

# Teaching Sexual Assault

## The Education of Canadian Law Students

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*Dans cet article il est question de la pertinence de donner aux étudiantes en droit de première année un cours d'introduction au droit criminel sur les agressions sexuelles. Nous envisageons cinq façons d'en parler: 1) les politiques qui sous-tendent nos choix pour cet enseignement 2) comprendre et expliquer nos objectifs face à cet enseignement 3) les difficultés à faire la distinction ou à favoriser l'interaction entre la doctrine légale et l'influence sociopolitique sur la construction de ces lois 4) le problème d'identité dans la salle de cours, la nôtre comme prof de droit et celles, multiples des étudiantes 5) gérer la dynamique qui naît des sensibilités des étudiantes que ce matériel dérange. A notre avis la littérature de la pédagogie en droit au Canada est sérieusement déficiente. C'est pour nous une obligation professionnelle comme prof de droit de prendre au sérieux notre pédagogie et notre obligation de pousser nos étudiantes à critiquer la littérature légale qui est inadéquate face aux agressions sexuelles.*

Teaching sexual assault is an irreducibly challenging, highly emotional, and complex undertaking.<sup>1</sup>

Good teaching is not necessarily synonymous with happy students; and unhappy students do not necessarily mean

that something has gone wrong in the classroom. (Harris and Schulz 1805)

### Part 1: Introduction

Every first year law student in Canada is required to study criminal law. Along with contracts, torts, property, and constitutional law, criminal law is understood to be an essential part of the introduction to Canadian law that is the mainstay of the first year curriculum—a curriculum intended to expose students to the foundations of the common law, the basics of legal analysis, and the fundamentals of Canadian public law.<sup>2</sup>

In this article, we discuss the way in which sexual assault is taught in first year law school. We continue a productive and challenging collaboration begun in the fall of 2005. That initial collaboration, the creation of a first year criminal law course that specifically targeted incoming students with a commitment to social justice, and that was deliberately non-traditional in content, evaluation and teaching approach, was the subject of an earlier article: “Resisting the Hidden Curriculum: Teaching for Social Justice” (Cairns Way and Gilbert).<sup>3</sup> One of the many benefits of that teaching and writing collaboration was an increased and shared concern with pedagogical is-

suues, combined with the emergence of a respectful space in which to discuss these important questions as professionals engaged in a joint exercise. In the personal reflections that concluded that article, one of us remarked on and celebrated the way the experiment had disrupted the isolation characteristic of university teaching (Cairns Way and Gilbert 37). The process of moving out of that isolation and into conversation was the catalyst for this piece.

We are law professors teaching at the University of Ottawa. Between us we have 30 years of experience teaching criminal law in the first year program. In Canada, legal education is offered in professional schools. Our students have at least three years of university education before they attend law school, most have completed an undergraduate degree, and a significant minority has done graduate work. Entrance to law school is highly competitive, with approximately 2,500 applicants for 250 places in the first year program. Admissions policy at the University of Ottawa is holistic, with faculty members of the admissions committee individually assessing each applicant's marks, LSAT scores, and personal statement. The law school offers students the opportunity to specialize in social justice, and invites applicants to write about their own background and how it relates to

their desire to study law.

The University of Ottawa was in the forefront of the move away from a purely numbers-based admissions process, and is specifically and overtly committed to creating a diverse student body. The student population at Canadian law schools has changed dramatically in the last 25 years. Approximately 60 per cent of the class is female, and a significant proportion of the class is racialized.<sup>4</sup> Aboriginal students are seriously underrepresented despite a targeted admissions policy and active outreach to Aboriginal communities. The number of Aboriginal students in the class has hovered between three and seven per year over the last five years. During the last admissions cycle, the University of Ottawa made offers to 19 Aboriginal students and seven students registered in first year, out of a class of 280.<sup>5</sup>

The teaching faculty at the University of Ottawa is 50 per cent female, and has been so for at least ten years. While there is some racial diversity on faculty, most would agree that more diversity is required. Quite obviously questions of faculty and student diversity within the law school are of ongoing concern. This brief description is intended merely to assist the reader in understanding the context in which our teaching occurs. It should also be noted that the vast majority of our students take up the practice of law upon graduation in a wide range of legal environments.

Criminal law is part of the required first year curriculum. Faculty members teaching criminal law would likely agree that their objectives were to expose students to the key doctrinal structures in Canadian criminal law, as well as to the significant critical issues implicated by the criminal justice system. They would likely aim to ensure that students completing their course had the skills to solve a criminal law problem. How and what to teach in order to achieve those objectives would likely be answered differently by each teaching colleague.

This article is structured in three parts. In the first, we discuss the issues that motivated us to examine the teaching of sexual assault, including the political and social significance of legal education, as well as the way in which we collected data from colleagues across the country. In the next part, we turn our attention to the classroom. We explore five issues that relate to the way in which we teach sexual assault, issues that were also identified by the colleagues who responded to our survey, and who discussed their teaching in this area with us. These issues are: first, the politics embedded in our choices about how to teach sexual assault; second, understanding and making explicit our objectives in teaching in this area; third, the difficulty in distinguishing or unpacking the interaction between law's doctrines or rules and the influence of social policy in the construction of those rules; fourth, the problem of identity in the classroom—both our own as law professors and the students' own multiple identities; and finally, the sensitive classroom dynamics that this material provokes. The article concludes by linking our analysis back to Jane Doe, the woman whose experience with sexual violence and the legal system motivated the conference proceedings in which the paper was presented.

