WRITING ON AN UNCLEAN SLATE: CHALLENGES IN SUBSTANTIVE REFORM OF A PENAL CODE

*ERIN MURPHY**

Recent events have focused greater attention on the rules governing sexual assault, both on campuses and in the criminal law. Activists have pressed for legal and social changes that broaden accountability, while critics have argued that reforms have already gone too far. In the midst of this conflict, the American Law Institute undertook a project to revise the sexual assault article of its highly influential Model Penal Code. This process provides occasion to consider the tensions that lawmakers confront when undertaking reforms in hotly contested areas. Conflict has arisen around fundamental issues, such as whether reforms should harmonize punishments relative to harsh existing law or focus on absolute notions of proportionality; to what extent existing collateral consequences should bear on reform efforts; how to balance the "readability" of a law versus technical sophistication; and more. This essay will explore some of the challenges of revising one part of a penal code within a larger framework influenced by political actors and activists, existing bodies of law, both within and outside the control of the reformers, and popular understanding.

In the Spring of 2012, the American Law Institute (ALI) initiated a project to revise Article 213 of its Model Penal Code.[1] That article, titled "Sexual Offenses," contained five distinct subsections of proscribed behavior.[2] Although forward-looking for its time,[3] Ar-

* Professor, New York University School of Law. This paper owes a great debt of gratitude to Stephen Schulhofer, my colleague, friend, and the Reporter for the American Law Institute's project to revise the sexual assault article of the Model Penal Code. As Associate Reporter, I have worked closely with Steve for nearly a decade on the project, and have benefited immeasurably from his immense intellect and profound humanity. Additional thanks are due to Stuart Green, Alec Walen, and the participants in the Theorizing Criminal Law Reform conference, who provided helpful feedback on an early draft of this essay.

1. *See Model Penal Code: Sexual Assault and Related Offenses*, AM. L. INST., https://www.ali.org/projects/show/sexual-assault-and-related-offenses/ [https://perma.cc/LD2S-E3W4]. *See generally* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 323 (2007).

2. *See generally* MODEL PENAL CODE § 213 (AM. LAW INST. 1962). The two most serious crimes were defined as "Rape and Related Offenses" (which included "Rape" and "Gross Sexual Imposition") and "Deviate Sexual Intercourse by Force or Imposition," which covered vaginal penetration and anal and oral sexual penetration, respectively. *Id.* at §§ 213.1, 213.2. Article 213 also set out a list of offenses

ticle 213 now reads as outdated and anachronistic. In just the past few decades, society has witnessed dramatic changes in sexual mores, as well as increased awareness and acceptance of broader understandings of sex, gender, and sexual orientation. With increasing urgency, critics of the Model Penal Code's sexual assault provisions thus called for a wholesale overhaul.[4]

In 2012, the ALI leadership agreed, and selected Stephen Schulhofer—an NYU Law Professor well known for his landmark book about rape—as the Reporter.[5] I was selected as his Associate Reporter, and since 2012 we have drafted reform proposals, guided by an expert panel of advisers. Although our process is not truly legislative in nature, in that our final product is a *model* code voted on by a select group of legal professionals rather than elected officials, some of the difficult questions that we have encountered undoubtedly will arise with regard to any legal reform effort.

In this essay, I address three overarching challenges that the project has faced. Specifically, this essay examines the implications of engaging in piecemeal reform within an existing penal structure (both substantive and procedural); the balance between drafting an appropriately complex statute in a nuanced field and one that is readily intelligible to a wide array of audiences; and the tensions inherent to undertaking reform in a politically charged area.

I.
BACKGROUND

The sexual offense article is a single section nested within the larger Model Penal Code, which was one of the most successful projects of the ALI. Founded in 1923, the ALI is a non-governmental organization of eminent judges, lawyers, and legal scholars that was created with the goal of harmonizing and rationalizing the broad and diffuse body of law found across the United States. Over the years, the ALI became well known for its restatements, which

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under the heading "corruption of minors and seduction," a contact offense defined as "sexual assault," and an "indecent exposure" crime. *Id.* at §§ 213.3–5.

3. For instance, § 213's recognition of "gross imposition"—an offense requiring something less than extreme physical force—constituted an advance over much of existing law, as did its proscriptions for anal and oral intercourse. *Id.* at § 213.1(2).

4. *See, e.g.*, Deborah W. Denno, *Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207 (2003).

5. STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (2000).

consist of scholarly overviews of existing fields of law, such as contracts, torts, and trusts.

