UC DAVIS LAW REVIEW ONLINE

VOL. 58 OCTOBER 2024

Confronting *Vokes*: One Possible Guide for Progressive Law Students

Mark Kelman[*]

More than three decades ago, Robert Gordon used the Vokes v. Arthur Murray *case — a case in which the plaintiff, who had been subject to a range of manipulative and arguably dishonest sales tactics, sought to rescind a series of contracts that bound her to purchase a preposterous amount of dance lessons — to explain the pedagogical practices associated with one of the dominant progressive movements in legal academia at the time, the Critical Legal Studies (CLS) movement.*

In this Article, I revisit Vokes*, exploring how a* 21st *century progressive student might profitably approach the case. I discuss some of the straightforward doctrinal puzzles the case raises and offer some observations on why a progressive student should care about analyzing these doctrinal issues. I revisit the CLS approach, highlighting its virtues while expressing skepticism about Gordon's claim that the CLS analysis would "unfreeze legal reality" — countering the tendency of both judicial discourse and law school*

 James C. Gaither Professor of Law and Vice Dean Stanford Law School. Thanks above all to Bob Gordon and to Anna Bostwick and others in the American Constitution Society at Stanford who urged me to give the talk on which this essay is based, a talk designed to help progressive students reflect on how they might want to approach their first year doctrinal courses.

pedagogy to make existing hierarchy and subordination seem inevitable. Finally, I note the importance of recognizing that the case is not merely a case about the exploitation of an abstract, unsituated consumer facing an equally abstract aggressive salesperson but a case about gender. As such, I reflect on a familiar question — will increased protectiveness towards vulnerable women help or hurt women generally? — and consider a less familiar one — can we understand the problems that Vokes herself faced without understanding that she might not seek any truly self-regarding ends but simply identify herself, as many women are socialized to do, as someone whose only social role is to elicit something like sexual desire in men?

TABLE OF CONTENTS

INTRODUCTION

More than three decades ago, Bob Gordon wrote what still strikes me as the definitive piece exploring the pedagogical implications of the work associated with the Critical Legal Studies (CLS) movement.[1] Focusing on how CLS scholars might analyze a widely taught Contracts case, *Vokes v. Arthur Murray, Inc*,[2] Gordon provided a fascinating blueprint for progressive students, urging them to approach the case in a specific way that would help them ward off what he saw as the central destructive message of both law school in particular and legal discourse more generally. The basic message — "that legal and social realities are frozen, that we have reached the end of history and that the possibility of fundamental change is now forever closed to us[,]"[3] thwarting our aspiration "to make this a more decent, equal, solidary society — less intensively ordered by hierarchies of class, status, 'merit,' race, and gender"[4] — was supported by a variety of inadequately examined, often inexplicit claims. The most basic, foundational claim was that social outcomes arose from free and rational uncoerced choice and that what romantic progressives might naively see as needless constraint was in fact a product of social or natural necessity.[5] In Part III below, I discuss both the ways in which the CLS analysis of the *Vokes* case remains a valuable one for today's progressive students to consider and why Gordon might have overstated the connection between embracing the CLS critique of the conventional picture of Contract law and the project of "unfreezing" legal reality and rejecting necessitarian defenses of the status quo.

My dominant goal in this Article, though, is not to revisit Gordon's piece but to consider how a 21st century progressive law student might best approach *Vokes*, and of course by extension, how to profitably approach much of the material that we teach in the first year of law

---

[1] Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195 (1987).

[2] 212 So. 2d 906 (Fla. Dist. Ct. App. 1968).

[3] Gordon, *supra* note 1, at 198.

[4] *Id.* at 197.

[5] *Id.* at 198.

school. I think it is perfectly sensible to focus on *Vokes* itself: the case is still widely taught.[6]

I proceed in three substantive Parts. In the next two Parts, I (largely) ignore issues of gender that I believe are ultimately the most telling matters to focus upon. In Part II, I both try to identify the thorny doctrinal issues that the case raises and consider briefly why a progressive student ought to examine the conventional doctrinal issues in the case carefully. I also note the importance of considering an issue that I assume most instructors would raise regardless of their political predispositions: if the contract that Vokes and others like her signed was indeed either exploitative or imprudent, does it make sense to police these bad contracts through Common Law case-by-case adjudication or through general legislative or administrative regulation instead? In Part III, I discuss what both Gordon and I would deem the prototypical CLS approach to the case and reflect briefly on Gordon's claim that the approach significantly counters the deeply regrettable tendency to believe that significant social change is impossible. In Part IV, I centralize issues of gender, considering how important it is for progressive students to consider the virtues and perils of legal practices that treat women (and often times members of other subordinated communities) as atypically vulnerable and reflecting on the ways in which the case reveals profound insights about the limited applicability to women of conventional rational choice economic models that assume

[6] It is still a principal case in the most recent editions of many widely used Contracts case books. *See, e.g.*, IAN AYRES, GREGORY KLASS & REBECCA STONE, STUDIES IN CONTRACT LAW (10th ed. 2023); RANDY E. BARNETT & NATHAN B. OMAN, PERSPECTIVES ON CONTRACT LAW (5th ed. 2018); THOMAS D. CRANDALL & DOUGLAS J. WHALEY, CASES, PROBLEMS AND MATERIALS ON CONTRACTS (5th ed. 2008); TRACEY E. GEORGE & RUSSEL KOROBKIN, K: A COMMON LAW APPROACH TO CONTRACTS (3d ed. 2021); E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS (3d ed. 2003); DANIEL MARKOVITS & GABRIEL RAUTERBERG, CONTRACTS: LAW, THEORY, AND PRACTICE (2018); JOSEPH M. PERILLO & JOHN D. CALAMARI, CALAMARI AND PERILLO ON CONTRACTS (5th ed. 2003). There is also a case with almost identical facts in Knapp's most recent edition. The opinion in the case *Syester v. Banta* is not as jurisprudentially interesting as the opinion in *Vokes*, but it does contain one of the greatest (if undoubtedly unwittingly astonishing) lines one might confront over the course of law school: a witness at trial reported that "during the period from 1957 through the fall of 1960 she was 68 years old." 133 N.W.2d 666, 669 (Iowa 1965). Many of us getting on in years are both envious and intensely curious how she pulled that off.

subjects make self-regarding welfare-maximizing decisions. Part V is a conclusion.

