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Styles of Lawyering

by
NAOMI R. CAHN*

Women managers who have broken the glass ceiling . . . have proven that effective leaders don't come from one mold. They have demonstrated that using a command-and-control style of managing others, a style generally associated with men in large, traditional organizations, is not the only way to succeed.¹

Whereas men's legal reasoning may be influenced by the masculine concern about separation and autonomy, women's primary concern with intimacy, connection and community may influence their legal reasoning in different ways.²

The [legal] profession must become more open to a wide variety of lawyering styles for both men and women in order to provide all lawyers professional opportunities, unconstrained by gender stereotypes.³

Introduction

This Article explores issues concerning the identification of male and female styles of lawyering.⁴ The three quotes set out above display somewhat different approaches to whether men and women are different.

¹ Judy Rosener, Ways Women Lead, HARV. BUS. REV., Nov.-Dec. 1990, at 119. As Deborah Rhode points out, the study on which these conclusions are based has methodological flaws, such as no control group. Letter from Deborah Rhode to Naomi Cahn (1992) (on file with the Hastings Law Journal).
³ ABA COMM. ON WOMEN IN THE PROFESSION, REPORT TO THE HOUSE OF DELEGATES 13 (1988) [hereinafter ABA REPORT].
⁴ By styles, I mean methods of practice, such as ways of relating to participants in the legal system—including clients, judges, and other lawyers—as well as ways of arguing. Styles are, of course, affected by, and affect, content. For analyses of how different methods of approaching clients affect the substance of representation, see Anthony V. Alfieri, Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative, 100 YALE L.J. 2107 (1991); Gerald P. López, Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration, 77 GEO. L.J. 1603 (1989).

[1039]
I have juxtaposed them to show the widespread concern with male and female styles. As they show, in order to consider and evaluate theories about gender-based lawyering, we must grapple with the dilemmas of difference: the debates over whether women are different from men and over how, despite women's differences from each other, we can talk about "women."5

Given the complexities in feminist theory about sameness/difference (and related theories) and in a feminist practice, I have found no easy answer to the question of whether male and female lawyers have the same or different styles of litigation. Ultimately, however, the question whether gender-based styles of lawyering exist is not as important as examining the different methods by which we practice law and the implications of seemingly different ethics of lawyering for ourselves as lawyers, for our clients, and for transforming legal practice.6

To explore how this debate can inform (and distort) the lawyering process, I first suggest the elements of a female lawyering style based on an ethic of care; second, I critique this model and its underlying assumptions. Trying to correlate a female style of lawyering with a particular set of attributes ascribed to women, such as those of an ethic of care, is not only inaccurate, it is dangerous. Rather than identify as "female" one particular style of lawyering, I argue that many different styles of lawyering exist. I argue that feminist legal theory helps us uncover these

5. See Martha Minow, Introduction: Finding Our Paradoxes, Affirming Our Beyond, 24 HARV. C.R.-C.L. L. REV. 1, 2-3 (1989) (identifying the first stage of feminist scholarship as claiming the same rights and privileges granted to men, the second stage as accommodating for women's historical differences from men, and the third stage as using men as the starting point and ignoring differences among women); see also Martha Albertson Fineman, Feminist Theory in Law: The Difference It Makes, 1 COLUM. J. GENDER & L. (forthcoming 1992) (manuscript at 19-21, on file with the Hastings Law Journal) (affirming the importance of using women as a category for analysis); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 585-605 (1990) (questioning how feminist theory recognizes differences such as race); Susan H. Williams, Feminism's Search for the Feminine: Essentialism, Utopianism, and Community, 75 CORNELL L. REV. 700, 707 (1990) (labeling feminism "as trapped between the horns of a dilemma, unable to unify its goals of validating women and their experience on the one hand while maintaining the critical distance necessary to tolerance of diversity and change on the other").

styles and figure out when they are useful in our own litigation. Additionally, feminist theory teaches us how to use these different lawyering styles to challenge existing practices, and can change the way we practice, how we think about ourselves as lawyers, and how we think about our clients.

By putting into context observed gender differences in litigation styles, we are better able to question, and understand, the significance of these differences. Ultimately, I argue that what others have conceptualized as a female style of lawyering is an incomplete picture of some of the more positive attributes traditionally ascribed to women in our culture; at the same time, this “female style” is descriptive of many ways of practicing law that are not necessarily female. Some of the attributes of this style of lawyering are traditional methods for law practice, while others are innovations that may profoundly change how we practice law and how we act as lawyers.

Because of a focus on gender, we are able to uncover and develop alternative styles that have been obscured by the dominant and existing legal system. With a gender focus, we accept that society has constructed concepts of women who are supposed to embody specific attributes—although we do not accept that these are either universally valid, or even accurate, constructions of some women. Looking at the constructed images is useful, however, so that we can claim some of the attributes in order to reconstruct lawyering, and so that we can use outsider attributes to challenge dominant images. With an outsider perspective, we can revalue lawyering characteristics in an effort to create new legal methods.

7. See Deborah L. Rhode, The “No-Problem” Problem: Feminist Challenges and Cultural Change, 100 YALE L.J. 1731, 1788 (1991) [hereinafter Rhode, The “No-Problem” Problem] (“The limited data available [on legal practice] reveal some significant sex-linked differences, but their extent depends heavily on context.”). See Carrie Menkel-Meadow, Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change, 14 LAW & SOC. INQUIRY 289, 304-12 (1989) [hereinafter Menkel-Meadow, Exploring a Research Agenda], in which the author asserts that research on women in law has emphasized “occupational separation within the [legal] profession and the tensions between family life and work life.” She argues that this focus may be inappropriate due to the assumption that women bear the primary responsibility for caring for the family and in light of many women's complaints that traditional work demands should be changed to accommodate these responsibilities. Id. She also notes her “curiosity about how having two genders (and countless ethnic and racial variations) in an institution formerly all male might alter the structures and practices.” Id. at 314. Although I am interested in similar questions, this Article focuses on how alternative values, which, while associated with gender, are not necessarily gender descriptive, may change aspects of how we practice law.

8. Joan C. Williams, Deconstructing Gender, 87 MICH. L. REV. 797 (1989) [hereinafter Williams, Deconstructing Gender].
My hope is that shifting the framework away from a focus on categories of style to a more contextual perspective will help us to transcend the difficulties of difference and move towards a feminist lawyering process, rather than a feminine lawyering process. Thus, this Article joins in the process of evaluation current models of lawyering and creating new visions. Parts I and II of the Article tentatively define, and then critique, a female lawyering process. Then, in Part III I choose one value associated with a feminist process, that of connection, and show how it might be useful in a contextual lawyering process. I discuss its promise of change, as well as its problems.

I. Thinking About a Female Style of Lawyering

A. Women in the Law

This section explores some of the reasons underlying contemporary discussion of male and female styles of lawyering and discusses various efforts to study whether these differences exist. These studies attempt to understand men and women's experiences in law school and their lives as lawyers. In addition, they look at how existing institutions have adapted to the influx of women in the legal profession.

What has caused a contemporary rethinking of the existence of male or female styles of lawyering? The answer is complex and includes stereotypes about men and women, studies of differences between male and female lawyers, theories about the construction by males of the current legal system, perceptions about male and female lawyers, and the celebration of women's differences from men in some feminist writing. Sometimes, perhaps, the cause is a longing for an alternative style to the hard-ball, aggressive tactics of many lawyers. Or, it simply may be that because women have been excluded for so long, we imagine, and hope, they will act differently. The idea has pervasive, even seductive, appeal. Indeed, studies do show differences in how some men and women react to law school, how they respond to the legal system and decide moral issues, and how their styles are perceived by others, lending even more credibility to the supposed existence of different styles.

