

# WOMEN LITIGATORS IN SEARCH OF A CARE-ORIENTED JUDICIAL SYSTEM

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*Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereupon to stir up strife and put money in his pocket? A moral tone ought to be enforced in the profession which would drive such men out of it.<sup>1</sup>*

-Abraham Lincoln

## I. INTRODUCTION

As one commentator states, “some of the best battles in this country take place in . . . courtroom[s].”<sup>2</sup> Characteristic of American courtroom battles, the attorneys fighting them are frequently described as “aggressive,” “combative,” and “ruthless.”<sup>3</sup> In a society

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1. WHITNEY NORTH SEYMOUR, *WHY JUSTICE FAILS* 14 (1973). “Abraham Lincoln personified the lawyer of compassion and high ethical standards. Those who knew him when he was a trial lawyer in Illinois spoke of his fairness, his concern for others, his integrity, his warmth and humor.” *Id.* at 14.

2. EMILY COURIC, *THE TRIAL LAWYERS: THE NATIONS TOP LITIGATORS TELL HOW THEY WIN* xiii (1988).

3. See generally Lynn Hecht Schafran, *Abilities vs. Assumptions: Women as Litigators*, TRIAL, Aug. 1983, at 37 (discussing common stereotypes of courtroom litigators). For a portrayal of how women trial attorneys have been characterized by the press, with emphasis on prosecutor, Marcia Clark in the O.J. Simpson case, see generally Laurel G. Bellows, *Looking Through Law's Glass Ceiling*, CHICAGO TRIB., June 2, 1991, at 15; Graeme Browning, *Advocates for Change; Female Attorneys Crack A Traditional Male Domain — Trial Law*, WASH. POST, Dec. 25, 1989, at F1; Lynda Gorov, *Justice on the Chic Fashion Makes a Statement in Simpson Case*, BOSTON GLOBE, June 30, 1994, at 55; *Female Lawyers Taught to 'Emote' in Courtroom*, S.F. CHRON., Sept. 2, 1988, at B5; Joy Horowitz, *The Defender: Some Say Leslie Abramson is the Best Female Criminal Defense Lawyer Around. Others Say She's The Best, Period*, L.A. TIMES, July 23, 1989, at 8; Josh Meyer, *O.J.'s Prosecutor Described as Tough, Thorough, Successful*, MIAMI HERALD, July 3, 1994, at A7; Josh Meyer, *A Reluctant Headliner: Deputy D.A. Marcia Clark Likes the Challenge of High-Profile Cases — But Not the*

of limited resources, where rules and duties govern how we relate to each other, it is expected that competition abounds and individual achievement is the primary goal.<sup>4</sup> An inferred requirement of this competitive system is that those wishing to fight their battles in the courtroom must employ lawyers to act as their "hired gun."<sup>5</sup> On the other hand, however, there are those who believe that society will flourish, not because of rules and regulations that maintain order, but because of people's sense of interdependence and concern for community well-being.<sup>6</sup> It is those people who believe that justice will prevail in our society even when the system of law is imperfect.

Justice is an ideal that society has been in search of for centuries, an ideal that conjures up visions of fairness and truth.<sup>7</sup> The process of courtroom litigation, however, has shifted our focus away from fairness and truth.<sup>8</sup> Litigation is a process of fighting for legal rights that fosters courtroom battles. This is due to its adversarial nature and its main objective: winning.<sup>9</sup> Not only is justice sacrificed by litigation, but so is the well-being of society<sup>10</sup> and the personal morality of litigators, who are forced to step beyond the bounds of their professional responsibilities in order to win at all cost.<sup>11</sup> This

*Publicity*, L.A. TIMES, July 2, 1994, at A2; *Style Threatens to Overcome Substance in O.J. Simpson Case*, CHICAGO TRIB., Aug. 24, 1994, at 2.

4. See *infra* notes 28, 31 and accompanying text.

5. See generally RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS 29 (1989) [hereinafter JACK & JACK] ("As defined by tradition and by professional code, the job of a lawyer is to represent vigorously the position and interests of a client, to take a client's place in the legal process.")

6. See *infra* note 63-66 and accompanying text.

7. See generally J.R. LUCAS, ON JUSTICE (1980) (exploring the concept of "justice," including fairness, rights and interests, equality, the law, and morality); see generally WHITNEY NORTH SEYMOUR, JR., WHY JUSTICE FAILS (1973) (examining the institutions and participants of the American judicial system in order to understand why justice fails in our society and proposing several options for improving the criminal and civil justice systems).

8. See SEYMOUR, *supra* note 7, at 25 (1973) (stating that as a tactical device, it may be more effective to avoid issues of truth and fairness and, instead, to simply attack the adversary). "In modern times, the advice shared among lawyers is: 'When you are weak on the facts, argue the law. When you are weak on the law, argue the facts. When you are weak on both the law and the facts, attack the prosecution.'" *Id.*

9. See generally JACK & JACK, *supra* note 5, at 130 (illustrating that likening the work of attorneys to a game is appropriate).

[B]ecause law can be understood as a contest with rules, winners, and losers. . . . [t]he adversary nature of law makes it easy to maintain personal distance. From an attorney's point of view, moral neutrality is easily reinterpreted to mean 'it's just a game,' even though the stakes are often high and lawyers get deeply invested in the contest. When taking part in a game, it is hard not to become preoccupied with winning, by whatever the prescribed rules.

*Id.*

10. See generally JETHRO K. LIEBERMAN, THE LITIGIOUS SOCIETY (1981) (examining the phenomena of litigation in American society and its underlying reasons and consequences).

11. JACK & JACK, *supra* note 5, at 96-97.

is particularly true for women litigators, who often experience conflicts between their professional expectations and natural inclinations.<sup>12</sup>

How women litigators can implement more of their care-oriented personal morality into a professional, rights-oriented role, without being caught in the "double-bind," is the subject of this paper. Competition may define the present legal culture,<sup>13</sup> but women have options other than surrendering and becoming more competitive or rebelling and trying to revolutionize society. Women have more feasible alternatives to offer the judicial system.

Section I proposes that the concept of justice has been misunderstood and, therefore, abandoned. Filling the vacuum, litigation provides the adversarial process which is mistakenly believed to be the best method of presenting a case and finding the truth. Section II describes the adversarial nature of litigation and suggests that by taking an analytical approach to justice, instead of a human contextual approach, we move further away from justice. Section III defines the "morality of rights" and the "morality of care" perspectives. Section IV explains the role of a trial lawyer and shows the difficulties of being care-oriented in the present legal system. Section V offers a few ways that women litigators can change the mentality of individual litigators and the litigation system to a more care-oriented perspective. In conclusion, a society is made up of individuals who may or may not wish to act for the community. Thus, litigators must decide for themselves whether they will perpetuate the belief that individuals each have rights irrespective of anyone else's, or whether they will encourage their clients to take into account how their actions affect others.

