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Mary I. Coombs

University of Miami School of Law, [mcoombs@law.miami.edu](mailto:mcoombs@law.miami.edu)

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# Crime in the Stacks, or A Tale of a Text: A Feminist Response to a Criminal Law Textbook

Mary Irene Coombs

Phrases of men who lectured her  
drift and rustle in piles:  
Why don't you speak up?  
Why are you shouting?  
You have the wrong answer,  
wrong line, wrong face.

. . .

She must learn again to speak  
starting with I  
starting with We  
starting as the infant does  
with her own true hunger  
and pleasure  
and rage.<sup>1</sup>

As part of this special issue on feminism and legal education, I wanted to present a feminist fairy tale, complete with happy ending. That story tells how one woman transformed her own anger at the blatant misogyny in a particular criminal law textbook,<sup>2</sup> Perkins and Boyce's *Criminal Law*,<sup>3</sup> into a more general expression of concern and finally into a commitment to change. My story is best understood in the context of a broader feminist analysis of law texts in general and the particular textbook as a whole. Thus, Part I briefly describes why a study of textbooks is a useful part of the analysis of legal education; Part II then carries out a feminist critique of *Criminal Law*. Part III presents the feminist fairy tale. Finally, Part IV suggests the means by which feminist sensibilities and sensitivities can be brought to bear on the production and critique of other texts.

Historically, the action preceded most of the analysis. Reading the rape

Mary Irene Coombs is Associate Professor of Law, University of Miami. The author dedicates this article to her colleague, Jeremy Paul, for his assistance and for being living proof that feminism is not a matter of biology, and to her daughter, Karen, who, like many women of her generation, needs feminist analysis and politics more than she knows.

1. From Marge Piercy, *Unlearning to Not Speak*, in *Circles on the Water* 97 (New York, 1982). Copyright © 1982 by Marge Piercy. Reprinted by permission of Alfred A. Knopf, Inc.
2. By the term textbook, I refer to a single volume treatise that sets out, in organized, narrative form, the central concepts and rules of a particular doctrinal area, such as labor law, sales, or criminal law. West Publishing Company calls its textbooks "horn-books."
3. Rollin M. Perkins & Ronald N. Boyce, *Criminal Law*, 3d ed. (Mineola, N.Y., 1982) [hereinafter Perkins].

section of Perkins first led to the action described in Part III. It also led me to think about the role textbooks play in legal education and the importance of subjecting them to the same careful scrutiny we apply to other texts. Both sorts of activities—the cerebral and the political—are necessary elements of a feminist transformation.

### I. The Role of Textbooks in Legal Education

Feminist legal scholarship has focused most of its attention on cases and statutes, the primary materials with which lawyers work. These have been critiqued for the ways in which they deal—and do not deal—with women and with feminist values.<sup>4</sup> There is also an increasing body of feminist analyses of the legal profession and legal practice.<sup>5</sup>

More recently, some writers have begun to analyze the law school experience from a feminist perspective.<sup>6</sup> They have sought to document and analyze the way it furthers or impedes students' understandings of gender issues within the law. A literature focused on the impact of traditional legal education on women law students has also begun to develop.<sup>7</sup>

As part of that focus on the intersection of feminist concerns and legal education, casebooks have come under scrutiny. There are two outstanding efforts in this regard: Mary Joe Frug's deeply textured and insightful feminist analysis of Dawson, Harvey, and Henderson's contracts casebook,<sup>8</sup> and the ambitious and very useful survey of criminal law casebooks included in the massive project on sex bias in the teaching of criminal law spearheaded by Nancy Erickson.<sup>9</sup>

4. Relevant material is too extensive to cite here.

5. See, e.g., Cynthia Fuchs Epstein, *Women in Law* (New York, 1981); Carrie Menkel-Meadow, *Portia in a Different Voice: Reflections on a Women's Lawyering Process*, 1 *Berk. Women's L.J.* 39 (1985).

6. See, e.g., Jennifer Jaff, *Frame-Shifting: An Empowering Methodology For Teaching and Learning Legal Reasoning*, 36 *J. Legal Educ.* 249 (1986); Toni Pickard, *Experience as Teacher: Discovering the Politics of Law Teaching*, 33 *U. Toronto L.J.* 279 (1983).

7. The best introduction to this topic I know is the collected comments of several women and minority students at Yale on their law school experience presented at the Joint Mini-Workshop of the Gay and Lesbian Legal Issues, Minority Group, and Women in Legal Education sections during the January 1986 American Association of Law Schools convention. They are available on tape from the AALS. Feminists in other disciplines have also begun to study the relationship between women and academia. See, e.g., Adrienne Rich, *Toward a Woman-Centered University*, in *On Lies, Secrets and Silence* 125 (New York, 1979); *Gendered Subjects: The Dynamics of Feminist Teaching*, ed. Margo Culley & Catherine Portuges (Boston, 1985). This symposium is a reflection of this new focus.

8. Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 *Am. U.L. Rev.* 1065 (1985).

9. See Nancy S. Erickson, *Sex Bias in Law School Courses: Some Common Issues*, 38 *J. Legal Educ.* 101 (1988). As Erickson notes, and as any feminist criminal law teacher has undoubtedly discovered with frustration, the inadequacies of most existing casebooks in dealing with gender-related issues are legion. For example, Sanford H. Kadish, Stephen J. Schulhofer & Monrad G. Paulsen, *Criminal Law and its Processes*, 4th ed. (Boston, 1983), includes several pages on the defense of battered spouses who kill but never mentions the underlying problem of obtaining police and judicial attention for the battering. Peter W. Low, John C. Jeffries & Richard J. Bonnie, *Criminal Law: Cases and Materials*, 2d ed. (Mineola, N.Y., 1986), another popular and generally good book, deals

There apparently has been no similar effort to analyze legal textbooks from a feminist perspective. This is not surprising, because there appears to be little analysis of any sort of the role of texts or general discussion of the purposes they serve for their readers.<sup>10</sup> I suspect they are usually thought about, to the extent they are thought about at all, simply as windows to the substantive area of law that they purport to cover, and are judged by the clarity, completeness, and succinctness with which they perform that task. At least some of them must be sufficiently remunerative to be worth the time and effort to produce them, but, except for such classics as White and Summers,<sup>11</sup> Corbin,<sup>12</sup> or Prosser,<sup>13</sup> they generally provide fewer professional accolades than would the same degree of effort directed at writing law review articles or "scholarly" books.

The low prestige of textbooks is not a universal phenomenon. Before the transformation of American law teaching wrought by Christopher Columbus Langdell, a standard format for legal education was the study of textbooks and treatises together with lectures by professors and, perhaps, a period of apprenticeship with a practicing attorney.<sup>14</sup> Much of the early criticism of Langdell's method suggested that students were likely to learn the law better by being presented with the synthesis of a scholar in the field than by attempting to perform that synthesis themselves.<sup>15</sup> Textbooks, rather than American-style casebooks, still serve as a primary written source for British law students.<sup>16</sup>

The movement away from textbooks as a primary teaching tool in American legal education reflected a belief that students learned the necessary lawyering skills and understood the doctrine better if they extracted the principles and concepts from the raw material of cases. The perceived significance of textbooks declined still further with the rise of the realist movement.<sup>17</sup> The purpose of a text is to provide a coherent,

with rape only in two somewhat peripheral contexts: whether it is an adequate basis for capital punishment and whether a man who genuinely but unreasonably believes a woman consented to sex ought to be criminally liable.