10. See Ann Shalleck's call for such new visions in Shalleck, supra note 6.
11. See Joan Tronto, Beyond Gender Difference to a Theory of Care, 12 Signs 644, 646 (1987) (contending that, rather than analyzing gender differences, feminists should examine the adequacy and morality of care).
12. This is not, of course, a new concern. See Virginia G. Drachman, Women Lawyers and the Quest for Professional Identity in Late Nineteenth Century America, 88 Mich. L. Rev. 2414, 2428-29 (1990) (discussing debates among late nineteenth century women at the Equity Club about whether women brought "uniquely feminine qualities to the law").
Within the past five years there have been several major studies on whether male and female students experience law school differently—at Stanford University Law School and University of California, Boalt Hall—as well as numerous anecdotal discussions. The studies found differences in students' reasons for attending law school and in class participation rates. Women were far more likely to choose to attend law school because they wanted to serve society. Women were significantly less likely to participate in class. The Boalt study found that white and minority women and minority men participated at lower rates than did white men. However, the Boalt and Stanford studies differed on other measures of women's alienation from the legal profession, such as their law school performance, and their feelings toward law school.


15. E.g., Catherine Weiss & Louise Melling, The Legal Education of Twenty Women, 40 STAN. L. REV. 1299 (1988) (discussing Yale law students). It is not, of course, only the law in which the existence of male and female styles is an issue. For example, Deborah Tannen's popular book, You Just Don't Understand: Women and Men in Conversation, suggests that men and women have different ways of speaking. DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION 13-19 (1990).

16. Homer & Schwartz, supra note 14, at 28; Taber et al., supra note 13, at 1238.

17. See also Weiss & Melling, supra note 15, at 1333 n.101 (noting that in 19 Yale Law School courses for which data were collected, men participated 1.63 times as much as women in the classrooms).

18. Homer & Schwartz, supra note 14, at 29. The study reported, "[A] majority of women and people of color indicated that they never asked questions or volunteered answers in class, in contrast to approximately two-thirds of the white males, who stated that they had done both with some frequency." Id.

19. While the surveys did not ask identical questions on this issue, the questions are sufficiently comparable to show dramatic differences. The Stanford study asked students to describe their feelings about their performance in law school, and found "no significant differences between currently enrolled female and male students." Taber et al., supra note 13, at 1238. The Boalt study asked students about their satisfaction with their grades, as well as to describe their feelings about themselves, their classmates, and their experiences at the law school. The study found that a majority of men were satisfied, while a majority of women were not. There were also racial differentials, with white students of both sexes feeling more satisfied than both men and women of color. Homer & Schwartz, supra note 14, at 30, 51. Thirty-three percent of women and only 17% of men seriously had considered dropping out of law school (41% of women of color, 22% of men of color, 31% of white women, and 17% of white men). Id. at 53.

20. The Stanford study found no significant differences between how male and female students felt toward the law school. Taber et al., supra note 13, at 1239. By contrast, 42% of men as opposed to 28% of women liked Boalt (26% of women of color, 35% of men of color, 29% of white women, and 43% of white men). Homer & Schwartz, supra note 14, at 53 tbl. 8c. When the responses of students include liking Boalt more than disliking it, the differences in favorable perceptions toward the law school decrease. The study indicated that 77% of men
Notwithstanding the statistical differences between studies, it is clear that men and women have some differing reactions to law school.\textsuperscript{21}

Studies of women's responses to the legal system also show some gender-based distinctions. Unlike the Boalt study, the Stanford survey also sent questionnaires to its graduates. The study found significant differences between men and women graduates' satisfaction with their law school performance and their feelings towards law school.\textsuperscript{22} It also found that women responded somewhat differently than men to two hypotheticals—one on media law and one on legal standing—designed to test whether moral reasoning was dissimilar. The media law hypothetical asked respondents to balance the right to a free press against an individual's right to privacy where a reporter snapped a picture of a naked woman being dragged from her house by police.\textsuperscript{23} In the standing hypothetical respondents were asked whether a mother could appeal her son's murder conviction and imminent execution.\textsuperscript{24} The study found some limited support for the conclusion that male and female lawyers would find different factors relevant in reaching their decisions.

In another study of lawyers' attitudes, Stacy Caplow and Shira Scheindlin surveyed 1975 and 1976 female graduates from fourteen law schools (there was no male comparison group).\textsuperscript{25} Approximately one half of the respondents believed that their sex had hampered their success.\textsuperscript{26} Caplow and Scheindlin concluded that, underlying many of the problems for the women attorneys they surveyed, "perhaps too amorphous to touch, is the very nature of the practice of law.... Many of our respondents said they would prefer that the law was constructive, proactive, and that the bottom line was less important than the person the lawyer seeks to help."\textsuperscript{27} The authors believe that if these seemingly female qualities affect how law is practiced, the relationship between law-

\textsuperscript{21} The causes of these differences are unknown.
\textsuperscript{22} Male graduates reported feeling more satisfied with their law school performance than did female graduates. Taber et al., supra note 13, at 1241. Male graduates tended to have more positive feelings toward law school than did female graduates. Id. at 1242. Note, however, that responses by current male and female students showed no significant differences in either satisfaction with performance or positive feelings toward the law school. Id. at 1241-42.
\textsuperscript{23} Id. at 1277.
\textsuperscript{24} Id. at 1278; see infra notes 76-88 and accompanying text.
\textsuperscript{26} Id. at 419.
\textsuperscript{27} Id. at 428.
yers and their clients, and the lawyers' decisionmaking process, then women will have a "profound" effect on the law.28

In one extensive study of the different moralities, the authors found that female lawyers were more likely to be care-oriented than male lawyers.29 Other studies of graduates have focused on lifestyle differences, finding, for example, that seventy percent of men, but only forty-four percent of women worked in private practice five years after graduation, and that women are more likely to avoid working long hours when they have children than are men.30 These studies show other measurable differences between men and women. Women seem more likely to prefer less adversarial methods of resolving disputes that do not harm the other side—relying on methods of problem solving and reconciliation rather than aggressive posturing31—and women are more likely to be the primary, and expected, caretakers of children.

Studies also have supported the belief that women suffer discrimination in their legal employment and in the courts.32 Various studies of gender bias in the courts have found that judges treat women differently, and that male lawyers are even worse than judges in their discriminatory treatment.33 Women also are the subject of differing perceptions by

28. Id.
32. See Emily Couric, Women in the Large Firms: High Price of Admission?, NAT'L L.J., Dec. 11, 1989, at S2 (survey finding that at least 60% of its respondents had been subject to unwanted sexual attention and that many believed opportunities to get ahead in law firms were better for men than for women). Several women have sued their law firms, claiming sex discrimination under federal equal employment law. E.g., Hishon v. King & Spaulding, 467 U.S. 69 (1984); Ezold v. Wolf, Block, Schorr & Solis-Cohen, 758 F. Supp. 303 (E.D. Pa. 1991). In October, 1991, Baker & McKenzie's first woman partner sued her firm charging sex discrimination. Ingrid Beall said of her lawsuit, "I can afford to do this. I don't have 30 years practicing law ahead of me. The young ones can't [sue], because then they're a troublemaker... [A]nd there is very little sympathy for young ladies who cause trouble." Michael Abramowitz, One Woman v. Her Law Firm; In a Discrimination Suit, the Chicago Attorney Becomes the Plaintiff, WASH. POST, Oct. 14, 1991, at D1.
33. Indeed, from the outset, a bias against women exists in that they are often presumed to be legal assistants or secretaries, rather than lawyers. UTAH TASK FORCE REPORT ON GENDER AND JUSTICE, REPORT TO THE UTAH JUDICIAL COUNCIL 96-99 (1990) [hereinafter UTAH REPORT]; see also THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMM'N, REPORT 200-01, 204 (1990) (noting that male lawyers exclude or ignore female lawyers in court and in "warm-up" conversations before court; male judges question the credentials of female lawyers but not male lawyers; and court support staff, both male and female, engage in biased conduct). In court women are often subjected to hostile remarks, sexist jokes, comments about physical appearance or attributes, and verbal or physical sexual advances. UTAH
courts, other lawyers, and clients. The profession has been, and is still, primarily composed of white male lawyers.\(^3\) There are real differences in how seriously women are taken as attorneys.\(^4\) Even if women do not act differently from men, they look different. One comparatively recent article pointed out (in all earnestness) that women face "[t]he initial ‘minus’ of being recognizably non-male," but counseled that this could be "immediately superseded" if the women were knowledgeable and well-prepared.\(^5\)

Judges, attorneys, and court personnel do not give as much credibility to women as to men,\(^6\) and perceive women as acting differently from men. The ABA Commission noted:

> Not all male lawyers resort to the stereotypical aggressive, hard-ball, ‘male’ style of lawyering. Many are soft-spoken and conciliatory in negotiations. They may be more skilled at listening than at arguing. But when men display these varieties in lawyering styles, it is regarded as just that—a difference in style. When women depart from the stereotypical style of aggressive lawyering, it is more likely to be regarded as a gender difference and a basis for questioning competence.\(^7\)

Women and men, then, both use different styles at different times. Women, however, are perceived as using a female style when they depart from traditional patterns of lawyering; men are not. Men’s differences are accepted, while women’s differences are ascribed to gender and, correspondingly devalued.

