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STUDENT PERSPECTIVES ON TALKING ABOUT SEXUAL ASSAULT IN AUSTRALIAN LAW CLASSES

ANNA BELGIORNO-NETTIS*

I INTRODUCTION

Teaching rape law offers a chance to constructively intervene in public discourse about sex and sexuality, coerced sex and coercive sexuality.

Mary Heath¹

Heath's description of classes on sexual assault² law as a 'chance', or opportunity, differs starkly to many student accounts of these classes. For example, one Australian student recently wrote of how, during a university class on a poem recounting a sexual assault: 'I want to cry, I can't cry. I can't leave the room. I can't make a scene. I can't breathe.'³ The topic of teaching sexual assault related material has sparked significant debate in the United States of America,⁴ and recent Australian media descriptions of sexual assault related material

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¹ Mary Heath, 'Encounters with the Volcano: Strategies for Emotional Management in Teaching the Law of Rape' (2005) 39 *Law Teacher* 129, 133.

² This paper uses the term 'sexual assault' to refer to the kinds of sexual assault that Australian criminal law addresses. These are 'sexual activity that occurs without the consent of the other (non-assaulting) party'. Note that State jurisdictions define 'sexual activity' slightly differently. See Bianca Fileborn, 'Sexual Assault Laws in Australia' (Australian Centre for the Study of Sexual Assault Resource Sheet No 1, Australian Institute of Family Studies, February 2011) <<https://aifs.gov.au/publications/sexual-assault-laws-australia>>.

³ Ava K, 'Trigger Warning', *Farrago* (online), 2 March 2015 <<http://farragomagazine.com/2015/03/02/trigger-warning/>>.

⁴ Greg Lukianoff and Jonathan Haidt, 'The Coddling of the American Mind', *The Atlantic* (online), September 2015 <<http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/>>; Katie J M Baker, 'Teaching Rape Law in the Age of the Trigger Warning', *BuzzFeed* (online), 4 April 2015 <https://www.buzzfeed.com/katiejmbaker/teaching-rape-law-in-the-age-of-the-trigger-warning?utm_term=.wek9zKz63#.owqe1r1X2>.

as ‘potentially disturbing content’⁵ suggest that the Australian debate will only grow.

Although there are examples of Australian universities producing guidelines related to teaching sexual assault law⁶ and Australian academics exploring the topic,⁷ there are no theoretical pieces that focus on how to talk about sexual assault in Australian law classes from the perspective of *students*. Even in the American context, where there is far more research on the topic, most of it is from the perspective of lecturers. However the fact that lecturer research tends to recount student opinions, through either surveys or classroom anecdotes,⁸ reflects the importance of students’ perspective. Furthermore, much recent research into teaching methods shows that directly engaging with students and their perspectives can improve learning outcomes, particularly in universities.⁹ I suggest, therefore, that responses to teaching sexual assault might be enhanced through engaging directly with student voices rather than as mediated through lecturers themselves.

To make this paper as directly representative of student perspectives as possible, I rely on both my own experiences as a law student and experiences of other Australian university students as said in their words. My paper refers to various personal experiences of mine, since sexual assault-related legal material has been discussed in

⁵ Timna Jacks, ‘Universities Pull the Trigger on Political Correctness’, *The Age* (online), 24 June 2016 <<http://www.theage.com.au/victoria/universities-pull-the-trigger-on-political-correctness-20160623-gpqqon.html>>.

⁶ Flinders University, *Inclusive Practices for Managing Controversial Issues in the Classroom* <<https://www.flinders.edu.au/cdip/toolkit/teaching.cfm>>.

⁷ Rachael Field, ‘Women in the Law School Curriculum: Equity is About More than Just Access’ (1999) 10 *Legal Education Review* 141; Regina Graycar, “‘To Transform the Normative Tradition of Law...’ A Comment on the Feminist Project in the Law School’ (1986) 58 *The Australian Quarterly* 366; Jenny Morgan, ‘Feminist Theory as Legal Theory’ (1988) 16 *Melbourne University Law Review* 743.

⁸ Deborah Denno, ‘Teaching Rape in Law Schools’ (Paper presented at the Feminism and Legal Theory Workshop: Women in the Academy, Columbia Law School, 23 March 1996); Kevin C McMunigal, ‘Reducing the Risks and Realizing the Rewards: An Approach to Teaching Rape Law’ (1997) 34 *San Diego Law Review* 519; Michelle Oberman, ‘Getting Past Legal Analysis ... Or How I Learned to Stop Worrying and Love Teaching Rape’ (2012) 45 *Creighton Law Review* 799; James J Tomkovicz, ‘On Teaching Rape: Reasons, Risks, and Rewards’ (1992) 102 *Yale Law Journal* 481.

⁹ Alf Lizzio, Keithia Wilson and Roland Simons ‘University Students’ Perceptions of the Learning Environment and Academic Outcomes: Implications for Theory and Practice’ (2002) 27 *Studies in Higher Education* 27; Mick Healey, Abbi Flint and Kathy Harrington, *Engagement Through Partnership: Students as Partners in Learning and Teaching in Higher Education* (Higher Education Academy, 2014); James S Pounder, Elizabeth Ho Hung-lam and Julie May Groves ‘Faculty-Student Engagement in Teaching Observation and Assessment: A Hong Kong Initiative’ (2016) 41 *Assessment and Evaluation in Higher Education* 1193; Katherine Jensen and Liz Bennett, ‘Enhancing Teaching and Learning through Dialogue: A Student and Staff Partnership Model’ (2016) 21 *International Journal for Academic Development* 41.

seven of my 13 compulsory subjects,¹⁰ ranging from criminal law and procedure to legal theory.¹¹ I have also gathered other student perspectives through Australian university student publications, written in the last five years that were publicly available through online searches. This paper features substantial extracts of these accounts. Using a difference feminism framework, and drawing in particular on Mary Heath's lecturer approach to teaching sexual assault law,¹² I evaluate how student experiences might inform lecturer approaches to this topic.

