The Gendered Curriculum: Of Contracts and Careers

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Years ago when I taught college level history, the literature on higher education emphasized the falsity of educators' assumptions that students learn what teachers teach. When we grade exams, we are forced to notice that although some of what we intend to convey comes through, students fail to learn much of what we think we have taught. We may be less aware that students also absorb much that we do not consciously teach. Students learn about the frame as well as the picture; they learn from what we exclude as well as what we include. They learn from us as well as from lectures and books—from our passion or lack thereof, from our attitudes toward the world, from our manner toward ourselves and them. They learn from each other and from institutional arrangements and interactions. Thus, while students certainly learn from the formal curriculum with its graduation requirements, courses, syllabi, reading lists, and class discussions, a great deal of what they absorb is taught by an informal curriculum that lies outside a faculty's design. I seek to illustrate how both the formal and the informal curricula of legal education are gendered in ways that we may not have noticed.

I. The Formal Curriculum

A. The Division of Turf: Effects on the Law of the Family

Various people have illumined how topics that are important to women traditionally have been ignored, marginalized, or presented primarily from a masculine viewpoint in the legal curriculum.¹ I want to look at a related but different issue: the way we draw lines between fields of law. Everywhere in the law, the drawing of lines is central. We endlessly debate doctrinal lines—what constitutes intent, or notice, or negligence. But the way we draw certain other lines tends to be taken for granted. I refer to lines that divide the conceptual turf, lines that bound the groupings we use

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to think about and teach the law. The way we establish basic categories tells us a lot about what we assume and how we see the world. My focus here will be on the problem illumined by the observation that the last thing the fish notices is the water.

As a first-year law student taking the course I now teach, I was first intrigued and then puzzled. My contracts course opened with the sweeping question, "What promises should the law enforce?" The cases in the book, however, were drawn almost entirely from a commercial context. Surely, I thought, promises are made in other relationship settings. The presence of a handful of intrafamily disputes and one husband-wife case amid all of the franchise agreements, sales, arrangements for employment, and transfers of property in the casebook made more noticeable the general paucity of family (particularly marital or parent-child) cases. When questions about those omissions arose, the rationales offered—about the complicating effects of emotion, about the need to preserve family harmony by barring legal action, about the lesser intensity of expectations and reliance in intimate relationships, about the lack of institutional competence for such matters—were brief and ultimately unsatisfying. As I began teaching contracts and family law, I became interested in how we divide the conceptual terrain between these two fields. What is the nexus that holds the field of contracts together? How does that nexus differ from other definitive clusters of ideas and doctrine around which we organize and divide coursework?

It seemed to me that the field of contracts is act-centered, organized principally around the behavior of promising and the protection of expectations and reliance that arise from promising. By contrast, domestic relations as a field of doctrine and practice is organized around persons and the legal regulation of their relationship to one another. These are quite different theories of organization—at a minimum, apples as compared to oranges, perhaps even apples as compared to orangutans.

Dichotomizing the world helps us to simplify and understand it. The organization of contracts according to a behavior-centered principle contrasted with the organization of family law according to a person-centered principle reflects such a dichotomy. Contracts as a field of theory and practice purports to be about the market place, the public world, economic interests, and rational self-interested bargaining. By contrast, the family world is deemed to be about the private, the personal, the altruistic, the harmonious, the "squishy," warm-and-fuzzy side of life. In this division, there is comforting familiarity as well as some insight. There are, however, other less sanguine consequences.

By creating and reflecting such a dichotomy in our curriculum, we reinforce the polarization of stereotypical masculine and feminine traits (rational, impersonal, hard male vs. emotional, personal, soft female). We also rigidify the traditional division of the world into gendered spheres of

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2. The textbook used in this course was Lon L. Fuller & Melvin Aron Eisenberg, Basic Contract Law (3d ed. 1972).
influence (public-market-male vs. private-family-female). These gender expectations and roles are increasingly obsolete and objectionable as unnecessary and discriminatory limitations on the liberty and fulfillment of individuals.

Moreover, any dichotomy illumines some things by obscuring others. It enriches our understanding by simultaneously impoverishing it. This particular dichotomy, for instance, invites us to ignore the emotional and personal elements, the need for relationship accommodation, the intangible and noneconomic factors in marketplace agreements. By the same token, it asks us to suppress awareness of economic expectations and reliance, elements of self-interest, and aspects of conflict that are realities of family life. The emphases and omissions of this division reflect a view of life more attuned to masculine than to feminine experience.

Men traditionally have drawn their economic expectations and their personal identity mainly from the world of commerce. Accepting market norms regarding suppression or disguise of emotion and maintenance of disciplined and formal relationships in their work lives, men seem particularly prone to sentimentalize family life. Moreover, they typically have had sufficient socio-economic power to impose their priorities on intimate arrangements. For women, however, family life has played a definitive role not only in identity but also in economic and personal circumstances. The realities of family life and power afford women less opportunity to idealize intimacy or to trivialize its tangible consequences. Meanwhile, as women increasingly move into market work, their traditional attunements and values demand greater awareness of and greater attention to emotional and relational aspects of the commercial world.

