Comments

Convergences: Law, Literature, and Feminism

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One of us is a professor of law, the other a professor of literature, and both of us are professed feminists. To teach together, the obvious joint venture was feminism. Hence the title of a course: "Feminist Theory: Law and Literature" and our intensive study of the emerging field of "law and literature." But when we delved into the newly-minted discipline, we found to our dismay (and even, admitting, never-ending naiveté) that like both "law" and "literature," much of that hyphenated field examines a world in which white men attempt from a place of power to speak as if for us all. Elizabeth Villiers Gemmette has, for example, described law and literature classes given in thirty-eight law schools.[1] Only

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1. Elizabeth Villiers Gemmette, *Law and Literature: An Unnecessarily Suspect Class in the Liberal Arts Component of the Law School Curriculum*, 23 VAL. U.L. REV. 267 app. I (1989) ("Law and Literature Courses Offered at Thirty-Eight ABA Approved Law Schools").

Of course, some who write either within the rubric of "law and literature" or more aptly "law and

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one of the reading lists surveyed included "feminism" as a topic; most of the courses ignored women's voices altogether.[2] Robin West and Judith Koffler have also provided excellent critiques and suggestions for work in the field of law and literature; their efforts have not until recently, however, specifically touched on the necessity for reading literary works that represent woman and her particular demands upon the law as seen in fiction.[3]

This essay dissents from the creation of a law and literature canon that excludes feminist perspectives. Both "law" and "literature" share the activity of generating narratives that illuminate, create, and reflect normative worlds, that bring experiences that might otherwise be invisible and silent into public view. Both law and literature have often assumed that if not totally absent, women are the other, the object of the male gaze, the subject of the discussion, not the speaker. Looking at "law" and at "literature" together enables us to see how each discipline incorporates these assumptions (as men speak, judge, describe, and ascribe) and how to challenge that shared vision of the social order.

Both fields are rich with examples of the male perspective. From law, there is the case of *Hoyt v. Florida*,[4] in which a woman accused of murdering her husband was tried by an all-male jury. Her challenge to the composition of that jury failed in the Supreme Courts of both the State of

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humanities" do turn, indeed, have helped to lead the way, to the examination of the lives of women and minorities. *E.g.*, DERRICK BELL, AND WE ARE NOT SAVED (1987); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539; Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280 (1989); Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983); Linda Hirshman, *Brontë, Bloom, and Bork: An Essay on the Moral Education of Judges*, 137 U. PA. L. REV. 177 (1988); Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152 (1989); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987); Aviam Soifer, *Listening and the Voiceless*, 4 MISS. C.L. REV. 319 (1984); Patricia Williams, *On Being the Object of Property*, 14 SIGNS 5 (1988); Steven L. Winter, *The Cognitive Dimension of the* Agon *Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989). Such works have not, thus far, made their way onto the reading lists detailed by Gemmette.

2. Elizabeth Villiers Gemmette, *supra* note 1, at app. II (A Cumulative Bibliography of Works Taught in a Number of Law School "Law and Literature" Courses).

3. For their work on law and literature in general, see, e.g., Judith Schenck Koffler, *Capital in Hell: Dante's Lesson on Usery*, 32 RUTGERS L. REV. 608 (1979); Judith Schenck Koffler, *Terror and Mutilation in the Golden Age*, 5 HUM. RTS. Q. 116 (1983); Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985); and Robin West, *Submission, Choice and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986). For feminist commentary, see Judith Schenck Koffler, *Posner in Paradise* (Book Review), 10 CARDOZO L. REV. 2099 (1989); Judith Schenck Koffler, *Forged Alliance: Law and Literature* (Book Review), 89 COLUM. L. REV. 1374 (1989) [hereinafter Judith Schenck Koffler, *Forged Alliance*]; Robin West, *Communities, Text, and Law: Reflections on the Law and Literature Movement*, 1 YALE J.L. & HUM. 129 (1988); and Robin West, *Economic Man and Literary Woman: One Contrast*, 39 MERCER L. REV. 867 (1988) [hereinafter Robin West, *Economic Man and Literary Woman*].

4. 119 So. 2d 691 (Fla. 1959), *aff'd*, 368 U.S. 57 (1961). Gwendolyn Hoyt was convicted of killing her husband.

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Florida and the United States. The absence of women as jurors is made all the more poignant as we read how the men who were the judges described the offense. The majority, who affirmed her conviction, told the story this way:

> The homicide occurred at the parties' home when appellant [Gwendolyn Hoyt], after prolonged marital discord and alleged infidelities, called her husband from his military station . . . by a false report of injury to their young son. She was unable to salvage their relationship by any means, and when she was so informed by the deceased in a final and unequivocal fashion . . . , the fatal blows were struck.[5]

One of the dissenting judges argued that the majority had failed to provide "the true picture painted by the entire record" and offered details of Gwendolyn Hoyt's life, of her husband's "coming home with lipstick on his shirt," his sudden departures, his refusal to speak with his wife.[6] The judge explained that:

> because of her husband's sudden, complete and final rejection of her efforts toward revitalizing the marriage, [Gwendolyn Hoyt] became emotionally upset, as would forsooth even a *normally stable* wife under such circumstances. . . . The oft repeated quotation "Heaven has no rage like love to hatred turned, Nor hell a fury like a woman scorned" has been accepted as apodictic throughout the ages.[7]

Be the male gaze unfriendly or self-consciously sympathetic, the roles for women were thus confined—either to being responsible for salvaging relationships or to being rendered uncontrollable by a man's rejection.[8] From literature, parallel evidence of the restricted roles available to women is readily available.[9] In a moving short story, "Cousin Lewis," Jean Stubbs

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5. *Id.* at 692-93.

6. *Id.* at 696-97 (Hobson, J., concurring in part and dissenting in part). Judge Hobson (joined by Judge Thomas) initially concurred in part and dissented in part. The two judges believed that the Florida statute (which read "no female person shall be taken for jury service unless said person has registered with the clerk . . . her desire to be placed on the jury list") was constitutional. *Id.* at 697. They dissented from the judgment based on the view that evidentiary rulings—admitting information that Gwendolyn Hoyt had gone on "a date with a man about one week prior to the homicide" to attack her character—were erroneous. *Id.* In a subsequent dissent from a petition for rehearing, Judge Hobson revised his earlier concurrence/dissent and concluded that Florida's jury selection statute unconstitutionally burdened women otherwise qualified to serve. *Id.* at 700.

7. *Id.* at 697 (emphasis in original).

8. Other, more recent, portrayals of women do not provide much basis for optimism about what the law will permit to women. *See* Carol Sanger, *Seasoned to the Use* (Book Review), 87 MICH. L. REV. 1338 (1989). Reviewing two novels, *Presumed Innocent* by Scott Turow and *The Good Mother* by Sue Miller, Carol Sanger describes how both demonstrate that "American law has accepted two categories of women: good and bad. Membership in one or the other category is governed not just by the volume of circumstances of sexual intercourse engaged in, but by assumed and lesser indicia of sexual availability or motivation—a smile, fingernail polish, marital status." *Id.* at 1364.

9. *See generally* CAROLYN HEILBRUN, WRITING A WOMAN'S LIFE (1988).

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created a woman in Scotland named Margery Jones who worked on a farm and raised three children.[10] When she attempted on rare occasions to relieve the narrowness of her life by dressing in male garb (as "Cousin Lewis") so as to pretend herself a man engaged in actions beyond the range permitted women, she was perceived by her husband (as well as by herself) as psychologically deranged. Her defense to her husband's accusations incorporated his disapproval:

> It hasn't prevented me from making you happy, has it? It hasn't prevented me from being a good mother. It's my only weakness. I'm all right usually. Then, now and again, I just have to dress up. That's all.[11]

Jean Stubbs carefully calibrates the control of women; her heroine wore trousers for her farmwork but crossed the line when she donned pants designed for men.[12] Gwendolyn Hoyt and Margery Jones both lived in worlds in which, if women could be seen at all, they were seen as men's objects and adjuncts. Reading about them at the same time illuminates that the violence in which Gwendolyn Hoyt found herself enmeshed was not some aberrational event (the curiosity that becomes a reported decision) but of a piece with the experiences of Margery Jones. Knowing how men's law saw Gwendolyn Hoyt makes Margery Jones' fearful compliance with her husband's demands for "normalcy" all the more understandable. The silencing of women has not, however, been complete; stories have and do emerge. Women break out of the roles given them, as they make their way toward generating their own stories—sometimes even before they can be heard. Two major nineteenth century English novels mark the way. In the later part of the nineteenth century, George Eliot created the Princess Alcharisi, Daniel Deronda's mother and a gifted singer who never wished to be a mother.

> "No," said the Princess . . . . "You are not a woman. You may try—but you can never imagine what it is to have a man's force of genius in you, and yet to suffer the slavery of being a girl. . . . [A] woman's heart must be of such a size and no larger, else it must be pressed small, like Chinese feet; her happiness is to be made as cakes are, by a fixed receipt."[13]

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10. Jean Stubbs, *Cousin Lewis*, in WOMEN & FICTION 268 (Susan Cahill ed. 1975).
11. *Id.* at 284.
12. Bettina Aptheker tells a similar story of inhabiting male characters ("an ace baseball pitcher, a concert pianist, . . . a Humphrey Bogart-type character"), all of whom enabled her to enter roles prohibited to women. BETTINA APTHEKER, TAPESTRIES OF LIFE: WOMEN'S WORK, WOMEN'S CONSCIOUSNESS AND THE MEANING OF DAILY EXPERIENCE 124–25 (1989). *See generally* 2 SANDRA M. GILBERT & SUSAN GUBAR, NO MAN'S LAND: THE PLACE OF THE WOMAN WRITER IN THE TWENTIETH CENTURY, SEXCHANGES 324–76 (1989) (chapter entitled "Cross-Dressing and Re-Dressing: Transvestism as Metaphor").
13. GEORGE ELIOT, DANIEL DERONDA, ch. 51 (1876).

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This chapter is one of the first in English literature in which a woman rejects the obligatory role of mother. Within twenty years, another heroine of the nineteenth century fears the role of wife and the institution of marriage. In Thomas Hardy's *Jude the Obscure*, Sue Bridehead made her own definitions of sexuality.

> I think I could begin to be afraid of you, Jude, the moment you had contracted to cherish me under a Government stamp, and I was licensed to be loved on the premises by you—Ugh, how horrible and sordid! Although, as you are, free, I trust you more than any other man in the world.[14]

The nineteenth century was one of moment for women in law as well. In 1878, Clara Foltz became the first woman admitted to practice in the State of California, but unlike Princess Alcharisi and Sue Bridehead, she attempted to disguise her refusal to be confined within female roles. Clara Foltz needed to cushion the meaning of her breakthrough as a lawyer by explaining that "a knowledge of the law of our land will make women better mothers, better wives, and better citizens."[15]

A century later, in both law and literature, women could more straightforwardly examine and challenge the rules made, by both women and men, about women's place in the world. Maxine Hong Kingston's heroine in *The Woman Warrior* experienced the multilayered messages sent to women: Be brave and fight; be compliant and complicitous.

> At last I saw that I too had been in the presence of great power, my mother talking-story. After I grew up, I heard the chant of Fa Mu Lan, the girl who took her father's place in battle. Instantly I remembered that as a child I had followed my mother about the house, the two of us singing about how Fa Mu Lan fought gloriously and returned alive from war to settle in the village. I had forgotten this chant that was once mine, given me by my mother, who may not have known its power to remind. She said I would grow up a wife and a slave, but she taught me the song of the warrior woman, Fa Mu Lan. I would have to grow up a warrior woman.[16]

Following in the path marked by Princess Alcharisi and Clara Foltz,

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14. THOMAS HARDY, JUDE THE OBSCURE, part V, § V-1 (1895).

15. Barbara Babcock, *Clara Shortridge Foltz: "First Woman"*, 30 ARIZ. L. REV. 673, 711 (1988); *see also* Barbara Babcock, *Reconstructing the Person: The Case of Clara Shortridge Foltz*, 12 BIOGRAPHY 5 (Winter 1989). By 1911, women were sufficient in number to form the Women Lawyers' Association (subsequently called the National Association of Women Lawyers) and to publish a journal, *Women Lawyers' Journal*. (The first volume is dated 1911; the next that we have been able to locate is dated 1933). *See generally* KAREN B. MORELLO, THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA, 1638 TO THE PRESENT 3-38 (1986) (women's struggles to enter the practice of law); *id.* at 126-27 (Women Lawyers' Association formed).

16. MAXINE HONG KINGSTON, THE WOMAN WARRIOR: MEMOIRS OF A GIRLHOOD AMONG GHOSTS 19-20 (1975).

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yet moving beyond it, women attempt to define what good women and men are. In *The Color Purple*, Alice Walker wrote of women who heal each other.

