BACKWARDS: THE ALI ON CONSENT AND MENS REA FOR RAPE

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Stephen Schulhofer published his forward-thinking and important book *Unwanted Sex: The Culture of Intimidation and the Failure of Law* in 1998.[1] At least in part because of this groundbreaking work and his related scholarship, Schulhofer was asked to lead the project at the American Law Institute ("ALI") to reform its outdated 1962 Model Penal Code ("MPC") provisions on sexual offenses. The MPC has been widely criticized for too narrowly defining the crime of rape and other sexual offenses.[2] Many provisions of the MPC reflect traditional rape law—including an explicit marital rape exemption, corroboration requirement, prompt complaint rule, cautionary instructions, and an implicit resistance requirement. Scholars derided the MPC for making it too hard, and sometimes impossible, for sexual assault victims to obtain justice.[3] The ALI decided to commence a reform project of the sexual offense provisions of the MPC in 2012 with Schulhofer as its lead reporter,[4] a position that required him to "structure the project, prepare drafts, and present drafts . . . for discussion."

Two elements of the crime of rape, as Schulhofer conceptualized them in his own scholarship, contrast with their counterparts

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1. STEPHEN SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (1998).

2. *Id.* at 20–29.

3. *See, e.g.*, 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, 947–50 (2004) (detailing the prompt complaint requirement, corroboration requirement, and cautionary instructions in rape prosecutions in most jurisdictions); Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1477–85 (2003) (describing the history of the marital rape exception); Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 962 (discussing the resistance requirement).

4. *See How the Institute Works*, A.L.I., https://www.ali.org/about-ali/how-institute-works [https://perma.cc/QSM6-69KA].

in the 2020 draft of the ALI revisions of the MPC on sexual offenses. These two elements correspond to the following questions: (1) what is the meaning of consent in rape law? (2) With what mens rea, or mental state, must the defendant have committed the crime of rape or a related sexual offense in order to be convicted?

Though Schulhofer leads the ALI project, the proposed answers to these two questions in the current ALI draft are antithetical to much of his most important scholarly work in the area. If the ALI Council and the ALI membership adopts the current answers to these two questions in the final version of a revised MPC, those answers would hinder progress that states have been making through reform over the past few decades and take rape jurisprudence decidedly backwards.

Before I begin to develop that argument, though, I want to acknowledge that the ALI project has made positive strides in other areas of the law of sexual offenses. I hope these five meaningful changes in the current draft remain in some form in the final revised MPC:

The current draft would decrease punishments for sexual offenses, which have become too draconian as a result of a tough-on-crime movement over the past few decades;[5]

The current draft would curtail the application of sex offender registries, which are unsupported by data and counterproductive to public safety;[6]

The current draft would allow people with intellectual disabilities to have noncriminal sexual lives, when traditional rape law and the MPC afforded them no such possibility;[7]

The current draft would decriminalize ethical BDSM when sexual desires and boundaries are negotiated beforehand, a position advanced by the BDSM community itself;[8] and

The current draft would criminalize having sex with someone who is passing in and out of consciousness, thereby addressing a

5. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (AM. LAW INST., Tentative Draft No. 4 Aug. 18, 2020) [hereinafter Aug. 2020 Draft]. For an analysis of draconian rape punishments, *see* Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1954–59 (2016).

6. Aug. 2020 Draft, *supra* note 5, at 51. For an analysis of sex offender registries, *see* Anderson, *supra* note 5, at 1956.

7. Aug. 2020 Draft, *supra* note 5, at 138–41.

8. *Id.* at 325–29. *See also* Richard Cunningham, Chief Legal Advisor, Nat'l Coal. for Sexual Freedom, Comment on ALI Model Penal Code Project on Sexual Assault and Related Offenses (Oct. 16, 2019) (on file with author).

common and deeply harmful scenario that both traditional criminal law and the old MPC ignored.[9]

None of these five issues, however, is as foundational or contentious as the core elements of consent and mens rea for the crime of rape.