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[P]rofessional responses for dealing with moral questions and social reality have an esoteric quality that separate them from the everyday life responses formulated by most people. Personal responses and assumptions are worked out over time, and have been tested at least tentatively before an alternative professional morality is available to an individual. To the extent that patterns have begun to solidify, new patterns make us uncomfortable if they are at odds with the old . . . . Potential for strain adheres in any profession that carries with it a morality of its own. So long as the moral assumptions of a profession . . . are at odds with the everyday life morality of those who practice the profession, a moral tension will exist.

*Id.*

12. See *infra* notes 21-23 and accompanying text (discussing female litigators' conflicts between their personal morality and professional responsibilities).

13. See generally, MONA HARRINGTON, *WOMEN LAWYERS: REWRITING THE RULES* 130 (1994) (describing the adversarial nature of today's legal system, where one side of a case must always "win" and one side has invariably "lost").

All lawyers work under the auspices of an elaborate and detailed code of ethics,<sup>14</sup> which is often referred to as "professional morality."<sup>15</sup> For some attorneys, there is no discernible difference between their professional ethics and their personal morals; their perceptions as lawyers so mirror their personal beliefs that there is little or no stress in reconciling their work with their personal ideals.<sup>16</sup> The personal morality of such attorneys is usually what is referred to as the "morality of rights."<sup>17</sup> The "morality of rights" is similar to our society's and judicial system's present focus on the importance of individual autonomy and achievement.<sup>18</sup> For other attorneys, the differences between their personal and professional ethics are so acute that tension and stress result from an internal struggle to resolve the dilemma. The personal morality of these attorneys is usually what is referred to as the "morality of care."<sup>19</sup> The "morality of care" conflicts with the "morality of rights" that governs the law and, more particularly, litigation.<sup>20</sup> "Morality of care" attorneys often have difficulty maintaining their dual roles without sacrificing a little of who they are because their professional roles are so demanding.<sup>21</sup>

A further disparity is created because the majority of litigators who are rights-oriented or are "morality of rights" thinkers, are men; and, the majority of litigators who are care-oriented or are "morality of

14. JACK & JACK, *supra* note 5, at 1.

15. JACK & JACK, *supra* note 5, at 34 (defining the term "professional conduct" as "a type of role-determined behavior in which the defining attributes of the role specify how a professional relates to other people.").

16. JACK & JACK, *supra* note 5, at 97.

17. JACK & JACK, *supra* note 5, at 6 & n.15 (explaining why the authors chose to use the term "morality of rights" instead of "morality of justice," as Carol Gilligan does in *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982), "because of the place of justice in the legal system.").

18. See Sandra Janoff, *The Influence Of Legal Education On Moral Reasoning*, 76 MINN. L. REV. 193, 203 (1991) (observing that the American legal system (including its law schools) is by tradition rights-oriented, focusing on logic, formal reasoning and precedent); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 17 (1974) (stating that the American political and legal system follows the rights and duties delineated by the Constitution. Consequently, when analyzing problems, one should use legal reasoning as it not only correctly incorporates current obligations and laws, but is also consistent with constitutional values).

19. JACK & JACK, *supra* note 5, at 97 & n.16. The authors additionally note that they would have preferred the more descriptive term "morality of responsiveness" but nonetheless chose "morality of care" as it is a less awkward phrase. JACK & JACK, *supra* note 5, at 196 n.16.

20. See JACK & JACK, *supra* note 5, at 6 (relating that "[m]oral superiority is gauged in terms of the relation of the self to the rules of society, with highest attainment emphasizing rights and obligations, rules and principles, and questions of justice, fairness, reciprocity, and equality—all concepts familiar in the American legal system.").

21. JACK & JACK, *supra* note 5, at 28-29 (noting that professional roles can be so pervasive and time-consuming that they will often threaten one's definition of him or herself. Attorneys in particular tend to surrender their self-identity—and also their loyalty to their personal ideals—to the more powerful calling of the professional role).

care" thinkers, are women.<sup>22</sup> Consequently, male litigators less often feel the tension between their personal and professional morality.<sup>23</sup> That makes the adjustment into their professional role, and their professional experience as a whole, smoother than women's adjustments.<sup>24</sup> Female litigators' conflicts between their personal morality and the responsibilities of the role they play<sup>25</sup> creates personal dilemmas and, thus, hinders their transition into their role as litigators.<sup>26</sup>

One of the most prevalent and difficult dilemmas female trial attorneys confront is the development of their professional style.<sup>27</sup> Women are trapped in a "double-bind"<sup>28</sup> when they enter a court-

22. See Janoff, *supra* note 18, at 195-96 (citing studies of psychologist Lawrence Kohlberg and Carol Gilligan in support of the proposition that women are more care-oriented and men are more rights-oriented); Stephen Ellmann, *The Ethic of Care as an Ethic For Lawyers*, 81 GEO. L.J. 2665, 2665-66 (1993) (citing several books, law review, and journal articles to show the debate over whether the ethic of care is exclusively the moral viewpoint of women and declaring that "[t]he ethic of care, [Carol] Gilligan implies, is distinctively the ethical standpoint, or voice, of women. Whether or not this characterization is true—and it has been the subject of intense debate—Gilligan is careful to say that the ethic of care is also characteristic of at least some men.");

That women have traditionally been the chief exponents of care morality is a cultural and psychological fact but not a statement that this is the way it should be or the only way it can be. Rights considerations are by no means foreign to moral decision making for most women, and many men rely on care concerns in assessing moral conflicts. Neither rights nor care thinking imprisons either gender. That women have symbolized care values in the past does not mean they alone must embody them in the future. What is critical is that they have nurtured those values and assumptions in the private sphere to which they were culturally relegated and that they now make those values available in the public sphere, particularly the public sphere of law. While the two moralities coexist in society by a division of turf, law does not lend itself to separation into public and private spheres. Law is part of the public sphere. Absent the alternative of a division of spheres, the two moralities can exist together there only by integration and balance—both in the institution of law and in the women and men who ply the legal trade.

JACK & JACK, *supra* note 5, at 157-58.

23. See JACK & JACK, *supra* note 5, at 99-105 (discussing how attorneys that strongly identify with the morality of rights perspective do not tend to experience a moral conflict in meeting their professional obligations).