> Mr. _____ ast me the other day what it is I love so much bout Shug. He say he love her style. He say to tell the truth, Shug act more manly than most men. I mean she upright, honest. Speak her mind and the devil take the hindmost, he say. You know Shug will fight, he say. Just like Sofia. She bound to live her life and be herself no matter what.
>
> Mr. _____ think all this is stuff men do. . . . What Shug got is womanly it seem like to me. Specially since she and Sofia the ones got it.
>
> Sophia and Shug not like men, he say, but they not like women either.
>
> You mean they not like you or me.
>
> They hold they own, he say. And it's different.[17]

Gwendolyn Hoyt, Margery Jones, Princess Alcharisi, Sue Bridehead, Clara Foltz, the Woman Warrior, Celie, and Shug. These women push against the roles assigned to women, and out of their stories, slowly, grows some sense of other options. At one level, in recent decades, legal institutions seem to have incorporated some of the changing understandings of women. Federal, state, and local legislatures enacted laws mandating nondiscrimination; the United States Supreme Court upheld the enforcement of some of those provisions[18] and ordered revisions of other laws that discriminated against women.[19] Women—in small numbers—moved into roles formerly forbidden. By 1989, the National Association of Women Judges, with more than 800 members, celebrated its tenth anniversary.[20] Yet, as we detail in the pages that follow, traditional assumptions of exclusion and silence persist and seem, sometimes, to gain strength. In the 1970's and 1980's, courses called "law and literature" made their way

17. ALICE WALKER, THE COLOR PURPLE 228 (1982).

18. *See, e.g.*, New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988); Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984) (all upholding applications of state or local antidiscrimination laws to clubs that sought to exclude women); Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989); Hishon v. King & Spalding, 467 U.S. 69 (1984) (cases involving application of title VII, providing for equal employment opportunities, to accounting and law firms respectively); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (sexual harassment in workplace is actionable under title VII).

19. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977) (illegal to discriminate against female wage earners in social security system); Reed v. Reed, 404 U.S. 71 (1971) (Idaho law creating statutory preference for men to be administrators of estates held to violate Fourteenth Amendment). *But see* Personnel Adm'r v. Feeney, 442 U.S. 256 (1979) (upholding Massachusetts' preference for hiring veterans).

20. In 1979, the association was formed by some 100 women judges. Its purposes include formulating " 'solutions' " to the " 'legal, educational, social and ethical problems mutually encountered by women judges.' " Gladys Kessler, *Foreword*, 14 GOLDEN GATE U.L. REV. 473, 477-78 (1984) (Symposium on National Association of Women Judges).

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into law schools, but largely left women's experiences and feminist criticism out. Women are still the objects of male violence; despite the overruling of *Hoyt v. Florida*, women charged with responding to male violence with violence must justify themselves to a world that continues to see women as responsible for relationships and obliged to conform to "ladylike" stereotypes. The work of feminist theory—in both law and literature—is to examine how both disciplines continue to assume either that women are irrelevant or that their role is to be the object of male desire. The shared work is to recover the other traditions—women who have written, spoken, acted, claimed, judged. The shared work is to uncover and admit the complexities of making "women's" claims, the comforting moments of recognition and commonality, the pleasures and risks of essentialism, the pain and necessity of age, class, and racial divisions, the tensions generated from a diverse set of perspectives, all spoken with women's voices.[21] The shared work is to explore texts other than those "already read,"[22] to learn of narratives other than those already told, and to understand more about the function of the repetition of the canonical works.

One final point by way of introduction. We insist upon the existence of two disciplines. What follows consists mostly of separately authored, but interrelated, commentary. We have not transcribed a conversation that we have had with each other. We are here writing to you, the reader. But we do not want to submerge either of our distinct perspectives, nor make it appear that either one of us is fluent in the other's native tongue. Two voices, one enterprise: to examine the emerging "law and literature" world, to remark (once again) upon the absence of women, and to explore what "law and literature" looks like from feminist perspectives.

I. From Where We Begin

A first premise of feminist conversations is that we begin with the actual experiences of women. The realities of women's lives are central to feminist description, analysis, and theory. Given the subject matter here—bringing feminism to a world of "law and literature"—our own experiences are relevant.

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21. *See, e.g.*, Regina Austin, *supra* note 1, at 541 (emphasis in original):

> [M]inority female legal scholars have every reason to believe that almost no one is interested in the legal problems of minority women. It is imperative that our writing acknowledge and patently reflect that we are *not* the voices of a monolithic racial/sexual community that does not know class divisions or social and cultural diversity.

See also Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. Chi. Legal F. 139.

22. Annette Kolodny, *Dancing Through the Minefield*, in The New Feminist Criticism: Essays on Women, Literature, and Theory 144, 155 (Elaine Showalter ed. 1985) (essay originally published in 6 Feminist Stud. 1 (1980)).

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The underscoring of experience is, in part, an act of recognition. A key issue for feminism in general—and for feminist revision of both law and literature in particular—is that of proximity, the closeness of the intellectual discussion to the experiences of daily life. No matter how passionate we are about a range of issues, from the various voices in detective fiction[23] to the relationship among courts in the United States,[24] this work is at some distance from the exchanges of our everyday lives. But with feminism and literature and with feminism and law, there is no such space, no cushion between topic and ourselves. We are each anomalies. On a daily basis our otherness is brought home to us. Despite an age difference of more than twenty years between us, both of us still are in some instances the "first" or the "only" woman in a particular situation.

Our sense is that both women and men share, to varying degrees, a sense that feminist issues are close, sometimes too close for comfort. While much (all?) of scholarly work is at some level about ourselves, feminism is so plainly, so unmistakably about the construction of our lives and relationships that the protective veneer of professionalism proves inadequate. But proximate it is. Because the work is both about ourselves and about the world we inhabit, we begin with how we came to do this work.

Carolyn Heilbrun:

A few years ago I was asked to offer a paper for discussion at a workshop in a law school, and submitted chapters from my then unpublished book, *Writing a Woman's Life.*[25] As a result, I met a group of west coast women lawyers and decided with that suddenness that we think of as connected only with falling in love, but which equally marks intellectual passions, that here was a context in which real changes in the language and stories of women might be enacted. These feminist women lawyers were not only constructing theoretical models, deconstructing the patriarchy, and analyzing texts—work whose importance I did not underestimate—they were also taking their theories, their beliefs, their ideas for political change into the courts and into the journals where law opinion is formed.

The importance of feminist (or any other) theory as the ground upon which change can be enacted was never, as far as I was concerned, in any doubt. Nonetheless, like many of those in departments of literature, feminist or not, I sometimes felt that we were just talking to ourselves when we should have been working in the public realm to change the political system known as the patriarchy, which serves men and conscripts women only for such lives as serve the men for whom the patriarchy has been

23. *See, e.g.*, CAROLYN HEILBRUN, *Gender and Detective Fiction*, in HAMLET'S MOTHER AND OTHER WOMEN 244 (1990).

24. *See, e.g.*, Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989).

25. CAROLYN HEILBRUN, *supra* note 9.

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constructed. These women lawyers were out there fighting where it mattered and might even make an immediate and palpable difference (an extraordinary idea to one in literature). My honeymoon, if I may continue my romantic imagery, is over, but I think that, unlike most infatuations, this one may well lead to a longer, if not notably stable, relationship.

It led, in fact, to my teaching two courses in feminism and law, or law and feminism as revealed in literature: one with Professor Subah Narasimhan and the other with Professor Judith Resnik. Our syllabi included law cases, literary works, literary criticism, and feminist theory. We who work with feminist theory have long known of the need for a new language representing women's experiences, and law had come close to finding words for long-standing female experiences that had been without names and therefore without the possibility of correction: "sexual harassment," "battered women," "child abuse," and "date rape" are examples. Women had long experienced these but had not named them. Now, the courts have begun slowly to recognize the experiences of women that differ from those previously dealt with by the law, not because women are essentially different in any but their reproductive capabilities, but because men had contrived the law to establish and codify behavior between men, who (ignoring race and class) are assumed to be persons encountering each other with a certain equality of the possibility of action, and between men and women, who are imagined by men to have only a limited range of action.

There is another factor about this teaching experience perhaps worth mentioning: Both law professors with whom I taught were young. Had I had children in my early twenties as was common with my generation of women, they could have been my daughters. What I found both significant and poignant was that neither of the young women professors interacted with me in a manner that forced upon us a generational encounter. We were women together, and we had agreed upon the power and ubiquity of man-made constructions that limited the possibilities of female action and choice. I think we felt none of that father-son competition of the sort that so frequently marks the interaction of generations among men. At the same time, the students reacted to us differently. As an older woman professor, perhaps unique in their law school experience, I seemed to embody a certain threat.

I write this article with Judith, but my experience was with both women, and the general lessons I draw from it are to that extent reinforced. Those lessons come under two headings: teaching feminism in law school and law and literature. I shall begin with the first.

I was not at all prepared for the angry response our students expressed to the content of this new course, and to me in my presentation of it. I have since learned from the experiences of others that, even today, a class in gender theory inserted into the curriculum of a largely patriarchal in-

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stitution, whether a school of criticism or a law school, causes aftershocks in two directions. One, easily enough anticipated, is fear and defensiveness among those who feel themselves and their secure positions in the society threatened by studies of gender arrangements. The other is the anger of the students who had thought themselves knowledgeable feminists, even if, as sometimes happened, they declined to call themselves feminists: an outrage for which even experience as long as mine had little prepared me.

In the early days of feminism, we were still exploring the effects and conditions of gender in culture and society; now, it is fair to say, we know more about how gender operates, and we are able to show its consequences and implications to the students with clarity. In the class, we presented analyses of the structures of religions, governments, families, and of political writings, from Plato and Aristotle through Rousseau and beyond, as well as historical references to women's relatively recent acquisition of political, professional, or legal rights.[26] The students' reaction was outspoken and abrasive. Anxiety arose, not only at the realization of how embedded these arrangements are, and how long they have, all but unnoticed, been in place, but also at the realization of the ways in which the culture and often the religion in which these women grew up were male-centered. They felt simultaneous loyalty to that culture and anger at it for demeaning them as women. It is not surprising that much of the anger at this message was displaced onto the messenger, that is, the professor, and also onto the outsider, that is, me. The lovely part of being a woman teaching law students is that they often speak in ways unavailable to them when with their male professors, but the speech sometimes lacks an awareness of the students' own power, of the interdependence of teacher and student, and of the needs of a teacher (particularly if she is one of few women on her faculty, or visiting from another faculty) to be accepted and supported as a teacher by the students.

Then the other aftershock developed: the ambivalence of all students, but especially women students, toward female authority figures. The classes studied the writings of Freud, Chodorow, and Dinnerstein, but no knowledge can soften the seemingly universal anger toward the mother. Nancy Chodorow[27] and Dorothy Dinnerstein[28] have emphasized how the parenting of infants by mothers (or substitute women) results in great anger toward the mother figure—particularly on the part of the girl who recognizes that the mother has failed to empower her as the mother has the boy. Children of both sexes resent what appears to have been the absolute power of the mother to give and withhold love in the infant's

26. *See, e.g.*, SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY (1989).

27. NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER (1978).

28. DOROTHY DINNERSTEIN, THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE (1976).

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earliest years. Double parenting is seen by feminists, if not as a panacea, at least as a way to undo the gender imbalance and ill-feeling resulting from exclusive female parenting.

I have learned, in years of teaching gender, that few women believe they were sufficiently loved by their mothers; this leaves a residue of anti-maternal resentment. In addition, women are expected to be nurturing and loving, not admonishing and powerful; a woman professor in her sixties was also a new and somewhat disturbing experience for the students. The classes, largely comprised of those who had only silently seethed under autocratic male professors, enacted a kind of group therapy before us that was not easy to suffer. They felt free to express the anger they dared not express to men. The instructors became, therefore, the objects of additional anger, not evoked by us but displaced onto us. While every woman teacher has an anecdote, if not several, of an aggressive young male student who challenges her authority, many white men have teaching careers without those confrontations, and to the extent that they worry about their interactions with students, their problems tend to be in being too powerful—"silencing" is today's term—not in seeking to find a place from which to speak. Interestingly, while the anger at female authority figures did not rapidly abate, the sense of cooperation among the women students intensified, as did the bonding among them.

What I have learned in this recent experience is that teaching as a feminist is not easy, either in early days or today. To the extent that colleagues say the problems will simply abate with time, twenty years has not proved them right. One must face students disturbed at what they learn; some so frightened they will denounce discussions about gender and return to the shelter of an established structure that offers no obvious danger. The culprit in their eyes is not gender, but the fear of what deconstructing gender ideology reveals—that formerly safe harbors of established cultural patterns, of religious life, of family and educational experiences contribute to the domination of women. In short, teaching about gender remains a risky and unsettling undertaking, and those who are nostalgic for the bad old days, when gender was treated as a law of nature rather than a system to be confronted and reformed, can still find encouragement in the arguments of those, like fundamentalists and neoconservatives, who fight to maintain the old patriarchal arrangements.

I am on happier ground discussing my own responses to law and literature because here I am fighting the old enemy, patriarchy, and if it is discouraging to fight the same battles over and over in different arenas, there is nevertheless an exhilaration possible in the early stages of a feminist fight when clarity of purpose and of issues have not yet been overtaken by the complexities and divisions of mature revolutions. Feminism is never, at any stage, monolithic, but at least in its early stages (or as with the current fight for women's choice to have an abortion), it has a certain

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wonderful single-mindedness. I have observed that those who fight revolutions and those who win their fruits are rarely the same persons. But occasionally those who fought have survived to fight again with renewed vigor. So it is with the questions of literature and law and the relations between them.

Judith Resnik:

When I started teaching law in the late 1970's, some twenty years after Carolyn began to teach English literature, a senior colleague offered to help me—by giving advice. Among his many suggestions was the following warning. "Be careful," he said. "Don't teach any area associated with 'women's issues.' Not trusts and estates, not family law, not sex discrimination. Teach the hard stuff—contracts, torts, procedure, property. And don't be too visible on women's issues."[29] I had come to law teaching in the midst of work already ongoing—on procedure, habeas corpus, and women in prison. I taught courses and wrote on all three topics.

Within a few years, I had to admit that my colleague's advice was close to the mark—descriptively. I was one of very few women then on the law faculty of my university.[30] Virtually all my male colleagues were interested in my work on the structure of adjudication and the Federal courts but less interested in my work on women in prison. (At the time of tenure, a person who reviewed one article commented that the essay on women in prison evidenced an odd choice of topic. There were so few women relative to men in prison; why write about women?) Further, the other women to whom my male colleagues also paid attention were those who taught and wrote about the "hard" stuff: corporations, law and economics, Federal courts, property.

