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# INCORPORATING ISSUES OF RACE, GENDER, CLASS, SEXUAL ORIENTATION, AND DISABILITY INTO LAW SCHOOL TEACHING

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**WESTLAW LAWPRAC INDEX**

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I think the lessons I have learned are greater than blackletter law principles. As far as those go, I am not sure that I learned anything new. What I learned has more to do with people and the different values we all have.[1]

Since the beginning of my law teaching career, I have raised ***542** issues of race, gender, class, sexual orientation, and disability in my classes. These diversity issues,[2] as they are sometimes referred to, often enhance and broaden discussions in class and cause my students to re-examine substantive legal doctrines. Those discussions, however, also can challenge a professor's ability to maintain the focus of the discussion, maintain a supportive and open classroom environment, and, generally, prevent the discussion from degenerating into a brawl.

The primary purpose of this Article is to encourage others to raise these issues for the right and important reasons. Discussion of diversity issues is relevant, important, challenging, and often rewarding. Those discussions belong in law schools and, at the very least, in law school classrooms. Diversity issues affect and shape legal doctrine, application of the law, and judicial and administrative processes. Consequently, students who will practice law into the next century need to be conversant with and understand the nuanced ways in which these issues affect what they will do as lawyers.

Part I of this Article addresses some reasons why this kind of discussion is necessary and relevant in the law school classroom. Part II identifies some potential challenges that one may confront when raising these issues in the classroom. This Article, to the extent possible, suggests some responses or ways to address these potential problems.

Part III provides some feedback from students who were in an advanced torts course that I taught in the Spring of 1995. The advanced torts course was concerned principally with defamation, privacy, mental distress, and publicity-right torts. Repeatedly, throughout the semester, we considered how the doctrine and policies behind the First Amendment influenced each of these torts. During the semester, I raised a diversity issue nearly every day of that class. This Part permits the reader to hear what the students say about their learning experience, which, I ***543** hope, will encourage teachers of the law to incorporate these issues into their substantive courses.

Part IV of this Article is devoted to a discussion of the principal conditions that a law professor should be concerned with if planning to raise diversity issues in the classroom. The reader will note that many of the points made in this section relate to professors' need to be effective, highly communicative, caring teachers. In fact, many of these points would apply even in those classes where no such issues are being raised. And that is the point. Too often, teachers will avoid these important discussions because they feel that one needs to have a range of special tools and skills to effectively handle a discussion about diversity. I believe that the most critical skills that teachers need are related to what is referred to as "good teaching"--the ability to listen, to demonstrate respect for the student, to model professionalism in the level of preparation and treatment of the material, and to not take yourself so seriously. But most importantly, the teacher must be willing to engage in some risk taking to enhance and enrich the students' learning experience.

The fifth and final Part of this Article provides the reader with some suggestions on how and where to begin. The usual advice to anyone who is about to begin a new journey or project is to take it slowly. Do not feel that you must raise these issues on a minute-by-minute basis in your classes to be successful.[3] Planning, thoughtful preparation, consultation with others (to *544 the extent possible), and developing a way to evaluate the success of your efforts are key. Of course, as with any new skill, it does help to have these discussions as often as possible to gain more experience and comfort in incorporating diversity issues into the classroom.

## I. The Pedagogical Case for Inclusion of Diversity Issues

Many reasons can be proffered in support of including issues of race, gender, class, sexual orientation, and disability in law school education.[4] Fundamentally, discussion of these issues aids substantially in the intellectual depth and breadth of the law student.[5]

### A. Improving the Understanding of the Law and Traditional Legal Analysis

An analysis of legal materials with an explicit consideration of diversity issues will strengthen and expand a student's intellectual capacity, as well as his or her capacity for passion and compassion.[6] Furthermore, these issues can assist in revealing the limits of legal doctrines and, in some cases, how the doctrine itself undermines the overriding purpose or goals of the law. Two examples help to illustrate this point. The first example demonstrates how a discussion of race and gender assists in constructing a better argument under the stated rule of law than *545 those presented in the court's opinion. The second example, arising out of a business context, illustrates how assuming objectivity of an economic concept arguably led to an incorrect interpretation of the law.

The first example is a defamation case from the sixth circuit. In Clark v. American Broadcasting Companies, Inc.,[7] the court considered whether to adopt the innocent construction rule or the reasonable construction rule in determining whether an utterance was actionable defamation.[8] The innocent construction rule states that if an utterance, considered in context, is reasonably susceptible of an innocent construction, then that construction is to be adopted.[9] The reasonable construction rule leaves for the jury the determination of the intended meaning when the utterance is reasonably susceptible of both a defamatory and an innocent meaning.[10]

The subject of Clark was a special ABC program entitled "SEX for Sale: The Urban Battleground."[11] The program focused on street prostitution in a middle-class neighborhood of Detroit.[12] The segment showed an obese white woman in her fifties, carrying a grocery bag down the street.[13] The next segment showed a slightly obese black woman, who was at least forty years old, walking down the street.[14] As these women appeared on the screen, the following comments were made: "According to residents, and Detroit police records, most of the prostitutes' customers or johns were white, the street prostitutes were often black. This integrated middle-class neighborhood became a safe meeting place for prostitutes and johns."[15] Then, the plaintiff, a black woman, was the third woman photographed walking down the street.[16] She was attractive, slim, stylishly dressed, and appeared to be in her early to mid-twenties.[17] She wore large earrings and had long hair that she pulled above her *546 head.[18] As she appeared on the screen, the narrator remarked: "But for black women whose homes were there, the cruising white customers were an especially humiliating experience."[19] Another black woman followed the plaintiff in an interview and stated that almost any woman who was black and on the street was considered a prostitute and was treated like a prostitute.[20] The trial court dismissed the plaintiff's action on summary judgment, stating that the broadcast was not reasonably capable of a defamatory interpretation.[21] While there was agreement that the portrayal of the plaintiff as a prostitute clearly would be defamatory, the court held that she was not presented as such in this broadcast.[22] Instead, the court held that she was presented as a resident of the neighborhood.[23]

The appellate court reversed and took the position that there were two possible interpretations--one defamatory and the other not--but, under the reasonable construction approach, it should have been left to the jury to determine which was correct.[24] As one court has observed, "The standard is not whether the statements are exclusively susceptible of the meaning alleged by the plaintiffs, but whether such an understanding is a reasonable one."[25]

In other words, the defamatory meaning of the broadcast could be that the plaintiff was a prostitute. The nondefamatory meaning of the broadcast was that the plaintiff was a resident of the neighborhood. Given those two possible interpretations, the court decided that the jury would be the best arbiter of the meaning to be attached to the broadcast as it relates to the plaintiff.[26] A strongly worded dissent agreed with the trial court's analysis.[27]

After a careful analysis of the opinion, I told the class that the majority opinion ignored any discussion of how racial stereotypes *547 regarding black women may contribute to the perception that, in the broadcast, the plaintiff was a prostitute. In fact, the only reference to race as a topic of discussion in the entire opinion was in the dissent. The dissenting judge

referred to the plaintiff's race by stating that race was irrelevant to the discussion.[28]

Why would raising this question be important to the legal issue? If you represent the plaintiff, the legal argument should be that summary judgment should be denied because there is a factual question as to whether the plaintiff could be regarded as a prostitute in the broadcast. The argument is that at least one prevailing racial stereotype of black women as sluts/whores[29] enhances the plaintiff's argument that viewers are likely to see her as a prostitute within this context. A fundamental aspect of the oppression of African-American women is the myriad negative stereotypical images applied to them. Slave images of mammies, Jezebels, and breeder women translate today into Aunt Jemimas on pancake boxes, ubiquitous Black prostitutes, and welfare mothers.

After much discussion of this point--during which students said that "one cannot generalize," "it depends on your community," "race is not a factor"--I shared my own experiences as an attorney with the United States Department of Justice in the Antitrust Division. While traveling to different cities on investigations or cases and staying in hotels, I was approached frequently by white men who assumed that I was "available," even though I carried a briefcase and wore a suit, modest pumps, and tiny pearl earrings.[30] The lesson for this class went far beyond ***548** the question of which rule of construction the court should use in construing defamatory meaning. The important lesson here was in revealing to students the power that societal stereotypes can have in creating or shaping legal arguments or outcomes.

