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**CRIMINAL LAW, MORAL THEORY, AND FEMINISM: SOME
REFLECTIONS ON THE SUBJECT AND ON THE FUN (AND VALUE)
OF COURTING CONTROVERSY**

JOSHUA DRESSLER*

I am going to be a bit unfair. The *Saint Louis University Law Journal's* invitation to me to participate in this issue allows me the luxury of satisfying two goals. The first is to take the opportunity, simply, to reflect (reminisce?) on slightly more than a quarter-century of teaching Criminal Law. I love the subject and hope most professors of the course feel as I do, but most of all I hope my excitement for the subject, unabated after twenty-seven years, will spread to others, especially to young professors who by choice or decanal edict find themselves now or in the future teaching Criminal Law for the first time.¹

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1. I have taught criminal procedure courses during the same period, and love them as well. As I note in Part I *infra*, however, students are more easily attracted to criminal procedure than to its substantive cousin, and I have found during the years that many young professors who are inclined to teach in the criminal field have the same preference. They ask to teach Criminal Procedure but sometimes have to be assigned to Criminal Law. That bias is breaking down, in part I suspect because the constitutional law aspects of criminal procedure seem less exciting now than during the heady days of the Warren Court (and even in the post-Warren Court 1970s and early 1980s), and because a great deal is percolating through the substantive area as a result of challenges to the status quo brought by feminists and adherents of other critical intellectual movements.

There are other events that make substantive criminal law potentially more interesting to academics than in the past. For example, the American Law Institute's recent decision to develop new sentencing provisions of the Model Penal Code (*see* AM. LAW INST., MODEL PENAL CODE: SENTENCING REPORT (2003)) has prompted interest in, and debate regarding, the creation of a Model Penal Code Second, which could reshape the criminal law. *See, e.g.,* Symposium, *Model Penal Code Second: Good or Bad Idea?*, 1 OHIO ST. J. CRIM. LAW 155, 155-244 (2003).

Also, lest I be misunderstood, I don't consider substance and procedure dichotomous fields, even if the classes we teach sometimes give that impression. For example, what is the subject of sentencing: substance or procedure? Of course, it is both. And nobody can truly appreciate the significance (and weaknesses) of the constitutional cases relating to the "procedural" issue of "burden of proof, without understanding "substantive" criminal law, the definitions of specific offenses, and the meaning of the concept of crime." *E.g.,* *Patterson v. New York*, 432 U.S. 197 (1977) (determining when a state may constitutionally allocate to the defendant the burden of persuasion regarding an issue properly before the fact-finder); *Mullaney*

My second goal (closer to the *Law Journal's* wishes) is to describe the three Criminal Law classes (or, more accurately, topics) I most enjoy teaching and, in the process, offer a few hopefully useful pedagogical suggestions. When I pondered this aspect of the essay and made my subject matter choices, I noticed certain commonalities: (1) two of the topics allow me to sensitize my students to moral theories of criminal responsibility and punishment, and to show even the most pragmatic of my students why they should care about these theories;² (2) they are all hot-button topics that regularly get students excited and agitated; (3) relatedly, all three topics involve feminist challenges to prevailing (or once prevailing) law, and (4) although I am sympathetic to many feminist goals, I disagree in part with feminist critiques in these areas and I enjoy expressing those doubts in class.

In short, the topics I most like covering are those that invite students to become agitated, to become passionate, and to “get it on” with me. On reflection, I guess my preference for stirring things up should not surprise me. I will not bore you with my background, at least not in the text of this essay.³

v. Wilbur, 421 U.S. 684 (1975) (same). Moreover, changes in “procedural” rules inevitably affect “substance” and vice-versa. If a legislature may not criminalize vagrancy, *see* Papachristou v. Jacksonville, 405 U.S. 156 (1972), declaring a vagrancy ordinance violative of the due process clause, you can expect that the police will be given greater authority to detain persons short of arrest to accomplish the same result. *See* Terry v. Ohio, 392 U.S. 1 (1968) (authorizing brief detentions of persons when officers reasonably suspect that crime is afoot, even when there are insufficient grounds for arrest).

2. I vividly remember the day a student came up just before class and asked me, contemptuously, why I was wasting his time discussing moral theories relating to concepts of justification and excuse. Despite my consternation (is that a great way to start class, or what?), I tried to give him a brief explanation. He stopped me midstream, did an abrupt about-face to return to his seat (at least he didn't walk out), and expressed under his breath (but I assume also for my edification), “If I wanted a philosophy class, I would have gone for my Ph.D.” By the way, that remark came from a student at an elite (supposed Top Ten) law school. Although my experience suggests that the stereotype is generally true—the more elite the law school, the more willing or even anxious students are to discuss theory—I have also learned that narrow-minded students are found at all law schools, and that students anxious to broaden their horizons are also found everywhere.

3. If your eyes dropped to this footnote, I can bore you (briefly) here. My parents were fellow travelers of fellow travelers of the Left during the Depression, my criminologist father earned the wrath of J. Edgar Hoover in the 1950s (I am not quite sure why) and was a vocal advocate of prison reform in the 1960s (not insignificant because he had been Chief of Parole for the State of New York in an earlier period), and all of this rubbed off on me. I resolutely (but quietly) refused to salute the flag in my junior and senior high school classes, and I was a Conscientious Objector during the Vietnam War. But, even during this period, I was uncomfortable with the intellectual rigidity of many of my New Left colleagues, and my tolerance for rigidity has grown thinner as I have grown older (and, uh, less thin). Indeed, I am never more pleased than when one of my seminar students tells me that her views on a criminal law topic have changed 180 degrees (and, I really don't care which direction that puts her) as a result of researching and thinking about her paper topic. My views on criminal law issues, too, have

It is enough to say here that what makes teaching Criminal Law so much fun for me, and I am sure for so many other veterans in the classroom, is the chance to get students immersed in thinking about—and, hopefully, tackling on a more-than-shallow level—some of the most provocative issues they will confront in law school, while simultaneously learning some law.

I will keep my personal thoughts about Criminal Law (Part I) relatively brief. In Part II, I provide an overview to my teaching strategy in my Criminal Law class. I then describe my favorite classes (Parts III through V) and, in the process, hopefully provide some useful pedagogical advice.

I. REMINISCING, ADVISING, AND A LITTLE CHEERLEADING

I have taught Criminal Law in twenty-six of my twenty-seven years of full-time teaching at nine law schools (either as a visitor or tenure-track professor) in five states and one Canadian province.⁴ In some schools, Criminal Law has been a first-semester first-year class, in others a second-semester first-year course.⁵ In most schools I taught a three-credit version of the subject; in a few I have had the “luxury” of four credits. I suppose like most 1L professors, I prefer teaching students in their first semester, when they are most excited and

changed during the years, sometimes requiring me to concede error (or, at least, change of heart) in subsequent scholarship. See, e.g., Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1361 n.175 (1989); Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 962 (2002) [hereinafter Dressler, *Why Keep the Provocation Defense?*].

4. I have taught Criminal Law in California (McGeorge School of Law, University of the Pacific, and two University of California branches [Berkeley and Los Angeles]), Minnesota (Hamline University), Michigan (Wayne State University and the University of Michigan), and Ohio (Ohio State University). I have taught other criminal-related classes at University of California, Davis, University of Iowa, and University of British Columbia (as part of a summer program run by Southwestern University).