24. JACK & JACK, *supra* note 5, at 99-105.

25. JACK & JACK, *supra* note 5, at 55.

26. JACK & JACK, *supra* note 5, at 99.

27. See generally Janet Taber, Marguerite T. Grant, Mary T. Huser, Rise B. Norman, James R. Sutton, Clarence C. Wong, Louise E. Parker, and Claire Picard, *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209 (1988) (relating that differences have been observed in women's and men's lawyering styles). But see Ann Shalleck, *The Feminist Transformation of Lawyering: a Response to Naomi Cahn*, 43 HASTINGS L.J. 1071, 1073 (1992) (rejecting the treatment of gender as a question of style, Professor Shalleck proposes that a feminist critique must explore how gender roles have become intertwined into one's conception of being a lawyer).

28. Schafran, *supra* note 3, at 37 (defining "double-bind" as the predicament professional women face in establishing their personal style); Naomi R. Cahn, *Styles Of Lawyering*, 43 HASTINGS L.J. 1039, 1046 (1992) (citations omitted) (stating that when a male attorney displays atypical male lawyering techniques (i.e., when he is not aggressive) he is merely regarded as favoring an alternative "style." However, when a female attorney does not play a combative legal game, then

room: one of style and one of objectives. If a woman displays a desire to minimize harm to the relationship of the parties or a concern for third parties, which is characteristic of the more feminine "morality of care," she risks being judged as "too weak to be effective."<sup>29</sup> But, if she adheres to the aggressive style of litigation and acts solely to protect her client's interests against interference from others, as the traditional male-oriented "morality of rights" system suggests is appropriate, she risks being described as too pushy and cold-hearted, even though those are traits that would be admired in a male litigator.<sup>30</sup>

## II. JUSTICE IS NO LONGER THE PRIMARY GOAL OF THE JUDICIAL SYSTEM

The many critics of the legal profession claim that lawyers are no longer interested in bringing justice to society because they are too consumed with their own pursuit of power and money.<sup>31</sup> While lawyers alone cannot be blamed for the way our judicial system has progressed, it is apparent that society has lost sight of the ideal of justice. For this reason, as lawyers, we must reevaluate our focus. After all, "[j]ustice is the bond of society, and without it, . . . no association of human individuals [can] subsist."<sup>32</sup> Unfortunately, justice is often sacrificed because of the way society is structured:

A society composed of discrete individuals created as equal encourages competition and dominance if resources are unequally distributed and positions in society hierarchically arranged. The ideals of equality speak to the right to run in the race but say nothing about distribution of rewards at the finish. Each person strives to secure a place in the social order, and because the places at the finish line are far from equal, competition abounds. Rules protect only the fairness of the contest . . . if individual achievement is thought to be largely isolated from the welfare of others, little inhibits the desire to race ahead. Only a sense of interdependence and community restrains competition and changes the goal from individual to group success. A vision based on a network of interdependencies encourages compromise and cooperation, for

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she is more likely to be seen as too feminine and her skill as a lawyer may be doubted.).

29. Schafran, *supra* note 3, at 37.

30. Schafran, *supra* note 3, at 37.

31. BERTRAM HARNETT, *LAW, LAWYERS, AND LAYMEN: MAKING SENSE OF THE AMERICAN LEGAL SYSTEM* 283 (1984) (noting as an example that wealthy corporate attorneys wield significant influence over the American Bar Association by holding powerful positions in the bar).

32. LUCAS, *supra* note 7, at 1 (1980) (citing DAVID HUME, *AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS* 206 (1902)).

your gain is also my gain. The world looks very different for those who see themselves as competing for a place in the lifeboat than for those already in the lifeboat working to keep it afloat.<sup>33</sup>

Justice, which was once seen as a guide for living peacefully with others, is now viewed as an external force with which to be reckoned.<sup>34</sup> Similarly, law is intended to assist us in our relationships with other individuals; however, when it is used solely to determine competing rights and fails to recognize the mutual interests of the parties, law serves to alienate us from each other. We have misunderstood justice and its role in our legal system and, as a consequence, society has become increasingly divided.<sup>35</sup> As one commentator states,

In a just society, there is . . . no dissension, because it does not matter whether decisions are taken by me or by someone else—they will not conflict, because they are taken in the same frame of mind, whoever it is that takes them—and yet this absence of conflict is achieved . . . by acceptance on the part of each of the existence and legitimate interests of everybody else.<sup>36</sup>

The adversarial nature of litigation does not encourage, or even allow for a resolution that is in the best interest of both parties to the dispute; therefore, the degree of satisfaction felt by those parties involved is greatly diminished.<sup>37</sup> When there is a win-lose situation, with little or no compromise, there will always be at least one person who believes at the end of the game that justice was not done.<sup>38</sup> As a society, we must seek justice,<sup>39</sup> in order to avoid focusing on an individual's exclusive rights, and in order to regain compassion and understanding for the interests of others. By examining the nature of the adversarial system of litigation, it is possible to recognize why justice is no longer the primary goal of our judicial system and how a more caring approach can be implemented.

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33. JACK & JACK, *supra* note 5, at 9.

34. LUCAS, *supra* note 7, at 1.

35. LUCAS, *supra* note 7, at 1.

36. LUCAS, *supra* note 7, at 18-19.

37. See generally ROBERT FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 40-41 (2nd ed. 1991) (asserting that interests motivate people to decide their positions). Further, "[w]hen you . . . look behind opposed positions for the motivating interests, you can often find an alternative position which meets not only your interests but theirs as well." *Id.* at 42. Consequently, "shared interests and differing but complementary interests can both serve as the building blocks for a wise agreement." *Id.* at 43.

38. HARNETT, *supra* note 31, at 13-14.

39. LUCAS, *supra* note 7, at 1.

### III. THE ADVERSARY SYSTEM DOES NOT ALLOW FOR A HUMAN, CONTEXTUAL APPROACH TO LITIGATION

Because of our strong attraction to the courtroom battle and our uncompromising worship of the adversary model, we have accepted the "Sport-Game Theory" of adjudication, despite occasional judicial exhibitions to the contrary.<sup>40</sup> The love of a good fight is an integral part of our national character, and we often value the adversary contest more for itself than for what it produces.<sup>41</sup>

Supporters of an adversarial process insist that because opposing forces are more likely to elicit all the facts of a situation, such a system is the most efficient and fair way of determining the truth.<sup>42</sup> Although the civil legal system may not require a search for the ultimate truth in order to bring justice to the parties and society, the criminal legal system certainly requires such a search so that an innocent person is not sent to prison. Justice is not the result attained, however, when the adversarial battle between the lawyers becomes more important than the truth.<sup>43</sup>

The adversary character of both the civil and criminal systems make them unreliable ways to achieve justice. The adversarial system is a contest, where each side presents its case, as effectively and convincingly as possible, to an "impartial" judge or jury.<sup>44</sup> Some believe that

40. Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 448 (1992). The Supreme Court has also commented on the adversarial nature of the criminal justice process. See *Morris v. Slappy*, 461 U.S. 1, 15 (1983) ("[a] criminal trial is not a 'game'"); *Williams v. Florida*, 399 U.S. 78, 82, n.12 (1969) ("The adversarial system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right to always conceal their cards until played.")

