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Feminist Legal Theory and the Reading of *O'Brien v. Cunard*

Ann C. Shalleck*

In July 1889, Mary O'Brien, a young, Irish, immigrant woman traveling to Boston in steerage on the "Catalonia," a ship of the Cunard Steamship Company, was given, against her will, a smallpox vaccine by Dr. I.T.M. Giffen, the ship's doctor. The vaccine left her body covered with sores and blisters. Two years later, in *O'Brien v. Cunard Steamship Co.*,¹ the Supreme Judicial Court of Massachusetts in an opinion written by Judge Knowlton held that the trial court had ruled correctly that Mary O'Brien's claims for battery² and negligence could not even go to the jury. The appellate court agreed with the trial court that, as a matter of law, she had consented to the vaccination.³ Dismissing all evidence of her desire not to be vaccinated, disregarding her statement to the doctor that she had been vaccinated already, and refusing to evaluate from her perspective the threatening and coercive nature of the circumstances under which she received the vaccine, the Supreme Judicial Court concluded, as had the Superior Court in Boston, that there was "no evidence" of lack of consent.⁴ The court also held, as a matter of law, that a steamship line is not liable for the negligence of a doctor employed by the company.⁵

The case appears to be an injustice from a feminist perspective. Male judges at all levels of the judicial system countenance a male professional's unnecessary invasion of a woman's body leaving her scarred and suffering. Neither the male professional nor the company employing him are accountable for harm to the woman. Furthermore, the judges effectively silence the woman's voice within the legal system by ruling that her desires, her

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With her knowledge of women's studies, history and health care, Emily K. Abel helped me develop my ideas for this article. Andrew Popper, my colleague who teaches torts, gave me support and encouragement. Robert Dinerstein, in his comments on an earlier draft, provided insight about the dynamics of consent within professional relationships. I thank them all.

1. 28 N.E. 266 (Mass. 1891), reprinted at 57 MO. L. REV. 347.

2. *Id.* at 266-67, 57 MO. L. REV. 347-49. The Massachusetts Supreme Judicial Court refers to the legal question as one of assault, rather than battery.

3. *Id.*

4. *Id.*

5. *Id.*

understanding, her statements and her experience are of no account at all. The jury can not even consider them. The result is hardly a surprise.

Were feminist legal theory to stop here, the contribution would be important. By attending to the gender of the participants in the legal system, we can see a court's decision in a different way. We look not just at a rule or a principle, but also at who is deciding and who is affected in which ways. Gender becomes one means for understanding the result. It may be the primary explanatory concept or it may be one of several, but it must be acknowledged.⁶

Feminist legal theory has, however, gone beyond looking to the gender of the participants in the legal system to explain particular results. It has sought to identify how gender affects our very ways of thinking about legal issues. It has explored the ways that gender itself can be a distorting category when not understood as embodying a multitude of different experiences shaped by interaction with factors other than gender, such as race, ethnicity and age. It has examined how the range of women's experiences get constructed by (or eliminated from) the legal system, within a particular doctrine or across doctrinal categories. It has also begun to develop alternative ways for approaching the analysis of legal issues. In this Article, I will draw upon several of the themes in current feminist theory to analyze *O'Brien v. Cunard*.

I. RECOVERING WOMEN'S EXPERIENCES: TELLING WOMEN'S STORIES

One of the major projects of feminist scholarship in many different fields has been the recovery of the suppressed stories of women from the official or accepted accounts of events or conditions in the world.⁷ One form that this project of recovery can take within feminist legal scholarship is the discovery of women's experiences that exist behind appellate court opinions. At least some aspects of that experience can often be gleaned from the trial court

6. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837-49 (1990) (asking the woman question is identified as one form of feminist legal method).

7. E.g., Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1033-34 (1991); Teresa de Lauretis, *Feminist Studies/Critical Studies: Issues, Terms, and Contexts*, in FEMINIST STUDIES/CRITICAL STUDIES 10-11 (Teresa de Lauretis ed., 1986); Jane Flax, *Postmodernism and Gender Relations in Feminist Theory*, 12 SIGNS 621, 641 (1987); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1630-34 (1991); Mary E. Hawkesworth, *Feminist Rhetoric: Discourses on the Male Monopoly of Thought*, 16 POL. THEORY 444 (1988).

record of a case.⁸ Fortunately for law teachers and legal scholars, trial court records are often relatively easy to locate and obtain. Even deeper inquiries are required to explore how women's experiences can get submerged or distorted through the trial process⁹ and within the lawyer-client relationship.¹⁰ Materials that present accounts of women's experiences as they are interpreted throughout the many stages of litigation or within the lawyer-client relationship are more difficult to find.¹¹

8. It is important, however, to be constantly aware that the record from the trial court may not reflect a woman's experience. The depiction of an event within a trial court is shaped by many different factors, including most obviously the lawyer-client relationship and the formal and informal constraints that attach to the telling of a story through the litigation process. For a discussion of the ways that these and other factors can affect the client's story, see, e.g., Anthony K. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); Christopher P. Gilkerson, *Poor Stories: Of Law, Lawyers, and the Disempowered*, 43 HASTINGS L.J. 861 (1992); Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

9. See, e.g., Kristin Bumiller, *Fallen Angels: The Representation of Violence against Women in Legal Culture*, in *AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY* 95 (Martha A. Fineman & Nancy S. Thomadsen eds., 1991); White, *supra* note 8, at 6-19.

10. Alfieri, *supra* note 8, at 2118-30; Dinerstein, *supra* note 8, at 506-56; Gilkerson, *supra* note 8; Lopez, *supra* note 8 at 1612-17; White, *supra* note 8, at 21-32.

11. A number of scholars have recently begun the project of actually observing lawyers at work. See, e.g., Maureen Cain, *The General Practice Lawyer and the Client: Towards a Radical Conception*, in *THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS AND OTHERS* 41 (Robert Dingwall & Philip Lewis eds., 1983); ROBERT L. NELSON, *PARTNERS WITH POWER* (1988); KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* (1985); Carl Hosticka, *We Don't Care About What Happened We Only Care About What Is Going To Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROBS. 599 (1979); Gary Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Office*, 35 BUFF. L. REV. 177 (1986); Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Conscientiousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663 (1989); Austin Sarat & William L.F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC'Y REV. 93 (1986). There remain, however, few records of the experiences of clients. A number of legal scholars have begun to develop ways to tell those stories. See, e.g., Alfieri, *supra* note 8, at 2109-10, 2114-18; Gilkerson, *supra* note 8; Lopez,

Using the pieces of the record that we have in the *O'Brien* case, we can discover other versions of Mary O'Brien's story. By comparing the story that appears in the record to the appellate court's opinion, we can see how the Supreme Judicial Court has made the story she presented at trial invisible. Through their interpretation of Mary O'Brien's experience, they discount her perspective and silence her voice.

Underlying the court's interpretation of Mary O'Brien's actions is a model of individual choice and control regarding the decision to be vaccinated. For the court, the Boston public health regulations governing the examination of emigrants to ensure vaccination for smallpox provide the framework for Mary O'Brien's decision. These regulations offer several alternatives. The medical officer of a ship can examine emigrants and give a certificate of smallpox vaccination. With this certificate, an emigrant can land without further examination. Without a certificate, an emigrant must either be detained in quarantine or be vaccinated by the port doctor. The Cunard Company operates within this regulatory framework. The company has its surgeons "vaccinate all emigrants who desire it, and who are not protected by previous vaccination."¹² It then provides the necessary certificates from the doctor.

In the court's description of the regulatory framework, an emigrant has a number of choices in complying with the smallpox regulations. The emigrant can demonstrate prior vaccination against the disease; be vaccinated by the ship's doctor; be vaccinated by the port doctor; or remain in quarantine for fourteen days. In addition, in the relationship with the ship's doctor, the emigrant exercises choice. The doctor is available to provide vaccination for those who "desire"¹³ it. Emigrants can decide whether or not to use the doctor's services.