This experience is by no means idiosyncratic. It is surely not a tale of any particular law school in the United States. As both quantitative[31] and powerfully poignant qualitative[32] articles have reported, in law teaching,

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29. Richard Delgado has a parallel story to tell about the advice given to him. *See* Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 561 (1984) ("When I began teaching law in the mid-1970's, I was told by a number of well-meaning senior colleagues to 'play things straight' in my scholarship—to establish a reputation as a scholar in some mainstream legal area and not get too caught up in civil rights or other 'ethnic' subjects."). As subsequent developments in feminist theory made plain, all law school courses are "associated with 'women's issues.' "

30. My situation was not unique; very few women were on faculties of any law school. *See* David Chambers, *SALT Survey: Women in Law School Teaching*, SALT Newsl., July 1983, at 1 (published by Society of American Law Teachers).

31. Richard Chused, *The Hiring and Retention of Minorities and Women in American Law School Faculties*, 137 U. PA. L. REV. 537, 548-49 (1988) (more than 35% of "high prestige" law schools have fewer than 13% of their teaching positions occupied by women, and 6.7% of surveyed institutions still have fewer than three women on their faculties).

32. Marina Angel, *Women in Legal Education: What It's Like To Be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMP. L.Q. 799 (1988); Sheila McIntyre, *Gender Bias Within the Law School: The 'Memo' and Its Impact*, 2 CANADIAN J. WOMEN & L. 362 (1987/88); *see also* Karen Czapanskiy & Jana Singer, *Women in the Law School: It's Time for More Change*, 7 LAW & INEQUALITY 135 (1988).

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women are few in number, often isolated, highly visible, and much scrutinized. During 1989, I was the Chair of the Section on Women in Legal Education of the American Association of Law Schools. Again and again, I heard stories—contemporary stories—of the risks of writing on the "soft" subjects of women and families and of the risks of writing from a feminist perspective. Some women's tenure battles have made newspaper headlines;[33] others have been quieter but no less painful.

In many of the settings in which women work in law schools, women are a distinct minority. The institutions are populated and controlled by men. We are present at their sufferance—at their vote. When one claims a space for women, there is the risk—of silence, marginalization, trivialization. For many it remains safe, prudent, to heed the advice of my colleague and to attempt to pass, albeit wearing skirts, as a "regular" law professor.

But there are some signs of change, even of improvement. Women's numbers in law teaching are rising (often in jobs at the lower echelons of those valued by the profession[34]). During the 1970's and 1980's, women law professors developed a critique of the content of the "traditional courses,"[35] wrote books and articles, and taught courses on women in the law and on feminist jurisprudence.[36] Women law students founded

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33. *See, e.g.*, Maitland Zane, *Professor Gets Her Job Back—Tenure Too*, San Francisco Chron., Aug. 26, 1989, at A2 (A woman, initially denied tenure at law school, contested that denial. Outside reviewers considered eight tenure files—hers included—before that faculty during relevant time period. Of eight cases, six men had been given tenure, and one man denied tenure. Reviewers ranked her as being well within range of those tenured, and law school acquiesced and gave her tenure.); Steve Curwood, *A Tenure Battle at Harvard Law*, Boston Globe, July 19, 1987, at 83; *see also* Tamar Lewin, *Job Offer to Feminist May Mark Turn*, N.Y. Times, Feb. 24, 1989, at B5, col. 3. *See generally* Bernice Sandler, The Campus Climate Revisited: Chilly for Women Faculty, Administrators, and Graduate Students (1986) (available from Project on the Status and Education of Women, Assoc. of Am. Colleges).

34. Richard Chused, *supra* note 31, at 539 ("Women are entering law school teaching in non-tenure track contract positions to teach legal writing at very high rates."). The question, of course, is whether the traditional hierarchy of value is itself to be reconsidered. *See* BARBARA HERRNSTEIN SMITH, CONTINGENCIES OF VALUE (1988).

35. Nancy Erickson, *Sex Bias in Law School Courses: Some Common Issues*, 38 J. LEGAL EDUC. 101 (1988); Mary Joe Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U.L. REV. 1605 (1985); Ann Shalleck, *Report of the Women and the Law Project: Gender Bias and the Law School Curriculum*, 38 J. LEGAL EDUC. 97 (1988).

36. According to a recent directory of the American Association of Law Schools, 100 professors teach or have taught courses on women and the law. ASSOCIATION OF AMERICAN LAW SCHOOLS, DIRECTORY OF LAW TEACHERS 1989-90, at 1059-60. For course books, see KENNETH DAVIDSON, RUTH BADER GINSBURG, & HERMA HILL KAY, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION (1974); HERMA HILL KAY, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION (2d ed. 1981) (3d ed. 1988); BARBARA ALLEN BABCOCK, ANN E. FREEDMAN, ELEANOR HOLMES NORTON & SUSAN C. ROSS, SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES (1975); RHONDA COPELON, ANN FREEDMAN, SUSAN DELLER ROSS, NADINE TAUB & WENDY WILLIAMS, SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES (2d ed. forthcoming); and J. RALPH LINDGREEN & NADINE TAUB, THE LAW OF SEX DISCRIMINATION (1988); *see also* Kate Bartlett & Rosanne Kennedy, Feminist Legal Theory: A Reader (Fall 1989) (manuscript on file with authors). For the AALS/ABA jointly sponsored conference, "The Voices of Women: A Conference on Women in Legal Education" (N.Y.U. Law School, Apr. 20-21, 1990), Paul George and Susan McGlamery of the law library of the University of Southern California Law Center prepared a bibliography of books and articles on women and the law; the bibliography runs some 70 pages long (manuscript on file

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women law associations, created journals, and described their discomfort with law schools.[37] During the 1980's, the American Bar Association appointed a commission to ponder the role of women.[38] State courts around the country study "gender bias in the courts."[39] In the spring of 1990, the American Association of Law Schools joined the ABA's Commission on Women in the Profession and its Section on Legal Education and Admissions to the Bar to host a national conference on women in legal education.[40]

By 1988, Carolyn Heilbrun could think it almost natural to come upon a group of women law professors engaged in feminist work. The year after, deans of two law schools could easily agree to add a course we proposed to teach, Feminist Theory: Law and Literature, to their curricula.

II. Literature and Law

Carolyn Heilbrun:

I came to the study of law and literature admiring the achievements of law and eager to see the insights gathered over years of exposure to literature enacted into public policy. I found, however, that I do not see the importance of literature to law, and particularly to the law's treatment of women, as most of the lawyers who write on law and literature see it.

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with authors).

37. Journals based at United States law schools devoted to women and the law include: *The Women's Rights Law Reporter* (Rutgers Law School, founded 1971); *Berkeley Women's Law Journal* (founded 1985; published yearly); *Women's Law Forum of the Golden Gate Law Review* (founded 1979; published yearly); *Harvard Women's Law Journal* (founded 1978); *Women and Law* (Hofstra, founded 1978); *Wisconsin's Women's Law Journal* (founded 1985); *Yale Journal of Law and Feminism* (founded 1989); and *Canadian Journal of Women and the Law* (founded 1985). Articles on women in law schools include: Patricia A. Monture, *Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah (The Way Flint Women Do)*, 2 CANADIAN J. WOMEN & L. 159, 162 ("I had spoken, but I did not feel like many people had listened."); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1323 (1988) (alienation of twenty women at Yale Law School detailed; "The pictures, the furniture, the male professors—all indicated that the place had always belonged to white men."). *See generally* Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137 (1988) (study of classroom interactions); Stephanie M. Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. LEGAL EDUC. 147 (1988).

38. In August of 1987, the American Bar Association established a Commission on Women in the Profession, chaired by Hilary Rodham Clinton. At the 1988 Annual Meeting, the House of Delegates of the ABA adopted Resolutions calling upon the ABA and all members of the legal profession to eliminate overt and subtle barriers to women's full integration and equal participation in the legal profession. ABA Commission on Women in the Profession, Report to the House of Delegates, Aug. 10, 1988 (on file with authors). In 1989, the ABA House of Delegates adopted a resolution calling for the use of gender neutral language. ABA Section of Tort and Insurance Practice and the Commission on Women in the Profession, Report to the House of Delegates, Feb. 6, 1989 (on file with authors).

39. Lynn Hecht Schafran, *Gender Bias in the Courts: An Emerging Focus for Judicial Reform*, 21 ARIZ. ST. L.J. 237, 237 (1989) ("At their 1988 joint annual meeting, the Conference of Chief Justices and the Conference of State Court Administrators adopted resolutions urging each chief justice to establish a task force 'devoted to the study of gender bias in the court system.' "). As of April 1989, 27 states either had or were considering convening gender bias task forces. *Id.* at 247.

40. "The Voices of Women: A Conference on Women in Legal Education" (N.Y.U. Law School, Apr. 20-21, 1990) (sponsored by AALS, ABA Commission on Women in the Profession, and ABA Section on Legal Education and Admissions to the Bar) (brochure on file with authors).

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Robin West and Judith Koffler are examples of those who have understood the importance of literature in increasing lawyers' understanding of how those, not as culturally or socially endowed as they, might see what the privileged must be always persuaded to see. But even West and Koffler write of literature more as it relates to law than as it casts light upon the conditions of women and evokes understanding of the ways in which patriarchy assaults women's rights and choices.[41] Literature, as it has so far been discussed by lawyers in law journals, rarely is considered as a source by which readers may come to understand the sufferings of women.[42]

As I began teaching in law schools, I had before me an example of someone who had repeatedly used literature to evoke moral understanding in his students. Robert Coles, a physician, psychiatrist, professor of a wonderfully roving kind, began by teaching literature to medical students in "hopes of doing moral and social inquiry."[43] As Coles would describe this process in his book *The Call of Stories: Teaching and the Moral Imagination*, " 'You don't do that with theories. You don't do that with a system of ideas. You do it with a story, because in a story—oh, like it says in the Bible, *the word becomes flesh.*' "[44]

Coles has been teaching in this manner since 1978, and he has expanded his teaching through stories to, it seems, almost every professional school at his university. As he put it, "I decided to extend my teaching further, to see if novels and stories might be of use to others in other parts of Harvard University."[45] He taught "Dickens and the Law" at the law school; stories about business and the law at the business school; novels about spiritual matters with students at the divinity school; and Ibsen's play *The Master Builder* to students in the school of design. Coles' book describes with immediacy and great personal honesty his experience of confronting moral issues with students in all of these courses. "The decisive matter," he has written, "is how the teacher's imagination engages with the text—a prelude, naturally, to the student's engagement."[46]

Like Coles, I had been reading "stories" since early childhood, and I wanted to engage the students through my own engagement. Coles was a fine exemplar, except for one thing: he almost never discusses the role of women in the texts he chooses, nor, one gathers, in the classes he teaches. He reports two occasions when women students objected to the women characters in the stories of Walker Percy and John Cheever,[47] but other-

41. *See supra* note 3 (articles by Judith Schenck Koffler and Robin West).
42. *Cf.* Linda Hirshman, *supra* note 1, at 196–201; Carol Sanger, *supra* note 8, at 1338–46.
43. ROBERT COLES, THE CALL OF STORIES: TEACHING AND THE MORAL IMAGINATION xvi (1989).
44. *Id.* at 128 (quoting student) (emphasis in original).
45. *Id.* at xviii.
46. *Id.* at 190.
47. Coles discussed the Percy novels in general, *id.* at 140, and the Cheever story, *The House-*

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wise Coles assumes throughout that the moral problems facing men and women are the same, are similarly evoked by great writers, and that the treatment of women—by medicine, law, business, theology, and architecture—presents no moral issues that themselves demand confrontation.

Our aim was, however, directly focussed on the experiences of women as they relate to law, and particularly on how an understanding of those experiences might empower the students and eventually affect the man-made laws by which women live. The legal cases we read, like *Hoyt v. Florida*[48] and *Michael M. v. Superior Court*,[49] would, we hoped, be illuminated by the texts we had chosen. I took my inspiration from *A Doll's House*, and particularly from some "notes for a modern tragedy" Ibsen had jotted down before beginning to write that play:

> There are two kinds of moral laws, two kinds of conscience, one for men and one, quite different, for women. They don't understand each other; but in practical life, woman is judged by masculine law, as though she weren't a woman but a man.
>
> The wife in the play ends by having no idea what is right and what is wrong; natural feelings on the one hand and belief in authority on the other lead her to utter distraction.
>
> A woman cannot be herself in modern society. It is an exclusively male society, with laws made by men and with prosecutors and judges who assess feminine conduct from a masculine standpoint.
>
> She has committed forgery, and is proud of it; for she has done it out of love for her husband, to save his life. But this husband of hers takes his standpoint, conventionally honourable, on the side of the law, and sees the situation with male eyes.
>
> Moral conflict. Weighed down and confused by her trust in authority, she loses faith in her own morality, and in her fitness to bring up her children. Bitterness. A mother in modern society, like certain insects, retires and dies once she has done her duty by propagating the race. Love of life, of home, of husband and children and family. Now and then, as women do, she shrugs off her thoughts. Suddenly anguish and fear return. Everything must be borne alone. The catastrophe approaches, mercilessly, inevitably. Despair, conflict, and defeat.[50]

In *A Doll's House*, Ibsen wrote the following lines:

> *Torvold*: No man would sacrifice his *honour* for the one he loves.
> *Nora*: Thousands of women have.[51]

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breaker of Shady Hill, id. at 157.

