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Legal Education as Political Consciousness-Raising or Paving the Road to Hell

Richard F. Devlin FRSC

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The *Journal of Legal Education* did all legal educators a great service when it published "Women in Legal Education—Pedagogy, Law, Theory, and Practice,"[1] a symposium that highlights feminist criticisms of, innovations in, and desiderata for legal education. The contributors challenge some of our deepest convictions about what it means to be a law teacher. Appropriately, all the contributors are women. It is they who have experienced most keenly—and have been harmed by—the gendered nature of the legal educational process. The gendered nature of legal education is not, however, a "women's only" issue; it is not solely "their problem," "their burden." Male educators, as benefactors and agents of gender bias in legal education, must also confront the problem and acknowledge their responsibilities. They must interrogate their own presuppositions; they must re-vision their own pedagogy, scholarship, and administrative activities; they must practice affirmative action in their professional and personal lives. Gender bias can only be thoroughly eliminated through the critical self-conscious agency of its practitioners.[2] What follows is a male teacher's reflection on his first year of teaching, on his aspiration to make the issue of gender a central concern, and on some of the dangers and opportunities involved in such an enterprise.

For several years now, I have been seriously concerned about legal education. Ever since my first exposure to law school in British-occupied Northern Ireland, I have been perturbed by the political agnosticism of many legal educators. In Ireland, the stance was designed in part to obfuscate personal preferences for continued colonial links with a defunct

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1. 38 J. Legal Educ. 1–193 (1988).
2. The risk of calling for male involvement in the reconstruction of legal education is that male domination will be reconstituted. Some males may "bandwagon" and appropriate the feminist critique in order to establish a new male hegemony that once again silences women "for their own good." There is no easy way to avoid the risk. All that can be hoped for is that the men who participate in reconstructive efforts will continue to listen to their feminist critics, to recognize the dangers of neoimperialism, and to respond accordingly.

British Empire. In North America, advocates of the autonomy of law, although perhaps not quite as obscurantist as their Anglo-Irish counterparts, also claim a fundamental distinction between law and politics, which they use to deny the partisan nature of law in relation to issues of gender, race, and class.[3]

First-year legal education is especially disconcerting. Despite the best intentions of some of its practitioners, the effects of legal education on first-year law students may be personally, socially, and politically detrimental. Because it disconnects law from the reality of its sociocultural contexts and canonizes legal texts, discourses, and reasoning, first-year legal education inculcates primarily male,[4] nineteenth-century,[5] bourgeois[6] values and "knowledge." By delineating the limits of legitimate legal discourse,[7] it excludes "different voices."[8] Law teachers, in a desire to forge the well-trained "legal mind," set in motion a decidedly dangerous dynamic.[9] By deliberately decomposing our students' pre–law school experiences, by denying a past that is constitutive of their very identities as persons, we encourage the role to swallow the person.[10] As a result, law teachers frequently cripple students both intellectually and politically[11] and even induce significant psychological distress.[12] Worse still, and perhaps unwit-

3. For an extended influential discussion of the claim that "it is all politics," see Roberto Mangabeira Unger, Social Theory, Its Situation and Task (New York, 1987), and False Necessity (New York, 1987); see also Roberto Unger, The Critical Legal Studies Movement (Cambridge, Mass., 1986).
4. James R. Elkins (ed.), Worlds of Silence: Women the Law School, 8 ALSA F. 1 (1984); Nancy S. Erickson, Legal Education: The Last Academic Bastion of Sex Bias? 10 Nova L.J. 457 (1986); Mary Joe Frug, Re-reading Contracts: A Feminist Analysis of a Contracts Casebook, 34 Am. U.L. Rev. 1065 (1985); Jennifer Jaff, Frame-Shifting: An Empowering Methodology for Teaching and Learning Legal Reasoning, 36 J. Legal Educ. 249, 258–61 (1986); Mary O'Brien & Sheila McIntyre, Patriarchal Hegemony and Legal Education, 2 Can. J. Women & L. 69 (1986); Faith Seidenberg, A Neglected Minority—Women in Law School, 10 Nova L.J. 843 (1986); K. C. Worden, Overshooting the Target: A Feminist Deconstruction of Legal Education, 34 Am. U.L. Rev. 1141 (1985). See also Taunya Lovell Banks, Gender Bias in the Classroom, 38 J. Legal Educ. 137 (1988); Mary Irene Coombs, Crime in the Stacks, or a Tale of a Text: A Feminist Response to a Criminal Law Textbook, 38 J. Legal Educ. 117 (1988); Nancy S. Erickson, Sex Bias in Law School Courses: Some Common Issues, 38 J. Legal Educ. 101 (1988); Elizabeth M. Schneider, Task Force Reports on Women in the Courts: The Challenge for Legal Education, 38 J. Legal Educ. 87 (1988); Ann Shalleck, Report of the Women and the Law Project: Gender Bias and the Law School Curriculum, 38 J. Legal Educ. 97 (1988).
5. Karl E. Klare, The Law-School Curriculum in the 1980s: What's Left? 32 J. Legal Educ. 336 (1982); Morton J. Horowitz, Are Law Schools Fifty Years Out of Date? 54 UMKC L. Rev. 385 (1986); Elizabeth Mensch, The History of Mainstream Legal Thought, *in* The Politics of Law, ed. David Kairys, 18 (New York, 1982).
6. O'Brien & McIntyre, *supra* note 4; Peter Gabel & Jay M. Feinman, Contract Law As Ideology, *in* Kairys, *supra* note 5, at 172; Richard L. Abel, Torts, *id.* at 185.
7. Peter Goodrich, Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis (New York, 1987).
8. Carol Gilligan, In a Different Voice (Cambridge, Mass., 1982).
9. Klare, *supra* note 5.
10. Robert Kerry Wilkins, "The Person You Are Supposed to Become": The Politics of the Law School Experience, 45 U. Toronto Fac. L. Rev. 98 (1987).
11. Stephen C. Halpern, The Politics and Pathology of Legal Education, 32 J. Legal Educ. 383 (1982).
12. G. A. H. Benjamin, Alfred Kaszniak, Bruce Sales & Stephen B. Shanfield, The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers,

tingly, the vast majority of us demand that students accept as necessary, and acquiesce in, unjustifiable hierarchy and deference.[13] Moreover, the consequences of such an impoverished pedagogy are culturally pervasive and socially systemic. As a central component in the training, controlling, and disciplining of students, legal education plays a vital role in molding some of the key technicians of the "disciplinary society."[14]

In short, contemporary legal education is about power and powerlessness; it is a microcosm of the structures of domination and subordination in our postindustrial, patriarchal society.

