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NON-SEXIST TEACHING TECHNIQUES IN SUBSTANTIVE LAW COURSES

Mary Irene Coombs*

I. INTRODUCTION

I came to the law as a woman, and as a woman of the sixties, and I am looking for a place in the eighties, which unfortunately seems to be a time of consumerism, of ambitious, individualistic, post-feminist women. At least, that is the picture that the media paints, though it is often, I think, a false picture. Still, I am very concerned about the world, including the world of legal academia. Oppression and exploitation still exist. Some of us have participated in it, many of us have benefitted from it, and all of us have permitted it to continue to exist.

It seems to me that the two most powerful forces in the world right now are not electromagnetism or gravity; they are inertia and the fear of being made a fool of in public. These forces keep a lot of us going along the same old paths. In the area of law, those paths are false to reality. For one thing, they are essentially male, partly because the world of law, in a time some of us can remember, was as male as football.

Fortunately, there is a countervailing force to inertia and a fear of embarrassment: the thirst for justice. It was the impetus for this symposium; it was the impetus which propelled many of us into law. I hope that the four of us, by speaking here today, can help reinforce that thirst for justice.

What I am going to talk about today is teaching substantive law. I am going to talk primarily about what gets taught, and secondarily, about how it gets taught, although obviously it is very hard to separate the two. I am going to assume that the audience I have is a group of well-meaning, well-intentioned students and faculty who need only to have their thirst for justice whetted. I

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recognize that, at least as to the faculty, it is also an audience that is overwhelmingly male, as it is at most institutions. I refuse to accept, however, that biology is destiny for men any more than for women. There is no biological barrier to good behavior. My talk is directed in the first instance to faculty, but I will suggest some strategies that students might use if faculty members don’t get the message.

In proposing a gender-sensitive approach to teaching, I have three levels of concern. The first and simplest is, I hope, uncontroversial. I call it “anti-sexism.” It is the legal equivalent of the Hippocratic Oath, i.e., first, do no harm. Gratuitous sexist and racist comments and stereotypes have no place in a law school classroom. Sexism is only one aspect of a larger problem in law schools and other institutions. There obviously are similar and interrelated problems with regard to race, class, and sexual preference. The law tends to be based on an assumption that the people who are talking, and the people they are talking to, and the people they are talking about, are white, male, middle class heterosexuals—as if it were all George Bush talking to Dan Quayle. We must remember that, in the world as a whole, those people are a very small minority, though with more power than is good for them—or for the rest of us.

I am going to talk today about gender. As you think about today’s symposium, you can and should translate it into concern with all of the other differences. As I said, the first focus is anti-sexism (or anti-racism or anti-classism). The second level is what I call gender awareness. Issues of relevance and concern to gender should be included in the curriculum, and I am going to suggest how we can do this without trenching on other legitimate curricular concerns.

Finally, I will speak a little about what has become the “F” word of this decade: Feminism. Even if we call a judge “she” half the time, and avoid making comments in class about women buying hats to make themselves feel better, that’s not enough. Even if we include issues of rape and marital property and interspousal tort immunity in our regular curriculum, law school teaching will still be male. Feminist scholars have begun to explore how men have certain styles of teaching and practicing the law—which has been called the Professor Kingsfield model—and how this style can be
harmful to women and other living things. After I have suggested the sort of minimal anti-sexism and gender awareness that I think we can demand, I want to go beyond that to explore how a feminist approach to teaching, across a range of topics, can benefit all students.

II. CASEBOOKS AND CURRICULUM

A. Gender Sensitivity in Choosing A Casebook

In teaching a substantive law course, probably the most important single decision a professor makes is choosing the casebook. As a matter of efficiency, most of us have used and will continue to use casebooks in our substantive courses. Being anti-sexist, gender aware, and feminist in the classroom is much easier if the casebook reinforces those positions. So when you choose a casebook, you want to look at the options and think, "How does this book treat women and women's issues?"

Typically, there are relatively few women featured in the cases selected. The one exception is family law: whatever the gender of the lawyers, the parties here tend to split evenly along gender lines. In other courses, however, most of the cases are all about men. Often, when women do appear as protagonists, they are selfish or stupid or silly. As Mary Joe Frug has pointed out, when women are rarely portrayed, the reader may exaggerate the significance of the few cases presented.