48. 119 So. 2d 691 (1959), *aff'd*, 368 U.S. 57 (1961).

49. 450 U.S. 464 (1981).

50. MICHAEL MEYER, IBSEN: A BIOGRAPHY 466 (1971) (quoting from Ibsen's notes).

51. HENRIK IBSEN, A DOLL'S HOUSE, Act 3, at 230 (Peter Watts trans. 1965).

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I began, therefore, with the assumption that over 110 years later, the imbalance in the law as it affects men and women has changed little. True, women have more rights now under the law: They are not sold into bondage when they marry, they may own their own property, they may be executors of estates and follow professions. But the essential conflict of Ibsen's play is still largely intact, which is probably why it is still so effective on the stage. (I saw it some years ago with Liv Ullman; the audience obviously felt in the presence of contemporary tragedy.) The Law still sees itself with "male eyes." The sentences: "A woman cannot be herself in modern society. It is an exclusively male society, with laws made by men and with prosecutors and judges who assess feminine conduct from a masculine standpoint," still reverberate, if my reading of many law articles by feminists is any indication.

But Ibsen's words do not reverberate in the relatively new field of law and literature, where male voices are heard almost exclusively. No man's work on law and literature that I have been able to discover has (with one exception) even noticed the place of women in the field. That exception is Stanley Fish who, though I understand he teaches contracts in a law school, made his considerable reputation as a professor of English and has, to his credit, allowed feminist contributions in literary studies to affect his writing and thinking.[52]

Here he is on the ever fraught subject of pronouns:

> [T]he man who refuses to substitute 'he or she' for 'he' and believes that in doing so he is remaining true to his prefeminist self, is self-deluding; for the fact that he feels obliged to refuse marks his act as different from the one he used to perform when he wrote 'he' without any awareness that it was a choice. Feminism 'has' him, in the sense of determining his behavior no matter what he does.[53]

Lacking Fish's awareness, the writers of law books on law and literature seem not to have noticed that the choice is theirs. For example, a recently published compilation of essays entitled *Interpreting Law and Literature: A Hermeneutic Reader* and edited by Sanford Levinson and Steven Mailloux, is dedicated: "For Stanley Fish, whatever the consequences,"[54] but the editors show little inclination to follow the consequences of his insights. Levinson and Mailloux explain that "recent literary theory" has shown the "costs of excluding 'certain types of questions'

52. STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989).

53. *Id.* at 24; *cf.* RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 311 (1988) ("the attempt by some feminists to coerce the adoption of a 'gender-neutral' vocabulary is an attempt at censorship defended by reference to the effect of language in shaping thought").

54. INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (Sanford Levinson & Steven Mailloux eds. 1988) (dedication page).

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from the self-confident discourse of the discipline" and that their anthology is aimed at opening up perspectives and meanings not yet available to law.[55] Yet their canon is similarly self-confident and exclusionary: the categories given, "Politics and Interpretative Theory," "The Question of Method," and "Rhetorical Politics" include no mention of feminist work.[56] As Judith Koffler pointed out in her review of the volume, one of the few articles by a woman (Clare Dalton) "has been radically unsexed, with editorial amputations mutilating its feminist arguments."[57] Koffler observed that (but for one contributor's passing mention of feminism), a reader would have no suspicion of the flood of feminist writings that address the debates raised in the Levinson and Mailloux collection.[58]

But Koffler's most crushing comment is aimed at the work, *Law and Literature*, by Richard A. Posner.[59] A good portion of his book, she points out,

> admittedly is a rescue effort to redeem "valid" law and literature studies from the apparently wrong-headed, politicized, tendentious writing of the "law and lit" subversives. The idea that seems to obsess Posner is that interpretation in literature cannot be interpretation if it draws support for an "ethical or political position" from a text.[60]

For Posner, Koffler tells us, the law and literature movement's focus on literature is "a moral and political challenge to the law's mask of justice."[61] We are, therefore, to conclude that law and literature, like law and economics, was designed exclusively for the defense of the free-market, "disinterested," reasonable world of manly law. That, no doubt, explains why women's voices and literature about women have been excluded.

In the English literature that I teach, which includes modern British literature from 1875 to 1945 and the novel from its beginnings in the eighteenth century, the question of marriage and the figure of woman are always prominent. From *Moll Flanders* by Daniel Defoe and *Clarissa* by Samuel Richardson through the novels of Jane Austen, William Makepeace Thackeray, Charlotte, Emily, and Anne Brontë, George Eliot, Wilkie Collins, Thomas Hardy, Henry James, E.M. Forster, D.H. Lawrence, and Virginia Woolf, women have carried within their prescribed

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55. *Id.* at xi-xiii.
56. *Id.*
57. Judith Schenck Koffler, *Forged Alliance*, *supra* note 3, at 1388.
58. *See id.* Koffler refers us to a note from one of the contributors to that volume who observes that "law and economics, critical legal studies, law and literature, and (last) feminism [are] the four horsepersons of the apocalypse." *Id.* at 1387 n.38.
59. RICHARD A. POSNER, *supra* note 53.
60. Judith Schenck Koffler, *Forged Alliance*, *supra* note 3, at 1382 (citation omitted).
61. *Id.* at 1384.

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and limited lives the large questions of human destiny just as, in Ibsen's mind, Nora in *A Doll's House* carried that destiny. Although the reading of texts by women and the listening to long unheard voices in accounts by women so far hidden from history are vital to my hopes for the study of literature in schools of law, the words of men when writing of women characters also require attention. It is a man, Thomas Hardy, who gave to a woman character the words: "It is difficult for a woman to define her feelings in language which is chiefly made by men to express theirs."[62] In our classes, we knew the importance of tracing women's voices in documents other than the appellate court opinions that describe them; what I had to offer was a few of the words of women and men authors who spoke, imaginatively, of the amazing and unrecognized desires and needs of women.

And here I come to one of the accomplishments of the law classes I team-taught. The criticism of *Jude the Obscure* in literary classes and publications has been, when it comes to Sue Bridehead, deplorable. Let me remind those of you who have not read Hardy's novel lately that the problem with Sue is that she doesn't like marriage because it licenses the man to have sex on the premises whenever he wishes, and, that worse, she doesn't think a woman should ever have sex unless she wants to. This makes her a very peculiar woman, but, as John Goode, a feminist literary critic, points out, nobody ever confronts Jude with the choice of being a man or being peculiar. I borrow again from Goode, who, alone in my experience, has understood Sue:

> Most accounts of *Jude the Obscure* cannot cope with Sue except by reference to some ideologically structured reality. This usually enables the critic to say one of two things, both of which are demonstrably false representations of the text: either that Hardy's presentation of Sue is inconsistent, or that she is a neurotic type of the frigid woman.[63]

What is so bothersome about Sue, Goode points out, is her "subjecting of experience to the trials of language . . . . Sue is destructive because she utters herself—whereas in the ideology of sexism, the woman is an image to be uttered."[64] Goode finds it amazing "how many critics either despise Sue or blame Hardy for the confusion without ever asking whether the difficulty resides in the ways in which we articulate the world."[65] Sue tells Jude, "I have not felt what most women are taught to feel."[66] As

62. THOMAS HARDY, FAR FROM THE MADDING CROWD, ch. 51 (New Wessex ed. 1974).
63. John Goode, *Sue Bridehead and the New Woman*, in WOMEN WRITING AND WRITING ABOUT WOMEN 101 (Mary Jacobus ed. 1979).
64. *Id.*
65. *Id.* at 102.
66. THOMAS HARDY, *supra* note 14, part III, § III-4.

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another character in the novel observes, horrified at Sue's refusal to be raped in the marriage bed: "if people did as [Sue does], there would be a general domestic disintegration. The family would no longer be the social unit."[67]

Although *Jude the Obscure* is not included on any of the reading lists surveyed by Gemmette in her review of law and literature classes,[68] we taught *Jude* in our classes. I was encouraged to find that no woman or man in either law class I team-taught had any difficulty at all understanding Sue. Unlike my literature students, they had read law cases having to do with rape, consent, marriage, and battering, as well as Adrienne Rich's essay "Compulsory Heterosexuality."[69] They knew, for example, the case of *Michael M. v. Superior Court*,[70] in which the constitutionality of California's law on statutory rape was challenged. The defendant, a man, argued that the law could not penalize him for sexual contact with a girl below a statutorily-defined age of adulthood. The four opinions written by members of the then all-male United States Supreme Court addressed the case as if it raised only the question of statutory rape: the regulation of sexual behavior between consenting participants of different ages. To varying degrees of explicitness, the shared assumption of the Justices was that the encounter between the two was voluntary.[71] In Justice Blackmun's words, "she willingly participated" during parts of the encounter.[72] Yet the record, also as quoted by Justice Blackmun, contained her testimony that:

> [H]e told me to take my pants off. I said, "No," and I was trying to get up and he hit me back down on the bench and then I just said to myself, "Forget it," and I let him do what he wanted to do . . . .[73]

The law students knew that the law has ignored women who have said no to sex, that the law has ignored women who had been beaten or harassed, and that even when the law has acknowledged the existence of such violence, the level and degree of intrusion had to be high to obtain attention.[74] In short, if literature and law are read together, despite the

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67. *Id.* at part IV, § IV-4.

68. *See* Elizabeth Villiers Gemmette, *supra* note 1, at app. II.

69. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in BLOOD, BREAD, AND POETRY: SELECTED PROSE 1979-1985, at 23 (1986).

70. 450 U.S. 464 (1981).

71. Justice Rehnquist wrote for the plurality; Justice Stewart wrote separately to concur and thus formed the majority that upheld the statute. Justice Blackmun concurred only in the judgment, while Justice Brennan, joined by Justices White and Marshall dissented; Justice Stevens wrote a separate dissent. *Id.*

72. *Id.* at 484.

73. *Id.* at 485 n.*. *See generally* Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984).

74. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (sexual harrassment); Dixon v. United States, 565 A.2d 72 (D.C. 1989) (self-defense) (discussed *infra* notes 134–48 and accompanying text); Teresa Godwin Phelps, *Stories of Women in Self-Defense*, 2 YALE J.L. & FEMINISM 189 (1989);

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personal agonies that inevitably ensue, the reputed objectivity of the male world of law—and, one supposes, economics, humanities, literature—cannot long be sustained. Law informs literature as well as literature informing law; when feminist teachers of the two disciplines joined together, we found plenty of shared experiences of the subjugation and neglect of women.

In many respects, much has changed since Thomas Hardy published the book in 1895. Jude's life has changed, and the issues of class prejudice that stunted his chances for an education have also changed. Jude could now go to Oxford, and the College for Working Men established at Oxford almost a century ago was almost named after Jude. Yet Sue Bridehead's problems, the demands on her sexuality, are as real today as when Hardy wrote of them. While *Jude the Obscure* is a text much used by Robert Coles—there are eight references to it in his book[75]—Sue Bridehead is never mentioned. Because of law cases which have gone some way toward establishing women's rights to their own bodies, Sue Bridehead's arguments and protests illuminate legal cases concerning those sexual rights, as legal cases illuminate her desperate condition. Had Robert Coles read *Michael M.*, he too might have been able to address the morality of Sue's choices. Law and literature allow those who have studied both to read both legal and literary texts wisely.

Feminism is, of course, the fulcrum here. Stanley Fish may point out that some writers on law and literature do not understand the finer points about how literature operates (he does so with a brilliance I heartily recommend in his essay called "Don't know much about the Middle Ages: Posner on Law and Literature"),[76] but there were many literary critics in the bad old days (the 1950's, 1960's, and before) whose ideas regarding women even Posner might find retrograde. The really bad old days of literary criticism (and much else) have been left further behind by literature than by legal studies. Feminist criticism and post-structuralist criticism have had almost twenty years in which to perfect theories and techniques, and to revise ideas of what to read and what to value. Surely law could well benefit from the fruits of those two decades, both in the reading of the new literature by women now available and in the reading and interpretation of texts not usually read in law classes.

Feminist literary criticism (to say nothing of feminist writings in philosophy, political science, classics, art history, and science) has been as innovative in theory, as far-reaching, and as exciting as any other form of literary activity in the past fifteen years, and considerably more compel-

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Karen Wiviott, Equal Protection, Reasonableness, and the Decoy of Psychological Testimony: The Case of Battered Women Who Kill (submitted for Feminist Theory: Law and Literature, Yale Law School, 1989) (manuscript on file with authors).

75. ROBERT COLES, *supra* note 43, at 80–81, 82, 88, 185, 186, 189, 201–02, 203.

76. STANLEY FISH, *supra* note 52, at 294–311.

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ling than most. It would seem odd to repeat some of its history in this essay, were it not for the virtual absence of its mark on "law and literature." Central to feminist literary theory has been the discovery, not only of the history of women's oppression, but of the necessity of women's developing their own language and their own narratives; until now, they have been dependent upon those provided by the patriarchy. By way of an all too brief encapsulation of a complex history of feminist literary criticism, suffice it here to say that feminist criticism began with a study of images of women in literature: the ways in which women were represented, disempowered, forced into stereotypical molds, and punished for any refusal to conform. Susan Koppelman Cornillon's *Images of Women in Fiction: Feminist Perspectives*[77] is an example of this early form, naive, but still, as far as I could see, not yet often considered by law students. Tolstoy's *Anna Karenina*, for example, is a fine instance of an accomplished novel wholly contrived to prevent its heroine from any destiny but conformity or death. Indeed, as Nancy K. Miller has observed of eighteenth century novels, there were but two possible fates for heroines: euphoric or dysphoric, marriage or death, and they were frequently indistinguishable.[78] (Most obviously, the woman lost her personhood upon marriage, her person being united with her husband's into one person: him.)