The second example[31] illustrates how the assumption that legal concepts are neutral, objective, and treated the same by everyone, regardless of culture and history, can lead to an unjust result. In my antitrust class, we studied a United States Supreme Court case, Matsushita Electric Industrial Co, Ltd. v. Zenith Radio Inc.,[32] involving alleged predatory pricing behavior by Japanese manufacturers in the electronic industry. Matsushita manufactures or sells consumer electronic products, mostly televisions.[33] Zenith claimed that the Japanese manufacturers illegally conspired to drive American firms from the consumer product market.[34] The district court dismissed the case on summary judgment motion, and the court of appeals reversed.[35] The Supreme Court upheld the district court's dismissal.[36] Why?

Predatory pricing is pricing below cost.[37] For instance, if a widget costs $10 to make and the manufacturer sells the widget for $8, the manufacturer sustains a $2 loss on that sale. Needless to say, one cannot stay in business long by pricing below cost in this manner. Apparently, the Japanese manufacturers engaged in this conduct for approximately twenty years.[38] Many American economists, as well as the Supreme Court in this case, will tell you that predatory pricing does not make sense.[39] No business person would engage in predatory pricing behavior in the United States; therefore, neither would the Japanese.[40] The Court noted that a sensible business person would not engage in predatory pricing unless one could reasonably expect to recover ***549** losses sustained during the predation period and the supracompetitive profit that would be obtained only after the period of predation.[41] Because this approach does not make sense to an individual business person, the Supreme Court reasoned that similar action would not be undertaken collectively.

Is the Supreme Court somehow limited by the shadows of a western viewpoint of predation? Is it possible that Japanese businesses have no problem with engaging in predatory pricing behavior because they are not as concerned with short-term profits as American businesses are? Possibly, the Japanese may be more interested in pursuing a course of action that increases their market share even at the expense of low or no profits, especially in foreign markets. In building market share, they may take a long-term approach rather than a short-term approach to accomplish this goal.

This example teaches not only about predatory pricing and the antitrust laws; rather, it illustrates that because the Supreme Court could not view the Japanese manufacturers' behavior from anything other than an Americanized or Western perspective, it may have failed to provide the victimized American manufacturers with a remedy under the Sherman Act. Once again, this example illustrates that raising such issues as race or ethnicity not only assists in furthering the doctrinal understanding but reveals some hidden or concealed assumptions on which the doctrine is constructed or applied.[42]

***550** The examples presented by the advanced torts and antitrust classes illustrate how to use diversity issues to examine a legal doctrine or the construction of an argument. Sometimes, one may choose to provide students with a hypothetical that raises diversity issues and more explicitly permits them to acknowledge and grapple with their own biased filters that affect the way they reach legal conclusions or construct an argument. An example of this kind of hypothetical can be found in the torts casebook by Dan Dobbs.

Austin cooked a continental dinner for a new acquaintance, Berwyn, served in candlelight and accompanied by excellent French wines. After dinner the couple sat on the sofa listening to Traviata and sipping Benedictine and Brandy. The moment came, as it must in every scene of this sort, in which Austin drew closer and with parted lips looked in Berwyn's eyes. A kiss

was imparted and Austin's hand caressed Berwyn's neck. Suddenly there was a snap as a vertebra in Berwyn's neck broke. At the trial on the battery claim, Berwyn testified: "I never consented to be touched at all, and in fact I was revolted at the idea." If the trier of fact believes this testimony, does it show there was no consent?[43]

This problem is a very straightforward way of getting students to understand that consent is determined by the outward manifestations of the actor (plaintiff) as viewed through the lens of the reasonable or ordinary person. The test is not a subjective evaluation. Rather, the real lesson in this problem is hidden in the way that Dobbs constructed it in his casebook. There are no pronouns--no clue whether Austin and Berwyn are male or female. Students typically assume that Austin is a male--being the aggressor in this problem--and Berwyn is a female. Once I point out that they have made some assumptions in the problem, we discuss how this might affect the outcome. Typically, students maintain that there is no change in the analysis whether Austin is male or female, or Berwyn is male or female. But, what if Austin and Berwyn are of the same gender? Pause. Silence. Nervousness. "Professor, I don't believe there would be any change in the result because nothing else has changed." This is the position they want to believe, but the awkward silence ***551** often reveals their real position--there is no consent in that case. Thus begins our lesson that gender can and does affect the legal analysis and outcome. More specifically, one's sexual orientation can influence the way the court evaluates a problem even when it is not the subject of the controversy per se.

There are many examples of how to raise or incorporate diversity issues in many courses like criminal law, contracts, torts, constitutional law, and even antitrust.[44] The variety of courses suggests something that I believe is fundamentally true: Diversity discussions can be integrated throughout the law school curriculum.

**B. Improving the Integration of Legal Skills with Other Problem-Resolving Systems**

In law school, students begin to discover ways to integrate their own experiences, perspectives, and other problem-resolving systems with the legal process. In doing so, they will be far more effective as advocates. Part of the incredible effectiveness of today's legal education--which, incidentally, varies little from that of the nineteenth century--is the all-encompassing and all-consuming approach to indoctrination of the legal process into neophyte law students. After the first year of law school, in most places, students barely can remember what it was like to consider a problem from their own points of view, rather than from the perspective of a third person or a court. In fact, students who use themselves as the reference point for analysis of a problem often are quickly and harshly admonished by faculty and peers that their approach is subjective and without authority. Admittedly, I do believe that students need to be immersed within the discipline to learn the explicit and implicit rules of the legal process and doctrinal paradigm. Nonetheless, there is a ***552** real danger that students will lose their ability to form or comfort with forming opinions based on existing alternative problem-resolving systems.

To begin with, the legal process is merely one problem-resolving system with an extensive body of analytical tools and precepts that are employed within the formal judicial system or to avoid entanglement with this system. However, not all problems are susceptible to resolution within the judicial system. Increasingly, problems brought within the context of the legal system may not be dissectible or resolvable as easily with traditional legal tools. Raising diversity issues reminds students that they need to learn how to work the legal process with their other problem-resolving skills. They came to law school with at least one set of problem-resolving skills in place; our job should not be to displace completely or silence students' ways of resolving problems. Rather, they should be shown how they might build a bridge between the legal problem-resolving system and their own so that they can be effective lawyers and citizens.

A student who can use the legal problem-resolving system in tandem with other such systems may follow the example of Charles Hamilton Houston, Dean of the Howard Law School and architect of the legal strategy leading to the landmark decision in Brown v. Board of Education.[45] Dean Houston understood that the legally sanctioned segregation system was wrong. He did not go to the legal system or process to learn that truth. Instead, he used another problem-resolving system to identify the problem and its solution. Specifically, he relied on his experience as an African American examining a segregated educational system. He used the legal process to construct the plan that would challenge and eventually cripple legally sanctioned segregation in this country.

For our students to construct or devise better solutions for the problems confronting our society today and tomorrow, they must be able to utilize all of the problem-resolving systems available to them.[46] Another example of the use of an alternate ***553** problem-resolving system is illustrated by the development of a legal theory for sexual harassment in the workplace. Catherine MacKinnon is credited with identifying and developing this theory, which is based on the experiences of women who typically occupy inferior job positions and job roles.[47] Professor MacKinnon was able to demonstrate how sexual

harassment was an improper exploitation of power by a male superior, and how sexual harassment worked to keep women in subordinated positions within the workplace. There was no law on sexual harassment as a form or type of gender discrimination. Professor MacKinnon used an alternative approach to begin constructing a legal theory to address this serious problem.[48] If MacKinnon or Houston had relied solely on existing legal authority, they would not have been able to successfully devise the arguments that ultimately prevailed. Clearly, their particular visions were a function of personal or group experience. Similarly, students must maintain their ability to use their alternate problem-resolving systems, including personal experience and perception, in tandem with the legal analysis. Discussions about diversity issues help students to learn how to integrate their personal experience and resolution strategies.

**C. Preparing Students for a More Diverse Society in the Twenty-First Century**

Exploration of diversity issues will better prepare students for a more diverse and multicultural society facing us all in the twenty-first century.[49] Students who plan to live and practice in that world simply will have to find a way to talk about diversity issues. Simply stated, if lawyers have a problem discussing these issues, how can anyone else raise these issues within the legal system?

A multiple-perspectives approach enables students to develop ***554** more effective arguments on behalf of their clients.[50] Furthermore, students with such an approach may be more able to identify and respond to lawyers who employ conscious, purposeful discrimination as a strategy for success.