For the court, the events on the Catalonia occur within this framework. Notices of the quarantine regulations and of the "willingness"¹⁴ of the ship's doctor to vaccinate those who need vaccination are posted around the boat. Through these notices, the passengers learn of the choices available to them. The law will "presume"¹⁵ that the passengers understand the regulatory framework and therefore understand the "importance and purpose"¹⁶ of vaccination for anyone without a vaccination mark. Within the court's vision, the passengers have not only choices, but also the information necessary for making those choices. They know their options and the consequences of

supra note 8; White, *supra* note 8, at 21-32 n.96.

12. *O'Brien*, 28 N.E. at 266, 57 Mo. L. REV. 347.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

exercising them. Each passenger on the ship is an autonomous individual who can make free, informed decisions about how to comply with governmental regulation and how to get medical care.

The assumptions of the model as set out by the court are at odds with the conditions on board the *Catalonia*, as documented in the record of the case. Nevertheless, the court uses the assumptions of the model in explaining the experience of Mary O'Brien. Relying on these assumptions, the court can disregard or obliterate Mary O'Brien's own story.

First, facts that do not fit with the model are ignored. For example, within the model of individualized choice and control, emigrants need to know what their choices are. However, the cross-examination of Mary O'Brien indicates quite clearly that she did not know anything about the vaccination requirements until she was about to be vaccinated. Even when she got some information from another woman who was waiting to be vaccinated, what she learned was incorrect. The woman told her that if she had no vaccination mark, she would have to be vaccinated on board the ship. Mary O'Brien had not read the notices. She had not been told by the crew nor the other passengers about the notices. She did not know that the notices were about vaccination. She did not know that if she was not vaccinated on the ship, she would be kept at quarantine. She did not know what quarantine was. She did not know anything about the process at quarantine. She did not understand what would happen if she did not have the certificate from the ship's doctor. Judge Knowlton never acknowledges in his opinion that Mary O'Brien had no idea what choices she faced. Instead he creates a presumption of her knowledge based on the notices.

Second, the court uses the model to attribute motive. Without a certificate from a ship's doctor, an emigrant faces detention at quarantine. In order to avoid this detention, emigrants can seek out the ship's doctor to secure the certificate. The doctor is provided for their benefit so they may avoid the consequence of quarantine. According to the court, Mary O'Brien got the vaccination in order to avoid detention. She wanted to obtain a card that would "save her"¹⁷ from detention and she wanted to be vaccinated "for that purpose."¹⁸ Relying upon this motive to explain her behavior, the court thereby forecloses inquiry into her actual reasons for being vaccinated.

Third, where facts in the record do not fit with the model, the court simply changes them. For example, in the model, it is critical that the relationship between the doctor and an emigrant be a voluntary one in which the emigrant exercises choice and control. The doctor is willing to provide vaccinations. He vaccinates only those who desire it.¹⁹ The model is

17. *Id.*

18. *Id.*

19. The court goes even further in spelling out the assumptions about the doctor-

inconsistent with a doctor telling emigrants that they have to do anything. He is not enforcing a regulatory requirement. He is only making it possible for them to meet the requirement in one of a number of ways. Therefore, although the record of Mary O'Brien's testimony at trial indicates that Dr. Giffen told her that she "must" be vaccinated, the court twice uses the word "should" in recounting Mary O'Brien's own testimony, which is described as "undisputed."²⁰

The court has made Mary O'Brien's experience invisible within the official account of what happened. In some respects her experience is ignored, in other respects experiences she did not have are attributed to her, and in still other respects her experience is directly contradicted. The result is that her story is not told, although it was her experience that brought the case to court. The model of abstract, autonomous individuals making free, informed choices about compliance with governmental regulation and about obtaining medical care has helped to hide and distort her experience. Although this model has been critiqued from a number of different perspectives,²¹ the feminist critique emphasizes the way the abstract individual does not reflect the actual experiences of many individuals. The actual experiences of individuals, whose identities are shaped by gender, as well as by other factors that intersect powerfully with gender, such as race and ethnicity, are without significance.²²

Discrepancies between the official account and Mary O'Brien's story are particularly important because of the status of the official version. The authoritative texts in the law, appellate opinions, do not just state rules and

patient relationship in the section of the opinion addressing the negligence claim. The ship's doctor is "in readiness" for the passengers on board. They "may employ" the doctor, "if they choose." The doctor's work is "under the control of the passengers themselves." They "employ" the ship's doctor, just as they may employ another doctor who happens to be on board. They can also choose to treat themselves or to go without treatment. Once they employ the doctor, they choose the nature of their treatment, and they have control over the decisions. "If they employ the surgeon, they may determine how far they will submit themselves to his directions, and what of his medicines they will take and what reject, and whether they will submit to a surgical operation or take the risk of going without it." *Id.* at 267, 57 MO. L. REV. 348.

20. *Id.* at 266, 57 MO. L. REV. 347.

21. See, e.g., C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* (1961); see also MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 86-113 (1987); Amy Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308 (1985).

22. See, e.g., Bartlett, *supra* note 6, at 837, 843, 849, 855-56; Katherine O'Donovan, *Engendering Justice: Women's Perspective and the Rule of Law*, 39 U. TORONTO L.J. 127, 131 (1989); Heather Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64, 69 (1985).

resolve legal issues. The judge's description of a situation also comprises "the facts of the case," the definitive statement of what happened. When a law professor asks a student to state the facts of a case, the professor almost always means the appellate court's description of the event or situation at issue. When the case is cited, distinguished or used in the construction of a legal argument, these are the facts that matter. Judge Knowlton's description of Mary O'Brien's vaccination by Dr. Giffen is a piece of the law. Other facts, alternative descriptions of the same facts, are without legal significance.

Within feminist theory, discovering women's stories is important for at least three reasons. First, we can see how the official versions of the facts are partial.²³ The appellate court is choosing, shaping, interpreting, and even misrepresenting. The "facts of the case" can be seen as the product of the historically and socially situated understanding of the judges.²⁴ The gendered nature of the legal profession generally, and the judiciary specifically, is significant in understanding the accounts contained in the appellate opinions.²⁵ At the same time, there are other components to the "situatedness" of the judges, including class, race, and ethnicity, that intersect with gender to shape the understanding that the judges bring when telling the official story of Mary O'Brien.²⁶

Second, and perhaps more importantly, the tension between the official version of the facts and the suppressed stories provides a starting point for critique of the constructs that organize the judge's understanding of the world.²⁷ This critique is rooted in the actual, concrete problems that we find with the official facts.²⁸ The fact that Mary O'Brien, a young, Irish, emigrant woman en route to Boston, does not know what her choices are, does not have information about the consequences of those choices, and does not

23. Wishik, *supra* note 22, at 68.

24. Mary E. Hawkesworth, *Knowers, Knowing, Known: Feminist Theory and Claims of Truth*, in FEMINIST THEORY IN PRACTICE AND PROCESS 327, 344-45 (Micheline R. Malson et al. eds., 1989); Teresa de Lauretis, *Eccentric Subjects: Feminist Theory and Historical Consciousness*, 16 FEMINIST STUD. 115, 128 (1990).

25. Goldfarb, *supra* note 7, at 1643; Mary Jane Mossman, *Feminism and Legal Method: The Difference It Makes*, in AT THE BOUNDARIES OF LAW 283, 287 (Martha A. Fineman & Nancy S. Thomadsen eds., 1991); Judith Resnick, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1928-33 (1988).

26. de Lauretis, *supra* note 24, at 130-34.

