
Honoring Angela Harris: A Review of “Gender, Violence, Race, and Criminal Justice”

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I would like to start by thanking Melissa Murray for inviting me to participate in this celebration of Angela Harris’s work on September 27, 2013, at the University of California at Berkeley School of Law. Angela is one of the nation’s leading critical race scholars, and is also recognized as one of the nation’s preeminent feminist scholars. Her work is so influential that she has been named one of the most cited young scholars.¹

I have known Angela for over fifteen years. I remember when I was a junior untenured professor how kind she was to read and help me improve one of my first major law review articles, an article on the ways in which racial stereotypes about Blacks, Latinos, and Asian Americans can influence determinations of reasonableness in self-defense cases.² Angela wrote several pages of single-spaced commentary, which helped me turn that work-in-progress from a mediocre paper into an article that helped launch my career as a legal academic. I also remember gaining inspiration from a talk that Angela gave at an academic conference on scholarly writing. Angela reminded us that everyone writes “shitty first drafts,” and therefore we should not be discouraged if our writing is not perfect from the start. I try to remember her advice when I am having trouble writing. She also introduced me to a book about writing that helped me finish writing my first book, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (NYU Press 2003). In *The Right to Write: An*

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¹ See Fred R. Schapiro, *The Most Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 424-26 (2000).

² See Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Construction of Reasonableness*, 81 MINN. L. REV. 367 (1996).

Invitation and Initiation into the Writing Life (Penguin Putman Inc. 1998), Julia Cameron advises us to write down whatever comes out on the page without worrying about the imaginary critic on our shoulder. I bought Cameron's book on tape and played it almost daily whenever I was in my car to remind myself that I needed to keep writing, even when writing was the last thing I felt like doing.

I started working closely with Angela approximately ten years ago when we began collaborating on a criminal law casebook for West Publishing Company.³ To the best of my knowledge, our casebook is the only criminal law casebook co-authored by two female professors of color. Our casebook is also unique in that it makes a conscious effort to highlight issues of race, gender, class, and sexual orientation in the criminal law. When we began working on the casebook, very few of the existing criminal law casebooks paid attention to such issues. The first edition of our casebook was published in 2005. We published a second edition of the casebook in 2009,⁴ and we recently finished work on the third edition, which should be published in the spring of 2014.

When I first approached Angela and invited her to be a co-author on this book project, she turned me down. She told me she already was or had agreed to be a co-author on three other casebooks at the time⁵ and did not feel she had the time to co-author yet another casebook. Desperate to convince her to say yes despite her other commitments, I told her that she could pick and choose which chapter or chapters she wanted to work on and that she could do as much or as little work on the casebook as she wished. To sweeten the pie, I told her that I would be happy to do all of the work on the casebook just to have her name on the spine. None of this persuaded her to say yes, but I refused to accept no for an answer. I asked her to just think about my invitation and keep the prospect open. Several months later, I arranged a lunch meeting with Angela to revisit the question. To my great delight, she agreed to be my co-author at that meeting. She never did take me up on my offer (to do all the work on the casebook just to have her name on the spine). Angela was a true partner and worked tirelessly with

³ CYNTHIA LEE & ANGELA HARRIS, *CRIMINAL LAW: CASES AND MATERIALS* (1st ed. 2005).

⁴ CYNTHIA LEE & ANGELA HARRIS, *CRIMINAL LAW: CASES AND MATERIALS* (2nd ed. 2009).

⁵ See generally KATHARINE T. BARTLETT, ANGELA P. HARRIS & DEBORAH L. RHODE, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* (3d ed. 2002); EMMA COLEMAN JORDAN & ANGELA P. HARRIS, *ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS* (2005); JUAN F. PEREA, RICHARD DELGADO, ANGELA P. HARRIS & STEPHANIE M. WILDMAN, *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (2000).

me. She made the book 100 times better than it would have been without her, and it has been a wonderful experience working with her.

Our casebook now has a respectable following of law professors who assign it to their students when they teach Criminal Law. I heard through the grapevine that our casebook was favorably mentioned by several panelists at the AALS Conference on Race and the Law in June 2010 and at the SALT (Society of American Law Teachers) Teaching Conference in Hawaii in December 2010.

Beyond the wonderful work Angela has done on our casebook, Angela's legal scholarship as a whole has had a deep impact on the legal landscape. I remember reading her Foreword in the California Law Review entitled, *The Jurisprudence of Reconstruction*, back in the mid-1990s.⁶ In this piece, Angela responded to a claim commonly made about Critical Race Theory ("CRT") — that CRT was more concerned with deconstruction than reconstruction. She brilliantly demonstrated a tension within CRT between its modernist and post-modernist strands and argued that the success of a jurisprudence of reconstruction lay in CRT's ability to recognize this tension. Her argument immediately resonated with me for I had seen these two strands of CRT scholarship yet had not previously recognized them as such. Angela's work made room in CRT for those like myself who are concerned about racial inequities yet willing to work within the system to try to bring about change.

