

The Pedagogy of Rape Law: Objectivity, Identity and Emotion

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In a recent conversation with a number of male law professors, one of them said: “I don’t teach rape because it’s just too difficult.” I immediately wondered what precisely was “too difficult” about it. Then I recalled how rape law was taught when I took a criminal law course at U.C. Berkeley in 2005. For every other subject covered in that course, the male professor combined lecture and the Socratic Method to get about 90 students to discover the underlying logic of criminal law. When we got to the rape law section, however, the class was broken into small groups. We met in these groups for several class periods. Second- and third-year law students, serving as teaching assistants, guided us in discussing rape and the law.

These two instances suggest that instructors of criminal law, perhaps particularly male professors, have anxiety about teaching the law of rape. Indeed, as I began to research the pedagogy of rape law, I discovered that this anxiety is relatively common and that, in response, some instructors either do not teach rape law in their courses or they teach it, as my own professor did, in a manner entirely different from the way they teach other criminal law subjects.¹

Despite the modest success of efforts in the 1980s to get rape included in the criminal law curriculum and while all major casebooks on the subject now include sections on rape, many instructors intentionally skip the topic. At first this may seem to be a trivial observation and one that can be easily explained by the fact that rape is an emotional and heavily charged topic. The limited scholarship on the pedagogy of rape law, however, outlines other reasons for not teaching rape law.

Some instructors say they do not teach rape because they do not cover substantive crimes—except for homicide—in their criminal law courses. James Tomkovicz, who relates his experience of teaching rape law for the first time in a 1992 law review article, mentions many reasons for avoiding the topic, including the risk it presents to the educational atmosphere. For instance, students who have been victims of sexual assault may find it difficult and traumatic to participate in or hear a discussion of rape law. For years,

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1. Kate E. Bloch, *A Rape Law Pedagogy*, 7 *YALE J.L. & FEMINISM* 307 (1995).

Tomkovicz did not cover rape in his criminal law course and his justification for not teaching the topic was that he had too much else to cover. After teaching it for the first time, however, he realized its pedagogic value and acknowledged that one of the reasons he had not taught it in the past was that he resented being told by an “interest group” what he should include in his course.²

Although there are a variety of reasons for not teaching rape law, many of them focus on the emotional and personal aspects of rape. A persistent worry is that the issue of rape is too volatile for the law school classroom. Tomkovicz offers this tentative explanation for the perceived volatility of rape law discussions:

Discussion of the subject will evoke strong, sometimes irrational, often intemperate reactions. I do not claim to know the reasons for this phenomenon. Perhaps it is that the vast majority of sexual assaults involve the victimization of women by men. Perhaps it is that rape remains a prevalent and critical problem in our society. Perhaps it is the perception that the predominantly male shapers of our law have moved all-too-reluctantly to eliminate harmful stereotypes of women and unfair advantages for men. Perhaps it is that many women, their relatives, and their friends have been injured, or that many men see themselves as potential targets of unfair criticism and unfounded serious charges. Perhaps it is a general unwillingness to be open-minded about controversial and emotional topics. More likely, it is some combination of all of these variables and more that guarantees a discussion of rape will be fraught with the potential for turmoil.³

While many aspects of this assessment likely are accurate, I think there is more to the volatility of rape discussions and thus to the issue of how and whether rape law is taught in a law school classroom.

In this article I consider some potential roots of the anxiety surrounding the teaching of rape law and its actual or perceived explosiveness. In particular, I argue that the crime of rape implicates issues of identity, gender and emotion. I explore how the politics of identity figures in the emotional intensity of rape and in the anxiety around teaching rape law. I argue that the identity politics framework and its epistemology would stifle classroom discussion and reinforce problematic understandings of female and male identity. Although I am critical of the politics of identity, I also argue that it challenges in important ways many deep-seated assumptions about law, reason and objectivity and is thus especially threatening to those law professors who take these things for granted. Emphasizing that rape is too difficult to teach because it is an emotional topic may mask the deeper ways in which a discussion of rape—particularly an analysis that views it as oppressive of women thus giving them special standing to analyze it—challenges ideas law professors take for granted, such as their own authority, rationality and objectivity. Moreover, it is in part emotion itself that grounds this challenge.

2. James J. Tomkovicz, *On Teaching Rape: Reasons, Risks, and Rewards*, 102 YALE L.J. 481, 483 (1992).

3. *Id.* at 505.

I thus explore the pedagogy of rape law through a framework that looks critically at the questions of knowledge, emotion and authority that are implicated in both identity politics and traditional ways of thinking about the law. Many scholars have examined the relationships among law, identity and emotion⁴ and some critical attention has been paid to the way in which identity and emotion play out in legal pedagogy.⁵ No one, however, has examined critically how identity and emotion affect the pedagogy of rape law. By critically analyzing instructors' reluctance to teach rape law, this article fills that gap. In doing so, I use the pedagogy of rape law to illuminate broader issues of gender, identity and emotion as related to rape and the law.

