

A Rape Law Pedagogy

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I. INTRODUCTION^{††}

Teaching rape law can be a little like the descent from the Castle at Chichén Itzá.¹ The angle of descent is so steep and the steps so narrow that, from the edge of the platform, you can barely see the stair onto which you will next descend.² For some, the descent is a challenge: a test of will, balance, and belief. For others, each step of the descent embodies a small, heart-stopping leap of faith. Fortunately, at Chichén Itzá, some kind stairway reconstructionist has installed a metal-linked chain secured directly to the steps.³ This metal guide enables one, if one is willing to proceed in a somewhat awkward pose, to descend from the platform to the ground with a sense of substantially enhanced security. Not only does the chain make for a more comfortable passage, but I suspect that knowledge of its existence would encourage some otherwise hesitant souls to undertake the ascent.

Teaching rape law presents a similarly formidable challenge. Absent guidance, this endeavor may evoke a sense of trepidation similar to that accompanying the downward gaze from the height of the stone platform. This trepidation is well-founded. The crime of rape ignites an emotive maelstrom of responses from students of all political persuasions.⁴ Risks abound in this

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1. Chichén Itzá is a Maya city, located in the Yucatán Peninsula, whose excavated ruins are open to the public. The Castle is a prominent pyramid in a central plaza of the city.

2. One might even contend that "barely" is too generous and that the stair beneath simply is not visible from a safe stance on the platform.

3. I do not know for certain who installed the chain. However, I do not recall observing a chain on the unreconstructed faces of the pyramid. Moreover, the kindness is to those for whom access is a positive end and for whom access would otherwise be difficult or unattainable.

4. See James J. Tomkovicz, *On Teaching Rape: Reasons, Risks, and Rewards*, 102 YALE L.J. 481 (1992). Professor Tomkovicz notes in his essay that discussions of rape law in his classroom possess a particular volatility. *Id.* at 505 ("The fact is, however, that rape is one of a small set of hot button topics that trigger extreme reactions and counterreactions. It is the only topic in all the courses I teach—Criminal Law, Criminal Procedure, Advanced Criminal Procedure, Law and Psychiatry—that falls into that narrow

charged atmosphere.⁵ Furthermore, in a class of any substantial size, there is a high probability that rape survivors⁶ are present in the room.⁷ Their presence and participation can increase both the intensity of the debate and the stakes involved in the study of rape law.⁸

While writings on rape law reform populate the scholarly literature,⁹ only recently have scholars begun to turn their attention to the challenge of teaching rape law. Two recent essays treat this challenge as their explicit subject.¹⁰

category.”). But see Susan Estrich, *Teaching Rape Law*, 102 YALE L.J. 509 (1992). Professor Estrich explains:

The [rape law] classes were, I think, among my best, not because they were explosive (my classes on search and seizure were much more explosive, with black and white students disagreeing rather sharply on how much discretion the police need, and whether they can be trusted to use it fairly), but because I cared so much, and so did so many of my students.

Id. at 511.

5. For a discussion of risks posed by teaching rape law, see *infra* notes 28-42 and accompanying text.

6. I employ the term rape “survivor” reluctantly. Although it embodies an affirmation of life after rape, I have been told by at least one individual who experienced the trauma of rape that although the rape had occurred a number of years earlier, he still felt like a victim rather than a survivor.

7. In testimony before the House Subcommittee on Civil and Constitutional Rights, a Senior Staff Attorney for the NOW Legal Defense and Education Fund cited the following statistics: “One out of every eight adult women, or at least 12.1 million American women, has been the victim of forcible rape sometime in her lifetime. . . . One out of every four female college students will be sexually attacked before graduating; one in seven will be raped.” *Crimes of Violence Motivated by Gender: Hearings on H.R. 1133 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103rd Cong., 1st Sess. 4-16 (1993) (statement of Sally Goldfarb, Senior Staff Attorney, NOW Legal Defense and Education Fund) (citations omitted). Although statistics are subject to debate, see, e.g., Neil Gilbert, *The Wrong Response to Rape*, WALL ST. J., June 29, 1993, at A18, and may not correspond directly to the number of rape survivors in any given class, if my experience is representative, in classes ranging from seventy-six to ninety-two students, the class regularly included one or more students who identified themselves to me as rape or sexual assault survivors. These identifications occurred outside of class. See also Mary I. Coombs, *Nonsexist Teaching Techniques in Substantive Law Courses*, 14 S. ILL. U. L.J. 507, 520 (1990) (“In the average law school classroom, there are going to be women who have been victims of rape or attempted rape.”).

8. Whether or not a woman has personally suffered the trauma of rape, the fear of rape is a consistent feature in the emotional landscape of many women. See SUSAN GRIFFIN, *RAPE: THE POLITICS OF CONSCIOUSNESS* 3 (1986) (“I have never been free of the fear of rape. From a very early age I, like most women, have thought of rape as part of my natural environment—something to be feared and prayed against like fire or lightning.”).

9. See, e.g., Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. CRIM. L. & CRIMINOLOGY 554 (1993); Lisa Frohmann & Elizabeth Mertz, *Legal Reform and Social Construction: Violence, Gender, and the Law*, 19 LAW & SOC. INQUIRY 829 (1994); Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780 (1992); Wallace D. Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543 (1980).

10. Estrich, *supra* note 4; Tomkovicz, *supra* note 4. Other recent scholarly works have also referenced issues involving the teaching of rape law. For example, Professor Nancy Erickson examined the contents of major criminal law casebooks in use in the mid-1980s, including their coverage of rape law, to support her thesis regarding gender bias in criminal law teaching. See Nancy S. Erickson, *Final Report: “Sex Bias in the Teaching of Criminal Law”*, 42 RUTGERS L. REV. 309 (1990). See also Professor Mary Coombs’ use of “the example of teaching rape” to illustrate how professors would teach as feminists. Her suggestions for teaching rape include:

[making] clear that it is not, from the victim’s perspective, about sex but about violation . . .

[making] sure the students understand that there are people in the classroom for whom it is more than an abstract legal concept . . . [bringing] in experiences outside the casebook to help them understand what the law is and what the law does.

Coombs, *supra* note 7, at 521. See also Beverly Balos, *Learning to Teach Gender, Race, Class, and Heterosexism: Challenge in the Classroom and Clinic*, 3 HASTINGS WOMEN’S L.J. 161, 171-72 (1992)

They explore, as Professor Tomkovicz describes in the title of his essay, *Reasons, Risks, and Rewards*,¹¹ of teaching rape law. Together, these essays provide an important foundation for rape law instructors. Both, however, focus primarily on "what," "why," and "whether" to teach rape law.¹² In contrast, in this work, I propose to focus on "how," by suggesting the application of a pedagogical technique that should augment the reasons and rewards, while minimizing the risks, of teaching rape law.¹³ The proposed method not only forges links in the chain, increasing the likelihood that those teaching rape law will successfully negotiate the descent (even without the need of an unflattering pose), but also enhances the pedagogical possibilities of the ascent to, and the vista from, the apex. This proposal, involving the participation of students as rape law legislators, fosters robust engagement¹⁴ while minimizing the likelihood of destructive combustion.

Beyond the immediate goal of facilitating and encouraging the study of rape law,¹⁵ the proposed teaching technique serves a constellation of important

(using a case-based simulation on statutory rape in a Gender and the Law course).

Another recent analysis treats the question of "the unintentional silencing of sexual assault survivors that often occurs when instructors or students introduce the subject of rape or sexual assault to classes of undergraduates." Amanda Konradi, *Teaching About Sexual Assault: Problematic Silences and Solutions*, 21 TEACHING SOC. 13, 13 (1993) (footnote omitted). Similarly, for a discussion of "ways in which teachers might be able to be more effective in the classroom to help survivors heal themselves" particularly in the context of an "introductory women's studies course," see Janet Lee, "Our Hearts Are Collectively Breaking": *Teaching Survivors of Violence*, 3 GENDER AND SOC'Y 541, 541 (1989). For a discussion of a role-play of a rape trial in a Sex Roles course, see Phyllis Kitzerow, *Active Learning in the Classroom: The Use of Group Role Plays*, 18 TEACHING SOC. 223 (1990). For a study of "the effect of four teaching methods on students' knowledge level and/or attitudes about the topic of rape," see Betty L. Garretson, *The Effect of Scenario Presentations on College of Education Students' Knowledge and Attitudes About Rape 3* (1992) (unpublished Ed.D. thesis, University of Arkansas (Fayetteville)). Research, however, has revealed no written commentary detailing a formal pedagogical legislative framework, like the model proposed here, for teaching rape law in a law school classroom.

11. See Tomkovicz, *supra* note 4.

12. Both essays do address some issues of how to teach rape law, but neither proposes a formal pedagogical framework. In addition to offering many useful insights for selecting materials for teaching rape law, see, e.g., Estrich, *supra* note 4, at 513-14, Professor Estrich does explain that she uses "a lot of role-playing on rape days." *Id.* at 514. As I understand her description, she is referring to students being required to give the "other side's approach," *id.*, either prosecutorial or defense arguments, rather than a change in classroom structure like the one proposed in the instant Article. Estrich explains, "[I] expect the feminists to articulate the defendant's strongest arguments, and those most skeptical of the feminist position to be able prosecutors." *Id.* The prosecutor/defense role-playing, like the student-as-legislator approach, can offer a number of the advantages of distance described *infra*.

13. For a number of criminal law teachers, assistance in this endeavor may be entirely unnecessary. But for others who either find the prospect of teaching rape law daunting or who wish to include the supplemental pedagogical benefits discussed *infra* in Part IV, this work should prove of value.

14. I take as a given that emotion makes a valuable and necessary contribution to the study of rape law. For an analysis supportive of the importance of emotion to classroom legal discourse, see Angela P. Harris & Marjorie M. Shultz, "A(nother) Critique of Pure Reason": *Toward Civic Virtue in Legal Education*, 45 STAN. L. REV. 1773, 1774 (1993) ("[W]hen emotions are acknowledged and rigorously examined, they can serve as a guide to deepening intellectual inquiry; they can make participants in a debate more keenly aware of the importance—or unimportance—of an insight or dialogue.").

15. In a study conducted in the mid-1980s, of the responding criminal law teachers, 183 included homicide/murder as a substantive crime covered in their criminal law courses, while only 98 included rape/sexual assault as one of those crimes. See Erickson, *supra* note 10, at 489. A recent newspaper account reported that "[t]eachers say they are tiptoeing around a range of sensitive subjects, lest something they say be labeled sexist, racist or insensitive." Maura Lerner, *Professors Wary of Touchy Class Topics*, THE PLAIN DEALER (Cleveland), July 17, 1994, at 131. As an example, the account reported that "[m]ale

supplementary pedagogical goals.¹⁶ First, the student-as-legislator approach acts as a counterpoint to a material refrain in many criminal law courses: criticism of legislators for "poor drafting" of criminal statutes. By inviting the students to play the role of legislators, the instructor can highlight complexities that accompany drafting effective and clear legislation, as well as the hazards of statutory construction.¹⁷ These complexities vitalize many of the recurrent themes in the study of criminal law, furnishing students with an experiential approach to legislative drafting.¹⁸

Second, studying rape law through the role of the legislator invites the connection of substantive criminal law to related legal disciplines. The role of the legislator encourages consideration of, *inter alia*, evidentiary (rape shield laws), ethical (disclosure of victim information), constitutional (vagueness, jury selection), and trial strategy issues. Third, the legislative paradigm raises the fundamental jurisprudential questions of criminal law study. To what extent does the emerging statute reflect a minimum standard of intolerable conduct versus an effort to educate the public and enlarge that minimum? Framed in the jurisprudential paradigm of Professor Lon Fuller, where does the rape law constructed in this legislative forum locate the line between the morality of aspiration and that of duty?¹⁹ Fourth, the student-as-legislator approach to

law school professors are reluctant to teach or write about rape cases, for fear of antagonizing feminists." *Id.* Similarly, a newspaper editorial explained that "some teachers of criminal law are reluctant to present in class a defense lawyer's argument against statutes that prevent the sexual history of an alleged rape victim from being used in a rape trial. . . . 'or no longer teach rape law at all.'" Nat Hentoff, *Chill Winds in the Ivory Tower*, SACRAMENTO BEE, Dec. 18, 1993, at B6 (quoting Professor Rick Duncan).

16. By structuring the investigation of the proposed method through an analysis of risk mitigation and additional pedagogical goals, I do not mean to slight the importance of a more comprehensive definition of the educational objectives of teaching rape law. On the importance of defining educational objectives in choosing a teaching method, see Jennifer L. Rosato, *All I Ever Needed to Know About Teaching Law School I Learned Teaching Kindergarten: Introducing Gaming Techniques into the Law School Classroom*, 45 J. LEGAL EDUC. (forthcoming 1995). For additional treatment of educational goals, see *infra* note 123 and accompanying text.

