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Recommended Citation
Teaching Gender as a Core Value: The Softer Side of Criminal Law, 36 Okla. City U. L. Rev. 525 (2011)
TEACHING GENDER AS A CORE VALUE:
THE SOFTER SIDE OF CRIMINAL LAW

Melissa Murray*

This is my fifth year teaching family law and criminal law at the University of California, Berkeley. In many ways, incorporating issues of gender into the traditional family-law curriculum is a no-brainer. From Bradwell v. Illinois to more recent cases like In re Baby M, the family-law canon is replete with examples of how gender shapes the construction and application of law in the familial context. In criminal law, however, it is more difficult to ventilate issues that speak to the salience of gender. Part of this is no doubt due to the fact that although the demographics of crime and law enforcement are changing, criminal law—as presented in the leading casebooks—is populated largely by men.

Like most criminal law courses, my course begins by examining the various justifications for punishment— theories developed by men like Jeremy Bentham and Immanuel Kant. Even thinking about the nature and scope of punishment is a male enterprise. Of the 2.3 million people incarcerated in the United States in 2007, most were men (and, more precisely, African-American and Latino men). Most of the individuals

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4. LAFAVE, supra note 3, § 1.5(a)–(b), at 26–33; DRESSLER, supra note 3, at 34–37, 40–41.
employed in the corrections system and street-level law enforcement are men.\textsuperscript{6}

The upshot of all of this is that men predominate in most criminal law casebooks—either as defendants, lawyers, or officials acting on behalf of the state. In the criminal law, women are notable in their victimhood. Indeed, if they are presented as offenders, it is usually in circumstances where their offender status is complicated by issues of victimhood—\textit{State v. Norman},\textsuperscript{7} a case involving a wife’s murder of her abusive husband, is illustrative.

As a professor in a law school where female students are the majority of the student body, I believe it is important to challenge criminal law’s entrenched assumptions about men as offenders and enforcers and women as cowed and silent victims. Perhaps paradoxically, one place where I seek to challenge the criminal law orthodoxy is in my discussions of rape.

I do this in a number of ways. First, I believe that part of teaching gender as a core value means making clear that, historically and modernly, the criminal law has not treated all women equally. To this end, my discussion of rape begins by noting how rape laws have been used to police the perceived threat to white womanhood posed by African-American male sexuality. I usually assign material from Glenda Gilmore’s \textit{Gender and Jim Crow: Women and the Politics of White Supremacy in North Carolina, 1896–1920},\textsuperscript{8} along with newspaper articles discussing the 1930s Scottsboro Boys’ trial.\textsuperscript{9} Alex Heard’s recent book \textit{The Eyes of Willie McGee} also complicates the traditional rape narrative with its discussion of a 1950s rape case in which an African-American man was sentenced to death for the alleged rape of a married white woman.\textsuperscript{10} The book notes the many rumors that

\textsuperscript{7} State v. Norman, 378 S.E.2d 8 (N.C. 1989).
\textsuperscript{9} See, e.g., C. Vann Woodward, Scottsboro: A Tragedy of the American South, N.Y. Times, Mar. 9, 1969, § 7, at 5 (reviewing Dan T. Carter, Scottsboro: A Tragedy of the American South (1969)); Obituary, Ruby Schut, 63, Is Dead; Said She Was Involved in ‘Scottsboro Boys’ Case, N.Y. Times, Oct. 29, 1976, at B16 (discussing the life of one of the women who accused the Scottsboro Boys of rape and later recanted her claims).
\textsuperscript{10} Alex Heard, The Eyes of Willie McGee: A Tragedy of Race, Sex, and Secrets in the Jim Crow South (2010).
surrounded the case, including a rumor that McGee and his victim were actually clandestine lovers and the victim's rape allegation was intended to obscure her own complicity in adultery and interracial fornication.\textsuperscript{11}

From this perspective, it is easier for students to see how women of color have been affected by the construction and application of rape laws. To continue excavating these issues, I assign a series of interesting supplementary texts, including Jennifer Wriggins' \textit{Rape, Racism, and the Law}\textsuperscript{12} and Annette Gordon Reed's \textit{Celia's Case}, which chronicles the trial of a slave woman for the murder of her master (who was also the father of her children).\textsuperscript{13} Also useful for this purpose is Rebecca Hall and Angela Harris's fantastic account of \textit{United States v. Cruikshank}.\textsuperscript{14} Often discussed in constitutional law, \textit{Cruikshank} involved a constitutional challenge to the convictions of white militiamen charged with killing over one hundred Republican freedmen in the Memphis Riots of 1866.\textsuperscript{15} Most discussions of the case focus on the politics of Reconstruction and the Court's holding limiting the application of the Fourteenth Amendment to state actors.\textsuperscript{16} Harris and Hall, however, offer an illuminating look at how racialized gender also factored into the riots and the disposition of the case.\textsuperscript{17} As they make clear, the victims of the riots were not solely the freed \textit{men} of color who were perceived as a political threat to the Democratic militiamen, but also the freed \textit{women} of color who were violently raped and/or killed during the riots.\textsuperscript{18}