I. Consciousness-Raising

I am a legal educator. Last year I taught a course entitled "Legal Research and Writing" (LRW) at Osgoode Hall Law School.[15] I was not a professor; rather, I was given the more lowly title and position of "sessional lecturer" and "instructor." As an LRW instructor, I was close to the bottom of the totem pole of legal education; below me there were the students, secretaries, and maintenance staff. I had power, but only in limited amounts, and only in relation to my subordinates.

The LRW program is one of the most difficult, demanding, and labor-intensive courses to teach.[16] In many ways it is the most important

1986 Am. B. Found. Res. J. 225; Andrew S. Watson, The Quest for Professional Competence: Psychological Aspects of Legal Education, 37 U. Cin. L. Rev. 91 (1968); Wilkins, *supra* note 10.

13. Toni Pickard, Experience As Teacher: Discovering the Politics of Law Teaching, 33 U. Toronto L.J. 279 (1983), and Is Real Life Finally Happening? 2 Can. J. Women & L. 150 (1986); Duncan Kennedy, Legal Education and the Reproduction of Hierarchy: A Polemic Against the System (Cambridge, Mass., 1983), and Liberal Values in Legal Education, 10 Nova L.J. 603 (1986); James C. Foster, The "Cooling Out" of Law Students, 3 Law & Pol'y Q. 243 (1981); Klare, *supra* note 5. Wilkins, *supra* note 10. See also Carrie Menkel-Meadow, Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School," 38 J. Legal Educ. 61 (1988).
14. Michel Foucault, Discipline and Punish (New York, 1977).
15. This article is written in the perfect tense. Earlier drafts were written in the present tense, in the last couple of weeks of my experience as an LRW instructor. The final draft was written one year after the events it recounts. It is appropriate, I think, to acknowledge the temporal shift captured in the linguistic distinction between present tense and past tense, in which the process of retrospective reflection replaces the immediacy of contemporaneous reporting. It is my hope that in the interim, and through the reworkings of the article, I have managed to retain as much as I can of the authenticity of my experience. Every form of communication—whether contemporary or ex post facto—is mediated rather than immediate, encoded rather than essential, and therefore necessarily partisan. Therefore my ruminations are subjective and not neutral. They do not claim to be a reporting of "the facts"; they are not intended to ventriloquize what the students have said or reenact what they have done. Theirs may very well be a different "story." What I have attempted is an honest reconstruction from my point of view, capturing in words "the then" and "the now."
16. The job description reads as follows:

> The Legal Research and Writing Program is designed to introduce first year law students to the basic principles and techniques of legal analysis, writing and research. Lecturers meet students weekly in a large group and also in seminar groups of about twenty students, conduct workshops, grade assignments and generally provide timely feedback and criticism on the work submitted by the students. The lecturers have some discretion in the planning and presentation of the Legal Research and Writing Program subject to the overall direction of the

course in any law school's curriculum in that it provides students with the technical talents—the grammar of law, if you will—that are fundamental and essential to their effective and successful participation in other courses. Everybody knows this, but, paradoxically, the "real" professors will not shoulder the burden; they will not do such pedantic work. Rather, they will leave it up to transient labor[17]—"cannon fodder," as one of my more cheery coinstructors described us—upon which disoriented and disenchanted first-year students can vent their frustration. At the same time, because "the faculty" cannot trust these strangers at their margin, the course is institutionally circumscribed, its basic structure preordained, and much of the materials "fixed". The ideal instructor is the automaton, one who facilitates the smooth running of the program, one who determines that the students are technically competent to deal with substantive courses, and most important, one who ensures that nothing conflicts with the desires of the professors. "Know your place and your purpose" is the unspoken maxim for the LRW instructor.

The LRW course is a paradigm of training for hierarchy. We introduce students to the techniques and methodologies that will enable them to think, write, and speak "like lawyers."[18] LRW instructors are the progenitors of the propaganda of objectivity and neutrality.[19] We emphasize and grade for (coerce) rationality, detachment, and dispassion. We construct practico-academic exercises such as case briefs (better known as "finding the ratio"), case syntheses (better known as "finding a legal reconciliation for the politically irreconcilable"), and the ominous sounding "memoranda of fact and law." The last of these is classically hierarchical; we cast the legal neophyte in the role of an articling student in a large "downtown" firm who dutifully and respectfully does the slog for her distinguished senior, usually

Assistant Dean; they also work with the other first year law professors in developing the necessary workshops and assignments. Each instructor assumes responsibilities for approximately sixty-five first year law students.