In 1985, Elaine Showalter edited a volume entitled *The New Feminist Criticism: Essays on Women, Literature, and Theory*[79] that contained essays indicating the progression of feminist criticism through the early 1980's. The use by feminist critics of French theory[80] brought great theoretical sophistication to the genre, as did the works of the French masters Foucault, Lacan, and especially Derrida who introduced deconstruction.[81] The publication in 1979 of *The Madwoman in the Attic: The Woman Writer and the Nineteenth Century Literary Imagination*,[82] by Sandra Gilbert and Susan Gubar, marked the culmination of feminist literary criticism that revealed the subtext of women's writings and the dangers that a woman faced if she allowed herself to assume the role of writer, a role defined as masculine. In a series of brilliant readings, Gilbert and Gubar changed forever the ways in which women's writings are read.

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77. IMAGES OF WOMEN IN FICTION: FEMINIST PERSPECTIVES (Susan Koppelman Cornillon ed. 1972).

78. NANCY K. MILLER, THE HEROINE'S TEXT xi (1980).

79. THE NEW FEMINIST CRITICISM: ESSAYS ON WOMEN, LITERATURE, AND THEORY, *supra* note 22.

80. *See* NEW FRENCH FEMINISMS: AN ANTHOLOGY (Elaine Marks & Isabelle de Courtivron eds. 1980).

81. *See* Linda Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 SIGNS 405, 415 n.24 (1988). For the disjuncture between some critical theorists and feminists, see Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59.

82. SANDRA M. GILBERT & SUSAN GUBAR, THE MADWOMAN IN THE ATTIC: THE WOMAN WRITER AND THE NINETEENTH CENTURY LITERARY IMAGINATION (1979).

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More recently, the collection *Feminist Studies/Critical Studies*,[83] edited by Teresa De Lauretis, with an introductory essay by her, indicates where feminist studies generally (not only in literature) were a few years ago. Then, as now, the central issues facing feminist studies in departments, institutions, and professional schools which have included feminism in their curriculum for most of these two decades are: the definition of gender; the definition of women; the importance of race and class; the interpretation of sexuality and of work; the legitimacy of the personal as women have begun increasingly to use it in critical studies; and the conflict between theoretical feminism and political action.

Obviously, for those who, like me, attempted to impart the fruits of these two decades of scholarship and criticism in one course in a law school, the difficulties were great. While it was necessary to begin somewhere near the beginning (with the images of women in literature), one was always proleptically using developments from a later stage. This process was made both easier and more difficult, as I found, by the fact that law students are intelligent and sophisticated, yet (like many younger people) largely unaware not only of what feminist criticism has produced, but even of the history of feminism in the last two decades. Despite this, some, like myself, turn now to the world of law where what we have learned may be implemented, made flesh. And the feminist lawyers, to judge by their writings, have been all one might wish. Yet when I, a literary critic hiding out in the country of law, discover a whole new area called "law and literature," I learn that feminism has no part in it, that it is again a male domain, and seems in its whole history to have learned nothing from the best of literary criticism in the past two decades. We women look to these studies of law and literature in which we ought to have participated and find few women's voices, no women's language or narrative, no awareness of the importance of listening with open ears if one is to initiate a field of study.

Feminist classes like ours enable the response of students to the particularly female experiences in the fiction to be more strongly, more deeply felt: such fiction is often the only opportunity for the expression or conscious recognition of feelings. And so in reading *Jane Eyre*, *The Mill on the Floss*, the *Princess of Cleves*, or *Villette*, or the books we read in our course,[84] students were encouraged to respond deeply to representations of female experience they had themselves known and wished both law and their law professors to recognize. Perhaps if women's writings, and writings about women by men who imaginatively re-created the condition of womanhood, are sufficiently studied in law school classes, the writings of our literary contemporaries will not, in 112 years, continue to be as rele-

83. FEMINIST STUDIES/CRITICAL STUDIES (Teresa De Lauretis ed. 1986).

84. *See* Appendix (reading list).

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vant and threatening, and reverberate with so much meaning as, alas, Ibsen's words still now do.

Judith Resnik:

A. *The New Canon Is the Old*

Looking from the "law" side at "law and literature," much of the written work in the area has thus far been devoted to one of two inquiries: law *in* literature or law *as* literature.[85] Law *in* literature may be a window into understanding how lawyers are perceived by the larger culture,[86] or, alternatively, a vehicle by which the educated lawyer becomes a certain kind of well-read humanist.[87] Law *as* literature has become a playing field for arguments about intentionality,[88] objectivity,[89] and meaning;[90] a good deal of the commentary is directed to whether and how legal meaning and literary meaning divide.[91] Neither of these two aspects addresses a third issue: canonicity.

While some of the history of the domain "law and literature" has been told,[92] relatively little attention has been paid to the question of the canon—of who is given voice, who cited, quoted, repeated, and who marginalized, ignored, submerged. In general, the choice of texts has been

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85. Robert Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUM. 1 (1988), provided this topology, as did William Page, *The Place of Law and Literature* (Review Essay), 39 VAND. L. REV. 391, 393 (1986). David Papke described these two "intellectual axes" as "early American Law and Literature scholarship," and argued that three voices (those named in the title of his essay) can be heard. David Ray Papke, *Neo-Marxists, Nietzscheans, and New Critics: The Voices of the Contemporary Law and Literature Discourse*, 1985 AM. B. FOUND. RES. J. 883, 885; *see also* Elizabeth Villiers Gemmette, *supra* note 1, at 267–68 ("Law in Literature, Literature in Law, and The Legal Imagination" are the "three sub-categories" of the field); Judith Schenck Koffler, *Forged Alliance*, *supra* note 3, at 1375 (identifying two aspects of field, "one, an alliance that aims at generating political friction, intentionally going against the grain; and two, an effective agitation of the organs of power").

86. Carol Sanger describes this activity as the "interesting though somewhat narcissistic inquiry more traditionally undertaken by law people when dissecting literature, as it suggests perceptions about the power or influence of law for civilians." *See* Carol Sanger, *supra* note 8, at 1339–40.

87. *See, e.g.*, ROBERT FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE (1984). As to what one should read, see John H. Wigmore, *A List of One Hundred Legal Novels*, 17 ILL. L. REV. 26 (1922), and Richard Weisberg, *Wigmore's "Legal Novels" Revisited: New Resources for the Expansive Lawyer*, 71 NW. U.L. REV. 17, 25 (1976).

88. *See, e.g.*, STANLEY FISH, *supra* note 52, at 294.

89. Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

90. Stanley Fish, *Fiss v. Fish*, 36 STAN. L. REV. 1325 (1984); Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982); John D. Ayer, *The Very Idea of "Law and Literature"* (Book Review), 85 MICH. L. REV. 895 (1987).

91. *See, e.g.*, Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986); Robin West, *Adjudication Is Not Interpretation: Some Reservations About the Law-as-Literature Movement*, 54 TENN. L. REV. 203 (1987).

92. *See, e.g.*, William H. Davenport, *Readings in Legal Literature: A Bibliographical Supplement*, 43 A.B.A. J. 813 (1957); William H. Davenport, *A Bibliography: Readings in Legal Literature*, 41 A.B.A. J. 939 (1955); Elizabeth Villiers Gemmette, *supra* note 1, at 285–90; Judith Schenck Koffler, *Forged Alliance*, *supra* note 3; Harold Suretsky, *Search for a Theory: An Annotated Bibliography of Writings on the Relation of Law to Literature and the Humanities*, 32 RUTGERS L. REV. 727 (1979).

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unquestioned. For the law *in* literature genre, Herman Melville's *Billy Budd*, William Shakespeare's *The Merchant of Venice*, and Franz Kafka's *The Trial* are standards. "Our" great books, in which law plays an interesting part, appear as if by collective agreement on many reading lists.[93] For law *as* literature, the "law" tends to be judicial opinions, and especially those of the United States Supreme Court. Robert Ferguson explains this choice: Judicial appellate opinions are the "most creative and generally read literary form in the law."[94]

The "most . . . generally read." The assumed passivity is striking, for as almost two decades of feminist literary criticism (inter alia[95]) has demonstrated, "generally read" is a category created by choices. As a law student, I read from assignment sheets prepared by law teachers; as a law teacher I prepare assignment sheets. What is handed down, preserved, repeated, enshrined is that which "we" (who have the power to ask or to tell others to read) say must be read.[96] Once the act of choice is made plain, a series of questions emerge: What shall "we" tell our colleagues and students to read? What shall "we" suggest to put into the category of the "most . . . generally read"? And what is learned by looking at what has *not* been "generally read"?

Carolyn has already demonstrated the insights gained from novels, such as *Jude the Obscure*, not commonly found in "law and literature" reading lists.[97] My responses are directed toward the law side, toward the tradition of looking to Supreme Court opinions as the "texts." How did such opinions get to be *the* "texts"? A first claim would be that, given the structure of authority in the United States, given the understanding of Supreme Court promulgations, if constitutionally-based, as binding upon other branches of the Federal government, the states, and upon occasion, as ruling Indian tribes as well,[98] the answer seems easy: The claim is that these are the texts in which law occurs in its most powerful form.

True? Lawyers and law students rapidly learn that Supreme Court opinions have force, but that such force is mitigated by subsequent interpretation, by distinctions drawn, and sometimes, even by direct abandon-

93. According to Gemmette, the most commonly read five are the three listed above, as well as Albert Camus' *The Stranger* and Charles Dickens' *Bleak House*. Elizabeth Villiers Gemmette, *supra* note 1, at 332-33.

94. Robert Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUM. 201, 201-02 (1990).

95. *See* Richard Delgado, *supra* note 29 (on absence of citation, by white male constitutional scholars, to work by non-whites); *see also* BELL HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM (1981) (feminist studies taught from white perspective); Regina Austin, *supra* note 1 (absence of focus on women of color); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Adrienne Rich, *supra* note 69 (lesbian existence not part of many inquiries, including feminist scholarship).

96. *See* BARBARA HERRNSTEIN SMITH, *supra* note 34, at 10.

97. *See also* Linda Hirshman, *supra* note 1; Carol Sanger, *supra* note 8.

98. The a-constitutional relationship between tribes and the Court is examined in Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 3.

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ment.[99] Moreover, lawyers know the breadth of the space between pronouncement and change. The technical terms—"implementation," "enforcement" of decrees, "attachment," and "execution"—describe the world of "post-judgment" remedies, all aimed at turning the signed judgment into events in individuals' or communities' lives. Studies of post-pronouncement and post-decree implementation all too often document that court orders are not readily, fully implemented, and sometimes are ignored.[100]

The space between judgment and implementation is not to be bemoaned as a failure of courts. Indeed, the dependence of courts upon others to effectuate decrees is the judiciary's saving grace and a major source of its legitimacy. As Robert Cover reminds us, courts do violence, but not directly.[101] Between the order for execution and the act of execution is an array of people. It is both that violence is justified by reasons and that violence occurs by collective process that gives some solace to (and hides) the reality that courts are instruments of violence.

Carolyn Heilbrun, English professor that she is, came upon "a group of west coast women lawyers" whom she envisioned as "out there fighting where it mattered and [who] might even make an immediate and palpable difference."[102] We women lawyers enjoy the compliment, love the sense of efficacy, indulge ourselves in believing it, and may even, occasionally, prove it to be right. But we also see the spaces between court "victories" and lives unaffected by the "new" rule of law. We know the risks of repeating the stories already told, of law not as a vehicle for changing but for reaffirming the arrangements of the status quo.[103] To the extent that United States Supreme Court texts are read because they are the "law," we—who read lower court opinions, consent decrees, regulations, other documents of implementation, as well as plays like *A Raisin in the Sun*[104]—know the limits of the claim of authority. We who are close to litigation know the power of adversaries and of trial judges; we know the many ways for law to work such that no opinions are written, no appeals are taken, but lives are changed.

In short, Supreme Court opinions are not as powerful as conventional

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99. That abandonment can occur by the Supreme Court or by lower courts, which have upon occasion determined that precedents have been eclipsed by subsequent events. *See* Judith Resnik, *Constructing the Canon*, 2 YALE J.L. & HUM. 221 (1990); *infra* text accompanying notes 105–15.

100. *See* BUREAU OF THE CENSUS, CHILD SUPPORT AND ALIMONY: 1981 (1983) (advance report authored by Ruth Sanders) (45% of women who received child support obtain full amount due); M. Kay Harris & Dudley P. Spiller, Jr., AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS (1976) (difficult implementation of court decrees in prisons); Comment, *The Supreme Court, The First Amendment, and Religion in the Public Schools*, 63 COLUM. L. REV. 73, 97 (1963) (court order "widely disobeyed").

101. Robert M. Cover, *supra* note 91.

102. *See supra* pages 1920–21.

103. And we turn to literature to make points that legal arguments seem repeatedly to miss. *See* Linda Hirshman, *supra* note 1, at 209–31.

104. LORRAINE HANSBERRY, A RAISIN IN THE SUN (1959).

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wisdom insists. While the opinions may set some of the terms of the discourse, the opinions are also, in daily and lived ways, reinvented and ignored. The conventional wisdom helps create the aura of power, but misses a centerpiece of court-based experience—that judges are dependent beings, and that judicial dependence is appropriate. That dependence is, of course, what makes essential the move of lawyers both to and then beyond the "text." We (lawyers) must know and understand the context of judging, and the context is comprised of the words spoken and written and of the social, economic, patriarchal, political, literary world in which we (all of us) live.