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35. See Karen Gross, Foreword: She’s My Lawyer and She’s a Woman, 35 N.Y.L. Sch. L. Rev. 293 (1990) (relating her experience of being introduced as an anomaly: a lawyer who was a woman).

36. Nell B. Strachan, A Map for Women on the Road to Success, 70 A.B.A. J., May 1984, at 94, 96. The author also notes, “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.” Id. at 94.


38. ABA Report, supra note 3, at 4; see also Lynn H. Schafran, Practicing Law in a Sexist Society, in Women, the Courts, and Equality 191, 202 (Laura L. Crites & Winifred L. Hepperle eds., 1987) (identifying the double bind for women attorneys: if they are soft-spoken, they are perceived as feminine; if they are assertive, they are “put down as a bitch”).
There is evidence that men and women experience substantial differences in treatment within the legal profession. Given these differences, in conjunction with stereotypes about the appropriate roles of men and women and theories about difference, it is understandable why the question of whether men and women use different styles is relevant. The existing system reflects male experiences and viewpoints. I thus focus on examining the existence of a female style. An image of a female style suggests that it is different from what currently exists, and, implicitly, that what currently exists is male.

B. A Female Lawyering Process

This section suggests what a female style of lawyering might look like. By drawing on the work of feminists who have suggested that men and women speak in a different voice, it is possible to outline some of the dimensions of this alternative style.

Let us start by imagining a female style of lawyering based on these studied differences, together with observations from the work of relational and affiliational feminists such as Carol Gilligan and Nel Noddings. Simply summarized, these feminists assert that women use an ethic of care in their moral reasoning, while men are more oriented to an ethic of rights. Women are more caring and more oriented towards relationships than are men. Women tend to perceive morally troubling problems as situations in which people might be hurt, and then try to resolve conflicts by strategies that maintain connection and relationship. Correspondingly, women are contextual, looking at surrounding

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39. Nel Noddings, Ethics from the Standpoint of Women, in THEORETICAL PERSPECTIVES ON GENDER DIFFERENCES 160, 161-66 (Deborah Rhode ed., 1990), discusses some of the difficulties of identifying philosophy as male—we cannot say that simply because almost all philosophers have been male that philosophy itself is male—but notes that it is useful to see how a male perspective affects philosophy. I nonetheless believe that, to undertake this inquiry, one must model a male perspective, or the process becomes circular. See Wendy W. Williams, Notes from A First Generation, 1989 U. CHI. LEGAL F. 99 [hereinafter Williams, A First Generation].

40. E.g., Fineman, The Future of Feminist Legal Scholarship, supra note 6, at 31 n.19; Williams, A First Generation, supra note 39, at 112 (arguing that what unites feminists is a belief that the current system is male and transmits male values).

41. See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); MAPPING THE MORAL DOMAIN (Carol Gilligan et al. eds., 1990); NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS & MORAL EDUCATION (1984).

42. See, e.g., Carol Gilligan, Moral Orientation and Moral Development, in WOMEN AND MORAL THEORY, 19, 23 (Eva Feder Kittay & Diana T. Meyers eds., 1987).

43. JACK & JACK, supra note 29, at 173.

44. NODDINGS, supra note 41, at 8.
circumstances.\textsuperscript{45} Men, by contrast, are oriented towards individual autonomy and impartial rules. They tend to see problems in terms of violations of rights,\textsuperscript{46} rather than relationships between people. Men are more likely to resolve conflicts by examining competing rights, and applying neutral and abstract standards.\textsuperscript{47}

The implicit critique of the legal system is that it has been constructed by (white) men to accord with male values, overlooking or de-valuing female values. The legal system values claims of individual rights, and overlooks claims that are based on connection. A legal system based on connection, rather than on competing rights, would result in valuing different aspects of each case. For example, in pregnant substance abuser cases the issues are currently framed as a conflict between the rights of the fetus and those of the mother, rather than a valuing of the connection between mother and fetus.\textsuperscript{48} When such a problem is viewed as a conflict between competing rights, it leads to state prosecution of mothers for substance abuse; when viewed in terms of connection, it suggests that a more appropriate outcome would be better information about birth control and improved prenatal care for pregnant substance abusers.\textsuperscript{49}

Using ethic of care principles, what would lawyering look like? Others have begun to answer this question by imagining lawyering in the following terms:

1. More negotiation, mediation, and other alternatives to traditional adversarial dispute resolution;\textsuperscript{50}

\textsuperscript{45} Gilligan, supra note 41, at 38; Noddings, supra note 41, at 96; Suzanna Sherry, \textit{Civic Virtue and the Feminine Voice in Constitutional Adjudication}, 72 VA. L. REV. 543, 587 (1986).

\textsuperscript{46} Jack & Jack, supra note 29, at 173.

\textsuperscript{47} Nona Plessner Lyons, Two Perspectives on Self, Relationships, and Morality, in Mapping the Moral Domain, supra note 41, at 21, 36-42.


\textsuperscript{49} Id. at 1342; see, e.g., Menkel-Meadow, Exploring a Research Agenda, supra note 7, at 316.

2. more appreciation of the other party's perspective—more understanding and recognition of that party's interests;

3. more appreciation for the relational context in which the client's problem arises, more understanding of the totality of our client's experience and more listening to her;

4. less aggressive, confrontational trial and pretrial tactics—more disagreement on real issues than creation of disputes solely to disagree; and

5. more altruistic reasons for choosing to become lawyers—more public interest work.

In terms of structuring the relationship between work and nonwork, this change of perspective would lead to the following: Less time at work; work environments structured to allow for parenting (child care in the workplace); and more alternative forms of structuring work—wider acceptance of part-time work and a reluctance to travel, and less hierarchy within the workplace.

As is clear from these lists, a female style of lawyering goes well beyond issues of work and family. When I describe this structure to my friends who are white women or women of color and who are lawyers, many of them agree that this accurately characterizes their lawyering styles and goals. As a small test of these perceptions, I asked sixty people who attended a 1991 Association of American Law Schools panel on Lawyering in a Different Voice to answer a questionnaire about male and female lawyers. While the responses of male and female lawyers did not differ dramatically, the respondents did conclude that differences exist between male and female lawyers. More than seventy-five percent of all respondents agreed that female lawyers are better able to listen to clients, and an even higher percentage agreed that women were more likely to need child care at the workplace and to take time off to spend with children.
As this discussion shows, there are alternative approaches to the practice of law that accord with traditional feminine values. If women could redesign the legal profession, there might be significant differences.\textsuperscript{56} These differences point to a method of practice that is more respectful of clients and of the other parties, as well as more accommodating of individual lifestyle preferences and family circumstances.

II. Critiques of a “Female Style of Lawyering”\textsuperscript{59}

Notwithstanding its articulation of improvements to the existing system, the preceding discussion does not describe accurately a female style of lawyering. Instead, it models a style of lawyering based on an ethic of care, and then ascribes this model to women. While I appreciate the insights from the ethic of care, it seems dangerously inaccurate to correlate a women's style with this ethic of care. The following sections explain why. I discuss three major problems with this analysis: first, there is a theoretical problem in using unmodified terms such as male or female to describe any lawyering style; second, psychological and sociological research does not support such broad definitions of styles; and third, an ethic of care is, at best, an incomplete description of a female style that limits alternative perceptions of lawyering.

