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I. INTRODUCTION

It is important to say at the outset that this discussion about one case, *O'Brien v. Cunard Steamship Co.*[1], would not have been as rich without access to the pleadings and trial record in the case. For example, much of Professor Bourne's discussion of *O'Brien* relies heavily on information not contained in the published case. As I explain in this essay, most casebooks contain appellate cases where the stories of the parties have been distilled; the extent to which the full story is told falls to the law teacher.

Too often we teach law courses as perspectiveless, adopting an analytical approach that consciously acknowledges no specific cultural, political, or class characteristics, but which is decidedly male, white and elitist.[2] We ignore the

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

2. Duncan Kennedy writes that: "[s]tudents who are women or black or working class find out something important about the professional universe from the first day of class: that it is not even nominally pluralist in cultural terms. The teacher sets the tone-a white, male, middle-class tone." Duncan Kennedy, *Legal Education as Training for Hierarchy*, *in* THE POLITICS OF POWER 40 (D. Kairys ed. 1982). This feeling of maleness is reflected in studies of women's experiences in law school. *See, e.g.*, Kimberle Crenshaw, *Foreword: Toward A Race-Conscious Pedagogy In Legal Education*, 11 NAT'L BLACK J. L. 1, 2 (1989) (pointing out that as a result of this perspectiveless approach white students tend to view the concerns of people of color as special interests, as opposed to general or universal concerns); Harriet Jacobs, *Women in Law School: Structural Constraint and Personal Choice in the Formation of Professional Identity*, 24 J. LEGAL ED. 462 (1972) (study of small sample of law students at two law schools); Catherine Weiss & Louise Melling, *Legal Education of 20 Women*, 40 STAN. L. REV. 1299, 1322-23 (1988) (study of women at Yale law school from 1984-87).

personal baggage both judges and litigants bring with them to the courtroom.[3] But many of our students are not fooled.[4]

Today's law school classroom is more diverse both as to gender, race, and class, than ten or twenty years ago. This more diverse student body enters law school with life experiences and perspectives not fully reflected in our legal textbooks.[5] However, we law teachers tend to acknowledge these differences, if at all, only in the margins of our courses.

Data I collected from law schools indicate that large numbers of law students, especially white women and people of color, feel alienated in law school.[6] Many students believe that law and the legal system are not neutral, but reflect only the values and perspectives of a white male dominated

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3. We learn legal rules, statutes, and cases as if these things have no perspective. Crenshaw, *supra* note 1, at 2-3 (law is not objective truth). John Noonan, Jr., in his book, PERSONS AND MASKS OF THE LAW, discusses how Cardozo in Palsgraf v. Long Island Railroad Co., 164 N.E. 564 (N.Y. 1928), objectifies the plaintiff, Mrs. Plasgraf, and omits facts which observers might think relevant because these facts might cause these observers to question Cardozo's conclusions that Mrs. Palsgraf must go remediless. JOHN NOONAN, JR., PERSONS AND MASKS OF THE LAW, 111-51 (1976).

4. Mari Matsuda describes the thinking process of a woman of color sitting in a first year class as multiple consciousness, a shifting back and forth between accepted white perceptions and perceptions from her cultural background and experiences. Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 7-8 (1989). Patricia Williams reaffirms this experience. Patricia Williams, *Response to Mari Matsuda*, 11 WOMEN'S RTS. L. REP. 11 (1989).

5. Some legal scholars have written about this problem from a feminist perspective. *See, e.g.*, Mary Coombs, *Crime in the Stacks, or a Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEGAL ED. 117 (1988); Nancy Erickson, *Sex Bias in Law School Courses: Some Common Issues*, 38 J. LEGAL ED. 101 (1988) (criminal law); Lucinda Finley, *A Breaking in the Silence: Including Women's Issues in a Torts Class*, 1 YALE L. J. & FEMINISM 41 (1989); Mary Jo Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985); Carl Tobias, *Gender Issues and the Prosser, Wade & Schwartz Torts Casebook*, 18 GOLDEN GATE U.L. REV. 495 (1988).