10. But see A. W. B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. Chi. L. Rev. 632 (1981). Simpson's focus is on the jurisprudence of treatises rather than their place in a legal sociology.
11. James J. White & Robert S. Summers, *Handbook of Law under the Uniform Commercial Code* (St. Paul, Minn., 1972).
12. Arthur L. Corbin, *Corbin on Contracts* (St. Paul, Minn., 1963).
13. William Prosser & Robert Keeton, *Torts*, 5th ed. (St. Paul, Minn., 1984). Some authors have suggested that the existence of these classics means that treatise writing is only academically worthwhile "in a new or underdeveloped area" of law. Alfred Conard, *The Roles of Lawbooks*, 80 Mich. L. Rev. 567, 571 (1982). See also John Henry Schlegel, *Langdell's Legacy, or, The Case of the Empty Envelope*, 36 Stan. L. Rev. 1517, 1529-30 (1984).
14. See generally Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill, N.C., 1983); Anthony Chase, *Lawyer Training in the Age of the Department Store*, 78 Nw. U.L. Rev. 893 (1983) (review of Stevens).
15. Stevens, *supra* note 14, at 56-59; Anthony Chase, *Origins of Professional Education: The Harvard Case Method Conceived as Clinical Instruction in Law*, 5 Nova L.J. 323 (1981).
16. William Twining, *Is Your Textbook Really Necessary?* 11 J. Soc'y Pub. Tchrs. L. 81 (1970); Simpson, *supra* note 10, at 663.
17. James Torke, *A Look at the Constitutional Law Texts*, 31 J. Legal Educ. 688 (1981); see

relatively comprehensive synthesis of the law of "torts" or "contract" or "trusts and estates." This task is only meaningful if one believes that such a synthesis is possible, i.e., that the cases, on the whole, reflect a series of ordered and consistent doctrinal rules. If the realist critique is correct, however, textbook authors seek to accomplish the impossible.<sup>18</sup>

Even if one does not accept the realist critique, the task of a textbook writer is extraordinarily difficult. The text is supposed to be comprehensive, yet reasonably brief: a six-volume treatise cannot serve the purposes of students or most practitioners. Some areas must be slighted, and each knowledgeable reader will inevitably disagree with some of the author's choices of doctrinal subareas and cases to emphasize, downplay, or ignore.

The text should be relatively objective and neutral, presenting the law as it is. Yet it is also supposed to synthesize that law, making it comprehensible to the reader in a way that a mere series of case briefs could never be. Every attempt at synthesis, however, involves choices, and so the text is thoroughly and inevitably the product of interpretation. The difficulty of the task is suggested by a sampling of the reviews of such books in recent years.<sup>19</sup> Reviews are, of course, inevitably critical; it seems an insignificant use of one's time to produce a review which simply says "Buy this book. It's wonderful!" Thus, even the most enthusiastic reviews find a few nits to pick.<sup>20</sup> Nonetheless, the grounds of criticism in the reviews examined highlight the double bind for the authors of such books. Texts are challenged for being too slanted<sup>21</sup> and for failing to take a position on conflicts in the doctrine,<sup>22</sup> sometimes for being too long,<sup>23</sup> and always for omissions.<sup>24</sup>

generally William L. Twining, Karl Llewellyn and the Realist Movement (London, 1973).

18. See Stevens, *supra* note 14, at 273-74; Simpson, *supra* note 10, 677-79. Some strands of feminist and CLS scholarship have also criticized the attempt to fit the law within a coherent, grand theory, either as principle or strategy. See, e.g., Christine Littleton, Sameness and Difference in Context: Reconstructing Sexual Equality, 75 Calif. L. Rev. 1279 (1987); James Boyle, The Politics of Reason: Critical Legal Theory and Local Social Thought, 133 U. Pa. L. Rev. 685 (1985). It is unlikely that such critiques have had any effect on the willingness of faculty, other than the cadres of feminists and "crits," to engage in textbook writing. Even the latter may, it is hoped, discover that treatises and textbooks, like casebooks, can be transformed rather than rejected as hopelessly fossilized forms. Cf. Barbara A. Babcock, Ann E. Freedman, Eleanor H. Norton & Susan C. Ross, *Sex Discrimination and the Law: Causes and Remedies* (Boston, 1975), a feminist casebook that is unfortunately now out of date as a classroom teaching book.
19. The low prestige of textbooks may also be inferred from the relatively small proportion of review space directed to such efforts. In a sample of recent issues of Harvard Law Review, Michigan Law Review (which devotes an entire issue each year to book reviews), and the Journal of Legal Education, the vast bulk of reviews were of "scholarly" books; the mass of casebooks and treatises, new and updated, received little attention.
20. See, e.g., Robert Hillman, Book Review, 33 J. Legal Educ. 542 (1983) (reviewing Allan E. Farnsworth, *Contracts*).
21. See, e.g., Earl Maltz, Book Review, 97 Harv. L. Rev. 1016 (1984) (reviewing John E. Nowak, Ronald D. Rotunda & J. Nelson Young, *Constitutional Law*).
22. See, e.g., Randy E. Barnett, Book Review, 97 Harv. L. Rev. 1223, 1238 (1984) (reviewing Allan E. Farnsworth, *Contracts*); Frederick Kirgis, Jr., Book Review, 33 J. Legal Educ. 394 (1983) (reviewing Eugene F. Scoles & Peter Hay, *Conflict of Laws*).
23. See, e.g., Sara Beale, Book Review, 32 J. Legal Educ. 646 (1982) (reviewing Charles Whitebread & Christopher Slogobin, *Criminal Procedure*).
24. See sources cited *supra* notes 19-23.

Despite all these caveats about the production of textbooks, they—together with their still less prestigious cousins, outlines, and “black letter” summaries—remain ubiquitous in American legal education. Students use them concurrently with (or, let us admit, sometimes in lieu of) assigned casebooks. They buy them, on the recommendation of faculty or fellow students, or use one of the many copies that law school libraries stock on their shelves. Even professors have been known to consult the complimentary copies of texts that help fill their bookshelves. Textbooks are also used, both by practitioners and students, as a quick introduction to an area never formally studied. Especially in the latter situation, the texts will have a direct impact on the reader’s understanding, unmediated by the corrective influence or differing perspective of a professor’s view on the subject.

Because of their style and their function, textbooks are likely to be considered authoritative statements of the law by their readers. The best-known of the textbooks and treatises have had an enormous impact on the development of American law.<sup>25</sup> Regardless of the author’s intent,<sup>26</sup> a successful textbook, like a Restatement, helps create the “law” in its field.

A scholarly book about a particular doctrinal area is not a textbook in part because it does not claim to be comprehensive. More significantly, the nontext avowedly has a point of view. Indeed, Tribe’s *American Constitutional Law*<sup>27</sup> is extraordinary, in part, because it appears to straddle the fence between the traditional, descriptive textbook and explicit re-creation of the area examined.<sup>28</sup>

Given the ways in which texts are used, and the ways in which they are perceived by their readers, they deserve to be the objects as well as the means of study. An analysis of their structure and content could suggest what the underlying assumptions of the author are and how these might be transmitted to the reader. In particular, a feminist critique, by searching for patterns of omission and inclusion, of emphasis and de-emphasis that reveal the likely intent and effect of the text, might help uncover the ways in which a particular text presents women and deals with doctrinal issues in which gender is implicated. Such knowledge has epistemological significance, for it reveals that views of gender are often so deeply embedded that they are felt as “natural” and are thus included in such “objective” texts almost inadvertently. It may also have political significance, indicating a body of material as to which techniques of sensitization in the service of change are both necessary and possible.