Second, what roles do the women in the cases play as legal professionals? How easily could a student conclude after going through this casebook that all the judges in the world are men? Apparently—and appallingly—this might be an accurate perception in southern Illinois, but in the country as a whole there are now a significant number of women on the federal bench (thanks largely to President Carter) and on some of the state supreme courts. Depending on the topic of a casebook, it might readily include

opinions by Justice O'Connor, or by Judges Patricia Wald or Ruth Bader Ginsberg of the D.C. Circuit, by Ellen Peters of the Connecticut Supreme Court, by Shirley Abrahamson of the Wisconsin Supreme Court, or by a variety of other women judges. Indeed, one can scarcely imagine a contemporary constitutional law course that did not analyze Justice O'Connor's jurisprudence.

Nonetheless, I suspect that women judges tend to be underrepresented in casebooks in part because most of them are new to the bench and casebook authors also suffer from a kind of inertia. There is a canon of famous cases that authors may feel they have to include, even though they could readily be replaced by newer cases written by women. Furthermore, even if these authors bring women into the casebook as judges, very often the case will say, "opinion by O'Connor, J." or "Peters, J." The students may very well not realize that there is a skirt beneath those black robes unless the professor points it out.

Whatever the institutional limits to the treatment of women in the excerpted cases, we can be more demanding as to their treatment in the author's notes and hypotheticals. In a hypothetical, a judge or a lawyer ought to be "she" half of the time. There is no reason not to do this. Now, some people are going to go, "aha—typical feminist nitpicking." They will think, "Come on, 'he' is a pronoun that covers both men and women, and I don't see why you women get so upset about it." I disagree; the word "he" does not refer to some sexless pod person—it refers to a man. The reason that a lot of people find it distracting when you use the word "she" is precisely because the image inside their head is male. We will no longer need to worry about the gender of pronouns only at the time when they are, naturally, no longer always "he." In fact, I would go further. I suggest to professors that, when you are using a casebook and there is a case in it by "Smith, J." and you don't

4. I do not suggest that law can be learned without a sense of its history; some older cases are crucial. But the determination of which cases, past or present, are crucial to understanding a subject matter is not fixed, but chosen by us in accordance with contemporary criteria of significance, as historians themselves recognize. If a case should not be law merely because it was so pronounced in the time of Henry IV, it should not claim a place in the casebook merely because it has done so since the time of Christopher Columbus Langdell. (Editor's note: This footnote was added after the symposium in response to Professor Schroeder's remarks, infra page 524).

5. Joshua Dressler, for example, consciously adopts a policy of alternating by chapter between "he" and "she" for hypothetical parties. See J. DRESSLER, UNDERSTANDING CRIMINAL LAW vii (1987).
know who "Smith, J." is, refer to half of the "Smith, J's." as "she." It is OK if sometimes Felix Frankfurter becomes Felice Frankfurter.

B. Covering Issues of Concern to Women

In almost any basic course, there are a range of issues that are of particular interest and concern to women. In a torts course, these might include interspousal tort immunity and recovery for emotional distress. In contracts, you could look at surrogacy contracts and prenuptial agreements; in property law, at married women's property rights or property rights in reproductive material; in criminal law, at spouse battering or rape. Many of those issues are important in their own right and they should be covered simply for that reason; but casebooks often ignore them or treat them as filler.

When we exclude women's issues from the basic courses, and confine them to our courses in Family Law, or Women in the Law, or Employment Discrimination, that is not a neutral policy. It is absurd to think that the existing choice of materials in basic casebooks and course coverage is a "natural" choice, determined by some ineffable brooding omnipresence of, for example, contract law. Every decision is a choice to include and to exclude. I want to present here a set of arguments for including more women-oriented material than is presently done—or at least being conscious and political in defending any other set of choices.

The existing organization says to students that "women's issues" are not important enough to count in the real, hardcore first-year courses. This has two effects. First, gender-sophisticated students, who were already aware of some of these issues, are placed in a dilemma. They are told, in effect, that something they thought was interesting or important, really is not. It is too frivolous to include in a "real" law course. Second, those students who did not know about these issues before will remain ignorant. This ignorance will make them less skilled, less sophisticated advocates for women clients, indeed, for any client who has a gender.  

Furthermore, including issues of interest to women does not have to interfere with other pedagogical concerns, including that dreaded monster "coverage." (Students will notice the effects of

the coverage monster shortly before the end of the semester when some professors swell daily assignments in a mad attempt to complete the syllabus.) First year courses, however, have significant flexibility, because the first year is not primarily about learning a set of rules or doctrines, but about creating opportunities to study the styles of legal argument, to trace the effects of doctrinal change over history, and to learn to perceive and manipulate the gaps and inconsistencies in legal rules. You can do that with a wide range of legal material. Let me give you a couple of quick examples of how women's legal issues can be used to examine general legal doctrines and concepts.

