

CommonLaw.S2.Ep7.final copy [MUSIC PLAYING]

RISA GOLUBOFF: Welcome back to Common Law, a podcast from the University of Virginia School of Law. I'm Risa Goluboff, the Dean.

LESLIE KENDRICK: And I'm Leslie Kendrick, the Vice Dean. If you've been listening this season, you know we've been looking at times when lawyers and the law changed society and the course of history, from the impact of key Supreme Court cases to shifts in law in response to major events like World War II.

RISA GOLUBOFF: Yes, and the topic of this episode also intersects with our own history here at UVA Law. This year, 2020, is the centennial of when women were admitted to the law school. This year is also the 100th anniversary of when women were given the right to vote in the United States with the passage of the 19th Amendment.

LESLIE KENDRICK: As we're going to learn from our guests today, legal educators at the time had many reactions and concerns about allowing women to study law. Should women be exposed to the kinds of topics that preoccupied courts? What kind of law would women study? Should they focus on family law, for example? There were two concerns. How would legal discourse affect women? And how would women affect legal discourse?

RISA GOLUBOFF: So much has changed over the last century, but these same questions have come up again and again, according to our guest today, UVA Law Professor Anne Coughlin. As an expert in criminal law and feminist legal theory, Professor Coughlin has seen concerns about women and legal speech arise in the feminist movement, to include rape and sexual assault in the criminal law curriculum, and in more recent arguments, that those subjects actually should not be covered in criminal law courses. We're so pleased she can join us today to share her insights navigating these questions in her own classes and scholarship. Anne, welcome to Common Law.

ANNE COUGHLIN: Thank you. I'm delighted to be here.

LESLIE KENDRICK: Anne, thank you so much for joining us. Even back in 1920 when UVA Law first started admitting women, very few law schools across the country allowed women to study law. How did this change start to happen?

ANNE COUGHLIN: So women start seeking admission to the bar in the late 19th century. And it is around that time, of course, that we see the emergence of the law schools. So women are both seeking admission to the bar and then admission to law school at sort of roughly the same time. The numbers are quite small in the beginning. And institutional leaders express hostility to the presence of women in law, generally, and then in law schools, more particularly.

RISA GOLUBOFF: And what was it that led to that hostility? Why did they think women shouldn't be part of law schools or part of the bar?

ANNE COUGHLIN: So there are lots of reasons for excluding women from higher education. And these arguments range from the notion that women's health will be destroyed if they study,

that women are not smart, that they lack the intellectual capacity for higher education, that women are, by nature, destined to be in the home, not in the public sphere. Those arguments, of course, are made in connection with legal education. But more specifically, the idea was that women couldn't be lawyers, because if they had to enter into the spaces where lawyers work, they would be exposed to topics that would wreck their virtuous character. They would be forced to listen to conversations that the institutional leaders called obscene, and that, in some way, that would ruin their virtue as potential wives and mothers.

LESLIE KENDRICK: And the institutions themselves, did they have concerns about having women at law school?

ANNE COUGHLIN: Yes. The institutions expressed concerns about having women in law schools. Some of those concerns were that women wouldn't be smart enough to do the work, but there also was the worry that women would be distracting to men, that their clothing was noisy, that their clothing would be rustling, their clothing would be distracting, that women would distract the men from doing their jobs, and also the fear that the schools would have to somehow change their curriculum in some way in order to accommodate the presence of women.

RISA GOLUBOFF: I've read some of the Dean of UVA Law School at the time, some of his speaking and writing about this. And one of the concerns that comes out really strongly is the fear of silliness, that you had to have serious women. And so it was that the women would distract both because they were women, and their femininity would distract, but also that they wouldn't really be serious students.

ANNE COUGHLIN: Yes, I think there was a concern that women would be going to school in order to find husbands. I mean, this was a concern that you see expressed. Why would we waste this important slot on someone who, by nature or otherwise wasn't necessarily well-suited to the job, and who wasn't going to stick with the job?

LESLIE KENDRICK: How did this change? How did schools like UVA decide to admit women?

