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Reforming the Law of Rape

Stephen J. Schulhofer[†]

Introduction

The topic of contemporary rape-law reform holds a natural point of interest for this Symposium convened to celebrate the thirty-fifth anniversary of *Law & Inequality: A Journal of Theory and Practice*, and in particular because of its commitment to paying tribute to its founding faculty sponsor, Catharine A. MacKinnon. I congratulate the *Journal's* editors on their very fitting decision to honor Professor MacKinnon, whose work over the past thirty-five years has been a major force for progress in affording women equal opportunity and protecting them from violence, in this country and around the world.

In this Article, I undertake two distinct tasks. First, I want to discuss what the laws against sexual assault ideally should look like. But second, I also want to discuss rape law from the perspective of someone who has spent the past four years in the messy and frustrating work of legislative compromise, trying to design law reform that can be both progressive and enactable. There is an obvious contradiction in that regard. The goal is to pass reforms that move society and our criminal justice system in a progressive direction, to the place where society ought to be. But that means, by definition, getting broad agreement on principles about which people do not agree—at least not yet.

Before I turn to that second part of the story, this Article addresses three points. First, it sketches the traditional twentieth

[†] Robert B. McKay Professor of Law, New York University; Reporter, American Law Institute Project to Revise Article 213 of the Model Penal Code. I am exceptionally grateful to Professor Catharine A. MacKinnon for stimulating my interest in these issues several decades ago and for incisively challenging my current and prior efforts in this area over the many years we have been colleagues. I have especially appreciated the inspiration she has afforded me in matters where we agreed and the unfailing courtesy and respect she has extended to me in matters where we did not. My understanding of the issues addressed here has also benefited from advice, consultation, and extensive conversation with individuals far too numerous to name—the many judges, academics, prosecutors, defense counsel, and other lawyers who have made important contributions to the American Law Institute project. I cannot fail to mention the special thanks I owe, for contributions far beyond the ordinary, to my energetic and insightful collaborator and Model Penal Code co-Reporter Erin Murphy. The views expressed in this Article are exclusively my own.

century law of rape (still in force in some jurisdictions!) and outlines the reforms that were emphasized in the 1960s and 1970s, before Professor MacKinnon's impact was felt. Second, it describes the distinct perspective that Professor MacKinnon brought to these debates and how it helped shaped the reforms that followed. Third, this Article offers an outline of where we are now, the progress we've made, and some of the problems that still need to be addressed.

This Article then turns to the second large part of the rape reform story and discusses the work of getting progressive reform enacted in the face of strong and determined resistance. Part of that resistance is outright misogyny—unconscious or overt disrespect for women. Although it is important to acknowledge that fact, this Article will focus instead on resistance that is not attributable to misogyny. It can be hard to see that resistance sometimes reflects legitimate concerns which those of us committed to reform must understand and address.

I. Traditional Rape Law and the First Wave of Reform (1960–1980)

In the eighteenth century, Blackstone defined rape as “[c]arnal knowledge of a woman forcibly and against her will.”¹ Courts were obsessed with the idea that a woman might fabricate a rape accusation, so there were unique obstacles to conviction: requirements of prompt complaint and corroboration,² including corroboration of unwillingness by proof that the victim had resisted to the utmost.³ Those requirements are now largely obsolete,⁴ but Blackstone's core concepts—force and non-consent—are now the focus of intense debate and disagreement.

1. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 210 (Chicago Press ed. 1979) (1765–1769).

2. See *United States v. Wiley*, 492 F.2d 547, 551 (D.C. Cir. 1974); Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 947–48 (2004).

3. See STEPHEN J. SCHULHOFER, UNWANTED SEX 20 (1998) (“The code preserved the rules requiring a prompt complaint, corroboration of the victim's testimony, and special cautionary instructions to the jury”).

4. Only one state, South Carolina, maintains a prompt complaint requirement, and that rule applies only in cases arising between spouses. Thirteen states retain limited corroboration requirements, and these have been narrowly restricted by judicial interpretation. See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES 185–87 (AM. LAW. INST., Preliminary Draft No. 5, Sept. 8, 2015) [hereinafter MODEL PENAL CODE, Preliminary Draft No. 5]. This “Preliminary Draft” is part of an ongoing American Law Institute (ALI) project to revise the sexual assault provisions of the Model Penal Code. It has not been

In the 1960s, the reformers who wrote the Model Penal Code (MPC) expanded Blackstone's narrow concept of force, so that it could include nonviolent duress, like a threat to fire someone from a job or to take away custody of their children, in cases where such a threat could prevent resistance by "[a] woman of ordinary resolution."⁵ States that generally followed the MPC in other respects, however, were not ready to accept its cautious extension of the law of sexual assault; they continued to define rape as a crime of physical violence.⁶