I. DOCTRINE

The key facts that the court recites in the *Vokes* case are straightforward:

> "Plaintiff Mrs. Audrey E. Vokes, a widow of 51 years and without family, had a yen to be 'an accomplished dancer' with the hopes of finding 'new interest in life.' . . . [A] motivated acquaintance [an instructor at the franchised Arthur Murray studio in town] procured her to attend a 'dance party' [at his studio] where she whiled away the pleasant hours . . . absorbing his accomplished sales technique, during which her grace and poise were elaborated upon and her rosy future as 'an excellent dancer' was painted for her . . . . As an incident to this interlude, he sold her eight [one-half] hour dance lessons to be utilized within one calendar month . . . for the sum of $14.50 . . . obviously a baited 'come on.' Thus she embarked upon an almost endless pursuit of the terpsichorean art during which over a period of less than sixteen months, she was sold fourteen 'dance courses' totaling in the aggregate 2302 hours of dancing lessons for a total cash outlay of $31,090.45.[7] . . . From the time of her first contact with the dancing school . . . she was influenced unwittingly by a constant and continuous barrage of flattery, false praise, excessive compliments, and panegyric encomiums . . . . The foregoing sales promotions . . . were procured . . . by false representations to her that she was improving in her dancing ability, that she had excellent potential, that she was responding to instructions in dancing grace, and that they were developing her into a beautiful dancer, whereas in truth and in fact she did

[7] The case was decided in 1968. Adjusting for inflation, Vokes purchased approximately $273,000 of dance lessons in 2024 dollars.

> not develop in her dancing ability, she had no 'dance aptitude,' and in fact had difficulty in 'hearing the musical beat.' . . ."[8]

The Court briefly mentions the possibility that the contract might be void because the salesman exercised undue influence over Vokes.[9] The invocation of "undue influence" suggests, at the doctrinal level, that the salesman might have had some sort of fiduciary obligation towards her even though they were in an ordinary commercial relationship, rather than a traditional fiduciary one (e.g., lawyer/client). Moreover, at the conceptual level, it suggests that the court ought to attend to the parties' status rather than merely treating them as a wholly abstract Customer C and Seller S because women may be atypically vulnerable to certain sorts of male manipulation, thereby establishing the possibility that Vokes was more vulnerable to the instructor's suggestions that she sign up for so many lessons.[10]

But ultimately the opinion, overturning the trial court's summary judgment ruling for the defendant and ordering the court below to consider her claims that she can rescind the contract, rests entirely on misrepresentation doctrine, on concluding that the defendant told the plaintiff a material lie. The case is taught to Contracts students as a (somewhat doctrinally troubling) misrepresentation case. As a misrepresentation case, of course, she *is* merely an abstract customer, and we can ignore her distinct features, whether features arising from her status or her more personal idiosyncrasies. Any abstract person considering making a purchase needs to know if the product or service they are buying will meet their goals. Vokes's goal was to become an accomplished dancer; she was misled into buying the dance lessons because she was misinformed that doing so would help her achieve this goal. Not only would the court approach the case the same way if the plaintiff were, say, a man seeking to become an accomplished golfer who signed up for lessons when his instructor lied to him about what the lessons might really do to help him meet this goal, but it would treat the

[8] Vokes v. Arthur Murray, Inc., 212 So. 2d 906, 907-08 (Fla. Dist. Ct. App. 1968) (alterations in original).

[9] "Davenport and his associates . . . went beyond the unsavory, yet legally permissible, perimeter of 'sales puffing' and intruded well into the forbidden area of undue influence [and misrepresentation] . . . ." *Id.* at 907 (alteration in original).

[10] I return to discuss her gender-based vulnerability in more detail in Part IV below.

case the same way if some abstract plaintiff X, seeking to ensure that their roof would not leak, purchased an ineffectual sealant from abstract defendant Y, who lied by telling them that purchasing the sealant would meet their goals.

Naturally, one lesson progressive students must learn early on in school is that while legal doctrines are most often taught as if they both are and should be impervious to the identity[11] of the parties involved, courts sometimes decide cases based on (often unself-conscious, often disparaging) identity-based beliefs about the litigants[12] and sometimes ignore identity when there are strong arguments that it is relevant.[13] But when in doctrine-crunching mode, students typically are expected to treat the parties as wholly abstract, unsituated rights-holders and duty-bearers: under some intuitive — if ultimately weak — conceptions of

[11] For my purposes in this Article, gender is most relevant. But for some of many excellent discussions of the same issue in relationship to race, class, and disability, see, for example, Kimberlé Williams Crenshaw, *Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L. BLACK L.J. 1 (1989); Marjorie Florestal, *Is a Burrito a Sandwich? Exploring Race, Class, and Culture in Contracts*, 14 MICH. J. RACE & L. 1 (2008); Orit Gan, *Anti-Stereotyping Theory and Contract Law*, 42 HARV. J.L. & GENDER 83 (2019); Sean M. Scott, *Contractual Incapacity and the Americans with Disabilities Act*, 124 DICK. L. REV. 253 (2020).

[12] For two of many excellent discussions of such judicial decisions, see Debora L. Threedy, *Feminists and Contract Doctrine*, 32 IND. L. REV. 1247, 1252 (1999) (comparing the outcomes in *Hammer v. Sidway* and *Kirksey v. Kirksey*, "judges may be less likely to perceive bargaining between the sexes in a family context"); Deborah Zalesne, *Gender Inequality in Contracts Casebooks: Representations of Women in the Contracts Curriculum*, 17 FIU L. REV. 139, 141-57 (2023) (discussing stereotyped portrayals of women in case decisions).

[13] *See, e.g.*, Mark D. Alicke & Stephanie H. Weigel, *The Reasonable Person Standard: Psychological and Legal Perspectives*, 17 ANN. REV. L. & SOC. SCI. 123, 130 (2021) ("[S]tudies demonstrate consistent support for the findings that, when compared to men, women (a) have a broader definition of sexual harassment, (b) perceive more sex-based maltreatment, and (c) are less tolerant of sexual harassment."); Penny L. Cigoy, *Harmless Amusement or Sexual Harassment?: The Reasonableness of the Reasonable Woman Standard*, 20 PEPP. L. REV. 3 1071, 1094-95 (1993) ("Behavior that many men consider flattering is perceived as offensive by many women."); Leenore E. A. Walker, *Battered Woman Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 321, 324-25 (1992) (imminent danger standard to justify use of self-defensive force fails domestic violence survivors because "the women are hypervigilant to cues of impending danger and accurately perceive the seriousness of the situation before another person who has not been repeatedly abused might recognize the danger").

equality principles, rules must apply across the board to everyone, regardless of their specific circumstances and social position.