41. Van Kessel, *supra* note 40, at 448.

42. Van Kessel, *supra* note 40, at 409 (citing DAVID W. PECK, *THE COMPLEMENT OF COURT AND COUNSEL* 9 (1954), Monroe H. Friedman, *Professional Responsibility of the Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1470 (1966), and Monroe H. Friedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1065 (1975)).

43. See Carolyn Jin-Myung Oh, *Questioning the Cultural and Gender-Based Assumptions of the Adversary System: Voices of Asian-American Law Students*, 7 BERKELEY WOMEN'S L.J. 125, 129 (1992) (noting that an attorney knows he or she is required to aggressively participate in the adversarial system if the process is to operate correctly. However, the goal of each adversary is not necessarily to determine the truth, but to present his or her client in the best light possible — which may or may not be an entirely accurate portrait (noted in David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* 90 (1983)); SEYMOUR, *supra* note 1, at 24 (describing the adversary system not only as a method of fact presentation and cross-examination calculated to elicit the truth, but also as a process that unfortunately "is the worst sort of perversion of what this legal philosophy is all about. To make a game of wits out of a serious proceeding in which a man's liberty and the protection of society are at stake is a grotesque charade. Just this sort of thing has made the general public cynical about the administration of justice and the role of lawyers.").

44. Oh, *supra* note 43, at 129 (1992) (citing David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* 90 (1983); Malcolm Feeley, *The Adversary System*, 2 *ENCYCLOPEDIA OF AMERICAN JUDICIAL SYSTEMS* 753 (1987)) (defining the term "adversary system" as the



the fact-finder will be able to make an informed, thoughtful, and equitable judgment after hearing the strongest case of both sides.<sup>45</sup> In addition to its strengths, though, an adversary system also has intrinsic weaknesses: advocates seeking to hide information damaging to their clients, a discovery process that may not always lead to all of the truth sought, and strict rules of court procedure include some examples.<sup>46</sup> It is virtually impossible to find the truth or reach justice under such circumstances. Attorneys will often ruthlessly pursue success instead of the truth; it is the nature of the adversarial process to prompt and even facilitate such behavior.<sup>47</sup>

In addition, as it is presently, litigation is not an ideal means of building community: its procedures and its impact do much to sow mistrust, and its limited successes may blind us to the need for reforms that lie outside the ceaseless cycle of plaintiff and defendant. As long as people are being harmed by human activities, litigation remains at best a short-term answer.<sup>48</sup>

On the other hand, justice looks toward the future, the long-term. It seeks to widen the inquiry. Attorneys are specifically trained to be logical and precise and to analyze and classify people and their actions; later they will utilize their training to convince judges and juries that their clients belong in certain categories and not others.<sup>49</sup> However, recognition of the fact that parties involved in litigation may have to carry on a relationship in the future, or that their lives may hang in the balance, is one step toward making justice a dominant characteristic of the judicial system.<sup>50</sup> The legal system is an essential piece of today's society as it serves to protect and promote justice. As such, it must be remembered that the significance of lawyers should

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method of adjudication characterized by three things: an impartial tribunal of defined jurisdiction, formal procedural rules, and . . . assignment to the parties of the responsibility to present their own cases and challenge their opponents. In theory, advocates are partisan representatives who bring the issues and all relevant legal principles and arguments to the attention of the fact-finder and decision-maker. The jury or judge, who is passive in the investigation and presentation of the dispute, then determines which arguments are more persuasive and declares its proponent the winner. These features make the adversary system closely analogous to a battle or sporting event where litigants' advocates are the players and the judge or jury is the umpire.)

45. Van Kessel, *supra* note 40, at 418.

46. Van Kessel, *supra* note 40, at 418.

47. Van Kessel, *supra* note 40, at 454-55.

48. LIEBERMAN, *supra* note 10, at 186.

49. Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 499 (1984).

50. *See generally*, Karst, *supra* note 49, at 490 (noting that smaller communities attempt to "resolve disputes in a way that preserves the connections among people.") Such a procedure, the author comments, is one way of preserving justice. *Id.* at 491.

not be underestimated; for they are a means of communication between the legal system and the world it is intended to protect.<sup>51</sup>

Not only do the parties to the dispute benefit from a contextual approach to the law, society also benefits.<sup>52</sup> Rights are not absolute, and it is important for people to make careful, thoughtful decisions and to also assume full responsibility for the consequences of those choices.<sup>53</sup> Making decisions with care also obliterates the need for an adversarial battle. Lines of communication are opened when parties observe each other making efforts to understand their interests. Lawyers are then able to take a more conciliatory approach to dispute resolution.

Although the search for truth has not been explicitly made high priority in the justice-oriented system, sometimes it is important not to focus solely on a logical, analytical approach but instead to consider the human aspect of a case in order to do what is right.<sup>54</sup> It may be possible, therefore, to have justice without a complete determination of truth.<sup>55</sup>

The following sections propose that through the efforts of women trial attorneys, it is possible to alter litigation and to implement the human contextual approach by adopting the "morality of care." As it is presently, a belief in rights guides litigation. Care-oriented thinking, however, offers the potential for a corrective shift from "unbridled zealous advocacy," which has little regard for the social and individual consequences of professional acts.<sup>56</sup>

51. Bertha Rembaugh, *Women in the Law*, 66 N.Y.U. L. REV. 2014, 2017 (1991).

52. See generally LUCAS, *supra* note 7, at 18-19 & n.31 (1980) (explaining that a rational individual will abide by the laws of society, even though he or she may disagree with the necessity of all of those rules, because of an awareness that society—and justice—are dependent upon people and their interaction with other people:

I can be happy to be one of We, if We are just, because then We will treat Me as one of Us, because We know that I, being just, will see things from Our point of view, and will not exclude wider considerations from My assessment of the situation, and will not construe everything in terms of My own exclusive self-interest. I can be sure that We will do well by Me, and We can count on My behaving as a member of the community should.)

53. Ellmann, *supra* note 22, at 2717 (paraphrasing a quote contained in CAROL GILLIGAN, *IN A DIFFERENT VOICE* *supra* note 17, at 148).

54. Karst, *supra* note 49, at 499 (1984).

55. As noted earlier, the criminal system requires a determination of the truth because a person's liberty is at stake, as well as the safety of society. See *supra* note 42 and accompanying text. But the civil system may not require the same truth-seeking process in order to bring justice to the parties and society.

