

Short Notes on Teaching About the Micro-Politics of Class, with Examples from Torts and Employment Law Casebooks

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INTRODUCTION

This short Essay explores several potential teaching moments in which one might raise issues concerning the micro-politics of socioeconomic class. I discuss cases found in popular casebooks for three course areas in which I teach: torts, employment, and employment discrimination law. All of these courses raise questions of distributive justice, in the sense that they all deal with issues about how economic and social resources, including legal rights or protections, get allocated between “haves” and “have nots.” Tort law, as Guido Calabresi pointed out long ago, is at its center about the politics of distribution; its core questions are political ones that address under what circumstances economic resources should be reallocated.¹ Employment law

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1. See Guido Calabresi, *The New Economic Analysis of Law : Scholarship, Sophistry, or Self-Indulgence?*, 68 PROC. BRIT. ACAD. 85, 90-94 (1982). As Calabresi argues, questions of economic efficiency arise only after decisions have taken place about initial distributional allocations and the legitimacy of those allocations, as well as decisions about the worthiness on distributional grounds of those who will win and those who will lose under particular legal

is about class relations too, since the topic is, quite literally, about the relationship between workers and bosses.

Analysis of economic relationships in teaching these courses can proceed on a number of levels, not only in terms of broad questions of policy and explicit choices in the shaping of legal doctrine, but also, as I suggest below, on what I refer to as the “micro-political” level of case analysis. By this term, I intend to refer to factors related to litigants’ socioeconomic class status, which can influence, usually at a submerged level, the courts’ reasoning towards particular case outcomes. I show how it can be fruitful to incorporate analysis at this micro-political level when discussing with students case materials frequently assigned in three course areas in which I teach.

All of the examples I discuss involve cases recognizing potential causes of action for dignitary harms. There is developing literature on this topic in the context of race and gender, which points out the close connection between the tort-based concept of dignitary harm and understandings of dignitary rights violations within a civil rights or anti-discrimination paradigm.² Some of these ideas can be easily extended to the analysis of socioeconomic class. Although there currently is no well accepted statutory basis for claims of discrimination on the basis of socioeconomic class, there is no reason that the tort-based concept of dignitary harm cannot be applied to socioeconomic class status as well.

rule regimes. *See id.* For a wonderful recent account tracing the history of these arguments about the relationship between tort law and distributive justice, including a discussion of Calabresi’s points as just mentioned, see JAMES R. HACKNEY JR., UNDER COVER OF SCIENCE: AMERICAN LEGAL-ECONOMIC THEORY AND THE QUEST FOR OBJECTIVITY 114, 129, 138-39 (2006).

2. *See, e.g.*, Derek W. Black, *A Framework for the Next Civil Rights Act: What Tort Concepts Reveal About Goals, Results, and Standards*, 60 RUTGERS L. REV. 259 (2008) (analyzing how tort law concepts can contribute to the development of more effective civil rights standards); Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115 (2007) (arguing for an expansion of tort-based causes of action for harassment based on sex and race in the workplace). This topic was also explored at the Association of American Law Schools Annual Meeting, Section on Torts and Compensation Systems, Frontier Issues on Race and Torts, Jan. 5, 2008, <http://www.aals.org/am2008/saturday/index.html> (involving presentations by Anthony Paul Farley, Rachel Godsil, James R. Hackney, Jr., Camille Antoinette Nelson, and Jennifer Wriggins).

As I argue below, such attention to issues of socioeconomic class can help develop students' lawyering capacities by exposing assumptions about the "naturalness" or inevitability of the law's withholding of dignity rights to persons of low socioeconomic status. Law sometimes reinforces ideas that subordination on the basis of socioeconomic class is natural to the workplace and market when, in fact, those ideas are subject to potential challenge through law just as they are reinforced through it.

It is common among progressive and left-leaning law professors to regard "rights talk," including talk about dignitary rights, with skepticism. But exploring issues of socioeconomic class in my teaching has led me to conclude that courts generally get it right when they uphold dignitary rights claims in the cases before them. In most of the cases I discuss below, the problem is not the court's recognition of dignitary rights claims, but rather the narrow or exceptional quality of the court's reasoning in reaching such results. This realization has led me to wonder about a point that may sometimes be overlooked by those quick to debunk "rights talk"—just as law can construct and enforce status hierarchies, might the notion of dignitary rights potentially be made to do positive work in law by disrupting the reinforcement of status hierarchies? This is a question I have found worthwhile to explore with students in discussions of the cases I discuss below.

I. TORTS

RICHARD EPSTEIN ET AL.,

CASES AND MATERIALS ON TORTS (9th ed. 2008)

The classic torts casebook I will focus on here, *Cases and Materials on Torts*, is a wonderfully rich palimpsest, created through the successive over-writings of several generations of torts scholars.³ It opens with *Vosburg v. Putney*, an iconic intentional torts case involving a "slight" touch to the shin administered by a rich kid, George Putney, to the poor and sickly boy, Andrew Vosburg, whose knee was apparently already in a fragile state due to a prior

3. RICHARD A. EPSTEIN ET AL., *CASES AND MATERIALS ON TORTS* (9th ed. 2008).

sledding injury.⁴ Vosburg ultimately wins at both the trial level and on appeal.⁵ The case immediately plunges one into questions about the relationship between class and the law: Was the outcome of the case influenced by the two boys' relative economic standing in the community? Should it have been? The casebook provides excellent notes on the case's background and the scholarly literature that has arisen about it.⁶ This material allows me to further inquire: Did the facts support the various jury verdicts and opinions on appeal through the case's complicated procedural history?⁷ Would we think differently about ability to pay if one of the parties to the case had been a corporation with deep pockets?

I still remember vividly, early in my teaching career, a student exploding in anger on the first day of class after I raised these questions. "I am sure the casebook editor did *not* put this case in the book to bring out those kinds of completely illegitimate and inappropriate questions," he shouted. My attempts to introduce discussion of class issues to new law students have perhaps become somewhat more artful since that experience, but I continue to believe, as I told my irate student back then (thus further guaranteeing his antipathy toward me for the rest of the semester), that this case does, and should, serve to place issues about class status and resource distribution at the forefront of first-year legal education.