In the 1970s, there was another wave of reform. Strong feminist organizations and rape-survivor advocacy groups joined with the general tough-on-crime movement that became powerful in the 1970s.⁷ Politically, the reformers were almost unstoppable. Yet what stands out, in light of Professor MacKinnon's subsequent work, is how modest the 1970s reforms were. The top priority was to eliminate procedural obstacles and protect victims from abusive cross-examination in the courtroom,⁸ and those goals were almost entirely successful, at least in the laws on the books.⁹

A 1975 Michigan statute was probably the most ambitious reform of its time.¹⁰ It enacted almost the entire victim-advocate's wish list.¹¹ For example, the statute repealed the resistance requirement and eliminated all reference to consent, because a non-consent requirement seemed to put the victim on trial and divert attention from the defendant's misconduct.¹² But from today's perspective, what is striking is that the Michigan statute still required proof of physical force or threats of physical violence.¹³ Flagrant coercion still fell outside the reach of criminal law.

In a 1983 case, an Illinois man accosted a woman on an isolated bike path.¹⁴ He was almost twice her size, and after they talked for a few minutes, he picked her up, carried her into the

formally approved by the ALI, and therefore does not represent its official position on any of matters covered.

5. MODEL PENAL CODE § 213.1 (2)(a) (AM. LAW. INST., Proposed Official Draft 1962).

6. See SCHULHOFER, *supra* note 3, at 1–10, 23–25.

7. *Id.* at 29–31.

8. *Id.* at 31, 33.

9. See *e.g.*, MICH. COMP. LAWS §§ 750.520h–750.520k (2014); see also MODEL PENAL CODE & COMMENTARIES, PART II § 213.1 (AM. LAW. INST.1980).

10. See SCHULHOFER, *supra* note 3, at 35–37.

11. See *id.*

12. See *id.* at 31, 33.

13. See *id.*

14. *People v. Warren*, 446 N.E.2d 591, 592 (Ill. Ct. App. 1983).

woods, and performed several sex acts.¹⁵ She was terrified, but because she never cried out or protested, the court reversed the rape conviction.¹⁶

In a 1985 case, a foster parent threatened to send the fourteen-year-old girl who was in his care back to a detention facility if she did not submit to sex.¹⁷ The court upheld a conviction for corrupting the morals of a minor but reversed the rape conviction because the foster parent had not threatened the girl with *physical* force.¹⁸

In a 1990 case, a Montana high school principal threatened to prevent a student from graduating unless she had sex with him.¹⁹ The court held that the principal could not be guilty of rape for the same reason—he had not threatened her with physical force.²⁰

That is where things stood when Professor MacKinnon addressed rape in a powerful 1983 article²¹ and, of course, in her 1989 book *Toward a Feminist Theory of the State*.²² By then a few courts were willing to say that coercive circumstances could *sometimes* be sufficient.²³ But these were halting steps. Even the most progressive courts were requiring some implicit danger of physical harm, for example, when an armed police officer implicitly threatens the victim with arrest.²⁴ Nearly all courts were still asking whether the defendant's conduct was essentially equivalent to physical violence.²⁵

II. MacKinnon's Contribution

What Professor MacKinnon's work showed was that "force" has many faces, that the absence of physical force does not necessarily enable women to control, as she vividly put it, "what is done to them." Rape law could not justifiably assume that ability

15. *Id.*

16. *Id.* at 593.

17. *Commonwealth v. Mlinarich*, 498 A.2d 395, 396 (Pa. Super. Ct. 1985), *aff'd by equally divided court*, 542 A.2d 1335 (Pa. 1988).

18. *Id.* at 404.

19. *State v. Thompson*, 792 P.2d 1103, 1103–04 (Mont. 1990).

20. *Id.* at 1107.

21. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward a Feminist Jurisprudence*, 8 *SIGNS* 635 (1983).

22. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

23. *E.g.*, *State v. Burke*, 522 A.2d 725, 735–36 (R.I. 1987) (finding that a police officer who demanded a hitchhiker perform oral sex on him had implicitly threatened the hitchhiker with violence if she did not comply).

24. *Id.* at 737.

25. *See id.* at 737–38.

to control because, under conditions of gender inequality, social constraints and pervasive disparities of power can be decisive.²⁶ MacKinnon's work laid bare the ways that women sometimes have no alternative except to acquiesce. As she wrote in *Toward a Feminist Theory of the State*:

[A]cceptable sex, in the legal perspective, can entail a lot of force The adjudicated line [distinguishing rape from sex in specific cases] . . . commonly centers on some assessment of the woman's will . . . [but] the deeper problem is that women . . . may have or perceive no alternative . . . [except to] submit to survive. Absence of [physical] force does not ensure the presence of that control [over what is done to them].²⁷

In other words, force runs on a continuum—the knife at your throat, the threat to throw you in jail, the threat to take away your job or your children, the need to placate a thesis supervisor—all these things can lead a person to tolerate and submit to unwanted sexual advances.²⁸

