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EXAMINING THE MODEL RULES OF PROFESSIONAL CONDUCT TO INCLUDE WOMEN’S MORAL EXPERIENCE AND FEMINIST ETHICS

ANIETIE AKPAN*

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The understanding and interpretation of what *feminism* is has been a hotly contested discourse for well over a century.¹ In our current social and political landscape, the #MeToo movement, the Kavanaugh Hearing and the coined term “Social Justice Warriors” (SJWs),” feminism is often dismissed,

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1. CHRISTINE STANSELL, *THE FEMINIST PROMISE: 1792 TO THE PRESENT* 1 (2010); *FEMINISM: OPPOSING VIEWPOINTS* 12–13 (Jennifer A. Hurley ed., 2001).

its core values minimized, and its unique interconnectedness to matters such as socioeconomics, education, and health policy fall on deaf ears.

The relationship between the female experience and the law is perhaps even more complex: for decades, men have comprised the majority of state and federal lawmakers, resulting in past legislation being completely uninformed of the complex and intersectional social, political, and economic needs of women.

Feminist jurisprudence, the nexus of feminism and the law, is a philosophy of law based on the equality of the sexes, beginning as a field of legal scholarship in the 1960s.² The premise of this legal theory is that patriarchy infuses the legal system and all its workings, making the legal system inadequate in identifying gendered components of seemingly neutral laws and practices. Such practices affect for example, employment, reproductive rights, domestic violence, and sexual harassment.³

This article purports that existing jurisprudence is “masculine” because it reflects the connection between patriarchal laws and humanity.⁴ Masculine jurisprudence not only perpetuates the methods of lawmaking, but it infiltrates the mode of construction for the codes of professional conduct. Feminist jurisprudence seeks to remedy this matter by recognizing male power, calling for substantive changes necessary to bring gender equality, and encouraging consciousness-raising in the practice of law.⁵

As with most “doctrines” governing behavior, the Model Rules of Professional Conduct⁶ are constructed with a male-oriented convention, rooted in “traditional” ethics completely uninformed of women’s moral experience.

2. See Robin West, *Women in the Legal Academy: A Brief History of Feminist Legal Theory*, 87 *FORDHAM L. REV.* 977, 989 (2018); Maxine Eichner & Clare Huntington, *Introduction, Special Issue: Feminist Legal Theory*, 9 *STUD. L. POL. & SOC.* 1 (2016) (discussing the historical development of feminist jurisprudence in the United States).

3. Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 *WIS. WOMEN’S L.J.* 149, 150 (2000) (discussing, “[W]omen suffer in ways which men do not, and that the gender-specific suffering that women endure is routinely ignored or trivialized in the larger (male) legal culture. . . . The dismissal of women’s gender-specific suffering comes in various forms, but the outcome is always the same: women’s suffering for one reason or another is outside the scope of legal redress.”).

4. Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 *BERKELEY WOMEN’S L.J.* 191, 193 (1989).

5. *Id.*

6. MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 2016) (setting the rules that prescribe the standard of legal ethics and professionalism for lawyers).

The construction of traditional ethics is based on our social system being male-centered and therefore, not only have men devised all philosophical and moral thought,⁷ but such thought is universally codified.⁸ Feminist critique on traditional ethics examines components of moral conduct that male philosophers praise (i.e., rationality, partiality, universality) with components of moral conduct that are disparaged (i.e., community, relationality, individuality).⁹

To understand the mechanics of how morality has been bifurcated into masculine and feminine thought, one must first examine how men and women were socially engineered to exist in segregated realities.

I. HOW THE FEMALE PERSPECTIVE OF THE WORLD HAS BEEN SHAPED INTO A VALUE THEORY

The root of how women have been socially, politically, and economically marginalized was first demonstrated in the separation of men and women into the public “working” sphere and private “domestic” sphere: “The dichotomy of ‘public’ and ‘private’ has shaped our understandings of gender. The traditional notion of separate spheres is premised on a dichotomy between the private world of family and domestic life (the ‘women’s sphere’) and the public world of marketplace (the ‘men’s sphere’).”¹⁰

