the growing number of women entering a system designed by and for men?"<sup>25</sup> Their interviews document a continuing sacrifice of personal morality that begins with the law school experience.<sup>26</sup> As a result they find that women experience great disharmony with regard to their professional roles. They trace the root of the conflict to women's care-oriented perspective that continually conflicts with a rights-based legal system. Jack and Jack also note that when the gap between personal morality and professional role widens, so does tension.<sup>27</sup> Describing the "double bind" women experience, they write:

Yet for a woman to play the law game as a man does violates sex role norms, a transgression that is negatively judged by others and that can create anxiety in the transgressor. To fit the stereotypical image of an advocate means being argumentative and aggressive, characteristics that are traditionally condemned in women. If a woman chooses to reject the usual lawyer image . . . she may be labeled too feminine, and others may doubt her fiber as a tough

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*the 1980s*, 35 N.Y.L. SCH. L. REV. 391, 428 (1990).

21. *Id.* at 422. The authors note that women "faulted themselves . . . for being insufficiently aggressive instead of questioning the operative professional values." *Id.* at 422-23.

22. *Id.*

23. See ABA COMM. ON WOMEN IN THE PROF., OPTIONS AND OBSTACLES: A SURVEY OF THE STUDIES OF THE CAREERS OF WOMEN LAWYERS 26-28 (1994); see also *The State of the Legal Profession*, 1990 ABA SEC. YOUNG LAW. REP. 8 (discussing the extent, causes and impact of lawyer career dissatisfaction).

24. See Raquel A. Hunter, 4 UCLA WOMEN'S L.J. 117, 125 & n.44 (1993) (reviewing DEBORAH L. ARRON, *RUNNING FROM THE LAW: WHY GOOD LAWYERS ARE GETTING OUT OF THE LEGAL PROFESSION* (1989)); see also Cheryl Frank, *Leaving the Law: Are Reasons Gender Based?*, ABA J., Dec. 1985, at 34.

25. RAND JACK & DANA C. JACK, *MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS* at xi (1989).

26. *Id.* at 45.

27. *Id.* at 126.

lawyer.<sup>28</sup>

Jack and Jack conclude with the hope that care-oriented perspectives can be better integrated into a right-based legal system, suggesting that "both care and rights speak to a quality of justice," with each checking the faults of excess in the other.<sup>29</sup>

The inherent role conflict that many women experience is exacerbated by legal institutions that still permit the derogation of women in the profession. These experiences have been catalogued at length in the various recent studies exploring gender bias in the courts.<sup>30</sup> In essence, these studies suggest that the courts, as primary legal institutions, have contributed substantially to women lawyers' sense of exclusion from the norms of professionalism. The studies detail the indignities that women face in the courts, both as litigants and as advocates. A Ninth Circuit study, for example, reported that women lawyers experience the federal courts as a "club" that welcomes only men.<sup>31</sup> The New York Task Force reported that beyond the more obvious examples of demeaning remarks, a more subtle form of discrimination undermines women in the profession: while aggressive behavior is rewarded or tolerated from men attorneys, it is viewed by the judiciary as out of place or unacceptable from women.<sup>32</sup> Statistical data bear out these perceptions, particularly in the number of women represented at various levels of the judicial hierarchy.<sup>33</sup>

Many of these works share common conceptions of possible remedial measures, ranging from pragmatic to transformative. The Penn Study authors call for a restructuring of legal education to modify the adversarial approach to problem solving represented by the Socratic method, which values the argumentative professor-student interaction.<sup>34</sup>

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28. *Id.* at 134.

29. *Id.* at 170-71.

30. See, e.g., Judith Resnik, *Gender in the Courts: The Task Force Reports*, in *THE WOMAN ADVOCATE: EXCELLING IN THE 90'S* 10-11 (Jean M. Snyder & Andra B. Greene eds., 1995).

31. *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 745, 784 (1994).

32. *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L.J. 11, 145 (1986-1987) [hereinafter *N.Y. Task Force*].

33. Resnik, *supra* note 30, at 11; Marilyn J. Berger & Kari A. Robinson, *Women's Ghetto in the Legal Profession*, 8 WIS. WOMEN'S L.J. 71, 89-92 (1992-1993); *N.Y. Task Force*, *supra* note 32, at 150-53 (noting nearly half of all women judges sit in New York's family, criminal, housing and civil courts).

