

1989

Women Lawyers: Archetype and Alternatives

Rand Jack

Dana Crowley Jack

Recommended Citation

Rand Jack and Dana Crowley Jack, *Women Lawyers: Archetype and Alternatives*, 57 Fordham L. Rev. 933 (1989).
Available at: <http://ir.lawnet.fordham.edu/flr/vol57/iss6/2>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

WOMEN LAWYERS: ARCHETYPE AND ALTERNATIVES

RAND JACK and DANA CROWLEY JACK

The following excerpt is taken from Chapter 5, Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers, by Rand Jack and Dana Crowley Jack, published by Cambridge University Press, 1989. The authors, an attorney and a developmental psychologist, base their ideas on interviews with practicing attorneys. Recent findings in developmental psychology which show that women and men often construct differing moral orientations, and the rapid increase of women entering the legal profession sparked the major questions which guide the authors' inquiry. How does an individual lawyer's moral perspective interact with the demands of professional role? What is the relationship between a lawyer's personal morality and the way that person practices law, encounters conflicts in legal work, and adjusts to being an attorney? How do women and men cope with the moral cost of fulfilling the lawyer role when it conflicts with personal values? Does the law school eulogy to "think like a lawyer" say as much about the gender bias of our system as about skills inherent in doing the attorney's job?

*Chapter 5, "Women lawyers: archetype and alternatives," describes patterns observed in women's adjustment to the role of lawyer. As used in this introductory excerpt to chapter 5, "care-orientation" refers to a perspective on morality and social relations rather than to a socially defined role for women. The term "care-orientation" was first described by developmental psychologist Carol Gilligan, and denotes an ethical imperative to avoid hurt to others and to protect relationships. When this perspective encounters the rights-oriented, adversary structure of legal discourse and practice, it raises the possibility of creative challenge and change in the legal system.**

How do care-oriented lawyers, particularly women, adjust to the practice of law amid structures and attitudes long the province of male, rights-oriented thinkers? Here our concern is not with response to a given legal task or moral quandary but, rather, to the whole set of mores, forms, and assumptions that underlie the legal apparatus. Moving from individual instances, the problem here is reconciling systems of perceiving, valuing, and responding.

THE RULES OF THE GAME: PREPARATION OF THE PLAYERS

When lawyers talk about their work, they commonly liken it to a

* The footnotes have been omitted from this excerpt. For references and sources, see R. Jack and D.C. Jack, *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* (1989).

game. People in other professions—physicians, teachers, therapists, ministers, scientists—seldom use the term “game” to describe what they do. For attorneys, the metaphor is apt, in part, because law can be understood as a contest with rules, winners, and losers. An attitude of emotional detachment reinforces the idea that law is a game to be played for its own sake; the adversary nature of law makes it easy to maintain personal distance. 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. And it is difficult to examine the premises behind the rules when they provide the parameters for play. If we take the game metaphor seriously, what does it tell us about the nature of the contest, about qualifications to play, about training of the players and about who owns the game?

In 1932, Swiss psychologist Jean Piaget observed that childhood games offer a window for understanding the moral development of children. He noted marked gender differences, especially regarding how children relate to game rules. Boys stick to the rules, resorting only to “legal elaborations,” whereas girls emphasize harmony and continually invent new rules to suit their play. Of girls’ attitudes toward rules, Piaget wrote “A rule is good so long as the game repays it.” When faced with an argument over the rules, girls end the game, starting over or finding something else to do; boys argue their way through the dispute with continual references to the rules of the game. Girls seek to preserve the relationships of the players, while the boys maintain the rules. Taking boys as the standard, Piaget judged girls as lacking: “The most superficial observation is sufficient to show that in the main, the legal sense is far less developed in little girls than in boys.” By preferring boys as the norm, Piaget mirrored a common cultural practice of valuing one moral orientation at the expense of the other, whether the games be childhood play or law.

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 nurturant skills, expression of personal feelings, and cooperation rather than competition. In summary, girls play more than boys; boys “game” more than girls.

From early childhood, then, our culture prepares females and males for different roles. For boys, prelaw training begins almost from birth—in the home, on playing fields, in relation to peers. For girls, these same

influences instill different values, different ways of assimilating and responding to life's experiences. Each gender receives its own gifts, its own limitations, and its own ways of making sense of life. 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.