27. Hawkesworth, *supra* note 24, at 349-51; Wishik, *supra* note 22, at 74.

28. See, e.g., Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 28, 32 (1990); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1750 (1990).

believe that she has any choice at all provides a beginning point from which to critique a model of abstract, autonomous people making knowing and free choices, as well as a practice of judging that proceeds from that model.²⁹

Third, discovering the suppressed stories is a step in finding new ways to construct the law so as to encompass these experiences. Understanding women's experiences of powerlessness when confronted with the dual requirements of state-imposed regulation and medical authority is a critical step in creating the law applicable to this situation. This step does not tell us what justice is in these situations and it does not identify the possible ways to secure it. It does, however, ground the feminist search for ways to overcome that powerlessness and to create a different kind of law rooted in the multiple experiences of many different women.³⁰

II. CRITIQUING THE CONSTRUCTION OF THE LEGAL CONCEPT OF CONSENT

A second important project of feminist scholarship has been the critique of purportedly neutral legal rules and principles to reveal the gendered nature of the experiences and norms of behavior contained within them.³¹ Feminist scholars have demonstrated how legal doctrine that embodies male experience and viewpoint has led to the exclusion and subordination of women.³² They have documented women's resistance to these doctrines and to the gendered visions contained within them. They have shown both the possibilities and

29. Hawkesworth, *supra* note 24, at 350-51; Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M. L. REV. 613 (1986).

30. See, e.g., de Lauretis, *supra* note 7, at 10; Fineman, *supra* note 28, at 33; White, *supra* note 8, at 52-58; Wishik, *supra* note 22, at 75-77.

31. See, e.g., Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Nancy Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L. J. 1177, 1207-08, 1215-16 (1990); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1105-21 (1986); Fineman, *supra* note 28, at 28; Lucinda Finley, *A Break in the Silence: Including Women's Issues in a Tort's Course*, 1 YALE J.L. & FEMINISM 41, 57-66 (1989); Catharine MacKinnon, *Feminism, Marxism, Method, and the State: Toward a Feminist Jurisprudence*, 8 SIGNS 635, 658 (1983); Martha Minow, *The Supreme Court 1986 Term, Forward: Justice Engendered*, 101 HARV. L. REV. 10, 61 (1987); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 631-32 (1980).

32. See *supra* note 31.

limitations of integrating this resistance into legal strategy to reconstitute legal doctrine.³³

In order to reveal the gendered nature of the doctrines of the law, feminist theory looks critically at gender differences within human activities and understanding. It directs our attention to the relationship of gender to the allocation of power and control. It also increasingly requires us to incorporate differences among women into our understanding of gender.³⁴ Although there are disputes within feminism about the sources of gender differences, the ways to think about them once identified, and what to do about them, feminist scholars agree that the recognition of gender is critical. At the very least, identifying the gendered nature of experiences and understanding both provides a basis for critique of purportedly neutral concepts and contributes to an understanding of human activity inclusive of women.³⁵

By analyzing the court's statement of the doctrine of consent in *O'Brien v. Cunard*, we can see how gender affects the relationship of experience and legal doctrine. The court says the legal issue is whether Dr. Giffen's action was "against the will"³⁶ of Mary O'Brien. Whether Mary O'Brien consented

33. See, e.g., Martha L. Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, in *AT THE BOUNDARIES OF LAW* 265 (Martha A. Fineman & Nancy S. Thomadsen eds., 1991); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 *N.Y.U. L. REV.* 589 (1986).

34. See, e.g., de Lauretis, *supra* note 7, at 10; Fineman, *supra* note 28, at 30-41; Marilyn Frye, *The Possibility of Feminist Theory*, in *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* 174 (Deborah Rhode ed., 1990); Linda Gordon, *What's New in Women's History*, in *FEMINIST STUDIES/CRITICAL STUDIES* 20, 25-26, 28 (Teresa de Lauretis ed., 1986); Sandra Harding, *The Instability of the Analytic Categories of Feminist Theory*, in *FEMINIST THEORY IN PRACTICE AND PROCESS* 15-20 (Micheline R. Malson et al. eds., 1989).

35. See, e.g., Deborah Rhode, *Theoretical Perspectives on Sexual Difference* in *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* (Deborah Rhode ed., 1990); see also Jill K. Conway et al., *Introduction: The Concept of Gender*, in *LEARNING ABOUT WOMEN: GENDER, POLITICS, & POWER* XXI (Jill K. Conway et al. eds., 1987); de Lauretis, *supra* note 7, at 14-15; Flax, *supra* note 7, at 626-27; Gordon, *supra* note 34, at 29-30; Martha Minow, *Adjudicating Differences: Conflicts Among Feminist Lawyers*, in *CONFLICTS IN FEMINISM* 149 (Marianne Hirsch & Evelyn Fox Keller eds., 1990); Joan W. Scott, *Deconstructing Equality—Versus—Difference: Or, the Uses of Poststructuralist Theory for Feminism*, in *CONFLICTS IN FEMINISM* 134 (Marianne Hirsch & Evelyn Fox Keller eds., 1990); Adelaide H. Villmoare, *Women, Differences, and Rights as Practices: An Interpretive Essay and a Proposal*, 25 *LAW & SOC'Y REV.* 385, 394-99 (1991); Lise Vogel, *Debating Difference: Feminism, Pregnancy, and the Workplace*, 16 *FEMINIST STUD.* 9 (1990); Joan C. Williams, *Deconstructing Gender*, 87 *MICH. L. REV.* 797 (1989).

36. *O'Brien*, 28 N.E. at 266, 57 *MO. L. REV.* 347.

to the vaccination is to be determined from her "overt behavior,"³⁷ not from her "unexpressed feelings."³⁸ The court looks to "the surrounding circumstances"³⁹ to decide if her behavior indicated consent. Finding "nothing"⁴⁰ in her conduct to show that she did not want the vaccination, the court holds, as a matter of law, that she consented.

In the court's view, once Mary O'Brien's feelings are eliminated from consideration, the meaning of her conduct is so clear that no jury could reasonably find that the vaccination was against her will. At least two factors contribute to the court's clarity about the interpretation of Mary O'Brien's conduct and demonstrate the gendered nature of their understanding. First, there is choice of perspective. In looking at Mary O'Brien's overt acts "in connection with the surrounding circumstances,"⁴¹ the court adopts the perspective of Dr. Giffen. The reasonableness of his understanding of the circumstances matters, not hers. The court is making an implicit choice to value his perspective over hers. The world is seen through the eyes of a male doctor and not an Irish, female emigrant who is traveling in steerage. That choice appears to be natural. There is no perceived need for justification.

Why does this choice of perspective seem so natural to the court? At one level, the choice hardly needs explanation. Given the similarities of situations between the judges and the doctor, it is not surprising that they would see the world through his eyes, rather than Mary O'Brien's, that they would not even be aware that they were making a choice. Thus, the "situatedness" of the judges helps explain their decision.⁴² Many of their assumptions about the world make the perspective of the doctor appear general and not partial to them. It is important to look beyond the characteristics of the particular actors, however, to understand why the court constructs the doctrine of consent from the perspective of Dr. Giffen, rather than Mary O'Brien. Underlying the court's construction of the doctrine of consent is a gendered understanding of the use of force.⁴³

The issue of consent to a battery concerns whether the use of force is justifiable. Justification is based on the decision of the person against whom force is used. Force is justified when that person wishes to accept it. In deciding if the force is accepted or rejected, the court looks to the experience and understanding of the person using the force, not to the person doing the

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. Bartlett, *supra* note 6, at 881; Hawkesworth, *supra* note 24, at 330, 332-41, 343, 348; Minow, *supra* note 31, at 13.

43. See Hawkesworth, *supra* note 24, at 350.

accepting or rejecting. How is the person using force to know how to act? The experiences and concerns of that person are put at the center of the court's view of consent. Therefore, Dr. Giffen's understanding of Mary O'Brien's actions is at the core of the court's inquiry. The person against whom force is used may have a range of experiences regarding the activity involving force, including being a victim or a willing participant. Within the court's decision, the concerns and understanding of this person are peripheral. Whether or not there actually was a choice about accepting the force, whether or not Mary O'Brien knew of the choice, and whether or not she could have refused the force are not even subjects of inquiry.