There are many other cases one might pull from Epstein's casebook for similar discussion. Another is *O'Brien v. Cunard Steamship Co.*, an 1891 decision that casebooks often summarize in their notes to illustrate the proposition that one can manifest consent without words.⁸ Ann Shalleck and others write about this case in a

4. 50 N.W. 403 (Wis. 1891) (quoting *Vosberg v. Putney*, 47 N.W. 99, 99 (1890)), as reprinted in EPSTEIN, *supra* note 3, at 4-6; EPSTEIN, *supra* note 3, at 7.

5. *Vosburg v. Putney* came before the Supreme Court of Wisconsin three times. In the final case, *Vosburg v. Putney*, 56 N.W. 480 (Wis. 1893), the jury's verdict for the plaintiff in the amount of \$1,200 was affirmed.

6. See EPSTEIN, *supra* note 3, at 7.

7. For a comprehensive exploration of the sociological and legal context of the case, see Zigurds L. Zile, *Vosburg v. Putney: A Centennial Story*, 1992 WIS. L. REV. 877 (1992).

8. 28 N.E. 266 (Mass. 1891), discussed in EPSTEIN, *supra* note 3, at 38, 40.

wonderful symposium focused on the teaching issues it raises.⁹ *O'Brien* holds that a young immigrant woman manifested consent when she lifted her arm to receive a smallpox vaccination upon arriving at a U.S. port.¹⁴ Ms. O'Brien first stated to a ship physician that she had already been vaccinated but it had left no mark, but the physician proceeded to vaccinate her anyway.¹⁰ The re-vaccination caused serious injury to the plaintiff¹¹ and she brought suit, but the court held that consent barred her cause of action.¹²

Shalleck and other symposium contributors deconstruct this opinion from a wide range of jurisprudential perspectives.¹³ Shalleck focuses mainly on gender, but issues of socioeconomic class emerge from her analysis as well.¹⁴ She points out the many ways in which both the physician and the court's attitude toward Ms. O'Brien rendered her invisible as a person.¹⁵ The physician gave Ms. O'Brien only momentary attention, treated her as part of an "undifferentiated group," communicated no information about the purpose or risks of the medical treatment he inflicted, and ignored her particular medical circumstances, background, and characteristics, including not only her report of prior vaccination, but also the fact that she was a minor.¹⁶ Apparently none of this troubled the court in the least.

Shalleck convincingly argues for a more robust interpretation of the doctrine of consent on such facts, one that would require physicians to give more respectful attention to a patient like Ms. O'Brien, despite her poor,

9. See Ann C. Shalleck, *Feminist Legal Theory and the Reading of O'Brien v. Cunard*, 57 MO. L. REV. 371 (1992); see also Richard W. Bourne, *Five Approaches to Legal Reasoning in the Classroom: Contrasting Perspectives on O'Brien v. Cunard S.S. Co.*, 57 MO. L. REV. 351 (introducing the Symposium).

10. 28 N.E. 266, discussed in EPSTEIN, *supra* note 3, at 38, 40.

11. See Bourne, *supra* note 9, at 359 n. 38 (noting that plaintiff's injuries consisted of blisters all over her body and a bad ulceration on her arm).

12. *Id.*

13. See, e.g., Shalleck, *supra* note 9.

14. See *id.*

15. See *id.*

16. *Id.* at 393.

youthful, female, and immigrant status.¹⁷ Such an exploration of alternative possibilities in classroom discussion of the case, Shalleck proposes, can help provide students “with material for shaping new visions and new possibilities of what the law can be.”¹⁸

I have found similar exercises to be useful in exploring socioeconomic class. My example of a case illuminating the significance of such questions in the Epstein casebook is *Coblyn v. Kennedy's, Inc.*, a main case used to illustrate or problematize the doctrine associated with the tort of false imprisonment.¹⁹ The case description in *Coblyn* begins with the plaintiff's physical appearance: he was “a 70-year-old man, five feet four inches tall, and dressed in a woolen shirt, topcoat, and hat,” who was shopping in the defendant's department store.²⁰ “While trying on a sportscoat,” he took off the “ascot” (a kind of men's scarf) he was wearing and put it in his pocket.²¹ He bought the sports coat.²² While he was exiting the store, he reached into his pocket, retrieved his ascot, and put it back on.²³ A store employee then “loomed up’ in front of the plaintiff and demanded that he . . . explain where he had gotten the ascot.”²⁴ A small crowd gathered and the plaintiff agreed to go back into the store with the employee.²⁵ As the plaintiff walked up a flight of stairs to return to the counter where he had purchased the sports coat, he developed chest pains.²⁶ He and the store security employee reached the salesperson who had sold the plaintiff a sports coat, and that employee verified that the ascot was the plaintiff's.²⁷ “The plaintiff was so upset by the

17. *Id.* at 387-97.

18. *Id.* at 397.

19. 268 N.E.2d 860 (Mass. 1971), as reprinted in EPSTEIN, *supra* note 3, at 88-90. I refer to the excerpted version for my discussion here, assuming that is what one might want to use in teaching.