The stereotypically gendered world envisioned by the dichotomy

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3. The public-private split has been heavily criticized. See, e.g., Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 93-102 (1987) (arguing so-called "privacy" rights are illusory for women; legal doctrines of privacy reinforce regime of male dominance); Duncan M. Kennedy, The Stages of the Decline of the Public-Private Distinction, 130 U. Pa. L. Rev. 1349 (1982) (demonstrating the incoherence and inconsistency of traditional private-public conceptual categories); Frances Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 Harv. L. Rev. 1497 (1983) (arguing that dichotomies between the market and family are incoherent and discriminatory); infra note 1 and accompanying text (arguing the standard dichotomy between commercial contract law and legal regulation of marriage is increasingly obsolete and ineffectual).

4. The importance of such elements in market agreements is discussed by a few contracts scholars. See, e.g., Robert A. Hillman, Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law, 1987 Duke L.J. 1 (describing different models appropriate to changed circumstances analysis depending on whether underlying relationship is discrete or long-term and multifaceted); Ian R. MacNeil, The Many Futures of Contracts, 47 S. Cal. L. Rev. 691 (1974) (discussing relational as opposed to transactional contracts, where relational contracts are characterized by intangible and incompletely crystallized terms which emphasize relationship continuity more than discrete exchange); G. Richard Shell, Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend, 82 Nw. U. L. Rev. 1198, 1202-12 (1988) (demonstrating a move toward generalized ethical standards of fairness in contractual litigation of business disputes).

5. See Marjorie Maguire Shultz, Contractual Ordering of Marriage: A New Model for State Policy, 70 Cal. L. Rev. 204, 253-64, 307-28 (arguing that self-interest and conflict management are important aspects of healthy marriage relationships).
between contracts and family law tilts our perceptions, doctrine, and behavior in ways that reflect traditional male dominance of legal thought and practice. Contracts is a basic building block of the common-law curriculum because promise is deemed to be a fundamental organizing principle in virtually all relationships. Since the contracts course (centered on commercial promises and generally excluding or de-emphasizing family-related promises) is required and family law is not, the dichotomy signals that commercial promises are very important and family ones are less so. Furthermore, the exclusion of most family-based promises from the reach of contracts courses foreshadows that promises will not be given the legal weight in families that they receive in other relationships. In recent years, legal decisionmakers have begun to recognize contracts as vehicles for governing the obligations and expectations of premarital, postdivorce, and nonmarital relationships. But within marriage itself, we remain deeply resistant to recognizing the legitimacy or importance of promises and to vindicating the expectation and reliance that flow from voluntary consensual agreements. Essentially, the law treats the personal relationship-centeredness of family life as a barrier to the operation of rules governing promissory behavior.

This same pattern has shaped our application of other basic legal principles to the domain of marriage and family life. We treat the family nexus as barring the run of generic behavior-based principles that are central to standard legal analysis. Traditionally, the law refused to recognize the possibility of rape in marriage. Spousal abuse has not been something people wanted to prosecute. Women do not own their own disproportionately greater labor within the marriage relationship. Marital income is taxed differently. Things as diverse as property rules and testimonial privileges vary on the basis of marital status. The consequences are enormous: either as a matter of definition or as a matter of standard practice, legal rules change at the boundary of marriage. It is as if the family were surrounded by a fence. Ordinary rules run up against that fence and bounce off or are at least deflected. In contracts, the barrier against generic legal rules is very explicit: rules that govern promising in other relationships do not apply here. The Second Restatement of Contracts bluntly states that agreements between spouses are void if they are deemed by a judge or a legislature to vary some "essential incident of the marital relationship in a way detrimental to the public interest." Thus, as a result of dichotomies like the one that segregates contractual promises from families, we have created an intimate terrain characterized by a peculiar kind of "lawlessness." Broad interests and principles that structure legal


7. For further discussion of this line of argument, see Shultz, supra note 5, at 211-16, 224-40, 265-80. For an interesting analysis showing that rules forbidding use of racial criteria also stop at the boundary of the family, see Elizabeth Bartholet, Where Do Black Children Belong? The Politics of Race Matching in Adoption, 139 U. Pa. L. Rev. 1163 (1991).


9. This label derives from a conversation with my colleague, Herma Hill Kay, about an earlier article of mine in which the term was used in a different but related way to describe the law of marriage. See Shultz, supra note 5, at 290.
analysis generally—bodily security, freedom from physical injury, ownership of one's labor and property, ability to vindicate expectations—either do not apply or are significantly altered at the boundary of the family.