ANNE COUGHLIN: So I think, again-- so this is really interesting. Women persisted. They kept knocking on the door. And they gradually made inroads in various places. As they were admitted, they proved themselves. They proved that they did have the intellectual capacity for the jobs. Also they performed really well in schools.

RISA GOLUBOFF: So when they joined and they succeeded in those ways, how did students react? How did faculty react? Once they were in the buildings, what did it look like?

ANNE COUGHLIN: It's very hard to know exactly what the story is, because the women's accounts were that they were welcomed and that they got support from male colleagues. One worries, though, that some of these accounts were not entirely truthful, that the women were trying to be strategic, were trying to put a brave face on it. At the same time, there certainly are plenty of accounts from women that suggest that their presence was greeted with hostility.

The Dean at Harvard Law School, which admitted women very late-- Harvard didn't admit women until 1950. And the story goes that every year he would invite women to dinner at his home and then ask them why they were there and how did they feel about taking a seat that should have been occupied by a man. So when you couple those kinds of anecdotes with what one imagines must have been a somewhat chilly climate, it's a mixed picture.

RISA GOLUBOFF: Those are some of the same stories that Ruth Bader Ginsburg has told. And they suggest that there was a fair amount of uncertainty about how to respond to women in the classroom. So does the curriculum shift? Or how does the institution change or not change early on in response to having women present?

ANNE COUGHLIN: So early on, the sense that we get is that the curriculum did not shift. There are anecdotes that suggests that women were not comfortable in the classroom, that male professors were playing to a largely male audience of students, and that there would be jokes made at the expense of women, and so forth. This is across the range of topics.

RISA GOLUBOFF: So you were part of this movement, right?

ANNE COUGHLIN: Yeah.

RISA GOLUBOFF: This isn't just history here. As we historians like to say, you're a primary source. So when you first visited at UVA and the mid 1990s, you were a pioneer here about what was taught in the classroom and also what was included in a really prominent criminal law casebook. Can you talk about that process, and what you did, and how it changed?

ANNE COUGHLIN: Yeah, so it's been interesting to go back and to study this history, because to be candid, when you're living through something, you don't really necessarily think about the forces that are shaping your own life and your own decisions. But as it turns out, in the mid '80s, a professor named Nancy Erickson who was at the Ohio State Law School, she did a survey of criminal law case books and criminal law professors to discover what in fact was being taught in the classroom. And what she discovered by doing this survey was that the vast majority of criminal law case books either didn't treat rape at all, had no coverage of rape, or they treated it in a very marginal way, sort of as part of other subjects, if you will.

And so what happened at that time was that authors of the leading criminal law case books read her final report, which is published in 1990, and one assumes, realized that they might want to consider adding rape-, sexual-assault-related materials to their case books. And that's precisely what happened here at UVA Law School. Three of our colleagues had a criminal law book that didn't have a chapter on rape. And so they reached out to me and invited me to come and add that chapter to the book. And I did, in fact, author those chapters, and then ultimately stayed.

LESLIE KENDRICK: It sounds like this was a task that you took on. And did you end up coming to have strong convictions about what materials should be in the casebook, how it should be taught?

ANNE COUGHLIN: I felt conflicted about the invitation. I had been told, like so many other female law professors of my generation, that we shouldn't be writing about women's topics, that we shouldn't write about women's topics before we got tenure, and that even after tenure, if we wanted to be taken seriously, we shouldn't be writing about issues that were important to women or thought to be important to women only. And then at that time as well, it was-- it felt risky and lonely to be a feminist law professor. And so you know, you feel like you're putting a target on your back by doing this work. And I had a very strong conviction that, if we were going to include a chapter on rape, that it needed to not merely describe the content of the doctrine that existed, but also contained materials that invited the students to think critically about that doctrine and about the need for reform.

LESLIE KENDRICK: So there are some people who have responded to this challenge by saying, it's too hard. We just shouldn't do it. I don't want to teach the law of rape anymore.

ANNE COUGHLIN: Right.

