TRANSFORMING THE CURRICULUM: WHAT DOES THE PEDAGOGY OF INCLUSION MEAN FOR BUSINESS LAW?

*ELAINE D. INGULLI

INTRODUCTION

Since the Black Studies and Women's Studies movements of the late 1960's, colleges across the nation have experimented with projects to integrate the "new" scholarship on women and ethnic studies into the curriculum.[1] Attention has been focused almost exclusively on the liberal arts. Little has been written about transforming the business curriculum, despite the popularity of the business major in American colleges and universities. This article lays the groundwork for such transformation. It seeks to "re-vision"[2]

* Associate Professor of Business, Stockton State College. The author thanks Brian Ackerman, Nancy Ashton, Denny Dugan, Richard Greenstein, and Terry Halbert for inspiration and assistance with this article.

[1] During the 1980's attention focused primarily on integrating feminist scholarship and works in ethnic studies throughout the entire curriculum. Government and foundation money has supported such efforts. In 1986, for example, the state of New Jersey initiated the first state-funded project to integrate race/class/gender studies into the curriculum. In 1988-89 the Ford Foundation earmarked approximately $5 million for curricular developments, including grants for mainstreaming new scholarship on women. *See* McMillan, *Foundations are Being Drawn into Colleges' Debate Over Cultural Diversity in the Curriculum*, 35 CHRONICLE HIGHER EDUC. 25-26 (April 26, 1989). In addition, whole issues of various journals have been devoted to feminist scholarship issues. *See, e.g.*, 10 WOMEN'S STUD. Q. 6 (1982) (curriculum reform); 20 J. THOUGHT 5 (1985)(feminist education); 38 J. LEGAL EDUC. 1 (1988) (women in legal education); 15 WOMEN'S STUD. Q. 6 (1987) (feminist pedagogy).

[2] Poet and essayist Adrienne Riche, describes re-vision as the "act of looking back, of seeing with fresh eyes, of entering an old text from a new critical direction." A. RICH, ON LIES, SECRETS AND SILENCES: SELECTED PROSE 1966-1978, at 35 (1979).

both the scholarship and the pedagogy of business law. The goal of such re-vision is to explore ways to transform business law, and to make the discipline more fully reflective of the ideas, perspectives, interests, and needs of all genders, races, and classes.

Only a visionary could hope to transform business law. Despite more than two decades of debate about its role in the undergraduate curriculum, there is little consensus about the nature of business law.[3] At best, there is agreement on what business law is not. Business law is not a single and distinct body of law like torts or contracts, which have histories of legal development and scholarly exploration. It is not even a course of study with relatively uniform content. Rather, it is a hodge-podge of traditional bodies of law, with the contours of the courses defined by the preferences of each faculty member. Within the discipline of business law, efforts to address race, class, and gender bias in the curriculum have been minimal.

This project to transform the discipline is not easy. Even for those who teach narrowly defined areas of law, such as the Uniform Commercial Code or criminal law or contracts, it is hard to re-vision and revise a course one has taught for years. For those who teach business law, re-vision is even more daunting, because it requires attention to virtually every aspect of the law. Not only must our courses change, so too must our scholarship. The discipline must include new analyses and explore new topics. Professors of business law must become familiar with the work that has been produced by feminist and critical legal scholars. In part, then, this article serves as an introduction to the "new" scholarship of feminist and critical legal scholars whose work to date has been virtually unexamined by business law professors.[4]

[3] *See, e.g.*, 15 AM. BUS. L.J. 1 (1977) (volume dedicated to collegiate teaching and curricular development); Dauten, *A Look at Business Law Education in AACSB Schools*, 2 AM. BUS. L.J. 329 (1964); Donnell, *Redesigning the Required Undergraduate Business Law Course*, 2 J. LEGAL STUD. EDUC. 1 (1984); Dunfee, Brennan & Decker, *Business Law Curriculum: Recent Changes and Current Status*, 18 AM. BUS. L.J. 59 (1980); Klayman & Nesser, *Eliminating the Disparity Between the Business Person's Needs and What is Taught in the Basic Business Course*, 22 AM. BUS. L.J. 41 (1984); Moore & Gillen, *Managerial Competence in Law and the Business Law Curriculum: the Corporate Counsel Perspective*, 23 AM. BUS. L.J. 351 (1985); Pashall, *Expanding Educational Objectives Through the Undergraduate Business Law Course*, 19 AKRON L. REV. 615 (1986); Schlesinger & Spiro, *Does Legal Education for Managers Teach Them to Think?*, 20 AM. BUS. L.J. 409 (1982).

[4] This article does not attempt to integrate "racial critiques" of the law scholarship, represented by such work as Bell, *Minority Admissions as a White Debate*, in D. BELL, RACE, RACISM AND AMERICAN LAW (2d ed. 1980); Delgado, *The Imperial*

This article should stimulate thought about how the new scholarship can be used to enrich and update both research and teaching. As scholars, we must test ideas against the standard of cutting-edge legal theories and challenge those theories. As teachers, we must extend our goals beyond imparting the 'rules of law' and how they currently function. In the future, our students inevitably will need to turn to lawyers for advice on resolving their legal problems. As managers, they will perceive the existence of problems and the need for legal help based on the rules of law they learned in the classroom. As citizens, however, they will be called on to make judgments about public policy issues when they vote, lobby, invest their capital, and make financial contributions. Business law should teach students, therefore, to question what law is, where it comes from, and what kinds of laws are possible and desirable. By viewing old subject matter through the lens of new scholarship, a new dimension is added to discussion of these issues.

This article is also about pedagogy. Most business law professors strive to make their courses as rich, useful, and meaningful to as many students as possible. One lesson of critical and feminist scholarship is that there is a necessary relationship between content and pedagogy. Ensuring that the content of our courses addresses the needs and concerns of a diverse student body is not enough. It is also necessary to consider the effectiveness of different pedagogical approaches on different students.

Finally, this paper is a call to action. It attempts to inspire work that is difficult, time-consuming, frustrating, and essential. The work must proceed on multiple, interrelated levels.[5] Our professional development requires us to explore new ideas about what knowledge is and how it is constructed. Those new ideas force us to reconsider the nature of our discipline, to define the core of business law. At the same time, we must begin to translate difficult, complex, and abstract concepts into meaningful classroom knowledge, while paying renewed attention to the interplay of pedagogy and content.

Scholar: Reflections on a Review of Civil Rights Literature, 132 U. PA. L. REV. 561 (1984); Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?* , 22 HARV. C.R.-C.L. L. REV. 301 (1987); Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 324 (1987); Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1 (1988). *But see*, Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (challenging assumptions of the Bell, Delgado and Matsuda critiques).

[5] *See* Fowlkes & McClure, *The Genesis of Feminist Visions for Transforming the Liberal Arts Curriculum*, in D. FOWLKES & C. MCCLURE, FEMINIST VISIONS 3 (1984) (discussion of "gender-balancing" program).

The Context: The New Scholarship

For some time, members of our profession have urged incorporation of jurisprudence into business law courses. More than a decade ago, Bruce Fisher argued that an introduction to the various schools of jurisprudence would provide students with a "framework, Gestalt, or structure with which they can explore and analyze rules long after leaving the classroom." They will receive an "appreciation and explanation for the complexity, inconsistency, and vastness of the law."[6] Most business law and legal environment texts now provide at least a brief introduction to positivism, natural law, legal realism, and usually to the school of law and economics. Few, however, mention feminist or critical legal scholarship or attempt to integrate feminist or critical analysis into the curriculum, despite the fact that both have produced volumes of writings and are widely viewed as important challenges to mainstream legal thought.[7]

An Historical Interlude

In the earliest days of the republic, American law drew on natural law, positivism, and the English common law. Natural law adherents believe that reason enables discovery of the true or natural moral laws of the universe—general principles of law that exist prior to and despite the pronouncements of a sovereign or secular authority. The notion, articulated in our Declaration of Independence, that man is endowed with "certain inalienable rights" is a natural law concept.[8] Positivists view law as emanating from the sovereign: law is law because those empowered to make law have said that it is so. In the United States, the Constitution, statutes, and judicial decisions are sources of positive law.

The view that the "case" is the cornerstone of American law, and the case-law method the appropriate way to study law, originates from a singular figure in American legal history, Christopher Columbus Langdell. Langdell became Dean of the Harvard Law School in 1873. At a time when "science" was becoming the dominant metaphor of intellectual discourse, few scholars took seriously the idea that law was anything more than a trade to be learned and

[6] Fisher, *A Role for Jurisprudence in the Business Law Curriculum*, 15 Am. Bus. L.J. 38, 38-9 (1977).

[7] *See* Minda, *The Jurisprudential Movements of the 1980s*, 50 Ohio St. L.J. 599 (1989) (describing law and economics, critical legal studies and feminist legal thought as three influential jurisprudential movements).

[8] For an example of a judicial decision that reflects natural law concepts see the concurring opinion of Justice Bradley quoted in the text accompanying note 87 *infra*.

used. In an ingenious bid to secure for law a respectable place in the academy, Langdell adopted the science, or positivist, metaphor. The law library, according to Langdell, was the laboratory of the lawyer, and the cases were "specimens" from which he could derive a small handful of general principles of law that could be applied in a reasoned fashion to new sets of facts. The "science of law" thus involved the abstraction of general principles from cases, and their logical application to new situations.[9]

Consistent with Langdell's approach, the late nineteenth and early twentieth century period often is referred to as the "formalist" era in American jurisprudence. This period was characterized by the view of the "rule of law" as "a structure of positivised, objective, formally defined rights... [in which] the legal world [is viewed] not as a multitude of discrete, traditional relations but as a structure of protected spheres of rights and powers."[10] This view of the legal world was illustrated in a case that has come to represent an era of erroneous interpretation of the fourteenth amendment. The United States Supreme Court invalidated a New York labor law setting maximum hours for working in a bakery at 60 hours per week, ten hours per day. Adopting a formalistic approach, the majority wrote:

> The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.... The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power in relation to his own labor.[11]

Lochner was not unanimous. Holmes, one of the dissenters, found other precedents that might have been applied. Cases that he found "settled" the question differently, supporting his argument "that state constitutions and state laws may regulate life in many ways

[9] Dean Langdell also edited the first case book. His introduction to that book, reprinted in G. GILMORE, THE AGES OF AMERICAN LAW (1977) and many legal history texts provide a good description of his characterization of law as science. C. LANGDELL, SELECTION OF CASES ON THE LAW OF CONTRACTS, at v-vii (1871).

[10] Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 18, 23 (D. Kairys, ed. 1982).

[11] Lochner v. New York, 198 U.S. 45, 57 (1905).

which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally interfere with the liberty to contract."[12] Moreover, in language that foreshadows legal realist criticism of the majority's approach, Holmes wrote: "General propositions do not decide cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise."[13]

During the decades of the 1920's, 1930's and the 1940's, a movement known as "legal realism" challenged the formalist approach of Langdellian positivism. Legal realists shared a distrust of the formalist approach and an abhorrence for the results of Supreme Court decisions of the time. Legal realist Felix Cohen thought the very idea that judges could come up with the appropriate rule and logically apply it, without making value judgments, was preposterous. Analogic reasoning, he argued, was saturated with value judgments.[14] His work reflected one theme of the realist challenge: that there can be no objective, neutral, value-free mechanical process from precedent to rule to a correct decision. Instead, law is politics.

A second school of legal realism, often associated with Karl Llewellyn, agreed that logic and analogical thinking alone cannot predict legal results, but clung, nevertheless, to the science metaphor. Llewellyn argued that empirical evidence, such as knowledge of how human beings function, the socio-economic background of judges, and studies of the jury process help explain how law works; while the "rules and logic" approach does not explain the relative unpredictability of judicial decisionmaking, social science might.[15] Although legal realism's strongest advocates were legal scholars, not judges, its elements have permeated judicial decision-making. Contemporary mainstream American jurisprudence is a mixture of natural law, positivism, and legal realism.

The New Scholarship: Critical and Feminist Legal Scholarship

Critical Legal Studies

The first strand of what I have labelled "new" legal scholarship is the work of critical legal studies. This body of work borrows from the legal realists, from marxism, from the literary movement known as deconstruction[16], and from the litigation and law reform

[12] 198 U.S. 45, 76 (Holmes J., dissenting).

[13] *Id.*

[14] Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201 (1931); Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

[15] Llewellyn, *A Realistic Jurisprudence - The Next Step*, 30 COLUM. L. REV. 431 (1930).

[16] *See* Minda, *supra* note 7, at 622 (description of how many critical scholars "deconstruct").

efforts of scholars who formed a social and professional network in the 1970's.[17] Critical scholars are not cut from one cloth. There are, however, certain common threads that can be uncovered in the works of those who consider themselves part of the critical legal studies movement.