17. See *infra* notes 125-129 and accompanying text.

18. Professor Jack Himmelstein offers the following useful definition of experiential learning: Experiential learning complements the cognitive approach by providing students with an experiential base. It provides the student with the *subjective experience* of the idea that is being taught, and relates ideas to the reality that is being experienced. This way the student can examine the validity of a concept he has learned by comparing his experience of it with his intellectual understanding of it. The experience also anchors the learning, makes it easier to grasp and remember, and reminds the student that ideas affect people's experience and lives, not only their minds.

Jack Himmelstein, *Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U. L. REV. 514, 550 (1978). See also Anna Marie Graf Williams, Effects of Experiential Learning on Knowledge Acquisition, Skill Mastery and Student Attitudes 23 (1990) (unpublished Ph.D. thesis, Purdue University) ("A fairly standard comprehensive definition of experiential learning emerged from the literature review. It contends that 'experiential learning exists when a personally responsible participant(s) cognitively, affectively, and behaviorally processes knowledge, skills, and/or attitudes in a learning situation characterized by a high level of active involvement.'") (quoting Jerry D. Hoover, *Experiential Learning: Conceptualization and Definition*, in THE GUIDE TO SIMULATIONS/GAMES FOR EDUCATION AND TRAINING 115, 116 (Robert E. Horn ed., 3d ed. 1977)).

19. LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969).

Where the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom. It lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain

rape law offers an excellent medium for investigating lawyering roles.²⁰ Who are we when we become advocates for others? How do we integrate and separate our personal from our professional perspectives? Should we do so? Consequently, studying rape law through the student-as-legislator paradigm can effectively serve multiple educational objectives.

Moreover the legislative approach, outlined for teaching rape law, readily translates to other incendiary topics both within and without criminal law.²¹ Provided the topic can involve legislative drafting, the benefits that this pedagogy engenders in the context of rape law are similarly available to these other topics.

Before delineating the approach, Part II of the Article affirms, in brief, various risks associated with the enterprise of teaching rape law. Part III develops the student-as-legislator approach. Part IV evaluates the approach. It focuses first on why this approach should mitigate the risks enumerated in Part II. This evaluative section also considers several potential drawbacks to use of the legislative method.²² Lastly, Part IV explores a number of the supplemental pedagogical objectives to which the proposed methodology proves conducive.

II. RISKS

As a law teacher preparing to teach rape law for the first time, I, like many of my predecessors, consulted my primer on criminal law: the hornbook authored by Professors LaFave and Scott.²³ To my surprise, nowhere in the table of contents could I locate a chapter or even a subchapter devoted to rape law.²⁴ This alerted me that rape was different from theft, manslaughter, and

specific goals must fail of its mark. It is the morality of the Old Testament and the Ten Commandments. It speaks in terms of "thou shalt not," and, less frequently, of "thou shalt." It does not condemn men for failing to embrace opportunities for the fullest realization of their powers. Instead, it condemns them for failing to respect the basic requirements of social living.

Id. at 5-6.

As we consider the whole range of moral issues, we may conveniently imagine a kind of scale or yardstick which begins at the bottom with the most obvious demands of social living and extends upward to the highest reaches of human aspiration. Somewhere along this scale there is an invisible pointer that marks the dividing line where the pressure of duty leaves off and the challenge of excellence begins.

Id. at 9-10.

20. See *infra* notes 78, 131-134 and accompanying text.

21. For examples of topics to which the proposed method could apply, see Part IV.B., *infra*.

22. These include whether the distance involved in role-play in the proposed method introduces a new danger in the teaching of rape law. See *infra* notes 115-120 and accompanying text.

23. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* (2d ed. 1986 & Supp. 1995).

24. Other first-time teachers of rape law have noted this absence. See Tomkovicz, *supra* note 4, at 485 ("I turned to the preeminent hornbook on criminal law, but to my dismay this ordinarily reliable tool for foundational study did not have an apposite chapter or section.") (footnotes omitted). For a discussion of that absence, see *id.* Contrast JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 531-56 (2d ed. 1995).

the other crimes that warranted chapters or subchapters in my primer.²⁵ As I rapidly came to learn, one of the primary ways in which rape law would be different was the way in which students responded to the subject in and outside of the classroom.²⁶ Several risks particularly pertinent to this study deserve mention.²⁷

First, fueled by immense quantities of emotional energy, the class dialogue is volatile, susceptible to igniting, with a risk of the instructor losing control of the discourse. Such an explosion can exceed the uncomfortable and become devastating. An explosion signals a failure of forum.²⁸ If rape law cannot be discussed effectively in the context of a law school classroom, how can we expect students to communicate successfully about this controversial issue, or other similarly controversial subjects, with clients, judges, victims, witnesses, and jurors? Chilled speech is a second likely result,²⁹ as the explosion gives way to a silent, smothering aftermath.³⁰ Reinitiating the dialogue, while not impossible, represents a formidable, usually awkward, and taxing prospect. By the silence stage, student alienation has become not an adverse consequence to be avoided, but a reality for a number of participants in the conversation. As a result, explosions can eviscerate rapport within the class community.³¹

25. The table of contents lists the following potential crimes as chapter or subchapter headings: 1) solicitation, 2) attempt, 3) conspiracy, 4) accessory after the fact, misprision, compounding, 5) murder, 6) aiding (and attempting) suicide, 7) manslaughter, 8) assault and battery, 9) mayhem, 10) theft—larceny, embezzlement, false pretenses, bad checks, receiving stolen property, robbery, extortion or blackmail, burglary. LAFAVE & SCOTT, *supra* note 23 at xxxiv-xli.

26. "Some may avoid teaching certain subjects, like rape, or even certain courses, like civil rights, in order to avoid provoking student emotion." Harris & Shultz, *supra* note 14, at 1783 (footnote omitted). See also *supra* note 15.

27. For an overview of the importance of teaching rape law, see *infra* notes 52-56 and accompanying text.

28. In discussing the potential for explosion, Professor Estrich notes that "explosiveness is fine, but no one wants a class to actually explode on her. Sharp disagreement and debate is what we strive for, but if it degenerates, and good will is lost, the atmosphere for learning can be destroyed." Estrich, *supra* note 4, at 515.

29. Cf. Harris & Shultz, *supra* note 14, at 1788. For a discussion of the silencing of sexual assault survivors and suggestions for inducing their trust and speech, see Konradi, *supra* note 10. Speech may be chilled even if no explosion has (yet) occurred, particularly when students deem the forum unreceptive to the view they wish to espouse. See Tomkovicz, *supra* note 4, at 504 n.61. The proposed legislative method should increase the likelihood that students will perceive the forum as more receptive to a broad spectrum of views. Chilled speech should accordingly be reduced.

30. In treating both the silence that follows the voicing of an inflammatory student view and the question of forum, Professor Shultz emphasizes the importance of

nam[ing] the tension that has seized us, exhorting the class to talk its way through the silence.

I challenge them, "If we can't deal with issues like race and class, who can? Society is falling apart on these tensions. Lawyers are supposed to help manage intergroup conflict. We play a key role in defining such central terms as 'justice' and 'discrimination,' 'fairness' and 'blame.'

We've got smart, articulate, caring people of all colors and sexes in this room. If not us, who?"

Harris & Shultz, *supra* note 14, at 1789-90. But I do draw a distinction between working through individual moments of tension or silence and sustained inquiry over several class sessions into an emotionally charged subject. As illustrated by this Article, I believe a format change renders the prolonged discussion of an incendiary issue more tractable. Of course, Professors Harris and Shultz's acknowledgment and naming of the tension is an invaluable technique applicable within the legislative format and throughout the law school curriculum.

31. The injury to class rapport need not be permanent and may, if addressed constructively, represent a valuable opportunity for deepening class understanding of the issue studied. See *id.*

Absence of rapport undermines engaged discussion, while magnifying professorial and student discomfort.

Even less explosive discourse tests the rapport. For the classroom to serve as an effective forum, the discussion needs to be robust. Robust discussion means disagreement. Student commentary on rape law often proceeds, not from abstract reasoning but from highly concrete and personal reaction to the political and social context of the crime of rape.³² A student who expresses deeply rooted personal views renders himself³³ especially vulnerable. A willingness to articulate a deeply held personal view may demonstrate courage, but if that view proves unpopular, expressing it can also alienate the student from colleagues and cause him to become the focal point for *ad hominem* attacks.

Combustion, forum failure, undermined rapport, chilled speech, and speaker alienation do not exhaust the potential pedagogical risks. In his recent essay, Professor Tomkovicz explores a number of additional risks—risks to the professor and to students beyond the confines of the classroom.³⁴ Under the category of “professional risks,” he articulates risks to one’s professional reputation arising from students forming “an ill-founded, unfavorable”³⁵ view of the professor, a view that lives on through generations of law students. Professor Tomkovicz warns that “such reputations sometimes gain sufficient steam to take on lives of their own,”³⁶ resulting in continuing damage to the academic’s reputation among students and colleagues, and potentially demanding substantial expenditures of time invested in responding to, or attempting to alter, that reputation.³⁷

To this set of professional risks, Professor Tomkovicz adds a series of personal risks,³⁸ both to the students and to the professor. These risks include the anguish caused to rape survivors in the classroom environment,³⁹ as well as the “personal pain”⁴⁰ of the professor whose reputation is harmed or who

32. Consider Professor Nancy Erickson’s insights on the dynamics of law students reading rape cases: Few male students have been rape victims. When a woman student reads a rape case, she may tend to identify with the victim. A male student, on the other hand, may, depending on the facts, identify with the defendant or abhor the defendant, but he will rarely identify with the victim unless he has been a victim of sexual assault.

See Erickson, *supra* note 10, at 340-41.

33. The gender-specific pronouns in this essay either alternate systematically or both genders are explicitly named, absent a conscious desire to be gender specific. Nonetheless, for purposes of coherence, if a gender-specific pronoun is used in one sentence and, within the remaining paragraph, I refer again to the same instance, I maintain the gender-specific pronoun used for that reference.

34. Tomkovicz, *supra* note 4, at 502-04.

35. *Id.* at 503.

36. *Id.*

37. *Id.*

38. *Id.* at 504. Professor Tomkovicz includes in this category variations of the risks enumerated earlier as student alienation and silencing. He discusses circumstances of “self-censorship” in which “popular opinion is the silencing force,” and students choose not to speak for fear of the repercussions. *Id.* at 504 n.61.

39. *Id.* at 504.

40. *Id.*

learns that students feel "alienated, offended, or ostracized as a result of classroom discussions,"⁴¹ and finally the risk of being personally "misunderstood, classified, or suspected."⁴² Daunting though these classroom, professional, and personal risks appear, application of the proposed student-as-legislator approach can substantially mitigate their occurrence and their severity. Nonetheless, the risks remain real and on occasion, even with the student-as-legislator approach, may be realized.

III. ROLE-PLAYING:⁴³ THE STUDENT-AS-LEGISLATOR APPROACH⁴⁴

The student-as-legislator approach designates all students in the classroom as the elected legislators charged with drafting criminal statutes covering sexual assault crimes for the relevant local jurisdiction. In preparation for the legislative task, students should be assigned background reading relating to the crime of rape and rape law.⁴⁵ In conjunction with the reading, assigning students the responsibility of creating a first draft of a rape law statute can

41. *Id.*

42. *Id.* Although Professor Tomkovicz uses this language specifically with respect to risks for the faculty, similar risks pertain to students.

43. "[R]ole-play is the experiencing of a problem under an unfamiliar set of constraints in order that one's own ideas may emerge and one's understanding increase." MORRY VAN MENTS, *THE EFFECTIVE USE OF ROLE-PLAY: A HANDBOOK FOR TEACHERS AND TRAINERS* 20 (rev. ed. 1989). "The use of role-play as an educational or training technique is part of the wider set of techniques that have collectively become known as simulation and gaming." *Id.* at 14. For a discussion of the "disagreement in the educational psychology literature over the definition of 'gaming,'" see Rosato, *supra* note 16.

44. I wish I could claim that the student-as-legislator approach burst forth fully formed, but in truth, the approach has evolved and continues to evolve through successive iterations. I am certainly not suggesting that students playing the role of legislators is novel. For a description of legislative role-plays, see, e.g., Kenney Hegland, *Fun and Games in the First Year: Contracts by Roleplay*, 31 J. LEGAL EDUC. 534, 543 (1981) (describing use of legislative role-play in a first-year contracts class in which teacher plays expert witness and proponent, and class plays legislative committee); Stephanie M. Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. LEGAL EDUC. 147, 153 (1988) (Professor Wildman describes "[c]onvening as a legislative body to decide whether to adopt a certain law . . . divid[ing] the entire class into groups, each representing a different special interest lobby that will offer 'testimony' to the legislature about the proposed legislation." She indicates that "this exercise gives the opportunity to address issues from a different perspective." *Id.* at 153.); Donald B. King, *Simulated Game Playing in Law School: An Experiment*, 26 J. LEGAL EDUC. 580, 581 (1974) (describing a number of simulated games for legal education used by the author in commercial law courses including legislative hearings where "[o]ne of the groups of students would sit as the legislative committee [and] [f]ive or six other groups of students would take various positions on the matter under study for the proposed legislation").