I.
CONSENT

Historically, the common law in England and the United States did not criminalize sex without consent. Traditional rape law defined the crime as "the carnal knowledge of a female, forcibly and against her will."[10] The 1962 MPC followed suit.[11] To be rape, an act of sexual intercourse had to be compelled by force, drugging, or threats of death or serious bodily injury.[12] Yelling "no" to sex did not have a legal meaning because sex without consent wasn't a transgression that the law recognized.[13] Against this backdrop, Schulhofer wrote his most pivotal work, advocating for a new right of sexual autonomy.

As Schulhofer wrote, "the right to sexual autonomy is simply missing from the list of essential rights that our society grants us as free and independent persons."[14] He explained, "criminal law still fails to guarantee a woman's right to determine for herself when she will become sexually intimate with another person."[15]

Schulhofer argued that consent should be the dividing line between legal and illegal sex,[16] and he defined consent as "actual words or conduct indicating affirmative, freely given permission."[17]

As Schulhofer saw it, "Sexual intimacy involves a profound intrusion on the physical and emotional integrity of the individual. For such intrusions, as for property transfers or surgery, consent cannot simply be the absence of . . . opposition. For such intrusions, actual permission—nothing less than positive willingness, clearly communicated—should ever count as consent."[18]

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9. Aug. 2020 Draft, *supra* note 5, at 264.

10. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 210, 161 (1769).

11. MODEL PENAL CODE § 213.6 (AM. LAW INST. 1962).

12. Anderson, *supra* note 5, at 1946.

13. *Id.*

14. Schulhofer, *supra* note 1, at x.

15. *Id.* at 9.

16. *Id.* at 254–55.

17. *Id.* at 283.

18. *Id.* at 271.

Schulhofer clarified that "no" means "no," and should always be assigned the meaning of "no" when resolving legal disputes.[19] Moreover, equivocal behavior means "no;" only clear expressions of affirmative permission grant consent for sexual penetration.[20] As he put it, "ambivalence, passivity, or silence—are by themselves sufficient to establish an unambiguous offense against personal autonomy and an unambiguous basis for punishment."[21]

The ALI project has continued so far for seven years and it has evolved with time. The project began, as most do, with two Reporters and a group of Advisers assembled to support the development of a new recommended black letter law in the area and its associated commentary. Both the Reporters and Advisers were subject matter experts in sexual offenses or criminal law. Advisers included prosecutors, defense attorneys, federal and state judges, sexual assault victim advocates, and law professors with a range of different opinions on the issues. They had knowledge, research, and experience to bring to bear on the legal questions at hand.

Over the years, however, the ALI's sexual offenses project has attracted the sustained attention of those with no expertise in the form of knowledge, research, or experience, but with a keen interest in the subject matter nonetheless, including many who opposed reform in this area of the law on the principle that it is unfair to men.

Schulhofer himself has acknowledged the "strong and determined resistance"[22] to reform by "misogynists," whom he calls "low information opponents" or "those who do not make it a priority to assure the dignity and equal worth of people who happen to be women."[23] He has also acknowledged the strong and determined resistance by criminal defense attorneys, whom he calls "well informed, highly sophisticated people with decent values" who are

19. *Id.* at 264–67.

20. Schulhofer, *supra* note 1, at 271.

21. *Id.*

> But silence, ambiguous behavior, and the absence of clearly expressed *un*willingness are evidence that affirmative consent was absent; they should no longer suggest, as they do in present law, that a defendant did nothing wrong in forging ahead to intercourse. The significance of equivocal behavior would in effect be reversed, because equivocal behavior would reinforce prosecution claims that consent was absent, rather than serving (as under current law) to buttress defense claims that the woman had never signaled her *un*willingness.

Id.

22. Stephen Schulhofer, *Reforming the Law of Rape*, 35 L. & INEQ. 335, 336 (2017).

23. *Id.* at 348.

concerned, as he is, with abuses of prosecutorial discretion, racial disparities in the criminal justice system, overly punitive sentencing, sex offender registries, and mass incarceration.[24] As these two groups have worked together to influence the ALI's MPC project, however, they have formed a sexist/defense coalition of sorts to thwart adoption of the positions Schulhofer advocated in his scholarship, the very work that landed him as Reporter to the project.

