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DECENT AND INDECENT PROPOSALS IN THE LAW: REFLECTIONS ON OPENING THE CONTRACTS DISCOURSE TO INCLUDE OUTSIDERS

BY BEVERLY HORSBURGH*

Recently the students at my law school revised the questionnaire used to evaluate professors at the end of the term. The format was changed so that the data can be more efficiently stored and expeditiously retrieved. Because computerized information can be swiftly located and tabulated, lightening what was in the past a heavy administrative burden, the new evaluation form strikes terror in the hearts of all nontenured professors. Those committed to minority interests have especially good reasons for alarm. On the form, students respond to the following questions:

1. Were the students treated fairly and impartially without regard to the professor's personal biases?
2. Did the professor's personal idiosyncrasies significantly detract from the course?
3. Would you like to see this professor retained at the school?

I worry about some of the evaluations I will receive because of an incident that occurred in my classroom. In response to the traditional "Who Sued Whom?" a student told me, "A colored guy petitioned for custody of a child." I hope I handled the situation properly when I suggested the appropriate form of address was African American or black. The student began again and reiterated "This colored guy...." I again asked that she use different words. The entire class fell into an uncomfortable silence. No one gasped or indicated by words or gesture any disapproval of the student's reading of the case. Student solidarity against the professor as prosecutor or persecutor was in the air. The small number of black students in the class put their heads down and became engrossed in their notes. The student

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I wish to express my gratitude to Professor Peter Margulies and Professor Naomi Cahn for their many thoughtful suggestions. I also appreciate the efforts of my research assistants, Jacqueline Cannavan and Julie Shapiro. Most of all, I thank my students for allowing me to share their stories. They greatly enrich my life.
started over and this time with great animosity repeated "A colored guy..." I interrupted for a third time. At this point I stopped trying to discuss the case and did the unthinkable. I lectured on sensitivity and insisted on politically correct speech.¹

No doubt my evaluations (I hope just a handful) will inform me that my personal idiosyncrasies and biases interfere with the course.² I also suspect they will tell me that I am not always fair and do not treat all of my students with respect. For some students, my insistence that the class adhere to what is perceived as Professor Horsburgh's personal choice of words is an indecent proposal, exactly the sort of stuff to be criticized on the questionnaire. From my point of view, however, an indecent proposal underlies and animates the questionnaire. The evaluation form presupposes that professors have an obligation to be impartial,

1. I discussed the incident at the recent conference of the Society of American Law School Teachers (SALT). Some of the professors in my workshop suggested it is more appropriate for a teacher to call on other students to correct a classmate rather than to personally become involved in the situation. Others agreed with my approach, insisting that professors are role models and must take responsibility for ensuring all in the class are treated with respect. They maintained that it is unfair to expect students to assume the professor's job. Another group perceptively observed that some professors, in particular, white women, black men and women, and Asian Americans, for example, are more likely to incur hostility and rebellion in the classroom than white male professors who are easily accepted as authority figures. As for me, I was so shocked and unbalanced by the student's statements that I reacted the way I would to anyone, be it student, professor, or social acquaintance.

I also believe there is all the difference in the world between "colored person" and "person of color," although seemingly the change is stylistic. Language is a system of signs produced and interpreted within a culture. As such, a social group is defined through the use of certain words or phrases that are encoded with the values of the culture from which the words are derived. In this case, "colored person" signifies the white culture's classification of African Americans and evokes images of slavery. In contrast, "person of color" is a form of words a people have chosen for themselves. It expresses dignity and pride. But see ROBERT HUGHES, CULTURE OF COMPLAINT: THE FRAYING OF AMERICA 20-21 (1993) (claiming racism is unaffected by the use of either phrase and criticizing the emphasis on politically correct speaking habits).

2. Student evaluations tend to reward professors who are traditionalists and to be hostile to professors who are concerned with racism or feminism, who espouse critical legal studies, or who are libertarians. See Richard L. Abel, Evaluating Evaluations: How Should Law Schools Judge Teaching?, 40 J. LEGAL EDUC. 407, 426 (1990). Abel attributes low ratings to a student's disagreements with a professor's politics and values. Id. at 439. See also Robin D. Barnes, Black Women Law Professors and Critical Self-Consciousness: A Tribute to Professor Denise S. Carty-Bennia, 6 BERKELEY WOMEN'S L.J. 57, 66 n.23 (1991) (commenting that teaching evaluations provide students with the opportunity to ventilate their antagonism to race and gender issues).

Although many studies find no correlation between gender and a student's evaluation of teaching, some have proven women professors receive lower ratings than men. See, e.g., Susan A. Basow & Nancy T. Silberg, Student Evaluations of College Professors: Are Female and Male Professors Rated Differently?, 79 J. Educ. PSYCHOL. 308 (1987).
that one interpretive method should be taught, and that rules of law are objective, principled, and apolitical.

Nonetheless, I believe the system that is touted as neutral and normative reflects the politics of the dominant culture. A partial and subjective view is presented as universal, setting the content, tone, and methodology of the educational process. Although outsiders\(^3\) challenge the stance of the dominant discourse, the core assumption of objectivity embedded in the tradition ensures that diversity is kept in its place. Furthermore, the traditional law school tends to institutionalize patriarchy, homophobia, and racism. For example, when women's issues are confined to an upper level course or seminar instead of included in context in every course, a school marginalizes women and enshrines a separate spheres philosophy.\(^4\) A course on AIDS is usually similarly misplaced. When black defendants are found in criminal courses, but not in contracts or property, a teaching institution perpetuates segregation and racist stereotyping. When family law and poverty law are downgraded as optional courses, and considered only policy-oriented also-rans, whereas commercial law and corporate law are promoted as analytically rigorous necessities, a school creates a value hierarchy and politicizes the curriculum.

Thus, notwithstanding the efforts of professors who attempt to open the discourse and provide neutralizers or antidotes to the parochial nature of the pedagogy, the debate has already been circumscribed. By implying that the legal discourse is objective, and that it becomes skewed only because of an individual professor's views, the evaluation form further entrenches biases and increases the difficulties professors encounter in unpacking racist and sexist assumptions in the law. It also enlist students to use their power to ensure the continuation of the status quo. In fact, in light of the traditional law school's pro forma commitment to diversity, what happened in my classroom is a predictable

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3. Professor Mari Matsuda coined the term "outsider" to designate a social group whose perspective is not recognized by the dominant culture. "Outsider" suggests that minority status is not just a question of a social group's actual number count. See Mari J. Matsuda, Public Responses to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320, 2323 n.15 (1989).

4. Feminists have noted the tendency to divide and separate the social world into private and public spheres, associating women with the personal, domestic side of life and men with the publicly regulated world of commercial transactions. See, e.g., Frances E. Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 Harv. L. Rev. 1497 (1983). Law schools reinforce social divisions by isolating gender issues from the rest of the curriculum and setting them apart from the concerns of lawyers.
event. The student revealed the prejudice that a school overtly condemns, but imperceptibly implements.

Maintaining a neutral stance in the classroom may also be interpreted as indifference, encouraging students to see themselves merely as hired guns. On the other hand, undertaking a commitment, assuming moral responsibility for one's acts as a lawyer, and becoming emotionally engaged in one's work, are devalued attitudes. Good lawyering is equated with the ability to disengage oneself from one's argument. A law school inflicts split personalities in defining success as excelling off brief. No wonder a student sees herself as deficient if she is unable to dispossess herself by cleaving her self-identity from her self-expression. No wonder minority students come to see their concerns as special interests evidencing their own inability. Instead of pressing for the impossible or the impracticable, surely a school should be helping students to a better understanding of themselves. Enabling students to use their own sense of self-identity in their work can bring out the best that is in them.

Hence, the evaluation form represents more than just a personal risk for the oddball, nontraditionalist professor. It also implicates a teaching institution's epistemology, values, and a power structure that involves students as well as professors. For me, the questions are inappropriate in a community of scholars and students who together should be able to question the law as well as the social arrangements that the doctrine reflects and engenders.

Despite the drawbacks in any given evaluation form and many law schools' curricula, I must confess that the drama that unfolded in my classroom suggests there was something wrong with what I was doing as a professor. Merely slipping a case into the traditional discipline in which a plaintiff is a member of a minority does not eliminate prejudice or broaden a course's scope of vision, let alone transform legal education. It can even lead to a backlash. Opening a course to diversity is more than a numbers game. The outsider's point of view should also be included to instill sensitivity. Because there are multiple disparate minority voices as well as many disagreements on approaches and solutions to outsider problems, any attempt to meaningfully attain diversity

5. For example, scholars are not in accord over the degree to which traditional rights analysis and the civil rights struggle have benefitted the black community. They also maintain different positions on the value of critical legal studies to minorities. See Kimberlé Williams Crenshaw, Race, Reform and Retrenchment: Transformation and Le-
can become entangled in a contradictory jurisprudence. As a result, I have experimented in my contracts course, drawing on various theories. I have learned that my success or failure is related to the degree to which a particular legal theory achieves its goals. I therefore replay in the classroom the existing debate between theorists, and contracts becomes a mix of decent and indecent proposals.

In this article I critique various avenues to diversity, including theories of formal equal rights, feminist and critical race approaches, and critical legal studies. Although these methodologies allow other voices to be heard in the classroom, I have come to believe they are also traps into which we all fall at times. I point out the ways in which these theories insufficiently address the project of including outsiders in contract law. I conclude that the shortcomings in jurisprudence, however, are not responsible for all the problems encountered in attempting to embrace a more inclusive discourse. As long as prejudice remains a part of the organizing thought structure of a law school education, the diversity project is limited at best. A change in the legal culture's attitude and more substantive alterations in the curriculum are needed in order to achieve a truly diverse law school education.