56. JACK & JACK, *supra* note 5, at 158.

## IV. THE MORALITY OF RIGHTS VERSUS THE MORALITY OF CARE

Personal morality develops over time as a product of complex moral and social forces. Professional morality, i.e., the established ethical obligations that come with a profession, is met by individuals fully fashioned and ready to be slipped on like a new suit of clothes. Ethical codes governing professional behavior may conform well with an individual's personal morality, or they may not, depending on whether one's personal ethics coincide with the values and goals that characterize the profession. Conflicts of personal and professional morality create dilemmas for individuals and place pressure on institutions.<sup>57</sup>

The highly adversarial and combative nature of litigation requires certain behaviors of its participants that are unlike most professions. Many who are drawn to the field of litigation have great difficulty maintaining the relentless drive to "win" that is required by their professional role. This is particularly true for those who, throughout their lives, have always been concerned about the impact their actions have on other people. Others, who were born to be legal warriors, only see who is in the right and not what is necessarily beneficial to society as a whole. These contrasting perceptions of social reality are the product of psychological development.<sup>58</sup> They are called the "morality of care" and the "morality of rights."<sup>59</sup>

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57. JACK & JACK, *supra* note 5, at 1.

58. JACK & JACK, *supra* note 5, at 7. The authors assert:

Recent work on children's play confirms that at an early age girls and boys interact differently. Girls choose smaller play groups, often consisting of two or three best friends whose interactions are based on shared confidences. By comparison, boys' groups are larger and tend to center on some competitive, goal-directed activity with clear rules and with winners and losers. Boys learn to "depersonalize the attack," to enter adversary relationships with friends and cooperate with people they dislike. Whereas team games teach boys emotional discipline and self-control, traditional girls' games reinforce nurturing skills, expression of personal feelings, and cooperation rather than competition . . . . From early childhood, then, our culture prepares females and males for different roles . . . . Experiences of most boys prepare them for a world of advocacy, stoic detachment, autonomy, and suspension of judgment. Girls' experiences usually instruct them for roles requiring sensitivity to others' feelings, cooperation, involvement, and contextual understanding.

*Id.* at 131-32.

59. JACK & JACK, *supra* note 5, at 6 & 97.

From a care point of view, society is an interconnected, interdependent web of life. The social fabric is woven of human relations and kept whole through responsiveness, empathy, and unmediated personal interaction. By contrast, those with a rights orientation experience society as composed of autonomous, separate individuals. A hierarchy of rules, rights, and obligations mediate human interactions and help preserve independence. Safety from aggression is found not in connection with others but in rules protecting individuals from infringement.

The "morality of rights" is the prominent viewpoint in the field of litigation and society today.<sup>60</sup> The morality of rights views the interaction among people as being governed by rules as well as obligations and rights attending those rules.<sup>61</sup> Rights proponents, like the framers of the Constitution, rely on a system of checks and balances for safety.<sup>62</sup> Similarly, men who seek self-identity through detachment perceive adulthood as synonymous with autonomy and individual success.<sup>63</sup> As people formulate and nurture the legal system, the system takes on the values of those who created it. Such thinking is what has led to the adversarial nature of litigation.<sup>64</sup> It should not be surprising, then, that the field of litigation, which has been and still remains dominated by men,<sup>65</sup> would reflect the need

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*Id.* at 97; Ellmann, *supra* note 22, at 2668 (1993) (quoting Carol Gilligan from *Moral Orientation and Moral Development*, in *WOMEN AND MORAL THEORY* 10 (Eva F. Kittay & Diana T. Meters eds., 1987) that "care is not simply an emotional response such as empathy, [n]or is it a gloss on moral reasoning of a fundamentally different type . . . . Instead, 'care represents a way of knowing and a coherent moral perspective.' This perspective emphasizes people's mutual connections rather than their solitary autonomy.").

60. See generally JACK & JACK, *supra* note 5, at 22. Within a labyrinth of procedures to ostensibly ensure fairness and uniformity in the application of law, institutions and individuals compete for their rights in a way preferred by the predominantly male morality of rights. STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS* 14 (1974) (stating that "[t]he principle institutional mechanism of the myth of rights is litigation, which we are encouraged to view as an effective means for obtaining declarations of rights from the courts, for assuring realization of those rights, and for building a more just social order.").

61. JACK & JACK, *supra* note 5, at 22.

62. JACK & JACK, *supra* note 5, at 8.

63. Karst, *supra* note 49, at 483.

Women, defining themselves as continuous with others, tend to equate maturity with responsibility and care. Men typically see their relationships with others in contractual terms, as derived from arm's length dealings among lonely contenders for places on the ladder of hierarchy. . . . Men, abstracting human relationships from their particular contexts, define morality and justice in the vocabulary of rights — specifically, rights to be free from interference of others. They seek protection against aggression in abstract rules. Women distrust "a morality of rights and noninterference," because of "its potential justification for indifference and unconcern." They define morality and justice in the language of responsibility, seeking solutions for moral problems not in impersonal abstract rules but in "the capacity to understand what someone else is experiencing" and to avoid hurt to particular people in real human situations. . . . If women tend to be deferential to others' judgments, that deference is not just the product of social subordination; it also springs from a healthy moral concern for others, growing out of an inclusive sense of self.

*Id.* at 483-84.

64. JACK & JACK, *supra* note 5, at 1.

65. HARRINGTON, *supra* note 13, at 129-30.

[T]he more aggressively hard-edged the practice, with trial work at the extreme, the fewer women are involved. This is a fact, but the question is, Why. Has nature programmed men hormonally to do battle and women to avoid it? Or do women shun competition because the larger culture socializes them to dislike it, teaches them that their virtue lies in sympathy, understanding, patience, cooperation, and peacemaking rather than in combat? Or is it mainly a lack of practice? Would women feel more comfortable as competitors if their families and schools and communities placed girls in the same gladiatorial roles that boys assume from early childhood onward? Or is it

to protect competing rights against intrusion.<sup>66</sup> In a society of limited resources, competition flourishes; however, the degree to which competition leads to an uncompromising adversarial system depends on how the disputes arising from that competition are resolved.

An ethic of rights that is derived from abstract moral grounds and is premised on identifying and protecting individual rights is but one form of mature moral reasoning.<sup>67</sup> The other is the ethic or "morality of care."