When ALI leadership turned its attention to a restatement of the criminal law, however, they found "existing law too chaotic and irrational to merit 'restatement.'"[6] So instead the Institute authorized the creation of a *Model* Penal Code (MPC), led by law professor Herbert Wechsler, intended to embody the best of contemporary penal theory and practice. According to the ALI process that remains in place today, Professor Wechsler (as the Reporter) drafted black letter law and accompanying commentary, aided by feedback offered by a panel of expert advisers.[7] Those drafts were then presented to the Council of the ALI—a selective, upper-chamber style governing body—for further revision and approval. Ultimately, provisions approved by Council were then forwarded to the entire membership of the ALI—the elected elites who in turn could accept, amend, or reject proposed provisions.

The MPC project finished in 1962 with the publication of the complete official draft as adopted by the full membership of the ALI.[8] A final version containing consolidated and revised commentaries (which are not formally adopted by the membership) was published in six volumes in 1985.[9] Without question, the project was a resounding success. The text of the general principles of liability (including its mens rea classifications) and specific liability subsections were adopted in part or whole by roughly thirty-four states, and courts and legislatures continue to use its principles as a common touchstone for understanding and assessing penal questions and proposed reforms.[10] Although other aspects of the MPC (such as its original sentencing provisions) were less successful, the project was deemed such a victory that its provisions remained untouched for decades after their passage, withstanding dramatic changes in social mores and criminal justice practices, serious critiques, and calls for comprehensive reform.[11]

In 2009, however, the ALI heeded some of these exhortations and initiated a project to re-examine the death penalty provisions of the MPC. That project ultimately resulted in a vote to withdraw the existing provisions (although not to take a formal stand against

6. Robinson & Dubber, *supra* note 1, at 323.

7. *Id.*

8. *Id.* at 324.

9. *Id.* at 327.

10. *Id.* at 326–28.

11. *See, e.g.*, Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Model Penal Code*, 4 BUFF. CRIM. L. REV. 53 (2000).

capital punishment).[12] Prompted in part by the success of that single intervention, in 2012 the ALI agreed to consider calls to revise Article 213, the sexual assault provisions of the MPC.

The prospectus proposing the revision project identified the most salient objections to Article 213. Specifically, the most common critiques noted:

- *Its highly gendered character*. Article 213 restricts the most serious penalties for vaginal penetration and does not contemplate that a man might be sexually assaulted by a woman; it further labels anal and oral penetration as "deviate" sexual intercourse.[13]
- *Its procedural and evidentiary rules*. Article 213 retains a marital exemption; permits a defense if the complainant is "promiscuous" or a "voluntary social companion" of the actor; and broadly requires prompt complaint, corroboration, and "special care" jury instructions.[14]
- *Its substantive scope*. Article 213 effectively requires force and resistance for liability; its child-offenses are also fairly restrictive relative to current law.[15]

The ALI leadership approved the project, which, as of 2020, is entering its final stages. Of course, the process of legal reform within the confines of the ALI varies in important ways from a typical legislative process. Moreover, as a model code, certain drafting challenges or practical constraints are lifted—for instance, a model code need not harmonize with the entire body of substantive and procedural law within a jurisdiction. Nonetheless, the process of revising Article 213 offers opportunities to observe and learn from some of the challenges inherent in any criminal legal reform project. This essay therefore seeks to record some of those lessons for the benefit of future efforts.

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12. AM. L. INST., REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY annex b (2009) (Report to the ALI Concerning Capital Punishment); *see also* Roberta Cooper Ramo, *The President's Letter*, 32 AM. LAW INST. REP. (Am. Law Inst., Philadelphia, PA), Fall 2009, at 1, 3.

13. *See* MODEL PENAL CODE §§ 213.1, 213.2 (AM. L. INST. 1962).

14. *See, e.g.*, Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L. J. 1465 (2003).

15. *See, e.g.*, Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953 (1999).

II.
REFORM WITHIN EXISTING STRUCTURES

Efforts to revise a criminal code, to a degree short of wholesale overhaul, face the challenge of reconciling the gaps that emerge between the old structures, often motivated by anachronistic values, and the contemporary sentiments that drive the revision. Even when wholesale law reform occurs, the framework within which those laws will be executed—whether the pragmatic rules of criminal procedure or evidence or broader systemic features such as the structure of the criminal justice system—cast a shadow over any efforts at revision. This section illustrates some of the kinds of challenges that can arise in each context.

A. The Constraint of Existing Substantive Law

When criminal law reform occurs piecemeal, modifying only parts of existing substantive legal doctrine, it can be difficult to achieve the ends desired without simultaneously causing unintended or controversial fissures or disruptions to existing law. What is more, targeted reforms can prompt calls to address other aspects of existing law that appear outdated or anachronistic, threatening to widen the scope of the effort beyond feasible management or subvert the project altogether. This can occur in a number of ways.