In criminal law, there is a continuing underlying question regarding the application of objective versus subjective standards to defendants' conduct. One area in particular where this comes up is self-defense. The black letter rule is that you are entitled to use deadly force only if it "reasonably appears necessary to prevent immediate death or serious injury." What that phrase means, of course, requires further analysis. One wonderful case for doing that analysis is State v. Wanrow. The defendant in Wanrow was a woman. She was in a house with a number of other people who came together because a man in the neighborhood (who apparently had sexually molested a neighbor's child at an earlier time) had that day attacked one of the children who lived in the house. The feared molester came to the door. Ms. Wanrow somehow found herself between him and the front door, blocked off from the rest of the house. He was more than six feet tall and visibly intoxicated. She was five feet, four inches tall and on crutches. She felt threatened, took out a gun, shot, and killed him. Was her behavior reasonable? Would a reasonable person think she (or he?) needed to shoot to avoid death or serious bodily harm? After all, he wasn't armed. She had friends in the house. A jury found her guilty. The Washington Supreme Court said that you need to take a broader view of what reasonable means. You have to look at the context in which events happened, not just at the facts at the moment she killed him, but at what she already knew. The court also said that the standard jury instruction on self-defense, which referred to the defendant as "he," did not fit the facts of this case. She wasn't a "he." She was a "she," and what looks reasonable to a she may be different from what looks reasonable to a he. When you

8. 88 Wash. 2d 221, 559 P.2d 548 (1977).
say "he," you evoke an image of self-defense akin to a school yard or barroom brawl between two men. It doesn't fit the facts of this case. *Wanrow* allows a professor to examine the underlying concepts of subjective and objective reasonableness in a context that also encourages students to think about gender assumptions in legal rules.

I will give you another example from your contracts course. The old contracts action of breach of promise to marry would provide a wonderful teaching vehicle for a variety of contract doctrines. I admit it is not something which is currently in use and you are not going to find examples in the local newspaper. But, as much of property law makes evident, the law and even the subset in the casebook does not limit itself to things of obvious contemporary relevance.

Breach of promise was an action that was almost always brought by a woman against a man. In essence, the plaintiff said: you promised to marry me; you broke the engagement; pay me damages. The cases and commentaries about breach of promise raise a number of wonderful legal issues. For example, the cause of action was not subject to the Statute of Frauds. Much to commentators' dismay, engagements were "proven" by inference from such evidence as love letters, gifts that he had given her, or sexual liberties she had permitted him to take. The material is a wonderful vehicle for examining more generally the kinds of evidence one can use to prove an agreement and the underlying dispute over the need for written contracts and the effect of oral agreements. Consider also that the defendant was allowed to break off the engagement without being liable for certain reasons, like the fact that the plaintiff was unchaste. But he was not allowed to break it off simply because he discovered that they hated each other. This is a wonderful opportunity to examine which terms are essential to a contract and the relative roles of the parties and the background legal regime in answering that question. Finally, you could use breach of promise law to examine the issue of damages. The cause of action, which flourished in the 19th and early 20th centuries, was in theory a contract action. Yet it allowed damages for humiliation and mental suffering, which sounds like tort, as well as normal contract damages for the value of the lost marriage. The cases and the criticism of them for blending what were seen as two entirely different legal regimes, can provide a springboard

9. Indeed, critics of the cause of action found both kinds of damages inherently excessive
for analyzing why we have different damages for contract and for tort, and what led to the contemporary collapse of tort into contract, or contract into tort.10 (I don’t teach that, so I can never remember which one collapsed into which.) At the same time, any analysis of breach of promise almost surely will induce students to think about the economics underlying the institution of marriage and about changing gender roles.11

There are enough opportunities to include women’s issues in the basic casebooks as vehicles for teaching legal rules and techniques12 that the burden of justification should shift to those who would exclude them. When gender awareness is essentially costless, its absence in effect, if not in intent, is sexism.

C. Looking For More Than Just Cases in a Casebook

As Professor Abrams suggested, casebooks in a standard substantive course are associated with a style of teaching and a style of law which privileges appellate cases over other sources of information about law and jurisprudence. They reflect the vision of law as an abstract and formal enterprise, derivable entirely within the closed universe of legal materials, and a notion that being a lawyer is merely being skilled at manipulating those materials. Feminists and other critics, such as legal realists and critical legal scholars,13 have noticed how narrow and distorted this vision is and proposed

and inappropriate. See, e.g., Brown, Breach of Promise Suits, 77 U. PA. L. REV. 474 (1929); Wright, Action for the Breach of a Marriage Promise, 10 VA. L. REV. 361 (1924).