17. From the viewpoint of equality, the terms of employment for the position leave much to be desired. Instructors are hired on a ten-month contract, renewable for one further ten-month period, and are paid about sixty percent of a first-year tenure-track law professor's salary at the same university. Although the work load of instructors is substantially heavier than that of their tenure-track counterparts, the ratio of their earnings parallels that of the average salary differential—greater than one third—between women and men in contemporary North American society. It is also worth noting that Richard Chused's 1986-87 study on the composition of United States law faculties indicates that women hold seventy percent of all legal writing positions but only 15.9 percent of all tenured or tenure-track positions. See Schneider, *supra* note 4, at 89 n.11. When I taught the course at Osgoode Hall, the positions were occupied by three men and two women.
18. The concept and practice of "thinking like a lawyer" is one of the ungraspable carrots that is continually dangled in front of students. However, despite its status as one of the organizing principles of legal education, the teaching community has left the concept remarkably underdeveloped. Could this be because "thinking like a lawyer" is more myth than reality; because lawyers—and this includes the judiciary—think as instrumentally, self-interestedly, subjectively, and politically as the rest of us; and because the only difference is in the rationalization or obfuscation, not in the processes?

    For a useful critical conception of what "thinking like a lawyer" means, see Jay M. Feinman & Marc Feldman, Achieving Excellence: Mastery Learning in Legal Education, 35 J. Legal Educ. 528 (1985). See also Klare, *supra* note 5, for some very sketchy suggestions.
19. See also Jaff, *supra* note 4.

"a partner." Ultimately, the course concludes with a whimpering moot in the law school's equivalent of the Court of Appeal. The process is oriented towards reproducing "appellate courtitis,"[20] once again under the assumption that this is where the action really is. In preparation for this day of reckoning, we pepper the academic year with tawdry anecdotes about great litigants, past and present, which reinforce the students' delusions of grandeur and visions of the jurisprudential splendor that can be theirs . . . but always and only if they play their cards right.

This is a gloomy but in my opinion accurate synopsis of first-year legal education in general, and LRW in particular. It is hardly an optimistic starting point for transgressive legal education.

Power, however, is neither unidirectional nor unidimensional; it should not be conceived of as purely repressive, as "power over." Despite the predilections of the Law Society of Upper Canada and the Canadian Bar Association, legal education, like the state,[21] is not an unassailable monolith that irremediably alienates students and undercuts their social, political, relational, and communal values. Legal education is polymorphous and heterogeneous; it necessarily localizes and decentralizes power and therefore provides interstitial opportunities for resistance. The LRW program—in spite of, indeed because of, its lowly position—provides an arena in which we can endeavour to discover and develop "emancipatory trojan horses"[22] within the citadel of contemporary legal education.[23]

My goal for the winter term of the LRW program was to reconstruct a legal academic exercise into a process of political sensitization. The formal structure of the course provided a valuable opportunity for students to engage in a fairly major piece of research, followed by the articulation of pro-and-con arguments in both written and oral form. I felt that the opportunity was too good to miss and chose as my topic the vexed sociopolitical problem of the legal regulation of pornography. I hoped that the overlap between law, politics, and gender could be made inescapable and that the chimera of the neutrality of the law could be banished. I could use my position of power to confront sixty-four (potential) power holders with an immediate, real, and highly charged politicolegal problem.

I constructed a hypothetical problem for the students: An amendment had been added to the *Ontario Human Rights Code 1980*[24] that, among other things, provided for a prohibition against "trafficking in pornography" on the ground that pornography discriminates against women. The amendment was modelled on Andrea Dworkin and Catharine A. MacKinnon's

20. Jerome Frank, Courts on Trial 222–24 (Princeton, N.J., 1949).
21. See further, Richard F. Devlin, Law's Centaur: A Preliminary Theoretical Inquiry into the Nature and Relations of Law, State and Violence, 26 Osgoode Hall L.J. (1988) (forthcoming).
22. Robert Samek, The Objects and Limits of Law Reform 131 (unpublished report, Law Reform Commission of Canada, 1976).
23. This discussion of power and resistance is influenced by the work of Michel Foucault. See in particular Michel Foucault, Knowledge and Power (New York, 1980), and 1 The History of Sexuality (New York, 1978).
24. Stat. Ont. 1981, ch. 53.

antipornography ordinances[25] but "doctored" to suit the academic elements of the course.[26] The legal exercise required inquiries into the division of powers between the provincial and federal governments[27] and *Charter*[28] issues. But these were not my main motivation.

More important from my perspective was the dynamic that I was attempting to put in place. The students were "forced" to encounter, contemplate, and assess certain feminist interpretations of pornography. They became aware of the harms that pornography causes women—something many of them probably would not have done voluntarily. Pornography had, therefore, become an issue in their lives that they could no longer avoid, because to get a grade they had to take the issue seriously. In turn, feminism had taken a higher profile in many of their lives, it had become part of their psyche whether they wanted it to or not. Benignly, I opened

25. Variations of the antipornography ordinances were passed in both Minneapolis and Indianapolis, only to be vetoed or struck down as unconstitutional. For a text of the Minneapolis Ordinance, see Appendix: The MacKinnon/Dworkin Pornography Ordinance, 11 Wm. Mitchell L. Rev. 119 (1985). For an excellent social, political, and legal history of the ordinances, see Paul Brest & Ann Vandenberg, Politics, Feminism and the Constitution: The Anti-Pornography Movement in Minneapolis, 39 Stan. L. Rev. 607 (1987).

26. One critic of the project has argued that the way I set up the problem suggests that I, the power holder, do not support antipornography legislation. My critic claims that the way I structured the issue sent a clear message to the students that it was an unconstitutional law. I have reflected on the criticism at length. As to my own position on the ordinance in general, I am still undecided. I am convinced that such is the indeterminacy and plasticity of Canadian constitutional doctrine that arguments could be made both ways. It will all depend on the hidden assumptions of those who make the decision. I do, however, have strong reservations about whether progressive movements—within which I include feminism—should build so much of their emancipatory strategy on legal terrain. But if the ordinance is the way that feminists as a community decide to go, I will not add my voice to the chorus of critics. See also Richard F. Devlin, Nomos and Thanatos: Parts I and II, 12 Dalhousie L.J. (1989) (forthcoming).