In the 1980s, a few courts finally started to understand this. For example, a Pennsylvania judge defined force as “[c]ompulsion by physical, moral, or intellectual means or by the exigencies of the circumstances.”²⁹ Another court recognized that force “[i]ncludes ‘not only physical force or violence, but also moral, psychological or intellectual force [when] used to compel a person to’ [submit]”³⁰ A 1995 Pennsylvania statute defined forcible compulsion to include “[e]motional or psychological force, either express or implied.”³¹

Progress was also made from a different direction: instead of expanding “force” to include all forms of coercion, some reforms achieved a similar result by requiring consent, and then requiring that the necessary consent be “freely given” under all the circumstances.³²

In 1988, the Supreme Court of the United States reflected the older view when it held that the statute used to prosecute sex trafficking—the law against holding any person in “involuntary servitude”—applied only to traffickers who use physical or legal

26. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 22, at 178.

27. *Id.* at 173, 175, 177–78.

28. *Id.*

29. *Commonwealth v. Mlinarich*, 498 A.2d 395, 404 (Pa. Super. Ct. 1985) (Spaeth, J., dissenting) *aff'd by equally divided court*, 542 A.2d 1335 (Pa. 1988).

30. *Commonwealth v. Rhodes*, 510 A.2d 1217, 1226 (Pa. 1986).

31. 1995 Pa. Legis. Serv. Sp. Sess. No. 1 Act 1995-10 (S.B. 2).

32. *State in the Interest of M.T.S.*, 609 A.2d 1266, 1279 (1992).

compulsion.³³ Congress overruled that decision and specified that coercion “[i]nclud[es] psychological, financial, or reputational harm . . . sufficiently serious . . . to compel a reasonable person [to submit] . . .”³⁴

We cannot necessarily draw a straight line from all these reforms back to *Toward a Feminist Theory of the State*, but nothing else was as important as Professor MacKinnon’s work in severing the link between our understanding of rape and the expectation that the crime inherently involves aberrant physical brutality. Her writing shattered the myth that force must mean physical violence. Nothing else was as important in opening society’s eyes to the fact that many faces of force can compel submission just as effectively as threats of violence.

So far, I have left out two important parts of this story. One is pushback based on the argument that that women supposedly should not be pampered or “infantilized”—that nothing stops a woman from resisting a nonviolent sexual advance if she really wants to resist.³⁵ I will say more about that below. But first, there was reform that came from the other side of the fence: the feminists and victim advocates who did not really get the full MacKinnon message—I am especially pointing to the slogan, “no-means-no.”

I found myself under fire from some reform advocates in the 1990s when I criticized the no-means-no movement.³⁶ Obviously “no” must mean no. But pitching the argument that way does not go very far and its emphasis is badly misplaced.

One thing Professor MacKinnon’s work makes clear is that the no-means-no idea puts all the burden on the woman to speak up, to resist, even when speaking up and resisting is exactly what social constraints and disparate power make it difficult or impossible for her to do.³⁷

33. *United States v. Kozminski*, 487 U.S. 931, 932 (1988).

34. 18 U.S.C. § 1591(e)(4) (2012) (defining the serious harm that qualifies as coercion within (e)(2)).

35. *E.g.*, KATIE ROIPHE, *THE MORNING AFTER* 67–68 (1993) (ridiculing the notion, allegedly underlying feminist reforms, that women are “[w]eak-willed, alabaster bodies, whose virtue must be protected from the cunning encroachments of the outside world” and that law must protect “[t]he cowering woman, knocked on her back by the barest feather of peer pressure”; insisting instead that “[t]he idea that women can’t withstand verbal or emotional pressure infantilizes them.”).

36. See Rebecca Whisnant, *Feminist Perspective on Rape*, *STAN. ENCYCLOPEDIA OF PHIL.* (Aug. 14, 2014), <https://plato.stanford.edu/entries/feminism-rape/>.

37. Catharine A. MacKinnon, *Rape Redefined*, 10 *HARV. L. & POL’Y REV.* 431, 446 (2016).

Of course, some who supported the no-means-no slogan understood that; they just wanted to make sure that—at a minimum—a verbal protest would always be *sufficient*.³⁸ Unfortunately, however, the no-means-no mantra distracted attention from the main point, and reinforced the expectation that an unwilling person would protest. Its subtext was—and still is—that sexual aggressors are entitled to take for granted a woman's availability unless and until she clearly and explicitly objects. In addition, some reform advocates even made that assumption explicit. In arguing for no-means-no, one feminist reformer wrote that “the jury has to believe that she did say ‘no’ Women should not be overprotected.”³⁹

My own work argues otherwise.⁴⁰ For practical and theoretical reasons, willingness should never be assumed.⁴¹ Arriving at the same conclusion from a somewhat different starting point, Professor MacKinnon writes in *Toward a Feminist Theory of the State* that “[t]he deeper problem is that women are socialized to passive receptivity; [they] may have . . . no alternative to [passive] acquiescence.”⁴² Therefore, silent submission and actual willingness are not the same thing; one should never be equated with the other.