1. Existing Substantive Law Undermines or Expands Reform Efforts

The first manner in which existing substantive law may distort reform efforts pertains to the need to integrate the revised section into existing legal standards that remain untouched by the reform. By way of example, in the MPC reform process, constituents on all sides of the issue were very interested in how to handle allegations of sexual assault that arise in a context in which both parties are intoxicated. Unquestionably driven by recent popular attention to the issue of campus sexual assault,[16] many commenters expressed grave concerns about expanding the scope of liability in a situation in which questions of consent were clouded by intoxication. Specifically, observers were acutely aware of the question of whether a de-

16. *See, e.g.*, Vanessa Grigoriadis, *A Revolution Against Campus Sexual Assault: Meet the Women Who Are Leading the Charge*, THE CUT (Sept. 21, 2014), https://www.thecut.com/2014/09/emma-sulkowicz-campus-sexual-assault-activism.html#_ga=2.185954857.1612985719.1613153632-1207434238.1613065696 [https://perma.cc/5TDQ-7ZAY].

fendant should face charges in a situation where both the defendant and the accused were intoxicated.

Under the existing Model Penal Code, the intoxication of the defendant is directly addressed. In a general provision applicable to the entire Code, and outside of the purview of Article 213, the Model Penal Code provides:

> (1) [I]ntoxication of the actor is not a defense unless it negatives an element of the offense.
>
> (2) When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.[17]

This rule largely follows the common law practice, which is to accord a defense for acts requiring *specific intent*—in MPC parlance, a purposeful or knowledgeable mental state—while not exculpating actors who behave recklessly, but claim a failure to appreciate the risk of their conduct due to intoxication.[18] Under this principle, if the mental state of the elements of any sexual assault offenses can be satisfied by proof of recklessness—which also happens to be the presumptive mental state of the MPC overall[19]—then an intoxicated actor is liable regardless of intoxication.

The MPC rule on intoxication has been the subject of sharp scholarly criticism for its failure to attend to the important distinction between subjectively culpable and non-culpable mental states.[20] There are many adherents to the view that the MPC unjustifiably departed from its general posture of prioritizing subjective culpability when it adopted this rule, and those adherents have long advocated to strike it from the Code.

The conflict presents a quandary for the project of reform. Reform efforts could expand to tackle the problematic provision—but at the cost of side-tracking and delaying the process. This is the "just amend the MPC intoxication rule while you're at it" view. Alternatively, reform could simply embrace the problematic provision, and

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17. MODEL PENAL CODE § 2.08(1) (AM. L. INST. 1962).

18. *See* MODEL PENAL CODE § 208 cmt. 1 (AM. L. INST. 1962) (describing the general rule prior to the MPC as harmonizing with the MPC's formulation).

19. *See* MODEL PENAL CODE § 2.02(3) (AM. L. INST. 1962).

20. Stephen J. Morse, *Fear of Danger, Flight from Culpability*, 4 PSYCHOL. PUB. POL'Y & L. 250, 254 (1998). The 1962 Code nonetheless chose to embrace the common law rule, chiefly because it is "fair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk." MODEL PENAL CODE § 2.08 cmt. 3 at 9 (AM. LAW INST., Tentative Draft No. 9, 1959).

accept its application to the proposed revision, but by so doing, the reform effort itself may be undermined by those who abhor any perceived ratification of the existing provision, and especially as applied to these particular kinds of cases. Thus, either the impeding provision precludes passage of a statutory scheme around which there is otherwise consensus, because forces would rally against the consensus proposal in light of the way it interacts with the offensive provision (e.g., "I can't vote for this proposal because of how it will interact with the intoxication provision."); or the consensus proposal gets distorted into something different and less ideal in order to accommodate the offensive provision (e.g., "Although generally speaking, I agree the proper mental state is recklessness, we should change it to knowledge so as to avoid the intoxication issue."). A final option may be to simply craft an ugly workaround—to exempt application of the general provision in the context of the specific reform (e.g., "The MPC intoxication rule does not apply to Article 213."), but to do so may work an injustice, or, at the very least, such exceptionalism requires justification. Observers on all sides of the question of the provision's merits are likely to decry the carving out of a special exception removing application of a generally applicable provision, simply because the reform proposal happened to arise at another time.