To be sure, governing important relationships by special legal rules may have advantages. I remember reading *Miller v. Miller*\textsuperscript{10} as a student. It was the one major case involving marital partners that was included in the casebook from which I was taught contracts.\textsuperscript{11} The *Miller* court held unenforceable a husband's promise to pay his wife for performance of her domestic duties.\textsuperscript{12} Some of the reasons offered in support of the decision in the class discussion made sense to me. Intimate relationships are unusually layered, enormously complex, and multicentric. They depend on subtle and fine-tuned accommodations that are difficult to evaluate or rectify when they go wrong. Court involvement may intensify conflict. Even so, I was angered by the explicit ruling that a wife should not be paid because she already owed domestic service to her husband.\textsuperscript{13} In addition, the discussion felt woefully incomplete. While carefully totaling up the costs of legal intrusion into family life, we failed to recognize costs attendant on the segregation of families from the ordinary organizing principles of the law. The severance of family promises from the general rules of contract doctrine means that expectations and reliance flowing from promises between family members will not be vindicated in the way or to the degree that such interests are otherwise protected by the law. Moreover, since men and women traditionally have had different degrees of involvement and different stakes in the intimate sphere as compared to the market sphere, the burdens of such "lawlessness" in family life are typically greater for women than for men.

Have things changed in the years since I was a student? Later editions of that same casebook include a few more disputes between family intimates, perhaps reflecting some slight erosion of the dichotomized worldview I describe. But even in the latest edition, *Miller v. Miller* is followed by editorial questions that, although they inquire whether the case would be decided the same way today, nevertheless assume its correctness. Without further commentary or discussion, the authors ask only, "Are there any types of legal bargain (other than the type considered in *Miller v. Miller*) which are unsuitable for judicial enforcement?"\textsuperscript{14}

While the family remains "lawless" in the particular sense that I have just described, it is not, of course, immune to law. Contract-based protestations about the incompetence of legal institutions, and accompanying prescriptions for legal disengagement from the intimate terrain, fail to account for historic and contemporary enmeshment of the law in the structure of family life. The law that governs family life is an outgrowth of the dichotomized worldview just as is the abrogation of generic legal principles within family disputes. Traditionally, separation of the family

\textsuperscript{10} 35 N.W. 464 (Iowa 1887), aff'd, 42 N.W. 641 (1889).
\textsuperscript{11} Fuller & Eisenberg, supra note 2, at 105.
\textsuperscript{12} *Miller*, 35 N.W. at 464, 42 N.W. at 643.
\textsuperscript{13} *Miller*, 35 N.W. at 464.
\textsuperscript{14} Lon L. Fuller & Melvin Aron Eisenberg, Basic Contract Law 76 (5th ed. 1990).
and contract spheres has been justified partly on the ground that it ensures family privacy while regulating the public marketplace. Yet, if we look at how the law actually works in the two domains, a paradox emerges. On the contract side, typically described as the public side of the public-private dichotomy, we deploy public resources to vindicate private choices. Granted, there is much overstatement and mystification regarding deference to private decision making within the market sphere. A growing body of public policy constrains private choices to varying degrees in differing sectors of the market; standard contract law is hardly a pristine preserve of private ordering. Yet, deference to and enforcement of private decision-making remains central to our analysis and to the solution of problems perceived as being within the public market sphere.

On the other side, in the family zone that we describe as quintessentially private, what we actually do is impose standardized public policy. Once again, some change has occurred on the family side of this dichotomy. In particular, some of the sexist content has been drained from the regulation of family life. But the notion that conventional public morality can and should be imposed on family life in spite of its supposed “privateness” remains alive and well. The state decrees who may marry, how, and when. It regulates the fact and terms of divorce. It may criminalize consensual sexual conduct. The state establishes norms for ownership of property and obligations of support between marital partners. It allocates parental status on the basis of marital status. The Restatement rule voiding contracts that seek to vary whatever courts or legislatures deem to be an “essential incident of the marital relationship” signifies that family life is to be governed not by private choice but by public norms. The paradox, then, is that precisely in that zone where exclusion of contractual principles is justified on the ground that family life is too “private” for legal intervention, there we impose standardized public content about the expectations and obligations of intimacy.

In sum, the conceptual and curricular segregation of the family from the market has important consequences. The treatment of families as “special” establishes an intimate terrain that is “lawless” in the sense that ordinary rules of law do not apply. At the same time, that intimate terrain—described as uniquely private—is suffused with public moral judgment conveyed through the mechanisms of the law. The curricular pattern reinforces gendered spheres of influence in which family is less important, legally speaking, than commerce. By separating family issues from doctrinal areas like contracts, this pattern also obscures prevailing but problematic legal judgments about matters such as whether promise-based

15. For example, support obligations, rules about name change on marriage, and rules governing domicile have undergone some change as a result of debates over sexism. See Herma Hill Kay, Sex-Based Discrimination 186-239 (3d ed. 1988).
17. See Restatement (Second) of Contracts § 190 (1981).
expectations are important in intimate relations, or what constitutes an appropriate balance of public and private norm-setting in each of these domains.

B. The Division of Turf: The Example of Surrogacy

Disputes about reproductive technology generally, and surrogacy in particular, are fraught with controversy. The Baby M case, for instance, confused and tormented us all. For my purposes, that dispute provides another useful illustration of the conceptual and curricular dichotomy between contracts and family life, this time in the context of parents and children.