As a result of the sexist/defense coalition's strong and determined resistance, the ALI draft is nowhere near Schulhofer's scholarly positions. For instance, consent is not defined as Schulhofer did in his book as "actual words or conduct indicating affirmative, freely given permission to the act of sexual penetration."[25] Rather, the current draft of the revised MPC defines consent as a complainant's "willingness" to engage in sexual penetration, express or inferred from "behavior—both action and inaction."[26]

Early in the project it became clear that the notion of affirmative consent was unacceptable to both the ALI membership and the Council. Despite support among many Advisers, the word *affirmative* was removed from the proposed code. Schulhofer's words "freely given" to describe consent were nowhere to be found.

In his scholarship, Schulhofer defined consent as a form of "permission." In terms of state law, however, *agreement* rather than *permission* probably best represents the status quo. Of those U.S. jurisdictions that define consent, a plurality use the term *agreement* or something stronger, such as "positive cooperation."[27]

Nevertheless, the word *agreement*, which defined consent for four years on the project without objection, was summarily removed at one point without discussion with the Advisers, and the word *willingness* appeared in its place. At an annual meeting thereafter, the membership ignored a motion to replace the word *willingness* with *assent*. Rather, both the ALI membership and its Council have de-

24. *Id.* at 350.

25. Schulhofer, *supra* note 1, at 283.

26. Aug. 2020 Draft, *supra* note 5, at 14.

27. *See, e.g.*, CAL. PENAL CODE § 261.6 (2019). *See also*, *e.g.*, State v. Adams, 880 P.2d 226, 234 (Haw. Ct. App. 1994) ("voluntary agreement"); State in the Interest of M.T.S., 609 A.2d 1266 (N.J. 1992) ("affirmative and freely-given permission"); VT. STAT. ANN. tit. 13, § 3251(3) (2019) ("voluntary agreement"); WIS. STAT. ANN. § 940.225 (West 2018) ("freely given agreement"); U.S.C.A. § 920 art. 120(g)(8) (2019) ("freely given agreement"); COLO. REV. STAT. § 18-3-401 (2019) ("cooperation in act or attitude"); D.C. CODE § 22-3001 (2009) ("freely given agreement); State v. Blount, 770 P.2d 852, 855 (Kan. Ct. App. 1989) ("voluntary agreement"); MINN. STAT. ANN. § 609.341 (West 2019) ("freely given present agreement").

fined consent as "willingness" to engage in sexual penetration, express or inferred from "behavior—both action and inaction."[28]

Willingness as a substitute for *agreement* undermines the principle of sexual equality. It suggests passivity, a retrograde and gendered notion of sexual acquiescence ("she let him"), rather than the equal engagement of a sexual participant, whatever their gender identity, which *agreement* would imply.

Worse still, in the current ALI draft, consent is not assessed against the objective behavior of the complainant. The Reporters and Advisers repeatedly discussed this very issue and agreed that consent should be measured by an objective assessment of the complainant's outwardly manifested behavior. Both the Advisers and Council rejected the notion that consent should be assessed in terms of the complainant's subjective state of mind. As Advisers, we repeatedly debated the choice between measuring consent by focusing on the complainant's outwardly manifested conduct or the complainant's subjective state of mind. The issue was at the center of numerous drafts and meetings. In particular, we discussed it in detail at the November 15, 2013, meeting of Advisers and Consultants. At that time, the attendees (though closely divided on a number of other issues) expressed an overwhelming preference for focusing on the complainant's conduct manifesting objective consent, rather than on the complainant's subjective willingness. The issue was also presented to the Council at its October 2015 meeting, and the Council likewise voted in favor of focusing on the complainant's objective conduct to determine consent.

Nevertheless, at the 2016 annual meeting, Kate Stith and Margaret Love advanced a written motion to revise the draft definition of consent that assessed it using the complainant's mental state of subjective willingness. With little public debate, the ALI membership passed the motion by voice vote.