The student anecdotes I draw on are selected to highlight what I see as two aims for *how* to teach sexual assault law, beyond *what* to teach substantively as sexual assault law. The first is to acknowledge the perspective of students that have experienced sexual assault, and the second is to change student perspectives that undermine sexual assault's gravity. In order to achieve these aims, this paper searches for a balance between recognising both the distressing impact that sexual assault related material can have on students, and the opportunity presented in law classrooms to reframe student perspectives on coerced sexual activity.

I suggest that these two aims encapsulate the educational principle of improving learning outcomes through engaging with student perspectives¹³ (here linked to changing sexual assault supportive perspectives in students), while recognising that student emotional safety (here linked to students who have experienced sexual assault) is necessary for such learning.¹⁴ These aims are, of course, not the only ones for such classrooms. However the prevalence of sexual assault amongst young Australians and the current engagement of Australian universities with that concerning prevalence, outlined below, justify these aims.

I acknowledge that the very act of analysing sexual assault related teaching through personal anecdotes means that, inevitably, every educational aim and concern cannot be considered. Some aims may in fact conflict directly with the student perspectives represented here. However, this paper's represented perspectives highlight how at least some students react to the ways in which sexual assault is discussed in class. More generally, by focusing on some student perspectives, I aim to illustrate the importance of considering student viewpoints when

¹⁰ See the list of compulsory 'Priestley 11' subjects: Victoria Legal Admissions Board, *Academic* (12 October 2017) <<https://www.lawadmissions.vic.gov.au/qualifications-and-training/academic>>. Legal Theory and Legal Research are not listed, but they are compulsory subjects for the Melbourne Juris Doctor.

¹¹ *PGA v The Queen* (2012) 245 CLR 355.

¹² Heath, above n 1.

¹³ See above n 9.

¹⁴ Janice Carello and Lisa D Butler, 'Potentially Perilous Pedagogies: Teaching Trauma is Not the Same as Trauma-Informed Teaching' (2014) 15 *Journal of Trauma and Dissociation* 153,163.

reflecting on how to conduct a law classroom discussion concerning sexual assault law.

II AUSTRALIAN UNIVERSITY STUDENTS AND SEXUAL ASSAULT

Statistics reveal a concerning number of Australian university students have either experienced unwanted sexual behaviour or perpetrated it. The *National University Student Survey on Sexual Assault*¹⁵ and *Sexual Harassment*¹⁶ (National Survey), conducted by the Australian Human Rights Commission, measured the experience of over 30 000 students across all of Australia's 39 universities. Its results, released 1 August 2017, are the first attempt to examine in detail the scale and nature of the problem in Australia. Both quantitative and qualitative data was gathered over three months with 1849 submissions.

The National Survey found that over half of all university students were sexually harassed on at least one occasion in 2016, and 6.9 per cent of students were sexually assaulted on at least one occasion in 2015 or 2016.¹⁷ Among those who had been sexually harassed in a university setting by someone they knew, more than two thirds (68 per cent) said that the perpetrator(s) of the most recent incident was a university student. Among those who had been sexually assaulted in a university setting by someone they knew, over half (57 per cent) said that the perpetrator(s) of the most recent incident was a university student.¹⁸

The National Survey's qualitative information indicated that underlying attitudes towards women, gender roles, relationships and sex contributed to sexual assault and sexual harassment at university.¹⁹ One of the Survey's key recommendations is to help universities 'create an institution-wide culture based on inclusiveness, gender equality, respectful behaviour and accountability'. The Survey emphasised educating students and staff about behaviours that constitute sexual assault and sexual harassment, and 'violence supportive attitudes'.²⁰

¹⁵ Defined by the National Survey as 'includes a range of behaviours, all of which are unacceptable and constitute a crime. Sexual assault occurs when a person is forced, coerced or tricked into sexual acts against their will or without their consent, including when they have withdrawn their consent.'

¹⁶ Defined by the National Survey by providing a list of fourteen behaviours likely to constitute unlawful sexual harassment, including: unwelcome touching, inappropriate staring that made you feel intimidated and sexually explicit emails.

¹⁷ Australian Human Rights Commission, 'Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities' (Report, Australian Human Rights Commission, 1 August 2017) 3.

¹⁸ Ibid 7.

¹⁹ Ibid 5.

²⁰ Ibid 5, 11.

The National Union of Students' 2015 survey of over 1300 Australian women university students found similarly concerning figures. Twenty-seven per cent of its respondents had experienced unwanted sexual encounters including rape, and 22 per cent of those encounters had been carried out by another student at their university.²¹ The survey also found that over 72 per cent of respondents had experienced some form of sexual harassment — from 'leering' to 'suggestive jokes' — and 51 per cent of the time that harassment was carried out by a student at their university.²² Although this survey is methodologically limited because it does not detail how results were collected and how its 1336 survey respondents were found, it nevertheless supports what the National Survey found: that many students at Australian universities have been sexually harassed in one of these ways, and it is often by another student.

The Australian Bureau of Statistics' (ABS) 2005 Australian survey also suggests a high prevalence of sexual assault experiences²³ in young Australians. The ABS conducted face-to-face interviews with over 16 000 Australians and found that, of the respondents that had experienced sexual assault in the previous year, 57.4 per cent of the women and 66.5 per cent of the men were under 35.²⁴ These statistics suggest that Australians are most likely to experience sexual assault when they are under 35 years of age. Given under 35 year olds make up over 60 per cent of Australia's higher education population, from which law classes are composed,²⁵ these statistics imply that Australian law classes have a similar proportion of participants who have experienced sexual assault. The ABS also found that, for 78 per cent of women and for 67 per cent of men who reported experiencing cases of sexual violence,²⁶ the perpetrator is known to the survivor.²⁷

This background points to the likelihood that Australian university students have personal experiences of sexual assault and sexual assault-related incidents such as sexual harassment, and that these

²¹ National Union of Students Women's Department, 'Talk About It' (Report, National Union of Students, 2015) 17.

²² The survey defines sexual harassment as "unwelcome sexual behavior", listing various types that include "leering" and "suggestive comments", but do not include "physical mistreatment" and "sexual assault", which the survey covers in different sections.

²³ The survey defines sexual assault defined as a 'physically forceful, intimidating or coercive sexual act'.