The Politics of Identity

Not long after the conversation in which the law professor mentioned that he does not cover rape in his criminal law course, a female colleague described to me her reactions when she heard that a man was writing a scholarly piece about rape. She acknowledged that she had had a knee-jerk reaction and questioned his standing to speak with expertise on the subject. Underlying her reaction was the idea that one must have a certain relationship to and particular experiences of rape to be able to speak authentically and with authority about it. Furthermore, she was assuming that only women have the requisite experience of rape. The possibility and even likelihood that students will have similar attitudes may be one reason that instructors are reluctant to teach rape law.

My colleague's reaction can be understood as a manifestation of what has come to be known as identity politics. Although the term is often used imprecisely to refer to a variety of ideas, aspects of identity politics capture something important about this reaction. In this analysis of the pedagogy of rape law, I am employing "the politics of identity" to refer to the idea that, because of shared experiences, only members of a historically subordinated

4. For an overview of the emerging field of law and the emotions, see Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 *LAW & HUM. BEHAV.* 119 (2006). For an overview of the relation between legal feminism, identity, and the emotions, see Kathryn Abrams, *Legal Feminism and the Emotions: Three Moments in an Evolving Relationship*, 28 *HARV. J.L. & GENDER* 325 (2005). See also Kathryn Abrams, *The Progress of Passion*, 100 *MICH. L. REV.* 1602 (2002); Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 *CARDOZO L. REV.* 37 (1988). For a critique of identity-based legal claims, see WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* (1995).
5. Scholarship on law school and identity includes: Kimberle Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 4 *S. CAL. REV. L. & WOMEN'S STUD.* 33 (1994); Judith G. Greenberg, *Erasing Race from Legal Education*, 28 *U. MICH. J.L. REFORM* 51 (1994); Lani Guinier, Michelle Fine & Jane Balin, *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 *U. PA. L. REV.* 1 (1994); Suzanne Homer & Lois Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law School*, 5 *BERKELEY WOMEN'S L.J.* 1 (1989); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 *STAN. L. REV.* 1299 (1988). Banu Ramachandran provides a critique of the latter three articles in *Re-Reading Difference: Feminist Critiques of the Law School Classroom and the Problem with Speaking from Experience*, 98 *COLUM. L. REV.* 1757 (1998).

group are thought to have the authority to speak about and analyze practices that are understood as central to their oppression. This perspective is itself a reaction to the persistent privileging of the perspectives of those in power and the tendency for those perspectives to be presented as objective reality.⁶ As bell hooks puts it: “Identity politics emerges out of the struggles of oppressed or exploited groups to have a standpoint on which to critique dominant structures, a position that gives purpose and meaning to struggle.”⁷

Experience and how it is interpreted play an important role in identity politics. My colleague’s identity-based reaction to a man’s analysis of rape is a manifestation of the perspective that, as Joan Scott puts it, takes experience as “an originary point of explanation—as a foundation upon which analysis is based.”⁸ In this case, the experience of being rapable and of being oppressed through rape, even if one is never actually raped, is understood as providing a necessary ground for analysis. This understanding takes experience to be the foundation of analysis rather than that which is itself open to analysis. It thus consolidates and “takes as self-evident the identities of those whose experience is being documented and thus naturalizes their difference.”⁹ Experiences are seen to flow from the incontrovertible fact of identity rather than, as Scott thinks we should see them, as part of the way in which difference is established. In other words, taking experience as unquestionable, as the ground of identity, naturalizes differences and categories like that of woman. Politically, this phenomenon manifests itself as the uncritical acceptance of the subject’s identity and experiences as the ground from which the subject speaks and as the basis of political recognition. Both experience and identity are understood as foundational and natural.

In the context of rape, identity politics’ uncritical appeal to identity and experience manifests as a skepticism of male analyses of rape. The postulated absence of the experience of being raped or of being rapable positions a man as per se unable to speak about rape. Moreover, if rape is understood as a means of oppressing women, men are excluded from having the experience of being oppressed through rape. While I agree with the analysis of rape that views it as a tool of oppression, when combined with an uncritical appeal to experience, rape’s status as a tool of oppression may be taken for granted. In the process, female identity itself becomes bound to rapability. Since only those who are presumed to have been oppressed by rape—that is, women—

6. For a number of other uses of identity politics, see Susan Bickford, *Anti-Anti-Identity Politics: Feminism, Democracy, and the Complexities of Citizenship*, 12 *HYPATIA* 111 (1997). For an account of identity politics, see SONIA KRUKS, *RETRIEVING EXPERIENCE: SUBJECTIVITY AND RECOGNITION IN FEMINIST POLITICS* 80-83 (2001).
7. BELL HOOKS, *TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM* 88-89 (1994).
8. Joan W. Scott, *The Evidence of Experience*, 17 *CRITICAL INQUIRY* 773, 777 (1991).
9. Joan W. Scott, *Experience*, in *FEMINISTS THEORIZE THE POLITICAL* 22, 24-25 (Judith Butler & Joan W. Scott eds., 1992).

are given standing to speak authoritatively about it, the connection between rapability and female identity is solidified.