And, of course, there are entire courses devoted to the study of legislation and legislative drafting. See, e.g., William N. Eskridge, Jr. & Phillip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987); Barry Jeffrey Stern, *Teaching Legislative Drafting: A Simulation Approach*, 38 J. LEGAL EDUC. 391 (1988). Moreover, the legislative model I propose, involving large group or full-floor drafting, is an artificial construct that may not conform to the procedure for drafting in any particular legislature.

Nor am I suggesting that some law teachers may not already use a legislative approach when teaching rape law; however, my research has revealed no written commentary detailing a legislative role-playing model, like the one described here, for teaching rape law in a law school classroom. Interestingly, a number of colleagues have described to me the deployment of legislative statutes relating to rape on final examinations.

45. Part IV.B. offers an expanded discussion of the question of reading selection in preparation for the legislative exercise. See *infra* note 122 and accompanying text.

enhance subsequent class participation, even if participation is limited to volunteers.⁴⁶ Encouraging students to begin the drafting outside of class helps focus the class discussion. Providing students the option of developing these drafts singly or in groups also stimulates collaborative learning.⁴⁷

The first day of in-class rape law study commences with a formal introduction of both the students' roles and the task before the legislative body. This introduction offers a useful opportunity to preface the study of rape law.⁴⁸ Addressing certain topics at the outset facilitates the success of the exercise. In my classroom, the following topics compose, with some consistency, at least a portion of each year's preface: 1) the challenge of discussing rape law; 2) the importance of the subject, including contextualizing rape law in the larger criminal law landscape; and 3) the forum or exercise parameters, including the logistics of the exercise and harmonizing freedom of expression with community values.

To these fundamentals of the preface, the teacher may find it appropriate to add some acknowledgement of student assumptions about the views held by the faculty member himself or herself. Students may assume, for example, that female faculty members will prove sympathetic only to certain views and unsympathetic to opposing views, and students may hold correspondingly opposite assumptions for male faculty members. Effectively addressing these unspoken assumptions at the outset can truncate their continuing force. The particular vehicle employed is a function of the individual speaker.⁴⁹ Whatever the vehicle selected, the professor can enhance its effectiveness by

46. In articulating the preclass drafting assignment (a student suggestion), the professor may wish to emphasize that the student's product will be neither collected nor reviewed. Rather, the purpose of the assignment is to help students focus on the elements that they believe should be included in a statute proscribing rape.

47. One can characterize the full class as the legislative committee. The individual or small groups then become the subcommittees. In either event, the type of full-floor drafting proposed in this Article may be unlikely to replicate the process employed by real legislative bodies. It clearly does not substitute for the more accurate portrait that might be offered in a course on legislation.

48. Ideally, the preface would form the conclusion of one class period with the drafting assignment and reading due the following class period.

49. For instance, to the extent that the assumptions are based upon gender, a female teacher who has sons may note that the rape law created will apply to her children as well as herself. This approach is an application of a technique described by Professor Shultz. See Harris & Shultz, *supra* note 14, at 1795. A male faculty member may challenge the same assumption by reference to his daughters. Or, the acknowledgement might be more abstract. For instance, it can be immensely valuable to remind students that we come to the classroom with profoundly differing experiences that affect the way we perceive the world. For this purpose, one might employ, for example, Ludwig Wittgenstein's duck-rabbit figure. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 194e (G.E.M. Anscombe trans., 3d ed. 1971). Without introduction, the figure can be placed on the overhead. After a brief interval, the professor can ask students what they see. Their differing responses illustrate how our perceptions of the identical event vary. One might conclude by suggesting that in the ensuing discussion of rape law, we hope to see both the "duck" and the "rabbit." My thanks to Lou Wolcher who piqued my awareness of the duck-rabbit figure through his writing.

Reminding students of our different perceptions and experiences of the world can also work to counteract the emergence of any false sense of objectivity or neutrality that assumption of a legislative role might produce.

encouraging students to visit him or her outside of class should a student feel that a bias is impeding the class discourse.

In beginning the in-class preface, I acknowledge the challenge of discussing rape law, a subject that evokes profound personal reactions.⁵⁰ This acknowledgment reinforces some students' doubts about undertaking the enterprise at all.⁵¹ Partially in response to those doubts, I then underscore the importance of the subject.⁵² This can be achieved in a multitude of ways. Reference to rape as the "subject of substantive criminal law in great[est] ferment"⁵³—an object of current legislative experimentation rather than ossification in existing common law black letter rules, to the raw statistics on the reporting and incidence of rape,⁵⁴ to feminist literature on rape law,⁵⁵

50. It has been my practice to explicitly acknowledge, in light of the statistics on sexual violence, the likelihood that one or more members of the class has been a victim of that violence. See Coombs, *supra* note 7, at 521 ("Reminding the class that there are rape victims among them has a significant sobering effect.").

51. In contrast, some students may not anticipate that the study of rape law will produce powerful responses. A preface alerts these students to the potentially explosive dynamic that commentary, including their own, may trigger.

52. Barbara Babcock explained the importance of studying rape as long ago as the 1972 A.A.L.S. Symposium on The Law School Curriculum and the Legal Rights of Women:

[R]ape is one of the most seriously regarded and heavily punished crimes in our society. It is committed peculiarly against women and its incidence appears to be increasing—perhaps at rates greater than those of other violent crimes. These factors make it important that the crime be studied in some depth in a criminal law course. More significantly, *the administration of the rape laws by the criminal justice system reveals the interplay of social attitudes and rules of law*. The deeply ambivalent attitudes of our society toward women clearly emerge from a study of the cases and lore about rape.

Erickson, *supra* note 10, at 338-39 (footnote omitted) (quoting Barbara Babcock, Materials on Rape, 1 The Law School Curriculum and the Legal Rights of Woman (Oct. 20-21, 1972) (unpublished materials distributed at a symposium presented by the A.A.L.S. and N.Y.U. School of Law) (available in the Rutgers School of Law-Newark Library) (footnote omitted; emphasis added by Erickson)). See also Jeannette L. Gerzon, The Psychology of Jury Verdicts: The Effects on Mock Jurors of Strength of Evidence and Complainant Demeanor in a Rape Trial (1989) (unpublished Ed.D. thesis, Harvard University). Gerzon indicates:

It is in our educational institutions where a non-biased view on the attitudes of men and women towards themselves and each other on gender-related issues can be taught. . . . If we do not turn to our educational institutions as leaders in the education of our nation's children [and adults] towards more realistic views of both men's and women's potentialities, we will miss the main avenue available.

Id. at 8.

53. Estrich, *supra* note 4, at 516.

54. See, e.g., LARRY BARON & MURRAY A. STRAUS, FOUR THEORIES OF RAPE IN AMERICAN SOCIETY 3 (1989) ("Between the years 1960 and 1987, the number of rapes known to the police in the United States escalated from 16,860 to 91,111 (Federal Bureau of Investigation, 1968, 1988). This represents an increase of approximately 440% over twenty-eight years. Reported rapes increased at a faster pace than any other major violent crime (that is, murder, aggravated assault, and robbery) in this time period."); *Murders Across Nation Rise by 3 Percent, but Overall Violent Crime is Down*, N.Y. TIMES, May 2, 1994, at A13 (supplying estimated number of reported rapes of 104,600 for 1993). See also LINDA A. FAIRSTEIN, SEXUAL VIOLENCE: OUR WAR AGAINST RAPE 270 (1993) ("Most professionals estimate that more than half of the sex offenses committed still go unreported today."). Consider also the results of the recently revised federal survey regarding the actual number of rapes and attempted rapes committed. See *Survey Questioning Changed, F.B.I. Doubles its Estimate of Rape*, N.Y. TIMES, August 17, 1995, at A18:

and to the sexual assault codes in force on the law school or university campus,⁵⁶ all, among other means, serve to furnish a context for the significance of covering rape as a subject.

Explaining the importance of examining rape law, however, may concern students who feel that no justification should be needed. Partially in anticipation of that criticism, I include a brief contextual discussion before each substantial topic in criminal law. As a result, contextualizing rape law parallels the discussion of other topics in criminal law.⁵⁷

Having named the tension in the room and proffered a justification for proceeding despite that discomfort,⁵⁸ I address the parameters of the forum in terms of student roles and professional role formation. The parameters discussion begins with the overt goals and procedures of the drafting exercise—that the class members are the elected legislators of the local jurisdiction and have been entrusted with the project of drafting a statute or statutes criminalizing “rape.” They can create one or several statutes as they deem appropriate. Like a real legislature, they should consider the importance

The Federal Government more than doubled its annual estimate today of rapes or attempted rapes—to 310,000. But official[s] said actual assaults were not up; rather, after years of debate, the Government’s biggest crime survey finally asked a direct question about rape.

In the first major report on data from the newly designed survey, the Bureau of Justice Statistics at the Justice Department estimated that there were 500,000 sexual assaults on women annually, including 170,000 rapes and 140,000 attempted rapes.

Id.

55. See, e.g., SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975); SUSAN ESTRICH, *REAL RAPE* (1987); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 171-83 (1989); Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41 (1993); Lois Pineau, *Date Rape: A Feminist Analysis*, 8 LAW & PHIL. 217 (1989). For a recent analysis critiquing the views of many feminists, particularly their perspectives and emphasis on rape, see KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS* (1993) (Roiphe’s arguments include: “Rape is a natural trump card for feminism. Arguments about rape can be used to sequester feminism in the teary province of trauma and crisis.” *Id.* at 56; “In emphasizing this struggle—he pushing, she resisting—the rape-crisis movement recycles and promotes an old model of sexuality.” *Id.* at 63; “The dangerous ‘miscommunication’ that recurs through the literature on date rape is a code word for difference in background.” *Id.* at 79.).

56. See, e.g., UNIVERSITY OF MICH., *SEXUAL ASSAULT POLICY* (1994) (on file with author) (“The University of Michigan is committed to creating a community free from violence. Sexual assault, sexual harassment, domestic violence and stalking as defined by State and Federal Laws, will not be tolerated at the University of Michigan.”); UNIVERSITY OF CAL. AT BERKELEY, *THE BERKELEY CAMPUS STUDENT POLICY AND PROCEDURES REGARDING RAPE AND SEXUAL ASSAULT* 2-3 (1994) (on file with author). The policy reads, in part:

The Campus Code of Student Conduct prohibits rape, sexual assault, or sexual harassment by students. The following policy definitions apply: A. Rape is defined to include all acts of sexual intercourse involving penetration imposed under the following circumstances: . . . 2) where such an act is accomplished against a person’s consent by means of force, coercion, duress, violence, or reasonable fear of harm to the complaining party or another . . . C. Consent is defined as positive cooperation in act or attitude pursuant to an exercise of free will.

57. Residual concern about singling out rape law for unique treatment may be addressed in three ways. First, where the legislative method for teaching rape law is but one of the repertoire of varied teaching techniques used in the course, treatment of rape law will appear less unique. Second, even if unique, explicitly sharing with students the particular virtues of role-play for classroom discourse in studying rape law can assuage concern about different treatment. Third, rape law is and has been the subject of extensive legislative revision. Consequently, treating rape law from a legislative perspective appropriately corresponds to the real world efforts at legislative change in this province.

58. See Shultz & Harris, *supra* note 14, at 1789-90.

of enacting some statute criminalizing rape or the consequences of failing to draft appropriate legislation. The introductory remarks on procedure can include information about whether the anticipated class vote to enact requires majority approval or two-thirds support, and any other guidelines pertinent to the legislative exercise.⁵⁹ The level of formality of the role assumption depends upon preference and comfort: generally, the more formal the roles, the more controlled the discussion. At this stage, examples of role assumption can be helpful. For instance, a legislator might feel compelled to air views with which she personally disagrees in order to effectively represent her jurisdiction. Legislators can also be encouraged to employ their knowledge about rape by invoking that knowledge as testimony or evidence derived from other forums. For instance, a legislator might recite statistics on the incidence of rape to support her position. Those statistics can be characterized as stemming from earlier expert testimony given in a subcommittee hearing⁶⁰ conducted in anticipation of the drafting endeavor.⁶¹ Students can employ this device to introduce information from their class reading, the media, or other sources that bear on legislating rape law.

At this juncture, the professor may also wish to explicitly recognize the merits of role-play in encouraging expression of diverse views in an emotionally charged environment.⁶² Recognizing those advantages facilitates

59. Although the introductory information clearly anticipates a penultimate vote on the legislation, it has not been my practice to compel students to vote on the final legislation, particularly when students indicate a desire not to vote. The expectation of a vote, however, is valuable to the exercise. This expectation affects communication on the "legislative floor," encouraging the harmonizing of freedom of expression with classroom community, as explained below. In my classroom, we occasionally take interim polls on aspects of the statute(s) under development, if that appears productive. Even absent final enactment, if the discussion has succeeded in raising a spectrum of views on criminal law elements, jurisprudential theories, policy issues, and role formation, then the legislative exercise has largely achieved its pedagogical ends. Still, some students may not feel satisfied without a final vote.