Here is just a sampling of what other scholars have said about this particular piece. In *Critical Race Histories: In and Out*, Darren Hutchinson writes:

[A]s Angela Harris has persuasively argued, rather than resisting this inherent contradiction and attempting to decide "which" strand (postmodern or modern, deconstructionist or reconstructionist) should dominate critical race analysis, Critical Race Theorists should "inhabit that very tension."

Critical Race Theorists have largely followed Harris's thoughtful advice. While Critical Race Theorists continue to unveil the malleability of law, the intractability of racism, and the socially constructed nature of race, they also offered doctrinal and policy reforms in a host of legal contexts.⁷

⁶ See generally Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741 (1994).

⁷ Darren Hutchinson, *Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187, 1193 (2004).

In *Essays in Refusal: Pre-Theoretical Commitments in Postmodern Anthropology and Critical Race Theory*, Derek Jinks writes:

Harris's article deftly maneuvers through the fundamental theoretical and political challenges facing CRT. In doing so, it provides perhaps the most sophisticated reflection on CRT's confrontation with postmodernism. To engage *The Jurisprudence of Reconstruction* is to address the very heart — the conceptual center — of CRT. Indeed, Harris's project is foundational for CRT⁸

Another foundational piece is Angela's article, *Gender, Violence, Race and Criminal Justice*, published in the *Stanford Law Review* in 2000.⁹ In this article, Angela draws upon sociology and criminology to examine the connection between gender violence, which she defines as violent acts by men to demonstrate their manhood, and the criminal justice system.

When we hear the words "gender violence," we usually think of men battering women. Angela suggests we should understand the term gender violence to also include male-on-male violence, as happens far too frequently when, for example, men get into bar fights and when men rape other men in prison.

Angela points out that gender violence is committed not only by lawbreakers, but also by those entrusted with enforcing the law. Angela uses the Abner Louima case to illustrate this point. In that case, a New York City police officer, Charles Schwartz, forcibly held down a Haitian immigrant named Abner Louima in a bathroom in the 70th precinct of the New York Police Department while Schwarz's fellow officer, Justin Volpe, rammed a broken broomstick into Louima's rectum, rupturing his bladder and his colon, then jammed the broomstick into Louima's mouth.¹⁰ Approximately twenty officers were working in the area while Louima was attacked, but no one came to assist Louima during the attack or called for medical attention.¹¹ Instead Louima waited nearly three hours, bleeding in a holding cell, until an officer was assigned to accompany him to the hospital.¹² In the meantime, Volpe walked around the stationhouse, brandishing the

⁸ Derek Jinks, *Essays in Refusal: Pre-Theoretical Commitments in Postmodern Anthropology and Critical Race Theory*, 107 *YALE L.J.* 499, 508 (1997).

⁹ See Angela Harris, *Gender, Violence, Race and Criminal Justice*, 52 *STAN. L. REV.* 777 (2000).

¹⁰ *Id.* at 778.

¹¹ *Id.*

¹² *Id.*

feces-stained broomstick he used to sodomize Louima and bragging about how he had humiliated Louima.¹³ In the end, Officer Volpe confessed and pleaded guilty to a civil rights violation.¹⁴ He explained that he sodomized Louima because he mistakenly thought Louima had punched him during a disturbance at a nightclub.¹⁵ Angela explains that Louima posed a threat to Officer Volpe's masculinity, and by extension, a threat to the masculinity of all the officers in Volpe's unit and to the NYPD as a whole.¹⁶ Sodomizing Louima was a way to show Louima that Officer Volpe was the bigger man.¹⁷ The incident was a horrifying example of the kind of gender violence that is sometimes done by men to other men as a show of masculinity.

What contributes to male-on-male gender violence? Angela explains that cultural structures of masculinity in our society contribute to male-on-male gender violence. These structures of masculinity divide men along the familiar lines of race and color.¹⁸

Angela notes that the dominant form of masculinity stresses "intellectual mastery, technological prowess, and the rationalized control of behavior (both one's own behavior and the behavior of others)."¹⁹ White, wealthy, heterosexual men generally reflect this dominant form of masculinity, often called hegemonic masculinity.