In my attempts to achieve the goal of diversity, I am mindful of the current intellectual climate, in which the writings and the efforts of nontraditional professors to include outsiders have been met with a degree of hostility that I believe is all out of proportion to any potential threat they pose. I am concerned that the backlash in legal education will lead to a suppression of nontraditionalist thought and that censorship looms in the future. In particular, I am troubled, as are many in academia, by the vicious

gitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331 (1988) (faulting critical legal studies for not addressing society's pervasive race consciousness, which perpetuates the subordination of blacks despite formal reform, and arguing that the black community must "assert a collective identity" in order to change its political reality); Richard Delgado, The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?, 22 Harv. C.R.-C.L. L. Rev. 301 (1987) (arguing that critical legal studies scholars who advocate eliminating formal societal structures that curb racism are misguided); Alan Freeman, Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay, 23 Harv. C.R.-C.L. L. Rev. 295 (1988) (concluding that transcending racial boundaries, rather than forming individual coalitions, is the key to making equality of opportunity a reality instead of a formalistic ideology). Feminists also express different perspectives on gender issues. For a comprehensive survey of feminist methodologies, see Katharine T. Bartlett, Feminist Legal Methods, 103 Harv. L. Rev. 829 (1990). An overview of the intellectual landscape in legal thought today can be found in Gary Minda, Jurisprudence at Century's End, 43 J. Legal Educ. 27 (1993).
attack on Professor Catharine MacKinnon in a recent article and the cruel parody of the late Professor Mary Joe Frug written by members of a law review. Of course, no professor is above peer criticism and students usually are entitled to poke fun at their tormenters. Nonetheless, the accusations leveled at Professor MacKinnon and other feminists are not the usual disagreements over legal theory between mutually respectful colleagues.


7. Even though Professor Frug had been murdered, student editors of Harvard Law Review wrote and distributed a satire deriding Professor Frug and her contributions to feminist theory. The editors called her the "Rigor-Mortis Professor of Law." Some believe the incident revealed the underlying hostility to women and feminist thought in the typical law school environment. For an accounting on what occurred at Harvard Law School concerning Professor Mary Joe Frug, see Jack Evans, The Gender Agenda: Is Feminism Welcome on Law School Campuses?, STUDENT LAW., Nov. 1992, at 34.

8. For example, the following is a particularly caustic criticism of feminist studies:
   Perhaps the most self-destructive characteristic of radical feminist scholarship is its long-winded pretentiousness, a kind of catalytic clack that has become a classic part of the process toward intellectual decay. In their philosophical pursuit of answers to ultimate questions, the radfems get mired in the multisyllabic muck of overintellectualization, lacing their ideas with obscure cross-references and mind-numbing bombast, ultimately turning words into meaningless twaddle. The burning bra has become a boombox of babble.

   Lasson, supra note 6, at 24.

   In fact, despite the sophistication and depth of thought in nontraditional scholarship, the writings of outsiders are misunderstood, distorted, and trivialized by many in the legal academy. See, e.g., Randall Kennedy, Racial Critiques of Legal Academia, 102 HARV. L. REV. 1745, 1807-08 (1989) (claiming critical race theorists attempt to generate feelings of guilt in the white majority in order to justify a lowering of academic standards). Outsider scholars often find it necessary to respond to their marginalization. See DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 142-46 (1992); Marina Angel, Women in Legal Education: What It's Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women, 61 TEMPLE L.Q. 799, 833 (1988); Patricia O'Cain, Feminist Legal Scholarship, 77 IOWA L. REV. 19, 30-32 (1991); Mary Coombs, Outsider Scholarship: The Law Review Stories, 63 U. COLO. L. REV. 683, 691 (1992); Richard Delgado, The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later, 140 U. PA. L. REV. 1349, 1356-60 (1992); see also Regina Austin, Saphire Bound!, 1989 WIS. L. REV. 539, 541 (reminding us that there is little in the case law or commentary that is helpful to someone writing on the legal problems of black women).

   Outsider professors, moreover, continue to experience difficulty in being hired, often resign their positions, and are frequently denied tenure. See Abel, supra note 2, at 409-10; Angel, supra at 823-24 (relating her own experience), 830-34 (condemning the criteria for tenure at most law schools as downright hostile to women and favoring the "boys" who lunch together, discussing the physical attributes of their women students); see also Richard Chused, The Hiring and Retention of Minorities and Women on American Law School Faculties, 137 U. PA. L. REV. 637, 638-39, 539 n.11 (1988) (documenting that in the 1986-87 academic year black professors constituted 3.7% of majority-operated law school faculties and that most women teachers were cloistered in non-tenure track legal writing departments); Duncan Kennedy, A Cultural Pluralist Case for Affirmative Action in Legal Academia, 1990 DUKE L.J. 705 (arguing scholarly opportunity is controlled by power and
Furthermore, if law students lack the simple human decency to refrain from callously ridiculing a professor who was violently murdered, and are unable to compassionately consider the feelings of her family and friends, the traditional law school may not be doing its job. Characterizing a personal attack on Professor Frug's values and character as only invoking issues of free speech\textsuperscript{9} descends to a level of utter indifference to others and to a degree of moral relativism that leaves me breathless. Quite possibly there is a need for academia to submit itself to some self-criticisms. Quite possibly an ongoing series of lectures, workshops, and retreats in which both faculty and students become more educated on diversity issues could sensitize the academic community and improve the quality of life for all. In any case, a little self-conscious awareness that what is usually presented in class insufficiently addresses the concerns of outsiders will not destroy the citadel. Accordingly, I write in hopes it will do some good, alleviate some fears, and in some small way be considered a rebuttal to the assaults on my colleagues. All of the stories I recount occurred in my classroom or were told to me by my students or other professors. I thank them for their confidences and in this article strive to give voice to their concerns.

I. The Liberal Proposal

The first approach to diversity in contracts is similar to theories of formal equal rights\textsuperscript{10} in that outsiders are granted nominal

\begin{footnotesize}
\textsuperscript{9} See Fox Butterfield, Parody Puts Harvard Law Faculty in Sexism Battle, N.Y. Times, Apr. 27, 1992, at A10 (quoting Professor Alan Dershowitz who described the outcry over the parody as evidence that radicals cannot accept the free speech rights of those who disagree with them).

\textsuperscript{10} See, e.g., RONALD DWORKIN, LAW'S EMPIRE 228-32 (1986); RONALD DWORKIN, TAKING
\end{footnotesize}
representation without a recognition of differences. Reflecting
traditional liberal thought and unaffected by the insights in
feminism or critical race scholarship, a standard contracts syllabus is presented to students. The well-intended liberal professor, however, believes his course is diversified because occasionally he varies his pronouns or uses gender neutral language. Now and again he includes minorities in typical contract hypotheticals.

Although the good liberal formalist may acknowledge minority presence in market transactions by naming Mr. Martinez the offeror and Mr. Chan the offeree or help to dislodge notions of gendered spaces by inventing a problem involving an employer named Ms. Jones, these are imaginary scenarios, at odds with the predominance of white males accurately reflected in contracts case law. Hypotheticals can present an unrealistic socioeconomic

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Rights Seriously 115-18 (1977). Dworkin speaks of law as the continuous expression of formal abstract principles that the ideal judge or Hercules discovers in past legal decisions. A new chapter on law must coherently fit within these past decisions. The judge’s interpretation of history becomes the measure of one’s rights. Although Dworkin attempts to develop universal abstract rights, many outsiders believe his approach only reflects the viewpoint of a white middle-class male intellectual. Dworkin has been criticized for proposing an atomistic individualistic political philosophy and for emphasizing rights as more important than civic responsibilities. See Robin West, Foreword: Taking Freedom Seriously, 104 Harv. L. Rev. 43, 46-47, 71-72 (1990) (attacking rights analysis because it insulates the holder of rights from public scrutiny and neglects our ability to understand another’s subjective experiences). Margaret Radin claims Dworkin’s ideal judge cannot step outside existing legal institutions to achieve a broader viewpoint and is unable to consider the perspective of the oppressed. See Margaret Jane Radin, The Pragmatist and the Feminist, 63 S. Cal. L. Rev. 1699, 1725 (1990).

11. In using the term liberalism, I refer to the overall structuring and analysis of the social world in mainstream legal thought, including legal definitions and classifications, law’s psychology of human behavior, and the thrust of legal argumentation. Liberalism or liberal legalism, the phrase used by some scholars, has a broader meaning than is ordinarily meant by the word “liberal” and encompasses the mainstream, the schools of thought of both liberals and conservatives. See Mark Kelman, A Guide to Critical Legal Studies 2-3 (1987). According to critical legal scholars, the thought structures of liberal legalism are composed of three sets of mutually contradictory arguments. The particular rhetoric chosen to resolve any legal question is indeterminate because the opposite argument could just as easily have been selected. First, a contradiction exists between our need for the security of bright-line arbitrary rules versus the justice of factually sensitive standards. Second, our belief in subjective values, self-determined in a free society, contradicts our faith in recognizing objective ethical precepts. Third, a contradiction exists between individualism, the notion that expressions of free choice are entitled to respect, and functionalism, the notion that preferences should be disregarded as the product of coercive social forces or insufficient information. Most importantly, critical legal studies adherents claim that one side of each set is privileged over the other. Usually, the preferred mode of legal argument that settles an issue consists of a defense of rules, a dependence on subjective values or an insistence on the importance of individualism. Id. at 3-4. See also Richard Michael Fischl, The Question That Killed Critical Legal Studies, 17 Law & Soc. Inquiry 779, 785 (1992).
picture and privilege the problems of the white middle class. Contract law historically developed in response to the special needs of an expanding middle class of mercantile actors. As such, the rules and standards promote the growth of commercial transactions by favoring customary commercial practices, honoring established business expectations, and protecting against the risks of the typical merchant: the unforeseen rise or fall in prices of goods in a free market economy. In short, contract law comprises the interests of those securely entrenched in society. Contract law does not concern itself with the history of women or African Americans becoming a part of this country's business enterprise. The efforts of outsiders to gain admission and find a place in the commercial world are obscured in this approach to diversity.

