At the Intersection of Criminal Law and Feminist Jurisprudence

Anne Coughlin’s areas of expertise are criminal law and feminist jurisprudence. At first glance, they seem an odd combination. Criminal law is a field dominated by men. Substantive criminal law punishes and deters wrongdoing committed overwhelmingly by men against men, and criminal procedure regulates traditionally male police officers as they try to identify and capture male offenders. Feminist jurisprudence, by contrast, is dominated by women. Feminist academics seek to expose the cultural mechanisms that have subordinated women’s experiences, interests, and perspectives to those of men. Perhaps since so few criminals are female, feminist legal scholars have tended to confine their attention to a few cor-

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Coughlin noticed, however, that the common law dropped this grudging approach to the defense of duress when it came to married women. If a wife committed a crime in the presence of her husband, the law presumed that he had coerced her misbehavior and attributed her crime to him. According to the judges who created this doctrine, women did not possess the same capacity for responsible conduct as men and it was therefore sensible to presume that a wife’s conduct was controlled by her husband. Indeed, the judges not only thought it likely that a wife would submit to her husband’s direction but even believed that she should do so. Since the wife was not a full-fledged moral agent, she should be encouraged to rely on the judgment of a man who had the ability to choose good over evil and who thus could be punished for making the wrong choice.

Of course, by the early 1990s, when Coughlin first encountered the doctrine of marital coercion, the law had changed. The idea that a woman was not criminally responsible for acts committed in her husband’s presence was dismissed as a quaint relic from a Victorian past. Yet Coughlin also noticed the widespread support for a new excuse from criminal liability, an excuse that in practice applied only to women. The so-called “battered woman syndrome” was increasingly invoked to avoid criminal punishment for women who killed their abusive male partners. At a time when most feminists applauded this development, Coughlin saw there a disquieting remnant of the misogynist assumption that women lack the capacity for responsible self-governance. Everyone agrees that the responsible course of action would be to leave the abusive male long before resorting to homicide, but the battered woman syndrome posits that women are too dysfunctional to perceive or pursue that responsible option. In Coughlin’s view, by suggesting that women suffer from psychological deficits that render them incapable of resisting pressures exerted by men, the battered woman syndrome defense explicitly locates women’s subjugation, not within legal or cultural convention, but within women themselves. On that assumption, Coughlin reasoned, women would continue to be vul-
nerable to forms of state intervention and supervision from which autonomous and responsible men would be immune.

Coughlin developed these ideas in “Excusing Women,” 82 California Law Review 1 (1994). The article is ground-breaking and controversial but finely nuanced. Coughlin argued against special excuses that privilege masculine over feminine traits even as they extend protection to women. At the same time, she called for taking the sympathetic intuitions that support the battered woman syndrome defense into account in a revised theory of criminal responsibility, one that can accommodate women’s experience of domestic violence without judging them to be deviant and inferior, indeed, creatures more like animals than men.

Coughlin’s interest in the premises of crime definitions and excuse defenses also inspired “Sex and Guilt,” 84 Virginia Law Review 1 (1998), an article advancing a novel theory about the origins and functions of contemporary rape doctrine. The beginnings of this paper were serendipitous. Coughlin, who had just come to Virginia from Vanderbilt, was working on a criminal law casebook with colleagues Richard Bonnie, John Jeffries, and Peter Low. Since she had particular responsibility for the chapter on sexual assault, Coughlin thought it might be sensible to write an article on that subject as well, but she found that the literature on rape was voluminous and that the law of rape had already been ably and exhaustively criticized by feminists. Then a bungled LEXIS search (designed to uncover judicial rhetoric about the force element of rape) produced decisions by military courts in which soldiers were punished, to this day, for adultery. At first, the adultery cases seemed a distraction, just another reminder of outdated attitudes toward sexuality that civilian culture rejected long ago. But as Coughlin reflected, the adultery cases became deeply informative. To Coughlin, they suggested that rape doctrine can be properly understood only if it is repositioned as part of a legal system that punished not only forcible but also consensual nonmarital sex. Once we recall that rape law was inherited from a culture that also punished adultery and fornication, Coughlin concluded, traditional rape doctrine looks less like criteria for defining the man’s crime than like the elements of the woman’s excuse for engaging in nonmarital sex.