34. Guinier, *supra* note 13, at 93, 95. In fact, criticism of the Socratic method is a staple of feminist writing about legal education. See, e.g., Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies and Legal Education* or "The Fem-Crits Go to Law School," 38



Jack and Jack concur and further advocate for the inclusion of a communitarian care-based approach to legal issues, with a recognition of the importance of personal morality.<sup>35</sup> The absence of women in positions of authority, such as professors and judges, in proportion to the number of women entering the legal profession<sup>36</sup> may be viewed as contributing to women's sense of alienation. In the practice of law itself, many have suggested that more attention should be given to forms of alternate dispute resolution that value a non-adversarial mode of interaction.

### III. THE ISSUE DEFINED THEORETICALLY

The empirical body of work studying women in the profession certainly appears to mirror the school of feminist psychological theory popularized by Carol Gilligan. Indeed, Gilligan's influence on both empirical and theoretical legal scholarship is widely acknowledged as enormously significant.<sup>37</sup> Her work has been used to explain much of the empirical evidence discussed above.

Gilligan's thesis is that women demonstrate a different moral focus than men.<sup>38</sup> Women reject a morality based on concepts of rights and individual justice. Instead, they employ an ethic of care in their moral reasoning, looking to concerns of responsibility and community. Thus, women and men approach the resolution of conflict from different perspectives: men favor the application of neutral rules, while women look for solutions that are more contextual and attempt to maintain relationships and connection.<sup>39</sup>

To explain this difference in moral development, Gilligan draws on the school of feminist psychological theory represented by the

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J. LEGAL EDUC. 61, 77 (1988); Morrison Torrey et al., *Teaching Law in a Feminist Manner: A Commentary From Experience*, 13 HARV. WOMEN'S L.J. 87, 90-91 (1990).

Others have called for course offerings, emphasizing women's voices in literature, to help stem women's sense of alienation in law school. See, e.g., Melissa Harrison, *A Time of "Passionate Learning": Using Feminism, Law, and Literature to Create a Learning Community* 60 TENN. L. REV. 393 (1993); see also Carolyn Heilbrun & Judith Resnik, *Convergences: Law, Literature, and Feminism*, 99 YALE L.J. 1913 (1990).

35. JACK & JACK, *supra* note 25, at 156-71.

36. Guinier, *supra* note 13, at 77.

37. GILLIGAN, *supra* note 8; see generally Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 797-80 (1989) (noting Gilligan's influence on feminist scholarship).

38. GILLIGAN, *supra* note 8, at 1.

39. *Id.* at 10-11; see also Menkel-Meadow, *supra* note 34, at 73.

works of Nancy Chodorow<sup>40</sup> and Jean Baker Miller.<sup>41</sup> These authors posit that men's need to separate from their mothers in order to achieve their gender identity creates the foundation for valuing autonomous rights-based thinking. Women, on the other hand, create their gender identity by maintaining attachment to their mothers, and therefore relational values come to dominate their moral viewpoint. Neo-freudian notions of male competitiveness and aggressiveness are linked to differences in the creation of the gender role.

Although Gilligan's work has been widely criticized,<sup>42</sup> it has been even more widely embraced in the realm of feminist legal scholarship.<sup>43</sup> Certainly, its essentialism is apparent: not all men and not all women replicate these models of moral reasoning. While this disclaimer is a standard feature of both Gilligan's writing<sup>44</sup> and those that rely on her thesis, it usually gets lost in any ensuing analysis. Issues of race, class, sexual orientation, and other cultural and societal differences may be at least determinative of moral perspective. Moreover, Catharine MacKinnon and others raise the persuasive argument that these gender differences are not immutable characteristics, but stem from societal construction of gender or more directly from our cultural history of the subordination of women.<sup>45</sup> Post-modern feminist legal theoreticians reject both the dominance and the relational schools as creating rigid and false dichotomies based on dominant gender stereotypes.<sup>46</sup>

Nevertheless, the critiques of Gilliganism cannot detract from its influence. Not only has "relational feminism" served as the foundation for a substantial rethinking of legal doctrine and lawyering theory, but it has, for better or worse, permeated the consciousness of the legal academy. Indeed, the relationship between the empirical studies of women in law school and in the profession and Gilliganism has been made quite explicit. All of the studies, to greater or lesser degrees, attribute women's role conflicts to the legal education's failure to value noncompetitive learning styles and to its exclusive emphasis on "neu-

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40. See NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978).