²⁴ Australian Bureau of Statistics, 'Personal Safety Survey – Australia' (Reissue No 4906.0, Australian Bureau of Statistics, 21 August 2006) 32. The percentage of men experiencing sexual assault is an estimate with a relative standard error of 25-50 per cent, so should be used with caution.

²⁵ Australian Bureau of Statistics, *Hitting the Books: Characteristics of Higher Education Students* (25 July 2013).

²⁶ The research defines 'sexual violence' as including "sexual assault", or an act of a sexual nature carried out against a person's will, and "sexual threat", or threats of sexual assault which a person believed were likely to be carried out.

²⁷ Australian Bureau of Statistics, 'Personal Safety Survey – Australia', above n 24, 11.

experiences include those of victims as well as perpetrators.²⁸ These varied experiences have informed this paper's two aims, outlined above, of acknowledging the perspective of students that have experienced sexual assault, and of changing student perspectives that undermine sexual assault's gravity. These aims also address the National Survey's recommendation of acknowledging and changing underlying pro-sexual assault attitudes, as well as encouraging inclusivity. The nature of any one student's personal experience will directly affect that student's engagement with the course materials and therefore, the extent to which learning outcomes might be met. Therefore the paper suggests that it is crucial to be mindful of varied, personal student experiences.

III DIFFERENCE FEMINISM

This paper undertakes its exploration of teaching sexual assault-related law through what Lacey calls a 'difference feminist' framework.²⁹ Difference feminism is particularly appropriate for the current discussion because it aims to include wide-ranging perspectives that are 'differently constituted' to those most often heard.³⁰ It therefore complements the first of my aims: of acknowledging classroom participants who have experienced sexual assault since, as Part II's statistics highlighted, while any Australian law classroom may have participants that have experienced sexual assault, they will most likely be in the minority.

Difference feminism's aim to consider less wide-ranging perspectives offers a way in which to reflect on how such sexual assault experiences can be respected in classroom deliberations. Respecting such perspectives does not, of course, require personal disclosures from students who have experienced sexual assault, which often recapitulates that traumatic experience. Instead, this paper adopts a 'trauma-informed' approach that acknowledges how teaching material may affect sexual assault survivors.³¹

The difference feminist framework also complements this paper's second aim: of changing student perspectives that undermine sexual assault's gravity. One of the major assumptions that difference feminism refutes is that the world is organised in binary oppositions.³²

²⁸ Australian Human Rights Commission, 'Change the Course', above n 17, 7; National Union of Students Women's Department, 'Talk About It', above n 21.

²⁹ Nicola Lacey, 'Feminist Legal Theory and the Rights of Women' in Karen Knop (ed), *Gender and Human Rights* (Oxford, 2004) 13, 25.

³⁰ Nicola Lacey, 'Feminist Legal Theory Beyond Neutrality' (1995) 48(2) *Current Legal Problems* 1, 7.

³¹ Carello and Butler, above n 14, 163.

³² Ian Bryan and Julie Wallbank, 'The Lore of Sexual Difference in Social and Legal Discourse on "Date Rape"' (2004) 15 *Law and Critique* 183, 195; Kathleen J Ferraro, 'The Dance of Dependency: A Genealogy of Domestic Violence Discourse' (1996) 11(4) *Hypatia* 77; Lacey, 'Beyond Neutrality', above n 30, 20; Wayne Morgan, 'Queer Law: Identity, Culture, Diversity, Law' (1995) 5

Difference feminist thinking acknowledges both sides of the gender man-woman binary, to then critique that assumption and deconstruct it into varied positions between or beside the binary. Difference feminism's suggestions for how to acknowledge, critique and overcome certain attitudes can offer suggestions for this paper's second aim of overcoming classroom attitudes that are supportive of sexual assault, or that are dismissive of students who have experienced such assault.

It is important to stress that to acknowledge the existence of attitudes that are accepting of sexual assault or dismissive towards those who have experienced sexual assault, is not to approve of them. Rather, a classroom deliberation can only hope to address and then change these attitudes if they are recognised. Knowing how to address diverse student perspectives is integral to an educational classroom debate, where student perspectives might develop without causing gratuitous distress.

Part IV to Part V of this paper is structured according to difference feminism's three steps — to 'reveal, challenge, and overcome the constrictions posed by the system', here being the system of the law.³³ To begin with, Part IV reveals, or exposes, the classroom's unconscious aspects and its resistance to being theorised. This enables classroom debates to move beyond, first, traditional lecturer-centric perspectives to give space for student opinions. Secondly, it enables classroom debates to step outside of and critique legal perspectives that have discriminated against sexual assault victims in the past by denying the legitimacy of, for example, date rape³⁴ or rape in marriage.³⁵ Part V then challenges, or critiques, these revelations to highlight how the legal system has unfairly approached sexual assault in the past. Part V also challenges the classroom's inability to offer all the support that students, particularly those that have experienced sexual assault, may need when approaching sexual assault-related law. Then, Part VI overcomes by exploring approaches both within and beyond the classroom and the law. I suggest that this overcoming can be achieved by approaching case law and statute from a socio-legal perspective, in order to enhance student substantive knowledge of that law. Hence, Part VI encourages extra-legal and extra-classroom-based support and conversations.

Australasian Gay and Lesbian Law Journal 1; Katherine O'Donovan, 'With Sense, Consent, or Just a Con? Legal Subjects in the Discourse of Autonomy' in Rosemary Owens and Ngaire Naffine (eds), *Sexing the Subject of Law* (Sweet and Maxwell, 1997) 47, 51.

³³ Bryan and Wallbank, above n 32, 186.

³⁴ *Ibid.*

³⁵ Heath, above n 1, 140.

IV THE FIRST STEP: REVELATIONS

A Revealing the Law and the Classroom

Exposing constructed systems — such as the law and the concept of the classroom — is essential in order to then critique their ‘instability’.³⁶ Consequently, legal difference feminism aims to decentre law by exposing moments when the linguistic construct of law conceals itself.³⁷ Applying this framework to the classroom entails looking for moments when that classroom construct may be concealing itself. By revealing those moments, this space’s instability can similarly be critiqued.

