

Sexual Offenses

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While American penal codes punish a wide variety of sexual offenses, reform efforts and their controversies have focused on the core crime of rape, and in particular on the principle of consent. Over many decades, definitions of rape have moved from egregiously pro-defendant rules requiring strong resistance from complainants to somewhat more nuanced notions of force and ultimately, in many states, to a deceptively simple-looking rule defining rape as sex without consent. Lawmakers and commentators have argued for pushing the line farther along to requiring “affirmative consent”—a standard now at work in just a few states but widely adopted in the parallel world of college disciplinary rules. As illustrated in recent American Law Institute debates over the Model Penal Code, that last step is a difficult one because of proof and mens rea problems. As a result, at least in the near term and at least outside the college context, the equilibrium might well—and arguably should—settle at the nonconsent point in the continuum, until the law finds a better way of apprehending the great psychological complexities of sexual communication and conduct.

INTRODUCTION

The subject of “sexual offenses” covers a wide range of conduct. While most would associate it with the crime of rape, the term can also encompass such diverse matters as prostitution, child pornography, and human trafficking. The goal of this paper is to identify areas of criminal law¹ widely perceived in need of reform, and the various subcategories of sexual offense law vary widely in terms of fitting that criterion. While there may be disputes about the scope and implementation of prostitution laws,² they have not been salient in

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1. The category of sexual harassment generally applies to noncriminal misconduct subject to tort law or institutional disciplinary rules.

2. Indeed, as matter of categorizations prostitution is often placed under the rubric of “vice crimes.” See FRANKLIN ZIMRING & BERNARD HARCOURT, CRIMINAL LAW AND THE REGULATION OF VICE (2nd ed., 2014).

public discourse of late, except in the form of human trafficking. And for that latter tragic subject, since there is obviously a moral consensus about its evils, the major discussions are about finding better resources and international mechanisms to fight it, not about how we conceive it legally.³ Child pornography is certainly an area subject to some contention, but mainly about whether federal sentences are excessive.⁴ The related area of Internet stings by police to find those who prey on children is subject to some disagreement about police conduct, with arguments addressing the boundaries of attempt law or the entrapment defense.⁵ Finally, there is plenty of dispute about the wider variety of sex-offender registration laws, with constitutional discussion about when a registration requirement might count as illegal punishment, and policy debates about its overbreadth.⁶ But if we are to concentrate our attention on an area most in contention and most in need of general legal resolution, the subject is indeed rape.

In that regard, we can readily identify the most contested specific subject within the realm of rape law. As will be elaborated on below, American rape law is at a pivot point about the role of *consent* in penal definitions of rape or sexual assault. Laws defining rape and sexual assault⁷ have undergone remarkable transformation in the last half-century, and equally remarkable is that the changes reflect a fairly strong moral and political consensus—at least up to a (very recent) point. For one thing, certain procedural rules long denounced as retrograde have largely disappeared. But in regard to our focus here on substantive criminal law, while state laws still vary widely, we can trace a fairly steady movement in the doctrine. It runs from the now-infamous “utmost resistance” test, to the “reasonable resistance” test, to a criterion of “force,” to a criterion of nonconsent, and ultimately (perhaps) to a requirement

3. See Jennifer M. Chacon, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977 (2006).

4. See Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 *STAN. L. & POL'Y REV.* 545 (2011).

5. See, e.g., *People v. Thousand*, 631 N.W.2d 694 (Mich. 2001) (finding that police sting remains within legal boundary of attempt law).

6. See *Kansas v. Hendricks*, 521 U.S. 346 (1997) (lifetime sex offender registration requirement not unconstitutional). See generally Wayne A. Logan, “Sex Offender Registration and Notification,” in Volume 4 of the present Report.

7. A caveat about vocabulary: “Rape” laws do not necessarily use the term “rape.” Some speak of “sexual assault,” and in most jurisdictions even if “rape” is a crime, there will be other very serious offenses under the rubric of sexual assault. Moreover, laws vary as to whether they are limited to acts of penetration or otherwise are gender-specific. This chapter will finesse those difficult questions by using the term “rape” to signal the act of penetration for sure, but also other serious violations of bodily integrity and sexual autonomy that a legislature would deem equally harmful.

of affirmative consent. The key choice for legislatures now is whether to make nonconsent or the absence of affirmative expression of consent the chief element of the crime of rape.⁸ That apparently subtle distinction has become hugely controversial. To be sure, there are related components of rape law that are still subject to debate and legislative revision, such as defining categorical incapacity to consent (in terms of youth, mental disability, unconsciousness, and intoxication, or subordination in a professional relationship),⁹ or rape by fraud or extortion, or the issue of marital immunity. But the focus of public debate has been what we might call situational consent, and the wisdom or feasibility of an affirmative-consent rule.

That issue has presented a unique challenge for settling even the most basic elements of the crime, and it requires us to face old and fundamental questions about how to define the act element of crime (*actus reus*), and how to choose from the conventional menu of mental-state standards (*mens rea*)—and indeed whether conduct element definitions end up obviating any need for mens rea terms. And thus we see a great paradox: An area of human conduct uniquely fraught with moral, social, and political dispute and empirical uncertainty has also been an arena for substantive criminal law doctrinal analysis of the most old-fashioned and abstract kind. A subject that some criminal law professors approach with anxiety or avoid altogether because of its controversy and sensitivity is also a useful topic to teach legal doctrine to first-year law students. Indeed, the new doctrinal debate focuses on the state of the Model Penal Code, a body of law written over a half-century ago that remains well-regarded for its rational and progressive rebuilding of penal law—except for its notoriously obsolete and culturally unenlightened provisions on rape. And as shown below, there are related paradoxes. For one thing, appellate judges used to deciding relatively abstract questions of law now take seriously claims of insufficient evidence that require them to parse the highly delicate and sensitive factual details of complex sexual communications between nonstrangers. For another, much of the debate over the best legal standard is being carried out by a kind of legal proxy, the non-criminal disciplinary rules governing the conduct of a distinct subset of people—undergraduate students on college campuses.

8. For a long historical view of the evolution of rape law, see GUYORA BINDER, *THE OXFORD INTRODUCTIONS TO U.S. LAW: CRIMINAL LAW* 261-84 (2016).

9. These issues receive some attention below regarding the mens rea doctrine.

I. A CENTURY OF EVOLUTION OF RAPE LAW DOCTRINE

Here is a brief review of how the line distinguishing rape from innocent conduct has moved over the last century of American law. We start with the “utmost resistance” test. In *Brown v. State*,¹⁰ where the legal definition of rape was simply to “carnally know” another “by force and against her will,” it was insufficient for the state to prove that the sexual act occurred “in the entire absence of mental consent or assent.” Rather, the complainant must have undertaken “the most vehement exercise of every physical ... power to resist”¹¹ until the very act of consummation. It is telling that in these old cases the alleged victim (complainant) was called the “prosecutrix,” because the terminology underscores that the prosecutor must align with the complainant to prove required action by her and not by the defendant. Put differently, to reframe the crime into elements about the defendant’s conduct or state of mind, the prosecution must prove that the defendant’s effort at consummation is accompanied by a virtual assault with intent to kill, since the complainant must have responded with the force virtually necessary to survive a fatal attack—a demonstrable effort at the equivalent of self-defense to homicide.