Additionally, when a professor fails to recognize differences, she compels an outsider student to deny her sense of group identity and aspects of her distinct individuality. For instance, consider how Jewish students may feel if their unique heritage is ignored. In many first-year contracts classrooms, students' introduction to the law entails learning to enforce contracts made in Nazi-controlled Europe. Understanding the rules of a bargain exchange, that courts will not question its fairness, requires them to stifle their identification with the Jews who fled from Nazi persecution, selling homes and possessions for whatever amounts they could obtain.

Likewise, women students must inhabit the neutered, disembodied minds of reasonable commercial actors, oblivious to their female biology and genderized social reality. Because of the dual burden of raising children as well as maintaining a job, few women in the business world achieve the same success as men. Yet, contract case books ignore women's situation. Commercial

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14. See Batsakis v. Demotsis, 226 S.W.2d 673 (Tex. Civ. App. 1949) (upholding an agreement in which a woman who was attempting to flee from Greece in 1942 agreed to pay $2,000 in order to receive $25 worth of Greek drachmas).
actors are childless, nonpregnant persons unhampered by family responsibilities.\textsuperscript{15}

A similarly distressing situation exists for African American students. Imagine the possible emotions of black students who are expected to identify with the buyer and the seller of cotton when class discussion centers on whether there is an agreement if both parties attach different meanings to the same word.\textsuperscript{16} The students may be affected by what is not being mentioned, remembering that the entire cotton trade was bottomed on the institution of slavery.\textsuperscript{17} Given that African labor furthered commerce and increased the wealth of the merchant class, and the very rules that are studied in contracts protected those who benefitted from African subjugation, the struggle of African Americans to become more than just the subject matter of an agreement should now be emphasized in any course on contract law.

Hypotheticals that essentialize all individuals into the prototypical offeror or offeree eliminate the significance of differences and the ways in which differences have been socially constructed into handicaps. If color and gender, as well as an individual’s socioeconomic situation, are not recognized and brought into the contracts discourse as substantial barriers that interfere with the exercise of bargaining power, diversity becomes a masquerade. The prototypical minority offeror who is not encumbered with the social disadvantages of race, gender, or both, is only a male dressed in a skirt or a white donning black face. Nominal inclusion approaches mislead students into thinking that everyone faces the same transactional problems and that these problems are unrelated to minority status. In using this strategy to include minorities, a professor could desensitize students from appreci-


\textsuperscript{16} See Raffles v. Wichelhaus, 159 Eng. Rep. 375 (Ex. 1864) (holding that there is no contract if the buyer intends one ship named “Peerless” while the seller intends another with the same name).

\textsuperscript{17} Grant Gilmore speculates that the price of cotton fell at the time of the Raffles decision. GRANT GILMORE, THE DEATH OF CONTRACT 36, 120 n.87 (1974). When Union forces captured the city of New Orleans, the Lincoln administration confiscated the Confederate bales of cotton at the port and sold them abroad. Id. Quite possibly American cotton could be sold more cheaply in England than the cotton from Bombay onboard the second ship “Peerless.” Id.
ate the difference that differences make\textsuperscript{18} in a sexualized, colorized world.

In addition, the liberal formalist tends to discuss rules of law in isolation, unrelated to the political, intellectual, and social history from which they were derived.\textsuperscript{19} Doctrine is portrayed not as the particular ideology of a specific culture, but as an unfiltered depiction of the truth, and as a result, students receive an unrealistic partial picture of the relationship between law and society. Although the liberal formalist makes students aware of some of the social consequences of law, policy discussions are seldom a serious concentration. The law's impact on intimate social relationships and personal choices is not acknowledged.\textsuperscript{20} Instead, the social is trivialized as insufficiently "analytical" and less demanding than legal analysis.\textsuperscript{21} Moreover, the converse is not always suggested—that society may affect law and the many cultural norms structured into legal analysis.\textsuperscript{22}

\begin{itemize}
\item \textsuperscript{18} See Christine A. Littleton, \textit{Reconstructing Sexual Equality}, 75 CAL. L. REV. 1279, 1323-35 (1987) (arguing that equality means recognizing "the difference that differences make" by ensuring that differences are costless).
\item \textsuperscript{19} For example, discussing \textit{Raffles} and concentrating only on the rules governing the formation of contract without reference to the importance of the cotton trade, the institution of slavery, or the effect of the Civil War on the price of cotton unanchors law and removes it from its historical, social, and economic contexts. \textit{See supra note 16.}
\item Similarly, Karl Klare uses the term "legal consciousness," meaning "the vision of law and of the world characteristic of the legal profession (or of a particular elite or other subgroup within it) at a given moment in history." Karl Klare, \textit{Contracts Jurisprudence and the First-Year Casebook}, 54 N.Y.U. L. REV. 876, 876 n.2 (1979) (reviewing CHARLES L. KNAPP, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS (1976)). Grounding law in an epochal moment allows us to become conscious of lawmaking as a continuous process of defining and redefining our values and our politics, as well as our cultural and intellectual attitudes.
\item \textsuperscript{20} See Nancy Ehrenreich, \textit{Surrogacy as Resistance? The Misplaced Focus on Choice in the Surrogacy and Abortion Funding Contexts}, 41 DePaul L. REV. 1369, 1392 (1992) (reviewing CARMEL SHALEV, \textit{Birth Power: The Case for Surrogacy} (1989)) (claiming surrogacy and abortion decisions are not free choices but reflect the consequences of limited economic options and stringent governmental regulations); Frances E. Olsen, \textit{The Myth of State Intervention in the Family}, 18 U. MICH. J.L. REF. 835, 837, 842-46 (1985) (arguing that the state acts to reinforce hierarchy within the family and that legal intervention or nonintervention is an incoherent methodology unable to resolve family law issues).
\item \textsuperscript{21} See Duncan Kennedy, \textit{Legal Education as Training for Hierarchy}, in \textit{The Politics of Law}, \textit{supra note 12}, at 43 (pointing out that the traditional law school education perpetuates this hierarchy by convincing students that legal reasoning is different from and more important than policy analysis).
\item \textsuperscript{22} See Clare Dalton, \textit{An Essay in the Deconstruction of Contract Doctrine}, 94 YALE L.J. 997, 1017, 1098 (1985) (noting that courts assume there is no contract between parties in personal relationships because of existing societal norms, although the same behavior is considered evidence of an implied contract outside the family setting).
\end{itemize}
Under the liberalist formalist approach, students are not sufficiently informed of the ways in which law's conceptualization process limits the understanding and resolution of social problems. They are allowed to overlook the complex interplay between law and society. Students, thus, can be led to assume that law exists separated and distanced from the culture in which it is situated. Students can also come to believe that it is possible to achieve total objectivity, and that they must cast aside their own perspective, discovering the law from a far distant, non-existent place. Students do not see law as operating within the context of a given culture, defining and reflecting a specific culture's self-expression.

The good liberal formalist also instills a belief in objectivity by addressing the doctrine without indicating a preference for any particular approach or party to the dispute. He seems to represent all perspectives, impressing on the class that objectivity is possible. Exams and problems compel detachment in order to encourage the student to represent each party and to argue against both sides. Students must rise above their own subjective personal response to case law and value analysis for its own sake, as an impartial methodology that applies to many different individuals and multiple variations of the facts. Students see contractual analysis as an objective process, not as a forceful tool that can predetermine results. There are benefits in appearing to be impartial. For example, students need not be concerned about disagreeing with a professor and may feel more free to air their views. A stance of objectivity, however, also teaches students to disregard the particular outcome in an individual case, even if it seems unjust. They learn they should not become embroiled in the interests of either the plaintiff or the defendant, not care about the result, or be sympathetic to the individual human beings involved. Of course, at times I too need to be the good liberal professor and objectively emphasize doctrinal anal-

23. I have always been grateful to one of my former professors who did not hesitate to express his personal response to law. I remember a particularly offensive case concerning a Jewish refugee who escaped from Nazi Germany and pressed a claim against his former employer for breach of contract in the New York court system. The employee was fired because he was a Jew. See Holzer v. Deutsche Reichsbahn-Gesellschaft, 14 N.E.2d 798 (N.Y. 1938). After discussing the doctrine, the professor asked the class if we agreed with the New York court's refusal to entertain the claim. He then emotionally expressed his disapproval. As a member of the Jewish post-Holocaust generation who lost many relatives in Europe, I remember every word he said and the positive impression he conveyed. The holding in the case is long forgotten, but not the professor's willingness to reveal his values.
ysis. Nevertheless, the approach is inappropriate at times because the human dimension is lost.

When objectivity floats around the law school atmosphere, a student quickly becomes converted into an intoxicated believer. She has been indoctrinated into a cult, the Cult of True Objectivity, and she places her faith in those who espouse this approach to the law. If she follows the Path of Enlightenment, she too will reach True Understanding, past her own imperfect subjective awareness of reality. She succumbs to the professor’s interpretive stance, assuming that if she should give in to her perception of injustice or bias she would be derailed from the Path to Truth.