The first thread is a commitment, shared by feminist scholars, to criticize traditional legal scholarship and fundamentally change a legal system they view as unjust. Generally, "crits" seek "to explore the manner in which legal doctrine and legal education and the practices of legal institutions work to buttress and support a pervasive system of oppressive, inegalitarian relations."[18]

Another common thread in critical legal studies is a belief in what is often described as the "indeterminate" nature of the law. "Legal principles and doctrines are open-textured and capable of yielding contradictory results," according to critical scholar Martha Minow.[19] This is so because legal reasoning is not what it claims to be. In an introduction to a book of critical readings, David Kairys identifies

> a central deception of traditional jurisprudence: the majority claims for its social and political judgment not only the status of law (in the sense of binding authority), which it surely has, but also that its judgment is the product of distinctly legal reasoning, of a neutral, objective application of legal expertise. This latter claim, essential to the legitimacy and mystique of the courts, is false.[20]

Crits challenge the very idea that the legal system is by nature "uncontroversial, neutral, acceptable."[21] Many agree with Robert Gordon, a leading critical theorist, who describes the "reification" process by which people mistakenly come to believe that the legal system is legitimate:

> Law, like religion and television images, is ... [a cluster of] beliefs—and it ties in with a lot of other nonlegal but similar clusters—that convince people that all the many hierarchical relations

[17] For an introduction to critical legal scholarship see, R. UNGER, KNOWLEDGE AND POLITICS (1975); THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982); Kennedy & Klare, *A Bibliograpy of Critical Legal Studies*, 94 YALE L.J. 461 (1984); Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505 (1986).

[18] Statement of Critical Legal Studies Conference, quoted in CRITICAL LEGAL STUDIES (P. Fitzpatrick & A. Hunt eds. 1987).

[19] Minow, *Law Turning Outward*, 73 TELOS 79, 83 (1986).

[20] Kairys, *Legal Reasoning*, in Kairys, *supra* note 17 at 11, 13.

[21] Gordon, *New Developments in Legal Theory*, in Kairys, *supra* note 17, at 281.

> in which they live and work are natural and necessary. . . . ["C]ritical" lawyers . . . try to describe—to make maps of—some of these interlocking systems of belief. . . . [T]hey claim that legal ideas can be seen to be organized into structures, i.e., complex cultural modes. The way human beings experience the world is by collectively building and maintaining systems of shared meanings that make it possible for us to interpret one another's words and actions . . . . [W]hat we experience as "social reality" is something that we ourselves are constantly constructing; and that this is just as true for "economic conditions" as it is of "legal rules."[22]

Gordon rejects the science metaphor. In its place, he asserts a belief that the world is "socially constructed." Just as deconstructionists believe that words have no fixed meaning or fixed corresponding reality, crits believe that concepts of right and wrong, individual and community are social constructs. If we de-construct their meaning, we discover myriad possibilities for change.

Critical legal scholars rely on a number of techniques for uncovering (or de-constructing) this hegemony of law. Historical research is used to demonstrate that certain belief-structures are historically contingent, not eternal. Empirical studies are conducted and offered to disprove the necessity of certain rules by showing that such rules are not what they are claimed to be or are applied differently in different times or places. Studies explore and demonstrate other ways of achieving the same purpose. Analysis demonstrates the internal incoherence or contradictions within a particular theory by showing how it cannot be logically applied to certain situations.[23] The ultimate goal of most crits is not merely academic. Rather, it is to transform law so as to create true democratic decisionmaking.[24]

An example of a recent critical study is one by Karl Klare, a leading critical labor theorist and advocate of both collective bargaining and legal intervention to reconstruct labor markets to expand and enhance democracy. His underlying values are typical of the crits. Klare believes that public policy should not be indifferent to the hierarchical governance structure found in most firms or to occupational segregation along race, class, and gender lines.[25]

[22] *Id.*

[23] Gordon, *supra* note 21 at 289-90.

[24] *See* Kairys, Introduction to Kairys, *supra* note 17, at 3. ("[W]e place fundamental importance on democracy, by which we mean popular participation in the decisions that shape our society and affect our lives."*Id.*).

[25] Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U.L. REV. 1 (1988).

Klare's method of analysis is also typically critical. By examining the historical development of the market, he demonstrates that the "free market" is not a "natural" law, but rather an historical construct. His analysis of the operation of "background rules," such as trespass and property rules that give the employer the power to withhold access to productive resources and earning opportunities, reinforces his conclusion that there is no natural or "a-legal" form of bargaining or markets. Rather, markets are structured by these background laws, as well as the more obvious rules governing labor bargaining, such as wages, hours and safety requirements, and equal employment opportunity laws. Employment relationships are thus determined by a combination of bargaining and internal administration, the "deeply embedded social patterns and structures (*e.g.*, gender-based role differentiation underlying the sexual division of labor) which affect access opportunities," and "administration" or planning that is done through the medium of public law.[26] There is not, he concludes, the strong dichotomy between "free market bargaining" and "regulation of labor" that opponents of legal intervention to re-structure labor markets would have us believe. In other words, creative change is possible.

It can be difficult to confront some critical scholarship: it is theoretical, complex, derivative of earlier works (especially legal realism), and controversial.[27] It is hard to imagine undergraduates reading these works, and I do not recommend that business law teachers require their students to do so. But these works are accessible to faculty, and can provide ideas for additional cases and for new ways of examining existing materials. Precisely because critical legal theory is so controversial, it is essential that faculty members become familiar with developments in the field.

Feminist Jurisprudence

The second strand of new scholarship is what I have labelled feminist jurisprudence.[28] Like critical scholars, feminists rely on new methods of analysis, including deconstruction. As in feminist

[26] *Id.* at 5-7.

[27] The reader interested in work critical of critical scholarship should see Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984); Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1 (1980); Fiss, *Supreme Court, 1978: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

[28] Robin West has argued that there can be no feminist jurisprudence because "feminists take women's humanity seriously, and jurisprudence does not, because the law does not. Until that fact changes, 'feminist jurisprudence' is a political impossibility." West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 3-4 (1988). Instead, West would discuss feminist legal theory.

theory, one finds a diversity of both theoretical models and discourses within the broad rubric of "feminist jurisprudence." Nevertheless, we can identify some common themes.

Feminist theorists in every field are concerned with understanding and changing women's subordinate status, and with recognizing the importance of the works, ideas, perceptions, and experiences of women across time and cultures.[29] Leslie Bender describes some of the major strands of feminist thought:

> Feminism integrates practice and theory. It is a woman-centered methodology of critically questioning our ideological premises and reimagining the world. Feminists applaud women's accomplishments that have been unmentioned or slighted in others' tellings. We study women's oppression in order to understand what it is, how it happened, the subtle ways it works, and how oppression, exploitation, and exclusion affect different aspects of our lives and thinking. Whatever the focus of our particular work, all feminist efforts are combined in struggle to eradicate women's subordinate status.[30]

Feminist legal scholars share these concerns and are particularly focused on understanding the ways in which the law and the legal system create, reflect, and reinforce the subordination of women.[31]

[29] Numerous attempts to define feminism have failed largely because there are indeed several strands or schools of feminist thought. One oft-quoted definition of feminism is that given by Linda Gordon: "By feminism I ... mean an analysis of women's subordination for the purpose of figuring out how to change it." Gordon, *The Struggle for Reproductive Freedom: Three Stages of Feminism*, in CAPITALISTIC PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM 107 (Z. Eisenstein ed. 1979).

Another definition is offered by historian Karen Offen, who considers any male or female a feminist whose:

> ideas and actions ... show them to meet three criteria: (1) they recognize the validity of women's own interpretations of their lived experience and needs and acknowledge the values women claim publicly as their own ... in assessing their status in society relative to men; (2) they exhibit consciousness of, discomfort at, or even anger over institutionalized injustice (or inequity) toward women as a group by men as a group in a given society; and (3) they advocate the elimination of that injustice by challenging, through efforts to alter prevailing ideas and/or social institutions and practices, the coercive power, force, or authority that upholds male prerogatives in that particular culture.

Offen, *Defining Feminism: A Comparative Historical Approach*, 14 SIGNS 119, 152 (1988).

[30] Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 20 J. LEGAL EDUC. 3, 4 (1988).

[31] Representative feminist legal works include C. MACKINNON, FEMINISM UNMO-

Martha Minow, in an introduction to a recent symposium on feminist legal scholarship, argued that one could understand the different schools as different "stages" in the development of feminist scholarship:

> [T]he first stage articulated women's claims to be granted the same rights and privileges as men. The problem writers identified centered on the exclusion of women from the rights and prerogatives granted to at least some men .... The second stage advocated respect and accommodations for women's historical and contemporary differences. For those writing in this second stage, the problem needing redress was the undervaluation or disregard for women's historic and persistent interests, traits, and needs.... The third stage rejects the preoccupation with similarities and differences between men and women. As third-stage representatives see it, this preoccupation has itself helped perpetuate the degradation and subordination of women. Focusing on the similarities and differences between men and women threatens to preserve men as the starting point for analysis.[32]

"Feminist legal analysis" does not necessarily lead to one correct "feminist" stand on a given issue, but to feminist critiques of the law, and an on-going debate among feminists about the meaning of difference, special treatment, and equality in law.

DIFIED (1987); C. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); D. RHODE, JUSTICE AND GENDER (1989); *Voices of Experience: New Responses to Gender Discourse*, 24 HARV. C.R.-C.L. L. REV. 170 (1989); Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 20 J. Legal Educ. 3 (1988); DuBois, Dunlap, Gilligan, MacKinnon & Menkel-Meadow, *Feminist Discourse, Moral Values, and the Law - A Conversation*, 34 BUFFALO L. REV. 11 (1985) (hereinafter, Feminist Discourse); Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. REV. 55 (1979); Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751 (1989); Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987); MacKinnon, *Feminism, Marxism, Method, and the State: Toward a Feminist Jurisprudence*, 8 SIGNS 635, 638 (1983); Olsen, *Statutory Rape A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984); Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); Schneider, *The Dialectic of Rights and Politics*, 61 N.Y.U. L. REV. 589 (1986); Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 487(1977); West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEG. F. 59 (1989); Note, *Toward a Redefinition of Sexual Equality*, 95 HARV. L. REV. 487 (1982).

[32] Minow, *Introduction: Finding Our Paradoxes, Affirming Our Beyond*, 24 HARV. C.R.-C.L. L. REV. 1, 2-4 (1989).

Special maternity leave rules illustrate the diversity of views within feminist criticism. In 1987, the Supreme Court was faced with a potential conflict between the Pregnancy Discrimination Act which prohibits employers from treating pregnancy differently from other disabilities, and a California statute that mandated three-months unpaid leave for pregnancy-related disabilities.[33] Feminists had already aligned themselves on both sides of the issue: On one side, Wendy Williams argued against the wisdom of special privileges and treatment of pregnancy on the ground that such policies are politically divisive, directing attention away from the need to protect all workers, and are particularly dangerous to women. Historically, "protective labor legislation" has protected women out of jobs and the opportunity to become truly equal citizens, relegating women to "special" separate (and presumably inferior) roles and spheres. Feminists must recognize the risk inherent in allowing the law to afford special treatment of pregnancy.[34]

In analyzing the same problem, feminist Sylvia Law argued that constitutional doctrine had not resulted in ending sex-inequality because the Court had failed to focus, as it should, on biological reproductive differences between men and women.[35] She urged adoption of a two-part standard for evaluating laws governing reproductive biology: (1) the law must have no significant impact in perpetuating the oppression of women or culturally imposed sex-role constraints on individual freedom; or (2) if the law has this impact, it is justified as the best means to serve a compelling state purpose.[36] Applying that test, she insisted, would save us from the

> slippery slope on which the state is allowed to exaggerate the costs of difference.... It is likely that courts would be less inclined to confuse biology with the social consequences of biology if a finding that a law was premised on biological differences between men and women were only the beginning and not the end of the equality inquiry.[37]

[33] The Court resolved the issue in favor of the California statute, noting that both the Pregnancy Discrimination Act and the California statute served the same objective: to achieve equality of employment opportunities and remove barriers that have operated in the the past. California Federal Savings & Loan v. Guerra, 479 U.S. 272 (1987).

[34] *See* Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982) and Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985).

[35] Law, *supra* note 31, at 955.

[36] Law, *supra* note 31, at 1008-09.

[37] Law, *supra* note 31, at 1033.