## **Part 2: Why Law School Classrooms Matter: Taking Teaching Seriously**

The education of lawyers ... has an importance that extends beyond the cloisters of the university or professional guild. The practice of legal education, the social construction of "law," the social roles of jurists and legal practitioners...? are all thoroughly intertwined.... Though generations of legal academics have tended to overlook issues related to their work's relation to the social construction of legal knowledge, this cannot

continue. The world around us is changing. For better or for worse, we are called upon to rethink both law as a discipline and law school as educational practice. (Rochette and Pue 168)

This article was generated in experience and conversation. It proceeded from our shared sense that our classroom work was socially and politically significant, and that talking and writing about our teaching would improve it by, at the least, rendering it more explicitly intentional. We have a combined personal experience of a quarter century of teaching sexual assault as well as a store of anecdotes shared by frustrated, disheartened, anxious, and inspired colleagues. We decided to begin with an informal survey of the field and sent out a brief, voluntary questionnaire to colleagues across the country teaching first year criminal law. The four questions we chose reflected our own preoccupations and were deliberately open-ended. We asked:

- 1: How do you teach sexual assault in your first year criminal law class—do you teach it as a discrete unit? Or do you incorporate it into general doctrinal analysis?
- 2: What materials do you use? Cases? Secondary materials? Other?
- 3: What are your teaching objectives with respect to sexual assault?
- 4: Have you ever experienced any particular or distinct classroom challenges related to teaching sexual assault? How did you deal with these challenges?

We received seven responses to our survey from generous colleagues across the country. We spoke individually to a few others, and the discussion that follows will include both observations about and excerpts from some of these responses. This

is, of course, neither statistically sound nor statistically significant. Nevertheless, we realized in reading the views of some colleagues and in talking with others that we share common struggles and concerns, but sometimes approach the issues from different perspectives and with different objectives. We are convinced that the similarities and differences among colleagues deciding how to

the foundations for the approaches to law that will dominate the legal system when our students achieve positions of social power. We wonder what public obligations we have with respect to the way Canadian students are initially educated about sexual assault? Who has a legitimate stake in the way sexual assault is taught to Canadian law students? How can we incorporate those interests into our

and the significance of clinical legal education, alternative dispute resolution and instruction in professional responsibility (for example, Sturm and Guinier; Schurz; Nelson; Kennedy; Rhode; Ihrig; Calmore).

In other words, while there is a developing literature in the United States and Canada on legal education in general, there is virtually no work that addresses the challenges

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organize and deliver education on sexual assault are important in and of themselves, as well as being broadly illustrative of the choices that face legal educators every day in Canadian law schools. We agree with the following commentary:

The scholarship of teaching and learning is also about overcoming the pedagogical isolation of faculty from one another, in order to ensure that substantive knowledge produced through pedagogical inquiry can be built on and elaborated publicly over time in the fashion of traditional academic scholarship, rather than being gained and lost anew with each individual teacher. By making classroom practice the subject of critical scrutiny, law professors are applying to their teaching and their students' learning the kind of skill they routinely bring to their legal scholarship.... making teaching explicit. (Sullivan 201)

In addition to our immediate pedagogic concern about classroom choices, we are also responsive to the larger public dimensions of our teaching. Law professors lay

teaching? These are difficult questions without easy or obvious answers. Surprisingly, there is no Canadian literature on point, although there is a vast and highly developed literature on the crime itself.<sup>6</sup>

We imagine that this gap in the literature reflects the fact that scholarship on legal education in Canada remains underdeveloped,<sup>7</sup> although it has been buoyed by the recent launch of a specialist journal, the *Canadian Legal Education Annual Review*. Even the more extensive American literature on legal education contains few articles focused on the teaching of sexual assault. In 1992, a mini-boom occurred with the publication of "Teaching Rape Law" by Susan Estrich and "On Teaching Rape: Reasons, Risks and Rewards" by James Tomcowicz. Follow-up articles on teaching rape law were narrowly didactic (Bloch; McMunigal). At the same time, an exciting critical scholarship on legal education has evolved with essays examining, for example, the challenges and opportunities presented by an increasingly diverse student body, the risks and benefits of intentionally or unreflectively politicizing the law school classroom, the ways in which legal education inspired or disempowered students with radical or transformative agendas,

and obligations that inhere in the teaching of sexual assault. Our work on this article suggests that this does not indicate a disinterest or a consensus on pedagogy, or the diminishing significance of the topic. Rather, the teaching of sexual assault continues to challenge us as legal educators and our students as future professionals. In our view, teaching difficulties reflect the fact that the criminal justice system itself, despite its rhetorical commitments, continues to disproportionately fail the women who turn to it for protection from sexual violence, while perpetuating inequality in the ways in which it selectively prosecutes and punishes the men who assault them. For us as teachers, the important question is—how should our teaching reflect this reality?

### Part 3: Classroom Choices

#### *i. Politics*

We share a belief that teaching law is a political exercise. By this we do not mean to say that law teaching is (or should be) governed by recognized politics (conservative, liberal, etc.) or that all subjects are equally fraught with clear political overtones. Criminal law is, however, an acutely politicized area of legal

regulation in Canada. The federal *Criminal Code* is amended almost every year to include new crimes, new sentencing principles, or new criminal justice procedures. The government's criminal law authority is perhaps the starkest demonstration of the power of the state in regulating the lives of its citizens. What is defined as "criminal" reflects, among many other things, moral judgments as to

in a conviction at trial.<sup>8</sup> This reality is particularly harsh given the gendered statistics on sexual assault. Victims of sexual assault are overwhelmingly female (85 per cent) and young (61 per cent of women who reported a sexual assault were under the age of 18). On the other hand, 97 per cent of accused offenders are male.<sup>9</sup>

We believe that the law might still have a role to play in improving those

cohort of critical lawyers, policy-makers, and scholars (see Bartow). Our perspective on the vital contribution of feminist analysis in criminal law echoes Catharine MacKinnon's insights: "The question of the role of feminism in legal education can thus be reframed as: What can legal education do to prepare lawyers to intervene in this situation—women's inequality to men—in order to change it?"