    I have also discussed the assignment on a few occasions with Professor MacKinnon, and although she had strong criticisms of the project in general, she did not appear to believe that I had "set her work up." I do not know if she has changed her mind since our last conversation.

    Many academics and practitioners who took part in the judging aspect of the assignment went *both* ways, which suggests that the project was not as tilted as my critic suggests. The process of setting up the assignment was, however, somewhat convoluted. A colleague suggested that a good moot problem could be centered around a case that had just been argued in the Supreme Court of Canada, Rio Hotel Limited v. Liquor Licensing Board, [1987] 2 S.C.R. 59. The case raises issues about the separation of powers between the federal and provincial governments and also about the extent of the provincial criminal law power. Because two distinct issues were necessary to fulfill the academic requirements of the moot, I superimposed the antipornography amendment on the *Rio Hotel* analysis and highlighted certain aspects of the criminal law issue. I also informed the students that this was a corrupted version of the MacKinnon-Dworkin ordinance (see *supra* note 25).

27. Under the British North American Act, 1867, 30 & 31 Vict., ch. 3 (U.K.), the Canadian constitutional structure is divided into two mutually exclusive spheres of legislative authority: federal and provincial. Should either the federal or provincial legislatures interfere with the realm of the other, the courts will determine that such intervention is ultra vires.

28. The Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 (Schedule B of the Canada Act 1982, ch. 11 (U.K.)) can be loosely understood as a Canadian equivalent to the United States Bill of Rights, so long as we do not minimize significant differences between them.

their minds to a contemporary social problem and various perspectives upon it; malignly, I used my position of power to force them to think about at least one aspect of the feminist critique of patriarchal society.

There was a further, more complicated, side to the politicoeducational process. The vehicle that I adopted as a pornographic movie was the controversial *9 ½ Weeks*. Although for me the movie was on the borderline, it could be interpreted as pornographic on the basis of the antipornography ordinance. This obviously piqued the sensibilities of many who would, perhaps, tolerate "censorship" of blatant hardcore pornography, but who would be concerned about the repression of "pretty pornography," despite the ideological messages it might carry with it. Hard cases make for a good politics of law.

I also attempted to provide the class with an opportunity for nonhierarchical participatory democracy. Although on the strictly academic level it was unnecessary for the students to see the movie, I raised the issue of whether it would be appropriate to view the movie in the law school in order to provide a social context for their academic exercise. I informed them that I did not want to be the one to decide, that I regarded them as a microcommunity of sixty-four who had to make a decision whether to show a pornographic movie in their environment. If they could not make a decision, how could they expect a larger, diversified Canadian community to make a decision?

The initial response to my foisting communal responsibility on them was one of confusion over why there could even be a problem. The main sentiment expressed was what I would describe as "liberal laissez-faire": If the movie was the vehicle for the assignments, then the students should have an opportunity to see it, even though it was not strictly necessary for successful completion of the problem. Those who might be offended by it did not have to see it. Against the liberal viewpoint was a minority but equally "obvious" position: It was not academically necessary to see it; pornography harms, therefore the movie should not be shown in the law school. To show the movie would be to "turn the law school into a pimp"[29] and threaten any security and trust that women might have felt they had within the law school community. Law school concretizes some of the centrifugal forces in contemporary society. Pious, perhaps naive, hopes for a consensual (micro) society were thwarted.

I decided to convene an unscheduled meeting of the class to discuss what we should do, what processes we could adopt, and how we would make a decision as to whether or not to show the movie. The turnout was disappointing—only about sixteen people attended. Assistant Dean Mossman, a senior female member of faculty with whom I had consulted before embarking on the project, also participated.

Several conclusions emerged from the group discussion. First, it was agreed that simple majoritarianism would be both inappropriate and incapable of bearing the burden of resolving such a complex and poten-

29. Conversation with Catharine MacKinnon.

tially harmful process. Numbers, per se, were not enough.[30] Second, the available options narrowed to two. One option was to show the movie but to require for all viewers a "facilitated" discussion that would explicate the harm pornography causes. The other option was to forgo showing the movie, because we all know the basic premises of pornography—harmless, victimless if sometimes tasteless, entertainment—and instead hold a discussion to challenge this tolerant paradigm. I, for one, was fairly pleased with the outcome of this discussion, even though we failed to reach a decision on whether to show the movie.

I was, however, perturbed that only about one quarter of the class participated in the discourse. I decided to use the second half of my four seminars that week to raise the issue once again in smaller forums, on the assumption that they might prove to be a more comfortable environment. Students were given the option of not attending, which several took.[31] The discussions covered much of the same ground as the earlier forum. I concluded each session by circulating a questionnaire (with scope for comments) in order to have a concrete, nonpublic basis on which a decision could be made.

About two thirds of the class provided written responses. About seventy percent of the respondents favored showing the movie if it were supplemented by discussion; twenty percent favored discussion on its own; and ten percent referred to other options, such as bussing the students to the movie, which was being shown elsewhere in the city. The lack of consensus meant that, ultimately, the burden shifted back to me.

After a week of reflection and balancing the options, I came to a decision. Acutely conscious of the weaknesses of pure majoritarianism, I decided that the movie would *not* be shown but that a discussion would take place. We were fortunate that the discussion would be facilitated by Susan Cole, a local feminist activist and journalist, and Catharine MacKinnon. I circulated a five-page memo that outlined the reasons for my decision. A vital element in the decision was the failure of so many of the students to participate in the decision-making process. I did not know whether the cause of the lack of participation was apathy or an incapacity or unwillingness even to discuss the issue. In my opinion, the danger of the harm that

30. On reflection, there appear to have been two main reasons for the students' adopting an antimajoritarian position. First, they recognized that, given the highly charged nature of the issue, there could easily be a division of the class on the basis of sex. If this were to occur, women students would be the inevitable losers, even if they voted as a unanimous bloc, because they only numbered twenty-seven against the thirty-seven men in the section. The class as a whole was reluctant to take the risk of coming to a decision through a process that could so easily marginalize the viewpoint of the women in the class. The second, less tangible, factor is that, inspired in part by the recently acquired *Canadian Charter of Rights and Freedoms*, there was a sentiment among these novice lawyers that majoritarianism has its limits as a democratic decision-making process and that other factors—for example, harm to others—are important limitational criteria.