The problem is that subjective willingness focuses critical inquiry in a rape case on the complainant rather than on what the defendant heard, saw, and therefore understood at the time of the sexual act. It asks the factfinder to divine the mental state of the complainant rather than the defendant. It thereby shifts inquiry from the person on trial to the person who reported having been harmed. *What did she really want, anyway? What did she expect would happen, given the circumstances? If she could have anticipated that he would want sex, and she didn't fight back, isn't it likely that she just wanted it, too?* This line of questioning is what folks have for more than fifty

28. Aug. 2020 Draft, *supra* note 5, at 14.

years called "putting the victim on trial" in a rape case. What is more, it opens the door to defendants arguing that the complainant was secretly willing to have sex with him, despite her words and actions, and despite objective indicia to the contrary.

The consent standard that Schulhofer advanced in his most important scholarship cannot be squared with this position in the current ALI draft, which rejects affirmative permission and defines consent as the complainant's subjective willingness.

II.
MENS REA

In his forward-thinking scholarship, Schulhofer argued that the minimum mens rea of sexual offenses should be criminal negligence, meaning that the actor should have known, but did not, of a substantial and unjustifiable risk that the sexual penetration was without consent.[29]

Importantly, criminal negligence is required if you believe that the legal system should assign "no" its natural meaning, as Schulhofer does. People may mean different things when they utter the word "no." However, Schulhofer argues, "the very fact that 'no' doesn't always mean no underscores the need to decide which meaning will be treated as controlling."[30] He lands on advocating for a per se rule that "no" means "no" as a legal matter because such a rule places the risk of misunderstanding on the actor who may harm someone, rather than placing it on the person who may be harmed.[31]

If an actor personally believes "no" means "yes," and penetrates someone in the face of "no," the criminal law has to characterize that actor's mental state. If the actor is culpable, it is because the complainant's "no" should have given the actor subjective awareness of a substantial and unjustifiable risk that sexual penetration lacked consent. What's more, if "no" means "no," uttering "no" would be sufficient to conclude that the actor was criminally negligent, regardless of the type of sexual offense.

In the current ALI draft, though, the mens rea for sexual offenses varies greatly by crime. Recklessness is a higher mental state of criminal liability than is negligence; it requires that the defendant was subjectively aware of a substantial and unjustifiable risk that the penetration was without consent. Knowledge is higher still

29. Schulhofer, *supra* note 1, at 258.
30. *Id.* at 264.
31. *Id.* at 264–67.

and requires that the defendant knew with a practical certainty that the penetration was without consent.

In the draft statute, the mens rea of offenses in the order in which they are presented is as follows. Sexual assault by aggravated physical force or restraint requires knowing behavior.[32] Sexual assault by physical force or restraint requires reckless behavior.[33] Sexual assault of a vulnerable person requires reckless behavior.[34] Sexual assault of a person subject to state-imposed restriction requires knowing behavior.[35] Sexual assault by extortion requires reckless behavior.[36] Sexual assault by exploitation requires knowing behavior.[37] Sexual penetration or oral sex without consent requires reckless behavior.[38] There are other sexual offenses, but the point is clear. The mental state of negligence is absent. The sexual offenses vary between requiring the more serious mental states of recklessness or even knowledge.

Requiring a more serious mental state before a defendant may be convicted of having violated a statute narrows the scope of that statute. The statutory variation in the current draft of the MPC on sexual offenses is incoherent, and it is evidence that that the sexist/defense coalition has successfully chipped away at the law's protection for victims.

This statutory variation that narrows the law's protection is at odds with even the traditional MPC on sexual offenses. Recklessness was designated a culpable mental state for rape and other sexual offenses by the ALI in 1962.[39] Purposeful, knowing, and reckless rape have been graded the same as a second-degree felony since that time.[40] Removing or downgrading reckless rape would make the Model Penal Code of 2020 even narrower in its coverage than the 1962 Code. This treatment of reckless rape would be retrograde, a step backward even from the 1962 MPC.