12. There are numerous other examples I could have used. For instance, casebooks could examine the meaning of cognizable harm through selections from tort cases brought by DES daughters. See Finley, A Break in the Silence: Including Women's Issues in a Torts Course, 1 YALE J. OF L. AND FEMINISM 41 (1988); Bender, A Lawyers' Primer on Feminist Theory and Tort, 38 J. LEGAL EDUC. 3 (1988). They could use a case like McDonald v. Ortho Pharmaceutical Corp., 47 N.E.2d 65 (Mass. 1985) (alleging company's failure to warn consumers of contraceptive pills about the dangers) to refine the meaning of informed consent. See Finley, supra at 69. They could use cases of homicide by battered women to examine the tension between objective and subjective visions in self-defense doctrine. They could use coverture and the development of trust law to consider the role and impact of legal fictions.

13. Feminist legal scholars such as Carrie Menkel-Meadow and Leslie Bender have drawn on materials in feminism generally in developing a critique of traditional legal education. Much, though not all, of this analysis has been developed by some of the realists and post-realists, especially critical legal studies adherents, as well. See, e.g., Kennedy, Legal Education and the Reproduction of Hierarchy, 32 J. LEGAL EDUC. 591 (1982); Paul, A Bedtime Story, 74 VA. L. REV. 915 (1988). For a feminist critique of some aspects of the critical legal studies counter-model, see Hantzis, supra note 1.
that we need to bring more than just law into our legal education and our jurisprudence. We need awareness of facts and how to discover and present them. We need the tools of history, economics, psychology and sociology.

Even if casebooks and the case method are, on the whole, clumsy tools for transforming legal education, they are not uniformly problematic. Some casebooks are better than others. For example, some casebooks provide more facts of the excerpted cases. Any sensitive and deep understanding of the law requires having a thick context, making a serious attempt to know what actually happened. There are good reasons we do not teach from the little squibs of legal doctrine in those “study aids” that too many students love. Indeed, a good casebook should sometimes go beyond the case itself to explain what happened in the opinion below or even in those facts not preserved by any West reporter. Students often want to know, “So what happened next? What did they do?” In one casebook that I am aware of, the author actually went out and called up the lawyers, asked those questions, and put the answers in the casebook. Interestingly, it is a woman’s casebook, on a “woman’s topic”—Judith Areen’s Family Law.14

A feminist casebook will make an effort to provide a broader factual background for legal issues.15 It may include commentary, both legal and non-legal, government statistical reports, even popular press clippings to give more sense of the context out of which cases arise. For example, the constitutional law casebook by Stone, Seidman, Sunstein & Tushnet16 uses cases challenging the Social Security system as gender-biased as a major portion of its section on gender discrimination. In her review of that book,17 Professor Mary Becker points out that, without a general explanation of how the Social Security system operates, a student could come away thinking that these judicial decisions have created real equality in the system. These cases operate, however, on the fringes of the Social Security system; its basic structure is designed so that the average woman gets only a fraction of what the average man receives. You would never know that from the materials in the casebook.

15. A good example of such contextualizing material comprises the first part of the chapter on rape in L. WEINREB, CRIMINAL LAW: CASES, COMMENT, QUESTIONS (4th ed. 1986).
Let's assume you are a good, well-intentioned professor and you are trying to consider anti-sexism, gender awareness, and feminism when choosing a casebook. Unfortunately, there is no general Consumer's Guide to Non-Gender-Biased Casebooks. There are a few studies of particular casebooks and particular areas; otherwise, you are pretty much on your own.

Is it worth the effort to add these criteria to the complex task of choosing the most suitable book? I believe so. As we choose books that are less sexist, that are more gender aware, that are more feminist, the landscape itself will change. Remember the invisible hand of the market? Our efforts needn't be entirely economic and invisible. We can write to authors and publishers and tell them, "This is why I liked your casebook, and this is why I chose it." And sometimes, we can write to them to say, "This is why I didn't like your casebook, and this is why I didn't choose it."19

III. SUPPLEMENTATION AND CLASSROOM DEEMANOR

Even with the best intentions, you can't always find a suitable casebook. It is sort of like having to go shopping for vegetables on late Sunday afternoon—all the available choices are a bit limp and brown around the edges. What do you do then if you're a good-hearted professor?

First, if the problem is a lack of gender awareness, you could use supplementary materials. For example, I used a criminal law casebook that had nothing about the problem of spousal violence except some self-defense cases involving battered women who eventually killed their batterers. I thought it was important for the students to have some insight into how the law handles battering generally.20 I prepared a set of supplementary readings. It began

18. See, e.g., Frug, supra note 3; Finley, supra note 12; Women in Legal Education — Pedagogy, Law, Theory and Practice, 38 J. LEGAL EDUC. 1 (1988) (a collection of articles on women in legal education); and sources cited in Erickson, supra note 6, (including her own criminal law project). For several years, the annual AALS meeting included programs by the Women in Law Project (coordinated by Professor Ann Shalleck) and by the Women in Legal Education Section jointly with various other sections such as property, torts, and criminal law, dealing with issues of gender and legal education.