31. The assumption that small groups may make better forums for discussion is probably only true in the abstract. It all depends on *what* we are talking about. There may be some issues that, regardless of numbers, are difficult to discuss in mixed-gender groups. Further, because students who wished to withdraw had to exercise the option actively, I probably reinforced their experience of alienation from the class as a whole.

showing the movie might cause outweighed the possible benefits.[32]

The facilitated discussion was extremely well attended, volatile but informative. Some felt that the facilitators were ideological twins and that the discussion was not comprehensive enough. It was suggested that Larry Flynt, or some "anticensorship activist," ought to be included. My response was that most of the community knows (and agrees with) the anticensorship stance; that approach needs no facilitated vocalization, whereas the antipornography stance does. Not surprisingly, the Cole-MacKinnon perspective had a powerful impact on the class.

That was the end of the public polemics but not the private "fallout." The academic element of the process gained ascendancy; the class produced consistently strong memoranda of law (purged almost completely of *explicit* political preferences) and somewhat weaker factums, which did hint at the underlying political choices. The course ended with the moots, students' presentations on the legal strengths and weaknesses of the proposed amendment for which I and two other make-believe judges—usu-

32. Some readers may be puzzled by the decision. After such a protracted and apparently much-vaunted democratic process, why decide not show the movie? As the text indicates, two factors were central to my own thinking at that time, harm and participation. Although it would take considerable space to defend my position on harm fully, its origin can be indicated briefly. While teaching the course I had also been researching the feminist critique of pornography and had come to believe women when they tell us that they are harmed by pornography. See, e.g., Irene Diamond, Pornography and Repression: A Reconsideration, 5 Signs 686 (1980); Andrea Dworkin, Pornography: Men Possessing Women (New York, 1981), and Against the Male Flood, 8 Harv. Women's L.J. 1 (1985); Susan Griffin, Pornography and Silence (New York, 1981); Laura Lederer, Take Back the Night: Women on Pornography (New York, 1980); Catharine A. MacKinnon, Feminism Unmodified 125–213 (Cambridge, Mass., 1987) (pt. 3, Pornography).

The participation factor also weighed heavily on me. The class was composed of twenty-seven women (42%) and thirty-seven men (58%). Because only two thirds of the class responded, I feared that the results might disproportionately reflect the views of the men. What if many of the women had felt that their contribution would be irrelevant and therefore had not responded? Further, how many of the twenty percent who objected to showing the movie might be women? Although I knew from my interaction with the students that the class was not divided on the basis of sex—some men favored not showing the movie, while some women thought it should be shown—I was concerned that a significant number of women were against showing the movie.

Thus I found myself in a difficult situation. I had promised the students a nonhierarchical, participatory democratic process, something different from majoritarianism, but I feared that majoritarianism had made its presence felt even so. Because my concerns about the harmful impact of pornography made me doubly disconcerted, I determined that the risk was too great and that the movie should not be shown.

My decision obviously leaves me open to a variety of criticisms. In particular, I can be accused of paternalism, of acting as a protector or guardian of the women in the section. Alternatively, I can be accused of false progressivism—when things got rough, I reneged on my promise of participatory democracy and took refuge in the institutional hierarchy.

I do not have an answer that would deal satisfactorily with either criticism. I do, however, have responses. Although I can never fully understand the threat that pornography poses for women, I have spent a couple of years trying to deal with the issue. I hope and honestly believe that my decision not to show the movie was based not on paternalism but on empathy, on an awareness of others in conditions of powerlessness. As to the accusation of hierarchical flight, I suppose I must plead guilty, except to say that I still think I made the right decision, that I avoided inflicting at least that harm, and that perhaps some readers will agree with my decision.

ally an academic and a practitioner—adjudicated.[33]

I was generally pleased with the mock judiciary. I had been concerned about how sensitive they might be to the sexual-political issues I had raised for the class, but the questions they asked, in general, did not go beyond the pale of acceptability.[34] It did become obvious to the students, however, that many of the bench had come with preconceptions. Specifically, the judges appeared to believe that the issue of the regulation of pornography through a *Human Rights Code*[35] amendment would not be within the powers of the provincial government, although it would certainly be within the competence of the federal government. When it came to the *Charter* issue, there were also clear feelings from the bench *both* ways. It became clear to the students that willful judicial preconceptions are a vital reality for legal practice, and that the nonpartisan bench is a myth. (Real judges, on occasion, manage to hide their bias more cleverly than my colleagues.)

Although a majority of the judges expressed an opinion that the legislation would be better suited to the federal than the provincial sphere, a substantial minority disagreed.[36] The *Charter* issue also revealed the panorama of political choice in judicial decision making. Despite their awareness that analogies could be drawn to the hate literature provisions of the *Criminal Code*[37] and cases such as *Keegstra*,[38] most of the bench felt that pornography would be a form of expression and therefore protected by the *Charter*.[39] With regard to whether antipornography legislation could be saved as "demonstrably justified in a free and democratic society,"[40] my impression was that the participants may, by a bare margin, have favored