When the court chooses the perspective of Dr. Giffen, it is both drawing upon and reaffirming the centrality of the experience of using force. When it denies the perspective of Mary O'Brien, it is both reflecting and reaffirming the marginalization of the experience of receiving force. Although the connection between gender and force may not be inherent, our culture has placed the use of force primarily within the male sphere of experience. Being an object of force is part of the female sphere of experience. Much of women's experience of force, including their victimization, has remained either largely invisible within the dominant culture or subject to societal stereotyping.⁴⁴ When the Supreme Judicial Court constructs the doctrine of consent from the perspective of Dr. Giffen, their work goes on within the framework of a gendered understanding of force.⁴⁵

44. See, e.g., Judith Allen, *"The Wild Ones:" the Disavowal of Men in Criminology*, in *DISSENTING OPINIONS: FEMINIST EXPLORATIONS OF LAW AND SOCIETY* 21 (Regina Graycar ed., 1990); M. Bograd, *Feminist Perspectives on Wife Abuse: An Introduction*, in *FEMINIST PERSPECTIVES ON WIFE ABUSE* 11, 14 (K. Yllo & M. Bograd eds., 1988); Bumiller, *supra* note 9, at 95; NANCY HARTSOCK, *MONEY, SEX, AND POWER: TOWARD A FEMINIST HISTORICAL MATERIALISM* 164-66 (1983); SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* 11-52 (1982); Estrich, *supra* note 31, at 1105-21; Flax, *supra* note 7, at 641; Schneider, *supra* note 31, at 624-30.

45. In identifying conceptions of force as gendered, I do not mean to overlook the significance of other factors that intersect with gender in the construction of our understanding of force. Both men and women of different racial and ethnic groups and of different classes are portrayed differently within our conceptions about the use of force. They also have very different experiences regarding the use of force. In saying that the concepts contained within the doctrine of consent are gendered, I mean both to identify gender as one of the critical elements in shaping the concepts and also to reaffirm the multiplicity of experiences within each gender. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581 (1990); Lynne N. Henderson, *Review Essay: What Makes Rape a Crime?*, 3 *BERKELEY WOMEN'S L.J.* 193, 199 (1987-88); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 *HARV. WOMEN'S L.J.* 103 (1983).

The second way we can see the impact of gender in shaping the relationship of experience and legal doctrine is in the court's choice of "the surrounding circumstances."⁴⁶ Many of the circumstances important to an understanding of whether or not Mary O'Brien expressed consent to the vaccination are invisible in the court's analysis. These aspects of the event are critical, however, in the account presented by Mary O'Brien's lawyers. In their theory of the case presented on appeal, Mary O'Brien was forced to submit to the vaccination against her will. The lawyers argued that submission does not equal consent.⁴⁷ The circumstances, including the doctor's overt acts, that made the situation coercive and threatening and that showed the exercise of force are essential in understanding her conduct as submission and not consent. The exceptions filed by her lawyers at the conclusion of the trial, as well as their brief on appeal, stress these parts of the record.⁴⁸

The steerage steward told the 200 women steerage passengers who were on deck that they had to go below into steerage, without telling them the reason. From the steerage area, there was only one door, which was at the top of a staircase. At the middle of the staircase was a landing where the doctor and two steerage stewards positioned themselves. There was no other way to leave steerage. The 200 women were lined up and told that they would not be allowed to leave until they had been examined. One of the steerage stewards stood at the door leading to the deck and let no one leave without the doctor's order.

The court mentions none of the circumstances surrounding the vaccination, except for the fact that "about 200 women passengers were assembled below."⁴⁹ The court ignores anything that could have led Mary O'Brien reasonably to believe that she had to be vaccinated, that there was no choice. Dr. Giffen knew of these circumstances as did Mary O'Brien. Could he think that in these circumstances he was presenting the passengers, his patients, with a choice? For the court, however, the threatening and coercive aspects of the situation are without significance. Although the doctor was certainly aware

46. *O'Brien*, 28 N.E. at 266, 57 Mo. L. REV. 348.

47. Plaintiff's Brief at 1, reprinted at 57 Mo. L. REV. 482.

At the outset, a distinction must be drawn between mere submission and positive consent. . . .

It is no answer to a claim for an assault that the plaintiff submitted to it, if the circumstances are such that resistance would have seemed useless; consent obtained by a show of superior force, or under such circumstances that the will cannot be said to have acted freely, is not consent in contemplation of law.

Id.

48. Plaintiff's Exceptions, *O'Brien v. Cunard Steamship Co.* (Super. Ct. Suffolk 1891), reprinted at 57 Mo. L. REV. 470-78.

49. *O'Brien*, 28 N.E. at 266, 57 Mo. L. REV. 348.

of them, he did not have to take them into account in interpreting the meaning of Mary O'Brien's overt acts.

Against this background, the procedure for vaccinating the women has a different significance. The women were lined up, and one by one, passed by the doctor. They were not asked if they wished to be examined. They were not told the purpose of the examination. Dr. Giffen examined each woman's arm to see if there was a vaccination mark. Those with a mark were allowed to pass. Those without were vaccinated. As they left, the doctor instructed the steward to give each a card. Once the threatening and coercive nature of the situation is acknowledged, the doctor's actions can be understood as part of the exercise of superior force to compel acquiescence. No one had to touch Mary O'Brien to let her know that she had no choice.

If the coercion and threat are acknowledged, and if the doctor's actions can be seen as exercising force, then Mary O'Brien's behavior takes on a different meaning. She did not get in line, but stood to the side. When she was the only one left, except the two stewards, she went up to the doctor and told him that she had been vaccinated before. He did not inquire about the previous vaccination. How did she know she had received one? What did she know about it? On what part of her body was it administered? He did not examine her to see if there was a mark anyplace else on her body. He did not explain her choices if she had no mark. He did not discuss how a prior vaccination that left no mark would be treated by the public health authorities in Boston. He simply told her she had to be vaccinated. It was reasonable for her to voice no further objection. It was not reasonable for the doctor to conclude that she had given freely her consent.

What makes the court unwilling to acknowledge the circumstances that indicate threat and coercion? Women's experiences of vulnerability and danger have been an important part of their subordination. The law has been slow to acknowledge the circumstances that create threats to women.⁵⁰ It has often failed to give legal protection to women who face grave danger.⁵¹ It has required women to resist actively invasions of their bodies in order to

50. See e.g., Finley, *supra* note 31, at 55-56; Wendy Pollack, *Sexual Harassment: Women's Experiences vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 51-52 (1990); Schneider, *supra* note 31, at 624-30; Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987).

51. See, e.g., Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1082, 1085 (1991); Charlotte Germane et al., *Mandatory Custody Mediation and Joint Custody Orders in California: The Danger for Victims of Domestic Violence*, 1 BERKELEY WOMEN'S L.J. 175, 176-77 (1985); Schneider, *supra* note 31, at 626.

claim violation.⁵² It has ignored power differentials in evaluating passivity or lack of action by women.⁵³ It has overlooked the pressures on women not to speak about dangers they face.⁵⁴ It has assumed that women have choices to escape threatening or dangerous situations, when there are no real choices.⁵⁵ It is only recently, with the rise of concerted feminist activity, that these biases in the law have been identified and some change has occurred.⁵⁶

In addition to the two ways that the court's interpretation of the conduct of Mary O'Brien and Dr. Giffen is gendered, so also is their identification of the dispute in the case. The case stands for the proposition that "feelings" do not matter in determining consent; only the "manifestations" of those feelings in "overt acts" count legally. This question was not, however, put to the court. The lawyers for both parties took for granted that only acts mattered. The dispute, as presented in the briefs, concerned the inferences that could be drawn from those actions. The lawyers for Mary O'Brien did not claim that the question of consent should be decided based upon her unexpressed feelings. They argued that the manifestations of her feelings showed that she had not consented, or more precisely, that it would be reasonable for a jury to find, based on those manifestations, coercion rather than consent.⁵⁷ The lawyers for the Cunard Company disputed the meaning and significance of the acts.⁵⁸ They had no reason to respond to an argument about unexpressed feelings.

Why does the court reframe the issue in this way? Feminist theory alerts us to the importance of examining and critiquing the dichotomies we find, particularly to see the ways that the dichotomies are associated with gender.⁵⁹ The dichotomy between feeling and action certainly has gendered associations. Feeling is female; acting is male. Within the context of the legal doctrine of

52. Cahn, *supra* note 51, at 1084; Estrich, *supra* note 31, at 1122; Henderson, *supra* note 45, at 200-01; Weiner, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 8 HARV. WOMEN'S L.J. 143, 144-46, 150 (1983).