A. The Problem of Essentialism

As theoretical and analytic categories, the unmodified terms “male” and “female” are problematic. By identifying characteristics as male or female, we ignore differences based on race, class, sexual orientation, or other significant social and cultural experiences which shape how we view the world and act in it. In this essentialist position we simplify without acknowledging the diversity within groups.\textsuperscript{57} For example, to talk about male or female assumes that generalizations about white and

\textsuperscript{56} See Rhode, The “No-Problem” Problem, supra note 7, at 1788-89 (discussing studies which do not show substantial differences between male and female lawyers and judges). She suggests, however, “that a variety of cultural forces make all-female associations likely to express different concerns than male-dominated organizations.” Id. at 1789 n.284.

\textsuperscript{57} See, e.g., ELIZABETH V. SPELMAN, INESSENTIAL WOMAN (1988); PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR (1991); Harris, supra note 5; see also Evelyn Brooks Higginbotham, African American Women’s History and The Metalanguage of Race, 17 SIGNS 251, 256 (1992) (noting that “[e]ven black women’s history . . . nonetheless reflects the totalizing impulse of race in such concepts as ‘black womanhood’ . . . concepts that mask real differences of class, status and color, regional culture, and a host of other configurations of difference”).
black women, and white and black men are accurate. But, we know this is not true. The recent study of Boalt law students illustrates the fallacies in these generalizations. The differences in response varied by both gender and race. Questions often elicited very different responses from members of different racial groups. For example, fifty-one percent of all women questioned felt pressured to set aside their own values in order to think like a lawyer; but white women and women of color differed by thirteen percentage points: sixty-one percent of women of color said they felt pressured, compared to forty-eight percent of white women. Additionally, thirty percent of women of color but only sixteen percent of white women—constituting twenty percent of all women questioned—felt negatively about their lives since entering law school. While the differentials may not be dramatic, they do show the difficulties of generalizing about a particular group.

Even if, notwithstanding difficulties inherent in essentialism, we recognize styles as male or female, we risk perpetuating the very subordination of "the female voice" that many of us, as feminists, are trying to overcome. When something is characterized as female, it is generally devalued or deliberately and self-consciously overvalued. At one extreme, this results in exclusion of women from the legal profession because they are so different from the correct, male style. At another extreme, this results in celebration of a female style, presumably supplanting the currently dominant style, and thus privileging one style as the correct way to practice law. Neither of these extremes is desirable. While we should not be frightened to characterize something as female lest it be devalued, we should be careful in deciding what is female and what we wish to defend as so. Similarly, we should not construct a new, although female, style to be emulated. Characterizing lawyering methods with the labels of male and female is limiting; it excludes alternative styles, and pretends that there are no overlapping attributes. As shown by the research briefly discussed below, people exhibit a mixture of "male" and "female" traits.

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58. Homer & Schwartz, supra note 14, at 52. Thirty-five percent of men of color felt pressure, while 28% of white men so responded. Id.

59. Id. at 53. Men of color were at 16%; white men were at 13%. Id. There were significantly different responses to the question of who was more likely to speak in a class taught by a professor of color. Id. at 54. While 9% of all male students surveyed agreed that they were more likely to speak in such a class, 24% of all female students felt this way. Id.

60. An example is "women's work." See Frances Olsen, The Sex of Law, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 453-65 (David Kairys ed., 1990). Deborah Tannen points out that "if women's and men's styles are shown to be different, it is usually women who are told to change." TANNEN, supra note 15, at 15.
B. The Problem of Research

As a practical matter, the research does not support essentialist categories of male and female that correlate with moral orientations. Specifically, Carol Gilligan's research does not provide a basis for universalization of the terms "male" and "female"—although it does allow us to understand and perceive more fully the dimensions of an alternative voice.61 Neither sex uses either of the moral orientations exclusively. Many men and most women actually combine aspects of each orientation in their thought processes.62 Although when they focus on one perspective, most men do choose a rights perspective, most women do not choose a care perspective. In studies only of men it is harder to perceive a care focus, and, thus it is less likely to appear as a significant factor; only by including women can we perceive the dimensions of an ethic of care.63 As an example we may look to one of Carol Gilligan's studies. She asked eighty educationally advantaged people to describe a moral conflict. Fifty-four of the participants focused on either an ethic of justice or care. Of these fifty-four, one third of the female respondents focused on justice, and one third focused on care; all but one of the men chose the justice perspective.64 While this shows that men are more likely to choose an ethic of rights, it does not show that women are more likely to choose an ethic of care. While it demonstrates the necessity of including women in order to appreciate the different themes, it also cautions us not to generalize that the different voice we have identified is feminine—that is, it describes many women, some men, and possibly the views of some members of other socially subordinant groups.65

Moreover, we must remember that what researchers find depends, at least to some extent, on what they look for and how they look for it.66

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61. Carol Gilligan herself has been somewhat inconsistent on how strongly she correlates the ethic of care with gender. Compare GILLIGAN, supra note 41, at 2, with Tronto, supra note 11, at 645.


64. Id. at 25; Carol Gilligan & Jane Attanucci, Two Moral Orientations, in MAPPING THE MORAL DOMAIN, supra note 41, at 73, 81; see also Diana T. Meyers, The Socialized Individual and Individual Autonomy, in WOMEN AND MORAL THEORY, supra note 42, at 139, 144 (noting that, although men rarely deviate from an ethic of rights perspective, there is no similar uniformity among women with respect to the ethic of care perspective).

65. See Tronto, supra note 11, at 650-51.

66. See e.g., Andrew D. Gitlin, Educative Research, Voice, and Social Change, 60 HARV. EDUC. REV. 443 (1990); Suzanne J. Kessler, The Medical Construction of Gender: Case Management of Intersexed Infants, 16 SIGNS 3 (1990); Barrie Thorne, Children and Gender: Constructions of Difference, in THEORETICAL PERSPECTIVES ON GENDER DIFFERENCES, supra note 39, at 100, 112; see also Janet Shibley Hyde, Meta-Analysis and the Psychology of Gender
Research on boys and girls has been characterized by a focus on analyzing the duality of gender. Instead, and more productively, it could focus on cross-gender groupings, examining boys and girls playing together, and analyzing differences among boys and among girls that show the variations within gender.67

Like the researchers, we, as observers, are influenced by our own gendered expectations.68 Babies who are born of indeterminate sex can be socialized to become either boys or girls.69 External stimuli have an enormous impact on young children. One of my favorite stories about gender socialization concerns the three year-old daughter of friends. My friends refused to put a dress on Randy until she asked for it; consequently, Randy always wore pants or overalls. People who did not know what sex she was frequently commented, "What an active boy you have." When my friends responded by saying they thought their daughter was pretty special, the commenters began to coo, and exclaimed, "She is so adorable." This child was experiencing, in a visible manner, how children learn gender-appropriate behavior; the commenters were displaying their expectations of how little girls and boys act. Clearly, there are powerful, and presently uncontrollable, influences that reinforce stereotypes of men and women.

C. The Problem of Incompleteness

Finally, the list of characteristics ascribed to women by relational feminists is incomplete. Only the strongest of those attributes traditionally ascribed to women emerge in the depiction of an ethic of care.70 These positive aspects of womanhood include caring and nurturing, as well as a focus on relationships. The definition of an ethic of care does not include other conventional attributes of femininity, such as passivity and dependence, in its canon.71 A female style of lawyering would not be a completely positive model, and should account for negative attributes

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67. Thorne, supra note 66, at 103-05.
68. Ethnographers have long confronted this issue of simultaneous participation and observation in the same culture. See, e.g., CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (1973); HISTORY AND POWER IN THE STUDY OF LAW (June Starr & Jane Collier eds., 1989); see also BEYOND METHODOLOGY: FEMINIST SCHOLARSHIP AS LIVED RESEARCH (Mary Fonow & Judith Cook eds., 1991).
70. I owe this analysis to Joan Williams. See Williams, Deconstructing Gender, supra note 8, at 807.
71. Id.; see also Joan C. Williams, Gender Wars: Selfless Women in the Republic of
of femininity. An ethic of care does not do this. While an ethic of care presumes to describe women, it is inaccurate for several reasons. First, just as women have been socialized to be caring, they have also been socialized to be passive and dependent on others; second, as discussed earlier, many women have escaped this socialization.