Moreover, removing or downgrading reckless rape would be a substantial departure from modern state rape law. Although states

32. Aug. 2020 Draft, *supra* note 5, at 351–52.
33. *Id.* at 352–53.
34. *Id.* at 354.
35. *Id.* at 354–55
36. *Id.* at 355–56.
37. *Id.* at 359.
38. Aug. 2020 Draft, *supra* note 5, at 357.
39. The 1962 Code defined rape under § 213.1(1) without explicit reference to mens rea; therefore, under § 2.02(3), the mens rea element "is established if a person acts purposely, knowingly, or recklessly." MODEL PENAL CODE §§ 213.1(1), 2.02(3) (AM. LAW. INST., Proposed Official Draft 1962).
40. *Id.* at § 213.1(1).

criminalize sexual offenses in many ways, if one focuses on behavior that corresponds to rape, 43 out of 50 states criminalize reckless behavior at the same level as knowing or intentional behavior.[41] Some even criminalize criminally negligent behavior at the same level.[42]

Early in the project, the ALI leadership rejected criminal negligence as an adequate mens rea for sexual offenses, thereby rejecting a key position Schulhofer had advanced in his scholarship. Since then, the sexist/defense coalition has taken aim against even more serious culpable mental states, such as recklessness, and it has frequently prevailed.

The removal of the mens rea of criminal recklessness for rape by aggravated physical force or restraint happened via an unwritten, verbal motion, spontaneously advanced from the floor at the May 2017 national meeting of the ALI membership.[43] It was a last-minute action that passed without thoughtful consideration. There was no written motion or document of position available prior to the meeting to consider, and dialogue on the verbal motion was shut down in favor of a quick vote. By contrast, written motions filed on time for the meeting were ignored by the ALI leadership. Since that time, the sexist/defense coalition continues a drum beat to remove recklessness from all other sexual offenses and require the mental state of at least knowing for all remaining offenses.

As a result, does "no" mean "no" in the current ALI draft? In the current draft, "no" is "a clear verbal refusal" that establishes a lack of consent or the subsequent withdrawal of consent.[44] But here's the hitch: if the statute requires recklessness, and an actor who believes that "no" means "yes" penetrates someone in the face of "no," the actor is not liable. Recklessness is a subjective, not objective, standard, and the actor would not have consciously disregarded a substantial and unjustifiable risk that the penetration lacked consent. So, the complainant's "no" would not actually mean "no" in that instance. "No" would mean whatever a defendant speculated that it meant at the time.

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41. Aug. 2020 Draft, *supra* note 5, at 108–12.

42. *Id.*

43. The ALI website describes it as a "written motion" made "from the floor." *Model Penal Code, Sexual Assault and Related Offenses*, AMERICAN LAW INSTITUTE, https://www.ali.org/projects/show/sexual-assault-and-related-offenses/ [https://perma.cc/TT5Q-YA4W]. No other motions are described in this way, which suggests how unusual the procedural move was. It appears that the motion was written down after the fact.

44. Aug. 2020 Draft, *supra* note 5, at 350.

The negligence mens rea standard that Schulhofer advanced in his most important scholarship cannot be squared with the current ALI draft that requires reckless or knowing mens rea before a sexual offense is criminal.

III.
THE REAL TEST OF THE PROJECT

In his scholarly work on rape, especially in the 1998 book *Unwanted Sex*, Schulhofer's key agenda was to challenge the traditional, supposedly inherent link between rape and physical force. He thought that rape law should not primarily focus on freedom from forced sexual penetration but should instead focus on a person's sexual autonomy to decide whether and when to engage in sexual penetration. Criminalizing sex without consent was the key to sexual autonomy. He wrote, "Intercourse without consent should always be considered a serious offense."[45]

Schulhofer's focus on sexual autonomy was an outlier view at the time and was obviously contrary to the outdated 1962 MPC on sexual offenses. His scholarly goal was to establish sexual autonomy as the central value of rape law, to demonstrate that it is a workable, bounded concept, and to clarify that the law need not be tethered to force.

Today, Schulhofer's position is no longer an outlier, but the idea of criminalizing sex without consent hangs in balance. Although half the states do recognize sex without consent as a crime, half do not. In the current ALI draft, consent, for now, remains a dividing line between legal and illegal sexual penetration. Consent has become a thin reed of subjective willingness, but at least sex without consent is defined as a crime, though minor.