## II. A Cautionary Tale: A Textual Analysis of Perkins & Boyce

The primary task of this section is an analysis of Perkins. The approach

25. Consider, for example, the effect of Williston and Corbin on contracts or of Wigmore on evidence.

26. See *infra* text accompanying note 114 (discussing letter from Perkins).

27. Lawrence H. Tribe, *American Constitutional Law*, 2d ed. (Mineola, N.Y., 1988).

28. See Conard, *supra* note 13, at 570: “[t]he brief-of-argument approach is particularly frustrating when, as in Lawrence Tribe’s *Constitutional Law*, a book that calls itself a ‘treatise’ slips silently from truths perceived by judges to truths perceived by the author.” See also, e.g., discussions in Torke, *supra* note 17; Maltz, *supra* note 21.

of that book, however, is best understood in the context of its dominant rival in the criminal law field, LaFave & Scott's *Criminal Law*.<sup>29</sup>

*Criminal Law*, like many books, uses the male pronoun throughout<sup>30</sup> and refers to the "reasonable man" standard. It appears to avoid the use of explanations or hypotheticals that are unnecessarily sexist or play on sex-role stereotypes. It deals concisely with traditional doctrines that treat women differently and that have been largely discredited, such as the rule that a husband and wife cannot form a conspiracy,<sup>31</sup> the notion that a man's authority to discipline his wife permits what would otherwise be a battery,<sup>32</sup> or the presumption that a wife is coerced by the commands of her husband (and therefore exempt from punishment for obeying them).<sup>33</sup> These trends are generally applauded. Given the scope of the work, the extent of coverage seems unexceptional.

The primary ground on which a feminist analysis would find LaFave and Scott's text problematic is its failure to cover rape and related crimes at all. This is an area, undoubtedly, where authors tread on eggshells, as the discussion of Perkins will illustrate. Professors LaFave and Scott, as they point out in their preface, cover primarily the "general part" of criminal law in their relatively short textbook, i.e., doctrines such as intent, attempt, or self-defense which apply to many different crimes. They limit their discussion of specific offenses to "certain crimes against the person . . . and crimes relating to property."<sup>34</sup> As they point out, these are the crimes most frequently covered in the criminal law courses for which their book often serves as a supplement. Nonetheless, even in 1972, when the book was originally published, rape may have been as frequently covered in criminal law classes as mayhem, receiving stolen property, or extortion, all mentioned at least briefly.

The omission may be relatively insignificant when the book serves a supplementary role; the professor determines coverage, influenced by the content of the chosen casebook. Textbooks, however, also serve as desk references or resources for those confronting problems not studied in school. LaFave and Scott do not provide any erroneous information about rape law. They do, however, suggest by implication that rape is not an important enough crime to be on the select list of those included.<sup>35</sup> A

29. Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law*, 2d ed. (St. Paul, Minn., 1986).

30. After this article was in final draft, I received a copy of a new criminal law treatise, Joshua Dressler, *Understanding Criminal Law* (New York, 1987). The Dressler treatise, which is exemplary in its treatment of feminist concerns, is thus referred to only in passing. The sensitivity of Dressler is most immediately demonstrated in the preface, in which the author announces that, partly in recognition of "the increasing importance of women in the law," the gender of unnamed or hypothetical persons will alternate, chapter by chapter, between male and female. *Id.* at vii-viii.

31. LaFave & Scott, *supra* note 29, at 563.

32. *Id.* at 451 n.1.

33. *Id.* at 440.

34. *Id.* at xvii.

35. Such an omission, unfortunately, recapitulates the pattern of rape as a crime traditionally underreported and underprosecuted, at least when outside the "stranger in a dark alley" pattern. See, e.g., Susan Estrich, *Rape*, 95 *Yale L.J.* 1087, 1161-78 (1986);

feminist reader would hope that, in future editions, the authors would take into account the message conveyed by that particular omission.

Perkins, by its length and coverage, provides much richer soil for feminist analysis. The book is almost 1200 pages, nearly twice the length of LaFave & Scott. The difference is primarily attributable to its more comprehensive coverage of specific offenses.<sup>36</sup> In discussing particular crimes and doctrines, the authors include substantial discussions of legal history and of the Model Penal Code,<sup>37</sup> which they contrast to the traditional rules embedded in case law. Although they explicitly relegate discussion of “the behavioral sciences” and criminology to footnotes,<sup>38</sup> they do recognize the social context of the criminal law. They claim that the text will include an effort “to picture the criminal law in the light of the social interests sought to be protected by it.”<sup>39</sup>

The text’s treatment of rape, as noted, was the impetus for this article. Furthermore, the centerpiece of a feminist analysis of a criminal law book is surely its treatment of rape. The approach to gender issues, implicit or explicit, elsewhere in the text can best be understood in the context of that treatment. Perkins’ text, I suggest, is a complex but consistent tapestry; each thread reflects a particular view of women and their place in the world.

Unlike LaFave & Scott,<sup>40</sup> Perkins does not avoid the topic of rape; it includes almost thirty pages on it.<sup>41</sup> The doctrines under study have often been used and understood in ways that seem deeply misogynist and harmful to the real interests of women.<sup>42</sup> Perkins, however, does more than report neutrally on offensive doctrine. The text includes several gratuitously offensive passages.<sup>43</sup>

Comment, Rape and Rape Laws: Sexism in Society and Law, 61 Calif. L. Rev. 919 (1973).

36. Perkins is 1173 pages; 615 on the “general part” of criminal law and 558 pages on particular offenses. LaFave & Scott devotes 527 of its 717 pages to the general part and only 190 to specific offenses.

37. Model Penal Code (Proposed Official Draft 1962).

38. Perkins, *supra* note 3, at v–vi. Even the footnotes of the sections discussed here contain little reference to social science materials. By contrast, Dressler deliberately includes “criminological and feminist thought” on rape, even at the cost of a less comprehensive survey of every detail of the case law. Dressler, *supra* note 30, at 515. Such use of nonlegal material is still relatively rare in textbooks, though there are some indications that the Langdellian pure law approach is in retreat here as well as in the production of casebooks. See Ted Schneyer, Uniting the Balkans: Wolfram on Legal Ethics, 37 J. Legal Educ. 434, 438–41 (1987).

39. Perkins, *supra* note 3, at x.

40. See *supra* text accompanying note 34. Dressler devotes 25 of its 540 pages to rape. About three-quarters of the text is devoted to the general part of criminal law; the only specific crimes covered are homicide, theft, and rape.

41. Perkins, *supra* note 3, at 197–224.

42. See, e.g., Estrich, *supra* note 34; Catharine MacKinnon, Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, 8 Signs 635 (1983).

43. These passages are the authors’ own statement of “law,” not quotations or paraphrases of cases or other primary sources. For example, the authors illustrate the sufficiency of penetration without emission by analogizing a rape victim to a house: “Just as a rogue bent on burglary has carried his plan far enough for conviction of this crime if he has broken open the dwelling and passed the line of the threshold . . . , so the rapist has done enough to complete his guilt at the moment of sexual penetration even if his brutal lust was not gratified.” Perkins, *supra* note 3, at 202. “[E]ven where the resistance [of the victim] is genuine and vigorous in the beginning, if the physical contact arouses the



The structure and language of the text reveal more than a failure to adopt current, feminist views of the meaning of rape. Rather, buried within them is a quite particular view of rape as a crime primarily against chastity. The essence of the crime is not that a woman is sexually assaulted by a man with whom she has not then and there chosen to be sexually intimate.<sup>44</sup> Rather, it is that a man has stolen from a deserving woman the sexual purity that she was entitled to maintain.