Analyzing the issue from what Deborah Rhode calls a "gender-disadvantage orientation" allows us to focus on "identifying strategies most likely to promote gender equality in a given set of social, political and economic circumstances." [38] On that basis, Rhode favors:

> Sex-neutral strategies [which] pose the least risk of entrenching stereotypes or encouraging covert discrimination and offer the widest range of protections for disadvantaged groups. The distinctive consequences of pregnancy should not be overlooked, but neither should they be overemphasized .... Pregnancy-related policies affect most women workers for relatively brief intervals. The absence of broader disability, health, child-rearing, and caretaking policies remains a chronic problem for the vast majority of employees, male and female, throughout their working lives.[39]

Feminist legal scholars continue to analyze problems from a variety of feminist perspectives and from different stages of theoretical development. Increasingly, attention is being paid to the diversity of voices of men and women across cultures, ages, races, religions, and abilities, and the ways in which gender intersects with race and class.[40]

The Connection: Critical Legal Studies, Feminism, and the Fem-crits

It is almost impossible to pinpoint the relationship between critical studies and feminism. To be sure, there is overlap and connection between the two schools, and there are legal scholars who consider themselves both ("fem-crits").[41] In an article exploring critical legalism, feminism and the law and economics movement, critical scholar Gary Minda speculated about future directions:

> One possibility is that one of the new movements, or perhaps a combination of two or all three, will emerge as the dominant jurisprudential perspective, thereby replacing the prevailing jurisprudential views of mainstream legal scholars. Movements toward partnerships and synthesis seem likely. Critical legal studies and

[38] Rhode, *supra* note 31, at 124.

[39] *Id.*

[40] The shift from focusing primarily on gender to efforts to understand the interactions of race, class and gender is evident throughout feminist scholarship. *See, e.g., Common Grounds and Crossroads: Race, Ethnicity, and Class in Women's Lives*, 14 SIGNS 739-960 (1989).

[41] Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School"*, 38 J. LEGAL EDUC. 61 (1988).

> the feminist legal theory movement have already begun to develop a partnership of sorts which may yield a new form of legal criticism built on the strengths of each. It is not inconceivable that a synthesis may also develop between progressive strands of the [law and economics] movement and [critical legal studies.][42]

At least one feminist theorist has argued that critical legal studies is not a feminist jurisprudence because it rests on a primarily male vision of human experience, not the experiences of women.[43] Critical legal studies, Robin West insists, is a male critique of a male jurisprudence (liberal legalism). Neither critical legal studies nor the liberal regime it criticizes is feminist because both rest on a vision of the human being that is based on male experience:

> These, then, are the differences between the "human beings" assumed by legal theory and women, as their lives are now being articulated by feminist theory. The human being, according to legal theory [including critical legal theory] values autonomy and fears annihilation, while at the same time he subjectively dreads the alienation that his love of autonomy invevitably entails. Women, according to feminist theory, value intimacy and fear separation, while at the same time longing for the individuation which our fear of separation precludes, and dreading the invasion which our love of intimacy entails. The human being assumed or constituted by legal theory precludes the woman described by feminism.[44]

This is so, according to West, because of what she calls the "connection thesis" that underlies both cultural feminist and radical feminist thought.[45] "Women are actually or potentially materially connected to other human life [by their ability to become pregnant]. Men aren't."[46] Nevertheless, West, like Minda, sees the potential

[42] Minda, *supra* note 7.

[43] West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

[44] *Id.* at 42.

[45] West describes these two strands of feminist thought in the following way:

> [W]hile most modern feminists agree that women are different from men and agree on the importance of the difference, feminists differ over which differences between men and women are most vital. [Cultural feminists believe] the important difference between men and women is that women raise children and men don't.

West, *supra* note 43, at 13. Radical feminists focus on heterosexuality and rape, believing that therein lies the important difference between men and women, with women being "those from whom sex is taken," just as workers, definitionally, are those from whom labor is taken. *Id.*

[46] West, *supra* note 43, at 14.

for a new jurisprudence growing out of both feminist and critical theories:

> Feminist jurisprudence must respond to these utopian images, correct them, improve upon them, and participate in them as utopian images, not just as apologies for patriarchy. . . . Masculine jurisprudence must become humanist jurisprudence, and humanist jurisprudence must become a jurisprudence unmodified.[47]

Transcending Disciplines: Looking Outside Law to Works in Feminist and Ethnic Studies

The new scholarship has fundamentally changed the academy by breaking narrow, discipline-bound thinking. It is no longer possible to be an educated person unless one is comfortable crossing the line of one's own formal education to read, reflect on, and borrow from the works of other disciplines.

The notion of transcending disciplines should not be foreign to the business professor who has studied each of the major areas of business, including economics, marketing, management, accounting, computer or information sciences, and law. Some business law professors already teach not only from legal materials but also from materials of other business disciplines.[48] Many business law professors, however, are not trained in the business disciplines, having been educated within the narrow confines of the law school. In research and teaching, however, they should learn to use not only economics and the business disciplines, but also sociology, psychology, anthropology, philosophy, literature, history, feminist theory and ethnic studies.[49]

For an example of the way in which feminist theory might change the way we think about teaching law, let us focus briefly on a psychologist and feminist, Carol Gilligan.[50] Gilligan is one of many

[47] West, *supra* note 43, at 72.

[48] *See, e.g.*, Allan, *Law as a Liberal Art Versus Law as Professional Discipline: A False Dichotomy*, 15 AM. BUS. L.J. 61 (1977) (urging that our curriculum include discussion of law as a system, theories of law, legal history, law and values, and law as a multidisciplinary system).

[49] For a good introductory discussion of the major schools of feminist theory, see TONG, FEMINIST THOUGHT: A COMPREHENSIVE INTRODUCTION (1989).

[50] Gilligan's work has a clear and direct impact on ethics, a topic of great interest to business law professors in recent years. Those who think seriously about ethics inevitably find their way to philosophy and (moral) psychology. Yet, the most influential writers in the burgeoning business law and ethics movement have ignored or downplayed the importance of feminist writers.

feminists whose ideas have been so widely disseminated as to be part of the intellectual core of present-day knowledge.[51] She is of particular interest to law teachers insofar as her work articulates a system of ethics. Because most schools of jurisprudence are grounded in particular schools of ethics, an understanding of the Gilligan ethical schema provides a background for new analysis of traditional legal issues.

Gilligan's early work drew heavily on the foundations of her mentor, Lawrence Kohlberg. Both were developmental psychologists[52] with a particular interest in the way human beings acquire the ability to reason about moral issues. Kohlberg is a major figure in the history of moral psychology because he created a theoretical framework for understanding moral development.[53] Based on a series of studies, Kohlberg posited different "moral stages" through which individuals pass, although not all individuals reach the highest stage. Under the Kohlberg "morality as justice" model, persons at the highest stage reason from universal ethical principles, based on logical, universal principles of justice, equality and reciprocity.

Gilligan accepted Kohlberg's basic premise that moral cognition "develops" over time but disputed some of the specifics of his findings. She theorized that not all people moral-reason in the same way. Some people, predominantly but not exclusively women, view moral problems as arising from conflicting responsibilities rather than from competing rights. These dilemmas require for their resolution a mode of thinking that is contextual and narrative, rather than formal and abstract. Complementing the morality of justice that Kohlberg described, Gilligan described a morality of care. She argued that for many people, but predominantly women, morality

[51] Gilligan is best known as the author of IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (hereinafter cited as C. GILLIGAN, A DIFFERENT VOICE). More recent work includes a chapter co-authored by Gilligan & Wiggins, *The Origins of Morality in Early Childhood Relationships*, in THE EMERGENCE OF MORALITY IN YOUNG CHILDREN 277 (Kagan & Lamb eds. 1987) and Brow, Tappan, Gilligan, Miller & Argyrs, *Reading for Self and Moral Voice: A Method for Interperting Narratives of Real Life Moral Conflict and Choice*, in ENTERING THE CIRCLE: HERMENEUTIC INVESTIGATION IN PSYCHOLOGY 141 (M.J. Packer & R.B. Addison eds. 1989).

[52] Developmental psychologists study the way in which human beings develop over time, from infancy to old age, looking for trends, stages, and catalysts that explain the transitions from one stage to another.

[53] Kohlberg, *From Is to Ought: How to Commit the Naturalistic Fallacy and Get Away With It in the Study of Moral Development*, in COGNITIVE DEVELOPMENT AND EPISTEMOLOGY 151, 179 (T. Mischel ed. 1971). For a fuller treatment of his work see, L. KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT (1981).

is most often concerned with the activity of care and with increasing understanding of responsibilities and relationships.[54]

During the past decade, Gilligan's work has provoked scholars to re-think their understanding of legal and ethical norms.[55] Her insistence that justice can be viewed as both fairness (the Kohlberg model) and as care, connection, and the primacy of relationships (the second, added voice) has been fuel for feminist critics. Such criticism is evidenced in litigation and the lawyering process,[56] employment discrimination,[57] and tort law.[58] An age old tort concept, for example, is the lack of a duty to rescue. Criticism of that no-duty rule[59] becomes increasingly compelling if one thinks about morality as including a concept of responsibility for others. We ought to examine, as well, how a view of morality-as-care might

[54] C. GILLIGAN, A DIFFERENT VOICE, *supra* note 53; Gilligan, *In A Different Voice: Women's Conceptions of the Self and Morality*, 47 HARV. EDUC. REV. 481 (1977).

[55] *See, e.g.*, N. NODDINGS, CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION (1984); Flanagan & Jackson, *Justice, Care and Gender: The Kohlberg-Gilligan Debate Revisited*, 97 ETHICS 622 (1987); Hasse, *Legalizing Gender-Specific Values*, in WOMEN AND MORAL THEORY, (E.F. Kittay & D.T. Meyers eds. 1987); Tronto, *Beyond Gender Difference to a Theory of Care*, 12 SIGNS 644 (1987).

[56] Carrie Menkel-Meadow explores ways in which the practice of law might be changed by the incorporation of women, and their voices, into the profession. *See* Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 U.C.L.A. L. REV. 754 (1984); and Menkel-Meadow *Remarks*, in *Feminist Discourse*, *supra* note 31, at 49-60.

[57] Speigelman, *Court-Ordered Hiring Quotas After Stotts: A Narrative on the Role of the Moralities of the Web and the Ladder in Employment Discrimination Doctrine*, 20 HARV. C.R.-C.L. L. REV. 339 (1985).

[58] *See* Bender, *supra* note 31, at 4. Sparked by Gilligan-generated ideas, Bender argues that tort law should be more a system of response and caring, with a greater focus on interdependence and collective responsibility than on individuality, and on safety and help for the injured, rather than on "reasonableness" and economic efficiency. She proposes a redefinition of negligence law, including the meaning of "standard of care." Under our present system, we examine the defendant's "level of caution" to decide whether or not the defendant acted as a reasonable person to avoid impairing another's rights or interests. This too easily translates, Bender argues, into a judgment about the economic efficiency and the dollar value of harm to human life. Instead, we ought to consider "standard of care" as a standard of "caring" or "consideration of another's safety and interests", and we ought to measure concern and responsibility for the well-being of others and their protection from harm. The emphasis shifts from concern with the individual's rights, to a recognition that we are "all interdependent and connected and that we are by nature social beings who must interact with one another." Bender, *supra* note 31, at 31.

[59] For good materials on the duty to rescue, see T. C. GREY, THE LEGAL ENFORCEMENT OF MORALITY 157 (1983).

change the discourse in the debate about the social responsibility of corporations.[60]

To date, however, Gilligan has received scant attention or been downplayed by the most influential business law writers. In one recent article, for example, Conry and Nelson argue that business students can and should be taught ethics. The article focuses heavily on the work of Kohlberg, but dismisses Gilligan as "[having] a very strong intuitive appeal, [but] the recent empirical evidence tends to undermine it."[61] That dismissal of Gilligan is too facile. Whether or not Gilligan was wrong about the Kohlberg bias[62] is less important than her main point that there are multiple modes of moral reasoning.

Gilligan is an important figure in current thought for another reason. Like feminists in every discipline, she has challenged traditional methodology and contributed to understanding the construction of knowledge in general.[63] Feminists, for example, question the adequacy of the traditional definitions of "facts" and "data." Gilligan criticized Kohlberg on those grounds. She suggested that the data from which his theories derived was biased because he studied only male subjects. Gilligan questioned how "knowledge" of this subject would change if we looked not only at males, but also at female subjects. Gilligan answered her own question, finding that a theory cannot be accurate if it is based on the experience of only males. Kohlberg's theoretical model was flawed because it was too simple. It told but part of the story.[64] Increasingly, we recognize that the

[60] Consider for example, the proposed guidelines for socially-responsible behavior by corporations that are contained in the "Valdez Principles" released by the C.E.R.E.S. Project, (Coalition for Environmentally Responsible Economies) in September, 1989. The introduction explains that the principles are based on the belief that:

> corporations and their shareholders have a direct responsibility for the environment. We believe that corporations must conduct their business as responsible stewards of the environment and seek profits only in a manner that leaves the Earth healthy and safe. We believe that corporations must not compromise the ability of future generations to sustain their needs.