Simultaneously, male identity becomes bound to the potential to rape and men's presumptive status as perpetrators is reinforced. Thus, taking experience and identity as foundational sets up and perpetuates a binary understanding of men as powerful rapists and women as relatively powerless potential victims. This dichotomous understanding is reflected in Tomkovicz's discussion of teaching rape in a criminal law course for the first time when he notes: "All women are potential victims. All men are potential defendants."¹⁰ Crucially, the naturalization of difference that occurs in an analysis of rape that takes identity for granted reinforces both the link between women and rapability and the link between masculinity and the capacity to rape. This characterization challenges neither women's violability nor the culture of rape and sexual assault.

Although examining the way in which rape operates as an instrument of power and oppression is important, identity politics risks binding the experience of subordination to female identity. As political theorist Wendy Brown has argued, injury has become constitutive of identity for marginalized groups. In fact, to the extent political recognition comes to rest on a subordinated identity, subjects become invested in their own injury. As Brown writes: "Politicized identity thus enunciates itself, makes claims for itself, only by entrenching, restating, dramatizing and inscribing its pain in politics; it can hold out no future—for itself or others—that triumphs over this pain."¹¹ On this understanding, identity becomes rooted in injury such that when identity is naturalized and reinscribed, injury is as well. Injury itself becomes foundational. Brown argues that "wounded attachments" have formed "the basis for ungrounded persistence in ontological essentialism and epistemological foundationalism, for infelicitous formulations of identity rooted in injury."¹²

Rape brings up, viscerally for some, what is understood as the injury of womanhood. Indeed, rape is commonly viewed as the worst thing that could happen to a woman and thus as the most severe mark of the injury of womanhood. This intense identification with violability may stem in part from the tendency of legal authorities not to take rape accusations seriously and to put victims on trial,¹³ as well as other discriminatory practices such as historic laws that rendered black women unrapable.¹⁴ Nonetheless, the identification

10. Tomkovicz, *supra* note 2, at 498.

11. BROWN, *supra* note 4, at 74.

12. *Id.* at xii.

13. For a discussion of rape victims being put on trial, see SUSAN ESTRICH, *REAL RAPE* (1988); JEANNE C. MARSH, ALISON GEIST & NATHAN S. CAPLAN, *RAPE AND THE LIMITS OF LAW REFORM* (1982); and Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977).

14. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 599-601

of violability with womanhood has negative effects. When combined with a politics that assumes identity as a ground of analysis and not as something open to analysis, rape appears inevitable and foundational to womanhood. While rape has rightfully been analyzed for its role in the oppression of women, taking rape as foundational to women's experience and identity is at odds with an approach that challenges women's presumed violability and powerlessness.

Considering the historical and ongoing differences of women's experience of rape complicates understandings of the relationships among gender, identity and rape. As mentioned above, black women were historically not seen as violable. And, as bell hooks notes, slave women were often blamed for their own rape and white women were complicit in the sexual assault of black women.¹⁵ While black women have been viewed as unrapable, black men have been seen as presumptive rapists of white women. Analyzing rape from an intersectional perspective reveals varied experiences and interpretations of it.¹⁶ It thereby also adds another element to the politics of identity as they may play out in the law school classroom. Racial as well as gendered tensions are likely to arise.¹⁷

These views of identity, experience and injury provide insight into why criminal law instructors, especially male ones, would be hesitant to teach rape law. The instructor's position as the authority figure in a classroom would necessarily be challenged when discussing rape since, from an identity politics viewpoint he would be understood as lacking access to the truth of the matter. He would presumably lack the necessary experience, injury and identity to speak about rape. Even a female law professor may be hesitant to teach rape law since her identity may be viewed as predetermining her analysis and thus as lacking objectivity, especially if she is a member of other marginal groups. Additionally, should her analysis depart from the views she is presumed to hold, she may be vilified, since identity politics sometimes manifests as an assumption that one's membership in a group and the group members' shared experiences demand a given analysis and political outlook.¹⁸

(1990). For a detailed historical account of the intersection of gender and race in colonial Virginia, see KATHLEEN BROWN, *GOOD WIVES, NASTY WENCHES, AND ANXIOUS PATRIARCHS: GENDER, RACE, AND POWER IN COLONIAL VIRGINIA* (1996).

15. BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* 51-59 (1981).
16. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 139 U. CHI. LEGAL F. 139 (1989).
17. Patricia Williams, for example, examined law school exams and found, among other things "criminal-law exams whose questions feature exclusively Hispanic or Asian criminals and exclusively white victims" as well as "many, many questions in which women are beaten, raped and killed in descriptions pornographically detailed (in contrast to streamlined questions, by the same professors, that do not involve female victims)." PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 85 (1992).
18. This identification with injury also may ground the idea that there is one reality of rape and that, if a woman articulates something that does not closely align with what she is supposed to think, she is demonized. For example, one of Tomkovicz's students was castigated

The politics of identity also reveals how debate and analysis of rape law in the classroom might be stifled. The assumptions that only those who are oppressed by rape should speak about it would hinder classroom discussion. The belief that there is one legitimate analysis of rape, which is the analysis grounded in a position of subordination would also stifle discussion.¹⁹ Moreover, the binary understandings of men and women vis-a-vis rape, as well as the idea that experience is foundational, would be reinforced.