Moreover, even if one is interested only in attempting to understand pronouncements of the most officially empowered actors (the high court judges, the legislators, and the like) in the legal universe, one would need to see how the words announced are read, applied, interpreted, reinvented below. Take, for example, the effort by Robert Ferguson to examine the "judicial voice" by using two famous flag salute cases, *Minersville School District v. Gobitis*[105] and *West Virginia State Board of Education v. Barnette*,[106] decided by the United States Supreme Court. The Supreme Court held in 1940 that schoolchildren could be compelled to salute the flag but, in 1943, reversed itself and ruled that such compulsion was unconstitutional. From his reading of the two cases, Ferguson identified the qualities of the "voice in the judicial opinion"[107]—specifically, "the monologic voice," the "interrogative mode," "the declarative tone," and "the rhetoric of inevitability."[108]

Ferguson's reading is based upon his comparison of the two Supreme Court opinions; that limitation on sources prevents him from reading beyond the "already read" and makes difficult distinguishing "as primary the importance of *what* we read as opposed to *how* we have learned to read it."[109] By reading materials other than the Supreme Court opinion, such as the record and the opinion of the lower court in the second flag salute case (*Barnette*), one learns that, *before* the United States Supreme Court announced its decision to overrule the *Gobitis* precedent, the three-judge court below had already decided not to follow the ruling in that case.[110] These Federal judges reported that, given developments in the law and statements of some of the Justices, they did not feel it "incumbent upon" them "to accept [*Gobitis*] as binding authority."[111] Those lower court judges were not wide-eyed radicals; rather, they were part of a consensus that the Supreme Court had erred in the *Gobitis* case. Some twenty

105. 310 U.S. 586 (1940).
106. 319 U.S. 624 (1943).
107. Robert Ferguson, *supra* note 94, at 205.
108. *Id.* at 204–16.
109. Annette Kolodny, *supra* note 22, at 154 (emphasis in original).
110. Barnette v. West Virginia State Bd. of Educ., 47 F. Supp. 251 (S.D.W. Va. 1942).
111. *Id.* at 253.

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"legal publications" had criticized the opinion; Congress had arguably enacted legislation that preempted states from requiring flag salutes, new Justices on the Court had questioned the opinion, and newspapers across the country had condemned the opinion.[112]

The Supreme Court opinion in *Barnette* made virtually no reference to the lower court disobedience or the popular disapproval, so that readers of only the Supreme Court might well be unaware of the widespread distress that *Gobitis*' compulsory flag salute rule had engendered.[113] Although attempting to capture the Supreme Court's "judicial voice" but using only its own product, Ferguson missed aspects of the very "voice" he had hoped to describe. The "voice" has other qualities: recreation and distortion are part of Supreme Court pronouncements. The Court often describes a case and its decision quite differently from what others, with knowledge of the case, have described. When reading law texts, one often has available multiple versions of the same events, and if one chooses to read the multiple versions, one learns that recreation and distortion are as surely a part of the "judicial opinion as genre" as are the monologic voice and the declarative tone.

Learning what happens beyond the highest courts and the legislatures not only informs the reading of those speakers' output; such reading also enables an understanding that the most officially powerful are not necessarily the only powerful actors. Law "texts" are generated by many people; appellate judges have no monopoly on the genre. Lower court opinions speak more directly than do the higher courts to the people whose lives give rise to the lawsuit and who may be deeply affected by it. The tone and sounds of "the judicial voice" vary with the audience. Since feminists are interested in interaction and interdependence, in power holding and in powerlessness,[114] consideration of the conversations among judge, litigant, lawyer, court, and culture becomes vital. The lower courts are an important place from which to learn about those interactions.

But even if one were to assume the primacy of the Supreme Court, a question remains: Why read only the texts of the most powerful? The feminist interruption of "law and literature" occurs at the juncture be-

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112. *See* Brief for the Committee on the Bill of Rights of the American Bar Association, As Friends of the Court at 12–13, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (No. 591); Brief for the American Civil Liberties Union, Amicus Curiae at 20–22, *Barnette*, (No. 591) (describing Act of June 22, 1942, ch. 435, § 7, 56 Stat. 38 (codified as amended at 36 U.S.C. § 172 (1982)).

113. Justice Jackson, for the majority, made the only explicit reference to the case below: "The cause was submitted on the pleadings to a District Court of three judges. It restrained enforcement as to the plaintiffs and those of that class." *Barnette*, 319 U.S. at 630. To have "restrained enforcement" would have to mean that the rule in *Gobitis* was ignored, but Jackson made no direct comment about the lower court's refusal to follow the *Gobitis* rule. Arguably, Justice Frankfurter's dissent made oblique digs at the lower court judges. *Id.* at 647–48 (Frankfurter, J., dissenting).

114. *See, e.g.*, SARA RUDDICK, MATERNAL THINKING (1989); ROSEMARY RUETHER, SEXISM AND GOD TALK (1983).

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tween the texts of the powerful and the readers of the powerful. The work of appellate judges, and United States Supreme Court justices in particular, are, of course, deeply familiar to those who have written many of the books and articles about "law and literature." These are the texts "already read,"[115] and so it is comfortable to return to them. As Annette Kolodny explained, "[W]e read well, and with pleasure, what we already know how to read; and what we know how to read is to a large extent dependent upon what we have already read (works from which we developed our expectations and our interpretative strategies)."[116] Moreover, the authors of these paradigmatic opinions are familiar. These are the personages who populate the "legal academy;" these are the participants in the conversation among law professors, judges, and lawyers that has continued for many years.

But we (women law professors), we new entrants, we read these texts, meet these men, and often do not experience the same (evident) degree of comfort as do many of our male colleagues. Our discomfort is not surprising. The "American story of origins" as Milner Ball so well puts it,[117] is not a story of women's origins.[118] Feminists do not assume that the current hierarchical arrangements are enduring or desirable. While the exclusion of women from "older" aspects of legal discourse might be expected, the "law and literature" world is of relatively recent vintage, much of it developed contemporaneous to developments in feminist theory. One might thus have assumed that the about-to-be canonized body of materials under the law and literature rubric would have incorporated some feminist insights and might have self-consciously attempted to respond to women's exclusion from political and literary discourse by deliberate acts of inclusion.[119] Instead, one finds much of the old canon repeated, with a bit of literary theory thrown in.

From Thomas Jefferson, James Madison, and John Marshall to Joseph Story, David Dudley Field, Benjamin Cardozo, and John Wigmore. From Christopher Columbus Langdell and Roscoe Pound, Karl Llewellyn and Felix Frankfurter to Henry Hart and Herbert Wechsler.[120] The texts, the stories handed down, have passed from fathers to sons, who may have (briefly) attempted to rebel against their fathers but then, post-rebellion, have been admitted to the fold.[121] The patriarchal generational

115. Annette Kolodny, *supra* note 22, at 144.
116. *Id.* at 153.
117. Milner S. Ball, *supra* note 1.
118. Nor of blacks. *See* Charles R. Lawrence, III, *Promises to Keep: We Are the Constitution's Framers*, 30 How. L.J. 937 (1987).
119. *See, e.g.*, Ken Karst, *Women's Constitution*, 1984 Duke L. Rev. 447; Sylvia Law, *Family, Gender and Sexuality: What Our Founding Fathers Had to Say*, 26 Judges' J. 22 (1987); Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955 (1984).
120. Different law schools hand down somewhat different lists of who the relevant "fathers" are.
121. Compare women professors' experiences. *See* Clare Dalton, *"The Political is Personal" in Tenure Decisions*, Harvard L. Rec., Apr. 22, 1988, at 7, *reprinted in* CLS: Newsl. Conf. on Critical

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tradition is deep. Exemplary of this structure is an annual sports event of a major law firm in the midwest. The game is named the "fathers and sons" basketball game. In that game, the partners play the associates.[122]

It is not simply that I cannot be either a son or a father. I do not want to rename the game "mothers and daughters" or, more ecumenically, "parents and children." In my workplace, I want to be neither, nor do I want to conceptualize my adult relationships as offering only those two paradigms.[123] (As Carolyn notes above, when students in the seminar attempted to cast her in the role of mother—and me as big sister, we became entangled in discussions addressed not really to us but to absent figures, mothers who fit or failed to fit the conventional role.) It is the search for other paradigms that leads lawyers outside law; it is the search for other ways to be lawyers and teachers that leads women to cooperative, cross-disciplinary work, and, in this context, to urge that "law and literature" move outside the texts already read.[124]

B. *If the About-to-be-Canon Were to be Revised*

The texts would be different texts and the same texts would be read differently. Linda Hirshman demonstrates why abortion discussions need to occur in the context of the social realities evident in *Jane Eyre*, *The Scarlet Letter*, and *The Handmaid's Tale*.[125] The narratives and the law dovetail; in both, women are the objects of men, and this aspect of the abortion debate is sometimes obscured. Whatever the claims of late twentieth century enlightenment, the oppression of women by means of their reproductive capacities remains intact. Carol Sanger suggests that *Presumed Innocent* and *The Good Mother* "provide a whiff of what's out there for women interacting with law"[126]—that women who express their sexuality remain at risk, for men will continue to punish them. Martha Minow places *Hansberry v. Lee*, a case frequently cited in procedure for the proposition that in class suits, those not represented in a first litigation

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Legal Stud., July 1988, at 7.

122. Carolyn tells me that on the east coast, the male game in English departments is squash, whereby young male professors are folded into the old boy network.

123. *See, e.g.*, ROSEMARY RUETHER, *supra* note 114, at 47-71 (rejecting religious imagery of God as "father" or "mother"); Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN'S L.J. 1, 12 (1987-88) ("academic father-slaying, by sons, while a terrifying prospect for both generations, is at the same time recognized as a generational dynamic, tamed by the cultural institutions in which it plays itself out").

124. Robin West notes that the fields of law and economics and law and literature, working from different perspectives, move to the same end. For economists, it is "preference and choice"; for legal humanists it is the "promulgation of texts and interpretations" and a "commitment to canonical culture"; both produce an "intensely conservative commitment to the values and mainstays of the status quo." Robin West, *Disciplines, Subjectivity and Law*, in THE FATE OF LAW (Austin Sarat ed. forthcoming 1990) (manuscript at 34-45; on file with authors).

125. *See* Linda Hirshman, *supra* note 1; *see also* John O. Honnold, *Hirshman, Brontë, and Hawthorne on Law, Abortion, and Society: Brava and Addendum*, 137 U. PA. L. REV. 1247 (1989).

126. Carol Sanger, *supra* note 8, at 1365.

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are not bound by its outcomes, in the context of the lives of the plaintiffs, the Hansberrys. That black family bought a house subject to the restrictive covenant that it could not be "sold, leased to or permitted to be occupied by any person of the colored race."[127] The play, *A Raisin in the Sun*, which Lorraine Hansberry wrote, details the experiences of being a part of the family which fought the racially restrictive covenants, of the pain of the "fight [that] required that our family occupy the disputed property in a hellishly hostile 'white neighborhood,' in which, literally, howling mobs surrounded our house."[128] Clare Dalton examines the "stories told by contract doctrine."[129] She finds that contract doctrine's self-description as enmeshed in "more private than public" activities, more concerned with "objective" rather than "subjective" interpretation, and with "form" rather than "substance" results in readings of contracts of cohabitation that submerge questions of power;[130] women may thus be understood by judges as either appropriately seeking the protection of marriage or inappropriately demeaning themselves by exchanging "sex for money. In either event, woman is a provider, not a partner in enjoyment."[131]

In addition to reading different "literature" as part of the "literature" of law and literature, different "legal" texts must also be read. And, when the "law" side of the "law and literature" canon shifts, the questions asked will change as well. Much of the current academic debate in "law and literature" is about the legitimacy of the study itself.[132] Can this field be a field? How safe and familiar those questions are, how comforting and insular. Are we (law teachers) interpreting? Decoding? Objective? We (law teachers) are, of course, interesting, but there are others about whom to think, write, teach, and to whom to listen. Instead of repeating some of the more cheery tales available by way of some Supreme Court opinions (in some eras), why not try some of what goes on (not all of it transcribed) in the lower courts, which are also places in which speakers of law display their power?[133]

Take the case of *Dixon v. United States*,[134] a recent opinion by a local

127. Hansberry v. Lee, 311 U.S. 32, 37-38 (1940).

128. Martha Minow, *The Case of Legal Language*, in THE STATE OF THE LANGUAGE 246, 251 (Christopher Ricks & Leonard Michaels eds. 1990) (quoting Lorraine Hansberry).

129. Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 999 (1985).

130. *Id.* at 1000-01.

131. *Id.* at 1111.

132. See, e.g., Richard Posner's critique of the field, RICHARD A. POSNER, *supra* note 53. *See generally Law as Literature*, 60 TEX. L. REV. 373 (1982) (Symposium).

133. Of course, an important enterprise is to move beyond places of official legal power, to other arenas, to examine the power relations there and the way in which law works to permit or limit abusive interactions. *See, e.g.*, Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988).

134. 565 A.2d 72 (D.C. 1989). My thanks to Judge Gladys Kessler for bringing this case to my attention.