60. A public hearing illustrates such an earlier forum. For an example of such a hearing and the type of testimony presented, see *Legal Problems of Rape: Public Hearing Before the Senate Comm. on Judiciary*, California Legislature (1987).

61. This type of testimony opens the floor to different forms of information presentation, including contextual narrative. For a study on the role of contextual narrative in moral problem-solving, see CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982). Professor Gilligan studies and contrasts "two ways of speaking about moral problems," *id.* at 1, one voice that she associates with male and one with female, although she explains that "this association is not absolute, and the contrasts between male and female voices are presented . . . to highlight a distinction between two modes of thought . . . rather than to represent a generalization about either sex," *id.* at 2. In her studies of these differing voices, Professor Gilligan indicates that

[w]hen one begins with the study of women and derives developmental constructs from their lives, the outline of a moral conception different from that described by Freud, Piaget, or Kohlberg begins to emerge and informs a different description of development. In this conception, the moral problem arises from conflicting responsibilities rather than from competing rights and requires for its resolution a mode of thinking that is contextual and narrative rather than formal and abstract.

Id. at 19. Because the legislative model is amenable to a variety of forms of discourse, it may facilitate the inclusion of different voices.

62. For a more detailed discussion of the benefits and dynamics of role-play, see *infra* notes 83-109 and accompanying text.

student comprehension of the professor's choice of the legislative paradigm particularly for the study of rape law.

Complementing the legislative roles and tasks, articulating the parameters of the forum also entails addressing expression in the classroom. This represents an expanded treatment of the subject of classroom expression from the first class of the semester. In both the first class of the year and in the rape law preface, the parameters involve harmonizing First Amendment rights⁶³ (including the right to express ideas with which others may profoundly disagree) with classroom community (mutual respect and courtesy). In the student-as-legislator paradigm, we consider informing and persuading other legislators to adopt the speaker's perspective. The parameters discussion focuses on how a conscious decision about approach, about words, affects the impact of the message. The parameters discussion is not a function of "political correctness," but of the role of the legislator. A speaker who wishes the legislative body to adopt his position should employ speech persuasive to his audience. Harmonizing freedom of expression with classroom community values becomes less about *what* is said than *how* it is said. The legislator's goal should be to ally rather than antagonize. In allying, the legislator both informs his audience and accrues the voting support necessary for adoption of his version of the statute(s).

Recently, in concluding the portion of the discussion on parameters, I have employed Professor Estrich's approach to argumentation,⁶⁴ one that promotes the persuasion perspective of the legislative role. She suggests to her class that "the way to disagree is to make a better argument, and if you really disagree, to make a much better argument."⁶⁵

At the start, the class faces an empty chalkboard and a blank overhead screen. Visual aids,⁶⁶ in this context, serve logistically to collect the issues and positions of the debate. They encourage consideration of the effect the current issue has on those previous and, by their "silence," function as a reminder of those issues yet to be considered. For convenience, the chalkboard

63. Or freedom of expression.

64. Estrich, *supra* note 4, at 515.

65. *Id.*

66. The value of visual aids to learning has been documented in various teaching environments. See, e.g., THE ASS'N OF TEACHERS OF SOCIAL STUDIES OF THE CITY OF N.Y., HANDBOOK FOR SOCIAL STUDIES TEACHING 225 (3d ed. 1967) ("Today the constantly improving variety and value of materials available to the teacher are the result of scientific studies of the functions of auditory and visual materials in the learning process. . . . Educational authorities agree that audio-visual methods and materials are effective means for the improvement of instruction."); Stephen L. Sepinuck & Carol Rice, *Visual Aids Give Your Students the Big Picture*, 1995 THE LAW TCHR. 8 (Professor Sepinuck points out, "Many students learn better visually than textually." Professor Rice comments, "Visual aids are of special benefit to law students who are learning not only new material but a new way of thinking."). But see CHARLES C. BONWELL & JAMES A. EISON, ACTIVE LEARNING: CREATING EXCITEMENT IN THE CLASSROOM (ASHE-ERIC Higher Education Report No. 1, 1991). Bonwell & Eison note that "evidence from research to demonstrate the effectiveness of visual-based instruction upon learning outcomes has proven to be very elusive." *Id.* at 33. Nonetheless, based upon their review of a number of studies, Nowell & Eison note that "the media can be a valuable tool for developing strategies promoting active learning." *Id.* at 35.

serves as the drafting table and the overhead projector is used to introduce additional or outside material for discussion. I open the drafting exercise by asking the class which act(s) or conduct should be prohibited by a statute criminalizing rape.⁶⁷ An effort to name the principal actus reus to be criminalized usually confronts students with the controversial question of gender neutrality and what the crime of rape represents. As a corollary, students must begin a dialogue on the number of statutes necessary to accomplish their task. Initiating the inquiry with a focus on the actus reus also provokes discussion of same-sex sexual assault.

As the debate proceeds from the primary actus reus to other conditions or attendant circumstances of the crime, in particular the questions of force and consent, the need to associate a mens rea with each conduct or attendant circumstance element becomes clear. The chalkboard now displays three parallel columns, one labeled "actus reus - attendant circumstances," the column adjacent labeled "mens rea," and a final column for "additional considerations." Each actus reus and attendant circumstance has a corresponding space in the adjacent mens rea column for the scripting of an appropriate mens rea. The additional considerations column supplies space for issues raised that either need to be addressed at a later point or do not qualify under the two initial rubrics. Once the drafting has begun, the chalkboard might resemble the example below:⁶⁸

RAPE STATUTE

ACTUS REUS - ATTENDANT CIRCUMSTANCES	MENS REA	ADDITIONAL CONSIDERATIONS
1) Vaginal Intercourse _____	1) Knowledge _____	Definition -
2) Sexual Touching	1) Purpose	Sexual Touching
3) Without Consent	1) Recklessness 2) Knowledge 3) Negligence	Definition of Consent
4) With Force or _____	1) Recklessness 2) Knowledge _____	Unconscious Victim Rape Shield Laws?
5) Fear, or by		
6) Fraud, or by	1) Knowledge	
7) Extortion	2) Negligence	

67. One could begin, as one of my students has suggested, by outlining the legislature's objectives in creating laws against rape. This approach should give the drafting greater direction as many of the debates that usually transpire in the drafting would now occur in the objectives phase. However, much of the pedagogical value of the legislative model inheres in the drafting task itself. As a consequence, it remains my preference to launch into drafting at an early phase of the exercise.

68. Of course, the contents of the chart might differ dramatically from year to year.

As illustrated above, one formulation of the primary actus reus is "vaginal intercourse." Once proposed, this actus reus invites discussion of the questions of gender neutrality and same-sex sexual assault.⁶⁹ During the discussion of these issues, a student might propose that the primary actus reus be defined instead as "sexual touching." "Sexual touching" then becomes the second available option for both current consideration and later vote. As this debate proceeds, other student legislators join by adding attendant circumstances, mens rea corresponding to particular options, and additional considerations and definitions. Each new option receives a numbered position on the drafting board. Consequently, for voting and discussion purposes, we can construct statutes that incorporate various combinations of the enumerated options.

One statutory combination available from the above listed options would be a statute with "sexual touching" as the primary actus reus, "purpose" as the required mens rea for that element, "without consent" as an attendant circumstance, with "recklessness" required for that circumstance. The statute would probably also include definitions of "sexual touching" and "without consent."⁷⁰ Another option available from the chart would be a statute in which "vaginal intercourse" supplies the primary actus reus and "knowledge" the associated mens rea. This statute might reject "without consent" as an appropriate attendant circumstance and instead require the existence of "force" or "fear." The statute might associate the mens rea of "knowledge" with these attendant circumstances. Thus, the legislative dialogue generates this collection of options. These form the basis for interim or final votes on statutory combinations. As each option is voiced, the consequences and reasons favoring and disfavoring adopting that option can be inventoried. Often, if not invariably, the debate exceeds the boundaries of traditional substantive criminal law, incorporating, for example, evidentiary issues of the complainant's sexual history and rape shield laws.⁷¹

As the group progresses through the legislative exercise, I employ the overhead projector to introduce materials that guide the discussion⁷² by clarifying or injecting issues that have not been raised or by providing examples of the efforts of other scholars, policy-makers or legislative groups

69. Gender neutrality and same-sex sexual assault also raise the question of terminology and language. Although, for purposes of this Article, I employ the term "rape" as a label that encompasses a range of sexually assaultive conduct, the question of whether to employ an inclusive approach, or the term "rape" at all, can form a valuable component of the legislative exercise. For a discussion of the terminology choice, see, Lani A. Remick, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1107 n.22 (1993).

70. Students who have been assigned to draft a statute as preparation for the class can be expected to articulate a more developed proposal, one that already includes a number of components. Those statutes can be simply incorporated as a numbered set of components along a horizontal axis in the existing chart.

71. For an extended treatment of rape shield laws, see Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763 (1986).

72. Use of the overhead projector helps assure coverage of the particular doctrinal material, policy issues, and range of perspectives, that the professor wishes to include in the study of rape law.

to resolve the specific issue under consideration.⁷³ For example, latent in our efforts to draft a criminal law statute are our underlying beliefs about the purpose of criminal law. To surface that subtext, I might display an overhead transparency describing the Antioch College policy on sexual conduct.⁷⁴ The Antioch College policy requires explicit verbal consent to initiate intimacy⁷⁵ or to move from one level of intimacy to another.⁷⁶ Discussion of the Antioch verbal assent policy usually encourages students to confront their aims in drafting the legislative provisions. Are they attempting to prohibit conduct that many members of the public already perceive as criminal, or are they using the opportunity to educate the public and expand the definition of criminal

73. For a discussion of approaches taken by some courts to the mens rea ascribed to consent, see ESTRICH, *supra* note 55, at 94-96. For a recent judicial approach to the issue of force in sexual assault, see *State ex rel. M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992) ("[P]hysical force in excess of that inherent in the act of sexual penetration is not required for such penetration to be unlawful."). For a recent proposal reformulating the legal principles governing conduct related to rape law into two new statutes, see Donald A. Driggs, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780 (1992).

Legislators should give up on the common-law formulation and anything based upon it, and instead distinguish two quite distinct offenses calculated to obtain sexual gratification by culpable means. First, the purpose of causing another person to engage in sexual acts should enhance the penalty for assault. Second, nonviolent disregard of another's refusal to engage in sexual acts should be punished as an offense of sexual expropriation.

Id. at 1796-97.

In the rape context, we must grade the pressures to have sex according to their legitimacy—from those pressures to have sex that are perfectly moral, to those that are immoral but not criminal, to those that are criminal, to those that constitute crimes of the most serious sort.

Contemporary rape statutes, like their common-law progenitor, bypass this difficult inquiry in favor of a binary classification of sex into consensual and nonconsensual cases. The law then superimposes the requirement of force on the nonconsensual cases to identify cases of rape.

Crippled by the burden of history, the reform statutes are predicated on an absolute rather than a relative notion of autonomy.

Id. at 1788. For a response to Professor Driggs' article, see Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442 (1993). For Professor Driggs' reply, see Donald A. Driggs, *More on Distinguishing Sex, Sexual Expropriation, and Sexual Assault: A Reply to Professor West*, 93 COLUM. L. REV. 1460 (1993). Consider also Professor Stephen Schulhofer's approach proposing "a new criminal prohibition against nonviolent interference with sexual autonomy." Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35, 71 (1992).

74. ANTIOCH UNIV., THE ANTIOCH COLLEGE SEXUAL OFFENSE POLICY (available from Antioch College and on file with author) [hereinafter ANTIOCH POLICY]. The Wisconsin Criminal Code can serve a similar purpose. See WIS. STAT. § 940.225 (1993) ("(4) 'Consent', as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact."); see also Remick, *supra* note 69, at 1103.

75. Except when contact is "mutually and simultaneously initiated." ANTIOCH POLICY, *supra* note 74.

76. *Id.*

1. For the purpose of this policy, "consent" shall be defined as follows: the act of willingly and verbally agreeing to engage in specific sexual contact or conduct. 2. If sexual contact and/or conduct is not mutually and simultaneously initiated, then the person who initiates sexual contact/conduct is responsible for getting the verbal consent of the other individual(s) involved. 3. Obtaining consent is an on-going process in any sexual interaction. Verbal consent should be obtained with each new level of physical and/or sexual contact/conduct in any given interaction, regardless of who initiates it. Asking "Do you want to have sex with me?" is not enough. The request for consent must be specific to each act.

Id. For a commentary on the policy, see "Ask First" at Antioch, N.Y. TIMES, Oct. 11, 1993, at A16. For Antioch's response to media reaction to the policy, see ALAN E. GUSKIN, THE ANTIOCH RESPONSE: SEX, YOU DON'T JUST TALK ABOUT IT (1994) (available from Antioch College and on file with author).

conduct?⁷⁷ Or is there, in light of evolving social mores, a “generally accepted” understanding of criminally intolerable conduct in the rape context? Students then engage the larger jurisprudential themes of the course, emphasizing the purposes of drafting these statutes in the larger criminal law landscape.

