RE-READING CONTRACTS: A FEMINIST ANALYSIS OF A CONTRACTS CASEBOOK

MARY JOE FRUG*

Like many other contracts instructors, I presently teach my course from Dawson, Harvey, and Henderson's contracts casebook.[1] This Essay is a feminist examination of that casebook. My objective is critical in character, for I believe a feminist analysis should change one's consciousness. However, I do not intend to deliver a diatribe against the casebook or its editors. Rather, I am writing this for the readers of other casebooks, as well as for readers of *Dawson, Harvey, and Henderson,* in the hope of accomplishing two goals. First, I want to demonstrate that readers' views about gender affect their understanding of a law casebook. Second, I want to demonstrate that gendered aspects of a casebook affect readers' understanding of the law and of themselves. If these endeavors are successful, I hope that casebook readers will be liberated from some of their opinions about gender, opinions that casebooks foster and sustain. Indeed, this Essay is designed to contribute to the feminist effort to diminish the power that ideas about gender exercise over our lives. I also hope, somewhat paradoxically, that exposing and examining gender in a casebook will liberate and vitalize qualities within readers, as well as approaches to contract doctrine, that are currently linked with women.

My plan is to use the first section to discuss the nature and value

---

* Professor of Law, New England School of Law. Although the responsibility for any errors that follow is mine alone, I have received enormous help and encouragement from others in this Essay. I thank Nadine Taub and Nancy Erickson for inspiring the topic of this Essay by their efforts to organize women law teachers to eliminate sex bias in casebooks, and I thank friends in the Critical Legal Studies Conference for their enthusiasm and their assistance during workshops at the Gloucester summer camp and the CLS Feminist Conference at Pine Manor and in "femcrit" and "lit crit" study groups over the past two years. I am especially grateful to Betsy Bartholet, Clare Dalton, Karl Klare, Martha Minow, and Fran Olsen for their suggestions, and to Jerry Frug, Judi Greenberg, and Duncan Kennedy for their generous rereadings.

1. J. DAWSON, W. HARVEY & S. HENDERSON, CASES AND COMMENT ON CONTRACTS (4th ed. 1982) [hereinafter cited as J. DAWSON].

of a feminist analysis of a contracts casebook. I will also describe a variety of possible casebook readers in order to create a shared sense of readers and their attitudes toward gender. In the second section, I will undertake an overview of *Dawson, Harvey, and Henderson,* examining both how women are treated in the casebook and the "maleness" of the casebook. In the third section, I will combine and elaborate some of the approaches used in the overview section by considering two individual cases. Finally, in the conclusion, I will return to the goals I have described here.

I. INTRODUCTORY EXPLANATION

The analysis of *Dawson, Harvey, and Henderson* which follows is primarily concerned with the power of gender in the casebook. It is this focus on gender that makes me claim my analysis is feminist. I use "gender" to mean the reductive, dualistic classification of a wide array of social and psychological characteristics according to biological sex. Gender has power because we use it as a category to explain differences among individuals; it is an idea that organizes and colors many of our responses to others—what we expect of them, what we hope for them. It also affects what we desire for ourselves and how others view us. I believe that gender is a significant constraint on the lives of most women and men. It affects how I present myself (my voice, in this Essay), who my friends are, which students seek me out, which ones I will care for, and what my work is—which courses I teach and which scholarly projects I choose. Indeed, because the explanatory force of gender can be so convincing, gender often functions as a kind of emotional and rational shortcut. Our reliance on it, as on any theory,[2] can save us effort. But it can also induce us to avoid thinking, listening, or responding very carefully. Thus, despite the fact that we could understand our differences in other ways, and often do, our ideas about gender have a profound impact on our lives: they divide us from one another and from ourselves.[3]

---

2. For two Essays that elaborated this idea for me, see M. FOUCAULT, *Two Lectures,* in POWER/KNOWLEDGE 78 (1980) and Griffin, *The Way of All Ideology,* in FEMINIST THEORY: A CRITIQUE OF IDEOLOGY 273 (N. Keohane, M. Rosaldo & B. Gelpi eds. 1982).

3. For all of these reasons, some form of gender exploration is a major characteristic of feminist work. Feminists differ from one another in the ways they explore gender and in the significance the focus on gender has in their work. For many, feminist analysis consists of studying the social and psychological construction of the differences between men and women. Some of these scholars want to learn why more women than men take primary care of children. *See, e.g.,* N. CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER (1978); D. DINNERSTEIN, THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE (1976). Others want to learn why housework is so dramatically undervalued. *See, e.g.,* Gardiner, *Women's Domestic Labor,* in CAPITALIST PATRI-

I also claim my analysis of this casebook is feminist because of my oppositional stance toward gender. Some individuals who explore and analyze gender characteristics implicitly subscribe to that aspect of gendered thinking that privileges "male" traits over those generally thought to be female.[4] I maintain, however, that a gender-focused analysis is feminist only when its analyst is consciously oppositional, when the analyst seeks to change the impact of gender categories either to improve the position of women[5] or to liberate both sexes from gender constraints.[6] This oppositional aspect of feminism has important implications for my Essay. Because I believe that the social and psychological differences between men and women are constructed and mutable, rather than biologically deter-

---

ARCHY AND THE CASE FOR SOCIALIST FEMINISM 173 (Z. Eisenstein ed. 1979); FEMINISM AND MATERIALISM: WOMEN AND MODES OF PRODUCTION (A. Kuhn & A. Wolpe eds. 1978). Still others want to learn why the objectification of women's sexuality takes the particular, violent form it takes in some kinds of pornography. *See, e.g.*, A. DWORKIN, WOMAN HATING (1974); Benjamin, *The Bonds of Love: Rational Violence and Erotic Domination*, in THE FUTURE OF DIFFERENCE 41-70 (H. Eisenstein & A. Jardine eds. 1985). Feminist literary theorists write about why women write and read differently than men do. *See, e.g.*, J. FETTERLEY, THE RESISTING READER: A FEMINIST APPROACH TO AMERICAN FICTION (1978); K. RUTHVEN, FEMINIST LITERARY STUDIES: AN INTRODUCTION (1984). Feminist legal scholars, in part, have focused on the doctrinal and theoretical implications of treating women and men differently or similarly. *See, e.g.*, Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984); Minow, *Rights of One's Own* (Book Review), 98 HARV. L. REV. 1084, 1089-93 (reviewing E. GRIFFITH, IN HER OWN RIGHT: THE LIFE OF ELIZABETH CADY STANTON (1984)). *See generally* Bibliography of Feminist Legal Scholarship (Dec. 28, 1984) (unpublished manuscript on file with author). Others have used gender as a way to draw on an aspect of experience more available to women than to men, such as a personal perspective on an issue or an outsider's unempowered perspective. *See, e.g.*, Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985).

My Essay is different from many of those I have just described in that my primary focus is an examination of the gendered nature of a specific text. Rather than examining gender itself as a phenomenon, or using a gender-related trait as a perspective from which to see something else, I am trying to work within gender categories, hoping to expose the way our ideas about the world are infected with our ideas about gender. My Essay is connected to other feminist projects, however, in that I will include investigations of the personal or silenced aspects of contract doctrine, references to the origins and nature of gender differences, and discussion of the legal questions gender poses for contract, as part of my undertaking. I believe my methodology is similar both to the consciousness-raising process feminists often describe and to the uncovering of submerged discourses that feminist literary theorists claim as their methodology. *See, e.g.*, MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. OF WOMEN IN CULTURE AND SOCIETY 515 (1982); Kolodny, *Dancing Through the Minefield*, in THE NEW FEMINIST CRITICISM 144, 159-63 (E. Showalter ed. 1985).

4. *See, e.g.*, S. FREUD, *Some Psycological Consequences of the Anatomical Distinction Between the Sexes* and *Female Sexuality*, in SEXUALITY AND THE PSYCHOLOGY OF LOVE, 183-93, 194-211 (P. Reiff ed. 1963).

5. C. CHRIST, DIVING DEEP AND SURFACING 119-31 (1980); R. JOHNSON, SHE: UNDERSTANDING FEMININE PSYCHOLOGY (1976).

6. Joan Kelly's Essay discussing the shift in feminist theory away from dualistic analyses is useful in pursuing this point. *See* Kelly, *The Doubled Vision of Feminist Theory*, in WOMEN, HISTORY & THEORY 51-64 (1984); *see also* Leahy, "[U]ntil women themselves have told all they have to tell. . ." (1985) (unpublished paper on file with author).

mined and immutable,[7] I believe that the act of focusing on gender should be oppositional; it should change the effect of gender on a writer and her readers by unsettling those ideas in their consciousnesses.[8]

I have identified my Essay as a feminist analysis with some reservations. I recognize that the feminist label may seem uninviting to certain readers, and I do not want to lose those readers preemptorily. Moreover, I believe that the creativity, flexibility, and subordinated opposition that women's life experiences often demand and cultivate are important to the constitution of feminism.[9] I do not want a "feminist" label for this project to jeopardize claims that differing analyses are also feminist.[10] Nevertheless, calling my analysis "feminist" seems desirable as a way to distinguish my project from the task of eliminating overt sexism in a book. I fear that "eliminating overt sexism" could seem limited to rooting out instances of pejorative, demeaning treatment of women in casebooks, and that would not accurately describe my Essay. While I believe eliminating that kind of sexism in books is an important and challenging enterprise,[11] I concede at the outset that *Dawson, Harvey, and*

---

7. *See* L. DAVIDSON & L. GORDON, THE SOCIOLOGY OF GENDER 1-33 (1979); S. DE BEAUVOIR, THE SECOND SEX 1-47 (1953).

8. This claim is similar to that made by feminist literary critics regarding their work, see J. FETTERLEY, *supra* note 3, at vii-xxiv; J. RADWAY, READING THE ROMANCE 3-18 (1984), and to Robert Gordon's description of Critical Legal Studies scholarship. *See* Gordon, *Critical Legal Histories,* 36 STAN. L. REV. 57, 117-24 (1984).

9. For examples of feminist writing that can inform this definition of feminism, see J. MILLER, TOWARD A NEW PSYCHOLOGY OF WOMEN (1976); Minow, *supra* note 3; Leahy, *supra* note 6.

10. *Cf.* Kolodny, *Dancing Through the Minefield,* in THE NEW FEMINIST CRITICISM 144, 159-63 (E. Showalter ed. 1985). The embrace of diversity implied here is similar to Annette Kolodny's normative description of feminist literary criticism as pluralistic. *Id.* I think Kolodny's use of "pluralistic" is an unfortunate choice of adjective, however. Pluralism as commonly understood is not what I understand her to be saying, and it's not what I mean in suggesting that analyses which differ from mine may also be feminist. I think there is some "there" in feminism, not just anything goes.

11. For examples of this effort undertaken outside legal education, see 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 (D. Spender ed. 1981). Efforts to eliminate overt sexism are now underway within legal education as well. Nancy S. Erickson at the Ohio State University College of Law was awarded an Ohio State University Affirmative Action grant for the 1984-85 academic year to complete a project "Sex Bias in the Criminal Law Course: Bringing the Law School Curriculum into the 1980's." Erickson, with the assistance of Nadine Taub (Rutgers/Newark) as primary consultant, and others. examined whether gender-related issues have become an integral part of the traditional first-year criminal law course as it is taught throughout the country.

The study proceeded in three concurrent steps: a review of major casebooks currently being used in the first-year criminal law courses; a survey of all law professors currently teaching the course; and a bibliography and compilation of supplementary materials recommended to compensate for inadequacies in traditional materials. The criminal law study was designed to serve as a model for a comprehensive study involving the entire law school curriculum. While

Henderson seems cleansed of any gratuitously negative comments about women. But I believe editors could conscientiously eliminate all instances of female degradation in their casebooks and still produce books that would affect readers' views about gender and that would be subject to multiple interpretations because of readers' gender attitudes. A "feminist" casebook analysis will be useful, therefore, as long as the concept of gender has any meaningful content.[12]

Thus far I have discussed the significance that the power of gender has for my Essay. However, since my subject is the relationship between gender and a casebook, my analysis of *Dawson, Harvey, and Henderson* also depends on several assumptions about casebooks which I should state. I do not believe that a casebook is simply a neutral reflection of what students need to know to practice law, to pass the bar, to think like lawyers, or to become law teachers. I maintain that, even within the constraints of professional necessity,[13] editors have a wide range of choice in their case selections, their comments, their notes, their problems, and their questions, and the choices they make are not inevitable. The choices could be different and, indeed, choices about content do differ among casebooks within particular subject areas. I also believe that a casebook is a powerful document. The editorial choices within a casebook determine how many readers think about the law of a doctrinal area, about lawyering in that field, about clients, and about legal reasoning. (Indeed, since *Dawson, Harvey, and Henderson* may be one of only five books a first year student reads in a given year, its influence over students' views may extend beyond the "professional" concerns just listed.) Because a casebook has such power, and because its contents are subject to editorial choice, analyzing the biases of a particular casebook could challenge the effect of the casebook on its readers.

Despite my position that casebook editors are responsible for cre-

---

this project focused on eliminating sex bias in the criminal law casebooks, it also overlapped with aspects of my project. Moreover, any effort to eliminate overt sexism will require feminist analysis as I have broadly defined it here, and I hope my work will further such pursuits.

12. I agree with Catharine MacKinnon's eloquent claim that "the male point of view [is] fundamental to the male power to create the world in its own image." MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. OF WOMEN IN CULTURE AND SOCIETY 635, 640 (1983). As long as our ideas about gender permit us to divide our views dualistically between male and female viewpoints, gender will continue to profoundly influence the nature of our lives.

13. I do not think that "professional necessity" is any more determinate than I suggest the contents of a casebook need to be. I use the phrase here, however, simply to acknowledge that there are some (arguable) limits within which a casebook editor functions in selecting the contents of a casebook which is to be used for legal education.

ating works of significant power over readers, I do not believe that casebooks are frozen artifacts. I believe, with Stanley Fish, that "linguistic and textual facts, rather than being the *objects* of interpretations are its *products*."[14] Readers cannot fully screen themselves out of their reading and interpretation, just as they are unable to ignore the social and institutional setting in which a casebook is read. Think, for example, of how differently one might interpret *Dawson, Harvey, and Henderson* by reading it along with Patrick Atiyah's *Rise and Fall of Freedom of Contract*[15] rather than with *Legalines*. Since I believe readers have a significant role in creating the meaning of a casebook, I want at this point to introduce my impressions of a group of typical casebook readers. I hope that by drawing portraits of a variety of individuals who read casebooks I can convince *my* readers that singular interpretations of *Dawson, Harvey, and Henderson* are unlikely. My portraits of casebook readers concentrate almost entirely on the readers' attitudes toward gender, in order to broaden and deepen our shared views about the content of gender. By using these portraits later in the Essay I hope to convince you that I am not the only reader of *Dawson, Harvey, and Henderson* with a gendered perspective, and I also hope these portraits will remind you of your own ideas about gender.[16]

The readers I have created are fictional; indeed, they may not avoid seeming stereotyped. Nevertheless, I believe they resemble students and colleagues I have known in twelve years of law teaching, and, while you may not see yourself as any one reader, you may see parts of yourself in more than one. Because I will refer to these examples of readers later in the Essay, I am giving them taglines for names.

The Feminist

Whether this reader is male or female, he or she is a self-identified feminist. If this reader is female, she is proud to be a woman; if male, he is admiring of women's achievements. These readers are interested in the historical, social, and psychological discrimination against women in our society; they oppose such discrimination; and they are informed about the ways in which such mistreatment has

---

14. S. FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 9 (1980) (emphasis added).

15. P. ATIYAH, RISE AND FALL OF FREEDOM OF CONTRACT (1979).

16. It may seem paradoxical to seek to further our understanding of the content of gender when my stated objective is to "diminish the power that ideas about gender exercise over our lives." However, because I think that gender distinctions are nurtured and perpetuated by their continuing impact on our consciousnesses, I believe that we cannot diminish their power without first exposing them and discussing the effect they have on us.

been resisted. They also believe that the construction of gender has locked many men into sex roles that uncomfortably restrict them. Gender is on this reader's mind; she notices how many women are in a room, how many speak, and who listens when they do. She has special knowledge about women and their concerns, the way some people know a lot about the Civil War, about jazz, or the history of baseball. This reader might chide me for making such comparisons, however, for The Feminist can be quite single-minded and somewhat humorless about feminist issues. They mean a lot to her.

The Woman-Centered Reader

A modified version of The Feminist is the woman whose experience as a wife and mother has altered her career. She is acutely conscious that the majority of male students and faculty members have not had to substantially modify their work lives for the sake of their spouses or their children. Having needed other women's help in her family work, where carpooling, childcare exchange, and nursery school cooperatives require a high degree of cooperation, reliability and trust, she tends to see women students and faculty members as friends and allies. She may not identify herself as a feminist, in part because she fears that might alienate her from her family and her old friends, but because she continues to take care of other people as an additional, time-consuming occupation, she has learned to live a divided life, with some attention on her casebooks (and single-minded instructors), some on her family's demands and some attention reserved for her natural law school allies, who are often The Feminist Readers.

The Reader with a Chip on the Shoulder

The female version of this reader is angry at men, perhaps because of some mistreatment she has suffered, or perhaps because of her empathy for other women who have suffered mistreatment on account of sex. Because anger is often repellant, one may attribute a paranoid personality style to this reader. She seems to be constantly looking for clues that women will be denied justice in law school, as they have been elsewhere. If this reader is a student, she is vigilantly examining her instructors or the casebooks they have chosen for any indication she can find of prejudice against women. As a faculty member she is likely to have her colleagues and her casebooks under steady surveillance for sexist offenses. This reader may not, however, make herself known to individuals whom she

considers unsympathetic. She can be very isolated in the law school setting.

The male version of this reader is angry at women. For many reasons he resents the women in law school, whether they are students or teachers; he sees them as threats to a system of male dominance that he supports. Faculty members of this type are clever about masking their anger, at least around self-described feminists, but students, who sometimes act as if faculty members can't see them (or perhaps don't care if they do), reveal themselves by snorting if they hear the name of Geraldine Ferraro—but not, say, Mario Cuomo, or by a tease of a hiss if too many classroom hypotheticals involve *female* judges, lawyers, or parties. This reader may be searching his classes or his casebooks for evidence that patriarchy lives, despite the aberrational presence of the women who surround him. Or, like the female version of this reader, he may be looking for clues to justify his anger.

The Innocent Gentleman

This casebook reader also sees law school women as a challenge to his view of a male dominated world, but he is more bewildered than angry about their presence. He may never have seen his father drink a glass of water his mother didn't pour, and he does not understand how to treat women as colleagues and authority figures. Must he, or can he, compete with them? What about sexual relationships; how can he understand such people other than as sexual objects? He may be searching his classes and his casebooks for evidence about the truth of a world view where women have more restricted roles than they have in the law school setting.

The Reader Who is Undressed for Success

Whether these casebook readers are male or female, their primary characteristic regarding gender is insecurity about their ability to conform to a popular image of "lawyers," which they understand as masculine, not feminine. They fear that successful lawyers are analytical, rather than emotional; adversarial, rather than cooperative; certain, not tentative; ambitious, not flexible. They do not identify with Paul Newman in "The Verdict," Professor Kingsfield in "The Paper Chase," or even the elegantly tough Katharine Hepburn in "Adam's Rib," and they have grave doubts that their (purportedly) masculine traits are sufficiently dominant to allow them to succeed in law school, as students or faculty members. Whether they read the casebook to find evidence to confirm their fears, or to dispel

them, they are very sensitive about gender questions in their casebooks.

The Individualist

These readers are assertive, conscientious students and faculty members who have modelled themselves after men and women who have succeeded in the public world. Because they have seldom met an obstacle they have not been able to overcome, they are suspicious of claims that membership in a group can handicap a person, regardless of individual merit. Some of these readers conduct their lives quite self-consciously and high-mindedly according to the tenets of sex neutrality; others harbor traces or even wide stains of misogyny. As men, they want to continue rising to the top or revolving on the fast track unimpeded by a group of women who seek to change the rules of the game. As women, they do not want consciousness-raising to spoil their victories. These readers try to be unconscious about the sex or the gender of people in the casebook or elsewhere.

The Civil Libertarian

Because of their general political stance as individuals who favor civil liberties and rights for the oppressed, these readers are likely to oppose invidious discrimination against women. Indeed, some of these readers may have been interested in feminism at some time, particularly during the late sixties and the early seventies. However, these readers are currently committed to other causes, such as opposition to racism, the elimination of hunger, and the antinuclear movement. Whether they genuinely believe that the oppression of women is less significant than it used to be, or whether they simply believe that other oppression deserves a superior claim to their attention, they prefer to avoid noticing gender in the casebook.

The Undeserving Male or Female Reader

Like the Reader who is Undressed for Success, these readers are also insecure about their abilities to succeed in law school, as students or faculty members. Because they have had good luck, well-placed connections, or ample money in their lives, they may fear that they do not deserve the positions and opportunities that have come their way. Unlike the Individualists, these readers are not insensitive to the effects group membership can have on an individual. Noticing gender in the casebook, however, unacceptably reminds both the Undeserving Male and Female about the backs they have

walked over. The Undeserving Female, whose gender may have given her a boost she feels she was unworthy to receive, wishes to avoid hard questions, like affirmative action, which noticing gender might provoke.

Before turning to *Dawson, Harvey, and Henderson,* let me acknowledge again that casebook readers are much more complicated than I have presented them. Many people may not consciously notice gender at all, while many others may combine attitudes and personality traits which I have divided among the types I have drawn. Because the sketches are brief, and because they concentrate almost entirely on the readers' attitudes toward gender, these readers seem one dimensional and more like caricatures than I want them to. But I believe that any discussion of the choices the editors have made in creating this casebook requires a shared sense of variety of casebook readers; the character sketches are necessary, in my view, to underscore the variety of readers' attitudes concerning gender.

II. AN OVERVIEW OF THE CASEBOOK: DIS-COVERING THE GENDER OF CONTRACT CULTURE

By segregating social and psychological characteristics into two categories and linking those categories to one sex or the other, our ideas about gender constrain our beliefs about what kinds of work men and women can do, what their interests are, how they can act, and how they can feel. In addition, because traits commonly identified as male are generally more highly valued than characteristics associated with women, our ideas about gender have a constituting effect on the continuing imbalance of power between men and women. For example, because "men's" work is considered more important than "women's" work, and "male" analytical skills are more valued than "female" intuition, women who choose a conventional woman's job and exhibit common feminine attributes are likely to have less respect (from women as well as men),[17] less power, and less money[18] than women who are more masculine in manner and occupation. I believe that *Dawson, Harvey, and Henderson* strongly

17. J. RUSS, MAGIC MOMMAS, TREMBLING SISTERS, PURITANS AND PERVERTS: FEMINIST ESSAYS (1985).

18. Department of Labor reports indicate that women earn only 59% as much as men. WOMEN'S BUREAU, OFFICE OF THE SECRETARY, U.S. DEP'T OF LABOR, THE EARNINGS GAP BETWEEN WOMEN AND MEN 6 (1979) (table l). This discrepancy has been linked to the undervaluation of the kinds of work women do. *See* Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964,* 12 U. MICH. J. L. REFORM 397, 421 (1979); Note, *Equal Pay for Comparable Worth,* 15 HARV. C.R.-C.L.L. REV. 475, 478-79 (1980). Note, *Equal Pay, Comparable Work, and Job Evaluation,* 90 YALE L.J. 657, 663 (1981); *see also* Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers,* 59 B.U.L. REV. 55 (1979).

supports this ideology of gender, and my primary objective in this section is to expose how the casebook functions to sustain and further these gender-related ideas.

I have chosen to begin with an overview of the casebook because, for many of my readers, the casebook's relationship to ideas about gender may seem apparent only after a cumulative description of the gendered aspects of many different facets of the book. This will be particularly true, I think, for readers who are unaccustomed to noticing gender-related ideas, readers who identify with casebook readers like the Individualists and the Civil Libertarians.[19]

In providing an overview of the book, I pursue two different kinds of discussion. In the first part, my analysis proceeds from concrete questions regarding women. I look at women as "characters" in the cases, among the "authors" whose decisions or legal commentary the editors have included in the book, and in the language of the book.[20] Most appellate decisions allow one to learn something about the people who are parties in the cases, such as what their jobs are, what activities they undertake that lead to litigation, and occasionally what their characters are like. Judicial descriptions of parties do not, however, stand alone in a casebook. Just as editors are responsible for choosing the cases readers read, they also influence readers' views about the parties in the cases by the comments, elaborations, or questions they include with the decisions. Indeed, as I will show, readers can also interpret the significance of editorial silence about the parties. In addition, readers' views about people in a case will be affected by the people in neighboring cases, so that editorial organization will trigger readers' views regarding gender. Thus, I also observe the effect of the editorial arrangement of women's cases. In this part I shall look at men primarily as a gauge by which to evaluate the treatment of women.