C.E.R.E.S., VALDEZ PRINCIPLES. The full text of the Valdez Principles is available from the Social Investment Forum, 711 Atlantic Avenue, Boston, MA 02111.

[61] Conry & Nelson, *Business Law and Moral Growth*, 27 AM. BUS. L.J. 1, 19 (1989).

[62] The issue remains hotly contested, and the psychological literature is replete with empirical evidence that undercuts Kohlberg, as well as Gilligan.

[63] Central to feminist inquiry are issues concerning the construction of knowledge, and our understanding of what counts as knowledge. *See, e.g.*, S. HARDING, THE SCIENCE QUESTION IN FEMINISM (1986); Flax, *Postmodernism and Gender Relations in Feminist Theory*, 12 SIGNS 621 (1987).

[64] As Gilligan has explained: "I called the construction of morality I heard a

same question must be asked by researchers in every field. Those who do empirical research must be certain that the data on which they base hypotheses are adequately representative of the persons about whom they wish to generalize.[65]

A second hallmark of feminist theory and research is its emphasis on context. Again, Gilligan has contributed to recognition of the critical role of a contextual interpretation of data. In her work, she explored the same issues that concerned Kohlberg, moral decision making. Instead of questioning subjects about hypothetical situations as Kohlberg had done, however, Gilligan asked her subjects about actual decisions they had made. Thus, her work forced psychologists to consider how the answers change when the researcher's focus is on the particular, fact-based experience of people, and not solely on abstract, hypothetical situations. Gilligan is not the only psychologist to recognize the importance of studying human beings in a real-life context, but hers is a strong voice in that chorus. Nor is psychology the only discipline that has been altered by feminist thinkers who emphasize the importance of contextualizing.

Feminist legal theory borrows from and is reinforced by feminist theory. In a recent work, feminist legal scholar Deborah Rhode explores the historical development of sex-based laws in America with the goal of pointing the way to achieving gender justice.[66] Rhode argues that the dominant legal discourse, which currently revolves around discussions of abstract rights, needs to be enlarged. Rights are better understood, Rhode argues, when discussed in the social context that constrains them. Only if we explore the socioeconomic context in which legislation is passed can we understand the impact of particular laws on the lives of real people.

different voice because I was not comparing women with men. Rather ... I was comparing women with theory. I said this voice is different from the voice that had been described in the psychology of moral development, in moral philosophy, and in the legal and political system which was sitting all around my work." Gilligan remarks, Feminist Discourse, *supra* note 31, at 38.

[65] In Spring, 1990, the National Institute of Health was criticized for funding medical/scientific studies that rely primarily on male subjects. An enormous amount of federal money supports studies, the results of which are widely disseminated as medical and health advice to the general population. In the absence of data based on female subjects, however, there is some question about the validity of the generalizations made and the advice given on the basis of such findings. We do not know, for example, whether cholesterol, weight, and so forth affect the conditions of women's hearts in the same way that they affect the condition of men's hearts because scientists have not used women in their studies.

[66] D. RHODE, JUSTICE AND GENDER, *supra* note 31.

An example is Rhode's contextual analysis of the problems of association and assimilation that are raised by single-sex private clubs. First, she looks at the history of private clubs and the social costs to women ("gender disadvantages") of such affiliation: lost opportunities for social status; the deprivation of personal dignity that inevitably accompanies denial of access; missed opportunities for informal exchanges; and exclusion from the places where men exchange information and develop "relationships that generate business or career opportunities." The missed opportunity to establish such relationships is a great disadvantage to women, particularly "in a society where men reportedly obtain almost one-third of their jobs through personal contacts."[67] When white men, members of the dominant group, are excluded from a women-only association, the effects are different for obvious reasons. Rhode eschews the kind of constitutional analysis that has been done in the past, based on general principles, and instead advocates a particularized finding based on "the cumulative significance of the organization's governmental and commercial entanglements,"[68] including receipt of public grants, licenses, and tax benefits that might justify regulation. Her analysis would permit the government to regulate single-sex clubs by depriving them of liquor licenses and public funds and by limiting tax benefits to employers who subsidize such clubs.

The Absence of the New Scholarship From Business Law

Not all of the themes of the new scholarship are totally foreign to our discipline. John Bonsignore, for example, has long argued that we need "(1) to strengthen in academic ways the lines of inquiry uncovered by disaffected professionals and (2) to listen to the external critiques of law."[69] Writing at a time when critical legal studies was in its infancy, he urged us to recognize the "unconscious jurisprudence" of law as it was taught and practiced. "Over a long period it has been analytical [legalistic, formalistic] with mild touches of legal realism and sociological-functional jurisprudence *a la* Roscoe Pound."[70] His suggestions included studying legal phenomena in informal settings, such as "the family, the school, the classroom, an athletic team, a work place, a church, or the old folks home."[71]

Yet, some thirteen years later, a look at business law scholarship in our own journals as well as the work we publish elsewhere, and

[67] *Id.* at 283.
[68] *Id.*
[69] Bonsignore, *Lacunarian Law*, 15 AM. BUS. L.J. 52, 54 (1977).
[70] *Id.* at 55.
[71] *Id.*

the textbooks from which we teach, reveals but sporadic attention to the new scholarship. The time has come for business law to change, to uncover our unconscious jurisprudence and modify it.

Changing Business Law

Once one has made a commitment to re-vision knowledge in light of new scholarship it is easy to fall into a state of paralysis induced by the overwhelming amount of such scholarship. It is not hard to convince oneself that change must start from within and will be a lengthy process. The goal, however, is to revitalize both scholarship and coursework to include subject matter content that speaks to and about our students, who are the multi-cultural, multi-racial, mixed gender workforce of the future. To begin to change we must re-think the core content of business law. Transformation of the discipline will mean changing its content to reflect the fact that women are a majority of the population, whites a minority, and the professional-middle class but one of several classes in our society.[72]

Re-Examining A Course

Appraisal begins where we are.[73] In the broadest sense, we need to question the goals of our courses and the way they fit into the business curriculum before deciding that additional or different goals may be appropriate. Many of us can describe the appropriate goals in our sleep: to encourage critical thinking, reading, writing; to teach students to recognize legal problems ("when they need to get to a lawyer"); and to learn some of the vocabulary that will enable them to communicate with lawyers. Some professors include as a goal preparation for the CPA examinations.

If critical thinking is a goal, it seems essential to learn to be critical of the law and to incorporate reasoned criticism into law courses. This is particularly hard to do in view of the form of the typical business law texts, which exhibit a strong, possibly unconscious, positivist bent: law is treated as a series of black letter rules with little attention to history or context. Cases are "summarized," but their narrative is largely excluded. Few business law texts include excerpts from dissenting opinions, a vain attempt to erase the reality of the contested nature of the common law. We cheat our students if we let the goal of "recognizing legal problems" dominate over that of teaching critical thinking. In ten, five, maybe

[72] *See* B. Ehrenreich, Fear of Falling (1989).

[73] *See* M. Schuster & S. Van Dyne, Women's Place in the Academy: Transforming the Liberal Arts Curriculum 279-81 (1985) (checklist of questions to ask as a starting point for curriculum transformation).

two years the legal problems will change as new rights are created by courts and legislatures and old rights are winnowed down. An ability to think critically will last a lifetime.

Part of critical thinking is an ability to differentiate the normative from the descriptive. Where material reflects a point of view, students need to be taught to understand the limitations of that point of view. In other words, we must be sure that the white, middle-class male viewpoint is examined as the standpoint of white, middle-class men, instead of the "objective" standpoint of persons without a race, class, or gender identity. When Justice Rehnquist found that a disability plan which excluded coverage for disabilities arising from pregnancy did not violate Title VII's ban on sex discrimination, he did so from a uniquely male point of view: "For all that appears," he wrote, "pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks."[74] From a woman's perspective, the possibility of pregnancy and attendant risk is not "additional" to anything.

Studying the experience of people of diverse genders, races, ethnicities, and class backgrounds should be an explicit goal of every course in every college, including business law. That means different topics and more contextual background within which to understand legal rules. Often it will mean new organization, because the standard organization provided by standard texts is likely to obscure or distort the experience of women and racial and ethnic minorities. [75]

Toward a Pedagogy of Inclusion

The critical legal studies movement and feminist scholars both have emphasized the close relationship between content and pedagogy.[76]

[74] General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

[75] Margaret Anderson, sociologist and curriculum transformation consultant from the University of Delaware argues that we must challenge the assumption that the only opportunity to teach race/class/gender is when the discussion is about women of color; that we must fight to keep ourselves from presenting women and minorities as affected by race and gender, while the experience of white men is treated as the universal, objective experience. Address by Margaret Anderson, Stockton State College faculty workshop (Nov. 20, 1988). Schuster and Van Dyne insist that we should put marginalized persons, such as women of color, at the center of a course by beginning with their experienced viewpoint. SCHUSTER & VAN DYNE, *supra* note 73, at 279-82.

[76] Schuster and Van Dyne describe the stages in the transformation from a

Common themes have emerged from their works: (a) an emphasis on the importance of personal experience;[77] (b) a high value placed on cooperation instead of competition;[78] and (c) sensitivity to the way in which men of color, women, and working class students are treated by faculty in the classroom, so that their experience is not marginalized.[79] Concern has also centered on the way students are treated in their professional relationships, how much authority the teacher should have or project, and the need to think about learning as a process.[80] Ann Carver, a literature professor, characterizes feminist pedagogy in the following way:

> (1) intense, nonfragmented involvement of the whole person in the creative act of study; (2) sharing, based on deserved trust, as the

traditional, pre-1960's curriculum, before the advent of Black Studies and Women's Studies, to a curriculum that is balanced, to provide an "inclusive vision of human experience based on difference and diversity." As the content changes, so does the pedagogy, from the lecture format of the "old" curriculum, to the collaborative learning process of the transformed curriculum. SCHUSTER & VAN DYNE, *supra* note 73, at 16. *See also* Schneidewind, *Cooperatively Structured Learning: Implications for Feminist Pedagogy*, 20 J. THOUGHT 75 (1985); Maher, *Pedagogies for the Gender Balanced Classroom*, 20 J. THOUGHT 48 (1985)("[If we believe] in the crucial importance of linking means and ends, we can use cooperative learning to teach reciprocity; to share knowledge, power and skills; and to take responsibility for all.... Through such feminist pedagogy we will contribute to the creation of a society that will do the same." *Id.* at 86).

[77] M.F. BELENKY, B.M. CLINCHY, N.R. GOLDEBERGER & J.M. TARULE, WOMEN'S WAY OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND 200 (1986), argue that women especially are drawn to the sort of knowledge that emerges from firsthand observation. *See also* Schniedewind, *Feminist Values: Guidelines for Teaching Methodology in Women's Studies*, in LEARNING OUR WAY: ESSAYS IN FEMINIST EDUCATION (C. Bunch & S. Pollack ed. 1983); and S. COULTER, K. EDGINGTON & E. HEDGES, RESOURCES FOR CURRICULUM CHANGE: INTEGRATING THE SCHOLARSHIP OF WOMEN (1986) ("[I]t is especially important that the experience of our women students be accepted as relevant to what they study in the classroom [because] [i]t is a way of acknowledging that they exist as individuals and of showing them how to make connections between themselves and others, between their culture and other cultures." *Id.* at 140).

[78] Coulter, Edgington, and Hedges explain the importance of this emphasis on cooperation: "Based on the premise that in our society women are oriented to communal relationships where authority is shared or exists on a more horizontal basis, feminists are concerned that the [typical] classroom replicates the male, patriarchal values of the society that has historically oppressed women and made them invisible." COULTER, EDGINGTON & HEDGES, *supra* note 77, at 139.

[79] Spelman, *Combatting the Marginalization of Black Women in the Classroom*, in GENDERED SUBJECTS: THE DYNAMICS OF FEMINIST TEACHING 240 (M. Culley & C. Portugues eds. 1985).

[80] Friedman, *Authority in the Feminist Classroom: A Contradiction in Terms?* in Culley & Portugues, *supra* note 79, at 203; COULTER, EDGINGTON & HEDGES, *supra* note 77.