By mid-century, that utmost-resistance test came to be viewed as an unjustifiable obstacle to conviction, rooted in misogynist prejudice. The next step on the continuum is captured by the New York case of *People v. Dorsey*.¹² While state law made “forcible compulsion” the actus reus of the crime, the court required proof that the complainant undertook the “earnest resistance ... reasonably to be expected from a person who genuinely refuses to participate in sexual intercourse.”¹³ This test obviously eases the prosecutor’s burden, and indeed—as construed by the court—even no resistance at all could be sufficient (most obviously in stranger cases, where the complainant could reasonably infer that any resistance was futile). But still the focus was on the complainant’s conduct, and still the state bore not just the burden of proof beyond reasonable doubt at trial but a considerable burden to fend off an insufficiency of evidence claim on appeal.

A next important stage on the continuum is reflected in the famous California case of *People v. Barnes*,¹⁴ which establishes that the actus reus of the crime really must in fact be framed in terms of the action of the defendant. Rejecting any formal requirement of resistance by the complainant, the California law

10. *Brown v. State*, 127 Wis. 193 (1906).

11. *Id.* at 199.

12. *People v. Dorsey*, 429 N.Y.S.2d 828 (N.Y. Sup. Ct. 1980).

13. *Id.* at 832.

14. *People v. Barnes*, 42 Cal. 3d 284 (1986).

defined rape (and still does) as a sexual act “accomplished against a person’s will by means of force or fear of immediate and unlawful bodily injury on the person or another.”¹⁵ The state Supreme Court issued a stern rebuke to a lower appellate court that had continued to require some proof of resistance (and also cited social science evidence of not just the futility but the positive harm of resistance in certain circumstances). In technical legal terms, the court was also admonishing the lower appellate courts to grant more respect to jury verdicts and hence to look with more skepticism on claims of insufficient evidence.

But the *Barnes* standard is still only a midpoint on the continuum. For one thing, the force requirement still speaks of a threat of injury that presumably goes beyond the experience of unwanted sex per se. For another, in the factually nuanced cases and often disputed narratives in nonstranger cases (like that in *Barnes* itself), where the defendant has not expressly threatened a physical battery independent of the nonconsensual sexual act, the inference of force will remain very much a matter of interpretation. Thus, even while resistance is not formally necessary, it is often vital as part of the evidence for a prosecutor trying to prove force. Further, *Barnes* implicitly raises questions of mental state as well as act, matters buried in the utmost-resistance standard and only indirectly raised in *Dorsey* in the context of the complainant’s reasonableness in perceiving whether resistance was feasible. Indeed, *Barnes* implicitly raises questions of mental state with respect to both parties. Did the complainant reasonably perceive the defendant’s arguably ambiguous actions as threats? And if a reasonable perception that his action contained a threat can establish force, does that mean that the mens rea of rape is less than full intent? That is, while of course the state must prove the defendant’s intent to have intercourse, is it sufficient to prove that he was merely reckless or negligent with respect to whether his actions will be reasonably perceived as a threat? Finally, and despite the court’s admonitions, with all these new subtleties in the definition of rape, the *Barnes* standard could hardly preclude appeals based on insufficiency of evidence, nor could it spare judges the discomfort of close scrutiny of sensitive and entangled human interactions and speculations about governing social mores.¹⁶

15. *Id.* at 292.

16. To get a sense of the awkward delicacies appellate judges face in finely parsing the evidence in nonstranger rape cases, see Jeannie Suk’s narration of how judges at different tiers of a state court system contentiously analyzed the facts of a famous case in “*The Look in His Eyes*”: *The Story of Rusk and Rape Reform*, in *CRIMINAL LAW STORIES* 171-211 (Donna Coker & Robert Weisberg eds., 2013).

The previous standards may have sometimes applied in the context of a statute or doctrine that also mentioned absence of consent, but the inevitable next step on the continuum was to focus solely on the criterion of nonconsent, without any requirement of force, and certainly not a threat of extrinsic assaultive force, much less resistance. And notably, while American law generally does not formally distinguish between stranger and nonstranger cases, legislative and judicial debates in this next historical step have mainly focused on cases involving acquaintances. Thus many of the most controversial adjudications have involved people who have had at least a casual social or romantic relationship for a while, or who are new dating partners.

Exemplary is *State v. Smith*,¹⁷ which involves a spontaneous and initially consensual social encounter. The *Smith* decision makes absence of consent the very essence of the crime. But in moving the line even farther along than did *Barnes*, the *Smith* court unavoidably encountered questions of state of mind. Whether the complainant has indeed consented or not might seem to be a question about an observable event, but in the court's language, "whether a complainant should be found to have consented depends upon how her behavior would have been viewed by a reasonable person under the surrounding circumstances."¹⁸ In turn, "whether a complainant has consented to intercourse depends upon her manifestations of such consent as reasonably construed."¹⁹ Thus, the court conceded that the mental state of the defendant is not really separate from the presence or absence of the act of consent, and that the mental state need not be "an actual awareness on the part of the defendant that the complainant had not consented or a reckless disregard of her nonconsenting status."²⁰ Even negligence with respect to whether the complainant has manifested consent might be sufficient for rape, and so the subjective and objective components of the crime are analytically entangled.

But rape law reformers were still not satisfied by the easing of the prosecutor's burden offered by the *Smith* standard. As the *Smith* court said, "[c]onsent is not made an affirmative defense," but its absence must be proved beyond a reasonable doubt as an element of the crime.²¹ And if that question turns on how a reasonable person would interpret the possibly ambiguous or vague "manifestations" by the complainant, juries might err too far on the side of the defendant, and appellate courts might yet again find insufficient evidence—

17. *State v. Smith*, 554 A.2d 713 (Conn. 1989).

18. *Id.* at 717.

19. *Id.*

20. *Id.*

21. *Id.*

even under this standard. So the proposed solution brings us to the choice point at which American rape law now stands: To induce a person who seeks intercourse with another to avoid any unreasonable risk of wrongly construing the other person's behavior as indicating consent, the new standard requires as the key element of the crime that the manifestation amount to affirmative expression. In the language of the important case of *In re M.T.S.*,²² "any act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to the specific act of penetration constitutes the offense of sexual assault."²³ As a result, the only "force" needed is "any amount of force against another person in the absence of what a reasonable person would believe to be affirmative and freely-given permission to the act of sexual penetration."²⁴

Although I will discuss the implications of this new standard in more detail below, here is the gist of the issue in the words of the *M.T.S.* court itself:

Persons need not, of course, expressly announce their consent to engage in intercourse for there to be affirmative permission. Permission to engage in an act of sexual penetration can be and indeed often is indicated through physical actions rather than words. Permission is demonstrated when the evidence, in whatever form, is sufficient to demonstrate that a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act. ... Although it is possible to imagine a set of rules in which persons must demonstrate affirmatively that sexual contact is unwanted or not permitted, such a regime would be inconsistent with modern principles of personal autonomy.²⁵

The court is conceding that while "affirmative consent" purports to be an objective event that helps us avoid the interpretive difficulties of the *Smith* standard, unless we truly literally mean that only "yes" means "yes," the problem of interpretation never goes away. Thus, a defendant can argue that nonverbal conduct by the complainant could be reasonably construed as affirmative consent, and then, in turn, the plausibility of such a claim might well depend on some empirically based understanding of the norms of sexual communication.