33. Although I made a strenuous effort to persuade as many female—although not necessarily feminist—"judges" to participate, few women actively work in the constitutional sphere, and among those who do, not all were able to participate in a moot that would keep them from returning home until 11:00 p.m. There was no shortage of male participants to engage in the "smut problem," as one nonparticipant put it. (My response to this trivialization of the issue by a very highly respected member of the Canadian legal community, himself a member of a disadvantaged group, was to refuse to invite him to participate as a judge).
34. This is, of course, from my perspective on the bench. The students may or may not agree.
35. Again, I must emphasize that the way I framed the issue was distinct from Dworkin and MacKinnon's approach. See *supra* note 25.
36. This does not necessarily apply to the Dworkin-MacKinnon approach. To raise the issue of legislative authority, I departed significantly from their work. *Id.*
37. 281.1 (1) Every one who advocates or promotes genocide is guilty of an indictable offence and is liable to imprisonment for five years.
    (2) In this section "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely:
    (a) killing members of the group, or
    (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.
    (3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.
    (4) In this section "identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin.
    An Act to Amend the Criminal Code, R.S.C. ch. 11 (1st Supp. 1970).
38. Regina v. Keegstra, 19 Can. Crim. Cases 3d 254 (1985) (hate literature is not constitutionally protected expression).
39. "Everyone has the following fundamental freedoms . . . freedom of thought, belief, opinion and expression including freedom of the press and other media of communication." Can. Chart. Rights & Freedoms, *supra* note 28, at § 2(b).
40. *Id.* at § 1.

the legislation as constitutionally valid. Some were persuaded by the arguments that charter guarantees of equality[41] were sufficient to trump the freedom of expression clause, while others opined more candidly that if such legislation did manage to get through a legislature, it would be "unwise" for a court to strike it down as unconstitutional.[42]

II. The Road to Hell

I believe in education; I believe in the emancipatory and expansionist potential of legal education; I believe that lawyers, as persons and as power holders, may have a positive impact on social interaction. I began the project as an optimist. I sought to introduce sixty-four legal acolytes to a radically new, energizing, and controversial perspective on law. I had hoped that education could make a difference. I had no aspiration to convert the class. My aim was more modest: to open horizons, to introduce the class to the sexual politics of law.

At the same time, however, I was concerned that the project might backfire; that instead of giving my institutional and personal support to feminism, I would activate a reactionary, negative dynamic that would further alienate feminism as a politicolegal movement and intensify the harm or hurt that some women experience in the male-dominated classroom.[43] I considered the risk at length,[44] and now, after the process is over, I still am not certain that I took sufficient measures to avoid harm.

On the positive side, I created a legal-educational environment in which certain aspects of feminism became a live issue, in which certain feminist voices were heard,[45] and their arguments were implanted in the psyche of *all* members of the class. People who had never encountered a feminist perspective were coerced into at least reading some feminist materials. I am optimistic that never again will any of the class watch a pornographic movie

41. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Id. at § 15(1) & (2).

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Id. at § 28.

42. Again, I must add that these are only impressions of a group of pseudo judges. I would make no predictions as to what a real outcome would be if antipornography legislation came into existence in Canada.
43. The claim that law school is male dominated is a reference to law schools in general and does not identify Osgoode Hall in particular. For discussions of the pervasive and systematic nature of male domination in the legal academy, see *supra* note 4.
44. In particular, I discussed the project with Assistant Dean Mossman, who provided both criticism and encouragement.
45. Hearing, of course, is not the same as listening or understanding, but it is a prerequisite for either.

without an awareness of a feminist critique. Although they may well reject, ridicule, banish, or delegitimize that perspective, they will do so deliberately. They will be aware that there is a choice—and that was my minimum goal.

I had also hoped that some of the students would see merit in the feminist perspective on law, develop an interest, and pursue further discussion, courses, research, or activity. I had hoped that legal education could stimulate a progressive, socially responsible dynamic in peoples' lives. Furthermore, I had sought to legitimize feminist interpretations of law, first by using my institutionalized power as instructor to support them, and second by introducing their intrinsic validity, vitality, and veracity. In short, I had aspired to be a good educator, to "teach as if women really mattered,"[46] to open up horizons, and to make the politics of law real.

But such aspirations are no guarantee against myopic or dangerous behavior. I have made mistakes, some dangerous and hurtful. I ought, for instance, to have thought through more clearly how I was going to introduce the problem to the class. On the first day back after Christmas break, at 9:00 a.m. on a Monday morning, I opened with the novel legal claim that pornography harms women and asked, Is it constitutionally legitimate? Should we see a pornographic movie in the law school? Can we create a nonrepressive decision-making process? All of this was too open-ended, too much to ask, too unstructured. This was compounded by nervous hyperactivity on my part.

I also wonder whether I should have been so ambitious as to raise the question of how we decide whether to show the movie. I assumed that there was scope for rational discussion, debate, and cross-communication, and therefore naively betrayed an undue optimism for consensus. Perhaps people (different genders) live in different worlds, which makes real communication—in terms of mutual receptivity—impossible. It is utopian to expect an LRW class to solve the problem of fundamental communicative and experiential disjunction.

Furthermore, seeking gender neutrality when I set up the hypothetical problem, I posited the person trafficking in pornography to be a woman. This was a double error. First, it is descriptively inaccurate and therefore undercuts the reality that I was trying to evoke. Second, it provided ammunition for the antifeminists to say, "See, feminist efforts will haunt you . . . . Serves you right."

When it came to the factums and the moot, I did not provide the students with a choice as to whether they would argue in favor or against the antipornography legislation. This meant that to get the grades, students had to develop and articulate arguments that might be anathematical to their life experiences and beliefs: they would have to write and say things that they simply did not believe. For some this could prove painful, even detrimental.

46. Christine Boyle, Teaching Law As If Women Really Mattered, or, What About the Washrooms, 2 Can. J. Women & L. 96 (1988).

I also put an extra burden on women who might already have been experiencing the problems of participating in a male-dominated law school.[47] Not only did they have to fulfill the academic requirements, some may have experienced the abusive impact of pornography in their own lives. To have to cope with both within the context of the class could be an immense strain.