19. We can also make our concerns felt collectively. See Coombs, supra note 2.

20. This need not be included in a criminal law course. However, the fact that we use the police as our agents of social control, and the ability to contrast the treatment of assault in non-domestic contexts makes this one place where the issue could appropriately be discussed. As indicated earlier, to relegate all issues involving women and family to the family law course reinforces a false vision of these issues as separate and subsidiary. (Editor's note: This footnote was added after the symposium in response to Professor Schroeder's remarks, infra page 524).
with an article from the early seventies which recommended that the police separate the squabbling spouses, since domestic violence wasn’t really a criminal matter. The packet also included a more recent article which documented the effects of arrest, a case involving an equal-protection challenge to police refusal to respond to domestic violence calls, and the Florida form that police are now required to fill out every time they make a domestic violence call. With these materials, I could lead a discussion about the possibilities and limitations of police intervention in domestic assaults.

That kind of supplementation helps, but has its own problems. Students are likely to view what is in the casebook as real and what is in the professor’s supplement as a form of self-indulgence: “Well, now she’s doing her feminist shtick, you know, so we’ll all put our pens down and not worry about it.” This image of women’s issues as extraneous is especially problematic if the issues are presented as a special unit. You should try to make sure that, even if women’s materials are physically ghettoized in the supplemental readings, they aren’t temporally ghettoized.

Supplements can mitigate problems of gender awareness. How do we counter sexism in a casebook, such as misogynous images of women, stereotypes, or problems in pronouns? It may seem tempting to ignore the problem and just run your class in a non-sexist fashion. The difficulty is that a casebook has apparent power and authority simply because you chose it and because it is printed text. I think the better approach is to confront distortions in a casebook as they arise. We don’t hesitate to teach “against the text” in regard to its substantive materials, and I think we can also teach against the text in regard to its sexism, or its racism, or its classism. Casebooks, like judges and professors, can sometimes provide us with negative examples.

If the faculty in the audience were all perfect, I could move on right now to the topic of feminist teaching modes. But, unfortunately, I suspect that not all my colleagues, here or elsewhere, will accept my suggestions. Even those who try to be anti-sexist or

gender-aware are going to fail sometimes—I’ve used more than my share of presumptively male pronouns. So, as students, what can you do when the person in front of the room is less than perfectly empathetic, less than perfectly brave, maybe even perfectly piggish? I suggest that your response should largely depend on whether you think the lapse is one of judgment or of character. What if you are not sure? My strategy in similar situations is to assume good-will and a temporary lapse of judgment until I am faced with evidence to the contrary. I think a part of the reason Ghandi and Martin Luther King succeeded was because they acted as if everyone would respond to moral claims. In doing so, they sometimes induced their opponents into behaving better. For example, let’s assume there is some gratuitous sexism or racism in your text and the teacher seems oblivious to it. I think, as long as the presumption of good-will is operating, you should try to bring it to the attention of the professor in a way that is not going to create public embarrassment or defensiveness. Nobody likes to be put on the spot. You can raise the issue privately, or you can do so in a way that is gentle and non-confrontational. For example, I was in one class where a professor consistently referred to a hypothetical judge or lawyer as “he” and I watched the students, when they responded, just refer to the same person as “she.” The message was clear.

Those sort of gentle, polite approaches are not always effective. If they don’t work, you have three options. First, you could accept the temptings of inertia, write off the class or the field as sexist and keep quiet. Sometimes, we lack the courage or the energy for one more struggle. If you are a little braver, you can call on higher authority. Go to somebody else who you think has some influence and talk to them about it. Finally, I think you can at least make your feelings clear outside of class. More often than you may recognize, your complaints can reduce or eliminate the perceived legitimacy of the sexism or racism in the eyes of your fellow students.

Failures in coverage, however, are difficult for you as students to combat, because you are frequently not going to be aware of them. It is similar to reading an appellate opinion—it seems quite logical until you read the dissent, where you discover the facts that got left out of the majority opinion. Sometimes, if you are fairly sophisticated in a certain gender area, you may realize that there are gaps in class coverage. Again, begin by assuming good will. You may solve the problem simply by bringing it to the professor’s
attention. If the teacher is unresponsive, you can provide alternative channels of learning, like this symposium. You can set up little study groups, with professors or on your own, or arrange for guest lecturers from academia or practice. Remember that the learning experience in law school is not just what happens in the classroom. There are many ways to provide alternative fora for educating yourselves and others.