LESLIE KENDRICK: That, I take it, is not your stance.

ANNE COUGHLIN: That is not my stance. And it's not my stance in part because of the conversations that I have with my students. So in the first place, I think that it's really important to study this subject.

It is one of the most important areas in criminal law. For us individually and personally, this the area in which the criminal law comes home for each and every one of us. Most people want to have sex. Most people do have sex. And the law is regulating our activity. It is telling us when our activity is lawful or unlawful. So that's important.

But more than that, I think that because so many of the students themselves have been survivors of this crime and they have a stake in what the reforms should look like, it's really important to continue to discuss it in the classroom.

LESLIE KENDRICK: So what did the law of rape look like at the time? And what were some of the critiques that needed to be leveraged against it?

ANNE COUGHLIN: Up until the middle of the last century, rape was defined as sexual intercourse with a woman, not one's wife, by force and without consent. So rape required not merely that the woman-- let's assume it's a woman victim-- was not consenting. It also required proof that the perpetrator had used force.

And every state at that time required that the prosecution show that the victim had physically resisted the rapist. By proving physical resistance, the state would show both that the woman did not consent and also that force was used. If she had physically resisted and the man had persisted, then he had used physical violence. And in the absence of physical resistance, the courts would conclude that the sex was consensual. And they would actually say, even if the woman said no, if she didn't physically resist, by her body, she had submitted.

RISA GOLUBOFF: We're in a very different moment where, even though not all rape law has been reformed, there have been a lot of reforms. And women are-- hover right around 50% of the student body of most law schools. So what does it look like, given the change in both the law and the demographics and cultures of law schools? What is it like to teach about rape today?

ANNE COUGHLIN: So it remains difficult to teach the law of rape, but it's difficult for different reasons. Now we have, as you mentioned, many women in the class. And we also now know how many women, and alas, men too, have been victimized by this precise crime.

The numbers are quite staggering, as you know. But if you face a class of 70 first-year students, for example, there is just almost no doubt that students in the classroom have been the victims of rape, or a friend, a family member, and so forth. And so we have students in the class who have experienced this crime. And what they are now telling us is that conversations about rape can, for them, be quite difficult, because those conversations remind them of their experiences. In fact, in some sense, they re-experience the rape.

Today, my understanding of the landscape has changed. My own understanding of what is in fact going on is different. I'm thinking more richly about the problem. I'm thinking about how covering this subject hurts them.

LESLIE KENDRICK: We face similar things in torts where pretty much every story towards it is personal injury law. And every story is probably the intimate history of the absolute worst tragedy that ever happened in the history of that family, you know, every single case. And the worst ones are the negligent infliction of emotional distress cases which are about parents watching their children die. And it's just, it's terrible. It's terrible.

And I think the only way to deal with it is to foreground the emotional component of it, to have that, and to say to students, although we will be talking, we're reading each of these cases really to extract some sort of legal principle, that's not the only thing that's important about these cases. And each one of these is a story about a person. And however you feel about the way the law of torts ultimately deals with this, the name of what we're doing here is trying to make the law a tool to improve these situations, to have it be a force that actually lends itself towards some sort of resolution of these horrible, harrowing events. And the emotion is it's part of that. It has to be part of that.

ANNE COUGHLIN: Yeah, I-- that's so profound and moving what you just said. And if I could go back for a minute and reflect on when I first started teaching-- and this is why, again, I feel so grateful that I've had a long career, and that I have a much richer understanding now of the landscape and a much richer understanding of what it means to be a good professor.

So when I first started teaching, again, I was told don't teach women's topics. I was also told you have to be twice as smart, but most important, twice as tough as the men. I felt as if I had to approach the painful cases in a, not just in a dispassionate manner, but in a hardened manner.

And it's awfully easy to suddenly find yourself making cheap jokes, or again, just not taking seriously the pain of the people that are involved in the cases. And it was presented to me that

that was the way to be a good teacher. And I have learned, thanks to the presence of additional female faculty members, but also the presence of the students, that that's just completely false.