Still more vexing, existing law proves extremely variable in its treatment of intoxication. A survey of current law revealed that very few jurisdictions followed the common law rule, but their reasons differ. Some jurisdictions define sexual assault as a general intent or strict liability crime, thereby obviating the applicability of a defense that was only ever available for specific intent offenses.[21] Other jurisdictions limit intoxication evidence to crimes requiring proof of purpose, rendering it inapplicable to sex offenses that per-

21. *See, e.g.*, People v. Newton, 867 N.E.2d 397, 399 (N.Y. 2007) (holding that as "a defendant's subjective mental state is not an element of the crime of third-degree sodomy, evidence of intoxication at the time of the sexual act is irrelevant"); Malone v. Commonwealth, 636 S.W.2d 647, 647 (Ky. 1982) (forcible rape and sodomy—which include intercourse with a "physically helpless" person—are strict-liability crimes as the acts "do not say that a mental state is required for their commission," and thus intoxication is no defense).

mit proof of knowledge for liability.[22] Still others forbade evidence of intoxication from negating any crime.[23]

In light of the tremendous variation in local practice, the revised Code explicitly deferred the resolution of the issue to generally applicable state law. In this respect, the lack of uniformity, and the nature of the project as a model code, provided an option unavailable to an actual legislator. The revision project was thus able to avoid direct confrontation with the contentious question of whether to amend the existing provision to conform to prevalent practice, leaving that debate to the adopting jurisdiction.

Another such conflict arose with regard to the mens rea—that is, the defendant's culpable state of mind—provisions of the MPC. The 1962 MPC mens rea provisions are widely considered its crowning achievement.[24] The MPC establishes a default mental state of recklessness, which it presumes applicable to every element of the offense unless a contrary mens rea is indicated.[25] Early drafts of the

22. *See, e.g.*, State v. Ramos, 648 P.2d 119, 121 (Ariz. 1982) (en banc) (stating that intoxication is not a defense to knowing mental state, only to "intentionality" or purpose); People v. Brown, 632 P.2d 1025, 1027–28 (Colo. 1981) (noting that "evidence of intoxication is relevant to negative the mens rea element of specific intent crimes . . . [but f]irst-degree sexual assault, which contains the culpable mental state of 'knowingly,' is a general intent crime).

23. *See, e.g.*, Payne v. State, 540 S.E.2d 191, 193 (Ga. 2001) (holding that "voluntary intoxication shall not be an excuse for any criminal act or omission"); White v. State, 717 S.W.2d 784, 786 (Ark. 1986) (affirming that the state statute eliminated all defenses of voluntary intoxication in all prosecutions, rather than just in cases involving a mens rea less than "purpose").

24. *See, e.g.*, Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CALIF. L. REV. 943, 952–53 (1999) ("The Code's mens rea proposals dissipated these clouds of confusion with an astute and perspicuous analysis that has been adopted in many states and has infused thinking about mens rea everywhere. . . . This is all old hat now, the standard stuff of the first-year criminal law class. But it was a breakthrough to articulate so lucidly and powerfully a conception of culpability requirements comprehending all crime definitions, and it has been transforming in its impact on the law and on legal education and scholarship."); Michael Serota, *Proportional Mens Rea and the Future of Criminal Code Reform*, 52 WAKE FOREST L. REV. 1201, 1201 (2017) ("[T]he centerpiece of the most influential criminal code reform project in recent history, the American Law Institute's Model Penal Code, is its general mens rea provisions, which define and more generally explicate the culpability requirement governing the individual offenses contained in the Code's Special Part."). Even critics of the Code acknowledge the universal acclaim for its mens rea provision. V.F. Nourse, *Heart and Minds: Understanding the New Culpability*, 6 BUFF. CRIM. L. REV. 361, 361 (2002) ("One of the central tenets of late twentieth century criminal law scholarship is that the thin, descriptive ideas of culpability of the Model Penal Code are the essence of goodness and wisdom and clarity.").

25. MODEL PENAL CODE § 2.02 (AM. L. INST., Proposed Official Draft 1962).

revision, therefore, relied on this principle and omitted any mention of mens rea, unless a higher mens rea was warranted and thus explicitly indicated. However, it quickly became apparent that those unfamiliar with the MPC structure, including outsiders (such as journalists or legislators) approaching the material for the first time, read this absence of explicit text as having left room either to interpolate their own imagined mens rea (for instance, assuming that negligence was the standard) or to indicate that no mens rea applied at all. It was decided, therefore, that although it was at odds with the MPC scheme, it was preferable to include the explicit language regarding the applicable mental state.