7. GATIEN LAUROL, THE RELEVANCE OF FEMINIST EPISTEMOLOGY AND FEMINIST ETHICS 1 (2016), <http://www.fau.edu/athenenoctua/pdfs/Gatien%20Laurol.pdf>; see CELESTE D. HARVEY, NATURE, FEMINISM, AND FLOURISHING: HUMAN NATURE AND THE FEMINIST ETHICS OF FLOURISHING 22–3 (2016), http://epublications.marquette.edu/cgi/viewcontent.cgi?article=1657&context=dissertations_mu (explaining how “[T]he ideal of human nature functioning in Western philosophical theory has been biased by being implicitly a masculine ideal. The male form of being human [is] the ideal of humanity, and on that basis, judged that women were defective, malformed, ‘misbegotten’ men.”); see also LISA TESSMAN, FEMINIST ETHICS AND SOCIAL AND POLITICAL PHILOSOPHY: THEORIZING THE NON-IDEAL 191 (2009), http://cachescan.bcub.ro/2008_05_28/E-book/583783.pdf (noting scholars’ understanding that “categories of ‘masculine’ and ‘feminine’ identify a shifting complex of traits, behaviors, images and social expectations [and that therefore] gender is . . . expressed through moral norms.”).

8. *See id.* at 5.

9. *Id.* at 2.

10. WOMEN AND THE UNITED STATES CONSTITUTION: HISTORY, INTERPRETATION, AND PRACTICE 202 (Sibyl A. Schwarzenbach & Patricia Smith eds., 2003); see also MARTHA ALBERTSON FINEMAN, MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD 94 (Isabel Karpin ed., 1995) (discussing how gendered division of labor perpetuated sex roles within marriage-specific behavior by men and women); GATIEN LAUROL, THE RELEVANCE OF FEMINIST EPISTEMOLOGY AND FEMINIST ETHICS 6 (2016), <http://www.fau.edu/athenenoctua/pdfs/Gatien%20Laurol.pdf> (noting

As a result of women's segregated existence in the domestic space, women developed a moral convention based on both interpersonal relationships and fostering their children's growth. Philosophers thought characteristics such as self-sacrifice, nurturance, compassion, and sympathetic responsiveness were inextricably linked to the experience of womanhood—namely, motherhood—these characteristics later became integral components of feminist ethics.¹¹ Scholars have even postulated that the very nature of domestic work, namely, the creation and maintenance of strong families in which moral virtue thrives, informs feminist ethics.¹² These traits, by nature of how they were first constructed—again, due to segregation into the private domestic sphere—were understood as distinctively *feminine* or *female*.¹³

Feminism has always been rooted in challenging gender stereotypes and antiquated ideas of womanhood; the irony that the impetus of feminist thought began—at least according to some scholars, men and women alike—in the domestic space, is not lost. This neither minimizes nor devalues, the significance of feminist thought, the subsequent moral and ethical reasoning it shaped, or how feminist thought should inarguably inform our ethical understanding in the practice of law and law making.

II. GENDERED MORALITY: TRADITIONAL ETHICS V. FEMINIST ETHICS

To further explain, philosophers have proposed that the principal purpose of ethics is to demonstrate the ability to rationally “[p]erceive universal and impartial rules of rightness and then act on those rules.”¹⁴

Philosophers historically purport that there is a cyclical relationship between morality and maleness: men are inherently the ideal moral agents, resulting in the male-centric perspective shaping ethical reasoning.¹⁵

how “traditional ethics regulates women’s roles in ethics to the private sphere while men can practice ethics in the public sphere.”).

11. Rosemarie Tong & Nancy Williams, *Feminist Ethics*, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* 2 (1998), <http://plato.stanford.edu/archives/sum2016/entries/feminism-ethics/>.

12. *Id.* at 3.

13. Beth Bernstein, *Difference, Dominance, Differences: Feminist Theory, Equality, and the Law*, 5 *BERKELEY WOMEN’S L.J.* 214, 219 (1990); see Zuleyka Zevallos, *Sociology of Gender*, *THE OTHER SOCIOLOGIST* (Nov. 28, 2014), <https://othersociologist.com/sociology-of-gender/> (discussing the difference between “sex” and “gender”).

14. Sarah Conly, *Why Feminists Should Oppose Feminist Virtue Ethics*, *PHILOSOPHY NOW* 1 (2001), https://philosophynow.org/issues/33/Why_Feminists_Should_Oppose_Feminist_Virtue_Ethics.