Nonetheless, identity politics and the essentialism that may accompany it need to be understood within the larger framework of who is given authority to speak. As bell hooks explains:

. . . systems of domination already at work in the academy and the classroom silence the voices of individuals from marginalized groups and give space only when on the basis of experience it is demanded [W]hen [marginalized] groups do employ essentialism as a way to dominate in institutional settings, they are often imitating paradigms for asserting subjectivity that are part of the controlling apparatus in structures of domination.²⁰

Asserting the authority of voice, as hooks calls it, can thus be understood as “a strategic response to domination and to colonization, a survival strategy that may indeed inhibit discussion even as it rescues students from negation.”²¹

As noted above, the identity politics framework would deny a man’s analysis of rape any legitimacy because victims or potential victims are thought to have the only legitimate perspectives. This can be understood sympathetically as a response to the historic denial of women’s perspectives and experiences of rape. However, it is also important to consider that one of the central legal dilemmas of rape is precisely the issue of whose perspective matters most. What of the situation when the defendant in a rape trial claims not to have understood the actions of the victim as a real protestation? To deny the defendant any legitimate basis for speaking from his experience is to preclude an analysis of that perspective and, crucially, an analysis of gendered differences of experiences of sexual encounters. To deny men any authority from which to speak, because they are presumptively excluded from the category of potential victim, is to reify sex difference on the topic of rape and thereby to preclude analysis of how those differences are constituted. Again, as Scott writes on the view that experience is the foundation of analysis, “evidence of experience

by her fellow students for arguing in class that there may be some reason for separating acquaintance rape from stranger rape. Tomkovicz, *supra* note 2, at 495.

19. Scott elaborates on identity and experience by noting, “all those not of the group are denied even intellectual access to it, and those within the group whose experiences or interpretations do not conform to the established terms of identity must either suppress their views or drop out. An appeal to ‘experience’ of this kind forecloses discussion and criticism and turns politics into a policing operation.” Joan W. Scott, *Multiculturalism and the Politics of Identity*, 61 *OCTOBER* 12, 18 (1992).

20. HOOKS, *supra* note 7, at 81.

21. *Id.* at 83.

becomes evidence for the fact of difference rather than a way of exploring how difference is established, how it operates, how and in what ways it constitutes subjects who see and act in the world.”²²

To curb the frequency of rape this difference is precisely what needs to be confronted. Examining how this difference is established through practice is crucial. In other words, if difference is established in part through experience all experience must be examined critically. Only in this way can gendered and racial differences of opinion about what constitutes non-consensual sex be brought into alignment. To be sure, it will take a skilled teacher both to acknowledge the value in hearing from a variety of perspectives and to critique those rooted in patriarchal or racist assumptions. This would be unlikely and the classroom would be volatile if the instructor shared those assumptions.

The view that only women have the requisite experience and thus authority to speak about rape not only closes off analysis of experience, it also obscures the prevalence of the rape of men. Male rape is already stigmatized and underreported, in part because of its associations with feminization and homosexuality. Although there often is shame in female rape, it is not stigmatized and silenced in the same way male rape is. This is both because women are more likely to be targets of sexual assault and because sexual objectification and the possibility of sexual assault is bound to female identity. The view that denies men any legitimate basis for speaking about rape contributes to and reinforces the silence surrounding male victims of rape. To the extent the identity politics framework takes hold in the law school classroom, future attorneys will not grapple with the question of how the law and legal services could better redress the rape of men. In fact, future attorneys may continue to think that men are not raped.

Objectivity and Emotion

One reason instructors cite for not teaching rape in criminal law courses is that they perceive rape to be an extremely emotional and sensitive issue.²³ The sensitivity of the issue is further compounded by the fact that it is likely there will be at least one victim or perpetrator of rape in the classroom.²⁴ Although the emotion aroused in a discussion of rape may be deeply personal, rape is an emotional topic precisely because it is not just an individual crime but

22. Scott, *supra* note 9, at 25.

23. Michelle Madden Dempsey, *Teaching Rape: Some Reflections on Pedagogy*, SSRN ELIBRARY, May 6, 2008, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1601490; Bloch, *supra* note 1; Susan Estrich, *Teaching Rape Law*, 102 YALE L.J. 509 (1992); Tomkovicz, *supra* note 2.

24. Susan Estrich dismisses the concern that rape should not be taught because of the likely presence of victims in the class: “No one would ever suggest that we should skip homicide in those years when we have students who have been touched by it, or skip insanity because some of our students have fought mental illness, or never mention drunk driving because we’re all probably too familiar with that. Why should rape be different? Besides, I think the majority would find it even more painful to learn nothing about rape in law school.” Estrich, *supra* note 23, at 514.

also an instrument of oppression. That is, rape is particularly emotionally charged to the extent it is understood as a crime of power, the effect of which is to subordinate women. Since it is that very subordination that serves as the foundation of identity politics, the emotion associated with rape is itself intertwined with the politics of identity.