20. *Id.* at 88.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

incident that he required the attention of the store's nurse and was . . . hospitalized and treated for a 'myocardial infarct.'"²⁸ The jury entered judgment in favor of the plaintiff and awarded substantial damages for false imprisonment; and the defendant appealed.²⁹

Preceding cases in the casebook have already demonstrated the basic doctrinal rule that false imprisonment requires complete restraint or confinement within a fully enclosed boundary, so that the plaintiff has no means of escape or exit.³⁰ Nonetheless, the court in *Coblyn* reasoned that "[c]onsidering the plaintiff's age and his heart condition, it is hardly to be expected that with one employee in front of him firmly grasping his arm and another at his side the plaintiff could do other than comply with [the security employee's] 'request' that he go back and see the manager. . . ." ³¹ The court further reasoned that "the 'honesty and veracity [of the plaintiff] had been openly . . . challenged. If he had gone out before . . . [exonerating himself], his departure well might have been interpreted by the lookers on as an admission of guilt,'" which would have caused him embarrassment.³² The court thus concluded that the jury could properly determine that restraint or duress had been imposed by the situation "even if no threats of public exposure or of arrest were made, and no physical restraint of . . . [the plaintiff] was attempted."³³

In my experience, students need almost no prompting in discussing this case to focus on how the plaintiff's readily apparent class status, as manifested by his clothes and

28. *Id.*

29. *Id.*

30. *See id.* at 85-87 (discussing cases that illustrate the proposition that "an action for false (i.e., wrongful) imprisonment depends on a showing of effective confinement, not a simple restriction on movement"). *Id.* at 87.

31. *Id.* at 89.

32. *Coblyn v. Kennedy's Inc.*, 268 N.E.2d 860 (Mass. 1971), as reprinted in RICHARD A. EPSTEIN ET AL., *CASES AND MATERIALS ON TORTS* 68, 69 (8th ed. 2004). This paragraph is omitted from the ninth edition of the casebook.

33. *Id.* at 69. There is another issue in the case, concerning the interpretation of a statute permitting merchants to detain in a reasonable manner for a reasonable time a person reasonably suspected of shoplifting. *See id.* The analysis of that issue takes the same direction that I highlight in the text.

upscale shopping objective, may have contributed to the results. Students immediately ask, injecting their implicit understanding of the plaintiff's likely privileged racial status as well, "what if the plaintiff had been a young African-American man? Would the court have so easily seen an unreasonable affront to his dignitary rights?"

I sometimes assign an interesting comparison piece by Binny Miller concerning clinic students' handling of the case of a young African-American man unjustly detained in a store for shoplifting pillowcases.³⁴ In an interesting twist, not fully revealed until the end of the article, the client turns out to be gay, which may subtly alter the case theory.³⁵ This study raises interesting issues concerning the contrasts and relationships among the social identities of the client, clinic student legal representatives, and supervising clinical professor. I find it a useful way of introducing the relationship between legal representation, case theory, and the very narrow slice of what constitutes "law" that students study in first-year doctrinal courses.³⁶ Although the formal structures of the facts of this case and *Coblyn* are similar, the social perception of those facts changes because the plaintiffs in the two stories possess different identity characteristics. It can be quite fascinating to observe students detecting this as they compare the two narratives.

With respect to *Coblyn*, my students and I discuss the symbolic importance of the plaintiff's clothes, diminutive size, apparent demeanor, and upscale shopping objective. What, for example, is the significance of Coblyn's ascot as a symbol of class identity? What is its relation to the court's view as to the law's appropriate treatment of this plaintiff? Is it possible that the judges identify with this particular plaintiff based on similarities in social identity? Is it possible that these judges have projected some of that identification with the plaintiff into their application of the doctrine of false imprisonment? Why in this case does the court view the constraint of embarrassment as valid

34. Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994).

35. *See id.* at 573-75.

36. For one leading legal philosopher's discussion of the misguided narrowness of conceiving of the law as what judges write in opinions, see DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 131, 151, 160 (2007).

grounds for a false imprisonment claim? What accounts for the court's willingness to relax the usually very strict requirements for establishing complete restraint or confinement to allow recovery in this case?

The case appears early in the casebook, and some students tend to resist the idea that class identification or class-based sympathy affects law's working here. This may be for several reasons. One may be the disappointment students understandably experience in the first stages of discovering that law is not as neutral or fair as they had hoped it would be. Another may be the fact that the central "fairness" paradigm in U.S. law focuses almost exclusively on prohibitions against only a very limited set of unfairnesses based on discrimination on account of race, sex, and a few other protected characteristics that do not include class status, as I explore further in Part II.

In any event, one piece of wisdom I have learned teaching *Coblyn* is that it is a bad idea to make fun of ascots. Some students interpret such attempts at light humor as an attack on their own class identity. But poking fun at the dressing habits of the upper class does at least seem to make those students who have not heard the term "ascot" before feel better. Lately, I simply note that I had to look the term up in the dictionary the first time I read the case, so that I am only poking fun at myself.

In short, I have found that this case offers a fairly lighthearted opportunity to broach serious questions about how class status affects the treatment of individuals who appear before courts. It also nicely introduces issues concerning the relationship among the symbolic content of factual details in cases, such as Mr. Coblyn's ascot; the understandings of those facts by courts and juries; and the significance of those understandings in the application of law to facts. These materials can also begin to introduce ideas about the development of case theory through the interaction between client and lawyer, as mediated by social identity,³⁷ and the eventual production of a narrative text as presented in an excerpted legal opinion in a casebook.

37. On the relationship between interpersonal relationships and the production of social identity and vice versa, see Susan D. Carle, *Theorizing Agency*, 55 AM. U. L. REV. 307, 366-67 (2005) (discussing symbolic interactionism of George Herbert Mead).

First-year legal education presents a special opportunity to shape the way students approach legal analysis, but opportunities to introduce discussion of socioeconomic class do not stop with the first-year curriculum. In fact, by second year I find that many students have already figured out, through one encounter with the law or another, some of the lessons I seek to impart by exploring the materials discussed above. Upper-level courses provide opportunities to pursue class analysis further and at a more doctrinally sophisticated level.

II. EMPLOYMENT LAW

CHARLES SULLIVAN, DEBORAH CALLOWAY
AND MICHAEL ZIMMER,

CASES AND MATERIALS ON EMPLOYMENT LAW (1993)

There are many excellent employment law textbooks.³⁸ The one I have chosen to discuss here is a wonderfully edited and accessible casebook, Charles Sullivan, Deborah Calloway and Michael Zimmer's *Cases and Materials on Employment Law*.³⁹ As in torts, class issues arise in many of the cases in this casebook. I have chosen two for comparison here, which I view as particularly interesting illustrations of the intersections among class, race, and gender at the micro-dynamic level.⁴⁰

38. For a casebook that has recently caught my eye for doing a particularly fine job of emphasizing class issues, see KENNETH M. CASEBEER & GARY MINDA, *WORK LAW IN AMERICAN SOCIETY* (2005).