6. I surveyed 14 ABA approved law schools during the 1987-88 and 1988-89 academic years to determine students' perceptions of the classroom climate. My initial study of five of these schools has been published. Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. LEGAL ED. 137 (1988). Some preliminary comments about the larger study appear in Taunya Lovell Banks, *Gender Bias in the Classroom*, 14 SO. ILL. U. J. L. 527 (1990). These findings also are supported by anecdotal information. J. Elkins, ed., *Worlds of Silence: Women in Law School*, 8 ALSA F. 1 (1984); Weiss & Melling, *supra* note 2.

society.[7] This dominant society also assumes incorrectly, that all people in America share their values and perspectives.[8]

Writers in both the critical legal studies and feminist jurisprudence schools challenge the notion that American law is perspectiveless,[9] but neither school fully acknowledges the extent to which culture and/or race also influence all aspects of the law or the interrelationship among race, gender, and class.[10] Typically race, like gender, is raised only when it is an obvious issue in the case or as a topic of special interest. Cultural or class differences separate from race are seldom mentioned. Further, race, cultural, gender, and class differences are almost never included as pervasive issues throughout the course—integrated into the course. Some law teachers attempt to integrate gender or class, or even race, but treat each as isolated issues. The approach

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7. My conclusions are based primarily on interviews with a small sample of these students and anecdotal information. These initial findings are supported by a recent survey of law students at Berkeley. *See* Suzanne Homer & Lois Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L. J. 1, 43-4 (1989-90) (a study of first, second, and third year law students at Boalt Hall in 1988).

8. For an interesting discussion of this point, see Gary Peller, *Race Consciousness*, 1990 DUKE J. L. 758.

9. For specific references to law school, see DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY (Cambridge 1983); Kathleen Bean, *The Gender Gap In The Law School Classroom—Beyond Survival*, 14 VT. L. REV. 23 (1989); Karen Czapanskiy & Jana Singer, *Women in the Law School: It's Time for More Change*, 7 LAW & INEQ. J. 135 (1988); Nancy Erickson, *Legal Education: The Last Academic Bastion of Sex Bias?*, 10 NOVA L. REV. 457 (1986); Homer & Schwartz, *supra* note 7, at 43-44; K.C. Worden, *Over-shooting The Target: A Feminist Deconstruction of Legal Education*, 34 AM. U. L. REV. 1141 (1985); Weiss & Melling, *supra* note 2.

10. For criticism of these schools' failure to consider race as an additional factor, see Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Harlon Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435 (1987); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987); Andrew Haines, *The Critical Legal Studies Movement and Racism: Useful Analytics and Guides for Social Action or an Irrelevant Modern Legal Skepticism and Solipsism?*, 13 WM. MITCHELL. L. REV. 685 (1987); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Mari Matsuda, *Looking To The Bottom: Critical Legal Studies And Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Patricia Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); Robert Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory For Peoples of Color*, 5 LAW & INEQ. J. 103 (1987).

I suggest emphasizes the interrelationship and intersection of these issues in the cases that appear in our casebooks. I call this concept a pluralistic approach to law teaching.[11]

A pluralistic approach means consciously choosing to structure my course to include multiple perspectives-race, culture, class, and gender. This is more than the traditional legal tool we teach students of seeing both sides of the issue. Under the traditional approach our perspective is very narrow, we look at the litigants only as stick figures for competing doctrinal arguments. The traditional perspective, perhaps unconsciously, is almost always privileged, white, and androcentric.[12]

An emerging body of legal literature from scholars of color suggests that there are indeed different perspectives and these perspectives have value and thus should be included in the legal decision-making process.[13] Law teachers in class seldom, if ever, view legal issues from the perspective of the "outsider," the "other" or the "subordinated" individual in society partly because we assume these groups share the same perspective; and partly because dominant American society does not value cultural, racial, class, or gender differences of subordinated groups.