The emotional intensity of rape initially may seem like a legitimate reason for not discussing it. Yet, probing further into the emotions associated with rape—in particular, the gendered character of that emotion—and the relation between emotion and the law reveals that the anxiety surrounding teaching rape law ultimately may be rooted in problematic understandings of emotion and objectivity. Additionally, while instructors of any subject may want to avoid intense emotional discussion in the classroom, law professors are often especially ill-equipped to deal with emotions and especially challenged by them because emotions are commonly understood as diametrically opposed to the reason and objectivity that are presumed to be the substance and object of law. The legal profession confers expertise on those who achieve dispassionate distance from a case. The threat of subjectivity and emotion in the law school classroom is thus particularly worrisome to instructors, who are seen as paragons of rationality and expert distance.

In fact, on a forum about teaching rape law in criminal law courses an anonymous instructor wrote:

Rape is a difficult subject to teach, and discuss, well. I think many people are unable to learn about it in an intelligent fashion. In my experience, even people who discuss or advocate regarding rape issues (and who are theoretically capable of having an objective discussion) are frequently unable to do so. One of the most important lessons we learn in law school is the ability to “step back” from the facts of the case and analyze/discuss the LAW. Rape is probably one of the, if not the, most difficult subjects in that respect.²⁵

The author then advised: “Any professor who cannot remain objective during the discussion should probably avoid rape.”²⁶ Similarly, Professor Daniel J. Solove wrote on the same forum: “I’m not sure whether the fact that ‘rape touches close to home’ forces students to focus on the issues. I think it could possibly be a distraction.”²⁷ As quoted previously, Tomkovicz writes: “Discussion of [rape] will evoke strong, sometimes irrational, often intemperate reactions.”²⁸

25. Sailorman, Comment to Jennifer Collins, *Teaching Rape in a Criminal Law Class*, CONCURRING OPINIONS, http://www.concurringopinions.com/archives/2006/11/teaching_rape_i.html (November 16, 2006, 10:47).

26. *Id.*

27. Daniel J. Solove, Comment to Jennifer Collins, *Teaching Rape in a Criminal Law Class*, CONCURRING OPINIONS, http://www.concurringopinions.com/archives/2006/11/teaching_rape_i.html (November 5, 2006, 22:19).

28. Tomkovicz, *supra* note 2, at 505.

These quotations demonstrate the persistence within the legal profession of the dichotomy between reason and emotion. As is common in legal reasoning, these instructors express the view that objectivity is acquired through distance. Being too entangled, too personally invested or too emotional distracts from objectivity. Put in other words, the idea behind these perspectives on rape is that being personally affected and having a personal investment in an issue detracts from the ability to think rationally and with objectivity. These quotations resonate with what Catharine MacKinnon has argued about epistemology. She observes that “the basic epistemic question” of law and science has been taken “as a problem of the relation between knowledge—where knowledge is defined as a replication or reflection or copy of reality—and objective reality, defined as that world which exists independent of any knower or vantage point, independent of knowledge or the process of coming to know, and, in principle, knowable in full.”²⁹

This distanced view of objectivity is in tension with identity politics. In fact, this is precisely the kind of understanding of objectivity and reason that the identity politics framework challenges. As discussed in the previous section, identity politics seeks to challenge dominant notions of objectivity and reality. That is, identity politics challenges dominant understandings of epistemology that assume there is a truth of things as they are in themselves and that we can access that truth by taking up a distanced stance that is not rooted in a perspective. Identity challenges legal pedagogy because it makes one’s experiences epistemically important.

Kimberle Crenshaw suggests a different way to interpret emotion and debate in the context of rape. In discussing the silencing and alienation of minority students in law school, she writes:

In many instances, minority students’ values, beliefs, and experiences clash not only with those of their classmates but also with those of their professors. Yet because of the dominant view in academe that legal analysis can be taught without directly addressing conflicts of individual values, experiences, and world views, these conflicts seldom, if ever, reach the surface of the classroom discussion.³⁰

It is more difficult to set aside personal values, experiences and world views in a discussion of the law when the topic is rape. In part this is because so many in the classroom will have personal experiences with it and will have analyzed it prior to law school. It will be more difficult for female students especially “to assume a stance that denies their own identity and requires them to adopt an apparently objective stance as the given starting point of analysis.”³¹

The passion associated with the crime of rape—which is so passionate in part because it is understood as a crime of power that is key to women’s

29. CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 97 (1989).

30. Crenshaw, *supra* note 5, at 34-35.

31. *Id.* at 39.

social subordination—directly challenges the epistemology that underpins traditional approaches to legal reasoning. A discussion of rape brings to the surface questions about objectivity and emotion that usually go unquestioned in legal discourse. In particular, female students’ emotions may very well challenge instructors’ distance and objectivity. Perhaps, then, the reluctance to teach rape law is connected to the fact that rape, more than other crimes and other issues encountered in law school, particularly in the first-year curriculum, forces instructors to confront the very notion of objectivity on which their craft is based.

It is also crucial to note that, like rape, the dominant understanding of objectivity is bound up with power relations. Donna Haraway argues that the distanced view of objectivity “has been about a search for translation, convertibility, mobility of meanings, and universality—which I call reductionism, when one language (guess whose) must be enforced as the standard for all the translations and conversions.”³² The distanced, universal account of knowledge can act as a way of establishing and maintaining power. The silencing or eschewing of perspectives borne out of the experience of being rapable or being raped can be especially emotional insofar as it sustains oppression.