> mode of operating in the course; (3) conscious recognition that learning is a process. [81]

The feminist/critical approach to pedagogy is not unlike that advocated by some within our own profession. Bonsignore, for example, has urged us to relish the greater freedom we have in teaching undergraduate legal studies than do professional law school professors:

> An undergraduate program need not run rough shod over the prior experiences of students, and it can teach to the whole person, show alternatives to hierarchy and exploitative relationships, and encourage the preservation of democratic and equalitarian values. An undergraduate legal studies program can better achieve these aims because at present it is an art form and not a pragmatic form, although there is constant pressure to make it serve some master.[82]

These operating principles must be translated into practice. Specific techniques that have been used commonly in women's studies courses and by critical scholars provide suggestions for class dynamics and assignments for business law classes. Assignments should encourage students to introduce feelings as well as ideas into the classroom by incorporating role-playing, use of personal accounts, and faculty/student sharing of experiences.

Role-playing, for example, is a staple of business law classes.[83] The added element is the attention to student feelings and experience. For several years, I have used an adaptation of a role play involving sexual harassment. Students are paired and asked to leave the classroom to role play a meeting between a new law associate and a senior partner to discuss some topic of substantive law that the class is studying. On the surface, this is an exercise in student communication about their understanding of the law to another student. However, secret instructions to the "senior partner" call for behavior that might be characterized as sexual harassment—varying from comments about the associate's dress and body, to

[81] Carver, *Applying Feminist Approaches to Learning and Research: A Practical Curriculum Model*, 7 Women's Stud. Newsletter 24 (1979).

[82] Bonsignore, *Law School Involvement in Undergraduate Legal Studies*, 32 J. LEGAL EDUC. 53, 64-5 (1982).

[83] *See* Jones, *Bridging the Gap: Using Contract Simulations as an Experiential Teaching Method*, 6 J. LEGAL STUD. EDUC. 71 (1987); Miller, *Mock Jury Trial: A Model for Business Law I Courses*, 6 J. LEGAL STUD. EDUC. 91 (1987); Schaefer, *Mock Trials: A Valuable Teaching Tool*, 8 J. LEGAL STUD. EDUC. 199 (1990).

persistent romantic advances. After the meeting, students who felt uncomfortable about it are asked to "consult" with the head of the law firm, the instructor. Each time, later class discussion of both the law and students' feelings about sexual harassment has been lively and useful, enriched by their having "experienced" sexual harassment.[84]

Role-playing legislative hearings on proposed bills can give students an opportunity to draw on their own experience, as witnesses do in testifying at actual congressional hearings. Workplace safety regulations are a particularly fertile area, providing an opportunity to discuss current law, as well as issues of government regulation, federal/state conflicts, cost/benefit analysis, and the role and limitations of research findings. At a mock legislative hearing revolving around a proposed ordinance to regulate the use of video-display terminals in the workplace, for example, my class heard from several students who worked at such jobs and gave first-hand accounts of the headache, vision, and muscle strain problems that sometimes result from overuse.

Having students read first-person accounts is another way to interject human experiences into the classroom and add a dimension to the study of most topics. For example, any study of the A.H. Robbins Dalkon-shield case in a class on products liability or on bankruptcy might include an article on the effects of the Dalkon shield on individual women.[85]

Faculty/student sharing of personal experiences and feelings, particularly at the beginning of a new topic, not only helps to "teach to the whole person" but can also provide a roadmap to the legal issues to be covered. A discussion of the law of discrimination, for example, might well be preceded by questions that probe students' own experience. The dialogue might go something like this:

> Professor (P): Has anyone ever felt discriminated against?
>
> Student Answer (S1): I have. I was discriminated against because I'm a student. I tried to rent a house near campus, and the landlord wouldn't rent to students.
>
> P: How did that make you feel?
>
> S1: I was really ticked off. It's not fair. Why shouldn't students be able to rent? My money is as good as anyone else's.
>
> P: Can anyone think of any reason why a landlord might *not* want to rent to students?

[84] Rogers, *Creative Teaching and the Topic of Sex Discrimination*, in American Business Law Association, 1987 NAT'L PROCEEDINGS.

[85] *See, e.g.*, Breslin, *Day of Reckoning*, 17 Ms. 46 (June 1989).

S2: He might be worried about drinking or loud parties... you know, student life.

S1: But I'm not that kind of person. I'm pretty quiet, and I have to work to put myself through school. It's not like I have all that much time to party even if I want to.

P: Why would the landlord assume you were a loud student?

S1: Well, maybe he had bad experiences in the past.

P: Does it seem fair to refuse to rent to *any* students because of bad experience in the past with some students?

S1: No. That's stereotyping.

S3: But it is the landlord's house. He should be able to rent to whomever he wants. I don't want anyone telling me who can live in my house and who can't. I should be able to decide that.

S4: I agree. It's a free country isn't it?

S5: Isn't it illegal to discriminate against people? I mean, what if everyone refused to rent to you then what would you do? Isn't that what the civil rights laws are all about?

P: That's what we are going to talk about today. Let's outline some of the issues we've raised that we will be exploring in greater depth: First, the reason or basis for discrimination (student status, age). Has anyone else ever been denied a house or apartment for any reason? (race, sex, sexual orientation, marital status, handicap, religion, income). We will see that some but not all bases for discrimination are illegal. Second, size of the building/employer etc. The law does not treat the person renting the upstairs of her home to another person the same way that it treats a landlord who owns a large multiple dwelling or rents out houses she doesn't live in. Employment discrimination laws, like most laws regulating business, generally exempt small businesses. So, size will be an issue. Third, Rob mentioned "stereotyping." That is an important concept in employment discrimination law. We will see that business practices based on stereotypes about race or gender are a kind of illegal discrimination. But before we discuss the law, would someone else like to describe their experience with discrimination — perhaps in a job?

At this point, students might describe not getting a job or a promotion because of the way they dressed, their age, their gender, race, personal contacts, or the school they attended.

P: Someone else? (No hands.) Well, let me tell you about one of my experiences. When I was in college in the late 1960's, my aunt got me a job with a Wall Street stock broker, as a summer clerk. I spent several weeks folding stock certificates and putting them

> in envelopes, volunteered to type because I knew how when one of the typists was out, and answered telephones. They rehired me the next summer, and I asked about their trainee program. I didn't know anything about stock brokering, but I was smart, and I figured I could learn. I was told by my supervisor that I shouldn't bother applying, they didn't take "girls" because trainees had to work overtime and it was not really safe for "girls" to walk around Wall Street alone at night. I was really angry, but I didn't do anything about it.
>
> S5: Why not?
>
> P: I guess I didn't know it was illegal, and I doubt that I would have known what to do if I'd been told it was illegal. I didn't know any lawyers, and I didn't have much money. But that was 25 years ago and I am still upset about it. Your question raises another issue for our outline: remedies. What can be done if you experience discrimination?

This discussion might well be followed by reading several cases involving discrimination. To provide some historical perspective, a pre-1964 case can be included. A classic case among feminists is the 1873 United States Supreme Court decision allowing the state of Illinois to prevent Myra Bradwell from practicing law because of her sex, even though she had passed the bar exam.[86] Students are usually surprised to learn that the Illinois rule was not unusual. The case is particularly useful for the concurring opinion, which discusses the "separate spheres and destinies of men and women":

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.... The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional ones.[87]

[86] Bradwell v. Illinois, 83 U.S. 130 (1873).
[87] 83 U.S. 130, 141-142 (Bradley, J., concurring).

This case might be followed by a more recent one, such as *Price Waterhouse v. Hopkins*,[88] brought under Title VII by a woman denied partnership in a major accounting firm and advised to improve her chances in the future by learning to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[89] The decision outlines current Title VII law and also addresses the issue of stereotyping:

> As to the existence of sex stereotyping in this case, we are not inclined to quarrel with the District Court's conclusion that a number of the partners' comments showed sex stereotyping at work.... As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[in] forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'[90]

When discussing legal issues that are politically divisive, such as affirmative action, allowing discussion of personal experience can be especially critical. Experienced teachers suggest that political disagreements can be managed better, for example, if theoretical presentations of different political perspectives and analyses are alternated with an around-the-room sharing of personal experiences of the issues at hand.[91]

It is especially important that faculty members who encourage students to discuss their personal experiences be sensitive to the ways in which certain students, in particular women of color, have been marginalized in the past. One way to help avoid such marginalization is to use the experience of minority groups to demonstrate more general issues in order to avoid "ghettoization."[92] So, for example, an instructor can make a conscious effort to call on a woman of color when asking students to share experiences con-

[88] 109 S. Ct. 1775 (1989).

[89] 618 F. Supp. 1109, 1117 (1985).

[90] 109 S. Ct. 1175, 1791.

[91] Ferguson, *Feminist Teaching: A Practice Developed in Undergraduate Courses*, 20 RADICAL TCHR. 28, 29.

[92] It is not uncommon for majority professors to look to white students as individuals, and to black students to be spokespersons for all black people. The effect is to isolate, or ghettoize the experience of black students. *See generally*, Spelman, *supra* note 79 and G. PEMBERTON, ON TEACHING THE MINORITY STUDENT: PROBLEMS AND STRATEGIES (1988).

nected to workplace safety or drug testing, not just those connected with racial discrimination.

A common practice in women's studies courses is to require students to keep journals, as a "means of empowering women, third world and working class students by helping them to recover feelings, in order to develop assertiveness and to confront opposition with newly uncovered feelings of anger and oppression."[93] In the business law context, students continue to have strong reactions to such topics as affirmative action, sexual harassment, and comparable worth. Journals or occasional reaction papers provide an opportunity to explore their feelings. Sharing such writings can help to change the class into a "community of people who were learning how to share and how not to sabotage trust."[94]

To encourage cooperative ("collective") learning, classroom dynamics need to be altered so that the lecture is not the primary mode of education, and the teacher is not the sole authority in the classroom.[95] Students learn from the experience of setting their own goals, and from developing their own ways of presenting materials. They can be asked, for example, to keep a file of newspaper and magazine clippings related to current developments or presenting issues of gender, race, or class. This is especially valuable in business law classes, where the "content" is constantly changing as new laws are passed and new issues come to the forefront, and where the standard materials may not provide full coverage.

Small group projects are a common business school teaching technique. The small group experience can help establish norms of sharing resources and collective problem solving.[96] Small groups can be used not only to enhance collective learning, but also to develop more inclusive course materials.

Mini-research and writing projects can be designed to serve the same purpose. For example, a group of students might be asked to explore a topic involving environmental or workplace safety from different perspectives and to research state or federal legislation,

[93] Ferguson, *supra* note 91, at 28.

[94] Carver, *supra* note 81.

[95] Bricker-Jenkins and Hooyman, *Feminist Pedagogy in Education for Social Change*, 2 FEM. TCHR. 36, 41 (1987). A recent study by the New Jersey Master Faculty Program emphasizes the importance of frequent interactions with faculty and fellow students for freshmen to learn the learning and study techniques needed for successful college study. 1 Connections: Newsletter N.J. Master Faculty Program, 3 (April 1989). For a series of tips on improving discussions see Cashin & McKnight, Idea Paper No.15 (Jan. 1986) available from the Center for Faculty Evaluation and Development, Kansas State University.

[96] Bricker-Jenkins & Hooyman, *supra* note 96, at 41.

case law, and "current issues" using news and business periodicals or scholarly journals. Part of the assignment can be to evaluate the "state of the law" in light of their findings, and to draw conclusions regarding the degree of government regulation. The class might be divided into "resource groups" responsible for acquiring expertise on different governmental agencies (EPA, NLRA, OSHA, EEOC, SEC) to be shared with the rest of the class as various topics of government regulation of business are explored. The groups can be told to be particularly attentive to problems or issues within each agency that might affect persons of different races, genders, and classes differently.

Discussion within a single class period can be altered by breaking the class into smaller groups, with the professor roving from group to group to handle questions or problems. Students might be asked, for example, to draft proposed bills or ethical guidelines on a topic likely to provoke a variety of responses, such as harassment guidelines (racial, sexual, etc.) for their college; drug-testing rules for a school or workplace; or guidelines for limiting smoking.[97] A group report presented to the rest of the class allows for sharing results of the discussion.

Class participation is enhanced by including participation as part of the student's grade in the course. Students can be consciously taught effective listening skills, for example, when they are given credit for respecting and hearing accurately what other students are saying, and for participating in a constructive manner.[98] They can also be asked to evaluate themselves in a way that enables them to focus both on the learning process and the cooperative nature of it. Such assessment might include questions such as: Did

[97] For details of such projects, see LAW AND ETHICS IN THE BUSINESS ENVIRONMENT (T. Halbert & E. Ingulli eds. 1990).