Furthermore, discussion about diversity issues can help students become better listeners. They may be more able to hear what clients, who come from different perspectives than theirs, are really saying.[51] For example, if a lawyer were to have a female client who is poor, how would that lawyer understand her needs if the lawyer has a personal filter of destructive representations and images of poor women that pervade popular culture and political discourse? Professor Lucie White raises issues involving the lives of disadvantaged women in her large, first-year classes, as well as in her seminars.[52] According to Professor White, raising questions about poverty in the context of different issues that poor women face can affect student responses. For instance, students respond more positively about resolving issues for a poor woman regarding childcare issues than they do about working with the same woman to reinstate her welfare benefits. This kind of discussion allows students to understand their need ***555** to question their own personal filters that may undermine their ability to hear and serve their clients.

**D. Encouraging a Multidisciplinary Approach to Problem Solving**

The introduction of diversity issues may require the use of materials from other disciplines, such as studying newspaper articles in a given city to identify the images of poor women in the welfare system or using social science studies on the effect of racial slurs on targets and nontargets. For instance, psychological studies of post-traumatic syndrome and its application to women who were battered by spouses or significant male partners provided a basis for a legal theory of battered spouse syndrome that challenged the underlying assumptions of self-defense in this context.[53]

Once students use a multidisciplinary approach to evaluate or diagnose a problem, more complete and varied solutions are likely to result. Sometimes the solution may be not to resolve the problem exclusively through the judicial system but, rather, through use of other fora. For instance, the problem of domestic violence is one of the most knotty and difficult issues confronting the country today. Adopting federal and state legislation to increase the criminal penalties for a batterer is one solution. But, perhaps bringing the medical and legal communities together through the Federal Advisory Council on Domestic Violence may allow for the development of other responses that can be more effective in preventing, rather than simply responding to, the problem.[54] In any event, using the exploration and discussion of diversity issues teaches law students to look beyond casebooks and to explore other vehicles for resolving their clients' problems.

***556** **E. Facilitating an Understanding That Values Matter**

Court-created doctrine or legislatively enacted statutes ultimately reflect some resolution of competing interests and values. For example, Congress adopted a statute to address the problem of claims arising out of inoculation of infants with the DTP vaccine.[55] The statute was a way of responding to and managing "the interests of the injured party who was required by state law to be immunized as part of the childhood vaccination program, the vaccine manufacturers' interest, and the public health community's interest in maintaining the national childhood vaccine program."[56] Those interests may be resolved in terms of

what is important to or valued by the decision maker--e.g., a legislature or a court--or what the decision maker determines should be valued in society. Often, students refer to this type of discussion as the public policy argument.

Diversity issues tend to force a consideration of what is or is not valued in a particular controversy or by society in general. A student undertakes a self-actualization process when thinking about and discussing these issues. As Maya Angelou, renowned poet and writer, has said: "You cannot return to your prior ignorant state once you have acquired knowledge about other perspectives. It is not possible. You will begin to change."[57] It is this personal grappling that permits students to understand more keenly that the determination of a rule to resolve a legal question is really a decision about which values matter.

### F. Shared Obligation for Seeking Justice in Society

Students need to hear all professors address diversity issues. Typically, only a few implicitly or explicitly designated spokespersons for "special interests" will raise these issues. Everyone, however, is responsible for changing society so that it is far more inclusive and fair to all members of the community. In addition to teaching students substantive law, professors, willingly or unwillingly, ***557** are role models for our students. We should take that role very seriously and model for our students our vision and concern for legal and social change. More importantly, while we all certainly do not share the same vision, we can demonstrate that we have visions and that our own visions and consciences play vital roles in our lives as lawyers.

## II. Mayhem in the Classroom--or Why I Can't Raise These Issues?

What kinds of risks does a professor take when he or she decides to "talk diversity" in the classroom? With so many benefits, it is difficult to identify the risks associated with engaging in this kind of teaching. But, they exist.[58] Take, for example, my husband's experience in teaching a course on "Youth and Violence" at the University of South Carolina, in Columbia, South Carolina. He received a couple of student evaluations that said that he was racist in the teaching of his course. The problem, according to those student evaluations, was that only one of his six outside speakers was white. The other speakers were African American. Further, those students said that my husband wanted to talk only about race; therefore, he must be a racist.[59] Surely, most law professors want to avoid this nightmare. Frequently, however, this kind of a response has very little to do with the teacher.

First, there may be racist, sexist, and homophobic people in your classroom. In fact, everyone is at varying levels of bias--realization and actualization. In sum, we all have biases. "We are by our nature creatures of bias. It is impossible for us to set aside our biases. We must recognize them and when they do not serve us or serve the public, set them aside. . . ."[60]

Second, some students will be uncomfortable with a discussion ***558** about diversity issues no matter what the teacher does to create a supportive classroom environment for the discussion. Consequently, those students who are unable to handle the discomfort often will displace or shift their discomfort to the teacher. The teacher as the problem is much easier for the student to handle than accepting personal responsibility for his or her own discomfort with these issues.[61]

Students may complain about a multiple-perspectives or diversity approach because it could increase their reading load.[62] Too much of a focus on difference might increase tensions in the classroom. Students and the professor might be uncomfortable and feel awkward.[63] Furthermore, some students view these issues as entirely irrelevant to the law. In raising diversity issues, the professor is charged with introducing impermissible bias and subjectivity into an otherwise objective, neutral, and reasoned discussion of the law. A professor might offend someone unintentionally. ***559** Worse, other students, by their statements, unintentionally might offend some students or groups of students in the class. Students who are women and men of color could feel further marginalized within the classroom and the law school as a result of this discussion.[64] Furthermore, there is the perpetual concern that a classroom discussion might deteriorate into a heated emotional debate that will get out of control. Finally, there are a professor's own feelings of vulnerability on these issues that may be difficult for him or her to handle within this kind of discussion.[65] As a professor, how should he or she handle these situations?

I believe that many of these are valid points that need to be considered. However, in my experience, each of these concerns can be addressed effectively with a combination of teaching strategies discussed in Parts IV and V this Article. The most important point, regardless of what strategy or strategies are employed to respond to any of these potential negative risks, is that the teacher pay attention to his or her relationships with individual students and the class. Investing time and energy into developing a solid, respectful, and approachable relationship with the students in the classroom will put the teacher in the best position ***560** to learn about any of the concerns raised above. Further, these same students may offer solutions that are more appropriate responses to those concerns.

## III. What Students Say About Raising Diversity Issues in the Classroom

In many of my upper-level courses, I use an assessment tool to determine whether and to what extent incorporation of diversity issues has helped or hindered students' learning in the course. The assessment is always done anonymously.[66] Excerpted below are some of the comments made by second-and third-year students who were in a fall semester advanced torts course. There were approximately forty students in the class. Out of the forty students, five were students of color and one woman identified herself as lesbian. The class was almost split in half along gender lines.

### EXAM QUESTION

What have you learned in this course?[67] Please respond to this question in a bluebook or on notepaper. Use a four-digit number to identify yourself.

### EXAM NO. 1231

I've learned about the history and development of the law of defamation. But more important than the black letter law, I've learned how to analyze fact, theories, and arguments in a more precise manner.

Also, I've learned quite a bit about gender and culture--and how these factors affect the judicial process. This is the part of the learning that I value the most, as these factors are ignored in other classes. I value learning about the world from another perspective--a perspective that I can't know. I hope that while you are here [you will] encourage the powers that be to work on diversifying the faculty and the student body.

Lastly, I've learned about human nature and psychology. From the comments of several of my colleagues, I have gathered ***561** that most of them are blind to the fact that we don't all see the world through the same filter. It looks different for each of us, depending on our race, culture, religion, sexual orientation, gender, etc.

### EXAM NO. 1159

I have learned that it's ok to have feelings about the law. I have learned that the law can attempt to do the right thing, but because the law is created by people and people have different values, it is very difficult to have a singular "right" answer.

Although this class material covered a lot of material I had no specific interest in, the presentation was such that I could generally find relevance in all the material. Sometimes that meant I was frustrated because the parameters seemed so wide, i.e., "What does she want me to know (memorize)?" I have never taken so few notes in law school. The good part was I only worried about that recently. The bad part is, I'm worried about that now.

