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The Feminist Transformation of Lawyering: A Response to Naomi Cahn

by
ANN SHALLECK*

Naomi Cahn, in her article *Styles of Lawyering*,¹ tells us persuasively that we need to move beyond identifying as either male or female the different ways of being a lawyer. Through her critique of the application of the “ethic of care” to lawyering, we see the conceptual and practical pitfalls of trying to find a feminist approach to being a lawyer in the abstract characteristics that correspond to our cultural understandings of male and female. We understand from Professor Cahn’s article that the transformative project of feminism is distinct from the search for the feminine, whether possessed by women or men. What then is this feminist project?

Professor Cahn suggests using the ethic of care not as the way to define gender-based differences in lawyering, but rather as a beginning point for a critique of dominant forms of legal practice. She explores how one component of the ethic of care, *connection*, can be used to evaluate the profession’s ideas about acceptable lawyer behavior. Through this critique, she hopes to expand our shared understanding of what a lawyer does to include those behaviors and ways of thinking that have been labeled feminine and thereby devalued. For Professor Cahn, the critical tool itself—the concepts comprising the ethic of care—must also be subjected to criticism. Therefore, in using the ethic of care to change our definition of lawyering, we must examine what it means in context. This attention to context helps us be aware of ways the ethic of care can operate to create new forms of exploitation and domination.

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I wish to thank Naomi Cahn for the ongoing dialogue I have shared with her. Not only have I learned a lot from her, but I have also admired her openness and intellectual generosity.

1. Naomi Cahn, *Styles of Lawyering*, 43 HASTINGS L.J. 1039 (1992).

In using the ethic of care as a critical tool, Professor Cahn moves beyond debates about whether or not we can accurately define two ways of acting as lawyers to correspond to notions of "male" and "female."² Insights about perceived gender differences, which resonate with at least some women's experiences, become devices for identifying a richer and more varied vision of legal practice, rather than fixed categories for interpreting the meaning of gender in the world. As reinterpreted, does the ethic of care work as a critical device? Does it provide the proper grounding for Professor Cahn's project—the identification of a feminist lawyering process? In this Essay I will examine three questions regarding the adequacy of this approach for a feminist transformation of lawyering.

Is Style Enough?

In rejecting the notion of a monolithic female style of lawyering rooted in the ethic of care, Professor Cahn bases her critique of lawyering in the characteristics of that female style. A unitary female style is splintered into discrete elements of style that are associated with, although not determined by, gender. Once freed from the fixed categories of male and female, these stylistic elements are used to identify multiple styles of lawyering.

Within this analysis, the use of the concept of *style* is troubling. Gender is treated as a question of style.³ Are there male and female styles of being a lawyer? What are the variations within the male and female styles? Are there mixtures of male and female styles? Can a person simply pick and choose among the component pieces of the different gender styles to make an individual stylistic statement? This approach seems to suggest that there is a fixed content to lawyering apart from the gendered styles that individuals can adopt in expressing that content. The content is not problematic; only the styles are. The debate is about

2. Other attempts within feminist scholarship to move beyond the sameness/difference debate include: Linda Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 *SIGNS* 405 (1988); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 *COLUM. L. REV.* 1118 (1936); Martha Minow, *Adjudicating Differences: Conflicts Among Feminist Lawyers*, in *CONFLICTS IN FEMINISM* 149, 151-54 (Marianne Hirsch & Evelyn Fox Keller eds., 1990); Joan C. Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 *FEMINIST STUD.* 33 (1988); Adelaide H. Villmoare, *Women, Differences, and Rights as Practices: An Interpretive Essay and a Proposal*, 25 *LAW & SOC'Y REV.* 385 (1991); Joan C. Williams, *Deconstructing Gender*, 87 *MICH. L. REV.* 797 (1989).

3. Although Professor Cahn defines styles to mean "methods of practice," she has not described how a method of practice differs from the idea of style. Cahn, *supra* note 1, at 1039 n.4.

how we see and define the styles, not about how we understand and act as lawyers. If we see gender as merely a question of style, we fail to examine how it has been fundamental in shaping the development of the legal profession, the structuring of relationships within the profession, lawyers' actions, and lawyers' understandings of their activities.

A feminist critique of lawyering is not about styles. It is about being a lawyer. It requires a thoroughgoing analysis of the gendered nature of this work: how it is organized and structured, how it is experienced, and how it is understood. We must explore the multiple and subtle ways gender has been a fundamental component in the construction of our most basic conceptions of what it means to be a lawyer. A feminist approach to lawyering presents the possibility of creating new ways to be and to understand being a lawyer, not just adopting new styles for doing the same old thing.

Is More Better?