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District of Columbia appellate court, in which Evelyn Dixon challenged her conviction for manslaughter. Evelyn Dixon, like Gwendolyn Hoyt some thirty years earlier, was charged with killing her husband. Dixon defended against the charge by arguing that she had killed in self-defense. As in the *Hoyt* case, the appellate court provided a description of the events—with some variation in the opinions of the majority and dissent. According to the majority:

> In the afternoon of October 19, 1985, Mr. Dixon, having used both PCP and alcohol, became agitated and began to behave in irrational fashion. He accused his wife of having an affair with a neighbor's 22-year-old brother. In furtherance of these accusations, he apparently punched Ms. Dixon in the mouth and subjected her to other physical abuse. . . . [Mr. Dixon] produced a steel pole from behind the door. He held the pole like a baseball bat and then began to wave it about . . . . He next swung the makeshift weapon in the direction of Ms. Dixon and her mother. . . . Ms. Dixon, who had previously picked up a butcher knife, warned her husband not to "do anything to make me have to hurt you." Mr. Dixon continued to swing the pole at the furniture . . . and his wife lunged at him and stabbed him through the heart. . . . Mr. Dixon died shortly thereafter. . . . Later in the evening . . . , Ms. Dixon gave a detailed statement to the homicide detective. . . . [She said] . . . "Then I went up to him, standing with the knife pointed in his face, and told him if he hit my mother or tear up anything else in the house, I was going to stab him just as sure as my name is what it is tonight."[135]

According to the briefs before the appellate court, the jury also heard—from the detective who took Ms. Dixon's statement—that, "at the time she gave her statement," Ms. Dixon was "calm, cooperative, . . . dry-eyed;"[136] she did not "cry."[137] During the trial, the prosecutor reminded the jury several times that Ms. Dixon had not appeared teary, helpless, or fearful when she spoke to the police after her husband's death.[138]

Ms. Dixon's appeal was based on a claim that, because of prosecutorial misconduct, she was denied a fair trial. Ms. Dixon's lawyers challenged the prosecutor's display of her husband's blood-stained shirt, the prosecutor's introduction of post-mortem photographs of Mr. Dixon (and his

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135. *Id.* at 73-74. According to the brief filed by the government on appeal, the record indicated that Evelyn Dixon sought help from a neighbor; that she had "a swollen lip and appeared to have been crying, and said that Charles had beat her because he believed [she] . . . had been having an affair." Brief for Appellee at 2, *Dixon* (No. 86-1480). The government also reported that Evelyn Dixon was four feet nine inches tall and that she had testified that Mr. Dixon "had hit her with his feet and hands and that he once threw a nightstand toward her." *Id.* at 6. Further, Evelyn Dixon "became hysterical as Charles Dixon, blood gushing from his wound . . . staggered, and fell to the floor." *Id.* at 4.

136. Brief for Appellant at 10, *Dixon* (No. 86-1480).

137. *Id.* at 18 n.16.

138. *Id.* at 28-30.

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comparison of those photographs with pictures of him while alive), the prosecutor's statements that she was "the woman who was not afraid" and that "Charlie Dixon, . . . the man who is in this jealous rage . . . will not get to see the son or daughter . . . grow up," and a variety of other alleged misstatements of law and fact.[139] The majority, upholding the conviction, relied heavily (as is the convention) on the views of the trial judge. "The trial judge . . . who candidly revealed that he would have voted for acquittal if he had been the trier of fact, found the prosecutor's performance at the trial, as well as that of defense counsel, to be exemplary."[140] The majority interpreted the events as further proof of the tragedy wrought by drugs: "This case presents a particularly poignant illustration of the consequences of drug abuse on citizens of this community. As a result of irrational and assaultive conduct following his ingestion of PCP and alcohol, a young father is dead at the hands of his pregnant wife."[141]

Like the *Hoyt* case, a dissenting judge's view provides additional information and a different account of the events.

> On this record, the government's evidence, taken alone, establishes one of the strongest circumstantial settings for a reasonable claim of self-defense that an accused could hope to establish—a wife and her mother fending off injury from the hands of a husband, crazed by alcohol and PCP, and destructively swinging a steel pole as a bat.[142]

From the two versions, we know that an intoxicated husband swung a steel pole around a room and lunged at his wife and her mother. The wife, who had been physically harmed before by her husband, stabbed him. He died. A trial judge believed her legally or factually innocent yet applauded the prosecutor and the defense for conducting in the trial in which she was convicted. An appellate court detailed rules of deference to the trial court, explained that it agreed with the trial judge that the con-

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139. *Dixon*, 565 A.2d at 77-78. Like the judges in the *Hoyt* case, the prosecutor in *Dixon* assumed that the woman's role was to assuage her husband. The prosecutor asked: "Ms. Dixon, in the times Charlie would be upset and you'd have to calm him down, you'd always been successful in calming him down, isn't that right?" Transcript, *quoted in* Brief for Appellant at 20, *Dixon* (No. 86-1480).

140. *Dixon*, 565 A.2d. at 73. The majority stressed the special place of the trial judge in assessing the "dynamics of a trial" and that appellate review should thus be deferential to the trial judges' decisions and appraisals. *Id.* at 75.

141. *Id.* at 73. According to Ms. Dixon's brief on appeal, she had had surgery the "month before the homicide so she and her husband could have a second child together. [On the day of the murder], she was—unbeknownst to her—at least two weeks pregnant with his child. She was in her seventh month of pregnancy when her trial began." Brief for Appellant at 4 n.3 (citation omitted). Further, the "prosecutor had tried to prevent the jury from learning that the child [Ms. Dixon] was carrying was her husband's." *Id.* at 16 n.13.

142. *Dixon*, 565 A.2d at 81 (Mack, J., dissenting).

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viction was fairly (albeit not perfectly) achieved,[143] and blamed the problem on drugs.

What were these judges about? How disconnected was the process and the outcome? How deep the disjuncture between practice and belief, between professionalism (at least as currently defined) and content?[144] It is plausible that judges and juries might disagree, that judges might acquit when juries convict or vice versa, and that majority and dissenting judges describe and interpret events differently. It is plausible that judges might believe that, despite the disagreement with an outcome, the process was nonetheless within the bounds of "fair." It is plausible that among individuals, such as judges and lawyers who see each other regularly and who work together, gracious interaction might lead to freely given compliments.

But when the conviction is for voluntary manslaughter, when the defendant (according to a majority of the appellate court) is a "young mother with a previously spotless record [whose life is] interrupted by incarceration and by tragedy from which she will doubtless find it difficult ever to recover,"[145] how can a trial judge be enthusiastic about the trial? How are we to read his speech?

> I want to say to . . . all . . . counsel . . . that I think it's the finest case I've seen tried. . . . You were all professionals. You acted it. And you ought to be commended for the way you tried this case.[146]

But read it we must, as we must think about what was accomplished by the words, the text. The "record" was protected, in that—as demonstrated by the appellate opinion—the conviction was upheld, in part because the trial judge had insulated the prosecutor with his praise. Perhaps the lawyers who tried the case felt better, once they heard the judge give praise, and maybe the judge himself derived some comfort. But the two beliefs ostensibly held simultaneously by the trial judge remain elusive: how did the trial judge think it appropriate both to say that he believed Ms. Dixon should not have been convicted and yet to applaud the prosecutor and defense for enabling her conviction?

One way out of this confusion is to fashion a rule of law—trial judges be silent. Say nothing about your beliefs on the justice of the outcome or about the way the task was done. Another way out is also to create a rule of law—trial judges, stop being so protective of those with whom you

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143. *Id.* at 77–78.

144. *See* Julius G. Getman, *Colloquy: Human Voice in Legal Discourse*, 66 TEX. L. REV. 577, 577 (1988) ("The most prevalent mode of expression in legal education is 'professional voice,' the essence of which is addressing questions of justice through the analysis of legal rules.").

145. *Dixon*, 565 A.2d at 73.

146. *Id.* The government ends its brief on appeal with those words. See Brief for Appellee at 29–30, *Dixon* (No. 86-1480).

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work, the prosecutors and defense attorneys whom you see on a regular basis, and stop being so protective of your process that you will always seek to protect the outcomes, whatever occurs. Yet another way out of this confusion is to turn from the judges and lawyers, their words and interactions, to the Dixons and the world in which they lived. How often had he threatened attack? Did she have any place to go—with her children? Was there a chance for shelter and a modicum of safety outside her house?[147] Should the law offer a jury only two options: convict or acquit? What range of responses might be available when violence occurs? How much was the jury that decided the case affected by the police and prosecutor's report that Ms. Dixon failed, when speaking about her husband's death, to appear conventionally female, that she did not cry, did not seem as helpless or distraught as might have been expected?[148] The questions abound, and the safety of the professional law and literature "discourse" becomes all the more obvious. How much more comfortable to speak of "formalism" and "indeterminacies," to ponder the role of "rhetoric" in the Constitution, to question the method but not the content, to talk about the familiar personages, lawyers and judges, and even more familiarly, to speak of how academics are to speak about texts. But ignoring the confusion spawned by events like those in *Dixon* will not preclude them from occurring, or law from interacting with and judging women who fear and who (very occasionally but with disproportionate legal visibility) do bodily harm. Of course, we must ask about how to read and interpret, how to give and take meaning from words and from acts. But the words and acts at the center of the inquiry should include a range of speakers and actors, women and men, holding different levels of recognized and unrecognized power.

The law texts that must be considered are not limited to the (relatively) polished, edited, printed, and reprinted opinions of the United States Supreme Court. By definition, these opinions operate at a level of abstraction and generalization that protects them from challenges about the ways in which the rules affect the immediate material conditions of the individuals whose lives brought forth the cases. And, to the extent those are the texts considered, they must be read in light of the multiple other versions of the same events, available by virtue of the existence of lower court opinions, briefs, records, and sometimes non-legal materials.[149] The legal behavior

147. *See* Christine Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23.

148. According to Ms. Dixon's Petition for Rehearing, the jury deliberated for three days and "once indicated it was deadlocked." Petition for Rehearing at 2, *Dixon* (No. 86-1480).

149. Here, literary theory about multiple voices, ownership of stories, voices that give and take agency are relevant. *See* HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL WRITTEN BY HERSELF (Jean Fagan Yellin ed. 1987) (includes preface by white woman to "authenticate" narrative evidences power of whites to speak for and to silence blacks); ROBERT STEPTO, FROM BEHIND THE VEIL: A STUDY OF AFRO-AMERICAN NARRATIVE (1979).

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to examine is not only that of the judge writing an opinion (or editing one written by a law clerk) but also the way judges and lawyers speak and write when in close contact with people whose lives they may change. At the lower levels of judicial work, there is not as easy an escape to a general rule of law; instead there is the question of what will happen to Evelyn Dixon. And the answer is, she was sentenced to spend eighteen months in prison, and had completed service of her term before the appellate court ever wrote.[150]

I learned of the *Dixon* case at the National Association of Women Judges (NAWJ) tenth anniversary meeting. Although I have attended many conferences of judges, I had not before ever attended a conference of women judges. Whatever the "political correctness" of claiming "sameness" and "difference,"[151] I could not help but feel how, repeatedly, these women judges, as a group, acted differently from judges at other (male-dominated) judicial conferences that I have attended. I listened as, at one of the sessions, women judges asked each other: How is a "judge" to respond when one sees a witness, after a difficult time testifying, dismayed that a jury did not believe her? How should a woman judge respond when a lawyer seeks a continuance because of her pregnancy? Should women judges worry if, as the only woman on a particular court, the sentences that they imposed were lighter/heavier than those imposed by the rest of the (male) judges? Several of the women judges reported how, at the time of sentencing, they routinely spoke to the families of defendants and victims, and that such communication was essential to the role of judge. These were women who examined their own experience of the job of judging, found it not particularly comfortable, and did not seem shy about admitting the disquiet that judging engendered. Further, they wondered, out loud, about how those litigants and witnesses, subject to the experience of being judged, responded; the judges wondered about what lessons were learned. And, amidst the many scheduled programs announced at the registration table, I saw a sign that stated: "Anyone interested in serving lunch to the homeless on Saturday, sign up here."

Different texts. The same texts read differently. Other voices included in the conversation. Different behavior. Women judges talking about judging may well develop different rules for judging. One example is suggested by inquiries made at the recent NAWJ meeting. Of about 150 judges, law professors, and lawyers, none of us knew of "rules of law" on how judges should interact with litigants or witnesses who were not be-

150. The full sentence was three to nine years, all except 18 months of which was suspended. According to one of Ms. Dixon's attorneys, she was not given bail; at some point before the 18 month period ended, Ms. Dixon was released to a half-way house. Although she was sentenced on October 8, 1986, Ms. Dixon's appeal was not decided until October 18, 1989. Conversations with an attorney who represented Ms. Dixon (Jan. 1990, Mar. 1990); *see also* Brief for Appellant at 1.

151. *See* Carol Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN'S L.J. 59 (1986).

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lieved by the jury. The question was how to reach out to people who have, often at personal pain, come to court and who perceive themselves to be leaving, empty-handed. How to acknowledge those people, without undermining the judgment of the jury? If judges speak often enough about how to respond to witnesses and to the families of defendants, those actions will develop into case law—about which comments are appropriate, which inappropriate.

The evolving law on the confrontation between child and alleged abuser is illustrative.[152] Judge Lynne M. Hufnagel, of the Denver, Colorado district court, has rearranged the furniture in her courtroom to accommodate the elderly, the handicapped, and children who are witnesses. Judge Hufnagel "steps down from the bench to greet young witnesses at the courtroom door, then walks them to a special seat with its back to the defendant, [but] facing the jury."[153] In an unpublished opinion, an appellate court overturned the conviction of one defendant whose trial was conducted with these procedures; the appellate court stated that the "trial judge's actions towards the child witnesses could have been perceived by the jurors as an indication that the trial judge believed in the credibility of the children."[154] The appellate court then suggested that other persons in the courtroom might be asked to assist the child but that the judge should not. Is a judge who steps down from the bench to respond to the physical needs of a witness less "disinterested" or "impartial" than one who offers no such assistance? Will jurors read such gestures as endorsements of the content of the witnesses' statements? As women judges contribute to the language and behavior of judging, the fact of judicial connection, and of dependence as well as independence, the relational aspects of the work will become more visible.[155] Rules of law that acknowledge judicial responsibility for the space in which they work will develop.