A wonderful example of how the theory of care does not always account for the reality of women's lives is the story of the little girl in Margaret Atwood's *Cat's Eye*. Elaine is "friendly" with three other girls. Among other things, the girls force her to walk three steps in front of them; they bury her in a deep pit, covering it with planks and then with dirt; and they abandon her after she falls into ice, where she almost freezes to death. In short, they demean her, and almost kill her. These little girls do not conform to our image of children who play together cooperatively and stop a game when it appears that they will hurt someone. These are cruel girls who delight in torturing their "friend."

This story resounds with many women, who recognize themselves as either Elaine or her "friends," and also remember how unpleasant little girls can be to each other. An ethic of care does not explain this cruelty. For that matter, neither does an ethic of rights, showing the limits of both paradigms.

Instead, we need to put alleged differences into a context so that we can describe the actualities of law practice, see the limits of using the paradigms of ethics of care and rights to describe behavior, and only then determine the meanings of differences.

### III. A Contextual Approach

Given the difficulties of correlating an ethic of care with women's style, I now explore a second position from which to analyze methods of lawyering: a contextual approach. This approach does not deny that some male and female lawyers are different, but rather examines how lawyers actually practice; it then evaluates the impact of these differences in practice; and then questions whether they can form the basis for new
methods of lawyering. As such, it goes beyond the descriptive. By look-
ing at the social context, we first shift "analysis away from fixing abstract and binary differences to examining the social relations and contexts in which multiple differences are constructed, undermined, and given mean-
ing." At that point, we can challenge the meanings ascribed to what have been observed as differences.

To show how context helps to interpret allegedly gendered styles, I will reinterpret one of the hypotheticals used in the Stanford University Law School survey of 1500 graduates, which was designed to test women's supposedly different reasoning process. I then discuss the societal attitudes that help form the expected responses to this hypothetical.

A. Reinterpreting Hypotheticals

The hypothetical was designed to test whether there was a distinct women's perspective on moral problems presented by legal issues. The hypothetical concerned the issue of standing: A mother wanted to appeal her son's conviction for murder, and respondents were asked to decide whether she should be able to do so, notwithstanding her son's objections. The respondents then were asked to rank the importance of seven factors to their answer: (1) whether the son's desire not to appeal was more important than the mother's desire to appeal; (2) what the mother's motive for appealing was—was it because she loved her son or was she seeking publicity; (3) whether the son realized the effect on his family of his decision not to appeal; (4) whether the mother loved her son; (5) whether the son liked his mother; (6) the fact that the woman was the defendant's mother, rather than his second cousin; and (7) whether allowing the mother to appeal would mean that more distant relatives would be able to appeal. The study categorized the first five factors as "contextual" factors—regarding concerns for relationships, care, and communication—and the last two factors as "abstract"—determinations based on rights, logic, and abstract justice.


76. Taber et al., supra note 13, at 1227, 1248-49. As the Boalt study points out, some problems may exist in using a "classroom hypothetical presented in an entirely legalistic con-
text, complete with the rule of law." Homer & Schwartz, supra note 14, at 15. Notwithstand-
ing the construction of the hypothetical, there were some differences between the responses of male and female graduates.

77. Taber et al., supra note 13, at 1278.

78. Id. at 1278-79.

79. Id. at 1248-49. Interestingly, the authors never articulate which factors were context-
tual and which were abstract. Presumably, however, the factors were categorized as indicated.
Men and women responded similarly to five factors, including whether the son realized the effect on his family of his decision not to appeal, and the basis of the mother's motive for appealing. Male and female graduates rated differently only two factors: whether the mother loved her son, and whether the son liked his mother. The study's authors concluded that, when men and women differed, women rated contextual factors higher than did the men, although they did not know why men and women differed on only some of the contextual factors. The authors reasoned that women appeared to focus more readily on the quality of the mother-son relationship, which might explain the varying importance placed on factors regarding the mother's and son's feelings towards each other. Ultimately, the authors believed that the responses provided "some, although limited, support to Gilligan's theory" about different moral approaches.

I have a slightly different theory. The responses to this hypothetical do not show a distinctively feminine voice that considers connection and context to be more relevant. Men and women both considered equally relevant the mother's motive and whether the son had considered the effect on his family of his decision. These are both connection and contextual factors that go beyond rules of law; neither of these factors was legally relevant to the Supreme Court decision that inspired the hypothetical. Instead, the responses show that, for purposes of only two of the five contextual factors, women may have identified with the mother and respected the mother-son bond. This is not because the women were necessarily more caring; rather, it is because women are socialized into motherhood, into stereotypes that the mother-child bond is theirs to establish and hold sacred. Based on this socialization process, women should rate as more important to their decision the factors that relate to the mother-son bond. The responses do not necessarily show that women have a universal voice that is more focused on relationships and connection; they show, instead, that many (though not all) women identified more with the (female) mother than with the (male) son.

80. Id. at 1249.
81. Id.
82. Id. at 1249-51.
83. Id. at 1249, 1251.
84. Id. at 1250.
85. For a discussion of the totalizing nature of this social construction, see Fineman, The Future of Feminist Legal Scholarship, supra note 6; Martha L. Fineman, Images of Mothers in Poverty Discourses, 1991 DUKE L.J. 274, 289-93.
86. If the responses can show that women are more attuned to connection, then they also may show how this connection can be smothering. The mother seeks to override her son's needs for her own needs in the relationship.
the authors suggest that the relatively few differences between male and female respondents might result from the socialization process into a legal mindset. I believe that they show more about the socialization into motherhood than about the process of becoming a lawyer.

B. Context

Feminist jurisprudence, and feminism in other areas, has become preoccupied with the existence and meaning of gender differences. How does a feminist analysis of gender differences affect legal practice?

First, a feminist analysis (or other outsider-based analysis) can begin to identify what the dominant style has left out of the conventional view by questioning the inevitability and neutrality of that dominance. The "female" style discussed earlier may not correlate with women, but it does point to alternatives (some of which already exist within practice). Second, the feminist analysis shows us how society constructs gender, how gender constructs society, and how dangerous these constructions are because they ignore variations within and among men and women. Third, by challenging what has been left out, feminist theory adds in some of the missing context.

This analysis of social construction leads to a questioning of existing methods of practice. Thinking about who has developed existing models gives us an appreciation of the social context that fosters these practices. Thus, gender, when defined as a socially constructed term, is use-

88. Another example of how women do not have an unwavering ethic of care is the reasons women chose to become lawyers. The Boalt study found that women are more likely to choose law because of a desire to help society. Homer & Schwartz, supra note 14, at 28, 51 tbl. 2. However, a similar study, conducted 20 years ago, found almost the opposite results. The study's procedures were to write to each of 134 accredited law schools for names and addresses of female graduates in the years 1956-1965, with one male from each class. Questionnaires were sent to 2219 women and 2151 men. 1298 women and 1329 men responded. The study found that twice as many women as men stated that "good remuneration" was a very important reason for their attending law school. James J. White, Women in the Law, 65 MICH. L. Rev. 1051, 1069 (1967). This does not suggest an unwavering feminine voice that is focused on relationships or doing good for society.
89. The most obvious example is psychology. See GILLIGAN, supra note 41; Hyde, supra note 66.
91. Bartlett, supra note 6, at 843. For a fascinating account of how the medical profession constructs sex, see Kessler, supra note 66.
93. See Vicki Schultz, Room to Maneuver (f)or a Room of One's Own? Practice Theory and Feminist Practice, 14 LAW & SOC. INQUIRY 123, 143-44 (1989) (arguing that recognition
ful analytically as part of a feminist analysis that seeks change. I agree with Deborah Rhode when she states:

The sameness/difference dilemma cannot be resolved; it can only be reformulated. . . . To make significant progress, our strategies must rest on feminist principles, not feminine stereotypes. The issues of greatest concern to women are not simply "women's issues." Although the feminist platform incorporates values traditionally associated with women, the stakes in its realization are ones that both sexes share.94

Instead, given that gender is a social construct, and that society constructs different meanings for gender,95 it is clear that there are no universal descriptions within each gender. For example, it means something different to me than to Phyllis Schlafly to be a white woman.96 People can make some choices as to what being a woman means to them.97 Being male or female does not invariably determine behavior. The meaning and organization of gender varies widely. The sociologist Barrie Thorne notes that, when girls and boys are organized on opposing sides, children on each side may ally themselves within that gender, with some antagonism to the other side, but, when situations are based on lines other than

of the social construction of gender alone is insufficient). Of course, I am critiquing from within the paradigm; I accept the limits of this critique.