53. *E.g.*, Estrich, *supra* note 31, at 1175; Henderson, *supra* note 45, at 205; Germane et al., *supra* note 51, at 176.

54. *E.g.*, Henderson, *supra* note 45, at 199.

55. Cahn, *supra* note 51, at 1084-85, 1087; Schneider, *supra* note 31, at 626-27.

56. *See, e.g.*, Schneider, *supra* note 33, at 606-10, 642-48.

57. Plaintiff's Brief at 3, 57 MO. L. REV. 484.

58. *See* Defendant's Brief at 2-3, *O'Brien*.

59. *See, e.g.*, de Lauretis, *supra* note 24, at 116-18; Regenia Gagnier, *Feminist Postmodernism: The End of Feminism or the Ends of Theory?*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 21, 24-25 (Deborah Rhode ed., 1990); O'Donovan, *supra* note 22, at 143-44; Scott, *supra* note 35, at 136-38; Carol Smart, *Law's Truth/Women's Experience*, in DISSENTING OPINIONS: FEMINIST EXPLORATIONS IN LAW AND SOCIETY 1, 8-9 (Regina Graycar ed., 1990)

battery, acting is certainly the superior half of the dichotomy.⁶⁰ The court associates Mary O'Brien's claim with the female. By creating this association, by making it seem that her claim is at least partially grounded in an appeal to feeling, even if it is not, then the legitimacy of the claim is undercut.⁶¹

III. RECOVERING WOMEN'S EXPERIENCES: FINDING WOMEN IN THE LEGAL SYSTEM

To a large extent, feminist legal theory has not sufficiently addressed women's experiences as litigants within the legal system.⁶² The focus of inquiry has remained primarily on the law that is created through the legal system and the relationship of women's experiences in the world to that law. The gendered nature of the legal frameworks and legal rules that are constructed within the legal system is, however, related to the process of actually going through the legal system. The emerging feminist scholarship about women's experiences within legal institutions has begun to identify the gendered quality of these experiences.⁶³

60. For examples of discussions of how the dichotomies are not balanced, but systematically weighted in favor of the male, and of how the exploration and critique (deconstruction) of these sorts of dichotomies has provided a tool of feminist analysis, see de Lauretis, *supra* note 7, at 15; Flax, *supra* note 7, at 628-29, 633-36; Scott, *supra* note 35, at 138-46.

61. Feminist legal theory has also challenged the devaluing of feeling in the law. Several theorists have suggested that feeling should be a more prominent and valued part of the law. See Bartlett, *supra* note 6, at 857; Goldfarb, *supra* note 7, at 1639, 1669; Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Carrie Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 LAW & SOC. INQUIRY 289 (1989); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); West, *supra* note 50; see also Susan M. Okin, *Reason and Feeling*, in FEMINISM AND POLITICAL THEORY 15, 34 (C. Sunstein ed., 1990); Susan M. Okin, *Thinking Like a Woman*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 145, 152-53 (Deborah Rhode ed., 1990).

62. Some notable exceptions are Naomi R. Cahn, *Defining Feminist Litigation*, 14 HARV. WOMEN'S L.J. 1, (1991); Goldfarb, *supra* note 7; White, *supra* note 8. For closely related work see also, Alfieri, *supra* note 8; Gilkerson, *supra* note 8; Lopez, *supra* note 8; Gerald Lopez, *The Work We Know So Little About*, 42 STAN. L. REV. 1, 1-10 (1989); Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987-88); Lucie E. White, *To Learn and To Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699.

63. One of the major developments in legal literature that has made gender visible within the legal system has been the reports on gender bias and the courts. Although

Mary O'Brien went through the legal process, just as she went through the trip on the Catalonia. The very existence of this litigation may represent some resistance on Mary O'Brien's part to her experience of harm, coercion and powerlessness on the ship. Unfortunately, we do not have materials that could help us decipher what this litigation meant for her. The materials we do have, however, raise important questions about the relationship of the litigation process to gendered experience and to gendered doctrines.

First, why was the case brought? If it was filed primarily to obtain compensation for Mary O'Brien's bodily injuries, the record appears amazingly vague about the nature, extent and permanence of those injuries. We know that about a month after the vaccination she was "suffering from an eruption almost over her whole body, with blisters" and had a "very bad ulceration on her arm where the vaccination took place."⁶⁴ It appears that she was hospitalized for these problems. Was there some other reason for initiating the litigation? Was Mary O'Brien angry about how she had been treated? Was her father, who was with her on the ship and was not consulted about the vaccination, angry? Was there some other concern?

Second, whose decision was it to litigate? The case was brought on Mary O'Brien's behalf by her next friend because she was a minor. Presumably, that friend was her father. Was it his decision to litigate? Or hers? What part did she play in the decisionmaking? Was anyone else involved? What did Mary O'Brien want to achieve? How did she view the legal system?

Third, why were the lawyers interested in this case? Who were E. N. Hill and Frederic Cunningham? How was the case financed? What sort of relationship did Mary O'Brien have with them? How did they respond to her accounts of her experience? Was she involved in decisions about the litigation? Did she help develop the case theory?

Fourth, what was the trial like for Mary O'Brien? What was it like to testify? How did she feel about telling her story? What did she think when the trial judge directed a verdict? Was she angry? disappointed?

Although we have no answers to these questions, it is important for feminist theory to make these questions visible. The process of engaging in the legal system is itself deeply gendered.⁶⁵ However, the legal system has

these reports are not theoretical works, as that term is commonly understood, and although there are many people on the task forces who are not feminists, the reports have made important contributions to the development of feminist theory. See, e.g., *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 803 (1990) (Ricki L. Tannen, reporter); Maryland Special Joint Committee, *Gender Bias in the Courts*, (1989) (Karen Czapanskiy, reporter).

64. Plaintiff's Exceptions at 6, 57 MO. L. REV. 474.

65. See *supra* note 62.

also provided one way that women have protested against harm that has been done to them. They have sought to redress that harm. They have sought to tell their stories. They have sought to change legal rules that have contributed to their subordination. They have found both success and failure and contradictory combinations of the two in these endeavors. They have also been unwilling participants in a system that has exacerbated their harm and suffering. We do not know what the experience was for Mary O'Brien. Doctrine emerges only at the end of a process. But any feminist evaluation of the doctrines that emerged from Mary O'Brien's case remains incomplete without at least the acknowledgment of the critical piece that is missing.⁶⁶

IV. CONTEXTUALIZING THE DOCTRINE

A fourth theme of feminist legal theory has been the desire to contextualize legal reasoning and legal rules. Contextualizing can mean many things. The term is used loosely to describe ways of thinking about the law as existing not in isolation, but in connection with something else that is essential to its meaning. These ways of thinking all challenge in some respect the abstract character of both legal rules and the process of applying those rules in particular situations. Contextualizing is not, however, necessarily a feminist project. For contextualizing to operate as a feminist project, each of its aspects must be approached critically, that is, with a consciousness of the gendered nature of the concepts and ways of thinking being invoked.