Yet there is no Path or Way enabling anyone to distance herself from her situation in the world. We are constituted by our social interactions, cultural/socioeconomic background, and the language of law. Such a stance, nonexistent and without perspective, is neither realizable nor meaningful. Our very thought structures are the product of our situation. Attempts to separate one’s thoughts from the culture in which thoughts arise yield self-reflective images. We see ourselves when we gaze in the pond. Because I am a white woman, Jewish, and a mother, my reflection differs from yours. In other words, to the grave-digger, Hamlet is the story of a grave-digger who encountered a prince.

An example of the partiality of the liberal perspective, as well as the pressure on students to close their minds and orient themselves to one uniform approach, occurred in my contracts class. A woman student unsuccessfully attempted to convince her classmates that there is no contract between the parties in Hamer v. Sidway, and that the case is all about family and the unselfishness of love. She insisted, against considerable opposition, that the story Hamer tells concerns an uncle who cared about his nephew and tried to prevent him from leading a self-destructive lifestyle and squandering money. Notwithstanding my response that the student’s reading was insightful, and that some

24. For example, students are instructed in contracts to deny their common sense and believe that the most obvious barriers to understanding, little education and inability to read and write, are not capacity issues. See, e.g., St. Landry Loan Co. v. Avie, 147 So. 2d 725 (La. Ct. App. 1962) (holding liable an illiterate French-speaking black man who claimed he did not understand the contents of a loan agreement he signed).


26. 27 N.E. 256 (N.Y. 1891) (enforcing an uncle’s promise to pay his nephew $5,000 if he abstained from gambling, drinking, and smoking until the age of 21).
feminists would agree with her approach to the case,²⁷ the majority of students argued that Hamer holds that a detriment to the promisee or a benefit to the promisor constitutes valid consideration. Understandably, the student conceded she was wrong and recanted, accepting canonical authority.

Both Stewart Macaulay²⁸ and Clare Dalton,²⁹ however, suggest other interpretations of Hamer different from the classical wisdom and the view of the woman student in my class. All are equally valid interpretive constructs, yet the good liberal professor may insist only one is the Truth, only one will gain points on an exam. Learning law is thereby made more difficult because a student’s understanding is conditioned on her ability to shutter her mind and accept the one aspect of reality that liberalism projects as objective. I found it sad when that very same student, in her third year of law school, assured me she has learned to think like a lawyer and has a “better” grasp of legal analysis. I suspect she has lost self-confidence, learned to deny her own perceptions, and come to assume her sense of the world is false. She now accepts that there is only one intelligible method to divine the correct legal solution. This student has been taught by students as well as professors to distrust her own reactions, reject her own truths, and suppress her creative ability.

²⁷. A cultural feminist would similarly analyze Hamer. Cultural feminism claims that caring and responsibility are more important values than individual rights or contractual obligations. See generally Carol Gilligan, In a Different Voice (1982); Carrie Menkel-Meadow, Portia in a Different Voice: Speculations on a Women’s Lawyering Process, 1 Berkeley Women’s L.J. 39 (1985). Robin West would also support the student’s reading. She argues that a woman’s understanding of the social world is informed by her experiencing a sense of self in connection to others, as opposed to a man’s sense of self in separation from others. Robin West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1, 3 (1988).

The student happened to be a black woman. I raise this point because Robin West has been criticized for privileging white women’s experiences over the experiences of black women. See Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 561, 603 (1990). Although theories of an intrinsic female self are questionable and significant differences exist between black women and white women, a black woman raised in a middle-class traditional family at times may reflect the same values and thought structures as a white woman who is similarly situated. Hence, any definition of black women as essentially different from white women risks the danger of being an overbroad generalization.

²⁸. In his new casebook’s table of contents, Professor Macaulay classifies Hamer under the category of “Promises by a family member with money to influence the lives of those without it.” Stewart Macaulay et al., Contracts: Law in Action 3 (1993).

²⁹. See Dalton, supra note 22, at 1088-89 n.402 (recasting Hamer as a detrimental reliance case to illustrate the incoherence in contract analysis and arguing it is not possible to meaningfully distinguish between fact patterns in which there is consideration but the facts implicate only reliance).
II. THE ASSIMILATIONIST PROPOSAL

The second approach to diversity, the assimilationist proposal, hardly differs from the first because it is based on the liberal feminist view that although women should not be granted "special" rights, the differences between men and women should be minimally accommodated under certain circumstances. Even though room is made for women, the legal analysis and subject matter of contracts remain untouched, reflecting the notion that women are the same as men and should be afforded the same treatment. By adhering to standards that evolved to suit the interests of white men, liberal feminism duplicates traditional liberalism's errors of omission. It conceals racist, sexist, and class-based social practices. The theory is inadequately tuned to the many problems of outsiders.

For example, formulating a contracts problem in which a white woman is the vice-president of a corporation or the manager of a football team subtly emphasizes women's competence to compete with men in the workplace. Nonetheless, this flattering image of women avoids an ugly truth. The domestic responsibilities of affluent white women are often transplanted onto the shoulders of minority women who clean their homes and care for their children. Additionally, celebrating women as equal to men could deceive students by painting rosy pictures of an ideal world, causing them to assume that equality actually exists.

The experience of another contracts professor provides a compelling example of how this result could occur. The professor was roundly criticized for being sexist by some of his women

30. See, e.g., Herma Hill Kay, Equality and Difference: The Case of Pregnancy, 1 BERKELEY WOMEN'S L.J. 1, 26 (1985) (arguing that pregnancy should be accommodated in the workplace because it is only a temporary episodic condition in which women differ from men); Nadine Taub & Wendy W. Williams, Will Equality Require More Than Assimilation, Accommodation or Separation from the Existing Social Structure?, 37 RUTGERS L. REV. 825, 832-36 (1985) (arguing that a dual system of sex-based rights preserves hierarchy and that gender neutrality mandates that men and women be treated the same unless there is a disproportionate impact on women).

31. See Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. CHI. LEGAL F. 139, 154 n.35. The recent search for a qualified woman to serve as U.S. Attorney General unearthed a common social practice, that women frequently hire domestic workers who are illegal immigrants and are unable to find better paying jobs. It was hardly a surprise that the successful woman nominee for the position of Attorney General was able to meet a male profile—someone unburdened with child care or housework. See Carol Kleiman, Nannygate Calls Up Good Old Days, CHI. TRIB., June 10, 1993, at N3.
students because he called on a woman to discuss a case involving a dispute over kosher cooking oil. Although it was appropriate for the women to point out that cooking and housework should not be genderized in the classroom, calling on male students to avoid traditional gender stereotyping does not comport with the real world in which men seldom assume domestic responsibilities. Eliminating gender from the discussion can lead to decreased awareness of women's problems and the omission of gender issues that should be brought to the attention of the class. If anything, both male and female students need to become even more aware of gender. A contracts course should inform them that housework tends to be devalued by the courts and that women receive little in the way of compensation for their domestic services. Thus, a gender equality approach can blind the class to the oppressive reality of genderized social roles by overlooking concerns that are critical to women.

Furthermore, the assimilationist proposal does not eliminate the flaws in contract methodology. The conceptual structure of contract tends to objectify women. To illustrate, consider the issues in my exams (which are probably fairly representative) in which students are expected to argue that a surrogate mother should be sued for breach of warranty or that a woman can claim recovery in quantum meruit from her former lover. In testing my students' knowledge of the fundamentals of contract, I also teach them to commodify women. If a woman is identified as a surrogate, she is envisioned as nothing more than a babymaker whose body is the vehicle of another's interests. As a professor, I sanction the exploitative instrumental usage of women and restore the patriarchal world that I, as a feminist, attempt to dismantle.

35. For the opposing view of the liberal feminist, which ignores the exploitation inherent in the practice of surrogacy, see Marjorie M. Schultz, Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality, 1990 Wis. L. Rev. 297, 302-03 (defending the enforcement of surrogacy agreements and insisting specific enforcement respects the expressed intent of both parties).
Similarly, as soon as a woman is classified as unmarried, she becomes entitled to compensation for only her household labor in a dispute with a former lover. Students "correctly" distort a woman's experience of a long-term, intimate, and loving relationship and perceive it as a discrete bargain exchange. By accepting the law's refusal to acknowledge the validity of the relationship as a marriage, my students absorb an ideology that reinforces traditional definitions of family and the existing ordering of social relationships. Families composed of single mothers with children and single-sex relationships are delegitimized as well. If I include another issue, that the woman has committed a fraud, I contribute to the stereotypical notion of women as deceivers of men who cannot be trusted to keep their word. If, however, the facts emphasize the exploitative nature of the surrogacy agreement or suggest that the male lover has lied and has failed to abide by his promise of marriage, I open myself to the criticism of bias. I then would be accused of politicizing the course. Apparently, neutrality means the woman is at fault. In the end, treating men and women the same amounts to perpetuating contract's fundamentally male perspective, failing to capture many women's experiential understanding of pregnancy, family, and personal relationships.

Furthermore, the liberal feminist view does not question the legal classification system itself, which is defined and ordered by privileged social groups. Certain rules in contract law are established as normative, whereas the claims of disfavored social groups who question the rules are treated as threatening exceptions to the natural social ordering. The social world of contract reflects existing hierarchies; it is comprised for the most part of employers and professional merchants (usually white men) opposing employees and less knowledgeable consumer/victims (at times women, blacks, and other outsider groups). Liberal feminism does not, however, challenge the power dynamics implicated in

36. Mary Joe Frug observed that a contracts casebook furthers gender stereotypes by illustrating the doctrine of mutual assent with examples from the commercial sphere where we presume men predominate, and illustrating the softer, less-important doctrine of detrimental reliance with examples from personal social relationships where women have traditionally been confined. Mary Joe Frug, Rereading Contracts: A Feminist Analysis of a Contracts Casebook, 34 AM. U. L. REV. 1065, 1092 (1985).