22. *In re M.T.S.*, 609 A.2d 1266 (N.J. 1992).

23. *Id.* at 1277.

24. *Id.*

25. *Id.*

The application of conventional principles of mens rea to rape law has always been vexing, and the reason should now be evident. But let us make a key distinction. In one area of sexual assault law which is not the main subject here, those conventional principles and doctrinal choices still apply. This is the area of incapacity in its various forms. When the incapacity is due to age, under the rules of statutory rape there is a straightforward question of the required mens rea for the underage element, and we can safely say that many if not most jurisdictions make this a strict liability element—and do so fairly uncontroversially.²⁶ Somewhat more complicated is incapacity in the form of mental deficiencies because of less certainty about the objective indications—but negligence is the norm.²⁷ Still somewhat more complicated is situational unconsciousness, where negligence is the usual standard, but the role of intoxication (by either or both parties) has led to policy disputes.²⁸

But when it is a matter of actual consent, not incapacity to consent, American law has been unclear about whether or how mens rea should enter the equation. The implication of the *Smith* and *M.T.S.* standards and possibly the *Barnes* and even *Dorsey* standards, is that a defendant is guilty if he is reckless—or possibly negligent—with respect to whether his actions could be reasonably construed as threatening the relevant degree of force, or whether the complainant's conduct manifests consent. Some defendants have framed their arguments that they were not reckless or negligent in these situations by claiming a “mistake of fact” defense, which, but for a possible shift of burden of proof, amounts to saying that they lacked the required mens rea. Where the defendant argues that his mistake was reasonable, he is implicitly construing the required mens rea as at least negligence. In many jurisdictions, the mistake-of-fact defense is rejected and mens rea does not explicitly become any part of the legal dispute. Thus in *Commonwealth v. Fischer*,²⁹ where the relevant standard was whether the defendant engaged in “forcible compulsion ... by use of physical, intellectual, moral, emotional or psychological force, either express or implied,”³⁰ the court construed state law as forbidding any mistake-of-fact defense. On the other hand, even under that standard, especially because of the latter phrases, the jury might well have considered the reasonableness of the defendant's understanding of his own behavior in light of the complainant's apparent responses.

26. BINDER, *supra* note 8, at 280. A few states have moved toward a negligence standard. See, e.g., *People v. Hernandez*, 61 Cal. 2d 529 (1964).

27. E.g., *White v. Commonwealth*, 478 S.E.2d 713 (Va. Ct. App. 1996) (negligence sufficient in case of retarded victim).

28. BINDER, *supra* note 8, at 279-81.

29. *Commonwealth v. Fischer*, 721 A.2d 1111 (Pa. Super. Ct. 1998).

30. *Id.* at 1116.

But Professor David Bryden expresses skepticism whether a focus on the defendant's mens rea or mistake would make any difference in jurisdictions that retain the force-resistance rule, because juries are unlikely to believe that a defendant, who used force on a resisting victim, honestly believed she consented.³¹ Bryden suggests that litigation over mistake will be rare in any event, because in addition to ambiguous cases of consent being screened out before trial, few rape defendants will find it in their interest to argue mistake: “[A] defendant who claims that the woman consented may still get the benefit of jurors’ speculation that he made an understandable mistake and so should not be punished. Unless he is unusually honest, or the facts are unusually clear, he has no reason to concede that she did not consent, and therefore no reason to assert a mistake defense.”³²

II. THE CURRENT STATE OF THE LAW

One can find a number of sources surveying the current array of state law, both statutory and judicial, defining the elements of rape. These surveys are trying to hit a moving target, because in some states the law remains somewhat undefined or is in active flux. They also face a great obstacle in comparing state laws, because these laws vary so much in the number and complexity of their forms and severity levels of rape and sexual assault. Nevertheless, a review of well-researched and reasonably up-to-date sources³³ shows a consensus on some key general points: A majority of states still have some version of an explicit “force” requirement.³⁴ Some have what might be called a soft version of affirmative consent by using the term “unwillingness” in their statutes.³⁵ Perhaps 15 could be said to be affirmative-consent states, but in several jurisdictions the notion is implicit and tied to force (as in California under *Barnes*), with some requiring express or implied acquiescence. Only three could be said to be “pure” affirmative-consent states: Wisconsin, Vermont, and New Jersey.³⁶

31. David Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 341-43 (2000).

32. *Id.* at 414-15.

33. Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 442 (2016); 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, 1084-86 (2011). Patricia J. Falk, *Not Logic But Experience: Drawing on Lessons from the Real World in Thinking About the Riddle of Rape by Fraud*, 123 YALE L.J. ONLINE 353, 357 (2013).

34. Tuerkheimer, *supra* note 33, at 447.

35. *Id.* at 445-48.

36. *Id.* at 451.

One recent source, the American Law Institute, helps give us an impressionistic picture—which may be the best we can hope for in this inquiry.³⁷ It tells us that five states define consent as “positive cooperation.” Two states define consent in terms of “express or implied acquiescence,” which might be viewed as a subspecies of affirmative consent. Three more states do not have a clear definition, seeming to lean toward a positive cooperation conception by using the term “without ... consent,” but without any statutory definition of consent. Six states define nonconsent with language that can be roughly paraphrased as some expression of unwillingness or resistance, although several of these states continue to use some language of “force.” One state defines consent as “actual words or conduct indicating freely given agreement” but then also requires that “lack of consent was clearly expressed by the victim’s words or conduct.” Another state penalizes sexual intercourse when the defendant knows it is without consent, but case law suggests that the complainant must communicate unwillingness.

Adding to that uncertainty is that even in the so-called “pure” affirmative-consent states, the interpretive case law has so far told us very little. Professor Deborah Tuerkheimer has shown that in those states, the facts in the appellate cases upholding rape convictions under the affirmative-consent standard show enough indications of force or manifest nonconsent that they could readily come out the same way under the earlier standards.³⁸ As she finds, the cases tend to fall into fact patterns where the complainant was asleep or intoxicated, or exhibited fear. In the first two, the facts of the cases clearly establish liability without affirmative consent being an issue. Only the third contains cases where the complainant is passive, such that an argument could be made that the missing element was affirmative consent, but those cases tend to involve such otherwise decisive factors as past physical abuse, incest, or “surprise attack.”³⁹ And perhaps most notably, virtually none of the cases turns on a plausible argument of miscommunication between the parties, where plausible interpretations could be found on either side.⁴⁰

Because state laws vary so much, especially where their divergent vocabularies and gradations make comparisons difficult, and because state courts often fail to resolve statutory ambiguities, generalizing about the average or modal point on the historical continuum is difficult. But one might venture that the heart

37. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (Preliminary Draft No. 5, Sept. 8, 2015) [hereinafter Preliminary Draft No. 5].

38. Tuerkheimer, *supra* note 33, at 451-57.

39. *Id.* at 459.