In the second part, my focus shifts to comparisons between abstract characteristics which we commonly attribute to men and characteristics of the casebook. I shall concentrate, in other words, on the analytical, autonomous, abstract, and neutral qualities of the book. Because the book does not exhibit many characteristics com-

---

19. In contrast, other readers, readers who identify with The Feminist and the Reader with a Chip on her Shoulder, are likely to realize the casebook's support for the ideology of gender immediately upon learning that the concept of the reasonable *man* is utilized in the first case in the book as a standard by which to judge the "objective" interpretation of contractual language. *See* Hawkins v. McGee, 84 N.H. 114, 115, 146 A. 641, 643 (1929), *excerpted in* J. DAWSON, *supra* note 1, at 1, 2.

20. This approach is similar to the first "moment" or stage of feminist literary criticism which K. Ruthven describes as "dismantling androcentric assumptions." K. RUTHVEN, *supra* note 3, at 59-82.

monly characterized as feminine (such as sentimentality, earthiness, and compassion), I use women in this part primarily as a way of understanding what is not womanly. My aim in this second part is to reveal the gendered aspects of the book which do not directly pertain to women.[21] Although I am describing the gender-related aspects of the casebook in both parts of this section, I try to demonstrate the ways in which different casebook readers would interpret the materials the editors have chosen. I want to show not only how the editors' choices affect the readers' views of contract doctrine and their views of themselves, but also the different ways they understand the editors' choices.

A. The Casebook Treatment of Women

1. Women as characters

There are substantially fewer women than men among the parties in Dawson, Harvey, and Henderson's cases. Only thirty-nine of the 183 major cases in the casebook contain women.[22] Men, therefore,

---

21. Although the first part focuses on women as characters and the second on male characteristics, the first part will implicate the casebook treatment of men as characters, just as the second will implicate female characteristics. In the conclusion I will discuss the implications of this approach for contesting gender in the casebook. *See infra* note 221 and accompanying text.

22. The major cases in the book that involve parties who are women are: Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965), *excerpted in* J. DAWSON, *supra* note 1, at 697; Rouse v. United States, 215 F.2d 872 (D.C. Cir. 1954), *excerpted in* J. DAWSON, *supra* note 1, at 906; Kirksey v. Kirksey, 8 Ala. 131 (1845), *excerpted in* J. DAWSON, *supra* note 1, at 192; Bleecher v. Conte, 29 Cal.3d 345, 626 P.2d 1051, 173 Cal. Rptr. 278 (1981), *excerpted in* J. DAWSON, *supra* note 1, at 660; Parker v. Twentieth Century-Fox Film Corp., 3 Cal.3d 176, 474 P.2d 689, 89 Cal. Rptr. 737 (1970), *excerpted in* J. DAWSON, *supra* note 1, at 46; Heyer v. Flaig, 70 Cal.2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969), *excerpted in* J. DAWSON, *supra* note 1, at 896; Davis v. Jacoby, 1 Cal.2d 370, 34 P.2d 1026 (1934), *excerpted in* J. DAWSON, *supra* note 1, at 316; Fairfield Credit Corp. v. Donnelly, 158 Conn. 543, 264 A.2d 547 (1969), *excerpted in* J. DAWSON, *supra* note 1, at 946; Allied Van Lines, Inc. v. Bratton, 351 So.2d 344 (Fla. 1977), *excerpted in* J. DAWSON, *supra* note 1, at 448; Skendzel v. Marshall, 261 Ind. 226, 301 N.E.2d 641 (1973), *excerpted in* J. DAWSON, *supra* note 1, at 681; Brackenbury v. Hodgkin, 116 Me. 399, 102 A. 106 (1917), *excerpted in* J. DAWSON, *supra* note 1, at 331; Hoffman v. Chapman, 182 Md. 208, 34 A.2d 438 (1943), *excerpted in* J. DAWSON, *supra* note 1, at 410; Fitzpatrick v. Michael, 177 Md. 248, 9 A.2d 69 (1939), *excerpted in* J. DAWSON, *supra* note 1, at 128; Reigart v. Fisher, 149 Md. 336, 131 A. 568 (1925), *excerpted in* J. DAWSON, *supra* note 1, at 848; Taylor v. Barton-Child Co., 228 Mass. 126, 117 N.E. 43 (1917), *excerpted in* J. DAWSON, *supra* note 1, at 935; Fischer v. Union Trust Co., 138 Mich. 612, 101 N.W. 852 (1904), *excerpted in* J. DAWSON, *supra* note 1, at 160; Skelly Oil Co. v. Ashmore, 365 S.W.2d 582 (Mo. 1963), *excerpted in* J. DAWSON, *supra* note 1, at 601; Gartrell v. Stafford, 12 Nev. 545, 11 N.W. 732 (1882), *excerpted in* J. DAWSON, *supra* note 1, at 118; Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843 (1967), *excerpted in* J. DAWSON, *supra* note 1, at 469; Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), *excerpted in* J. DAWSON, *supra* note 1, at 461; Timko v. Useful Homes Corp., 114 N.J. Eq. 433, 168 A. 824 (1933), *excerpted in* J. DAWSON, *supra* note 1, at 123; Cook v. Lum, 55 N.J.L. 373, 26 A. 803 (1893), *excerpted in* J. DAWSON, *supra* note 1, at 919; Weisz v. Parke-Bernet Galleries, Inc., 67 Misc.2d 1077, 325 N.Y.S.2d 576 (N.Y. Cir. Ct. 1971), *rev'd*, 77 Misc.2d 80, 351 N.Y.S.2d 911 (N.Y. App. Term. 1974), *excerpted in* J. DAWSON, *supra* note 1, at 453; Cohen v. Kranz, 12 N.Y.2d 242, 189 N.E.2d 473, 238 N.Y.S.2d 928 (1963), *excerpted in* J. DAWSON, *supra* note 1, at 787; Mitchill v. Lath, 247 N.Y. 377, 160 N.E. 646 (1928), *excerpted in* J. DAWSON,

vastly outnumber women as "characters" in the book. Indeed, men not only monopolize the majority of the cases in which women do not appear but they also appear in most of the cases involving women.[23] Because Dawson, Harvey, and Henderson allow male parties to outnumber female parties so significantly, readers who notice gender differences are likely to be sensitive not only to the marginal representation of women in the casebook, but also to any sex role stereotyping within the decisions. Moreover, the cumulative impression provided by similarities among the women parties could provoke readers somewhat disinclined to notice gender to observe the casebook's links between women and ideas about gender.

a. Women's work

The most obvious commonality among the women parties is the narrow range of life situations in which they appear. Women, in this casebook, have legal problems arising from the limited activities typ-

---

supra note 1, at 426; Allegheny College v. National Chautauqua County Bank, 246 N.Y. 369, 159 N.E. 173 (1927), *excerpted in* J. DAWSON, *supra* note 1, at 194; Seaver v. Ransom, 224 N.Y. 233, 120 N.E. 639 (1918), *excerpted in* J. DAWSON, *supra* note 1, at 863; Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917), *excerpted in* J. DAWSON, *supra* note 1, at 231; Hamer v. Sidway, 124 N.Y. 538, 27 N.E. 256 (1891), *excerpted in* J. DAWSON, *supra* note 1, at 156; Hinson v. Jefferson, 287 N.C. 422, 215 S.E.2d 102 (1975), *excerpted in* J. DAWSON, *supra* note 1, at 575; Funk v. Baird, 70 N.D. 396, 295 N.W. 87 (1940), *excerpted in* J. DAWSON, *supra* note 1, at 916; Kabil Devs. Corp. v. Mignot, 279 Or. 151, 566 P.2d 505 (1977), *excerpted in* J. DAWSON, *supra* note 1, at 269; East Providence Credit Union v. Geremia, 103 R.I. 597, 239 A.2d 725 (1968), *excerpted in* J. DAWSON, *supra* note 1, at 203; Najarian v. Boyajian, 48 R.I. 213, 136 A. 767 (1927), *excerpted in* J. DAWSON, *supra* note 1, at 850; DeLeon v. Aldrete, 398 S.W.2d 160 (Tex. Civ. App. 1965), *excerpted in* J. DAWSON, *supra* note 1, at 114; Batsakis v. Demotsis, 226 S.W.2d 673 (Tex. Civ. App. 1949), *excerpted in* J. DAWSON, *supra* note 1, at 165; Jackson v. Seymour, 193 Va. 735, 71 S.E.2d 181 (1952), *excerpted in* J. DAWSON, *supra* note 1, at 170; Hoffman v. Red Owl Stores, Inc., 26 Wis.2d 683, 133 N.W.2d 267 (1965), *excerpted in* J. DAWSON, *supra* note 1, at 355; Plante v. Jacobs, 10 Wis.2d 567, 103 N.W.2d 296 (1960), *excerpted in* J. DAWSON, *supra* note 1, at 812.

23. Indeed, the figure of 39 women's cases is somewhat misleading because women are coupled with their husbands in 11 of those cases and do not have a significant separate presence as women. The 11 cases involving married couples are: Fairfield Credit Corp. v. Donnelly, 158 Conn. 543, 264 A.2d 547 (1969), *excerpted in* J. DAWSON, *supra* note 1, at 946; Hoffman v. Chapman, 182 Md. 208, 34 A.2d 438 (1943), *excerpted in* J. DAWSON, *supra* note 1, at 410; Skelly Oil Co. v. Ashmore, 365 S.W.2d 582 (Mo. 1963), *excerpted in* J. DAWSON, *supra* note 1, at 601; Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843 (1967), *excerpted in* J. DAWSON, *supra* note 1, at 469; Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), *excerpted in* J. DAWSON, *supra* note 1, at 461; Weisz v. Parke-Bernet Galleries, Inc., 67 Misc.2d 1077, 325 N.Y.S.2d 576 (1971), *rev'd*, 77 Misc.2d 80, 351 N.Y.S.2d 911 (N.Y. App. Term. 1974), *excerpted in* J. DAWSON, *supra* note 1, at 453; Kabil Devs. Corp. v. Mignot, 279 Or. 151, 566 P.2d 505 (1977), *excerpted in* J. DAWSON, *supra* note 1, at 269; East Providence Credit Union v. Geremia, 103 R.I. 597, 239 A.2d 725 (1968), *excerpted in* J. DAWSON, *supra* note 1, at 203; DeLeon v. Aldrete, 398 S.W.2d 160 (Tex. Civ. App. 1965), *excerpted in* J. DAWSON, *supra* note 1, at 114; Hoffman v. Red Owl Stores, Inc., 26 Wis.2d 683, 133 N.W.2d 267 (1965), *excerpted in* J. DAWSON, *supra* note 1, at 355; Plante v. Jacobs, 10 Wis.2d 567, 103 N.W.2d 296 (1960), *excerpted in* J. DAWSON, *supra* note 1, at 812. In addition, the woman involved in *Hamer v. Sidway* is an assignee (and wife) of the nephew whose uncle promised him money for refraining from various activities; she is scarcely noticeable in the decision. Hamer v. Sidway, 124 N.Y. 538, 538, 27 N.E. 256, 256 (1891), *excerpted in* J. DAWSON, *supra* note 1, at 156.

ically 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—as wife,[24] as mother-in-law,[25] sister-in-law,[26] or niece.[27] Outside family relationships, one can see a woman in this casebook having contract issues that arise only from such limited stereotypically female roles as home purchaser,[28] home seller,[29] nurse,[30] fashion designer,[31] charitable benefactress,[32] entertainer,[33] mental incompetent,[34] and welfare recipient.[35] Men in *Dawson, Harvey, and Henderson* also have legal problems arising from family relationships,[36] as well as from positions such as home purchaser,[37] home seller,[38] mental incompetent,[39] and nurse.[40] But men's legal problems in *Dawson, Harvey, and Henderson* also stem from much

---

24. *E.g.*, Skelly Oil Co. v. Ashmore, 365 S.W.2d 582 (Mo. 1963), *excerpted in* J. DAWSON, *supra* note 1, at 601; Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), *excerpted in* J. DAWSON, *supra* note 1, at 461; Weisz v. Parke-Bernet Galleries, Inc., 67 Misc.2d 1077, 325 N.Y.S.2d 576 (N.Y. Civ. Ct. 1971), *rev'd*, 77 Misc.2d 80, 351 N.Y.S.2d 911 (N.Y. App. Term. 1974), *excerpted in* J. DAWSON, *supra* note 1, at 453; East Providence Credit Union v. Geremia, 103 R.I. 597, 239 A.2d 725 (1968), *excerpted in* J. DAWSON, *supra* note 1, at 203; De Leon v. Aldrete, 398 S.W.2d 160 (Tex. Civ. App. 1965), *excerpted in* J. DAWSON, *supra* note 1, at 114; Hoffman v. Red Owl Stores, Inc., 26 Wis.2d 683, 133 N.W.2d 267 (1965), *excerpted in* J. DAWSON, *supra* note 1, at 355.

25. Brackenbury v. Hodgkin, 116 Me. 399, 102 A. 106 (1917), *excerpted in* J. DAWSON, *supra* note 1, at 331.

26. Kirksey v. Kirksey, 8 Ala. 131 (1845), *excerpted in* J. DAWSON, *supra* note 1, at 192.

27. Davis v. Jacoby, 1 Cal. 2d 370, 34 P.2d 1026 (1934), *excerpted in* J. DAWSON, *supra* note 1, at 316.

28. Hinson v. Jefferson, 287 N.C. 422, 215 S.E.2d 102 (1975), *excerpted in* J. DAWSON, *supra* note 1, at 575.

29. Gartrell v. Stafford, 12 Nev. 545, 11 N.W. 732 (1882), *excerpted in* J. DAWSON, *supra* note 1, at 118.

30. Fitzpatrick v. Michael, 177 Md. 248, 9 A.2d 639 (1939), *excerpted in* J. DAWSON, *supra* note 1, at 128.

31. Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917), *excerpted in* J. DAWSON, *supra* note 1, at 231.

32. Allegheny College v. National Chautauqua County Bank, 246 N.Y. 369, 159 N.E. 173 (1927), *excerpted in* J. DAWSON, *supra* note 1, at 194.

33. Parker v. Twentieth Century-Fox Film Corp., 3 Cal.3d 176, 474 P.2d 689, 89 Cal. Rptr. 737 (1970), *excerpted in* J. DAWSON, *supra* note 1, at 46.

34. Fischer v. Union Trust Co., 138 Mich. 612, 101 N.W. 852 (1904), *excerpted in* J. DAWSON, *supra* note 1, at 160.

35. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965), *excerpted in* J. DAWSON, *supra* note 1, at 696.

36. *See, e.g.*, Kirksey v. Kirksey, 8 Ala. 131 (1845) (brother-in-law), *excerpted in* J. DAWSON, *supra* note 1, at 192; Brackenbury v. Hodgkin, 116 Me. 399, 102 A. 106 (1917) (son and son-in-law), *excerpted in* J. DAWSON, *supra* note 1, at 331; Hamer v. Sidway, 124 N.Y. 538, 27 N.E. 256 (1891) (nephew and uncle), *excerpted in* J. DAWSON, *supra* note 1, at 156.

37. Hoffman v. Chapman, 182 Md. 208, 34 A.2d 438 (1943), *excerpted in* J. DAWSON, *supra* note 1, at 410.

38. *Id.*

39. Faber v. Sweet Style Manufacturing Corp., 40 Misc. 2d 212, 242 N.Y.S.2d 763 (N.Y. Sup. Ct. 1963), *excerpted in* J. DAWSON, *supra* note 1, at 492.

40. Bright v. Ganas, 171 Md. 493, 189 A. 427 (1936) ("personal attendant and companion"), *excerpted in* J. DAWSON, *supra* note 1, at 111.

broader, more diverse situations, such as their work as a doctor,[41] contractor,[42] farmer,[43] miller,[44] coal dealer,[45] town commissioner,[46] lumberman,[47] deputy sheriff,[48] sportscaster,[49] prize fighter,[50] engineer,[51] manager,[52]—there's even a man in one case who is a lawbook writer with a drinking problem.[53]

One might object to the critical implications of the preceding observations on the grounds that "life is, or has been, like that for women; the cases which have been selected accurately reflect differences between men and women in the real world." One might think that Dawson, Harvey, and Henderson's inclusion of a few cases in which women are successful entrepreneurs, such as the fashion designer and the entertainer cases,[54] fully vindicates their choices of cases involving women. The entrepreneurial cases not only complement the cases in which women are engaged in stereotypical activities but the diminutive number of such cases proportionately reflects the actual participation of women in the predominantly male world of business. Indeed, one might claim, including more cases in which women do untraditional things would deceive students about the actual status of women outside the casebook milieu.

This argument strikes me as an ironic diversion. In fact, my impression is that casebook editors generally fail and seldom make much effort to select cases and materials on the basis of how accu-

---

41. Hawkins v. McGee, 84 N.H. 114, 146 A. 641 (1929), *excerpted in* J. DAWSON, *supra* note 1, at 1.

42. Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958), *excerpted in* J. DAWSON, *supra* note 1, at 346.

43. Boone v. Coe, 153 Ky. 233, 154 S.W. 900 (1913), *excerpted in* J. DAWSON, *supra* note 1, at 92.

44. Hadley v. Baxendale, 9 Exch. 341 (Ex. 1854), *excerpted in* J. DAWSON, *supra* note 1, at 67.

45. Illinois Central Railroad Co. v. Crail, 281 U.S. 57 (1930), *excerpted in* J. DAWSON, *supra* note 1, at 59.

46. Rockingham County v. Luten Bridge Co., 35 F.2d 301 (4th Cir. 1929), *excerpted in* J. DAWSON, *supra* note 1, at 41.

47. Tanner v. Merrill, 108 Mich. 58, 65 N.W. 664 (1895), *excerpted in* J. DAWSON, *supra* note 1, at 541.

48. Denney v. Reppert, 432 S.W.2d 647 (Ky. 1968), *excerpted in* J. DAWSON, *supra* note 1, at 558.

49. American Broadcasting Companies, Inc. v. Wolf, 52 N.Y.2d 394, 420 N.E.2d 363, 438 N.Y.S.2d 482 (1981), *excerpted in* J. DAWSON, *supra* note 1, at 667.

50. Chicago Coliseum Club v. Dempsey, 265 Ill. App. 542 (1932), *excerpted in* J. DAWSON, *supra* note 1, at 81.

51. Southwest Engineering Co. v. Martin Tractor Co., 205 Kan. 684, 473 P.2d 18 (1970), *excerpted in* J. DAWSON, *supra* note 1, at 290.

52. Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980), *excerpted in* J. DAWSON, *supra* note 1, at 254.

53. Clark v. West, 193 N.Y. 349, 86 N.E. 1 (1908), *excerpted in* J. DAWSON, *supra* note 1, at 738.

54. *See supra* notes 31, 33.

rately they depict the "real world."[55] Moreover, the issue is not, I think, whether Dawson, Harvey, and Henderson could defend the cases they have chosen. Perhaps they could.[56] What is important to me is the effect that their choices have on readers' views regarding gender. Read together, the cases in this book confirm, rather than challenge, the generalization that women and men mostly do different things, and that women's opportunities are drastically more limited than men's. Most women who read the casebook do so to prepare for a career that historically has been predominantly male, and they may be concerned about the effect gender will have on their legal careers. Because almost all the women in the *Dawson, Harvey, and Henderson* cases do traditional "women's work," the casebook is likely to reinforce readers' fears (or fantasies) that, because gender has been a factor linked to career choice and success in the past, it may inhibit their options in the future.

In addition to perpetuating readers' views about occupational distinctions between women and men, cases in which women do traditional women's work can pose pedagogical problems for casebook readers. Although women's work has not been highly regarded or fairly compensated historically,[57] relying on these views regarding women's work in a decision may inadequately inform readers how to use the case in other situations. *Fitzpatrick v. Michael*[58] is an example of a case in *Dawson, Harvey, and Henderson* in which a court's failure to appreciate women's work obscures the reasoning of the opinion.

Fitzpatrick involves the claim of a practical nurse for specific performance of her employer's agreement to employ her until he died and to leave her a substantial interest in his estate. In exchange, she was to remain with him until he died and provide such services as giving him company, managing his house, driving his car, and nursing him when he was sick. The court declined to grant relief specifically enforcing the contract or negatively preventing Mr. Michael from hiring anyone else, in part because the court was unconvinced

---

55. There are, of course, exceptions to this generalization. *See, e.g.*, C. KNAPP, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS xxi (1976) ("no study of law is adequate if it loses sight of the fact that law operates first and last *for, upon,* and *through* individual human beings). I. MACNEIL, CASES AND MATERIALS ON CONTRACTS, EXCHANGE TRANSACTIONS AND RELATIONSHIPS xx (2d ed. 1978) ("The book contains a considerable amount of text, both original and borrowed, devoted to putting the legal materials into the economic, social, financial and commercial contexts in which they occur.").

56. One might argue, however, that a certain lack of realism should be encouraged in a casebook in order to obtain the beneficial effect on readers of an idealized image of how editors think the world should be for women and men.

57. *See supra* notes 17-18.

58. 177 Md. 248, 9 A.2d 639 (1939), *excerpted in* J. DAWSON, *supra* note 1, at 128.

that Ms. Fitzpatrick's services were sufficiently "rare and unusual" to warrant these extraordinary remedies:

> [Her services] were varied, it is true, but they required no extraordinary or unusual skill, experience, or capacity. Under the employment, the appellant acted as a nurse, chauffeur, companion, gardener, and housekeeper, and, while it may be difficult to appraise in monetary terms the value of services so varied, nevertheless they involved no more than doing such things as a housewife often does as a part of the ordinary routine of life.[59]

The court in *Fitzpatrick* dramatically devalued the kind of "woman's work" Ms. Fitzpatrick performed for Mr. Michael in concluding that, because her services involved "no more" than things a "housewife often does," her work was not "rare and unusual." This judgment ignored the social significance of the kind of work women have traditionally done, thereby indicating that "women's" work is inferior to "men's." In addition to nourishing this idea about gender, however, the court's distorted treatment of "women's" work functions as an analytical shortcut in the opinion: by analogizing Ms. Fitzpatrick's work to a "housewife's" work, the court avoids explaining why her services for Mr. Michael were not "rare and unusual." This avoidance is likely to prevent some readers from mastering the rules regarding specific enforcement of personal services. For example, Woman-Centered Readers, as well as The Feminist Readers and the female Readers with Chips on their Shoulders, may be so offended by the court's dismissive attitude toward work they and other women have done that their feelings of rejection or their anger may interfere with their ability to understand the court's refusal to grant Ms. Fitzpatrick specific relief.

The *Fitzpatrick* opinion also pedagogically disserves readers who are undisposed to favor women. Readers who share the court's opinion that women's work is unimportant may be unwisely lulled by this opinion into believing that the law, like the labor market, generally devalues such services.[60] Moreover, Dawson, Harvey, and

---

59. *Id.* at 259, 9 A.2d at 643, *excerpted in* J. DAWSON, *supra* note 1, at 128, 131.

60. By providing that all income earned during marriage is marital property, the recently proposed Uniform Marital Property Act values the housework of a married woman who has no other source of income at half her wage earning spouse's income. *See* Unif. Marital Property Act § 4(d), 9A U.C.L.A. 19 (Supp. 1985). In the context of divorce, the nonmonetary contributions homemakers and parents make to their families have received increased recognition through state legislation passed since the early 1970s which provides that a homemaker's contribution to a marital unit may be or (in some states) should be considered when dividing marital property according to the equitable distribution systems now in effect in most jurisdictions. *See, e.g.*, LaRue v. LaRue, 304 S.E.2d 312, 321-23 (1983); In re Marriage of Cornell, 550 S.W.2d 823, 826 (Mo. Ct. App. 1977). *See generally* Freed, *Equitable Distribution as of December 1982*, 9 [Current Developments] FAMILY LAW REP. (BNA) 4001 (Jan. 11, 1983). *See also* Avner, *Using the Connecticut Equal Rights Amendment at Divorce to Protect Homemakers' Contribu-*

Henderson make sure that at least some of these readers will be as unlikely to understand the rules regarding specific enforcement of personal services as the readers who support women's concerns. Although the court in *Fitzpatrick* asserts that a negative form of specific enforcement is *un*available if personal services are "part of the ordinary routine of life," the editors place a note case immediately after *Fitzpatrick* involving a contract for personal services that *is* negatively enforced.[61] In this decision an appellate court temporarily enjoined a football player from playing for any team other than the Dallas Cowboys, pending the completion of a new trial on the plaintiffs' claim against the player for breach of an agreement to play football exclusively for their assignor. By combining *Fitzpatrick* with *Dallas Cowboys,* the editors present without apparent embarassment two opinions involving the "ordinary routine[s] of [American] life" in which judges assert that while nursing, housekeeping, and companionship are not unique services, playing football. . .ah, well, that's another matter.