However, even that decision gave rise to disagreement. "Reckless" is a term of art defined at length in the Code itself.[26] It requires proof of the actor's subjective awareness—and disregard—of a substantial and unjustifiable risk.[27] But the word reckless, when read in the black letter statute, seemed to impart different meanings to different people. And, indeed, it turned out that in the civil law, the word reckless carries a broader meaning than in criminal law—tort law recklessness can encompass actors who are not subjectively aware of a risk, so long as the risk is sufficiently serious or large.[28]

So, despite several proposed alternative formulations, none could satisfy every constituency. MPC purists preferred to leave out mens rea entirely, consistent with the Code's underlying architecture—even at the expense of confusion or misinterpretation by outsiders. Others proposed to explicitly write in "reckless," even though that invited the ire of readers who understood that word to allow liability broader than the MPC definition would have permitted. Compromisers sought to substitute an abbreviated version of the MPC's lengthy "reckless" definition, but that grievously offended MPC purists and textualists who thought that providing a new formulation of an established concept implied difference from

26. MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST. 1962) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.").

27. *See id.*

28. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 842–45 (1994) (comparing a civil law "recklessness" approach, which would permit liability based on objective unreasonableness, with the subjective recklessness approach of criminal law, which it defined as "knowledge of a substantial risk of serious harm").

the original. No conclusion could satisfy all constituents, and thus the decision rested more on pragmatic rather than substantive considerations: the revision uses the word "recklessly," but reproduces the pertinent definition from the original 1962 Code. The commentary also underscores its distinctions from the civil standard.

In the case of the MPC, the irritating preexisting provisions pertained to intoxication and the definition of recklessness, but it is easy to see that such an issue could arise in any number of situations, such as where a general mens rea scheme fails to supply a mental state desired for the revision, or a generally applicable principle of accessorial or vicarious liability widens or thwarts the scope of liability, or when a term defined elsewhere in the code is at odds with its intended meaning for the reform effort.

2. Existing Punishments Influence Optimal Sanction Setting

Existing substantive law also constrains the extent to which criminal law reforms can effectuate their optimal goals in terms of punishment-setting. At this time, it seems fair to say that there is broad consensus that American penal law is too harsh. The statutory sanctions authorized by law were largely set during a period when parole operated to blunt some of their force, but sentencing reforms have eliminated that discretion. In addition, judges and prosecutors have veered toward pursuing more serious charges and imposing lengthier punishments,[29] resulting in the crisis of mass incarceration that we now face. Fortunately, the tides have slowly been turning, and there is recent bipartisan agreement about the need to mitigate the harshness of penal sanctions.

Partial reform efforts undertaken in such a climate, however, can meet with vexing challenges. These challenges are augmented by what is the essentially arbitrary task of fixing criminal punishments. Even if one subscribes to a particular penal theory, it is difficult to defend one specific term of years versus another—at least within a reasonable range—as unambiguously justified. Moreover, existing law may prove incoherent, leaving the ultimate judgments about appropriate sentence length wholly within the discretion of the drafters and voting membership with little to anchor the debate.

29. *See generally* Nat'l Research Council, The Growth of Incarceration in the United States: Exploring Causes and Consequences (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014); JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM (2017).

By way of example, revised Article 213 defines a wide spectrum of criminal conduct. At one extreme, it penalizes egregious violations of another person (such as a forcible rape causing serious bodily injury); at the other extreme, it punishes offensive but far less intrusive sexual acts (such as unwanted groping or fondling). In between are offenses of varying severity, with only loose consensus about how serious one particular act is over another. How should one rank nominally consensual sex between a prison guard and inmate versus sex with a person who has a severe intellectual disability? Still more complex are questions of sex that occurs without even nominal consent; should there be a difference in punishment between a person who engages in sexual penetration with another person who is actively resisting or saying no, versus a person who is frozen in fear? How seriously should the law treat sexual acts with children or youth, and how much should it matter whether the *child or youth* viewed the act as "consensual"? These are the kinds of questions that are raised in any criminal law drafting process, but they take on a special urgency in the context of reform.

A lack of clear consensus in existing law can further compound the difficulty of affixing penalties. Take an offense such as engaging in sexual intercourse with an adult who is unconscious. The lowest maximum punishment found in existing law is five years' incarceration;[30] the highest is life without parole.[31] Even an offense as seemingly straightforward as using aggravated physical force to compel an adult to engage in sexual intercourse exhibits tremendous variety in sentencing. The lowest maximum sentence for that offense in existing law is eight years;[32] the highest is life without parole.[33] Looking to existing law thus offers little guidance, and instead simply widens the scope of debate further.

What is more, even if existing law revealed consensus, it arguably ought *not* be the touchstone for affixing punishments in an era in which there is widespread agreement that punishments are altogether too harsh. But a revision that focuses on only one subset of criminal offenses has to balance between setting punishments that are justified in absolute terms and setting punishments that can be defended comparatively.

30. *See, e.g.*, OHIO REV. CODE ANN. §§ 2907.03(A)(2)–(3), 2929.14(A)(3)(a) (West 2019).