In class law teachers tend to narrowly frame legal issues in ways that prevent students from stepping outside the doctrinal boundaries to comment

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11. Rachel Moran, speaking at the AALS Emerging Voices Workshop on Minorities in Legal Education, Sept. 8, 1989, Washington, D.C., said that there are four ways to bring race into the classroom: (1) the seminar approach where race is a special issue; (2) the "racial gloss" where race is an issue to be developed further where already evident in the materials; (3) the major curriculum reform such as the Stanford experiment with Lawyering for Social Change; or (4) the integrated, pluralistic curriculum where race is a pervasive issue throughout the curriculum. I use the term "pluralistic" in this context, but do not limit it to race.

12. This should not be surprising since most law teachers learned law in institutions which taught from this perspective and we have been chosen to teach by the disciples of this school.

13. *See, e.g.*, Regina Austin, *Sapphire Bound*, 1989 WIS. L. REV. 539 (need for the perspective of African-American women to be visible); Crenshaw, *supra* note 2, at 3-5; Peggy Davis, *Law As Microaggression*, 98 YALE J. L. 1559 (1989) (legal decision-making excludes Black voices); Richard Delgado, *When A Story Is Just A Story: Does Voice Really Matter*, 79 VA. L. REV. 95 (1990); Andrew Haines, *Minority Law Professors And The Myth Of Sisyphus: Consciousness And Praxis Within The Special Teaching Challenge In American Law Schools*, 10 NAT'L BLACK J. L. 247, 293-94 (1988) (minority law teachers must make students question destructive value systems that influence legal decisions); Matsuda, *supra* note 10, at 330-35; Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seed in Plowed-Up Ground*, 11 HARV. WOMEN'S J. L. 1 (1988) (law teachers need to prepare students to be effective advocates in a pluralistic world).

on or critique the rules which marginalize or objectify the outsiders or subordinated groups of American society.[14] As a result, we do a disservice to our students by not exposing them to a pluralistic perspective of the law on a continual basis. We fail to present a whole picture of American society when we exclude or marginalize issues of race, gender, and class.

I returned to teaching torts after several years of absence and selected James Henderson & Richard Pearson's casebook, *The Torts Process*, because it facilitated my approach to the course.[15] Henderson & Pearson raise many of the issues I will discuss about *O'Brien v. Cunard S.S. Co. Ltd.*[16] Unfortunately, the authors raise these issues in their teaching manual and not in the text, leaving it to the teacher's discretion to mention them in class.[17] By relegating these essential facts to the teacher's manual Henderson and Pearson are simply reenforcing the traditional casebook emphasis on doctrinal analysis and rules of substantive law. This emphasis permits students to believe that judicial decision-makers are neutral and always fair. It also allows law teachers who are uncomfortable with these issues to deny students ready access to them through the casebook.

In all fairness, Henderson and Pearson may do this for pedagogical reasons, to encourage students to play lawyer before they have more information.[18] But even if this is the case, they do not combine the issues of class, gender, and culture, showing how they intersect. Instead, the authors tend to treat race, class, and gender in isolation. Nevertheless, Henderson & Pearson, by including gender and race issues do more than most casebook authors.

O'Brien raises many tort issues.[19] However, my focus here is on what

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14. This narrow focus also may reflect our own discomfort with issues of race, gender, and class.

15. JAMES A. HENDERSON, JR. & RICHARD N. PEARSON, THE TORTS PROCESS (3d ed. 1988). Rachel Moran at Boalt Hall, takes a similar approach using RICHARD A. EPSTEIN, ET AL., CASES AND MATERIALS ON TORTS (4th ed. 1984) (a fifth edition edited only by Richard Epstein was published in 1990). Interestingly, neither edition treats *O'Brien* as a major case, relegating it to the notes without exposing its biased reasoning. Unfortunately, there is probably no one textbook that best facilitates this approach, and none are perfectly suited.

16. 28 N.E. 266 (Mass. 1891), 57 MO. L. REV. 347.