That brings me to the current battle cry: “yes-means-yes.”⁴³ Here, the problem is similar to the one we encountered with respect to no-means-no: a well-intentioned, ostensibly progressive rallying cry misleads and fosters assumptions that ultimately are antithetical to effective reform. The yes-means-yes slogan impedes genuine clarity in society's understanding of the stakes. What the slogan is supposed to mean is that *silence* does not mean yes.⁴⁴ People have to *give permission*; that's the essential minimum. But again, the mantra, in this case “yes means yes,” is drastically incomplete. It distracts attention from the main point

38. Vivian Berger, *Rape Law Reform at the Millennium*, 3 BUFF. CRIM. L. REV. 513, 522 (2000).

39. *Id.*

40. SCHULHOFER, *supra* note 3, at 267–73; *see also* Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously*, 11 LAW & PHIL. 35, 74–75 (1992).

41. SCHULHOFER, *supra* note 3, at 267–73; *see also* Schulhofer, *Taking Sexual Autonomy Seriously*, *supra* note 40, at 74–75.

42. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 22, at 177.

43. *See* MacKinnon, *Rape Redefined*, *supra* note 37, at 454–56 (describing the “so-called affirmative consent standard, understood as meaning that only when a woman says yes to sex is it not rape”).

44. *Id.*

because it reinforces the expectation that “yes” does mean yes and that a person who says “yes” *is* willing.

We must be clear about this: for all the reasons that Professor MacKinnon shows, “yes” *does not* always mean yes. In situations dominated by disparities of power, merely saying yes is not saying that I have freely made a sexual choice.⁴⁵

III. Where We Are Now

We therefore remain a long way from a proper social understanding of the issues and the law’s role in addressing them. But first, the good news. Two key points are mostly accepted. They are, first, that “no” is always sufficient to establish non-consent,⁴⁶ and second, that force does not always have to be physical force—other coercive circumstances suffice.⁴⁷ To be clear, even these basic points still are not universally accepted in United States law. We are still fighting these two elementary battles.⁴⁸ But for the most part, these battles have been won.

Now the status report moves into more disappointing territory. It *should* be an equally basic point that non-consent—for example, a clear “no”—is sufficient *by itself* to make penetration a crime, even when there is no additional force of any kind: physical, psychological, situational, or otherwise.

This simple proposition should not be the least bit controversial. Unlike the first two points, however, this proposition is not close to being fully accepted in United States law. In almost half the states, sexual penetration is not a crime

45. See SCHULHOFER, *supra* note 3, at 168–253 (discussing taints that result from disparities of power and trust).

46. Compare *State v. Jones*, 299 P.3d 219, 227 (Idaho 2013) (“[V]erbal resistance is sufficient resistance to substantiate a charge of forcible rape.”), with John F. Decker & Peter G. Baroni, “No” Still Means “Yes”: *The Failure of the “Non-Consent” Reform Movement in American Rape and Sexual Assault Law*, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1112 (2012) (providing an overview of how different states understand the necessary level of resistance to establish non-consent).

47. MODEL PENAL CODE, Preliminary Draft No. 5, *supra* note 4, at 45–47.

48. See generally Decker & Baroni, *supra* note 46 (discussing current gaps in the law in this regard).

unless there is *both* non-consent *and* some sort of force.⁴⁹ ***Penetration without consent is not, in itself, a crime.***⁵⁰

This last point is emphasized for a reason; it is not a misprint. All people (or almost all people) know, as a matter of common decency, that no one is supposed to ignore a clear expression of non-consent. Today many students learn in high school, and nearly all college students learn in freshman orientation, that it is unacceptable to ignore a clear expression of non-consent.⁵¹ But that is not a criminal law requirement in almost half the states. In all these jurisdictions, some sort of force is required, *in addition* to non-consent, to make out a crime.⁵²

I will come back to this legal approach in a moment, but I do not want to dwell on it, because it has finally become the minority view. In a majority of states, it is finally true that non-consent alone suffices,⁵³ and this is the recommendation currently before the American Law Institute in its revision of the sexual offense provisions of the Model Penal Code.⁵⁴ This battle is not over, but the trend is clear. The opposition is becoming weaker by the minute.

That leaves two important issues where the trend is *not* clear and where reform still faces formidable opposition. First, what

49. CAROL E. TRACY ET AL., RAPE AND SEXUAL ASSAULT IN THE LEGAL SYSTEM 19–20 (2013), http://jpp.whs.mil/Public/docs/04-Meetings/sub-20150507/03_Rape_SexAsslt_LegalSystem_WLP_AEQuitas_20120605.pdf (listing Alabama, the District of Columbia, Kansas, Florida, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New York, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, and Washington as states that require both penetration without consent and without force).