This image is reflected in the placement of the discussion after abduction<sup>45</sup> and abortion,<sup>46</sup> rather than immediately following homicide and assault and battery. It can be seen in the decision to treat rape and statutory rape together.<sup>47</sup> Thus, the factor which distinguishes them—the need to prove force or other indicia of nonconsent in the former crime—seems less central than those elements they have in common. It is especially evident in the ordering of the subheadings. The discussion of force and other forms of nonconsent is near the end,<sup>48</sup> after discussions of the elements of sexual intercourse,<sup>49</sup> unlawfulness (i.e., the marital rape exception),<sup>50</sup> and chastity<sup>51</sup> (although the authors concede that the latter is

passion of the woman to the extent that she willingly yields herself to the sexual act before penetration has been accomplished . . . it is not rape." *Id.* at 211. The only citations in the first passage are to burglary cases; see *id.* at 202 n.39. The source for the latter passage uses the considerably less offensive language reproduced *id.* at 211 n.12, in the course of affirming a conviction for seduction over the defendant's claim that he had really committed rape and thus deserved a new trial. *Wade v. State*, 37 Ga. App. 121, 138 S.E. 921 (1927).

44. There is substantial ferment within the feminist community over the concept of rape and how the criminal law should approach the issue. The disagreement is over whether a reasonably clear line can be drawn between forced sexual encounters, which should be criminalized as rape, and mutually chosen heterosexual encounters, or whether, under current conditions, all such encounters involve an unacceptable degree of coercion. Cf., e.g., Susan Estrich, *Real Rape* (Cambridge, Mass., 1986); Andrea Dworkin, *Intercourse* (New York, 1987). Dressler includes a brief summary of different views regarding the "social perceptions" of rape, *supra* note 30, at 519–23. Current legal doctrine in many states (and, typically, legal practice, even in those states where statutory language has been improved) requires a greater degree of resistance on the woman's part than even Estrich's "no means no" position. Substantial efforts are necessary to shift the law to even the moderate feminist position. Nonetheless, significant progress has been made: special evidentiary rules that made rape convictions unusually difficult to obtain (such as the defense's ability to expose the complainant's sexual history before the jury) have been largely eliminated, processes have been set up to aid victims both in testifying and putting their lives back together, and social scientists have begun to study why men rape, not why women lead them on. If feminist ideas and activities are still ahead of the legal system, pulling it forward, Perkins is somewhere far behind the articulated mainstream.
45. See *infra* text accompanying notes 81–86.
46. See *infra* text accompanying notes 88–94.
47. The authors also distinguish the two crimes sharply, defining the latter, in their black-letter summary, as "intercourse with a willing female child," Perkins, *supra* note 3, at 198. Their sources, however, make it clear that statutory rape only makes willingness irrelevant, not necessary. Furthermore, they fail to consider the meaning of "consent" in a statute such as the "ancient English" one described by Lord Coke, in which the girl must be less than ten years old. *Id.*
48. *Id.* at 209–218 (Section D).
49. *Id.* at 201–02 (Section A).
50. *Id.* at 202–04 (Section B).
51. *Id.* at 205–08 (Section C). The intermixture of forcible and statutory rape is particularly problematic here. The text is unclear about the varied theoretical and practical "uses" for the victim's prior sexual history as either a substantive element or defense or as evidence. Cf. Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the*

not an element of the crime at common law).<sup>52</sup>

The language is consonant with the structure. On the one hand, sexual intercourse between husband and wife is described as essentially different from any other sexual activity. Even if the husband sexually assaults his wife, this is not rape, because “unlawfulness” is “an essential element of the crime.”<sup>53</sup> It could statutorily be punished as a form of assault, but to “use the label ‘rape’. . . is not necessary and seems undesirable.”<sup>54</sup> The same distinction is highlighted in the discussion of rape by fraud. Although case law is in conflict,<sup>55</sup> the authors argue that sex obtained by pretending to be a woman’s husband is rape. Her “consent” is insufficient, for “[t]he act of marital intercourse and the act of adultery are as far apart as day and night and it is atrocious to suggest that willing submission by a wife . . . is consent to an act of adultery with another.”<sup>56</sup> If, however, the woman had agreed to extramarital intercourse with A, it would not be rape for B secretly to substitute himself.<sup>57</sup> After all, adultery is adultery.<sup>58</sup> The woman’s choice of partner is apparently not a social interest deserving of the protections of the criminal law.

Courtroom, 77 Colum. L. Rev. 1 (1977), cited in Perkins, *supra* note 3, at 205 n.69 (clearly describing and assessing the uses of such material in forcible rape cases).

52. Perkins, *supra* note 3, at 205 n.64. Statutory definitions of forcible rape similarly do not ordinarily demand chastity of the victim, although the Model Penal Code would make prior sexual intercourse with the defendant a mitigating factor when there is also no serious bodily injury. Model Penal Code § 213.1(1) (Proposed Official Draft 1962).
53. Perkins, *supra* note 3, at 203. It is clearly true that the common law did not criminalize sexual assault within a marriage. There is, however, dispute over the rationale for the distinction, with some authors attributing it to the obviously discredited notion that husband and wife were “one” under the common law and one could not rape oneself, or that the wife had, in marriage, irrevocably committed herself to acceding to her husband’s sexual demands. See, e.g., Matthew Hale, *Historia Placitorum Coronae* 636 (London, 1736), quoted and discussed in Michael Freeman, “But If You Can’t Rape Your Wife, Who[m] Can You Rape?”: The Marital Rape Exemption Re-examined, 15 *Fam. L.Q.* 1, 9–10 (1981).  
The centrality to Perkins of this special treatment of sexual behavior by a husband is further illustrated by the inclusion of a paragraph reminding the reader that “any act of extra-marital sex is unlawful . . . [though it] is frequently not punishable as an offense.” Perkins, *supra* note 3, at 203.
54. Perkins, *supra* note 3, at 203. There is no discussion of marital rape as a problem or of the ways in which the law might deal with it except to suggest that calling it rape may have helped cause “the jury to refuse to convict” the husband in the Oregon case of *State v. Rideout*. *Id.* Cf. Diana E. Russell, *Rape in Marriage 57–73* (New York, 1982) (reporting on frequency of marital rape).
55. See, e.g., *Regina v. Barrow*, 11 Cox C.C. 191 (1868); *Lewis v. State*, 30 Ala. 54 (1857), cited in Perkins, *supra* note 3, at 215 n.43.
56. Perkins, *supra* note 3, at 216. The conclusion reached is admirable; it is the reasoning that is disturbing. Note also the description of a wife’s “legitimate” sexual activity as “willing submission.”
57. *Id.* The authors explain the distinction doctrinally as one between fraud in factum and fraud in inducement, but that merely recapitulates their acceptance of the view that the “factum” is lawful versus unlawful sex rather than sex with a chosen partner. Under the latter interpretation, it would be fraud in the inducement if the partner had falsely promised he would marry the complainant to lure her to bed. Dressler discusses, without editorial comment, the fact that the only form of sex by fraud some courts recognize as rape is sex obtained under the pretense that the defendant is the victim’s husband. *Supra* note 30, at 526.
58. And, presumably, fornication is fornication.

If a wife is the paradigm of the deserving victim, the prostitute is the paradigm undeserving victim. Can a prostitute be raped? The authors answer as follows:

Just as it is possible for a very wicked man to be murdered, so it is possible for a prostitute to be raped.