Patricia Williams comments that, ironically, those who successfully defend against a claim of contract are typically the old, the poor, women, and blacks. See PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: THE DIARY OF A LAW PROFESSOR 155-56 (1991).
commercial relationships or the ways case analysis forecloses the possibility of change.37

For example, in classifying employment contract cases, students must discredit an employee's claim of contract breach as well as her perspective on her work environment and reconstitute her story as just another illustration of, or an exception to, the employee-at-will doctrine. That is how such cases are usually described in a student's contracts outline. Whether the employee wins or loses, what counts and becomes a natural law is the employer's right to fire employees.38 The rule reconfigures the employee's life and at the same time indoctrinates a student to believe that relatively little can be changed. The employee maintains the burden of proving to the class that she falls into one of the limited exceptions. Thus, a predetermined thought structure takes control, shaping the reader as well as the issue and curtailing an understanding of more important underlying discriminatory social practices that should be revealed.

Traditional case analysis does not lend itself to the identification of systemic inequalities. It enthrones the hierarchical structure of work in our society39 and minimizes the pervasiveness of

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37. For example, in my recent contracts exam I presented my students with a paradigmatic adoption scenario. A young single mother without sufficient means to provide for her daughter Jessica enters into an adoption agreement with a childless couple, the DeBoers. Subsequently, when she marries and feels more secure about her future, she changes her mind. Asked to represent the biological mother, students attempt in vain to find an appropriate defense to the agreement. An adoption contract is not intrinsically unconscionable, fraudulent, unduly influenced, or the product of an unsound mind. Yet nothing but the most severe socioeconomic hardships, as well as the stigma attached to being a single mother, would compel most women to make such a choice in the first place.

38. See, e.g., Thompson v. St. Regis Paper Co., 685 F.2d 1081 (1984) (holding an employee has a cause of action for wrongful discharge only if the employee has given separate consideration, the employer has promised specific treatment in an employee handbook, or has violated a clear mandate of public policy in firing the employee). Marnie Mahoney writes that the walls of the workplace are papered with employee's rights. Sexual harassment policies, minimum wage rules, and authorized work hours are prominently displayed. The power of the employer over the employee, however, need not be posted:

This place can close at any time. We could be gone with minimal warning to you, and you can't stop us.
I can fire you any time I want. I don't even need a reason.
If I do fire you, it will be up you to prove it was not your fault.
Otherwise, you can't even get any unemployment insurance benefits.


abusive treatment,\(^{40}\) including sexual harassment.\(^{41}\) By adhering to the legal classification scheme, students absorb the status quo. As a result, students discount the primary claim of outsiders—that the legal system inadequately responds to inequality and oppression. Accordingly, assimilating outsiders into the tradition does not include them in the very interstices of the law itself. Rather, they are subsumed within the law's biased structural system. Once an outsider has vanished within the classification, it becomes more difficult for students to realize that the outsider perspective is not really there. Indeed, a student can become so steeped in grouping cases under the heading of one fundamental contract principle, that she is disabled from writing a persuasive argument.

This problem was brought home to me in my first year of teaching contracts. A student was experiencing great difficulty in writing an appellate brief. When she asked me for help, she told me she saw no point in reading cases in most of her first year classes because the rules were already there. Cases were merely anecdotal illustrations of the existing doctrine. I asked her to explain the authoritative source of the rules and she mechanically repeated what she had been taught—case law. Something was seriously wrong. She was oblivious to the manipulation of the rules and facts in case law—that lawmakers assume only certain rules apply and that they interpret doctrine in different ways, using conflicting arguments. Only after prolonged discussion was I able to pinpoint her confusion. She had so internalized the classification system as an objective depiction of reality that she was prevented from critically reading opinions.

\(^{83}\) (suggesting that legal reasoning is an ideological form of thought, presupposing and legitimating the existing hierarchy of social relationships, such as landlord/tenant, and employer/worker).

\(^{40}\) See, e.g., Regina Austin, Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress, 41 STAN. L. REV. 1, 3-4 (1988) (accusing tort law of condoning and supporting the emotional abuse of minority and female employees who are in the lowest socioeconomic tier of the labor force and must endure abusive mistreatment by supervisors).

\(^{41}\) The availability of a legal remedy as an exception to the employee-at-will doctrine does not necessarily alter the power relationship between employer and employee, or men and women. See Mahoney, supra note 38, at 1289-98 (explaining that leaving one's job or suing one's employer because of sexual harassment are unrealistic options for many women employees who are unable to obtain equivalent work and fear reprisals if they dare speak out; Vicki Schultz, Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 HARV. L. REV. 1749, 1833-36 (1990) (describing the hostility and resistance to the presence of women in the workplace).
She had cabined her mind in her efforts to catalogue cases. I found the best way to help this student was to challenge her habit of organization. I asked her to find ways in which the cases were inconsistent and unpersuasive. Deconstruction, not the construction of legal categories, enabled her to comprehend the dynamic nature of law and to begin to think like a lawyer.

III. THE CARING PROPOSAL

The third approach to diversity, the caring proposal, is more subversive. A contract is recast into a personal relationship between mutually interdependent parties who should respond to each other's interests. This proposal has the advantage of significantly broadening contract law's subject matter to include issues that are of special interest to women. In effect, contracts is combined with family law. The methodology is closely associated with cultural feminism, that ethical principles of caring and responsibility are more important than minimalist contractual obligations or individualistic personal rights.42 Duncan Kennedy's groundbreaking work on contract law,43 as well as the writings of Ian MacNeil similarly reinvent contract analysis.44 Students learn to question the underlying values of the bargain exchange rules, to reconceptualize contract as a long-term ongoing relationship, and to consider a contracting party's social responsibility instead of just his or her interest in market maximization.

Emphasizing agreements in the family, however, such as marital and adoption contracts, and surrogacy and cohabitation agreements, can suggest that women should be excluded from commercial transactions altogether. Cultural feminism's ethic of care insinuates that women are imbued with special nurturing qualities and that gender differences are innate, thereby perpetuating separate spheres. Existing social arrangements in which women assume the double burden of housework and a job outside the home appear to have been created by inborn gender-specific

42. See supra note 27.
43. See Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 HArv. L. Rev. 1685, 1717-22 (1976) (noting the ambiguity in contract theory, reflecting inconsistent visions of a world of free individualists and a world of social beings who must take into account the interests of others).
44. See Ian R. MacNeil, The New Social Contract: An Inquiry Into Modern Contractual Relations 10-35 (1980) (discussing the differences between a theory of contract as a discrete transaction and a relational contract, in which values other than an increase in wealth play a role).
traits. Additionally, students view one-sided marital dissolution agreements, surrogacy and cohabitation contracts (typical situations in which women exercise little bargaining power), as well as discriminatory treatment in the workplace as not requiring legal intervention because those situations are the expressions of women's altruistic nature or the "natural" consequences of womanhood. If I help students to understand that women need the law to recognize the value of their caring, they can still assume that separate spheres are a part of the natural order, instead of the social invention of patriarchy. Moreover, the nurturing ethic of cultural feminism tends to be associated with the values of middle-class white women. For example, in a recent case a black gestational surrogate, who argued she had bonded with the non-black child she carried and that the mother/child relationship outweighed her contractual obligation, was denied custody. As a black woman on welfare, her maternal caregiving ability was devalued.

Critical contract theory, emphasizing communal standards of trust and responsibility, is also problematic. For example, in discussing unconscionability, despite good intentions, professors can portray outsiders as perpetual helpless victims denied of all agency who are not quite smart enough to protect themselves.

45. For a truly frightening example, see EEOC v. Sears Roebuck & Co., 628 F. Supp. 1254 (N.D. Ill. 1986), aff'd, 839 F.2d 302 (7th Cir. 1988) (holding Sears did not discriminate in failing to promote female employees who "naturally" prefer to care for their families rather than secure time-consuming and higher-paying jobs). Joan Williams claims that cultural feminism is responsible for the result in Sears. She believes the ethic of care harms women by disguising the unfair wage-labor system and the unequal burden on women who maintain dual working roles at home and on the job. A woman's "choice" to sacrifice career success is cloaked in virtue instead of being exposed as gender discrimination. Joan C. Williams, Deconstructing Gender, 87 Mich. L. Rev. 797, 814-15, 831 (1989).

46. See Beverly Horsburgh, Redefining the Family: Recognizing the Altruistic Caretaker and the Importance of Relational Needs, 25 U. Mich. J.L. Ref. 423, 453, 497 (1992) (proposing that women who are in informal relationships and women who are formally married be awarded permanent support when their relationships end, in recognition of not just their housework, but also their value system).

47. Johnson v. Calvert, 851 P.2d 776 (Cal.), cert. denied, 114 S. Ct. 206, and cert. dismissed, 114 S. Ct. 374 (1993). For a criticism, see Beverly Horsburgh, Jewish Women, Black Women: Guarding Against the Oppression of Surrogacy, 8 Berkeley Women's L.J. 29, 45-46 (1993) (arguing cultural feminism's claim that surrogates are entitled to custody, on grounds they bond with the children they carry, does not help a black gestational surrogate because the bonding experience of a black woman who is genetically unrelated to the child is not believed and a black woman's mothering skills are not valued).