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**Imparting critical feminist theory in the law school classroom is about more than identifying, deconstructing, and hopefully obliterating the inconsistencies and injustices that pervade society and the law: it is also about understanding the hierarchies of privilege and power that raise race, class, and able-ist concerns.**

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what is "wrong" and hence punishable by the state. Criminal law has a rich history, but it is also the location of some significant historical and current oppressions. Criminal law is plagued by sexism, racism, colonialism, heterosexism, classism, and many other systemic discriminatory practices. It is our firm understanding that criminal law cannot be taught as a "neutral," objective, or depoliticized abstract set of skills and rules. Our politic in the teaching of sexual assault (in the context of criminal law as a whole) is explicitly informed by what we understand about the nature of that crime: that it is endemic, reflective of systemic and invisible inequality, and that the *Criminal Code* provisions, and particularly their enforcement, contribute to women's experience of inequality in sexual assault cases.

It is statistically true, and widely understood and accepted by those who practice criminal law, that as compared to other criminal offences, sexual offences are the least reported and most likely to be "unfounded" by police (ie. police will cease an investigation for lack of credibility or evidence). Sexual offences are less likely to proceed to trial (charges will be dropped before trial, or the accused will arrange a plea bargain, often for simple assault), and less likely to result

realities, and further that we as law professors might assist students in acquiring the skills and knowledge necessary to change things for the better. Imparting critical feminist theory in the law school classroom is about more than identifying, deconstructing, and hopefully obliterating the inconsistencies and injustices that pervade society and the law: it is also about understanding the hierarchies of privilege and power that not only make manifest gender inequalities, but also raise race, class, and able-ist concerns. Considered in this light, a feminist approach to teaching law instills in (first year) law students a much-needed critical consciousness in their approach to the study of the law. To treat the study of law as de-contextualized, without a critical perspective, would make a university law school experience akin to a trade school.

Instead, critical feminist theory and instruction enables students to approach the study of law in a way that prods them to challenge their own political viewpoints, social values, and personal beliefs and to transcend their own status quo. The end result is to contribute to the students' abilities to engage critically with the law and the legal system, and to foster the development of a new

(203). Our view that sexual assault law teaching is imbued with political questions frames our thinking on the complex and contested questions of how to do it successfully.

**ii. Objectives**

Teaching in a law school is an incredible privilege: as professors, and in particular as professors teaching in the first year program, we have the opportunity to shape our students' initial academic understanding of the law. First year law school is a time of powerful intellectual and ideological socialization.<sup>10</sup> The attitudes, skills, and competencies that we reinforce and legitimate in our classrooms will have a powerful and lasting impact on how our students understand and experience the law, how they conceptualize their future within it, and what they understand of their own responsibilities and obligations as future legal professionals. We are convinced that individual teaching is necessarily political, and more broadly, that the ways in which law schools deliver legal and professional education does far more than simply transmit a set of skills and knowledge. Our teaching choices influence "personal values, political commitments and sometimes, fundamental self-conceptions" (Wells) in ways that are



Shary Boyle, "Feral Girls and Dogs Hunt Down and Prepare to Slay God," 2004, ink and gouache on paper, 60 x 50cm.

consequential for the legal profession and for the communities in which our students practice law.

Lawyers are self-regulated professionals whose primary ethical obligation is to act in the public interest.<sup>11</sup> In our view, this professional commitment to the public interest imposes unique professional and personal obligations on law professors—obligations that include teaching in a way that is responsive to the public interest, particularly in the so-called "core" courses that our students are required to study. Criminal law is one such core course.

Being an effective educator requires the careful articulation of objectives. For most law professors, course objectives reflect a blend of substantive content, skills development, and critical thinking linked to the eventual practice of law. Of course, contemporary legal practice is incredibly diverse, and the task

of predicting which legal skills and abilities each student will eventually require is impossible. For most, this means abandoning the attempt to cover everything (an unattainable task given the constant evolution of the law and legal practice) and instead focusing on the transmission of a core (however understood) subset of doctrine combined with the ability to conceptualize, strategize, and manage the task of finding an answer to a legal problem. Given the incredible diversity of potential legal problems, this is no mean feat. When we started to talk about the challenges of teaching sexual assault law in the first year curriculum, we began by thinking about our objectives. What, exactly, were we trying to achieve when we taught our students about sexual assault? What skills and abilities did we want them to have when they completed the unit? What ideas and perspectives did we wish to

expose them to? And whose voices and experiences did we wish to privilege in our choice of content?

Our survey revealed a fascinating array of objectives, from almost entirely doctrinal, to overtly attitudinal. Many colleagues commented on how the law of sexual assault was a uniquely effective pedagogical tool in its capacity to illustrate the tensions inherent in the criminal system's commitment to both the presumption of innocence and the protection of the vulnerable. One colleague noted: "[T]his is a topic that I think is unparalleled in its capacity to demonstrate to students not just the failures but the limits and the very particular nature of the criminal law." Another noted that sexual assault law offered an opportunity to query the usefulness of the criminal law as a response to embedded gendered violence, while, by contrast, another characterized their teaching objectives as "not a normative exercise" but

rather as a mechanism for students to learn about the legal concepts they will need as practitioners and law reformers. Interestingly, a number of respondents identified process-based objectives linked to the creation of a “safe, open, and respectful” environment for academic enquiry, as well as attitudinal objectives related to the open-mindedness and self-reflective abilities of students. In particular, colleagues noted their desire to encourage students to examine their own preconceptions about sexual communication and gendered violence, and saw sexual assault as an especially effective vehicle for the development of the critical self-awareness that is essential to exercising legal judgment.