94. Rhode, The "No-Problem" Problem, supra note 7, at 1790-91; see also Leslie Bender, From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law, 15 VT. L. REV. 1, 9 (1990) (concluding that gender difference should continue to inform feminist theorizing, and that "we cannot neuter the strategies and seek the transformative potential they offer by ignoring their source in women's acculturation and socialization"); Estelle Freedman, Theoretical Perspectives on Sexual Difference: An Overview, in THEORETICAL PERSPECTIVES ON GENDER DIFFERENCES, supra note 39, at 257 (stating that, "what we lack at present is a framework that neither uncritically embraces nor overcritically rejects ideas about male/female differences").

95. We have enough studies of discrimination against women to prove that men and women are treated differently. We also have enough studies to show that there are differences in socialization between boys and girls. See supra notes 13-16 and accompanying text. To argue that this different treatment does not result in other differences is contrary to common sense. Nonetheless, we must be careful not to generalize that, because some women act in certain ways, and because many women are perceived to act in a certain way, there is an identifiable woman's style.

96. See Kay Deaux & Brenda Major, A Social-Psychological Model of Gender, in THEORETICAL PERSPECTIVES ON GENDER DIFFERENCES, supra note 39, at 93; see also Catharine A. MacKinnon, Not by Law Alone: From a Debate with Phyllis Schlafly, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 21 (1987).

gender, then boys and girls interact without "gender-marked ways," often, for example, playing some games in mixed groups.98

The stories and studies recounted in this Article show differences in socialization and perception, and they show that some women learn to behave in certain ways that result in, and conform to, feminine stereotypes. However, these differences do not show an identifiably female style of being a lawyer. There are many women who do not exhibit the attributes I have ascribed to a female style of lawyering, and some men who do.

What is most important is the recognition that there is no one way to practice law effectively, and that monolithic male models do not describe how the profession practices law, nor how best to serve clients. Indeed, as Nina Tarr shows in her examination of two rural female lawyers, an ethic of care already exists in the reality constructed by rural society of a lawyer's role.99 We need to look at how lawyers actually practice, what techniques individual lawyers use,100 as well as how legal profession norms create an ideal worker and penalize others.101 What studying male and female styles can do is open us up to appreciate the diversity in practice. There is a hierarchy of gender differences that values men over women,102 that makes male style the norm, and nonmale styles aberrational. In practice, however, both styles are used, and men and women need to understand each style's strengths and weaknesses.

Through this recognition, we should strive to value the differences, to learn what alternative styles teach us about our own practice.103 As a feminist, I must take seriously those values that have traditionally been identified as feminine. Rather than identifying a monolithic female style, however, I want to use these values to examine and to challenge existing

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98. Thorne, supra note 66, at 107.
100. The Hastings Conference drew together many who have begun this examination, such as Anthony Alfieri, Richard Boswell, Clark Cunningham, Phyllis Goldfarb, Ann Shalleck, and Lucie White.
101. See Karen Czapanskiy, Volunteers and Draftees: The Struggle for Parental Equality, 38 UCLA L. Rev. 1415 (1991); Williams, Deconstructing Gender, supra note 8.
structures, to change our ways of understanding what lawyers do well, and to recognize the importance of methods that have been overlooked, or excluded.104 Because of the power of existing methods of practice, it often is difficult to see behind them or beyond them.105 Beginning to talk about what has been excluded is the first step in the process of change.106 While this is not sufficient, it serves to broaden the agenda—to begin the process, called for by Ann Shalleck, of “creat[ing] a framework for challenging what is dangerous or harmful within dominant forms of lawyering activity” and to inform a process of creating something new.107

The legal system may be unable to accommodate new styles, or even to acknowledge the existence of a multiplicity of styles.108 Indeed, some of these innovations, such as the need to restructure the workplace, might permanently change lawyering.109 The need to address how gender structures attorney-client relationships may result in other changes.110 Nonetheless, the legal profession is changing and accepting new styles.111 Many of these changes result from different people entering the legal system—people who have different backgrounds and who have been socialized to be mothers, rather than fathers—that, for example, value family as well as work. The changes result, in part, from a different way of thinking—not only by women, but also, and perhaps more importantly, about women.112

104. See Judith Leonie Miller, Making Change: Women and Ethics in the Practice of Law, 2 YALE J.L. & FEM. 453, 467 (1990) (book review) (arguing that we must address the differing merits of the different voices).


107. Shalleck, supra note 6, at 1073-74.

108. See Lizbeth Hasse, Legalizing Gender-Specific Values, in WOMEN AND MORAL THEORY, supra note 42, at 282, 289 (stating that “accommodation” of a women’s morality may be impossible).

109. We should not call this a woman’s innovation, however, even though it emerges from women’s historic role and responsibilities.

110. For an examination of how gendered constructs can silence people in the legal system, see Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 BUFF. L. REV. 1 (1990) [hereinafter White, Sunday Shoes].

111. The move to alternative dispute resolution is a sign of this. For a critique of the rush to these methods, see Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 YALE L.J. 1545 (1991).

112. A polling firm found that a majority of women and men believe children are deprived when their mothers worked. The firm, however, did not ask whether children are deprived when their fathers worked full time. Paul Taylor, Struggling to Be a Woman for All Seasons, WASH. POST, May 12, 1991, at A1.
C. Connection and Lawyering

Given the interest in the debate over male and female styles of lawyering, and the importance of looking at the values underlying each supposed form of lawyering, the question is not whether women speak in a different voice, but how different voices can change how we practice law. Notwithstanding the problems of "the different voice" approach, the subordinated values that outsider jurisprudence can expose still may be useful in creating new forms of practice. Indeed, feminists are beginning to address how to incorporate different values into the attorney-client relationship,\(^\text{113}\) an important inquiry given the significance of this relationship to daily legal practice. I will examine one concept that is commonly thought to typify the different feminine voice and also is a component in a contextual approach: connection. Many feminists use "connection" to explain why women are different from men.\(^\text{114}\) Regardless of whether this thesis is correct—because there are many ways in which men demonstrate and use connection—connection is one of the many attributes that is useful to consider in the process of redefining the attorney role. We can reject its descriptiveness of all women, but still acknowledge its potential for transformation.

Many forms of connection are antithetical to the attorney-client relationship.\(^\text{115}\) If the concern over different forms of lawyering highlights issues of connection and the lack thereof in the attorney-client relationship, then should we encourage more connection? This section explores the significance of connection in feminism and in the lawyering process, and then examines whether more connection is desirable.

Connection is an important concept for "cultural" and radical feminists. Carol Gilligan uses connection to explore girls' psychological development. She suggests that women are more caring\(^\text{116}\) because they view themselves as interconnected to others.\(^\text{117}\) Robin West explains:

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\(^{113}\) For some of the most prominent examples, see Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599 (1991); Menkel-Meadow, *Portia in a Different Voice*, supra note 50; Menkel-Meadow, *The Comparative Sociology*, supra note 50; Shalleck, supra note 6; White, *Sunday Shoes*, supra note 110.

\(^{114}\) See infra notes 118-122 and accompanying text.

\(^{115}\) See Naomi Cahn, *A Preliminary Feminist Critique of Legal Ethics*, 4 GEO. J. LEGAL ETHICS 23 (1990) (discussing constraints on lawyers' behavior); infra notes 125-128 and accompanying text.