41. See JEAN B. MILLER, *TOWARDS A NEW PSYCHOLOGY OF WOMEN* (2d ed. 1986).

42. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 585 (1990).

43. For a discussion of Gilligan's influence, see Williams, *supra* note 37, at 803 n.17.

44. See GILLIGAN, *supra* note 8, at 2.

45. See CATHARINE MACKINNON, *FEMINISM UNMODIFIED* 38-39 (1987); see also *Feminist Discourse*, *supra* note 10, at 23-28.

46. See, e.g., Jeanne L. Schroeder, *Abduction in the Seraglio: Feminist Methodologies and the Logic of Imagination*, 70 *TEX. L. REV.* 109, 112-16 (1991).

tral," rights-based analysis.

#### IV. A PERSONAL DIGRESSION

I went to law school in the early 1970's and thus preceded the reign of relational feminism. We, the fifteen women in my law school class, were very much part of the equality generation. We were following closely on the heels of the rebirth of feminism in the contemporary women's movement, and it was our involvement in the struggle for equal rights that led most of us to law school in the first place. We believed, naively as it turns out, that a formal abstract standard of equal treatment was all that was required to remedy what we called "sex discrimination." We viewed law school as a means for learning the tools to wage that campaign. Even those of us without an explicit public interest focus envisioned a future of breaking down the barriers against women in the traditional bar and taking our rightful place among the leaders of the profession.

I do not recall our feeling silenced in the classroom, despite an all male faculty relying exclusively on the Socratic method. In fact, the few women in a class usually made their presence felt quite vocally. We felt the absence of role models and mentors, but we supported one another in what we conceived of a group effort to integrate ourselves into the legal world. We were rewarded by our academic performance which, as a group, seemed to outpace that of the men.<sup>47</sup> Looking back, it seems that we embraced wholeheartedly a rights-based jurisprudence and suffered little over issues of role conflict stemming from an ethic of care and connection. Clearly, these are completely subjective impressions, but in talking to women colleagues of my generation, I've found that their law school experiences were not dissimilar to mine.<sup>48</sup>

As a teacher today, however, I do not doubt for a moment that my women students experience law school as described in the empirical work and that those graduating in the last ten years struggle over questions of professional role as related to gender. My personal experience

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47. In their survey of 1975 and 1976 women graduates, Caplow and Scheindlin found that their respondents typically performed well in law school: "Over 51% reported graduating in the top quarter of their class; 21% in the top 10%." See Caplow & Scheindlin, *supra* note 20, at 403. The University of Pennsylvania study reports similar findings. See Guinier, *supra* note 13, at 13 n.40.

48. However, women's accounts of the law school experience from a slightly earlier period paint a different picture. See, e.g., Marina Angel, *Women in Legal Education: What It's Like To Be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMP. L. REV. 799, 811-12 (1988).

confirms that most women, and even some men, have a difficult time adapting to the dominant professional norms, even discounting for issues of family and work that continue to fall more heavily on the shoulders of women.

What accounts for the difference? There are some rather obvious hypotheses. First, it may be that women who chose law school in the pioneering times of the "second wave" were a self-selecting group. Perhaps we were already "social males," and therefore pursued legal careers with a minimum of conflict. Perhaps our grounding in the equality feminism<sup>49</sup> that pervaded those years made us believe that once in the law school door the rest was easy; on a level playing field we would succeed. Another theory, of course, is that we were victims of "false consciousness": we could not even perceive or take in the oppressiveness of the law school environment.<sup>50</sup> It may have just been that times were different, however, the spirit of social change gave us the belief that all things, including the eradication of sexism and patriarchal oppression, were possible.