31. *See, e.g.*, WASH. REV. CODE ANN. §§ 9A.44.050(1)(b)–(2); 9A.20.021(1)(a) (West 2019).

32. *See, e.g.*, CAL. PENAL CODE §§ 261(a)(2), 264 (West 2013).

33. *See, e.g.*, GA. CODE ANN. § 16-6-1 (2011).

That is, assume that, in an absolute sense, we could agree that a low-level sanction is appropriate for nonconsensual sex in the absence of force. How should the precise maximum penalty be set, when it will be nested within the existing punishment scheme of the MPC? The MPC punishes recklessly subjecting an animal to cruel mistreatment as a misdemeanor,[34] and revising that penalty provision is not within the scope of the project revision. It would thus seem absurd to set a punishment that would equate animal cruelty with penetrating another person without consent. Similarly, in the current Code, theft of goods over $500 is a third-degree felony,[35] and recklessly causing serious bodily injury is a second-degree felony.[36] A revision that endeavors to lower punishments across the board, in response to contemporary views of penal excess, must thus attempt to square those preexisting harsh punishments with a revision that imposes lower sanctions for sexual violations.

Conversely, if the revision project is aimed at ensuring that penal law embraces changed mores about the propriety of certain behaviors, then the revision may seek to impose harsher punishments in a climate generally averse to them. For example, many advocates of the revision of Article 213 felt that existing law treated sexual offenses—both as a matter of law and practice—*too* leniently. Although many of those advocates may generally agree that mass incarceration is a pressing social problem or that punishments for many offenses (such as drugs or weapons offenses) are indefensibly harsh, those criticisms stop short when it comes to sex crimes.[37] Indeed, recent popular sentiment seems to tilt in the direction of preferring harsher sanctions for sexual offenses, even as it also calls for reduced reliance on incarceration overall—a sort of sex-offense exceptionalism.[38]

In such a context, how should a reformer determine the proper punishment for a revised provision of a penal code, both in relative and absolute terms? Is exceptionalism justified in either di-

34. MODEL PENAL Code § 250.11 (AM. L. AW INST. 1962).

35. MODEL PENAL CODE § 223.1(2)(a) (AM. L. INST. 1962).

36. MODEL PENAL CODE § 211.1 (AM. L. INST. 1962).

37. *See, e.g.*, Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007) (critiquing the appeal of penal punitiveness to feminist activists).

38. One article recently compiled a list of judges who gave lenient sentences to persons convicted of sex offenses, which includes a judge recalled for giving a sentence perceived to be too lenient. *See* Lili Loofbourow, *Why Society Goes Easy on Rapists*, SLATE (May 30, 2019, 5:45 AM), https://slate.com/news-and-politics/2019/05/sexual-assault-rape-sympathy-no-prison.html [https://perma.cc/Z8RH-BEEK].

rection—either to impose harsh sentences notwithstanding a general belief that American sentences are too harsh already, or to impose a sentence less severe than those found for less serious offenses, as perhaps justified in an absolute sense even if not in a relative sense, given American penal excess? Any attempt at revision within only one subsection of the penal code risks creating bad optics, if not outright injustice. In stark, illustrative terms: how can a reform project defend a maximum sentence (even if defensible in absolute sense) that is half the length of a crime universally acknowledged to be much less serious (however that is measured)? Or can a project defend the imposition of harshly punitive sentences while also criticizing the severity of sentences allowed for *other* offenses not subject to revision? Creating anachronistic punishments—whether they reflect shifts in penal philosophy or application of the same philosophy to less (or more) punitive ends—may undermine the reform effort's perceived legitimacy. Further, it may cause outside observers to question the legitimacy of the revision altogether.

3. The Distorting Effects of Collateral Consequences

A related problem arises with respect to the existence within a penal scheme of an array of collateral consequences. In the American legal system, the full scope of the collateral effects of conviction are staggering and breathtaking.[39] Sweeping in topics as wide ranging as housing, voting, and licensing to registration and immigration consequences, these collateral consequences often impose more serious penalties upon conviction than any term of incarceration. The area of sexual offending, in particular, is notorious for the harsh and expansive collateral consequences, including registration requirements and restrictions on residence and workplace locations. In the especially punitive and far-reaching context of American collateral consequences, the result can be an especially high bar for inflicting any punishment at all. Notwithstanding a shared sense that collateral consequences have spun far out of hand, the fact that such consequences endure prevents some persons who might otherwise agree with a particular reform from offering their support. And, even if the need to define some scope of liability is generally accepted, the existence of collateral consequences influences the scope and terms of liability.