When it appears appropriate, and perhaps not until the conclusion of the drafting exercise, the question of professional role formation can be raised. Some teachers may find it most comfortable simply to articulate the questions about professional role formation, raising the act of assuming a role and the parallels to lawyering to the students’ conscious awareness.⁷⁸ Others may wish to use this theme to debrief the legislative exercise with a discussion of integrating and separating our personal and professional selves in our lawyering roles.⁷⁹ Debriefing enables the participants to step outside the paradigm and to evaluate the experience. This phase furnishes an opportunity to reflect with students on the virtues and limits of the legislative teaching model and to explore explicitly the extent to which anticipated goals were achieved. Additionally, it offers a platform for comparing the student-created legislation with a variety of existing rape statutes. This comparison, for those who choose to incorporate it, can alleviate student perception of a lack of grounding in existing statutory treatment of rape.⁸⁰

77. See, e.g., ESTRICH, *supra* note 55, at 101.

Or we can use the law to push forward. It may be impossible—and unwise—to try to use the criminal law to articulate any of our ideal visions of male-female relationships. But recognition of the limits of the criminal sanction need not be taken to justify the status quo.

Id.

78. Role formation is fundamental to lawyering. It has been a primary focus of clinical legal education. See, e.g., Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, in CLINICAL EDUCATION FOR THE LAW STUDENT 374 (1973) (“What is envisioned is a mode of education which involves the systematic interaction of pedagogical technique and the psychological dynamics involved in role adjustment and definition.” *Id.* at 379. “In clinical teaching the lawyer’s decisions in a variety of roles and contexts are the central sources of meaning . . .” *Id.* at 387-88.). Role-play offers an excellent bridge to role formation. Not surprisingly then, role-play is a mainstay of clinical teaching methodology. *Id.* at 379-80; see also Anthony G. Amsterdam, *Clinical Legal Education—A 21st-Century Perspective*, 34 J. LEGAL EDUC. 612, 616 (1984) (describing clinical legal education at end of twentieth century as: “Students . . . confronted with problem situations of the sort that lawyers encounter in practice. The situations might be simulated—role-playing exercises . . . or they might be real The students dealt with the problem *in role*.”).

For a discussion of “a role-playing exercise” in a first-year property class that “present[ed] students with an opportunity . . . to learn what it means to become a lawyer,” see Joseph P. Tomain, *Lawyering in First-Year Property*, 33 J. LEGAL EDUC. 111, 111 (1983). The legislative model draws upon the advantages of role-play to surface the process of role assumption.

79. Debriefing the legislative exercise is extremely important. For a discussion of the importance of debriefing role-play exercises generally, see Elaine Waters et al., *Role Play: A Versatile Cooperative Learning Activity*, 63 CONTEMP. EDUC. 216, 217-18 (1992) (“If the enactment and the debriefing of the role play are not accomplished in one class setting, the focus of the activity is lost and students leave without closure of issues.”). But see Gillian Porter Ladousse, *Role Play*, in RESOURCE BOOKS FOR TEACHERS 16 (Alan Maley ed., 1987) (“Debriefing is not, however, an absolutely essential part of language-learning simulation or role play. Putting the performance under the microscope has a distinctly inhibiting effect on many students, even on some seasoned role-players.”). Debriefing in the legislative role-play should focus on features other than the performance of individual legislators and should prove unlikely to produce the effects described by Ladousse.

80. Because the legislative method may be perceived as removed from traditional “black letter law,”

The student-as-legislator exercise generally consumes three to four class hours during the semester, depending on the discussion and the extent to which corollary topics receive attention. I teach rape law near the conclusion of the semester. This timing derives from several considerations. First, for the student-as-legislator approach to serve as a counterpoint, we must have critiqued legislative drafting.⁸¹ Second, while in a rare year there is almost instant rapport among class members and the professor, more often in my experience, genuine rapport takes time. The existence of that rapport is fundamental to the success of the rape law enterprise. If I did not believe that my students trusted me to guide them and, if necessary, to intercede on their behalves, I might not embark upon the endeavor of teaching rape law.⁸² Equally important, that rapport serves as an invitation for students to speak with me outside of class about classroom or personal experiences with rape law. Those conversations form a critical component in understanding the classroom dynamics. Students, in my experience, aren't likely to disclose intensely personal incidents in the first few weeks of the semester. As a result, later is better, although I would not teach rape law as the final subject of the semester. If the exercise were to fail in its aims to mitigate the risks, I would want to reserve some portion of the semester to collect and re-establish community within the classroom. Consequently, after rape law, I cover theft-related offenses as the concluding subject. The principles involved in these offenses generally prove substantially less emotionally demanding than many of the other offenses covered in the course. Finally, I wait to cover rape law to insure time to assess the students' reaction to other highly controversial topics. By the time we reach rape law, we have explored several subjects raising related challenges. For instance, earlier chapters include issues of domestic violence and racism. Observing the class and individual reactions to these topics facilitates the assessment of how, on a very detailed level, to treat rape law.

some students may feel anchorless without an explanation of existing treatment of rape in state criminal codes. If the professor wishes to remedy this circumstance, the debriefing phase of the exercise furnishes an opportunity to compare the legislation that the students have created with existing rape statutes. If no final vote has been taken, a subset of the proposed statutory options produced during the exercise can be compared with existing statutes. I would hesitate, however, to provide an extensive acquaintance with "black letter law" before the exercise, as I anticipate that it would cabin the creativity of student legislators and reinforce traditional stereotypes about rape. I credit those of my 1994 first-year Criminal Law students who suggested a "black letter" overview for this addition to the legislative model. Just over half the students from that class filled out an anonymous questionnaire designed to provide me with feedback on the legislative method. Their comments have enabled me to modify and (I hope) improve the model.

81. Of course, the exercise could be employed to introduce the complexities of drafting early in the semester and to reduce the quantum of criticism. However, I find the rape law legislative exercise most helpful as a counterpoint rather than introduction.

82. On the need for trust before examining emotion in the law classroom, see Professor Harris' comments in Harris & Shultz, *supra* note 14, at 1803 ("Similarly, the ideal of acknowledging and examining emotions in the law school classroom may be hard to achieve until a certain level of safety and trust has already been established."). For suggestions on methods of establishing trust, see Konradi, *supra* note 10, at 17-20.

I do not mean to imply that each year's experience teaching rape law is so carefully orchestrated that it magically proceeds precisely as described above. As one might expect, the experience varies from term to term. Nonetheless, the structure of the legislative task results in the eliciting of similar themes and some familiarity of sequence. As described below, the method should reduce the likelihood that the risks enumerated in Part II above will be realized.

IV. EVALUATING THE STUDENT-AS-LEGISLATOR APPROACH

Assessing the value of the student-as-legislator approach first requires an evaluation of the method's potential for mitigating the risks outlined earlier. This initial evaluation also considers various potential drawbacks of the legislative role-play model, including whether deploying the legislative model introduces a new danger: excessive distance. Lastly, this section investigates advantages to the legislative model beyond risk mitigation.

A. *The Legislative Model as Risk Mitigator*

To the extent that a substantial contingent of the risks in teaching rape law stems from the intensity and immediacy of classroom participants' personal responses to the subject of rape, roles offer distance.⁸³ Students speak on behalf of their constituencies,⁸⁴ and therefore have the opportunity to adopt another's voice.⁸⁵ Although often the advocate's voice and the speaker's voice are, in fact, one, the structurally implemented ability to couch one's personal beliefs in the role of the legislator offers a necessary distance and limits the

83. Wildman, *supra* note 44, at 152 ("Role playing provides a distancing function, allowing students to separate their personal identities from their words, a separation paralleling that of an attorney representing a client.").

84. I do not assign students a particular constituency. Instead, I inform students that they represent about 20,000 individuals within the jurisdiction. By virtue of the number of constituents, students can assume that they represent a spectrum of views. Students do not necessarily preface their remarks with an "on behalf of my constituents." However, it can be helpful to remind students from time to time of their role. For a discussion of the dangers of role failure, see *infra* notes 92 and 93 and accompanying text.

85. "Some students find it easier to participate in class when they view speaking in class as playing a role." Stephanie M. Wildman, *The Classroom Climate: Encouraging Student Involvement*, 4 BERKELEY WOMEN'S L.J. 326, 329 (1989). Generally, "[w]omen law students . . . are substantially less likely to speak in class." Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547, 1552 (1993); see also Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137, 139 (1988). Whether or not this empirical experience of women's silence manifests itself in classes focused on rape law, it is valuable to make some effort to monitor airtime. If it appears that some legislators are dominating the floor, one can employ various common pedagogical devices to encourage those who have not yet spoken to speak, for example, suggesting that the next "x" minutes be reserved for those representatives who have not yet expressed a view on behalf of their constituents. Consider also Suellen Scarnecchia, *Gender and Race Bias Against Lawyers: A Classroom Response*, 23 U. MICH. J.L. REF. 319 (1990). Professor Scarnecchia describes the protective function of assigned roles in a class designed to teach about gender and race bias in the legal system. In the assigned role, "[e]ven though the student might be expressing his own opinion, he can appear to the students to be playing devil's advocate, offering possible motivations for" the person whom he plays in role. *Id.* at 336.

speaker's vulnerability.⁸⁶ Just as a role can provide distance for the speaker, it supplies an opportunity for the teacher to separate student-personal from student-advocate. Separation promotes diffusion. Instead of considering the speaker's remarks as the speaker's personal views, attention can be directed toward the student role, e.g., the likelihood other constituencies will adopt those views, questioning whether all constituents in a given jurisdiction share the same view, whether there is any room for compromise to enhance the likelihood of passage.

Roles, through their ability to afford distance between personal and in-role advocacy, mitigate the likelihood of combustion and forum failure. Advocacy in-role minimizes personal vulnerability and can encourage expression of unpopular views. It renders the speaker substantially less vulnerable to say, "I'm concerned that individuals in my constituency will not accept x," than to say "I personally find x wrong." Moreover, having the views of one's constituency rejected is generally less personal than having one's own views rejected. Role-playing can therefore minimize speaker alienation. The separation creates a relatively safe place for speech. Moreover, for some students, it may prove less intimidating to act or speak on behalf of others than on behalf of themselves.⁸⁷

In published literature on education, authors extol the virtues of role-play as a teaching vehicle.⁸⁸ Affirming the value of the ability to assume another

86. Students may embrace role adoption in varying ways. For instance, for some, role adoption represents the protective voice through which to express personal convictions. For others, role adoption means a conscious effort to step back from their own convictions to attempt to implement a vision of "what is 'best'" for their constituents. Hegland, *supra* note 44, at 543.

87. See Wildman, *supra* note 85.

88. See, e.g., Waters et al., *supra* note 79; Connie Wolfe et al., *Getting Our Students to Think Through Simulations*, 63 CONTEMP. EDUC. 219 (1992); VAN MENTS, *supra* note 43, at 23-27 ("As a technique, role-play has proved to be very powerful. It is highly motivating and enables students to put themselves in situations they have never experienced before; in particular it opens the way for them to put themselves in others' shoes." *Id.* at 21.). Van Ments' work on role-play describes a host of advantages, including that it "enables student to express hidden feelings. . . . Enables student to discuss private issues and problems. . . . Enables student to empathize with others and understand their motivations. . . . Portrays generalized social problems and dynamics of group interaction." *Id.* at 25. Of course not every role-play necessarily achieves each of these benefits, even in theory; see also BONWELL & EISON, *supra* note 66, at 49 (discussing a "study in economics [demonstrating] the usefulness of simulations and games for reaching students with alternative learning styles"). For a discussion of some of the limits of role-play, see *infra* notes 93, 110-120, and accompanying text. As the literature on role-play and simulation is quite extensive and spans a number of disciplines, I do not pretend to have canvassed all the studies, analyses, and debates within it. For a useful resource on the literature on role-play and gaming particularly as applied to law school teaching, see Rosato, *supra* note 16. Professor Rosato divides the "general benefits of gaming," which she defines as "students actively taking on a role and, while in that role, effectuating changes in an artificial but realistic environment," *id.*, into three domains, "increased motivation, more cooperation among students, and improved cognitive ability." *Id.* With respect to increased motivation, she indicates that "the primary benefit of gaming is the increased motivation that comes with an active learning experience." *Id.* With respect to cooperation, Professor Rosato posits that "games encourage cooperation." *Id.* Regarding cognitive ability, she notes: "Although the results of studies have been mixed, some have found that gaming improves the ability to retain knowledge, to make decisions, and to understand general principles. Even if students do not learn more by playing games, studies have found that they generally do not learn less." *Id.* (citations omitted). Finally, specifically with respect to role-play, Professor Rosato states that "a role play is an effective way to teach doctrine, skills, and values within the traditional law school curriculum." *Id.*

persona, educators explain: "Role play offers students the opportunity and the courage to 'step out' of themselves and try new roles."⁸⁹ As a consequence, "[r]ole play fosters the development of initiative, risk-taking, and a tolerance for complexity and ambiguity."⁹⁰ In addition, role-play is described as sparking the "exercise [of] independent judgment."⁹¹

The virtues of role-play generally, and specifically the legislative model, however, depend upon successful role adoption. Failure to adopt the legislator's role or, of greatest import, the students' failure to recognize colleagues in that role, redeposits students into their personal roles, subtracting the fundamental benefit of role-play. The legislative role is relatively generic,⁹² fostering versatility and fluidity. It permits students to espouse a variety of positions and to change those views without loss of role. It is, however, this generic and malleable nature that renders the risk of role failure particularly pertinent in the legislative context. As a consequence, throughout the exercise, the teacher must guard against realization of this risk. Preventative measures include reminding students of their constituencies and modeling role-appropriate examples of discourse. Measures like these work to prevent or alleviate role failure.⁹³ In this way, the role remains malleable to accommodate changing views but distinct enough to prevent role failure.