The classroom is often concealed because the space itself is rarely acknowledged; as a law student, I have not often been encouraged to pause and reflect on the space I am in, or the flaws it may have. This issue is particularly prevalent when in a space as emotionally charged as a classroom in which sexual assault is discussed. One Australian law student recently wrote of how the lack of classroom reflection and preparation impacted on her learning experience during a ‘Rape in Cyberspace’ reading in a Cyberlaw unit:

... I had no warning, no knowledge that this would be the topic of the readings this week [it was in] first person, sensationalised, a rape narrative ... Talking about [sexual assault] as a hypothetical concept, as an abstract, as something that could be divorced from the actual reality that is experienced by people, is something that only people who are lucky enough not to be sexually assaulted can do.³⁸

If students are given the time to prepare for what classroom material will cover, and to recognise that topics related to sexual assault are not a ‘hypothetical’ concept, but rather personal issues that may affect them, the learning space is no longer left ‘unconsciously’ unquestioned.

Lecturers can decentre the law classroom by recognising it as a space that students will experience in different ways. They can begin classes by saying that sexual assault law raises particularly emotional responses.³⁹ For example, Heath takes ‘plenty of time...to establish

³⁶ O’Donovan, above n 32, 51-2.

³⁷ Elizabeth Adams St Pierre, ‘Poststructural Feminism in Education: An Overview’ (2000) 13 *International Journal of Qualitative Studies in Education* 477, 501.

³⁸ Katy Hampson, ‘The Law and Sexual Violence: A Troubled Relationship’, *De Minimis* (online), 19 October 2015 <<http://www.deminimis.com.au/home/the-law-and-sexual-violence-a-troubled-relationship>>.

³⁹ Heath, above n 1, 136; McMunigal, above n 8, 524; Stacey Scriver and Kieran M Kennedy, ‘Delivering Education about Sexual Violence: Reflections on the Experience of Teaching a Sensitive Topic in the Social and Health Sciences’ (2016) 35 *Irish Educational Studies* 195, 200; Alesha Durfee and Karen Rosenberg, ‘Teaching Sensitive Issues: Feminist Pedagogy and the Practice of Advocacy-Based Counseling’ (2009) 19 *Feminist Teacher* 103, 110; Pam Lowe, ‘Lessening Sensitivity: Student Experiences of Teaching and Learning Sensitive Issues’ (2015) 20 *Teaching in Higher Education* 119, 124.

the ways in which the classes will be run', allowing for students to 'assess [lecturer] accessibility and responsiveness to their concerns'.⁴⁰ Sriver and Kennedy stress that sexual assault law classes should begin by recognising that 'the topic is potentially distressing *and* important ... [which helps] create a social presence'.⁴¹

Acknowledging sexual assault law's importance reminds classroom participants why such material is being covered. Emphasising that teaching sexual assault law is potentially emotional and socially significant complements difference feminist thinking, since students and lecturers will consequently not reflect on sexual assault related law as a concept that exists outside society, but rather as a 'dynamic, unstable effect of language/discourse and cultural practice'.⁴² Lecturer transparency around how law classroom discussions can trigger painful emotions brings the law and the classroom's unconsciousness into new light.

B *Revealing Binaries and Classroom Perspectives*

As seen above, difference feminism's revelations about *law* provide suggestions for facilitating class discussions about sexual assault. Here, I explore suggestions that difference feminism's revelations about *binary oppositions* can provide. The difference feminist technique of identifying, or 'rendering visible' how the law has constituted one side of the binary in opposition to the other⁴³ can be adapted to ensure sexual assault in classroom environments is also rendered visible, rather than ignored or unconsciously assumed.

One student described a recent university literature class where the concept of sexual assault victim and sexual assault perpetrator were not rendered visible, but rather unconsciously presumed:

As we progress through reading the poem, I realise [the author] is revelling in rape. An iron hand closes around my throat ... A girl across the room says in a frowning voice how violent and rapey the poem is – not romantic at all! I look to her with the gratitude of a mortal saved by a good angel. The tutor looks nervous. 'Yes, well, that's the elephant in the room, isn't it?'⁴⁴

The 'elephant' of sexual assault is in the class, whether or not lecturers or students acknowledge it. The fact that the class is on literature, not sexual assault specifically, highlights how many classes face this topic of discussion. As mentioned above, during my law degree sexual assault-related legal material has been discussed in

⁴⁰ Heath, above n 1, 135.

⁴¹ Sriver and Kennedy, above n 39, 200.

⁴² Adams St Pierre, above n 37, 502.

⁴³ See, eg, O'Donovan, above n 32, 51-2.

⁴⁴ Ava K, above n 3.

seven of my 13 compulsory subjects:⁴⁵ criminal law and procedure;⁴⁶ torts;⁴⁷ evidence;⁴⁸ administrative law;⁴⁹ constitutional law;⁵⁰ legal theory;⁵¹ and legal research.⁵² The pervasiveness of sexual assault within the broader law curriculum highlights the relevance of understanding how best to deal with such content.

Various lecturer strategies address the fact that there are likely to be students who relate personally to sexual assault in any large law class, whether as sexual assault victims, sexual assault perpetrators or as their friends or relatives.⁵³ These strategies might involve talking about existing student knowledge and experience in class, such as sexual assault-supportive myths and the ‘victim-blaming and minimisation of perpetrator violence’ that these myths support.⁵⁴ Openly addressing the preconceptions that students may have to legal subject matter enables classes to recognise how varied student perspectives on sexual assault are. In Heath’s words, ‘gendered cultural norms shape [sexual] ethics and practices...[and sexual assault law] classes participate in this process no matter how we run them; the challenge is to constructively participate’.⁵⁵ This puts into practice the difference feminist aim of identifying individuals’ lived experiences of the law’s discourse and constructed binaries.

Heath’s strategy of acknowledging existing student knowledge and experiences could, however, go further. Heath reminds *lecturers* that students may relate personally and differently to sexual assault in any large law class. However, that acknowledgement does not appear to be shared with *students*. Heath begins her classes by telling students that sexual assault law is the most emotional topic she covers, and recommends organising support where needed. Phrasing that introduction to address not only those who may have emotional reactions, but also those who do not, will raise all students’ consciousness of what they can do to facilitate an inclusive, respectful discussion for everybody present.