Because of its failure to appreciate the uniqueness of "women's" work, the *Fitzpatrick* opinion fails to clearly explain the prohibition against specific enforcement of personal services contracts. The prohibition could be clarified, however, by an interpretation of the decision that might occur to The Feminist, the Woman-Centered Reader, or the Reader with a Chip on her Shoulder. These readers might wonder how the court could have overlooked the possibility that from the perspective of the parties the services Ms. Fitzpatrick rendered to Mr. Michael may have been uniquely valuable and uncommon. They might think, for example, of how a patient can feel about the care given by a favored nurse, how a parent can feel about the services a valued babysitter performs for her children, and then how an individual like Mr. Michael might have felt about the work a capable housekeeper did for him. When services are personal they can be intensely unusual; no one else can do them quite the same

---

tions to the Acquisition of Marital Property, 4 U. BRIDGE. L. REV. 265, 270-80 (1982) (arguing that homemakers' nonmonetary contributions should be equated with wage earners' contributions). The law also attributes value to a homemaker's services in personal injury actions, where courts have valued the loss of a homemaker to her family by using a "replacement costs" standard (valuing the homemaker's work by determining either the cost of replacing each of the various tasks she performed or by determining the costs of procuring a "substitute homemaker"), or by using a "lost opportunity costs" standard (valuing a homemaker's work by equating it with the estimated value of the work she could have performed had she not worked in the home). *See* Yale, *The Valuation of Household Services in Wrongful Death Actions,* 34 U. TORONTO L.J. 283, 292-304 (1984); Annot., 47 A.L.R.3d 971 (1973) (collected cases involving death of housewives).

61. Dallas Cowboys Football Club, Inc. v. Harris, 348 S.W.2d 37, 42-44 (Tex. Civ. App. 1961), *excerpted in* J. DAWSON, *supra* note 1, at 132, 132.

way. Their rareness will depend on the relationship of the individuals involved and the way they evaluate the quality of the work. Only by separating such services from the relationships in which they occur and by dismissing their personal and social significance can their uniqueness be denied. Had the *Fitzpatrick* court been less influenced by traditional ideas about women and more sensitive to the value of personal services such as Ms. Fitzpatrick's, its refusal to award specific performance could actually have been more persuasive.

Dawson, Harvey, and Henderson apparently rely on students or instructors to "save" *Fitzpatrick*. The editors run the risk, however, by placing *Dallas Cowboys* next to *Fitzpatrick* and by failing to comment on the sexism in the *Fitzpatrick* opinion, that the *Fitzpatrick* decision may only be effective in this casebook to perpetuate gender stereotypes about "women's" work.

b. Women's character

Moving from observations of what women in the casebook do and how their work is valued to what their characters are like, readers who notice gender issues will find women described in stereotypical and unflattering ways in *Dawson, Harvey, and Henderson.* Although the two major case studies included in this Essay are designed to illustrate the effect of such treatment in greater depth,[62] I will briefly offer here the examples of two cases in which the characterization of the women could affect how readers view themselves and, in one instance, how they understand the law.

In *Wood v. Lucy, Lady Duff-Gordon,*[63] Judge Cardozo describes a dispute between a man and a woman who agreed to allow him the exclusive right to promote her fashion designs. The designer broke the agreement with the promoter by selling her products elsewhere, in an apparent attempt to make more money by double-dipping. Lady Duff-Gordon is one of the few women in *Dawson, Harvey, and Henderson* who appears to have had an unconventional, successful career, and she is one of only four parties whose photograph is included in the casebook.[64] Her character, therefore, has more signif-

62. *See infra* notes 168-217 and accompanying text.

63. 222 N.Y. 88, 118 N.E. 214 (1917), *excerpted in* J. DAWSON, *supra* note 1, at 231.

64. Shirley MacLaine, Jack Dempsey, and Hiram Walker are the other parties whose photographs appear in the casebook. *See* J. DAWSON, *supra* note 1, at 47, 82, 87, 563. Although the Hiram Walker case in the book involved the sale of a cow, Walker's picture is probably included in the casebook because of his more well-known business, a liquor concern that still distributes its products in his name. *See* Sherwood v. Walker, 66 Mich. 568, 33 N.W. 919 (1887) (overruled in Lenarver Co. Bd. of Health v. Misserly, 417 Mich. 17, 331 N.W.2d 203 (1982)), *excerpted in* J. DAWSON, *supra* note 1, at 561; Letter from Helen MacKenzie, Public Relations Department, Hiram Walker & Sons, Ltd., Ontario, Canada to author (Aug. 13,1985) (on file with author).

icance than if she were one of many businesswomen, some good, some bad, some in between. Her unique position in the casebook casts her character into prominence, particularly for those readers who are conscious of gender, and from several viewpoints Lady Duff-Gordon's character is disappointing.

Readers who have observed the phenomenal jeans-to-shampoo expansion of designer designated products must wonder how a woman in the early twentieth century could have earned money from dress manufacturers for "a certificate of her approval." The caption under her photograph, reproduced in the casebook from *Good Housekeeping Magazine,* intriguingly states that Lady Duff-Gordon "employ[ed] psychology in designing clothes for women,"[65] but Cardozo and the editors do not describe whatever talent, energy, or imagination this woman may have had.[66] Moreover, the decision's treatment of her legal defense does not redeem the greedy fickleness that her breach of contract suggests. Instead, her claim that the contract lacked mutuality of assent seems like a technical attempt to dodge responsibility in Cardozo's skillful exposition of the reasons for his decision against her. Thus, readers who are inclined to look to Lady Duff-Gordon as a role model are likely to observe that as a successful woman she seems undeserving and unethical. This is not a promising message for those readers who seek to abandon conventional women's roles, although it will be reassuring to the Gentleman Reader and the Reader with a Chip on his Shoulder who hope women will be inhibited in their efforts to break away from gender restrictions.

Other readers, who could be among The Feminist Readers or the female Readers with Chips on their Shoulders, might be offended that in one of the rare instances in this casebook in which a woman has a nondependent, untraditional career her work involves commercializing the personal appearance of women. These readers believe the fashion industry exploits and degrades women, and they may feel belittled, angered, or disappointed that a woman with Lady

---

65. J. DAWSON, *supra* note 1, at 232.

66. In addition, Cardozo's wording might permit the female Reader with a Chip on her Shoulder to believe, in her paranoid mode, that the judge was skeptical about the reasons for Lady Duff-Gordon's success. His opinion states that she "*styles* herself 'a creator of fashions.'" Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 90, 118 N.E. 214, 214 (1917), *excerpted in* J. DAWSON, *supra* note 1, at 231, 231. Was she really a designer, such phrasing hints. Although in a later sentence Cardozo states that Lady Duff-Gordon did, in fact, design things—"fabrics, parasols *and what not*"—this creativity could seem undercut not only by the judge's "what not" but also by the hint of contempt he displays for the public, which ascribed "new value . . . [to products she designed] when issued in her name." *Id.* at 90, 118 N.E. at 214 (emphasis added), *excerpted in* J. DAWSON, *supra* note 1, at 231, 231.

Duff-Gordon's prominence in the casebook is engaged in work they cannot respect.

Jackson v. Seymour,[67] a case involving a woman's contract with her brother for the sale of land, illustrates the casebook characterization of women who, unlike Lady Duff-Gordon, do not have successful careers outside the home.[68] I find *Jackson* significant not only because the imagery of the case conveys a restrictive message to readers about what women are like, but also because the imagery is critical to the readers' understanding of the law of the case. Moreover, like Lady Duff-Gordon, Mrs. Jackson's image is particularly meaningful because her case is rare; her case is the only case in *Dawson, Harvey, and Henderson*'s unit on consideration in which a contract with inadequate consideration is set aside.

In *Jackson,* Lucy Jackson, having sued her brother because he paid her considerably less for her land than it in fact was worth,[69] manages to have the transaction set aside because of the parties' "confidential relationship." "The parties were brother and sister," the court explains. "He was a successful business man and she a widow in need of money."[70] Because the court in *Jackson* does not elaborate its discussion of the parties' confidential relationship, and because it is unlikely that the decision rests solely on the biological relationship between the parties, the reader who seeks to understand the resolution of the case needs to develop the relationship between Mrs. Jackson and her brother more fully than the court has done.

Connecting the language of the case with typical, gendered ideas about what women and men were generally like in the 1950s, and before, a reader might construe Mrs. Jackson's confidential relationship with her brother in the following manner. Most women need to depend on one man or another in order to get along, and the

---

67. 193 Va. 735, 71 S.E.2d 181 (1952), *excerpted in* J. DAWSON, *supra* note 1, at 170.

68. Other cases in the book involving women who do not work outside the home also characterize the women, as this case does, as victims. *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965), *excerpted in* J. DAWSON, *supra* note 1, at 697; Brackenbury v. Hodgkin, 116 Me. 399, 102 A. 106 (1917), *excerpted in* J. DAWSON, *supra* note 1, at 410. It is not clear whether the victimized women in other cases worked outside the home. *See, e.g.*, Kirksey v. Kirksey, 8 Ala. 131 (1845), *excerpted in* J. DAWSON, *supra* note 1, at 192; Reigart v. Fisher, 149 Md. 336, 131 A. 568 (1925), *excerpted in* J. DAWSON, *supra* note 1, at 848; Batsakis v. Demotsis, 226 S.W.2d 673 (Tex. Civ. App. 1949), *excerpted in* J. DAWSON, *supra* note 1, at 165. The victimized stereotype is not the only unflattering stereotype readers can find in this casebook, however. For the cases in which women are characterized exclusively in terms of their dependency on their husbands, see *supra* note 23.

69. 193 Va. 69 at 736, 71 S.E.2d at 182, *excerpted in* J. DAWSON, *supra* note 1, at 170, 172. At the time of the purchase, neither he nor Mrs. Jackson knew that there was valuable timber on the land. Seymour cut and sold the timber, however, realizing a substantial amount of money which he did not share with his sister. *Id.*

70. *Id.* at 736, 71 S.E.2d at 182-183, *excerpted in* J. DAWSON, *supra* note 1, at 170, 172, 173.

court's description of Mrs. Jackson as a "widow," along with indications of her poverty, and in contrast to her brother's economic success, suggest that Mrs. Jackson was shrouded with the entailments of emotional bereavement, vulnerability, and economic dependency. All of these characteristics, if they accurately described her situation, could have cast her into a relationship of dependence, trust, and confidence with her brother, in which she was weak and needy and he was strong and providing. This interpretation of Mrs. Jackson as victim simplifies the doctrinal issue in the case: a court will more closely scrutinize the terms of a contract on the grounds that it is based on a confidential relationship when one of the parties can be designated a weakling.

In contrast, if one shuns or does not recognize the stereotypically gendered idea that poor widows have usually been victims, the doctrinal issue in the case is harder to resolve. Suppose, for example, that Mrs. Jackson was an emotionally vigorous woman whose widowhood was of so many years standing that she had long overcome the vulnerability she experienced when her husband died: or suppose that she was never so emotionally dependent on her husband that his death could affect her relationship with her brother. If neither party in *Jackson* is obviously a weakling, the standards the court used to intervene in the parties' contract are harder to understand. We can conceive of a confidential relationship based on deep intimacy and shifting dependencies, particularly between a brother and sister. We can imagine a relationship in which Mrs. Jackson sustained her brother through the trials and tribulations of his business affairs while he offered her economic assistance and emotional support when she needed help. However, overturning a contract based on this sort of confidential relationship would require more blatant judicial judgment calls than the objective theory of contract interpretation usually contemplates.[71] It is not surprising, therefore, that the court in *Jackson* appears to depend on our not thinking of Mrs. Jackson as a vigorous widow and vigilant sister. Rather, the court and the casebook editors (through their silence) count on our complicity in the more typically gendered view of the widow as victim.

I do not mean to suggest that emotional dependency, poverty, or bereaved feelings are unnatural or odious; indeed I believe a court should intervene to protect men and women when their vulnerabilities prevent them from making contract judgments in their best in-

71. For articles asserting an objective rather than subjective approach to interpreting the doctrine of mutual assent, see Costigan, *Implied-In-Fact Contracts and Mutual Assent*, 33 HARV. L. REV. 376, 398-400 (1920); Williston, *Mutual Assent in the Formation of Contracts*, 14 ILL. L. REV. 525, 529-35 (1919).

terests.[72] My point about the *Jackson* case is that the brevity of the court's reasoning and the words that the court uses to describe the parties encourage readers to think of Mrs. Jackson in the gender stereotype of the pitiful widow. However innocently, the opinion reinforces a restrictive view that men are strong and women are weak, and it uses that limiting idea as an analytical shortcut to avoid a challenging doctrinal problem.

Readers may wonder, reading this case, whether men who are weak can also obtain this kind of protection, or whether women who are strong cannot count on assistance of this sort. Indeed, readers could easily conclude from reading this case, along with Lady Duff-Gordon's, that women who remain in conventional sex roles are rewarded, while those who break away are not. Moreover, because the decision in *Jackson* implicitly relies on a restrictive way of thinking about what women are like, it particularly discourages readers from broadening their views about the possible ways men and women can act and feel. Instead, *Jackson* teaches readers that gendered thinking will contribute to their success as lawyers.

I hope that the *Lady Duff-Gordon* and *Jackson* discussions suggest how women are stereotypically and unflatteringly depicted in the cases Dawson, Harvey, and Henderson have selected for their casebook.[73] I do not mean to imply here that men should monopolize the villainous roles in a casebook. However, by disproportionately limiting the number of cases involving women in their casebook, and by selecting cases in which women are given stereotypically "feminine" personality traits, Dawson, Harvey, and Henderson offer readers a casebook that furthers gendered ideas that women are not as significant as men and that women are limited to "female" personalities.

c. Women's silence

In addition to choosing cases in which women have limited occupations and constricted characterizations, Dawson, Harvey, and Henderson foster confining ideas about women and men by their silence about matters that are important to women. By omitting ma-

---

72. *Cf.* Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 624-31 (1982).

73. While this is my general impression of the characterization of women in this casebook, there are cases in the book which do not conform to the generalization stated here. *See, e.g.*, Bleecher v. Conte, 29 Cal. 3d 345, 626 P.2d 1051, 173 Cal. Rptr. 278 (1981), *excerpted in* J. DAWSON, *supra* note 1, at 660, in which Judge Rose Bird describes the defendant as "an experienced businesswoman involved in real estate transactions." *Id.* at 345, 626 P.2d at 1052, 173 Cal. Rptr. at 278, *excerpted in* J. DAWSON, *supra* note 1, at 660, 660. Although the defendant is unsuccessful in her legal claims, she has some dignity in Judge Bird's treatment.

terial which is traditionally more closely linked to women and their experiences than to men, the editors perpetuate that aspect of gendered thinking which privileges "male" concerns. I will briefly discuss one case which illustrates two forms of editorial silence regarding "women's" interests.

Crenshaw v. Williams,[74] the fourth case in the casebook, is an example of a case in which both the opinion writer and the editors omit historical information, relevant to the case, that is of special significance to women. *Crenshaw* would be the first major case in the casebook in which a woman is a party, if the case had not been decided in Kentucky in 1921, before the 1942 amendments to that state's Married Women's Property Act.[75] Although the case involved a contract for the sale of land that Mrs. Williams inherited from her father, her husband—rather than she—was the party in the case, because she was not allowed to convey her land without her husband's consent at the time of the events giving rise to the lawsuit.[76]

Nothing in the casebook explains the problem of incapacity that state law imposed on Mrs. Williams, and other women, at the time of the lawsuit. This silence about the impact of common law restraints on married women has two effects. First, it leaves Mrs. Williams, who might have been the first principal female "character" in the casebook, standing helplessly in the wings of her own lawsuit, completely dependent on and subordinate to her husband. This stereotypical image of a woman may misrepresent Mrs. Williams's actual relationship with her husband, and it definitely imparts a first impression about women parties for readers that encourages restrictive rather than expansive notions of how women can be.[77]

---

74. 191 Ky. 559, 231 S.W. 45 (1921), *excerpted in* J. DAWSON, *supra* note 1, at 25.

75. KY. REV. STAT. § 404.030 (1972).

76. KY. REV. STAT. § 404.020(1) (1972) (repealed by implication by the 1942 amendment to § 404.030(1)) (permitting married woman to sell land without husband's consent). *See* Schaengold v. Behen, 306 Ky. 544, 545-46, 208 S.W.2d 726, 729-30 (1948) (stating that Act of 1942 allows married woman to convey land freely). *See also* Levy, *Vestiges of Sexism in Ohio and Kentucky Property Law: A Case of* De Facto *Discrimination,* 1 N.KY.ST.L.F. 193, 214-18 (1973) (discussing impact of 1942 amendments on § 404.020).

77. Adding this historical material to the *Crenshaw* presentation might counter the sex role stereotyping effect on readers of later cases in the book, such as Reigart v. Fisher, 149 Md. 336, 131 A. 568 (Ap. Md. 1925), *excerpted in* J. DAWSON, *supra* note 1, at 848, in which a husband not only formally brought suit *with* his wife, in a dispute regarding the sale of *her* land, but also "acted as spokesman" for her. Since Maryland's provisions regarding the capacity of married women were not as restrictive as Kentucky's at the time of the decision in *Reigart,* readers cannot blame Gulielma Fisher's subordinated conduct on a legal anachronism. *See* Vogel v. Turnet, 110 Md. 192, 193-94, 72 A. 661, 662-63 (1909) (interpreting Maryland Married Women's Property Act to give wives same control as husbands over their own property); MD. ANN. CODE § 4-203 (1984) (Maryland provision regarding married woman's control over her property).

The editors' failure to mention the status of Kentucky's Married Woman's Property Act at the time of the decision in *Crenshaw* is also significant because readers who are familiar with women's history are likely to notice this omission. Because the casebook contains notes about other historical events long overridden by change,[78] these readers may question the editors' avoidance of an appropriate and obvious opportunity to mention a major historical issue affecting women in the field of contract law. Female readers who are aware of past restrictions on married women may be angry at the editors for failing to discuss the problem of married women's legally restricted capacity. Or they may feel belittled by the casebook's silence on this subject—if women's history is unimportant, how important can we ourselves be? Do we have significance only insofar as we are like men, and take men's history for our own? For readers who are unaware of the historical disabilities women endured under the common law, the casebook's silence permits them to remain ignorant and, perhaps, insensitive to the continuing implications of these problems. The editors' silence on this issue nourishes the Individualist and the Civil Libertarian Readers' opinions that women's issues are unrelated to legal concerns.

Crenshaw also symbolically illustrates the silence that the casebook generally evidences regarding legal problems of current significance to women by suggesting one of the "women's" subjects which the casebook omits.[79] The lawsuit in *Crenshaw* arose when the Williamses could not convey clear title to Mrs. Williams' property—a disability which occurred because "[t]hough Mrs. Williams had reached an age at which in the ordinary course of nature she would bear no children, the Kentucky Court of Appeals had earlier held that the possibility remained of her having another child, who, under the will of Mrs. Williams' father, would inherit the property after her death."[80] Thus, a woman's sexuality and reproduction, a subject of enormous historical, current, theoretical, and practical interest to women, lies at the heart of the contract problem in *Crenshaw*.[81]

---

78. *See, e.g.*, J. DAWSON, *supra* note 1, at 6-8 (discussing controls over jury verdicts); *id.* at 37-41 (discussing history of equity).

79. I recognize that my claim that Dawson, Harvey, and Henderson have not included contracts cases in their book which would be particularly interesting to women might seem difficult to substantiate to some of my readers. Not only must I ask you to look with me in the casebook for what's not there, but more problematically the claim assumes the questionable proposition that women have special interests, that are different from men's, and that they have utilized the legal system, including contract doctrine, to pursue them.

80. J. DAWSON, *supra* note 1, at 25 (editor's note).

81. While reproductive functions and sexuality are also important to men, many feminists assert, and I agree, that the lack of control women have had over these matters is a major

Although the line I have quoted from the *Crenshaw* decision is the only material in the casebook on the subject of reproduction and sexuality, contractual arrangements have been utilized by women and men availing themselves of recent developments in reproductive technology, and cases involving these issues could be utilized in a contracts course. Thus, for example, a woman who seeks to become pregnant through artificial insemination by a donor other than her husband is required in many states to obtain her husband's written consent if she wants him to be legally responsible for the support of the child she conceives;[82] sperm donors in some states may use contracts to accept or relinquish their rights and responsibilities in children who are conceived with their sperm;[83] and men who wish to sire and father children in marriages in which their wives are infertile have attempted to use contracts as a way to structure arrangements with other women to bear children for them.[84]

The disputes involving reproductive technology generally arise in the context of support or paternity cases, and yet they raise very traditional, basic contract issues, such as problems of consideration, assent, and the interplay between private ordering and social control.[85] Moreover, these disputes can only be understood and suc-

---

cause of their historical oppression. *See, e.g.*, S. FIRESTONE, THE DIALECTIC OF SEX 1-14 (1970); MacKinnon, *supra* note 3.

82. Typically statutes provide that if a husband and wife consent in writing to artificial insemination with semen donated by someone other than the husband, the husband is irrebutably presumed to be the father of the conceived child. *See, e.g.*, GA. CODE ANN. § 19-7-21 (1982); Unif. Parentage Act § 5, 9A U.L.A. 592-93 (1979). *See generally* Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 VA. L. REV. 465, 483-84 n.84 (1983) (surveying state statutes on artificial insemination).

83. *See, e.g.*, WASH. REV. CODE ANN. § 26.26.050(2) (Supp. 1986). The issue of whether donors are responsible for the support of children conceived by their sperm is often avoided by medical practices designed to preserve donor anonymity. *See* Curie-Cohen, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585, 588-89 (1979).

84. Provisions in surrogate contracts which provide for payment to the surrogate mother beyond her expenses are considered unenforceable in the forty-nine states that prohibit payment to parents for the termination of parental rights. *See* Wadlington, *supra* note 82, at 479-82; Note, *Parenthood by Proxy: Legal Implications of Surrogate Birth*, 67 IOWA L. REV. 385, 389 (1982). Moreover, such contracts have been criticized on the grounds that contractual analysis does not adequately consider the best interests of the child. Note, *supra*, at 389. *But see* RESTATEMENT (SECOND) OF CONTRACTS §§ 178, 179 (1979) (promises may be unenforceable on grounds of public policy). There is some evidence, however, that contracts are being used successfully to structure surrogate parenting arrangements in some cases. *See, e.g.*, Syrokowski v. Appleyard, 420 Mich. 367, 362 N.W.2d 211 (1985) (requiring circuit court to accept subject matter jurisdiction over biological father's request under Paternity Act for order of filiation declaring paternity of child conceived by surrogate mother under surrogate parent contract). *See also* Brophy, *A Surrogate Mother Contract to Bear a Child*, 20 J. FAM. L. 263 (1981-82) (presenting surrogate parenting contract used in author's practice with infertile couples).

85. The most commonly litigated dispute involving reproductive technology occurs in a divorce or support proceeding in which a woman who conceived a child by artificial insemination from a third party seeks support for the child from her husband. Courts address this issue by determining whether the husband consented to the insemination procedure and whether the form of consent was adequate to comply with the formality requirements im-

cessfully argued with contract doctrine and discourse,[86] a discourse which fully dominates the decisions.[87] Because the issues are often cast in a complicated configuration that would be pedagogically stimulating, and because the cases contain subject matter such as human reproduction, the organization of the family, and the legal protection of personhood which could be very meaningful to students, including these materials in this casebook would be a plausible way to break the silence it otherwise imposes on legal problems which currently have particular significance for many women.

Contracts casebook editors might object to using reproductive technology materials, or other materials thought to be of special interest to women, such as cohabitation and separation agreement disputes, on the grounds that they should not be expected to satisfy special interest groups in their case selections. I agree that legal content, not interest group satisfaction, should be the appropriate standard for including material. However, even when "women's" materials like the reproductive technology cases satisfy other pedagogical requirements, editors generally exclude such material from contracts casebooks, presumably because it is "customary" to omit material from casebooks that is considered basic subject matter in other courses.[88] Omitting "women's" issues in contracts, therefore, is purportedly justified as a neutral curricular decision to defer such issues to more appropriate courses, which usually means the domestic relations or sex discrimination courses.

This deferral is not neutral. By confining issues that particularly concern women to domestic relations or sex discrimination courses, casebooks combine with standard law school curriculums to perpetuate the idea that women's interests are personal, concerning only themselves or their families. Men, in contrast, are concerned with

---

posed by statute. *See* R.S. v. R.S., 9 Kan. App. 39, 670 P.2d 923 (1983). *See also supra* note 84 (discussing surrogate parenting contracts).

86. *See* R.S. v. R.S., 9 Kan. App. 39, 670 P.2d 923 (1983) (utilizing equitable estoppel and implied contract doctrines to interpret formality requirement of spousal consent provision imposed by state statute); *see also* Karin T. v. Michael T., 484 N.Y.S.2d 780, 127 Misc.2d 14 (1985); Anonymous v. Anonymous, 246 N.Y.S.2d 835, 41 Misc.2d 886 (1964); Gursky v. Gursky, 242 N.Y.S.2d 406, 39 Misc.2d 1083 (1963).

87. Thus, there is a natural fit between the reproductive technology materials and a contracts course. Moreover, the family law context in which these cases arise is sufficiently accessible so that it should not be a barrier to using the cases in a contracts course.