Keep in mind the standard feminist criticism of rape law. Traditional rape law required a woman to offer physical resistance to the man’s sexual advances; verbal resistance did not count. As feminist critics rightly insisted, this definition allowed men to annul women’s exercise of sexual autonomy by disregarding the answer “no.” Critics also condemned the traditional definition of force, which required proof that the man used or threatened serious physical violence and discounted other pressures, such as threats of economic or reputational injury. As critics noted, the law punishes those who use such threats to take money. Why should it refuse to punish men who use them to take sex? In a sense, critics saw rape as analogous to robbery and charged that the law’s refusal to treat the two the same reflected the lawmakers’ complicity in male domination of female sexuality.

In “Sex and Guilt,” Coughlin noted that although the foregoing critique may reflect contemporary assumptions, it ignores the moral and legal premises of the culture from which the rape prohibition emerged and therefore fails to account for the precise ways in which sexism shaped rape law. Coughlin invited readers to suspend their contemporary
understanding of consensual intercourse as lawful activity and to try to recapture the mind-set underlying laws against fornication and adultery. The question Coughlin asked was how the criminalization of consensual nonmarital sex influenced the law of rape.

Coughlin addressed this question by taking up the perspective of a judge committed to the criminalization of nonmarital intercourse. For such a judge, the task presented by a case of nonmarital intercourse was not to determine whether the incident was rape, for which the man alone would be punished, or ordinary intercourse, for which no one would be punished. Rather, the task was to decide whether the encounter was rape, for which the man was solely to blame, or fornication or adultery, for which both the man and the woman shared criminal responsibility. For such a judge, the woman who made a rape complaint was not in the same position as the person who reported a robbery, because giving away sex, unlike money, was itself a crime. From this perspective, the rape complainant seemed more like someone who implicated herself in the commission of a crime in charging another perpetrator.

From this perspective, the law of rape resolves itself with startling clarity. The traditional elements of rape law mimic the arguments we would expect a woman to make if she were defending herself against an accusation of fornication or adultery. Consider the duress defense. When we compare the defense of duress to the crime of rape, the connection between the woman’s excuse and the man’s crime is irresistible. The elements of the duress excuse are indistinguishable from the force and physical resistance elements of rape. Just as the duress defense requires threat of death or serious injury, the rape complainant was required to show that she had been subject to threats of exactly that sort. Likewise, physical resistance is a standard element of duress. Certainly, the malefactor who pleads duress will not be excused merely because she did not want to commit the crime or even that she manifested her reluctance by saying “no” to her criminal partner. Rather, courts tend to find the duress excuse credible only where the accused actively resisted the coercer and had no available strategies to avert the crime.

For Coughlin, this new way of looking at the traditional law of rape is not just an exercise in legal archaeology. She believes that it has the potential to support a thorough reform of rape doctrine. As a society, we now seem agreed that adultery and fornication should no longer be crimes. If that is so, there is no reason to continue a law of rape that requires women to prove that they have a valid legal excuse for engaging in consensual sexual activity. Coughlin therefore advocates the reform of rape statutes so that we no longer construe rape complaints as admissions of guilt for which women alone must be exonerated.