39. CHARLES A. SULLIVAN ET AL., *CASES AND MATERIALS ON EMPLOYMENT LAW* (1993). This casebook has, unfortunately, fallen somewhat out of date; I hope its editors might be persuaded to publish a new edition in the near future. The same group has also edited an equally good, or perhaps even finer, employment discrimination law casebook, which I also highly recommend. See MICHAEL J. ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* (6th ed. 2003).

40. See SULLIVAN, *supra* note 39, at 1170-81. On the value of micro-dynamic analysis, see Lucie E. White, *Seeking the Faces of Otherness, in* *LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE* 41 (Susan D. Carle ed., 2005) (presenting the value of close, contextual analysis of the dynamics of law's operation).

The first case is *Agis v. Howard Johnson Co.*⁴¹ The plaintiff in *Agis* was a waitress.⁴² The case arose after she was informed, along with all the other waitresses working at the restaurant in question, that the manager had detected that “there was some stealing going on,” but had been unable to discover the identity of the perpetrator.⁴³ Therefore, the manager announced that he intended to begin firing all of the waitresses present at the meeting in alphabetical order, and to continue doing so until someone admitted to the theft.⁴⁴ *Agis*, having a last name at the top of the alphabet, was first to be fired.⁴⁵ She alleged that, as a result, she became “greatly upset, began to cry, sustained emotional distress, mental anguish, and loss of wages and earnings.”⁴⁶

The trial court granted the defendants’ motion to dismiss the complaint for failure to state a claim, but the Massachusetts Supreme Court reversed, reinstating the plaintiff’s claim on the ground that “reasonable men,” though they might differ on the issue, could “conclude that defendant’s conduct was extreme and outrageous, having a severe and traumatic effect upon plaintiff’s emotional tranquility.”⁴⁷ The Court further upheld the counts in the complaint that *Agis*’s husband brought for loss of consortium, holding that the “loss of ‘companionship, affection and sexual enjoyment of one’s spouse’ [can occur] as a result of psychological or emotional injury as well as from actual physical harm.”⁴⁸

The casebook editors juxtapose this case with *Wilson v. Monarch Paper Co.*⁴⁹ There, the plaintiff, a 48-year-old man

41. 355 N.E.2d 315 (Mass. 1976), as reprinted in SULLIVAN, *supra* note 39, at 1170. This case is, interestingly enough, from the same court and even the same year as *Coblyn*.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 1172 (quoting *Alcorn v. Anbro Eng’r, Inc.*, 2 Cal.3d 493, 498 (1970)).

48. *Id.* at 1172.

49. 939 F.2d 1138 (5th Cir. 1991), as reprinted in SULLIVAN, *supra* note 39, at 1174.

named Richard Wilson, filed both age discrimination and intentional infliction of emotional distress (IIED) claims against his employer and won both claims at trial.⁵⁰ Wilson had been the manager of a division at the company until he was promoted to corporate director and vice-president, in which capacity he successfully supervised the largest construction project the company had ever carried out, involving the building of a new office warehouse in Dallas.⁵¹ Wilson regularly received merit raises and performance bonuses for his work until a new, younger president came to the company.⁵² That president engaged in a series of blatantly discriminatory acts towards the company's older workers, including gradually and cruelly stripping Wilson of his job responsibilities and authority.⁵³ Eventually Wilson was transferred to a job as warehouse manager at the new Dallas building, with no cut in salary but a large reduction in management perks and other benefits.⁵⁴ When Wilson reported for duty he was placed in an entry-level position and subjected to harassment and verbal abuse by his youthful supervisor.⁵⁵ As the court of appeals described, "Wilson, the former vice-president and assistant to the president, was thus reduced finally to sweeping the floors and cleaning up the employees' cafeteria"⁵⁶

In affirming the jury award on the pendant state law IIED claim, the Fifth Circuit acknowledged that "work culture" can involve "teasing and taunting that in other circumstances might be considered cruel and outrageous," and that "it is not unusual for an employer, instead of directly discharging an employee, to create unpleasant and onerous work conditions designed to force an employee to quit."⁵⁷ Such action, "as deplorable as it may sometimes be," generally does not constitute "extreme and outrageous"

50. *Id.*

51. *Id.*

52. *Id.* at 1174-75.

53. *Id.* at 1175.

54. *Id.* at 1175-76.

55. *Id.* at 1176.

56. *Id.*

57. *Id.* at 1178.

conduct.”⁵⁸ But the court nevertheless agreed with Wilson’s argument that the facts in his case offered the rare situation supporting a different conclusion.⁵⁹ The court’s reasoning is revealing. The court pointed to “the degrading and humiliating way that [Wilson] was stripped of his duties and demoted from an executive manager to an entry level warehouse supervisor with menial and demeaning duties.”⁶⁰ As the court explained,

We find it difficult to conceive a workplace scenario more painful and embarrassing than an executive, indeed a vice-president and the assistant to the president, being subjected before his fellow employees to the most menial janitorial services and duties of cleaning up after entry level employees: the steep downhill push to total humiliation was complete.⁶¹

Such behavior was, in the court’s eyes, “so outrageous that civilized society should not tolerate it.”⁶²

As the Fifth Circuit noted in *Wilson*, the foundational assumptions underlying individual employment rights law in the United States make it very difficult to make out a cause of action for IIED in the workplace.⁶³ This is because federal and state statutory law provide very little protection against dignitary harms in the workplace except in the limited subclass of cases involving one particular kind of dignitary right invasion—namely, discrimination based on a restricted set of protected characteristics: *i.e.*, race, sex,

58. *Id.* at 1178.

59. *Id.* at 1180.

60. *Id.*

61. *Id.* at 1181 .