88. Indeed, Grant Gilmore has described contract doctrine as "a residual category—what is left over after all the 'specialized' bodies of law have been added up . . . ." GILMORE, THE DEATH OF CONTRACT 7 (1974). Editors generally not only leave domestic relations cases out of basic contract materials, but they also minimize the number of cases involving such subjects as insurance, labor relations, admiralty, and business organization. *See, e.g.*, F. KESSLER & G. GILMORE, CONTRACTS: CASES AND MATERIALS vii (2d ed. 1970) (explaining omission of materials on labor contracts and antitrust in second edition) [hereinafter cited as F. KESSLER].

the rest of life. Introducing reproductive technology materials into a contracts casebook would integrate a "woman's" issue into a commercial course, thereby loosening a traditional curricular link between subject matter and the sexes. This change would challenge the gendered message curriculums usually imply regarding the separate interests of men and women.

There may, however, be reasons other than course jurisdiction for excluding women's issues like reproductive technology from *Dawson, Harvey, and Henderson.* In this casebook, the editors use predominantly commercial issues to illustrate the complicated doctrines of mutuality of assent, while more personal issues are used to illustrate the counterprinciples of reliance and promissory estoppel.[89] This commercial and personal dichotomy between the cases invites readers to analogize the stereotypical gender differences between the sexes to the differences between groups of conflicting rules. That is, readers could assume that, because men as a group customarily dominate women, the rules of assent, which are illustrated with cases involving the commercial side of life, where men dominate, must be more significant than the rules of reliance, which are largely illustrated with cases involving the more personal side of life, where women have traditionally been consigned. Excluding "women's" issues from this casebook, therefore, permits the content of the cases to work doctrinally to further gender stereotypes. Because readers interpret gendered clues in cases, the editors' se-

---

89. Excluding the section of cases on standard form contracts, which is extensively discussed later, see *infra* notes 195-217 and accompanying text, the 35 other major cases in the chapter on assent doctrine, J. DAWSON, *supra* note 1, at 261-486 (chapter three, "The Consensual Basis of Obligation"), include only four cases involving family relations or family transactions. In several of the cases in which one corporation is suing another, one has no sense of the people who acted for the corporations in the transactions that gave rise to the disputes. *See, e.g.*, Idaho Power Co. v. Westinghouse Electric Corp., 596 F.2d 924 (9th Cir. 1979), *excerpted in* J. DAWSON, *supra* note 1, at 368; Allied Steel & Conveyors, Inc. v. Ford Motor Co., 277 F.2d 907 (6th Cir. 1960), *excerpted in* J. DAWSON, *supra* note 1, at 313; Humble Oil & Refining Co. v. Westside Investment Corp., 428 S.W.2d 92 (Tex. 1968), *excerpted in* J. DAWSON, *supra* note 1, at 375.

In contrast, the unit of six cases on promissory estoppel includes no cases involving sale of goods or construction contracts. There are two cases involving family disputes, Kirksey v. Kirksey, 8 Ala. 131 (1845), *excerpted in* J. DAWSON, *supra* note 1, at 192 (brother-in-law's breach of agreement to help sister-in-law "raise her family") and Seavey v. Drake, 63 N.H. 393 (1882), *excerpted in* J. DAWSON, *supra* note 1, at 192 (father's failure to give son deed to land son had farmed). A third case involves a woman's promise to leave money for a scholarship fund in her name to a college. Allegheny College v. National Chatauqua County Bank, 246 N.Y. 369, 159 N.E. 173 (1927), *excerpted in* J. DAWSON, *supra* note 1, at 194, and a fourth case involves a married couple's dispute with a bank over insurance payments on their ranch wagon. East Providence Credit Union v. Geremia, 103 R.I. 597, 239 A.2d 725 (1968), *excerpted in* J. DAWSON, *supra* note 1, at 203. The two cases involving employment contract disputes convey a concrete sense of the individuals involved. *See* Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948), *excerpted in.* J. DAWSON, *supra* note 1, at 217; Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 153 N.W.2d 587 (1967), *excerpted in* J. DAWSON, *supra* note 1, at 214 .

lection and organization of cases subtly communicate a message that estoppel doctrine is subordinate to assent doctrine. Although Dawson, Harvey, and Henderson do not editorially address the relationship between the doctrines, the editors implicitly suggest their views to readers.

Including the reproductive technology materials in this casebook would decrease the power that its gendered messages exercise over readers' views of themselves. But including these materials would also loosen the relationship between gender and the editors' presentation of legal doctrine. Thus, because these materials seem solicitous and protective of male donors and male spouses,[90] the materials would challenge readers' impressions from cases like *Jackson v. Seymour*[91] that contract doctrine can only be used altruistically for women. Similarly, because these decisions involve obviously personal issues, including them in the casebook would disrupt the commercial/personal dichotomy that presently prevails in the mutual assent and promissory estoppel sections. This would not only break the implicit link the casebook now makes between the sexes and "hard" rules like assent and "soft" rules like reliance;[92] it would also force Dawson, Harvey, and Henderson to confront their position regarding the relationship of the assent and estoppel rules more straightforwardly. Just as gender provided an analytical shortcut to the courts in *Fitzpatrick* and in *Jackson,* so gender has permitted Dawson, Harvey, and Henderson to skirt their views about the relationships within legal doctrine in their casebook. Breaking the book's silence on women's issues, therefore, would challenge the power of gender over the casebook editors themselves.

---

90. One could argue that there is a discriminatory tilt in this area in favor of men. Thus, male spouses with sterility problems are protected against unwanted parental responsibility by statutes requiring their written consent to the artificial insemination procedures, even though these requirements may make parenthood somewhat more difficult for women whose husbands are sterile. *See supra* notes 82, 83. Similarly, male donors who wish to sell their sperm and avoid any further responsibility for children who are conceived are permitted to use contracts for those purposes, while women have not been permitted to contract for the use of their wombs and the sale of their ova. *See supra* notes 83, 84. However, these materials can also be understood as discriminating against sterile married men or men who are married to infertile women, for the decisions make siring and fathering children of their own difficult for these men. This reversed understanding of the discriminatory tilt of the decisions is one of the reasons they would be interesting to add to a contracts casebook; the results in these cases cannot be explained by our traditional ideas of what women and men are like.

91. *See supra* notes 67-72 and accompanying text.

92. By sexualizing these materials through the selective use and organization of women's cases, the editors obstruct connections readers might usefully make between them. *Cf.* Dalton, *supra* note 3, at 999 (describing how doctrines constitute other doctrines generally understood to stand in opposition to or in conflict with them).

2. Women as authors and in the language of the casebook

In addition to their significance as "characters" in the casebook, the way women appear as authors and in the casebook language also influences readers' ideas about gender. Thus, some readers who see the judges and legal commentators whose work editors select for reproduction in a casebook as professional role models are interested in how many women are among those selected. Readers today are also sensitive to whether editors recognize women in the language of a casebook, both as characters in a book's questions and problems and through the use of feminine pronouns when authors or editors write about the generic person.[93] Readers who examine *Dawson, Harvey, and Henderson* closely to evaluate the appearance of women as authors or in the language will find, however, that women are virtually invisible in these aspects of the casebook.[94]

Beginning with the language of the book, readers will find that the editors and their authors use masculine pronouns consistently throughout the cases and the materials to refer to the generic person. A provision of the U.C.C., which the editors include in the casebook, forthrightly claims that "words of the masculine gender [should be understood to] include the feminine and the neuter. . . ."[95] The practice extends, however, substantially past the U.C.C. in *Dawson, Harvey, and Henderson* to reach even cases involving women, where judges use masculine pronouns to phrase the rule statements that apply to female parties.[96]

Historical custom might explain the exclusive use of masculine pronouns in the U.C.C. and the older decisions, but it will not eliminate the impact that the casebook's lack of feminine pronouns has on most readers. And yet the casebook editors never take corrective measures through their editing perogatives to assure readers that the particularity of women is recognized. Thus, for example, the editors leave undisturbed law review excerpts in which influential

---

93. For an essay by a linguist discussing the relationship between language and gender formation, see McConnell- Ginet, *Difference and Language: A Linguist's Perspective* in THE FUTURE OF DIFFERENCE, 157-66 (H. Eisenstein & A. Jardine eds. 1985).

94. Although I write as if readers in general will notice the observations elaborated here about women as authors and in the language of the casebook, typically only readers who are conscious of gender issues are likely to notice such things. I believe, however, that most readers are influenced by these gender-related factors.

95. U.C.C. § 1-102(5)(b) (1977), *quoted in* J. DAWSON, *supra* note 1, at 977.

96. *See, e.g.*, Parker v. Twentieth Century-Fox Film Corp., 3 Cal. 3d 176, 474 P.2d 689, 89 Cal. Rptr. 737 (1970), *excerpted in* J. DAWSON, *supra* note 1, at 46, where the dissenting judge states that the general principle that "governs the obligations of an employee after *his* employer has wrongfully repudiated or terminated the employment contract . . . requires *him* to make a reasonable effort to secure other employment. *He* is not obliged, however, to seek or accept any and all types of work which may be available." *Id.* at 185, 474 P.2d at 695, 89 Cal. Rptr. at 743, *excerpted in* J. DAWSON, *supra* note 1, at 46, 51 (emphasis added, footnote omitted).

commentators write as if parties to contracts are exclusively male[97] or in which distinguished scholars speak directly and specifically to readers as men.[98]

Dawson, Harvey, and Henderson also fails to modify their own language to include feminine pronouns. Of the nine problems which the editors have created for the casebook, almost all contain neutral, nongendered names such as "*s*" and "*b*," "*a*" and "*b*," "trustee" or "vendee."[99] But in those instances where the editors do not describe the figures in the problem neutrally, they refer to them by male pronouns,[100] with the sole exception of one question, (out of six, in the fourth problem), in which the editors refer to a shopper interested in purchasing an alligator handbag as "she."[101] Using a

---

97. *See, e.g.,* Fuller & Perdue, *The Reliance Interest in Contract Damages,* 46 YALE L. J. 52, 56-57 (1936), *quoted in* J. DAWSON, *supra* note 1, at 4-5. In the reproduced portion of this influential description of the three purposes served by contract damages, promisors and promisees are consistently referred to as men. This passage is pivotal for readers, since it conceptually frames and organizes the lengthy materials on damages that follow.

98. Consider, for example, two passages placed relatively early in the book with the apparent intention of directing the readers' attention beyond the development of legal doctrine. Thus, in a portion of the stirring Holmes essay which includes the phrase, "[i]f you want to know the law and nothing else, you must look at it as a bad man . . ." the clear and personal voice of the justice speaks directly to readers who want to know the law, but he speaks to the readers quite specifically as men. Holmes, *The Path of the Law* in COLLECTED LEGAL PAPERS 168-76 (1920), *quoted in* J. DAWSON, *supra* note 1, at 30-33. Similarly, later in the book, having advised readers that they should know something about judicial style, the editors reproduce several paragraphs from *The Bramble Bush,* where Karl Llewellyn links clarity, consistency, craft, knowledge, beauty and vision with the needs and aspirations of "a man," "a man," and "a man." K. LLEWELLYN, THE BRAMBLE BUSH 157-58 (1951), *quoted in* J. DAWSON, *supra* note 1, at 110-11. Like the passage by Holmes, this piece reaches directly to readers with ambitious goals for themselves, but one knows from the many references to men that the readers Llewelyn addresses here are decidedly not women.

99. J. DAWSON, *supra* note 1, at 98 (contract between "*s*" and "*b*"); *id.* at 133 (dealings between "vendor" and "vendee"); *id.* at 227 (contract between "seller" and "buyer"); *id.* at 304 (claims of "*a*" and "*b*"); *id.* at 353 (bids of "sub" and "general"); *id.* at 365 (negotiations between "offeror" and "offeree," "*v*" and "*p*"); *id.* at 640 (sale of land by "*s*" to "*b*"); *id.* at 855 (conveyance from "vendor" to "vendee").

100. J. DAWSON, *supra* note 1, at 284-85 (referring to purchaser attempting to buy fur coat, supermarket purchaser, medical school applicant, homeowner and auctioneer by male pronouns).

101. In addition to the nine problems Dawson, Harvey and Henderson have written for the casebook, they have also included a much larger number of shorter "questions" which are dispersed throughout the book. Like the problems, the questions do not use feminine names or pronouns to refer to persons generically. However, a few questions which refer to cases involving women do use feminine pronouns to refer to those parties. *E.g., id.* at 125, 233, 918. Indeed, one of the few examples of blatant sexism I have found in the book involves one such question. Immediately following the note case of Ricketts v. Scothorn, 57 Neb. 51, 77 N.W. 365 (1898), *excerpted in* J. DAWSON, *supra* note 1, at 193, the editors challenge that court's use of equitable estoppel in a case in which a granddaughter is suing her grandfather's estate to enforce his promise to give her money so that she could stop working. Although the granddaughter had returned to work after a year, and the court found that in her year of not working she had "altered her position for the worse on the note being paid in full," Dawson, Harvey and Henderson ask "Was Katie's position altered very much 'for the worse?' " J. DAWSON, *supra* note 1, at 193. I doubt they would have asked such a question if Katie had been a male grandchild, for whom work would have been understood as important for his feelings of

feminine pronoun once, and then only in conjunction with the stereotypical woman's role of mindless consumer, hardly compensates for the many instances in the casebook where women were not recognized because of historical custom. Instead, a reader's overwhelming impression is that the casebook is not addressed to, nor does it contemplate, women.

In addition to blocking women out of the language, the casebook conveys the mistaken impression that legal authors are exclusively male. One cannot tell from reading the cases whether the judges who wrote the decisions are men or women. In other materials that introduce readers to some of the heroes of the law and their ideas,[102] however, the editors leave many clues that men monopolize legal authorship in contracts.[103] Unlike their sexblind treatment of case authors, the editors often indicate the sex of legal commentators in the book, either by including their first names when their names are used[104] or by using masculine pronouns to refer to them in editorial material.[105] Indeed, by including their portraits or photographs among the illustrations in the book the editors remind readers that Holmes, Mansfield, Corbin, Llewellyn, Cardozo, and Hand were not women.[106]

Well, *of course* they weren't, the Individualist Reader might object here. Surely Dawson, Harvey, and Henderson should not be asked to distort history, nor should they be blamed for the historical discrimination against women in the legal profession. No, they shouldn't; and yet I think they are responsible for the way their casebook influences readers' views regarding women's current opportunities in the legal profession. I think the invisibility of women as legal authors and in the casebook language may be a significant omission to readers. Readers may well understand that for pedagogical reasons the casebook must rely heavily on materials pro-

---

self-respect. Indeed, I also doubt that the court or Dawson, Harvey, and Henderson would have referred to a male grandchild by his first name.

102. Dawson, Harvey, and Henderson state in their preface that in addition to "substantive knowledge and analytical skills," their book aspires to pass on "a language and a culture." J. DAWSON, *supra* note 1, at xvii.

103. In fact at least several cases in the casebook were written by women. *See, e.g.*, Sheets v. Teddy's Frosted Foods, 179 Conn. 471, 427 A.2d 385 (1980) (Ellen Peters, J.), *excerpted in* J. DAWSON, *supra* note 1, at 254; Bleecher v. Conte, 29 Cal. 3d 345, 626 P.2d 1051, 173 Cal. Rptr. 278 (1981) (Rose Bird, C.J.) *excerpted in* J. DAWSON, *supra* note 1, at 660.

104. *See, e.g.*, J. DAWSON, *supra* note 1, at 4 (discussing work of "Lon" Fuller); *id.* at 40 (discussing rebellion against chancery led by "Sir Edward" Coke).

105. *See* J. DAWSON, *supra* note 1, at 589 (reference to Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUDIES 1 (1978)).

106. *Id.* at 31 (illustration of Oliver Wendell Holmes, Jr.); *id.* at 772 (illustration of Earl of Mansfield); *id.* at 709 (photograph of Arthur Corbin); *id.* at 459 (photograph of Karl Llewellyn); *id.* at 195 (illustration of Benjamin Cardozo); *id.* at 344 (photograph of Judge Learned Hand).

duced when women were not recognized in common language usage—when they could not practice law, teach, or write decisions—indeed, when they had little opportunity to generate problems amenable to legal solutions. Some readers may also fully realize that circumstances have changed dramatically for women, that this casebook need not be understood to reflect current opportunities and attitudes. Because the casebook is one of the few sources from which many readers draw their sense of *current* legal culture, however, they may interpret the absence of women in the casebook language and among its authors in a way Dawson, Harvey, and Henderson did not intend.

If, for example, The Feminist Reader or the Reader with a Chip on her Shoulder, uses the presence of women among the authors and in the language of the casebook to test the editors' stance toward women, the editors will fail to win her confidence. The casebook might then become a less effective learning device for such a reader. Alternatively, if The Feminist Reader, the Reader with a Chip on her Shoulder, or Readers Who are Undressed for Success look for women among the authors and in the casebook language because they need and seek some assurance that women or womanly people are not excluded from the profession, they will find nothing in this casebook to reassure them. Because the authors of the law in *Dawson, Harvey, and Henderson* all seem to be men, because legal scholars address men exclusively in their writing, and because the editors and judges do not refer to women in their rule statements or their questions, these readers will not know from this book that they can listen when legal authors speak, or that they might some day join their ranks.

In contrast with readers who are angered or hurt by the invisibility of women, the Gentleman Reader and the Reader with a Chip on his Shoulder will be relieved that these aspects of the casebook confirm their view that women are as unimportant in the legal world as they are (or should be) elsewhere. Insofar as the self-confidence of these readers is related to their feelings that they are better than women, the casebook supports their particular form of self-esteem.[107]

---

107. One feminist commentator has described the psychological differences between men and women by making a similar point about the basis for male self-confidence:

> All oppressed people must be controlled. Since open force and economic coercion are practical only part of the time, ideology—that is, internalized oppression, the voice in the head—is brought in to fill the gap. . . . Vast numbers of men can be allowed to experience some power as long as they expend their power against other men and against women. . . .
>
> The Masculine Imperative means that men avoid the threat of failure, inadequacy, and powerlessness—omnipresent in a society built on competition and private prop-

3. The placement of women's cases: gender and the implications of casebook organization

We have now examined women as "characters" in the cases, among the "authors" of the casebook, and in the casebook language. My claim in the preceding discussion has been that in the course of learning contract doctrine from these casebook materials, readers receive messages about gender that perpetuate their ideas about the divisions between the sexes. In some instances, the gendered messages also affect their view of doctrine, either because of an idea which a particular case conveys or because the organization of cases involving women or subjects generally associated with them suggests a gendered message to readers.[108] My final observations regarding the treatment of women in this overview of the casebook elaborate my claims regarding the significance of the casebook's organization of cases involving women.

The position that case organization affects readers' views of legal doctrine and legal theory is undoubtedly familiar. Editors can affect the way readers interpret the content of doctrine or the way they think about legal reasoning by rearranging the customary order of subjects within a casebook[109] or by placing decisions with similar facts but different outcomes side by side. If women were more represented and less stereotyped in the casebook, readers might be unlikely to take gender into account in considering the doctrinal or theoretical significance of the relationships among cases. The limited number of cases involving women in *Dawson, Harvey, and Henderson,* however, renders the presence of women a factor readers can interpret when they consider the significance of casebook organization.

Because readers hold multiple and conflicting ideas regarding the distinctions between the sexes, readers might attribute a number of different meanings to the organizational significance of cases involving women. The two illustrations I discuss below involve only *one* of the many organizational issues one could explore and only *one* gender message. I focus on the use of women in two variations of the case/countercase organizational technique, a technique often used

---

erty—by existing *against* others. But the Feminine Imperative allows of no self-help at all. We exist *for* others.

J. RUSS, *supra* note 17, at 44.

108. *See supra* note 89 and accompanying text.

109. For example, Lon Fuller's use of remedies at the beginning of his casebook is frequently cited as an example of the use of casebook organization to affect readers' views regarding legal formalism. *See* Klare, *Contracts Jurisprudence and the First-Year Casebook* (Book Review), 54 N.Y.U.L.REV. 876, 882-84 (1979) (reviewing C. KNAPP, *supra* note 55).

in casebooks.[110] And I concentrate on the message of subordination, which I believe readers can construe from cases involving women. Because the subordinate status of women in society is so commonly acknowledged, I think readers will be most inclined to think of that message when they consider the relationship between conflicting cases where only one of the cases involves a woman.

The case/countercase scheme typically encourages readers to dispute the formalistic reasoning of cases that are paired together. On a theoretical level, readers can interpret this scheme to imply that rules are ruthlessly indeterminate, that legal doctrine fails to provide a predictable way to determine a certain result in particular situations. More conservatively, readers can interpret the case/countercase scheme to imply that the rule of one case is an *exception* to the rule of the other case. This rule/exception interpretation is based on an assumption that one of the cases has less authority than the other, while the indeterminate interpretation is based on a belief that the cases could have equal authority. I believe that pairing a case involving a woman with a conflicting case involving male parties invites readers to adopt the rule/exception interpretation of the case/countercase scheme rather than the indeterminate or rule/counterrule interpretation. The two examples I have chosen from the casebook not only contextualize this assertion but also suggest how gender strongly tempts readers to choose the more conservative interpretation of the case/countercase scheme.

Dawson, Harvey, and Henderson were unable to resist beginning their casebook with the decision of *Hawkins v. McGee*,[111] the well-known case a patient initiated against his doctor after plastic surgery left the patient with a hairy hand instead of the perfect hand the doctor had promised. As the introduction to contract remedies, the decision in *Hawkins* utilizes the expectation measure of contract damages.[112] The ludicrous results that the standard promises to

---

110. There are at least a half dozen times in *Dawson, Harvey, and Henderson* where a woman's case is paired with a contradictory case involving a man. *Compare* Parker v. Twentieth Century-Fox Film Corp., 3 Cal. 3d 176, 474 P.2d 689, 89 Cal. Rptr. 737 (1970), *excerpted in* J. DAWSON, *supra* note 1, at 46 (restrictive application of general mitigation rule in case involving female employee) *with* Rockingham County v. Luten Bridge Co., 35 F.2d 301 (4th Cir. 1929), *excerpted in* J. DAWSON, *supra* note 1, at 41 (broad application of mitigation rule in case involving a male contractor); *compare* Brackenbury v. Hodgkin, 116 Me. 399, 102 A. 106 (1917), *excerpted in* J. DAWSON, *supra* note 1, at 331 (applying rule that offeror may not terminate offer for unilateral contract after performance begun in case involving female offeror) *with* Petterson v. Pattberg, 248 N.Y. 86, 161 N.E. 428 (1928), *excerpted in* J. DAWSON, *supra* note 1, at 323 (applying rule that offeror may terminate unilateral contract after performance begins in case involving male parties).

111. 84 N.H. 114, 146 A. 641 (1929), *excerpted in* J. DAWSON, *supra* note 1, at 1.

112. The *Restatement (Second) of Contracts* indicates that expectation is the primary standard

yield in the *Hawkins* case may prejudice the reader's respect for the expectation measure, however.[113] The law review comment on reliance damages that follows the case,[114] and a note case, also involving plastic surgery, in which the reliance measure of damages provides more reasonable compensation to the injured party,[115] undoubtedly assist this result. Thus, most readers would agree that the expectation measure does not work well in situations like *Hawkins*.

Dawson, Harvey, and Henderson, however, obviously believe that the expectation measure is the primary standard by which contract remedies are gauged, for expectation dominates the first three sections of the book. If one holds this attitude toward the expectation measure, then one would not want readers to confuse their criticism of the effectiveness of the expectation measure in *Hawkins* with their appreciation of the importance the measure generally has in other remedial situations. In my judgment, the editors' choice of *Sullivan v. O'Connor*[116] as the note case following *Hawkins* signals readers that the reliance damage measure is an exception to the primary standard of the expectation measure. The plaintiff in *Sullivan* is a woman, "a professional entertainer," who sought plastic surgery on her nose . . .to "enhance" her beauty and improve her appearance. These facts will surely remind many readers of the stereotypical image of woman as princess (or beauty queen)—vain, self-absorbed, and decidedly inferior not only to men but to worthier women as well.[117] Connecting this image of inferiority to the reliance measure of damages utilized in the case will encourage readers to believe that, however fairly the decision in *Sullivan* seems to come out, the reliance standard it utilizes is inferior to the basic principle set forth in *Hawkins*.

---

for measuring contract damages. RESTATEMENT (SECOND) OF CONTRACTS § 347 (1979). The expectation measure, which gives an injured party damages measured by the value of the performance he or she was promised, is frequently contrasted with the reliance measure. The expectation measure puts an injured party where she would have been but for the breach, whereas the reliance measure puts an injured party where she would have been but for the contract. *See generally* Fuller & Perdue, *supra* note 92, at 54, *quoted in* J. DAWSON, *supra* note 1, at 5.

113. The court concludes that the appropriate measure should be "the difference between the value . . . of a perfect hand . . . and the value of the hand in its present condition. . . ." Hawkins v. McGee, 84 N.H. 114, 117, 146 A. 641, 644 (1929), *excerpted in* J. DAWSON, *supra* note 1, at 1, 3.