A core issue confronting the New Jersey courts in Baby M was whether contracts or family law should provide the template for analysis. In terms of my discussion here, should principles protecting expectations and reliance flowing from private agreements be applied? Or should the public policy norms of family law control? The trial court applied contracts law, but the New Jersey Supreme Court reversed, ruling the contract unenforceable. The court invoked rules governing adoption, baby-selling, and custody disputes between unwed parents to decide the issues before it. It awarded custody to the biological father and visitation rights to the surrogate. Regarding future arrangements, the court held commercial surrogacy contracts void as against public policy and required that uncompensated arrangements allow the gestational surrogate to change her mind after birth.

The court presumably resolved the case as it did for a number of reasons, perhaps including the degree to which it had considered the technological developments, its perceptions about the interests of women and children generally, and its evaluation of these individual litigants. I am confident, however, that a major factor shaping the court’s decision was that, conceptually speaking, it indexed the issue as one of family law rather than as one of contract law. It categorized the problem as one where standardized public regulation of families was more appropriate than enforcing private expectations and reliance. In other words, it reacted in line with the dichotomy that the law school curriculum both reflects and reinforces.

When I teach contracts, I open with the same question my professor posed on my first day of law school: Which promises should the law enforce? In recent years, however, I raise those issues initially through a discussion of surrogacy agreements. Had the New Jersey judges been

20. Id. at 1246-51 (finding the contract to surrender the child upon birth against public policy).
21. Id. at 1238-46 (finding the contract violated the state statutory law).
22. Id. at 1251-53 (discussing related prior case law).
23. Id. at 1255-62 (noting the factors involved in satisfying the child's best interest).
24. Id. at 1246-51 (stating the court's reasoning behind finding the surrogate's contract void).
exposed to an analogous discussion, perhaps they would have been more receptive to the contractual dimensions of the *Baby M* case. Although surrogacy is not an entirely new phenomenon, the *Baby M* case is emblematic of a new era in reproduction and parenthood that makes such contractual factors critical.\(^{25}\) For years, procreation and parenthood have been primarily matters of fate rather than intention. Even when birth control and abortion brought greater opportunity for purposeful decision, reproductive control remained largely negative and reactive. Modern techniques, however, greatly increase the role of affirmative intention in procreation and parenthood.\(^{26}\)

Modern techniques can subdivide the procreative process (allowing replacement of impaired biologic functions) and can sever reproduction from the sexual and interpersonal intimacy in which it, at least according to traditional ideals, has been embedded. These changes make reproductive purpose less ambiguous than is typical in coital procreation. At the same time they generate new biological and social choices. To actualize these new opportunities, individuals have made agreements that seek to govern procreational and parenting commitments. As contracting parties always do, they seek to render the uncertain future more appealing by undertaking commitments in exchange for expected benefits.

These developments in reproductive technology pose a substantial challenge to the law. Historically, the assignment of legal parenthood was comparatively easy. For mothers, the law could simply track the biologically self-evident fact; for fathers it could guestimate biological paternity derivatively on the basis of a man's relations with the mother. While biological paternity could not be decisively known, gaps could always be filled by the conventions of family morality. Now, however, as a consequence of growing intentionality in procreation and of the severance of reproduction from socio-psychological intimacy, new variations and disputes have arisen over who will have the legal right and responsibility to parent a child. For instance, the law must now choose not simply between biological and intending mothers as in *Baby M*, but also between two biological mothers where there is both a genetic and a gestational claimant to that role.\(^{27}\) The law must adjudicate between a definitively determined genetic father and one claiming parental status on the basis of more conventional norms such as marriage to the mother.\(^{28}\) It must decide disputes arising in new familial contexts such as the dissolution of homosexual relationships where both partners claim parental rights to a child.\(^{29}\)

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25. See Marjorie Maguire Shultz, Reproductive Technology and Intent-Based Parenthood, 1990 Wis. L. Rev. 297, 355-60 (criticizing court's decision for disregarding intentions of the parties).

26. Id. at 307-16.


28. See supra note 16.

In its Baby M decision, the New Jersey Supreme Court chose to ignore the emergent role of intention in surrogacy arrangements. It analyzed the issues under existing family law, that is, under publicly determined norms. Despite the fact that Baby M never would have been conceived without the surrogacy contract, the court ruled that the intentions that gave rise to that agreement were irrelevant. Although the adults who planned Baby M's conception had no relation to each other apart from their contract, the court described the issues as being "the same as" those in a custody dispute between ordinary unwed parents.30 The court's choice to ignore factual distinctions as well the intentions of the parties is particularly surprising given that this is the same court that led the nation in crafting new law to manage parallel changes in the circumstances surrounding death.31 The court likely responded differently to these issues, at least in part, because it had internalized the dichotomy between the realm of contracts and the realm of parenting.

When it locked surrogacy arrangements into the publicly-regulated family category, the New Jersey Supreme Court not only devalued intention, expectation, and reliance, it also reinforced the gendered spheres of influence that undergird the public-private dichotomy. The court stated that no meaningful intentions could be formed or commitments made before pregnancy and childbirth, and that a surrogate therefore must be able to change her mind after the birth. By so concluding, the New Jersey Supreme Court reinforced biology as female destiny. By invalidating commercial surrogacy, it restated the separation of women from the world of money and the market. By privileging a surrogate's claim on the basis of pregnancy, the court re-emphasized the centrality of women and the peripheralness of men in the sphere of children.