5. Which semester is better? From a curricular perspective, I think the case for teaching Criminal Law in the fall is strong. First, it is valuable for students to take a public law course at the start of their law school career, especially because they are otherwise inundated with private law subjects in the traditional first-year curriculum. Second, for students who are already oriented toward public law when they enter, Criminal Law gives them a tid-bit early on, while their excitement with law school is likely to be at its zenith. Third, Criminal Law might be the best first-year substantive class for teaching students statutory analysis (through the use all semester of the Model Penal Code found in almost every criminal law casebook, or with supplementary materials linked to some actual state criminal code) along with the common-law materials they will learn in all of their 1L courses. Fourth, probably better than any other first-year course (except where Jurisprudence might be taught in the 1L curriculum), Criminal Law familiarizes students with broad jurisprudential issues that any educated lawyer will confront in her career. Finally, the fact patterns are usually (and, perhaps unfortunately) within the common experience of most students or, at least, are familiar to them through the media and other cultural venues.

idealistic,⁶ although I am always struck by how much slower I must proceed, and thus how much less I can cover, during the fall semester because of student inexperience with the case method of learning.⁷

As a student at the University of California-Los Angeles, I learned Criminal Law with the Kadish and Paulsen casebook, so I began teaching my class as well with the Kadish and Schulhofer casebook.⁸ I think most professors would agree that it is the classic in the field. Few casebooks influence the way lawyers or scholars think about a subject, but this book qualifies in that regard.⁹ I enjoyed teaching from it, but I found from student evaluation forms that students were less happy with it than I was. In 1992 or 1993, I began teaching in part from my own materials, and in 1994 those materials became my own casebook.¹⁰ Although I no longer teach from

6. I find student morale—and, thus, class participation—erodes appreciably in the second semester, when grades from the fall semester are distributed and the ninety percent of the class that expected to be in the top ten percent, but are not, rethink their position. And, of course, a certain level of fatigue sets in for everyone in the second semester, regardless of class rank. It is as if the intellectual adrenaline tank is now at one-quarter level, and students are pacing themselves, as they know they must be mentally prepared for final exams. Also, at least in my experience, it seems that law schools often give 1L students a heavier load in their second semester—an extra unit or two, or more time-consuming work in legal writing than they had in their first semester. This factor alone cuts into student time for class preparation and energy.

7. In my teaching experience, the four-unit version of Criminal Law has always been a fall semester phenomenon. I cover only slightly more material in those four units in the fall than I can cover in three units in the spring, all else equal. Needless to say, a three-unit fall class allows a teacher very little opportunity to give her students either the breadth or depth of coverage she desires or requires.

8. The first edition of the casebook, *Criminal Law and Its Processes*, published in 1962, actually was the Paulsen and Kadish casebook, with then co-author Monrad G. Paulsen listed first. The names were reversed for the second edition, by the time I took Criminal Law in 1970. Upon Professor Paulsen's death, Professor Stephen J. Schulhofer joined the casebook on the fourth edition in 1983. It is now in its seventh excellent edition, published in 2001.

9. Perhaps (as my colleague Kate Federle suggests) the following point deserves more than a footnote: It is not simply, or even primarily, casebooks that shape the way lawyers and scholars think about the law; it is the classroom professor who is the greatest influence. By our selection of casebooks, by our decisions on what cases to cover and which ones to omit, and most of all by the particular ways in which we ask our students to think about the cases, we are shaping our students' thought processes and, whether by choice or not, their ideas about the law.

This is not to say that our students arrive in a tabula rasa state. Far from it. And, in any intellectually diverse classroom, these students' ideas and prior experiences will also help shape the learning process. Nonetheless, the teacher directs the classroom discourse, brings her or his expertise to the conversations, and, simply by these facts alone, has a disproportionate influence on students' thinking about the more subtle aspects of the law. That is why teaching—in law school, yes, but even more so in the elementary, secondary, and undergraduate phases—is such an exhilarating—and yet hopefully humbling—experience.

10. JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* (1994). The casebook is now in its third edition.

Kadish and Schulhofer, as my casebook preface indicates, I am indebted to their book.¹¹

Students at every law school at which I have taught have found Criminal Procedure—specifically the police practices version of the course—their favorite criminal justice course (and, often, their favorite class in law school generally). Most students come into *that* class ready to enjoy it—after all, it is cops and robbers, *NYPD Blue*, and *Law and Order* for three units. I have found that most students do *not* come into Criminal Law with this same positive attitude.¹² And yet, it is *this* course that I most love to teach.

I am irked that many law faculties have historically treated Criminal Law with relatively little respect. In the not-too-distant past, Torts, Contracts, Civil Procedure, and even Property were accorded five or six first-year credits while Criminal Law, if a first-year class at all, received three units. What does this tell new students? Seemingly the message is that these other subjects are twice as important (and what does this say about the public versus private law dichotomy?), or that they are twice as difficult,¹³ or perhaps that there is twice as much law to learn in those subjects. Of course, none of this is true, but the fact remains that criminal law historically has been viewed as the “grubby” area of the law that true “gentlemen” did not aspire to practice. And yet, it is Criminal Law that probably best teaches 1Ls the critically important skill of statutory analysis, and I don’t think there is a better basic substantive course for familiarizing students with political, moral, and legal theory.¹⁴

11. *Id.* at ix (“With the publication of my own casebook comes my professional *bar mitzvah*, but I can think of no higher accolade than if someone were to say of this book, ‘Why, it is a son-of-Kadish (and Schulhofer).’”).

12. This attitude is not peculiar to my experience, nor is it just a recent phenomenon. *See* Sanford H. Kadish, *Why Substantive Criminal Law—A Dialogue*, Address at the Eighteenth Cleveland-Marshall Fund Visiting Scholar Lecture (May 13, 1980), in 29 CLEV. ST. L. REV. 1 (1980) (responding, through fictional dialogue, to criticisms of the course and subject matter expressed by students to the author over many years).

My colleague Larry Herman suggests another reason for students’ (and his own) preference for Criminal Procedure. At least as to the police practice version of the class, it primarily involves a single system (federal constitutional restraints) over which a single court (United States Supreme Court) ultimately presides. As Larry has put it to me, “it is fun to observe and analyze the progression (or retrogression) of cases. By contrast Criminal Law is unwieldy—one case from California, another from Pennsylvania, a third from New York.”

13. I remember a comment from a former colleague of mine—a former civil practitioner—unfortunately made only partly in jest: “You don’t even need three units. Just tell your students that they are lucky that states now have a penal code, and point them to it. What is so difficult to understand about the criminal law?” I told my colleague, not in jest, that I hoped nobody would ever ask him to teach Criminal Law or, worse, come to him needing advice on a criminal law matter. As he was a tenured member of the faculty, and I was not at the time, I smiled as I said it. Inside, I was steaming.

14. *See supra* note 5.

The curricular bias against Criminal Law persists today, although less so than when I started teaching. A substantial minority of law schools now allocates four credits for the course. I suppose I should not incite rebellion, but I urge those of you required to teach Criminal Law in a three-unit version to try to raise your faculty's openness to the idea of adding one unit to the course.¹⁵

As I say, many of my Criminal Law students do not come to the class expecting to be excited, even though (or is it because?) it involves the rawest material—for example, cannibalism,¹⁶ euthanasia,¹⁷ rape, tragic abuse of

15. As any veteran of the curricular wars knows, it is extremely difficult to make changes in the first-year law school curriculum. Adding one unit to one subject will usually require taking away a credit from another subject, and my experience is that it is a rare professor willing to say that her subject should be the one sacrificed. Thus, changes of the sort I am suggesting typically occur as part of broader first-year curricular reform, perhaps by removal of credits from *all* of the other first-year classes, the addition of a fourth unit to Criminal Law, and the inclusion of another class (for example, a course in professional ethics, statutory interpretation, or jurisprudence) in the first-year menu.

As hard as the process of getting a four-credit Criminal Law class might be, it is not insurmountable, as evidenced by the trend toward four credits. If you are inclined to make the effort, I have a few suggestions. First, of course, get together with the other criminal law professors to be sure you are (or can come to be) on the same wavelength. If you folks don't agree, you can hardly expect support from the faculty.