I learned some basic black letter law, the basic elements of defamation, how damages are assessed, what degrees of fault, etc. I thought maybe we spent too much time on defamation. I struggled with the "meaning" question and the "fact/opinion" distinction. I was grateful that I was allowed to bring my personal perspective to the class.

I was challenged in my beliefs. This was particularly enjoyable. This was a great reminder to me that every issue has many "sides."

I thought the section on hate speech could have been longer. What I got out of that was what it's like to try to create law. I got to look at what it's like to see a hole and the dangers and benefits of filling it. The discussions were worth it alone, so this subject was brought up here in a way that was somewhat safe.

### EXAM NO. 4425

At first I thought the course would consist of some black letter elements of torts we didn't cover as a first year. The course began that way, as we considered the restatement elements of defamation on page 6 of Halpern.

Although the particular torts we studied were interesting, what I began to find in the course was the animation in the law. Each element of each tort contains an array of policy decisions. Discussing these were the most interesting.

*562 I learned that no law is applied in a vacuum.

The actual laws we discussed are still subject to debate, both as to application and necessity. Consequently, I don't consider them to be more than something to look up. What I take from them is what we saw going into them, the discussions, the choices, and human aspects.

**EXAM NO. 2462**

First and Foremost--I have gained an awareness of the considerations behind the creation of law. Who decides what interests are worth protecting? Which interests are valuable to society--so valuable that these interests are worth sanctioning (civil and/or criminal liability) the citizens of our country?

I learned that the law is biased in many ways and I gained greater insight into some of the inequities. I had never considered how gender, race, class, and power structure went into the creation of law. Now, I never take all law as the just and gospel truth--I just had not considered these things.

Yes, of course I learned the black letter law too. I found the dignitary torts very interesting--we didn't cover any of them in first-year Torts class.

Overall, the exposure to criticisms of the law and the opportunity to consider alternatives to existing law has given me a new perspective. This, along with the viewpoints of my classmates and "deep thought" discussion, will change--has changed--how I view law.

**EXAM NO. 7777**

I have learned several important tort doctrines this semester, such as defamation, privacy, and publicity. However, these are not the lessons I will probably carry with me when I leave.

I will remember the intense Socratic debate and open class discussions regarding issues of race, sex, and expression. I will remember a bold visiting professor who encouraged thought, oral manifestation of intellectual study, and taught respect.

Most of all I will remember how I felt about certain cases and issues and what I can do to change people's opinions or at least encourage an intelligent discussion so that I can learn from my colleagues and my colleagues can learn from me.

**EXAM NO. 5342**

*563 I have learned that the "Human side," emotions and "passion" are of utmost importance in the law, especially the law of torts. This course has solidified my gut feeling that the law is not an objective entity. It is a way in which people argue their competing interests in a civilized manner. Tort law is an attempt to have certain interests protected and codified; it is a constant struggle between competing beliefs and thoughts. This is evident in the courts' struggle to define and shape the various torts we have studies. Just as I have great difficulty in resolving the issues we have studied for myself, personally, the courts seem to deal with the same struggle but under the pressure of having to provide some "answer" (which I assume is what I will have to attempt to do on the final exam!).

Our class discussions have also shown just how much we are all trapped in our own "lens" of analysis. Our background, ethnic origins, etc. are inescapable beyond our ability to respect and recognize differences.

**EXAM NO. 6784**

To begin with, this course has taught me a number of basic tort concepts that were not covered in my torts class first year: punitive damages, defamation, and libel/slander. Additionally, advanced torts has opened up a new way to look at the law. No longer do I sit in class and simply copy down the rules without thinking about where those rules come from, why they are used and what can the courts or legislature do to make them more effective to the parties individually and plaintiffs/defendants in general.

Specifically, defamation is an area of torts I knew nothing about in August. Now, however, I feel as though I have a firm grip

on the tort and how often it surfaces in our daily lives. I especially found the brief time we spent on privacy and hate speech particularly enlightening. The Indian cases really showed how the "ordinary sensibilities" standard does not protect all individuals as we'd like to think tort law can. The Hate Speech topic was a necessary eye opening experience and helpful in forcing us, as future lawyers, to look at where we are as a society and how we can affect change as well as redress wrongs upon those injured.

This class has been the best class of my law school education because it has gone well beyond "bar prep" style teaching. I has even given me more confidence in my ability to think about the law--not just memorize it. . . .

## *564 IV. Creating the Environment for Teaching Diversity

At least seven essential points will greatly assist a teacher who deliberately plans to incorporate issues of race, gender, class, sexual orientation, or disability into the teaching of legal materials: Relationships, Relevancy to the Legal Analysis or Process of Lawyering, Listening, Methodology, Humor, Handling Silence, and Preparation. In my experience, most of these qualities can be found in good, solid teaching[68] that promotes a useful, highly productive learning environment for most of the students in the classroom. In sum, I believe that the teacher who raises diversity issues in the classroom will have to pay greater attention to these critical areas. Problems or awkward moments, when they occur, are related typically to a failure to address one or more of these seven points. These seven points are related principally to conditioning the classroom environment and, therefore, preparing your students and yourself for future discussions about diversity issues.

### A. Relationships

All teachers focus in some manner on the way in which they develop a relationship with the students in the class. It is a fundamental axiom of teaching that students learn best when they have a good rapport with the teacher. Developing a relationship with the class should occur at two levels-- the individual students and the group.[69] Naturally, it is important to convey your respect for the student in as many ways as possible. Respect does not mean agreeing with everything that the student says; instead, *565 it is treating the student as a valued human being with a point of view. When both teacher and student exercise mutual respect, the need to control a discussion will be far less significant.

Furthermore, a teacher must realize and be comfortable with the fact that real control in the classroom lies not with the teacher but rather with the class.[70] Real control is evidenced by the teacher talking less and the students talking more. Another indicator of control is revealed when the teacher assumes a more remote posture in a discussion in which the students are thoroughly engaged with each other. Real control does not need a whip or loud voice but just a look, comment, or question that can redirect the energy and discussion so that the teaching goals can be achieved.[71]

Ultimately, teachers who pay attention to and work on developing positive, respectful, and open relationships with their students on individual and group levels will have classroom environments in which students can and will take risks. Some refer to this as creating a safe environment for students.[72]

Teachers must convey the message that every student has access to the classroom. Over the years, I have noticed that I never have to ask males to volunteer in the classroom--their hands always go up first and persistently throughout the semester.[73] *566 When I taught in the CLEO program during the summer, the white men or men of color raised their hands more often than the white women or women of color. When I taught at the University of Richmond, American University, and Willamette University College of Law, men raised their hands first and often. Great! Some students are interested and willing to participate in the classroom. That is precisely the point--some students are eager participants; if a teacher adopts or employs only a first-hand-in-the-air approach, then only some of the students will be engaged in the class. As a result, a terrific in-class relationship may be developed with only some selected students in the class, which can convey a negative message to others who are not otherwise engaged in the classroom. In particular, women and men of color and white women in a predominately white and/or male classroom may choose not to become involved in any discussion. Therefore, I deliberately spread the opportunities for participation, especially in a large classroom-- making certain that I have as many men and women of color and white women participate in each class as much as possible.[74]

For example, prior to a particular class discussion on the consent doctrine in torts, a teacher might assemble a group of students to engage in a role-playing of the O'Brien v. Cunard S.S. Co.[75] case. The group should be representative of the class, containing women and/or people of color. The teacher should assist the group in making assignments for parts so that, where possible, stereotypes are avoided--e.g., the attorney who represents the plaintiff in the case could be an African-American woman rather than a white male. This role-playing may be the *567 principal introduction of a discussion about consent on the assigned date.

Another way to expand the number of opportunities for input by more students in the class is to use buzz groups. A buzz group is made up of five or six students during the class period who are working on an assigned problem or proposal; this can be done in very large classrooms because students do not need to move from their seats. Simply create small groups throughout the classroom and allow ample time for students to work on a discrete problem or proposal. Always end the buzz group activity before the end of the class period so that the class has an opportunity to reconvene as a community. If there are only ten minutes remaining in the class period, focus on the process rather than the substantive problem. In other words, have the students critique and reflect on the way in which they were interacting. This is always a healthy discussion and contributes to building the group relationship with the teacher and validates the different ways students learn and process a legal discussion. If there is time to have a substantive discussion, consider which groups have spokespersons who do not speak often in the class. Beginning with them delivers the message that everyone has access to this classroom forum and everyone can take risks.