62. *Id.*

63. *See id.* at 1178, 1181.

national origin, religion, and age (forty and older),⁶⁴ and an even more restricted set of qualifying disabilities.⁶⁵

In my employment-related courses, I have tried—not very successfully thus far—to teach against the assumptions built into this general employment law paradigm. Why, I like to ask my students, should we care so much about whether an employer’s act is discriminatory on the limited dimensions encompassed by these statutes, but not about employer mistreatment of employees in other regards?⁶⁶ In other words, why is it acceptable in the United States for employers to treat all their employees equally badly? Why do we not explore as a society the benefits of legal systems that grant to all workers, regardless of whether they are represented by a certified collective bargaining representative, rights such as to treatment with dignity; just cause for discipline and dismissal; meaningful seniority protections; and a voice in, or self-governance rights with respect to, workplace matters?

In the current ideological regime regnant in the United States,⁶⁷ these ideas fall on unreceptive ears, even among my otherwise quite progressive law students. They believe fervently in the anti-discrimination principle, but little more. As my students seem to see it, employers will

64. These anti-discrimination protections exist in a few federal laws: Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000); the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 706 (2000), and the Americans with Disability Act of 1990, 42 U.S.C. § 12101 (2000). State law analogs may slightly expand the set of protected characteristics. See ROTHSTEIN ET AL., *EMPLOYMENT LAW* § 3.39 (1994) (summarizing state statutory anti-discrimination protections).

65. See *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184, 197, 199 (2002) (emphasizing that the federal protections against disability discrimination apply only to a narrow category of disabilities that are “of central importance to daily life,” and holding that the plaintiff’s severe carpal tunnel syndrome did not meet this standard).

66. For an interesting discussion of employees’ dignitary rights in the workplace that compares United States and European law, see Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241 (2003).

67. Cf. *id.* at 266-67 (suggesting that in Europe, where there is less job mobility, the law is more concerned about employees’ treatment by their current employers, while in the United States, workers’ high mobility between jobs leads to more attention to policing discriminatory hiring barriers and less to dignitary protections once hired).

inevitably exploit workers' labor, and if either side in such relationships sees options for better arrangements, they can and should cut and run. As I like to provocatively suggest in my employment law course, in the United States virtually any dignity-denying action an employer chooses to engage in toward an employee, short of a criminal act or one barred by the statutes just mentioned, is legally permissible. This is an important aspect of the at will/laissez faire paradigm that organizes our law's hands-off view of the employment relationship.

But every rule or principle has its limits, and even the one just stated has a few around the edges. One of these limits is the handful of cases in which U.S. courts have upheld IIED cases filed by employees who have suffered abuse at the hands of employers. The two that the Sullivan casebook⁶⁸ uses simply could not be better suited to illuminate the operation and intersection of gender, race and class in courts' understandings of what kinds of employer behavior may rise to the extreme level required to make out a cause of action for IIED.⁶⁹

As is so often true of issues concerning socioeconomic class, the way these issues figure into the analysis is not apparent on the surface of these cases. The courts writing the opinions cannot talk about class openly, just as my first-year torts student found it outrageous for his law professor to bring up such uncomfortable and heavily loaded ideas on the first day of what he apparently expected to be the study of lofty, neutral principles of justice. The socioeconomic class dynamics that underlie the courts' approaches in these

68. SULLIVAN, *supra* note 39, at 1170-81.

69. As RESTATEMENT (SECOND) OF TORTS § 46 (1965) states, the kind of "extreme and outrageous conduct" that may rise to an actionable level under the IIED doctrine must be such "as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." It must, indeed, be so bad that "the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"

This old-fashioned language has been the butt of many facetious recitations in my classroom and, I am sure, many others. But when would a court uphold a finding that this standard had been met in the context of an employment relationship? Regina Austin's pathbreaking work along these lines has greatly assisted me in seeing the potential fruits of further inquiry on these questions. See generally Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988).

cases may be submerged in the opinions because they involve a site of contradiction: law is supposed to be neutral and objective but must also take into account the circumstances or social context of the actors to which it applies. And sometimes when it does so, even in the interests of respecting dignitary rights, it ends up enforcing the very stereotypes that the impulse toward objectivity and dignified treatment aims to suppress. Thus in *Agis*, the court views it as outrageous to make a female—and very probably, young and white—waitress break into sobs by accusing her of theft and firing her for the arbitrary reason that her name begins with “A.”⁷⁰ But is it not doubtful that the court would have seen it as equally outrageous to do the same to a more seasoned, tougher employee? Such toughness could come from a gender difference—can one possibly imagine *Agis* being male? Age is possibly at play as well: Would the result be the same if the plaintiff had been in the low-wage workforce for decades? And though not mentioned, class and race also appear to hover below the surface. One develops a picture of *Agis* as somewhat fragile, someone who had previously led a sheltered life, prone to tears at ill-treatment; she seems quite unlikely to have endured the sting of race prejudice, or to have “come up the hard way” in other respects.

Similarly, with respect to the plaintiff in *Wilson*,⁷¹ the same result could not be reached had he always been a janitor or held a similar low-paid, low-skilled position. The extreme outrageousness of the employer’s treatment, as the court readily acknowledges, arises from the juxtaposition of the plaintiff’s prior managerial status with the activity of cleaning up after others who properly should be his subordinates.⁷² Note the strong gender overtones as well: the situation involves a deep affront to *Wilson*’s masculinity because he is forced to *clean* a warehouse—to perform women’s work—after having previously been in charge of the masculine activity of *erecting* that very building.

70. *Agis v. Howard Johnson Co.*, 355 N.E.2d 315 (Mass. 1976), as reprinted in SULLIVAN, *supra* note 39, at 1170-72.

71. *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, as reprinted in SULLIVAN, *supra* note 39, at 1174-81.

72. *Id.* at 1176, 1181.