Professor Cahn demonstrates how a critique rooted in the characteristics of the ethic of care permits us to appreciate more varied styles of lawyering, visible only because of our focus on gender. Identifying previously invisible or devalued ways of approaching and understanding lawyering activity is a moment in the feminist project. With this step, Professor Cahn moves beyond the acceptance of what is labeled "male" as the norm, and beyond the glorification of what is labeled "female" as the utopian ideal. We have more available options.⁴ We also understand from her how some options are valued more because they are associated with men, and we therefore are better able to challenge the existing hierarchy among options.⁵

This critique, however, is incomplete. It fails on two accounts. First, it does not create a framework for challenging what is dangerous or harmful within dominant forms of lawyering activity. When we identify some women's modes of behaving that differ from the dominant model of lawyering activity and when we seek to value those ways of acting, do we effectively challenge accepted ways of lawyering? It becomes permissible for both women and men to adopt these ways of acting that have been previously excluded or marginalized.⁶ But the dominant

4. *Id.* at 1041-42, 1051.

5. *Id.* at 1059.

6. Professor Cahn writes:

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, that makes male style the norm, and nonmale styles aberrational. In practice, how-

forms of lawyering remain in place. We have greater diversity. But that diversity includes within it all forms of lawyering activity, even those that are contained within the dominant model. Diversity seems to accept uncritically all types of lawyering that exist. If the previously devalued ways of acting do, or can, challenge aspects of the existing forms of practice, the process by which that happens, or could happen, is not clear. It seems equally plausible that those devalued ways will have no effect on dominant forms of practice, or may even have the effect of supporting them.⁷ There may be greater choices for individuals within legal practice, but we do not know why those choices matter or how they can change previously accepted forms.

Second, the critique based in the characteristics of the ethic of care fails to create any new ways of being a lawyer. It identifies and upgrades those things that some women have done in the past. But have we created *new* options? It is cause for concern that these newly identified and legitimized options have been created under conditions of domination. By valuing already existing, but devalued, ways of being a lawyer, do we make it harder to create new forms of practice? How can we be sure that the characteristics of the ethic of care provide a good starting point for creating something new?

The feminist project is not about simply expanding the available ways women and men can act and think as lawyers. It is about challenging those accepted ways of practice that contribute to domination, subordination, or exclusion on the basis of gender. It is also about creating new ways to practice that enable us to overcome these conditions. Using the characteristics of the ethic of care to reveal previously invisible ways of being a lawyer can contribute to the feminist project only if what is identified challenges what is harmful in the old or helps create something new.

How to Ground the Project

For Professor Cahn, the ethic of care, as a set of attributes, is a tool to expand the available ways to be a lawyer, not a ready-made alternative

ever, both styles are used, and men and women need to understand each style's strengths and weaknesses.

Id.

7. For example, Professor Cahn identifies mediation as an activity that fits within ethic of care principles. *Id.* at 1048. Mediation does not necessarily challenge other forms of dispute resolution. The acceptance and valuing of mediation could have the effect of supporting more traditional forms of dispute resolution by creating a limited class of cases that are seen as appropriate for mediation. Thus the use of other forms of dispute resolution in all other cases may be legitimated.

to what exists. It is the starting point for the discovery of a feminist lawyering process. Through her examination of the value of connection in lawyering, Professor Cahn explores the critical potential of the ethic of care. What is the grounding of a critique rooted in the ethic of care? Why proceed from these attributes? Can they help us understand critically the activities and thought processes of lawyering? The ethic of care critique is grounded in visions of both the "female" and the "male." The assumptions underlying each of these visions reveal the instability of the critique's grounding.

The characteristics of the ethic of care originate in an attempt to define the "feminine." Professor Cahn describes connection—one of the ethic of care attributes—as a "concept that is commonly thought to typify the different feminine voice."⁸ Why is it that this female characteristic offers a critical perspective on the male? For Professor Cahn, the ethic of care is an incomplete picture of some of the more positive attributes traditionally ascribed to women in our culture.⁹ If she is correct, why use the abstract characteristics of this false picture to interpret the experience of lawyers? What makes connection a meaningful standpoint for evaluation? Is it an adequate answer that the desire for connection is descriptive of at least some women's experiences some of the time? The process of using cultural descriptions of the female, even with a recognition that the description is partial and that the characteristics of the description are socially constructed,¹⁰ is problematic, particularly when equated with the critical project of feminism.¹¹

Using connection as a critical tool does not escape the problem of essentialism that Professor Cahn recognizes as plaguing the definition of a female style of lawyering. Professor Cahn has chosen connection as a critical device because of its significance within attempts to define the feminine, as well as its potential for critique of dominant conceptions of the attorney-client relationship.¹² The source of its critical potential

8. *Id.* at 1061.

9. *Id.* at 1053.

10. *Id.* at 1053-54.