A care-oriented perspective sees society as an integrally connected "web of life."<sup>68</sup> The "morality of care" differs from the "morality of rights" in that it is not concerned with rights and duties, but relationships between people. Paying deference to these relationships by attempting to comprehend all of the concomitant concerns, the "morality of care" recognizes a duty to minimize harm.<sup>69</sup> Women most often personify the "morality of care" perspective. When faced with moral dilemmas, women strive to preserve the "morality of care" in the solutions they adopt because women regard relationships as a part of their self-identity.<sup>70</sup> Thus, a woman's perception of social reality is in conflict with the axioms of the American legal system of constitutions, statutes, administrative codes and case law. Specifically, Rule 1.6 of the American Bar Association Model Rules of Professional Conduct comments, "[a]most without exception, clients come to lawyers in order to determine what their rights are, [not to find out how to resolve their dispute so that all parties' interests are satisfied]."<sup>71</sup> Instead of attempting to mend relationships, this system of rights, rules, and duties pit the involved parties as adversaries despite their legal equality.<sup>72</sup>

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that women, entering the legal profession with more social training than men in quiet dispute-settling, see the lawyer's reliance on adversarial procedures as excessive? Are women rejecting, as a matter of consciously formed critical judgment, the degree of competition they find in the law? These are hard questions to answer because the women themselves cannot know, with certainty, whether they are moved by unconsciously held social teachings or consciously formed mature values. (Yet the answers are important if women are to gain equal authority in the law.)

*Id.*

66. See *supra* note 22 and accompanying text (describing the belief that men are "morality of rights" thinkers and women are "morality of care" thinkers).

67. Ellmann, *supra* note 22, at 2665 (referring to an argument Carol Gilligan made in her book *IN A DIFFERENT VOICE* *supra* note 17).

68. JACK & JACK, *supra* note 5, at 7.

69. Ellmann, *supra* note 22, at 2665.

70. Karst, *supra* note 49, at 483-84.

71. JACK & JACK, *supra* note 5, at 22.

72. JACK & JACK, *supra* note 5, at 22.

Women generally reject the combative quality of litigation<sup>73</sup> and find little motivation to "climb the ladder" in order to define themselves.<sup>74</sup> But if women litigators conform and do not challenge the "morality of rights," women will never be able to influence the way the judicial system operates.<sup>75</sup> Furthermore, women litigators will continue to be considered suspect,<sup>76</sup> or worse, continue to face gender bias<sup>77</sup> in a profession in which they could be equally successful. The care they have to offer to the system and society will continue to be absent.<sup>78</sup>

The role of a trial lawyer is so unique, however, special consideration must be given to how a woman might go about changing the status-quo. The following section will explore the special terrain a woman occupies as a trial lawyer.

## V. THE TRIAL LAWYER'S ROLE

In order to understand the dilemma a woman faces when she becomes a trial attorney and develops her professional style, goals,

73. See Oh, *supra* note 43, at 133 (citing Carrie Menkel-Meadow, *The Comparative Sociology of Women Lawyers*, 24 OSGOODE HALL L.J. 897, 914 (1986) and noting that "women are less comfortable with the hostility and combativeness that characterize the adversary system . . . [and] 'express dissatisfaction with the win or lose nature of litigation and the inability to effect solutions that take account of all the parties' needs.").

74. Karst, *supra* note 49 at 487.

75. See HARRINGTON, *supra* note 13, at 58-59 (warning that silent women cannot transform the content of the law).

76. See Schafran, *supra* note 3, at 37 (stating that even though women litigators vary in their level of competence, their male counterparts' gender-based stereotypes overshadow women's abilities and undermine their credibility).

77. For a sample of the literature and studies about gender bias in the legal profession, from law school to the courtroom, see Honorable Shirley S. Abrahamson, *Toward a Courtroom of One's Own: an Appellate Court Judge Looks at Gender Bias*, 61 U. CIN. L. REV. 1209 (1993) (discussing gender bias in the judicial system and the effects); Deborah Ruble Round, *Gender Bias in the Judicial System*, 61 S. CAL. L. REV. 2193 (1988) (describing the effects of gender bias on female attorneys); J. Stratton Shartel, *Despite Some Improvements, Women Trial Lawyers Still Face Gender Bias in Litigation* (this article is adapted from an article that appeared in INSIDE LITIGATION, Feb. 1992) (affirming gender bias in litigation); Judith Resnick, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195 (1993) (recounting efforts of the Ninth Circuit in bridging the gender gap); Kathleen S. Bean, *The Gender Gap in the Law School Classroom: Beyond Survival*, 14 VT. L. REV. 23 (1989) (conveying gender bias in the law school); GENDER BIAS IN THE COURTS: REPORT OF THE MARYLAND SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS, May 1989.

78. See generally Deborah L. Rhode, *Missing Questions: Feminist Perspective On Legal Education*, 45 STAN. L. REV. 1547 (1993) (arguing that "values central to feminist analysis - care, collaboration, and context - should also become more central to legal education and legal practice."); Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987) (exploring the possibilities, hopes, and consequences of integrating feminist approaches into the law). "The tricky issue, of course, is whether the legal system will include and be transformed by these new constructions or whether these constructions will be transmuted into a form that the lawmakers control." *Id.* at 30.

and ethics, it is important to first understand the role<sup>79</sup> of trial attorney.<sup>80</sup> Where most professional roles relate to a specific task, the litigator's role "encompasses and intrudes."<sup>81</sup> When a litigator accepts a case, she first convinces herself; when she completes a sketch of her brief, her initial skepticism dissolves, then, once she appears before the court, her skepticism becomes a sincere conviction.<sup>82</sup> Such partisanship<sup>83</sup> is required by the profession. In fact, a client has a strong legal and ethical claim in retaining an attorney with a partisan stance.<sup>84</sup>

Neutrality,<sup>85</sup> is equally crucial to the trial lawyer's role. As one commentator notes, "[t]he successful advocate never allows . . . emotion to stand in the way of peak performance."<sup>86</sup> Neither does the litigator pass judgment.<sup>87</sup> In order to avoid bias, an advocate

79. See generally JACK & JACK, *supra* note 5, at 28 (explaining that social expectations and institutional structures share one's conduct and affectations; thus, the role becomes part of a person's identity).

80. See generally JACK & JACK, *supra* note 5, at 96 (explaining that the lawyer's role as an advocate suspending judgment as to the truth or justice of that client's cause).

81. JACK & JACK, *supra* note 5, at 29.

As defined by tradition and by professional code, the job of a lawyer is to represent vigorously the position and interests of a client, to take a client's place in the legal process . . . . In a sense, the client has purchased more than a hired gun. The client has also acquired a piece of the attorney's integrity, credibility, mind, and soul. The lawyer stands in the client's shoes, thinks the client's thoughts, speaks the client's words, advocates the client's position. The attorney is the client's mouthpiece, the client's alter ego.

*Id.*

82. JACK & JACK, *supra* note 5, at 30 (quoting Charles Curtis, a prominent Boston attorney).

83. JACK & JACK, *supra* note 5, at 32 (explaining that "[p]artisanship requires uncompromised devotion of an attorney to serving a client's interests. The loyalty of an attorney to a client is exclusive and aggressive.").