Dismissing emotion as at odds with rational objective inquiry forestalls efforts to make emotion the beginning of a critical social theory.³³ That is, to the extent the emotion of rape suggests the beginning of a social critique of gender and power, it is threatening to the established hierarchy. Dismissing emotion as inappropriate and irrational helps keep hierarchy in place in law schools. Furthermore, because gender is a salient feature of rape, it means that to understand the crime one must grapple with gender and social power. Although law school trains students to pick out the salient features of legal disputes, it does not equip students to grasp the underlying issues of power and social inequality that drive so many legal disputes.

Notice, too, that placing the blame on students who are insufficiently objective and overly emotional insulates the law professor from interrogating his own subjectivity and the way in which he may undermine the importance of experience or set up an exclusionary power dynamic within the classroom. It may be that, as hooks argues, “[u]sually it is in a context where the experiential knowledge of students is being denied or negated that they may feel most determined to impress upon listeners both its value and its superiority to other ways of knowing.”³⁴ Rape becomes an especially volatile subject in those classrooms in which there is a gendered dynamic that silences female voices and experience.

32. Donna J. Haraway, *Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective*, in SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE 188, 187 (1991).

33. Alison M. Jaggar, *Love and Knowledge: Emotion in Feminist Epistemology*, 32 INQUIRY: AN INTERDISCIPLINARY JOURNAL OF PHILOSOPHY 151 (1989).

34. HOOKS, *supra* note 7, at 88.

These assessments of teaching rape law resonate with what Patricia Williams chronicles in *The Alchemy of Race and Rights*. She describes many instances in which her stands against racism and sexism in the legal academy are turned back against her to portray her as the wrongdoer. She gets in trouble for raising difficult questions that call on faculty and students to account for their perspectives and acknowledge their privilege. She is viewed as too personally invested in such issues to be objective.³⁵ Students with “strong, sometimes irrational, often intemperate reactions” are likely to be implicitly or explicitly calling on faculty and other students to account for their perspective and examine their assumptions.

It is worth noting that rape is not the only emotional subject that might be discussed in a criminal law course. In fact, I doubt there is any area of criminal law that is completely devoid of emotion. For example, is not homicide an emotional event? What sets rape apart is not just the intensity of emotions, but also the fact that rape is generally more personal and emotional *for women*. When instructors contemplate teaching rape law, they likely conjure up images of a classroom that is dominated by women’s emotions. Beneath the surface of the hesitancy to discuss rape law may well be the old trope of female hysteria: rape just cannot be discussed within the rational space of the law school classroom because women will just get too emotional, too hysterical even.

At the same time, it is women’s emotional responses that will render their perspectives subjective, the product of their particular experience and thus not generalizable. Although all perspectives have some connection to experience, only those from dominant unmarked, unencumbered positions are coded as objective, especially in the rationalizing space of law school. Within the legal realm, apparently particular, local perspectives and their attendant emotions are thus easily dismissed. So long as personal investment in an issue is seen as polluting, distanced objectivity will be privileged. The subjectivity of the “expert” perspective will continue to be masked and presented as a true reflection of reality.³⁶

Pedagogy and Epistemic Foundations

While the emotion associated with injured identity is challenging to the understandings of objectivity and rationality that dominate in law, when conjoined with an identity politics framework, emotion risks being seen as foundational. Just as the politics of identity can involve an uncritical appeal to experience, emotion also is often rendered as foundational, as something that serves as the ground of analysis but is not itself open to analysis.³⁷

35. Williams, *supra* note 17.

36. Martha L. Minow and Elizabeth V. Spelman have articulated a similar point in their exploration of law and the emotions: “There is a real risk of imposing one’s own perspective by claiming already to be impartial and objective—by claiming, indeed, to be the kind of reasonable person whose standards provide the standards for judging the conduct of others.” Minow & Spelman, *supra* note 4, at 52.

37. For a discussion of different “moments” in the relationship between feminist legal scholarship

Scholars both within and outside law are coming to understand emotions as themselves constructed. Just as I have urged an approach to experience that views experience as playing a role in establishing difference, rather than as the ground of difference, I urge a constructivist approach to the emotions.³⁸ In fact, if both emotion and identity are understood as constructed, formed or developed in particular historical and cultural circumstances, the law school classroom emerges as a place where the production of gender and affect take place.³⁹ Teaching rape law thus may be able to foster critical engagement with identity, emotion and the role of each in the study and practice of law.⁴⁰

Both identity politics and the standard view of legal objectivity rely on an epistemology that does not call on those who claim to have knowledge to account for their perspectives. The standard view of legal epistemology relies on the view that there is one true version of reality and that the way to understand it is to be a distanced, neutral observer. As Crenshaw puts it: “Dominant beliefs in the objectivity of legal discourse serve to suppress the conflict by discounting the relevance of any particular perspective in legal analysis and by positing an analytical stance that has no specific cultural, political or class characteristics.”⁴¹ On this approach to knowledge, it is reality that determines knowledge and thus the knower’s perspective and position are irrelevant. In the identity politics framework, one’s experiences and identity are epistemically foundational, which precludes an inquiry into how identity and experience are formed. In both approaches, knowers are not accountable for their knowledge claims. Rather, it is either reality in itself or one’s identity that determines knowledge.⁴²