114. The excerpt from Fuller's Article on reliance damages includes his critique that there is less justification for the use of the expectation measure than the reliance or restitution measure. Fuller & Perdue, *supra* note 92, at 56-57, *quoted in* J. DAWSON, *supra* note 1, at 5.

115. Sullivan v. O'Connor, 363 Mass. 579, 586-89, 296 N.E.2d 183, 188-90 (1973), *excerpted in* J. DAWSON, *supra* note 1, at 5, 6.

116. *Id.* at 579-80, 296 N.E.2d at 184, *excerpted in* J. DAWSON, *supra* note 1, at 5.

117. *See generally* L. GILBERT & P. WEBSTER, BOUND BY LOVE THE SWEET TRAP OF DAUGHTERHOOD 1-19 (1982).

The *Hawkins* and *Sullivan* case/countercase example concerns a relationship between a major case and a note case. My second example of the way the subordinate status of women affects the interpretation of casebook organization involves a relationship between sections within a chapter. (This is a section/countersection variation on the case/countercase scheme.) The editors have organized the four sections of the contracts remedies chapter so that the first two sections are primarily concerned with the expectation standard for measuring damages. The expectation standard also dominates the third section, which deals with reliance and restitution damages, because the editors present these alternative damage remedies in terms of their relationship to the expectation measure. The expectation measure, therefore, commands considerable authority by the time the reader turns to the fourth section of the chapter, which is on equitable remedies. The preceding sections of the chapter have demonstrated that money damages often fail to secure an injured party her expectation interest. Upon learning that an equitable remedy requires the breaching party to do exactly what she agreed to do readers might assume that equitable remedies promise to achieve the goals of the expectation standard more satisfactorily than money damages. Indeed, the reader approaching the casebook section on equitable remedies is likely to wonder whether it contains the ultimate form of expectation damages—this unit might be the capstone of the chapter.

The concentration of cases involving women in the equitable remedies section, however, is likely to signal readers that equitable remedies are subordinated to money damages as the common method of effectuating the expectation standard. Of the eighteen major cases that precede the equitable remedies section in the chapter, a reader may have noticed only one woman among the parties.[118] In contrast to the low number and proportion of cases involving women in the preceding cases, three of the five cases in the equitable remedies section involve women as parties.[119] Since women domi-

---

118. Parker v. Twentieth Century-Fox Film Corp., 3 Cal. 3d 176, 474 P.2d 689, 89 Cal. Rptr. 737 (1970), *excerpted in* J. DAWSON, *supra* note 1, at 46. In fact there are two cases that involve women among the eighteen that precede the equitable remedies section, but readers may overlook the presence of a woman in De Leon v. Aldrete, 398 S.W.2d 160 (Tex. Civ. App. 1965), *excerpted in* J. DAWSON, *supra* note 1, at 114. Although the editors state in an opening note that the defendants are husband and wife, the court refers to the DeLeons throughout the opinion as "the defendants," thereby disguising their sex for the remainder of the opinion.

119. The three cases involving women are: Fitzpatrick v. Michael, 177 Md. 248, 9 A.2d 639 (1939), *excerpted in* J. DAWSON, *supra* note 1, at 128; Gartrell v. Stafford, 12 Neb. 545, 11 N.W. 732 (1882), *excerpted in* J. DAWSON, *supra* note 1, at 118; Timko v. Useful Homes Corp., 114 N.J. Eq. 433, 168 A. 824 (1933), *excerpted in* J. DAWSON, *supra* note 1, at 123.

nate this unit of cases, some readers will use this fact as a clue to the relative value of equitable remedies. By comparing the inferior status of women to the relationship between the "women's" unit on damages (the equitable remedies section) and the "men's" unit (the money damages sections), these readers would assume that money damages are dominant. Under this interpretation, which comports with the position of the Restatement,[120] the equitable remedies section is not the capstone of the contract damages chapter; instead it demonstrates that some aspects of law—like some aspects of society—are subordinate to others.

Because the organization of cases involving women in both of the preceding examples reinforces a doctrinal message that is in accord with substantial authority,[121] it might be tempting to assume that readers will benefit from the gendered messages they gleaned from the organizational significance of these women's cases. As I will demonstrate in the two major case studies presented later in the Essay, however, there are times when certain readers will misinterpret the organizational significance of women's cases, which will hinder their ability to learn particular doctrinal messages. In addition, I believe that readers are personally harmed when the relationship between casebook structure and doctrine depends on gender. Utilizing the subordinate status of women as part of doctrinal analysis reinforces the division between the sexes. It reminds men and women of the different historical treatment of the sexes, it revitalizes the nefarious contention of gender-related thinking that men are superior to women, and, as in the examples discussed here, it sometimes rewards readers for extending these ideas to legal analysis. Readers who think about the subordinate status of women understand the casebook better than those who don't.

Readers are harmed when the relationship between casebook structure and doctrine depends on gender because this kind of organizational message analysis is implicitly based on the manipulation of women. Although cases involving men are organized so that their position in the book also conveys doctrinal messages, these messages are not sex-linked. Cases involving women are the cases that carry the extra organizational punch. Admittedly, the casebook organization manipulates *cases* involving women, rather than women themselves, but this form of organizational interpretation neverthe-

120. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS §§ 347, 359(l) (1979). Section 359(l) provides: "(1) Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party." *Id. See also supra* notes 111-116 and accompanying text.

121. *See supra* notes 114, 120.

less symbolically conveys the message to readers that men and women can be treated differently. By utilizing the idea of different treatment in the placement of women's cases the casebook furthers the constraints of gender, nourishing a reader's consciousness that the sexes are divided by more than their biological differences.

B. The Maleness of the Casebook

Although the preceding part of the casebook examination focused on the treatment of women, the casebook treatment of men was an integral, if submerged, part of that discussion. Thus, we not only saw that the masculine pronoun overwhelmingly dominates the feminine when the book utilizes gendered pronouns, but that the language of the book specifically and exclusively addresses readers as men.[122] Moreover, the authors of the opinions and of the supplementary material included in the book all seem to be male;[123] (indeed, the editors themselves are all men). Finally, men—and only men—are generously represented as parties in the casebook, in many different occupations and roles.[124]

I did not include in the preceding part of this section any discussion of the manner in which the cases characterize men. Although the imagery of the cases may reinforce readers' opinions about the limitations of male personality traits, there are so many men in the casebook that, by dint of sheer numbers, the male "characters" exhibit a much broader range of human behavior than the women do. There may be no nurturing parent or tempestuous sex object among the male parties in the casebook, but Lady Duff-Gordon's fickle greed[125] can be matched by the cheap callousness of the father in *Mills v. Wyman*[126] who failed to honor his promise to repay the innkeeper for nursing his adult son through his final illness. Similarly, Mrs. Jackson's pitiful dependency[127] can be matched by the exploited pathos of the hired hand in *Britton v. Turner*,[128] whose employer attempted to fleece him out of his salary for ten months' work. There is perseverance in the nephew who gave up drinking, smoking, swearing, and gambling for six years,[129] and there is ex-

---

122. *See supra* notes 93-101 and accompanying text.
123. *See supra* notes 102-07 and accompanying text.
124. *See supra* notes 22-53 and accompanying text.
125. *See supra* notes 63-66 and accompanying text.
126. Mills v. Wyman, 20 Mass. (3 Pick.) 207, 207 (1825), *excerpted in* J. DAWSON, *supra* note 1, at 181.
127. *See supra* notes 67-72 and accompanying text.
128. Britton v. Turner, 6 N.H. 481, 482 (1834), *excerpted in* J. DAWSON, *supra* note 1, at 104.
129. Hamer v. Sidway, 124 N.Y. 538, 540, 2 N.E. 256, 256 (1891), *excerpted in* J. DAWSON, *supra* note 1, at 156.

travagant self-confidence in the entrepreneur whose self-serving testimony became the basis for his whopping damages award.[130] There's a dogged loser,[131] a loyal son,[132] an antagonistic son-in-law,[133] a public-spirited citizen,[134] a contrary farmer,[135] and a self-sacrificing employee.[136] Indeed, there is so much variety in the male parties' behavior that determining the confines of male character, based on the representation of men in the casebook, would be a daunting task.

My claim about the maleness of the casebook does not rest, however, on how many men there are in the casebook or the wide range of behavior they exhibit. I believe that, even if the editors transformed the casebook by equalizing the number of cases involving men and women and by editorially defusing stereotyped characterizations within all the cases, the casebook would still seem male. My objective in this part is to demonstrate why this is so.

The assumption underlying my claim that a casebook can be male is my belief that, because ideas about gender are deeply rooted in our culture, casebook readers are accustomed, if not reconciled, to categorizing characteristics according to the masculine/feminine paradigm. Many casebook readers may not share the opinion that women and men differ in ways that far exceed the biological distinctions between them; they may believe that gender differences are not required by the inherent, unalterable, biological differences between women and men.[137] Indeed, for many readers (and I include myself among them), gender distinctions do not accurately describe our friends, our colleagues, our children, or ourselves as women and men. Nevertheless, dividing our ideas by sex is sufficiently familiar that we could agree in a rough way which characteristics "most people" attribute to men and which to women. My analysis of the maleness of *Dawson, Harvey, and Henderson* proceeds on the

---

130. Fera v. Village Plaza, Inc., 396 Mich. 639, 646-47, 242 N.W.2d 372, 375-76 (1976), *excerpted in* J. DAWSON, *supra* note 1, at 76, 80.

131. Hoffman v. Red Owl, 26 Wis. 2d 683, 133 N.W.2d 267 (1965), *excerpted in* J. DAWSON, supra note 1, at 355.

132. Brackenbury v. Hodgkin, 116 Me. 399, 102 A. 106 (1917), *excerpted in* J. DAWSON, *supra* note 1, at 331.

133. *Id.*

134. Sheets v. Teddy's Frosted Foods, 179 Conn. 471, 427 A.2d 385 (1980), *excerpted in* J. DAWSON, *supra* note 1, at 254.

135. Boone v. Coe, 1153 Ky. 233, 154 S.W. 900 (1913), *excerpted in* J. DAWSON, *supra* note 1, at 92.

136. Webb v. McGowin, 27 Ala. App. 82, 168 So. 196 (1935), *cert. denied,* 232 Ala 374, 168 So. 199 (1936), *excerpted in* J. DAWSON, *supra* note 1, at 185.

137. See Chodorow, *Gender, Relation, and Difference in Psychoanalytic Perspective* in THE FUTURE OF DIFFERENCE 3-19, H. Eisenstein & A. Jardine, eds. (1985) for an account of the construction of gender differences based on psychoanalytic, social, and cultural factors.

assumption that casebook readers generally share my views that analytical intellect, detachment, autonomy, and control seem masculine, whereas emotional intellect, attachment, compassion, and spontaneity seem feminine. I do not claim that these qualities are essential to either sex. In fact, I would argue that they aren't. I only claim to have described my impressions of the way many people understand the content of gender.[138]

Because we can also use the traits that we attribute to men and women to describe things (such as boats, machines, and buildings), objects which are described by characteristics predominantly related to one sex can be directly identified by gender.[139] Although any cultural artifact can seem gendered, books are especially susceptible to seeming male or female because one can use their contents, as well as their form and function, to determine their character. For me, considering the style as well as the contents of *Dawson, Harvey, and Henderson,* the casebook's most salient characteristics are its analytical, abstract character and its authoritarian neutrality. I believe that these characteristics are commonly understood as masculine and, therefore, that the casebook itself seems male. In the remaining pages of this part, I will demonstrate why the characteristics I have mentioned accurately describe *Dawson, Harvey, and Henderson;* I will also describe the effect of the casebook's maleness on readers.

1. The analytical, abstract character of the casebook

The analytical and abstract character of *Dawson, Harvey, and Henderson* stems in part from the organizational structure the editors have chosen. The editors have used several organizational techniques that not only are abstract or analytical in themselves but that also encourage abstract analysis in casebook readers. The editorial

---

138. Although the attributions I have made accurately reflect how I think many people would characterize the sexes, I also believe that people attribute qualities to the sexes in a relational way. That is, when women exhibit the traits generally ascribed to men, we tend to think of these traits in comparison to opposing, differently formulated traits linked to men. We make the same comparative adjustments when men exhibit "feminine" characteristics. However, because of men's traditional dominance over women, the traits which were positive when we they were linked with men may seem negative when they are attributed to women. Thus, women may be described as scheming, cold, selfish, and manipulative, when they appear intellectual, detached, autonomous, and in control, while men may be described as uninhibited, loyal, considerate, and easy-going, when they seem emotional, attached, compassionate, and spontaneous.

139. As long as we continue to identify characteristics by one sex or the other, the only barrier to fully genderizing all our artifacts is whatever limits our imaginations impose on our willingness to personify things. My sturdy, dependable, capacious, cyclical washing machine is certainly an "old girl," rather than an "old boy" to me, while the computer on which I am composing these words is so logical and self-contained that I could never think of it as female. If I were able to anthropomorphize it at all, it would be male.

decision to open the book with a substantial unit on contract remedies illustrates this kind of technique.[140] This opening distinguishes *Dawson, Harvey, and Henderson* from most other contracts books.[141] The idea of beginning a contracts casebook with remedies was originally introduced as a way to use the organization of the contracts casebook to challenge formalistic legal analysis,[142] and even today this way of organizing a book seems counterintuitive. Students expect that they should learn about contract formation and breach before they study remedies.[143] The analytical challenge of the casebook's organization tends to dominate readers' responses to the casebook. The remedies beginning encourages readers to focus, from the very outset of the book, on an enormously complicated rule structure that they find hard to connect with their own experience. The opening of the casebook thus initiates and facilitates an abstract and analytical response to the casebook.

After the opening chapter on remedies, the editors continue to organize the casebook according to doctrinal categories that are divorced from the chronological or relational contexts of contract transactions.[144] This organization also encourages readers to focus on rules in the abstract. Because the structure separates the rules from the more concrete and personalized aspects of the casebook—the case settings, the parties, and even the judges who authored the decisions—the casebook encourages an approach to contracts which can seem exceedingly impersonal.[145]

The extensive use of the case/countercase organizational tech-

---

140. J. DAWSON, *supra* note 1, at 1-143.

141. *See, e.g.*, L. FULLER & M. EISENBERG, BASIC CONTRACT LAW (4th ed. 1981); C. KNAPP, *supra* note 55; F. KESSLER, *supra* note 88; A. MUELLER, A. ROSETT & G. LOPEZ, CONTRACT LAW AND ITS APPLICATION (3d ed. 1983).

142. *See* Klare, *supra* note 109, at 882.

143. This form of organization probably seems natural because it is "chronological." *See* Klare, *supra* note 109, at 878. It also seems natural to students, however, because many contract study aids and contract treatises are organized chronologically. *See, e.g.*, J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS (2d ed. 1977); M. EISENBERG, GILBERT LAW SUMMARIES: CONTRACTS (11th ed. 1984); S. EMANUEL & S. KNOWLES, EMANUEL LAW OUTLINES: CONTRACTS (2d ed. 1984); E.A. FARNSWORTH, CONTRACTS (1982); G. SCHABER & C. ROHWES, CONTRACTS IN A NUTSHELL (2d ed. 1984); RESTATEMENT (SECOND) OF CONTRACTS (1979); *cf.* LEGALINES: CONTRACTS (R. Meslar ed. 1983) (adaptable to courses utilizing materials by Dawson).

144. Examples of the categories into which the editors divide the casebook are "Grounds for Enforcing Promises" and "The Consensual Basis of Obligation." *See* J. DAWSON, *supra* note 1, at xix (summary of Table of Contents).

145. My claim here should be familiar, in that the impersonality of legal study has been described and criticized elsewhere. *See, e.g.*, J. NOONAN, JR., PERSONS AND MASKS OF THE LAW vii-xii, 3-28 (1976). *See also* G. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1293-95 (1984); Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 MINN. L. REV. 601 (1977); Gabel, Book Review, 91 HARV. L. REV. 302 (1977) (reviewing R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977)). What is different about my assertion, however, is the contention that impersonality seems male to gender-conscious readers.

nique also illustrates the book's analytical and abstract character. This technique could produce concrete rather than abstract readings of conflicting cases if readers could evaluate the factual differences between decisions. The factual distinctions do not speak for themselves, however, and the casebook does not provide any guidance about how to evaluate them. If *Dawson, Harvey, and Henderson* readers, therefore, use the case/countercase technique to focus on factual comparisons between conflicting cases, this analysis is likely to produce an abstract discussion. Moreover, as I have stated earlier,[146] the case/countercase technique typically invites readers to use the doctrinal relationship between specific contract rules as a way of thinking about the theoretical implications of contract doctrine. This too produces an abstract analysis of the materials.

Although the organizational factors discussed above contribute to the analytical, abstract characteristic that makes this casebook seem male, this characteristic stems primarily from the contents of the casebook. Like the majority of law casebooks, this casebook mostly contains appellate decisions that concentrate on doctrinal analysis. Just as casebook editors like Dawson, Harvey, and Henderson adopt strategies that encourage readers to separate rules from contexts, so appellate courts commonly subordinate discussion of the contexts of disputes in order to focus on rule analysis. Thus, a major reason that *Dawson, Harvey, and Henderson* seems male is because it contains so many appellate decisions.

My claim that *Dawson, Harvey, and Henderson* seems male because it utilizes organizational techniques and subject matter that are routinely used in legal education may seem fanatical. Using appellate opinions or organizing materials by doctrinal categories shouldn't be considered "male," the Individualist or Civil Libertarian Reader might object: using these things is simply normal. However "normal" the character of this casebook may seem to some readers, its abstract, analytical traits will make it seem male to other readers. One of the problems with the ideology of gender is that men's dominance over women permits the eclipse of traits that are associated with women. Male traits seem standard only because female traits are suppressed from observation and consideration.

In any event, it is disingenuous to claim that this casebook is so "normal" that its analytical and abstract character should not be considered male. Other editors in recent years have departed from the organizational forms and case-conservative content that Dawson, Harvey, and Henderson have chosen. Casebooks that are or-

146. *See supra* note 110 and accompanying text.

ganized around problems particularly challenge the assertion that this casebook is a standardized, nongendered document, because the problem technique renders casebooks substantially more "feminine" than *Dawson, Harvey, and Henderson.*[147] Problems permit readers to personalize casebooks. Problems require students to undertake tasks that involve their interaction with the materials, that allow them to observe contexts which include settings, characters or issues that often mirror their lives. Casebooks utilizing the problem technique dispute the claim to "normalcy" of a casebook like *Dawson, Harvey, and Henderson,* and the contrasting level of abstraction between the two types of books emphasizes the "maleness" of *Dawson, Harvey, and Henderson.*

In addition to the appellate decisions that dominate the content of *Dawson, Harvey, and Henderson,* I believe that the illustrations the editors have included in the casebook also demonstrate the casebook's abstract and analytical character. I consider the illustrations part of this casebook's appeal for readers; students are unaccustomed to charming felicities in legal reading matter. The *idea* of using illustrations in a law casebook suggests an editorial compassion for weary readers and a somewhat impish desire to surprise: the *idea* seems, in a word, "feminine." As it turns out, however, the illustrations in this casebook emphasize the abstract, depersonalized quality of the book as a whole, partially because when one comes up on them the illustrations seem so odd, in contrast to the other material, and partially because the editors fail to connect the illustrations to the content of the book. Although none of the illustrations included in the casebook can literally be labelled abstract, because they each represent a concrete object or person, they seem abstract because, with two exceptions they have only a tenuous relationship to the substance of the book.[148] The illustrations are interesting but only in

---

147. *See, e.g.,* C. KNAPP, *supra* note 55; T. MORGAN & R. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY (2d ed. 1981); E. RABIN, FUNDAMENTALS OF MODERN REAL PROPERTY LAW (2d ed. 1982).

148. The illustrations that arguably are useful to the way readers understand the book accompany Rockingham County v. Luten Bridge Co., 35 F.2d 301 (4th Cir. 1929), *excerpted in* J. DAWSON, *supra* note 1, at 41, and Mitchill v. Lath, 247 N.Y. 377, 160 N.E. 646 (1928), *excerpted in* J. DAWSON, *supra* note 1, at 426. The Luten Bridge illustration shows the photograph of a bridge, J. DAWSON, *supra* note 1, at 43, that a construction company continued to build after county commissioners rescinded the contract for its construction and discontinued work on the connecting surface roads. Because the bridge looks quite substantial and unoccupied in the picture, it may reinforce the arguments in the decision regarding the value of mitigating damages. The Mitchill photographs, J. DAWSON, *supra* note 1, at 427, 430, show an elaborate summer house and the plain wooden ice house that blocked its view. The summer house purchaser claimed that the seller had agreed to tear the ice house down. The photograph of the buildings may help readers determine whether the parties were likely to have included such an agreement in the contract for sale of the house. I think I may be giving the editors the

themselves; they are sometimes funny (one is surprised in seeing them), but they do not help readers understand the cases or the legal doctrine they are studying.[149]

Because the form and content of this casebook together make its analytical and abstract character so predominant, the casebook encourages readers, by example, to cultivate the analytical portions of their intellect, and to separate themselves from their work. Readers do not receive positive reinforcement to nourish their emotional sensibilities or to empathize with clients and their problems as part of legal problem solving. Insofar as the activities that the casebook neglects to nurture are commonly understood as feminine, the casebook subtly warns readers, as future lawyers, to repress the feminine characteristics within themselves.

2. The authoritarian neutrality characteristic

Like many law casebooks, *Dawson, Harvey, and Henderson* seems neutral both in style and content. The editors have not visibly injected themselves or their opinions into the casebook, so that there seems to be no editorial presence in the casebook. Moreover, the editors have selected uncontroversial material to accompany the appellate decisions in the casebook, so that the contents of the casebook are quite unlikely to provoke emotional responses from readers. Although the editors have chosen to evade personal involvement and commitment in their casebook, they never acknowledge that the book's neutrality is deliberately contrived; they do not admit that their casebook has a point of view. Thus, the editors are authoritarian about the casebook's neutrality; they offer readers no information about what is left unsaid in their casebook. Because most readers associate detachment and control with men, the authoritarian neutrality of this book seems male. Several examples demonstrate this characteristic.

---

benefit of the doubt on the Mitchill photos, however, since they do not affect my own views of the case.

149. At best the illustrations may help readers remember the cases they accompany. At worst, perhaps inadvertently, they convey information to readers about the hierarchy of the legal profession. Thus, the illustrations of four celebrities, mentioned *supra* note 64, could suggest that only famous clients are sufficiently interesting to warrant illustrations, and most lawyers won't have the opportunity to represent such people. The six imposing photographs of legal heroes, mentioned *supra* note 106, are a visible reminder that women and minorities do not yet have a significant presence in the profession. The full page picture of a cow that accompanies Sherwood v. Walker, 66 Mich. 568, 33 N.W. 919 (1887) (overruled in Lenawee Co. Bd. of Health v. Messerly, 417 Mich. 17, 331 N.W.2d 203 (1982), *excerpted in* J. DAWSON, *supra* note 1, at 561, 568, amusingly labelled "Black Angus in Pensive Mood," seems like an exception to the mulish, humorless charge of abstraction I have developed against the illustrations. The Black Angus seems to be the editors' joke on their own illustrations. Why is this in here except to make us laugh?

I have already examined the impersonal style of the casebook in my earlier discussion of the editors' use of neutral names and neutered pronouns in the casebook's problems and questions.[150] The neutrality of that language is consistent with other ways in which the editors maintain a distance between themselves and their casebook. The casebook lacks, for example, any significant discussion regarding the theoretical implications of beginning the casebook with materials on remedies.[151] Similarly, there is no editorial explanation or discussion of the authors' use of the case/countercase organizational technique.[152] In addition, the editors usually do not express their own views regarding the justice of the decisions, the complexity of cases, or the ethical conduct of lawyers and parties. Disembodied hands seem to have dropped the cases into doctrinal categories.

The kinds of questions the editors pose following cases illustrate the uncommitted and uncontroversial aspect of the book's neutrality. These questions are typically composed by modestly changing one or more facts of the preceding case, or by asking how the Uniform Commercial Code would affect an outcome.[153] While readers undoubtedly can benefit from addressing these kinds of questions, they would also benefit from addressing more provocative and controversial questions, such as those that would challenge the fairness or the coherence of decisions or which would ask about the assumptions underlying judicial attitudes. But these questions have been neglected in this casebook.

The casebook's dry, narrow, and unprovocative editorial commentary also illustrates the uncontroversial aspect of the book's neutrality. For example, the legal history materials in *Dawson, Harvey, and Henderson* predominantly relate to the development of legal

---

150. *See supra* notes 93-101 and accompanying text.

151. The editors' preface states:

> [w]e point again to the attention given remedies for breach of contract—still at center stage but now even nearer the footlights. . . . Because contract is as much a social and economic concept as it is a set of rights and duties, we continue to believe that contract law is best understood, in function and societal impact, if it is approached through a remedy-centered study. The underlying purposes of contract law (what it seeks to do, and how it goes about doing it) are revealed most clearly when problems are looked at from the perspective of taking care of harms or losses, or gains held unjustly.