Roles also offer flexibility and separation for the professor. One can assume the role of speaker of the assembly and moderate and guide the drafting in-role.⁹⁴ The structural ability to play a role or to be seen as playing one by students should serve to minimize the association of acts and views expressed in-role with personal acts and views. Limiting the assignment of one's professorial acts and views to oneself should reduce the likelihood of damaging one's credibility and reputation. In these ways, the exercise can circumscribe, although not eliminate, the professional risks of unfounded reputation damage.

89. Waters et al., *supra* note 79, at 216.

90. *Id.* at 217. See also VAN MENTS, *supra* note 43, at 23 ("Role-play is one of a unique group of experiential teaching techniques which help the student to cope with the idea of uncertainty.").

91. Waters et al., *supra* note 79, at 217. For an analysis favoring greater use of role-play and gaming generally in law school teaching, see Rosato, *supra* note 16.

92. Contrast the legislator role played by all students, each of whom represents some 20,000 unspecified constituents, with, for instance, the role of sexual assault counselor. Assigning a role like sexual assault counselor supplies a much less generic and malleable role than legislator.

93. In direct contrast to role failure, role-play literature warns of the opposite danger in role-play exercises—excessive role adoption or "personalization of the roles by students." Waters et al., *supra* note 79, at 218. Perhaps, "personalization" in the legislative context means that students would perceive the inability to persuade other legislators to support their proposal as personal political failure. Although I am unaware of this "personalization" phenomenon occurring in my legislative drafting sessions, if it were to become apparent, I would revisit and expand a discussion of the legislative process during the debriefing phase. In the discussion, I would address issues of compromise and the democratic process in an effort to dispel the belief that unmitigated success routinely companions legislative proposals. For an analysis of other potential limitations and drawbacks in the use of role-play, see *infra* notes 112-120 and accompanying text.

94. Cf. Waters et al., *supra* note 79, at 218 ("Role play provides the teacher the opportunity to 'step out' of the traditional, authoritative role and to take the role of facilitator.").

Even absent professorial assumption of a legislative role,⁹⁵ the format offers opportunities for diffusion and separation. For instance, one of the benefits of listing suggested options for later vote is the ability both to capture and diffuse an explosive moment. For example, a student may voice profound and vehement opposition to a position aired in the debate. As this opposition rarely takes the form of suggested language for the statute, I can then call upon the student to codify her constituency's views in specific language for the proposed statute.⁹⁶ Focusing the student on the drafting task in the wake of a moment of potential ignition can serve to validate, or at least not undermine, the position expressed by the student and to produce a constructive option for later class vote or continued discussion and modification.

In this way, one need neither endorse nor criticize the view, if one perceives the view as likely to cause the class to erupt. Nonetheless, the view is not dismissed, but rather embodied in proposed language, manifesting respect for the importance of different views, without allowing the view to undermine the community on the drafting floor.⁹⁷

The legislative method fosters rigorous interrogation of the proposed language, reasons, emotions, and assumptions that it incorporates, and the consequences of adoption. The method also permits, however, inclusion of views whose interrogation may be too inflammatory for immediate pursuit. The listing of these latter options records their existence, making them available for later discussion should that prove to be a constructive exercise.

With respect to personal risks, the method's focus on persuading other legislators should discourage alienation. If one's goal is to persuade others to adopt one's own view, this perspective increases the incentive to sculpt one's speech to attract rather than repel. As a result, student legislators genuinely attempting to create support, rather than simply to make a point, are less likely to alienate others. Similarly, the unpleasantness of student speakers being "misunderstood, classified, and suspected"⁹⁸ as individuals should also decrease with role-playing, both because of the medium of expression and because of the expanded opportunity to separate the student-advocate from the student-person.

For the professor, even the physical logistics of the exercise facilitate the separation between the information provided and the information provider. Use

95. It has not been my practice to assume a role other than the professorial one for this exercise.

96. Of course, not every student comment needs to be codified into statutory language. Some narratives yield their pedagogical value in the telling.

97. As in real life, however, one might encounter a legislator who despairs of accruing the requisite votes, and instead wishes to "vent" in order to register disagreement with particular language or the prevailing legislative winds. If the venting cannot be transformed into a constructive option or an argument for or against an existing option, venting itself, so long as it occurs in role and consistent with classroom community values, should not eviscerate the nature of the exercise. It probably will not, however, advance the legislature's drafting task. Consequently, in the wake of such venting, the teacher may wish to acknowledge that registering disagreement on behalf of one's constituents is consistent with the legislator's task in some instances, but then refocus students on the primary legislative function of drafting.

98. Tomkovicz, *supra* note 4, at 504. See also *supra* note 42 and accompanying text.

of the overhead projector allows the introduction of materials in hard copy, rather than simply recited by the professor. As a result, the information enters the discussion through visual perception of the printed or pictured matter. The overhead can prove particularly useful for presenting empirical studies that respond to issues raised in the legislative exercise, without the professor being personally associated with the responsive materials. For instance, to advance a discussion on whether gender differences influence perceptions of rape complainants, the teacher might display the results of an empirical study on "the effects of complainant demeanor and evidence strength on jurors' verdicts and beliefs of defendant guilt in a rape trial."⁹⁹ By using the overhead, students should prove less likely to associate the information being introduced with the personal views of the professor.

Similarly, legislative role-play limits risks by its prospective nature. Unlike many role-plays based upon a real or invented past incident, legislative role-play governs the future rather than the past. The professor is less subject to criticism for embedding his or her biases into an invented incident or through the selection of a particular real incident upon which the role-play scenario is based.¹⁰⁰ Moreover, students embark on a collaborative effort to affect future events in fundamentally symmetric roles.¹⁰¹ These features of the legislative role-play should further limit the personal risks associated with classroom rape law study.

Finally, there remains the question of the pain and anguish of student rape survivors. To this issue, I offer several thoughts. First, during the legislative exercise, all the students who speak are volunteers. I never call on a student who has not raised his hand. Second, I penalize no student for failure to attend class during the exercise. Third, it has been my (limited and anecdotal) experience that rape survivors who have spoken with me about the class have acknowledged, if not emphasized, the importance of addressing rape law in the classroom. If we do not speak of rape in a law school classroom, what message do we send to law students who are rape survivors? Does not our failure to address rape perpetuate the devastating silencing of rape?¹⁰²

99. Gerzon, *supra* note 52.

[I]n the strong evidence condition male jurors who saw the provocative complainant voted the defendant not guilty significantly more often than did men who saw the conservative complainant. On the other hand, women jurors in the strong evidence condition were not reliably influenced by the demeanor variable. Also, women jurors in the provocative/strong evidence condition found the defendant not guilty significantly less frequently than did men jurors.

Further analyses indicated that women jurors reported stronger private beliefs in defendant guilt, had higher pro-feminist attitudes, and believed less strongly in rape myths than did men jurors.

Id. at v-vi.

In contrast, consider the perspective of Linda Fairstein, Director of the Manhattan District Attorney's Office Sex Crimes Unit: "[I]t is often *female* jurors who are most critical of the conduct of other women, just as it is female jurors who are more likely to make judgments based on the physical appearance of the accused." FAIRSTEIN, *supra* note 54, at 258.

100. Contrast a role-play based upon a rape report or an appellate review of a court case.

101. However, a self-identified rape survivor might be offered the role of expert. *See infra* note 117.

102. One student who had suffered through the trauma of rape has reminded me that silence in the classroom about rape can serve to perpetuate the shame and embarrassment of a victim/survivor of rape.

Lastly with respect to the anguish of rape survivors, the legislative method is designed to render the classroom a more hospitable environment for their individual participation. In a recent analysis of "the unintentional silencing of rape or sexual assault survivors that often occurs when instructors or students introduce the subject of rape or sexual assault to classes of undergraduates,"¹⁰³ Professor Amanda Konradi noted several characteristics that appear to impede participation by those survivors.¹⁰⁴ The first impediment occurred "when sexual assault was not introduced adequately and appeared to emerge from nowhere."¹⁰⁵ In this situation, "the survivors reported being mentally unprepared to deal with the subject."¹⁰⁶ Because the legislative method contemplates substantial preparation, including the preface, the readings, and the outside-of-class initial drafting, the legislative method should eliminate the surprise element that hinders participation. The second impediment articulated by Professor Konradi was the treatment by "strictly abstract lectures about sexual assault that began and ended without reference to the viewpoint of the individual attacked, or discussions that were limited to 'what if' or 'in theory.'"¹⁰⁷ In contrast to an abstract lecture, the legislative method is an interactive participatory conversation, one that invites inclusion of context and narrative. Nonetheless, the legislative method does depend on installing some distance between the speaker and the view expressed through role assumption. If one perceives common law school treatment of rape law as already too removed and academic, one might fault the legislative method for moving in the wrong direction. But the limited distance provided by role assumption in the legislative method is not designed to render the ensuing discussion abstract and severed from context. To the contrary, this space provides a forum for inclusion of narrative and contextual discourse without the requirement that the speaker claim the narrative as his or her own. In this way, the legislative approach invites a range of perspectives and methods of communicating those perspectives.¹⁰⁸

Third, Professor Konradi explains "that some women did not participate because they were unwilling to be identified as *the* sexual assault survivor in

On the silencing of conversation about rape, see, e.g., Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1088-89 (1986) ("At first, it is something you simply don't talk about. Then it occurs to you that people whose houses are broken into or who are mugged in Central Park talk about it all the time. Rape is a much more serious crime. If it isn't my fault, why am I supposed to be ashamed?").

103. Konradi, *supra* note 10, at 13.

104. *Id.* at 14-15.

105. *Id.* at 14.

106. *Id.*

107. *Id.* In contrast, Professor Konradi did note that "asking students to solve hypothetical but concrete problems dealing with emotionally powerful material can be an excellent learning experience when conducted in a classroom in which a real effort has been made to build trust." *Id.* at 23.

108. For additional discussion regarding the danger of the debate becoming too abstract and academic, see *infra* notes 115-120 and accompanying text. Consider the reflections of Professor Carrie Menkel-Meadow on the value of "a greater range of voices in the classroom." Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School"*, 38 J. LEGAL EDUC. 61, 79 (1988).

the class."¹⁰⁹ With role-play, a sexual assault survivor can engage in the conversation without claiming that the perspective she shares results from her personal history. Instead, the speaker sets forth her narrative or observations as a legislator representing her constituents. Her participation does not require that she designate the source of her comments. Alternatively, she can explicitly disclaim a personal connection, by indicating that her comments reflect the testimony of expert witnesses at a legislative subcommittee hearing or information provided by constituents who staff a rape crisis hotline. Role permits the inclusion of a multiplicity of perspectives without requiring a personal claim. In these ways, the legislative method can elicit speech where silence might have reigned.

In painting this portrait of the legislative method, I do not mean to suggest the absence of potential hazards or drawbacks. A number of these potential hazards have been catalogued earlier in this work, e.g., role failure¹¹⁰ or possible student dissatisfaction with the absence of a grounding in existing statutory treatment of rape law.¹¹¹ The discussion that follows addresses several additional potential drawbacks of the legislative model.¹¹² None, however, should prove intractable.

For example, using the overhead projector to introduce materials that guide the discussion and respond to floor debate entails substantial preparation. Although today's laser printers and copy machines generally transfer information directly onto overhead transparency forms, that task must be arranged and accomplished in advance of the class meeting. Moreover, the fluidity and spontaneity of floor drafting suggest that for maximum efficacy, the professor needs a wide enough selection of materials on overhead transparencies to accommodate the likely scope of the drafting discussion. Because many, if not most, of the issues in the drafting exercise repeat from year-to-year, the largest time expenditure for preparation generally accompanies the first iteration. Thereafter, transparencies from previous years can be recycled, shared, and supplemented, when necessary.