A progressive student confronting *Vokes* should both recognize and learn to analyze the doctrinal issues that the case raises *and* come to terms with why it is important that they do so. I will simply list the doctrinal issues, only occasionally commenting on the complexity of the issue:

- The case is facially puzzling as a case about protecting an under-informed consumer. It may be true that Vokes does not know that she is a hopelessly bad dancer, but she is most duped and misinformed because she does not know a far more critical fact that the salesman certainly knows: she has purchased substantially more lessons than she will ever use. It is incumbent on a student to figure out why the court focuses on the less relevant information gap and whether the court was bound to do so under certain views of misrepresentation doctrine — the deciding judge almost certainly feels bound to find a (plainly forbidden) lie (commission) rather than a (less unambiguously prohibited) non-disclosure (omission).
- Is it possible to "lie" when one is not stating a "fact" (e.g., the studio is open on weekends, the days when you, the customer, can use the purchased lessons), but an opinion (e.g., "you are a good dancer")? Plainly, though, a party *can* lie about what his actual opinion is. Perhaps I cannot lie about whether your painting *is* good, but I can surely lie about whether I *believe* it to be good (though it may often be difficult for a litigant to prove what I genuinely believe.) It is also the case, as the court notes, that parties holding themselves out as expert might be deemed to lie when they state views that those with their level of expertise would not hold because buyers legitimately rely on their opinions.[14]

[14] *Vokes*, 212 So. 2d at 909 (citing Ramel v. Chasebrook Const. Co., 135 So. 2d 876, 879 (Fla. Dist. Ct. App. 1961)) ("A statement of a party having . . . superior knowledge may be regarded as a statement of fact although it would be considered an opinion if the parties were dealing on equal terms.").

- Can we distinguish what this salesman did from mere "puffing," from exaggerating the virtues of the product or services one offers in conventional ways? Should Vokes *expect* the salesman to overstate her progress and discount his statements so that she should not really be misled? Naturally, students who emphasize the importance of individualistic self-reliance and self-protection will be more likely to label this "mere puffing" than those who emphasize the importance of non-exploitation and obligations to care for one's trading partners.

- If the implicit theory behind the claim that Vokes was a victim of misrepresentation is that she sought a particular goal (to dance well) and was misled into believing she was meeting it by buying an absurd number of dance lessons, what if we reinterpret her goal and say that her goal was, for whatever reason, to be flattered about her grace and dancing acumen? It is arguably perfectly legitimate to sell "flattery services," just as it is legitimate to get paid to teach people to dance well, though a normatively acceptable market in such services is obviously tricky to establish: one cannot really ask someone in Vokes's position whether she would pay large sums of money to be falsely flattered because she would no longer feel flattered if she knew she was buying *false* praise.[15]

- Is the problem that the court is trying to address better dealt with by a more general rule (typically established by a legislature or an administrative agency) rather than through more narrowly fact-focused case-by-case adjudication? Progressive students in their more "reformist" (rather than "radical") modes should find this

[15] It is important for progressive students to come to understand that Panglossian claims about self-realization through markets are often paradoxical in ways much like this. At some general level, it may seem credible that if people realize their preferences, they will be better off, at least so long as their preferences are prudent and informed. But if it turns out that they are not "better off" (given some account of what that might mean) when they get what they preferred, one can readily say that the initial preference was *not* adequately prudent or informed because the party forming the preference did not properly understand and assess the consequences of his choices. For a more complete discussion of the topic, see Mark Kelman, *Hedonic Psychology and the Ambiguities of "Welfare,"* 33 PHIL. & PUB. AFF. 391, 393-97 (2005).

question engaging: it is closely related to a question they often face in deciding whether to do direct service work for individuals or work on "law reform" projects of various sorts once they get out of law school. The answer to the question in this specific context may of course depend on what one believes the problem is. Does one think that the issue is that people frequently imprudently commit to long-term deals (and that it might therefore be sensible to place general limits on the enforceability of certain forms of long-term contracts)[16] or are the problems more heterogenous and idiosyncratic (sellers take advantage of the very specific vulnerabilities of individual customers)? One's view of this issue also depends a good deal on one's views on access-to-justice problems and on one's view of the efficacy of administrative or legislative regulation. Progressive students should be acutely sensitive to the cost of case-by-case adjudication and the effect of high cost on the capacity of economically stressed folks to vindicate formal rights[17] as well as the strategic advantages that repeat-player defendants like Arthur Murray might have in these cases.[18]

[16] *See, e.g.*, CAL. CIV. CODE § 1812.80—1812.97 (mandating that, among other restrictions, the service recipient has the right to cancel the contract within 45 days after the contract is executed if the contract for health studio services requires payment of $2501 or more, the duration of the contract may not exceed three years, and the contract may not require payments for longer than the term of the contract).

[17] Progressives have long embraced the claim that the overwhelming majority of victims "lump" the injuries they suffer (in part because of the financial and emotional expense of litigating); that, contrary to the more typical claim by conservative commentators and business groups that we face a litigation explosion crisis, under-claiming is the real problem. *See, e.g.*, Richard L. Abel, *The Real Tort Crisis — Too Few Claims*, 48 OHIO ST. L.J. 443 (1987) (only a tenth of medical malpractice victims filed claims and only four percent of claims resulted in payment; workplace deaths and injuries are massively underreported; claiming rates higher for auto accidents but underclaiming still commonplace); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986) (politicians, the popular press, insurance companies and business groups decry the "litigation explosion," but per capita rates of litigation were higher in colonial and nineteenth century America and in the period in which the piece was written, litigation rates ebbed and flowed).

[18] For a discussion of the classic progressive Law & Society account of repeat-player advantages — advantages that make it difficult for aggrieved individuals to prevail

Why, though, might progressive students think it important to carefully consider these conventional doctrinal questions? The simplest answer might be that they may well someday litigate misrepresentation cases or cases grounded in statutes that either draw heavily on the Common Law of misrepresentation or on "reforming" it to require higher levels of disclosure. It is almost surely the case that members of subordinated communities have been particularly vulnerable to information asymmetries. They may, for instance, both pay too much for mortgage loans and take on undue risk in part because they deal with lenders who both misinform them and take advantage of problems that they have properly assessing the information that they do get.[19] But even if they have no intention of making direct use of the doctrine in their professional lives, understanding more generally how to recognize what an authoritative legal text (like a judicial opinion) does and does not say and what suppositions lie behind the conclusions the authority has drawn and how they might be contested (by the progressive students themselves, by those who disapprove of an outcome the progressive student extols) is central to becoming someone who brings a level of valuable expertise to whatever individuals, groups, or causes one chooses to work on behalf of.[20]

against organizations (i.e., corporations and governments) that may exploit them — see Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 104-77 (1974).