These types of activities can help the teacher build relationships of trust with individual students and, in particular, with students who generally may be silent in the classroom.[76] As I stated earlier, these and other activities will strengthen the relationship so that there is a greater likelihood of success when the class discusses diversity issues. If there is a relationship of trust and mutual respect, all participants will have a greater ability to listen more closely, to hesitate before making a judgment, and, in general, to give someone the benefit of the doubt regarding awkwardly worded or inappropriate comments.

Another way to communicate that your classroom is safe for risk taking is to respond to personal attacks on students or bigoted positions taken by students in the classroom. I do not permit profanity, name calling, or personal attacks against a student by any student in the class. I demand that we respect each other ***568** and each others' viewpoints, no matter how much I or someone else may disagree with them.

When faced with a personal attack in a classroom discussion, I typically respond by immediately taking the position of the student who was personally challenged (whether or not I agree with it) or, in the case of what might be regarded as a bigoted remark, by making explicit the underlying assumptions on which the remark is based so that the class knows that I do not endorse that position or the values such a position promotes. Those kinds of challenges, if left unanswered, can disturb the "force" or "environment" in your classroom, undermining your efforts to allow for discussion by most of the students in your class.

Here is another example of how such comments might enter the discussion. In one advanced torts class, we discussed the four slander per se categories. The class discussion focused on the category of loathsome disease, and whether a potential plaintiff could use this category if someone falsely said that the plaintiff was HIV-infected. A white male student presented his analysis of the query but did so by using loaded, offensive references and erroneous assumptions about HIV-infected persons. Nervous laughter and sour expressions followed from some of the students around him. No one spoke after he finished--a sign that there may have been a problem. The class was clearly uncomfortable. Although the student used offensive language to talk about the plaintiff, unbeknownst to him, he may have been talking about a student in the classroom. He may not have intended that his comments were deliberately mean-spirited or offensive, but the practical effect was the same. In my opinion, this was an opportunity to continue building a relationship with the class and help them to learn to live with and work through the discomfort that will accompany "controversial" topics.

I asked the class to explain why there was laughter. I waited. When I received no response, I provided a reason and asked them to critique it. I told them that the laughter was a way of conveying discomfort with some of the comments of the previous speaker regarding HIV-infected persons. Rather than stating the basis of the nervousness or discomfort, they had laughed. The students responded to my critique in a way that permitted them to disagree with the speaker on some points but agree with him on his over-arching point. This discussion did not ***569** take long--maybe ten minutes--but it was necessary to preserve the classroom relationship and not place future discussions about diversity issues in jeopardy.

Certainly, there is potential for silencing students like the student referred to above. In the example above, however, the student continued to participate in classroom discussions, although he was a little more careful with his choice of words. After all, lawyers are wordsmiths and should be careful with their words. However, I believe that a constructive response is still necessary in such circumstances; otherwise, the remarks will remain a part of the classroom environment, distorting and undermining the professor's ability to have open, respectful, and penetrating discussion of diversity issues. I recognize that not all of my students will feel safe no matter what I do--after all, it is law school. But, my hope is that a substantial portion of the class will understand the boundaries and will receive the message that the classroom is for learning and everyone is

welcome to participate.

**B. Relevancy to the Legal Analysis or the Process of Lawyering**

One of the criticisms often leveled against efforts to incorporate diversity issues in law courses is that diversity issues are irrelevant and unrelated to law. Obviously, this writer disagrees with that point. However, one should be careful that when raising these issues they are related to and designed to advance the discussion in a material way. Discussing the horrors of the middle passage countless numbers of Africans suffered might be interesting and even new information to your students. But, unless this discussion is used in connection with legal theory, doctrine, or practice, this discussion is best left to another forum. Hence, thoughtful planning and discussion with colleagues, inside or outside the institution, may be necessary to ensure adequate connection with the legal subject matter.

**C. Active Listening**

Being an effective listener means listening with everything--to not just the words the student uttered, but the manner, tone, body position, pace, and other nonverbal signals that convey the full meaning that should be attached to a comment. In the classroom, effective teachers realize that they must acquire ***570** an ability to listen simultaneously to the speaker and to the nonspeakers, the rest of the class. In this way, the teacher can detect points of discomfort or concern that otherwise might go unexpressed or unarticulated in the classroom. This skill is especially important when discussing diversity issues because many students come to the classroom with limited experience in these kinds of discussions. Thus, reliance on the nonverbal communication can be critical to assessing what is going on in the classroom, as well as directing the discussion. When I think about listening then I am reminded of a poem by Ralph Roughton:

When I ask you to listen to me and you start by giving advice, you have not done what I asked.

When I ask you to listen to me and you begin to tell me why I shouldn't feel that way, you are trampling on my feelings.

When I ask you to listen to me and you feel you have to do something to solve my problem, you have failed me, as strange as it may seem.

Listen! All I ask is that you listen, not talk or do . . . just hear me.

When you do something for me that I can and need to do for myself, you contribute to my fear and inadequacy.

And I can do for myself. I'm not helpless. Maybe discouraged and faltering, but not helpless.

But when you accept as simple fact that I do feel what I feel, no matter how irrational, then I can quit trying to convince you and get about the business of understanding what's behind this irrational feeling. And when that's clear, the answers are obvious and I don't need advice.

Irrational feelings make sense when we understand what's behind them.

. . . . .

So, please listen and just hear me. And if you want to talk, wait a minute for your turn, and I'll listen to you.[77]

**D. Using Varied Teaching Methodologies**[78]

In recent years, academic support scholars have published ***571** articles and conducted workshops about the importance of using a variety of teaching methodologies to maximize learning in the classroom. The reason for adopting such an approach is that students have a broad range of different learning styles. Some students learn best through visual presentations of the Rule Against Perpetuities, and others may understand its nuances simply by reading the text. Still, other students learn most effectively by working on problems in small groups and talking through the scope and application of the Rule. Because students learn in different ways, a teacher concerned with maximizing learning will employ a variety of techniques, such as small groups working on problems, role-playing, in-class writing assignments, a debate format, or videotapes.

This point, again, is vital when raising issues of diversity. Frequently, a teacher may need to employ materials such as historical documents, social science data, or the briefs in the case to set out properly the context for discussion of any one or more of these issues. Materials other than casebooks may necessitate the need for another method for introduction of this material.

Moreover, discussion of diversity issues usually can elicit students' personal narratives, which must be treated respectfully. If this is likely to occur on a particular subject, a teacher might consider another way to permit students to share their narratives with minimal personal vulnerability rather than, for instance, having the student talk to the whole class about his or her personal experience with racial discrimination in housing. Instead, the teacher might permit students to respond in writing to a question that elicits the personal story, then move them to small groups for discussion about the student writings; and finally, move them into the large classroom, where the kernels of those narratives can be used to discuss the strengths or weaknesses of the present federal statutory scheme involving fair housing enforcement. Teaching methodologies must adjust to focus both ***572** on achieving the teaching goals and raising the diversity issues contained in the subject matter.

### E. Using Humor

A sense of humor can carry an awkward and difficult discussion a long way. Laughter can help ease a tense moment and allow the class to relax so that a useful discussion can continue. By the use of humor, this writer does not mean the use of off-color remarks or jokes about racial/ethnic groups. Rather, it is more an attitude that the discussion is serious, but we need not take ourselves so seriously.

Humor, when used appropriately (particularly self-deprecating humor), can generate a great deal of goodwill and make everyone feel comfortable within the class. Humor sometimes can enable students to participate and take risks when they otherwise might not.[79]

### F. Making Silence Work for You

Silence. Some teachers fear silence, especially when it follows the introduction of an issue about affirmative action or the creation of a tort for racial insults. Silence, however, is a wonderful teaching tool, especially in moments of awkwardness and uneasiness. Silence can help students focus on the underlying assumptions that he or she may be making regarding the efficacy of affirmative action. Sometimes I expect or build in silence at certain points in the discussion that can be used for further reflection. I tell the students what the silent period is for and do not permit anyone to speak before everyone has had a chance to think more carefully about his or her point of entry into the discussion.