In our view, teaching sexual assault is inevitably normative. This means that we aim to do more than, in the words of one colleague, “sensitize students to the controversial issues in this area.” We take an explicitly critical stance on the values that are, we contend, furthered by the current criminal justice approach to sexual assault, and the values that are, as a result, ignored. We try to encourage our students to see the law’s failure to respond to the feminist critique as a failure of both law and justice, and therefore as potentially amenable to the transformative potential of both justice and law. For us, that means using history and doctrine as a way of illustrating issues like the contingency of the criminal law’s response to harm, the cultural normalization of gendered violence, and the criminal law’s seeming impermeability to substantive equality values, including, but not limited to understandings of gender and race implications.<sup>12</sup> The challenge, of course, is to recognize that not all students will accept our normative analysis: our goal is to make them think, to encourage and assist them in developing rigorous and complete arguments with legal currency, and to, in as much as is possible from the podium, insist that they engage with rather than ignore the sophistication and complexity of

critical analysis while recognizing that it is an essential legal skill.

### **iii. Doctrine/Policy: A False (Unhelpful?) Binary**

Our commitment to a politicized teaching of sexual assault law, as well as our belief that first year law is a normative experience, influences the materials and assignments we rely on in our course. The small law school market in Canada circumscribes the range of commercial texts or casebooks available for an introductory overview course. Our survey results suggest that many colleagues rely on the two leading commercial casebooks, the structures of which shape the ways in which they deliver their criminal law courses. Two casebooks, Don Stuart, Ronald Delisle, and Steve Coughlan, *Learning Canadian Criminal Law* and Kent Roach, Patrick Healy, and Gary Trotter, *Criminal Law and Procedure: Cases and Materials* appear to dominate the market, although feminist colleagues have published and teach from their own casebooks (Pickard, Goldman and Cairns-Way; Abell and Sheehy; Abell, Bakht, and Sheehy).<sup>13</sup>

The Stuart et al. and Roach et al. casebooks have venerable pedigrees—the Stuart casebook was first published in 1969—the fact that it has undergone eleven revisions in 40 years is testimony both to its staying power and its popularity. The Roach casebook is the ninth descendant of the original casebook published by Professor Martin Friedland in 1970. Both Tables of Contents reflect a classical, doctrinally-grounded approach to introductory criminal law—*actus reus*, *mens rea*, strict and absolute liability, defences of justification and excuse, mental disorder, intoxication and sentencing—with a number of individualized modifications—police powers, the trial process, and wrongful convictions in Roach, and victims’ rights, normative theories of liability, and the ethical obligations of the Crown and defence in Stuart.

Interestingly, both books include a separate chapter on Sexual Assault.

The Stuart chapter is comprehensive and contains excerpts from a wide variety of sources—including cases, statute law, parliamentary debates, secondary sources reflecting a feminist and non-feminist perspective, as well as the editors’ notes and a series of practical problems. The chapter is 100 pages long in a book of 1150 pages, and in the preface, the editors describe the chapter as one that allows “consideration of [that] controversial subject in context” (Stuart, Delisle and Coughlan vi). The preface suggests the problems in the chapter are intended to allow students to learn the law in a “less emotive context” than the judicial decisions that the problems are intended to illustrate. The Roach casebook contains a “special part” that includes separate chapters on two offences, homicide and sexual assault, a choice explained in the preface by reference to “the increasingly contextual nature of criminal law principles” (Roach, Healy, and Trotter iii). The sexual assault chapter is shorter than Stuart’s and is made up entirely of case excerpts and editorial notes. Secondary sources are listed at the end of the chapter (consistent with the remainder of the book) and include references to feminist analysis. The sexual assault chapter begins with the assertion that: “Few subjects in the criminal law are as sensitive and difficult as sexual assault and related matters” (Roach, Healy and Trotter 637).

It is difficult not to notice the fact that all of the editors of the leading commercial casebooks are male. In fact, traditional criminal law scholarship continues to be male-dominated, while critical criminal law scholarship reflects a more diverse range of voices. Despite the fact that it is almost 25 years old, the insights in Christine Boyle’s remarkable article “Teaching Criminal Law as if Women Really Mattered or What about the Washrooms?” continue to have relevance in contemporary criminal law teaching and scholarship (Boyle 1986).

The Pickard, Goldman, and Cairns-Way casebook and the two

volume casebook by Abell and Sheehy emerge from the new generation of (with the exception of Goldman) women law professors who take a feminist and critical legal theorist stance on the teaching of criminal law. The Pickard book was first published in 1992 and is now in its third edition; the Abell and Sheehy volumes were published in 1993 and 1995, and are in their fourth editions. Although

truly critical. (Stuart, Delisle, and Coughlan vi)

Inevitably, students will complain that it is very difficult for them to learn the rules *and* critique them at the same time. We do not believe, however, that sexual assault law—the rules that govern the admissibility of evidence or the definition of the crime, the meaning of consent, or the

to criminal law regulation. In *R. v. Osolin*, the Court held:

It cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all the other forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is, in the vast majority of cases, gen-

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**Sexual assault law—the rules that govern the admissibility of evidence, the meaning of consent, or the available defences—cannot be taught as neutral legal constructions, without the accompanying systemic lens of a feminist theoretical critique that reveals how devastating those rules are to raped women.**

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these casebooks also use a doctrinal approach to the criminal law, they unfailingly ask critical questions of the doctrine, using secondary sources and engaging students in unpacking the assumptions, biases, and inequalities upon which criminal law is premised. In these casebooks, sexual assault is not treated as a discrete subject but is instead a recurring theme under many doctrinal headings, where the doctrine itself is exposed as encoding male bias and masculine privilege.

When we teach sexual assault in criminal law, we take the view that we cannot teach sexual assault law exclusively, or even primarily, through case law. We assign explicitly feminist and other critical materials to our students, work that directly challenges the legal rules constructed by legislators and judges.<sup>14</sup> In this respect we strongly disagree with Stuart and Delisle who state in the preface to their casebook:

Although the development of a critical perspective is key to any university environment, we believe it essential to ensure that we first provide a full and complete analysis of the existing laws before we turn to critical analysis. Our students need to be informed before they can be

available defences—can be taught as neutral legal constructions, without the accompanying systemic lens of (for example) a feminist theoretical critique that reveals how devastating those rules are to raped women in particular, and to the ordering of equality more generally.