Second, develop the arguments for the additional unit that seem most persuasive given your law school's situation. One law school I know had an historically strong "private law" bias that newer faculty, including a fair number of non-criminal law professors and the dean, wanted to reverse. Thus, the public law versus private law argument had the potential to convince some persons, even some 1L professors "negatively" affected, to support change. Another law school might find arguments based on the job market—job availability in the criminal law area—to support more emphasis on criminal law classes. And so on.

Third, don't just come to the appropriate academic committee requesting an additional unit. Provide some alternative models of how this change can be fit into the 1L schedule. Can the extra unit be added without taking away from others, or will this extra credit put too much of a load on your students? If the unit added requires a unit taken away, how will you handle this problem? Perhaps you know that there are some 1L professors who have agitated for other types of first-year reform, who could join you in support of the additional unit because it would be part of some larger reform.

Warning: If prior experience is any indication, if you succeed in getting the extra unit, Criminal Law will be placed (if it was not already there) in the fall semester. As I have mentioned, *see supra* note 7, a four-unit fall version of Criminal Law provides only minimal space for additional coverage, if you are currently teaching the three-unit version in the spring. I still think the change is worth the effort because you get students with a more positive attitude to learning, you do get to cover a little more material (or go deeper into the same material), and your law school will be sending a valuable message about the importance of the subject and public law generally. (Of course, if you currently teach Criminal Law as a three-unit *fall* class, the added unit will be a true blessing.)

16. *The Queen v. Dudley and Stephens*, 14 Q.B.D. 273 (1884).

17. *People v. Kevorkian*, 639 N.W.2d 291 (Mich. Ct. App. 2001).

children,¹⁸ and the like—they will read in their law school careers. But, as I tell my students on the first day, what is so special about Criminal Law is not simply that it involves, literally, life-and-death issues, but that it is a course where they will have the opportunity to reflect on the truly Big Questions—the questions that not only lawyers, but also theologians, poets, geneticists, social scientists, and just plain folk, have been contemplating for centuries. It is Criminal Law, after all, where students consider issues of right and wrong, as well as matters of personal and social responsibility for wrongful conduct. It is Criminal Law that asks such questions as: What types of conduct merit enforcement through the criminal law? When is the infliction of pain through punishment justifiable? When is it just to hold a person legally accountable for the actions of another? When is intentionally taking human life proper, or at least tolerable, and why? When should people be free from moral censure for concededly wrongful conduct? At what point is it proper for society to intervene and punish for inchoate conduct? Free will versus determinism. Feminism versus multiculturalism. Retributivism versus utilitarianism. Rawls versus Hobbes. And so on, and on and on. So many old and contemporary conflicts.

This is a *great* subject! I feel blessed that I have been able to teach it for so many years. For those of you who are at the early stages of your Criminal Law journey, treasure the opportunity.

II. MY CLASS GOALS

Students sometimes complain that I try to do too much in my Criminal Law class. If you glance at the preface to the first edition of my casebook, you will see the basis for their complaints. I state there what I think matters: doctrine, penal theory, appreciating the relevance of other disciplines in formulating sensible criminal laws, statutory analysis, and “thoughtful, wide-

18. As an author looking for pedagogically useful cases to include in a casebook, I have read more child abuse (and child homicide) cases than I ever expected or wanted to. Those were the cases that I found emotionally hardest to stomach; some of the cases I read brought me to tears, and I omitted the use of some otherwise pedagogically useful child abuse cases because the facts left me up at night. Nonetheless, some such cases made it into my casebook. *E.g.*, *Oxendine v. State*, 528 A.2d 870 (Del. 1987) (in which the court reports that the homicide victim, a six-year-old boy, was heard by a neighbor crying, “Please stop, Daddy, it hurts”). I continue to receive unsolicited comments from some casebook users suggesting I omit these cases. The problem, of course, is that any class covering Criminal Law is replete with awful crimes, so there is no sensible way to protect readers from this reality, nor should we. To the extent that some students dislike Criminal Law because of the ugliness of the cases, I understand their feelings even as I compel them to confront them, as lawyers must do. Nonetheless, we need to be especially sensitive to the possibility, even probability over time, that we will have students who, as a result of being direct or indirect crime victims, will become overwrought (what if they are survivors of child abuse?) by some of the cases in the class. *See infra* note 67.

open, and relevant” discussion of controversial topics.¹⁹ You cannot do all of this, all of the time, but I try to do a lot of it, much of the time. I urge you to do the same, although each of us must choose her or his own weighting of these elements, depending on scholarly interests, student abilities, and pedagogical philosophy.

There is never enough time in any class, and especially Criminal Law (even in the four-unit version), to teach everything that is found in any casebook. Choices must be made, and I always find those choices painful, somewhat like deciding which of my children to pay attention to and which ones to ignore.²⁰ In terms of coverage, like most professors and casebooks, I emphasize the general part of the criminal law, that is, the basic doctrines that apply regardless of the crime. As for the special part, the only completed offenses I emphasize are murder, manslaughter and rape, although students will certainly learn the definitions, without the complexities, of other major offenses along the way.²¹

Teachers of 1L courses know that a primary goal of any first-year class is to teach lawyering skills (“thinking like a lawyer”). This means that we cannot teach as much doctrine in the first year as in an equivalent upper-division course. And, because doctrine changes over time, no law school course should ever be focused too much on these basics. That being said, I want my students to leave my classroom with a reasonable grounding in doctrine. Indeed—and here is where students start to complain—I warn students on day one that they will be held responsible for two sets of doctrine, the common law and the Model Penal Code, the former because the roots of our penal law come from it, and the latter because it is a wonderful tool for critiquing the common law, for seeing where modern law is moving, and for helping students learn skills of

19. DRESSLER, *supra* note 10, at v-vi.

20. As a casebook author, I need to experience my entire casebook in the classroom, so I teach every page of my casebook during a four-year period. I cover some topics every year (for example, basic theories of punishment, voluntary act and omission requirements, basic mens rea concepts, mistake of fact and law, causation, criminal homicide, rape, self-defense, necessity, duress, insanity, criminal attempts, and accomplice liability), although not necessarily every case in my book relating to the topic, and then I cover the omitted materials rotationally during the four years, making room when needed by skipping a little of the previously mentioned materials. Of course, you can decide “permanently” to skip materials you find less interesting or important, but there is something to be said, if only to avoid intellectual stagnation, with varying your syllabus this way, over time.

21. Professor Douglas Husak has written that criminal theorists spend too little time attempting to develop a theory of criminalization that could help reverse the exponential increase in the number of criminal statutes in the United States. Douglas Husak, *Is the Criminal Law Important?*, 1 OHIO ST. J. CRIM. L. 261 (2003). In personal conversations with me, he has criticized many casebooks, including my own, for failing to focus on the criminalization issue, and especially for ignoring drug offenses, which are a far greater real-world factor in the criminal justice system than any of the offenses we teach.

statutory interpretation. As much as I care about theory, I am sufficiently grounded in the real world that I want students to have the opportunity, if they work at it, of leaving my class with enough basic substantive knowledge that if they choose to practice criminal law, they can say that at least *some* of the substantive law they confront daily looks at least a little bit familiar.

I also want my students to leave class prepared to be policy-makers, whether this occurs in the courtroom, in government, or simply as opinion-makers in their community. This means that I want them to have the tools to thoughtfully critique the criminal law. I believe that students ought to be steeped in retributive and utilitarian theory so they can test every doctrine they study against these penal theories. I tell my class in the first week that the theories of punishment are the most important tools they will use all semester. If a rule is not defensible under *either* theory, this should trigger concern on their part. If a doctrine is only defensible under retributive theory, for example, but is being rationalized by courts or legislators on utilitarian grounds, bells should go off. If a particular criminal law doctrine is *only* justifiable under one penal theory but interrelated doctrines are founded on the other penal theory, they should worry that lawmakers might have developed a self-defeating set of principles.