Awkward silence can be a useful reminder to students that there are many reasons why discussion of these issues is uncomfortable and difficult for them. Likewise, they may experience this same awkward silence in court, at a negotiation, or with a client when they feel it is appropriate to raise an issue concerning diversity on behalf of the client. They must learn not to fear it, but to use it.[80]

### *573 G. Preparation

This last point seems so obvious but, nonetheless, bears some mention. Diversity issues should not be raised as an afterthought in a classroom discussion. In addition to reading any legal literature on a particular point, for example, a discussion about the marriage bonus under the Internal Revenue Code might include a close examination of how that bonus is disadvantageous to a middle-class African-American couple with two incomes.[81] The teacher also might consider role-playing the discussion with a colleague or two before trying it on the class. This kind of preparation will assist the teacher greatly in handling and effectively using diversity issues to deepen understandings concerning the formation and values implicit in the policies behind particular statutes and doctrines.

## V. Getting Started

Diversity issues can be raised across the law school curriculum and are not necessarily limited to only certain areas of the curriculum, like courses on civil rights, gender and the law, or domestic relations. Throughout this Article, there have been examples of diversity issues in Torts, Tax, Antitrust, Contracts, and Corporations courses. A couple of years ago, when I made this same point at a New Law Teachers Workshop, I received a response from a professor who teaches intellectual property. He felt that diversity discussions would not apply in his course. He is an experienced intellectual property professor, and I am inexperienced and relatively uninformed (except to the extent of my discussions in antitrust) about the law of intellectual property. I asked him whether there were other ways in which artistic works were communicated in other societies that might also be "a property interest." In this way, I tried to suggest to him that we do have a westernized viewpoint of property that is not neutral about what is or is not property. He acknowledged that it might be worthwhile exploring that possibility. This type of exploration might be extremely useful in a technological environment ***574** that is remaking and redesigning the possibilities for property interests.

Extensive outside research is not necessary to raise diversity issues. The issues appear in some casebooks by virtue of the author's choice of cases and notes.[82] In addition, some casebooks have included materials, other than cases, to support a professor's choice to raise these issues. For example, at least one casebook includes a number of materials on critical legal studies and feminist theory in the evaluation of the legal doctrine of contracts.[83]

Case studies are an excellent source for the professor to use to deconstruct legal doctrines with students and to help students understand the underlying social policies or myths that support them.[84] Articles, of course, could be assigned that will provide students with another critique on legal norms that often appear neutral.[85] Furthermore, narratives and autobiographies can illustrate how neutral legal doctrines are constructed to exclude women and minorities.[86] Narratives are also powerful tools for communicating the outsider perspective to someone who has no experience on which to draw. In addition, simulations, including both traditional clinical and alternative dispute resolution models, and documentaries also can enrich the students' understanding of outsider perspectives.[87] Of course, professors also can use Supreme Court and appellate court briefs, newspaper articles, and videotapes.[88]

## *575 VI. Conclusion

The need to integrate issues of race, gender, class, sexual orientation, and disability into the law school curriculum is important at this moment in legal education.

We need to include more voices and perspectives in our training of lawyers who will be practicing law in the twenty-first century--a century that will have a more diverse population and work force in this country than ever before. Lawyers need to be able to communicate and work effectively within that environment.

The issue of whether and how to raise these topics in the law school classroom will challenge the mission of the institution in some significant ways. One needs to think broadly about the missions of the institutions and how the discussion of diversity issues will assist in achieving those missions. I have no doubt that incorporating diversity into the curriculum is an appropriate direction for law schools, and one that will greatly enhance the students' abilities to be effective lawyers and leaders within our communities.

Footnotes

a Assistant U.S. Attorney, United States Attorney's Office for the district of Oregon; Professor of Law, T.C. Williams School of Law, University of Richmond. The views expressed in this Article belong to the writer. The reader should not construe anything set forth in this Article as the position or endorsement of the United States or its agencies.
I thank many people for their support and encouragement as I continue to assert, in various fora, the need to incorporate race, gender, class, disability, and sexual orientation issues into our legal curriculum and into the teaching of law. I am thankful to Jet Harris, a graduate of Willamette University College of Law, for her persistence in getting me finally to put down my thoughts on this topic. Many thanks to Elizabeth Large, also a graduate of Willamette University College of Law, for just everything. As always, I am thankful for the many students who permitted me the opportunity to explore the implications of these issues in our study of various areas of law. Thank you for allowing me to share in your intellectual and emotional journey from which I have learned much.

1 Student Evaluation #0114 in Advanced Torts, Willamette University College of Law, Fall 1994.

2 I have settled on the use of the phrase "diversity issues" to describe, in shorthand, the issues of race, gender, class, sexual orientation, and disability throughout this Article. I am uncomfortable with the phraseology "diversity issues" for several reasons, but could not find an adequate substitute to refer collectively to "race, gender, class, sexual orientation, and disability." I decided to use a convenient phrase, albeit one with political implications, that is generally understood to refer to these issues collectively. I hope that this choice of words will not unduly distract any reader of this Article.

3 Bender and Braverman begin their wonderful book titled, Power, Privilege and Law with a poem by Alice Walker that serves as a reminder that one need not attempt to break all barriers and raise all issues at once.
Silver WritesIt is true--I've always loved the daring ones Like the black young man Who tried to crash All barriers at once,wanted to swim At a white beach (in Alabama) Nude.Leslie Bender & Daan Braverman, Power, Privilege, and Law 1 (1995) (citing Alice Walker, In Search of Our Mothers' Gardens 335 (1983)).

4 One reason not explored in this Article is that discussion of diversity issues can reduce student alienation within the law school. This point is well developed in an article by Charles R. Calleros, Training a Diverse Student Body for a Multicultural Society, La Raza L.J. 140, 144 (1995).

5 See David Dominguez, Beyond Zero-Sum Games: Multiculturalism as Enriched Law Training for All Students, 44 J. Legal Educ. 175, 176-77 (1994) (Dominguez argues that cultural diversity, even in the zero-sum law school environment, can generate joint-gain instructional methods. To achieve this result, Dominguez employs the pedagogical tool of "negotiable learning," which stimulates integrative bargaining and provides students with extensive opportunities to reconcile divergent cultural interests, value judgments, and priorities.).

6 See, e.g., Frances Lee Ansley, Race and the Core Curriculum in Legal Education, 79 Cal. L. Rev. 1511 (1991) (arguing that integrating matters of racial justice into legal education is worth the difficulty); Kimberle Williams Crenshaw, Foreword: Toward a Race-Conscious Pedagogy in Legal Education, 4 S. Cal. Rev. L. & Women's Stud. 33 (Fall 1994).

7 684 F.2d 1208 (6th Cir. 1982), cert. denied, 460 U.S. 1040 (1983).

8 Id. at 1212.

9 See 2 Fowler V. Harper et al., The Law of Torts s 5.4 n.2 (2d ed. 1986).

10 Id.

11 Clark, 684 F.2d at 1210.

12 Id. at 1211.

13 Id.

14 Id.

15 Id.

16 Id.

17 Id.

18 Id.

19 Id.

20 Id.

21 Id. at 1212.

22 Id.

23 Id.

24 Id. at 1214.

25 Davis v. Costa-Gravras, 619 F. Supp. 1372, 1376 (S.D.N.Y. 1985).

26 Clark, 684 F.2d at 1214.

27 Id. at 1219 (Brown, J., dissenting) (believing that the portrayal of the plaintiff would not be construed reasonably as defamatory).

28 See id. at 1222.

29 See, e.g., Nancy S. Ehrenreich, O.J. Simpson and the Myth of Gender/Race Conflict, 67 U. Colo. L. Rev. 931, 941 (noting the racial stereotyping of African-American women as "dominating, promiscuous, and irresponsible"); Judith Olans Brown et al., The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor, 6 UCLA Women's L.J. 457, 539 n.208 (1996) (noting that the depiction of the oversexed black Jezebel has sufficient visibility to "haunt black women to this day").

30 This is a more common experience by African-American women than some might think. See, e.g., Patricia Reid-Merritt, Sister Power: How Phenomenal Black Women Are Rising To The Top 26-27 (1996) (recounting a story by Pamela Johnson, former publisher of the Ithaca Journal, after she accepted employment with a topflight corporation. She was leaving the luxury hotel where the interview was held and entered the elevator with a white man. This white man propositioned her. As she reports in the book: "He assumed that I was a prostitute. He let me know that I was still a black female in America.").