There is no requirement of chastity on the part of the victim of this crime so far as the common law is concerned. The analogy suggested leaves much to be desired. No matter how wicked a man may be he is still entitled to his life until deprived thereof by due process of law, and he has a keen and strong interest in preserving it. But to speak of sexual intercourse with a prostitute without her consent as an "outrage to her person and feelings" is in the nature of mockery. Her unlawful career has not placed her beyond the protection of the law, it is true; but when her only grievance is that she was taken without being paid, the law of assault and battery would seem more appropriate than to include such an act within the scope of one of the grave felonies.<sup>59</sup>

When the victim is not so readily categorized, her attitude toward nonmarital intercourse remains significant. "[H]uman nature will impel an unwilling woman to resist unlawful sexual intercourse with great effort if she is not disabled by any physical or mental incapacity at the moment, nor deterred by intimidation or deception."<sup>60</sup> Not all women who prosecute rape cases are so deserving, however. "Obviously a man should not be convicted of this very grave felony where the woman merely put up a little resistance for the sake of 'appearance,' so to speak, taking care not to resist too much."<sup>61</sup>

Even girls seemingly can be divided into the deserving and the undeserving. The authors argue vigorously on behalf of a "very salutary legislative trend"<sup>62</sup> to restrict the availability of statutory rape when the female was not previously chaste. Their concern is not with the autonomy of the young woman whose freely chosen sexual activities might be criminalized. Rather, it is with the male, who is seen as her victim: "[i]t shocks the moral sense to see a normal and socially-minded boy convicted of felony for having been picked up on the street and led astray by a common prostitute who merely happened to be under the age mentioned in the statute,—particularly if she was actually older than he."<sup>63</sup>

The approach to gender issues, as noted, is problematic in regard to

59. Perkins, *supra* note 3, at 205 (footnotes omitted). None of the cited sources support the essential claim of Perkins' text. In the course of presenting survey data regarding gender differences in the perceived seriousness of a rape of a topless dancer, Dressler paraphrases the same statement from Perkins. Dressler, *supra* note 30, at 522 n.12.

60. Perkins, *supra* note 3, at 211. A showing that "great force" was used is therefore necessary to disprove consent. *Id.* Clearly, in almost all rape prosecutions, there is a requirement, *de jure* or *de facto*, of a showing of resistance for a forcible rape conviction. Nothing in the doctrine, however, requires the conclusion that that requirement is rooted in "human nature," i.e., that a woman who claims rape but did not resist is either inhuman or lying.

61. *Id.*

62. *Id.* at 207.

63. *Id.* The cited case, *Yates v. Commonwealth*, 211 Ky. 629, 277 S.W. 995 (1925), states in dicta that the conviction would stand even if there were evidence that the defendant was under 21; the victim was no prostitute but a seventeen-year-old he had promised to marry.

other criminal law doctrines as well. This is apparent, for example, in the treatment of the gender-specific “general part” doctrines touched on in LaFave & Scott.<sup>64</sup> Two of these three doctrines receive relatively detailed coverage<sup>65</sup> in Perkins: coercion of wives by husbands<sup>66</sup> and husbands’ authority to discipline wives.<sup>67</sup> In each case, the presentation of the current state of the law is relatively unexceptional.

The authors elegantly present the common-law doctrine that a woman who commits a crime in the presence of her husband is presumed to have done so under his coercion (and thus presumed not to be criminally responsible). It served primarily, they explain, as a substitute for the doctrine of “benefit of clergy,” a protection against the death penalty which was unavailable to women.<sup>68</sup> They recognize that the “common law concept is of doubtful application in today’s world,” and that in many jurisdictions “the trend against it has proceeded beyond the stage of doubt.”<sup>69</sup>

Nonetheless, they continue to treat the rule with great seriousness, suggesting that the degree of coercion necessary presumptively to exculpate may still be merely “his command plus his presence,”<sup>70</sup> far less than would be required to show “duress” as an excuse for anyone else. They approve the rule in its current form, they state, because the general rule regarding duress is too harsh.<sup>71</sup> Such manipulation of doctrine to achieve desirable results is in the grand tradition of legal scholarship. The conclusion is buttressed, however, by a particular view of woman’s place in the family.<sup>72</sup> The section includes a quotation that reflects this view: “we have not yet reached the point where we decry the nobility, dignity or grace of a wife’s deference to her husband’s wishes.”<sup>73</sup>

64. See *supra* text accompanying notes 31–33.

65. The third, husband-wife conspiracies, receives only a sentence. Perkins, *supra* note 3, at 693. The book also includes a discussion of the duty of support, in its section on “negative acts,” that is relatively straightforward and recognizes the general shift in the law toward gender-neutral obligations to support spouses and children. *Id.* at 672–80.

66. *Id.* at 1018–27.

67. *Id.* at 1105–06.

68. *Id.* at 1020–23. Under “benefit of clergy,” any priest and, ultimately, any man who could read was exempt from the death penalty, at least for his first capital offense. Because women were ineligible to be clergy, even literacy could not save them from the gallows. LaFave & Scott provide the same explanation, *supra* note 29, at 440.

69. *Id.* at 1024.

70. *Id.* at 1025.

71. *Id.* at 1026.

72. A similar preference for traditional family values over usual criminal law rules is shown by their explanation that the intraspousal exception to larceny rules is “usually continued today on the theory that it is socially desirable to have such family matters settled in some manner other than by resort to the criminal courts.” *Id.* at 319. Cf. Frances Olsen, *The Family and The Market: A Study of Ideology and Legal Reform*, 96 *Harv. L. Rev.* 1497, 1509–13 (1983) (describing the feminist arguments against excluding family disputes from the protection of the legal system).

73. Perkins, *supra* note 3, at 1026 (quoting *Commonwealth v. Jones*, 1 Pa. D. & C. 2d 269, 274–75 [Pa. Dist. and Co. 1954]). The quotation is immediately followed by a discussion that begins, “[w]ithout questioning the sentiment of the quotation.” *Id.*

The coercion rule serves as an excuse for, rather than a justification of, criminal acts. Thus, one could conclude that it is inappropriate to punish a woman who obeyed her husband’s order that she violate the law, yet not approve of such deference. On the distinction between excuses and justifications in criminal law, see, e.g., George P.

A similar view is manifest in the discussion of domestic authority.<sup>74</sup> The current law relevant to the title "domestic authority" is, as the authors state, almost entirely about the authority of parents and school teachers. The section nonetheless begins with a black-letter rule to the effect that husbands used to be able to chastise wives without criminal penalty, but such is no longer the case.<sup>75</sup> The first sentence of text then asserts that a husband may not strike his wife "even to enforce obedience to his just commands."<sup>76</sup> The text as a whole could leave the impression on a careless reader that a husband's right to strike his wife still is, or should be, legally arguable. It would, I suggest, more clearly reflect current doctrine (if not practice), and as readily highlight its historic roots, if the black-letter summary were confined to the authority of parents over children.

An understanding of the intersection of gender and criminal law that limited itself to an analysis of explicitly gender-specific legal doctrine would be radically incomplete, however. Some doctrines, although gender neutral on their face, can be applied in ways that reflect (or refuse to reflect) differences between the sexes.<sup>77</sup> A discussion that ignores these issues reinforces the sense that the law is built on a male model of reality.<sup>78</sup>

For example, a homicide that would otherwise be murder may be reduced to manslaughter if carried out under adequate provocation.

Fletcher, *Rethinking Criminal Law 759–875* (Boston, 1978); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 *Colum. L. Rev.* 1897 (1984).