J. DAWSON, *supra* note 1, at xvii. I maintain that this oblique discussion provides little information to readers regarding the editors' theory of rules or contract doctrine. *Cf.* F. KESSLER, *supra* note 88, at 1-15 (casebook introduction discussing relationship between casebook organization and editors' theory of social function of contract).

152. *See generally* J. DAWSON, *supra* note 1, at xix (summarizing Table of Contents).

153. *See, e.g., id.* at 54, 67, 74 (posing questions changing facts of preceding cases), and *id.* at 242 (asking how plaintiff in preceding case would have fared under U.C.C.).

procedures, such as the changing forms of legal actions,[154] the merger of law and equity,[155] and the shifting roles of juries and judges.[156] Some of this material helps readers understand portions of decisions that otherwise would seem mystifying,[157] while some of it undoubtedly evokes a "yeah, so?" response.[158] The material as a whole, suggests that legal history is technical rather than lively, and that legal history does not offer contract doctrine any larger perspective. If the editors had included several other kinds of legal history in the book, readers would have a much more engaged response to the materials.

For example, despite the contributions of one of the casebook editors to legal realism,[159] the editors do not include any intellectual legal history in the casebook.[160] Readers, therefore, do not have access in the casebook to the relationship between the way the courts decided cases in the book and the changing perspectives in legal thought that both influenced the decisions and that the cases themselves represent.[161] Similarly, because the editors do not include economic and social history relating to the periods in which the cases were decided,[162] the casebook gives readers no assistance in considering the effect of this material on the courts' decisions.[163] When the editors do depart from procedural history to include history of substantive legal doctrine in the casebook, the material tends to describe the legislative or practical resolution of a contract is-

---

154. *See id.* at 37-41 (discussing history of equity); *id.* at 99-103 (discussing history of common counts and restitution).

155. *See id.* (discussing historical merger of law and equity).

156. *See id.* at 6-8 (commenting on controls over jury verdicts).

157. *See, e.g., id.* at 146-50 (commenting on legal formalities as introduction to chapter on consideration).

158. *See, e.g., id.* at 6-8 (commenting on controls over jury verdicts).

159. *See* Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 254 (1947). *See generally* G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 116-32, 136-44 (1978) (describing development of Realist movement).

160. Llewellyn's excerpt on judicial style is an exception to this statement. The excerpt, however, is quite slight. J. DAWSON, *supra* note 1, at 110-11 (excerpting K. LLEWELLYN, *supra* note 98, at 157-58).

161. Kessler and Gilmore's casebook gives readers some sense of intellectual legal history by their extensive introduction, "Contract as a Principle of Order," and by their chapter and section titles, which indicate the relationship between the cases and moral, social, and political themes. F. KESSLER, *supra* note 88, at 1-15. (Titles include such headings as "From Status to Contract," "Formalism in Our Law of Contracts," and "Mistake: Security of Transactions and the Objective Theory of Contracts").

162. There are a few, very narrow exceptions to thise assertion. *See, e.g.*, J. DAWSON, *supra* note 1, at 56 (giving brief, apolitical description of price fixing and union organizing efforts during time of fluctuating coal prices, referred to in Missouri Furnace Co. v. Cochran, 8 F. 463 (W.D. Pa. 1881), *excerpted in* J. DAWSON, *supra* note 1, at 54); J. DAWSON, *supra* note 1, at 167-68 (noting starvation conditions in Greece after Nazi occupation, as historical setting for Batsakis v. Demotsis, 236 S.W.2d 673 (Tex. Civ. App. 1949), *excerpted in* J. DAWSON, *supra* note 1, at 165).

163. *Cf.* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977).

sue.[164] The editors do not present material focusing on current, heated disputes about contract doctrine. Thus, for example, although there are several cases in the casebook involving employees' claims of unfair discharge,[165] the editors scatter these cases throughout the casebook and do not refer to the uncertain status of these claims or the stimulating doctrinal debate they have engendered.[166]

The primary effect of the authoritarian neutrality I have described thus far is to mislead readers about the kind of questions one can ask about cases and about the kind of legal history that might be relevant to consider in studying contracts. This casebook, like many others, discourages readers from developing ethical, social, and moral opinions on legal issues. Insofar as these questions and opinions seem feminine, because they involve attachment, compassion, and emotion, repressing these questions encourages readers to repress the feminine characteristics within themselves. This promotes a narrow concept of professional conduct, and it also devalues authentic self-development.

Although the editorial style and noncase material that the editors have written or selected for the book are enough, in my judgment, to give this casebook the authoritarian neutrality that makes it seem male, The Feminist Reader or the Reader with a Chip on her Shoulder might also argue that by omitting legal issues of current interest to women the editors have selected cases that contribute to the casebook's "maleness." The Individualist or the Civil Libertarian Readers would staunchly contest this position. They would claim that the cases in this casebook are not gendered. Not only do the editors include "women's" issues in the casebook (there are cases

---

164. *See, e.g.*, J. DAWSON, *supra* note 1, at 249-54 (description of congressional attempts to regulate automobile manufacturers' franchise transactions with dealers, following two cases involving claims of unjust termination of franchises, Bushwick-Decatur Motors, Inc. v. Ford Motor Co., 116 F.2d 675 (2d Cir. 1940), *excerpted in* J. DAWSON, *supra* note 1, at 243, and Corenswet, Inc. v. Amana Refrigeration, Inc., 594 F.2d 129 (5th Cir. 1979), *excerpted in* J. DAWSON, *supra* note 1, at 247). *See also id.* at 352-53 (comment on firm offers that praises construction industry practices regarding revocability of subcontractors' bids, following three cases in which issue was litigated, James Baird Co. v. Gimbel Bros., Inc., 64 F.2d 344 (2d Cir. 1933), *excerpted in* J. DAWSON, *supra* note 1, at 342; Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958), *excerpted in* J. DAWSON, *supra* note 1, at 346; E. A. Coronis Associates v. M. Gordon Construction Co., 90 N.J. Super. 69, 216 A.2d 246 (1966), *excerpted in* J. DAWSON, *supra* note 1, at 350).

165. *See, e.g.*, Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 153 N.W.2d 587 (1967), *excerpted in* J. DAWSON, *supra* note 1, at 214; Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948), *excerpted in* J. DAWSON, *supra* note 1, at 217; Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980), *excerpted in* J. DAWSON, *supra* note 1, at 254.

166. *See generally* Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1931 n.3 (1983) (citing extensive commentary on unfair employees' discharge that was available before casebook's fourth edition was published).

involving contractual transactions within families), but the wide range of commercial contract problems they have included should be of concern to both sexes. Regardless of what's left out of the casebook, these readers would argue, what's in the book is neutral.

Although it seems obvious to me that cases can be as gendered as the editorial material I have been discussing,[167] this observation deeply challenges the claim of impartiality that is a traditional aspect of legal rhetoric. I have tried to show, however, in this overview of the casebook, that *Dawson, Harvey, and Henderson* is a gendered document. The editors' treatment of women and the "maleness" of the book's style and contents support and nourish gendered thinking within casebook readers. By reinforcing the restrictions that gender-related ideas impose on readers, the editors encourage readers to understand themselves partially, as men or women. One of the dangers casebook editors risk by linking their books with gender is that gender-related ideas may spread. If the casebook and its editors are closely linked with ideas about gender, it should not be surprising that some readers should believe that gender infects not only the casebook and its editors, but the law itself.

III. RE-READING CASES: CHALLENGING THE GENDER OF TWO CONTRACT DECISIONS

This section will focus on an extended discussion of two cases in *Dawson, Harvey, and Henderson*. While the previous section concentrated on the impact that the gendered aspects of the casebook has on readers, this section will emphasize the impact that readers' ideas regarding gender have on their understanding of legal doctrine. By analyzing each case from feminist and nonfeminist perspectives, I want to demonstrate that gender-related ideas can be embedded in nonfeminist as well as feminist case readings. My goal in this section is to expose and question the gender constraints that often affect case interpretations, and yet, I also hope this section will arouse interest and respect for gender-related readings that draw on attitudes and concerns commonly linked with women. Specifically, I want the feminist attitudes toward the social history that I describe in conjunction with the first case to change readers' views of that case, and I want the feminist oppositional stance that I adopt in analyzing the second case to lead readers to resist the standard doctrinal synthesis of that material.

---

167. *See supra* note 89 and accompanying text. *See also* Olsen, The Sex of Law (1985) (unpublished paper on file with author).

A. Shirley MacLaine and the Mitigation of Damages Rule: Re-Uniting Language and Experience in Legal Doctrine

Parker v. Twentieth Century-Fox Film Corp.[168] involves a breach of contract claim against a motion picture studio by a "well-known" actress, whom the editors identify as Shirley MacLaine.[169] Just before production was to begin on a musical entitled "Bloomer Girl," the studio cancelled its contract to pay MacLaine $750,000 to star in the film, offering her instead the role of leading actress in a "western type" movie, "Big Country, Big Man." MacLaine did not accept the offer. The studio opposed her motion for summary judgment on the grounds that her claim for lost wages in "Bloomer Girl" should be reduced by the wages she could have earned in "Big Country, Big Man." This defense is based on the general rule of mitigation of damages, elaborated for casebook readers in the preceding major case: a party injured by breach of contract cannot recover compensation for any damages she could have avoided (or mitigated).[170] The doctrinal issue in *Parker* involves an employee's obligation to avoid damages after her employer has breached their employment agreement: was Shirley MacLaine's claim for compensation foreclosed because of the opportunity, which she refused, to avoid her loss by working in "Big Country, Big Man?"

In deciding the case for Shirley MacLaine, the court in *Parker* relied on the fact that, under the mitigation rule, an employee need not avoid damages by accepting "employment of a *different* or *inferior* kind . . . ."[171] The majority concluded that the " 'Big Country' lead was . . . both different and inferior:"

> The mere circumstance that "Bloomer Girl" was to be a musical review calling upon plaintiff's talents as a dancer as well as an actress, and was to be produced in the City of Los Angeles, whereas "Big Country" was a straight dramatic role in a "Western Type" story taking place in an opal mine in Australia, demonstrates the difference in kind between the two employments; the female lead as a dramatic actress in a western style motion picture can by no

---

168. 3 Cal. 3d 176, 474 P.2d 689, 89 Cal. Rptr. 737 (1970), *excerpted in* J. DAWSON, *supra* note 1, at 46.

169. J. DAWSON, *supra* note 1, at 46 n. *. MacLaine won an academy award in 1984 for her role in the film "Terms of Endearment."

170. In Rockingham County v. Luten Bridge Co., 35 F.2d 301 (4th Cir. 1929), *excerpted in* J. DAWSON, *supra* note 1, at 41, a contractor was denied his claim for the full contract price of an agreement to build a bridge. The plaintiff had completed the bridge after the defendant had repudiated the contract. *Id.* at 303, *excerpted in* J. DAWSON, *supra* note 1, at 41, 42.

171. J. DAWSON, *supra* note 1, at 49 (emphasis added). The *Restatement of Contracts* chooses different wording, stating that "damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation." RESTATEMENT (SECOND) OF CONTRACTS § 350(1) (1979).

> stretch of imagination be considered the equivalent of or substantially similar to the lead in a song and dance production.
>
> Additionally, the substitute "Big Country" offer proposed to eliminate or impair the director and screenplay approvals accorded to plaintiff under the original "Bloomer Girl" contract[172] . . .and thus constituted an offer of inferior employment. No expertise or judicial notice is required in order to hold that the deprivation or infringement of an employee's rights held under an original employment contract converts the available "other employment" relied upon by the employer to mitigate damages, into inferior employment which the employee need not seek or accept.[173]

The dissenting judge, however, charged that the majority relied on a "superficial listing of differences" between the films, asserting that:

> [i]t is not intuitively obvious . . .that the leading female role in a dramatic motion picture is a radically different endeavor from the leading female role in a musical comedy film. Nor is it plain to me that the rather qualified rights of director and screenplay approval contained in the first contract are highly significant matters either in the entertainment industry in general or to this plaintiff in particular. Certainly, none of the declarations introduced by the plaintiff in support of her motion shed any light on these issues. Nor do they attempt to explain why she declined the offer of starring in "Big Country, Big Man."[174]

By calling attention to the majority opinion's conclusory application of the "different or inferior" qualification, the dissenting opinion encourages the casebook reader to feel uncertain about how to use the mitigation rule in the employment context. It will seem unjust, to some readers, that Shirley MacLaine is apparently going to get $750,000, after this decision, for doing nothing. The mitigation rule seems to lose all of its muscle as a result of this "different or inferior" qualification. Would MacLaine have been entitled to damages if she had refused the lead in "Annie Hall," because that extremely successful film is not a musical? Would she have been

---

172. In offering MacLaine "Big Country," the studio asserted there was insufficient time to negotiate with her regarding choice of director and regarding the screenplay. The studio reminded her that she had "already expressed an interest in . . . 'Big Country, Big Man,' " and although she could not have the same approval rights she would have had in "Bloomer Girl" the studio did promise to consult with her regarding the choice of director for photoplay and regarding screenplay revisions. Parker v. Twentieth Century-Fox Film Corp., 3 Cal. 3d 176, 180 n.2, 474 P.2d 689, 691 n.2, 89 Cal. Rptr. 737, 739 n.2 (1970), *excerpted in* J. DAWSON, *supra* note 1, at 46, 47-48 n.2.

173. *Id.* at 183-84, 474 P.2d at 693-94, 89 Cal. Rptr. at 741-42, *excerpted in* J. DAWSON, *supra* note 1, at 46, 50.

174. *Id.* at 188, 474 P.2d at 697, 89 Cal. Rptr. at 745 (Sullivan, Acting C.J., dissenting), *excerpted in* J. DAWSON, *supra* note 1, at 46, 52-53.

denied damages if she had turned down "Springtime for Hitler"?[175] How can you tell?

I believe The Feminist Reader and the Reader with a Chip on her Shoulder (as well as other readers who are familiar with feminist social history) might find the majority's application of the "different or inferior" standard much less mysterious than other readers. Their views would be based on their acquaintance either with Amelia Bloomer, a mid-nineteenth century feminist, suffragist, and abolitionist, or with "bloomers," the loose trousers that some women wore under a short skirt, without hoops, multiple petticoats, or restricting underwear, in the early 1850s. (Bloomer, whose magazine, *The Lily,* was the first American magazine published by and for women, publicized and stirred enthusiasm among some women for the trousers, or pantelettes, as they were sometimes known, and they came to be called after her.)[176] These readers might have the intuition, as I did in reading the *Parker* case, that a film entitled "Bloomer Girl" was related in some way to the radical effort feminists in the last century made to achieve more freedom of movement and control over what they wore by reforming their dress. Moreover, simply because Shirley MacLaine is a woman, these readers might assume that the role in "Bloomer Girl" had personal significance for the actress;[177] even if the film treated women's issues in the lighthearted fashion typical of musical comedy, it would still link the actress with events that are historically significant to other women.[178] "Bloomer Girl" would seem different, from this perspective, not

---

175. "Springtime for Hitler" was the musical comedy created within the film "The Producers" solely for the purpose of obtaining a financial loss for its originators. The producers designed the musical hoping it would be a commercial disaster. *See* N.Y. Times, Mar. 19, 1968, at 38, col. 1 (reviewing "The Producers").

176. *See* Fatout, *Amelia Bloomer and Bloomerism,* 36 THE NEW YORK HIST. SOC'Y Q. 361, 365 (1952). For recent histories of other prominent feminists that contain references to Amelia Bloomer, see L. BANNER, ELIZABETH CADY STANTON, A RADICAL FOR WOMEN'S RIGHTS 35 (1980); E. GRIFFITH, IN HER OWN RIGHT: THE LIFE OF ELIZABETH CADY STANTON 63-64 (1984); ELIZABETH CADY STANTON, SUSAN B. ANTHONY, CORRESPONDENCE, WRITINGS, SPEECHES 15 (E. DuBois ed. 1981).

177. Although the actress's decision to reject "Big Country, Big Man" may not have been politically motivated, feminists who read the case now may identify MacLaine as a feminist and they are likely to assume that her decision more than twenty years ago was politically motivated. MacLaine has written about her longstanding political activism, as well as her other interests, in several bestselling autobiographical books. *See, e.g.,* S. MACLAINE, OUT ON A LIMB (1983); and S. MACLAINE, YOU CAN GET THERE FROM HERE (1975). MacLaine has been a Civil Rights activist, a vigorous opponent of the Vietnam War, and a delegate to the Democratic National Convention. J. SPADA, SHIRLEY AND WARREN 210 (1985). In 1984, when she received an honorary degree from Hunter College, she was praised for her "support of those who champion the victims of discrimination, particularly women." *Id.*

178. Indeed, while the spirited campaign for bloomers was ultimately unsuccessful in reforming women's dress of the period, it contained themes familiar to modern feminists—bloomer advocates sought to free themselves from the confines of fashion constraints which they blamed men for imposing on them. *Cf.* S. BROWNMILLER, FEMININITY 77-102 (1984); K.

only from a western but from other musical comedies, because of its political overtones.

In contrast with their favorable attitudes toward "Bloomer Girl," The Feminist Reader as well as the Reader with a Chip on her Shoulder would probably assume that a movie entitled "Big Country, Big Man" would offer a leading actress the inferior kind of leading role westerns have typically offered women. Like Miss Kitty in "Gunsmoke," a woman in a western is usually very much subordinated to the main focus of such films—the cowboy-hero. Because feminist readers oppose the subordination of women, they are likely to believe that, assuming "Big Man" portrayed women as men's sidekicks, it would be "inferior" to "Bloomer Girl," where women were probably shown leading their sisters to fight for control over their own bodies. Thus, the readers' gender-related presumptions regarding the political overtones of "Big Country, Big Man" would affect their opinion of why the film would seem "different or inferior" to "Bloomer Girl."

Although these readers might not know whether "Bloomer Girl" had feminist themes[179] or whether "Big Country, Big Man" por-

---

CHERNIN, THE OBSESSION: REFLECTIONS ON THE TYRANNY OF SLENDERNESS (1981); Note, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 HARV. WOMEN'S L.J. 73 (1982).

179. It turns out that "Bloomer Girl" did have feminist themes, as Charles Knapp has pointed out in his contracts casebook. C. KNAPP, *supra* note 55, at 1118. My own intuitions about "Bloomer Girl" were confirmed by reading John Gregory Dunne's review of a book by "Danny Santiago" in the New York Review of Books last year. Dunne, *The Secret of Danny Santiago* (Book Review), 31 N.Y. REV. OF BOOKS 17 (Aug. 16, 1984) (reviewing D. SANTIAGO, FAMOUS ALL OVER TOWN (1984)). "Danny Santiago" was revealed in that review to be the *nom de plume* of Dan James, a Hollywood writer who was blacklisted during the fifties because of his past membership in the Communist Party. Dunne mentioned that the Broadway musical "Bloomer Girl" was based on a play that James and his wife Lilith co-authored. The inspiration for the James' play stemmed from "a Party-endorsed workshop on women's rights." *Id.* at 20. Professor Stewart Macaulay, of the University of Wisconsin, who has extensively researched the production and reception of the Broadway "Bloomer Girl," has kindly shared with me some of the fascinating details he has found about the Broadway play. A major character in the play was based on Amelia Bloomer, who is portrayed as having a brother who manufactures hoop skirts. One of his daughters refuses to marry a hoop salesman, as her five sisters have done before her, and joins her aunt in abolition activities. In the song "It was Good Enough for Grandma," lyricist E.Y. Harburg dashes off several bitingly feminist stanzas, including the verses:

> When Grandma was a lassie,
> That tyrant known as man
> Thought a woman's place
> Was just the space
> Around a frying pan.
> . . .
> We won the revolution
> In seventeen-seventy-six. . .
> Who says it's nix
> For us to mix
> Our sex with politics!
> We've bigger seas to swim in

trayed women according to the usual demeaning western stereotype,[180] because of their skepticism about women's roles in westerns and their intuitions regarding "Bloomer Girl's" feminist themes, they might understand MacLaine's rejection of the "Big Country, Big Man" role in terms of their own efforts to reconcile their politics with their careers. These readers would be able to ground the language of the "different or inferior" qualification in their own lives.[181] They might assume that MacLaine not only sought to refuse a role that would be demeaning to her as a woman, but that she also wanted to avoid contributing to the oppressed images of women in popular culture. Rather than thinking that Shirley MacLaine is being paid to do nothing in *Parker,* and that the "different or inferior" qualification to the mitigation rule was unfairly applied, their attitude toward the two films could enable them to infer an ascertainable but complicated standard for determining when the "different or inferior" qualification should be applied in employment cases. That is, they would assume that *Parker* demonstrates that an employee's serious and recognized personal goals should be respected and protected when they are connected to a concern that is respected and acknowledged by others. Under this interpretation, some degree of mitigation can be required (mitigation does not lose all of its muscle in *Parker*), and yet a wrongly discharged employee would not have to take just any substitute employment. Money

---

And bigger worlds to slice.
Oh, Sisters, are we women
Or mice?

L. ENGEL, THEIR WORDS ARE MUSIC 75 (1975). Descriptions of "Bloomer Girl" can be found in A. LAUFE, BROADWAY'S GREATEST MUSICALS 77-79 (1970) and D. EWEN, NEW COMPLETE BOOK OF THE AMERICAN MUSICAL THEATER 11-12 (1958).

180. The court in *Parker* states that "Big Country" was a "'western type' story taking place in an opal mine in Australia." Parker v. Twentieth Century-Fox Film Corp., 3 Cal. 3d 176, 183, 474 P.2d 689, 693-94, 89 Cal. Rptr. 737, 741-42 (1970), *excerpted in* J. DAWSON, *supra* note 1, at 46, 50. Marlene Lasky, library assistant with the Academy of Motion Picture Arts and Sciences, stated in a telephone interview that although Sean Connery and Diane Cilento were signed to play the lead roles, the movie was probably never made. Telephone interview with Marlene Lasky, Library Assistant, Academy of Motion Picture Arts and Sciences (July 22, 1985). Ms. Lasky thinks the film was about the settlement of Australia.

181. These readers might also be able to find support for their views in other language of the majority opinion. By describing the Big Man role as a "*female* lead as a dramatic actress in a *western* style motion picture," the majority may be indicating their awareness that women are traditionally given subordinate roles in western films. Parker v. Twentieth Century-Fox Film Corp., 3 Cal. 3d 176, 184, 474 P.2d 689, 694, 89 Cal. Rptr. 737, 742 (1970), *excerpted in* J. DAWSON, *supra* note 1, at 46, 50 (emphasis added). In contrast, the dissent describes the "Big Country, Big Man" role as "the leading female role in a dramatic motion picture." *Id.* at 189, 474 P.2d at 697, 89 Cal. Rptr. at 745, *excerpted in* J. DAWSON, *supra* note 1, at 46, 52. By not referring to the "dramatic motion picture" as a "western," the dissent seems insensitive to the issue of female subordination in westerns, thus suggesting that attitudes toward the importance of sex roles may explain the silent rationale of the majority opinion, as well as the distinctions between the two opinions in the case. *Id.*

would not be the only test for determining whether jobs are comparable, and yet other employment objectives would require social as well as personal significance in order to be protected under the "different or inferior" qualification.

The interpretation of *Parker* generated by feminist attitudes and information about the social history related to the case offers readers useful guidance in applying the "different or inferior" qualification to other situations. This interpretation also allows readers who identify with Shirley MacLaine (because she is a woman) to attribute dignity to her conduct. However, readers of *Dawson, Harvey, and Henderson* will have to struggle to interpret *Parker* in the manner I have described. Inexplicably, the editors omit material that would confirm readers' intuitions that the social context and political significance of the films might explain the application of the "different or inferior" qualification in *Parker.*[182] Dawson, Harvey, and Henderson thus subtly deter readers who are familiar with nineteenth century feminist activists and their work from utilizing their personal connections with the case to understand *Parker;* these readers may even be led to believe that social context and politics are not legitimate interpretive tools. Although readers' intuitions about the *Parker* case may in fact explain the otherwise baffling result of this decision, the casebook does not encourage them to draw on those intuitions. It discourages—in the context of these opinions—the sensitivity to what is influential but not said, a sensitivity that women have often found to be a source of strength.[183]

The negative pedagogical effect of omitting information about the feminist themes in "Bloomer Girl" extends to other readers too. Most casebook readers are unlikely to know about Amelia Bloomer or the nineteenth century feminist dress reform effort. Had Dawson, Harvey, and Henderson included the information about "Bloomer Girl," which Charles Knapp provides in his casebook, then feminist attitudes toward the subordination of women in westerns and the importance of dress reform could have been tapped in other readers to develop the complicated, contextualized interpreta-

---

182. Well before the fourth edition of *Dawson, Harvey, and Henderson* was published in 1982, Charles Knapp informed his readers that MacLaine had been connected to feminist causes and that one of the characters in "Bloomer Girl" was "Amelia Jenks ('Dolly') Bloomer . . . a leading advocate of women's rights in the United States during the nineteenth century." C. KNAPP, *supra* note 55, at 1118 n.1. It is hard to believe that Dawson, Harvey, and Henderson were unaware of this casebook scholarship.