[19] *See* Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1261-65, 1267-70, 1283-86 (2002); Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 711 (2006). For a similar case study of the vulnerability of members of subordinated communities to misrepresentation in the medical care context, see Lauren Hersch Nicholas, Jodi Segal, Caroline Hanson, Kevin Zhang & Matthew D. Einsenberg, *Medicare Beneficiaries' Exposure to Fraud and Abuse Perpetrators*, 38 HEALTH AFFS. 788, 792 (2019) (finding that nonwhite, disabled, and Medicaid-eligible/poorer Medicare patients are markedly more likely to be victimized by fraudulent and abusive providers).

[20] For a powerful defense of the notion that progressive lawyers must not forget that their specialized knowledge and skills can be of service to subordinated communities while acknowledging that members of those communities are poten1t sources of knowledge and expertise, see Ann Southworth, *Taking the Lawyer Out of Progressive Lawyering*, 46 STAN L. REV. 213, 217, 234 (1993).

II. CRITICAL LEGAL STUDIES

To the doubtless limited extent that 21st century progressive students are aware of the half century-old Critical Legal Studies (CLS) movement, they are likely to describe it in ways that I find significantly misleading, emphasizing the argument that legal "reasoning" is indeterminate and manipulable and that what often drives outcomes is the imperative to create and protect privilege. Many CLS scholars did indeed share to some extent a set of predispositions advanced by any number of progressive lawyers and legal academics: law frequently directly serves the material interests of super-ordinate groups at the expense of subordinate ones, whether subordination is defined by race, gender, gender performance, religion etc. or by class.[21] But, in terms of *Vokes* in particular, one would be hard-pressed to argue that the petit bourgeois Arthur Murray franchisees (or other small businessmen using high pressure or manipulative sales techniques) are plausible beneficiaries of an elite-responsive legal system or even, more generally, that individualized unsavory salesmanship is a critical tool that the privileged use to maintain their dominance.[22] The more general and

[21] Significant works associated with the formative days of the CLS movement that emphasize the role the law played in creating and entrenching privilege of different forms would include MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780—1860 (1977); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978). This strand of CLS scholarship was echoed, though in most significant ways independently arrived at, in foundational Critical Race Theory and left feminist works. See generally, among many other canonical works, DERRICK BELL, AND WE ARE NOT SAVED (1987); CATHARINE MACKINNON, FEMINISM UNMODIFIED (1987); CATHARINE MACKINNON, WOMEN'S LIVES, MEN'S LAWS (2007).

[22] That is not to say that there are not actors with significant social power who rely on such one-on-one aggressive salesmanship in the markets in which they operate. See, for example, the discussions of manipulative marketing of sub-prime mortgages by banks and surrogates for large banks in Engel & McCoy, *supra* note 19, at 1283-86; Willis, *supra* note 19, at 709-10, 766-89. More generally still, of course, one could readily argue that "consumerism" broadly understood serves to prop up privileged sellers and "consumerism" is dependent on misleading potential buyers into believing that purchasing a range of unneeded products is the road to happiness and fulfillment. Ensuring that the "soft" misrepresentation that characterizes advertising generally does

significant point for my purposes here is that the most novel contribution of CLS, what distinguished it from prior progressive scholarship that had zeroed in on the ways in which law catered to elites (defined in a multitude of ways), was its emphasis on unpacking the ways in which law, carefully examined, both reveals and suppresses widespread contradictory impulses about the ideal forms of social organization.[23]

In this view, the fundamental battle that is played out repeatedly in law (and most transparently in contract law) is the battle between the idea that law should reflect commitments to individualism — the belief that we have a robust entitlement to be utterly self-seeking so long as we do not violate others' clear rights when seeking our own interests — and views that are more altruistic and solidaristic, that demand not that we treat others' interests precisely as we treat our own or that we treat *all* others with equal concern (regardless of a myriad of features of our

not constitute a form of actionable misrepresentation is arguably, then, one mission that Common Law judges are fulfilling.

[23] The emphasis on contradiction — that the legal system as a whole and each of as individuals — harbors contradictory impulses to follow the individualist's predisposition to seek one's own ends and to be protected from the demands and incursions of others and the altruist's impulse to nurture social connection and responsibility — was especially pronounced in the canonical CLS work of Duncan Kennedy. For an especially insightful discussion of what he calls the Fundamental Contradiction, see Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 211-12 ("Here is an initial statement of the fundamental contradiction: Most participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it. Others (family, friends, bureaucrats, cultural figures, the state) are necessary if we are to become persons at all — they provide us the stuff of our selves and protect us in crucial ways against destruction. . . . Moreover, we are not always alone. We sometimes experience fusion with others, in groups of two or even two million, and it is a good rather than a bad experience. But at the same time that it forms and protects us, the universe of others (family, friendship, bureaucracy, culture, the state) threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good. Numberless conformities, large and small abandonments of self to others, are the price of what freedom we experience in society."). For further reflections on the significance of contradiction, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1710-13, 1731-37 (1976) [hereinafter Kennedy, *Form and Substance in Private Law Adjudication*].

relationship to them) but that their welfare is of significant weight.[24] In the Contracts context, we are obliged (to some extent) to ensure that we meet the true, collectively validated ends of the practice of exchange and contracting, to arrive at arrangements that are at least reasonably expected to benefit both parties to a deal. Typically, demands that we attend to the interests of others are stated as standards (e.g., negotiate or perform in "good faith," protect against imprudent or short-sighted contracts using imprecisely defined concepts of "undue influence," "unconscionability," "breach of duties to disclose," and "duress") rather than the rules that characterize traditional, individualistic contract law (no contract until parties have assented to mirror image terms; parties presumed to make reasonable decisions absent easily adjudicated markers of incompetence like infancy, adjudicated disability; only lies rather than omissions to correct known information asymmetries negate a deal.)[25]

What Gordon emphasized in his exegesis of *Vokes* is that while the court *in fact* was moved by the recognition that the salesman as an individual (and the studio as a corporate entity) is indeed obliged to ensure that there is at least a reasonable chance that Vokes is benefitting from the contract she assents to, they reached this result by supporting, rather than questioning, classical Contract law's commitment to individualism. *Of course,* the norm is that contracts entered into by

[24] For the canonical CLS accounts of individualism, see Kennedy, *Form and Substance in Private Law Adjudication*, *supra* note 23, at 1713-22 ("The essence of individualism is the making of a sharp distinction between one's interests and those of others, combined with the belief that a preference in conduct for one's own interests is legitimate, but that one should be willing to respect rules that make it possible to coexist with others similarly self-interested. The form of conduct associated with individualism is self-reliance. This means an insistence on defining and achieving objectives without help from others (i.e., without being dependent on them or asking sacrifices of them). It means accepting that they will neither share their gains nor one's own losses. . . . The essence of altruism is that one ought not to indulge a sharp preference for one's own interest over those of others. Altruism enjoins us to make sacrifices, to share, and to be merciful.").