Parents and coaches regularly tell boys that sports build character, teach respect for rules, engender a healthy sense of competition, and generally prepare them for life in a depersonalized, adversary society. Mentors might also add that competitive sports supply the first stage of prelaw training. Until recently, relatively few girls got this same message or childhood practice for skills useful in the lawyer game. Though these generalizations about early acculturation for gender role admit of many exceptions, they nonetheless describe patterns deeply rooted in the history of our culture.

IT'S A MAN'S GAME: PRESSURE TO CONFORM

Women entering the practice of law find that mores of that game bear the imprint of boys' play rather than that of girls. Simply put, in subtleties of custom, structure, and decorum, law is still a man's game. In its Summary of Hearings, the American Bar Association Commission on Women in the Profession (1988) stated:

While several witnesses emphasized the great strides women have made in entering and succeeding in the profession, most participants at the hearings expressed frustration and disillusionment that barriers are still great and that progress has been far slower than expected. Witnesses cautioned that we must not be lulled into complacency about the status of women in the profession simply because the numbers of women entering the profession continues to increase.

The barriers women face consist of overt discriminatory behavior, subtle attitudes and institutional structures. Although several witnesses indicated that many blatant forms of discrimination have been eradicated, other individuals presented a significant amount of testimony about instances of overt discrimination. . . .

The bottom line, according to the witnesses, is that progress has been made but obstacles remain. The issues that should be addressed by the Commission are not legal, but structural and attitudinal.

Not only must care-oriented lawyers face the puzzle of integrating their moral perspective into a rights-oriented system, but women attorneys have the additional task of accomplishing this in an atmosphere of discriminatory attitudes and structures. Beginning in law school, women learn that feminine ways of participating are not always welcome. Given that qualities learned by women at home and in play make them vulnerable in a predominantly male profession, one solution women have attempted is to eradicate "feminine" characteristics. For example, a

female partner in a large firm advises, "Don't think of yourself, or allow anyone to think of you, as anything but a hard-driving, capable lawyer." The safest way to success is emulation of males, even to the extent of learning to "speak louder and lower," and "actively becoming an intimidator." Even clothes, a worldwide symbol of gender difference, are to be homogenized to the male mode. "Dress and talk in a conservative and professional style. Avoid wrap-around skirts, casual shoes or hair color changes. Dress like a lawyer, in a conservative suit. Don't chew gum."

A general social devaluation of femininity prepares women entering law to separate from the disliked characteristics of their sex and to align with the culture against feminine attributes within themselves. Particularly in the legal profession, which prides itself on objectivity, professionalism, and combativeness, traditional feminine traits are unacceptable. For many women, this results in an internal tension of "me/not me" when they define themselves as feminine yet try to negate within themselves the stereotypes that discount them in the legal world.

The law as a jealous mistress not only demands that women rid themselves of feminine characteristics but also demands a commitment to work that may be incompatible with the place of relationships in the lives of care-thinking attorneys. As law firms are more and more operated as is any other business for profit, and beginning lawyers can command up to \$75,000 starting pay, there is little room for divided loyalties, especially when an attorney enters with already suspect characteristics. That women may place relationships over professional success threatens both the old paradigm of law as a profession and the emerging perception of law as a business. The American Bar Association Commission on Women in the Profession (1988) reports:

Several witnesses emphasized that the problems facing lawyers of both sexes, but especially women, in trying to combine professional demands with important human relationships and children, involve questioning the values and ethics of the profession. The concern is that, at a time when the pressures are growing for law firms to be successful businesses and for lawyers to produce even greater numbers of billable hours, lawyers are becoming dehumanized, unable to relate to clients and family members.

In a similar vein, a woman lawyer, who had followed the traditional male path to success, writes:

While most male lawyers are assumed to be serious and to be embarking on a lifelong career, females still are viewed as question marks who may quit and stay home to raise children. Each woman, therefore, must establish herself as a committed and competent professional and convince each judge and opposing counsel that she means business and is in the profession to stay.

Top quality, hard work will do this. Work longer and harder on tough assignments. Don't shirk late hours or weekend projects. Don't

go home to cook dinner—or if you do, don't tell anyone. Get the work done on time, and in the best possible manner.

Old stereotypes that women are less rational and more emotional undoubtedly contribute to the requirement that they have to play longer and harder to earn the right to compete on equal terms. Family roles must be kept invisible, so as not to intrude on professional life. For women in law, rejecting a one-sided emphasis on professionalism in order to affirm interrelatedness, cooperation, and involved concern carries the liability of being dismissed as a “question mark” within the profession.