84. JACK & JACK, *supra* note 5, at 32.

85. See JACK & JACK, *supra* note 5, at 32 ("Neutrality, the second foundation block of the lawyer's role, [partisanship being the first] requires an attorney to represent a client without passing judgment on the character of the client or on the moral merits of the client's position.").

86. COURIC, *supra* note 2, at 362. "While [trial lawyers] get to know a client intimately during the course of trial preparation and during a trial itself, lawyer and client usually do not form long-lasting friendships. Nor do lawyers necessarily worry about who is in the wrong or in the right . . . . [L]awyers retain their distance from their clients . . . . It is a security that benefits us all." *But see* HARRINGTON, *supra* note 13, at 60 (arguing that it is impossible for "human beings to detach themselves from their social identities and to analyze issues through reason and logic alone.").

Feminists argue not only that this is impossible, that all thinkers carry socially shaped perspectives with them, but that thinkers seeking a high degree of detachment miss the concrete human detail that is a vital part of important issues. The further charge is that in practice, the tradition of objectivity masks the very harms it is supposed to prevent. It is supposed to prevent bias toward powerful or favored groups, but instead allows the perspectives of socially dominant groups to dominate the law. And it effectively silences those whose perspectives are different.

*Id.* Ellmann, *supra* note 22, at 2693 (stating that a lawyer can evince deep interest and care for her client without becoming personally engaged).

87. COURIC, *supra* note 2, at 362.

must separate their own ideas from the words and thoughts of their paying client. This will ensure moral and psychological well-being and facilitate effective client representation. "Neutrality is an indispensable part of being an attorney."<sup>88</sup>

Further, women litigators must balance their desire to be care-oriented with the need to be assertive while in the court room.<sup>89</sup> Starting in law school, women learn that care-oriented behavior is not always welcome in the American legal system.<sup>90</sup> Especially in the legal profession, which glorifies stoicism and combativeness, female qualities are eschewed.<sup>91</sup> This is an added burden for women litigators. Women are aware that law schools teach only one method of lawyering, and that if they wish to adopt other methods, they will need to develop these alternatives on their own.<sup>92</sup> Women experience life different from men; therefore, it is essential that they forge their own paths and leave their own imprint on the legal profession. Otherwise, women will just be playing a man's game by men's rules.

A primary problem for care-oriented trial attorneys<sup>93</sup> is what to do with their personal morality when they enter the rights-oriented practice of law.<sup>94</sup> Many questions and options for adapting to the attorney's role arise for women trial attorneys. The following section discusses a few of them.

## VI. WHETHER OR NOT TO ADAPT TO THE PROFESSIONAL ROLE OF TRIAL ATTORNEY

Proper functioning of the legal system presupposes that lawyers will fulfill their roles by conformity to the letter of the law.<sup>95</sup> Thus, a care-oriented litigator must make choices as to whether she will fully adhere to the professional role, which requires that she be a fervent advocate and exercise stoic detachment, whether she will reject the prescribed role, or whether she will find some middle ground.<sup>96</sup>

88. JACK & JACK, *supra* note 5, at 40.

89. JACK & JACK, *supra* note 5, at 134 (quoting testimony of a male attorney before the New Jersey Supreme Court Task Force on Women).

90. JACK & JACK, *supra* note 5, at 132-33.

91. JACK & JACK, *supra* note 5, at 133.

92. JACK & JACK, *supra* note 5, at 136.

93. JACK & JACK, *supra* note 5, at 33 (asserting that client partisanship and professional neutrality strictly comprise the lawyer's moral universe without regard to the interests of others).

94. JACK & JACK, *supra* note 5, at 136.

95. JACK & JACK, *supra* note 5, at 95.

96. See generally Janoff, *supra* note 18, at 207 (citing many journal and law review articles in support of her proposition that choices must be made by women in the legal profession who are experiencing conflict with the adversary system in order to survive).

James Foster explored how women feel about being advocates in an adversarial legal process . . . . He concluded that women in the legal profession are "reluctant



While disassociating herself from the trial attorney role will not benefit her, her client, or the judicial system, conformance<sup>97</sup> will mean adopting male qualities to the potential exclusion of her care-oriented tendencies.<sup>98</sup> By taking the middle ground, she may be able to fulfill her professional role while retaining an acceptable level of loyalty to her personal morality.<sup>99</sup>

Women must decide how their care-orientation fits into their professional life as a trial attorney. It is as much a personal decision as is what profession they will enter. Nevertheless, in order to achieve success that can be equated with men's success as litigators, something more radical must be suggested in order to have care-oriented thinking be an integrated part of the judicial system<sup>100</sup> and, more

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adversaries" who must choose between risking professional rejection by "articulating nonadversarial values" and silencing their "women's voice" in joining the process. Foster identified three strategies women use to survive law school. The women with whom Foster spoke either joined in as "[one] of the boys," rejected adversariness entirely, or decided to "[g]rimace and bear it." Foster identified problems inherent in each choice. Women who adopted the first strategy had to remain silent. The second strategy . . . was used by women who wanted to succeed by redefining success. These women risked being stigmatized "first as women trying to play a man's game; then as outsiders who want to change the game's rules; and finally as people who repudiate being stigmatized." The majority of women chose the third strategy. These women sought to work within the law school system, resigning themselves to the adversary game. They did not give up their need to make meaningful human connections, yet they were not blind to the fact that "[b]eing a lawyer requires that you choose your battle ground."

*Id.*

97. See JACK & JACK, *supra* note 5, at 42 (asserting that unlike the adversary system, morality involves identifying with people on a human level, not just being correct. This broadened moral vision avoids both the parochialism of total role identification and the alienation that attends rejection of that role.).

98. JACK & JACK, *supra* note 5, at 136; see also HARRINGTON, *supra* note 13, at 60 (quoting UCLA law professor Kimberle Crenshaw, who says that "[t]o play the game right, [minorities] have to assume a stance that denies their own identity and requires them to adopt an apparently objective stance as the given starting point of analysis."); Martha Siegel, *A Practitioner's Guide to Feminist Jurisprudence*, B.B.J., Oct. 1993, at 6 (stating that there is "an inherent tension between . . . [the] standard of how 'to think like a lawyer' and the evidence that women and men may process information differently," which suggests that "when law schools teach us 'to think like a lawyer,' they may really teach us to 'think like a man.'").