[25] Highlighting the connection between the rule form and individualism and the standard form and altruism is perhaps the central, novel feature in Kennedy's *Form and Substance in Private Law Adjudication. See id.* at 1737-40.

broadly competent people are enforceable[26] and that we need not look out for those we contract with. But, the contract at issue in *Vokes* is not the norm because it is in the *exceptional* category of cases in which there has been a clear breach of contracting rules, a material misrepresentation. Gordon's piece is the classic exposition of the CLS claim that courts may often obscure how *routinely* the legal system imposes altruistic obligations while avoiding direct invocation of the altruistic doctrines in favor of the strained utilization of the classical individualistic doctrines. Examined carefully, as I noted, the misrepresentation of Vokes's dancing ability that preoccupies the court is almost surely almost wholly irrelevant. Nonetheless, a court bent on voiding what the judge plainly intuits is a grotesquely bad deal that Vokes, at best, would surely come to regret, *without* extending and highlighting the altruistic features of our legal system (e.g., an expansion of quasi-fiduciary duties, the expansion of disclosure duties, good faith dealing obligations), has no choice but to foreground it. In doing so, it preserves the idea that we can stay in the pristine classical Contract world in which selfish actors pursuing their own ends

[26] "[W]here parties are dealing on a contractual basis at arm's length with no inequities or inherently unfair practices employed, the Courts will in general 'leave the parties where they find themselves.'" Vokes v. Arthur Murray, Inc., 212 So. 2d 906, 909 (Fla. Dist. Ct. App 1968). As Gordon put it: "The 'normal' framing of the transaction for decision . . . remains that of nineteenth-century classical liberalism . . . private bargains [are] presumptively free and efficient . . . Ms. Vokes competence to contract and consent to the terms are presumed from her signature. In order to have any chance of success in her suit, she must struggle against the normal framing and recast her situation as falling into some recognized category of exceptions and defense: duress, fraud, mistake, undue influence, unconscionability, and so forth." Gordon, *supra* note 1, at 202. "The prominent language of the case, the phrases that you would underline with magic marker, decides for Audrey Vokes with the least possible disruption of the frame. The decision is market-reinforcing rather than market-regulating." *Id.* at 203. It may well be the case that the law school curriculum writ large — foregrounding Contracts and Torts, the courses that establish the basic ground rules of the Classical night watchman state — while reserving subjects that reform classical doctrine (e.g., Securities Law, Employment or Labor Law, Environmental Law) or deal with distributive justice issues that classical doctrine largely ignores (e.g., Tax, Welfare Law, antidiscrimination law) until later in law school reinforces this same idea that the classical system is The Core and legal institutions more skeptical of the Classical 'Free Market' as Utopia are The Exceptions. This point is central to Mark Kelman, *Text and Sub-Text: Curriculum Structure as Ideology* (forthcoming. J. LEGAL EDUC., winter 2025).

restrained only by minimal barriers to malfeasance will maximize everyone's welfare.[27]

My view is that the CLS view of the case remains a persuasive one, and that it is important for a progressive student to understand that existing law embraces significant non-libertarian, non-individualistic impulses but that it may do so as surreptitiously as possible lest calls for higher demands for solidarity become unduly routinized and acceptable.[28] Still, I am skeptical of Gordon's claim that a progressive student who fully absorbs this claim will find it all that useful in "unfreezing" legal reality. It would seem most plausible that the hypothetical progressive student would look at the argument and say, "Gee, it turns out we already incorporate lots of progressive moral intuitions into law, even if we typically do so covertly, and yet the system as a whole remains profoundly unjust. Maybe my mainstream teachers describe existing practice inaccurately, but existing practice is hardly doing much to undo subordination." Additionally, it is not that clear whether the real ideological pillars of resignation, the arguments that egalitarian restructuring is infeasible and existing hierarchy is necessary or unavoidable, are significantly undermined by the CLS claims. The claims do address the possibility that some (existing) levels of protectiveness of the interests of the vulnerable do not lead to systemic collapse, but they do not really address the claims that the sorts of restructuring progressive critics of the status quo seek would wreak various forms of social and economic havoc.

[27] Gordon's piece is the classic exposition of the CLS claim that courts may often obscure how routinely the legal system imposes altruistic obligations by avoiding direct invocation of the altruistic doctrines in favor of the strained utilization of the classical individualistic doctrines. Gordon argues that thinking carefully about perfectly ordinary equitable doctrines that tell us that people who "have achieved a certain level of intimacy and an expectation of mutual trust . . . the other's room for self-interested strategic maneuvering should be limited[,]" Gordon, *supra* note 1, at 206, would help us reframe *Vokes* itself and help us see that our actual contractual norms may often imply duties to perform in good faith and imply duties to satisfy trading partners, to protect their long-term capacity for free choice, to avoid choice-distorting and choice-limiting conduct, and to protect them from making bad deals to satisfy their addictions. *Id*. at 211.

[28] The CLS commentators also build on their Legal Realist forebears to undermine the ideologically important claim that the market is a domain of non-coercion, freedom, and mutual gain.