IV. THE FEMINIST PROFESSOR

So far I have been talking primarily about what a good-hearted professor—with some gentle prodding from students—can do to promote anti-sexism and gender awareness. If we consistently achieve those goals, we have some reason to be pleased. But I am going to be a little greedy now. I am going to suggest that I would like to have professors be feminists too. I want to use the example of teaching rape to explain what that means.

The word “rape”—even in an academic lawyer’s context—is scary. Butterflies start in my stomach whenever I talk publicly about rape. Such anxieties should not tempt us into leaving it out of our classes. Admittedly, choices must be made, and some crimes excluded. When you leave rape out, however, that decision reads as political; it marginalizes rape and denigrates its significance. Furthermore, rape is an area where a lot of students come to law school with prejudices and stereotypes. If these are not confronted, they will continue to exist. Even an imperfect class on rape can make our students better lawyers and better citizens.

Rape, like other gender issues, is also a topic through which we can effectively examine a variety of general legal issues, such as the role and meaning of consent, and the nature of character evidence. It is a good vehicle for examining the effects of racism in the doctrines and practices of the law. Rape law, traditionally, was formally racist: one statute specifically made rape a capital crime only if a black male raped a white woman.24 Rape law in practice is still deeply racist (as well as sexist).25 Despite its social significance and pedagogical usefulness, however, rape is not a central focus of criminal law teaching. The general skittishness can be seen in the casebooks. Some of them leave rape out altogether,

25. Id. See also S. Estrich, REAL RAPE (1986); G. LaFree, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT (1989).
while many others include only minimal coverage.\textsuperscript{26} My admittedly anecdotal impression is that classroom coverage is even scantier.

Such avoidance may not be altogether bad. If the professor is going to be really insensitive, you may be better off with nothing at all, for he or she can do real harm. I have heard stories of truly appalling things being said in the classroom by the professor. Almost as bad, I have heard of students making comments, such as “any woman who really doesn’t want it can prevent a rape,” without the professor immediately condemning the statement. One of the reasons that sensitivity is crucial becomes apparent from the statistics on the frequency of rape. In the average law school classroom, there are going to be women who have been victims of rape or attempted rape. Perhaps it is even scarier to look at the statistics and then at our average law school classroom and realize how likely it is that there will be men who have committed rape or attempted rape. How are we going to handle teaching rape, given that?

One option is to go back to the Professor Kingsfield model, and treat rape cases as pure legal doctrine, ignoring all the factual contexts. Rape, such an approach seems to say, has nothing to do with gender, has nothing to do with sex; it is just “law.” There were good reasons, though, for feminist rejection of the Kingsfield socratic model of teaching, a model that saw law as something formalistic, distinct from the experiences of people’s lives, apart from politics. That model of law and teaching is a lie. It places the instructor in the role of the neutral, objective voice of authority, what is sometimes termed the Male Voice. Hiding inside the cases, it assumes a pre-existing set of doctrinal principles. You, the student, can uncover them if you have someone to guide you. Specifically, it assumes that rape law consists of a set of determinate, objective rules, applying “reasonable man” standards to both the victim and the perpetrator. Placing the class in such a straight-jacket ensures that they will never understand what rape is or how rape law operates in the real world.

It is not simply that concepts of "consent" and "force" and "resistance" in rape law prove, on close analysis, to be so multi-meaninged that the attempt to make them determinate is the intellectual equivalent of trying to pin Jello to the wall.

The problem with rape law, and the reason that it cannot be taught effectively in a Male Voice, is itself a problem of gender. Facts and circumstances that a reasonable woman would view as coercion or rape, a reasonable man may well view as reluctant consent. Typically, men and women have different perspectives. The law, unfortunately, does not acknowledge those two perspectives equally. Unless the woman can articulate her version in male terms, it is not going to be heard by prosecutors, by police, by juries, or by appellate courts. Good, feminist classroom teaching of rape will expose and explore those tensions.

How do you teach rape effectively? I think the first thing you need to do is to make clear that it is not, from the victim's perspective, about sex but about violation. You need to make sure the students understand that there are people in the classroom for whom it is more than an abstract legal concept. You need to do that because at one level, it is about things like sexuality and gender and that makes many people nervous. One of the ways that people traditionally deal with being nervous is to make jokes. These kinds of jokes are simply not an acceptable part of classroom discourse. Reminding the class that there are rape victims among them has a significant sobering effect.