11. Feminist theory is currently struggling with precisely this problem within many different disciplines. See Linda Gordon, *What's New in Women's History*, in *FEMINIST STUDIES/CRITICAL STUDIES* 20, 27 (Teresa de Lauretis ed., 1986) (history); Mary Hawkesworth, *Knowers, Knowing, Known: Feminist Theory and Claims of Truth*, in *FEMINIST THEORY IN PRACTICE AND PROCESS* 327, 329-31 (Micheline R. Malson ed., 1989) (philosophy); Evelyn Fox Keller, *Making Gender Visible in the Pursuit of Nature's Secrets*, in *FEMINIST STUDIES/CRITICAL STUDIES*, *supra*, at 67 (science); see generally DEBORAH L. RHODE, *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* (1990) (essays within the fields of history, philosophy, psychology, sociology, anthropology, economics, political theory, and law).

12. Cahn, *supra* note 1, at 1061.

comes from its identification with the experience of women. But if it is rooted in only certain women's experiences, it may continue to distort our inquiry. We examine and evaluate lawyering through the lens of connection. We do not use the lens of those attributes excluded from the definition of the feminine. Therefore, the inquiry can hide, rather than reveal, both critiques based on the experiences of excluded women and alternatives that can have meaning to them.¹³ Looking for connection within the activities of lawyers matters only to those women for whom connection is meaningful.

In addition, women's experiences do not necessarily possess critical power. The relationship of those experiences to the project of feminism is complex.¹⁴ Using concepts that arise from cultural definitions of the female runs the dual risk of reinforcing the patriarchal processes that have defined the female and of constricting our visions of what is possible.¹⁵ Professor Cahn tells us how connection is different from a domi-

13. Addressing this same issue in another context—that of feminist historical scholarship—Linda Gordon has said, "It is not legitimate to define a topic that by its very boundaries creates a distorted view of reality. I am reminded particularly of women's scholarship that begins with the caveat that only white, or only middle-class, women are here included, as if the statement justified the exclusion." Gordon, *supra* note 11, at 25.

14. See Alcoff, *supra* note 2, at 406-22 for a groundbreaking discussion of different approaches to this issue within feminist theory.

15. See *id.* at 405:

For many contemporary feminist theorists, the concept of woman is a problem. It is a problem of primary significance because the concept of woman is the central concept for feminist theory and yet it is a concept that is impossible to formulate precisely for feminists. It is the central concept for feminists because the concept and category of woman is the necessary point of departure for any feminist theory and feminist politics, predicated as these are on the transformation of women's lived experience in contemporary culture and the reevaluation of social theory and practice from women's point of view. But as a concept it is radically problematic precisely for feminists because it is crowded with the overdeterminations of male supremacy, invoking in every formulation the limit, contrasting other, or mediated self-reflection of a culture built on the control of females.

See also Gordon, *supra* note 11, at 30:

Female and feminist consciousness stand in complex relation to each other: clearly they overlap, for the female is the basis of the feminist, yet the feminist arises out of a desire to escape the female. That seems to me an inescapable tension. . . . Throughout various parts of feminist scholarship today, historical and otherwise, there is an attempt to reach a false resolution of the tension I have just defined, a resolution that would obliterate the distinction between the female and the feminist. It seems to me important to claim both. The female is ourselves, our bodies and our socially constructed experience. It is not the same as feminism, which is not a "natural" excretion of that experience but a controversial political interpretation and struggle, by no means universal to women.

nant, "male" form of lawyering,¹⁶ but she does not tell us why it provides a good starting point for challenging that form.

The ethic of care provides unstable grounding for critique and change not just because of its acceptance of the female as the starting point of critique, but because of its monolithic, undifferentiated portrait of the dominant "male" mode of lawyering.¹⁷ Lawyers are treated as a single, uniform group. They have "carefully structured relationships with their clients and, indeed, appear to avoid connection, or even association with their clients."¹⁸ Their behavior and morality are seen as entirely consistent with the formal rules within which they act.¹⁹ This view eradicates the tensions and contradictions within accepted conceptions of lawyering that have arisen from important political and social struggles over what it means to be a lawyer. It also disguises the ways these tensions and contradictions have created spaces for oppositional forms of lawyering.²⁰ To say that these oppositional practices do not fit within our understanding of being a lawyer would be to cede too much to those social and political forces that have shaped dominant forms of lawyering. Although dominant structures and forms of lawyering have constrained the work of those lawyers who have challenged them, these structures have also had to accommodate many of these challenges.²¹ Through their struggles, many lawyers have worked in large and small ways to create humane, brave, and connected ways to do their work.²² To ignore the tensions within dominant modes of lawyering that have incorporated these experiences is to marginalize that work, and to fail to see the important legacy it has created for us.

This monolithic, undifferentiated view of the dominant form of lawyering sees connection as external to that form. Professor Cahn

16. Cahn, *supra* note 1, at 1061-63.

17. Within other fields, feminist theory is also struggling with definitions of the "masculine." See, e.g., Sara Ruddick, *Thinking About Fathers*, in *CONFLICTS IN FEMINISM*, *supra* note 2, at 222, 224-25.