15. Nathan Nobis, *Feminist Ethics Without Feminist Ethical Theory*, *J. of Philosophical Research* 213, 218 (2005), <https://www.morehouse.edu/facstaff/>

The “masculine” traits of reason, aloofness, and impartiality encapsulate the *ethics of justice*, a system of ethics based on the moral development of men. By corollary, *ethics of care* is rooted primarily in interpersonal relationships and are thus associated with “feminine” traits of empathy and partiality.¹⁶ Traditional ethicists categorize using an “emotional” approach to discern a moral or ethical issue as feminine; this approach is deemed as both unintelligent and cognitively immature.¹⁷ This further perpetuates traditional ethicists’ collective belief that the moral development of women is inferior to that of men.¹⁸

Although rationality and impartiality are undoubtedly paramount in the practice of law, marginalizing virtue and the significance of interpersonal relationships results in one-dimensional lawyering and fails to reflect the client’s narrative and best interests.

III. APPLYING FEMINIST ETHICS TO THE MODEL RULES OF PROFESSIONAL CONDUCT

The purpose of evaluating the Model Rules through a feminist lens is to examine traditionally constructed ethics lacking values central to feminist-care ethics. The Model Rules fail women by favoring, and subsequently codifying, “male” forms of moral reasoning over “female” ways of moral reasoning, resulting in the notion that female moral reasoning is inferior to

mnobis/papers/feminist-ethics.pdf (stating, “[A]ll mainstream traditional ethical theories have been developed by men, these theories [therefore] reflect the experiences of this group . . . [t]he result of this . . . is that the moral ‘experiences’ of most, or many, women are left out and/or ‘impossible to make sense of’ on these theories or, more generally, these perspectives.”); see George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533, 539 (1987) (noting that “[a]n action has moral worth only if the actor acts out of the necessity . . . [generated] by reverence for the law.”).

16. Nobis, *supra* note 15, at 222 ; see also Michael E. Allsopp, *Feminist Ethics at Thirty: A Retrospective*, <http://www.shc.edu/theolibrary/resources/allsopp.htm> (noting that “[a] feminine consciousness regards the gender traits that have been traditionally associated with women – in particular, nurturance, compassion, caring[.]”).

17. Beth Bernstein, *Difference, Dominance, Differences: Feminist Theory, Equality, and the Law*, 5 BERKELEY WOMEN’S L.J. 214, 217 (1990). The “othering” of women has yielded the omnipresent operative hierarchy of the male-female binary. *Id.* This binary has generated numerous male-female binary pairs, which perpetuate male-female opposition with “male” held as the privileged superior construct, and “female” perceived as inferior. *Id.* These binaries include but are not limited to: “mind/body, culture/nature, reason/emotion, public/private, etc.” *Id.*

18. Stephen O’Sullivan & Phillip Pecorino, ETHICS: AN ONLINE TEXTBOOK, CH. 12, SEC. 1 (2002), http://www.qcc.cuny.edu/SocialSciences/ppedorino/ETHICS_TEXT/Chapter_12_Feminism/What_is_it.htm.

its male counterpart.

As aforementioned, the Model Rules as constructed emphasize duty and impartiality which undoubtedly has its place in the practice of law. The Rules, however, fail to address that in order for an attorney to be truly impartial, ethical reasoning must involve emotive input. Attorneys must connect emotionally with the client to appreciate and understand the backstory and the conduct leading to the need for legal assistance.¹⁹

By engaging in this behavior, practicing law based on Model Rules that includes feminist moral reasoning results in a more advanced and comprehensive practice of lawyering.

A. *Autonomy*

“The legal profession’s relative autonomy carries with it special responsibilities of self-government.”²⁰

–Model Rules, Preamble

The Model Rules Preamble emphasizes that the legal profession is largely self-governing.²¹ The legal profession is unique from others due to its intimate relationship with government, lawmaking, and law enforcement processes.²² Therefore, autonomy within the practice of law is important because it maintains the legal profession’s independence from government interference.²³

This language, however, presents the practice of law as incredibly insular, ignoring the fact that attorneys are undoubtedly relational beings; therefore, it is impossible to make moral and ethical decisions in practice without considering the connectedness and context of the relationships with clients.