In my classes, almost all of the doctrinal analysis during the semester is done through the dual lenses of retributivism and utilitarianism, although sometimes we turn to political theory as well.²² I also make a few other overarching points during the semester, one of the most important of which is this descriptive one: Although the criminal law does not seek to punish everything that is considered immoral (thank goodness), and not everything that is punishable involves morally wrongful conduct (perhaps unfortunately), a criminal code is as close as we come in our secular legal system to a moral code. The criminal trial, therefore, is something of a morality play. This means that as long as this description remains relatively accurate and we don't seek to separate the criminal law from moral considerations, we should care about whether the penal code accurately expresses society's moral sense. In turn, this means that lawmakers and lawyers—and students—should care about moral theories; and as lawyers we need to use the tools of our profession—words—with care so that moral judgments are expressed accurately.²³ This

22. Of course, as I proceed I add more than a few comments on the need for realism about what actually occurs in legislative halls and courtrooms. I find, however, that students usually come to law school well-equipped with skeptical, even cynical, views about the law and law-making, so I do not need to feed them too much of this. In any case, I want them to retain at least a little idealism by suggesting that moral theories and principled analysis of the law matter or, at least, *should* matter.

23. For example, lawyers should appreciate the distinction between saying that a homicide is “justifiable” (proper, good, or, at least, tolerable) or that it is “excusable” (the homicide is wrong,

also means that those concerned about the criminal law should be cognizant of matters that might affect moral judgments, including what the “hard” and “soft” sciences might teach about human conduct, what literature explicates, and what history might inform us about the human condition. Of course, a law class cannot be all things to all people, but I want students to appreciate the interdisciplinary nature of the enterprise, and to come to the issues of criminal law with appropriate humility.

III. THE PROVOCATION CASES

I love teaching (and writing²⁴) about provocation. For me, there are two great pedagogical aspects to the topic: It is my first opportunity to sensitize students to the difference between justification and excuse defenses, a matter of importance in my classroom, and second, this is the first (but hardly last) time I bring feminist considerations to the classroom.²⁵

A. *Justification versus Excuse: The First Experience*

Although there are not perfectly clear lines between justification and excuse defenses,²⁶ most lawyers, courts, and casebooks make too little of the difference.²⁷ My students are cognizant of the distinction by the end of the semester.²⁸ I want students to appreciate the importance of distinguishing

but the actor is morally blameless for causing it). Although it is a bit too simplistic to put it this way, “justifications” focus on the act, and “excuses” focus on the actor.

24. See, e.g., Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421 (1982); Joshua Dressler, *Provocation: Partial Justification or Partial Excuse?*, 51 MOD. L. REV. 467 (1988); Joshua Dressler, *When “Heterosexual” Men Kill “Homosexual” Men: Reflections on Provocation Law, Sexual Advances, and the “Reasonable Man” Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726 (1995); Dressler, *Why Keep the Provocation Defense?*, *supra* note 3.

25. I typically spend two to two and one-half sessions on provocation, divided into three segments: (a) teaching the common law basics and discussing the rationale of the defense; (b) focusing on the objective standard of the doctrine, i.e., determining who or what constitutes the “reasonable” or “ordinary” person who is provoked, and (c) covering the expanded and controversial Model Penal Code version of the defense, which nicely leads into arguments for outright abolition of the defense.

26. See Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984); see also Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking*, 32 UCLA L. REV. 61 (1984).

27. I have previously provided examples of the legal profession’s failures in this regard. Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1160-61 (1987). There is somewhat greater attention to the distinction today, at least in various casebooks.

28. I jokingly tell students that they will be dreaming—having nightmares?—about the concepts by the end of the semester. In fact, I expect students to use the words “justification” and “excuse” correctly by the end of the year, and almost all do.

between (as I put it in class) “J” and “E” as a means of sending accurate moral messages.²⁹ I also want them to see that this distinction can have practical legal significance to a trial lawyer. Students will immerse themselves in this distinction later in the semester, but I give them a taste of it here, early on.

It almost doesn’t matter with what case you begin, but I start the provocation materials with what might be characterized as a typical case: a male killing a female in an alleged provocation as the result of a domestic dispute. I use *Girouard v. State*,³⁰ a case in which the defendant’s wife, after just a few months of marriage, told her husband that she no longer loved him and, after being questioned by the defendant about this, jumped on his back on the bed, pulled his hair, and taunted him (“What are you going to do, hit me?” and “I never did want to marry you and you are a lousy fuck and you remind me of my dad [whom she despised for impregnating her]”).³¹ A few moments later, the defendant entered the kitchen, obtained a kitchen knife, returned to his wife, and after she verbally provoked him further, he stabbed her to death and then slit his own wrists.³²

After developing the basic principles of the defense—most notably that the defense only applies if there is adequate provocation (emphasis on “adequate”) and insufficient cooling-off time—I ask the obvious question: Why is an intentional killing *ever* reduced to manslaughter? By now students have learned that many state criminal codes divide murder into degrees and that a sudden-provoked killing will typically reduce the offense from first-degree to second-degree murder, but why as a policy matter should it be reduced further to “mere” manslaughter? Why should the law “reward” persons for “failing to keep their cool?,” I ask.

This line of questioning and the facts of *Girouard* allow me to begin developing the competing views of the defense. I provocatively (no pun intended) ask students, for example, whether victim Joyce Girouard “asked for it” by her conduct. Some students understandably object to this characterization, but I “defend” my position by reminding students of trial testimony, reported in the appellate opinion, by a psychologist that Joyce had a “compulsive need to provoke jealousy.”³³

The point of this discussion is to show students that, at least subliminally, the defense might be based in part on the principle that the victim partially (it is, after all, only a *partial* defense, in that it only results in mitigation of guilt and not full exculpation) deserved to die, that her (and so often, it *is* a female who is killed) actions invited this response, that her death does not constitute

29. For the most basic distinction, *see supra* note 23.

30. 583 A.2d 718 (Md. 1991).

31. *Id.* at 719.

32. *Id.* at 720.

33. *Id.*

the same level of social harm as the death of an “innocent” person. In short, this interpretation suggests that provocation is a partial *justification* for a homicide. This characterization upsets many students, which is my purpose. This leads me simultaneously in two directions: to see if the class can develop an alternative and better explanation for the provocation doctrine, and to consider criticisms, particularly of a feminist nature, of the defense.³⁴

If the discussion has focused too much on the justification side of the defense line, I ask: “If the rationale of the defense is that the victim partially deserved to die, then why is there a requirement that the defendant act in a state of passion, that he not have had time to cool off?” This question demonstrates that there is a potential excusatory explanation of the defense, i.e., the fact that the defense involves “heat of *passion*” shows that the defense focuses, at least in part, on the defendant’s emotional condition, which is a feature of excuse defenses.

Of course, at this stage of the semester, the concepts of “justification” and “excuse” are foreign to the students, so this is why I lay out the justification/excuse distinction at this point (promising them a lot more is coming),³⁵ and I let students see how the defense can potentially be explained on either ground as, hopefully, class discussion has shown by now, albeit probably without use of these magic “J” and “E” terms.

It is here that I can develop the two justification/excuse points I try to make during the semester—the importance of sending the proper moral message and the practical significance to lawyers of the distinction. I want students beginning to think about the possibility that the claim that a provoker deserves, even partially, to die for her misbehavior is far more morally troubling than the excuse-based claim that, all else equal, a person who is seriously provoked to kill is less blameworthy because of an understandable loss of self-control than one who kills calmly.