74. Perkins' view is akin to the nineteenth-century notion of "separate spheres." On the history of the ideology of separate spheres of family (for women) and market (for men), see, e.g., Carroll Smith-Rosenberg, *Disorderly Conduct: Visions of Gender in Victorian America* (New York, 1985). Frances Olsen, *supra* note 72, analyzes the ways in which legal doctrine embodied these concepts.

75. Perkins, *supra* note 3, at 1105.

76. *Id.* (citing *Fulgham v. State*, 46 Ala. 143 [1871]). LaFave & Scott, *supra* note 29, at 451 n.1, also cites *Fulgham* but does not reproduce the language regarding "just commands."

Perkins does, it should be noted, mention that some states, in addition to deleting the special justification for chastising wives, "have enacted statutes for the prevention of domestic violence." *Supra* note 3, at 1106. While the social problems leading to the perceived need for such statutes are not described, the text generally provides little discussion of nonlegal matters. See *supra* text accompanying notes 38–39.

77. For example, many feminists and some mainstream authors have discussed the "battered wife syndrome" as a subset of self-defense. See, e.g., Elizabeth Schneider & Susan Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault* (New York, 1978); Comment, *Self-Defense: Battered Woman Syndrome on Trial*, 20 *Cal. W.L. Rev.* 485 (1984). A number of courts have dealt with the issue and begun to suggest guidelines as to when and how a battered woman can introduce evidence to show that she reasonably believed she was acting in self-defense when she killed her batterer. See, e.g., *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979); *Hawthorne v. State*, 408 So. 2d 801 (Fla. Dist. Ct. App. 1982). Perkins does not mention this issue in its lengthy discussion of self-defense. *Supra* note 3, at 1113–44. The shorter Dressler text devotes two pages to a brief exegesis and critique of the use of the syndrome in homicide cases. *Supra* note 30, at 203–05.

Another example of this phenomenon of (perhaps) inadvertently gendered legal analysis is Perkins' discussion of infanticide. It intersperses cases in which the mother is also a victim with cases in which the mother is the killer. It ends, however, by suggesting that "[a] very practical approach to this problem . . . is the enactment of a special statute making it a crime to conceal the birth of an infant." *Supra* note 3, at 53. The significant problem, apparently, is destruction of newborns by their mothers.

78. Cf. Note, *Toward a Redefinition of Sexual Equality*, 95 *Harv. L. Rev.* 487, 499–502 (1981) (criticizing models of equality that require women to be like men in order to establish a claim).

Adultery is a traditional example of sufficient provocation. While LaFave and Scott, in their brief text, note that the doctrine can apply to a killing by either husband or wife,<sup>79</sup> Perkins never mentions the latter possibility.<sup>80</sup> Rather, adultery-related homicide is set in the context of other cases in which a man loses control upon discovering that one of his female relatives has, willingly or unwillingly, engaged in sexual activities.<sup>81</sup>

The placement and extent of coverage of certain gender-related crimes in Perkins is also revealing. The coverage of several crimes seems disproportionate to their practical significance. For example, in the section on crimes against the person, the third topic, after "Homicide" and "Assault and Battery," is "Abduction."<sup>82</sup> Abduction is not kidnapping<sup>83</sup> but that congeries of crimes growing out of the early English statute "designed primarily to protect young heiresses from designing fortune hunters."<sup>84</sup> As the authors recognize by the end of the section, current abduction laws could almost all be recategorized as, in essence, variations of either (1) gender-neutral kidnapping of children or (2) statutory rape. The separate treatment of abduction and its prominent placement<sup>85</sup> allows the inference that the authors feel protecting fathers' interests in their daughters' chastity<sup>86</sup> is an important function of the criminal law "if the organized group is to continue to strive for an ever higher level of cultural development, and 'a more abundant life,' intellectually and morally."<sup>87</sup>

The text also includes a lengthy discussion of abortion.<sup>88</sup> Almost two full pages precede the first mention<sup>89</sup> of *Roe v. Wade*;<sup>90</sup> that case and the other Supreme Court abortion decisions are not discussed until the ninth page of text.<sup>91</sup> They are then described as "rais[ing] doubt as to the constitutionality of abortion statutes in many states."<sup>92</sup> The section lacks any contemporary

79. LaFave & Scott, *supra* note 29, at 656. See also Dressler, *supra* note 30, at 477 n.33.

80. See Perkins, *supra* note 3, at 96–98.

81. Perkins discusses a case where a separated wife "rejected his advances towards reconciliation, denied affection for him, scorned him with racial epithets, stated she had intercourse 'with everybody on the street,' and threw a telephone and photographs at him." *Id.* at 97. The implication is that legal doctrine (as well as legal practice) treats killing with less severity when a man's concerns with the sexual behavior of his family are implicated.

82. *Id.* at 182–86.

83. Discussed in *id.* at 229–38.

84. *Id.* at 183.

85. Because the authors say that "[t]he crime of abduction is . . . for the maintenance of parental custody," regardless of the wishes of the abductee, *id.* at 186, it might more appropriately be listed with the crimes against property interests.

86. There is no mention of any interests the young female might have in her own sexual autonomy. Cf. Gayle Rubin, *The Traffic in Women: Notes on the Political Economy of Sex*, in *Towards an Anthropology of Women*, ed. Rayna R. Reiter, 157 (New York, 1975) (discussing women as objects of exchange from, e.g., father to husband).

87. Perkins, *supra* note 3, at 183. The imbedded but unattributed quotation is presumably a paraphrase of John 10:10.

88. *Id.* at 186–97.

89. Perkins, *supra* note 3, at 188 (prior editions' discussion of abortion statutes "is repeated here" as "background for the change which was made later, and will be discussed presently").

90. 410 U.S. 113 (1973).

91. *Id.* at 194 n.84.

92. *Id.* at 195.

practical significance for a student or practitioner of criminal law.<sup>93</sup> Its inclusion, then, reflects either an unwillingness to revise carefully as new editions were published or an implicit view as to the desirability of recriminalization of abortion.<sup>94</sup>

Perkins's chapter on miscellaneous "Other Offenses" begins with "Offenses Against Morality and Decency."<sup>95</sup> Not surprisingly, most of these involve sex. The placement<sup>96</sup> and length of the discussion of these offenses suggest the importance the authors attach to laws against adultery, bigamy, seduction, prostitution, obscenity, etc.

Their concern with protecting the chastity of women is illustrated by the decision to include the crime of seduction. The practical significance of the criminal prohibition against obtaining sexual favors from a previously chaste woman by a fraudulent promise of marriage is slight. The authors cite only one case more recent than 1942,<sup>97</sup> and refer readers to a 1921 article "[f]or an exhaustive study of the statutes."<sup>98</sup> Further, the placement of the discussion among other "victimless" crimes suggests that criminal seduction is akin to bigamy or incest and involves the abandonment of virtue, rather than being a variation of sexual assault.<sup>99</sup>

Generalization is always risky. I would suggest, nonetheless, that an identifiable attitude towards women permeates the book. Women are defined by their sexual behavior. When they are "good" and seek to remain within their appropriate roles, they deserve the protections of the criminal law. Wives deferring to their husbands' commands are acting in accord with chivalric conceptions of gender;<sup>100</sup> when they refuse to do so, however,