RISA GOLUBOFF: What you're saying sounds so different from the way people talk about trigger warnings in popular culture and the critiques that are leveled against them. Why is there this disconnect between the public perception and the reality of what you see happening in the classroom?

ANNE COUGHLIN: So it's for that reason that I'm really grateful to have this conversation, because I see them as being-- I see those criticisms as being caricatures or cartoons. And I use the word "bemuse," "baffle." I simply do not understand what's behind them. I sometimes think that the professors who call students snowflakes, or who denigrate students, or belittle students who are asking for the so-called trigger warning, I think that those professors simply may not believe that the students have had these experiences.

LESLIE KENDRICK: So you've also been a legal reformer working to change the law of rape and to revise Virginia's sexual assault laws. What has that entailed? And how has that gone?

ANNE COUGHLIN: For the past two years, I've been working with a team of lawyers from Covington & Burling and some absolutely terrific law students to try to develop draft legislation that would revise Virginia's sexual assault statutes. And our biggest target is to develop a statute that punishes rape that is nonconsensual even when there is no physical violence. So in other words, right now, Virginia punishes sexual assault only when the sex is nonconsensual and it's procured by force, threat, or intimidation.

So that means that in cases where a woman says no, there is no crime if the state can't point to something that also counts as force, threat, or intimidation. And that, to our eyes, seems like a real problem, a real gap in the law. So what we've done is to do a deep dive into the Virginia case law. We've read every Virginia rape case since the 1980s, and many from the earlier generation as well.

And we've also talked to lots and lots of stakeholders. So we've met with commonwealth's attorneys. We've met with police officers. We've met with defense lawyers. We've met with sexual assault advocacy groups. We have even met with some survivors to get their ideas, to get their input on what's working about the Virginia statutes and what's not working, because our thought was, we really needed to reach out into the community.

We didn't want to write a law that would simply be the position of the UVA people. We wanted to write a statute that would take account of the perspectives of many different people in Virginia. So that's what we've been doing.

LESLIE KENDRICK: Where are you in that process?

ANNE COUGHLIN: So we were planning on presenting the draft to the legislature now, this January, but because of the turnover in the General Assembly in November, we thought it prudent to wait and see how things go for them. With so many new legislators in place, they've

made lots of promises. They have lots of pressing issues at the forefront of their agendas. And we just thought that there wouldn't be time, that our effort would get lost in this early move by the new regime.

LESLIE KENDRICK: This has been a really important and wonderful conversation. Thank you so much for being here with us.

RISA GOLUBOFF: Thank you, Anne.

ANNE COUGHLIN: Thank you.

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LESLIE KENDRICK: Well, that was so interesting. And one thing it makes me think-- I'm usually a splitter who is distinguishing different things. But here, I want to be lumper and say, I think it's really interesting to be talking all at once about what legal education looked like for women 100 years ago, and from there, all of the changes that have taken place. And it's just really fascinating to think about all of that together at the same time.

RISA GOLUBOFF: I think that's right. And it raises questions, obviously, the historian in me, it raises questions about continuity and change. And I think if you look at 1920 and you look at 2020, a lot is very, very different. But there are all these moments of punctuation in between, and moments where we have information about what it looked like.

And so one of the most fascinating ones is this story about Ruth Bader Ginsburg that underscores this kind of non-full citizenship. And it's portrayed in the recent movie about Ruth Bader Ginsburg as well that Dean Griswold, who was the Dean of Harvard Law School when she was there, had all the women in her class over for dinner and basically asked them the question, why are you taking up the spot of a man? Justify yourself. Why are you here?

And the way the movie portrays it, and the way the story is usually told, is that he was hostile to the women and he was demanding their explanation. But recently, there was a wonderful conference in Washington, DC that was celebrating both 100 years of women's voting and also the fact that, this year, which corresponded with that centennial, all the editors in chief of the top 16 law views in the nation were women. And so there is a wonderful conference hosted by Duke Law School. And Ruth Bader Ginsburg spoke.