There are some alternative explanations, however, that can translate into suggestions for women in law school today. First, the strength of the women's community was of inestimable value. Because there are so many more women in law school now, that sense of community does not naturally create itself, but it can be fostered and nurtured if law schools provide the resources and opportunities.<sup>51</sup> Second, our commitment to law as an instrument of social change was another source of strength.<sup>52</sup> Again, support and encouragement in law schools

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49. Equality feminism is concerned with issues of equal access for women to educational, civic and economic institutions. Martha Minow views equality feminism as the first of three stages of feminist scholarship. In the second stage, scholars began to focus on acknowledging and respecting women's differences. She identifies a third stage that rejects this dualistic paradigm. See Martha Minow, *Introduction: Finding Our Paradoxes, Affirming Our Beyond*, 24 HARV. C.R.-C.L. L. REV. 1, 2-3 (1989). For other discussions of equality feminism, see Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 199, 199-205 (1989-1990) and Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987).

50. See Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1773-76 (1991) (discussing why women fail to perceive or complain about discrimination).

51. Weiss and Melling discuss the importance of their women's group as contributing to a sense of empowerment and creating a means by which they could become more assertive in the law school community. Weiss & Melling, *supra* note 16, at 1309; see also Harrison, *supra* note 34, at 394, 412 (discussing at length the sense of community created by a group of women students participating in an independent study program on feminism, law and literature).

52. Caplow and Scheindlin found that among the women they surveyed, those least likely to have chosen a different career worked in legal education and public or government agencies.

for public interest careers may help those women whose motivation to become lawyers stemmed from this perspective.

#### V. CHANGING THE PROFESSION: SOME TRANSFORMATIVE IDEAS

I will not dwell on the doctrinal contributions of relational feminist theory. This presents a body of work that seeks to answer the question of how the law and legal education would be different if they addressed concerns of community and connection rather than autonomous rights-based individualism.<sup>53</sup> Such a doctrinal shift might well create a closer fit for women in the profession, but this scholarship does little to respond to the everyday concerns of women entering the law today, other than to provide what is hopefully a vision for the future.

Other scholarship stemming from relational feminism, that addresses the issue of lawyering role has more immediate relevance to women's dilemma over professionalism norms. Some of this work attempts to find a place for the "ethic of care" in a re-conceived view of the lawyering process. For example, Carrie Menkel-Meadow suggests that women may alter the structure of dispute resolution by favoring alternatives to the adversarial model that better responds to the varied needs of the parties. She writes that the ethic of care "suggests that women lawyers may be particularly interested in mediation as an alternative to litigation as a method of resolving disputes."<sup>54</sup> Even within the adversarial model, she notes, women lawyers may more actively pursue negotiated settlements with greater attention to equitable remedies.

Others scholars drawn to relational feminism have posited a re-conception of the attorney-client relationship. Stephen Ellmann, for example, writes about the different moral responsibilities towards clients that would spring from an ethic of care.<sup>55</sup> Lawyers would permit themselves to feel sympathetic engagement and a personal attachment

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See Caplow & Scheindlin, *supra* note 20, at 421.

53. See, e.g., Marjorie M. Schultz, *The Gendered Curriculum: Of Contracts and Careers*, 77 IOWA L. REV. 55 (1991); Nancy S. Erickson, *Final Report: "Sex Bias in the Teaching of Criminal Law,"* 42 RUTGERS L. REV. 309 (1990); Bender, *supra* note 9.

54. Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 53 (1985).

55. See Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993); see also Phyllis Goldfarb, *A Clinic Runs Through It*, 1 CLINICAL L. REV. 65, 69 (1994); Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175 (1992).

to clients.<sup>56</sup> Indeed, Ellmann suggests that the acceptance of such connection would not be deemed "unprofessional," but rather would be viewed as critical to effective and ethical standards of representation.<sup>57</sup>

Another category of scholarship that seems to respond to women's role conflict relates to questioning ethical responsibilities with regard to client selection. The traditional view is that we take clients as we find them and are bound to represent them zealously with few boundaries. We are not responsible for the resulting impact on the larger community, nor are we to judge the moral or political content of what we espouse on behalf of the client.<sup>58</sup> William Simon, among others, argues that legal ethics should acknowledge a contrary responsibility to choose clients only after we examine and approve their goals, based on our understanding of community values and interests.<sup>59</sup> His "discretionary" approach to lawyering, while not explicitly grounded in relational feminism, responds in part to the law's failure to value communitarian concerns that trouble many women. Naomi Cahn takes this analysis a step further in suggesting that our ethical codes could suggest or require that lawyers disclose to clients potential conflicts between personal morality and professional judgment.<sup>60</sup>