Men who are disempowered by racial or class status — men who often take orders rather than give them — develop what Angela calls rebellious forms of masculinity.²⁰ These men, who desire and envy men who reflect the dominant form of hegemonic masculinity, often resort to "hypermasculinity," the exaggerated exhibition of physical strength and personal aggression in order to gain social status.²¹ To prove their masculinity, working class men and men of color aspire to an ideal of masculine identity that emphasizes physical strength and sexual prowess.²²

Even though White, heterosexual, upper and middle class men who occupy order-giving positions in the institutions they control have the

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* In fact, Louima's cousin was the one who had punched Officer Volpe. *Id.*

¹⁶ *Id.* at 798.

¹⁷ *Id.*

¹⁸ *Id.* at 780.

¹⁹ *Id.* at 784-85.

²⁰ *Id.* at 780.

²¹ *Id.* at 785.

²² *Id.* at 784.

privilege of hegemonic masculinity,²³ Angela notes that often these men secretly admire, desire, and envy the supposed sexual potency, athleticism, and sensual physicality of men of color and working-class men.²⁴

Race and class thus “separate men from one another and engage them in relations of competition, envy, and desire.”²⁵ One thing, however, unites all men. Angela notes that all men know that being a man means “not being a woman” and not being homosexual.²⁶ Not being seen as feminine, a sissy who is fearful of others, or gay, is very important to a man’s sense of identity. When a man finds his manhood or masculine identity threatened, either by another man who insults him or by a woman who threatens to reveal his sexual inadequacy, he may react violently.²⁷ Angela ends by suggesting ways to disrupt the convergence of gender violence with law enforcement.

Today, because of Angela’s pathbreaking work, scholars like Bennett Capers,²⁸ Russell Robinson,²⁹ Frank Rudy Cooper,³⁰ and Camille Gear Rich,³¹ are paying attention to the various ways that men are victimized by other men attempting to confirm or demonstrate their masculine identity. Back in 2000, when Angela published this work, very few scholars had explored this terrain.

Building on Angela’s work, I have used Angela’s theory of gender violence as a way to understand why a heterosexual man might kill a gay man who has made what he perceives as a non-violent sexual advance upon him.³² In a number of cases, men charged with murdering gay men have claimed they were provoked into a heat of

²³ *Id.* at 783.

²⁴ *Id.* at 784.

²⁵ *Id.* at 785-87.

²⁶ *Id.*

²⁷ *Id.* at 789.

²⁸ Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259 (2011).

²⁹ Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309 (2011).

³⁰ MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 1, 9-10 (Frank Rudy Cooper & Ann C. McGinley eds., 2012); Frank Rudy Cooper, *Masculinities, Post-Racialism and the Gates Controversy: The False Equivalence Between Officer and Civilian*, 11 NEV. L.J. 1 (2010); Frank Rudy Cooper, ‘Who’s the Man?: Masculinities Studies, Terry Stops, and Police Training’, 18 COLUM. J. GENDER & L. 671 (2009).

³¹ Camille Gear Rich, *The Racial Politics of Masculinity: Trayvon Martin, George Zimmerman and the Dilemmas of Desiring Whiteness*, 102 CALIF. L. REV. (forthcoming 2014).

³² Cynthia Lee, *The Gay Panic Defense*, 42 UC DAVIS L. REV. 471 (2008); see also CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* 67-95 (2003) (discussing the gay panic defense strategy).

passion by the gay male victim's unwanted sexual advance and therefore should be found guilty of voluntary manslaughter rather than murder. This defense theory is commonly known as the "gay panic" defense, even though it is not officially recognized as a defense.³³

For example, on February 12, 2008, in Oxnard, California, fourteen-year-old Brandon McInerney shot his classmate Larry King twice in the back of his head while King was typing a paper for his English class in the computer lab.³⁴ The teacher in the classroom at the time said she heard a loud pop, smelled smoke, and saw McInerney standing with a gun in his hand. She looked at him and yelled, "What the hell do you think you're doing?"³⁵ McInerney looked at her, shot King again, dropped the gun, and walked out the door.³⁶

Prosecutors argued the killing was first-degree murder.³⁷ First-degree murder requires a showing of premeditation and deliberation. In this case, McInerney brought a loaded gun to school after telling a classmate to say goodbye to King because she would never see him again.³⁸ He shot King not once, but twice, the second time after the teacher asked him what he was doing. These facts provide strong

³³ Lee, *supra* note 32, at 475.