A law school classroom that is dominated by either of these perspectives would be one that would silence some portion of the class. As I have argued, each approach has its drawbacks and liabilities when it comes to a conversation about rape. Identity politics is an important response to the privileging of a distanced, neutral approach to objectivity. In the case of legal objectivity, those who are too personally or emotionally invested in an issue would lack the ability to take a distanced, objective approach to the topic. However, in the context of rape, identity politics involves the privileging of women’s perspectives on rape in a way that can close off discussion of the production of

and the emotions, see Abrams, *supra* note 4.

38. See, e.g., Cheshire Calhoun, *Making Up Emotional People: The Case of Romantic Love*, in *THE PASSIONS OF LAW* 217, (Susan A. Bandes ed., 1999); DAN M. KAHAN, *THE PROGRESSIVE APPROPRIATION OF DISGUST*, in *THE PASSIONS OF LAW*, *supra*, at 63.
39. For an account of the gendering that takes place in law school, see, e.g., Guinier, Fine & Balin, *supra* note 5.
40. For a discussion of identity and pedagogy, see Olympia Duhart, *Improving Legal and Latino Education: Cluster Introduction—Education and Pedagogy—On Identity and Instruction*, 48 *CAL. W. L. REV.* 453 (2012).
41. Crenshaw, *supra* note 5, at 35.
42. Donna Haraway makes a similar critique of different ways of knowing. See Haraway, *supra* note 32, at 187.

identity. Those without the presumed requisite experience of rape would lack the appropriate background and thus could be denied a voice.

Identity politics simultaneously contains within it an important critique of legal reasoning and objectivity and is easily dismissed within the objective, rationalizing space of law school. As it plays out in the criminal law classroom, identity politics might close off discussion and also might be part of the motivation for not covering rape law at all. The notion that experience cannot be legitimately challenged because it is the basis from which one speaks leads to the worry that the classroom during a discussion of rape could become explosive. No better understanding of either the law of rape or experiences of rape can ever be reached if it is perceived to be too volatile an issue to discuss. Although the potential to replicate the problematic aspects of identity politics in a classroom discussion of rape, as well as instructors' concerns about their own authority in the classroom may seem like legitimate reasons for not teaching rape law, I do not think the best response to the foregoing analysis is silence.

Since the law school classroom is one place where future legal professionals, many of whom will have substantial power, form their ideas about rape, discussion is crucial. Precisely because people have such different and charged views of rape, it is important that future lawyers at least have the opportunity to discuss it. Furthermore, the reluctance to teach rape law and the politics of the pedagogy of rape law cannot be divorced from the historic tendency of prosecutors and judges to presume that women are the sole victims of sexual assault and in many instances trivialize rape accusations. Crenshaw argues, for example, that the reluctance of legal actors, including prosecutors, to address the rape of black women is rooted in stereotypes of black women's licentiousness.⁴³ The law school classroom could serve as a site where such stereotypes are confronted.

A critical approach to the pedagogy of rape law would take the confrontation between different ways of understanding rape seriously and would be self-reflective about knowledge and its production. I would call not just for getting more instructors to teach rape law—and for a related push to reveal that the decision not to teach rape law is just as political as the decision to do so—but also for an effort to reveal the space of the classroom, as well as the claims to knowledge made therein, as political.⁴⁴ The difficulty will be in developing a pedagogy that allows for exploration of one's position and an inquiry into how that affects one's understanding of the crime of rape. Rather than taking the objective as that which has no point of view, it must be acknowledged that there is no way not to have a point of view. As Crenshaw notes, not calling “into question the objectivity of the dominant perspective . . . fail[s] to challenge majority students' beliefs that the minority perspective is self-interested and biased, while the doctrinal framework and their own

43. Crenshaw, *supra* note 5.

44. Teaching rape law in a way that differs from how other topics are taught may be an effective way to achieve this goal. For a possible alternative, see Bloch, *supra* note 1.

perspectives are not.”⁴⁵ The exploration of experience and identity can thus destabilize the appearance of legal objectivity and requires those with the dominant view to account for their perspective. As hooks explains:

. . . a critique of essentialism that challenges only marginalized groups to interrogate their use of identity politics or an essentialist standpoint as a means to exerting coercive power leaves unquestioned the critical practices of other groups who employ the same strategies in different ways and whose exclusionary behavior may be firmly buttressed by institutionalized structures of domination that do not critique or check it.⁴⁶

These critiques show that what is needed is an epistemology that would call for all to account for their perspectives—that is, an epistemology grounded in situated knowledges. Haraway writes:

. . . situated knowledges require that the object of knowledge be pictured as an actor and agent, not a screen or a ground or a resource, never finally as slave to the master that closes off the dialectic in his unique agency and authorship of ‘objective’ knowledge. . . . Accounts of a ‘real’ world do not, then, depend on a logic of ‘discovery,’ but on a power-charged social relation of ‘conversation.’⁴⁷