39. *See National Inventory of Collateral Consequences of Conviction*, JUSTICE CTR., https://niccc.csgjusticecenter.org [https://perma.cc/5CM4-5TZQ] (last visited Nov. 18, 2019) (listing consequences of conviction by jurisdiction and type of consequence, as compiled by the American Bar Association).

That is, basic decisions such as, "should this conduct be criminal" or "what is the appropriate mens rea" or "what defenses should be available" were inevitably refracted through the lens of the consequences of conviction of the offense, not just the anticipated period of maximum incarceration. For example, consider a debate about whether sex between a therapist and a patient in the therapist's care ought to be criminally punished. Such a debate obviously invites differing views of the proper scope and subjects of penal law, and how far it should extend. But the debate also grapples with the inability of the reform effort to prevent low-level offenses from spiraling into crimes with crippling consequences. To be convicted as a sex offender in contemporary society—even at the lowest levels—is to face the prospect of permanently losing the ability to live in large swathes of the country, to work, to get a license, to obtain loans, and so on. Thus, debates over the proper scope of penal law inevitably had to account for the likelihood that even the lowest levels of undesirable conduct, if substantively outlawed and assigned minimal penalties, nonetheless would invoke severe collateral consequences.

Thus, any reform effort nested within a larger body of law that remains untouched must account for whether and how much to embrace the parameters of existing law—whether in terms of the range in severity of sentences or the availability of collateral consequences. And, if the reform departs from those existing judgments, it must defend the exceptionalism of the reformed section either on its own terms or as a form of protest or critique of existing law.

And still more pertinently, and perhaps unexpectedly, the existence of a known and extensive body of collateral consequences inherently informed the drafting of the *substantive* scope of liability, as well. In the context of the MPC revision, that pressure led to arguments to constrict liability. But it is easy to imagine, in another context, that the existence of collateral consequences will drive decision-making toward the opposite direction. If the desired outcome of the revision project is to sweep certain offenders within the ambit of certain consequences, then that may affect drafting or other such decisions. For instance, a domestic assault conviction can trigger a presumption that a person is not fit for custody of their children, stop the convicted person from receiving spousal support, or strip away the person's Second Amendment rights.[40] Misdemeanor domestic assault also makes a non-citizen eligible for

40. *See, e.g.*, Nancy K.D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?*, 28 WM. MITCHELL L. REV. 601, 614 (2001); Tiffany Sala, *What Do You Get When You Abuse Your Spouse? Spousal Support.*,

removal in certain circumstances.[41] If reformers specifically seek a particular collateral consequence of an offense, then they must ensure inclusion of the triggering language in the proposed statute, even if it otherwise ill fits the overall scheme. In both cases—whether unwanted or desirable collateral consequences—the key observation is that ancillary punishments end up shaping and distorting both the decision to penalize at all, as well as the manner in which the elements of the crime are defined.

B. The Constraint of Institutions and Procedures

1. Institutions

Shared knowledge about the institutions and systems that execute substantive criminal law in a particular jurisdiction also affects any efforts at undertaking meaningful criminal law reform. In particular, two effects are notable: first, constituents and advisers to the reform will be freighted with their own expectations—often divergent—as to how the law plays out "on the ground;" and second, the architects of the reforms must determine how much consideration should be given to those ground-truths, assuming they can even be reliably assessed.

Interestingly, one might imagine that the project of reforming a *model* penal code would be free from such concerns. As law students have long lamented, the Model Penal Code is just a *model*: it isn't itself the governing law in any jurisdiction. But because the aim of the project is, of course, to inform actual legislation—and indeed, because so many states wholesale adopted the Code's provisions when first drafted—such concerns rightly take center stage.

These "reality" checks regularly intruded on antiseptic discussions of the best choice among substantive standards. Conversations about the substantive terms of the statutes contended with the universally recognized conditions of current criminal justice processing. For instance, there were concerns about the ways in which prosecutors regularly exercise discretion to thwart substantive law (e.g., choosing not to prosecute certain kinds of cases, pursuing prosecutions based on discriminatory criteria, and filing unduly harsh charges for bargaining purposes); the low quality of counsel for most defendants; the high rate of plea bargaining; the ines-

50 U. PAC. L. REV. 735 (2019); Carolyn B. Ramsay, *Firearms in the Family*, 78 OHIO ST. L. J. 1257 (2017).

41. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(E) (2019) (making a person eligible for removal upon conviction of certain domestic offenses); *id.* at § 1229b(c)(4) (making a person ineligible for cancellation of removal if they were convicted of a domestic offense).

capable pressure to plea bargain; and so on. A provision with multiple grades of offense was not just considered in isolation—or in "punishment-fits-the-crime" terms—but as a part of a larger scheme in which prosecutors would engage in strategic charging and defendants would bargain for reduced liability. Would one crime be a "lesser included offense" of another crime, such that conviction for both merged at sentencing? Or would the elements support multiple charges, thereby dramatically extending the scope of actual punishment to which a defendant was exposed and stripping the defendant's capacity to plea bargain effectively?