A further problem is that I exposed the women of the class to the danger of a vicious antifeminist backlash. In the "public sphere," everything appeared to be rational, tolerant, and communicative (however animated). But in the "private realm," in the corridors, the cafeteria, the washrooms, the library, and apartments, the seedy side of the debate reared its ugly head. Wild accusations flew, feminism was ridiculed and disparaged, phallocentric logic entered the fray, and obscene phone calls were received. By dropping the pornography grenade in the cozy environment of law school, I may well have polarized opinion, reinforced general entrenchment, and further pressed the foot upon women's necks.[48]

This leads me to another point of concern. As I have stated, my aim was to reinforce the feminist approach to law, and therefore I had hoped to receive some response—even criticism—from students I believed to be feminists. I was disappointed when this was not forthcoming. Although I tried to elicit feedback, I encountered what I felt to be abstentionism and inability. I think this is how power comes back to haunt the powerholder. First, I am a teacher; students are unwilling to risk openness with those who hold coercive power over them. Second, and I believe more important in this situation, I am a male. A male who apparently adopts a profeminist position is immediately suspect. His gender renders him incapable of experiencing the inequality, indignity, and pain that women suffer. When this male makes mistakes, it heightens concerns and twists the foot. At best, he is playing games; at worst, he is seeking some advantage. Indeed, I was asked, "What are you getting out of this?"[49]

In one sense, however, the portrait of nonresponsiveness is not totally accurate. By the end of the term, I had in fact received feedback, but for me at least it was from a surprising source, one that hurt. In retrospect, it was a response that says a great deal. With one feminist student in the class, I had been able to engage in a dialogue that focused directly on the connection between education, pornography, and power(lessness). In the

47. See *supra* note 43. For a more specific indictment of Osgoode Hall Law School, see Mary Lou Fassell et al. v. Harry Arthurs, York University and Osgoode Hall Law School (September 1987) (on file with author). This complaint advances the novel claim that students and practitioners in Ontario have been unjustifiably discriminated against on the basis of sex because York University failed to appoint as dean of the law school a suitably qualified female candidate, Assistant Dean Mossman. (The events recounted in this article were contemporaneous with Mary Jane Mossman's candidature for the deanship.)

48. The phrase comes from Catharine MacKinnon, *supra* note 32, at 30.

49. A statement by Stephanie Wildman helps me understand better some of the silence that I encountered: "[S]ilence may be a valid expression of alienation or hostility. For many students the choice of silence is not a passive act; it is an expression of anger." Stephanie Wildman, The Question of Silence: Techniques to Ensure Full Class Participation, 38 J. Legal Educ. 147, 149 (1988).

course of one of our conversations towards the end of the term, she mentioned that "some students needed outside help" to get through the assignment. It was unclear to me what she meant by this, and when I sought elaboration she was unwilling or unable to say anything more. I was deeply troubled; more so because I did not know what "outside help" meant. I worried that perhaps psychiatric help had been necessary for some of the students. I feared that the worst had happened, that the whole process had a negative impact on the very persons it had been intended to support. I was anguished.

Within a day or so, I met Assistant Dean Mossman in the corridor. In the course of our conversation, she informed me that she had received a phone call from the sexual harassment center at the university, inquiring about whether she knew what was going on in my class. She did, because she had been the person with whom I had consulted about raising the issue of pornography. The upshot of our conversation was that the staff at the sexual harassment center had been counseling several of the students in my class. The counselors had inquired whether it would be a good idea to meet with me. Professor Mossman had informed them that she was sure that I would want to meet with them, and I confirmed that this was my position.

But it was a position with which I was extremely uncomfortable. My initial response was disbelief—this could not be a sexual harassment complaint, my intentions were exactly the opposite. Then I was hurt; why me, I'm the good guy, why not go for some of the others whom I know to be blatantly sexist? Then I was frightened, indeed sick, because of what I felt that this could mean for my reputation—and career.[50] And finally, I was angry—this simply was not fair. I did, however, want to speak to the people at the sexual harassment center: first, to find out exactly what problems led to this turn of events; second, to get some feedback, even if it had to be from this source; and third, to be as open and honest as possible about the project, my purposes, my intentions, my aspirations. At the same time, the sexual harassment context was both frightening and painful for me.

Within a few days, I received a call from a counselor at the center, and we arranged to have coffee together. I was certainly keyed up for the meeting. Two members of the center, one finishing her Ph.D. in English, the other a graduate student in psychology met with me. They very quickly set the terms of the discourse. No complaint of sexual harassment had been made against me; rather, several women had experienced a high level of pressure from dealing with an assignment based on pornography. My response was both relief and continued anxiety. At this stage in the conversation, relief was certainly the stronger emotion. I became increasingly perturbed, however, by the concerns they articulated. The basic

50. I have strong reservations about even compiling my recollections. The idea of recording and sharing the experiences was suggested by a friend when the project was at an advanced stage. Later, when I mentioned to some of the students that I was writing about the experience, at least one felt as if she was part of an experiment, a guinea pig on the academic treadmill. I have attempted to weigh this concern against the possible benefits of sharing the experience with other progressive teachers.

proposition the members of the center put forward was that some of the structures that I had set up made it extremely problematic for the women students to participate in the process.

First, my taking so long to determine whether or not the movie ought to be shown created a great deal of anxiety and tension. It made life very difficult, and instead of working as a process of empowerment, it just created anguish. In short, people did not feel empowered by the process.