48. See generally Duncan Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 Md. L. Rev. 563 (1982) (insisting that a more empathetic standard is needed in contract law and that paternalistic motives are pervasive in the traditional doctrine).
In addition, white students may stereotype all blacks as welfare recipients, likely to be involved in Walker-Thomas\textsuperscript{49}-type dealings. They may not be made aware of the black middle class. Important differences among individuals in a minority group could be neglected. Conversely, if I ignore race in discussing Walker-Thomas, I do not educate my students on the social and historical context that informs the court's opinion. I have found many students do not realize the plaintiff is black in Walker-Thomas and few know much about the civil rights movement. In reading the case, they do not consider its background—that as late as the 1950s, Jim Crow laws prohibited African Americans from exercising free choice in the marketplace. I need to bring race into the class discussion in order for students to see Walker-Thomas as a civil rights case, a part of the struggle of African Americans to secure access to public goods and services but, at the same time, I need to find ways to ensure I avoid stereotyping.

I have also found that critical contract theory's methodology, deconstructing legal analysis to reveal its underlying indeterminacy,\textsuperscript{50} does not in itself suggest the importance of focusing on one's own personal life. Because students have been indoctrinated to accept liberalism's construction of reality and to interpret the experiences of others from a privileged vantage point, I need to entice them to trust the personal. I try to create an atmosphere in which students are willing to ground themselves in their situations, and from that context, reconstruct a legitimate reality informed by their own knowledge of social life. By viewing the situation from their personal vantage point the students will be better able to perceive the incoherence in the liberal vision.

For instance, in discussing unconscionability and contracts in the family setting, I want the class to look at their own experiences and realize that we are not always obsessed with the need to control government, despite the prominence of this issue in liberal theory. Power does not blow in from only one direction, like a strong prevailing northeastern wind, but comes at us from many regions, permeating our everyday lives. Some students are only too aware of the misuse of government power. A black student will reveal that he has felt the full brunt of the police power in his community, singled out for constant surveillance.

\textsuperscript{49} Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (holding unconscionable an installment sales contract in which each item purchased became security for all other items sold to the buyer).

\textsuperscript{50} See supra note 11 for an analysis of critical legal theory.
Yet in other circumstances the presence of the police is sorely missed. Many students are willing to confess their preoccupation with the faculty's power to assign the grades that will play such a determinative role in their career opportunities. They also mention the authority of law school deans, the influence of peer pressure, and problems with parents or spouses as ongoing conflicts in their personal lives. I confide I also experience power issues in my life. My family responsibilities, the administration, tenured faculty members, and students exercise control over me. Student/faculty evaluations and a law review's decision on publishing are important salient factors in my promotion.

Although there are benefits in these exchanges about the variety of power conflicts in our daily lives, liberalism's notion that the state is the exclusive enemy of freedom is ingrained, pulling on the mind of the class. Students continue to lose sight of their own awareness that power relationships exist in private social settings, as well as in the public context. Even if they are cognizant of power sources other than the state, they nevertheless cannot connect the liberal theory with their lives and note that there is a disparity. Students have been trained not to question presupposed theoretical constructs, even if they fail to match up with reality. Abstraction has become true because students are tutored to trust liberal theory more than their own perceptions in discerning the truth. They also are not repeatedly shown in the classroom that the answer does not lie in merely controlling government, but that oppressive social relationships also require a response from the state.

The artificial compartmentalization of private law from public law has other negative effects. This approach also isolates students from seeing that the state is implicated in private decision making and that contracts is a matter of public law. Course divisions make it more difficult for them to comprehend that the state is always present, influencing choices by empowering some and weakening others.

Merely discrediting and deconstructing authoritative textual readings, however, does not suggest to students that they should trust their own experiences and risk sharing them with each other. They are deprived of enriching themselves by really listening to diverse experiences and accepting their authenticity. Unless they are encouraged to have faith in the personal account, it is not possible to probe beneath the thick layering of socially constructed images in liberalism and fathom the many power relationships that shape our lives.
IV. THE RADICAL PROPOSAL

In contrast to the liberal view, the radical feminist proposal directly attacks the private/public distinction and presents agreements in the family and in the market as part of an overarching social order in which women are dominated by men. Combining contracts with family law in this manner can aid in dispelling idealistic illusions of a private area of life unsullied by power relationships or financial bargaining. Women’s work in the home could be rendered visible to students once they are encouraged to see the family as an economic institution. On the other hand, representing contracts as the systematic subordination of women is also a privileged and partial perspective. Marital agreements and cohabitation contracts appear to be the concerns primarily of white women who press claims against relatively affluent white men. I essentialize all women by narrowly constructing contracts around white women’s experiences, ignoring other institutional forces such as race and class. I also reinforce the tendency to see gender bias from the perspective of well-paid professional women. Radical feminism in contracts, just like liberal feminism, can take on elitist overtones. For example, in discussing compensation for housework, some women students attempt to show the male students that men devalue women’s work by pointing out how expensive it is to hire a maid.

Students also could assume that traditional women are only unenlightened passive victims of powerful social forces, thereby denying many women the dignity of knowing their own minds. I could present a picture of women that fails to reflect their complex experiences and various responses to oppression, de-

51. See generally Catharine A. MacKinnon, Toward a Feminist Theory of the State 327 (1989) (arguing that traditional social institutions are patriarchal and that liberal theory masks the reality of women’s oppression by enforcing the male point of view); Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 YALE L.J. 1261 (1991) (claiming that a model of equality based on women’s sameness with men or difference from men is unable to challenge the systematic social construction of women as inferior to men).

52. Radical feminism’s claim that women are oppressed victims who at times contribute to their own domination by internalizing the dominant culture’s depiction of women alienates many women who see themselves as autonomous decisionmakers. It also fails to recognize that women’s choices are often not easily made. A woman’s decision to take on primary responsibility for home and children can result from her lack of success in convincing her spouse to agree to a more equitable arrangement. See Kathryn Abrams, Ideology & Women’s Choices, 24 GA. L REV. 761, 782, 789, 798 (1990) (criticizing feminist theories based on ideological determinism and suggesting that narratives are better able to convey the subtle, multi-causal factors influencing women’s choices).
picting them as irrational and weak, as does the patriarchal
description of women that all feminists deplore. Moreover, be-
cause we encourage the preservation of hierarchy, students may
decide that a court should not reward a woman for maintaining
a conventional life style. Overall, I may not be sensitive to many
women; I could deny the experiences of many outsiders by
overlooking oppressive social practices other than gender and
could unintentionally lead the class to believe that helping women
achieve equality means ignoring the traditional woman’s values
and economic plight.53

Radical feminism, however, also has the potential to surpass
its seemingly limited, unidimensional focus on institutionalized
gender bias. For example, after a heated class debate over the
court’s decision in Walker-Thomas,54 I ask the class the following
questions: Why do many students believe the buyer is fully
informed and not the victim of an unfair surprise? Conversely,
why does the law presume the buyer of abortion services is not
fully informed and must be given additional time and additional
information?55 If the purchase of the goods in the unconscionable
contract seems ill-considered, surely it is a less-informed choice
than abortion, which is a serious matter and less likely to be a
frivolous decision. Can we read the buyers’ minds? This leads us
into a comparison of the negative images of women and the poor
in case law, calling into question the social attitudes that govern
decision making. Looking at the contradictory assumptions re-
garding whether there has been an exercise of meaningful choice
heightens awareness of the ways those in power tend to depre-
ciate the problems of disadvantaged social groups and to resort
to negative stereotyping. Accordingly, understanding patriarchal

53. Although I agree with Joan Williams that the ethic of care harms women in
general by marginalizing them in the workforce and reinforcing genderized social roles,
an individual woman, nevertheless, should not be denied compensation for her domestic
work and traditional values out of fear that remuneration will encourage the continuation
of an unequal wage-labor system. It is not helpful for a lawyer to tell a woman she has
been deceived and would have been better off if she had spent more time in the workforce
when she needs someone to champion her interests at the time of divorce. She depends
on her lawyer to argue that her contributions in the home are valuable. See Peter
Margulies, The Mother with Poor Judgment and Other Tales of the Unexpected: A Civic
(suggesting that a lawyer needs to be open to the client’s values, even if they are at
odds with one’s own).

(holding it is not an undue burden to require a woman to wait 24 hours before having
an abortion).
social images can pave the way to understanding other kinds of negative social imprinting perpetuated in the law.

V. THE MULTIPLE PERSPECTIVE PROPOSAL

The last proposal to include minorities, the multiple perspective proposal, is more eclectic. I use narratives and articles by critical race scholars with the hope that students will transcend their own particular outlook and reappraise contract issues from the standpoint of the oppressed.\textsuperscript{56} I also include more traditional scholarship and socioeconomic studies, noting the effects of class, race, and gender on bargaining power. Personal accounts of racism refute notions that all blacks are on welfare and reveal the widespread antipathy encountered by African Americans of all income classes in buying goods.\textsuperscript{67} Narratives open the class to the human dimension and exert a sympathetic pull on the students' emotions. Critical race scholars expose the depth and breadth of prejudice, pointing out that the negative images of outsiders exist in popular culture, although they are often not immediately recognized as racist expressions.\textsuperscript{68} In addition, studies that prove the price of a new car is set higher for women and for black men,\textsuperscript{69} or that document how the doctrine of unconscionability has not benefitted the urban poor,\textsuperscript{60} illuminate the class-based, sexist, and racist power structures conditioning negotiations in the marketplace. As a result of reading these

\textsuperscript{56} Judy Scales-Trent explains this teaching method as helping others who are not outsiders to see the ways we are all the same as well as the ways we are different. To the extent that students who are not Asian-American can see this society through the eyes of an Asian-American ... to the extent that a student who is not gay can see the world through the eyes of a gay person ... to this extent will they be less able to engage in the oppression that harms so many.