50. *E.g.*, *Commonwealth v. Lopez*, 745 N.E.2d 961, 965 (Mass. 2001) (noting that in Massachusetts, the offense “encompass[es] two separate elements each of which must independently be satisfied . . . beyond a reasonable doubt . . . (1) . . . physical force[,] . . . nonphysical, constructive force, . . . or threats of bodily harm . . . and (2) at the time of penetration, there was no consent.”); see also MODEL PENAL CODE, Preliminary Draft No. 5, *supra* note 4, at 52–53 (“[Thirty-one] American jurisdictions impose [criminal] liability on the basis of nonconsent alone, without requiring any added showing of force.”).

51. Tovia Smith, *To Prevent Sexual Assault, Schools and Parents Start Lessons Early*, NPR (Aug. 9, 2016, 4:48 AM), <http://www.npr.org/2016/08/09/487497208/to-prevent-sexual-assault-schools-and-parents-start-lessons-early>; Beth Howard, *How Colleges are Battling Sexual Violence*, U.S. NEWS & WORLD REP. (Aug. 28, 2015, 2:58 PM), <https://www.usnews.com/news/articles/2015/08/28/how-colleges-are-battling-sexual-violence>.

52. See TRACY ET AL., *supra* note 49, at 19–20.

53. *Id.*

54. See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES at 23–41 (AM. LAW INST., Council Draft No. 5 2016). This “Council Draft,” also part of the ongoing ALI revision project, has not been formally approved by the ALI and does not represent its official position on any of matters covered.

counts as consent? What is the minimum requirement? And second, when that minimum requirement is met—for example, when you have explicit permission—what circumstances nullify that *apparent* consent? When does yes *not* mean yes? These are the places where the key battles for reform are now being fought.

a. What counts as consent?

Even among states that treat absence of consent as sufficient (together with sexual penetration) to establish the offense, there is wide and consequential disagreement about what “consent” means. There are three options in play. The first option says that to prove unwillingness, there must be some verbal protest.⁵⁵ The second option says we should assume *non*-consent unless there is clear affirmative permission. In the first option, silence and passivity always imply consent; in the second option, silence and passivity always mean *no* consent.⁵⁶ In the third option, silence and passivity can imply *either* consent or non-consent, depending on all the circumstances.⁵⁷

In media accounts, the requirement of affirmative permission is often portrayed as a nightmare of fascist intervention in private life, as if all sex would be illegal in the absence of a written agreement—signed, sealed, and notarized.⁵⁸ You would never know from the alarmist media hype that realistic standards of affirmative consent, signaled by words or conduct, are already the

55. *E.g.*, N.Y. PENAL LAW § 130.05(2)(d) (McKinney 2017) (requiring that “the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor’s situation would have understood such person’s words and acts as an expression of lack of consent to such act under all the circumstances.”); NEB. REV. STAT. § 28-318(8) (2016) (“Without consent means . . . the victim expressed a lack of consent through words, or . . . conduct . . .”).

56. *E.g.*, WIS. STAT. § 940.225(4) (2016) (defining consent as “freely given agreement”); *State in the Interest of M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992) (requiring “affirmative and freely-given permission”).

57. *E.g.*, ME. REV. STAT. ANN. tit. 17-A, § 255-A(1)(A) (2016) (requiring proof that the victim “has not expressly or impliedly acquiesced”); MO. ANN. STAT. § 566.061(14) (West 2017) (noting that consent “may be expressed or implied”); *McNair v. State*, 825 P.2d 571, 574 (Nev. 1992) (“Lack of protest by a victim is simply one among the totality of circumstances to be considered by the trier of fact [in determining whether there was a lack of consent].”).

58. *See, e.g.*, Ashe Schow, *Has the Federal Government Ever Had Sex?*, WASH. EXAMINER (June 15, 2015, 12:01 AM), <http://www.washingtonexaminer.com/has-the-federal-government-ever-had-sex/article/2565963> (“This new attempt to alter the American Law Institute’s Model Penal Code, a highly influential document that has been adopted in whole or in part by many states’ legislatures, is part of a push to bring authoritarianism into the bedroom.”).

law in many states, including Minnesota and Wisconsin,⁵⁹ where these standards seem to work perfectly well.

Equally important, it is crucial to explain why this is the *right* standard. This standard simply says that people do not want to be sexually penetrated unless and until they indicate (by words or actual conduct) that they do. Without that requirement, the law would, in effect, be assuming that people are always receptive to sexual intercourse (at any time, with any person) until they do something to revoke that permission.

That is hardly an accurate description of ordinary life. Moreover, when we consider the specific contexts in which sexual abuse typically occurs, the point is even clearer. Sexual interaction too often occurs when someone's ability to express unwillingness is impaired, whether by fright, intimidation, alcohol, or drugs. A standard that treats silence or passivity as equivalent to consent—a standard that requires people to communicate their *unwillingness*—presents enormous dangers of sexual abuse.

b. What circumstances can nullify apparent consent?