Coughlin’s other articles include “Of White Slaves and Domestic Hostages,” 1 Buffalo Criminal Law Review 109 (1997), and “Regulating the Self: Autobiographical Performances in Outsider Scholarship,” 81 Virginia Law Review 1229 (1995). Both articles engage the attention of criminal law and feminist scholars. Her research agenda includes a work-in-progress on interrogation techniques in rape cases and another major project on the feminist movement to regulate pornography. In all these projects, Coughlin brings to bear the unique insights and perspectives of someone who is simultaneously committed to the unlikely fields of criminal law and feminist jurisprudence. The intersection of those interests is the foundation of her scholarly career and the direction of her future.
It might have been serendipity. It might have been evidence of the way the tenure clock focuses the mind. Probably both luck and stress had a hand in it, but Anne Coughlin is sure that something special about her first year at the University of Virginia School of Law also made an important contribution to her favorite scholarly work to date, "Sex and Guilt," 84 Virginia Law Review 1 (1998) (excerpted here at page 11). Coughlin came to the Law School in the fall of 1995 as a visiting associate professor of law, and, during that year, she found the right mixture of people and professional values—a supportive administration, productive and energetic colleagues, and talented and receptive students—in which to flourish as a scholar and teacher.

Coughlin's visit to Virginia originated with Peter Low, John Jeffries, and Richard Bonnie, co-authors of a casebook in criminal law. In 1994, Jeffries contacted Coughlin and invited her to co-author a revised edition. "John had read my article in which I evaluate the battered woman syndrome defense ("Excusing Women," 82 California Law Review 1 (1994))," Coughlin recalled,
“and he phoned to ask me if I would write a new chapter on rape and revise the existing materials on justification and excuse defenses. When I agreed to join the casebook, John suggested that it would be helpful for me to visit at the Law School so that we could collaborate closely during the revision process.” As it turns out, Coughlin's co-authors did not intend for feminist ideas to be limited to isolated passages on sexual assault and domestic violence. After arriving in Virginia, Coughlin learned that they wanted her to be what Jeffries called a “minister without a portfolio,” one who would review the entire book with an eye toward updating its traditional readings with fresh, critical perspectives. “At first, I thought the assignment was pretty intimidating.” Coughlin admitted, “and things got even scarier when my co-authors told me that they wanted the new rape chapter to be the first chapter in the book. I had never written even a footnote for a casebook before, so I just gulped and, then, somehow persuaded them that the sexual assault materials should come later, at a point after the students had a foundation in general criminal liability principles. I remember thinking, wow, these guys must be serious, they want to turn the book upside down.”

During her first semester at the Law School, Coughlin and her criminal law colleagues used a draft of the revised casebook in their courses. Coughlin found the experience very rewarding. “Of course, I have always known that our students are our colleagues in the sense that they will be members of our profession in three short years,” Coughlin said. “But, during my first year at Virginia, I saw how important the classroom experience can be in terms of developing and shaping our research agendas. The students appreciated our efforts to revise the casebook, to incorporate cutting-edge developments and critical perspectives, while still giving them a solid background in the traditional doctrine. I was working on the casebook chapter on rape and writing an article on rape, and, at the same time, I had the opportunity to get my students’ input on everything from specific course coverage to pedagogical strategies to feminist efforts to reform rape statutes.”

Just as Coughlin’s scholarship has flourished at the Law School, so has her teaching. During her year as a visitor, she won the Student Bar Association First-Year Council Teaching Award. “That award always will be most special to me,” Coughlin said. “With the award, the members of the class of 1998 were sending me a signal, they were telling me that they were rooting for me, that they wanted me to stay here permanently. At least that was my impression on the day I received the award, and students from that class later said to me, ‘We gave you that award so that you and the administration would know that we were adopting you.’” The Law School did adopt Coughlin. In the fall of 1996, she became a permanent member of the faculty, and, in 1997, she was named Class of 1941 Research Professor of Law. Since then, Coughlin has received more teaching accolades. In 1999, one of the classes she teaches, Criminal Investigation, was voted the most popular class in the Law School. In the spring of 1999, she won the prestigious All-University Teaching Award. The recommendations supporting Coughlin’s nomination were filled with praise for her teaching and her commitment to the students. As one student commented, “The Professor is brilliant, has great command of the subject and takes you on an intellectual ride that is incredible.” Steve Nickelsburg (Class of 1998, now clerking for Justice Anthony M. Kennedy) had this to say: “First-year law students spend much of their time drowning in information, wondering how any of it fits together. Breakthroughs come as an incredible relief. I had one of my first ‘Aha!’ moments in Professor Coughlin’s class, as she analyzed a judge’s written opinion by comparing it to three or four that we had studied in prior weeks. ‘So this is how you do it,’ I realized, and approached her class and my other first-year classes with newfound confidence.”
Sex and Guilt