[98] On the importance of listening:

> I have a theory about listening, really listening, and I tried to impart it to the students. Often when we listen to others, we pick out the bits of their stories that are like our stories and discard the rest. That is, we embrace the familiar, the part that is easily recognized. At other times, especially at the first hint of the nonfamiliar, we say "that's not like me at all." I asked the students not to discard any part of each other's stories, not to contrast themselves to each other. For the rest of the class, I asked them to identify with the speaker and to do so beyond the familiar part. My theory is that if you can find some slim reed of commonality with the other, you can begin to build understanding. But to find the slim reed, you cannot focus on yourself when listening to the story of the other. Instead, you must so identify with the other that you *feel* the story being told.

Cain, *Teaching Feminist Theory at Texas: Listening to Difference and Exploring Connections*, 38 J. LEGAL EDUC. 165, 171 (1988).

I share my insights and resources? Did I support the work of the group by completing assignments on time?[99] Students are encouraged to value learning from classmates when they are asked to write down the names of those students who contributed most to what they learned from a particular exercise or class.

Even among the most ardently egalitarian teachers, considerable effort is needed to check one's own treatment of students to be sure that each student, regardless of race, gender, or class background, is made to feel equally comfortable and significant in the classroom. That means, for example, that a professor should monitor her own interactions with students to check for bias—to assure that one is a role model of a non-sexist, non-racist person who treats others with equality and respect.[100] One way to monitor classroom behavior is to ask what kind of behavior is rewarded. For example, a teacher may make verbal or eye contact with some students more than others, or be impatient with, or inattentive to, some students compared with others. Interactions among the students, such as interruptions or lack of cooperation, are also worth noting. Most classes are dominated by highly verbal, assertive males, with patterns established within the first two weeks of class. A teacher who is conscious of those patterns can adopt methods for breaking them up to assure fuller participation from those students who are otherwise likely to be quiet and marginalized in the classroom.[101] These are, of course, only some of the strategies and techniques that might be adopted to transform one's classroom into a place that is truly open to students of diverse backgrounds.

[99] Bricker-Jenkins & Hooyman, *supra* note 96, at 36.

[100] Anderson & Gribman, *Communicating Difference: Forms of Resistance*, in SCHUSTER & VAN DYNE, *supra* note 73, at 221. For suggestions on monitoring for bias, generally, see R. HALL & B. SANDLER, THE CLASSROOM CLIMATE: A CHILLY ONE FOR WOMEN (1982). Recommendations include avoiding sexist humor, the use of the generic "he," invading someone's personal space, disparaging remarks about groups of people, such as women or homosexuals, complimenting women on their appearance. *See also* McMillen, *How to Keep Discussions Free of Sexual Inequities*, 31 CHRON. HIGHER EDUC. 22 (1985).

[101] Numerous scholars have noted the relative silence of women in the classroom. *See* Fox, *Women and Higher Education: Sex Differentials in the Status of Students and Scholars*, in WOMEN: A FEMINIST PERSPECTIVE (J. Freeman ed. 1984); Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. LEGAL EDUC. 147 (1988). On the significance of women's silence generally, see West, *supra* note 43. On the importance of interaction among minority students, Spelman writes: "Encourage students to voice their opinions on the material at hand—to think out loud with one another, challenge one another, help one another figure out their own considered views. The heart of the educational exchange is not in the delivery of pearls of wisdom from the professor on high, but in the lively exchange among students." Spelman, *supra* note 79, at 241.

Re-Examining Course Materials

Re-examination of a course necessarily means re-evaluation of materials for bias and inclusiveness. The kind of analysis of textbooks for bias that has been commonplace in other disciplines[102] is rare in law. Nevertheless, a few such efforts have been made, providing starting points for a close examination of the race/class/gender content of available texts and teaching materials.[103] No one, however, has published an analysis of business law texts. Such an analysis should be undertaken for several reasons. First, the text is critical to the course.[104] The business law text is doubly powerful since most business law professors use it to structure their courses. The order in which a textbook covers material may well determine the organization of an entire syllabus. Thus, analysis of the structure of a textbook may in fact be a critique of the course itself. If that analysis points to gaps, they can be filled. An additional text, other books, or supplemental cases and readings can be assigned to "round out" the textbook.[105] Media resources can be considered. By identifying bias in a textbook the instructor demonstrates the pervasiveness of racism and sexism as persistent problems, and better arms students in the struggle against them.

A professor who feels that a chosen text is too valuable to give up, despite biases, might consider sharing her analysis with students. Class discussion about the book—how it is constructed, what is included and why—can help students understand the way in which a discipline such as business law is constructed by those who

[102] J. GAPPA, SEX AND GENDER IN THE SOCIAL SCIENCES (1980) (produced under grant from Women's Educational Equity Act Program, United States Department of Education); Ruth, *Methodocracy, Misogyny and Bad Faith: The Response of Philosophy*, in MEN'S STUDIES MODIFIED: THE IMPACT OF FEMINISM ON THE ACADEMIC DISCIPLINES 43 (D. Spender, ed. 1981).

[103] *See, e.g.*, Erickson, *Sex Bias in Law School Courses: Some Common Issues*, 38 J. LEGAL EDUC. 101 (1988); Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U.L. REV. 1065 (1985); Klare, Book Review, *Jurisprudence and the First Year Casebook*, 54 N.Y.U. L. REV. 876 (1979).

[104] Allen, *Law As a Liberal Art Versus Law As A Professional Discipline: A False Dichotomy*, 15 AM. BUS. L.J. 61, 64 (1977).

[105] Some experts on curriculum reform caution, however, that students are likely to view supplementary materials as less important and less authoritative. In law, it is relatively easy to minimize that problem. One way is to be sure that supplementary materials are not exclusively by and about women and men of color. Since there is an inevitable lag time between the writing and availability of a major textbook, supplementary materials that include relatively new cases and statutes are an effective way to add materials by and about women, working class people, and racial and ethnic minorities. The justification for doing so is not solely to round out a biased textbook, but to update materials.

practice, teach, and write about it.[106] It is helpful to consider *all* material from a variety of viewpoints, asking how differently a topic might be treated if it were constructed by women instead of men, by a black person instead of a white person, by a working class person instead of an upper-middle class person.

A variety of questions can help to uncover and remedy racial and sexual bias in a text. One might ask, for example, whether the authors use non-sexist language in narrative sections of the book. The power of sexist language is well-documented[107] and most publishers have taken steps to avoid sexist usage in their books.[108] Professors should consider abandoning a text that does not use non-sexist language. One might also ask whether the book cites both male and female authorities, such as judges, authors, authorities, or commentators discussed by the authors/editors of the book.[109] If, as is not uncommon, all or most of the authorities in a given textbook are male, the message that is clearly communicated to students is that in law, authority is male. While that may be historically and generally true, it is devastating to the self-esteem of young women to continue to believe that only men, and specifically European men of upper and upper-middle class background, are capable of such authority.[110]

If the textbook refers only to male authorities, a teacher might want to supplement the text with readings that include current works by women and African-American scholars. Many of the most

[106] The editors of a textbook make choices about the cases they use, the parts of cases that are excerpted and the parts that are omitted, and the "comments, elaborations, or questions they include with the decisions," as well as the organization of the book. Frug, Re-Reading Contracts, *supra* note 103, at 1077. All of those choices may influence readers' views about women.

[107] Jenkins & Kramara, *A Thief in the House: Women and Language*, in MEN'S STUDIES MODIFIED: THE IMPACT OF FEMINISM ON THE ACADEMIC DISCIPLINES 11 (D. Spender, ed. 1981).

[108] C. MILLER & K. SWIFT, A HANDBOOK TO NONSEXIST USAGE FOR WRITERS, EDITORS, AND SPEAKERS (2d ed. 1988).

[109] *See* Frug, *supra* note 103, at 1096 (texts may include opinions written by women justices, but readers will not *know* that unless the first name of the judge is included). Frug cites as examples, Judge Ellen Peters' decision in Sheets v. Teddy's Frosted Foods, 179 Conn. 471, 427 A.2d. 385 (1980) (a wrongful discharge case that appears in many business law texts) and a decision written by former Chief Justice Rose Bird of the California Supreme Court in Bleecher v. Conte, 29 Cal. 3d 345, 626 P.2d 1051, 173 Cal. Rptr. 278 (1981).

[110] *See generally* PROSPECTUS FOR EDUCATING THE MAJORITY: HOW WOMEN ARE CHANGING HIGHER EDUCATION (Pearson, Shavlik & Touchton, eds. 1988); Haines, *Minority Law Professors and the Myth of Sisyphus: Consciousness and Praxis Within the Special Teaching Challenge in American Law Schools*, 10 NAT'L BLACK L.J. 247 (1988).

important current writings on law, ethics, sociology, economics, psychology, literature, and philosophy are written by such authors. To counter the lack of women or people of color as authorities, women and racial minorities with positions of authority, such as attorneys, judges, and government officials, can be invited into the classroom to speak.

The instructor also should observe the gender of the major characters in cases, as well as their status and their description. How does the court describe what women do and the value of their work? Are there any references to the ethnic or racial background of case characters? If not, are there times when such descriptions would help the reader understand the case?[111] These questions are useful to help us see how the book might affect the way in which a reader learns about the gender roles of males and females in our society, including the relative worth of their various activities. For example, in analyzing a classic contracts textbook, Frug found that characters identifiable by gender were overwhelmingly male. Not surprisingly, the men's legal problems stemmed from broad, diverse situations. The fewer female characters had "legal problems arising from limited activities typically associated with their sex, and the jobs they have are the most stereotypical forms of women's work. Their disputes involve contract problems arising from some experience in a family relationship, while men's problems arose in a variety of business settings."[112]

One may analyze how the editors and authors portray women and men in the problems, chapter questions, and projects, and particularly the type and variety of jobs they hold. Male and females students are much more likely to accept problems in which people hold jobs that are traditionally allocated to the other sex if they have been previously exposed to materials in which people are portrayed in similar ways. One way to assure that students see and accept men and women in a variety of jobs is to be sure that the course reading materials portray them that way. If the teacher

[111] Mari Matsuda asks the following about the relevance of race issues in teaching a Miranda-type case:

One wonders whether the defendant was a person of color and whether the police officer was white. The student knows the city in which the case arose, and knows that the level of police violence is so high in that place that church groups hold candlelight vigils outside the main police station every Sunday. The crime charged is rape. The student wonders about the race of the victim, and wonders whether the zealous questioning by the police in the case was tied to the victim's race. . . .

Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989).

[112] Frug, *supra* note 103, at 1076-78.

knows that the textbook does not do so, she should consider supplemental materials, such as another book, selected cases and readings, or even newspaper articles or magazine articles collected by the students themselves, that portray men and women in traditionally opposite-sex jobs.

The style and content of the book should be examined.[113] An apparent "neutrality" may disguise the fact that the editors have a point of view, and that the book itself has a point of view. It is easy to assume that a particular text is objective simply because its content and style seem to be the same as that of other leading texts. The new scholarship admonishes us to be mistrustful of all claims of neutrality and objectivity, and to search for ways to understand and critique the underlying point of view.

One may look for readings from economics, social history, anthropology, and related disciplines, that will provide a context for the legal material and thereby assist the reader. Non-legal readings may demonstrate that law is constructed by human beings within a particular socio-economic context and is not neutral doctrine. Readings also provide a context within which to understand the case, such as data, manifestos, histories, and personal narratives that provide insight into the personal experiences on which the law is built.[114]

Finally, one should analyze what the overall organization of the textbook, and the topics covered by the major cases, tell the reader is important and not important. Some topics may be well-developed and clearly central, while others are marginalized by superficial treatment or placement at the end of a chapter, or at the end of a book as an afterthought. One way to confront that issue in the classroom is to reorder the sequence of topics covered in the course.

The content of our courses reflects and reinforces our understanding of the core meaning of "business law." In re-examining the

[113] Erickson suggests reading the unedited version of cases that appear in a textbook. As an example, she cites a famous statutory rape case in which the court concluded that mistake as to the age of the victim should be a defense to the charge of statutory rape, even though the legislature had not authorized such a defense. The edited case appears neutral. However, several textbooks had edited the case to delete material that "clearly indicates the judge's view that women and girls are not to be trusted, that many are emotionally disturbed, and that many cry rape when they really consented or press statutory rape charges after they deceive and seduce the innocent defendants." Erickson, *supra* note 104, at 107-08.

[114] *See* Menkel-Meadow, *supra* note 41, at 80-82 on the importance of providing information about the context in which the law develops. Menkel-Meadow discusses visits by litigants themselves as a way of providing a concretized, experiential dimension to the study of law. *See also* Erickson, *supra* note 103, at 114-15.

content, then, we cannot avoid re-thinking our scholarly efforts. The questions we ask, the data, studies and readings we turn to in our own research, and the analysis we do, will change as we incorporate new ways of thinking about our discipline. We need to read stories about human beings, especially the stories of women, as well as cases and statutes. We need to consider the impact of every law, no matter how "neutral" it appears to be, from the standpoint of different races, classes, and genders. We need to explore the law's silence as well as its voice. As we twist the prism through which we view "business law", we are likely to find a dearth of materials addressing some topics that suddenly seem relevant to our new conception of the discipline.