Had the court been more responsive to the importance of the parties' agreement, to their expectations, and to their actions in reliance on those intentions, it might have given more credence to the idea that a woman might conceive a child that she did not intend to mother, and that a man might go to great lengths to attain the opportunity to parent. Courts recently have recognized a need for legal rules to offset the biological disadvantages that pregnancy and childbirth impose on women's access to the traditionally male world of market work.32 By the same token, legal rules should facilitate greater male access to and responsibility for children than biology and gender roles traditionally have provided. Whether ultimately persuasive or not, such an analysis would have been considerably more "thinkable" if we did not from our earliest days in law school assume (like the fish with the water) that personal intentions and expectations are less important in family life than in commercial contexts.

31. See Shultz, supra note 25, at 351-53 (analyzing certain similarities between reproductive issues and death issues).
32. See California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 289 (1987) ("California's pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs.").
C. Examples Within Contracts Doctrine

The gendered nature of the legal curriculum is reflected not just in the way conceptual lines are drawn. It permeates rules and principles within contract doctrine as well. For example, a bargain theory of consideration lies at the heart of modern contract doctrine; unrelied-upon donative promises are not enforceable. However, as one of my female colleagues, tongue firmly in cheek, observed, we had to invent promissory estoppel or we would have nowhere to put all the widows and orphans. Even with the significant addition of reliance actions, self-interested bargaining remains the privileged form of interaction. When bargaining creates an expectation, that expectation is protectable from the moment a promise is made. By contrast, in reliance actions the eventuation of incurred detriment must be shown in addition to the promise to establish a substantive claim. These differences are justified on the ground that one-sided promises are less worthy of legal protection. Because donative promises often arise out of relations of trust and interpersonal intimacy, they are asserted to be more emotionally and less deliberately made, to create less intense disappointment when broken, and to possess less social utility than those deriving from self-interested exchange.3 These conclusions are, to say the least, debatable. They are not facts but judgments and, given the historic demographics of the legal profession, judgments made primarily by men. These judgments intersect with differences in moral norms that are associated with gender.34 Because women place substantially greater priority on an ethic of care and concern for persons than do men, women might design a different hierarchy of promissory enforceability than the one currently having the status of received truth in first-year contracts courses.

An observation by one of my female students provides a related example.35 She commented that contracts doctrine views everything that women do and value as donative or illusory, as being a moral obligation or a pre-existing legal duty, or as being in some other way noncognizable and unenforceable. To illustrate her point she brought me the lyrics to a song by Edie Brickell and New-Bohemians titled “Nothing.” To understand the full force of her insight it is necessary to know that when teaching consideration doctrine, I often state the legal conclusion of nonenforceability in a shorthand way. I say that although, theoretically, courts will not review the adequacy of consideration, they will judge whether various claims of consideration turn out, on closer examination, to offer only a “nothing” on one side of the purported bargain. Thus, I press the analytic issue of determining enforceability by asking, “Is this a ‘something’ or a ‘nothing’?” The lyric my student supplied expresses a woman’s lament: “There's nothing I hate more than nothing. Nothing keeps me up at night. I toss and turn over nothing. Nothing could cause a great big fight. Hey, Hey...”

33. Fuller & Eisenberg, supra note 2, at 9-10.
34. See generally Carol Gilligan, In A Different Voice: Psychological Theory and Women's Development (1982) (arguing that females place a higher moral value on interpersonal context and care than do men).
35. I am indebted to Rebecca Hall, Boalt Class of 1989, for this point.
what’s the matter? Don’t tell me nothing.” What my student saw so clearly was that the law judges as “nothing” many expectations and reciprocities that are at the core of women’s lives and relationships.

I offer one more example from the doctrines concerning the interpretation of agreements. Several years ago I worked on a campus task force to design new rules to govern date rape and sexual harassment. We came up against the perennial problem of how meaning is to be attributed in relations between men and women: I can report that the old struggle about whether “no” means “yes” remains alive and unwell. More and more women are convinced that “no” should mean “no” and that affirmative consent should be required. Some men share that conviction. But in the context of punishment, whether through the criminal code or through campus conduct procedures, many men and some women are uneasy about that conclusion. They believe that when men act on a presumption of greater ambiguity of meaning in intimate encounters, their view is often more reasonable than feminists deem it to be.

Grappling with the problem of how language and conduct should be interpreted in the context of acquaintance rape and harassment, I asked myself how contract doctrine would resolve the issues. Admittedly, the punitive context casts a different light than the promissory one because the consequences of the legal judgments differ so substantially. But in some sense, the issue is precisely whether a given experience of sexual intimacy was the product of a consensual, contract-like agreement, or was the result of criminal or tortious imposition. My inquiry about attribution of meaning in consensual contexts was instructive and its outcome troubling.