Importantly, in all these dignitary harm cases, I think the courts got it right in the sense that the plaintiffs deserved to win. This is a point sometimes overlooked by those interested in class analysis, as I have already noted: the notion of dignitary rights sometimes does do important work in law. This is not to say, of course, that a rights discourse can solve all, or even a large part, of the problem of economic injustice. However, it does seem that improving worker protection through law in part requires the notion of dignitary rights to be ratcheted up, rather than being ratcheted down or done away with altogether, as some critics of individual rights talk would suggest. Otherwise, do we not risk wiping out nascent possibilities of achieving greater dignity protections in the workplace for any employee?⁷³ The law obviously cannot and should not hold that being assigned to do janitorial work is *per se* demeaning. But one could imagine the development of legal principles that disapprove employer practices that enforce status discriminations in a manner that symbolically expresses that low-hierarchy work connotes low status or dignity. I have found this to be an interesting proposition for class discussion.

In all of the preceding case examples, I have been exploring the intersection of class with race and gender. There is much more that can be said or mined from that connection.⁷⁴ Some of the most powerful ideas I have encountered have come from my students, such as the following analysis initially drafted by Michelle Lapointe, who was formerly a student in my employment discrimination class.⁷⁵

73. See generally Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988).

74. See, e.g., Ann C. McGinley, *Harassing "Girls" at the Hard Rock: Masculinities in Sexualized Environments*, 2007 U. ILL. L. REV. 1229 (describing sexual harassment of female workers in the casino industry).

75. I approached Ms. Lapointe about co-authoring this Part because it seemed to me unacceptable to appropriate her observations concerning the contrast posed in the following pair of cases as my own, especially in a symposium devoted to class analysis. Ms. Lapointe has now graduated, and this Part reflects my edited version of work product that she originally produced.

III. EMPLOYMENT DISCRIMINATION

ROBERT BELTON ET AL.,

EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS
ON EQUALITY IN THE WORKPLACE (7th ed., 2004)⁷⁶

A third set of casebook examples starts with *Jespersen v. Harrah's Operating Co.*, a case in which Darlene Jespersen, a bartender at Harrah's Casino in Reno, Nevada, filed a Title VII challenge to a new Harrah's policy requiring its female bartenders to wear makeup as a condition of continued employment.⁷⁷ As Ms. Lapointe pointed out during class discussion, *Jespersen* provides a fascinating counterpoint to *Price Waterhouse v. Hopkins*,⁷⁸ the case in which the Supreme Court concluded that an accounting firm's denial of partnership to accountant Ann Hopkins had been based in part on impermissible sex stereotyping⁷⁹ where the evidence included a partner's suggestion to Ms. Hopkins that she "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."⁸⁰ The *Price Waterhouse* Court noted that "we are beyond the day when an employer could evaluate employees

76. See also ROBERT BELTON ET AL., 2008 SUPPLEMENT TO EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIAL ON EQUALITY IN THE WORKPLACE (2008) [hereinafter BELTON SUPP.].

77. 444 F.3d 1104 (9th Cir. 2006) (en banc), as reprinted in BELTON SUPP., *supra* note 76, at 37.

78. 490 U.S. 228 (1989), as reprinted in BELTON ET AL., *supra* note 76, at 140-43.

79. See 490 U.S. 228 at 250-52.

80. *Id.* at 235 (quoting 618 F. Supp. 1109, 1117 (D.D.C. 1985), *aff'd.* in part, *rev'd.* in part, 825 F.2d 458 (D.C. Cir. 1987), *aff'd.* in part, *rev'd.* in part, 490 U.S. 228 (1989)). *Price Waterhouse* produced only a plurality opinion on the proper standards of proof in evaluating so-called "mixed-motive" cases (*i.e.*, cases in which the trier of fact has properly concluded that an employment decision was based on a combination of permissible and impermissible considerations). A majority of the Court agreed, however, that there had been impermissible sex stereotyping on the facts presented. Compare Plurality opinion, 490 U.S. at 251 (Brennan, J.), with concurring opinion, 490 U.S. at 272 (O'Connor, J.) (agreeing that Hopkins had "proved discriminatory input into the decisional process, and had proved that participants in the process considered her failure to conform to the stereotypes credited by a number of the decisionmakers had been a substantial factor in the decision").

by assuming or insisting that they matched the stereotype associated with their group.”⁸¹

Given the Court’s disapproval of employers’ imposition of sex-stereotyped notions of appropriate gender presentation in *Price Waterhouse*, one might have expected the courts to disfavor Harrah’s full makeup requirement for female bartenders as well. The Ninth Circuit saw things quite differently, however, refusing to extend the disapproval in *Price Waterhouse* of sex-stereotyping of female employees in professional jobs to similarly onerous and uncomfortable sex-stereotyped appearance standards imposed on employees in service positions. Reconciling the two holdings leads to the conclusion that Title VII bars employers from requiring female accountants to wear makeup in order to meet employer standards for acceptable professional self-presentation, but permits employers to require full makeup as a condition of continued employment for female bartenders. A comparison of the two cases thus provides yet another example of how the factor of socioeconomic status sometimes appears to affect the law’s respect for autonomy and dignity rights, as reflected here in the ability to control the self-presentation of one’s gender identity.

Jespersen worked for Harrah’s Casino in Reno, Nevada, for nearly twenty years, starting as a dishwasher and moving up quickly to bartender.⁸² Her performance as a bartender was by all accounts exemplary, with both customers and supervisors praising her service.⁸³ Then Harrah’s implemented a “Beverage Department Image Transformation” program, which imposed certain sex-specific grooming and dress requirements on its employees.⁸⁴ Jespersen was willing to accept most of these requirements, but strongly objected to the program’s new requirement that women wear full makeup, including face

81. *Id.* at 251.

82. *Jespersen v. Harrah’s Operating Co.*, 280 F. Supp. 2d 1189, 1190 (D. Nev. 2002), *aff’d*, 392 F.3d 1076 (9th Cir. 2004), *vacated*, 409 F.3d 1061 (9th Cir. 2005), *aff’d en banc*, 444 F.3d 1104 (9th Cir. 2006).

83. *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076, 1077 (9th Cir. 2004), *vacated*, 409 F.3d 1061 (9th Cir. 2005), *aff’d en banc*, 444 F.3d 1104 (9th Cir. 2006).