A New Business Law

Implicit in the idea of a transformed pedagogy is a new vision of what it is that we mean by business law. At one level, we may decide that we are confident in our current definitions of that core, although we are persuaded to make efforts to be more conscious of historical developments and socio-economic context in our writings, as well as the need to be more sensitive to race and gender in the classroom. We might also consider feminist methodology, stretching to locate and analyze the ways in which apparently neutral laws have had impact on women, people of color, and members of the working class. It is even possible that we might re-vision the core content of our discipline.

Seen through the new prism, business law may encompass more than was formerly understood. While we might all agree, for example, that business is about the market, not the family, critical scholar Frances Olsen suggests that we might "increase the possibilities available to individuals and to the human personality" if we see that market and family is a false dichotomy that can be transcended.[115]

Similarly, a more inclusive view of contract law would consider issues of reproduction and sexuality. Contracts for surrogate mothers and artificial insemination can be explored, because legal developments in those areas may (or may not) lead to increasing numbers of businesses devoted to the arranging of such contracts.[116]

[115] Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497 (1983). *See*, Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 Harv. C.R.-C.L. L. Rev. 79 (1989).

[116] *See* Surrogate Parent Association v. Ky ex rel Armstrong, 707 S.W.2d 209 (Ky. 1986); Matter of Baby M., 109 N.J. 396, 537 A.2d 1227 (1988); Robertson, *Embryos,*

Cohabitation and separation agreements might be viewed as public arrangements, not merely private affairs.[117] A critical discussion of contract law would look at the field in historical perspective[118] and would include discussion of the historical limitations on the rights of African-Americans and married women to contract.[119] The impact of particular contractual arrangements on different classes of people should be explored. Covenants not to compete, for example, can be

Families and Procreative Liberty: The Legal Structure of the New Reproduction, 59 S. CAL. L. REV. 939 (1986); Taub, *Surrogacy: A Preferred Treatment for Infertility?* (Forum on Surrogate Motherhood: Politics and Privacy) 16 LAW, MED. & HEALTH CARE 89 (1988); *Special Project: Legal Rights and Issues Surrounding Conception, Pregnancy and Birth*, 39 VAND. L. REV. 597 (1986); Note, *Parenthood by Proxy: Legal Implications of Surrogate Birth*, 67 IOWA L. REV. 385 (1982). *See also* M. ATWOOD, A HANDMAID'S TALE (1985) (fictional world in which reproduction occurs through surrogate mothers); COREA, THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL WOMBS (1985); REPRODUCTIVE LAWS FOR THE 1990s (S. Cohen & N. Taub eds. 1989) (essays from authorities in a variety of professions and disciplines who share a commitment to reproductive freedom and gender equality).

In Radin, *Market Inalienablity*, 100 HARV. L. REV. 1849 (1987), the author explores the significance of 'market inalienability,' which is the right to give away, but not to sell, certain things. She offers a justification for market inalienability that relates to an ideal of human flourishing, and demonstrates its application to prostitution, baby-selling, and surrogate motherhood.

[117] Hunter, *Child Support and Policy: The Systematic Imposition of Costs on Women*, 6 HARV. WOMEN'S L.J. 1 (1983); Shultz, *Contractual Ordering and Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204 (1982). Separation agreements are a good vehicle for exploring such topics as duress, undue influence, and unconscionability. *See, e.g.*, Hale v. Hale, 539 A.2d 247 (Md. App. 1988). *See also*, L. WEITZMAN, THE DIVORCE REVOLUTION (1985) (the relationship between divorce and the feminization of poverty).

[118] *See generally* Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983); Gabel & Feinman, *Contract Law as Ideology*, in Kairys, *supra* note 17, at 172; Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U.L. REV. 195 (1987) (using a contracts case involving Arthur Murray Dance studio contract).

[119] On the common-law disability of married women to contract, own property, sue and be sued in their own right, see W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, especially Book I, chapter 15 on Coverture. Married Women's Property Acts are discussed in BASCH, IN THE EYES OF THE LAW (1982). Legal and non-legal historical documents (cases, diary excerpts, newspaper articles) are collected in 1 WOMEN IN AMERICAN LAW: FROM COLONIAL TIMES TO THE NEW DEAL (M. Wortman ed. 1983).

For discussion of the legal limitations on African American slaves and indentured servants in colonial America, see A.L. HIGGENBOTHAM, IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS [THE COLONIAL PERIOD] (1978). *See also* Williams, *On Being the Object of Property*, 14 SIGNS 5 (1988) (reflections by a black woman who taught commercial and consumer law, including a discussion of surrogate mothering contracts).

examined from the worker's point of view as well as the employer's,[120] and the wisdom of enforcing them could be questioned.

Tort law, a core component of our discipline, should be examined from a critical perspective. We should teach the torts of sexual harassment in the workplace,[121] racial harassment,[122] and problems of homophobia. Whistleblowing and the tort remedy of wrongful discharge should be a central topic, not a marginal one. In our writings, we might re-examine the concept of duty and no duty determinations from an historical and feminist perspective[123] while drawing on critical studies of tort law.[124]

Textbook chapters on "business and the constitution" frequently focus on the First Amendment (commercial speech, employment rights, perhaps zoning), the commerce clause, and due process. Feminists would have us expand our First Amendment analysis to include the debate on pornography.[125] Critical scholars would have

[120] Lowry, *Inevitable Disclosure Trade Secret Disputes: Dissolutions of Concurrent Property Interests*, 40 STAN. L. REV. 519 (1988) (analogizing the concurrent interests of employer and employee in trade secrets learned on the job to the concurrent property interests of husband and wife in a marriage that is dissolved); Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988) (exploring idea of reliance and concurrent interests throughout property law, with a special focus on plant closings).

[121] *See* C. MACKINNION, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE STUDY OF SEX DISCRIMINATION (1979). The Supreme Court recognized sexual harassment as a violation of Title VII in Meritor Savings Bank v. Vinson, 106 S. Ct. 2399 (1986). Sexual harassment tort actions have also been brought. *See* Bell v. Crackin Good Bakers, Inc. 777 F.2d 1497 (11 Cir. 1985) (intentional infliction of emotional distress); Phillips v. Smalley Maintenance Servs., Inc., 711 F.2d 1524 (11th Cir. 1983) (invasion of privacy); Howard Univ. v. Best, 484 A.2d 958 (D.C. Ct. App. 1984); Tolbert v. Martin Marietta Corp., 621 F. Supp. 1099 (D. Colo. 1985) (negligent hiring of employees); Rogers v. Loew's L'Enfant Plaza Hotel, 526 F. Supp. 523 (D.D.C. 1981) (assault and battery); Arnold v. City of Seminole, 614 F. Supp. 853 (E.D. Okla. 1985). *See also* Rich, *Toward a Woman-Centered University* (1973-74), in A. RICH, ON LIES, SECRETS AND SILENCE: SELECTED PROSE 1966-1978 125, (1979) (the problem of sexual harassment in education); M. KATZ & V. VIELAND, GET SMART! A WOMAN'S GUIDE TO EQUALITY ON CAMPUS (1989) (advice to students for dealing with problems such as sexual harassment).

[122] Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 131 (1982). *See* Hunter v. Allis-Chalmers Corp., 797 F.2d 1417 (7th Cir. 1986); Brooms v. Regal Tube Company, 881 F.2d. 412 (7th Cir. 1989).

[123] Bender, *supra* note 31, at 33-36.

[124] Abel, *A Socialist Approach to Risk*, 41 MD. L. REV. 695 (1982), Abel, *The Real Tort Crisis — Too Few Claims*, 48 OHIO ST. L.J. 443 (1987).

[125] American Booksellers Assoc. v. Hudnut, 777 F.2d 323 (7th Cir. 1985), aff'd 106 S. Ct. 1172 (1986) introduces the debate on pornography statutes. For feminist legal analysis see Brest & Vandenberg, *Politics, Feminism and the Constitution: The Anti-*

us question the expansion of corporate free speech rights during the past decades, while the expressive rights of individuals have been restricted due to the high cost of access to the major means of communication.[126]

Those who are not part of the dominant class regard the Equal Protection Clause as a central part of constitutional law. Certainly it should be taught and analyzed as part of the core of business law.[127] Recent developments in equal protection law must be explored in historical context[128] and racial critiques must be considered.[129] Business law professors should participate in the debate over the meaning of equal protection, both in their teaching and in their scholarship.

Pornography Movement in Minneapolis, 39 STAN. L. REV. 607 (1987); Dworkin, *Against the Male Floods: Censorship, Pornography and Equality*, 8 HARV. WOMEN'S L.J. 1 (1985); MacKinnon, *Pornography, Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985); West, *The Feminist-conservative Anti-pornography Alliance and the 1986 Attorney General's Commission on Pornography Report* (Symposium on the Attorney General's Commission on Pornography), 1987 AM. B. FOUND. RES. J. 881 (1987). *See also*, PORNOGRAPHY AND CENSORSHIP (Copp & Wendell eds. 1989) (collection of philosophical essays, social scientific studies, and judicial essays); A. DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981) (feminist analyses of pornography); S. GRIFFIN, PORNOGRAPHY AND SILENCE (1981); L. LEDERER, TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY (1980); A. SOBLE, PORNOGRAPHY: MARXISM, FEMINISM, AND THE FUTURE OF SEXUALITY (1986).

[126] *See* Tushnet, *Corporations and Free Speech*, in Kairys, *supra*, note 17, at 253.

[127] Equal Protection has been a popular topic among feminists, African-American scholars, and critical legal scholars. *See* Burns, *Race Discrimination Law and Race in America*, in Kairys, *supra* note 17, at 89; *Antidiscrimination Law: A Critical Review*, in Kairys, *supra* note 17, at 96; Freedman, *Sex Equality, Sex Difference, and the Supreme Court*, 92 YALE L.J. 913 (1983); Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39; Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 394 (1986); Law, *supra* note 31; Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987); Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WIS. L. REV. 55; Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1988); Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 263 (1984); Note, *Toward A Redefinition of Sexual Equality*, 95 HARV. L. REV. 487 (1981).

[128] *See, e.g.*, the recent Supreme Court decision, Croson v. City of Richmond, 109 S. Ct. 706 (1989), in which the Supreme Court held that all race-based classifications, even "benign" affirmative action efforts like the minority set-aside program in the City of Richmond, must be strictly scrutinized, and Wards Cove Packing Co. v Antonio, 109 S. Ct. 2115 (1980), which changed the rules for evaluating disparate impact discrimination.

[129] Bell, *supra* note 4; Freeman, *Racism, Rights and the Quest for Equality of Opportunity*, 23 C.R.-C.L. L. REV. 295 (1988); Matsuda, *Affirmative Action*, *supra* note 4.

Affirmative action and/or equal employment opportunity has been a staple of legal environment courses for years. Again, the new scholarship provides multiple perspectives from which to analyze such issues[130] and would include extensive discussion of comparable worth,[131] occupational segregation,[132] family leave policies, day care,

[130] D. BELL, RACE, RACISM AND AMERICAN LAW (2d ed. 1980); D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM (1986); Bell, *A Hurdle Too High: Class-Based Roadblocks to Racial Remediation*, with Freeman, Fordham & Willheim, 33 BUFFALO L. REV. 1 (1984); Bell, *Does Discrimination Make Economic Sense? For Some, It Did—And Still Does* (Special Report: The Civil Rights Movement Today) 15 HUM. RTS. 38 (1988); Freeman, Bell, & McGee, *Race, Class and the Contradictions of Affirmative Action* (panel discussion); 7 BLACK L.J. 270 (1981); Law, *Girls Can't Be Plumbers Affirmative Action for Women in Construction: Beyond Goals and Quotas*, 24 HARV. C.R.-C.L. L. REV. 45 (1989) (arguing that it is not enough to know what cases and statutes prescribe, because law is not merely prescriptive, but includes what actually happens); Taub, *Keeping Women in Their Place: Stereotyping per se as a Form of Employment Discrimination*, 21 B.C.L. REV. 345 (1980); Taub & Williams, *Will Equality Require More than Assimilation, Accommodation or Separation From the Existing Social Structure?* (Second Decennial Conference on the Civil Rights Act of 1964) 37 RUTGERS L. REV. 825-44 (1985).