³⁴ *Gay Student Shooting: 'I Wanted to Kill Him,' Accused Told Expert*, L.A. TIMES (Aug. 25, 2011), <http://latimesblogs.latimes.com/lanow/2011/08/gay-student-shooting-i-wanted-to-kill-him-accused-told-expert.html> (noting that McInerney shot two bullets into King's head); *Mistrial Declared in Killing of Gay California Student*, CNN JUSTICE (Sept. 1, 2011), <http://www.cnn.com/2011/CRIME/09/01/california.gay.student.murder/> ("McInerney allegedly shot [King] in the back of the head . . ."); Catherine Saillant, *Gay Teen's Killer Takes 21-Year Deal*, L.A. TIMES (Nov. 21, 2011) [hereinafter *Gay Teen's Killer*], <http://articles.latimes.com/2011/nov/22/local/la-me-1122-gay-shooting-20111122> (reporting that Brandon McInerney was 14 when he pulled a gun out of his backpack and shot Larry King two times at point-blank range); Ramin Setoodeh, *Young, Gay and Murdered*, NEWSWEEK (July 28, 2008), <http://www.newsweek.com/young-gay-and-murdered-junior-high-92787>. For a brief description of this case, see Cynthia Lee, *Masculinity on Trial: Gay Panic in the Criminal Courtroom*, 42 SW. L. REV. 817, 824-25 (2013).

³⁵ Jim Dubreuil & Denise Martinez-Ramundo, *Boy Who Shot Classmate at 14 Will Be Retried As an Adult*, 20/20 ABC NEWS (Oct. 5, 2011), available at <http://abcnews.go.com/US/eighth-grade-shooting-larry-king-brandon-mcinerney-boys/story?id=14666577#.UZvT7KI-aVE>. <http://abcnews.go.com/US/eighth-grade-shooting-larry-king-brandon-mcinerney-boys/story?id=14666577#.UZvT7KI-aVE> (last visited May 21, 2013).

³⁶ *Id.*

³⁷ *California Teen Brandon McInerney Sentenced to 21 Years for Point-Blank Murder of Gay Classmate*, CBS NEWS (Dec. 19, 2011), http://www.cbsnews.com/2102-504083_162-57345168.html.

³⁸ Setoodeh, *supra* note 34, at 45-46.

support for a finding that McInerney thought about killing King in advance of killing him and understood the consequences of his actions.

McInerney's attorneys argued that McInerney should be found guilty of voluntary manslaughter, not murder, since McInerney was provoked into a heat of passion by King's repeated "sexual taunts."³⁹ According to McInerney, the day before the shooting, King had approached McInerney at school and said something like, "What's up, baby?"⁴⁰

One problem for McInerney was that provocation law generally requires that one who claims provocation must have succumbed to a *sudden* heat of passion.⁴¹ These allegedly provocative actions by King took place one to two days before the shooting. The reasonable person in McInerney's shoes would have had sufficient time to cool off, undermining any claim of provocation. To overcome this problem, McInerney's attorneys argued that McInerney had changed his mind about killing King — he had decided not to kill King — but snapped when he overheard King telling a classmate in the computer lab that he had changed his name to Leticia.⁴² One might question why McInerney brought a loaded gun hidden in his backpack to school if he had changed his mind about killing King. Despite the strong evidence of premeditation and deliberation and the weak evidence of legally adequate provocation, McInerney's trial ended in a hung jury, with seven jurors in favor of finding McInerney guilty of voluntary manslaughter and five in favor of finding him guilty of murder.⁴³

What motivated McInerney to kill his classmate in cold blood? McInerney admitted that King's sexually flirtatious behavior upset him so much that he felt he needed to kill King. But why did King's flirtations bother McInerney so much? McInerney was probably afraid

³⁹ See Catherine Saillant, *Mistrial Declared in Slaying of Gay Oxnard Teen*, L.A. TIMES (Sept. 2, 2011), <http://articles.latimes.com/2011/sep/02/local/la-me-0902-gay-student-20110902>.

⁴⁰ *Id.* at para. 13.

⁴¹ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 31.07 (A) (6th ed. 2012). California, however, does not adhere strictly to this usual rule. See *People v. Berry*, 18 Cal.3d 509 (1976). Additionally, in most jurisdictions, mere words are insufficient to constitute legally adequate provocation. DRESSLER, *supra*, 31.07(B)(2)(b)(i) (noting that "one common law rule that has persisted in most non-Model Penal Code jurisdictions is that 'words alone' do not constitute adequate provocation.").

⁴² *Gay Student Shooting: 'I Wanted to Kill Him,' Accused Told Expert*, *supra* note 34, at paras. 13-15.