17. TEACHER'S MANUAL, THE TORTS PROCESS 7-10 (3d ed. 1988) [hereinafter MANUAL]. It would seem more appropriate if the facts which provide the context of Mary O'Brien's case were included in the text.

18. Some would call this getting students to "objectively" analyze the case, but the use of this term suggests that there is a neutral perspective. A point with which I and others disagree.

19. The placement of this case in the casebook reenforces the lessons learned from preceding cases about the tort process. When viewed in its entirety, it is a good

constitutes consent to a battery in *O'Brien*, because that is the context in which the case usually appears in the casebook. Specifically, Henderson and Pearson classify the tort in *O'Brien* as a harmful as opposed to offensive battery, the unconsented intentional harmful contact with another. I intend to illustrate how the appellate court's resolution of this issue has cultural, gender, and class dimensions that should be addressed in classroom discussions.

II. THE CASEBOOK'S STORY OF *O'BRIEN V. CUNARD STEAMSHIP*[20]

It is undisputed that Mary O'Brien did not verbally say she wanted to be vaccinated,[21] but according to the appellate court, her conduct also did not suggest lack of consent. Specifically, Mary testified, and the court accepts, that she told the physician she had already been vaccinated.[22] It is undisputed that the physician found no mark on her arm, but it also is undisputed that the physician told Mary she should be vaccinated again.[23] Finally, it is undisputed that Mary continued to hold her arm up toward the doctor after he made the remark and the doctor vaccinated her.[24] So the legal question is whether in light of the facts supplied by the appellate court and the court's legal definition Mary O'Brien "consented" to be vaccinated.

When you read the case, whether in the textbook or the reporter, the court's decision seems very clear cut. The court's operational definition of consent is the failure to indicate verbally or by conduct lack of consent.[25] The court reasons that Mary's consent was implied by her conduct.

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boundary crossing case for students in the first weeks of law school. As Henderson & Pearson point out in their teaching manual, *O'Brien* can be used to point out the difference between intentional and negligent conduct. MANUAL, *supra* note 17, at 9-10. However, this point would be even clearer to the students if the text contained excerpts from the pleadings where it becomes clear that Mary O'Brien's lawyer was really suing the steam ship line for negligence and probably added the battery count because the concept of negligence still was developing. But then again, this may be just a difference in pedagogy between the authors and me. In addition, as my colleague Karen Rothenberg points out, in this case and the two that precede it, the facts provided in the opinions are sparse and the outcomes are not entirely satisfactory. Thus a more complete record in *O'Brien* provides students an opportunity to rethink the outcomes of the earlier cases, armed with the understanding that the published case seldom provides the full story.

20. Henderson & Pearson, *supra* note 15, at 48.
21. *O'Brien*, 28 N.E. at 266, 57 MO. L. REV. 347.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*

According to the court, a reasonable person would conclude from this conduct that Mary consented to be vaccinated.[26]

Although the case seems very clear cut and many in the class agree with the court that she did consent, some students still have questions. Students might claim that Mary's actions were ambiguous. She may have been holding out her arm to refute the physician's claim that she needed to be vaccinated. Perhaps the physician should have affirmatively asked Mary if she wanted to be vaccinated. It seems a case can be made that her conduct is not as clear as the court suggests. However, as Professor Bourne points out, it is the "objective" not the "subjective" perspective that counts here. These questions are all valid, and might be raised in any torts class.

There are other dimensions to this case which display some of the inherent biases in the law and raise some larger issues. Unfortunately, students are denied the information to make a truly informed choice about the wisdom of the decision. Only by reading the trial record and briefs in the appellate court, do you get a more complete picture of the circumstances surrounding this controversy.