\(^{116}\) See supra text accompanying notes 41-47.

\(^{117}\) Gilligan, supra note 41, at 29.
Underlying both radical and cultural feminism is a conception of women's existential state that is grounded in women's potential for physical, material connection to human life, just as underlying both liberal and critical legalism is a conception of men's existential state that is grounded in the inevitability of men's physical separation from the species.¹¹₈

This "physical, material" connection symbolizes the ability of women to focus on relationships.¹¹⁹

Like Gilligan and West, Deborah Tannen uses the concept of connection to explain how many women approach the world.¹²⁰ While men focus on status and one-upmanship, she believes that women see themselves "as... individual[s] in a network of connections."¹²¹ Using sociolinguistics, she analyzes how men and women interpret speech based on their underlying perspectives of status and connection.

Connection is, of course, not a monolithic concept, and includes notions of empathy and intimacy. Through empathy, we can "understand[] the experience or situation of another, both affectively and cognitively."¹²² Empathy allows us to draw on our own experiences so that we can understand, and thus feel connected to, others. Kathleen Sullivan has recently discussed intimacy in the clinical supervisor-student relationship;¹²³ many of her insights are transferable to the attorney-client relationship. She characterizes intimacy as involving four aspects: self-disclosure, proximity, mutuality, and trust, all of which lead to both su-


¹¹⁹. At the same time as some feminists celebrate women's abilities to connect, however, other feminists do not. Catharine MacKinnon claims that women value care only because that is what men have allowed them to do. CATHARINE A. MACKINNON, Difference and Domination: On Sex Discrimination, in FEMINISM UNMODIFIED 32, 36 (1987). Some socialist feminists believe that the story of women's oppression is alienation. See ROSEMARIE TONG, FEMINIST THOUGHT 192 (1990). Nonetheless, even if care and connection (as associated with the feminine) result from false consciousness, they still can be important—it is critical to recognize that we value them not because they have been used to describe women, but because of their own intrinsic worth. See Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 VAND. L. REV. 1183, 1195 (1989) ("[W]omen may have to move toward a society in which socially female qualities are valued by resorting to some gender-neutral programs.").

¹²⁰. TANNEN, supra note 15, at 25.

¹²¹. Id. She further observes that "[l]ife, then, is a community, a struggle to preserve intimacy and avoid isolation."


pervisor and student personally knowing each other. Similarly, with this type of intimacy and sharing, attorneys and clients can form connections based on mutual trust and knowledge.

On the other hand, lawyers have carefully structured relationships with their clients and, indeed, appear to avoid connection, or even association, with their clients. The traditional image of the lawyer is that she can espouse the viewpoint of any client; although once she begins the representation, she is prohibited from representing another client with a conflicting viewpoint in the same action. In representing a particular client, she is not responsible for that client's moral or political beliefs.

David Luban summarizes this principle of "nonaccountability": "In representing a client, a lawyer is neither legally, professionally, nor morally accountable for the means [and] ends achieved."

As part of nonaccountability, a lawyer is not responsible for the client's actions with respect to third parties. In many states a lawyer is not even required to reveal client confidences in order to prevent death or serious bodily harm. The lawyer is constructed as an autonomous creature, connected by contract to her client, but otherwise detached from her client's perspectives and from the effects of her client's actions on the surrounding community. (As Ann Shalleck points out, many lawyers deviate from this conception and there has been much internal critique of this model.)

Commentators have suggested reforms within legal ethics to recognize that lawyers should choose clients only after examining and approving their goals. Perhaps the strongest proponent of this method is

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124. Id. at 6.
125. This may provide some understanding of what Stephen Ellmann is describing when he argues that lawyers should be able to express approval to their clients. See Ellmann, supra note 122.
126. To some extent, the following discussion simplifies the traditional structure of the legal profession. In using the professional codes to establish this structure, I am treating them as the recognized aspirational goals; obviously, not all lawyers actually adhere to them, nor do all lawyers believe they represent the appropriate goals. For some dissenting views, see infra notes 131-137 and accompanying text.
127. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(b) (1989) ("A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral view or activities.")
129. See Peter Margulies, "Who Are You to Tell Me That?" Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients, 68 N.C. L. REV. 213 (1990) (arguing that lawyers should be obligated to explore with their clients the implications of any legal action on third parties).
130. E.g., D.C. RULES OF PROFESSIONAL CONDUCT Rule 1.6(c).
William Simon, who advocates a “discretionary” approach to choosing clients. He suggests that lawyers represent clients only after “an assessment of the relative merits of the client’s goals and claims and the goals and claims of others whom the lawyer might serve . . . [and] an effort to confront and resolve the competing factors that bear on the internal merits of the client’s goals and claims.” That is, the lawyer judges the worthiness of the client’s claim before deciding whether to represent her. This is similar to the ethic for legal services offices suggested by Paul Tremblay. He advocates that, in deciding which cases to accept, legal services lawyers should examine the values and needs of the client’s community. A lawyer should decide which clients to represent based on her understanding of the client’s community’s values and interests, together with advice from community members. Lawyers are thus connected to the goals of their clients and, hence, presumably to the clients themselves.

David Luban takes another look at moral worthiness; he suggests that in certain cases, such as rape, the lawyers’ role should be to protect individuals against powerful institutions, such as the state or patriarchy. Thus, in cross-examining an alleged rape victim, a criminal defense lawyer ought not “make [the victim] look like a whore.”

These approaches allow the lawyer some connection to the client’s goals, because the lawyer decides on the merits of the client’s claims. They do not address connection, however, in the same way as many feminists, who focus on interpersonal relationships. Feeling approval of the client’s goals is different from feeling connected to the client and her needs. Indeed, the very process of judging a client’s worthiness involves the application of universal principles in a broad context. That is, to judge any individual client’s claim, the attorney refers to broad, community-based norms that she determines (albeit after consultation with the

132. Id. at 1091.
134. Id. at 1139.
135. Id. at 1145.
137. Id. at 1031. Thomas Shaffer articulates another approach. He suggests that lawyers use a “morality of care” in their relationship with their clients. This care morality involves the lawyer’s belief that, with her client, they can make moral choices; and that the lawyer has an investment in the client’s goodness. THOMAS SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS 448-53 (1985).
138. See supra notes 113-124 and accompanying text.
client's community), rather than focusing on the more immediate, and obvious, needs of the individual client.

Even though the process uses context, at least in the sense of judging the merits of a potential client's claims in relation to those of other potential clients, this use of context frames the lawyer's decision rather than the client's situation. The lawyer does not care about any particular client until she has decided that this client merits representation. Context merely helps in her decision as to whether to represent the particular client. The resulting connection is not necessarily to individual people, but to abstract principles of justice.

A feminist connection in the attorney-client relationship could involve a different conception, one which requires the lawyer to empathize with, or listen to, her client, rather than imposing her preconceived notions on the client's problems. The lawyer would "demonstrate greater sensitivity to client relations."

To see how this might work in an actual attorney-client meeting, I have listened to many attorney-client conversations, read others, and attempted to imagine new forms of conversation. I have often felt paralyzed by critiques of lawyering. Nonetheless, we must foster the possibilities of creating new dialogues between lawyers and clients, while remaining aware of the dangers.

Among the promises of connection is an improved attorney-client relationship, with better communication. First, a lawyer would try to place questions of legal strategy into a larger context. For example, in a settlement negotiation, the lawyer might initiate the discussion by broaching the narrow issue of the other side's offer, although without framing a question designed to elicit a simple yes or no response. Instead, she might use the conversation as an opportunity to review the client's goals in initiating litigation. This opens the conversation to issues beyond the sum of money offered, to the psychological and emotional needs of the client. Second, a lawyer could question virtually every statement of her own and of her client to understand her own hidden agenda and to prevent her from distorting the client's agenda. She would be conscious that she can manipulate her client, and would try not to do so.