Under the traditional objective theory of contracts, disputes about assent would be settled by testing reasonable meaning from the vantage point of the hearer or observer. In alleged rape or harassment where the issue is whether the woman consented, such a rule would privilege the interpretive viewpoint of the man, albeit the reasonable man. Even modern approaches that look to the reasonable expectations of the person whose assent is at issue would inquire whether the woman knew or had reason to know that the man would interpret her behavior as assent. Under either doctrinal approach, the woman’s viewpoint about her meaning disappears; it is the man’s viewpoint that remains pivotal. In a context as intensely contested along gender lines as date rape, focus on the man’s viewpoint alone, whether directly, through the “reasonable hearer” standard, or indirectly, through inquiry into the woman’s understanding of his viewpoint, is not adequate.

36. Edie Brickell and New Bohemians, Nothing, on Shooting Rubberbands at the Stars (Geffen Music 1988).
38. See Restatement (Second) of Contracts § 19(2) (1981) (“The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.”). Only if a woman could show not only that she should have known the man’s meaning, but that he should have known hers as well, might she establish nonconsent. See id. § 20(1)(b) (“Each party knows or has reason to know the meaning attached by the other.”). In the circumstances of date rape, the latter is hard to do.
Rules invoking the understanding of hearers or the expectations of speakers about hearers' understanding are generally appropriate where a unitary standard of reasonableness is accepted. Reasonableness then functions as an adequate corrective to illegitimate meanings that may be put forward by individuals. Rules that focus on the viewpoint of one side, however, are far less appropriate where long and deep traditions about reasonableness differ in significant ways. Where such differences are not idiosyncratic and fluid but are systematically associated with immutable traits like sex or race, the rule becomes profoundly problematic. Moreover, where such differences in understanding consistently align with particular litigant roles in a given category of disputes, as is the case with date rape, and where one-sided rules have been chosen and legitimated primarily by members of the group they favor, the problem is further exacerbated.

I do not contend that men designed the rules of contract interpretation to protect them from harassment and rape charges. I do suspect that only a relatively homogeneous group that has long dominated the "rules of the game" could fail to notice how traditional rules systematically privilege one viewpoint over another even in circumstances where doing so undermines fairness. Duality of meaning is a factor unlikely to be encountered by those who create such rules. Because they control the attribution of meaning, the powerful need not understand the symbols and meanings of the powerless. But to survive, the powerless have to understand both their own meanings and those of the powerful. Unitary rules depend for their legitimacy on the existence of unitary standards. If in a given category of disputes a single standard is illusory—as is arguably true here where immutable traits like sex (or race) are so encrusted with culturally different experience that no transcendent standard of meaning can fairly be discerned—we face enormous difficulties of decision and legitimacy. I do not claim to know precisely where we should turn in such circumstances. I am convinced, however, that habit or dominance-driven deference to what is really only a pseudo-unitary standard of meaning is not acceptable.

Issues about contractual agreements are seldom as systematically polarized along the lines of gender as are questions of rape or sexual harassment. Nevertheless, my excursion into the terrain of contract versus criminal interpretations of consent raises an important cautionary flag throughout the curriculum. Both the aspiration for transcendent standards of fairness and the desire for clarity in dispute resolution are laudable goals. But neither can legitimate facile imposition of the meanings of one group on the members of another. Where normative meanings diverge, true legitimacy depends on our ability to analyze in ways that are responsive to differences without losing sight of the need for principled resolution.

39. A standard privileging only the viewpoint of the speaker or actor would also be unacceptable for the same reasons because it would not satisfy traditional concerns about fairness to the person being accused.

II. The Informal Curriculum

As I noted at the outset, students learn many things that we neither formally design nor wholly control. Yet, if we were conscious about those lessons, we likely could influence them. Career and placement services in law schools provide an important illustration of what I have called the informal curriculum. Here, too, gendered learning goes on.

Getting a job, starting a career, earning serious money, being responsible for important matters—these experiences generate intense eagerness, pride, satisfaction, and relief, but also bring anxiety, doubt, and pressure. In making first job decisions, students undergo what is for many the first major transition from years of preparation and education to the start of "real life." In the process, students acquire vital markers of adulthood. Whatever their underlying attitudes, options, and satisfactions, making these decisions gets the attention of students in a big way. The intensity of the issues and the significance of the personal investments makes lessons learned in this setting peculiarly deep and long-lasting. What do law students in general and women in particular learn about the legal profession as they consider various job placements? What, if anything, is the role of law schools in relation to that learning?

Studies have shown that as compared to men, women come to law school with a greater orientation toward public service, public interest law, and "helping people." On the average, male law students come more motivated by the money, power, or status the legal profession offers. Of course, it is also true that law students in general start law school with more of a public service focus than they retain by graduation. Moreover, underlying motivations and expectations as well as self-reported career preferences likely reflect stereotyped gender roles that expect women to be caring and expect men to be money and power oriented. Whatever the origin of the differences, what do women learn when they confront a profession that increasingly is portrayed and portrays itself as being mainly about money, power, and status? I fear that many women learn that their aspirations about the law are viewed as inappropriate, that they themselves are in some deep sense irrelevant to the law and unwelcome in the profession.