This problem is not unique to the Henderson and Pearson casebook, but is a problem of casebooks generally. Critics of the casebook approach to law teaching question the use of appellate cases to teach subjects like torts where factual distinctions are so important. Henderson and Pearson at least put students on notice by occasionally providing them with a more complete picture. Once a more complete record is provided a very different picture emerges. Whether this additional information changes the outcome is a matter of dispute. However, these additional facts force students to understand that the judges were operating from a perspective that was quite different from that of the plaintiff Mary O'Brien. Students will see that this difference in perspective may significantly have affected the outcome of the case.

III. MARY O'BRIEN'S STORY

The plaintiff's brief and bill of exceptions indicated that Mary O'Brien was a 17-year-old Irish woman traveling with her recently widowed father and younger brother in steerage from Queenstown in Ireland to Boston.[27] This means while not illiterate, she was poor, unsophisticated, and perhaps, easily intimidated by the authority of the ship's crew.[28] In addition, she was

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26. *Id.* "Viewing his conduct in the light of the surrounding circumstances, it was lawful; and there was no evidence tending to show that it was not." *Id.*

27. MANUAL, *supra* note 17, at 8; Plaintiff's Exceptions at 1.

28. "[T]he fact that she told the doctor she had been vaccinated before, which was a strong a remonstrance as could be expected of a young girl under the circumstances .... [S]he had a right to assume that remonstrance would be useless ...." Plaintiff's

working-class Irish, as opposed to English, a significant difference.[29] Mary had never left home before, and except for the vaccination process had remained with her family during the voyage.[30]

The men who judged her conduct most likely were upper class Anglo-Saxons, so there were some cultural and class differences between the parties. The appellate court concludes that Mary understood the importance and purpose of a vaccination for those who had not been vaccinated.[31] But the trial record does not clearly support this conclusion.

Mary O'Brien testified that she learned once she was in line that she would be vaccinated if she had no vaccination mark.[32] She waited until last before approaching the physician because she had no vaccination mark, but knew from her dead mother that she had been vaccinated as a child.[33] There was no other way back to the deck where she left her family except the door on the elevated platform where the male steerage steward stood.[34] Even though Mary O'Brien could read the signs posted around the ship those signs used the terms "quarantine" and "vaccinate" and the trial record suggests she did not understand the meaning of those terms.[35]

Brief at 3, 57 MO. L. REV. 483.

29. According to some Irish academics who participated in a discussion of race which occurred during a workshop at the Law & Society meeting in Amsterdam summer of 1991, Irish individuals are viewed by the English as members of a separate "race" and their treatment by the English is analogous to the treatment of African-Americans in this country.

30. MANUAL, *supra* note 17, at 8. The record in this case simply indicates that Mary's father was not consulted or present when his daughter was vaccinated. Plaintiff's Exceptions at 5.

31. *O'Brien*, 28 N.E. at 266, 57 MO. L. REV. 348. Although the court uses the language "for those who bore no marks to show that they were protected." *Id.* Consequently even though Mary knew that she had been vaccinated in Ireland, because she had no mark on her arm to indicate vaccination, she was compelled to be vaccinated.

32. *Id*; *see also* discussion *infra* note 33 and accompanying text.

33. Plaintiff's Exceptions at 5, 57 MO. L. REV. 472-73.

34. *Id.*

35. The relevant portion of Mary O'Brien's testimony on cross examination appears below:

> Q. Then you knew before you went to the doctor that you were to be vaccinated, if you had not the vaccination marks, did you?
>
> A. Yes, sir; when I was below.
>
> Q. And you know, did you not, that if you did not have the vaccination marks, the doctor would not give you a card, and then you would have to be vaccinated at quarantine? You knew that, didn't you?
>
> A. No; I didn't know then, until the woman said if there wasn't marks on us we would be vaccinated.