As the above student in the university literature class wrote, ‘unwanted, uninformed opinions’⁵⁶ are more likely to cause negative

⁴⁵ See the list of compulsory ‘Priestley 11’ subjects: Victoria Legal Admissions Board, above n 10. Legal Theory and Legal Research are not listed, but they are compulsory subjects for the Melbourne Juris Doctor.

⁴⁶ *Royall v The Queen* [1991] HCA 27; *Crimes Act 1958* (Vic) s 38.

⁴⁷ *Zanker v Vartzokas* (1988) 34 A Crim R 11; *Jackson v Jackson* [1999] NSWSC 229; *Cooper v Mulcahy* [2012] NSWSC 373.

⁴⁸ *State of North Carolina v Michael Iver Peterson*, COA 05-973 (N.C. App. 2006); *Graham v The Queen* [2016] HCA 27.

⁴⁹ *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17.

⁵⁰ *Fardon v A-G (Qld)* [2004] HCA 46; *XYZ v The Commonwealth* [2006] HCA 25.

⁵¹ *PGA v The Queen* (2012) 245 CLR 355.

⁵² See Carol Smart, ‘The Woman of Legal Discourse’ (1992) 1 *Social and Legal Studies* 29.

⁵³ Heath, above n 1, 130.

⁵⁴ *Ibid* 140.

⁵⁵ *Ibid* 141-2.

⁵⁶ Ava K, above n 3.

reactions in classes on sexual assault-related material than informed opinions. Rather than students having to silently accept, or ignore, a sexual assault in teaching material, students can be encouraged to consider not only that they themselves may react negatively, but that their peers may.⁵⁷ In-class acknowledgement of the personal ways in which classroom participants may relate to sexual assault content can validate students with such experiences, creating ‘an atmosphere of respect towards survivors’.⁵⁸ Such acknowledgement also prepares all classroom participants for the discussion, so that deliberation is encouraged rather than stifled.

In-class acknowledgement can ensure both that students are not shocked into silence if and when the discussion arises; and that no student is placed in the position that the above student writer and the ‘girl across the room’⁵⁹ were in: of feeling that the reality of the situation — whether in a reading, or in a student’s own experience — is being ignored.

V THE SECOND STEP: CRITIQUES

A *Critiquing the Law and the Classroom*

The process of critiquing the law is at the heart of difference feminist thought, as the theory argues that the law, in ‘constituting us as sexed subjects’, determines what is a ‘normal’ man and woman without space for anyone different to those stereotypes.⁶⁰

Difference feminism shifts the reader’s attention ‘from the instrumental aspects of law to its symbolic aspects’. It problematises the law itself as a practice, rather than problematising material aspects within the law.⁶¹ Difference feminism even critiques its own discourse, to ensure that all metanarratives are fully decentred. Therefore ‘the main emphasis of [difference] feminist scholarship was on critical analysis’.⁶² An Australian law student who has suffered sexual assault articulated her desire for a law class that critiques the law’s metanarrative in that way:

Legal theory taught us that critical legal theory is out of fashion, and that lawyers don’t think like that anymore. The law is the law is the law. But I don’t think I can think like that...The hardest part about being a law student who has suffered sexual assault is the law itself. The law is our advocate. The law is our adversary. The law is indifferent to us. The law is a system that is fundamentally flawed.⁶³

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Lacey, ‘The Rights of Women’, above n 29, 29.

⁶¹ Lacey, ‘Beyond Neutrality’, above n 30, 7.

⁶² Lacey, ‘The Rights of Women’, above n 29, 26.

⁶³ Hampson, above n 38.

In-class discussion of law being ‘fundamentally flawed’ — similar to difference feminism’s discussion of legal systems being ‘part of the problem;⁶⁴ — can ensure that students do not feel forced to learn the law without learning its flaws.

Various lecturers provide strategies on how to facilitate a discussion that critiques both the law and the classroom. McMunigal highlights the limits of the criminal sanction and the tendency of the law to approach sexual assault from a reasonable man, rather than more general person, perspective.⁶⁵ Oberman’s classes focus on how the law’s prosecutorial discretion raises issues for ‘acquaintance rape’ cases.⁶⁶ Heath discusses with her classes how recently Australian sexual assault law has been reformed to be gender-neutral, and to recognise rape in marriage.⁶⁷ Strategies from both social sciences and law-specific teaching emphasise respecting, even if not agreeing with, all opinions. Heath frames this as an encouragement of students critiquing every perspective — statistics, judgments and her own opinions.⁶⁸ Similarly Scriver and Kennedy suggest that lecturers ‘firmly emphasise that everybody’s opinion will be respected’.⁶⁹

These strategies exemplify the difference feminist ‘decentring’ of the meta-narrative,⁷⁰ which allows space for other perspectives, including those of students. To critique the classroom space, Heath begins her lectures with a warning: that law classes are ‘not necessarily a safe or appropriate environment’ to voice all emotions or conversations.⁷¹ Her explicit acknowledgement of the classroom’s inability to provide students with the emotional support they may need criticises the discourse of the classroom in that very classroom space; just as difference feminism critiques its very own discourse.

Again here, Heath’s strategy could include students further. Although her suggestions explore the inappropriateness of the classroom, she does not vocalise that with her students. Given she tells students that not all emotions are appropriate in class,⁷² it is even more important to confirm that the *classroom space* — not the students’ emotions — is the problem. Incorporating this element of publicly recognising the classroom’s flaws into Heath’s strategies might help validate student emotions and decentre classroom spaces even further.

B *Critiquing the Binary and Classroom Perspectives*

Difference feminism aims to expose constructs such as the man-woman binary because ‘revealing law’s underlying assumptions about

⁶⁴ Lacey, ‘Beyond Neutrality’ above n 30, 21.

⁶⁵ McMunigal, above n 8, 537-8.

⁶⁶ Oberman, above n 8, 809.

⁶⁷ Heath, above n 1, 140.

⁶⁸ Ibid 143.

⁶⁹ Scriver and Kennedy, above n 39, 200.

⁷⁰ Lacey, ‘Beyond Neutrality’, above n 30, 21.