41. Analogous inquiries should be made regarding learning by other subgroups of students as they confront career decisions during law school.

42. See Project, Gender, Legal Education and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates, 40 Stan. L. Rev. 1209, 1219, 1238-41 (1988) (citing various studies showing that women value service commitments substantially more than men).

43. See Robert Stover, Making It and Breaking It: The Fate of Public Interest Commitment During Law School 3 (1989); E. Gordon Gee & Donald W. Jackson, Bridging the Gap: Legal Education and Lawyer Competency, 4 B.Y.U. L. Rev. 695, 957-59 (1977) (citing a 1976 study arguing that during the three years of law school there is a decline in student interest in public service careers).

44. See Cynthia Fuchs Epstein, Women in Law 39 (1981) (discussing the pressure on women to say they want to work for social good).

45. The storm of news coverage regarding 1986 raises in lawyers' starting salaries at large New York firms provides an example. See, e.g., Tamar Lewin, At Cravath, $65,000 To Start, N.Y. Times, April 18, 1986, at D1.
What do women and for that matter, men, conclude as they recognize, absorb, and experience the pecking order of fields within the law? Whether in the curriculum or in the job world, the professional hierarchy replicates the gendered hierarchy of life. Family law, probate, education, criminal law, poverty law, homelessness, welfare, and public interest concerns are the stereotypically women's fields—the low status fields in the profession. One basis for status differences is the money to be made in various fields. But to me, the grouping also reflects whether a specialty deals in a deep way with people in boundary situations. In our society and in our profession, trouble-shooting with complex, difficult, messy human emotions and relationships is low in status when compared to dealing with money, formal power, and abstraction—women's work rather than men's. Of course, hostile takeovers or contests over predatory pricing also involve emotion and complexity. But that emotion is comparatively disguised and attenuated, submerged in competitive power games. It is male-style emotion, compatible with money and status, rather than female-style emotion, doomed to second-classness. At the other end of the hierarchy, the economic and power consequences of family, criminal, and welfare law systems are enormous both for individuals and for society. The legal issues those fields address are deeply significant in human terms. Yet these fields are reputationally “pooh-poohed” as dealing in “small potatoes;” their importance gets lost in the interviewing rush.

Does law school challenge the standard career-status assessments or does it reinforce them? Our own denigration of work with individuals (in our own lives, the teaching and advising of students) replicates and reinforces the profession's analogous neglect of person-centeredness. The career pecking order is routinely justified by claims about the greater intellectual and professional challenge of securities, or antitrust, or mergers and acquisitions work. Do we, the arbiters of intellectual rigor, make it our business to rebut, or at least to analyze, those claims? What could possibly be more important or more demanding of professional strength, skill, and integrity than the resolution of disputes about who raises a child, whether a murderer is executed, when a family gets off the street, or whether public financing of reproductive counselling is permissible? The hierarchy of fields conveys powerful messages about the profession, inevitably affecting students' decisions and their sense of self. We do not control the career hierarchy, but neither are we irrelevant or powerless in regard to its effects.

What do students learn from their exposure to academic employment within the profession? Comparable worth is traditionally understood as a problem of nurses and secretaries as compared to truck drivers and equipment movers. With discrimination law generally, there is a deep reluctance to intrude into elite occupational enclaves. It has only recently struck me that in higher education we have our own version of the comparable worth debate. Teaching versus research is our variation on the theme. The low status, low priority, low reward attached to teaching and service in the academy is a powerful illustration of the society-wide notion that investing in people and in interpersonal environments is not important and difficult work worthy of reward. Students cannot help but notice that pursuing status based on abstract intellectual products (“My article is cited more than your article”) as opposed to engaging with human issues (“Is
daily life in this environment conducive to productive and satisfying work-lives for the individuals engaged here?" or "How does one improve the learning process?") is what the academy rewards.

Comparable worth remains a controversial idea, but more direct lessons about gender hierarchy are also available in the informal law school curriculum. A recent report showed "an alarming disparity' in the prospects of Yale men and women seeking to clerk for federal judges, particularly at the most sought-after courts."\(^46\) Seven times as many men as women from Yale’s 1991 class were scheduled to clerk for a federal appellate court, although forty percent of the graduates were women.\(^47\) Conflicts over high-visibility tenure cases also prove instructive to students’ understanding of their new professional options. I cannot overemphasize how often exceptional women students, when asked whether they might seek an academic career, respond, "Are you kidding? When I see what you and so many others have gone through? Why would I have any interest in teaching?" The messages transmitted by the informal curriculum are powerful indeed.