Feminist legal theorists have identified a number of different aspects to the project of feminist contextualization. First, contextualizing involves focusing on the particularity and uniqueness of each situation by attending to the richness and complexity of detail found within it. Second, it relies upon the recognition of multiple perspectives for understanding any particular situation, both at the level of individual participants, as well as the communities those participants belong to. Third, contextualizing involves identifying the differing norms, practices and values that the multiple communities have. Fourth, it acknowledges that the interests of individual participants and their communities might be different. Fifth, disparities in power among the participants and among their communities are acknowledged. Sixth, it recognizes that individuals exist not in isolation, but in multiple relationships. Those relationships are important in understanding not only a particular event, but also the structure of the law. Seventh, it considers the ways that individuals exist within and in opposition to institutions. Eighth, it draws

66. See Cahn, *supra* note 62, at 15-20; Ann Shalleck, *Clinical Supervision in Context: From a Case to a Vision*, 72-73, 124-28, 144-51, 154-55, 158-67 (1991) (unpublished manuscript, on file with the *Missouri Law Review*); White, *supra* note 8, at 21-58.

upon knowledge from other disciplines to help interpret the meaning of particular actions. Psychology, sociology, economics, literature, history may all be used. Feminist legal theorists use these disparate approaches in various combinations to highlight how context affects the understanding and analysis of the law.⁶⁷

These different aspects of contextualization could all be used in analyzing *O'Brien v. Cunard*. First, I will develop one example of how content provides insight into both what happened to Mary O'Brien and the legal construction of that experience. I will place the case within the context of the historical development of the doctor-patient relationship. In particular, I will identify some of the gendered aspects of this relationship during the latter part of the nineteenth century. Without doing a full analysis of the multiple ways that gender was critical in the emerging character of the doctor-patient relationship during this period, I will suggest how some aspects of this relationship help us to understand the case. Second, I will note briefly other ways that analysis of the relationships of the participants can offer a critical perspective on the law in this case.

The Massachusetts Supreme Judicial Court decided *O'Brien v. Cunard* in 1891, a time when professionalization was rapidly occurring within many different parts of American society. The modern medical profession, in the form we know it, had not yet taken shape. The full emergence of the modern form of medical education, medical training, and medical practice was not to occur until more than two decades later.⁶⁸ This case happened at a time of rapid change and intense social conflict within and around the emerging profession.⁶⁹ Many of these struggles centered on questions of autonomy and control for members of the profession.⁷⁰ During this same period, the modern form of the public health profession also emerged. At some points this development intersected with, and at others was in conflict with, the professional forms of the private practitioners.⁷¹ Historians have documented

67. See, e.g., Bartlett, *supra* note 6, at 849-51, 855-57, 861; Goldfarb, *supra* note 7, at 1636-41; Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990).

68. See MAGALI S. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 37 (1977); PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* 116-23 (1982).

69. GEORGE ROSEN, *THE STRUCTURE OF AMERICAN MEDICAL PRACTICE* 13-37 (1983); STARR, *supra* note 68, at 79-127.

70. ELIOT FRIEDSON, *PROFESSION OF MEDICINE: A STUDY OF THE SOCIOLOGY OF APPLIED KNOWLEDGE* 12, 137 (1970); LARSON, *supra* note 68, at 38.

71. ROSEN, *supra* note 69, at 25-36; STARR, *supra* note 68, at 135-138.

many aspects of the gendered character of these developments during the late nineteenth century.⁷²

As part of physicians' quest for professional status and authority during the latter part of the nineteenth century, they asserted greater control within the doctor-patient relationship.⁷³ As the century drew to a close, the authority and legitimacy of the profession became increasingly entwined with rapid developments in scientific knowledge and technical competence.⁷⁴ The assertion of control and the attainment of technical expertise combined to give character to the emerging profession. A professional culture of technical expertise and distanced relations between doctor and patient was being constructed quickly and intensively. Gender was one component in that construction.

The medical profession was overwhelmingly male. During the second half of the nineteenth century, however, women had fought with some success to gain entrance.⁷⁵ The historical literature shows us the tensions that arose

72. See, e.g., BARBARA EHRENREICH & DEIRDRE ENGLISH, *FOR HER OWN GOOD* (1979); PENINA M. GLAZER & MIRIAM SLATER, *UNEQUAL COLLEAGUES: THE ENTRANCE OF WOMEN INTO THE PROFESSIONS, 1890-1940* (1987); REGINA MARKELL MORANTZ-SANCHEZ, *WOMEN PHYSICIANS IN AMERICAN MEDICINE: SYMPATHY & SCIENCE* (hereinafter *Sympathy & Science*) (1985); MARY R. WALSH, *DOCTORS WANTED: NO WOMEN NEED APPLY* (1977); Joan Jacobs Brumberg & Nancy Tomes, *Women in the Professions: A Research Agenda for American Historians*, 30 *REV. IN AM. HIST.* 275 (1982); Regina Markell Morantz & Sue Zschoche, *Professionalism, Feminism, and Gender Roles: A Comparative Study of Nineteenth-Century Medical Therapeutics*, 67 *J. AM. HIST.* 568 (1980); Regina Morantz-Sandrez, *Physicians*, in *WOMEN, HEALTH & MEDICINE IN AMERICA: A HISTORICAL HANDBOOK* 469 (Rima D. Apple ed., 1990); Carol Smith-Rosenberg & Charles Rosenberg, *The Female Animal: Medical and Biological Views of Women and Her Role in Nineteenth-Century America*, 60 *J. AM. HIST.* 332 (1973); Ann Douglas Wood, "The Fashionable Diseases": *Women's Complaints and Their Treatment in Nineteenth-Century America*, 4 *J. INTERDISCIPLINARY HIST.* 25 (1973); see also STARR, *supra* note 68, at 117 & 123-26, for a general account of American medicine identifying developments regarding gender.

73. STARR, *supra* note 68, at 81.

74. Morantz-Sanchez, *Physicians*, *supra* note 72, at 487; STARR, *supra* note 68, at 134-40.

75. During the second half of the nineteenth century there were concerted efforts to found medical colleges for women. Seventeen were started during this period. Also, there was intense struggle to secure admission for women at elite, all-male institutions. In 1890, after an organized campaign by a group of women, Johns Hopkins finally agreed to admit women in return for a half-million dollars in endowment from the women. In 1893-94, nineteen coeducational medical schools had 10% or more women. The number of women in the profession also increased. From 1880 to 1900, the national percentage went from 2.8 to 5.6. In several large cities, the

when female doctors entered the medical world as the emerging professional culture was being created.⁷⁶ Gender influenced both how doctors viewed the doctor-patient relationship and, in certain respects, the ways they behaved within it.⁷⁷ In particular, men and women doctors differed in certain ways in their relationships with their women patients.⁷⁸

By the end of the century, a variety of factors converged to begin to undermine the modest gains women had so recently made within the medical profession.⁷⁹ Reaction against their presence was widespread.⁸⁰ As the

percentage was higher. In Boston, 18.2% of the doctors were women. STARR, *supra* note 68, at 117; Walsh, *supra* note 72, at 147-177; *see also* MORANTZ-SANCHEZ, SYMPATHY & SCIENCE, *supra* note 72, at 64-89.

76. *See, e.g.*, GLAZER & SLATER, *supra* note 72, at 1-23, 69-117; MORANTZ-SANCHEZ, SYMPATHY & SCIENCE, *supra* note 72, at 90-183; Morantz-Sanchez, *Physicians*, *supra* note 72, at 481; Walsh, *supra* note 56, at 106-40.

77. The relationship between doctor and patient was shaped by many intersecting factors including gender, class, race and ethnicity. The relationship between white, male doctors and white, female, middle class patients has been analyzed by scholars. *See, e.g.*, Wood, *supra* note 72. Within the doctor-patient relationship, these women were supposed to be extremely dependent and trusting. Women were subjected to extremely harmful and debilitating treatments, often focusing on their reproductive organs, even when their complaints had nothing to do with their reproductive systems. Medical texts presented scientific explanations for women's inferiority, explanations usually rooted in their reproductive organs. Treatment for "nervous disorders" was either painful or isolating. Social control of unacceptable feelings or attitudes on the part of the women was a part of the medical relationship. *See also* EHRENREICH & ENGLISH, *supra* note 72; Smith-Rosenberg & Rosenberg, *supra* note 72.

This historical work presents only one aspect of the gendered nature of the control over women within the physician-patient relationship. It does not, however, present a complete picture. It is important to examine the ways that other women were treated in order to be able to identify similarities and differences. *See infra* note 83 and accompanying text.

78. *See, e.g.*, Morantz & Zschoche, *supra* note 72, at 569.