Note that this claim for the acknowledged dependence of judges and of the interactional quality of judging is not a claim of women's sweetness, nurturance, and uniquely sympathetic ways. I have written about feminism and judging, of judging as an act of responsibility and of connection.[156] I have sometimes been met with an assumption that what "we"

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152. *See* Coy v. Iowa, 487 U.S. 1012 (1988); Craig v. Maryland, 316 Md. 551, 560 A.2d 1120 (1989) (child witness can testify in separate room where she cannot see defendant only when prospect of testifying before defendant causes child emotional distress), *cert. granted*, 110 S. Ct. 834 (1990).

153. Lis Wiehl, *National Rules for Child Witnesses?*, N.Y. Times, Jan. 12, 1990, at B12, col. 4.

154. People v. Green, No. 88CA0230, slip op. at 2 (Colo. App. June 22, 1989). My thanks to Judge Lynne M. Hufnagel for providing me with the opinion.

155. For example, the NAWJ has already taken some steps toward altering judicial canons of behavior. In 1983, the NAWJ passed a resolution that judges should not belong to clubs that discriminate on the basis of race, gender, and other invidious categories. *See* Gladys Kessler, *supra* note 20, at 475. The same can be said of the language and behavior of lawyering. *See* Carrie Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 LAW & SOC. INQUIRY 289 (1989); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

156. Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*,

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women are talking about is sympathy and compassion and that such emotions are either inappropriate for the judicial realm or of little use, for they give no guidance.[157] As a matter of law (or fact, as the case may be), "sympathy" in law is officially acknowledged—under legal rules written by men. The United States Supreme Court insists that when juries consider imposing the death sentence, they make individualized decisions because of the belief, long held by this society, that defendants who commit criminal acts, attributable to a disadvantaged background or to emotional or mental problems, may be less culpable than are defendants who did not have such problems.[158] The term of art is "mitigating factors." When sentencing, judges and juries consider such mitigating factors, and courts have vacated death sentences imposed after a jury has been warned not to be sympathetic.[159] This aspect of sentencing may be not much discussed, but between death penalty litigation and feminist theory, commentary is growing.[160] Of course, the question is not whether to be sympathetic, but which sympathies one wants to encourage, and the problem, sometimes spoken of under the term "contextualism," is part of a longstanding and never-ending debate about context and the rule of law.[161]

But there is more than repetition, for the arguments are to alter the understanding of value, the legal rules that express that understanding, and actual modes of interaction. The aspirations for judges in the United States call for them to be "disinterested," "disengaged," "dispassionate,"

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61 S. CAL. L. REV. 1877 (1988).

157. *See, e.g.*, Tony M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2125 (1989) ("The guideposts for assigning our priorities are missing in the empathy literature.").

158. *See* Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989) (O'Connor, J., concurring); California v. Brown, 479 U.S. 538, 539 (1987) (California instruction to juries in capital cases not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" survived Eighth Amendment challenge because it was read not to prohibit considering sympathy when making death penalty decisions.).

159. *See, e.g.*, Parks v. Brown, 860 F.2d 1545, 1553 (10th Cir. 1988) (en banc) ("Sympathy that *is* based on the evidence is a valid consideration in sentencing that cannot constitutionally be precluded.") (emphasis in original), *rev'd on other grounds sub nom.* Saffle v. Parks, 110 S. Ct. 1257 (1990) (new legal rules of limited applicability in habeas corpus); *see also* Davis v. Maynard, 869 F.2d 1401, 1411 (10th Cir. 1989), *vacated and remanded sub nom.* Saffle v. Davis, 58 U.S.L.W. 3613 (U.S. Mar. 16, 1990) (remanded in light of *Saffle v. Parks*). How long such a rule will last is not clear, given the questioning of the use of "sympathy" by the majority opinion in *Saffle v. Parks*.

160. *See, e. g.*, William J. Brennan, Jr., *Reason, Passion and the "Progress of Law,"* 42 REC. ASSOC. BAR CITY N.Y. 948 (1987); Lynn Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655 (1989); Patricia Wald, *Disembodied Voices—An Appellate Judge's Response*, 66 TEX. L. REV. 623 (1988); Robin West, *Economic Man and Literary Woman*, *supra* note 3; Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L. J. 389 (1989) (authored by Paul Whitlock Cobb, Jr.); Robin West, *supra* note 124.

161. *See, e.g.*, Patricia A. Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945 (1988); Tony M. Massaro, *supra* note 157; Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. (forthcoming 1990); Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. (forthcoming 1990) (Symposium on the Renaissance of Pragmatism in American Legal Thought).

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and "independent." These are words suspicious of—and hostile to—relationship. But as many judges know, but some seem to find easier to admit, judges are related, dependent, embedded, and interconnected. Sympathy and compassion are there, in judging, appropriately so. There is no need to apologize, but rather to explore and delineate the realms of connection and how to respond, appropriately, to the poignant events played out daily in courts.

The trial judge in *Dixon* may well have felt pain at what he saw acted out before his eyes: a woman responding with a knife after her husband had abused her, and a jury struggling to place the events into the legal categories offered to it. The trial judge might well have thought that by indicating his view that Ms. Dixon should have been acquitted, he expressed his sympathy. But the trial judge should have wondered (on the record) about how a wonderfully "conducted" trial could result in awful outcomes. The trial judge should have wondered about how wonderful a trial (and the culture it expresses) could be in which a prosecutor thinks that points can be scored with a jury by arguing that Evelyn Dixon did not cry enough, did not seem distraught or frightened enough, implicitly did not perform sufficiently as a stereotypic female so as to be acquitted.

If confined to the written words of the highest court, we know little of such prosecutors' arguments to juries or of judges' decisions to permit or prohibit explanations about who fathered the baby Evelyn Dixon carried when she, seven months pregnant, was on trial. We would map women's legal gains without acknowledging that, in the 1980's like the 1950's, women in the position of Evelyn Dixon and Gwendolyn Hoyt continue to be confronted by prosecutors who believe that they can score points with juries by suggesting that women have had sexual relations with men who were not their husbands.[162] Despite some law/literature claims that judicial opinions are the appropriate vehicle for study because judges "explain every action with an individual writing,"[163] the trial judge in *Dixon* did not explain his actions with an "individual writing," and there are many other powerful actors in the legal arena who also do not write all that they do. Further, a wide range of acts of courts—at all levels—vanish with little or no trace. For example, many courts do not have a tradition of documenting disqualifications or special appointments of judges. Sometimes, a footnote will mention that—but not explain why—a special court has been convened. In the Federal system, the current custom is for judges not to explain when they voluntarily recuse themselves, thereby insulating themselves from examination and limiting the information available about

162. *See supra* note 6 (evidence admitted in *Hoyt* of Gwendolyn Hoyt's getting baby sitter, allegedly to go out on date); *supra* note 141 (prosecutor in *Dixon* attempted to prevent admission of evidence that Evelyn Dixon was pregnant with her husband's child).

163. Robert Ferguson, *supra* note 94, at 202.

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when judges believe that recusal is appropriate.[164] With cryptic footnotes and silence, the moments when power is relinquished and shared are hidden; the conversation about how much power is held is distorted.

In the 1950's and 1960's, before sexist language was much acknowledged, procedure was the "handmaiden of justice,"[165] and rules that were unimportant were called "housekeeping" rules. The rules about disqualification are procedural rules, as are the rules of deference to trial judges and the range of discretion accorded prosecutors. We who have kept house, and we who craft and criticize procedural systems, we who have been cast in the roles of supporters and "handmaidens," understand that the values of the social order are expressed in the ways of daily life. Housekeeping is an apt definition of all procedure—civil, criminal, administrative, those bits of it in the United States Constitution (like rights to jury trials and lawyers) and those bits of it crafted by individual judges. Hands, maiden or married, are what shape the expression of the rules of law.

Carolyn Heilbrun and Judith Resnik:

We, women, are here. Here in law reviews. Here, in small numbers in law teaching. Here, in literature departments. Here, in "law" and "literature." Reading texts, writing, talking about lives that need to be considered, with sadness, such as those of Evelyn Dixon and Gwendolyn Hoyt, and with admiration, such as those of Sue Bridehead and Celie and Shug.

After teaching this course, all the same, we have a sense of exclusion, of marginality, of beating at the doors of institutions that are recalcitrant when it comes to the serious contemplation of women: their lives, their place in the legal world, their voices. We do not see how the male perspective can fail to reform itself now that women have become a visible part of the legal and literary professions. But we were saddened to see that the pace of the reformation is slowed by the thickness of the institutions' doors, by multiple communications to students that inhibit and make them (sometimes appropriately, all the worse) afraid and ambivalent to make use of the techniques, theories, readings, and scholarship that feminism has so richly provided.

Carolyn Heilbrun:

Since teaching in law schools, I have returned to my graduate courses in literature with a new understanding of feminism. I assign selected readings of law to my literature classes to reinforce their political sense of

164. John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 244-45 (1987); Linda Greenhouse, *Questions for a Reticent Court*, N.Y. Times, Nov. 22, 1989, at A22, col. 2 ("By making it impossible to ascertain what standards they are applying, the Justices' silence about recusals short circuits public discussion, making it less likely that . . . ambiguities can be resolved through informed debate.").

165. Charles Clark, *The Handmaid of Justice*, in PROCEDURE—THE HANDMAID OF JUSTICE 69 (Charles Wright & Harry Reasoner eds. 1965).

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the urgency of feminism, and their knowledge of how far the law must go to recognize the problems of women that literature, whether in subtext or criticism, has long recognized. I see no end to the possibilities of the exchange between law and literature; for the present, there is only the necessity of increasing the opportunities for conversation between them.

The traditional female story is one of closure. "If he notices me, if I marry him, if I get into college, if I get this work accepted, if I get this job"—there always seems to loom the possibility of something being over, settled, sweeping clear the way to contentment. This is the delusion of a passive life.

Carolyn Heilbrun and Judith Resnik:

We do not offer closure, nor promise much by way of comfort (our assigned expertise). Ibsen told us that "woman is judged by masculine law, as though she weren't a woman but a man." We join with others who have only begun to explore what law and literature without the adjective "masculine" might be about.

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APPENDIX

Feminist Theory: Law and Literature
Syllabus of Seminar Taught at Yale Law School, Spring 1989

Carolyn Heilbrun
Judith Resnik

I. WOMAN AS OBJECT

Hoyt v. State, 119 So. 2d 691 (Fla. 1959).
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SIMONE DE BEAUVOIR, THE SECOND SEX i-xxx (H.M. Parshley trans. 1968) (introduction).
JOHN BERGER, WAYS OF SEEING (1972).
Jean Stubbs, *Cousin Lewis*, in WOMEN & FICTION 268 (Susan Cahill ed. 1975).
DORIS LESSING, *To Room Nineteen*, in STORIES 396 (1978).

II. EMERGING AND SUBMERGING STORIES

MAXINE HONG KINGSTON, THE WOMAN WARRIOR: MEMOIRS OF A GIRLHOOD AMONG GHOSTS (1975).
Barbara Babcock, *Clara Shortridge Foltz: "First Woman,"* 30 ARIZ. L. REV. 673 (1988).
Katina Leodas, Women in Law School: The View from the Margins (April 1988) (manuscript on file with authors).
SANDRA HARDING, THE SCIENCE QUESTION IN FEMINISM (1986).

III. USING SILENCE, BREAKING SILENCE

A Question of Silence (Quartet 1984) (film directed by Marleen Gorris).
ALICE WALKER, THE COLOR PURPLE (1982).
Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987).
Gayle Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex*, in TOWARD AN ANTHROPOLOGY OF WOMEN 157 (Rayna R. Reiter ed. 1975).
GEORGE ELIOT, DANIEL DERONDA, ch. 51 (1876).
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IV. GENDER ROLES: FIRST SESSION

Written Testimony and Transcript of testimony of Rosalind Rosenberg and of Alice Kessler-Harris, EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986) (No. 79-C-4373).

EEOC v. Sears, Roebuck & Co., 504 F. Supp. 241 (N.D. Ill. 1980).

EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986).

EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988).

Thomas Haskell & Sanford Levinson, *Academic Freedom and Expert Witnessing: Historians and the* Sears *Case*, 66 TEX. L. REV. 1629 (1988).

Alice Kessler-Harris, *A Response to Haskell and Levinson*, 67 TEX. L. REV. 429 (1988).

JOAN W. SCOTT, GENDER AND THE POLITICS OF HISTORY (1988).

CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

Susan Glaspell, *A Jury of Her Peers*, in THE BEST SHORT STORIES OF 1917, at 256 (E.J. O'Brien ed. 1918).

V. GENDER ROLES: SECOND SESSION

THOMAS HARDY, JUDE THE OBSCURE (1895).

ADRIENNE RICH, *Compulsory Heterosexuality and Lesbian Existence*, in BLOOD, BREAD, AND POETRY: SELECTED PROSE 1979–1985, at 23 (1986).

Mary G. Dietz, *Context is All: Feminism and Theories of Citizenship*, DAEDALUS, Fall 1987, at 1.

California Federal Savings & Loan v. Guerra, 479 U.S. 272 (1987).

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CAROLYN HEILBRUN, WRITING A WOMAN'S LIFE (1988).

VI. IMAGES OF WOMEN IN BRITISH ART

Lecture by Susan Casteras (Asst. Curator at British Art Center, New Haven, Conn.).

SUSAN CASTERAS, IMAGES OF VICTORIAN WOMANHOOD IN ENGLISH ART (1987).

VII. CLAIMING FOR US, CLAIMING FOR THEM

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VIII. CAN NEW STORIES EMERGE?

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Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981).
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VIRGINIA WOOLF, MRS. DALLOWAY (1925).

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