by Anne M. Coughlin

The contemporary critique of the law of rape proceeds from the theoretical premise that the prohibition against rape exists to protect female sexual autonomy. This assertion about the proper purpose of rape law serves different strategies for different authors, depending on their political inclinations. From the perspective of liberal philosophy, the claim represents the primary normative judgment that lawmakers should employ when articulating a formal definition of rape and when applying that definition to particular circumstances. After scrutinizing rape doctrine in the light of late-twentieth-century liberal sexual mores, some authors have noticed that elements of the offense promote the sexual agency of men at the expense of that of women. Therefore, these commentators have suggested revising rape law in ways calculated to secure for women the authority to make sexual choices on an equal basis with men...
The critics' assertion that rape law is designed to protect female sexual autonomy carries with it a cluster of related assumptions about gender, heterosexuality, and the legal regulation of heterosexual intercourse. Speaking generally, the critics treat heterosexuality as a social sphere within which men and women should be free to pursue a range of erotic options. Although their conceptions of the state's role in securing sexual freedom differ in some crucial respects, the critics stipulate that, at a minimum, sexual freedom requires that people should be entitled to expect that the law will protect them from sexual contacts that they subjectively do not want and affirmatively reject or that they accept under conditions that would invalidate the exchange of other kinds of goods. The commentators imply that men enjoy sexual autonomy and that, at least when they are pursuing sexual connections with women, biological and cultural conditions coincide to support their autonomy and, indeed, their domination of female sexuality. . . . Women, on the other hand, possess physical and social traits that complement those of men—for example, where men are strong and assertive, women are weak and acquiescent—so they are ill-equipped to repel on their own the sexual depredations that men are disposed to undertake. Hence, in order to effectuate its goal of equal sexual autonomy, rape law intervenes in heterosexual relations to correct the existing imbalance in sexual power. By punishing rape, the law seeks to constrain the exercise of male sexual autonomy to the extent necessary to secure the sexual autonomy of women.

Viewed from this perspective, rape law in practice is thoroughly misogynistic. As the critics remark, the courts have interpreted the offense so narrowly that it prohibits only the most egregious violations of female sexual agency. By limiting rape to intercourse procured by physical violence, the courts tacitly validate many other coercive practices that would be criminal if, for example, men were trying to obtain money, rather than sex, from unwilling women. Worse still, the courts often represent such women as if they subjectively desired the sexual connection. The courts have achieved this inversion of female desire by holding that a
rape occurs only when the woman physically resists the man's violent sexual advances. Rape law thus instructs men that they are free to ignore a woman's verbal protests and even to construe such protests as expressing her agreement to participate. Through these and other distortions of women's experiences and perspectives, the law of rape promotes, rather than restricts, male control of female sexual expression.

By now, this account of rape law is a familiar one, and, if frequency of repetition is any indication, many members of the legal academy find it to be compelling. In this article, I will offer an alternative account of rape doctrine that the legal literature has not explored. My account endeavors to be sensitive to the historical specificity of rape by examining some of the different ways of thinking about heterosexuality that may have shaped the prohibition, conditioned the experiences of rapists and their accusers, and influenced the community's response to rape allegations, in long (as well as recently) forgotten cases.