⁷¹ Heath, above n 1, 137-8.

⁷² Ibid 137.

the binary oppositions between sexes helps to render them...open to analysis'.⁷³ One such analysis is the difference feminist argument that the law conceives of 'man' and 'woman' as homogenous,⁷⁴ which is similar to Bryan and Wallbank's argument that the law portrays 'victim' and 'perpetrator' as 'unequivocal' extremes.

Bryan and Wallbank analyse how date rape cases pose problems for the law's essentialist binary because the law sees 'real rape' as stranger rape with an 'unequivocal' perpetrator that the 'unequivocal' victim does not know.⁷⁵ Consequently the law struggles to address date rapes, seen in the lower rate of conviction for such rapes:⁷⁶ these cases do not fit the law's conception of a rape perpetrator or rape victim.

One Australian university student has stressed the importance of questioning assumptions about what a sexual assault looks like, and the importance of fully adopting a discourse that complements this questioning. In an article the student wrote after having sex with someone who sexually assaulted their friend, they say:

Current discourse around sexual assault does a good job of emphasising that the vast majority of rapists are not strangers in dark alleys, they are most likely to be those we know and those in our homes. This is something I knew intellectually... but I don't think I really believed it... when people question the truthfulness of victims because [they] just 'doesn't seem like that kind of [person], they're being not only being dickheads, they're being arrogant ones – because I couldn't tell and neither can you. So please, believe those who come forward, and question why you might doubt them.⁷⁷

The student highlights the danger of adopting a legal binary based on 'unequivocal' constructs, where sexual assault experiences that do not fit those constructs are invalidated.

Heath's strategies provide one example of lecturers aiming to broaden how students think of sexual assault victims and sexual assault perpetrators beyond constrained stereotypes. In the same way that Bryan and Wallbank analyse the law's failure to acknowledge victims and perpetrators in date rape, Heath tells her students about the law's failure to recognise victims and perpetrators in rape in marriage. This facilitates a classroom critique of the law's binary, as well as student critiques of their own perspectives, since realising these realities about legal progress (or lack thereof) 'challenge many of the perceptions that students bring to class'.⁷⁸ Bibbings and

⁷³ Bryan and Wallbank, above n 32, 187.

⁷⁴ Lacey, 'The Rights of Women', above n 29, 24.

⁷⁵ Bryan and Wallbank, above n 32, 192-3.

⁷⁶ Ibid 194; Jessica Harris and Sharon Grace, 'A Question of Evidence? Investigating and Prosecuting Rape in the 1990s' (Home Office Research Study No 196, Home Office, 1999).

⁷⁷ Anonymous, 'I Slept with a Rapist', *Honi Soit* (online), 25 February 2016 <<http://honisoit.com/2016/02/i-slept-with-a-rapist/>>.

⁷⁸ Heath, above n 1, 140.

Nicolson describe difference feminist critique as ‘a shift away from questions of how ‘women’ are treated (or ignored) by legal doctrine in favour of questions about legal doctrine’s dynamic role in constituting women and men as legal and social subjects’.⁷⁹

Similarly, Heath raises many questions about the law’s role in constituting sexual assault-related experiences by highlighting: how the law has recognised victims and perpetrators relatively easily in some scenarios (such as stranger rapes) but so rarely in others (such as rape in marriage); how little research there is on male, as opposed to female, sexual assault victims; how the law previously only recognised female, not male, sexual assault victims;⁸⁰ and how the law depicted ‘males as always and only perpetrators’.⁸¹ These questions render the law critiqueable.

When a class critiques the law’s construct of sexual assault cases by exploring questions such as those above, student perspectives regarding the law’s authority and verity are challenged. They may be able to reconceptualise how they picture victims and perpetrators, to include individuals and situations that the law has ignored.

VI THE THIRD STEP: OVERCOMING

A Overcoming the Law and the Classroom

Besides difference feminism’s focus on critique, the theory has, at its heart, ‘a realism about just how much can be changed by legal means’.⁸² Difference feminism aims to overcome law’s ‘purely doctrinal approach’ in order to include the varied subjectivities for which law does not allow.⁸³ However, overcoming the law does not mean ignoring the law. The difference feminist project recognises that the law is not a ‘straightforwardly usable tool’ in bringing about change to its own constraints;⁸⁴ yet it does not reject the law entirely. Instead, difference feminism at times uses the law, where appropriate, because of the ‘power [the law has] to define’.⁸⁵ As Irigaray says, ‘taking into account the sexualisation of discourse...[equivalent to this paper’s critiquing step] opens up the possibility of a different relation to the transcendental. Neither simply subjective nor simply objective,

⁷⁹ Donald Nicolson and Lois Bibbings, *Feminist Perspectives on Criminal Law* (Cavendish, 2000) 96.

⁸⁰ Heath, above n 1, 131, 143, citing Richard O de Visser et al, ‘Experiences of Sexual Coercion Among a Representative Sample of Adults’ (2003) 27 *Australian and New Zealand Journal of Public Health* 198, 200.

⁸¹ Ibid 143.

⁸² Lacey, ‘Beyond Neutrality’, above n 30, 36.

⁸³ Lacey, ‘The Rights of Women’, above n 29, 30.

⁸⁴ Lacey, ‘Beyond Neutrality’, above n 30, citing Audre Lorde, ‘The Master’s Tools will Never Dismantle the Master’s House’ in *Sister Outsider: Essays and Speeches* by Audre Lorde (Crossing Press, 1984) 110.

⁸⁵ Smart, above n 52, 165.

neither univocally centred nor decentred.⁸⁶ There does not need to be a ‘univocal’ rejection of law to reshape classroom relations to it.

Difference feminism’s distinctive inclusivity is seen in how it considers law *as well as* possibilities outside those that law offers. That inclusivity is applied to all issues: from finding new ways to conceive of ourselves, to finding new discourses through which to talk about legally pertinent issues such as sexual assault. Therefore, law classrooms that reconceive of the law in a ‘more polyphonous and inclusive’⁸⁷ way can still avoid classifying individuals into rigid categories and identities.