79. The situation was quickly deteriorating. The number of medical schools that trained women rapidly decreased as a result of increased state licensing requirements permitting practice only by graduates of approved school, as well as the development of national standard setting leading to accreditation. By 1909, only three of the seventeen women's medical schools were still in existence. The situation was particularly severe for black women. Only two of the seven medical schools for blacks remained. Driven by the rapid decline in the number of available places in medical schools generally, deliberate discriminatory practices based on gender, race and ethnicity were instituted throughout medical education. For example, in order to exclude women from medical education, many schools established quotas of 5% for women. Primarily privileged, white women could gain admission to these schools. GLAZER & SLATER, *supra* note 72, at 76; STARR, *supra* note 68, at 124; *see also*

profession became more elite and homogeneous, women were excluded from meaningful participation in the creation of the professional culture.⁸¹ The relationship between doctor and patient was constructed increasingly around the experience of elite male doctors. The ascendancy of a culture based on technical expertise and distanced relationships was a part of the process by which men consolidated their domination of the medical profession. This construction of the doctor-patient relationship helped to marginalize those women who had become doctors and to foster the domination by men of the medical profession. The interaction between Dr. Giffen and Mary O'Brien described in *O'Brien v. Cunard* typifies a relationship that was becoming a prototype of institutionally sanctioned, male-dominated medical practice in the period. The case reveals the role of the law in the consolidation of these practices.

Through a study of hospital records of the late nineteenth century, historians have identified ways that medical care was provided differently by men and women physicians.⁸² In the treatment of poor women, male doctors

Gloria Melnick Moldow, *Women Doctors in Gilded Age Washington: Race, Gender and Professionalism* (1987).

80. GLAZER & SLATER, *supra* note 72, at 16; STARR, *supra* note 68, at 117, 124; WALSH, *supra* note 72, at 178-206; Moldow, *supra* note 79, at 48-74.

81. Around the turn of the century, the medical profession was becoming progressively more homogeneous. As competition among medical sects was replaced by one dominant form of medical practice, as state licensing, permitting practice only by graduates of approved schools, and national standard setting for medical schools were instituted, and as medical education became longer and more expensive due to the increasing curricular focus upon basic science and research, many medical schools, particularly those not affiliated with universities, were forced to close. Educational opportunities for less privileged groups became extremely rare. The institutions that admitted people from the working and lower-middle classes, blacks, immigrants and women in significant numbers were eliminated. *See supra* note 79. In addition, internships at teaching hospitals, appointments to the staffs of those hospitals, and membership in medical societies became necessary for professional success. These positions were controlled by a small elite and were hard to secure. Race and gender operated singly and in combination to create enormous barriers to involvement in the profession. Black women physicians faced seemingly overwhelming obstacles. STARR, *supra* note 68, at 102-06, 116-25, 162-63; Moldow, *supra* note 79, at 94-113.

82. *See* MORANTZ-SANCHEZ, SYMPATHY AND SCIENCE, *supra* note 72, at 203-31; Morantz & Zschoche, *supra* note 72. Regina Morantz-Sanchez and Sue Zschoche conducted a major empirical study of the behavior of male and female doctors in late nineteenth century Boston. They compared the records from two hospitals, one staffed entirely by women physicians, the other by men. The New England Hospital was founded by a women physician, Marie Zakrzewska, in 1862. Providing medical, surgical, and obstetrical care for women and children, it was a

of the period had virtually no interaction with their patients. They tended to treat poor women as a uniform group, neither gathering any medical or social information from them that would distinguish one from another nor individualizing treatment decisions except in a purely technocratic way.⁸³ Women doctors of the period practicing in the same communities and treating similarly situated patients used the same sorts of therapies and prescribed the same sorts of drugs as their male counterparts. However, the women doctors had much more complex and extensive contacts with their patients and made decisions concerning the course of treatment in a far more multifaceted way. They solicited and elicited much more information, concerning both the medical histories and the social situations of their patients. They also took many of these factors into consideration in determining the duration and nature of the patients' involvement with the medical care system.⁸⁴

showplace for quality medical care in the latter third of the nineteenth century. Ambitious women doctors longed to receive clinical training there, and its teaching program was rigorous and demanding. Standards reflected the very highest of the day.

MORANTZ-SANCHEZ, SYMPATHY AND SCIENCE, *supra* note 72, at 225. The comparable hospital staffed by male physicians was Boston Lying-In, a teaching facility of the Harvard Medical School.

It is particularly fortuitous for an analysis of *O'Brien* that these historical studies were of Boston hospitals of the late nineteenth century.

83. MORANTZ-SANCHEZ, SYMPATHY AND SCIENCE, *supra* note 72, at 227, 229; Morantz & Zschoche, *supra* note 72, at 577-78, 579-80, 584. The authors have documented this phenomenon in two ways. First, male doctors, as distinct from female doctors, in their record keeping provided little information differentiating one woman from another, in terms of treatment, medical history and background or social information. Second, male doctors, again distinct from female doctors, tended to provide standard treatment with little variation based on individual need.

When treating middle-class women, these same male doctors behaved somewhat differently. When attending home deliveries of middle-class patients, Boston Lying-In doctors maintained complete and detailed records. *Id.* at 577. Male doctors did not, however, differentiate among women in their scientific and medical understanding. In their medical theories, all women were both "prisoners and products of their reproductive systems." MORANTZ-SANCHEZ, SYMPATHY AND SCIENCE, *supra* note 72, at 206. Although male physicians' attitudes about female inferiority affected both middle-class and poor women, and the passivity and dependence of both groups of women was maintained within the doctor-patient relationship, middle-class women were treated in a more individualized fashion. *See supra* note 77.

84. MORANTZ-SANCHEZ, SYMPATHY AND SCIENCE, *supra* note 72, at 227-29, 231; Morantz & Zschoche, *supra* note 72, at 577-78, 579-80, 584.

Women physicians also differed in significant respects from men physicians in their underlying scientific and medical theories about women's health. Women doctors did not see women as inherently weak, sickly or emotional, nor primarily determined

The picture of Dr. Giffen's behavior toward Mary O'Brien that emerges from the record and the opinion in *O'Brien v. Cunard* is consistent with the model of male-dominated medicine as practiced on poor women that is described in the historical literature. First, there is uniform treatment. In the process of vaccination, Mary O'Brien is not distinguished from any other woman. She is one of an undifferentiated group. The group is brought to the same place, at the same time, to get the same treatment. They are lined up and processed through the treatment in exactly the same way. Mary O'Brien attempts to distinguish herself from the group by holding back and by standing to the side. She is asserting a claim to be treated in an individualized fashion within a system of uniform treatment. Dr. Giffen, however, does not vary the procedure or the treatment in any fashion.

Second, there is no attempt to gather or evaluate information in making a treatment decision about whether to vaccinate. Dr. Giffen looks only at the patient's arm to determine prior vaccination. He does not ask if there is a mark on some other part of the body, and he does not search for a mark when he finds out that there might have been a prior vaccination. Even when Mary O'Brien asserts that she was vaccinated before, he makes no inquiry about the circumstances of the prior vaccination to determine if it occurred and if it might have been effective. It appears that the information has no bearing on his decision to vaccinate. He does not see her particular history as important to the uniform treatment he is providing.

Furthermore, Dr. Giffen seeks no information about her general social situation that might be relevant to a decision about vaccination. He does not ask about her family, although consulting with her father might affect her feelings about being vaccinated. He does not find out her age, a factor seemingly of importance to notions of consent. He does not inquire about what awaits her in Boston.

Third, there is virtually no communication between doctor and patient. Not only does Dr. Giffen fail to get any information about Mary O'Brien's claim that she was vaccinated before, he discusses nothing with her. He does not describe the reasons for being vaccinated, either medical or regulatory. He does not explain that a prior vaccination may have been ineffective. He does not present choices to Mary O'Brien, including the risks of not being vaccinated.⁸⁵

by their reproductive systems. Rather, for them, women were capable of good health and had a right to it. Also, although many women doctors supported women's reproductive role, they did not see women as physiologically determined by it. MORANTZ-SANCHEZ, SYMPATHY AND SCIENCE, *supra* note 72, at 216-20; Morantz-Sanchez, *Physicians*, *supra* note 72, at 485.