109. Konradi, *supra* note 10, at 14. Professor Konradi also described silencing as occurring when "women applied to themselves their beliefs that academic discourse is purely dispassionate and objective. Working within this framework, those who believed they might 'lose control' chose to censure themselves rather than to be disparaged for being 'nonacademic.'" *Id.* As Professor Konradi suggests, to overcome this silence, "[w]e need an approach to teaching about sexual assault that respects the emotional nature of the topic and increases survivors' feelings of trust and safety in the classroom." *Id.* at 15 (citation omitted). The legislative method offers one path designed to that end. Although Professor Konradi's approach does not appear designed specifically for a law school class studying rape law, she does offer a number of useful suggestions for increasing trust and safety that can be applied to the law school classroom, for example, "addressing silence," "learning names," "confronting affect." *Id.* at 16, 19. Professor Konradi explains the utility in "point[ing] out that new ways of seeing are often accompanied by discomfort." *Id.* at 19.

110. See *supra* notes 92-93 and accompanying text.

111. See *supra* note 80 and accompanying text.

112. The drawbacks catalogued in this work are not intended as an exhaustive list of all potential dangers of the legislative method. I have tried, instead, to highlight both those that I perceive as likely to prove common and those that, without prior warning and preventative or remedial efforts, could prove especially problematic.

Spontaneity itself may spawn professorial reservations.¹¹³ It implies, accurately, that the precise script for each class session cannot be inked in advance. Nonetheless, the professor retains the ability to control many facets of the drafting experience. Because the teacher has selected the reading, controls the chalkboard and the overhead, and remains the facilitator interacting with students at each moment of the class, the instructor is likely to maintain substantial control over the class engagement. For example, the pace and order of presentation can be adjusted by deferring some issues for later attention to the "additional considerations" column in the drafting chart. Moreover, the professor can choose to modify or direct the class focus by intervening with material on overhead transparencies or by pausing for a thorough inventory of the doctrinal or policy consequences of a particular proposal. Thus, while spontaneity may cause some personal concern, the legislative method does incorporate effective tools for monitoring and shaping class discourse.

Another potential drawback concerns the time commitment required for full engagement in the legislative enterprise.¹¹⁴ Although three to four class hours likely exceeds the time that a lecture format would require, it is probably comparable to the class time that a traditional "Socratic" treatment would absorb. Nonetheless, where that time commitment is unavailable, even a slightly time-truncated version of the legislative paradigm should enable the professor to achieve many of the pedagogical goals of the exercise.

Finally, the legislative paradigm's success in mitigating the risks of teaching rape law, particularly through the use of role-play, also harbors its greatest danger. Because role-playing involves some formality and distance, the visceral reactions that frequently drive students' responses to rape law may become too tempered.¹¹⁵ Tempering the discussion risks losing an appreciation of the devastation of rape and the powerful fear regarding false accusations. In principle, the debate could become too abstract or academic,¹¹⁶ undermining the vitality of the discussion and the genuine power

113. A loss of control over student learning is a concern about role-play found in the literature. See VAN MENTS, *supra* note 43, at 27. Of course, there are those who find spontaneity a benefit.

114. The time consumptive nature of role-plays is a commonly voiced criticism of role-play. See, e.g., Waters et al., *supra* note 79, at 217 ("One limitation of role play is the time required for preparation, enactment, and debriefing.").

115. Similarly, the structure of the exercise, including the explicit acknowledgement of the presence of rape survivors, might inhibit some students from expressing views or raising issues that they believe may offend rape survivors. The professor can facilitate the participation of those students reluctant to even broach a relevant issue or express a view for fear of giving offense by modeling role-appropriate means of raising sensitive or controversial issues and views or by displaying an overhead transparency that surfaces such an issue or expresses such a view. Through this modeling or display, the professor demonstrates how these views may be expressed within an environment promoting a range of debate but that harmonizes freedom of expression with classroom community.

A teacher may also establish more robust debate by employing an overhead transparency raising a perspective or issue inconsistent with the apparent direction of the legislative tide. This may give voice to a student who otherwise is feeling too uncomfortable to dissent or express a potentially unpopular view.

116. Even though the legislative role generally represents a partisan rather than an impartial role, class discussion could, absent remedial measures like those described here, still become too far removed from

of people's response to rape, necessary ingredients in the discussion of rape law within or without the legislative forum. However, awareness of this risk reduces the probability of its realization. The teacher retains the ability to maintain contact with the powerful emotional component of rape law in various ways. For instance, reading or displaying on the overhead a printed excerpt from a rape survivor's story,¹¹⁷ introducing information about a case involving a false accusation,¹¹⁸ or raising the empirical work on the impact of race in rape cases¹¹⁹ should rapidly reconnect students to the emotional dimension of rape law.¹²⁰

the crime of rape.

117. See, e.g., Nancy V. Raine, *Returns of the Day*, N.Y. TIMES, Oct. 2, 1994, § 6 (Magazine), at 34. See also the materials cited in Nancy S. Erickson, *Sex Bias in Law School Courses: Some Common Issues*, 38 J. LEGAL EDUC. 101, 114 nn. 69-70 (1988). In my experience, no student has come forth during a class period to reveal himself or herself as a rape survivor. Should such a disclosure be made, my inclination would be to offer the student a position as expert witness for the legislature, if the student preferred the role of expert to the general one of legislator. In her writing, Professor Coombs recounts that "[s]ometimes, [she] get[s] students' stories. They are unbelievably enriching when they are told. You cannot guarantee that a student will feel safe enough to tell a personal story. It rarely happens. Treasure it when it does." Coombs, *supra* note 7, at 522.

118. See FAIRSTEIN, *supra* note 54, at 217-30 (describing some of the rare incidents of false reporting during her tenure as Chief of the Manhattan District Attorney's Office Sex Crimes Unit); ROIPHE, *supra* note 55, at 39-42.

119. See, e.g., Robert J. Hunter et al., *The Death Sentencing of Rapists in Pre-Furman Texas (1942-1971): The Racial Dimension*, 20 AM. J. CRIM. L. 313, 336 (1993) ("Race was found to be a significant variable in the sentencing decision.").

Rapist and Victim Racial Combination Comparison of Death- and Term-Sentenced Rapists (1942-1971) (Restricted Population)

Rapist Race By Victim Race	Percent of Death-Sentenced Rapists (n=74)	Percent of Term-Sentenced Rapists (n=87)
White X White	21.6%	56.9%
White X Black	0.0%	1.1%
White X Hispanic	0.0%	0.0%
Black X White	70.2%	2.3%
Black X Black	1.3%	22.0%
Black X Hispanic	1.3%	0.0%
Hispanic X White	4.0%	2.3%
Hispanic X Black	0.0%	1.1%
Hispanic X Hispanic	1.3%	13.9%

Id. at 335.

120. For a discussion of other "limitations" in role-play, see Waters et al., *supra* note 79, at 217-18 (describing, *inter alia*, the "time required for preparation, enactment, and debriefing" and "personalization of the roles by students"); BONWELL & EISON, *supra* note 66, at 49 ("Although simulations and games have become increasingly popular in universities, research provides mixed results as to their relative effectiveness. . . . Nonetheless, students usually expressed positive feelings about the experiences, and several studies found an increase in students' achievement." (citation omitted)). Van Ments also describes a number of "potential disadvantages of role-play." VAN MENTS, *supra* note 43, at 27. His summary list consists of nine potential disadvantages:

The legislative approach embodies ways of mitigating each of the risks associated with the descent from the Castle. And new potential obstacles that use of the approach might introduce, such as those discussed above,¹²¹ should generally prove avoidable or tractable. The legislative paradigm relies on the premise that much of what renders rape law overwhelming as a first-year criminal law subject results from the intensity of personal reaction to rape issues. By implementing role-playing, the legislative approach encourages a modicum of separation between the personal and the advocacy role, creating a safer zone in which issues of rape law can provoke robust debate while diminishing the risk of combustion. But mitigating the risks of teaching rape law is merely the forging of links in the chain of descent from the Castle, thereby perhaps encouraging the ascent. The legislative approach offers, in addition, multiple means of enhancing the appreciation of both the ascent and the vista. The study of rape law generally, and the use of the legislative approach specifically, can achieve a number of supplemental pedagogical goals, several of which are detailed below.

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1. Tutor loses control over what is learnt and the order in which it is learnt.
 2. Simplifications can mislead.
 3. Uses a large amount of time.
 4. Uses other resources—people, space, special items.
 5. Depends on the quality of tutor and student.
 6. Impact may trigger off withdrawal or defence symptoms.
 7. May be seen as too entertaining or frivolous.
 8. May dominate learning to the exclusion of solid theory and facts.
 9. May depend on what students already know.

Id. None of these potential disadvantages should undermine the use of the student-as-legislator role-play as each can be avoided or addressed through the structure of that role-play. For a response to the first criticism, alleging loss of control over the classroom learning, see *supra* note 113 and accompanying text. With respect to misleading simplification, the level of complexity can be adjusted by the reading selection or pursuit of complex issues in greater detail. Moreover, with respect to the third potential disadvantage, the teacher controls the quantum of time to be devoted to the legislative exercise. See also the discussion of time consumption in the text accompanying note 114, *supra*. Fourth, the legislative role-play requires no special resources, beyond an overhead projector (a staple of my teaching fare). Fifth, while the role-play does depend upon the quality of the tutor and student, that is true generally for interactive methods of teaching, including the “Socratic” dialogue. Preparation for both the teacher and the student can work to minimize the particular concerns in the legislative context. The sixth potential disadvantage, one in which the “impact may trigger off withdrawal or defence symptoms,” is a genuine concern in any class discussing rape law. *Id.* However, it is the implementation of role-play itself that embodies the mitigation of this potential disadvantage. The distance of role and the malleable nature of the legislative role temper the probability of withdrawal or defense symptoms. In addition to the distance of playing a role, the debriefing offers an opportunity to verbalize and mend discomfort. Seventh, given the subject matter and the serious enterprise of the drafting task, students are unlikely to perceive the exercise “as too entertaining or frivolous.” *Id.* Nonetheless, should the tenor incline towards the frivolous, the teacher can remedy that through a return to the realities of the crime of rape. Eighth, “solid theory and facts” are integral facets of the legislative exercise. *Id.* Although they sometimes dwell in the subtext, they can be raised readily to the text. Additionally, the debriefing furnishes an excellent medium for surfacing any neglected substance. Finally, the legislative exercise does “depend on what students already know.” *Id.* What students bring to the classroom creates the richness of the legislative tapestry. Of course, the teacher can supply some elements of a common denominator in student awareness through reading selection in preparation for the exercise. In sum, none of the enumerated potential disadvantages should outweigh the potential benefits of role-play in the student-as-legislator paradigm.

121. See *supra* notes 110-120 and accompanying text.

B. *Advantages Beyond Risk Mitigation*

In addition to mitigating risks, several other features of the legislative approach may induce those who have been reluctant to broach this topic to add rape law to their syllabi. First among these features is flexibility. The approach does not dictate the specific type of background reading material. For example, the approach can operate with traditional case reading, theory reading, or newspaper clipping reading. The reading becomes informative background for the legislative task. For instance, rather than requiring the teacher or a student to recite the facts of an appellate opinion, that case serves as part of the framework informing the issues the students confront in their attempt to draft legislation. Adopting this approach does not, therefore, necessitate a change in casebook or reader selections. Nonetheless, selection of particular background reading can enhance the range of views expressed in the classroom discussion.¹²² Selections that expose students to views different from their own, or validate experiences that have traditionally been marginalized, can spur greater involvement from students who might otherwise remain silent. Consequently, the reading selection is vital to the success of the enterprise, but remains flexible to accommodate the particular needs of the environment in which the drafting takes place. Flexibility also encompasses the ability to emphasize a range of cognitive educational objectives, including the common substantive goal of student mastery of a body of doctrine or network of policy perspectives about rape law.¹²³

Beyond flexibility in the ease with which this approach can both accommodate the existing structure of a given criminal law course's assigned reading and meet a range of substantive teaching objectives, the legislative

122. For a bibliography of background reading materials, see Erickson, *supra* note 10, at 533-52. Because the experience of sexual intercourse may be profoundly different for men and women, and, as many commentators have noted, the perceptions of unwelcome penetration in particular often differ, see, for example, *id.* at 341-43, inclusion of at least one selection that describes the experience of rape from the perspective of a female survivor of rape can be valuable. The fact that the experience of unwanted penetration may be replete with pain and devoid of pleasure is a crucial starting point for a discussion on rape law. *Id.* Similarly, including background materials on the sexual assault of males can further enhance the legislative considerations. For a discussion of the benefits of providing background reading on male victims of sexual assault, see, for example, *id.* at 379-80. For a study of male victims of sexual assault, see Gary H. Lipscomb et al., *Male Victims of Sexual Assault*, 267 J. AM. MED. ASS'N 3064 (1992). The effects of race on rape law can also form an important component of the discussion. See, e.g., Erickson, *supra* note 10, at 373-75. For a collection of works on a range of rape-related topics, see RAPE AND SOCIETY: READINGS ON THE PROBLEM OF SEXUAL ASSAULT (Patricia Searles & Ronald J. Berger eds., 1995).