183. *See* Homans, *"Her Very Own Howl:" The Ambiguities of Representation in Recent Women's Fiction,* 9 SIGNS: J. OF WOMEN IN CULTURE AND SOCIETY 186 (1983) (describing views of French and American feminist literary critics regarding relationship between women's experiences and their interpretations and use of language).

tion of mitigation suggested above. By failing to describe the social context of this case, the editors probably deprive many readers of an interpretation of *Parker* that would advance their understanding of mitigation doctrine.

Although The Feminist Reader or the Reader with a Chip on her Shoulder may pursue her intuitions about *Parker* despite the editors' silence, the editors include a photograph of the actress in the casebook which could distract many of these readers from such an understanding of the majority's result in *Parker.* MacLaine is pictured, pouting, in a fringed, lowcut cocktail dress. Her legs are crossed, a knee is bared, she's wearing open-toe, sling-back high heels, and her cheek is resting on her hand. She might look to some readers like a "sex kitten," an image which is subtly reinforced by the stuffed rabbit tucked under her arm. Her picture, on page forty-seven, is the third illustration in the casebook, following a magisterial full page portrait of Holmes, in judicial robes, on page thirty-one,[184] and then a picture of a bridge, on page forty-three. (The bridge was built by the injured party in the preceding case after he failed to mitigate his damages; it is the object he produced as he piled up his damages.)

Some feminists might relish the contrast between the images of Holmes and MacLaine in that each is wearing a costume that emphasizes the nature of its subject's power—for Holmes, the judicial robes; for MacLaine, the sexy dress and shoes. The conjunction of these illustrations could remind such readers that sexuality has been a considerable source of power for some women. Regarding MacLaine's illustration as a statement that her sex appeal is linked to her exceedingly successful acting career, these readers would believe that their interpretation of the *Parker* case was sound; MacLaine is exactly the kind of female actress who might have had the courage to stand up to the studio and turn down "Big Country, Big Man."

Many feminist readers, however, might find a different message in these illustrations. Comparing Holmes with MacLaine might remind them of the substantial disparities between the public achievements of men and women. Comparing the picture of the bridge with the picture of MacLaine, these readers might assume they are being shown two "objects" in the mitigation section of the casebook—a bridge and a woman. Because treating women as if they were nothing more than objects for sexual pleasure is a signifi-

184. J. DAWSON, *supra* note 1. The illustration is a photograph of the widely reproduced Charles Hopkinson portrait which hangs in the Harvard Law School.

cant feminist concern, these two illustrations could remind feminists that sexuality has often been a form of oppression in women's lives. Thus, MacLaine's photograph could prevent many readers from believing that her refusal to accept the "Big Country, Big Man" role was motivated by her political integrity. Instead, MacLaine's photograph might deter them from considering Amelia Bloomer's significance to the case. How could Shirley MacLaine have stood up to the studio for feminist reasons, they might think; she's not a feminist but a "sex object."[185]

Without any clues in this casebook regarding the feminist themes of "Bloomer Girl," most *Dawson, Harvey, and Henderson* readers will have to find other ways to cope with their uncertainty about the meaning of the "different or inferior" qualification of the mitigation rule. In the remaining pages of this part I shall elaborate interpretations of *Parker* that do not depend on social context or feminist attitudes in order to demonstrate how assumptions regarding gender can also be implicated in interpretations that are not overtly linked with feminism.

The breach of an individual's employment contract sharply presents a basic conflict underlying all mitigation issues. We earnestly want to protect the contract objectives of individual employees against employer breach (they should be compensated for their losses under the contract) and yet we also abhor the idea that such employees should be excused from the communal work ethic by getting paid for doing nothing. The general rule of mitigation of damages favors the communal pole of this conflict (one cannot recover compensation for damages that can be avoided),[186] while the qualifi-

185. In addition to the negative pedagogical consequences of the editors' treatment of *Parker*, the choice and organization of the first three illustrations in the casebook are likely to diminish the general confidence of some feminist readers in the casebook. In so far as the photograph of MacLaine signals such readers that the editors are insensitive to the opposition many harbor to the sexual subjugation of women, these readers may be on guard after reading the decision in *Parker* against what they understand as the editors' implicit misogyny. Think of how differently these readers might view the casebook if Shirley MacLaine were pictured making a campaign appearance for George McGovern, or if she were shown smoking a big cigar after a theater triumph. *See, e.g.*, J. SPADA, SHIRLEY AND WARREN 150, 164 (1985). Adding either of these photographs would be a plausible way for Dawson, Harvey, and Henderson to preserve the charm that illustrations give their casebook while eliminating the negative effect of the first three illustrations on a portion of their readers. (The two illustrations accompanying Chicago Colliseum Club v. Dempsey, 265 Ill. App. 542 (1932), *excerpted in* J. DAWSON, *supra* note 1, at 81, the case involving Jack Dempsey's breach of contract to fight Harry Wills, suggest to me that the editors may be sensitive to the power of some of their illustrations. J. DAWSON, *supra* note 1, at 82, 87. The first Dempsey illustration shows Dempsey fighting Gene Tunney, and the second show Dempsey shaking hands with Wills, a black fighter. *Id.* Since the opinion is silent about the race of the parties, the additional photograph may alert readers to the question of whether race may have been a factor in Dempsey's breach of contract or in the court's decision. *Id.* at 87.

186. As the dissenting judge in *Parker* states, the basic mitigation rule "embodies notions

cation to the general rule, that one need not avoid damages by accepting work of a "different or inferior" kind, favors the individualist pole. Without the qualification, the mitigation rule would swallow an employee's contractual freedom—her employer could fire her with little risk of fiscal responsibility. Thus *Parker,* like all mitigation cases, presents the question of how to resolve in a particular situation a fundamental conflict between the individual and communal claims mediated by the mitigation rule and the "different or inferior" qualification.

To some readers, the conclusory application of the "different or inferior" qualification by the majority in *Parker* will seem like appropriate, if unreasoned deference to individualism. Searching for some rational explanation of the majority's decision, they will conclude that the directorial rights MacLaine would have lost in "Big Country, Big Man," in conjunction with the lost opportunity to advance her musical comedy expertise, would justify the application of the "different or inferior" qualification in this case. These readers will agree that MacLaine's autonomy deserved more protection than the general social good that would have come from not letting her off the working hook the rest of us are on.

This interpretation of the case will seem gendered to some readers because the individualism/community duality I have described is generally understood to be gendered. Individualism and autonomy are commonly associated with men while altruism and community are generally linked with women, just as, more concretely, men are usually expected to pursue their individualistic careers single-mindedly while women are expected to subordinate other career objectives to care for their families or to participate in community activities.[187] Readers who justify the majority's decision on the basis of an autonomy rationale are also likely to be influenced in this

---

of fairness and *socially responsible* behavior which are fundamental to our jurisprudence . . . it is a rule requiring reasonable conduct in commercial affairs." Parker v. Twentieth Century-Fox Film Corp., 3 Cal. 3d 176, 183, 474 P.2d 689, 694, 89 Cal. Rptr. 737, 742 (1970) (Sullivan, Acting C.J., dissenting), *excerpted in* J. DAWSON, *supra* note 1, at 46, 50. The basic rule "minimizes the *unnecessary personal and social (e.g., nonproductive use of labor, litigation) costs* of contractual failure." *Id.* at 186 n.5, 474 P.2d at 693 n.5, 89 Cal. Rptr. at 744 n.5, *excerpted in* J. DAWSON, *supra* note 1, at 46, 52 n.3 (emphasis added).

187. Indeed, some readers may think the decision in *Parker* is irrational because the sex of the victorious plaintiff is inconsistent with the gender of the legal rationale supporting the decision, while other readers will be pleased that the decision reverses the usual assumption that men's problems will be resolved with "male" rules and women's with "female" rules. The kind of analysis of the sexualization of law presented here is developed in Fran Olsen's paper "The Sex of Law." Olsen, *supra* note 167. While asserting that dualization occurs, Olsen also criticizes this process, arguing that each pole of a duality is constitutive of the other, rather than separate and different from the other. *See generally* Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 1685 (1976) (describing fundamental conflict between individualism and altruism in common law and in political and economic discourse).

reading by gender-related ideas about MacLaine and what her objectives were regarding "Bloomer Girl." Thus, some of these readers may approve of MacLaine's efforts to stand up to the studio—to "act like a man"—and the studio be damned, while others may approve of the decision because MacLaine was seeking to protect directorial and approval privileges which these readers understand as participatory and "feminine."

Whatever the particular rationale underlying an interpretation of *Parker* which justifies the majority's decision, it offers readers very little guidance for arguing future employment cases involving a mitigation issue. The majority's conclusory opinion provides readers almost no guidance in how to make an individualist or "masculine" argument. As Judge Sullivan points out in his dissenting opinion, "there will always be differences" between two jobs, and "a superficial listing of differences with no attempt to assess their significance may subvert a valuable legal doctrine."[188]

Because this preceding reading is so unsatisfactory, I believe most readers will be inclined to assume that the majority opinion in the *Parker* decision is an irrational capitulation to individualism. Gender-related ideas may also contribute to this conclusion. As I have stated in an earlier discussion, one way the insignificance of a decision can be suggested to readers is through the organization of the casebook.[189] Because the editors pair *Parker* (the first case in the book in which a woman is a party) with a case setting forth the general obligation of mitigation, readers who link the traditionally inferior status of women to the countercase position of the *Parker* decision will be encouraged to consider the *Parker* rule subordinate to the principal mitigation obligation.

MacLaine's photograph will encourage other readers to treat the *Parker* case skeptically. Because the photograph plays on gender-related ideas about female sexuality, these readers will be reminded that men have historically been able to manage and control the power such a picture suggests in its subject.[190] These readers will be encouraged to believe that the *Parker* rule can be managed and controlled, just as women have been.

Finally, still other readers will be encouraged to dismiss *Parker*'s

---

188. Parker v. Twentieth Century-Fox Film Corp., 3 Cal. 3d 176, 186-89, 474 P.2d 689, 696-97, 89 Cal. Rptr. 737, 744-45 (1970), *excerpted in* J. DAWSON, *supra* note 1, at 46, 52.

189. *See supra* notes 108-121 and accompanying text.

190. *See, e.g.*, R. SCHOLES, *Uncoding Mama: The Female Body as Text*, SEMIOTICS AND INTERPRETATION 127 (1982) (describing restrictions on female sexuality achieved through particular forms of discourse); *see also* Vance, *Pleasure and Danger: Toward a Politics of Sexuality*, in PLEASURE AND DANGER, EXPLORING FEMALE SEXUALITY 1-29 (C. Vance ed. 1984) (describing relationship between "good" female behavior and protection against male violence).

significance because of the customary disposition in our culture to devalue any kind of women's work. These readers may be dubious at the outset of the opinion about whether acting is *real* work, and MacLaine's sex[191] will foster their belief that *real* employees doing *real* work will not be treated like MacLaine.[192]

Each of these gender-related ideas legitimates a reader's conclusion that *Parker* is incorrectly decided, or insignificant, but the ideas would not help such a reader elaborate altruistic arguments for a different result. Thus, like the earlier interpretation supporting the majority's decision, the dismissive reading of *Parker* disserves readers pedagogically. It fails to offer them guidance for arguing and resolving a mitigation conflict. In addition, because *Parker* is the first major case in the book in which a woman is one of the parties, the dismissive reading is likely to affect the way gender-conscious readers feel about women.

The dismissive reading of the case tempts instructors and students to ridicule MacLaine, to imagine her as an indulged starlet lying around eating chocolates, while the defendants, hard working studio types, struggle to manage their business efficiently despite her arbitrary whims. Some readers may be proud that MacLaine is a woman who manages to "beat the system" by getting paid for doing nothing, but other readers may internalize any disrespect that they think the opinion generates for MacLaine. If these readers believe that women are morally superior to men (and some readers will hold this opinion), they will be shamed if MacLaine, as a woman plaintiff, seems successful because she cleverly manipulated the legal system. In contrast, the misogynist feelings of readers who are undisposed to favor women will be intensified by any derogation of MacLaine; women are just as bad as these readers have always supposed. A distinct advantage of the *Parker* reading based on feminist attitudes toward the social history implicated by the case is that this interpretation will challenge the effect dismissive readings would have on readers; it will encourage feminist as well as nonfeminist readers to rethink their ideas about women.

I am not immune to the diversion *Parker* offers from standard

---

191. Readers might also disparage the value of a male actor's work, but that attitude too would probably be affected by the gender-related notion that a *real* man wouldn't do that kind of work.

192. A footnote in the dissenting opinion, which informs readers that the mitigation rule "may have had its origin in the bourgeois fear of resubmergence in lower economic classes," may influence readers to adopt the kind of class bias analysis suggested here as an explanation for MacLaine's victory in the case. Parker v. Twentieth Century-Fox Film Corp., 3 Cal. 3d 176, 185 n. 2, 474 P.2d 689, 695 n. 2, 89 Cal. Rptr. 737, 743 n.2 (1970) (Sullivan, Acting C.J., dissenting), *excerpted in* J. DAWSON, *supra* note 1, at 46, 51 n.2.

commercial contracts reading. It's fun to talk about the movies. My objective has not been to spoil the fun, but to illuminate some of its darkness. Indeed, *Parker* would be a good case with which to introduce feminist themes into the classroom: as I have argued, feminist attitudes improve its pedagogical usefulness. An interpretation of *Parker* that acknowledges and utilizes feminist attitudes is valuable because it challenges the lessons readers learn from cases such as *Jackson v. Seymour*[193] and *Fitzpatrick v. Michael*[194] that gender-related ideas are only helpful to legal interpretations when they draw on negative images of women.

Understanding MacLaine as a powerful actress whose feminist politics are respected by the California Supreme Court could also stimulate readers to draw connections between social contexts and legal decisions, between the experiences of parties in a case and the experiences of readers themselves. Although these interactions are not unique to feminism, they are similar to the skills of "deep reading" many women claim as part of their gendered heritage. Recognizing the value of such skills will affirm, for some readers, an attribute they identify as feminine. Because "women's" attributes are so often less valued than "men's," affirming a "feminine" attribute through an analysis of *Parker* will contribute to the release of gender-related restrictions on our lives.

B. Allied Van Lines, Inc.: *Exposing the Power Issue in Standard Form Contract Doctrine*

Allied Van Lines, Inc. v. Bratton,[195] introduces *Dawson, Harvey, and Henderson's* five case unit on standard form contract doctrine.[196] The decision involves companion cases brought against a national moving company by two householders—both women—after their household goods were destroyed in transit. Both women sought relief from provisions in standardized agreements that limited their carrier's liability for loss and damage. Mrs. Bratton and Mrs. McKnab argued that these provisions should not be enforced against them because, although they had signed the carrier's forms,

---

193. *See supra* notes 67-72 and accompanying text.

194. *See supra* notes 58-61 and accompanying text.

195. 351 So. 2d 344 (Fla. 1977), *excerpted in* J. DAWSON, *supra* note 1, at 448.

196. The other four major cases in the unit are Woodburn v. Northwestern Bell Telephone Co., 275 N.W.2d 403 (Iowa 1979), *excerpted in* J. DAWSON, *supra* note 1, at 476; Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843 (1967), *excerpted in* J. DAWSON, *supra* note 1, at 469; Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), *excerpted in* J. DAWSON, *supra* note 1, at 461; Weisz v. Parke-Bernet Galleries, Inc., 67 Misc. 2d 1077, 325 N.Y.S.2d 576 (N.Y. Civ. Ct. 1971), *rev'd*, 77 Misc. 2d 80, 351 N.Y.S.2d 911 (N.Y. App. Term. 1974), *excerpted in* J. DAWSON, *supra* note 1, at 453.

they had not actually read or agreed to the terms. The court in *Allied* rejected Mrs. Bratton's argument; it disregarded her ignorance of the restrictive terms in the carrier's bill of lading and held that her signature was sufficient to bind her to the agreement. In contrast, the court held that Mrs. McKnab's signature did not bind her. The carrier's agent had advised Mrs. McKnab incorrectly that the agreement gave her no choice regarding the amount of insurance coverage available to her. This misstatement, the court held, relieved Mrs. McKnab of the presumption of assent that her signature on the agreement would otherwise have warranted. By granting relief to Mrs. McKnab, *Allied* indicates to readers that standardized agreements need not always be binding. In denying relief to Mrs. Bratton, however, the court in *Allied* demonstrates that standardized agreements are often enforceable.

Allied is the only case in this unit in which a court enforces a standardized agreement against a party.[197] Therefore, as a result of its introductory position in the unit and its unique support of a standard form contract, *Allied* has a substantial impact on readers' views about standard form contract doctrine. I believe that because readers' ideas regarding gender affect their interpretation of *Allied,* these ideas influence their subsequent approach to standardized contract interpretation. In the part that follows, I will discuss two different interpretations of *Allied* that demonstrate these claims about the significance of gender. The first interpretation, which I call a traditional reading of the case, is an elaboration of the rationale the court presents in support of its decision. Readers who interpret *Allied* in the traditional manner are unlikely to acknowledge that gender-related ideas are a factor in their reading of the case. Yet, as I will show, gender-related ideas are implicated in this interpretation. I label the second interpretation a feminist reading, because gender-related ideas are overtly recognized in this interpretation. In addition, this reading is characterized by its opposition to *Allied* and to the traditional interpretation of the decision.

The traditional interpretation of *Allied* leads to a conclusion that, by and large, standardized contracts are legitimate, fair, and benign.

---

197. In *Weisz, Henningsen,* and *Ellsworth Dobb,* the challenged provisions were not enforced. Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843, 858 (1967), *excerpted in* J. DAWSON, *supra* note 1, at 469, 474; Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 408, 417, 461 A.2d 69, 97, 102 (1960), *excerpted in* J. DAWSON, *supra* note 1, at 461, 467; Weisz v. Parke-Bernet Galleries, Inc., 67 Misc. 2d 1077, 1082-84, 325 N.Y.S.2d 576, 582-83 (N.Y. Civ. Ct. 1971), *rev'd,* 77 Misc. 2d 80, 351 N.Y.S.2d 911 (N.Y. App. Term, 1974), *excerpted in* J. DAWSON, *supra* note 1, at 453. In *Woodburn* the case was remanded to determine if the plaintiff had an opportunity to see the restrictive provisions. Woodburn v. Northwestern Bell Tel. Co., 275 N.W.2d 403 (Iowa 1979), *excerpted in* J. DAWSON, *supra* note 1, at 476.

Several aspects of the decision invite this favorable view. Thus, for example, the court frames the question of standardized contract enforceability as an issue of whether the individual householders *agreed* to the standardized terms.[198] By discussing the legitimacy of the agreements in the language of assent, the court implies that individual householders have the ability to avoid the severity of the terms of standardized contracts if they simply adequately assert themselves. Mrs. Bratton "realized that she was signing a contract,"[199] the decision reports. Moreover, the carrier's agent did not "prevent" her from reading the document.[200] She "simply did not read . . .or even ask questions about the Bill of Lading."[201] The court indicates that, because Mrs. Bratton deliberately chose both to sign the documents and not to read them, she voluntarily relinquished her right to judicial protection against the harshness of the standardized form. She, not the carrier or the court, is responsible for her inability to obtain relief from the onerous terms in the standardized agreement.

The particular form of standardized agreement at issue in the case contributes to the view that Mrs. Bratton should be held responsible for her own loss. Unlike many standardized contracts (including those in the cases following *Allied* in the casebook), the standardized documents Mrs. Bratton failed to read actually offered her the choice of more insurance if she wanted it.[202] Mrs. Bratton was not stuck with a form document that offered her only one set of terms. Traditional readers are more likely, therefore, to feel critical of Mrs. Bratton's conduct than to feel critical of standardized agreements.

---

198. Although the decision reports that the jury at trial considered both mistake and assent in reaching its verdict for Mrs. Bratton, mistake is not discussed in the appellate opinion. Allied Van Lines, Inc. v. Bratton, 351 So.2d 344, 347-48 (Fla. 1977), *excerpted in* J. DAWSON. *supra* note 1, at 448, 451-52. This treatment of the enforceability issue is conventional. *See* Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract,* 43 COLUM. L. REV. 629, 630 (1943).

199. Allied Van Lines, Inc. v. Bratton, 351 So.2d 344, 346 (Fla. 1977), *excerpted in* J. DAWSON, *supra* note 1, at 448, 449.

200. *Id.* at 346, *excerpted in* J. DAWSON, *supra* note 1, at 448, 449.

201. *Id.* at 348, *excerpted in* J. DAWSON, *supra* note 1, at 448, 451.

202. The Bill of Lading reproduced in the decision provided:

> Unless the shipper expressly releases the shipment to a value of 60 cents per pound per article, the carrier's maximum liability for loss and damage shall be either the lump sum value declared by the shipper or an amount equal to $1.25 for each pound of weight in the shipment, whichever is greater. The shipment will move subject to the rules and conditions of the carrier's tariff. Shipper hereby releases the entire shipment to a value not exceeding . . . Notice, the shipper signing this contract must insert in the space above, in his own handwriting either his declaration of the actual value of the shipment, or the words "60 cents per pound per article." Otherwise, the shipment will be deemed released to a maximum value equal to $1.25 times the weight of the shipment in pounds.

Id. at 346, *excerpted in* J. DAWSON, *supra* note 1, at 448, 448-49.

The contrast between the court's treatment of Mrs. McKnab and Mrs. Bratton also conveys the benign nature of standardized agreements to traditional readers. The rationale that locked Mrs. Bratton into her agreement protected Mrs. McKnab. Although the court seemed ready to hold Mrs. McKnab responsible for her signature—she too "knew" she was "signing a contract"[203]—ultimately the court is persuaded that the conduct of the carrier's agent "prevent[ed] [her] from exercising her right to choose adequate coverage."[204] The court referred to prior conversations between Mrs. McKnab and the agent in which she had alerted him to her desires for maximum insurance coverage.[205] Readers can infer from this that the agent's misstatement to Mrs. McKnab was deliberately deceptive. The agent's statement seems like a concrete obstacle which he placed between Mrs. McKnab and the bill of lading; his words seem to have wrested control of the situation from Mrs. McKnab. Because the court relieved Mrs. McKnab of liability for her signature on the grounds that the agent prevented her from assenting freely to the standardized form, the *Allied* decision assures readers that the law of standardized agreements can be flexible and particularized. It will protect someone like Mrs. McKnab who actively seeks to protect herself, but it will not protect someone who is negligently passive, like Mrs. Bratton. Unlike Mrs. McKnab, Mrs. Bratton did nothing concrete to indicate to her agent that his silence about the agreement would deceive her. An active/passive distinction between the conduct of both the two women and the two agents, therefore, provides readers an explanation for the different treatment the women receive. More importantly, Mrs. McKnab's situation indicates that in discreet, predictable, and exceptional circumstances, courts will not enforce standardized agreements.

The form of legal analysis that the court utilized in *Allied* also legitimates, for traditional readers, the legal doctrine dealing with standardized agreements. Because the court judged the enforceability of Mrs. Bratton's agreement by her signature, rather than by an examination of her actual knowledge of the contents of the standard form, the *Allied* court seems scrupulously neutral and objective. Unlike later cases in the standardized agreement unit, the court in *Allied* did not inquire into inequality of bargaining power to deter-

---

203. *Id.* at 348, *excerpted in* J. DAWSON, *supra* note 1, at 448, 451.

204. *Id.*

205. "Mrs. McKnab's situation is different [from Mrs. Bratton's] . . . for she sought information [and] was misled by the carrier's agent as to available coverage." *Id.* at 348, *excerpted in* J. DAWSON, *supra* note 1, at 448, 451. In addition, the court cites portions of the trial transcript in which Mrs. McKnab testified about her conversation with the agent in which she inquired about insurance. *Id.* at 347 nn. 5-6, *excerpted in* J. DAWSON, *supra* note 1, at 448, 449-50 nn. 4-5.

mine the enforceability of the standardized agreements.[206] Nor did it consider the justice of permitting a national moving company to limit its liability for loss of an individual householder's belongings. By avoiding these approaches, the court in *Allied* also avoided the troublesome question of whether setting aside standardized agreements violates the principle of judicial neutrality regarding the substance of contracts. Its silence on these issues enhances the apparent defensibility of its decision.

All of the justifications for the *Allied* decision advanced so far are reinforced by gender-related ideas. Readers can convince themselves that Mrs. Bratton could have avoided the limited liability of which she complained by attributing a restrictive notion of self to her that is customarily linked with men.[207] The court in *Allied* protects Mrs. McKnab's "masculine" attempt to be autonomous, aggressive, and self-reliant, and the court denies Mrs. Bratton relief because she didn't try to conduct her affairs in a similarly "masculine" way. If traditional readers implicitly recognize Mrs. McKnab's conduct as masculine and Mrs. Bratton's conduct as feminine, accepting *Allied* will be as natural as the superiority of "male" traits sometimes seems. Indeed, the gendered view of self implied in the opinion tends to prevent readers from being troubled by the complicated issue the case poses about the power of standardized contracts.