I can make this argument fairly persuasively, and simultaneously show students the practical significance of the defense, by using a hypothetical, which is a variation on the facts in *Regina v. Scriva*:³⁶ Father (*F*) and Daughter (*D*) are walking along the side of a rural road. *F* observes a car, driven by *S*, approaching and veering unsafely. *F* moves *D* further to the side but before he can protect her, *S* (who is drunk) runs over and kills *D* with his car. *S*’s car runs into a tree, immobilizing him. *F*, enraged and grief-stricken, pulls a knife from his jacket and moves toward the car with the intention of stabbing *S*. As

34. I hold off much of the outright critique of the defense to the next class session. See *supra* note 25.

35. My casebook includes a brief explanation of the justification/excuse distinction in the provocation context, but a professor can simply lecture briefly on the point, if needed. JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 264-67 (3d ed. 2003).

36. [No 2] (1951) 1951 V.L.R. 298.

he does this, Bystander (*B*), who observed all of the preceding events, intercedes to prevent the stabbing. *F* intentionally stabs *B* to death.

F is prosecuted for murder of *B* but wishes to claim he is guilty only of heat-of-passion manslaughter. In *Scriva*, on roughly these facts, the issue was whether this defense could be raised, i.e., whether the jury should be instructed on provocation. I ask students to articulate the arguments they would make to the judge to permit, and alternatively to refuse, a provocation instruction. It is wonderful here to see the light bulbs go on above the heads of so many students. If the earlier justification/excuse discussion seemed a bit too abstract for some, now it is clearer. They see that there is no plausible way to argue that *B*'s death was even partially justified, but students typically feel compassion for *F* and understand how he could have been in such a state of grief that he could not control himself when *B* stood between him and the killer of his daughter. Students can appreciate how his level of self-control would be undermined in a way that might make him less blameworthy than the usual intentional killer. Thus, simultaneously, students see how the justification/excuse distinction has practical significance (a jury instruction on manslaughter should be given if, but only if, the defense is a partial *excuse*), and they see from an overarching policy perspective how the provocation defense can more easily be accepted if it is understood in excusing, not justificatory, terms.

Typically, I succeed in getting the justification/excuse concepts in the students' minds. When I return to these concepts later in the semester, students have the provocation discussion, including the importance of drawing distinctions, fairly well-etched in their minds.

B. *The Feminist Critique*

The preceding *Scriva* hypothetical somewhat blunts the feminist critique of the provocation defense, but I don't want students to get too far from the criticism, for it is an important one. As feminists have pointed out, most users of the defense apparently are men, and a disproportionate number of the victims in provocation cases are females³⁷ or a male killed because of his conduct in relation to a "significant female" (for example, a wife, girlfriend, sister, or daughter) of the provoked killer. Thus, to many feminists, the defense is not much more than an unjustified testosterone-inspired defense that promotes or, at least, partially condones, male violence in response to personal loss and insults to their pride.

I think the best way to get students focused on the feminist critique is to move beyond *Girouard* (although it nicely makes the point) and consider the Model Penal Code's even more expansive "extreme mental or emotional

37. Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1335 (1997).

disturbance” defense.³⁸ *People v. Casassa*³⁹ nicely gets us back on message (or issue, at least): Casassa brutally killed Victoria Lo Consolo for no better reason than that she spurned his affection.⁴⁰ The proverbial final straw occurred when she rejected a gift he offered her.⁴¹ The case is unfortunate from one pedagogical perspective: The defendant’s claim seems more properly characterized as diminished capacity than provocation.⁴² But, the fact that the Model Penal Code would allow the defense to be raised (to become a jury issue) in a case like this—where the “provocation” is nothing more than a female’s legitimate desire to make clear to the defendant that she does not want a relationship with him—clearly focuses attention on the controversial nature of the defense. It is here that I bring to the students’ attention the findings of Professor Victoria Nourse that the Model Penal Code version of the defense is often used by a man who has killed in response to nothing more than legitimate efforts at separation by his female victim.⁴³ Although Nourse does not use these findings to argue for outright abolition of the provocation defense, I want students to seriously consider such a possibility, even though it is one I ultimately reject in my own scholarship.⁴⁴

Class discussion usually is very good. Critics of the defense, either from a feminist or law enforcement perspective, typically make utilitarian arguments for its abolition; defenders of the provocation doctrine usually provide retributive just-deserts, excuse-based arguments. Students, therefore, see how these competing theories of punishment inform their discussion. Student comments also tend to touch upon nature-or-nurture ideas: do men primarily turn to violence, whereas women do not, because of testosterone (in which case it might be unfair to ignore the biological explanations for the conduct), or is it because our culture promotes male violence (in which case we might want to abolish the defense to promote a different value system)?

I never feel we have enough time for the provocation defense. But, I justify (not excuse) the time I give it because it is a wonderful opening for what is to come, both in terms of justification and excuse discussion and feminist criticisms of prevailing law.

38. MODEL PENAL CODE § 210.3(1)(b) (1985).

39. 404 N.E.2d 1310 (N.Y. 1980).

40. *Id.* at 1312.

41. *Id.*

42. Dressler, *Why Keep the Provocation Defense?*, *supra* note 3, at 987–89.

43. Nourse, *supra* note 37, at 1342–51.

44. Dressler, *Why Keep the Provocation Defense?*, *supra* note 3.

IV. BATTERED WOMEN SELF-DEFENSE

This might be my favorite single class of the semester. I only give the “battered woman” materials one class session,⁴⁵ but I find that the discussion stretches on outside of class, among students themselves and in the hallways and my office for days thereafter.⁴⁶ This is a class where I want students to think about *why* we justify self-defensive killings, and it is another good place to get students considering the importance of the justification/excuse distinction. Most especially, this is a place for students to consider feminist challenges to self-defense law as it has developed. As with provocation law, I believe the feminist challenges are important for what they show us about criminal law doctrine; I also believe that the most extreme position taken by some feminists—that battered women are justified in killing sleeping abusers—should be rejected.

By the time we reach the battered women materials, students have learned the basics of self-defense. Relevant to current discussion, they know that there is an imminency requirement, but they also understand that the defense can be based on a reasonable, yet inaccurate, belief that deadly force is necessary to combat a supposed imminent attack. However, in teaching basic self-defense, when I try to get students to tell me *why—precisely why—*killing a lethal aggressor in self-defense is justified (and not merely excused), I usually have difficulty getting them to articulate what seems to them to be self-evident. Because one of my goals in the discussion of criminal law defenses is to get my class to tackle that deeper question—why is killing another human being *ever* justifiable?—and to see that there are both potential utilitarian and non-consequentialist moral answers to the question,⁴⁷ I carry this question along to *State v. Norman*,⁴⁸ the best battered-woman case I have found to date. Here, students do provide answers, albeit conflicting ones, to the why-is-killing-in-self-defense-justifiable question.

45. Ideally, I spend seventy-five minutes on the subject of battered women. In the past, I was often able to have my three-unit criminal law class scheduled twice a week, which allowed seventy-five minutes per session. These days at Ohio State, I teach my four-unit class three days a week, which works out to seventy-minute sessions.

46. I also am a high-level user of The West Educational Network (TWEN) in my Criminal Law classes. TWEN or its LEXIS counterpart is a topic all of its own. (If you would like to look in on my TWEN activities in Criminal Law, let me know.) However, two of the “forums” I have are “Dressler’s Musings” (in which I start a conversation on a subject from class and students respond to me and each other) and “Student Musings” (in which students start their own criminal law conversation unregulated by me), and discussion of battered women often continues there.

47. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 17.02 (3d ed. 2001) (“Underlying Theories of ‘Justification’”).

48. 366 S.E.2d 586 (N.C. Ct. App. 1988) (overturning Norman’s manslaughter conviction), *rev’d*, 378 S.E.2d 8 (N.C. 1989) (reinstating the conviction). Students read both opinions.