40. *Id.* at 468.

of American law now is something like the *Smith* consent standard, a standard that stops short of affirmative consent. This standard arguably holds sway even in many states that officially still have “force” language on the books but have allowed judges to finesse their way around it. And as I suggest later, this is the point where American rape law likely will be—and probably should be—for some time.

An alternative, or complement, to a survey of current law is an analytic map of the possible combinations of act and mens rea available to the states in defining rape law. Useful here is a chart by David Bryden:⁴¹

	Mens Rea		Act
1.	Intentional		Penetration, plus
2.	At Least Recklessly	1.	Force and nonconsent
3.	At Least Grossly Negligent	2.	Nonconsent (Subjective)
4.	At Least Negligent	3.	Nonconsent Manifested by Either Verbal or Physical Resistance
5.	Strict Liability	4.	Lack of Affirmative Expression of Consent

As Bryden observes:

By combining one of the mental states from the left column with one of the acts from the right column, we can create a definition of rape to suit nearly anyone. Of all the possible combinations of a mens rea and an act, the most advantageous to the prosecution would be strict liability combined with subjective nonconsent. The most favorable to the defense would be intent (to have nonconsensual intercourse) combined with force and nonconsent.⁴²

We can add to Bryden’s taxonomy a fifth act standard, penetration plus force, employed by Model Penal Code (MPC), to which I now turn.

III. THE MODEL PENAL CODE AS IT HAS BEEN

Overall, the MPC, in both its “General Part” (dealing with such broad concepts as mens rea, complicity, and attempt) and in its specific statutes for specific crimes, has won considerable favor over the decades and has broadly influenced the codes of many states. It has also remained very stable, except for some proposed changes in its sentencing provisions,⁴³ with little public attention to, or calls for, amendments. Then we get to the paradox of its rape

41. Bryden, *supra* note 31, at 422–23.

42. *Id.* at 423.

43. In the first major change in the original MPC, the ALI has now approved MODEL PENAL CODE: SENTENCING (Proposed Final Draft, approved May 24, 2017), which calls for such innovations as sentencing guidelines and sentencing commissions.

provisions: While some states have incorporated or imitated those provisions, the provisions have also been criticized as embarrassing cultural anachronisms. Yet now those very rape provisions are undergoing a process of revision that has brought unprecedented public attention to the American Law Institute (ALI) mission of model law writing. So on the subject of rape law, the MPC is trying to leap 50-plus years forward over the many incremental changes that evolved in the states.

Below is a key part of the “current” MPC law, excluding provisions dealing with incapacity:

Section 213.1. Rape and Related Offenses

(1) *Rape*. A male who has sexual intercourse with a female not his wife is guilty of rape if:

(a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; ...

Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted sexual liberties, in which cases the offense is a felony of the first degree.

(2) *Gross Sexual Imposition*. A male who has sexual intercourse with a female not his wife commits a felony of the third degree if:

(a) he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution;⁴⁴

A number of features stand out. First, the MPC provides for three different felony levels of rape, and a lesser included offense of “gross imposition.” In that sense, the MPC somewhat fairly reflects the state of the law today. Many jurisdictions have at least two levels of rape, with different combinations of elements. In one sense it is obvious that any prosecutor can call on lesser offenses below the highest rape charges and use them as a risk-averse offering to a possibly lenient jury or to a defendant considering a guilty plea.⁴⁵ Putting

44. MODEL PENAL CODE § 213.1 (Proposed Official Draft 1962).

45. According to Professor Deborah Denno, the MPC drafters believed that severe punishments in cases not involving strangers or severe bodily harm had two perverse effects: a perception that these penalties were too severe led to underenforcement and false acquittals; and severe punishments exacerbated the problem of racially motivated prosecutions of black men accused of raping white women. Deborah Denno, *Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207, 208 (2003).

aside the complex menu of statutory crimes in the case of predation on children (i.e., “contributing to the delinquency of a minor”), there is always some form of non-sexual generic assault available. But the MPC offers a lower felony charge similar to what some states do, and what many progressive commentators recommend: a lesser, compromise sexual offense which, to put it simply, could be viewed as further along our historical continuum than the higher offense. Thus a state can have a force requirement for the higher crime and a nonconsent standard for the lower.

The MPC does something like this, but notice its language. It uses the term “by force,” but it has no term for nonconsent, and while never defining “force,” it distinguishes force from “threat of imminent death, serious bodily injury, extreme pain or kidnapping.” For the “gross sexual imposition” crime, it speaks of compelling the woman to submit to intercourse “by any threat that would prevent resistance by a woman of ordinary resolution.” It might thereby imply that “force” under section (1)(a) means threat of physical harm to distinguish it from compulsion to submit under section (2)(a). In her article calling for revision of the MPC rule, Professor Deborah Denno suggests we give the 1962 drafters at least partial credit for enlightenment.⁴⁶ The absence of a term for consent was part of its effort to avoid the “put the victim on trial” effect that results from focusing on the complainant’s state of mind or actions.⁴⁷ Objective act elements were to do the work. But still, the 1962 law is widely derided now for an overly defendant-friendly rule even for the lower offense, and also for its choice to distinguish the two highest felony levels on the basis of whether the complainant is a “voluntary social companion.” That partial diminution of the suffering of nonstrangers now looks terribly ill-informed. But in some ways the MPC was being realistic, given that many decades later the nonstranger cases are the hardest for prosecutors to win. Moreover many reformers call for a lesser offense of sex without consent which, while not formally designated as applying to nonstrangers, is clearly designed to enable convictions in those cases.⁴⁸

But the drafters’ failure to address the matter of nonconsent in acquaintance rapes is reflected in their inadvertently telling assertion that rape law must draw “a line between forcible rape on the one hand and reluctant submission

46. *Id.* at 207–08 (also noting that the post-1962 Commentaries on art. 213 recognized and called for reform in some of the contestable 1962 provisions).

47. STEPHEN SCHULHOFER, UNWANTED SEX 20-24 (rev. ed. 2000).

48. See the proposal by Professor Donald Dripps for an intermediate standard of “sexual expropriation.” 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).

on the other.”⁴⁹ These substantive provisions, along with outdated evidentiary rules like the prompt complaint and corroboration rules, as well as its gender-specificity and marital immunity rule, no longer reflect the state of American rape law. But as Professor Denno argues, the 1962 law is still widely cited and remains important—hence the new move to revise it, to which we turn below.⁵⁰ But first we must look at another major new vector in the American debate about rape law: the college disciplinary system.

IV. THE COLLEGE CONTEXT

The move toward an affirmative-consent standard has been happening along a front parallel to the criminal law—our institutions of higher education. A huge number of universities have now adopted some version of affirmative consent as part of their internal disciplinary standards.⁵¹ It is very hard to generalize among universities, because the standards are so much in flux and because they are difficult to compare to each other—even more so than the state criminal laws discussed above.⁵² Some have a single category called sexual assault. Others have distinct enumerations of forms of sexual misconduct with different names, different act (and mental state) elements, and different penalties. Further, whereas in criminal law we can hold constant the procedural side of things—i.e., the due process and related rights of criminal defendant are roughly uniform regardless of the state’s penal code definitions—universities vary widely in terms of who the adjudicator is (administrator, faculty panel, or student jury), who the “prosecutor” is, what the rules of evidence and discovery are, whether professional counsel play a role, and so on. But, as discussed below, a fair generalization is that universities have moved in the direction of an affirmative-consent standard.