123. As the legislative method involves cognitive, affective, and skills learning, it is conducive to achieving a wide range of educational objectives. For instance, a professor might emphasize cognitive learning of specific doctrinal or policy issues in rape law by exploring those through the legislative forum and the debriefing phase of the exercise. Alternatively, a professor might underscore skills learning in the assumption of the legislator's role. Nonetheless, the legislative method is clearly not the most effective means of satisfying all educational objectives. For example, if the professor's goal were to *test* whether students had mastered a particular legal doctrine, the legislative method, at least as described here, would be unlikely to satisfy that educational goal. For a discussion of matching teaching methods to goals, see Rosato, *supra* note 16. Consequently, an instructor preparing to teach rape law needs to consider whether his or her particular teaching objectives can be adequately met by the legislative method.

method promotes the attainment of additional pedagogical goals.¹²⁴ Role-playing removes the class discussion one level from the reading, enabling students to consider the background materials from another perspective. The shift in perspective from student to legislator remedies a characteristic omission in the study of criminal law, namely attention to legislative drafting and appreciation of its difficulties. Frequently, the first-year law school curriculum focuses almost exclusively on appellate case reading and interpretation.¹²⁵ The legislative approach directs students toward the importance of legislative bodies and enactments rather than appellate court interpretations. If desired, the teacher can structure a portion of the discussion around issues of statutory construction and intent with examples of statutory construction issues derived from the instant discussion.¹²⁶ The approach forms a natural segue for analyzing distinctions between legislative and judicial tasks. In these ways, the student-as-legislator approach complements a traditional emphasis on appellate decisions.

The legislative approach further offers students an experiential appreciation of the difficulties of drafting clear statutes.¹²⁷ "Poor drafting" often appears in the legislature's failure to script a mens rea for each actus reus and attendant circumstance of the crime. Attorneys, judges, and jurors frequently confront statutory silence or confusion on the appropriate mens rea to attach to a particular element of a legislative enactment. Legislative silence or lack of clarity often produces extended litigation on mens rea issues.¹²⁸ Litigation

124. The goals described in this section are meant to be representative rather than exhaustive with respect to pedagogical opportunities presented by the legislative method.

125. As a response to the overwhelming emphasis on appellate case analysis, Hastings College of the Law recently implemented a mandatory one-semester statutory course requirement for first-year students. Students may elect one of several areas of statutory law, but must take a statutory course in the spring semester of their first year. Calls for greater attention by the legal academy to the importance of legislative pronouncements are not new. See, e.g., Joseph Dolan, *Law School Teaching of Legislation: A Report to the Ford Foundation*, 22 J. LEGAL EDUC. 63, 63 (1969):

Legislation is the primary instrument of ordered social change under the United States constitutional system, at the federal, state and local level. Present day law school teaching generally places much greater emphasis on judge made law than on law made by legislative bodies. There is inadequate knowledge of the legislative process.

126. For example, "How would a court interpret a statute incorporating these elements (subset of those in the chart) in the following circumstances?"; "How would the instant version of the statute affect the result in (a case from the reading)?"

127. Wolfe et al., *supra* note 88, at 219 ("[a]ccording to Thatcher, 'all games and simulations are a form of experiential learning . . .'" (citation omitted) (quoting D.C. Thatcher, *Promoting Learning Through Games and Simulations*, 21 SIMULATION & GAMING 262, 267 (1990)). Professor Hegland describes a legislative committee role-play and notes that it "underscores how difficult drafting can be." Hegland, *supra* note 44, at 543. He characterizes the role-play as "forc[ing] actual decision rather than simply identifying competing interests and arguments." *Id.* Whether this last characteristic applies to the student-as-legislator approach for rape law depends largely on whether votes are actually conducted.

128. The Supreme Court's 1994 Term is illustrative. During that Term, the Court addressed questions of mens rea in no fewer than three published opinions interpreting three different criminal statutes. *Staples v. United States*, 114 S. Ct. 1793, 1795 (1994) (addressing mens rea requirement of National Firearms Act and holding that prosecution has to prove defendant's knowledge that the weapon had "the characteristics that brought it within the statutory definition of a machinegun"); *Posters 'N' Things, Ltd. v. United States*, 114 S. Ct. 1747 (1994) (addressing the scienter requirement of the Mail Order Drug Paraphernalia Control Act); *Ratzlaf v. United States*, 114 S. Ct. 655, 657 (1994) (addressing the term "willfully" in 31 U.S.C. § 5324 (1988) and holding that to establish violation, "[g]overnment must prove

involving "poor drafting," captured in the appellate cases of criminal law casebooks, generates repeated criticism of legislative drafting efforts throughout first-year criminal law study. By placing the students in the role of legislators, they must directly confront the formidable difficulties of drafting clear statutory language. Students may begin to appreciate silence or absence of clarity as the failure to reach consensus rather than legislative inattention. Similarly, students, like legislators, may choose not to raise an otherwise important issue, for fear of jeopardizing passage of a statute that embodies some, albeit not all, of their views.¹²⁹

As indicated earlier, the legislative approach also facilitates exploration of jurisprudential issues. Students should analyze to what extent the law they choose to enact represents an ideal or a minimum standard of conduct. Those teachers inclined to develop jurisprudential themes will find a ready forum in the legislative approach to rape law.

The legislative forum also lends itself to an analysis of the interdependence of legal fields. Legislating a statute criminalizing rape raises, *inter alia*, evidentiary, constitutional, trial strategy, and ethical issues. For those who wish to offer or at least expose students to the interdependence of legal thought, the legislative approach fosters the introduction of those themes.¹³⁰ The extent to which corollary subjects find voice in the legislating of rape law remains, of course, a matter of individual pedagogic preference.

Finally, the legislative experiential approach promotes professional role formation through role assumption.¹³¹ Role assumption represents a critical component of lawyering. Assuming the role of an effective legislator requires students to consider how to persuade others of a particular viewpoint. Effective legislators, like effective lawyers, marshal the facts and arguments supporting their position and mold their discourse to appeal to the given audience. Role assumption encourages students to consider and practice the techniques of effective rhetoric.

that the defendant acted with knowledge that his conduct was unlawful").

129. Although the drafting exercise may not ultimately result in an approved statute, the experience takes students into the role of elected officials and can empower them to believe they can make law. This form of learning also unveils the ways in which criminal law forms social norms. I thank Donna Coker and the participants in the Criminal Law Working Group of the SALT Conference in September 1994 for pointing out these particular benefits.

130. If this approach is chosen, in addition to evidence, the study of rape law supplies a powerful medium for examining criminal procedure and ethical decisions. Topics that readily lend themselves to incorporation include trial tactics and strategy issues, from, for instance, the coaching of witnesses in their courtroom attire, language, and, when applicable, make-up (for a study on the effects of complainant demeanor on mock jurors, see Gerzon, *supra* note 52, at 63), to the extent of investigation of the complainant's past in defense investigatory efforts. The United States Supreme Court's recent decision in *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994), extending the prohibition in *Batson v. Kentucky*, 476 U.S. 79 (1986), on peremptory challenges based upon race to those based upon gender, is a natural inclusion in a rape law discussion. Consideration of the Supreme Court's pronouncement in *J.E.B.* might prompt some modification in the drafting of rape laws to address the question of peremptory challenges and special or extended voir dire opportunities for the parties.

131. See *supra* note 78.

In the context of rape law, role assumption also raises two additional related issues: the complex issue of the personal versus the professional and the question of difference. First, role assumption elevates to the fore the intersection of our professional and our personal selves.¹³² The study of rape law, because of the intense visceral responses it generates, serves as a useful platform from which to address lawyering roles. From the perspective of the ethicist, must legislators advocate views that they find morally repugnant? By extension, to what extent are lawyers simply "hired guns"? When is it permissible to reject a client or refuse to advance a particular argument not otherwise frivolous? Should a lawyer expect to be effective for all clients regardless of the lawyer's personal views? These complex issues of role formation arise naturally as students struggle with their intensely personal reactions to rape law.

On a related theme, to what extent do differences in our individual and collective experiences equip us to be effective advocates for others? In particular, the legislative approach to rape law furnishes a platform for discussing difference and the ways in which race, gender, sexual orientation, disability, and other differences affect how we lawyer and the legal system in which we lawyer. For example, the discussion can reflect elements of recent legal scholarship that challenge assumptions in legal thought and practice.¹³³ These assumptions frequently homogenize individual and collective experiences. The legislative approach, like other role-playing exercises, can facilitate the exploration of difference. In this way, the study of rape law recognizes the heterogeneous nature of our individual and collective experiences. Rape law, studied through the prism of role assumption, encourages exploring challenges to traditional perspectives: that our differences may, in fact, affect the way in which we lawyer.¹³⁴ First-year criminal law study of rape is an early phase of the continuing dialogue that prepares students for their professional roles.

132. For a discussion of the relationship between the personal and the professional in lawyering and legal education, see Himmelstein, *supra* note 18, at 523. Professor Himmelstein explains: "Who is lawyering determines what lawyering is. . . . Each lawyer's response to these choices [whether to take a client, go to court, etc.] depends on what kind of professional identity he has assumed and on who he is as a person." *Id.* He notes that "[lawyers] are not aware of the many personal and professional decisions about dealing with people that they have implicitly made during their professional acculturation." *Id.*

133. For an extensive treatment of both Feminist Legal Theory and the challenges it raises, see FEMINIST LEGAL THEORY: FOUNDATIONS (D. Kelly Weisberg ed., 1993). See also Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985) (applying Professor Carol Gilligan's insights to law and the lawyering process); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986). For a multidisciplinary approach to issues of sexual difference, see THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE (Deborah L. Rhode ed., 1990). For an annotated bibliography of scholarship on Critical Race Theory, see Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461, 462-63 (1993) (noting that "[m]any Critical Race theorists consider that a principal obstacle to racial reform is majoritarian mindset—the bundle of presuppositions, received wisdoms, and shared cultural understandings persons in the dominant group bring to discussions of race").

134. See, e.g., Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990).

In addition, then, to reducing the likelihood that the risks associated with teaching rape law will be realized, the legislative approach holds the potential of achieving numerous additional meritorious pedagogical aims. The intensity of students' personal reactions to rape law constitutes an invaluable and somewhat unusual opportunity for assaying a whole range of important teaching objectives.

Finally, the legislative paradigm may be employed to treat other highly charged legal issues that depend upon legislative enactment. Rape law, although perhaps somewhat singular in the depth, intensity, and widespread nature of the emotional response, does not stand alone in its ability to ignite the classroom. Topics both within and without criminal law share that inflammatory ability. For instance, the study in evidence courses of rape shield laws furnishes an excellent opportunity to engage the legislative model. Students might be asked to draft a rape shield provision for the pertinent evidentiary code. In constitutional law, one might employ the legislative model for the drafting of a hate speech prohibition either by a state or national legislative body or as the participants in a campus senate undertaking the drafting for their educational institution. The student-as-legislator approach can provide role-playing distance, ability to surface jurisprudential themes, a bridge to the interdependence of legal disciplines, and role assumption inquiry to those incendiary topics throughout the legal curriculum that lend themselves to legislative drafting.

V. CONCLUSION

Rape law ought to represent a fundamental component of first-year survey courses in criminal law. Teaching rape law, however, can prove a substantial and daunting challenge for both novice and experienced law teachers. The pedagogy proposed here holds promise, through its structure of role-playing, of mitigating the risks of the teaching enterprise while enhancing the rewards. By inserting a measure of distance between the speaker and his or her personal views, the approach can create a safer place for emotive speech without undermining the robust discussion necessary for an effective learning environment in a law school class focusing on rape law.

Beyond mitigating the incendiary nature of rape law discussions, the legislative paradigm also creates a forum for achieving a constellation of essential pedagogical aims. Legislative role-playing induces an appreciation of the complexity of the drafting task and serves as a counterpoint to repeated criticism of legislators for "poor drafting." Legislating rape law also fosters analyzing legal issues in a multidimensional realm of legal thought. The legal landscape influencing the legislator drafting a criminal prohibition on rape possesses, *inter alia*, evidentiary, ethical, constitutional, and procedural

dimensions. As a consequence, the legislative paradigm can introduce students to the interdependence of related legal disciplines.

Drafting a criminal prohibition also surfaces the primordial jurisprudential themes of criminal law, as students confront the purposes of their legislative product. Does the evolving legislation embrace conduct commonly regarded as "criminal"? Or does the emerging legislative pronouncement enlarge or diminish that range of conduct? In addition, the experiential quality of the legislative paradigm fosters interrogation of professional role assumption. Should we, and how do we, integrate and separate our personal and professional selves? In what ways do our differences affect our lawyering?

The benefits inherent in the proposed legislative approach can apply whether one is teaching rape law or the myriad other legal topics that evoke powerful visceral responses, so long as the topic permits legislative involvement. Thus, the medium proposed here translates to contexts throughout the law school curriculum.

The legislative paradigm should render the scaling of classroom pyramids less intimidating and prone to enhanced pedagogical opportunities and success. Consequently, the journey should prove more inviting.