Such situated knowledges will always be partial, but it is possible to inquire into one’s perspective and partiality. Because the self is always partial and constructed, it is “therefore able to join with another, to see together without claiming to be another.”⁴⁸ Haraway also notes that, although subjugated knowledges should be open to inquiry, they are the least likely to deny that knowledge emanates from a perspective. This is because those who are subjugated frequently confront partial knowledges that are held as universal and that conflict with their own knowledge. Taking subjugated knowledges seriously is thus most likely to lead to a world less defined by oppression.⁴⁹

This is an epistemology that strives for justice. As Martha Minow and Elizabeth Spelman describe, “The ideal of justice includes an aspiration to try to step beyond personal predilections and prejudices; the adversary system seeks to challenge preconceptions by giving full play to competing perceptions.”⁵⁰ She goes on to note of judges that, “these aspirations are for nought if the judge fails to challenge his or her own point of view and takes in all evidence and arguments without examining the tilt created by his or her own

45. Crenshaw, *supra* note 5.

46. HOOKS, *supra* note 7, at 82-83.

47. Haraway, *supra* note 32, at 198.

48. *Id.* at 193.

49. *Id.* at 191.

50. Minow & Spelman, *supra* note 4, at 52.

angle of vision.”⁵¹ A similar dynamic occurs in law schools when instructors fail to examine their own perspective. Rape law is a difficult subject to teach in part because it is a topic that is more likely to raise questions, explicitly or implicitly, about the instructor’s point of view and the foundation of his or her authority. That is also precisely why it is so important a subject to teach.

Conclusion: Toward a Critical Pedagogy of Rape Law

My arguments in this article serve as a call for rethinking, not just the teaching of rape law in particular, but legal education and its norms more generally. Many of the traditional norms of legal education rely on the idea critiqued in this article that distanced dispassionate reasoning is necessary to arrive at legal truth. This call for an exploration of critical approaches to the pedagogy of rape law fits within a substantial tradition of questioning the norms of legal education and the way in which it alienates those on the margins and sidelines their concerns.⁵²

Acknowledging the many reasons that rape law is a difficult subject to teach is the first step toward addressing those difficulties. Rather than pushing an important issue out of the curriculum because it is not easy to teach, attention should be focused on how to handle the subject well. This likely will involve pedagogical experiments. Perhaps my own professor’s tactic of small group discussions—though ceding before teaching of the topic ever begins that it is a different and more emotional subject—is a way to keep the topic in the curriculum and acknowledge its particular politics. Advancing a pedagogy that does not silence experience but instead uses it as a means of exploring the differences within a classroom and the way in which those differences are established would lessen hostility and exclusion.

One problem with the training received in law schools is that it can give too much importance to legal reforms and present them as key to social transformation. A potential pitfall of integrating the study of rape law into criminal law courses is that it could reinforce the propensity to view litigiousness as fundamental to solving social problems. Sharon Marcus argues that the way out of what she calls the “rape script”—the social script that casts women as powerless victims and men as powerful perpetrators—is to focus on combating rape before injury occurs. Anti-rape efforts focus too much on the law and the redressing of injury in a way that identifies women as inherently rapable. She calls for a politics of rape prevention that would aim to provide women with tools for combating rape instead of just accepting women’s rapability and thus seeking only redress.⁵³

51. *Id.* at 52.

52. Scholars who have made this argument include: Crenshaw, *supra* note 5; Greenberg, *supra* note 5; Guinier, Fine & Balin, *supra* note 5; Homer & Schwartz, *supra* note 5; Weiss & Melling, *supra* note 5.

53. SHARON MARCUS, FIGHTING BODIES, FIGHTING WORDS, in *FEMINISTS THEORIZE THE POLITICAL* 385 (Judith Butler & Joan W. Scott eds., 1992).

Litigiousness can in fact reinforce and be an effect of identity politics. Brown argues that the politics of injured identity is the basis “for litigiousness as a way of political life.”⁵⁴ In seeking legal remedies, injury is redressed, not challenged or combated. A sole focus on criminal law remedies does not challenge the idea that women’s injured identity is foundational. A critical pedagogy of rape law might, then, include an exploration of alternatives to law. Perhaps an exploration of the injury paradigm could be part of the conversation. The law school classroom could be a place where discussions of rape prevention and how to contest the notion of women’s inherent rapability could occur.

I am not so optimistic as to think that every criminal law instructor will teach the topic of rape well or with sufficient sensitivity. It is probably the case that most instructors do not want to use rape law to explore issues of identity, emotion and objectivity. And many will never question their own perspective. Nonetheless, I hold out hope that in some instances the law school classroom could be an important site for conversations in which students and instructors come to appreciate the partiality of their own perspectives. Although rape certainly is a challenging topic to teach for a variety of reasons, instructors who leave it untaught and undiscussed fail to use the classroom to challenge and broaden their own and their students’ understandings of a serious and pervasive crime.

54. BROWN, *supra* note 4, at xii.