The second arena where the major battles over reform are now playing out is on the difficult question: when does *yes not* mean *yes*? Obviously, “yes” is not authentic consent when it is given at the barrel of a gun. The issue we are fighting over today is the same one that has been unresolved since the 1960s: what things other than physical violence make consent inauthentic? Broadly speaking, the major disagreement on this issue is between those who want the list to be very short—limited to things that are almost as coercive as physical violence—and on the other side, those who want that list to include many or all the other circumstances that limit a completely free choice.

Before discussing the choice between grudging reform and very ambitious reform, it is worth mentioning a more abstract but nonetheless crucial issue of strategy. This is an issue that divides those of us in that second group, those of us who agree about the need to protect against a broad range of coercive pressures.

The issue here is the choice, familiar to law students and legal academics, between clear rules and flexible standards:

59. MINN. STAT. ANN. § 609.341(4)(a) (2016) (defining consent as “words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor.”); WIS. STAT. § 940.225(4) (2016) (defining consent as “freely given agreement”).

should reform aim for statutes that specify which pressures are unacceptably coercive? Or, should reform statutes prohibit coercive pressure in broad, general terms, leaving it for the jury to decide whether circumstances were too coercive in the context of each particular case?

When you get into the details of legislative reform, this becomes a decisive issue, and committed reformers have different views, not only about which framework meets fairness requirements but also which approach is ultimately better for victims.

Professor MacKinnon and I have had a friendly disagreement on this issue. She proposes that the legal formula for identifying criminal conduct should be whether the sexual intrusion involved either “[the] threat or use of force, fraud, coercion, [or] abduction,” or also “the abuse of power, trust, or a position of dependency or vulnerability.”⁶⁰ The Model Penal Code provision I have been drafting and working to get passed aims to identify in detail which circumstances involve prohibited kinds of force, fraud, coercion, exploitation, and vulnerability. This means, of course, that the proposed MPC provision also identifies, by implication, the kinds of force, fraud, coercion, exploitation, and vulnerability—pervasive in any modern society—that *do not* suffice to establish criminal liability.⁶¹

The advantage of the proposed MPC approach is that it sets boundaries for the criminal law that are as clear and specific as possible.⁶² On the downside, it is infinitely less concise than Professor MacKinnon’s conceptually phrased alternative. Also, arguably on the downside for the MPC proposal (or an advantage, depending on your perspective), it would not reach various kinds of coercion and exploitation that could sometimes be prosecuted under Professor MacKinnon’s approach. Examples of coercion that the MPC proposal would not prohibit, absent aggravating circumstances, would include the implicit pressure that can arise, even without direct or indirect threats, in interaction between a supervisor and a subordinate at work, between a public defender and the accused, between a wealthy older man and an economically vulnerable young mother, or between a popular

60. MacKinnon, *Rape Redefined*, *supra* note 37, at 474.

61. See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES, *supra* note 54, at 10–22, 42–80 (proposing sexual offenses based on specifically defined circumstances involving force, fraud, coercion, and exploitation).

62. See *id.*

athlete and an insecure student on campus.⁶³ Indeed, Professor MacKinnon argues that the MPC proposal's elaborate structure of rules and exceptions is "fundamentally beside the point."⁶⁴ Referring specifically to the MPC revision effort I lead, Professor MacKinnon acerbically writes:

Scholars debate granular details of the traditional elements of consent and force in sexual interactions in complex and esoteric ways, fracturing consent into a dozen forms with as many modifiers and force into multiple guises and levels, seldom assessing these elements themselves in sex equality terms If rape is less a question of unwanted sex than of unequal sex, if equality not autonomy is its primary issue, if internal psychology is less determinative of these criminal acts than leveraged external conditions and gendered social behaviors, the existing conceptual framework, together with its lexicon of examples, has been fundamentally beside the point all along.⁶⁵

A far better approach, she argues, is to prohibit:

[A]ll the forms of force that someone, usually a man, deploys to coerce sex on someone with less power than he has. This is not only far more realistic in lived experience. It is also more sensible, more humane, and more workable in legal practice. Coercion, including circumstances of social coercion, tend (with social hierarchies) to build upon and leave forensic tracks in the real world that are subject to investigation, observation, and evidence. There are uniforms, positions of authority, traditions and triggers of dominance, well-worn consequences that flow from refusal of the desires of the dominant. Even the psychological dynamics of coercion are far more externally observable in their referents than are those of consent.⁶⁶

The choice between these two approaches is very important and by no means easy. As is often the case when it comes to translating reform aspirations into concrete legal form, the devil is in the details. The differences among reformers on this issue, however, are much less important than the disagreement between all of us on the reform side and the large group of people who want to make sure that prohibited forms of coercion—regardless of whether defined by clear rules or by flexible standards—are kept within narrow bounds.