Works by non-legal scholars include SEX DISCRIMINATION AND EQUAL OPPORTUNITY: LABOR MARKET AND EMPLOYMENT POLICY (G. Schmid & R. Weitzel eds. 1984); NATIONAL COMMITTEE ON PAY EQUITY, PAY EQUITY: AN ISSUE OF RACE, ETHNICITY AND SEX (1987); M. WARING, IF WOMEN COUNTED: A NEW FEMINIST ECONOMICS (1988) (detailing how economic theory has excluded women's housework, volunteer work, and childbearing and rearing from value in economic theory, while giving high value to war-related and ecologically destructive practices); Shattuck, *Sex-Based Wage Discrimination: A Management View*, 62 DEN. U.L. REV. 2 (1985).

[131] *See* Blumrosen, *Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 399 (1979) (theoretical framework for comparable worth suits); Haywood, *Can Theories of Intentional Wage Discrimination and Comparable Worth Help Black People?*, 10 NAT'L BLACK L.J. 16 (1987); Volz & Brietenbeck, *Comparable Worth and the Union's Duty of Fair Representation*, 10 EMP. REL. L.J. 30 (1984) (discussing 300 S. Grand Co., 257 N.L.R.B. 178 (1981) and Farmer v. ARA Services, Inc., 660 F.2d 1096 (6th Cir. 1981).

For interdisciplinary works on comparable worth see F. HUNTER, EQUAL PAY FOR COMPARABLE WORTH (1986) (economic analysis); E. JOHANSEN, COMPARABLE WORTH: THE MYTH AND THE MOVEMENT (1984) (political scientist); WOMEN IN THE LABOR MARKET (C.B. LLoyd ed. 1979) (economics); THE ECONOMICS OF SEX DIFFERENTIALS (C.B. LLOYD & B.T. NIEMI eds. 1979); COMPARABLE WORTH AND WAGE DISCRIMINATION: TECHNICAL POSSIBILITIES AND POLITICAL REALITIES (H. Remick ed. 1984); WOMEN, WORK AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE (D.Treiman & H. Hartmann eds. 1981); *Special Issue: Approaching Pay Equity Through Comparable Worth* (R.H. Lowe & M.A. Wittig eds.), 45 J. SOC. ISSUES 1 (1988).

[132] Sociologists, anthropologists, economists, and political scientists have looked at the segregated workplace. *See, e.g.*, C. BOSE, R. FELDBERG & N. SOKOLOGG, HIDDEN ASPECTS OF WOMEN'S WORK (1987); L.K. HOWE, PINK-COLLAR WORKERS: INSIDE THE WORLD OF WOMEN'S WORK (1977); P. ROOS, GENDER AND WORK: A COMPARATIVE

and the need to accommodate workers who do not live in a "working father/full-time mother" family.[133] Labor policy, including the rights of workers to organize,[134] and legislation protecting the health of

ANALYSIS OF INDUSTRIAL SOCIETIES (1985); E. LEACOCK, H.I. SAFA, WOMEN'S WORK: DEVELOPMENT AND THE DIVISION OF LABOR BY GENDER (1986); INGREDIENTS FOR WOMAN'S EMPLOYMENT POLICY (C. Bose & G. Spitze eds. 1987); GENDER IN THE WORKPLACE (C. Brown & J. Pechman eds. 1987); A LABOR OF LOVE: WOMEN, WORK AND CARING, (J. Finch & D. Groves, eds. 1983); SEX DISCRIMINATION AND THE DIVISION OF LABOR (C.B. Lloyd ed.1975); THREE WORLDS OF LABOR ECONOMICS (G. Mangum & P. Philips eds. 1988); WOMEN, MEN AND THE INTERNATIONAL DIVISON OF LABOR (J.C. Nash & M.P. Fernandez-Kelly eds. 1983); Henry, *Toward a Theory of the Desegregation of the Workplace*, 19 BLACK SCHOLAR 23 (1985); Higgenbotham, *Laid Bare by the System: Work and Survival for Black and Hispanic Women*, in CLASS, RACE, AND SEX: THE DYNAMICS OF CONTROL (A. Swerdlow & H. Lassinger eds. 1984).

[133] Feminists note that the idea of the non-pregnant worker as "normal" and the pregnant worker as "special" comes about only because the male standpoint is viewed as "objective." If the perspective is changed, then the "normal" biography that forms the basis for working lives also changes. *See* MacKinnon remarks, *Feminist Discourse*, *supra* note 31, at 23. *See also*, Finley, *Transcending Equality*, *supra* note 31, at 1182 (arguing that "work and family are two of the most important defining aspects of the lives of men and women."); Fisk, *Employer-Provided Child Care Under Title VII: Toward an Employer's Duty to Accommodate Child Care Responsibilities of Employees*, 2 BERKELEY WOMEN'S L.J. 89 (1986); Taub, *From Parental Leaves to Nurturing Leaves* (Colloquium: Discrimination in Employment in the 1980s), 13 N.Y.U. REV. L. & SOC. CHANGE 381 (1985) and Williams, *Equality's Riddle*, *supra* note 34.

For readings on workplace and the family from a variety of disciplines, see K. CHRISTENSEN, WOMEN AND HOME-BASED WORK (1988); F.J. CROSBY, SPOUSE, PARENT, WORKER (1987); N. GERSTEL & H.E. GROSS, FAMILIES AND WORK (1987); A. HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME (1989); R.M. KANTER, MEN AND WOMEN OF THE CORPORATION (1977); A. KESSLER-HARRIS, WOMEN HAVE ALWAYS WORKED (1981); A. KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES (1982); G.N. POWELL, WOMEN AND MEN IN MANAGEMENT (1988); I. SAWHILL & H. ROSS, TIME OF TRANSITION: THE GROWTH OF FAMILIES HEADED BY WOMEN (1975); J. SCOTT & L. TILLY, WOMEN, WORK AND FAMILY (1978); R.M. SPALTER-ROTH & H. HARTMAN, UNNECESSARY LOSSES: COSTS TO AMERICANS OF THE LACK OF FAMILY AND MEDICAL LEAVE (1989); BRINGING WOMEN INTO MANAGEMENT, (F.E. Gordon & M. Strober eds. 1975); THE SUBTLE REVOLUTION: WOMEN AT WORK (R. Smith ed. 1979); U.S. DEPT. OF LABOR, EMPLOYMENT AND TRAINING ADMINISTRATION, LOW WAGE JOBS AND WORKERS: TRENDS AND CHANGE, PRELIMINARY REPORT OF FINDINGS (1989); Ehrenreich & English, *Blowing the Whistle On the "Mommy Track,"* 18 MS. 56 (Jul.-Aug. 1989); Schwartz, *Management Women and the New Facts of Life*, HARV. BUS. REV. 65, Jan.- Feb. 1989, (advocating a "mommy track"); Winfield, *Workplace Solutions for Women Under Eldercare Pressure*, 64 PERS. 31 (1987).

[134] Klare, *The Quest for Industrial Democracy and The Struggle Against Racism: Perspectives From Labor Law and Civil Rights Law*, 61 OR. L. REV. 157 (1982); Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective* (Symposium on Civil Rights and Civil Liberties in the Workplace), 23 HARV. C.R.-C.L. L.

workers, especially, women workers, are also core topics in a concept of business law from the perspective of working people. Discussions of workplace safety issues should include fetal-vulnerability policies[135] and their effect on women, including especially women of color.[136] Critical scholars would have us challenge the root assumptions about the workplace.[137]

In teaching and writing about "legal process" we need to continue to focus on alternatives to litigation,[138] and on the effects of those alternatives on different groups of people. Feminists, for example,

REV. 39 (1988); Law, *Women, Work, Welfare and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249 (1983); Kennedy, *Critical Labor Law Theory: A Comment*, 4 INDUS. REL. L.J. 503 (1981).

[135] International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1988), *cert. granted* (1990); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982). *See also* Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219 (1986); Devereux, *Equal Employment Opportunity Under Title VII and the Exclusion of Fertile Women from the Toxic Workplace*, 12 LAW, MED. & HEALTH CARE 164 (1984); Fintel, *Legality of Fetal Protection Policies Under Title VII*, 34 SYR. L. REV. 1131-54 (1983); Gordon, *The Fetus As a Business Customer in the Toxic Workplace*, 1984 DET. COL. L. REV. 973 (1984); Howard, *Hazardous Substances in the Workplace: Implications for The Employment Rights of Women*, 129 U. PA. L. REV. 798 (1981); Samuelson, *Employment Rights of Women in the Toxic Workplace*, 65 CAL. L. REV. 1113 (1977); Williams, *Firing the Woman to Protect the Fetus*, 69 GEO. L.J. 641 (1981).

For non-legal commentary see J. BAER, THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION (1978)(historical study); Bertin, *Reproductive Hazards in the Workplace*, in Cohen & Taub, *supra* note 116, at 277 and Kotch, Ossler & Howze, *Policy Analysis of the Problem of Reproductive Health of Women In the Workplace*, J. PUB. HEALTH POL'Y 213 (June 10, 1984).

[136] *See, e.g.*, Jefferies v. Harris County Community Association, 615 F.2d 1025 (5th Cir. 1980); Judge v. Marsh, 649 F. Supp. 770 (8th Cir. 1987); Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987); Carter v. Dialysis Clinic, 28 F.E.P. Cases 268 (D. Ga. 1981); Graham v. Bendix, 585 F. Supp. 1036 (D. Ind. 1984); DeGraffenreid v. General Motors Corp., 413 F. Supp. 142 (E.D. Mo. 1976), *aff'd in part, rev'd in part on other grounds*, 558 F.2d 480 (8th Cir. 1977). *See also* Scarborough, *Conceptualizing Black Women's Employment Experience*, 98 YALE L.J. 1457 (1989); Shoben, *Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination*, 55 N.Y.U. L. REV. 793 (1980).

Interdisciplinary works include: J. JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT (1985); P. WALLACE, BLACK WOMEN IN THE LABOR FORCE (1980); Fulbright, The Myth of Double Advantage: Black Female Managers, in SLIPPING THROUGH THE CRACKS: THE STATUS OF BLACK WOMEN (M. Simms & J. Malveaux eds. 1986); Malveaux & Wallace, *Minority Women in the Workplace*, in WORKING WOMEN: PAST, PRESENT FUTURE 265, 279 (K. Koziara, M. Moskow & L. Tanner, eds. 1987).

[137] *See supra* text accompanying notes 25-26.

[138] The recent Special Issue on Alternative Dispute Resolution in 26 AM. BUS. L.J. (1988) is a good start.

question whether mediation is a fair process when one party holds all the power. Environmentalists are not satisfied with new federal emphasis on conciliation in lieu of litigation.

Corporate law and corporate structure can be viewed in a traditional way, as a "given," or from a critical perspective that demonstrates that the existing structures are challengable.[139] We need to explore the gender/race/class content of laws that appear to be impervious to such bias: laws governing banking and bankruptcy, secured transactions, agency and partnership laws. Little feminist/critical work in those areas has been done and the area is ripe for scholarship. In this work, we might reconsider our notions of public and private, or at least the boundaries between the two. One might ask, for example, whether there are "private" topics that should be covered because of their relationship to "public" issues.[140]

Conclusion

These suggestions are beginnings. Once the business law professor has opened the door to new ways of thinking about traditional topics, to reading and assigning from non-legal sources, the possibilities for curriculum transformation are endless. Inevitably, research will turn in new directions and provide new analysis of old topics. The resources for re-visioning our discipline are abundant and growing. We need only commit our energy, our time, and our will to change.

[139] *See* K. Ferguson, The Feminist Case Against Bureaucracy (1984); Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. Va. L. Rev. 173 (1985).

[140] Feminists have written extensively about the separate spheres ideology that has permeated American society, opening the public (ie., work, politics, culture) sphere to men, and relegating women to the private sphere of the family and home. That ideology is shown to be reflected in and reinforced by the legal system. *See* Rhode, Gender and Justice, *supra* note 31, at 111-31 (discussion of separate spheres and of the public/private split); Finley, *supra* note 31; Rostker v. Goldberg, 453 U.S. 57 (1981) (justifying male-only Selective Service registration).

The public/private debate appears in other contexts. *See, e.g.*, Horwitz, *The History of the Public/Private Distinction*, 130 U. Pa. L. Rev. 1423 (1982); Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. Pa. L. Rev. 1349 (1982) and Klare, *The Public/Private Distinction in Labor Law*, 130 U. Pa. L. Rev. 1358 (1982). Some "private" activities are more easily recognized as having public overtones that impact on public life. *Compare* Roberts v. United States Jaycees, 470 U.S. 1058 (1984) (large private associations prohibited from discriminating against women); Rotary International v. Duarte Rotary Club, 197 S. Ct. 1940 (1987).