Having established how notions of racialized gender pervade the history of rape law, I then turn to the traditional rape canon—\textit{State v. Alston},\textsuperscript{19} \textit{State v. Rusk},\textsuperscript{20} etc.—and the feminist-inspired legal reforms of traditional rape law. I typically ask my students if they agree with the feminist reforms of rape law. By and large, most say that they do. The

\begin{itemize}
  \item \textsuperscript{11} \textit{Id.}
  \item \textsuperscript{14} Rebecca Hall \& Angela P. Harris, \textit{Hidden Histories, Racialized Gender, and the Legacy of Reconstruction: The Story of United States v. Cruikshank}, in \textit{WOMEN AND THE LAW STORIES} (Elizabeth M. Schneider \& Stephanie M. Wildman eds., 2011).
  \item \textsuperscript{15} United States v. Cruikshank, 92 U.S. 542 (1875).
  \item \textsuperscript{16} \textit{Id.} at 554.
  \item \textsuperscript{17} Hall \& Harris, \textit{supra} note 14, at 23.
  \item \textsuperscript{18} \textit{Id.} at 25–26.
  \item \textsuperscript{19} State v. Alston, 312 S.E.2d 470 (N.C. 1984).
  \item \textsuperscript{20} State v. Rusk, 424 A.2d 720 (Md. 1981).
\end{itemize}
reforms, they tell me, level the playing field for women victims by eliminating the resistance requirement and taking seriously the idea that “no means no.”

I credit these responses but challenge the students to think about whether these reforms offer women greater agency or further embed the idea of women as victims. That is, do the reforms embrace essential truths about the reality of rape, or do they simply exacerbate a legal paternalism that diminishes women’s sexual autonomy while emphasizing their victimhood? To underscore my point, I ask my students to consider whether men can be raped. Many of them agree that, as a practical matter, men can be raped. However, most are hard-pressed to identify a case or news item discussing a male victim of sexual assault outside of the carceral context. I then show them clips from the movie Deliverance, in which Ned Beatty’s character is brutally raped by two other men.\footnote{21} I also remind them of the tragic case of Abner Louima who was forcibly sodomized with a broom handle by a New York City police officer.\footnote{22} Aren’t these examples of male rape victims? Why don’t these examples immediately come to mind when we think of rape?

Empirical evidence suggests that men are the victims of sexual assault—in and outside of prison.\footnote{23} Yet in both casebooks and broader discussions of rape, men are infrequently (if at all) featured as victims of sexual assault. I challenge my students to think about what this tells us about the law of rape and our public-policy responses to it.

As part of this effort, I point my students to State v. Gounagias.\footnote{24} (I cannot take full credit for incorporating Gounagias into my syllabus—the idea was inspired by Bennett Capers’s important article Real Rape, Too,\footnote{25} which considers the invisibility of male rape in the criminal law.) The facts of Gounagias are well known to most criminal law instructors: While celebrating Greek Easter with a friend, Gounagias became so inebriated that he lost consciousness.\footnote{26} According to the opinion, while Gounagias was unconscious, his friend “committed upon him the

\footnotesize{\begin{itemize}
\item \footnote{21. Deliverance (Warner Bros. 1972).}
\item \footnote{22. David Kocieniewski, Injured Man Says Brooklyn Officers Tortured Him in Custody, N.Y. TIMES, Aug. 13, 1997, at B1.}
\item \footnote{23. See Dressler, supra note 3, at 378.}
\item \footnote{24. State v. Gounagias, 153 P. at 9 (Wash. 1915).}
\item \footnote{25. I. Bennett Capers, Real Rape Too, 99 Calif. L. Rev. 1259, 1290–91 (2011).}
\item \footnote{26. Gounagias, 153 P. at 10.}
\end{itemize}}
unmentionable crime”—sodomy. For three weeks thereafter, Gounagias was the subject of “laughing remarks and suggestive gestures” from other friends and community members. After three weeks, Gounagias armed himself, located his friend, and killed him.

In most criminal law casebooks, Gounagias is used to explain the limits of the provocation defense, which traditionally is deployed to mitigate murder to voluntary manslaughter where the offender acts in the heat of passion. Accordingly, the central issue in Gounagias, as it is presented in the casebooks, is whether Gounagias’s murderous actions occurred in the heat of passion or whether he had an opportunity to cool off. What goes unmentioned is that regardless of whether Gounagias killed his friend in the heat of passion, three weeks earlier, he was raped.

I assign Gounagias as part of the materials on rape rather than in the section on the provocation defense, and I ask my students to think about why the sexual assault aspect of the case has been so obscured, even as it hides in plain sight. This move helps my students to think about the way in which rape is considered a paradigmatic crime against women, and in so doing, challenges a particular understanding of masculine identity that often is manifested in criminal law. These conversations help to illuminate the gendered nature of rape and prompt reflection about the broader issues of gender and status in the criminal law as a whole.

27. Id.
28. Id.
29. Id.
30. See LAFAVE, supra note 3, at 829–31; DRESSLER, supra note 3, at 262–63.
31. LAFAVE, supra note 3, at 829–31; DRESSLER, supra note 3, at 262–63; Gounagias, 153 P. at 12.