If autonomy exists on one end of the spectrum, then feminist ethics highlights the opposite end. The nature of the interpersonal relationships developed with clients represents an integral element of ethical analysis, further elevating the ability to “lawyer” and advocate more holistically.²⁴

19. *Id.*

20. MODEL RULES OF PROF’L CONDUCT, PREAMBLE (AM. BAR ASS’N 2016).

21. *Id.*

22. Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1149 (2009) (quoting MODEL RULES OF PROF’L CONDUCT, PREAMBLE).

23. *See id.* (noting that “[s]elf-regulation . . . helps maintain the legal profession’s independence from government domination.”).

24. Allsopp, *supra* note 16 (explaining that “[w]ithin feminist ethics, there is widespread criticism of the assumption that the role of ethics is to clarify obligations among individuals who are viewed as paradigmatically equal, independent, rational and autonomous.”)

Failing to evaluate an ethical decision without considering the relationships existing between clients and third parties involved in the matter results in “a patchwork of inherently incomplete perspectives,” leading to an attorney’s failure to represent a client’s best interests.²⁵

B. Counselor

“In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client’s situation.”²⁶

–Model Rules 2.1

This is the *only* rule in the Model Rules of Professional Conduct that alludes to a lawyer’s ability to connect with personal emotions or with the client’s relationship when exercising independent moral judgment. Far from impersonal, human knowledge derives from situated perspectives.²⁷ To practice ethically, attorneys must draw from “situated perspectives” to better understand the clients and their situation.

Examining ethics from this perspective creates a conflict between emotion and reason in moral decision-making. Emotion should not be viewed as a *corollary* of reason; “reason” is an expression of several moral resources that *include* emotion. Feminist ethics recognizes this concept, whereas traditional ethics alienates us from our ability to integrate sentiment and partiality into our ethical processing.

Therefore, when an attorney cannot segregate reason as a separate entity when making a split-second moral or ethical decision. Emotion and intuition should be fully integrated in the decision-making process and the attorney’s arsenal of moral resources.

C. Advocate

“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”²⁸

–Model Rules, Preamble

Unlike other roles described in the Model Rules, the attorney’s advocate role specifically addresses the ability to build a case and plea the same before a court. A feminist ethical framing of advocacy emphasizes the significance

25. *Id.*

26. MODEL RULES OF PROF’L CONDUCT R. 2.1.

27. Allsopp, *supra* note 16.

28. MODEL RULES OF PROF’L CONDUCT, PREAMBLE.

of the human experience, emphasizing that an attorney's ability to represent her client must also consider additional underlying issues contributing to that client's circumstances.

1. Family Law and "Ideal" Motherhood: An Example of Applying Feminist Ethics Advocacy in Legal Practice

In my own experience as a family law practitioner, for example, my internal moral code is challenged when I represent clients deemed as unfit parents.

When presented with such difficult cases, I have to be conscious of activating my feminist ethical reasoning and recognize that for some family cases (not *all*)—namely when a mother's childrearing abilities are called into question—that unfair ideologization of motherhood fuels the questioning of those abilities. Additionally, this questioning often ignores the oppressive power structures impacting the different ways in which women experience motherhood.

Using a feminist ethical lens in legal advocacy highlights that many intersectional identities and experiences shape a woman's mothering style (*and* how her mothering is scrutinized by legal and non-legal entities alike).

It is collectively understood that social expectations of motherhood are based on one particular type of woman: the White, suburban, middle-class homemaker.²⁹ The experiences of motherhood, however, are not experienced, litigated, or adjudicated in a universal or homogenous way. This is because race, economic class, sexual orientation, immigrant status, and even the ability to bear children shape the several different realities that women experience.³⁰

Erasing institutions of racial injustice, economic disparity, heterosexism, and xenophobia makes clear *who* the ideal mother looks like and *what* she can afford to provide her children. As a result, "anomalous" individuals who

29. See Jane Wong, *The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond*, 5 WM. & MARY J. WOMEN & L. 273, 284 (1999) (describing how the experiences of White women have historically been presented as the metric in which motherhood should be measured against); see also Jarune Uwujaren & Jamie Utt, *Why Our Feminism Must Be Intersectional (And 3 Ways to Practice It)*, EVERYDAY FEMINISM (Jan. 11, 2015), <http://everydayfeminism.com/2015/01/why-our-feminism-must-be-intersectional/> (noting, "[w]hite feminism is a set of beliefs that allows for the exclusion of issues that specifically affect women of color[;] it is a 'one size-fits all' feminism, where middle class White women are the mold that others must fit. It is a method of practicing feminism, not an indictment of every individual White feminist, everywhere, always.").

30. MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD 284 (Martha Fineman & Isabel Karpin eds., 1995).

do not conform to this construct are subject to unfair generalizations, prejudices, and often labeled as bad mothers under judicial scrutiny.”³¹

Many of these “anomalous” identities are inextricably linked to a mother’s accessibility—or lack thereof—to adequate medical care, child care, healthy food, educational, and employment opportunities. Attorneys representing these women through a feminist lens will conduct their representation with background knowledge that experiencing poverty, racism, homophobia, and fear of violence in one’s household make caring for children difficult.³²

Feminist lawyering requires an attorney to apply the abovementioned variables to the facts of a client’s case; as a result, the attorney will discover that the client is not an “unfit” parent; instead, women are unfairly measured against the metric of an unequal idealized motherhood.³³

It is not enough to acknowledge that courts validated society’s construction of the multiple variables contributing to how motherhood is perceived. Feminist lawyering also requires an attorney to adjust and adapt her practice to reflect feminist understanding in an empirical way. Researching issues of privilege and oppression, actively listening to the client’s backstory and factual history for evidence reflecting the client’s experiences, and reviewing the history of court holdings in the respective jurisdiction can accomplish this. This newly adopted practice allows the attorney to advocate thoroughly and appropriately decipher bias in an adjudication.

If the Model Rules adopted such an expanded understanding of advocacy—as described above—feminist lawyering would not be viewed as the foundation for how law should be practiced.

Feminist ethics calls on attorneys’ ethical and moral decisions to incorporate the totality of human life;³⁴ this includes an attorney’s ability to

31. *Id.* at 120. The intersection of patriarchy and race has played a large role in the way Black women have been historically viewed as mothers. For example, the backdrop of slavery required, “[W]hite women to be nurturing mothers, housekeepers, and companions to their husbands” in contrast to the slave woman’s role which required strenuous labor. These two divergent racialized constructs of women—the former as virtuous, the latter as licentious—perpetuated the exclusion of Black women in the construct of an ideal woman and an ideal mother, encouraging the White woman’s “allegiance to an oppressive concept of their own womanhood.” *Id.* at 233–34.

32. *Id.* at 149.

33. *Id.*

34. *Making Choices: A Framework for Making Ethical Decisions*, BROWN UNIV. (May, 2013), <https://www.brown.edu/academics/science-and-technology-studies/framework-making-ethical-decisions> (explaining how “feminist ethics concerned with the totality of human life and how this life comes to influence the way we make ethical decisions.”).

self-analyze the ability to identify emotionally with the client, the client's backstory and recognize the impact of the client's representation on additional parties. The attorney is better equipped to represent the client's best interests through incorporating these matters.

IV. CONCLUSION

To be clear, advocating from a feminist ethical perspective is not an outright rejection of traditional ethics. Feminist-care ethics does not minimize the importance of using a "moral minimum" as a benchmark for making legal and ethical decisions impacting clients; rather, it "exceeds the 'moral minimum' of respecting individuals' rights."³⁵ As aforementioned, "reason" should *include* emotion to yield well-balanced and ethical decision-making. Such decision-making would generate lawyers that are emotionally-sensitive critical thinkers empowered to "[m]ake generalizations about human relations as well as to tease out their unique characteristics."³⁶

For those who presume that practicing from a feminist perspective is unfairly subjective lawyering, law itself is a subjective construct. It may have an objective purpose providing regulation and order, but it is rooted in the expectations, realities, and norms of those who are socially and politically dominant.

Feminist ethics recognizes the significance of relationality and the multiplicities of the human experience that broadens the scope of morality. It also emphasizes that the practice of law must reflect the *personal* nature of morality. Clients are better represented if attorneys approach the practice of law from a more relational perspective. This approach results in attorneys obtaining a stronger and much clearer understanding of their client's narrative, ultimately leading to advocacy that better reflects the client's interests and social standing.

35. Rosemarie Tong & Nancy Williams, *Feminist Ethics*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (1998), <http://plato.stanford.edu/archives/sum2016/entries/feminism-ethics/> (emphasis added).

36. *Id.*