But while we may think of these university disciplinary systems as “private law” (even when it is a public university) designed independently of state criminal law, governmental law directly interacts with college disciplinary systems in at least three ways.

49. MODEL PENAL CODE § 213.1 commentary at 279-80 (Official Draft and Revised Comments 1980).

50. See Denno, *supra* 43.

51. Tuerkheimer, *supra* note 33, at 442 (number is as high as 1400).

52. See HEATHER M. KARJANE, BONNIE S. FISHER & FRANCIS T. CULLEN, NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT 3, 6, 11 (2005), <http://perma.cc/H7EE-9CZN>.

First, since college campuses tend to be the most visible arena in the public media for the controversies about defining and punishing sexual assault, especially for nonstranger or “date rape” cases, the intellectual and public energy operating in that arena greatly influences discussion of governmental law.

Second, and more concretely, there is a movement in the state legislatures to impose the affirmative-consent standard on both public and private colleges and universities as a condition of state funding.⁵³ California now requires institutions receiving state funding (effectively all of them) to forbid any sexual activity on campus without affirmative consent as defined in the California Education Code:

affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.⁵⁴

This law is entirely separate from the state’s criminal law, and it doesn’t even tell the university how to define sexual assault or how much to punish it.

The third mode of government-college interaction is a still more pervasive *federal* intervention that has energized and polarized public debate about affirmative consent: the U.S. Department of Education’s effort to control colleges’ internal university disciplinary rules and processes. This has been a very remarkable phenomenon, with complex roots. The statutory basis for this incursion is Title IX,⁵⁵ a law originally motivated by a concern with sexual discrimination in colleges, and one area in particular—funding for college athletics. But the wide-ranging notion of discrimination has come to embrace sexual harassment and ultimately sexual assault. The Department of Education now issues a variety of messages—some through formal regulations, some through exhortations, some through passive-aggressive “guidance”

53. Tuerkheimer, *supra* note 33, at 442-43.

54. CAL. EDUC. CODE §67386(a)(1); *see also* N.Y. EDUC. LAW § 6441.

55. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-99.

documents⁵⁶—that colleges must take greater steps to ensure student safety, and that of female students in particular, by strengthening their rules against sexual assault. Ironically, while an original goal or effect of this new administrative effort was to hold the colleges themselves accountable and thus to allow injured students' actions against the college, a later effect has been that the colleges respond to Title IX with arguably harsh quasi-criminal law systems to punish students. In turn, where the system is criticized by accused students for lack of due process, the aggrieved accused students sometimes sue the college and the federal government for complicity in this deprivation.

Professors Jeannie Suk and Jacob Gerson have narrated this incursion in scathing terms.⁵⁷ As they portray it, the complicated world of romance, dating, and sexuality of 20-year-olds has become the subject of the federal administrative state and its rather abstracted principles of technocratic and procedural rationality.⁵⁸ Unbounded by any penal code or by the constitutional constraints on actual criminal adjudication, the government has been forcing colleges to prosecute a variety of forms of behavior not otherwise illegal under any criminal law or even any independent civil regulation.⁵⁹ It has also complicated or confounded the adjudication of sexual offenses with public health discourse about “risk.” The goal of the public health may be to bring “nonjudgmental” remedies to the harms students suffer, but, as Suk and Gerson show, this approach has some worrisome consequences. First, while the government tries to finesse the ascription of blame by purporting to treat both parties to a sexual encounter as being “at risk,” it has produced demographic data on “risk” that ends up reinforcing prejudicial stereotypes about certain minority-group males as the likeliest perpetrators of harm.⁶⁰ Second, the government’s “encouragement” of better sexual health education ends up with colleges virtually writing scripts for sexual communication among students, with declarations that consent should not just be affirmative

56. The most famous of these is the so-called “Dear Colleague Letter.” Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP’T OF EDUC. (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<http://perma.cc/DB7V-5UBD>]. Opining on how colleges might better define and fight sexual violence, the letter offered interpretations of Title IX by the Education Department’s Office for Civil Rights, including that colleges use the preponderance of the evidence standard in adjudications, but the letter was evasive on its source of authority.

57. Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. 881 (2016).

58. *Id.* at 885.

59. *Id.* at 892. Under the Clery Act, 20 U.S.C. § 1092(f), which requires crime reports from colleges, the government has a much broader set of definitions of offenses than would obtain in the relevant state penal code or in the college’s own rules.

60. Suk & Gerson, *supra* note 57, at 912-16.

but even “enthusiastic” and going into bizarre detail about what qualifies as “good” sexual activity.⁶¹

While these messages come to students in a variety of ways short of express prohibitory rules, Suk and Gerson argue that the effect is to induce among students the sense that these new norms do indeed represent the “rules.” Further, the actual sanctioning effect of Title IX’s messages in terms of formal constraints on the colleges remains unclear, because colleges, terrified of the loss of federal money, respond to the nonbinding messages from the government with agreements to significantly change their disciplinary definitions and processes in implicit or negotiated settlements that dodge the actual legal issues. As a result, the college has become the laboratory where we are testing the various hypotheses about how a full-fledged affirmative-consent doctrine would operate in state criminal law—with outcomes that are at least very confusing or at worst very distressing.

While these governmental actions and legal and campus advocacy have fueled the push toward an affirmative-consent standard, there has also been robust scholarly commentary on the wisdom of that standard—and it has inclined toward the skeptical. From the perspective of political philosophy, Professor Aya Gruber has suggested that the legal uncertainty and controversy over the standard is inescapable because the very concept of “consent” is fundamentally contestable:

[T]here are a variety of views about what constitutes a consensual mental state, ranging from enthusiastic to grudging, from hedonistic to instrumental, from sober to quite inebriated. Others argue that focusing on internal willingness puts victims on trial; thus, sexual consent should be about what the parties say and do. Even here, there is considerable variability on what constitutes performative consent. Some hold that engaging in sexual activity without protest, or with weak protest, communicates consent. Others insist that consent be “affirmatively” or “positively” expressed. To complicate matters, affirmative consent, depending on who you ask, runs the gamut from nonverbal foreplay to “an enthusiastic yes.”⁶²

Gruber offers a striking insight into an implicit but highly troublesome analogy between consent and contract. The notion of consent, she observes, evokes the liberal principles that animate the law of contract, and at a high level

61. *Id.* at 924-31.