What does a polyphonous, inclusive approach to the law look like when applied to teaching sexual assault law? It may be an approach that considers the law’s social and emotional context, since that context is inevitably present in a classroom that touches on sexual assault.

One anecdote highlights the pervasive presence of the social and the emotional in sexual assault-related classes. In my recent law class related to sexual assault, each student was asked to present their paper. One student’s presentation, on sexual war crimes towards men, mentioned relatively graphic details of some of those tragedies. I noticed that the student sitting next to me seemed uneasy and, a few minutes after the presentations finished, they ran from the room crying. I was caught off-guard by their reaction, and felt dismayed at how unprepared I was for it. I have seen numerous social media complaints from students about related situations,⁸⁸ I have had conversations with students about similarly shocked reactions to such situations and I have heard of other students, besides the one mentioned above, leaving visibly shaken from a law class because of their reaction to sexual assault-related content.

Besides the lecturer strategies, of saying that sexual assault law is the most emotionally-charged topic taught,⁸⁹ and of acknowledging prior non-legal student knowledge related to sexual assault,⁹⁰ another lecturer strategy that embodies a decentred, inclusive approach to the law and the classroom involves encouraging students to prepare themselves in whatever way they personally need to participate in the classroom debate.

Thus, Heath advises students to ‘organise the support they need to make the most of the classes. I suggest students let their support people know that this material is coming up...and that they want to be

⁸⁶ Luce Irigaray, *This Sex Which is Not One* (Catherine Porter and Carolyn Burke trans, Cornell University Press, 1985) 153.

⁸⁷ Lacey, ‘Beyond Neutrality’, above n 30, 7.

⁸⁸ Eg. Facebook wall posts criticising law subject readings with references to sexual assault; others praising lecturers that gave notice about readings with sexual assault material; others sharing articles that covered the topic; each post received numerous likes (from 5-36) and comments (from 2-10), highlighting the interest in the topic.

⁸⁹ See, eg, Heath, above n 1, 135.

⁹⁰ Ibid 140-1.

able to call on them if necessary'.⁹¹ Durfee and Rosenberg emphasise the importance of helping students 'both prepare for and process the material presented' by creating balanced reading lists, introducing more difficult material later and establishing 'ground rules for class discussions'. They also suggest giving students the option of leaving the class if needed, which must be an option where necessary.⁹² However other lecturers state that leaving the classroom should be a last resort, since this excludes the students from important sexual assault related classroom discussions. Instead, forewarning students of classroom material can allow students the time to 'empower [themselves] to deal with their emotional reactions by allowing them to situate their response within a deeper conceptual understanding of that issue'.⁹³

These strategies exemplify the difference feminist aim of overcoming the critiqued construct, here the classroom, because they either implicitly or explicitly consider possibilities, such as external support, that would not usually be mentioned in class. Through external support, more students are able to participate in classroom deliberations on sexual assault since each student is as prepared as they individually need to be; whether because they are aware of how other students may react, or because they have the time to organise the necessary support for their reactions. In this way, classrooms can foster less legally and theoretically constricted approaches to sexual assault — which often contain graphic, personal details of the crime — without distressing students with that detail. The difference feminist objective becomes more attainable: a more subjectively inclusive space that changes pro-sexual assault attitudes without unnecessarily distressing any classroom participants.

B *Overcoming the Binary and Classroom Perspectives*

Revealing the law's, and a student's own, constructions of sexual assault allows that student to critique and then overcome these perspectives in order to consider more inclusive alternatives to understanding. As seen above, socio-legal conceptions of what is a sexual assault victim or sexual assault perpetrator are still confined in ways that necessitate critique. These confined conceptions are amplified in compulsory law classes for two reasons. First students often represent opinions across that dichotomy — from actual perpetrators and victims, to students who can relate, in varying degrees, to either side. Secondly, students do not take these classes voluntarily.

To reflect a variety of individual victim-related experiences, classes can adopt an approach similar to the difference feminist

⁹¹ Ibid 137-8.

⁹² Durfee and Rosenberg, above n 39, 107.

⁹³ Scriver and Kennedy, above n 39, 200; Lowe, above n 39.

approach of highlighting ‘that “woman” has a plurality of meanings and that discourses on sexual assault should reflect the complexities of woman’s subject position in relation to negotiations around sex’.⁹⁴ Applying this objective to sexual assault related law classes can help create classroom spaces that include multifaceted conceptions of victims. Difference feminism’s decentering of the law also alludes to how the law’s traditional conception of sexual assault victims as only female,⁹⁵ not male, and the law’s ‘unequivocal’ approach to sexual assault perpetrators and victims, are to be re-framed. In this way, law classroom debates can overcome constrained perspectives on sexual assault victims and perpetrators, to include new classroom opinions and change preconceived attitudes.

I have experienced how socially and personally informed opinions on a topic such as sexual assault can change student perspectives. In 2015, our law school’s student society posted in our law student Facebook group about a proposal for a women’s-only room. The post generated over 100 student comments — from those questioning the room’s necessity with outrage, to others outraged at that questioning. The comments I most remember were from some law students responding to the posts of fellow students who, in that Facebook thread, had recounted their personal experiences of being sexually assaulted. The thread has now been deleted, so it cannot be recited exactly, however those students wrote that — after reading both the theoretical comments and, particularly, the comments from their fellow students on their personal experiences of sexual assault — they changed their perspective and agreed that the room was needed. This anecdote illustrates how combining the personal, or societal, and the legal can develop people’s opinions — whether on Facebook or in classrooms.

Lecturers suggest various ways in which to encourage new opinions in law classes on sexual assault. Carello and Butler say, ‘it is tremendously important to acknowledge, normalise and discuss the difficult feelings that can arise when learning about trauma and its victims’.⁹⁶ Their emphasis on normalising the feelings of sexual assault victims is similar to Heath’s concern with talking about sexual behaviour in a ‘relaxed way’, since otherwise ‘we further silence survivors and construct sex as an “outlaw activity”’.⁹⁷ These inclusive teaching approaches are critical since they can help us find multiple ways in which to represent individuals that the law has not recognised.

Heath also suggests ways to encourage inclusive perspectives when teaching and learning about sexual assault law, in order to

⁹⁴ Bryan and Wallbank, above n 32, 204.