63. For detailed discussion of the potential abuses that can arise in these situations and assessment of the competing sexual autonomy interest of every individual to seek intimacy in mutually desired relationships, see SCHULHOFER, *supra* note 3, at 99–113, 168–253.

64. MacKinnon, *Rape Redefined*, *supra* note 37, at 436.

65. *Id.* at 435–36.

66. *Id.* at 469.

Instead of going more deeply into the weeds on those issues here, I want to turn now to broader and more fundamental problems that we reformers face in trying to achieve progress. The most intractable problems we face involve trying to convince the large body of citizens who resist efforts to move forward, citizens who do not want criminal sanctions in this area to reach even one millimeter further than they already do.

IV. Resistance to Reform

I will use three greatly oversimplified categories to describe groups that resist almost any reform of a relatively ambitious nature. I will call them the misogynists, the low-information opponents, and the well-informed, very thoughtful opponents.

Those that I call misogynists are those who do not make it a priority to assure the dignity and equal worth of people who happen to be women. They may not even consider the condition of women in our society as a particularly pressing problem. They simply do not see that women are disadvantaged, or they take male privilege for granted. I am not going to say anything further here about this group. Unlike some reformers whom I respect, I do not see people in this group as hopelessly beyond persuasion. We can and must think about ways to communicate with this group and enlighten them. But this is not the place to pursue that issue.

I want to focus here on the two groups of well-intentioned opponents: those whose views are shaped by low-information and those whose opposition springs from sophisticated concerns. These last two groups pose a larger challenge because they hold the balance of power in settings where reform efforts play out. These are the groups that we must understand and connect with if we want to make progress.

The low-information group includes people who have decent values but a distorted picture of what rape cases really involve. They think they understand the problems, because they have seen TV shows about sexual assault on campus; they have heard TV pundits debating both sides of the issues in those cases; they may even have read newspaper op-eds discussing the pros and cons on the subject.

I wish someone would study the amount of time and space that TV and the newspapers devote to campus sexual assault, especially cases involving upper middle-class, mostly White defendants, and then compare it to the time and space devoted to all other situations involving sexual abuse. I do not know what

the numbers would show, but I do know that when my work on legislative reform runs into resistance, it comes far too often from people in policy-making authority who want to know how my proposals would apply to their own son or daughter who just started college. That is a perfectly reasonable question for any parent to ask. But lawyers, judges, legislators and others weighing the merits of public policy surely can be expected to consider the problem through a wider lens. Yet ninety percent of the time, resistance to reform seems to come from decision-making elites who picture the typical rape scenario as a case involving two college classmates at a party, flirting, drinking too much, experimenting sexually, and not communicating with each other very well.

Of course, rape-victim advocates vigorously challenge this picture of campus life by stressing how much deliberately predatory behavior occurs between classmates in college settings.⁶⁷ Unfortunately, that kind of challenge inadvertently perpetuates the idea that *the* central problem our society faces today in connection with sexual abuse is the problem of too much drinking, too little communication, and too much boorish behavior on college campuses. This pervasive assumption is dangerously misleading; it can almost be described as a myth. My claim in this regard may seem counter-intuitive, and it is important not to misunderstand it. Sexual assault on campus is a *very* serious problem. Reform efforts must give it a great deal of attention, and it is a big part of my own work.⁶⁸

But focusing on these campus scenarios gives people—both those committed to reform and those who oppose it—a distorted picture of sexual abuse in the United States today. The situations in which the serious inadequacies in current rape law become most salient and consequential include domestic violence, physically and mentally disabled victims, and gross discrepancies in age, power, or authority. The salient abuses also include intoxication, of course, but not only intoxication involving middle-class college students. Equally important are cases of intoxication

67. See, e.g., Brigid Schulte, *One in 5 Girls will be Sexually Assaulted in College. Here's How to Help Change That*, WASH. POST (Dec. 3, 2014), https://www.washingtonpost.com/blogs/local/wp/2014/12/03/one-in-five-girls-will-be-raped-in-college-eight-steps-parents-can-take-to-change-that/?utm_term=.298bb0aa0275 (discussing the effects of campus sexual assault training focusing on identifying “predatory behavior”).

68. See, e.g., SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES* 354–55, 403–05 (10th ed. 2017); SCHULHOFER, *supra* note 3, at 7–9, 14–15, 261–73.

in settings framed by poverty, domestic violence, and social deprivation of all kinds.⁶⁹

So, building a consensus for reform requires changing the narrative. We must work to shake people free of the media's obsession with young, inexperienced, middle-class peers in college settings. We have thousands, probably millions of well-intentioned citizens, people of good will and good values, who are stuck in the media narratives about naïve, inexperienced kids behaving badly. These low-information people have to be reminded of the wide range of very different contexts in which current rape law fails. They must be made aware of what the rape reform effort is really about.