Norman involves awful facts. Defendant Judy Norman and her husband J.T. were married twenty-five years, with four children, at the time of the homicide.⁴⁹ J.T. was an alcoholic who began beating his wife five years after their wedding.⁵⁰ According to the court:

[J.T.] Norman, himself, had worked one day a few months prior to his death; but aside from that one day, witnesses could not remember his ever working. Over the years and up to the time of his death, Norman forced defendant to prostitute herself every day in order to support him. If she begged him not to make her go, he slapped her. Norman required defendant to make a minimum of one hundred dollars per day; if she failed to make this minimum, he would beat her.

Norman commonly called defendant “Dogs,” “Bitches,” and “Whores,” and referred to her as a dog. Norman beat defendant “most every day,” especially when he was drunk and when other people were around, to “show off.” He would beat defendant with whatever was handy—his fist, a fly swatter, a baseball bat, his shoe, or a bottle; he put out cigarettes on defendant’s skin; he threw food and drink in her face and refused to let her eat for days at a time; and he threw glasses, ashtrays, and beer bottles at her and once smashed a glass in her face. Defendant exhibited to the jury scars on her face from these incidents. Norman would often make defendant bark like a dog, and if she refused, he would beat her. He often forced defendant to sleep on the concrete floor of their home and on several occasions forced her to eat dog or cat food out of the dog or cat bowl.

Norman often stated both to defendant and to others that he would kill defendant. He also threatened to cut her heart out.⁵¹

As for the homicide itself, during the two days preceding the killing, Judy was subjected to J.T.’s usual treatment, but perhaps it was worse even by previous standards: J.T. slapped Judy, threw a bottle at her, smeared food on her face, burnt her with a cigarette, and threatened to “cut her breast off and shove it up her rear end.”⁵² During J.T.’s last day on this earth, the police were called three times, although they only arrived twice.⁵³ The first time, an officer advised Judy to file a complaint against her husband, but she explained that he would kill her if she did that.⁵⁴ The second visit occurred after Judy took an overdose of “nerve pills.”⁵⁵ Sometime later, Judy decided to take matters into her own hands: she went to her mother’s house, obtained a gun, and shot her

49. *Norman*, 366 S.E.2d at 587.

50. *Id.*

51. *Id.*

52. *Id.* at 588 (internal quotations omitted).

53. *Id.*

54. *Norman*, 366 S.E.2d at 588.

55. *Id.*

husband while he slept.⁵⁶ At trial, Judy claimed self-defense.⁵⁷ Because she could hardly claim that an actual imminent threat on her life existed—a sleeping man is not an instantaneous threat—she supplemented her case with expert testimony that she suffered from battered woman syndrome.⁵⁸ Apparently this evidence was intended to show, among other matters, that as a battered woman with the syndrome she could reasonably have believed that J.T. represented an imminent threat. The trial judge, however, refused to instruct the jury on self-defense.⁵⁹

Students come primed to discuss battered woman syndrome, but I don't let them start there. I ask them to ignore the syndrome testimony, but to accept all of the other facts, including (of course) that Judy Norman had been beaten and degraded by her husband for years, including the hours immediately preceding the homicide. I ask students whether Judy Norman had a valid common law self-defense claim on those facts (the answer is no). I ask the same question under the Model Penal Code (probably no). I then ask, *should* the law justify what Judy Norman did. And now the discussion breaks open into a wonderful flurry of yes-and-no responses. There are males and females on both sides of the discussion. Students who would justify the killing—and sometimes I have to remind them that they must ignore the syndrome evidence—come up with various arguments, and almost always I can show them how their answers fit one or another of the moral theories of justification I have asked them to consider.

Perhaps the most common explanation I get is, in essence, that Norman forfeited his right to life by his horrendous conduct. I ask those students whether, if this is so, they would justify the homicide if Judy asked a brother to commit the killing. If J.T. has forfeited his right to life—if his death does not constitute a social harm—then it shouldn't matter, should it, if her brother does the killing? What if Judy hired a contract killer to commit the crime? Now some students begin to rethink their position, or they seek to provide a principled way to distinguish a homicide by Judy (or, perhaps, her brother) from the contract killer. I also ask: What if just before she planned to kill J.T., he had suffered a debilitating stroke and no longer represented a threat to her life? Many of the “forfeiture” students would not justify the killing now. I try to show them that this would mean that the underlying justification for the homicide really has less to do with forfeiture and more to do with either utilitarian concerns of Judy's safety or moral claims based on Judy's right of autonomy. From here we proceed to discuss those and other possible reasons to justify the homicide, and I open up discussion to be sure that critics of

56. *Id.* at 589.

57. *Id.* at 587.

58. *Id.* at 589.

59. *Norman*, 366 S.E.2d at 587.

justifying the homicide get their full opportunity to explain why killing J.T. as he slept should not be authorized by the law.

The discussion is, almost without exception, wonderful. The discussion allows us to flesh out the various theories of justification that can explain the defense of self-protection and they can see that if one takes a particular moral theory and applies it to a specific case or class of cases, this can help them (and, presumably, thoughtful lawmakers) decide how broadly or narrowly the self-defense privilege should be drawn. They see a reason to care about the “abstract” moral theories I have put in their way.

Inevitably during the free-wheeling discussion some students will either explicitly argue that we should excuse, not justify, Judy Norman, or they make an argument for justification that really sounds in excuse (“protecting yourself is instinctual”).⁶⁰ Perhaps when this happens, or later, I bring syndrome evidence back into the discussion and ask whether such evidence *really* helps support a justification claim or whether, instead, it has the unintentional effect of pathologizing Judy Norman and her claim, thus converting the case more to an excuse. In turn, this allows me to get students thinking about whether it is better policy—or makes any real difference—whether we justify or merely excuse Judy Norman. Students pretty clearly see that it *does* matter on a policy level (some feel that it is important to send a message of support for battered women through justification reasoning, while others feel that it is better for the law not to promote or authorize non-confrontational killings).

As one final effort to have students appreciate the justification/excuse distinction, I ask them then to think about one of the first publicized battered woman cases, the so-called “burning bed” case in which a battered wife poured gasoline over her sleeping husband and lit a match.⁶¹ What if he had awakened, smelled the gasoline, observed his wife with the match, and put two and two together and came up with four? Would *he* be justified in killing *her* with his trusty gun under the pillow? Students’ eyes light up with recognition of the problem: if self-defense is limited to the use of force against *unlawful* threats, and if the battered woman is *justified* in killing her husband, then she represents a *lawful* threat to him. Ergo, he would not be justified in protecting himself with the gun. But, if she is only excused for killing him, then she *does* represent an unlawful threat to him, and he *would* be justified in killing her. Thus, the label of her conduct potentially matters.

Of course, *Norman* permits full discussion of feminist concerns about the protection of battered women. In very recent years this discussion has allowed

60. Some students, of course, favor the outcome in *Norman*, i.e., conviction for some form of criminal homicide. I make sure their views are heard, indeed, often early on in the discussion, so as to force students who would acquit the defendant to defend their position against the prevailing law.

61. FAITH MCNULTY, *THE BURNING BED* (1980).

me the opportunity to test out my own approach to the issue, one that would only excuse, not justify, some (not all) homicides in *Norman*-like cases, but one that would not be linked to excuse-sounding syndrome claims.⁶² The case also allows students to consider the arguments of some feminists that self-defense law itself, independent of the battered women issue, is based on a male-on-male combat model, and thus that various features of the defense—most especially, the imminency requirement and the idea that use of a weapon to respond to an unarmed threat represents disproportional punishment—should be reconsidered. However one comes out on these issues, the discussion gives credence to the importance of considering, if not inevitably accepting, feminist (and, thus, by implication, other “outsider”) theories.