⁴³ *Mistrial Declared in Killing of Gay California Student*, *supra* note 34, at paras. 1, 3. McInerney later pled guilty to second-degree murder and accepted a sentence of 21 years in prison. Saillant, *Gay Teen's Killer*, *supra* note 34, at paras. 1, 3.

his classmates would think he was gay because of King's flirtatious behavior towards him. McNerney felt he had to do something to prove to his friends that he was not at all interested in King or any other boy — he had to prove that he was not a homosexual.

King's gender non-conformity — wearing makeup and high heels — upset McNerney as well. Remember that the last straw for McNerney was overhearing King telling a female classmate that he planned to change his name from Larry to Leticia. Killing King was a way to punish King's gender non-conformity. It was also a way to demonstrate to the world that he (McNerney) was the opposite of King, a feminine boy. McNerney was showing his friends that he was tough and not afraid to use physical force.

Even though McNerney was white and described as a tall, athletic, and popular eighth grade jock,⁴⁴ hegemonic masculinity was not part of his world.⁴⁵ McNerney was not from an elite, wealthy family. According to several sources, McNerney was born into a family of crystal methamphetamine addicts and alcoholics.⁴⁶ This may explain in part why McNerney engaged in rebellious forms of masculinity to assert his masculine identity.

In other work, I use Angela's theory to explain the rage of a heterosexual man who responds violently to the discovery that he has been sexually intimate with a transgender woman.⁴⁷ In several cases involving men charged with murdering a transgender female, the defendant has claimed he panicked and killed upon discovering that

⁴⁴ Jim Dubreuil & Denise Martinez-Ramundo, *supra* note 35, at 17.

⁴⁵ Hegemonic masculinity was not a part of King's world either. King was a young, gender nonconforming teen of color who had been in and out of foster homes for much of his childhood. Sikivu Hutchinson, *Disposable Children: Whiteness, Heterosexism, and the Murder of Lawrence King*, THE FEMINIST WIRE, Oct. 10, 2013, available at <http://thefeministwire.com/2013/10/disposable-children-whiteness-heterosexism-and-the-murder-of-lawrence-king/> (reviewing the film, *Valentine Road*, and noting King's homelessness, foster care status, biracial status and history of sexual abuse). Hutchinson states, "We learn from a classmate's passing reference that King was 'part-black' and that she strongly identified with and perhaps saw herself as an African American girl." *Id.*

⁴⁶ Jim Dubreuil & Alice Gomstyn, *Was Teen Shooter Victim of Bullying, Sexual Harassment?*, ABCNEWS (Oct. 6, 2011), <http://abcnews.go.com/US/teen-shooter-victim-sexual-harassment/story?id=14663570> (noting that Brandon McNerney was born to a meth-addicted mother and at the age of seven, was sent to live with his father, a drug addict who often beat Brandon); Dorri Otis, *The Story of Larry King: Young, Gay, and Murdered by Classmate Brandon McNerney*, EXAMINER.COM (Oct. 7, 2013), <http://www.examiner.com/list/the-story-of-larry-king-young-gay-and-murdered-by-classmate-brandon-mcnerney> (reviewing *Valentine Road*, a documentary about Larry King's life and death).

⁴⁷ Cynthia Lee & Peter Kwan, *Trans Panic: Masculinity, Heteronormativity, and the Murder of Transgender Women*, 66 HASTINGS L.J. ____ (forthcoming 2014).

the person with whom he had been sexually intimate was biologically male, not female. This defense theory has been called “trans panic” since it borrows heavily from the gay panic defense. Like the defendant who argues his murder charge should be reduced from murder to voluntary manslaughter because the defendant was provoked into a heat of passion by an unwanted male-on-male sexual advance, the defendant who argues trans panic alleges he was provoked into a heat of passion by the transgender female victim’s deceit about her gender identity, and thus should be acquitted of murder and found guilty of the lesser offense of voluntary manslaughter.

What might motivate a man to react violently to the discovery that his intimate partner is biologically male, not female? Peter Kwan and I argue that the defendant acts to protect his masculine identity. In each of these cases, the defendant feels his masculine identity has been compromised by having engaged in sexually intimate behavior with the transgender female. The defendant views the transgender woman as a man since she was born with and may still have male genitalia. The defendant may fear that others will think he is gay because he enjoyed sexual relations with a man or he may be afraid of his own latent homosexuality. The defendant’s violent acts are also a way to punish the transgender woman for her gender nonconformity. In short, the defendant’s act of killing the transgender woman is a form of gender violence motivated by the defendant’s desire to protect his masculine identity and the ideal of masculine identity for all men.

Let me close by saying that Angela’s work on gender, race, and the criminal justice system has been deeply influential. It has helped shape my own work and the work of many other scholars. What is most important to me, however, is that Angela has been a wonderful friend and collaborator, and I am so glad she has touched my life.