

Rethinking Rape

Author : Erin Murphy

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I. Bennett Capers, *Real Rape Too*, 99 **Calif. L. Rev.** (forthcoming, 2011), available at [SSRN](#).

I had just finished teaching the rape unit to my first year criminal law class when my colleague Rachel Barkow brought I. Bennett Capers' *Real Rape Too* to my attention. I know that opinions about whether and how to teach rape vary dramatically amongst faculty members, but for several reasons I have always been committed to teaching it and to encouraging candid classroom discussions. However, one of the interesting things about teaching a topic about which social conventions are still in flux is that increasingly I find myself unintentionally steering the class to the debates of my own youth. Having graduated in the early to mid-nineties, I came of age in the twilight of "no means no" and Take Back the Night. Date rape had gained recognition as "real rape," but "roofies" were sufficiently unfamiliar that President Clinton had not yet signed the first federal date rape drug law. Understandings about sexuality, too, were still evolving. TV's "Friends" was considered a pathbreaking show because it depicted a group of male and female friends living together and hanging out in a (mostly platonic) way that felt very familiar to my generation but at times baffled our parents. Gay pride was a common feature on campuses, but few of my peers had been openly out in high school and a "don't ask, don't tell" military policy was still considered progressive. And when Ellen DeGeneres came out on her show in 1997, it was still a big media event.

Of course, the students I teach now are already of a different era. They grew up hearing public discussions about the President receiving oral sex from an intern in the oval office, learned that celebrity can be reached by the "leak" of a sex tape, and laughed at bawdy gay sex jokes on "Will and Grace." They can have "it's complicated" Facebook statuses, personal experience with "sexting," and be active in gay marriage debates. And it doesn't stop there: in the coming years, I'll encounter a generation that as children flipped through Ellen and Portia's beautiful wedding photos on the cover of *People* magazine, heard Senator Scott Brown publicly reveal his childhood sexual abuse, watched Kurt and Blaine's big, very real kiss on "Glee," and, if novelist Gary Shteyngart is to be believed, unselfconsciously wear transparent pants.

So what do these changes mean for teaching rape law? In my experience, it means that I find myself increasingly dissatisfied with the hetero-normativity of the debates that I lead in class, and that increasingly my students are too. I have noticed that I tend to set up discussions of rape that inevitably fall into the same pattern: I acknowledge the existence of other kinds of rape, but tell students that we'll focus on male-female rape given its prevalence. Then I proceed to replicate a whole range of gendered assumptions about rape: that fault lines occur because, consistent with cultural clues, men pursue aggressively and women demur; explore whether women's failures to resist or vocalize opposition are byproducts of women's socialization; talk about power; elaborate hypotheticals with slimy bosses and pushy boyfriends, and so on.

Yet as each year goes by, and each class impresses me with the diverse and divergent range of expectations and experiences that students bring to the discussion, I find my assumptions fail to speak to this generation's expectations and experiences of both wanted and unwanted sex. By and large, my students start from places that I never took for granted: that women are sexual beings with their own desires, that what one wears or how one acts might suggest their sexual availability but does not decide

it, and that “nice” girls (and boys) do all sorts of things. They seem more willing to view men not just as predators out to seduce in any way possible, but as possessing their own complicated emotions and sexual identities. And they see both women and men as operating within a larger theater of sexual expectations: a culture in which one night stands aren’t necessarily freighted with moral judgment, exploration is less risqué, same-sex relationships can be as “vanilla” or outré as heterosexual ones, and there exists greater fluidity in gender roles. I’m not saying that they are in a whole new world from the one that I came of age in, or even that there is a unitary sentiment of an identifiable kind, but there are significant differences between many of their experiences and mine.

Enter I. Bennett Capers’s extraordinary new article, *Real Rape Too*. His goal, he writes, is “to bring male rape out of the footnote and into the text.” He notes that “[R]ape law has been gendered for too long. Originally, it was gendered in a way that tilted the scales to benefit men: men as fathers, men as husbands, men as rapists. Feminists were right to point out the sexism inherent in traditional rape laws in this country. Though many . . . were wrong to view rape solely as a mechanism for male domination of women....[T]he real problem is this: in arguing for reform, many feminist scholars have inadvertently legitimized and contributed to the very gender distinctions of which they have been so critical. In response to one form of subordination, they have entrenched another.”

Capers goes on to explore the phenomenon of male-on-male rape. As might be expected, he devotes significant attention to the problem of prison rape and the ways in which it is either ignored or else presented as a joke, a threat, or a deserved extralegal punishment. But, most importantly to my mind, he also discusses male rape *outside* of the prison context, deftly illustrating the ways in which we as a society try to avoid calling male rape “rape,” by instead labeling it “police brutality” (Abner Louima), or “hate crimes” propelled by homophobia (the recent incidents in the Bronx), or “hazing” (fraternities, military). Indeed, Capers criticizes the law for being candid about the possibility of male rape in only two contexts: to provide a provocation defense to killers rebuffing homosexual advances, and to tacitly approve of using the threat of prison rape as a coercive tool for law enforcement agents and prosecutors seeking to extract confessions or pleas.

To be clear, Capers’s claim is not that male-on-male rape is the dominant form of sexual violence in our society (although he does cite statistics that show it to be more prevalent than suggested by its footnote status, especially if one considers the strong likelihood that male rapes are equally if not more underreported than their male-female counterparts.) Rather, his point is to call attention to the ways in which acknowledging male rape might help elucidate understandings of rape in general. To give just a few examples– he cites research that suggests that some male rape victims respond with the same kinds of “frozen helplessness” as do some female victims. He underscores the racialized rhetoric of prison rape, which calls to mind both the historical disregard of the rape of black women as well as the specter of white women raped by black men. And just as female rape victims worry about coming forward, fearing stigma and criticism for “asking for it,” so too are male victims reluctant to report out of concern of being labeled gay (whether correctly or incorrectly).

Capers closes by suggesting some immediate reforms: better policing and prosecution, better data collection, and even consideration of the risk of prison rape in sentencing. But the real insights of the article are in his exhortations to rethink rape law without reading out the experiences of male victims. For instance, Capers notes that most male-male rapists identify as heterosexual, which seems to affirm the longstanding feminist claim that rape is a crime of violence and power, not simple sexual desire. Likewise, concepts like force, resistance, and nonconsent become less about privileging the experiences of women than about understanding the nature of unwanted sexual intimacy. Consider the feminist project of defining rape to include “softer” forms of coercive power. In an environment that encourages women’s sexual aggression, not to mention economic and professional power, isn’t it only natural that we might expect our students to sense some dissonance in discussions that frame the dynamic as

though it were impossible for men to feel trapped by the same kinds of pressures? And if we don't acknowledge that possibility, isn't it only natural for men to think that if it's not rape when they engage in sexual activity to appease a boss or avoid the ridicule of peers or the disdain of a partner, then why should it be when women do the same?

In this respect, I was reminded of a lunch that I recently attended, at which participants intimately familiar with the issue were talking about the flak that (now Justice) Ruth Bader Ginsburg received from gender-equality advocates for occasionally representing men's equality interests (for example, a widower's equal right to receive social security benefits). The point was that what was not obvious to many feminists then is perhaps more obvious now: that there will be no true equality for women without fundamentally rethinking what it means to be a man. Whether in the domestic, professional, or sexual sphere, redefining the feminine is itself not enough; we must also redefine the masculine. With regard to the law of rape, then, Capers's *Real Rape Too* is exceedingly welcome, if long overdue.

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