V. RAPE LAW

A. *Some Preliminary Comments*

There is a fair amount of literature on the subject of teaching rape materials,⁶³ and no small amount of it has focused on whether the rewards (to students) of teaching rape law outweigh its risks (to teachers). At least one professor expressed published doubt that, in light of his teaching experiences, he would teach it again.⁶⁴ In my own situation, there have been incentives to downplay the subject: I was told by one professor (who might represent a silent, but significant minority) that he would never use my casebook—or any other casebook, for that matter— if it even *included* a chapter on rape;⁶⁵ a fist fight once broke out outside my classroom, after a class on rape;⁶⁶ I have been

62. See Joshua Dressler, *Battered Women Who Kill Their Sleeping Tormenters: Reflections on Maintaining Respect for Human Life While Killing Moral Monsters*, in *CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART* 259 (Stephen Shute & A.P. Simester eds., 2002) (arguing for a duress-like excuse claim).

63. E.g., Kate E. Bloch, *A Rape Law Pedagogy*, 7 *YALE J.L. & FEMINISM* 307 (1995); Susan Estrich, *Teaching Rape Law*, 102 *YALE L.J.* 509 (1992); Kevin C. McMunigal, *Reducing the Risks and Realizing the Rewards: An Approach to Teaching Rape Law*, 34 *SAN DIEGO L. REV.* 519 (1997); James J. Tomkovicz, *On Teaching Rape: Reasons, Risks, and Rewards*, 102 *YALE L.J.* 481 (1992).

64. Tomkovicz, *supra* note 63, at 506. Professor Tomkovicz recently informed me that notwithstanding his earlier doubts, he continues to teach rape law, “with much success, I think. At least no negative episodes or feedback of any sort. I am committed to keeping it in the course.” E-mail from James Tomkovicz to Joshua Dressler (Apr. 29, 2003) (on file with author).

65. This professor explained that he did not want to teach any materials on rape. I am not sure if he told me why, but my sense was that the subject simply made him uncomfortable. I suggested that he could always skip the chapter on rape, but he said that if he did this, “some of my students would complain.” He explained that if there were no rape chapter to delete, students would not blame him for omitting the subject.

66. The fight broke out between two male students. One of them, who had always struck me in class as a bit of a “frat boy,” had made a comment in class that another student, whose sister

criticized by students for being too directive in the class discussion, and I have been criticized by students for *not* controlling class discussion enough.⁶⁷

So, am I masochist to say that the rape law materials provide some of my favorite teaching experiences? I hope not. But, I must concede at the outset that I would not feel quite as I do if I were teaching the subject at some law schools,⁶⁸ or if I were an untenured faculty member at an institution in which

had once been raped, interpreted as making light of the subject. I had not thought that Frat Boy's comment on rape was extreme; I suspect, therefore, that there was more to the story than this single class comment. I could easily imagine that Frat Boy made more than his share of immature comments outside the classroom on a number of topics. This was just the final straw for the aggrieved student.

67. After the fistfight, some students blamed me for not having predicted potential problems. These critics thought I should have said or done something early on to prevent the violence. The year after the fistfight, I decided to make some comments at the start of the rape chapter in the hope that my words would prevent joking or other trivialization of the subject. The difficulty with this—and the basis for the new criticism I received from a number of students following my comments—was that my remarks chilled free expression and treated them like children. (Of course, although I did not say this, my comments had been inspired by a childish school brawl.) I cannot say for sure, of course, whether my comments had the deleterious impact my critics claimed, but I concede that class discussion that year seemed more constrained. I want students to feel comfortable making thoughtful, unpopular comments on *any* subject, including rape law, and my decision to issue a warning apparently constituted overkill.

I no longer make any special comments at the outset, and I have had no further problems in the classroom that would have even remotely justified “a speech.” I have concluded that, at least in the law schools at which I have taught, students willing to openly express adolescent “rape is funny” comments are now rare (a victory of feminism). See *infra* note 80. I also believe that a professor, simply by his or her natural control of the classroom, and by the seriousness that he or she brings to the subject, can reduce the risk of inappropriate student remarks nearly to zero.

This does not mean, however, that there won't ever be offense taken, hurt feelings felt, or emotions frayed. Some students feel so strongly about the subject that they cannot easily accept comments with which they disagree, and there will be students who have been sexually assaulted or the victims of attempted assault, who may find class discussion traumatic. In my mind, the former students should *not* be placated; the latter students need to have their concerns handled with care and consideration. Sexual assault victims need to realize that there might be an examination essay question dealing with rape, and thus they need to get whatever help is needed (for example, through student counseling services) to prepare for this, but in the interim I have always been prepared to let such students “have a pass” in the classroom on the subject, and even to leave the room if needed.

68. I prefer not to get into specifics, but I found the atmosphere at one law school uncondusive to pleasant teaching of rape law because too many students were intolerant of opposing views. Their rigidity to alternative ideas, expressed with considerable passion, deterred many students who disagreed with them from talking. This was not a symptom of just one group of students; it happened in more than one semester. This had little to do, really, with the rape materials; it was present much of the semester and involved a dynamic that extended beyond my classroom (indeed, throughout the law school) at the time. Having said this, I would still teach the rape materials if I were teaching at that law school, even if I thought that this same dynamic would be present, but I would probably be unable to say that teaching the materials was fun.

my career depended on sterling teaching evaluations⁶⁹ or, simply, if I were the type of teacher who strives to avoid all possibilities of classroom friction. I also believe that a professor's gender has an impact: at least subliminally, all else equal, female students will start with more positive expectations about class discussion of rape with a female professor, and men may feel more comfortable with a male teacher.⁷⁰ For me, by the time we reach the rape materials midway through the semester, my reputation with students provides *some* immunity: female students, and feminists in particular, see me as relatively open to their ideas; but, students have also seen that I reject some feminist solutions in regard to provocation and battered women, so I am not seen as falling into any particular camp. If I were seen by students, rightly or not, as a rigid feminist or anti-feminist, I would not find teaching the rape materials "among my favorite teaching experiences." I would still teach the subject, because the topic is too important and pedagogically valuable to avoid, but I would not do so with as much gusto as I do now.

B. *Teaching the Subject*

On average I spend four sessions on rape, covering most, but not all,⁷¹ of my own casebook materials. Early on,⁷² I use a non-traditional means to delve

69. Although I greatly value teaching, I have always disagreed with those who put much stock in student evaluation forms as a factor in the tenuring process. (I prefer serious yearly peer evaluation.) Although in extreme cases student forms might red flag a serious teaching problem (although, an attentive dean is likely to be aware of the problem anyway, as a result of individual and repeated student complaints brought to her office), such evaluative data can have the unfortunate effect of rewarding professors who try to please students rather than to challenge them.

70. I once read a "rape" fact pattern a law professor had put together for her examination. I was struck by its graphic nature. She received few, if any, complaints from her students. In great part I am sure this is because students respected and trusted her good judgment, but I believe (as does she, based on recent conversations) that she was protected, at least a bit, by the fact that she is female.

71. Because of time constraints, I frequently omit the materials on fraudulent rape. If I am falling behind schedule, very unhappily I also omit the rape-shield materials.

72. Before turning to the case materials, I start with some preliminaries. I contrast the subject we just completed, which focused almost exclusively on the mens rea issues of dividing criminal homicide into different offenses and degrees, with the study of rape, which primarily focuses on the actus reus of the offense. As I explain, rape law discussion involves drawing various dividing lines: between sexual conduct that does not justify the criminal sanction and conduct that merits the intervention of the criminal law; and another line distinguishing between criminal conduct justifying substantial penalties and that which does not.