31 This example was discussed in Okianer Christian Dark, Catchin' an Attitude About Learning to Respect Persons of Difference (University of Richmond Convocation Speech), 3 Benjamin Mayes J. 41 (1990).

32 475 U.S. 574 (1986).

33 Id. at 577.

34 Id. at 577-78.

35 Id. at 579-80 (The district court held that any inference of conspiracy was unreasonable. The Court of Appeals reversed, holding that evidence of direct concert of action precluded dismissal.).

36 Id. at 582.

37 Black's Law Dictionary 814 (6th ed. 1991).

38 Matsushita Elec. Indus. Co., 475 U.S. at 578.

39 See id. at 589-90.

40 Id. at 589-93.

41 Id. at 592-93.

42 This point was underscored by the opening panel of the SALT Teaching Conference: Diversity in the Law School Curriculum. Professor John Powell, University of Minnesota, succinctly responded to the query as to how and why a discussion of difference is important in the substantive legal fields. He stated that part of the power of the law is to make some things invisible. "Now you see it, now you don't." Professor John Powell, Remarks at the SALT Teaching Conference (Sept. 23-24, 1994, in Minneapolis, MN). The articulation of legal principles as neutral facilitates the law's ability to make some things invisible. It is important to help law students understand how neutral legal categories, in fact, can influence and control the way laypersons view oppressed individuals in society. Furthermore, raising these issues will help the students develop humility, values based in justice, and the courage to challenge the status quo. See also Crenshaw, supra note 6, at 1 (discussing the perspectivelessness approach of legal discourse and doctrine that results in objectification of people of color); Lucinda M. Finley, Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning, 64 Notre Dame L. Rev. 886 (1989) (providing an excellent discussion about how the legal process conceals a male-centered viewpoint under the guise of neutrality); Mary Jo Frug, Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook, 24 Am. U.L. Rev. 1065 (1985) (gender-centered analysis of some of the frequently discussed cases in contract law revealing the invisible bias against women in the construction of contract doctrine or its application).

43 Dan B. Dobbs, Torts & Compensation 85 (3d ed. 1993).

44 Other examples of how diversity issues could be raised include a corporations course discussing democracy and analogizing the shareholder system to redistricting or gerrymandering of minority congressional districts. See, e.g., Lani Guinier, Symposium: Regulating the Electoral Process, Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes, 71 Tex. L. Rev. 1589 (1993). This discussion is the brainchild of Azzia al-Habri, a professor at the University of Richmond. Another example within which to raise diversity issues is a comparison of the way tort law rules advantage physical injuries over mental injuries in determining the appropriate reasonable person standard for purposes of liability and in the treatment of damages. Finally, one might engage in an analysis of the comparative fault opinion in Wassell v. Adams, 865 F.2d 849 (7th Cir. 1989), based on race, gender, and class.

45 The Road to Brown (PBS television broadcast, Jan. 27, 1992).

46 See also Angela Harris & Marjorie Schultz, A(nother) Critique of Pure Reason: Toward Civic Virtue in Legal Education, 45 Stan. L. Rev. 1773 (1993) (observing that traditional legal education teaches that rationality is appropriate in legal reasoning while feelings are not; and proposing that when emotions are acknowledged and examined rigorously, they can serve as a guide to intellectual inquiry).

47 See Catherine A. MacKinnon, The Sexual Harassment of Working Women 9-10 (1979).

48 Today, there is substantial case law on sexual harassment in employment. The first leading case on sexual harassment did not occur until 1986, when the United States Supreme Court issued its opinion in Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).

49 See excellent discussion of this point by Calleros, supra note 4 (in particular, discussing preparation for practice in a multicultural society).

50 See, e.g, Steve Bachmann, Lawyers, Law and Social Change, 13 N.Y.U. Rev. L. & Soc. Change 1 (1984-85); Martha Minow, Breaking the Law: Lawyers and Clients in Struggles for Social Change, 52 U. Pitt. L. Rev. 723, 739-42 (1991) (discussing importance to legal system of representation of those who violate the law, to challenge injustice, and reform society, and emphasizing that such representation should avoid undermining the client's purposes or beliefs); see also authors in the symposium issues on "Theoretics of Practice: The Integration of Progressive Thought and Action," 43 Hastings L.J. (1992) and "Theoretics of Practice," 3 Hastings Women's L.J. (1992); Gerald P. Lopez, Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education, 91 W. Va. L. Rev. 305 (1989) (arguing that a reconceived legal pedagogy embracing greater human and theoretical diversity will produce not only lawyers better able to serve society's subordinated elements, but better generalists, as well).

51 Christopher P. Gilkerson, Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories, 43 Hastings L.J. 861, 929-35 (1992) (assessing the "universalized legal narratives" employed by parties to emergency homelessness aid litigation: Defendant state's narrative depicted plaintiff homeless women as unworthy poor with overabundance of demands; homelessness legal aid clinic's narrative described their clients, the homeless women, as incapable and dependent; the women themselves, when allowed to speak, invoked narratives of rights and dignity).

52 Professor Lucie White, Address at the Eleventh Annual Workshop on Women's Rights and the Law School Curriculum, sponsored by the Women & the Law Program of the American University, Washington College of Law (January 1996, in San Antonio, TX).

53 See, e.g., Beth I.Z. Boland, Battered Women Who Act Under Duress, 28 New Eng. L. Rev. 603, 612-22 (1994) (discussing gains made by battered defendants in the admissibility of evidence of past abuse and psychological impact of that abuse); Elizabeth M. Schneider, Resistance to Equality, 57 U. Pitt. L. Rev. 477, 497-513 (1996) (exploring legal and public misunderstandings of battered women in criminal trials).

54 Address by Attorney General Janet Reno to the House of Delegates, American Bar Association, Baltimore, Maryland (Feb. 5, 1996) (copy of speech on file with the Willamette Law Review).

55 42 U.S.C. s 300aa (1996).

56 Okianer Christian Dark, Cosmic Consciousness: Teaching on the Frontiers, 38 Loy. L. Rev. 117 (1992); Okianer Christian Dark, Is the National Childhood Vaccine Injury Act of 1986 the Solution for the DTP Controversy?, 19 U. Tol. L. Rev. 799 (1988).

57 This quotation is taken from a speech given by Maya Angelou at the University of Richmond in the spring of 1990. See also Dark, Catchin' an Attitude, supra note 31.

58 There may be more problems for untenured faculty members engaging in this type of discussion in their classrooms than for a tenured faculty member. See discussion of this issue from SALT Teaching Conference: Diversity in the Law School Curriculum (Sept. 23-24, 1994, in Minneapolis, MN).

59 My husband, Lawrence J. Dark (now President and CEO of the Urban League of Portland in Portland, Oregon), had 40 students in that class. He received only six "poor" evaluations, which I believe speaks well of his ability to truly challenge students. His evaluations overall were outstanding, proving once again that one will have more success than failure in raising these issues in the classroom.

60 Gender Fairness: Ensuring Justice For All, NJC Alumni Magazine 9, 10 (Summer 1991).

61 Many other examples could be provided here to illustrate the point. I have received evaluations (oral and written) from students who tell me that I am distorting the subject matter to accommodate my political views; that I'm on a soap box again, and when will I get to the real law? I have been described as a radical feminist who hates men because I raise gender issues in contracts. Clearly, one of the risks is that you will be called names. The good news is that, over the years, I have only a tiny collection of these kinds of comments from students. The vast majority of students are appreciative and challenged by discussions of these issues.

62 See discussion in Part V, infra (discussing how to get started raising diversity issues in the classroom).

63 At the 1990 AALS Annual Meeting, I heard a story by a professor that I thought provided an excellent way to assist students and others who are discomforted by a particular discussion. The professor went to China to teach. She said that when she entered the classroom all of the students sat in rows of seats facing her. There was an elevated structure in the front of the room that she identified as a source of authority. She rearranged the seating in the large lecture hall so that the Chinese students sat in groups of six to eight students and had to face each other. She did encourage the students to speak with her about the new seating arrangement. After approximately one month in this seating arrangement, the students came to her and said they were concerned. The students said to her: "Professor, we want to talk to you about how uncomfortable we are in the seating arrangements." And she said, "Yes." The students continued, "Well, we are sitting looking at each other." She said, "Yes." The students added, "Well, that is what we wanted to tell you, we are sitting looking at each other." Her response was immediate--"Great?! How do you expect to begin to see the world if you continue to sit in the same place? Looking at everyone in the same kind of relationship? We need to sit in different places to truly learn." Learning does involve struggle and, at times, great discomfort--not merely to understand some concept or theory but, at another level, to critique how that concept or theory may relate to us by holding it up to the multicolored lenses of experience, history, and perspectives is challenging. True learning means becoming uncomfortable. See Dark, Catchin' an Attitude, supra note 31.