Q. Didn't you understand that if you had no marks, and were not vaccinated on the ship, you would have to be stopped at quarantine and be vaccinated there?
A. Yes.
Q. You understood that, didn't you?
A. Yes.
Q. Who told you that?
A. A woman.
Q. The woman who was with you?
A. Yes.
Q. The steerage passengers about you talked about that, and said that if you were not vaccinated on the ship, and had no marks, you would be vaccinated at quarantine, didn't they?
A. No.
Q. Well, who did say that to you?
A. There was a woman down stairs said it, when people passed up. He was looking at their arms, and then she said he would vaccinate anybody who hadn't the mark.
Q. You said, just now, that you knew if you had no mark, and were not vaccinated on the ship, you would have to be vaccinated at quarantine?
A. No.
Q. You didn't know that?
A. No.
Q. Do you mean to say that you did not know that if you had no mark, and were not vaccinated on the ship, you would have to be vaccinated at quarantine?
A. No.
Q. You didn't know that?
A. No.
Q. What did you mean, just now, by saying that somebody told you that if you had no mark, and were not vaccinated on the ship, you would have to be vaccinated at quarantine?
A. I meant that I would have to be vaccinated on the ship.
Q. What did you mean by saying that you would have to be vaccinated at quarantine, if you were not vaccinated on the ship?
A. I didn't mean to say that.
Q. You didn't understand the question, perhaps?
A. No.
Q. Do you know what quarantine is?
A. No.
Q. You don't know anything about quarantine?
A. No.
. . . .
Q. Can you read?
A. Yes
Q. Didn't you see printed notices all over the ship about the vaccination?

Thus the real issue here is whether Mary consented, or merely submitted to the vaccination. There is a difference, because submission under duress may not be effective consent to battery. The full court record raises the question of whether there was some miscommunication of Mary's wishes because of differences in culture, gender, class, or all these factors and whether the doctor or the steamship company was obligated to do more than was done to ascertain consent.

The question of miscommunication resulting from gender, culture, or class differences are additional concerns, not usually covered in traditional first year subject casebooks. For example, in determining whether a reasonable person would have construed Mary O'Brien's actions as evidence of consent no serious attempt was made by the appellate court to consider the different power dynamics between the parties that resulted from the traditional subordination of women. No attention is paid to the fact that Mary O'Brien, as a person seeking entry into this country has fewer legal protections than immigrants already living in the country, and that the fear of exclusion from the United States has a powerfully coercive aspect. Henderson and Pearson, in their teaching manual raise the class issue by asking whether an upper class or aristocratic English woman would have been treated the same way.[36] It is doubtful since this policy of compelled vaccination only applied to passengers traveling in steerage, obviously a class distinction.

The record and pleadings also suggest that Mary O'Brien's "silent consent" was either coerced or uninformed. In light of this new information, students are forced to consider whether consent *really* is legally effective if you believe that it would be useless to resist. According to traditional tort law principles the answer is yes. Legally effective consent can be manifested through silence and inaction even where there is no willingness to incur an invasion of the person, because the defendant is entitled to rely upon what a reasonable "man" would understand from the plaintiff's conduct.[37] In addition, under the Restatement (Second) of Torts the plaintiff has the burden of proving lack of consent to a personal invasion, but not to an invasion of property[38] Thus tort law principles concerning consent either presuppose equal power between individuals on a personal level or are derogatory of the power imbalances that result from differences in gender, class, or culture. But these assumptions are not made when property as opposed to personal

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A. I saw them, but I didn't read them.
Plaintiff's Exceptions at 2-4, 57 MO. L. REV. 469-71.

36. MANUAL, *supra* note 17, at 9.

37. Silence and inaction may manifest consent where a reasonable person would speak if he or she objected. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 113 (5th ed. 1984).

38. *See* RESTATEMENT (SECOND) OF TORTS § 892A & cmt. c (1986).

invasions are claimed. To some students this distinction between consent to personal as opposed to property invasions may suggest a conscious choice to protect a point of view and power relationship long enjoyed by wealthy propertied men in England and this country.

These are important issues in consent cases both in 1891 and today. In *O'Brien* you have a plaintiff and defendants who are dissimilar based on gender, class, and culture. It is very hard pedagogically to determine whether the defendant doctor could reasonably assume Mary consented. One recurring question is which party should bear the burden of proof on this point and whether the relationship of the parties matters when making this determination. Students would be forced to question the Restatement's position on this issue. Another question is whether the burden of proof in such cases should be viewed as part of the plaintiff's prima facie case, or whether the defendant should have to prove a reasonable belief that plaintiff consented.