93. Perkins discusses here only one post-1973 case involving a criminal prosecution for abortion: *State v. Menillo*, 171 Conn. 141, 368 A.2d 136 (1976). See *id.* at 195–96 n.92. Another case, reversing a conviction, was discussed under infanticide. *Id.* at 53 n.53 (discussing *Commonwealth v. Edelin*, 371 Mass. 497, 359 N.E.2d 4 (1976)). A review of the annotated statutes of Florida, New York, Utah, and California since *Roe* shows only one criminal prosecution for abortion, *Wright v. State*, 351 So. 2d 708 (Fla. 1977).
94. The canons of textbook writing suggest that authors may only rarely advocate a change in the law, and that such advocacy should be clearly set off from the description of current law. My critique of Perkins is not that it has failed to meet that standard of "objectivity" and "neutrality." Because everything is necessarily written from a particular standpoint, which affects emphasis, organization, and tone as much as specific statements of opinion, such objectivity is impossible. The slant of Perkins is relatively visible only because it is not the slant of the mainstream. My criticism, rather, is twofold. First, the style sometimes, as in the abortion section, obscures the message and therefore makes it more insidious. Second, I believe the position implicit in the text is morally and politically wrong.
95. Perkins, *supra* note 3, at 453–77.
96. Discussion of such crimes as treason, perjury, and bribery is deferred to a later section of the chapter. *Id.* at 498–539. There is no apparent doctrinal justification for the organization of the chapter.
97. *Amburgey v. Commonwealth*, 415 S.W.2d 103 (Ky. 1967). Cited in Perkins, *supra* note 3, at 463. A review of the Florida, New York, and Utah annotated codes showed no prosecutions for seduction.
98. H. W. Humble, *Seduction as a Crime*, 21 Colum. L. Rev. 144 (1921), cited in Perkins, *supra* note 3, at 462 n.78.
99. The Model Penal Code seduction statute § 213.3 (1)(d) is by contrast part of a section dealing with variations on statutory rape. Perkins, *supra* note 3, at 465 n.18. For one feminist analysis of the assumptions behind seduction laws and their abrogation, see M. B. W. Sinclair, *Seduction and the Myth of the Ideal Woman*, 5 L. & Inequality 33 (1987).
100. See *supra* text accompanying notes 68–73. Perkins recognizes that marital coercion is no

husbands may no longer chastise them.<sup>101</sup> It is a crime worthy of discussion to seduce women<sup>102</sup> or to abduct them from their father's custody.<sup>103</sup> And, when they unsuccessfully fight to protect their honor, the criminal law of rape will punish severely.<sup>104</sup> On the other hand, sometimes woman is Lilith, untrustworthy and sexually voracious. She may commit adultery and risk tainting her husband's blood line.<sup>105</sup> Special statutes are needed to deal with the threat of her secretly killing her newborn<sup>106</sup> and, were it not for the recent interference of the Supreme Court, the criminal law could protect the fetus from her as well.<sup>107</sup> She may be a prostitute.<sup>108</sup> Finally, if she is such an abandoned creature, it would be a "mockery" to use the harsh law of rape to protect her.<sup>109</sup>

### III. A Fairy Tale, or "What Do Women Want?"

My first encounter with Perkins was with the text's treatment of rape. After reading that section alone, I concluded that the book was not merely wrong or a different book from the one I would have written. Especially given its status as a textbook—a purported statement of the law as it is—and its likely use by students and practitioners otherwise unfamiliar with crimes such as rape, it was capable of causing harm. Readers whose own attitudes were relatively unformed might accept its vision, with whatever risks to women caught up in the criminal justice system that might entail. Alternatively, a student or lawyer who was herself a rape victim could hardly read Perkins' statements without pain.

The students in my criminal law class, to whom I read some of the passages about rape, were also appalled. They clamored that something should be done. But what? Certainly I would not recommend the book, and I could suggest to my friends that they do the same. Someday I might write a text of my own, without the defects of this one. Such solutions seemed inadequate.

The increased use of such nonadversarial modes as dialogue and negotiation is viewed by many as part of feminist transformation.<sup>110</sup> Perhaps the authors were simply careless or obtuse. I sent a letter to them.<sup>111</sup> The letter noted the special role served by textbooks, quoted what seemed the most offending passages, and expressed shock and dismay at particular statements<sup>112</sup> and at what seemed a view of rape as a form of

longer legally recognized as a separate doctrine.

101. See *supra* text accompanying notes 75–76.

102. See *supra* text accompanying notes 97–99.

103. See *supra* text accompanying notes 82–87.

104. See *supra* text accompanying notes 40–63.

105. Perkins, *supra* note 3, at 454.

106. See *id.* at 469–71.

107. See *supra* note 77.

108. See *supra* text accompanying notes 88–94.

109. See *supra* text accompanying note 59.

110. See, e.g., Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass., 1982); Menkel-Meadow, *supra* note 5.

111. Copy on file with the Journal of Legal Education.

112. The passages in my letter included the three quoted in the Petition, quoted in turn *infra* note 118. In addition, I referred to the passage that held fraud as to identity could not



“aggravated fornication” rather than as an attack on women’s choices about their own sexuality. Like much political action, it was done with a mix of motives. I hoped (faintly) that it might evoke a positive response; in any event, the students’ urgings seemed to demand at least that much effort.

Less than two weeks later, a five-page, single-spaced reply from one of the authors arrived.<sup>113</sup> The letter dealt with a number of topics. It corrected my too summary definition of rape with citations to such sources as Coke, Hale, and Stephen. With equally impeccable authority, it supported the statement in Perkins that an essential element of rape at common law was that the parties not be husband and wife. It spent a paragraph analyzing why my rhetorical phrase, “aggravated fornication,” was “without legal meaning.” It asserted the importance of understanding the common-law approach to such issues as consent, because that was still the law in some jurisdictions and because “the common law often reflects the social attitudes of juries, police and others.”<sup>114</sup> Finally it closed with a reminder that a textbook’s function is not to emphasize policy and social theory but to state what the law is and the direction it has moved, including currently accepted positions.

At best, we seemed to be speaking at cross-purposes. I had criticized the text’s statement that the rape of a prostitute was essentially different from any other rape because it could not be considered an “outrage to her person or feelings.” He responded by the claim that “it is important to dispel any contention” that outrage is “an element of the offense.” He argued that, in some states, resistance is an element of the offense when rape by force is claimed and that, even elsewhere, it “comes up in actual litigation.” But my concern had been with the assertion that this requirement was rooted in an accurate vision of “human nature.”<sup>115</sup> No attempt was made to defend any of the other passages that had been quoted.<sup>116</sup> He did not convince me that the thrust of the criticism had been unfair.

If dialogue failed, what alternatives were there? Other feminists were concerned about the baneful influences of certain writings. Could one adapt the example of the Women Against Violence Against Women and other groups that were using boycotts and collective action to reduce or eliminate the availability of pornography?<sup>117</sup> Establishing a picket line in front of the author’s faculty office seemed impractical.

A primary audience for legal textbooks, however, was well defined: legal academics. Many of them would soon be gathered in one place for the

sustain a rape charge unless the man was pretending to be the victim’s husband. See *supra* text accompanying notes 55–58.

113. Copy on file with the *Journal of Legal Education*.

114. The biases in the law in action, stemming in part from the attitudes of police and juries, are clearly important to understanding rape law. See, e.g., Harry Kalven & Hans Zeisel, *The American Jury* 249–54 (Chicago, 1971); Estrich, *supra* note 35, at 1161–78. Perkins’ text never refers to them. Compare Dressler, *supra* note 30, at 521–23.

115. See *supra* note 48.

116. The letter did include a recapitulation of the asserted fraud-in-factum/fraud-in-the-inducement distinction, which remained unpersuasive to me. See discussion *supra* note 57.