⁹⁵ Before modern reform, rape law only covered heterosexual, vaginal intercourse: see, eg, Mary Heath, ‘The Law and Sexual Offences Against Adults in Australia’ (2005) 4 *Australian Centre for the Study of Sexual Assault Issues* 1, 19-20.

⁹⁶ Janice Carello and Lisa D Butler, ‘Practicing What We Teach: Trauma-Informed Educational Practice’ (2015) 35 *Journal of Teaching in Social Work* 262, 270.

⁹⁷ Heath, above n 1, 134.

improve student attitudes towards sexual assault. She notes how little focus legal education has given to the idea of ‘changing adherence to myths about rape’, before citing a problematic example in her own experience. After some persistence, Heath no longer expresses her intention to present a feminist analysis in class, because ‘the back row would throw their pens onto their desks, sit back and fold their arms across their chests. If I mentioned a case, they would pick their pens up.’ Heath therefore adopts a fact-based approach, which she says is between a confrontational, feminist one and a defensive, black-letter-law-only one.⁹⁸ Here, Heath uses both the law (in analysing sexual assault cases) and other means (in acknowledging student’s lived experiences) as tools to overcome classroom conceptions of the law’s binaries, including the victim-perpetrator one.

Although Heath does move somewhat beyond the strictly legal perspective on the law, her approach could more fully respond to the abovementioned university student’s concern about only focusing on ‘intellectually’ understanding sexual assaults. To move beyond that intellectual understanding of the law, classroom discussions could challenge themselves by considering, not only black-letter judgments or feminist legal academia, but also a more practical, contextual embodiment of the law.

Often the law class material that I remember most vividly is not strictly legal. The in-class ‘The Staircase’⁹⁹ documentary viewings on Michael Peterson’s case were the most memorable parts of my Evidence Law subject. I remember the transcripts of encounters between domestic violence victims and their perpetrators much more clearly than the legal analysis in my Torts Law case readings.¹⁰⁰ At a societal level, the impact statement written by Brock Turner’s sexual assault victim had immensely more effect, and led to greater understanding of the case across a greater number of people, than that case’s judgment.¹⁰¹ These examples show how, to fully understand the socio-legal context surrounding sexual offences, knowing the ‘black letter’ law may not be enough.

Various lecturers encourage understanding sexual assault beyond the intellectual. McMunigal assigns classroom readings where the author recounts her own sexual assault. These readings generated ‘intense but useful discussion’.¹⁰² Oberman uses storytelling in her classes so students ‘understand the complexity of drafting legal solutions to redress rape [and] more importantly...it permitted indeed forced students to reckon with the outrage and pain inherent in sexual coercion’.¹⁰³ Lowe highlights how ‘considering emotional elements of

⁹⁸ Ibid 142.

⁹⁹ *The Staircase* (Directed by Jean-Xavier de Lestrade, Maha Productions, 2004).

¹⁰⁰ *Cooper v Mulcahy* [2012] NSWSC 373.

¹⁰¹ ‘Stanford Sexual Assault Case: Victim Impact Statement in Full’, *The Guardian* (online), 6 June 2016 <<https://www.theguardian.com/us-news/2016/jun/06/stanford-sexual-assault-case-victim-impact-statement-in-full>>.

¹⁰² McMunigal, above n 8, 537.

¹⁰³ Oberman, above n 8, 805.

teaching and learning ... is an essential part of transformational education'.¹⁰⁴

If a lecturer's aim is therefore to transform, or change, certain student perspectives on sexual assault, an emotional teaching element is of particular value. Less strictly legal material, which represent sexual assaults in different ways to the traditional female victim/male perpetrator/stranger rape scenario can take student understanding beyond the intellectual to a full appreciation of sexual assault law's effect in reality, and how it impacts many different individuals in many different situations.

This strategy, which aims to change stereotyped student perspectives on how sexual assault occurs, must of course be balanced with the acknowledgement that students who have experienced sexual assault may be distressed by this more personal material. Consequently, the complementary strategy discussed above — of giving students advanced warning of the material and encouraging them to organise whatever support they may need to participate in such classroom discussions — is fundamental. Transcripts, documentary clips or impact statements that depict sexual assault outside of the female victim/male perpetrator/stranger rape scenario must be carefully introduced to allow students the time to prepare for such material, while still helping classroom participants understand sexual assaults in a more varied, socio-legal sense.

VII CONCLUSION

The importance of talking about sexual assaults in law classes, given the 'authority' that legal systems bring, cannot be underestimated.¹⁰⁵ As an Australian student who has been sexually assaulted explained:

In a society that still baulks at the prospect of open and serious dialogue about rape...we do ourselves a disservice by discouraging sorely-needed discussion about these issues by making an 'asshole' out of someone who simply wants to raise awareness of an issue, though it may be triggering for some.¹⁰⁶

While the significance of deliberating on sexual assaults in law classes is evident, the challenge is determining *how* to facilitate those conversations. Much of the available literature is from the perspective of lecturers seeking to respond to student perspectives. More literature directly from those student perspectives is therefore bound to help develop the deliberation. This paper has reflected on some of those direct student perspectives.

¹⁰⁴ Lowe, above n 39, 127.

¹⁰⁵ Bryan and Wallbank, above n 32, 205; see also Graycar, above n 7, 369.

¹⁰⁶ Caitlin Still, 'The Trouble with Trigger Warnings', *Honi Soit* (online), 7 August 2013 <<http://honisoit.com/2013/08/the-trouble-with-trigger-warnings/>>.

Using the difference feminist framework in various scenarios — both from lecturer approaches and student experiences — has addressed two aims of: acknowledging the perspective of students that have experienced sexual assault, and changing student perspectives that undermine sexual assault's gravity. These are not, as mentioned, the only aims that a classroom on sexual assault law can have. However this paper's analysis of some student perspectives illustrates that students themselves seek these outcomes from their learning. For lecturers, engaging with student perspectives holds an opportunity to enhance students' learning in sexual assault law classes in a way that is congruent with inclusivity and the principles of difference feminism. I look forward to seeing explorations by other students, of other student perspectives, and what this may bring to classrooms.