What do students learn when they read the California State Bar study showing that eighty-eight percent of women attorneys reported subtle but pervasive gender bias in the legal profession?\(^48\) When someone wins an election by a margin of fifty-five to forty-five percent, it is called a landslide. In opinion polling statistics, eighty-eight percent is astounding! Consider that figure in light of data indicating that of all possible types of legal problems experienced, discrimination on the job is the one least likely to be pursued.\(^49\) Of course, responding to a survey is not the same as filing a lawsuit. But the claims data certainly give me pause regarding the popular notion that people whine "discrimination" at the drop of a hat. My perception is that people are loathe to allege discrimination and typically look for other explanations first.\(^50\) Complaining of discrimination invites a rejoinder that one is weak and unqualified. It brands one as a troublemaker. It means admitting a lack of personal control over one’s life. Especially for the relatively privileged, educated, and able, claiming discrimination imposes enormous costs. I may be wrong about the psychodynamics of claiming discrimination. But I am convinced that when women students read headline stories stating that eighty-eight percent of women lawyers in their state believe there is pervasive discrimination on the job, it startles and disturbs them.

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47. Id.
48. See State Bar Report, Cal. Law., Nov. 1989, at 99, 106 (stating nearly half of women surveyed reported having experienced sexual harassment on the job and 62% believed they are not accepted as lawyers by men in the legal profession).
50. See, Deborah L. Rhode, The 'No-Problem' Problem: Feminist Challenges and Cultural Change, 100 Yale L.J. 1731, 1773-76 (1991) (describing theory of relative deprivation as a reason that women frequently fail to perceive or complain about sex discrimination).
In addition, female students do not have to turn far into their newspapers to discover that at least at the big firms, just as women are beginning to gain entry in significant numbers, the ante is going up. The rules of the game are changing and not in a way that facilitates women's integration into these workplaces. Required hours are increasing, making it nearly impossible for most women with family responsibilities to survive professionally or personally. The odds of making partner are also going down with every passing day. And, for those few who make partner, the odds of being fired are rising. For example, firms have begun to layoff partners on the basis of insufficient ability to bring in business. Yet, as Maryellen Cattani, a partner in a major San Francisco firm, observed, women have unequal access to bringing in business.

The new personnel policies of the firms are explained on the basis of the impersonal market; their gendered implications are for the most part ignored by everyone but women. This is the legal profession's own version of last-hired, first-fired. No wonder women law students and lawyers are starting to sound cynical, resigned, and angry. It sometimes seems that whatever we do, however good we are, the "neutral" rules keep changing and the bottom line keeps remaining the same: not many of us are going to make it into the charmed circles of the profession, at least not for a long time. Meanwhile, the data on the disproportional dissatisfaction of women attorneys and their disproportional stress within their jobs continue to mount. Our women students learn from those headlines as they scan the paper between job interviews.

Confronted with data like these, legal educators tend to ask, what does all this, however regrettable, have to do with us? By definition, we do not design or control the employment market. We do not "teach" this dimension of the informal curriculum. We may decry what we see or read, but our fundamental response seems to be that it is not our problem. My question is how does that response get heard? Many women students and I myself experience that traditional response as a declaration that we should not be seen or heard. The lesson learned is not only about what to expect in the profession. It also provides a painful insight into those who play a key role in entry into the profession. The gate-keepers from whom women students might hope for help and problem-solving strategies—or at least for

51. See The State of the Legal Profession: A Discussion of the Extent, Causes and Impact of Lawyer Career Dissatisfaction 1990 v. 1984 (ABA Young Lawyers Division Report No. 1, 1990). The report found a significant increase in number of hours worked and that 61% of women attorneys report they don't have enough time for themselves and their families. Id. at 12, 15.


53. Harriet Chiang, New Trouble for Women Lawyers, San Francisco Chron., April 9, 1990, at A1, A9. Cattani comments, "The glass ceiling keeps moving up, but it's still there. . . . Business development still has 'gender-related' problems. In terms of the way our society is structured, women aren't equal. And the people handing out the business are, by and large, men." Id.

54. See The State of the Legal Profession, supra note 51. "Significantly more women are dissatisfied with their jobs than men in private practice." Id. at 8.
understanding and concern—are turning a deaf ear to their deeply felt pain and frustration. Many women feel themselves—along with their critical issues of professional definition, opportunity, and survival—to be invisible to their teachers, their first professional models. The message is not a reassuring one.

We cannot escape that we are implicated in the informal curriculum any more than we could disown responsibility for our formal one. Our influence may be less complete and certainly less direct, but what happens, happens on our watch. As the “think tank” of the profession, law schools should focus attention on the issues of substance and structure that are involved in the patterns I describe. Also, we can and should guide students in reflection about the personal and professional meanings of these trends, and about the options available to them in relation and response. To do otherwise is to be absent from a post where the need for our attentiveness is great.

III. CONCLUSION

We design the formal curriculum. We are complicit with, if not wholly conscious or controlling of, the informal curriculum. Both curricula include gendered messages that students absorb. Given the rapid and drastic changes currently transforming gender perceptions and gender relations, this fact alone is neither remarkable nor blameworthy. What matters is that we increase our awareness about what we are teaching, eliminate the inappropriate sexist content, and get on with the interesting business of sorting out what new messages we want to convey. Failure to do that, especially as the need and the opportunity have become so clear, would be both surprising and culpable.