In particular, I argue that we cannot understand rape law unless we study the doctrine, not in isolation, but in conjunction with the fornication and adultery prohibitions with which it formerly resided and, perhaps, continues to reside. When we recall that the contemporary definition of rape emerged from a system that outlawed these forms of consensual heterosexual intercourse, it seems clear that the official purposes of rape law did not include the protection of sexual autonomy. Contrary to the assumptions of the modern rape critique, influential institutions within that former system decreed that sexuality was a force too dangerous that it could not safely be left to self-regulation, but rather should be closely confined, by law, within marital relationships. Far from being positively valued and protected, therefore, the exercise of sexual autonomy was something to be discouraged, even criminalized. Since legal institutions were assigned the task of enforcing both the rape laws and the fornication and adultery laws, it would not be surprising to discover that appellate judges and, presumably, other law enforcement officials found ways to enlist rape doctrine to detect and discipline sexual transgressions by women, as well as by men.

Therefore, I propose that we examine rape law by suspending our understanding that heterosexual intercourse ordinarily is lawful activity and by attempting instead to recapture the ways of thinking about heterosexuality underlying the fornication and adultery laws. In other words, what I suggest is an investigation of rape doctrine that proceeds from the premise that nonmarital heterosexual intercourse is — and should be — criminal misconduct for both women and men. When we consider the regulatory framework from which rape law emerged, this reversal of value is sensible, indeed, necessary, though it may seem absurd at first glance, especially to liberal readers. We inherited the rape crime from a culture in which rape was only one of two basic categories of heterosexual offenses. The other category of offenses consisted of consensual sexual intercourse outside marriage — fornication and adultery — in which the man and the woman were accomplices. The existence of this prohibition on consensual nonmarital sex has a number of important implications. . . .

The . . . implications . . . to which the article is devoted . . . concern[] the influence that we would expect the fornication and adultery prohibitions to exert on the development of the substantive definition of rape. How would judges who believed that consensual nonmarital intercourse
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Was a crime define rape? This article will develop a contentious point: By unearthing our ancestors’ belief that all nonmarital intercourse should be criminalized, we may begin to appreciate, even as we reject, the courts’ inclination to approach rape complaints with deep suspicion. Since, under our ancestors’ system, the underlying sexual activity in which a rape complainant engaged (albeit, by her own testimony, unwillingly) was criminal misconduct, her complaint logically could be construed as a plea to be relieved of responsibility for committing that crime. A court would be receptive to such plea only if the woman could establish that, although she had participated in a sexual transgression, she had done so under circumstances that afforded her a defense to criminal liability. Significantly, careful examination of rape doctrine suggests that the elements of the rape offense (almost) are a mirror image of the defenses we would expect from women accused of fornication or adultery. Such traditional defensive strategies would include the claim that the woman had committed no actus reus, that she lacked the mens rea for fornication or adultery, or that she had submitted to the intercourse under duress. For example, just as courts allowed perpetrators of nonsexual crimes to interpose a duress defense, so we must assume that they would be willing to excuse those women suspected of fornication or adultery who could prove that their accomplices had forced them to offend under threat of death or grievous bodily harm. According to this account, the features of rape law to which the critics most strenuously object — namely, the peculiar definitions of the nonconsent and force elements of the crime — are better understood as criteria that excuse the woman for committing an illegal sexual infraction, than as ingredients of the man’s offense. Curiously, when we acknowledge, rather than ignore or minimize, the longstanding and explicit connection our culture has made between sexual intercourse and criminal guilt, we produce a description of rape law that incorporates a justification for thorough doctrinal reform. That is, if we now are prepared to agree that fornication and adultery no longer should be criminalized — whether because these offenses violate contemporary constitutional guarantees or contemporary moral and political judgments — then there appears to be no justification for adhering to a definition of rape that treats the rapist’s victim as a lawbreaker who must plead for an excuse from criminal responsibility.

Publications of Anne M. Coughlin

**BOOKS**


**ARTICLES**