There also are public policy questions raised by the record in this case. For example, whether the ship owners can argue that the compelled vaccination policy while "uncivilized," was necessary to protect the health of the people already in America. Some students suggest that the public health argument is a sufficiently compelling argument to justify the personal invasion in *O'Brien*. However, others argue that poor people and other subordinated groups are most likely to be adversely affected by coercive public health policies.[39]

All of these questions raise issues of class, gender, and culture, all factors which directly or indirectly influenced the decision in *O'Brien*. I contend it is not enough to raise the class issues, as Henderson and Pearson do in their teacher's manual. The *O'Brien* case illustrates that the gender, class, and cultural influences are so intertwined that each cannot be discussed in isolation because all three are crucial in understanding the true nature of Mary O'Brien's conduct.

IV. CULTURE, CLASS, & GENDER ALMOST A CENTURY LATER

One recurring question is whether Mary O'Brien's case would be decided the same way today. There are some analogous modern cases involving gender, class, and cultural miscommunication on this issue of consent. For example, plaintiffs in an unreported 1978 federal district court case from California, *Madrigal v. Quillian*,[40] alleged that ten Mexican-American

39. For a discussion of this point in the context of HIV infected women, see Taunya Lovell Banks, *Women and AIDS—Racism, Sexism, and Classism*, 17 REV. OF LAW & SOC. CHANGE 351 (1989-90).

40. No. CV 75-2057 JWC, slip op. (C.D. Cal. June 30, 1978) (copy on file with *Missouri Law Review*).

women were sterilized without their informed consent by doctors at the University of California at Los Angeles hospital.[41] During the trial, a cultural anthropologist testified for the plaintiffs that the women did not understand the irreversible consequences of sterilization surgery primarily because of a language barrier between the women and the physicians.[42] The district court acknowledged that there was some miscommunication, but concluded that busy physicians do not have the time to deal with more precise language or cultural concerns.[43] The trial judge blamed the women for their inability to communicate more effectively with the physicians.[44]

There are some striking parallels between *Madrigal* and *O'Brien*. In both cases you have busy physicians handling large numbers of poor women. In both you also have poor women whose culture is different from both the defendants and the judge who are interpreting the women's conduct. But in *Madrigal* there is a new complication, language, and more obvious ethnic differences. All of these factors are interrelated to both the harm claimed by the plaintiffs and the way the court resolved the issue of consent.[45] However, in both *O'Brien* and *Madrigal* the unconsenting women lose, and the legal and human issues are whether they should.

V. CONCLUSION

The race, culture, gender, and class issues flow naturally from the *O'Brien* trial record, a record usually unavailable to students in the casebooks. Both *O'Brien* and *Madrigal* demonstrate the richness we can bring to our classes when we go beyond the casebooks, and often beyond the recorded cases to supply our students with the whole story. These whole stories more accurately reflect the law as it has always been structured and applied. Laws with flaws, constructed and applied by flawed people. Our goal in legal education should be to learn from these past mistakes and teach our students how to make the laws work for all segments of society.

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41. *Id.*

42. Carlos G. Velez-I, *The Nonconsenting Sterilization of Mexican Women in Los Angeles*, in TWICE A MINORITY: MEXICAN-AMERICAN WOMEN 235 (Margarita B. Melville ed. 1980).

43. *Madrigal*, No. CV 75-2057, slip op. at 6.

44. *Id.*

45. But *Madrigal* is dramatically different from *O'Brien* in other ways, notably the harm here was much greater than the harm Mary O'Brien suffered from the vaccination. Mary O'Brien claimed that the vaccination caused boils over most of her body and an ulcerated condition on the arm where she was vaccinated. Plaintiffs Exceptions at 6, 57 MO. L. REV. 474.