There is no doubt that sexual assault cases raise interesting and instructive examples of *actus reus*, *mens rea*, defences, and sentencing doctrines. In the past, we have struggled with how to structure our teaching of sexual assault, and debated whether it is best isolated as a discrete topic, or raised throughout a course that is organized by specific criminal law rules rather than by subject matter. The colleagues we surveyed were divided in their approaches, with some using sexual assault throughout the course as illustrative of particular challenges in criminal law, and others focusing specifically on it for a dedicated period of the course. After teaching criminal law together for several years, we have concluded that sexual assault law cannot be taught in the first year curriculum merely as illustrative of larger criminal law doctrinal questions.

The Supreme Court has recognized that the offence of sexual assault is unique in the challenges it presents

der based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women. (*R. v. Osolin* per Cory J at para. 165)

This view was also expressed in *R. v. Seaboyer* by Justice L'Heureux-Dubé in dissent:

Sexual assault is not like any other crime. In the vast majority of cases the target is a woman and the perpetrator is a man. ... Perhaps more than any other crime, the fear and constant reality of sexual assault affect how women conduct their lives and how they define their relationship within the larger society. (*R. v. Seaboyer* per L'Heureux-Dubé J. [dissenting] at para. 137).

In our view, teaching sexual assault within a broader organizational framework that focuses on doctrine serves to de-contextualize the offence. It is the entire context of sexual assault that reveals the law's systemic inability to respond. Arguably much of what we teach in a first year criminal law curriculum is abstracted from the reality of practice (both of crime and of the justice system),

and so a critique that law school is generalized and theoretical applies to all of criminal law teaching. The reasons for separating out sexual assault for focused study is bolstered by its capacity not only to reveal doctrinal problems to students (how to analyze *mens rea* for example), but also because as a discrete unit it illuminates the inextricability of a substantive equality analysis to our

arguments that this police practice further chills reporting of sexual assault offences and, in violation of women's equality rights, reinforces stereotypes that women often lie about rape. The assignment requires sophisticated legal analysis and a firm understanding of criminal law doctrine, and is infused throughout with an emphasis on policy and critical analysis.

have therefore tried to ensure that attentiveness to student vulnerability undergirds all of our teaching.

Of course, the pervasiveness of sexual violence means that there are likely to be perpetrators of sexual violence in the classroom as well. One colleague put it this way: "Without fail, there are students, usually male, who realize somewhere between *Mills* and *Ewanchuk* that there were

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understanding of the offence. We do not teach it in a separate unit for the reasons alluded to by the Stuart and Roach books, i.e., that it is an area of law that is particularly sensitive or emotive. Rather, we believe that a discrete unit on sexual assault gives the students the chance to observe the legal significance of its uniqueness within the criminal law experience, thus highlighting the legal significance of women's in/equality.

In an effort to repudiate a perceived separation between criminal law doctrine and policy, we gravitate towards assignments that offer students the opportunity to develop practical advocacy and research skills, while stretching their developing critical analysis. One successful assignment we have used requires students to act as hypothetical lawyers for a sexual assault support centre. As "lawyers" they are contracted to write an advisory legal memoranda for the centre to use in its submissions before a police advisory board. At issue is an increasing police practice of charging sexual assault complainants with public mischief for making allegations police classify as "unfounded." The students must research the case law on public mischief and its specific use in the sexual assault context, and aid the support centre in making persuasive

#### *iv. Identity*

Virtually every response to our survey raised issues of identity, and our experience as teachers confirms the significance of identity, both our own and our students, to the ways in which we teach sexual assault. That identity is complex is a truism: in this context, there are multiple and overlapping identities to consider. Many of us begin our teaching of sexual assault by explicitly recognizing the presence of survivors of sexual violence in our classrooms. This recognition immediately differentiates the teaching of sexual assault from other criminal law topics in a way intended both to alert students to the pervasiveness of sexual violence in Canadian society, but also, for many of us, intended to encourage students to pay particular attention to their interventions in class and to the potential harm caused by thoughtless and/or disrespectful class discussion. We wonder (worry) sometimes whether there is something problematic about this careful attention to the survivors of sexual violence—namely, that it marginalizes and minimizes the experiences of survivors of other forms of violence perpetrated by the criminal justice system, most particularly students who have been victimized by police (or other forms of racism).<sup>15</sup> We

instances in the past where they cut it a bit fine on the consent front." Another noted that in-class questions may "originate in a sense of guilt about an act they may have committed in the past, or that they would like to commit... their unconscious motivation may be to have their behaviour exonerated by the professor." This colleague explained that he (and we think his gender significant)<sup>16</sup> attempts to anticipate such questions by starting the unit with a request that students reflect carefully on their motivations for posing a question before raising it.

Beyond a student's potential identity as victim or perpetrator, what makes sexual assault classes unique is that fact that virtually everyone in the classroom (including the professor) has a stake in the law's treatment of sexual assault because virtually everyone in our classroom is sexually active. In other words, the act(s) that are the subject of potential criminal sanction are acts that many have enjoyed, and that most understand as being constitutive of our shared humanity. This is in sharp contrast to other criminal behaviour, and undoubtedly influences how students experience the material. There is both pedagogic value and pedagogic risk in these questions of identity.



For us, appropriate management of the risk involves an initial, explicit, and inclusive acknowledgement of relevant student identity accompanied by a careful explanation of why, in our view, identity requires our careful and respectful attention in the classroom. The pedagogic value in this moment is multifold. Most obviously, it may prevent a harmful or destructive explosion in the classroom. It acknowledges, we hope with compassion and respect, the likely victimization of some students, while reminding all students of the immediate and personal significance of the statistics about sexual victimization. In our experience, bringing statistics into the teaching environment is a direct challenge to the postures of detachment and objectivity that are likely to characterize other legal learning environments, and that are often valorized as essential to the task of “thinking like a lawyer.” Finally, it challenges students to consider the important claim that identity and perspective are relevant to, embedded within, and made manifest in law.