Dawson, Harvey, and Henderson's overall use of cases involving women is another gender-related factor that encourages *Allied's* traditional readers to believe that standardized contracts are fair and benign. The editors have not only selected *Allied,* a case with two women plaintiffs, to introduce their materials on standardized contracts, but four of the five cases in this unit involve women plaintiffs.[208] The unusually high number of women connected with

206. Inequality of bargaining power is discussed in Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 555-56, 236 A.2d 843, 857-58 (1967), *excerpted in* J. DAWSON, *supra* note 1, at 469, 473-74; Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 389-91, 161 A.2d 69, 86-88 (1960), *excerpted in* J. DAWSON, *supra* note 1, at 461, 463-64; Weisz v. Parke-Bernet Galleries, Inc., 67 Misc. 2d 1077, 1081-82, 325 N.Y.S.2d 576, 581-82 (N.Y. Civ. Ct. 1971), *rev'd,* 77 Misc. 2d 80, 351 N.Y.S.2d 911 (N.Y. App. Term. 1974), *excerpted in* J. DAWSON, *supra* note 1, at 453, 456-57.

207. Recent feminist scholarship has addressed the distinctions between male and female notions of personhood. *See, e.g.,* N. CHODOROW, *supra* note 3; C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). Feminist legal scholars are beginning to use this scholarship in their work. *See, e.g.,* Dalton, Remarks on Personhood, AALS panel (Jan. 5, 1985) (unpublished manuscript on file with author); Salter, Extended Identity, A Feminist Intuition of Self/Other and Its Implications for Theories of Justice and Rights (1984) (unpublished manuscript on file with author).

208. Woodburn v. Northwestern Bell Telephone Co., 275 N.W.2d 403 (Iowa 1979), *excerpted in* J. DAWSON, *supra* note 1, at 476, is the only major case in the unit on standardized contracts, in which a woman is not a party.

standardized contract cases[209] invites readers to analogize the status of these cases to the status of women in society. Women are victimized by standardized agreements in these cases, just as they are socially and economically subordinated to men and their concerns. But they are also protected and cared for by the application of standardized contract doctrine in the cases following *Allied.* Because the traditional reader may believe that standardized contract doctrine protects women more than people are generally protected in most aspects of life, this decision will have set this reader up to treat standardized contracts as a normal, acceptable part of modern commercial life. He may discount the extent to which such contracts can lead individuals who use them to treat one another as if they are as standardized as their documents. Although all of the cases succeeding *Allied* refuse to enforce standardized contract terms, these cases will be unlikely to change this reader's view that standardized contracts should, in a man's world, be generally enforceable—for the reasons explained in *Allied.*

The feminist reading of *Allied* leads to a conclusion that standardized contracts can be oppressive and unfair—not just to women but to men as well. The same gender-related ideas that supported the traditional interpretation of the case will encourage feminist readers to oppose the benign reading of the decision. Thus, the exclusive presence of women as plaintiffs in *Allied,*[210] and the disproportionate number of women in the standardized contract materials, will encourage these readers to criticize the effect of gender on the law of standardized contracts.[211] Because standardized contracts appear

---

209. Recall that 39 of the 183 major cases in the casebook involve women parties, in contrast to four out of five in this unit. *See supra* notes 22-23 and accompanying text.

210. It is interesting to note that other contracts casebooks also begin standard form contract units with cases involving women. *See, e.g.,* O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill. 2d 436, 155 N.E.2d 545 (1958), *excerpted in* E. FARNSWORTH, *supra* note 143, at 442; L'Estrange v. Graucob, Ltd., 2 K.B. 394 (1934), *excerpted in* F. KESSLER, *supra* note 88, at 1075.

211. The female reader with a Chip on her Shoulder, thinking, perhaps, in her paranoid mode, may be alerted to gender messages in the *Allied* decision by the quotation marks placed around the word "shipper" whenever it is used next to the names of the plaintiffs in the decision. While quotation marks could indicate someone else's words are being used, or while they might reflect the stylistic custom of using quotation marks to identify a person by his role, these plausible explanations for the use of quotation marks in *Allied* fail. There is nothing in the text to suggest the quotation marks note a quotation, and since the opinion writer does not use quotation marks when the word "carrier" is placed next to the defendant's name, it is unlikely that the quotation marks around the word "shipper" represent customary usage. Moreover, the diligent reader who looked beyond the text would learn that other cases involving householders which are cited in the opinion do not use quotation marks when referring to those parties as shippers. *See* Brannon v. Smith Dray Line & Storage Co., 456 F.2d 260 (6th Cir. 1972), *noted in* J. DAWSON, *supra* note 1, at 451-52; Chandler v. Aero Mayflower Transit Co., 374 F.2d 129 (4th Cir. 1967), *noted in* J. DAWSON, *supra* note 1, at 451. Thus, it is likely, at least for some readers, that the quotation marks function in *Allied* as a wink, conveying a message other than the ordinary meaning of the word they surround. While the judge's

to oppress mainly women, these readers will doubt whether the law adequately protects women.

The gender-related insight regarding the "male" notion of self underlying the *Allied* rationale will provide feminist readers with a basis for developing a critique of the traditional analysis. Mrs. Bratton's idea of self apparently did not conform to the view, commonly linked with men, that individuals should allow the assertive, self-centered aspects of their personality to dominate their conduct. The self-reliant view of personhood underlying *Allied* permitted the court to believe that Mrs. Bratton was free to choose whether or not to agree to the carrier's form, that her agent did not "prevent" her from reading the bill of lading before she signed it. But footnotes to the opinion reveal that Mrs. Bratton testified at trial that she did not read the document because "the house was really cold; and the men were tired. They were in a hurry to get out."[212] Although some people might feel free in such a situation to ignore the workers' discomfort in order to pause to carefully study the moving company's documents, it is not surprising that Mrs. Bratton could not. Women are socialized to consider and value others' feelings above their own, and Mrs. Bratton simply acted like a woman in this situation. Because feminist readers are sympathetic to characteristics commonly associated with women, the court's refusal to evaluate the substantive content of Mrs. Bratton's standardized contract will not seem like a neutral judgment to these readers but a preference for male rather than female personality traits. Rather than feeling critical of Mrs. Bratton, feminist readers are likely to feel critical of the standardized documents and of standardized contract doctrine that fails to protect and value "feminine" personality traits.

As the feminist reading of *Allied* implies, the court's analysis in *Allied* might have been different if the court had valued feminine as well as masculine personality traits. The court could have considered whether Mrs. Bratton's agent should have extended more sensitivity and compassion to her by understanding her sympathy for him and his men, by informing her about the insurance option, and by preventing her from signing without indicating the liability coverage she wanted. The court could have considered whether the

---

wink in *Allied* might simply indicate sympathy for the parties, some readers are likely to assume instead that the judge is communicating his view that *since* these shippers are women, and probably only housewives or widows, they are not shippers as someone in the public world understands the term. If the traditional readers who are undisposed to favor women notice the quotation marks, they will be assured that they are correct in their opinion that Mrs. Bratton, rather than the carrier or the court, is at fault in *Allied*.

212. Allied Van Lines, Inc. v. Bratton, 351 So.2d 344, 346 n.3 (Fla. 1977), *excerpted in* J. DAWSON, *supra* note 1, at 448, 449 n.2.

agent should have been as solicitous of Mrs. Bratton as she was of him.

Just as the traditional reader's interpretation of *Allied* could lead him to overlook the critique of standardized contract doctrine, the feminist reader's desire to criticize *Allied* may lead her to exaggerate the doctrinal significance of the succeeding cases. Because she believes that the decision affecting Mrs. Bratton was wrong, the feminist reader will look for ways to overturn standardized agreements in the cases following *Allied.* Her lack of confidence in the *Allied* rationale may prevent her from believing that standardized contracts are generally enforceable; she may believe that standardized contract doctrine is much more indeterminate and uncertain than it is.[213] She is likely to undervalue the *Allied* opinion as a useful source of persuasive arguments in favor of enforcing standardized agreements.

Although both the traditional and the feminist readers will be disadvantaged in their later reading of the standardized contract material if they are not exposed to alternative readings of *Allied,* the feminist reading is less likely to receive attention. It is, therefore, particularly important to emphasize how this reading will benefit traditional readers. A feminist reading will help these readers see the legal issue in standardized contract situations not as a question of assent but as a question of power.[214] The court in *Allied* utilized individual consent as the exclusive standard by which to evaluate contract enforceability. The court assumed, in justifying this standard, that individuals could make informed judgments about the wisdom of contracts, that they could obtain full access to all the knowledge they need to exercise their consent wisely. Indeed, the Restatement section on standardized agreements, which Dawson, Harvey, and Henderson reproduce at the conclusion of the standardized agreement unit, emphasizes the knowledge of the parties as the critical factor for determining when such agreements should be enforced.[215]

---

213. *See generally* Rakoff, *Contracts of Adhesion: An Essay in Reconstruction,* 96 HARV. L. REV. 1173 (1983) (expansive description and criticism of past and current presumption that standardized agreements are enforceable).

214. I am not referring here to the inequality of bargaining power argument which often surfaces in standardized agreement cases. *See supra* note 206 (referring to bargaining power); *see also* Kennedy, *supra* note 72, at 614-20 (criticizing inequality of bargaining power as an "appropriate" test for determining enforceability of compulsory terms).

215. The emphasis on knowledge occurs in the third subsection of section 221. RESTATEMENT (SECOND) OF CONTRACTS, § 221(3) (1979), *reprinted in* J. DAWSON, *supra* note 1, at 479.

> Section 211. Standardized Agreements
>
> (1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are

The feminist reader of *Allied,* who is sensitive to the subordinate status of women, would challenge this single minded focus on a consumer's obligation to inform herself about her contracts as misleading. The focus on knowledge masks the power exercised in contractual dealings. Mrs. Bratton's agent exercised power over her through his physical control over her bill of lading and through his familiarity, derived from prior experience, with its contents. But because he was a man, the agent also had power over Mrs. Bratton that she, as a woman, was socialized to acknowledge. By requiring Mrs. Bratton to assume full responsibility for informing herself about her bill of lading, the *Allied* court not only required her to challenge the agent's control over what she needed to know about the bill of lading, but also to challenge the control he as a man had over her as a woman.

A feminist reading of *Allied* exposes these forms of power.[216] Moreover, it reveals that traditional contract doctrine, by treating the parties as if they had an adversarial relationship, implicitly rejects the more cooperative way in which many women have traditionally experienced power and knowledge. The major form of power available to most women, given the kind of work they have done, has been the power to nurture and share. Women primarily occupied with family responsibilities have learned to live in the context of relationships that are trusting and interdependent. In this sphere, many women do not respect or adhere to the traditional male view of power as force, authority, and domination. Given the concern she stated she felt for the workers, Mrs. Bratton earned her own self-respect by recognizing the workers' discomfort and doing what she did to ease their situation. Had she been in the agent's position at that point, she would have spoken to the householder about the insurance option; she would have recognized the householder's need to know and would have helped her.

By analyzing Mrs. Bratton's claim as a question of whether she

---

regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.

(2) Such a writing is interpreted whenever reasonable as treating alike all those similarly situated without regard to their knowledge or understanding of the standard terms of the writing.

(3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

Id. § 221, *reprinted in* J. DAWSON, *supra* note 1, at 478-79. Prof. Rakoff argues that subsection three of the Restatement § 221 broadens traditional exceptions to the presumption that standardized agreements are enforceable. Rakoff, *supra* note 213, at 1190-91.

216. Other analyses of standardized contracts also raise the issue of power in such contracts. *See, e.g.,* Kessler, *supra* note 198, at 640.

agreed to the challenged terms, the *Allied* court sought to have Mrs. Bratton act unauthentically—to reject her own sense of self and be "more like a man." The court's assent analysis does more than simply deny the extent of the agent's power over Mrs. Bratton; it also prevents her from being able to exercise power in her own way. Thus the act of framing the *Allied* issue in terms of assent is itself a form of power over Mrs. Bratton and others like her. Mrs. Bratton cannot adequately defend herself as long as the standardized contract issue is discussed as it is in *Allied.* Feminist readers, because of their sympathy—indeed, their empathy— for Mrs. Bratton and because of their opposition to the outcome of her case, will recognize that the court's rhetoric of freedom of choice in *Allied* is simply another way of exercising power.[217]

A feminist reading of the decision reveals the aspects of the *Allied* opinion that foster traditional ideas about gender—aspects that in turn constrain readers' lives. Moreover, it exposes and stands in opposition to the domination of traditional legal doctrine. If readers understand that utilizing assent doctrine is a form of power over Mrs. Bratton's situation, they will be empowered to question and challenge the use of that doctrine. Indeed, by suggesting a way to oppose an outcome that would otherwise seem unassailable, the oppositional stance of feminist analysis becomes a source of power for the willing reader.

My aim in the casebook overview was to demonstrate the influence of gender-related ideas within the casebook. I emphasized the effect the casebook has on readers' attitudes toward themselves, although I also discussed the impact of gender on readers' understanding of legal doctrine. My discussion of *Parker* and *Allied* has reversed this emphasis. Although I asserted that the gender-related ideas that I identified in readers were stimulated by the two cases and their presentation in the casebook, my major goal in both discussions was to advance alternative interpretations of the cases that an oppositional focus on gender illuminated. I do not claim that the untraditional interpretations presented here are only available by the feminist route that led me to them. But insofar as the interpretations are useful the feminist approach to their development enables readers to struggle against the constraints of gender which casebooks foster.

---

217. *See generally* M. FOUCAULT, *supra* note 2; *see also* G. Frug, *The Language of Power* (Book Review), 84 COLUM. L. REV. 1881 (1984) (reviewing B. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984)).

IV. CONCLUDING DISCUSSION

I hope that my re-reading of *Dawson, Harvey, and Henderson* has raised two questions for readers. I hope, first, that readers wonder how a feminist analysis of this casebook should affect the use of *Dawson, Harvey, and Henderson* in the classroom. I also hope that readers wonder whether my analysis of *Dawson, Harvey, and Henderson* can be extended to other casebooks. Because both of these questions are related to my goals of challenging the influence of gender in reading and writing casebooks, I address these questions in this conclusion. Focusing on these questions also allows me to re-examine the objectives and methodology of the preceding sections and to discuss the implications of this Essay for further efforts to loosen the constraints of gender on our lives.

Because other casebooks, as I have implied, could be subject to the analysis I have applied to *Dawson, Harvey, and Henderson* in this Essay, I think it would be unrealistic and unfair to advocate abandoning this casebook on the grounds of my discussion. I would like instructors and casebook editors to undertake major efforts to modify the importance gender plays in classroom materials, but I recognize that for many reasons most of us do not want to junk the bulk of the traditional materials we presently use in teaching. The question most of us face, therefore, is what changes my re-reading of *Dawson, Harvey, and Henderson* suggests we make in our classroom use of this or similar books.

My aim in the preceding sections has been to indicate the power and authority that law casebooks have over their readers. At the same time, I have suggested that because of the wide variety of attitudes and ideas that casebook readers have about gender, readers interpret casebook material (and casebooks affect readers) differently and with varying intensity. The dialectical nature of the relationship between the casebook and readers is replicated in the relationship between students and an instructor who seeks to introduce a feminist casebook analysis into the classroom. Let me illustrate the student aspect of this relationship by considering a class discussion concerning the significance of Shirley MacLaine's photograph.[218]

---

218. *See supra* notes 184-185 and accompanying text. While the photograph could be understood as an overtly sexist part of *Dawson, Harvey, and Henderson,* I believe that class discussions of the more subtle, gender-related aspects of the casebook, such as the stereotypical roles of the casebook parties, the silence regarding women judges, or the predominance of masculine pronouns in the opinions and in the editorial material, would receive the same mixed reception I project here for the discussion of material which some readers will construe as overtly sexist. There are, of course, a number of other strategies this Essay suggests that

Students will come to class with different attitudes toward this photograph. Some readers, such as The Feminist, the Woman-Centered Reader, or the Reader with a Chip on her Shoulder, may be offended by the editors' use of a picture they think is denigrating to Shirley MacLaine in her role as a woman plaintiff. Other readers, who may also be Feminists and female Readers with Chips on their Shoulders, may be elated by the bravura of MacLaine's photograph. Here's a woman, they may think, who can use her sexual power effectively. Readers who are Undressed for Success may come to class feeling concerned that being a woman, or having "feminine" characteristics, is a disadvantage professionally. They are likely to believe that Dawson, Harvey, and Henderson exploited MacLaine by using her photograph in their book. Still other readers, like male Readers with Chips on their Shoulders, may be pleased to think the editors share their views that women are primarily sex objects. Because students vary so dramatically in their views about gender, an instructor's discussion of the photograph may validate the attitudes of one group of students toward gender at the same time that the discussion creates pedagogical problems for others. Consider the impact of two interpretations an instructor might put forward regarding the MacLaine illustration.

If an instructor believes that the editors' use of MacLaine's photograph is degrading to women, she may seek to mitigate the effect of the photography by criticizing the editors in class for including the illustration in their book. Her criticism would probably offend readers who believe the photograph communicates a positive image about women, and it might embarrass other readers who resent having their need for reassurance that sexism is unacceptable recognized. There is also a danger that the anger of Readers with Chips on their Shoulders might erupt during such a discussion and interfere with the instructor's control over the assuring, defusing message she seeks to convey.

The instructor would fare no better if she used the photograph, as I did in the *Parker* case analysis, to discuss the effect of gender on one's interpretation of the *Parker* decision. Many students, like the Individualist or the Civil Libertarian readers, do not acknowledge the power of gender over their ideas. They would come to class

---

instructors could utilize in class in order to challenge the gendered stance of *Dawson, Harvey, and Henderson.* In addition to discussing some of the observations presented here, instructors could also add material to the casebook that would challenge the links the casebook makes between gender and the law. By adding material to the course of special interest to women, instructors could challenge the restricted idea that contracts courses are limited to traditionally "masculine" interests.

without any position at all about MacLaine's photograph. Failing to mention the problems of gender would leave the arrogance or the isolation of these readers undisturbed, permitting them either to embrace the gendered messages of the photograph or to remain ignorant of other readers' distress. However, a serious discussion of the photograph might cause these students to see their instructor as a zealot; the discussion might reduce their confidence in her as a reliable teacher. "She has no sense of proportion," they might say. "She gets off the track." Thus, the different attitudes students have regarding gender will affect the treatment a feminist analysis of casebook materials receives in class.

Ideas relating to gender will also affect the way in which instructors determine how a feminist analysis should affect their treatment of *Dawson, Harvey, and Henderson* in class. In my contracts course, for example, I am willing to introduce those parts of this Essay that relate to the relationship between gender and how students understand cases, but I seem reluctant to discuss how the casebook affects students' views of themselves and of gender roles.[219] I thus subordinate the deep pleasure and appreciation many students would derive from having their intuitive responses to the casebook legitimated to my concerns about the negative reactions of other students. I succumb to the position I have disputed in this Essay that doctrinal instruction can be isolated from students' views of themselves.

My reluctance to fully pursue this Essay's ideas in my classroom is a gendered reaction. Like many women law teachers, I am suspicious of the authority and power that students are accustomed to extending to instructors.[220] Because students expect me and I expect myself to be more conciliatory, more deferential, and more understanding than male teachers, I am reluctant to exploit my power in the classroom by introducing some of this controversial material into class.

I am also reluctant to completely incorporate a feminist casebook

---

219. For example, my class discussions of Parker v. Twentieth Century-Fox Film Corp., 3 Cal.3d 176, 474 P.2d 689, 89 Cal. Rptr. 737 (1970), *excerpted in* J. DAWSON, *supra* note 1, at 46; Allied Van Lines, Inc. v. Bratton, 351 So.2d 344 (Fla. 1977), *excerpted in* J. DAWSON, *supra* note 1, at 448; Crenshaw v. Williams, 191 Ky. 559, 231 S.W. 45 (1921), *excerpted in* J. DAWSON, *supra* note 1, at 25; and Fitzpatrick v. Michael, 177 Md. 248, 9 A.2d 639 (1939), *excerpted in* J. DAWSON, *supra* note 1, at 128, are influenced by this essay, while my discussions of Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917), *excerpted in* J. DAWSON, *supra* note 1, at 231, and Jackson v. Seymour, 193 Va. 735, 71 S.E.2d 181 (1952), *excerpted in* J. DAWSON, *supra* note 1, at 170, tend not to be.

220. *See* Pickard, *Experience as Teacher: Discovering the Politics of Law Teaching*, 33 U. OF TORONTO L.J. 279 (1983) (criticizing effect of such power and authority on students). *See also* D. KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY 58-65 (1983).

analysis in class because the analysis is not only radically different from traditional classroom discussion but also closely related to my identity as a woman. Having been educated exclusively by men in the law schools I attended and having taught on predominantly male faculties, I link traditional classroom discussion with men. In order to pursue feminist material in class, I must struggle against the customary deference I have been socialized to extend to men. Challenging the restrictions my own ideas about gender impose on me is an effort I cannot always make.

Because one's own attitudes about gender affect what one believes is acceptable in the classroom and because one's views of what is acceptable in the classroom affect one's attitudes toward gender, any decisions regarding the classroom implications of this Essay must be personal and contextualized, as my own decision has been. Faithfully replicating the analysis set forth in this Essay is unlikely to be a useful way for anyone, even me, to challenge the influence of gender in class discussions of *Dawson, Harvey, and Henderson.* The variety of student—as well as instructor— attitudes needs to be considered. I hope, however, that this Essay has convincingly demonstrated that current classroom conduct is already molding students' views about themselves as men and women and about the relationship between gender and the law. Although the question of how one's treatment of *Dawson, Harvey, and Henderson* should change because of my re-reading cannot be given a uniform answer, there is no way to *avoid* the issue of gender in the classroom. Each of us must address this issue, but for him or herself.

My discussion of the classroom implications of this Essay suggests that I am unlikely to claim that one can simply "apply" the analysis in this Essay to other casebooks. Indeed, I want to caution readers not to freeze this analysis into a rigid, prescriptive, analytical formula for eradicating gender. At the same time, however, I believe that my Essay provides an approach for evaluating other casebooks. By using editors' case selections, editorial comments, and silences, one can examine their treatment of the work women do. One can analyze the way they permit women to be characterized in their casebooks, and the sensitivity they exhibit to information and legal issues of special interest to women. One can evaluate editorial use of language and the selection and presentation of authors, seeking in both these instances to determine whether the editors have granted recognition to the particularlity of women. By analyzing the organization of cases involving women, one can determine whether and how these cases are used to convey gendered messages about legal doctrine. In short, one can examine the gendered char-

acteristics of casebooks, determining through this effort the potential a casebook has to foster some traits within readers at the expense of others. Using the techniques described above, I determined in the casebook overview and case analyses sections that *Dawson, Harvey, and Henderson* favors masculine interests and masculine characteristics. This stance not only divides and limits readers' views about people, but it also divides and limits readers' views about the law. I believe these conclusions are significant and should prove illuminating to readers of this casebook.

But the method I have used to reach these conclusions poses problems for extending my analysis to other casebooks. As I acknowledged earlier,[221] challenging gender constraints requires using the gender-related ideas that a project such as this is designed to undermine. For example, I found significance in the stereotyped characterizations of the limited number of women among the casebook "characters" because, like the Reader with a Chip on her Shoulder or The Feminist, I read the casebook with gender on my mind. Although I attempted to dilute the singularity of my own reading by suggesting other readers' views of material, these descriptions were also affected by my particular consciousness as a describer.

I believe the gendered stance of my own reading in the casebook overview section was essential to my ability to demonstrate the influence of gender in the casebook. Describing examples of gender constraints enabled me to portray concretely how readers connect their sex and their views of law and how the casebook affects readers' views of themselves. However, literally applying my analysis of the gender-related aspects of *Dawson, Harvey, and Henderson* to every legal text one reads would foster rather than challenge the constraints gender ideas have over our lives. It may be accurate at this particular point in time to state that a casebook inhibits readers' views about what men and women can do by containing a large number of cases in which women are described as widows or dependent wives. Similarly, it may be accurate to say that a casebook that is analytical and abstract seems male. Continuing to assert over a long period of time that dependency and abstractions are gender-related characteristics, however, could strengthen rather than loosen the connection between those characteristics and the sexes. Some aspects of my analysis may need to be extended to other legal texts in order to break the hold of gender constraints on our con-

221. *See supra* notes 137-39 and accompanying text.

sciousnesses, but other aspects should be transformed in order to achieve the same objective.

A feminist analysis of *Dawson, Harvey, and Henderson* can be successful not by being "applied" to other legal writing but by generating other re-readings. Although we need to use gender-related ideas in order to challenge gender constraints, we will only be able to accomplish that objective by constantly re-examining the ideas we are using. Ultimately, in order to challenge gender constraints effectively, our use of gender-related ideas must change with our shifting cultural context and the changes within ourselves. Only by continually re-thinking who we are and why we are making the choices we make can we free ourselves from the belief that our selves are constructed by our sexual identities.