Having used some of these works in my clinical teaching, I know that many women students are amazed and delighted to discover such a body of scholarship. More than the empirical studies of women in law or the doctrinal scholarship, these works challenge the norms of professionalism and suggest alternative conceptions that seem to offer a better fit for those who privilege care based reasoning.

## VI. HELPING WOMEN TODAY

These various incorporations of relational feminist notions into professionalism norms hold out hope for the possibility of change. I celebrate them and am inspired by them; however, I recognize also that they do not fully respond to the dilemma of women in practice today, just as notions of reforming legal education say little to women in law

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56. See Ellmann, *supra* note 55, at 2693-94.

57. *Id.* at 2709.

58. David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1004 (1990) (citing DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY*, 160-61, 169-74 (1988)).

59. See William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083-84 (1988).

60. Naomi R. Cahn, *A Preliminary Feminist Critique of Legal Ethics*, 4 GEO. J. LEGAL ETHICS 23, 49 (1990).

school today.

Other writers exploring this dilemma have simply rejected the premises of relational feminism as inconsistent with the concept of law.<sup>61</sup> In her essay, *Gilligan's Travels*, Joan Shaughnessy concludes that "women's inclinations for activities of care will necessarily be frustrated as they encounter the law's limitations. Eventually, women are likely either to feel alienated from their practice or to learn to downplay their inclination for caring activities."<sup>62</sup> I cannot accept such a pessimistic assertion, which leaves satisfying professional careers only to those of us who become "social males." Given the empirical studies, and my anecdotal experience, we would then be consigning too many of us, perhaps even a large majority, to the dustbin of the profession. Moreover, it excludes the possibility of incremental changes in the norm.

I believe that there are some pragmatic and more immediately implementable solutions to the dilemma of women lawyers functioning effectively in an unreconstructed adversarial system. It is my sense that women who practice public interest law do not feel the same degree of role conflict. They are forceful advocates within the traditional adversarial system. While they may not relish the fight as much as their male counterparts, it does not tear them apart because they have the larger good to sustain them. Nor do women law students who are not deterred from such career goals have such negative reactions to the law school environment. If they are able also to connect with a supportive community, their experience is not so unlike mine in the early 1970's. Thus, one concrete goal for legal educators is to nurture and encourage these women and push our institutions to do likewise. Another goal is to attempt to provide empirical evidence for these impressions. Women need to be aware of positive professional models. They need to know about women who are emotionally rewarded by their work. I sometimes have the sense that the spate of recent empirical work, demonstrating how poorly women fit within professional norms, only serves to breed more dissatisfaction.

On a more theoretical level, it is time to rethink and reconfigure the foundations of relational feminism, and to examine more closely its psychological roots. The relationship of women to mothering, and the creation of gender identity through connection rather than separation, does not need to be viewed only as creating an ethic of care that es-

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61. See, e.g., Rhode, *supra* note 45, at 1738-39.

62. Joan M. Shaughnessy, *Gilligan's Travels*, 7 LAW & INEQ. J. 1, 23 (1988).

chews conflict and assertiveness, the staples of our adversarial system. The psychological construct of women can be reinterpreted to provide more productive motivational sources for women lawyers. For example, in discussing the meaning of morality, one woman in Gilligan's study says, "I think I have a real drive, a real maternal drive, to take care of someone—to take care of my mother, to take care of children, to take care of other people's children, to take care of my own children, to take care of the world."<sup>63</sup> I want to focus on that drive and the protectiveness that it engenders in women. It is that drive that creates the fierceness with which women can defend children or others in need of care. Just as concerns with connection can work to improve attorney-client relationships, concerns with protection of clients can provide the inspiration and motivation for effective adversarial advocacy. Thus, I suggest we look to begin to explore the concept of an "advocacy of protection" that can at least rival the male motivational sources of competition and aggression.