I use some of the first class session to get students discussing what they perceive to be the underlying harm of rape. In what way, if at all, is it any different than any other form of harmful or offensive bodily contact—why is rape, in other words, treated so much more harshly than battery? This permits discussion of feminist and other explanations of the offense of rape. This discussion also ties in later to our conversation about the proper scope of a modern sexual assault statute.

into the doctrinal materials, using the *Rusk* case.⁷³ My casebook includes the majority and dissenting opinions of both the Maryland Court of Special Appeals, which overturned the defendant's conviction, and the Maryland Court of Appeals opinion, which reinstated the conviction. This is a nice case because it lays out what might be characterized as a pre-reform, but hardly extreme, version of traditional rape law. I teach it through role-playing, a method I am now convinced frees the entire class to talk more openly throughout the rape chapter materials. It is also, simply, a nice change of pace for everyone.

A week before we get to *Rusk*, I assign one student to serve as the prosecuting attorney, and another as defense counsel.⁷⁴ I always select a female to serve as defense counsel, and a male to be prosecutor. If I know enough about my students by this time, which I almost always do, I try to pick those who will be compelled to defend propositions with which they probably initially disagree. The lawyers are instructed to prepare closing arguments to the jury in the *Rusk* case, using the facts and law set out in the opinions.⁷⁵ On the day of the trial or perhaps before, I select six students, three males and three females, to serve as jurors. I am the trial judge, whose role simply is to instruct the jury on Maryland law (which comes directly from the case) and on the presumption of innocence.

In our mock trial, the "attorneys" give their closing arguments. By having the students role play this way, I free them to make arguments that they might not personally believe, or that they might believe but that they might not otherwise express because of class social pressures. I briefly instruct the jury,⁷⁶ after which deliberations occur in front of the other students.⁷⁷ After

I also raise briefly for discussion the arguments of a few feminist commentators that acquaintance rape might be better deterred through civil suits than criminal prosecutions, or that it is an offense better suited for non-incarcerative remedies. Finally, students also read brief excerpts of the experiences of feminist criminal defense attorneys, who describe the tensions they feel in rape cases given their feminist values and potentially conflicting ethical responsibilities to their clients. Some students have told me they appreciated the latter materials because it legitimated their own conflicting feelings.

73. *Rusk v. State*, 406 A.2d 624 (Md. Ct. Spec. App. 1979) (reversing a conviction for rape), *rev'd*, *State v. Rusk*, 424 A.2d 720 (Md. 1981) (reinstating the conviction).

In the first two editions of my casebook, *Rusk* was the first substantive case in the rape chapter, followed by *State v. Alston*, 312 S.E.2d 470 (N.C. 1984). In the third edition, I reversed the order of these cases, and thus I start with *Alston*, which I cover in a traditional (Socratic) manner as part of the first class session preliminaries. *See supra* note 72. I then turn to *Rusk* on day two.

74. Approximately two weeks before the *Rusk* case, I tell my class of my role-playing plans and seek volunteers to serve as attorneys. I get enough names to make a careful choice.

75. One nice feature of *Rusk* is that there is little disagreement about the then-applicable law or of the basic facts of the alleged assault. The issue is whether there was sufficient evidence to convict.

76. I sometimes select a foreperson.

suitable time for deliberations, I ask the jury to vote. In the seven years I have taught *Rusk* this way, at four law schools, I have never had a unanimous verdict. In four of the trials, the vote was 3-3, and in the others it was 4-2 for conviction.

With the role-playing completed, I resume teaching by providing my observations of the students' performances and then opening up discussion of the case to the entire class. There is such a high class response that we never finish in the allotted time, so I sometimes set this class up at a special hour when we can run the class beyond its normal length, and even then students carry on conversation with each other and me after class.⁷⁸

Rusk works beautifully on many levels. First, a few students have the opportunity to get a slight taste of what it is like to argue a matter to a jury. In that regard, I always ask the student attorneys during the full-class discussion whether they felt comfortable with the side assigned to them when they first read *Rusk*. Far more often than not, they tell me they were not happy—as a matter of personal predilection⁷⁹ or because they felt they were assigned the losing legal side. However, with just one exception in all of these years, the student attorneys stated that by the day of trial they were convinced their arguments for conviction or acquittal were the “right” ones. This is a chance for students to learn a little about the psychology of being an advocate, including the effects of cognitive dissonance.

The jurors, and perhaps the class as a whole, benefit from the deliberative process. It brings home to some students what they already realized more abstractly, namely, that a lawyer's argumentation can affect the outcome regardless of the facts. And, perhaps most demonstrably, the jurors focus a lot on the instruction I give them on the presumption of innocence. The class gets a chance to see how that presumption affects deliberations; they see as well how student jurors can differ so much in terms of what constitutes

77. If you decide to follow this approach, think about the best way to physically structure the role-playing. The most difficult issue is where to place the jurors. You will want the lawyers to have eye contact with them during closing arguments, but you also need the jurors to be situated so that their deliberations can be heard by the rest of the class. I have taught in classrooms that are small enough, with good enough acoustics, to make this fairly easy; most classrooms, however, do not lend themselves to an easy set-up. (On one occasion I reserved the Moot Court room for this class session.) In the worst case scenario, I suggest bringing in six chairs, and having three jurors seated facing the other three jurors in the front of the classroom, but with enough distance between the three-seat aisles that they naturally have to talk louder to be heard by the other jurors, so that the rest of the class also hears adequately. Even so, you should remind the jurors to keep their voices up so they can be heard in the back of the classroom.

78. I don't believe the role-playing works well when limited to an hour or less. Ideally, you ought to give the attorneys fifteen minutes for their arguments (ten minutes would be the very least they will need); then you would give jurors fifteen minutes for deliberation; the remaining time would be used for full-class discussion.

79. Remember: I assigned a female to defend the accused rapist, and a male to prosecute.

“reasonable” doubt. And, the best students often notice how jurors—even law students—sometimes ignore or misunderstand jury instructions.

What is also great about *Rusk* is that in every trial there have been both males and females voting to acquit, and to convict. In short, this case not only isn’t a slam-dunk for either side, but because the jurors do not break down stereotypically (women to convict, men to acquit), the verdict essentially invites the class to speak their minds, less fearful of group (or gender) pressure, as we turn in the remaining rape law classes to such controversial topics as whether “no always means no” in sexual affairs, whether the criminal law should punish males who have intercourse with females who don’t say no but who also don’t say yes, whether the law should continue to recognize a “defense” of reasonable mistake of fact in rape cases, whether sexual assault law should expand beyond the area of *forcible* intercourse, and whether rape-shield laws unfairly restrict the ability of a defendant to cross-examine his accuser and present his case for acquittal.⁸⁰

VI. CONCLUSION

I love teaching. I most especially love teaching Criminal Law. After more than a quarter century of teaching, I remain as excited about the subject as when I first entered the classroom. The course allows law teachers to do everything we would hope to do in a first-year class: teach doctrine and statutory analysis, consider moral and political theory, demonstrate the value of interdisciplinary research, and, not the least of which, provoke students to wrestle with some of the deepest—and most ancient—issues we ever can hope to confront in a law school classroom or elsewhere.

I hope this essay, more than simply providing readers with some perhaps useful pedagogical suggestions, will inspire new (and, indeed, experienced) members of the legal academy to choose Criminal Law as “their subject” for teaching and serious scholarship.

80. For what it is worth, in the last three or four years of teaching rape law, I have found that the divisions between male and female students in class are not nearly as bright as in the more distant past. That is, more men are now sympathetic to feminist goals (or, at least, to law enforcement goals generally), and an increasing number of women reject the most expansive feminist arguments in the field. I cannot be sure, of course, if my experiences are random, but my observations are based on teaching in the last four years in California, Michigan, and Ohio, in public (Berkeley, Michigan, and Ohio State) and private (McGeorge) law schools.