III. GENDER

The judge who decided *Vokes* clearly believed that we need to learn more about Vokes than that she was lied to if we are to reach what he thinks of as an "equitable" decision in the case. Whether he is correct to think this or not, the judge plainly feels women are vulnerable to exploitation by contracting partners in ways that men are less prone to be. Thus, it is not coincidental that he begins the case by highlighting that she is a middle-aged *widow*, that she feels she needs to regain "interest in life" (that widows might typically lose?), that the salesman first hooks her by inviting her to a *party* and then complimenting her *physical grace*. There is little doubt that the judge believes she was more vulnerable to the lies that she was told because *once-married but now-unmarried women* have atypical needs to believe these very sorts of lies. I return to discuss a critical, progressive analysis of why this might be,[29] but first briefly discuss the virtues and perils of responding to the belief that women (or members of other historically subordinated communities) are often in need of greater levels of legal protection.[30]

A. The Virtues of Protecting the Vulnerable; The Perils of Marginalization Through "Protection"

For the moment, one need not accept, let alone explain that women are more vulnerable than men to being hoodwinked into signing the preposterous deals that Audrey Vokes signed. All of the hypotheses possibly underlying the judge's opinion in *Vokes* are contestable and each is arguably grounded in negative stereotypes that at a minimum deserve critical scrutiny. Perhaps (like too many women?) she will do anything to be flattered by and retain the attention of men.[31] Perhaps (like too many women?) she did not manage money during her marriage and finds herself in middle age without the appropriate financial sophistication that would enable her to properly evaluate the deal she is agreeing to.[32] Perhaps (like too many women?) she has lived in a kinder,

[29] *See infra* Part IV.B

[30] *See infra* Part IV.A

[31] *See infra* Part IV.B.

[32] For a superb discussion of the degree to which progressive reformers urged courts to use unconscionability doctrine to protect (mostly Black, poor consumers) from

more giving world, where "her people" are responsible both to caretake physically helpless children and ego-fragile husbands and she just does not realize how cruel and selfish the "male-dominated" world of commerce can be.[33]

The key question a progressive student must face is how to evaluate proposals to protect the subordinated, based on either accurate or inaccurate beliefs that they are particularly likely to enter into relationships that ultimately harm them absent such protection.[34] Should we be more prone to void the contracts that they make? Should we prevent them from taking jobs that threaten their health more than we prevent men from taking jobs that threaten their health?

The basic conceptual dilemma the progressive student faces in evaluating hyper-protective law is straightforward enough. Of course, there are real gains to women if they are protected from entering contracts that unquestionably harm them or even pose an undue risk of harming an unduly high proportion of them. If, for instance, women were even more prone than men to consent to privacy-intrusive and potentially liability-creating police searches when asked, ensuring that our judgments of when a search was truly consensual was gender-

improvident installment contracts in canonical cases like *Williams v. Walker-Thomas Furniture* on the grounds that they were financially unsophisticated and ignorant of the problems in the contracts they were signing, see Dylan C. Penningroth, *Race in Contract Law*, 170 U. PA. L. REV. 1199, 1263-70 (2022). Penningroth argues that most poor Black consumers had long understood perfectly well the dreadful features of the contracts they were signing but did so because they faced quasi-monopolists who offered nothing better. Instead of emphasizing the need to protect poor Blacks from their own vulnerability, progressives should have sought to expand access to the better deals available to white customers. *Id.* at 1238-43, 1263-70.

[33] For the classic discussion of the degree to which girls develop into women creating an "ethic of care" rather than a rights-based more individualistic one, see generally CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

[34] For two of the most insightful pieces reflecting on this dilemma — the second more specifically focused on discussing gender issues in cases like *Vokes* itself — see generally Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1239 (1998); Debora L. Threedy, *Dancing Around Gender: Lessons from* Arthur Murray *on Gender and Contracts*, 45 WAKE FOREST L. REV. 749 (2010).

sensitive would be unquestionably important.[35] Will supposedly protective employment law simply fortify the male monopoly over desirable jobs, either grounded in false beliefs about female vulnerability or an inadequate appreciation for the possibility that an increased access to employment is more valuable than a decreased risk in detrimental employment-related health outcomes? [36] Should we allow individual women to make the risk-versus-reward trade-offs so long as we protect their access to the best available information about risks? Similarly, if we allow women to rescind contracts more readily than we allow men to, will others be more reluctant to contract with them,

[35] It may seem "commonsensical" that women would be more compliant with search requests because of a tendency to be more conflict-averse or that people of color are more compliant because they have reason to be more afraid of violent police reaction (or simply of signaling criminality to police predisposed to think that they are criminal) if non-compliant. In this regard, see Tracey Maclin, *"Black and Blue Encounters" Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 271-72 (1991) ("While it might be comforting to pretend that black males react to police encounters in the same way that other people do, the reality on the streets teaches us that this is not the case."). Commonsensical suppositions here may be empirically dubious, though. See Roseanna Sommers &Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L. J. 1962, 1998-99 (2019) (explaining that people generally comply with requests to search at far higher rates than they believe they would). *But see id.* at 2008 n.156 (noting that compliance rates with police requests to search during traffic stops are insensitive to demographic distinctions).

[36] Regulations that barred women from working in certain industries because they would be exposed to chemicals that might cause birth defects not only ignored the fact that many women who would choose to work around the chemicals neither intend to nor will have children but vastly misstated the degree to which women, but not men, were at risk of harming future children if exposed. For illuminating discussions of this topic, see Mary E. Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1232, 1236 (1986) ("When employers . . . exclude all fertile women from the workplace, it is as if they are stating that women's interests in employment are so weak that they are easily trumped by the interests of beings who may never exist. . . . [F]etal vulnerability policies have excluded women from jobs without firm evidence that the jobs present greater risks for women than men."); David L. Kirp, *Fetal Hazards, Gender Justice, and the Justices: The Limits of Equality*, 34 WM. & MARY L. REV. 101, 112, 115 (1992) ("These women have an intimate appreciation of the risks. . . . They have chosen to work around lead . . . because they had already had their children, or were not intending to become mothers. . . . [F]irms like Johnson Controls, which rely mostly on male workers, have too quickly discounted the possibility that men's, as well as women's, exposure to high lead levels might put the fetus at risk.").

depriving them of opportunities to gain through trade? Even if women (or members of other subordinated groups) cannot rescind *more readily*, will doctrine that is more sensitive to cultural differences — for instance, recognition of the fact that members of different communities may manifest assent or non-assent to an offer in different ways so that behavior that tokens assent when performed by members of the statistically dominant group will not be deemed assent if performed by members of all groups — make it more risky (because less predictable) for typical vendors to deal with non-dominant group members?[37]

The dilemma is not just that there might be immediately practical costs to steps taken to benefit but less directly perhaps, but as importantly, costs that arise from the symbolic meaning of the interventions as well. We may justifiably worry not only that women will be unduly excluded from the world of commerce if those who might deal with them fear that they can readily undo contracts, but we may believe that narratives of female vulnerability discourage women (and girls) from recognizing their strength and encourage men to think of women as incapable of leadership and occupying (the many socially important) positions demanding resilience and self-confidence.[38]

[37] For a discussion of this problem, focusing specifically on the fact that assent may be manifest differently across cultures, see Deborah Zalesne, *Racial Inequality in Contracting: Teaching Race as a Core Value*, 3 COLUM. J. RACE & L. 23, 35-39 (2013).