62. Aya Gruber, *Consent Confusion*, 38 *CARDOZO L. REV.* 415, 417 (2016).

of generality the contractual vision of freely undertaken and well-informed assent might seem temptingly suitable as a standard to guide the law governing sexual relations. But under scrutiny, that conception is an odd fit for the crime of rape and related offenses:

The contractual framework is both over- and under-inclusive. It could dictate that sexual agreement procured through deception, tainted by intoxication, or failing to meet formalities is invalid, leading to overbroad laws. At the same time, contract principles might permit defendants to procure sexual consent through capitalizing on fear, insecurity, or lack of bargaining power, so long as such behavior does not amount to the duress that vitiates a contract.⁶³

For such reasons, Gruber concludes, the meaning of consent in sexual relations is necessarily distinct from that in contractual relations. While feminist reformers promoted a shift to the consent standard in their effort to *broaden* liability, many of those reformers were then disappointed when decisionmakers botched this standard and thus failed to proscribe unwanted sex. “Activists urged affirmative consent standards to compel legal actors to arrive at the ‘right’ conclusion about what constitutes rape,” all the while glossing over “the various presumptions and normative commitments underlying reformers’ ideas about what *is* the right conclusion.”⁶⁴

On another academic front, social scientists have used highly sophisticated survey instruments to examine how young people communicate about sex. A clear consensus emerges from this research, but alas it is not one that offers any very clear guidance to lawmakers. Communication between potential sexual partners occurs mainly through physical language, not verbal,⁶⁵ or through very subtle and indirect negotiation on to which legal standards of affirmative or manifest consent do not readily map.⁶⁶ Survey instruments reveal that these communications do not fall into sufficiently regular patterns, much less “scripts,” to allow for a later third party to judge whether a claim of consent

63. *Id.*

64. *Id.* at 419.

65. Terry P. Humphreys & Melanie M. Brousseau, *The Sexual Consent Scale—Revised: Development, Reliability, and Preliminary Validity*, 47 J. SEX RES. 420, 421 (2010).

66. Various studies include: Lucia F. O’Sullivan & E. Sandra Byers, *College Students’ Incorporation of Initiator and Restrictor Roles in Sexual Dating Interactions*, 29 J. SEX RES. 435 (1992); Michael W. Wiederman, *The Gendered Nature of Sexual Scripts*, 13 FAM. J. 496 (2005); Annika M. Johnson & Stephanie M. Hoover, *The Potential of Sexual Consent Interventions on College Campuses: A Literature Review on the Barriers to Establishing Affirmative Sexual Consent*, 4 PURE INSIGHTS (2015), <http://digitalcommons.wou.edu/cgi/viewcontent.cgi?article=1050&context=pure>.

meets some general legal standard.⁶⁷ And notably, the research reveals that on the whole students do not give specific permission for individual sequential sexual actions, so that much of the behavior proceeds without specific permission to continue. This unstated permission probably comes from the permission to begin the encounter in the first place, predicated on the interactive conduct that precedes the beginning of the sexual encounter, and it reflects a mind-set that assumes yes unless a no is heard. As researcher David Hall concludes, this finding is consistent with the assumption that a wanted sexual activity, once begun, is a consensual process unless a no is spoken or indicated.⁶⁸ He does observe that for the more intimate activities, such as oral sex and intercourse, both vaginal and anal, verbal permission occurs more often than it does for other activities, but much of this activity goes on with nonverbal or no specific permission.⁶⁹ A more cautious conclusion comes from Professors Annika Johnson and Stephanie Hoover, who acknowledge the rough consensus above but argue that the research is far too thin and premature to generate clear conclusions.⁷⁰ If so, and if some burden must be placed on the proponents of affirmative consent, then perhaps a shift to an affirmative-consent standard should be put on hold.

V. THE DRAMA AT THE AMERICAN LAW INSTITUTE

A. THE MOVE TO A NEW CONTEXTUAL CONSENT STANDARD

To return to the MPC, in recent years, the ALI has tackled the job of updating the anachronistic provisions of MPC article 213 with a new focus on consent as the basis of rape and sexual assault. But that effort has become a roiling controversy among this elite group of lawyers. Over the last four years, the redrafting effort, headed by Professors Stephen Schulhofer and Erin Murphy, has redefined the elements of sexual-assault crimes and added a new doctrine of consent, and has taken those new features through many iterations, each an effort to overcome objections to the last.

While the proposed new article 213 has many moving parts not relevant here, in structural terms the key change is to eliminate the “gross imposition” section from the 1962 version and to replace it with a felony called “Sexual

67. David S. Hall, *Consent for Sexual Behavior in a College Student Population*, 1 ELECTRONIC J. HUM. SEXUALITY (Aug. 10, 1998), <http://www.ejhs.org/volume1/consent1.htm>.

68. *Id.*

69. *Id.*

70. Johnson & Hoover, *supra* note 66.

Penetration Without Consent.”⁷¹ Putting aside any possible disagreement about limiting this crime to acts of penetration,⁷² the innovation here is a felony rape charge without any reference to force. The felony is of a lower grade than the forcible rape felonies detailed in a previous section.⁷³ Moreover, the new provision is linked to a new definition of “consent”⁷⁴—and from this derives the lawyerly drama.

Early on, unsurprisingly, there was a strong push to build affirmative consent into the definition section. The proffered rationale was that “sexual injury occurs not only through physical domination but also through the failure to respect personal autonomy, the individual’s right to control the boundaries of his or her sexual experience.”⁷⁵ But the affirmative consent standard was also designed to account for the “practical dynamics of sexual aggression,” specifically “the dangers of permitting a sexually assertive party to assume willingness until the other person clearly protests.”⁷⁶

In a series of subsequent ALI discussions, however, the proposals to add and define a component of consent shifted from an explicit requirement of affirmative consent to others that use different phrasings and may or may not have similar legal effect. The proposals also shifted among versions varying in terms of whether the affirmative standard applies to non-penetration as well as penetration offenses and also between felony and misdemeanor status. Clearly the movement toward affirmative consent had gotten stuck. The following is a slice of this legal history-in-the-making.

At one point in the debates, a proposed definition required that consent be “positive, freely given,”⁷⁷ and then the drafters dropped that term in favor of

71. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.2 (Tentative Draft No. 2, Apr. 15, 2016) [hereinafter Tentative Draft No. 2].

72. See *infra* note 87 and accompanying text (discussing criticisms of the definition of “penetration” and noting that the most recent draft provision has renamed the relevant offense “Sexual Penetration or Oral Sex Without Consent”).

73. Tentative Draft No. 2, *supra* note 71, § 213.1.

74. *Id.* § 213.0(3).

75. Preliminary Draft No. 5, *supra* note 37, at 61.

76. *Id.*

77. Preliminary Draft No. 5, *supra* note 37, § 213.0(3)(a).

a simple “agreement” and eventually just “willingness.”⁷⁸ It is telling that the bland, if redundant, sentiment in the original phrase could nonetheless become controversial. But, of course, lawyers—even lawyers in broad concurrence on the key principles at issue—are all too expert at uncovering problems at the molecular level of language. Some thought “positive, freely given” was too vague, and some thought it too prescriptive. Others thought that the phrase was simply a gloss on the notion of “agreement,” while still others thought that the very notion of “agreement” in the context of consent to sex raised difficulties. Reflecting the contract analogy raised by Professor Gruber,⁷⁹ some members wrote:

If the social ill we seek to prevent is sex with an unwilling person, we need to recognize that “agreement” is not synonymous with “willing.” An “agreement” is something different and is generally recognized as a subset describing a particular form of “willingness.” Unlike the usual understanding of “willingness,” the term “agreement” is generally understood more restrictively and carries with it the baggage of its meaning throughout the law of contracts where “agreement” typically includes such further requirements as consideration and intent to be bound, all of which are inappropriate for intimate relations outside of prostitution.⁸⁰