In order to get to this point, the students have to see themselves at the crossroads. They have to see not only the differences between themselves and others, but they have to see the sameness also.


\textsuperscript{57} See WILLIAMS, supra note 36, at 44-51.


materials, students could become less prone to stereotyping and more skeptical of the freedom of contract rhetoric, which is oblivious to racism and sexism, in the case law. At least in theory, students are enabled to see past the empty formalism of what passes as purportedly consensual decision making. They also are sensitized to others who are different from themselves and better educated concerning minority problems. The presence of these writings in the syllabus, furthermore, affirms the concerns of minority students in the class.

Although many students are emotionally touched by the eloquence of these writers and I may avoid the problem of essentialism by adding these materials to a syllabus, locating relevant sources is a heavy burden, especially for professors who, like me, teach in small schools with limited resources. Outsider perspectives tend to be shunted aside in a traditional library's acquisition plan. Moreover, when I am able to find an appropriate article in one of the few law journals receptive to new ideas, I realize many students are reluctant to read past case assignments. Even if I were better able to inspire my students to appreciate the importance of reading more than the usual casebook, I am not convinced that a politic of the personal resonates for the majority of students or that many grasp its legal implications. Relatively few in the class seem to understand the significance of a narrative and how it relates to the traditional contracts discourse. In fact, I have found that students tend to interpret the more creative and subjective writings as irrelevant to rules of law.

Because students have been taught to devalue subjective descriptions of personal experience in favor of abstract legal classifications, they disregard highly personalized writings and the ideas of many nontraditional scholars, not realizing the authors intend to expose the law's partial and biased outlook. As a result, students lose more than just the benefit of understanding outsider perspectives. They are also deprived of the help and guidance that nontraditional scholarship provides in coming to terms with the traditional discourse. They fail to realize that some of their struggles and frustrations are due to the incoherent and subjective nature of the concepts and categories of contract law.61

61. Clare Dalton's article exposing the underlying indeterminacy in contract analysis could be helpful to first-year students. Dalton validates a student's tendency to apply detrimental reliance to a fact pattern instead of consideration and suggests that the student's analysis is more accurate than the law's preference for consideration. See Dalton, supra note 22, at 1090.
At the very least, if students read these materials, they would be less prone to blame themselves for their lack of "common sense."

Students are also impressed by the power of law and many seem to reprocess their own experiences according to the traditional rhetoric of rights analysis and notions of formal equality, rather than associate themselves with the disturbing revelations present in less traditional scholarship. Some find it difficult to identify with, or hesitate to see themselves in, the narrative or the socioeconomic study. Most white students seem to believe the struggle against white supremacy is over and many male and female students assume sexism is a thing of the past. If we have not personally experienced bias, it is easy to believe that we are all equal now. Even raising these topics unsettles students, causing a hostile reaction. Consequently, the steadfast grip of a student's personal belief system can overwhelm the subjective minority account, rendering it trivial, anecdotal, and nonrepresentative.

Many students, moreover, resist discovering that outsiders are excluded from the discourse, not realizing that the processing of traditional analysis has immunized them from recognizing the bias in the doctrine. A student who has been drawn into the "Cult of Objectivity" wants to remain a member in good standing of the dominant social group.

In assimilating legal reasoning, a student also can be personally subsumed, enveloped by concepts that demand she reinvent herself. She can become malleable, learning to distance herself from her own identity and the problems of outsiders as well. Once a student is submerged in law, criticisms of the existing discourse can be interpreted as an attack on the student herself. A student's self-worth can become caught up in her ability to ingest doctrine and prove she has digested it in class and on an exam. Even if the law also has taught her to belittle herself, ignore abuse and oppression, and accept a humiliating judgment imposed by others, her need to stay with what she has learned, rather than chance the unknown, can cause her to refuse the very thoughts and insights that would free her to create her own identity.

In the law school setting, social issues are introduced that students may have personally experienced, previously thought about, or never considered at all. No matter what the student's degree of preparation, the law exerts intense pressure on an individual student to conform to the dictates of the dominant culture's picture of human behavior. She is obliged to transform
herself to meet a standard presented as universal, and stifle aspects of her personality at odds with the dominant viewpoint. A student has little choice but to imbibe the legal culture's ethnocentric outlook as representative of all outlooks, including her own self as the subject matter of another's outlook in the process. The cumulative effect of learning law is that the student adapts herself to respond to the social world according to the law's particularized demands. A student's self-identity is inevitably influenced and, if needed, altered. The process can be psychologically self-destructive.

Although some students resist conforming and many glimpse the biased nature of the law, without the opportunity to focus on outsider issues and discuss one's personal response to the doctrine, it is easy to swallow indignities reflexively. Critical self-conscious awareness of the law's effect upon oneself requires time for thought and discussion. The typical law school program allot little time to this end. Furthermore, unless sufficient space and time is made for outsider perspectives, the pressure to learn the tradition can insulate many students from receiving ideas that could provide them with needed emotional support.

The classroom's hierarchical socratic format, an epistemology grounded in the belief that students can find knowledge if their teachers guide them through the rigorous demands of doctrinal


63. See Kimberlé Williams Crenshaw, Foreword: Toward a Race-Conscious Pedagogy in Legal Education, 11 NAT'L BLACK L.J. 1, 4 (1989) (stating the objective perspective of the classroom requires a minority student to "look back at herself to determine whether her own presence in a white neighborhood would be sufficient cause for her to arrest herself").

64. For instance, a student's loss of confidence due to low grades could influence the rest of her life, interfering with her bar exam preparation and her relationships with colleagues and clients. Although many law schools offer tutoring programs and institute other helpful services designed to ensure "high risk" students survive, little is implemented to convince students to believe in their ability. Instead, the tradition is reinforced by remedial measures, exacerbating feelings of low self-esteem.

In order for these students to tackle their studies with confidence, they need more nontraditional perspectives, not just repetitions of the standard curriculum. Although a fresh approach, sensitive to outsider problems, could build assurance in their lawyering ability, they are less in a position to hear the voices of outsider scholars, oftentimes similar to their own, because they must be doubly dedicated to the traditional discourse.
analysis, is more often mystifying rather than enlightening. Because the process is arbitrary and subjective, it creates pressure on students.\(^6\) Any minimal gain in comprehension can be an exhaustive ordeal. Consequently, if I suggest that a court's refusal to enforce a cohabitation agreement and its willingness to uphold a surrogacy agreement are expressions of biased and subjective cultural values, I could threaten a student's hold on an understanding of the law she initially struggled so hard to obtain. The notion that the law is not objective topples an entire thought structure the student justifiably takes pride in having mastered. Furthermore, I attack the standardization process of law school itself, more than just a given rule of law. A student at this point is likely to resist, not welcome, the suggestion, since she has invested considerable emotional and intellectual efforts in adapting herself to fit within the confines of the cultural paradigm. Her tentative confidence in herself to become a lawyer is at stake.

Hence, the difficulty students experience in processing interpretive constructs that are eventually internalized as objective truths tends to encyst them against being receptive to new ideas. The nontraditionalist professor appears to be engaging in an unnecessary egocentric as well as politically motivated departure from unfiltered rules of law; law that the student now accepts as unconnected to a particular social group's politics. Outsider perspectives that are intended to reveal the politics of the majority are reduced to politicized exceptions. Minority concerns become, at best, minor additions to, or at worst, suspicious deviations from, a predesigned text. This result is unfortunate for all students, but for women students it is particularly counterproductive. Some women appear to be less aware of gender bias than black students are of racism, and for that reason are more likely to cling to the tradition and reject feminist analysis.

\(^6\) See Kennedy, supra note 21, at 40 (stating that the classroom arrangement in a law school suggests both “the patriarchal family and a Kafkalike riddle state”); see also Deborah L. Rhode, Missing Questions: Feminist Perspectives on Legal Education, 45 Stan. L. Rev. 1547, 1554-55 (1993) (arguing that the socratic method promotes authoritarian relationships as well as competition instead of cooperation, fails to value the emotional side of interpersonal relationships, and rejects the importance of ethical issues); Susan H. Williams, Legal Education, Feminist Epistemology, and the Socratic Method, 45 Stan. L. Rev. 1571, 1574-75 (1993) (criticizing the socratic method for assuming knowledge is something to be found and is possessed by the professor rather than being the result of an exchange between the professor and the student that creates knowledge of which neither was aware beforehand).
Yet a diverse perspective may be exactly what these women need the most in order to feel better about themselves.\footnote{Although I have seen how an understanding of feminism instills confidence, self-pride, and a sense of dignity, women law students resist feminism for many complex reasons. For one thing, it is dangerous to be defiantly female in a hostile environment in which male values reign supreme. See Deborah Waire Post, \textit{Reflections on Identity, Diversity and Morality}, \textit{6 Berkeley Women's L.J.} 136, 141 (1991) (noting the author discovered gender bias in law school and exclaiming how easy it is for women law students to internalize a value system that teaches them to hate themselves and other women).}

In addition, the voice of the oppressed at times has found refuge and strength in hate speech. Some who claim to speak for a minority express misogyny, racism, homophobia, or antisemitism,\footnote{For an article commenting on the need to air prejudice and resolve differences within and between social groups, see Horsburgh, \textit{supra} note 47, at 59 & n.112, 60 & n.118, 61 n.119. For a contrasting view, suggesting blacks should not be quick to condemn antisemitism and sexism within the black community, see Bell, \textit{supra} note 8, at 117-22.} discrediting the value of more sensitive minority perspectives. Scholars who should become familiar to students are thereby discounted.