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139. See supra notes 122-124; Alfieri, supra note 4, at 2126; Menkel-Meadow, Portia in a Different Voice, supra note 50, at 57 (noting that "the values of care and responsibility for others seem most directly applicable" within the attorney-client relationship); White, Sunday Shoes, supra note 110, at 3-4.

140. Menkel-Meadow, Exploring a Research Agenda, supra note 7, at 316.

This does not mean that the lawyer always approves of the client's case. Many lawyers often feel torn between their own personal moral principles and the merits of any client's story. See, e.g., Ashe & Cahn, supra note 106.
She would attempt to critically engage herself, both to think within the situation and also to step outside of the conversation, to act as a participant observer.\footnote{141} Third, the lawyer might attempt to use the settlement process to expose power relations and (perhaps) to empower her client. She would seek to ensure that her client takes responsibility for settlement decisions, rather than falling into the easier paradigm of the lawyer who takes control.\footnote{142} She would not want to act simply as the answer-giver, the authority figure.\footnote{143}

Notwithstanding these promises, there are, of course, many persuasive arguments against connection. First, a call to connection is itself somewhat disingenuous because one is always connected to someone or something, and the truly complex issues emerge from the need to choose to what or whom to be connected.\footnote{144} Assuming the choice is a feminist connection to one's client, then perhaps the most compelling arguments against this choice suggest that connection provides an opportunity to exploit, rather than to empathize and better represent. That is, through connection with her client, exploitation of both lawyer and client can occur in three ways: First, a lawyer can co-opt the client's goals, using the client to work toward the lawyer's goals; second, the lawyer can lose any sense of self, and revert to the traditional image of the lawyer as hired gun;\footnote{145} and third, connection may become a useful illusion for a lawyer, who, even though she believes she has established an equal rela-

\footnote{141. See infra notes 113-124 and accompanying text.}
\footnote{142. To some extent, she may need to do this for self-preservation. Connection with a client can prove to be emotionally draining, and it can be difficult to separate from a client and her responsibilities. See Jack & Jack, supra note 29, at 152-54 (discussing methods by which caring and empathetic lawyers limit their responsibilities to their clients).}
\footnote{143. See Patricia J. Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, 22 Harv. C.R.-C.L.L. Rev. 401, 403 (1987) ("In my experience, most non-corporate clients looked to lawyers almost as gods. They were frightened, pleading, dependent (and resentful of their dependence) . . . .").}
\footnote{144. See Deborah L. Rhode, Feminist Critical Theories, 42 Stan. L. Rev. 617, 631-32 (1990) (noting that, with respect to judges, "an appeal to empathetic values leaves most of the difficult questions unanswered. With whom should legal decisionmaking empathize when individual needs conflict?"). Moreover, unlike the feminists discussed earlier, I do not believe that connection is a "feminine" value. Men, too, exhibit connection in many different contexts.}
\footnote{145. Carrie Menkel-Meadow may think this is a good idea. See Menkel-Meadow, Portia in a Different Voice, supra note 50, at 57 ("More fully developed sensitivities to empathy and altruism . . . may enable women lawyers to understand a fuller range of client needs and objectives.").}
tionship with her client, nonetheless dominates the connection and masks the power relationships.

This exploitation can occur because of the structures of dominance and subordination in the attorney-client relationship; the possibility for exploitation is inherent in such a relationship. As progressive lawyers, many of us want to collaborate, to work with our clients in developing a legal strategy. We are genuine in our efforts to break down what we perceive as the distances and discordances between lawyer and client—distances and discordances that are mutual. We strive to understand our clients and their communities. Nonetheless, when we become connected to a client and develop a relationship with her, this "represents an intrusion and intervention into a system of relationships, a system of relationships that the [lawyer] is far freer than the [client] to leave. The inequality and potential treacherousness of this relationship seems inescapable." When we work with clients, we inevitably impose on them expectations of how they should act (and they impose expectations on us, too). When I write about my hopes for working with a client, I write in my own words, often without asking them what they think.

This exploration of opportunities for exploitation does not leave me hopeless, however, about the possibilities and promises of connection. Connection remains an important component in the attorney-client relationship, which can be constructive for both attorney and client. By naming its problems explicitly, we can try to avoid misusing connection. Moreover, connection must include self-awareness and question-

146. See Alfieri, supra note 4, at 2118; see also Cahn, The Reasonable Woman, supra note 97 (arguing that legal constructs may result in client subordination); Austin Sarat, "... The Law is All Over": Power, Resistance, and the Legal Consciousness of the Welfare Poor, 2 YALE J.L. & HUMAN. 343, 347 (1990) (discussing dynamic of power and resistance in lawyer-client relationship).

147. See Alfieri, supra note 4, at 2140-41; López, supra note 4.

148. Judith Stacey, Can There be a Feminist Ethnography?, 11 WOMEN'S STUD. INT'L FEMINISM 21, 23 (1988). Stacey made these observations about the ethnographer and her research subject, but her conclusions seem equally applicable to the lawyer-client relationship. See also Marilyn Strathern, An Awkward Relationship: The Case of Feminism and Anthropology, 12 SIGNS 276, 289 (1987) (arguing that "using people's experiences to make statements about matters of anthropological interest in the end subordinates them to the uses of the discipline").

149. See Sarat, supra note 146.


151. Unfortunately, it is not enough merely to name problems in order to overcome them, although naming is a first step. See PAULO FREIRE, PEDAGOGY OF THE OPPRESSED (1970).
This ability to maintain a perspective both inside and outside of the relationship is critical to fostering connection that is minimally exploitive. While our alliance with our clients will always be grounded in power inequalities, our common interests can make the relationship more equitable.

**Conclusion**

We can make some generalizations based on the data about male and female styles. Women, because they have been socialized into motherhood, may be more attentive to relationships. Because women have been excluded from the workplace and have lower incomes, they may be more likely to take time off when they have children. Such generalizations are dangerous, however, unless we qualify them. Moving beyond sameness and difference brings us back to gendered individuals who act within a variety of different structures and who are influenced by, and in turn influence, those structures.

Instead, it is more productive to use insights gained by studying different lawyering styles to transform how we practice law. For example, insights into an ethic of care can make our legal ethics more responsive to the conflicts that lawyers actually face when they are representing clients. Insights into the need for parents to take time off to spend with children can help us transform the workplace. Insights into the importance of listening to clients can help us transform attorney-client relationships. It is important to recognize different styles and needs, to try to look behind existing structures to see upon what they are constructed. We should value multiple voices, without forgetting the power differentials that have shaped, and generally silenced, these “other voices.”

Returning to my original theme of what would characterize a female or male style of lawyering, the answer is that we do not really know; nor, perhaps, should we care. Instead, we should examine how people prac-

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152. This concept is similar to what Tony Alfieri labels “critical distance.” Alfieri, supra note 4, at 2125.

153. *See* Strathern, *supra* note 148, at 290-91 (1987) (discussing a feminist critique of ethnography for assuming symmetrical power relationships such that collaboration between subject and object is possible).


156. Alfieri, *supra* note 4, at 2146-47.

157. As Linda Gordon has stated, pluralism was never merely a recognition of variation but a masking of inequality. Scott, *supra* note 97, at 849-50.
tocie law, what styles people use, and how these different styles affect attorney-client relationships, opposing counsel interactions, and court appearances. Some of what we observe may correlate with attributes that have been labeled male or female, even though both men and women may be using "cross-gendered" styles. What is important is to recognize that many attributes of what has been labeled a "female style of lawyering" could help improve the litigation process and that, in fact, many already have been implemented by men and women.

Feminist theory helps us critique existing lawyering methods, and develop and appreciate alternative methods of being a lawyer, but does not require us to label these new developments by gender. It counsels us to value these methods and use them to transform our practices by recognizing that they have much to teach us about new possibilities.

158. It is true that some of these alternatives incorporate what is socially constructed as a "female" value—for example, meditation, less adversariness, and more time at home. It is also true that some of these alternatives can be inverted—mediation is not female, but is male, because it assumes an equally matched contest from which compromise will result (or the mediator could be seen as an umpire, a sports metaphor). Whether something is male or female thus depends on the viewer's perspective. Therefore, we need to identify alternative styles, not necessarily a female style.