99. JACK & JACK, *supra* note 5, at 42.

100. See generally JACK & JACK, *supra* note 5, at 169-70.

[T]wo factors make it possible to bring care thinking into law without risking legal anarchy and demagoguery. First, the rights morality of law is well established and will not yield easily; at most, care concerns will integrate and provide balance. The moorings of conventional wisdom remain a check against arbitrariness and arrogance. Second, morality of care is not simply the personal predilection of individuals. It is itself a conventional wisdom, one shared by a large part of our society, and one well tempered in its own province. By definition, the rules are not clear because the thinking is not rule-bound, but underlying principles and assumptions are well understood. Thus, ultimately we are talking not about blending institutional and idiosyncratic moralities but about combining two moral viewpoints, each of which has a well-established social tradition.

JACK & JACK, *supra* note 5, at 169-79.

particularly, the litigation process. Women must go to the heart of the legal system to find their equal place beside men; not behind them, and, not necessarily in front of them. Not only is reform required to steer legal education toward a care-oriented mindset, but needed to broaden the moral development of all lawyers for the betterment of society as a whole.<sup>101</sup>

One of the most viable alternatives available to transform litigation into a more care-oriented system is to add care-oriented exceptions to the litigation process.<sup>102</sup> Such exceptions would serve as institutional encouragement to moderate partisanship and neutrality when needed and possible.<sup>103</sup> The exception could provide an opportunity to consult with peers when a litigator is facing a moral predicament, or even require them to do so or be subject to disciplinary hearings and a penalty. The exceptions would need to be well outlined in the ethical rules, yet allow a reasonable amount of discretion for the litigator to make necessary ethical decisions in a case.<sup>104</sup> The exception would allow for litigation to consider the parties' interests and community needs. Consequently, the "morality of care" and the "morality of rights" could be integrated into both the legal system and the professional lives of trial attorneys.<sup>105</sup>

Implementing theories behind alternative dispute resolution<sup>106</sup> (ADR) is another option available to add more care-oriented elements to the litigation process. The failure to communicate, resulting from distrust between the parties, is responsible for hindering the resolution of disputes. Alternative dispute resolution seeks to overcome the distrust, thereby allowing a settlement similar to one that a court would have reached.<sup>107</sup> Many trial lawyers fear that they would be out of a job if alternative dispute resolution

101. JACK & JACK, *supra* note 5, at 168.

102. Ellmann, *supra* note 22, at 2724 (describing an alternative to the present responsibility of lawyers to their clients, the author suggests "admit[ing], or rather announc[ing], in the rules of ethics that they are subject to exceptions when considerations of care justify making them.").

103. See JACK & JACK, *supra* note 5, at 161 (stating the lawyering profession has gotten where it has because of the possibility that lawyers might be able to do some good and have a responsibility to do so).

104. See Ellmann, *supra* note 22, at 2724-25 (suggesting that consulting peers, both lawyers and non-lawyers, may help resolve ethical dilemmas).

105. JACK & JACK, *supra* note 5, at 157.

106. Agencies that provide services or advocate alternative dispute resolution include the American Bar Association Section of Dispute Resolution, the Better Business Bureau, the American Arbitration Association, the Multi-Door Section of District of Columbia Superior Court, NOVA, SPIDR, Endispute, and the Center for Public Resources. There is also endless litigation on the pros and cons of alternative dispute resolution in every possible field of law which I do not attempt to go into at this time.

107. Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 427 (1986).

replaced its courtroom counterpart; however, the ideals of ADR, i.e., opening communication and building trust between parties, may help such attorneys to recognize that "we are interconnected parts of a community and that individual freedom and community conflict only at their extremes."<sup>108</sup> Similar to ADR, a care-oriented judicial system seeks to open the range of inquiry beyond the immediate rights of the respective parties to show them the independent effect that they have on each other, as well as society. The adversary system, on the other hand, operates on a theory of "fundamental distrust"<sup>109</sup> and offers only a win/lose resolution for the parties involved, with no thought to the effect on society.

It is possible that the sheer numbers of women entering the legal profession will mean that a more care-oriented perspective will become integrated into the present rights-oriented judicial system. After all, the legal profession is organic and susceptible to a certain inevitable degree of change.<sup>110</sup> However, for the women who are presently, or who soon will be trial attorneys, something needs to be done if they are to escape the "double-bind."

## VII. CONCLUSION

Both care and rights speak to a quality of justice. From our cultural perspective, a society where people are not free to speak, interact, form alliances, strive for achievement, and guard against governmental intrusion, is not a just society. Likewise, a society of plenty where some people lack basic necessities of food, shelter, and health care, where fellow humans do not respond to unjustifiable harm, is not a just society. Both the rights-oriented approach and the care-oriented approach aim at a just society, and each checks the faults and excesses of the other. Both have something vital to offer and recognize that human welfare is not complete without the contribution of each.<sup>111</sup>

Individuals should not have to compromise their desire to develop their identities and achieve according to their abilities.<sup>112</sup> Conversely, freedom and individual liberty cannot come at the expense of society as a whole. Our fate is inextricably linked with those around us.<sup>113</sup> Therefore, trial lawyer's professional and societal duty is to ensure that the fight for legal rights does not harm others. How

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108. JACK & JACK, *supra* note 5, at 157.

109. Lieberman & Henry, *supra* note 107, at 427.

110. Schafran, *supra* note 3, at 41.

111. JACK & JACK, *supra* note 5, at 171.

112. JACK & JACK, *supra* note 5, at 170.

113. JACK & JACK, *supra* note 5, at 170.

seriously a trial lawyer takes that obligation may depend on his or her personal morality. Those with a personal morality of the rights perspective will tend to see only the need to lay down boundaries, keep others at arm's length, and stake a claim to what the client legally deserves. On the other hand, a care-oriented thinker will prefer to understand the interests of the parties and argue based on what each party needs. The adversary system of litigation, however, has perpetuated the concept of courtroom warfare, making it difficult to break centuries of adversarial procedures. We need to move away from the purely adversarial system because justice is sacrificed by those procedures and because it moves society further and further away from the recognition that group success is more beneficial than individual achievement. When one party wins in litigation, victory is felt only by that one party and the losing party is left without his or her interests being met or even, possibly, considered. Justice should be concerned with taking both parties' interests into account and judging from that care-oriented perspective. Present litigation practices ignore that people frequently sue for underlying interpersonal reasons. If the system does not address those interpersonal dynamics and instead perpetuates conflict, the clients will not ultimately be satisfied and justice will suffer.

Rights-oriented litigators and care-oriented litigators seem to be divided among gender lines; men tend to be rights-oriented, while more women tend to be care-oriented. Adapting to the role of a trial lawyer may be more difficult for a woman at the outset because litigation is inherently right-based and the characteristics of a litigator are aggressive and dominating, but men have to live with the consequences of adversarial battles that ignore human considerations just as much as women do. It behooves men and women alike, then, to not forget that we are part of a human race, not a rat race.