84. *Id.* at 1077.

powder, blush, mascara, and lip color.⁸⁵ She argued that, for her, wearing makeup was offensive, conflicted with her self-image, and interfered with her work.⁸⁶ After she refused to wear makeup to work and failed to apply for another position in the company that did not require wearing makeup, Harrah's terminated her employment.⁸⁷

Jespersen's lawsuit alleged that Harrah's makeup requirement constituted disparate treatment on the basis of sex in violation of Title VII.⁸⁸ The district court granted summary judgment to Harrah's,⁸⁹ and the Ninth Circuit affirmed the district court's decision.⁹⁰ But Judge Thomas, writing in dissent, argued that Jespersen "articulated a classic case of *Price Waterhouse* discrimination."⁹¹ Judge Thomas noted that both Jespersen and Hopkins had experienced adverse employment actions precisely because they failed to "act femininely enough."⁹² Thus, Judge Thomas pointed out that the majority opinion "leaves men and women in service industries . . . without the protection that white-collar professionals receive."⁹³

After a rehearing *en banc*, the Ninth Circuit again affirmed summary judgment in favor of Harrah's. The court distinguished *Price Waterhouse* on the grounds that Harrah's policy did not single out Jespersen,⁹⁴ and no

85. *Id.* at 1078 & n.2.

86. *See id.* at 1077.

87. *Id.* at 1078.

88. *Id.*

89. To reach this conclusion, the district court applied the "unequal burden" standard it had previously developed to evaluate gender-specific grooming and dress standards, under which such standards may be maintained provided that they do not impose an unequal burden on employees of one gender. The court concluded that Harrah's makeup requirement did not impose such an undue burden on female employees. 280 F. Supp. 2d. at 1192-94.

90. 392 F.3d at 1081 (agreeing with the district court's legal analysis and citing a lack of evidence in the record to support Jespersen's contention that the makeup policy required women employees to make a substantially larger investment of time and money than male employees).

91. *Id.* at 1084 (Thomas, J., dissenting).

92. *Id.* at 1085.

93. *Id.*

94. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1113 (9th Cir. 2006) (*en banc*). This aspect of the Ninth Circuit's reasoning is curious when

evidence indicated that the standards “would objectively inhibit a woman’s ability to do the job.”⁹⁵ This decision produced two dissents, one from Judge Pregerson, who noted that the sex stereotyping in *Price Waterhouse* likewise revolved around “how women should dress and present themselves.”⁹⁶ Judge Pregerson reasoned that the full makeup requirement expressed Harrah’s view that female employees could achieve a professional appearance only through makeup, a view based on a gender-based stereotype that women’s faces require makeup to appear complete.⁹⁷

Judge Kozinski’s dissent would have allowed the case to go to a jury on both the sex stereotyping and undue burden

viewed alongside *Price Waterhouse*. The en banc majority’s opinion in *Jespersen* distinguishes *Price Waterhouse* by explaining that while the partners’ comments about Hopkins singled her out for sex-stereotyped criticism, Harrah’s policy applied to all bartenders and did not target Jespersen personally. *See id.* Noting that no evidence in the record indicated that “the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear,” the majority discounts Jespersen’s subjective reaction of extreme discomfort in wearing full makeup. *Id.* at 1112. But note that, in *Price Waterhouse*, too, an unwritten policy reflecting the impermissible influence of sex stereotyping in promotion decisions came to light in the case of one specific female partnership candidate. 490 U.S. 228, 236 (1989) (observing that the district court had found “[c]andidates were viewed favorably if partners believed they maintained their femin[in]ity while becoming effective professional managers . . . [t]o be identified as a ‘women’s lib[b]er’ was regarded as [a] negative comment.”) (alteration in original) (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985). *aff’d. in part, rev’d. in part*, 825 F.2d 458 (D.C. Cir. 1987), *aff’d. in part, rev’d. in part*, 490 U.S. 228 (1989).

There may have been other women partner candidates at *Price Waterhouse* who had little difficulty in adopting the firm’s gender-stereotyped expectations for a female partner, but it was Hopkins’s subjective reaction, in her refusal to conform to these stereotypical expectations for women managers, that set up the conflict with her employer. The fact that Darlene Jespersen challenged her employer’s rigid insistence that she wear makeup therefore is not as easily distinguishable from the “discrimination brought to ground and visited upon” Hopkins as the Ninth Circuit’s majority opinion claims. *Id.* at 251.

95. 444 F.3d at 1112. In rejecting the idea that Harrah’s was motivated by gender stereotypes in formulating its policy, the court focused on the clothing requirements, however, which were unisex, and did not fully scrutinize the makeup policy and its effect on women. *Id.*

96. *Id.* at 1115 (Pregerson, J., dissenting).

97. *Id.* at 1116.

theories.⁹⁸ His perspective drew from his powers of sympathetic identification to expose with humor the ludicrousness of Harrah's policy by analogizing it across bounds of both gender and professional status.⁹⁹ As he wrote, "[i]magine, for example, a rule that all judges wear face powder, blush, mascara and lipstick while on the bench. Like Jespersen, I would find such a regime burdensome and demeaning; it would interfere with my job performance."¹⁰⁰

In *Price Waterhouse*, the Court noted the "impermissible catch 22" of that employer's demand for the traditionally masculine trait of assertiveness by partnership candidates charged with managing large client accounts, while simultaneously rejecting that trait as insufficiently feminine in Hopkins' job performance.¹⁰¹ So too did Jespersen's performance as bartender depend in part on her cultivation of traditionally masculine qualities, including a strong physical presence and ability to deal with unruly customers.¹⁰² But in *Jespersen*, the court took a deferential

98. *Id.* at 1117-18 (Kozinski, J., dissenting).

99. *Id.*

100. *Id.* at 1118.

101. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

102. See Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER, L. & POLY 13, 99-100 (2007) (noting that Jespersen's compliance with Harrah's makeup policy likely would have diminished her ability to engage in the "masculine" performances she had developed as effective personal strategies for handling unruly customers and managing a high-stress service setting). In addition, Avery and Crain point out, viewing Jespersen's position as a bartender within the historical context of women's exclusion from this profession weighs in favor of a more exacting analysis. See *id.* at 92-100 (tracing the history of women's exclusion from bartending prior to the passage of Title VII); see also *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1086 (9th Cir. 2004)(Thomas, J., dissenting) (arguing that Harrah's makeup policy "rested on a message of gender subordination").

Avery and Crain further ask whether Harrah's makeup policy, providing specific guidelines on employees' makeup choices and a required consultation with an image specialist, embodies "a cultural assumption—and gender-based stereotype—that lower-class working women, left to their own devices, are likely to look 'unattractive' or 'unprofessional' because they wear too much makeup or the wrong kind of makeup." *Id.* at 87-88.

Other scholars writing about *Jespersen* have pointed to the absence of mainstream women's rights organizations from the case as evidence of a

approach to whatever policies Harrah's thought appropriate to adopt for its workforce. It mattered little that Jespersen was clearly an excellent employee, whose undisputed high skill as a bartender served both her own and her employer's interests. The court held that Jespersen's personal decisions as to how to achieve this success could be preempted by her employer's vision of an ideal female service worker. Viewed from the lens of a dignitary rights analysis, a majority of the Court empowered accountant Ann Hopkins and other women in her social and occupational class to reject stereotypical employer-imposed models of ladylike professional self-presentation, and created space in which to allow them to define their professional identities in new ways. But a majority of the Ninth Circuit appeared to assume that a lack of autonomy in controlling self-presentation is a natural or inherent aspect of service industry employment. In short, whether class bias played a role in the judges' determination that Darlene Jespersen did not suffer actionable discrimination is a question that deserves robust discussion in any employment discrimination course.

CONCLUSION

Law school courses in torts, employment law, and employment discrimination offer ample opportunities for discussing issues of socioeconomic class. The cases discussed above provide a few examples of how judges' perceptions of class status may influence their opinions. I have chosen examples from several popular casebooks, but I could easily have pointed to other cases in other casebooks I have used. The micro-political case analysis I have described could be undertaken in many areas of law. In the examples I have discussed, the influence of litigants' class status emerges through assumptions that are usually submerged below the surface of courts' reasoning. In all of the cases, socioeconomic privilege influences case outcomes in litigants' favor. Law insists on the enforcement of the

potential class bias within the advocacy community itself. See Devon Carbado, Mitu Gulati & Gowri Ramachandran, *The Jespersen Story: Makeup and Women at Work*, in *EMPLOYMENT DISCRIMINATION STORIES* 105, 126 (Joel WM. Friedman & Jack M. Gordon, eds., 2006) (suggesting that the mainstream feminist advocacy community may be more interested in pursuing the interests of middle-class professional women than those of blue-collar and service industry workers).

dignitary rights of higher-status employees, while appearing to deny the same consideration to employees with lower socioeconomic status. The operation of law in effect symbolically reinforces or expresses the differential value of persons on the basis of socioeconomic status.

I have argued that discussion of these issues in examining casebook materials can prevent students from accepting as natural or inevitable instances in which law reinforces or expresses ideas that actors possessing lower socioeconomic status have lower value and fewer dignitary rights. One objective of teaching students to consider class analysis in their study of law thus might be to strive together as students and professor toward insights into how to improve law's protection of litigants at lower rungs of the socioeconomic class.

I have further suggested that enormously productive teaching dialogues between student and professor can arise from exploring the intersectionality of class with other identity characteristics, such as race, gender, age, and other recognized axes of discrimination. I have suggested ways in which professors might want to seek to push students in reading legal opinions to analyze class along with race and gender dimensions of difference. These later dynamics are ones that, in my experience, students often very willingly and appropriately notice right away. Discussion of socioeconomic class, however, can be fraught with taboo for complex reasons.

As Lucille Jewel has compellingly explored in her contribution to this collection, some of those reasons may include students' perceptions or uncertainties with respect to their own past and future identities within class hierarchies both inside and beyond the legal profession.¹⁰³ Jewel argues that law school education can itself exacerbate class hierarchies by teaching students to reject or disparage certain types of law practice along with certain types of dress and other manifestations of socioeconomically defined culture and "taste." Indeed, Jewel's essay and this one fit together nicely in the following way: Jewel suggests that law schools can themselves cause class-based dignitary

103. See generally Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 Buff. L. Rev. 1157 (2008).

harms by sending students such messages as that representing individuals is less prestigious than representing corporations.¹⁰⁴ My suggestion that law professors encourage discussion in the classroom on the class-related micro-dynamics of case outcomes can be read as fitting into a need for a broader program to address issues of socioeconomic class in legal education. Such a program could seek to counter the climate created by a number of aspects of law school education that are laden with covert messages about the relationship of class status and dignity. These are issues with which students are rarely given a chance to grapple openly, and analysis of them in discussing casebook materials may provide one way of opening consideration of similar issues with respect to the process of professional socialization as well.

Finally, I have suggested that exposing the potential micro-politics of class submerged in the dynamics of particular case outcomes, and in contrasts between case outcomes, serves a third critical purpose of exposing the unintended consequences or irony of attempts to achieve fairness through law. An emphasis on context, social identity, and the subjectivity of experience in law potentially can improve the fairness of law's application to facts, but it can also further reinforce the very stereotypes law's emphasis on fairness seeks to avoid. Thus, the lessons of teaching about the micro-dynamics of class as manifested in law can involve both the deconstruction of doctrine and the deconstruction of that deconstruction, all with the aim of producing mature and sophisticated legal practitioners who possess a sense of both possibility and humility in seeking to make law a better tool for achieving justice.

104. Cf. Susan D. Carle, *Re-Valuing Lawyering for Middle-Income Clients*, 70 *FORDHAM L. REV.* 719 (2001) (arguing that the status hierarchy for public-interest law practice should be modified so that it also encompasses practice choices involving the representation of clients of limited means).