The other thing you can do to teach rape effectively is to bring in experiences outside the casebook to help them understand what the law is and what the law does. In both her article and her book about rape, Susan Estrich begins with the story of her own rape and then occasionally refers back to it in criticizing the stereotypes, the judges' decisions and the scholarship about rape. This practice of using personal experience, and storytelling, has been used by other feminist and minority scholars to enrich our legal scholarship. I think that

29. Id.
the use of personal stories can enrich the classroom as well. Rape is an important and appropriate area for doing so. I do not have a story, thank God, as horrific as Susan Estrich's or those of many other women, some of them in my classrooms. But I have sometimes told the story about the time when I sort of consented after a bad date. I was tired of arguing and embarrassed because I knew I should not have let the man into my apartment. And in some back part of my mind I realized that he was six feet, four inches tall and had talked about a previous college football career. Probably not legally rape, but a useful story for exploring the effective limits of legal rules. Sometimes, I get students' stories. They are unbelievably enriching when they are told. You cannot guarantee that a student will feel safe enough to tell a personal story. It rarely happens. Treasure it when it does.

I do not think it is just a coincidence that most of the law teachers who tell stories, who reject the Male Voice in their teaching and writing, have been white women and men and women of color. It may be in part because we have never been able to pull off the Male Voice very well. It is, then, less of a risk to say, "Look, since we can't do that, let's try the contextual, the open, the personal." But we are not going to have that many women in the classroom for at least the next ten or twenty years. If we accept as a norm, not just a fact, that feminism is something for women to do, we are not going to have enough feminist teaching and writing. I am asking for white male law professors to also be feminists in the classroom. It is, I recognize, harder for them. They really have the option of the safe, falsely neutral, authoritative Male Voice. They may have to be a little braver to give up something that they could do in order to use their own individual voices. A few of them may be unchangeable; they have had the male mask on for so long, that there is no face behind it anymore. Most of them, though, could choose to take the risks of speaking in their own voices. If they do, there will be not just Male Voice and women's voices, but men's voices as well.

Am I suggesting that men tell stories from their own experience in a rape class? Maybe. I remember a story that one man once told me which would have been incredibly instructive for a class. He talked of an evening when there was too much liquor all around, and he sort of suspected the woman he was with wanted to stop, but she wasn't articulating it very well. As he tells it, part of him wanted to have sex only if she wanted it or at least he wanted to want it only under those circumstances, and part of him just wanted it. "It's her job to tell me 'No'." The way he tells the story, the liquor fortunately
affected his capacity as well as his desire and he finally left, too embarrassed ever to see her again. A valuable story for rape class and one far more powerful told in a man’s voice.

Few men would, or could be expected to, tell a story like that in front of a class. Surely, there are other things that men can do in order to be feminist teachers. While one’s own stories have a peculiar power, the use of third-person stories can also be very useful in breaking out of Male Voice. If you are doing a unit on rape, you could begin by having the students read Susan Estrich’s story or selections from a book called Men on Rape. You could, as I did when I taught the rape unit in Women in the Law, show a segment of the movie The Accused, or use other fictionalized accounts. If you are teaching a case like Commonwealth v. Sherry, a recent and infamous Boston date-rape case, you could include some of the newspaper articles that describe what was going on and how people responded to it. There are a couple of instances in which law professors have gone back and done a rich, factual, contextual analysis that makes the cases come alive. Professor Noonan has done so for Palsgraf; and Professor Simpson for Dudley and Stephens, the famous case of the cannibals in the lifeboat. Maybe somebody will provide a similar context for one of the famous (or infamous) rape cases. There are a wide range of techniques and materials that you could use to make room in legal education for multiple perspectives and multiple voices. What we need is the will to do so, fueled by a thirst for justice and true knowledge. I hope my male colleagues can do that, so we can all seek for justice together.

Response by William A. Schroeder**

I am sympathetic to, and in general agreement with, much of what you have said. I see my role here, however, as a respondent; so I deliberately tried, as you spoke, to pick out some things that I thought were debatable rather than simply say “good job—you’ve made some good points.”

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33. The Accused (Paramount 1988).

First, the feminist perspective is certainly one way of approaching the teaching of law. I am not exactly sure what feminism means, either in the abstract or when you use that term, but I have no quarrel with someone presenting materials in the law school classroom from that perspective or from any other perspective. I think, however, that when materials are presented from a certain perspective instead of in a neutral way, the listener should be informed of the presenter’s approach so that he or she can take that perspective into account in evaluating the presentation.

Secondly, I would like to address the question of gender sensitivity in the classroom and in the selection of cases and materials. I try to use “she” as well as “he” in the classroom, and in conversations, but I am not entirely sure that it is always appropriate in every area of criminal law. As you know, the majority of the actors in the criminal justice system, and the vast majority of the defendants, are male. It is not clear to me that it is useful to attempt to alter that reality by referring to half of those defendants as “she.”