[38] Arguments that "benevolent sexism" (grounded explicitly in the desire to protect purportedly fragile women, especially those who occupy conventional female gender roles) plays an important part in creating and maintaining gender hierarchy and leads to reduced self-confidence among women were significantly sharpened and clarified in Peter Glick & Susan T. Fiske, *An Ambivalent Alliance: Hostile and Benevolent Sexism as Complementary Justifications for Gender Inequality*, 56 AM. PSYCH. 109 (2001). For a thoughtful discussion of the importance of recognizing female *sexual* vulnerability while understanding the negative impact of embracing conventional notions of female vulnerability, see Erinn Cunniff Gilson, *Vulnerability and Victimization: Rethinking Key Concepts in Feminist Discourses on Sexual Violence*, 42 SIGNS: J. WOMEN IN CULTURE & SOC'Y 71, 74-78 (2016). Even more critical of powerlessness narratives, see JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 345-46 (2006) (arguing that failing to call attention to the self-protective capacity of a rape victim out of fear of 'victim blaming' may intensify female injury.) For more general arguments that paternalistic interventions that single out groups — most typically, but not always, groups that are otherwise historically disadvantaged — create what the author sees as the fundamental problem of paternalism (that it communicates the insulting message

B. Are Women the Self-Interested Maximizers Posited in Law & Economics and Classical Contract Law?

What might be most clearly revealed to a progressive student reading *Vokes* may not be a problem that reforms of Common Law doctrine, or even consumer protective legislation that nullifies overlong or otherwise imprudent contractual commitments, can hope to solve. What the case might reveal is that the most basic premises of regimes extolling institutions that respond to our diverse array of self-interested wants are significantly inapplicable to women (and may be inapplicable to men as well in certain circumstances.) This may be true whether self-interest is manifest, as in this case, in market transactions or is manifest in voting for candidates who will reflect one's self-interested policy preferences. The basic market-affirming picture that even progressive students find so familiar and easily explicated that it provides some measure of comfort is that each of us seeks to meet our own subjective idiosyncratic ends. When we exchange, we believe that what we receive from our trading partner is more valuable to us — serves our selfish interests better — than whatever we have given up that induces our trading party to give whatever she gave. Again, most progressive students learn quickly and readily to recognize and emphasize barriers to effective self-seeking: they are more prone than centrist and conservative classmates to emphasize both external impediments the self-seeker will face (inadequate information,[39] an unduly restricted

that the paternalist is superior in judgment to the party he seeks to protect), see Nicolas Cornell, *A Third Theory of Paternalism*, 113 MICH. L. REV. 1295, 1325-32 (2015).

[39] The more reflective progressive student confronting the problem of uninformed decision makers will still need to think critically about how to respond to uninformed choice: The mainstream centrist answer is to increase disclosure duties, but there are a vast array of reasons to be suspicious of the efficacy of even those mandated disclosures that consumers actually read or listen to, and there is a good deal of evidence they do not read or listen to many. See generally Willis, *supra* note 19 for a clear summary of arguments skeptical of the efficacy of disclosure of mortgage loan terms. For summaries of the literature finding that people do not read form contracts more generally can be found in, see generally Margaret Jane Radin, *Commentary, Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223 (2006). Humorous illustrations of this problem abound. For instance, ninety-eight percent of experimental subjects agreed to give up their first born in exchange for access to a fictitious social network when the term was embedded in a lengthy terms of service agreement. *See* Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the*

range of options[40]) and internal ones (the range of barriers to utilizing information efficaciously that behavioral economists have emphasized, barriers that lead consumers to misestimate product risk or to evaluate product differently depending on the ways in which the product's purveyor frames the choices available to the consumer.[41]) But what they do not typically do is reflect adequately on the degree to which women are (to a considerable, significant extent) not self-seeking at all in the ways that rational choice theory posits.[42]

In the eyes of some "outsider" progressive feminist scholars, our male-centric jurisprudence can face the possibility of *badly performed* choice (inadequately informed, imprudent). But what we should see when we read *Vokes* is how much trouble the judge has effacing the individual more entirely, imagining someone who does not even try to

Privacy Policies and Terms of Service Policies of Social Networking Services, 23 INFO. COMMC'N & SOC'Y 128, 143 (2020).

[40] Compare, for example, the (mildly progressive) dissent in *O'Callaghan v. Walker & Beckwith Realty. Co.*, 15 Ill. 2d 436, 441-50, (1958) (Bristow, J. & Daily, C.J, dissenting) with the case's majority opinion, *id.* at 437-41. The dissenters (quite typically for more progressive observers) emphasize that renters may sign liability waivers because they have no real choice given the general housing shortage. *Id.* at 442 ("We are construing, instead, a [waiver] provision affecting thousands of tenants now bound by such provisions, which were foisted upon them at a time when it would be pure fiction to state that they had anything but a Hobson's choice in the matter." (alteration in original)). The majority emphasizes that the housing market is a many-seller, seemingly competitive one, rather than a monopoly. *Id.* at 440 ("The relationship of landlord and tenant does not have the monopolistic characteristics that have characterized some other relations with respect to which exculpatory clauses have been invalid.").

[41] For a far fuller discussion, with citations to the primary literature, of the barriers to self-interested choice that behavioral economists highlight, largely grounded in the work of psychologists associated with the "heuristics and biases" school, see MARK KELMAN, THE HEURISTICS DEBATE 19-31, 152-54, 159-64 (2011).