85. Although we do not have many details in the record, it appears that the male steerage passengers were treated similarly to the females. Although we do not know

Although the interaction between Dr. Giffen and Mary O'Brien does not occur within a hospital setting, it is striking that the characteristics of male medical practice documented in the hospital setting are replicated in the public health setting by a doctor engaging in the therapeutic application of immunology. These two settings were both of particular importance during the late nineteenth century because they were at the forefront of change in medical practice and professional culture occurring at the time. Hospital-based practice at a prestigious hospital was taking on increasing importance within the structure of the medical profession. Internships at one of these institutions assured professional status and essential clinical experience.⁸⁶ Scientific advances, including antiseptic surgery, were increasing the prestige of surgical practice.⁸⁷ Physicians were gaining authority and control over the operation of the hospitals, as well as over the nature of the patients' experience.⁸⁸ At the same time, public health was one of the major successes of scientific medicine at this period, increasing the prestige of the medical profession generally.⁸⁹ During this period, there was no rigid distinction between medicine and public health.⁹⁰ Advances in bacteriology led to dramatic decrease in disease through control of the water, food and milk supplies and

what any individual interactions looked like between the male passengers and the doctor, the structural setting of the interactions appears to be the same. These similarities highlight the ways that other factors interacted with gender in the construction of the doctor-patient relationship. It is noteworthy that at this same historical period, medicine and science created biological explanations for the inferiority of blacks, immigrants and the poor that served as instruments of social control, just as they did for women. MORANTZ-SANCHEZ, SYMPATHY & SCIENCE, *supra* note 72, at 208, Charles Rosenberg, *The Bitter Fruit: Heredity, Disease, and Social Thought*, 8 PERSP. IN AM. HIST. 189 (1974). In nineteenth century Boston, the Irish were subject to discrimination within the medical community. For example, they were initially excluded from admission as patients to Massachusetts General Hospital. STARR, *supra* note 68, at 173. It is not uncommon for all members of disempowered groups to be treated similarly to women. *See, e.g.,* White, *supra* note 8, at 9-19.

86. STARR, *supra* note 68, at 163; Morantz & Zschoche, *supra* note 72, at 576; Rosenberg, *And Heal the Sick: The Hospital and the Patient in the 19th Century America*, 10 J. SOC. HIST. 428, 437 (1977).

87. STARR, *supra* note 68, at 136.

88. Rosenberg, *supra* note 86, at 440-41.

89. STARR, *supra* note 68, at 136.

90. *Id.* at 138. The relationship between the assertion of state power to control individuals through public health measures and the assertion of professional power and authority within the doctor-patient relationship is complicated. *See generally* DEBORAH A. STONE, *THE DISABLED STATE* 90-119 (1984). Although the court in the *O'Brien* case places the decision within the rubric of the doctor-patient relationship, the court is well aware of the public health framework.

the development of antitoxins.⁹¹ Related advances in immunology created new vaccines which heightened the visibility and importance of preventive medicine.⁹² Scientific expertise was at the heart of the enterprise.⁹³ Individuals were treated as the sites of contagion.⁹⁴

Dr. Giffen's actions fit within the emerging professional culture of technical expertise and distanced relations between doctor and patient. He was engaging in a form of medical practice being shaped by elite men in male medical institutions. *O'Brien v. Cunard* reflects these historical developments. It also plays a role in shaping them. The decision of the Massachusetts Supreme Judicial Court ratifies the practice of Dr. Giffen.⁹⁵ Faced with a challenge to these practices, the court permits a doctor to provide uniform treatment. He can virtually ignore a particular patient's medical and social history. He can refuse to engage in any communication with the patient. Through the decision of the Supreme Judicial Court, these practices gain legitimacy. The male-dominated professional culture creates the parameters for addressing the issue of consent. The culture itself is strengthened. The effect that this culture has on the ability of a patient to give meaningful consent is removed from consideration.

The decision does more, however, than legitimize a prevailing form of medical practice. The court implicitly, if unknowingly, chooses among available models of professional medical culture. It is clear from the historical literature that there was a competing model of how technical expertise could be exercised within the doctor-patient relationship.⁹⁶ Women doctors operating within female-dominated institutions were constructing a different type of professional culture. Although they subscribed to similar professional standards regarding appropriate treatment, they provided that treatment in a different way. They differentiated among patients. They sought out and paid attention to information regarding medical and social history. They had conversations with their patients. Had this model been evoked in *O'Brien v. Cunard*, Dr. Giffen's actions could have been evaluated very differently. His failure to pursue Mary O'Brien's information about prior vaccination, his

91. STARR, *supra* note 68, at 135.

92. *Id.* at 135-36, 138.

93. BARBARA G. ROSENCRANTZ, PUBLIC HEALTH AND THE STATE: CHANGING VIEWS IN MASSACHUSETTS, 1842-1936 98, 127 (1972).

94. *Id.* at 98.

95. The *O'Brien* case was filed, tried and heard on appeal in the same community in which the New England Hospital and the Boston Lying-In Hospital operated. The case occurred during the same period as the practices described in the historical studies. Thus, the decision itself was a part of the construction of the doctor-patient relationship that was occurring in Boston in the late nineteenth century.

96. See *supra* note 82 and accompanying text.

failure to present her options to her, his insistence on delivering uniform treatment all take on a different significance. Within this alternative model, he has failed to do just those things that would have enabled him to understand if Mary O'Brien consented to the treatment.

By placing the case within the context of the historical development of the doctor-patient relationship, we see various aspects of the court's decision that would have been invisible without this inquiry. The process of contextualization is, however, multilayered, and it is important to maintain an awareness of the incompleteness of any attempt at contextualizing. For example, although we have seen the case within the context of the doctor-patient relationship in America, this context helps us to understand only partially Mary O'Brien's experience within that relationship. We also need to know about the doctor-patient relationship in Ireland in order to gain insight into her understanding of and expectations about what was happening with Dr. Giffen. How was medical care provided in Ireland at that time? Was it likely that Mary O'Brien had ever seen a doctor? Where was medical care provided? Who were the doctors? How did they view women? What sort of communication would have occurred? Would a young woman have been alone with a doctor? How were relationships within the family related to the experience of medical care?

Exploring the case within the context of one relationship can also help us see how inquiries about other relationships could reveal different aspects of the case.⁹⁷ For example, although the court views Mary O'Brien as an isolated, autonomous individual, she appears in the record within the context of her family relationships. She is a seventeen year old, Irish woman whose mother has recently died. She is traveling away from home for the first time in her life with her father and her brother. During the voyage, she is never away from her father and brother. How is this family structure and experience related to her encounter with the doctor? What does it mean that she is removed physically from the context of her family to be vaccinated? What does it mean that her decisionmaking is removed from the context of her family? Who has made medical decisions for her in the past? Who has made other decisions? What about patriarchal relations in the family? Why has the court chosen to take her out of the context of the family in analyzing the question of consent? What alternatives are available to the court? Why are family relations not more central to questions of medical consent?

97. From a number of different theoretical perspectives, feminist theory has focused upon the importance of the relationships within which women lead their lives to an understanding of gender. See, e.g., de Lauretis, *supra* note 7, at 14; Flax, *supra* note 7, at 628, 638; Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL ED. 47, 56 (1988); Villmoare, *supra* note 35, at 404-05; West, *supra* note 50.

V. CONCLUSION: CONSEQUENCES FOR TEACHING

Is it justifiable to approach *O'Brien v. Cunard* as merely a statement of doctrine, as part of the intricacies of the principles and rules that make up the law of consent? Just as feminist legal theory challenges the ways we think about legal issues, it forces us to question what and how we teach. Feminist theory does not just add something interesting to the "basic" task of doctrinal analysis. It helps us to redefine just what is basic. It shows us that to do doctrinal analysis without a consciousness of gender is to suppress the experience of women, to present male norms as neutral and to disguise the ways that gender is integral to our understanding of what the law is, how it came to be that way, and how it could be different. Feminist theory does not add ideology to the curriculum. It reveals the ideology that is already there. When we teach our students feminist methods of analysis, we give them fundamental critical skills for understanding the law. In addition, we provide them with material for shaping new visions and new possibilities of what the law can be.