You suggest substituting more recent cases involving women judges and litigants for some of the old (albeit classic) cases. That is almost re-writing history. It is kind of like saying, “We did not like the Inquisition, it wasn’t very nice, so we’ll just pretend it didn’t happen.” I am not sure what is achieved by that and I think something, the reality of where we are coming from, is lost. It seems to me to make more sense to try to focus on and change the future, rather than to try to change the past.

You mentioned self-defense. It seems to me that the issues you raise in the context of self-defense apply to both women and men. There’s a whole range of issues involving how a person can respond to specific types of threats. Is deadly force appropriate only when there is an imminent threat of death or serious bodily harm, or can the use of deadly force be predicated on something less? Must the defendant’s belief in the necessity of force be objectively or subjectively reasonable? What, if any, duty is there to retreat or otherwise remove oneself from a threatening or potentially threatening situation? What kind of past actions on the part of the original assailant are relevant and what kind of knowledge about that assailant’s history is relevant? Those are issues that affect males as well as females. Many males are uncomfortable with physical force and physical confrontation. Moreover, a five-foot, four-inch person threatened by a six-foot, four-inch drunken assailant who is known, or thought, to be capable of violence is in a difficult position without respect to the gender of the actors. This and similar scenarios raise questions
across the whole spectrum of self-defense law. It is not enough to simply add a woman’s perspective. If there is an argument that there should be a greater entitlement to self-defense than we have traditionally allowed, and I think there is, that argument reaches across a broad range of settings.

You mentioned domestic violence. I have read a lot recently that suggests that this is a very common thing. And the victim is not always a woman. Perhaps it would be useful to add a component on domestic violence to the basic criminal law course. Doing so, however, suggests that the criminal justice system is the proper forum for dealing with this problem. I am not sure it is. Every social problem cannot be solved through the criminal justice system. I have seen figures that suggest that violence occurs in half of all relationships. The criminal justice system is ill-equipped to handle a problem of this magnitude. Moreover, the tools available to that system may not be suited to this problem. For example, traditionally the police did not make arrests in domestic violence cases. Changing that policy and requiring that the police must make arrests in response to every complaint of domestic violence may have some adverse consequences. Arrest is a serious thing and it is something that happens at a time when the arrestee is still presumed innocent. An arrestee who is taken to jail, and most are, may be held under deplorable conditions. An arrestee may lose time from work and may even lose his job. Most arrestees, though, are soon released and when they are, they usually return to the same home, with the same complaining witness, as before. Often the complaining witness drops the charges. Even when there is a prosecution, the penalty is rarely substantial. But the effect of having an arrest record is that the arrestee may have difficulty getting a job in the future because of that record. Joblessness may exacerbate the problems that led to violence in the first place. Perhaps a better solution, instead of automatic arrest, would be to automatically order the offender out of the home for a time—say sixty days.

My purpose here is not to sell any particular alternative to the criminal justice system. My point is simply that if domestic violence is added to the criminal law course, it should be presented in a way that includes all aspects of the problem and that looks at alternatives beyond the criminal justice system. Perhaps the subject of domestic violence is more appropriate for a family law course, but wherever it is presented, it should be done in a neutral, broad-based way.

I would say somewhat the same thing in presenting rape as an issue. I realize that many criminal law casebooks do not include any materials on rape. I think that is unfortunate, because it should be
included in the basic criminal law course. Obviously though, rape is not the only crime there is. I was a prosecutor for a while and in our office maybe one or two percent of the prosecutions were for rape. I realize many rapes are not reported, but still, I don't think you would want a criminal law course that focuses disproportionately on rape. So I am not sure exactly what you are arguing for. If you are saying only that we should include rape in the criminal law course as a crime which should be discussed, I would agree. If you are saying that students should be taught that the way in which the law treats that crime is a manifestation of male dominance in society, I think you would want to insure that any other relevant perspectives are also presented. If you are arguing more broadly that the whole legal structure was created by males and reflects that fact, I wonder if that perspective could be better presented in a jurisprudence course.

I agree that there are a lot of issues that can be raised in the context of rape law. You mentioned some, racism and sexism, but there are also evidentiary issues, issues of intent, issues about the reality of the criminal process, and others. It seems to me that it is important to address the reality of the criminal process. Not every witness is motivated solely by the desire to tell the truth. Not every factfinder can distinguish truthful testimony from untruthful testimony. Not every trial results in the "guilty" being found "guilty" and in the "not guilty" being found "not guilty." Those things could, and should, be raised.