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 and follow a less combative form of participation, she may be labeled too feminine, and others may doubt her fiber as a tough lawyer. Speaking of the double bind female lawyers face in playing a man's game while held to standards of feminine behavior, a male attorney testified to the New Jersey Supreme Court Task Force on Women in the Courts:

A woman attorney must walk the fine line between being feminine and being assertive. She is held to a different standard than a man. If she is too feminine she is accused of trying to use it to her advantage and is therefore resented, but if she is equally assertive to her male counterpart, she is accused of being too aggressive. To their credit, most of the women attorneys with whom I have had dealings have been able to walk that fine line, but it is usually with much more pressure than is experienced by a man.

This “damned if you do, damned if you don't” walking-the-line metaphor was also used by the ABA Commission in *Women in the Profession* (1988): “Individuals . . . testified that women walk a fine line between being regarded as too feminine (and thus not tough, lawyer-like or smart) or too tough (and thus unfeminine or not the kind of woman male colleagues feel comfortable relating to).”

Saundra Douglas, a lawyer in our study, is aware of demands for walking the line and of the costs of erring on either side:

I picture myself as a pretty low-key person, in the sense that I don't think of myself as terribly strident or aggressive. In fact, that's one of the issues women as lawyers have to face, trying to be human and also letting people know they can't walk on you. If I have more trouble with one than the other, I think it's being afraid that people will walk on me. There are a couple of women who are lawyers who I think kind of deliberately made the choice that they'd be as aggressive as all get out in order not to face the stereotype of women not being able to stand up to combat. In this community I think people were just sort of waiting for other women to fulfill that stereotype.

As women experience a clash between their values and those of the legal game, they are beginning to express discomfort with what it takes to be a successful lawyer. The conflict surfaced at Yale Law School in 1984 when a number of female and minority law students documented their "dissatisfaction and alienation" in an open letter to the law school community. As our interviews might have predicted, they identified alienation as the opposite of feeling "connectedness, belonging, engagement." Noting their success as law students, the women asserted that "for many this success comes at a price—a price, paid gradually and often silently, of alienation and disillusionment." The students cited the "combative, monopolizing and self-promoting style of discussion" encouraged in the classroom as a source of alienation.

The voice that troubles us is the monolithic, confident voice of "insiders" who see themselves as the norm and who have (often unconsciously) little tolerance for our interest in diversity and difference. This voice, tone, style is often defended as "the way lawyers speak." . . . To the extent that this *is* the way lawyers speak, we must conclude that we cannot be lawyers—or that we cannot be ourselves.

These students bring a perspective to the law that generates a compelling dilemma: Forsake the law or forsake the self. Because the adversary structure of legal discourse precludes the voice of cooperation and interdependence, women and men with such an orientation risk alienation. They are the outsiders, and theirs is the different voice. These women recognize that law school offers only one alternative of how to lawyer. If they want to practice law in different ways, they must invent those for themselves. With insight perhaps most feasible before law school has fully done its work, the Yale women are saying that legal education has an obligation to help invent alternatives to an adversarial style and not simply to excommunicate those with a different perspective.

Both we and the Yale law students identify a set of problems that fall disproportionately on women. In our study, female attorneys most often experience the gap between personal morality and the role they are supposed to play. What price do women pay for following the male and, at present, the only officially sanctioned version of the lawyer role? Are there other alternatives compatible with remaining in the profession? Can care-oriented women reshape the role to make it acceptable to their personal values? Is it possible to protect both relationships and rules, to be caring advocates?

Women we interviewed described differing patterns of adjustment to the practice of law. For the most part, all play by the rules of the game, but at the same time they acknowledge conflict and the need to modify professional expectations. The incompatible demands of personal and professional imperatives led most of the female attorneys with whom we talked to choose the stressful challenge of trying simultaneously to meet divergent standards—the rights orientation of the legal system and the responsiveness orientation of female development. A central problem for

all care-oriented women is what to do with their personal morality when they enter the practice of law. The official solution, tried by some women, is to adapt to the lawyer role: talk like a (male) lawyer, think like a (male) lawyer, act like a (male) lawyer. This solution contrasts with other adjustments women describe—shaping the role to fit their own values and trying to live up to the standards of both professional role and personal morality. The latter two adjustments are attempts to maintain a care orientation while taking on the characteristics of role. Because care remains, women pursuing either of these courses must decide how the responsiveness and concerns of care fit into the life of a practicing lawyer.