What do I mean by an "advocacy of protection?" Primarily, I contemplate an advocacy in which the lawyer focuses on an empathetic understanding of a client's powerlessness in the litigation process and a deep connection with the client's goals. With this focus in mind, the lawyer can bring a "care perspective" to bear upon the litigation process, consistent with assertive advocacy. Thus, I suggest that we constantly keep in mind that in the traditional litigation context, lawyers must speak for clients. Whether plaintiff or defendant, our clients have little opportunity to tell how they have been wronged or falsely accused. Those occasions that supposedly allow for litigants to tell their stories, such as depositions and trials, are often stylized performances, the content of which is dictated by rules of evidence and case strategy, as much as by the stories our clients want to be heard. Clients frequently have little control over the speed at which their actions progress, the fairness of the procedures, the attitudes of the factfinder. However much we as lawyers respect the tenets of client-centered decision-making, our clients nevertheless cede to us tremendous responsibility. They are required by the process to rely on our skills to achieve their goals. Thus, we are their sole protectors in a system that often rewards zealous advocacy over truth and justice.

It is my sense that this vision of professional role can help those lawyers who value care and connection to better negotiate the adversarial process, and to suffer less from the role conflict that empirical

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63. GILLIGAN, *supra* note 8, at 99.



studies have described. Here I draw on my experience as a clinical teacher, directing a program in which students represent pro se litigants in federal court actions, primarily involving claims of employment discrimination or other civil rights violations. My students who favor care based reasoning—many women and some men—often excel at forming empathetic relationships with clients, but feel themselves at a disadvantage when faced with opposing counsel who view the litigation process as a game, or worse, as a war. These lawyers show little interest in approaching litigation from a problem solving perspective, or in exploring creative processes or solutions. Instead, they follow the all too familiar strategies of engaging in interminable discovery delays and disputes, taking contentious and acrimonious depositions, and making ill-founded motions. When students respond assertively, attempting to match their behavior to this view of the professional norm, they complain of feeling inauthentic, of acting a role with little conviction. When they do not respond in kind, they feel a sense of failure, of not representing their client effectively. In either case, these students frequently find their interactions with opposing counsel emotionally stressful and often question whether litigation will be a rewarding career for them.

In my supervision and counseling of students who face this dilemma, I am sometimes tempted to simply agree that traditional litigation practice is not an optimal means of resolving disputes, nor does it necessarily offer a satisfying professional life for those who do not relish conflict, or at least tolerate it well. But if teachers dissuade students with a care perspective from participating in our legal system's dominant dispute resolution mechanism, we are contributing to the perpetuation of professional norms that disadvantage many women lawyers. If women choose non-participation, they cannot effect change in the norms by their increasing presence in the profession, and by rising to positions of influence, particularly in the judiciary and the academy.

Thus, rather than affirm students' discomfort with the litigation process, I have attempted to help them focus upon their role as protectors. This perspective is a useful motivator for confronting professional norms that seem rooted in competition and conflict. The stressful nature of interactions with opposing counsel can be minimized by constructing a response to aggressive behavior in light of client goals and a determination to protect clients from abuse at the hands of the litigation process. Thus, when faced with an adversary who vociferously and irrationally argues against the production of obviously relevant documents, for example, those who favor care based reasoning can be over-

whelmed by the frustration and futility of the interchange, and have difficulty charting a path between escalating conflict and giving up the battle. But the "protective" advocate concentrates on the importance of "taking care" of her client to ensure that his goals are not derailed by such tactics. Through this conception of the lawyer's role, an advocate has a guidepost against which to measure an appropriate response. If, for example, the documents are available from another source, the advocate has not failed if she withdraws from the dispute. If the documents must be obtained from opposing counsel, however, she may be able to feel less conflict about insistent advocacy, and more authentic in formulating an assertive response, when viewing her role as a "protector."

## VII. CONCLUSION

Feminist theory has begun to change the nature of law and lawyering. However, the recent emphasis on relational feminism as explaining women's alienation from legal education and practice risks discouraging women from participating in those legal institutions that are most in need of change. Values of care and connection need not disadvantage women in the practice of law. They can be incorporated into an "advocacy of protection" that can help change professional norms.