The third group, the last source of resistance I want to discuss, is the hardest. These are well informed, highly sophisticated people with decent values. They are intensely concerned about the injustice to defendants that pervades our entire criminal justice system: abuses of prosecutorial discretion; shocking racial disparities; intense leverage deployed to coerce guilty pleas, especially when the evidence is the weakest; overly punitive sentencing; mass incarceration; and by no means least, our overly rigid, vastly over-inclusive system of sex-offender registration. This system often includes absurd, life-long restrictions on the offender's residency, education, and employment, applied to offenders whose crimes, though serious to be sure, do not mark them with the potential for life-long violent recidivism.⁷⁰

One answer to all these concerns is that there are vast numbers of conscientious, dedicated police, prosecutors, and judges who work hard every day to make responsible judgments and pursue justice fairly and even-handedly, without overreacting to less egregious behavior. Another answer is that in rape cases the failures of our criminal justice system usually lean in the

69. PA. COAL. AGAINST RAPE, POVERTY AND SEXUAL VIOLENCE 71–84 (2007), http://www.pcar.org/sites/default/files/pages-pdf/poverty_and_sexual_violence.pdf (discussing the relationship between sexual violence and a number of factors such as age, homelessness, employment, and poverty generally).

70. MINN. DEP'T OF CORR., RESIDENTIAL PROXIMITY & SEX OFFENSE RECIDIVISM IN MINNESOTA 2–3 (2007), http://www.csom.org/pubs/MN%20Residence%20Restrictions_04-07SexOffenderReport-Proximity%20MN.pdf (“Not one of the 224 sex offenses would likely have been deterred by a residency restrictions law A statewide residency restrictions law would likely have, at best, only a marginal effect on sexual recidivism.”); *see also* Kelly K. Bonnar-Kidd, *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, 100 AM. J. PUB. HEALTH 412 (2010) (arguing that the current restrictions on sexual offenders might not achieve the goals they are meant to).

opposite direction: police and prosecutors who will not pursue meritorious cases, juries that will not return justified convictions, and outrageously lenient sentencing, especially in cases involving middle-class, White defendants.⁷¹

For many of the victim advocates I work with, those answers are more than sufficient. Many of them cannot imagine that it is in any way plausible to think of rape law as an area where our criminal justice system is too harsh or too discriminatory. I wish I could fully agree with the victim advocates who hold that view, because it would make my job and my own commitments to reform much easier and much less conflicted. I can certainly match every claim about unfairness to defendants with a dozen stories that demonstrate the opposite. When I'm being honest with myself, however, and when I am trying to reach people of good will who do worry about racial discrimination, people who do worry about sex-offender registration and harsh, inflexible punishments, I must acknowledge that there is no simple answer to their concerns.

Both pictures have a lot of disturbing truth. There is pervasive under-reporting and under-enforcement, pervasive unwillingness to credit well-founded victim complaints, and pervasive inadequacy of punishment in prosecutions that lead to conviction.⁷² All that is true. Those problems exist to an alarming degree. But victim advocates must be equally willing to acknowledge the opposing dynamic that exists side-by-side with that neglect: pervasive race bias and class bias in enforcement; pervasive abuse of charging power and plea bargaining; pervasive rigidity and disproportionality in punishment; pervasive overbreadth, overreaction, and inflexibility in the deployment of collateral consequences such as registration, community notification, and restrictions on public benefits, employment, and residency.⁷³

The vexing problem we reformers face in trying to craft a more protective law of sexual assault is resistance from decent

71. See, e.g., Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, N.Y. TIMES (June 6, 2016), https://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html?_r=0 (discussing the role of privilege in sexual assault sentencing and convictions).

72. NAT'L RESEARCH COUNCIL, ESTIMATING THE INCIDENCE OF RAPE AND SEXUAL ASSAULT 36–39, 42 (Candace Kruttschnitt et al. eds., 2014), https://www.ncbi.nlm.nih.gov/books/NBK202264/pdf/Bookshelf_NBK202264.pdf.

73. See, e.g., CASSIA C. SPOHN ET AL., PROSECUTORS' CHARGING DECISIONS IN SEXUAL ASSAULT CASES: A MULTI-SITE STUDY 3 (2002), <https://www.ncjrs.gov/pdffiles1/nij/grants/197048.pdf> (discussing the effects of race and class on prosecution decisions).

people who are well aware of un-redressed victimization but at the same time are acutely aware of extreme racial disparities and the wildly inconsistent responses our media and our society have to sexual abuse: extreme skepticism toward victim allegations on the one hand and on the other, almost simultaneously, indiscriminate, extremely harsh condemnation and punishment when someone is alleged to be or found to be an offender.

The challenge for successful reform is to find ways we can maintain and strengthen our commitment to fair and proportionate punishment while also giving victims the much more effective protection they need from male aggression and all the other forms of exploitation and sexual overreaching that are still so pervasive in the United States today.