Second, one of the major criticisms was that in assigning people for the factums and moots I had forced some of the students to argue for a viewpoint that they personally opposed. Certain women in the class had to argue in favor or against the amendment, and this proved extremely problematic for them. Indeed, one of the counselors, who was working on her Ph.D. in the field of the psychological impact of pornography, suggested that the imposition of roles could create not just anguish but extreme cognitive dissonance, leading to sleepless nights, identity crises, and internal contradictions. Clearly, this was not something I had thought about adequately. Some of the students apparently believed that I had deliberately chosen to put women on one side rather than the other, that I had forced them to argue against that which they believed.[51]

Third, towards the end of the conversation, I suggested that one of my concerns was that I had received very little feedback from the feminist students. I pointed out my awareness that I was male, white, and in a position of power, and that I was conscious that it was very difficult to minimize or negate this power. One of the counselors pointed out that I tend to be rather aggressive in my discourse, that I very quickly conceptualize issues, and that I tend to dominate situations. She pointed out that such personality traits have a negative impact on those who may wish to discuss issues with me. Personal characteristics have direct political consequences.[52] I was already aware of this and had been trying to work on it—obviously not adequately.

The conversation concluded on the following terms. Although on this occasion there was no complaint of sexual harassment, the situation that I had created was such that, in the opinion of the counsellors, many of the symptoms of sexual harassment had manifested themselves. Indeed, it was suggested that if a similar situation were to occur again, there would be a possibility of an investigation to determine whether sexual harassment was

51. This perception was not accurate. Rather, I had allowed the students to choose other students with whom they felt they could work comfortably. I then tried to match each pair against another pair whom I believed to be of equivalent academic calibre. As to the issue of whether students were to be appellants or respondents, the criterion was completely arbitrary. The first couple within each team was assigned the role of appellant, the second the role of respondent. As indicated, the assignment had a negative impact. It is a classic example of a situation in which the belief that "pure arbitrariness equals fairness" creates substantive inequality despite the appearance of formal equality. This was a factor that I had never even considered.

52. The motivating factor for the statement was that at one point in the discussion, one of the counsellors appeared to become quite angry and asked me, "What, are you a therapist?" My response was to say, "of course not," but that I had attempted to be as aware of the issues and the potential downside risks and harms as possible. I continue to worry about the question, for some feminists have decoded "therapist" as "the/rapist".

actually taking place. So much for authorial intent.

III. Postscript

To construct a conclusion for a paper such as this would be singularly inappropriate. Experiences are integral to peoples' histories/herstories; they are constitutive of their identities and, as such, they have an ongoing impact. Tidy conclusions obscure more than they reveal. Nevertheless, I do wish to add a few comments.

First, there is the danger of "imperial scholarship," which Richard Delgado describes as "factual ignorance or naiveté, . . . failure of empathy, an inability to share values, desires, and perspectives of the population whose rights are under consideration."[53] Put differently, can or should a man, even if he is profeminist, attempt to raise concerns that are of particular relevance to women? Does he experience enough, can he know enough to carry through the project without harming those he hopes to encourage and support? My article does not purport to answer such a question but simply to raise it. More generally, it highlights the issue of what the nature of a coalition between the women's movement and "progressive" men might be, and on whose and what terms it can be constructed. More fundamentally, is such a coalition even possible?[54]

Second, if we are able to reach some sort of consensus about the role men might play in the "deghettoization" of womens' issues, then men must act with extreme caution. Good intentions are not enough. So pervasive and systemic are the structures of inequality, domination, and powerlessness that a great deal of planning, consultation, and awareness must be invested *before* embarking on such a project. Undoubtedly exigencies, both predictable and unforeseen, will crop up, and one must be as prepared as possible to deal with them. Group support and criticism are essential. The events I recount are an example of the very real dangers that can emerge for students if a teacher does not exercise extreme caution in the pursuit of a

53. Richard Delgado, The Imperial Scholar: Reflections on a Review of Civil Rights Literature, 132 U. Pa. L. Rev. 561, 568 (1984). Delgado provides "an *a priori* list of reasons why we might look with concern on a situation in which the scholarship about group A is written by members of group B."

> First, members of group B may be ineffective advocates of the rights and interests of persons in group A. They may lack information; more important, perhaps, they may lack passion, or that passion may be misdirected. B's scholarship may tend to be sentimental, diffusing passion in useless directions, or wasting time on unproductive breast-beating. Second, while the B's might advocate effectively, they might advocate the wrong things. Their agenda may differ from that of the A's, they may pull their punches with respect to remedies, especially where remedying A's situation entails uncomfortable consequences for B. Despite the best of intentions, B's may have stereotypes embedded deep in their psyches that distort their thinking, causing them to balance interests in ways inimical to A's. Finally, domination by members of group B may paralyze members of group A, causing the A's to forget how to flex their legal muscles for themselves.

Id. at 567. Pedagogy shares the same dilemmas as scholarship.

54. For a particularly useful collection of essays on this topic see Alice Jardine & Paul Smith, Men in Feminism (New York, 1987).

progressive pedagogy. I made some serious errors that did undoubtedly cause harm, but I still hope that the process was worth the effort, that the benefits outweighed the disadvantages. But, in truth, I do not know.

Would I do it again? At this point I am unsure. My intention is not to go around Canadian law schools traumatizing students and aggravating the alienation that many women experience in the legal community. But I remain committed to the ideal of progressive legal education and continue to believe that feminist concerns should be moved out of the ghetto of women's studies and into mainstream education, including legal education. I have gone on to teach Jurisprudence at a different law school, and although I still consider the issue of the legal regulation of pornography to be both an appropriate topic in itself and also an excellent vehicle for concretizing and unpacking the basic value structures of competing jurisprudential traditions, including feminism, I have resisted the temptation of making pornography the organizing theme. Instead, I have used the *Baby M* case.[55] Still, I am not even comfortable about this choice. If it is true that to raise the issue of pornography (or perhaps any other topic that is of particular concern to women) is to risk creating the "symptoms" of sexual harassment and provoking a virulent antifeminist backlash, then it may not be possible to construct a progressive legal education that does not intensify the pain that already saturates contemporary legal pedagogy.

55. See Richard F. Devlin, "*Baby M*": The Contractual Legitimation of Misogyny, 10 Rep. Fam. L. 4 (1987).