A contracts syllabus, to be truly representative, should also reveal the ways a minority can oppress its own members. For instance, as a Jewish feminist, I am aware that Jewish Orthodox husbands routinely exact economic concessions from their wives in divorce settlement agreements by threatening to withhold the "get" (the Jewish divorce), a power unilaterally granted to men by Jewish law.\footnote{See, e.g., Perl v. Perl, 512 N.Y.S.2d 372 (N.Y. App. Div. 1987); Irving Breitowitz, \textit{The Flight of the Agunah: A Study in Halacha, Contract, and the First Amendment}, \textit{51 Md. L. Rev.} 312 (1992); Marc Feldman, \textit{Jewish Women and Secular Courts: Helping a Jewish Woman Obtain a Get}, \textit{5 Berkeley Women's L.J.} 139 (1990).} Because no group of people is immune from prejudice or exploitative tactics, oppression within a social group as well as the divisions between groups should be exposed to the class.

In summary, including outsiders in the traditional discipline can lead to distortion and rebound against good faith efforts, conveying a different impression from that which was intended. Professors may inadvertently make minorities the victims of their own inclusion project.

On the other hand, inevitably there are flaws in any nonconventional theoretical perspective. Given that traditional legal analysis and formalist liberal theory were not designed to meet the needs of outsiders who played no role in their development, any new jurisprudence faces the daunting task of expanding or reinventing analysis without inventing a new Cult, and, at the
same time, revealing a small part of the numerous ways in which a minority is excluded and misunderstood. No megatheory or unique vision is able to capture and resolve all of the issues facing outsiders in an imperfect world beset with serious socio-economic inequalities and prejudice. Scholars have learned to seek flexible and pragmatic solutions that are tailored to the context of the particular situation, to live with contradictions, and to eschew dogmatic approaches.

For this reason, including outsiders and their various approaches to law in contracts necessarily results in a mix of conflicting as well as limited proposals. If I convey to students a sense of the magnitude of social ills to be addressed, they need not be led to assume that any legal theory can be reduced to a formula, providing obvious answers that are instantly ascertainable and relevant to all that ails us. Additionally, some of the difficulties encountered in introducing outsider issues can be candidly dealt with in the classroom. If classical case law may offend a particular outsider group, other cases can be found or the case can serve to expose the narrowness and bias in the tradition. Furthermore, opening class discussion to a criticism of one's attempts to include minorities actually helps to sensitize students. For example, the tendency to privilege middle-class white interests or to stereotype or objectify outsiders can be counteracted, to some extent, by simply making students aware of the problem and admitting that, at times, we are all guilty of this mistake. Also, as a white woman, I have more confidence in my teaching of women's issues than my ability to communicate the black community's concerns. I need to be open with my students about my own qualifications as well. Professors can share the good and the bad with students: the wonderful insights that scholarship can provide, our frustrations with our own limitations, and the shortcomings in case law or legal theory. More importantly, the drawbacks in nontraditional jurisprudence are not responsible for all the discouragements that a professor experiences in opening a course to diversity.

I suspect that bigotry lingers on, an intransigent feature of our culture, despite efforts to diversify. The hatred expressed in

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70. See Radin, supra note 10, at 1700-04.
my classroom has reminded me that we all have been raised to be racist and sexist deep down. Outsiders cannot truly be included in the context of the discourse in any course as long as the overall social world of a law school remains hostile to individual differences.

Prejudice against outsiders and outsider perspectives are artfully expressed. One way is for a school to depreciate the worth of courses taught by professors who are known to be interested in outsider issues. Another way is to guide students to select certain courses by maintaining requirements and by scheduling disfavored courses or professors at an inconvenient time. One popular way is to devalue the importance of teaching jurisprudence and writing theoretical law review articles, presenting these pursuits as largely irrelevant to the practice of law.72

Because of prejudice, students who resist conforming to the homogeneous model find they must withstand intense social pressure from their mentors, the faculty, and their peers. Nonconformists risk disapproval, intimidation, and the hostility of professors and other students just by being receptive to outsider perspectives. It is an act of courage to sign up for certain electives, such as AIDS and the Law, a seminar on women's issues or civil rights, or labor law taught by a critical legal studies scholar. As long as nontraditional students incur suspicion and disfavor by faculty and other students, undermining their ability to express their preferences, the inclusion project is less than completely successful.

Yet another subtle form of prejudice is to persistently ignore the raised hands of women in the classroom or to interrupt the women midstream, in order to hear what the men have to say, notwithstanding the women's perfectly acceptable responses. One last form of prejudice causes the most harm. Outsider students are compelled to hear painful and cruel descriptions of themselves and their behavior in traditional courses. To oppose the majority requires a degree of courage that no student should shoulder without the support of the school. The following incident illustrates what I mean.

Last year a professor at my school invited a prominent attorney to speak to the class concerning his strategy as defense attorney

in a highly publicized rape case. Although many stereotypical, vicious, and uninformed comments regarding women and date rape were "jokingly" expressed by the lawyer and some of the male students, none of the women in the class felt free to complain. Some internalized the portrayal of women as an accurate description of themselves, not realizing they were reinforcing their lack of self-esteem. Some, aware they were being insulted, cried silently to themselves. One woman, in frustration, wrote each statement down on paper, hoping to discuss the remarks more privately with her friends. Subsequently, the women came to my office for sympathy and to ventilate their outrage. After I passed around the Kleenex, I asked them why they hesitated to speak out at the time the incident occurred. They told me they did not know what to say. Although they felt offended, they did not think it would be polite to criticize an expert practitioner and were worried that they could also incur the anger of the professor who was a friend of the guest lecturer. After all, the expert was only "joking." If they overreacted, they would be told they lacked a sense of humor. Most of all, they were concerned with peer pressure. They feared the antagonism of their classmates and social ostracism. The social costs of disagreeing with the majoritarian culture's depiction of women inhibited their need to defend themselves and other women.73

Note what we are teaching future lawyers. Although the lawyer's jokes seem asides, a warm-up to the more serious discussion on effective representation, they convey a seductive message. As an expert who represents the very image of professionalism, his jokes are not harmless or neutral distractions, separate from his more serious lecture. Ostensibly neutral trial techniques embody prejudice against outsiders. A successful rape defense requires negative stereotyping of the victim, drawing on the fact-finder's fear and hatred of women. Misogyny is inscribed in effective advocacy. Thus, the woman-hating expressed by the expert was not a joke. Rather, it was the core content of his lecture, his very prescription of good lawyering.

In addition, arguing against the grain and representing what one believes to be true is not fostered in a law school if students

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73. Studies indicate that women law students speak less in class because they are intimidated by an environment that excludes and trivializes women. See, e.g., Taunya Lovell Banks, Gender Bias in the Classroom, 38 J. LEGAL EDUC. 137 (1988); Stephanie M. Wildman, The Question of Silence: Techniques to Ensure Full Class Participation, 38 J. LEGAL EDUC. 147 (1988).
fear the disapproval of the majority. How can students learn to effectively represent women or a gay person in the armed forces in this kind of atmosphere? My best guess is that the traditional law school culture cultivates passivity and an unquestioning acceptance of those in authority. Ultimately, diversity in one course is not much help to outsider students if in other courses they do not feel free to courageously argue what is a matter of their own self-respect. The laissez-faire approach of most law schools, which assumes students are capable of becoming assertive without institutional intervention, empowers the freedom of expression of the sexist "fraternity boys" in the quadrangle and suppresses the voices of the timid and the embarrassed. We forget that a professor may be tempted to please the prevailing sexist culture in the classroom because she will be well-rewarded in her student evaluations. In defending the remarks of the outsider student, the professor takes what may be an unacceptable risk. Furthermore, a student pays later for what she has said in class. In ignoring social pressure, by refusing to adopt policies prohibiting sexual and racial harassment, or, at a bare minimum, by refusing to emphasize the importance of sensitivity to others, law schools allow serious emotional injuries to take place. Outsider students and professors have every reason to feel betrayed, depressed, and angry by what they experience in the law school environment.

Moreover, even though including outsiders in the discourse is not possible unless we are able to communicate meaningfully with each other, and before we can converse we must be willing to admit to our own prejudice, bigotry is the claim that is most likely to be denied. I am therefore pessimistic about attempts to diversify the curriculum. I do not suggest that professors abandon the inclusion project. Nevertheless, without a willingness to become more self-critical and sincerely confess our insensitivity, tokenism may be all that can occur.

VI. Conclusion

In summary, I believe law schools are required to do more to confront their problems. They need to rethink their commitment

74. Similarly, Susan Estrich has argued that rape law punishes a woman by requiring her to stand up and fight like a man and to react as if she is the bully in the schoolyard, even though cultural attitudes regarding sexuality encourage male aggression and female passivity. See Susan Estrich, Rape, 95 Yale L.J. 1087 (1986).
to those values that are appropriate to institutions responsible for teaching the fundamentals of a democratic legal system. Diversity entails a change in the legal culture's attitude and a sweeping reform of the curriculum. A series of ongoing programs designed to educate and sensitize the entire law school community may prove fruitful. Otherwise, the efforts of professors to open a course to diversity will continue to be seen as non-neutral partisan politics, a mix of decent and indecent proposals. As long as an entire law school curriculum is only occasionally tuned to non-white, non-male concerns, law schools reproduce an all-white, all-male oriented legal practice that only some professors condemn in the classroom as an indecent proposal. In the end, despite the protestations of well-intended formalists, liberals, and radicals, because of a three-year processing, we teach our students that the status quo is really pretty decent after all.