Of course, student identity is not the only identity that has an impact on the sexual assault classroom. Susan Estrich, herself a woman who has been raped, writes powerfully about this issue:

For me, the big issue was whether to tell my students I'd been raped. If you are a young woman teaching 150 students in the first semester of first year ... you spend a lot of time thinking about how to present yourself in the classroom; how to retain the degree of distance and control necessary to make you and the students comfortable.... We all know that we bring ourselves to our teaching. If there is anyone left who thinks himself or herself totally objective, distanced, and singularly intellectual, I'll leave it to others to do the demystifying. Still, there are questions of degree. The biases I bring to the

teaching of rape sit at the surface, the hard edges of survival. (Estrich 511-12)

Many of our colleagues acknowledged the significance of their identity, experiences, and perspective. One female colleague wrote of her concern that her own experience with gendered violence in the home would disable her from teaching with sufficient “dispassion,” although she noted that the difficulties she anticipated had not, apparently, materialized. One male colleague wrote: “I worry about the experience for women victims of hearing a man speak about sexual assault, rates of victimization, and, of necessity, the law that has stumbled so painfully through this area.... It feels like a radical misfit—but it seems unavoidable.” In his view, and we agree, the appropriate response is “to ensure that there is enough richness in the readings that individuals can find a “hook” or foil, should they need it, as a conduit into the discussion.”

Our students have multiple and intersecting identities. We are white, heterosexual feminists. In our view, one (incomplete) response to our own partiality is to deliberately diversify not only the teaching materials, but the teaching voices, by inviting guests with frontline experience to speak to our students. In our criminal law class we have included guest appearances by a sexual assault counselor, trial judges, prisoner rights advocates from the Elizabeth Fry Society, prominent defence counsel, and others with direct experience in the realities of crime and criminal law. We do not conceive of this as an attempt for “balance,” with all that the phrase implies about the possibility for neutral positioning on the law of sexual assault. Nor do we accept the criticism sometimes leveled at academics that we teach only the “theory” of law, as if theory and practice can be rigorously divided in either the classroom or the courtroom. Rather, our invited guests are an attempt to illustrate and enrich one of the central insights of the sexual assault unit: the importance

of contextualizing the offence in a manner that takes women's experiences seriously.

There is no doubt that resisters are quick to delegitimize our analysis on the basis of our “feminist bias.” Ideally (and not always successfully) we try to counter that concern by exploring the concepts of bias and partiality, and challenging students to evaluate their own “biases.” At the same time, we struggle to ensure that our exploration of the racism of the criminal justice response to male sexual violence does not itself contribute to racism in the classroom. For example, it is statistically evident that racialized men are more likely to face prosecution, conviction and heavier sentences for all crimes, including sexual assault. Within the context of a feminist analysis, we are careful in class to acknowledge this racism, and to encourage discussion about how the criminal justice system operates to oppress racialized accused (Razack).

We recognize that professors who are themselves racialized will enter the sexual assault law classroom with a different range of vulnerabilities and challenges. Aboriginal faculty, for example, might well find their experiences as professors (and the reaction of students) informed by a history of racist colonization of Aboriginal people and the tragedy of widespread institutionalized sexual abuse within residential schools. While we remain uncertain about the most effective strategies for dealing with identity questions, it seems to us that open discussion of them is essential to the delivery of an effective sexual assault unit.

#### *v. Classroom Dynamics*

We know, anecdotally, that the way in which sexual assault is taught in first year criminal law classrooms is as varied as the professors that teach it. We also know that many colleagues who teach sexual assault approach it with a heightened sense of anxiety. They (and we) have worried about how, when, and with what materials

to teach the subject. They (and we) worry about the classroom dynamic created wittingly and unwittingly by our choices. They (and we) worry about the emotional, political, and personal risks of teaching sexual assault, about the potential for silencing or alienating our students, and about the risk that a destructive outburst in a class under our control will temporarily or permanently disrupt

that you have sacrificed the prospect of a continuing conversation with precisely one of the people you most wish to engage in conversation. On the other hand, others in the class have need of a meaningful response to that kind of comment and the thrust of the classes and treatments of this topic is to get at and critically address precisely these stereotypes and myths.”

creating space and opportunity for self-reflection that is respectful of each student’s individual perspective and experience and attempts to build upon, rather than challenge, each student’s personal politic. Frances Aynsley describes this as a student-centered pedagogy that “support(s) and pressure(s) students to stretch to new locations, but not at the cost of breaking their connections to their

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**We struggle with those so-called “teachable moments”  
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the creation of generative, productive, and transformative learning communities that most of us strive to create in our classrooms.

Every one of our colleagues talked about how difficult it is to teach sexual assault law. The classroom struggles are similar across the country and in every first year law class. The combination of a deeply personal response to sexual assault, the gendered realities of the crime, and the political backdrop to it (whether made explicit in class or not), produces charged classroom discussions. As one colleague admitted: “Sexual assault tends to provoke strong feelings so I am constantly on guard to ensure that the discussion does not get too heated or out of control.” We struggle with those so-called “teachable moments”—those moments where a student makes a problematic comment that is racist, misogynist, able-ist, or merely grossly insensitive or ignorant. It is the hope of all teachers that one can turn those moments around, use them to make an opposite point without silencing, or worse humiliating the student who spoke out. Difficulties in handling moments like this were a common theme in our colleagues’ responses, for as one put it: “To push back in the wrong way on the student comment virtually guarantees, it seems to me,

The challenge in pursuing critical normative objectives in the first year classroom is in the very nature of that classroom—and, in particular the inevitable range of experiences and perspectives students bring with them into that classroom. Identity and perspective create pedagogical challenges—process-based challenges that have an impact on the possibility or likelihood of achieving the substantive, normative, and political objectives to which we are committed. One colleague focused on these process-based objectives within a unit designed to create a “common base of knowledge about the context and nature of sexual assault.” He wrote about the importance of creating a safe environment for deep and open academic inquiry, as well as the need to push students to recognize their own partiality and ignorance. In our view, these remarks highlight what is perhaps the most difficult question for legal educators committed to educating in the public interest and in encouraging and enabling students to contribute to progressive social change.