At another point, a proposed version of “Sexual Penetration Without Consent” provided that an actor was guilty of a misdemeanor if he “knowingly or recklessly engages in an act of sexual penetration with a person who at the time of such act has not given consent to such act.”⁸¹ As then recounted by critics during the debate, the provision was heavily rewritten on three occasions, resulting in a proposal making it a fourth-degree felony if an actor “engages in an act of sexual penetration and knows, or consciously disregards a substantial risk, that the other person has not given consent to that act.”⁸² A few days after

78. See Memorandum of Undersigned ALI Members and Advisers, to ALI Director, Deputy Director, Project Reporters, Council and Members, about Council Draft No. 3 Revisions to Sexual Assault Provisions of the Model Penal Code, at 2-4 (Jan. 19, 2016) [hereinafter Jan. 19, 2016 Memo]; Memorandum from Undersigned ALI Members and Advisers, to ALI Director, Deputy Director, Project Reporters, Council and Members, about Preliminary Draft No. 6 Revisions to Sexual Assault Provisions of Model Penal Code, at 3 (Apr. 4, 2016) [hereafter Apr. 4, 2016 Memo]. The critics’ memoranda discussed in this section are available at <http://www.prosecutorintegrity.org/sa/ali/>.

79. See Gruber, *supra* note 62.

80. Jan. 19, 2016 Memo, *supra* note 78, at 2.

81. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.2 (Discussion Draft No. 2, Apr. 28, 2015).

82. Tentative Draft No. 2, *supra* note 71, § 213.2.

debating this version, the provision was rewritten yet again, so that an actor would be guilty of a fourth-degree felony if he “engages in an act of sexual penetration without the consent of the other person, and the actor knows that, or is reckless with respect to whether, the act was without consent.”⁸³

Thus, after five rewritings, and after the drafters acknowledged some members’ worry over overcriminalization, the crime of “Sexual Penetration Without Consent” returned close to its original version, but with one notable change: conduct that had been deemed a misdemeanor was re-graded as a felony. As Professor Kevin Cole wryly observed, “ALI critics of the sexual assault proposal could not be faulted for feeling as if they are in a game of Whack-a-Mole.”⁸⁴ In addition, there was debate over the requirement for consent to each “specific act”⁸⁵ of sexual penetration or contact, leading to the possibility of hyper-parsed judicial or jury inquiry into the timing and frequency of consent in the nuances of a sexual encounter. For some critics, “[t]he microscopic analysis of each ‘specific act’ invites troubling comparison to video replay of a contested call at a sporting event. If the Accused stepped ‘out of bounds’ in any individual freeze frame image from the video replay, the Accused is a felon, not merely a participant in a sporting play whistled to a halt.”⁸⁶

By the end of 2016, the ALI had rejected any explicit reference to affirmative consent but approved the following definition of consent:

- (a) “Consent” ... means a person’s willingness to engage in a specific act of sexual penetration or sexual contact.
- (b) Consent may be express or it may be inferred from behavior—both action and inaction—in *the context of all the circumstances*.
- (c) Neither verbal nor physical resistance is required to establish that consent is lacking, but their absence may be considered, in the context of all the circumstances, in determining whether there was consent.

...

83. This “friendly amendment” is quoted in Memorandum from Undersigned ALI Members and Advisers, to ALI Director, Deputy Director, Project Reporters, Council and Members, about Tentative Draft No. 2 Revisions to Sexual Assault Provisions of Model Penal Code, at 2-3 (May 12, 2016) [hereinafter May 12, 2016 Memo].

84. Kevin Cole, *Like Snow to the Eskimos and Trump to the Republican Party: The ALI’s Many Words for and Shifting Pronouncements About “Affirmative Consent,”* at 5 (Mar. 23, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2753718 [<https://perma.cc/4WCM-K3BA>].

85. Tentative Draft No. 2, *supra* note 71, § 213.0(3)(a).

86. May 12, 2016 Memo, *supra* note 83, at 3.

(e) Consent may be revoked or withdrawn any time before or during the act of sexual penetration or sexual contact. A clear verbal refusal—such as “No,” “Stop,” or “Don’t”—establishes the lack of consent or the revocation or withdrawal of previous consent. Lack of consent or revocation or withdrawal of consent may be overridden by subsequent consent.⁸⁷

This definition, often referred to as “contextual consent,” is important for several reasons. For one thing, it seems to represent a fairly stable equilibrium or consensus among members of the ALI, even though it obviously has dissenters, and even though the drafters’ seemingly endless efforts are not over yet. For another, it seems to avoid the aspects of affirmative consent that have so troubled critics of that standard and that seemed most incongruent with the empirical research about sexual communication⁸⁸—although the rough compromise of making it a felony, not a misdemeanor, and having it sit below a higher force-based felony may prove contestable. Of course, the MPC is just a “model” law; states that admire this model can adapt it however they wish into their own structures. But the compromise might satisfy those who are troubled enough even by a consent (not affirmative consent) standard that they want “forceful rape” to be punished more, as well as those who would think it would be an insulting dilution of the harm of sexual assault to make it a misdemeanor.

As for how it will operate, the detail of its language will be an issue. The language is useful as a *description* of the way many people, including judges, would identify the key features of a nonconsensual encounter. Some may think it too verbose to give to a jury. Others may prefer just simple language of “nonconsent” or “without consent” in a statute, and then leave it to judges to fashion case-specific jury instructions by borrowing some of the MPC’s language. Either way, prosecutors will have to make judgments about when a case meets these criteria; juries will unavoidably face close decisions on the facts but may not be any worse off, and may well be better off, by not hearing the term “affirmative” from the judge; and appellate judges may trust that juries are well enough guided by this standard that they can treat insufficient claims with as much skepticism as they do in criminal law generally.

B. BUT THE DRAMA GOES ON

Meanwhile, even as we consider the uncertainties about how a new MPC standard will operate, the debates continue to simmer within the ALI. In

87. Updated “Consent” Definition, AM. L. INST. (Dec. 21, 2016), <https://www.ali.org/news/articles/updated-consent-definition/> (emphasis added)

88. See *supra* notes 65-70 and accompanying text.

retrospect, dissatisfaction with each draft, conveyed in strong and sometimes scathing memoranda, seems to have led to tweaks that then provoke criticism for being insufficient or for worsening things.

One contested issue is technically separate from consent, but unavoidably intertwined with it: The new contextual consent standard governs the act of “penetration,” but a long list of critics had complained that one proposed definition was not really limited to penetration at all, because the term had been defined to include “direct contact between the mouth or tongue of one person and the anus, penis, or vulva of another person.”⁸⁹ Members have also lamented that, instead of grading conduct by severity, the ALI’s approach allows for treating the least severe conduct as harshly as the most severe.⁹⁰ Recognizing this concern but responding in a rather feckless way, the most recent draft reminds us that a provision in the MPC’s General Part tells courts to dismiss prosecutions where “it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.”⁹¹ Critics view this as an insufficient protection against overbreadth, especially because numerous states have not even adopted this type of savings clause.⁹²

89. Tentative Draft No. 2, *supra* note 71, § 213.0(7)(b); *see, e.g.*, May 12, 2016 Memo, *supra* note 83, at 4; Memorandum from Undersigned ALI Members and Advisers, to ALI Director, Deputy Director, Project Reporters, Council and Members, about Tentative Draft No. 3 Revisions to Sexual Assault Provisions of Model Penal Code, at 1 (May 18, 2017) [hereafter May 18, 2017 Memo]. It should be noted that the most recent draft sought to resolve this problem by creating a separate definition of “oral sex” for non-penetrative contact. *See* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.0(2) (Tentative Draft No. 3, Apr. 6, 2017) [hereinafter Tentative Draft No. 3]. In turn, this draft has renamed (and renumbered) the substantive crime as “Sexual Penetration or Oral Sex Without Consent.” *Id.* § 213.4.