Unfortunately, the sexist/defense coalition in the ALI will likely move to eliminate the provision that criminalizes sex without consent. If it is challenged at a national meeting of the membership, that moment will be a real test of the overall value of the ALI project to revise the outdated MPC provisions on sexual offenses.

IV.
THE OLD ALI AND THE YOUNG STEPHEN SCHULHOFER

The average age among ALI members is advanced. In 2009, famed ALI Council member Bennett Boskey, then 92, wrote that

45. Schulhofer, *supra* note 1, at 254.

the ALI "is deliberately aiming to attract outstanding younger individuals."[46] He added optimistically: "It seems likely that the median age of the Institute's membership will be noticeably sliding downward."[47] Ten years later, it is hard to detect a downward slide. The membership remains overwhelmingly white, overwhelmingly male, overwhelmingly old. On those counts, the ALI members on this panel assembled to celebrate Schulhofer's work are unrepresentative of the larger membership.

Schulhofer is seventy-seven. No spring chicken, he. Despite this demographic similarity, Schulhofer's substantive position on the law of rape is much more feminist and progressive than that of most of his ALI colleagues. As a result, he has taken tremendous heat for his ideas throughout this project. The personal denunciations of Schulhofer from some ALI members have been striking. Opponents charge that Schulhofer has been "push[ing] to bring authoritarianism into the bedroom,"[48] with "an ideological goal and an apparent reluctance to accept the will of the [ALI] membership."[49] Further, the Reporters are alleged to be "biased," seeking "to regulate intimate private behavior in a fashion not even attempted by the worst totalitarian states."[50]

But maybe great conflict with changing sexual norms is to be expected on any project rewriting the MPC for sexual offenses, given the age of the ALI membership. There is a great generational divide on sexual mores. Support for a consent standard, for instance, is much stronger among those who are under thirty than among those who are over sixty.[51]

The larger society is changing to become more feminist, whether the ALI membership likes it or not. Since 2012, the Federal Bureau of Investigations has defined rape simply as sexual pen-

46. Bennett Boskey, *The American Law Institute, A Glimpse at Its Future*, 12 GREEN BAG 255, 262 (2009).

47. *Id.*

48. Ashe Schow, *Has the Federal Government Ever Had Sex?*, WASH. EXAM'R (June 15, 2015), https://www.washingtonexaminer.com/has-the-federal-government-ever-had-sex [https://perma.cc/VS23-W4C2].

49. *See* Letter from Philip Lacovara et al., ALI Members and Advisors, to ALI Director, et al. (Oct. 17, 2017) (on file with author).

50. *See* George Liebmann, Comment on the Council Draft on Sexual Assault (Jan. 18, 2017) (on file with author).

51. Stephen Schulhofer, *Consent: What It Means and Why It's Time to Require It*, 47 U. PAC. L. REV. 665, 671 (2016) (discussing a study showing the relation between support for a consent standard and age group).

etration without consent.[52] States' laws are following suit. As Schulhofer puts it,

> The trend in criminal law, in codes of conduct in schools and colleges, and in social norms more generally – is one of steadily growing support for consent as a legal requirement. Although older generations recall social norms and sexual scripts in which male initiative and female reticence were taken for granted in mutually desired sexual interaction (an assumption at odds with a consent requirement), substantial segments of American society now consider expectation of consent perfectly realistic.[53]

The "unmistakable trend" in state criminal law is toward criminalizing nonconsensual sexual penetration.[54] Moreover, the widespread #MeToo movement is an expression that society is finally taking nonconsensual sexual acts seriously. If it is to be relevant, the ALI should be developing and announcing the best model statute for this important historical moment—and for our future. The current draft, however, threatens to place the ALI wildly out of step with both current social and legal norms on consent as well as longstanding legal doctrine on mens rea.

52. *An Updated Definition of Rape*, U.S. DEPT. OF JUST. BLOG (Jan. 6, 2012), https://www.justice.gov/archives/opa/blog/updated-definition-rape [https://perma.cc/E3L9-TZ7N].

53. Schulhofer, *supra* note 51, at 671.

54. *Id.* at 672.