What pedagogical method is, in fact, most likely to encourage our students to bring critical and transformative skills to their own legal practice? One option is a pedagogy based on

own story line” (14-15). The risk of this approach is the risk of “unjustifiable complacency” (Wells 5), which effectively entrenches and legitimates the status quo at the same time as it appears to challenge it. The other pedagogical option is more confrontational and outcomes based: it aims to politicize the classroom, it encourages students to identify their ideological commitments, and it insists that they come to grips with the legal and social implications of those commitments, with the express objective of moving them in the direction of a progressive politic. The obvious risk here is resistance, something with which feminists and critical scholars are all too familiar. The challenge, it seems to us, is to find a path that minimizes the potential for unproductive resistance, while recognizing that some resistance is essential for intellectual growth. Our sense of when resistance becomes unproductive, and potentially counterproductive to the educational mission, is unique to each class, and depends on the particular classroom dynamic created by student personalities and interactions, our own sense of the tenor and tone of the discussion, the larger law school culture, and the existing political climate.

Both male and female students experience challenges in engaging

with this material. While some of our students are already political beings when they enter into law school, many have not acknowledged the systemic discrimination that orders their lives. Many women students find it just as hard as their male counterparts to understand and accept the overwhelmingly gendered reality of rape. In our class we assign very challenging feminist critiques about the pervasive and oppressive inequality of women and men. Messages like that are hard for women students to receive, for many of them believe that their very presence in law school demonstrates the increasing irrelevance of feminist analysis. Many men find a feminist analysis of rape difficult to accept, and the conversations in class are often framed by, and mired in, unconscious discomfort by all students as to what sexual assault law says about women's equality rights and men's obligations in that regard.

#### **Part 4: Conclusion**

Each fall, our law faculty hosts a lecture by Jane Doe. She details her successful claim against Toronto Police Services for sex discrimination and the negligent investigation of her rape. Her lecture is a transformative moment for first year law students. She sets her story in the larger narrative of systemic sexual violence, patriarchy and law, and the legal system's failure to dismantle the institution of rape that overwhelmingly contributes to persistent and destructive patterns of gender oppression. By the time she arrives in October, first year law students have spent a few weeks learning abstract rules, but she suddenly makes that abstraction deeply real and personal. She is both the raped woman and the woman who won a major legal victory. She breaks down the artificial categories we impose in law as her case is about her criminal law experience, and how it informed her civil suit against the police. The students are asked to understand the connections between these two

experiences. She puts a direct challenge to the students based on their most fundamental identity as a man or a woman. In a moment that earns her raucous applause each year, she flips the traditional warnings we give women, that they should stay in at night, not walk alone, avoid campus tunnels, and suggests that since rape is overwhelmingly perpetrated by men, it is men who should stay indoors, not go out at night, and avoid dark places.

But the moment of her talk that is most pointed for us—and for our continued struggle to improve our teaching of sexual assault—is her demand that law students ask more of their professors. She reminds them of their power and privilege, and of their place in a patriarchal system of laws that oppress the most marginalized in our society. She exhorts our students to demand critical perspectives and teaching that transcends the simple laying out of abstract legal rules. She demands that law professors carry out the vital work of transforming the legal system, and tells our students that they should not let us off the hook if we are not doing that every day in the classroom. Hers is a challenging message for a law professor, but it accords with our own sense of professional obligation.

The constant evolution of the law, the continuously shifting social and political context, the diverse identities of our students, and our own personal and intellectual growth combine to make elusive any conclusive or absolute answers to the issues we have identified. Our experience tells us that every class has a unique personality, that every teaching year will be different, and that the issues that arise in individual classrooms will vary with the context. Indeed, it is that variability and intellectual challenge that makes law teaching so rewarding. Nevertheless, we are convinced that the effective education of first year law students on sexual assault requires law teachers to engage in the kind of critical self-evaluation and reflection we have discussed here. While we

may not (and probably should not) all agree on the specific objectives, materials, and classroom techniques required to teach sexual assault in a way that furthers the public interest while contributing to social justice and equality, we owe it to our students and to the public they will eventually serve to make explicit, intentional, and transparent pedagogic choices about how to educate Canada's future legal professionals.

We want to conclude by acknowledging the generosity of teaching colleagues who responded to our questions. Of course, our survey was highly subjective and utterly unscientific. It was intended to begin a conversation about what obligations inhere in the teaching of sexual assault to first year students. The questions are complex, the issues multifaceted, and the interests multidimensional, but it is a conversation in which many colleagues seem eager to engage. For the most part, academics work and teach in isolation, in institutions that increasingly devalue our role as teachers in the pressure to publish and achieve major grants. We are committed in this project, and informed by our previous work together, to the disruptive potential of collaborative thinking, thinking that, in the words of Angela Harris “violates the deeply individualist norms of law professing and the myth of personal “brilliance” that these norms perpetuate” (410). We agree with Professor Harris that “the individualist focus of academic life hinders truly transformative work in both teaching and research. Lone geniuses can offer insights here and there, but the major intellectual revolutions of our time—law and economics, critical race theory, feminist theory, queer theory—have been collective efforts” (Harris 410). If our work can encourage collective thinking on how we teach sexual assault, how we can do it better, and perhaps, most importantly, who we are answerable to for the ways in which we teach, we will be well-pleased.