[42] I emphasize in this Article only the perils of "selflessness," but it is important to realize that the pioneering generation of feminist legal scholars also focused on the positive side of selflessness. West, for instance, posits that women display not merely self-destructive selflessness but a more Utopian, welcome blurring of the self-other distinction. *See* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 14-19 (1988). In the same vein, West observes that the fear of power inequality, and the concomitant need to control it, characterizes much of our male-dominated mainstream law because men experience that those who have more power than others have will exploit that power. *Id.* at 27. But women, she notes, have a great deal more power than the infants and children that they care for rather than exploit. *Id.*

calculate something like self-interest. The feminist scholar Robin West's "giving self"[43] is not just diffusely "coerced" — rather than face the misery of innumerable acts of sexual expropriation, she "assents" to sexual self-display and sexual contact that she (knows at some almost inaccessible level that she?) doesn't really want — she loses the capacity to concretize a set of desires of her own.[44]

The "selflessness" that West describes in *Hedonic Lives* and the "selflessness" that the canonical dominance feminist scholar Catherine MacKinnon posits are fundamentally similar.[45] MacKinnon helps her readers appreciate the difference between viewing powerlessness in terms of the inability to get what one wants and viewing powerlessness in terms of having expressed wants that are not truly self-regarding. Gender socialization — the creation of women-the-gender that occurs through repeated exposure to rape, harassment, incest, and pornography — culminates in a profoundly thinned out self. "What defines women as such is what turns men on. . . . Gender socialization is the process through which women come to identify themselves as sexual beings, as beings that exist for men."[46] Women are not just precluded from acting on desires to perform their gender in their own way, their desires are distorted. Gender socialization produces a disturbing selflessness far more often than it disciplines would-be outlaws. It works best by nipping the will to rebel by performing gender differently in the bud.

---

[43] Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L. J. 149, 165 (2000).

[44] "[A] woman will define herself as a 'giving self' so she will not be violated. She defined herself as a being who 'gives' sex, so that she will not become a being *from whom sex is taken*. . . . [S]he becomes a person who gives her consent *to ensure the other's happiness* (not her own), so as to satiate the *other's* desires (not her own), so as to promote *other's* well-being (not her own), and ultimately so as to *obey the other's commands*. In other words, she embraces a self-definition and a motive for acting which is the direct antithesis of the internal motivational life presupposed by liberalism. The motivation of her consensual acts is the satisfaction of another's desires. She consents to serve the needs and satiate the desires of others." *Id.* at 165.

[45] *See* Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN IN CULTURE & SOC'Y 515, 551 (1982).

[46] *Id.* at 531.

In this view, what we should get out of reading *Vokes* is a clearer understanding of why she needed *as a widow*, a woman without a man to please, to regain "*interest in life*." We should reflect on why it was so important for her to believe that she was still capable of playing a woman's enforced social role, as someone who could elicit desire from men, by being invited to a *party* and being told *by a man* who, even if not overtly flirtatious, flattered her physical grace in the same way that someone who was being overtly flirtatious might well approach her. Her vulnerability, in this view, comes from her fear that she is nothing if she is unattractive to men, and she will make otherwise incomprehensibly bizarre financial decisions to cling to the hope that she has remained so, and can remain so.

There is no ready "fix" for the progressive student who recognizes the ways in which women's extreme self-effacement serves as a defining aspect of their subordination. It might well motivate an even more urgent concern with the sexual violence that might well trigger it, and it may make us less prone to give full normative credit to some of what appear to be male-pleasing preferences women express (or at least the choices they accede or acquiesce to.) It might also lead these students to question the general supposition that we can take for granted that people seek meaningful autonomy or self-advancement when they are permitted to manifest their preferences. West, for instance, was interested not just in criticizing the idea that women who were "giving selves" chose to act in their own interest but the idea that those who seek the approval of authorities (or Authority) are legitimately thought of as genuinely self-interested.[47]

[47] See Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 384-87, 390-91(1986). West focuses especially on the degree to which characters in Kafka's fictional world do not flourish by getting what they choose or seek to meet their own interests; instead, they blindly obey and seek the approval of authority. *Id.* at 387 ("Kafka's world, by contrast [with the rational choice world imagined by Posner], is peopled by excessively authoritarian personalities. Kafka's characters usually do what they do — go to work in the morning, become lovers, commit crimes, obey laws, or whatever — not because they believe that by doing so they will improve their own well-being, but because they have been told to do so and crave being told to do so. Whereas Posner's characters relentlessly pursue autonomy and personal well-being, Kafka's characters just as relentlessly desire, need, and ultimately seek out authority. The disjunction

CONCLUSION

A progressive law student reading the *Vokes* case ought to consider the doctrinal choices the deciding judge made; consider whether (as CLS scholars would have it) the judge suppressed the degree to which we might directly acknowledge the legal (as well as ethical) responsibility that a party might have to attend to the welfare of others (including their trading partners); consider whether and why increased protectiveness towards vulnerable women will help or hurt women generally, and reflect on the degree to which we cannot understand the problems that Vokes faced without understanding that she might not seek any truly self-regarding ends but simply identify herself as someone whose only role is to elicit something like sexual desire in men.

What, though, might a progressive *lawyer* do if confronted with a case like this, or more powerfully, a sufficient number of cases like this that she perceives that she needs to figure out how to respond to what would best be thought of as a social, rather than idiosyncratic, problem? I suspect the range of responses should be similar to those that *students* should contemplate. If she is representing an individual, she would feel obliged (not only by formal ethical canons demanding zealous advocacy but likely by personal connection to someone who seems to have been harmed by unjust treatment) to muster the most persuasive doctrinal arguments she could to vindicate her client's expressed interests while simultaneously helping the client clarify what those interests might be.[48] She might, especially if working for an organization representing clients with similar articulated ends or common concerns, consider whether it

between a system that formally and outwardly insists upon the legitimating function of consent and a human personality that inwardly and persistently seeks the security of authority accounts for much of the alienation in the lives of Kafka's characters." (alteration in original)).

[48] For the canonical piece arguing that it is not troublingly paternalistic, but ethically obligatory, to recognize that clients do not have simple unambivalent wants which one is obliged simply to represent but rather that one must often push back, without the false pretense that one is neutral as to their purposes, in part in the hopes that clients will examine their complex perceptions of their self-interest, see William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 36, 41, 52-59, 108, 115-17, 132-35, 139 (1978). Simon argues that lawyers often duck the responsibility to ascertain clients' ends by unself-consciously attributing to them stock, materially self-aggrandizing ends whether they have them or not. *Id.* at 53-54.

would be efficacious to seek class action relief on the one hand or instead organize and lobby for legislative change. The lawyer might recognize that she could not articulate the CLS arguments directly in debating doctrine or advocating legislation but might believe that understanding the extent to which legal practice has resisted the rules and practices most adverse to her cause might guide her framing of the arguments that she would invoke. To the extent that she is considering pushing in the direction of a regime that is more protective of clients based on their purported vulnerability, she will carefully consider the costs as well as the benefits of protectiveness. And she may come to understand the women she represents in a somewhat different way at the same time as her commitments outside the narrowest version of her practice role to bolstering institutions that counter the temptation to self-abnegate (e.g., regimes that successfully counter sexual harassment at schools and workplaces).