64 For example, the topic of affirmative action is raised in a first-year constitutional law course. Many opponents of affirmative action speak frequently and forcefully. The professor permits them to speak without interruption or critique. Comments are made regarding unqualified minorities and/or women getting jobs or being admitted to law school. Again, no one responds to these remarks. There are only two black students in the constitutional law class of approximately 60 students. One black student, a woman, leaves the classroom in the middle of the class period. The second black student, also a woman, is noticeably silent. The professor calls on this student for her opinion. She declines to comment. By the end of the class, a few other students have become involved in a heated debate about affirmative action. This kind of scenario has been played out, all too often, in courses where topics such as abortion, affirmative action, and right-to-life issues are likely to be raised. If there is no careful thought given as to how to conduct the discussion to facilitate a thoughtful discussion of the issues, there can be disastrous long-term effects for the teacher and the class.

65 The personal vulnerability issue is raised in a number of different ways. You may be vulnerable because you learn a few things about yourself regarding these issues that, heretofore, were unknown to you. Another kind of vulnerability might be expressed in terms of decreasing the amount of "distance" in the relationship between you and your students. Discussion of these issues can make the relationship more intimate than you may want with your students. You may have difficulty being "objective" if a student makes a comment that attacks a group or interests with which you are personally aligned. Finally, if your classroom persona is largely constructed on an objective, distanced professorial model, this kind of discussion can and will transform your persona before you may be ready for the change.

66 Usually, I have the students give me a critique on the last day of class. I do not look at the critiques until I have turned my grades in for the course.

67 Interestingly, this question was the entire examination given by Dean Guido Calibressi, Yale Law School, in one of his upper-level Torts courses.

68 There are many useful articles on the subject of law teaching, but two articles are particularly helpful: Douglas K. Newell, Ten Survival Suggestions for Rookie Law Teachers, 33 J. Legal Educ. 693, 697-700 (1983) (especially useful discussion about creating an atmosphere in the classroom in which students can and will take risks); Kent D. Syverud, Taking Students Seriously: A Guide for New Law Teachers, 43 J. Legal Educ. 247 (1993).

69 I feel very strongly that whether the class is a large first-year class or a small seminar, both types of relationships must be given attention. Naturally, your ability to get to know all of the students individually in a large classroom is more challenging, but the effort will be worth it. One must do more than learn the student's name based on the seating chart. Learning someone's name is only the very first step in any relationship. Look for opportunities--perhaps after class, in the hallways, during your office hours--to have conversations with your students. Try to find situations where you are not automatically able or expected to exert power.

70 See an example of this discussion in Dark, Cosmic Consciousness: Teaching on the Frontiers, supra note 56, at 112-15 (discussing student participation in a group process that enabled them to identify the key issues that should be studied in the course, thus enabling them to establish the template for the course).

71 One could use explicit rules, as well as rules developed from the customary treatment of students in the classroom. In fact, in my first-year torts class, I do have two explicit rules for my class. First, I tell them that they must be prepared--indeed, each student is presumed to be prepared and I will operate accordingly, meaning that the words "pass" or "I'm not prepared" have no meaning in my class. I tell them that I insist on constant preparation for the good of the class and for their own good because they are preparing for entry into the legal profession. Second, I show them how to treat each other and me with respect. However, I do not presume that the students in my class and I necessarily share the same understanding of these rules at the beginning of the semester.

72 See, e.g., Stephanie M. Wildman, The Question of Silence: Techniques to Ensure Full Class Participation, 38 J. Legal Educ. 147 (1988) (observing that women are socialized to be silent and proposing a variety of pedagogical tools law professors can employ to draw women into class discussions); Stephanie M. Wildman, The Classroom Climate: Encouraging Student Involvement, 4 Berkeley Women's L. J. 326 (1989) (advising students on overcoming feelings of intimidation in classroom participation and advising law professors on enhancing classroom participation); Beyond Silenced Voices: Class, Race & Gender in U.S. Schools (Lois Weis & Michelle Fine eds., 1993).

73 See Taunya L. Banks, Gender Bias in the Classroom, 14 S. Ill. U. L.J. 527 (1990) (reporting results of author's study revealing that more women than men perceive the law school classroom as alienating and hostile because it is structured to meet the needs of white upper- to middle-class males). Note that the reader should not assume that the writer is saying that all men raise their hands in the classroom. Of course, there are differences among individual men. The observation is a general one supported by many studies. See, e.g., Lani Guinier et al., Becoming Gentlemen: Women's Experiences at One Ivy League Law School, U. Pa. L. Rev. 1, 32 (1994) (noting that when speaking feels like a "performance," women respond with silence rather than participation).

74 Linda Karen Clemons, Alternative Pedagogies for Minority Students, Symposium: National Conference on Minority Bar Passage; Bridging the Gap Between Theory and Practice, 16 Thurgood Marshall L. Rev. 635 (1991).

75 28 N.E. 266 (1891) (involving the issue of consent and battery as related to vaccination).

76 See, e.g., Wildman, The Classroom Climate, supra note 72 (advising students on overcoming feelings of intimidation in classroom participation and advising law professors on enhancing classroom participation).

77 Ralph Roughton, On Listening, Friends J., Oct. 14, 1984, at 14.

78 Materials about active learning for use in the classroom were prepared by Laurie Zimet, Director of the Academic Success Program at Santa Clara University School of Law for the SALT Conference on Incorporating Diversity into the Classroom (Sept. 23-24, 1994, in Minneapolis, MN) (examples include a bingo or jeopardy game to permit students to review big-picture concepts in contracts; issue-spotting activity, in which students work in pairs to rank issues by order of complexity and importance in a contract hypothetical; and asking students to create a hypothetical fact pattern and an outline response for a torts class). See also Auturo Torres & Karen E. Harwood, Moving Beyond Langdell: An Annotated Bibliography of Current Methods for Law Teaching, 1994 Gonzaga L. Rev. 1 (1994) (special edition on teaching law that reveals the variety of methods employed particularly in clinical courses and courses concerned with diversity issues).

79 See Syverud, supra note 68.

80 See generally Wildman, The Question of Silence, supra note 72 (observing that women are socialized to be silent, and proposing a variety of pedagogical tools law professors can employ to draw women into class discussions).

81 See, e.g., Beverly I. Moran & William Whitford, A Black Critique of the Internal Revenue Code, 1996 Wis. L. Rev. 751 (addressing the question of whether the Internal Revenue Code systematically favors whites over blacks).

82 See Frug, supra note 42 (illustrating from a feminist perspective how a standard casebook implicitly sustains and furthers patriarchal gender roles).

83 Charles L. Knapp & Nathan M. Crystal, Problems in Contract Law: Cases and Materials (3d ed. 1993).

84 See, e.g., Leslie Bender, Teaching Torts as if Gender Matters: Intentional Torts, 2 Va. J. Soc. Pol'y & L. 115 (1994) (examining casebook approaches to gender and gender-related issues); Leslie Bender, An Overview of Feminist Torts Scholarship, 78 Cornell L. Rev. 575 (1993).

85 See, e.g., Leslie Bender, A Lawyer's Primer on Feminist Theory and Tort, 38 J. Legal Educ. 3 (1988) (providing, among other things, a critique of the reasonable man standard in torts).

86 See, e.g., Jerome McCristal Culp, Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy, 77 Va. L. Rev. 539 (1991) (acknowledging that "who we are" influences the way we teach the law).

87 See, e.g., The Road to Brown, supra note 45.

88 I use a copy of the advertisement that was the subject of the famous New York Times v. Sullivan decision when I discuss the constitutionalization of defamation. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The ad encourages students to look at the historical context of this decision. The case is as much a response to the civil rights movement as it is an accommodation of the reputational interests of a public official and the First Amendment speech and press clauses. An example of a videotape used in Property Law and Race and the Law courses is Housing Discrimination: Who Should Ever Have to Get Used to That? (Hope Fair Housing Council (1991)) (my personal story of housing discrimination).

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