*We wish to thank Elizabeth Sheehy*

and Jane Doe for the opportunity to present a draft of this piece at a conference in March 2009 honouring the tenth anniversary of Jane Doe's historic legal victory against the Toronto Police Services ("Sexual Assault Law, Practice and Activism in a Post-Jane Doe Era"). We are also grateful to our colleagues at law schools across the country who answered our questions about the teaching of sexual assault.

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<sup>1</sup>Response to author survey on teaching sexual assault (notes on file with the authors).

<sup>2</sup>The question of what is essential and non-essential in legal education is currently the subject of much debate. In June 2007, the Federation of Canadian Law Societies appointed a Task Force to "examine the current requirements for entry into provincial law societies' bar admission programs" (2). (As part of its analysis the Task Force identified "foundational competencies" related to substantive knowledge, legal skills and professional responsibility (4). The proposed list includes the following competencies (inter alia) which reflect the current core of most first year law programs in Canada: Foundations of common law, including the doctrines, principles and sources of the common

law, how it is made and developed and the institutions within which law is administered in Canada; contracts, torts and property law; criminal law; and civil procedure, and the constitutional law of Canada, including principles of human rights and Charter values (4-5). Significant concern about the "professional competencies" approach to legal education has been raised by a range of organizations directly involved with delivering legal education in Canadian law schools. The essence of the critical response was put elegantly by the Canadian Association of Law Teachers and the Canadian Law and Society Association: "A reconfiguration of law school curricula that places a predominant emphasis on professional competencies at the expense of creativity, innovation, and the study of the broader role of law in society would be ... a serious loss ... to society and the public interest. ... Law schools must continue to cultivate and cherish societal perspectives on law as well as pedagogies that enhance the ability to reeducate oneself and to think critically and imaginatively in response to social change.... The adoption of a "list of competencies" approach such as that proposed will likely produce, in the short term, a shift in material resources and faculty personnel away from the richness, diversity and creativity of such scholarship."

<sup>3</sup>Professor Constance Backhouse was the third member of our collaborative teaching team. Although unable to participate as a co-author of the paper, she was instrumental in the conceptualization and delivery of the course, and participated as thoughtful commentator as the paper was written. We have recently taught another iteration of the course to two small groups at the University of Ottawa, and will be offering it again in the fall of 2009.

<sup>4</sup>The admissions committee at the University of Ottawa compiles limited statistical data about the entering class every year. The num-

ber of female students has hovered at the 60 percent mark for the last ten years. There are no statistics on the number of racialized students as applicants are not required to self-identify on their applications. Our perception that the class is increasingly diverse is a subjective one, based on our own observations. We recognize that subjective observations are inadequate responses, but there is no existing mechanism at the admissions level to get at this statistic. Admissions information for the last five years is on-file with the authors.]

<sup>5</sup>Statistics on file with the authors. Students with disabilities are also under-represented.

<sup>6</sup>The collection in which this essay appears offers a vast and diverse scholarship devoted to sexual assault, each item of which presents a unique perspective on aspects of the crime, and provides a different entry point into the literature.

<sup>7</sup>Key pieces in the literature include the Consultative Group on Research and Education in Law, Law and Learning in Canada's *Report to the Social Sciences and Humanities Research Council of Canada* (or, The "Arthurs" Report, after the Group's chair, Professor Harry William Arthurs); Matas and McCawley's *Legal Education in Canada*, in which a series of authors comment on the state of Canadian legal education on the occasion of the 20<sup>th</sup> anniversary of the publication of the Arthurs Report; Rochette and Pue, as well as the remainder *Windsor Yearbook of Access to Justice 20* (2001), which contained a series of articles on Canadian legal education; and Bakht, Brooks, Calder, Koshan, Lawrence, Mathen and Parkes.

<sup>8</sup>See generally the work of Holly Johnson, Department of Criminology, University of Ottawa. In particular see: Johnson; and Roberts, Johnson and Grossman.

<sup>9</sup>See: <http://www.statcan.gc.ca/cgi-bin/af-fdr.cgi?l=eng&loc=http://www.statcan.gc.ca/pub/85-002-x/85-002-x2003006-eng.pdf&t=S>

exual%20offences%20in%20Canada.

<sup>10</sup>See our discussion of this process of socialization in Cairns Way and Gilbert (19-30).

<sup>11</sup>Detailed information can be found on the Law Society's website at <http://www.lsuc.on.ca>.

<sup>12</sup>For discussions of the relationship between the substantive criminal law and equality values see: Boyle and MacCrimmon; Boyle, (1994); Cairns Way (2005, 2003).

<sup>13</sup>As well, we learned of a self-published set of materials prepared by Professors Martha Schaffer and Hamish Stewart at the University of Toronto.

<sup>14</sup>Some examples of critical materials we assign include: Backhouse; Benedet and Grant; McIntyre (2000, 1994; Razack; Sheehy.

<sup>15</sup>We note that many of us purposefully avoid setting an exam question based on a sexual assault scenario, on the theory that such a scenario might unfairly prejudice a student who identified personally with the hypothetical facts. One of our respondents noted that a student had challenged him in class on this decision—pointing out that a factual scenario based on racial discrimination might be equally unfair to members of the class who had experienced, and continued to experience, racism in their lives. He admitted that this challenge caused him some concern.

<sup>16</sup>Neither of us have ever had this experience while teaching sexual assault.

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## JOANNA M. WESTON

### Goodbye

the word lies bitter  
in my mouth

it has the smell  
of departing trains

sounds like the last call  
for your flight

tastes of wet grass  
and leaning gravestones

slides like old photos  
against my lips

lingers under my tongue  
sticks in my throat

this saddest word  
rains on my face

Joanna M. Weston's poetry appears  
earlier in this volume.