117. See generally *Take Back the Night: Women on Pornography*, ed. Laura Lederer (New York, 1980).

annual AALS meeting. After consulting with a few trusted colleagues and feminist legal academics, I reduced my concerns with the text to a one-page summary, complete with a few quotations and headed Petition for the Redress of Grievances;<sup>118</sup> I brought it, together with pages for signatures, to the convention. Meetings of the Women in Legal Education section provided a natural place to get signatures and to explain to the assembled group the underlying concerns and goals. Friends and acquaintances (of both genders<sup>119</sup>), when asked, almost always agreed and signed as well. The petitions were sent off to the publisher with a cover note, politely recounting the history detailed above and expressing my hope that they would use their role in the publishing process to ensure that such statements would not again be published.

Although the author was obviously committed to the existing text, the publisher might be more open to my concerns. I can never know the relative impact of the appeal to the publisher's conscience and the implicit financial threat, but I like to believe the former was sufficient. In any event, the petition served its purpose. The president of Foundation Press assured me (and those signators whose handwriting was readable) that the book would be revised soon and that the "the issue of rape would be treated with

118. The entire petition, except for the signature pages, reads as follows:

Petition for the Redress of Grievances

We, the undersigned, believe that rape is a serious crime which the law and legal education must address seriously and with sensitivity.

We further believe that the following statements, made in Perkins and Boyce, *Criminal Law* (3rd ed. 1982), appear to reflect a set of attitudes and beliefs about rape that are neither a neutral statement of the law nor a fair statement of the social and psychological realities underlying the phenomenon of rape:

a. ". . . to speak of sexual intercourse with a prostitute without her consent as an 'outrage to her person and feelings' is in the nature of a mockery. Her unlawful career has not placed her beyond the protection of the law, it is true; but when her only grievance is that she was taken without being paid, the law of assault and battery would seem more appropriate . . ." (p. 205) (footnote omitted)

b. "Obviously a man should not be convicted of this very grave felony where the woman merely put up a little resistance for the sake of 'appearance,' so to speak, taking care not to resist too much" (p. 211)

c. ". . . human nature will impel an unwilling woman to resist unlawful sexual intercourse with great effort if she is not disabled by any physical or mental incapacity at the moment, nor deterred by intimidation or deception. Hence, the better view is that 'force' is not truly speaking an element of the crime itself, but if great force was not needed to accomplish the act the necessary *lack of consent* has been *disproved* in other than exceptional situations" (p. 211) (emphasis original)

We believe that students or practitioners, reading these statements in a hornbook, are very likely to come away with a distorted vision of the law and fact of rape. For those who have themselves been victims of rape, the volume's jocularity and its denial of the legitimacy of their experience is likely to prove personally painful.

We will not use, nor will we recommend that our students or others use, a hornbook that contains such statements. We look forward to a time when such statements will so universally be seen to be beyond the pale that petitions such as this will be unnecessary.

[I have left in the word "hornbook" to be historically accurate. I have since been informed that the word is a trademark of West Publishing Co.; I apologize for the inadvertent infringement.]

119. Fifty-seven women and seventeen men were signators; many of the women's signatures were garnered at the section meetings.

more sensitivity."<sup>120</sup> In and of itself, that is significant: a corner of legal education will, we have been promised, be more responsive to feminist concerns.

#### IV. A Tail to Wag the Dog, or "What Else Do Women Want?"

My story is unlikely to be repeated exactly. Indeed, one would hope not. I would hope that this particular text is unique in the depth and pervasiveness of its misogyny. Nonetheless, there is little reason to assume that other texts do not embody sexist stereotypes and gender-biased language, much of it gratuitous and/or unintended.<sup>121</sup>

Do these experiences provide any guide for reducing such problems before the coming of the (second) sexual revolution? I think two sorts of lessons can be drawn. First, the experiences suggest the value of a multiplicity of methodologies for change. Nonconfrontational, educational methods are preferable and were the first methods employed. Feminism is about change in the world as well as about process, however, and methodologies must be employed in light of their efficacy on a variety of levels. A petition was successful where a letter was not. The petition process raised the level of knowledge and concern among feminists; it also informed those with the immediate power to institute change that a large group of people were concerned. The issue, like most issues of significance, had political as well as ethical dimensions.

Second, the experience showed the need to apply feminist sensitivities and methodologies to a wide variety of materials. In particular, as legal educators, we need to pay attention to textbooks and even to outlines and study guides. Whether we admit it or not, they are part of the process of legal education. Review of existing material can sometimes lead to change. Admittedly, women are still a small part of the profession. And, partly because we are (mostly) young, our influence may be even less than numbers alone would suggest. When we join our voices, however, especially about an issue on which large numbers of our male colleagues can be convinced of the justice of our position, we can speak loudly indeed. A coordinated review of all such texts, however, is an unlikely and impractical task and, in any event, it can only lead to material change within the timeframe of a revision of a text.

The discovery of defects in existing texts could conceivably lead feminist academics to produce new texts. Such texts would avoid gratuitous misogyn-

120. Copy of letter on file with *Journal of Legal Education*.

121. Some feminist theory would suggest that much or all current writing, like much or all current social practice, is "gendered to the ground." Catharine A. MacKinnon, Francis Biddle's Sister, in *Feminism Unmodified: Pornography, Civil Rights, and Speech* 163, 173 (Cambridge, Mass., 1987). If so, "maleness" is not simply an overlay to be readily tossed aside. See, e.g., H el ene Cixous, *The Laugh of the Medusa*, and Xaviere Gauthier, *Is There Such a Thing as Women's Writing?* in *New French Feminisms: An Anthology*, ed. Elaine Marks & Isabelle de Courtivron (New York, 1980). Such critiques are powerful and we ignore them at our peril. Nonetheless, I am reformist enough to believe that uncovering sexism can frequently lead to improvements. If nothing else, the threat of loss of an increasing portion of the audience can operate on that other powerful motive, the desire for profits.

yny. They might even highlight the relevant interests and concerns of women. Since the authors would be operating within a form that is supposed to be objective, balanced, and neutral, however, the extent of any explicitly feminist analysis is limited. Unfortunately, we are likely to depend heavily for a substantial period on the sensitivity of senior (therefore, usually male) colleagues; few feminist women are so established as scholars that writing texts or treatises would be a sensible academic project.<sup>122</sup>

Real change requires that authors and publishers themselves begin to recognize how readily structures, topics, and language can embody particular images of women and of sexuality. With such awareness, one hopes, will come a commitment to eliminate those elements in the work that gratuitously reinforce sexism. Feminists would want much more; we can rightfully expect no less.

122. Cf. Mary Kay Kane, Some Thoughts on Scholarship for Beginning Teachers, 37 J. Legal Educ. 14, 17 (1987) (suggesting that untenured faculty should not write books). Although I agree with Professor Kane that untenured faculty generally lack both the time and the generalized knowledge of a field to make such a project practicable, I disagree strongly with some of her other suggestions. Whether one writes the sort of traditional "law reform" piece that she recommends, or works from an interdisciplinary, critical, or feminist perspective, must depend, for a scholar, on which approach reflects one's beliefs about law, not which is best calculated to achieve tenure. Furthermore, although I may be unusually fortunate, I have always felt safe in assuming that my tenured colleagues are capable of appreciating whatever potential and achievement of scholarship are reflected in a wide variety of novel writings, including pieces such as this, as well as in 1950s-style conventional scholarship (cf. Stevens, *supra* note 14, at 271).