And she told that same story in a really different way, which was that Dean Griswold was actually supportive of the women students. And when he asked them that question, he wanted to know the answer so that when others challenged him about what these women were doing at Harvard Law School and when others asked him that question, he would have the ammunition to say, they're going to go off and do great things. And this is why they're here.

And it's hard to know which of these versions of the story is the true version or if they both have a kernel of truth to them. But that was a real epiphany for me, because that was not my understanding of the story as it had been told prior.

LESLIE KENDRICK: That's so interesting. And it's a little symbol of how context really matters. And sometimes it's difficult to recover the context in which things were said or conversations were had. You tell that story.

And I think, my first thought is, gosh, you know, what kind of poverty of imagination that he couldn't think for himself what these women were doing, that he lacked this sort of empathy to be able to come up with that. But at the same time, at least he asked in order to learn. He had a blind spot himself.

And many in his position had a blind spot. And he recognized that he needed to fill it. And he made that conversational bridge in order to be able to do that, so on the one hand, of ignorance and lack of imagination and empathy, and on the other hand, an openness to learning from others' experience.

RISA GOLUBOFF: And I think that goes to, I mean, what I thought was the most moving part of our conversation, between you and Anne talking about the humanity in every legal case. And I think an important thing that we are teaching our law students and we have to expose them to is that empathy and that imagination of how the law interacts with human lives. And I think Anne and-- the two of you brought that out just so beautifully.

And that's something that I think every law student needs to be thinking about. And it doesn't have to be-- I don't think has been a constant drumbeat. But I do think that when we are graduating lawyers who are going to go out and work with people often at their most desperate moments, as you say, and they have to have that kind of humanity and empathy in order to understand where their clients are coming from and take seriously these enormously powerful tools that we are teaching them to use. And teaching them to use those tools is not only a technical matter of learning the law, but a human endeavor, a helping profession of thinking about how you use the law on behalf of and against real individuals, real people.

I don't think that's a particularly controversial thing to say. And I think different law professors will emphasize the humanity to different degrees. But I don't think anyone would necessarily disagree that the law has humanity baked into it everywhere.

And what's so interesting to me is that the humanity of the lawyers, the humanity of the law students is where there seems to be so much controversy today. That's what Anne is talking about, is taking seriously what the human experiences of our law students has been, and what they've gone through, and then how they come to the cases. And that seems a lot harder for us to think about pedagogically than thinking about the humanity of the people in the cases.

LESLIE KENDRICK: That's so interesting, that somehow it's easier to say, we should recognize the humanity of the client than to say we should recognize the humanity of the lawyer.

RISA GOLUBOFF: But clearly, there is humanity on all sides.

LESLIE KENDRICK: We're all people, right.

RISA GOLUBOFF: And you know, judges put on black robes. And that's an indication and blind justice. These are all ways in which there is a recognition of the need for our humanity not to overwhelm the tools of the law and to come to the law with fairness, and open mindedness, and even handedness. But we're still people under those robes. And we-- I don't know that it's possible to eliminate that humanity in whatever role we're playing in the law.

LESLIE KENDRICK: Right.

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RISA GOLUBOFF: That's all for this episode of Common Law. I hope you'll join us next time for more discussions in our second season about when law changed the world.

LESLIE KENDRICK: We'd love to hear from you. Stop by Apple Podcasts or wherever you listen to rate the show or give us a short review. To find past episodes or learn more about our guests, visit us at our website, commonlawpodcast.com, or on Twitter, [@CommonLawUVA](https://twitter.com/CommonLawUVA).

RISA GOLUBOFF: Join us in two weeks with UVA Law Professor Farah Peterson, where we'll talk about finding constitutionalism in unexpected places.

LESLIE KENDRICK: Common Law is sponsored by the University of Virginia School of Law. Today's episode was produced by Sidney Halleman, Tony Field, and Mary Wood, with help from Virginia Kennedy. This show was recorded at the studio of the Virginia Quarterly Review. I'm Leslie Kendrick.

RISA GOLUBOFF: And I'm Risa Goluboff-- until next time.