90. *See, e.g.*, May 18, 2017 Memo, *supra* note 89, at 2; May 12, 2016 Memo, *supra* note 83, at 4-5.

91. Tentative Draft No. 3, *supra* note 89, § 213.0 comment at 4-5 & n.8 (discussing and quoting MODEL PENAL CODE § 2.12(3)).

92. May 18, 2017 Memo, *supra* note 89, at 2-3. This memo also argues that Tentative Draft No. 3 has botched the issue of mens rea, either by confusion or conscious overbreadth. In particular, consider the new section on forcible rape, which states in relevant part:

An actor is guilty of Forcible Rape if he or she causes another person to engage in an act of sexual penetration or oral sex by *knowingly or recklessly*:

(a) using physical force or restraint, or making an express or implied threat of bodily injury or physical force or restraint; or he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; ...

(b) making an express or implied threat to inflict bodily injury on someone else.

Tentative Draft No. 3, *supra* note 89, § 213.1(1) (emphasis added). The placement of the mens rea terms (i.e., “knowingly or recklessly”) makes a charge possible where the defendant was knowing or reckless with respect the use of force or restraint but not respect to whether that act caused the act of sexual penetration. The memo urges consideration of moving the mens rea adverbs to precede “causes.” May 18, 2017 Memo, *supra* note 89, at 4-5.

Finally, the critics have complained that the ALI has diverged from its very own tradition of law reform. They characterize that tradition as one of building upon and, to a reasonable extent, incorporating established law in proposing reforms, and they argue that one of the conventional formulations for the nonconsent principle, the “against the will” standard, could well be the basis for a modified standard in the MPC. But critics allege that the drafters have essentially rebranded “affirmative consent” by bringing in the phrase “communicates willingness.”

If the standard is “communicates willingness,” the starting presumption is that sex is a crime. The prosecutor need only say, “Ladies and Gentlemen of the Jury, under the State’s definition, it does not matter whether the complainant actually was willing. It is undisputed that the sex act occurred and there is no evidence in the record that the complainant *communicated* willingness. There is no consent if the complainant has not *communicated* willingness. You must convict if you find that the defendant recklessly disregarded that absence of consent.”⁹³

The critics lament that this language might effect a de facto shift of the legal burden to the defendant—at least as to the burden of producing evidence, if not the burden of persuading the jury.

To the critics, the ALI has gratuitously taken a clean-sweep approach, contrary to the explicit statements in the ALI’s own guidebook, which claims that its projects “built upon, rationalized, and synthesized previous legislation” and “sought to clarify established and widely accepted” policy.⁹⁴ By contrast, say the critics, the ALI is effectively proposing “novel social legislation” through its sexual assault provisions, which create “an operative phrase that is not known to exist in any state” while failing “even to acknowledge the existence of the most widely used standard in the States.”⁹⁵

93. Apr. 4, 2016 Memo, *supra* note 78, at 3-4 (emphasis in original).

94. AM. L. INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 11 (rev. ed. 2015), https://www.ali.org/media/filer_public/08/f2/08f2f7c7-29c7-4de1-8c02-d66f5b05a6bb/ali-style-manual.pdf.

95. Apr. 4, 2016 Memo, *supra* note 78, at 4-5. This memo also objected to the deletion of language stating that the “lack of physical or verbal resistance may be considered” in determining whether someone has given consent. “Possibly a good defense attorney will argue past the [resulting] unbalanced definition,” the memo noted, but it raises “doubt about whether lack of resistance will be evaluated within the totality of the circumstances.” *Id.* at 5.

In all, the definition of consent has moved toward greater imbalance. Each elaboration within the definition describes circumstances that negate or revoke consent (“verbal or physical resistance,” “circumstances preventing or constraining resistance,” “behavior communicating unwillingness,” “a verbal expression of unwillingness,” “force, fear, restraint, threat, coercion, or exploitation”), while nothing supports consent or explains under what circumstances a person is safe from criminal accusation.⁹⁶

As thus depicted by the critics, the latest ALI proposal is a well-meaning but muddled and ambivalent—and even ambiguous—effort to respect the sentiment behind the affirmative consent concept, while finessing it as an explicit rule for American law.

CONCLUSION

The difficulty of achieving conciseness on these fundamental questions, even among elite lawyers who probably agree on general principles of progressive reform, is remarkable—but informative. The discomfort and disagreement that ALI members have been enduring may be worth the cost and might now be optimistically viewed as a robust and productive debate. A cautious speculation would be that American criminal rape law is likely to settle in around a consent standard without the complications of the “affirmative” term. The affirmative consent rule will continue to operate widely in the disciplinary regimes on college campuses, and lessons from that arena may inform our criminal system. But the realms will likely remain separate, and wisely so. While colleges have considerable power over students and expulsion can be life-jarring, the state’s power to criminally punish remains distinctively awesome. Meanwhile, the ALI’s current proposal for a “contextual consent” standard is a sincere but flawed way of accommodating the differing sides in the affirmative-consent debate. Its model language is unlikely to win great consensus among the states. On the other hand, that language may prove useful as a menu of terms that wise trial judges can incorporate into their jury instructions as the fact patterns of particular cases might call for. If so, renewed efforts at a reformed consensus standard might well draw on observations of these instructional practices. For now, the nonconsent standard has proved successful enough in curing some of the ills of the “force” standard and has worked well enough in many states as to be the best candidate for a consensus statutory rule. And while the nonconsent standard stops short of the stage of the continuum that many would prefer, from a century-old perspective it represents considerable moral progress.

96. *Id.* at 5.

RECOMMENDATIONS

While legislative experimentation and variation among the states in defining rape may be beneficial in our legal system, it might well serve American criminal law and American society to seek some consensus on that standard. But the design of an ideal standard meets challenges from social controversy about the proper norms for sexual communication, as highlighted by the very mixed social science research on that subject. For these reasons, I offer the following suggestions:

1. **Maintain the prevailing standard in American criminal codes (at least for now).** The standard defining rape as sex without consent is both an enlightened and workable one that deserves pride of place in our contemporary criminal law. As illustrated by the surprisingly divisive debates in the American Law Institute over a new Model Penal Code standard, the very appealing idea of an affirmative-consent standard may, at this point, be too controversial and too uncertain in its application to achieve or merit consensus.
2. **Short of immediate code reform, consider ways to draw upon the ALI's work product.** While the "contextual consent" standard proposed by the ALI has proved very divisive, it may be appropriate for proceedings outside of the criminal justice system, such as college disciplinary hearings. Moreover, the ALI's efforts have supplied ideas and vocabularies that trial judges may usefully draw on in their jury instructions, and experience with those instructions might usefully inform future legislative reform.