

Teaching Rape Under Cover

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We're going to talk about unpleasant things in this class. Ugly. Uncomfortable. Sometimes shocking. You might think some of it is unspeakable. But we're going to speak about it, because we have no choice. It's the nature of the subject. If it were all rainbows and lollipops, it wouldn't be illegal.

I give a speech like that on the first day of every first-year Criminal Law course I teach. As I tell my students, our class is large enough that, statistically speaking, we can just assume that some of their classmates have been touched personally by each of the by-definition-unpleasant-or-it-wouldn't-be-criminal things we would be dwelling on all semester. I remind them that someone in the room has had a family member or close friend deal with the crime of the day. That someone in the room has him- or herself been a witness, a victim, a defendant. I do it in the context of a reminder that our conversations should be frank, but also courteous and respectful. That one of the points of a classroom discussion is to flesh out opposing views, because it is through actively engaging with the other side that one learns best what one really thinks—but that this active engagement with dissenters is educational only if it is done professionally. I don't know that my students really need this reminder, but I figure it can't hurt. So whether my little speech has anything to do with it or not, our discussions have always been productive, and over the years, I've even had a number of students go out of their way to thank me for keeping it that way. Truthfully, I figure that's mostly to their credit, rather than anything I did.

So reminding students to be considerate of others' personal experiences isn't my pedagogical tip. I'm not sure how much work it actually does, and most of you are probably doing it already anyway. My tip is equally obvious, though, so apologies in advance if this idea is old hat to everyone in the audience.

I teach rape. I know not everyone does, and I suppose it's easier for me to do it than it might be for others, simply because I'm a woman. I'm not sure why that is. I gather that when my male colleagues talk about the rape laws, they feel the female students don't trust them to understand their viewpoint. But then again, surely my male students are inclined to think I can't possibly understand theirs. And as much as I want to encourage an open and frank debate in the classroom on every topic we cover, I especially want to encourage it here. And I find that I *have* to be especially encouraging here. No matter how open my students have been

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about their differing views in other areas, when it comes to talking about what should be the legal limits of sexual behavior, they tend to clam up.

I've found it helps to begin with a reference to Woody Allen's *Annie Hall* (even though none of them have seen the movie these days). Remember the scene where the man and the woman separately describe the frequency of their sex life to their respective therapists? For him, it's "Hardly ever. Maybe three times a week." For her? "Constantly. I'd say three times a week." It's universally true, and in no way limited to the criminal law context, that parties may witness the exact same events in the real world but come away with very different understandings of what those events mean.

And then we turn to the first case assigned for the day, *State v. Rusk*,¹ in which the female, alleged victim's perspective on what happened that night is very different from the male defendant's. (One of the more memorable lines of the term comes from the dissent in this case, noting that the intercourse had to be consensual because "[s]he certainly had to realize that they were not going upstairs to play Scrabble."²)

I figure there are a couple of things going on in the rape discussion dynamic that conspire to make our conversations less robust than they are in other areas: the inherent gender divide, together with an unwillingness to own one's opinions in a known hot-button area. So I announce that I need a male student to tell me what happened that night from the alleged victim's perspective. And when that male student finishes telling me her story, I ask if any other men in the room can fill in whatever details the first might have left out. I won't take any women's hands, and I chide any men who offer the defendant's story. This is her story, told as completely and sympathetically as possible by the men in the room. And then female volunteers tell me what the defendant thinks happened that night, again with no help from the men, and chastisement if they offer a detail that supports the victim's version more than the defendant's.

It's a small thing, and I don't insist it continue past the elucidation of the facts of the case. But the conversation for the entire section goes much more smoothly. I suspect that's because students feel more comfortable under the cover of a presumption that the view they're expressing isn't their own. They can feel free to make the points from each side, without fear their classmates will ascribe those double-edged (side with the opposite sex and be a turncoat, or side with your own and be an opposite-sex-hater) opinions to them.

I offer students the same opportunity for cover, in effect, when we talk about *State of Interest of M.T.S.* (famously holding that consent under New Jersey's rape law must be affirmatively given; lack of objection is insufficient).³ Oddly, no one wants to get specific about how we might verbally or (more realistically) nonverbally express consent for some sex acts but not others, or how for some

¹ 289 Md. 230 (1981).

² *Id.* at 258 (Cole, J., dissenting).

³ 129 N.J. 422, 447-49 (1992).

demographics especially (like the teenagers in the case, for example), there may be a divide between those who view “heavy petting” as an end in itself and those who view it as a signal that intercourse is welcome. I find that I have to laughingly prompt students with questions like “I know none of you have personal experience with any of this, but has anyone ever had a ‘friend’ who . . . ?”, and that usually works. Again, it doesn’t have to be very much cover, but even the thinnest of impressions that one is speaking in the hypothetical, rather than speaking one’s own considered thoughts, seems to get all the angles out on the table for discussion.

Some people might object that students should be comfortable owning their own opinions. I know some colleagues don’t allow anonymous posting on their class websites, for example. But as long as everyone keeps it civil, I consider the cloak of anonymity, or the cover of deniability, just another useful pedagogical tool.