18. Cahn, *supra* note 1, at 1063.

19. *Id.*

20. See, e.g., Nancy Polikoff, *Am I My Client?: A Lesbian Activist Lawyer Represents Gay and Lesbian Activists*, Presentation at Theoretics of Practice Conference (Jan. 31, 1992) (tape on file with the *Hastings Law Journal*). In her article Nancy Polikoff examines how to be a lawyer for a community when one is an otherwise active member of the community and cares deeply about the issues and the people involved. How does one act and feel as a lawyer who is connected in many ways and at many levels to one's clients and their cases? In analyzing her own experience, Nancy Polikoff looks particularly to the work of black lawyers who represented civil rights activists. She examines the images of being a lawyer that those lawyers helped create, discovering both the constraints and possibilities contained within those images.

21. See *id.*

22. *Id.*

writes, "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."²³ For Professor Cahn, then, the critique based on connection is an external one. Again, this approach cedes too much. For example, much of the recent work done on client-centered lawyering exists within currently available visions of lawyering. Although that work criticizes various practices of many lawyers and attempts to reshape our conceptions of being a lawyer, it exists reasonably comfortably within current legal culture.²⁴ It draws and builds upon themes and ideas that can be found within dominant forms of lawyering. This work emphasizes the value of empathy and the skill of listening, both of which Professor Cahn identifies as central to a feminist understanding of connection.²⁵ Without claiming that empathy or listening are central to dominant conceptions of lawyering, it is nonetheless important to recognize the ways they exist within these forms. To obscure the tensions, contradictions, and ambiguities of gender that one finds within dominant forms of legal practice is to hamper our ability to understand what exists and find effective mechanisms for change.

Conclusion

If the attributes of the ethic of care are flawed as critical tools because of their grounding in distorted conceptions of the female and the male, how else can we ground the feminist project of transforming lawyering? By identifying context as important, Professor Cahn helps us to locate an alternative ground for a feminist theory. The context of our experiences as lawyers and our understanding of those experiences forms the essential place for beginning.²⁶ We need to look at our particular experiences as lawyers in relationships with our clients and within the institutions that we and our clients confront on a daily basis. As feminists, we understand the pervasiveness of gender in all of these exper-

23. Cahn, *supra* note 1, at 1063.

24. See, e.g., Robert D. Dinerstein, *Clinical Texts and Contexts*, 39 UCLA L. REV. 697, 700 (1992) (discussing how new clinical textbooks can help current law students).

25. Cahn, *supra* note 1, at 1062; see also Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 524 (1990) (recognizing similarities between client-centeredness and feminist critique).

26. This emphasis upon grounding feminist theory in the exploration of concrete experience can also be found in Alcoff, *supra* note 2, at 421-22; Teresa de Lauretis, *Upping the Anti in Feminist Theory*, in CONFLICTS IN FEMINISM, *supra* note 2, at 255, 260, 263; Teresa de Lauretis, *Feminist Studies/Critical Studies: Issues, Terms, and Contexts*, in FEMINIST STUDIES/CRITICAL STUDIES, *supra* note 11, at 1, 10; Hawkesworth, *supra* note 11, at 538; Villmoare, *supra* note 2, at 387-90.

iences.²⁷ Gender affects us, our clients, and others within the legal system. The institutions with which we and our clients must deal are gendered, both shaped by and shaping our cultural understanding of gender. Working through these experiences, exploring the multiple ways that gender is embedded within them, and reflecting on our own understanding of those experiences provide us with a method for proceeding with the feminist project.

When we explore these experiences, we might discover that the experiences are quite common and the understandings widely shared; but by starting with the particularity of the experience, we are in a better position to see and accept differences within gender, as well as to find similarities across gender. We are also in a better position to identify those points of intersection of gender with race, ethnicity, age, and other factors that are important components of shaping our experiences within our legal culture. These points of intersection can help us develop feminist theories and practices of lawyering reflective of women from many different backgrounds.

In analyzing our experiences, we might discover aspects of the attributes of the ethic of care. But we will see them in their concrete particularity. We will find ambiguity and complexity. By discovering these attributes firmly embedded within our experiences, we will be better able to assess the significance of the ambiguities and complexities those attributes present to us in identifying a feminist lawyering process.

27. See, e.g., Jane Flax, *Postmodernism and Gender Relationship in Feminist Theory*, 12 SIGNS 621, 623-24 (1987):

Gender relations enter into and are constituent elements in every aspect of human experience. In turn, the experience of gender relations for any person and the structure of gender as a social category are shaped by the interactions of gender relations and other social relations such as class and race. Gender relations thus have no fixed essence; they vary both within and over time.