Of course, not all "ground-truths" that surfaced about criminal justice were shared. Whereas some participants in the process felt that police routinely disbelieve certain complainants, others felt that policing of sexual offenses had become too aggressive. Some participants felt that police and prosecutors were too punitive in pursuing and seeking punishment for sex offenders, whereas others felt that sex offenses had been largely ignored or minimized by the criminal justice system. Some of these observations took on a political character, which is discussed separately below, but often they also represented fundamental divergences in the perception of what "really happens" in criminal cases from complaint to post-conviction.

In undertaking substantive reforms, therefore, those attuned to the actual climate of criminal adjudication must consider arguments about the proper scope and shape of criminal law that go beyond the abstract substantive merits, and instead reflect on these kinds of operational realities. A lesser charge is no longer simply a lesser; it is a bargaining chip that will enable or thwart justice. An element is no longer simply an element; it is a piece of the offense that will make the crime unprovable, and thus unchargeable, because, practically speaking, sufficient evidence is too hard or too easy for a party to adduce.

The deep knowledge held by institutional actors—even and perhaps especially when such knowledge diverges sharply as a result of regional differences—undoubtedly affects the progress and merit of reforms, both as a matter of successful passage and in actual implementation.

2. Procedures

Attempts to revise substantive criminal law must also reckon with attendant procedural or evidentiary rules that affect the actualization of those substantive provisions. As any seasoned litigator will tell you, the rules of evidence and procedure often play a far

greater role in the adjudication of a complaint than the underlying substantive rules, particularly when those rules turn on fine-grained distinctions (such as the difference between mental states) that lay jurors may find hard to operationalize. Substantive reform therefore often occurs against the backdrop of an underlying belief in what kinds of evidence or procedures will apply in any particular case.

Of course, in the criminal law there are some basic procedural guarantees that are universal across jurisdictions. The right to counsel, the right to a jury in serious cases, the presumption of innocence, the government's burden of proof, and the standard of proof beyond a reasonable doubt apply nationwide. To the extent that these rights may affect decisions about substantive rules, they do so more in the "institutions" sense described above (in terms of how they play out on the ground). But other procedural rules may influence the choice among substantive standards.

For instance, in the sexual assault context, proof of the offense was historically laden with procedural doctrines intended to pose an obstacle to prosecution. Article 213 enshrined some of those procedures within the substantive code. Sections 213.6(4) and (5) embraced the "prompt complaint" and "corroboration" requirements of the common law, albeit in a relaxed form, and thus interposed a significant obstacle to conviction under any substantive standard.[42] Outside of the sexual assault context, it is easy to imagine other rules of procedure that might dramatically undermine or upset an intention guiding a substantive reform. Indeed, commentators have noted that the Model Penal Code itself is "littered with procedural provisions," notwithstanding that it is, ostensibly, a substantive code.[43]

42. MODEL PENAL CODE § 213.6(4) (AM. L. INST. 1962) ("PROMPT COMPLAINT. No prosecution may be instituted or maintained under this Article unless the alleged offense was brought to the notice of public authority within [3] months of its occurrence or, where the alleged victim was less than [16] years old or otherwise incompetent to make complaint, within [3] months after a parent, guardian or other competent person specially interested in the victim learns of the offense."); *id.* at § 213.6(5) ("TESTIMONY OF COMPLAINANTS. No person shall be convicted of any felony under this Article upon the uncorroborated testimony of the alleged victim. Corroboration may be circumstantial. In any prosecution before a jury for an offense under this Article, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.").

43. Robinson & Dubber, *supra* note 1, at 324.

The same problem arises in the context of evidentiary rules. Of the three pillars of adjudication— the definition of the substantive offense, the procedural rules of decision, and the rules of evidence that guide the admission of proof—it may be the last that is most decisive in determining the outcome in the majority of cases. Drawing again from the sexual assault context, the rules of evidence have played a contested and convoluted role in the history of sex prosecutions. For many years, evidence rules not only permitted admission of evidence that unjustly tainted or prejudiced the jury against the complainant, but also interposed significant hurdles to conviction on the part of the prosecution—specifically, the use of evidence rules to allow in general information about a victim's sexual history, and the use of cautionary instructions that warned jurors that sexual assault complainants were uniquely unreliable.

The original MPC contained provisions that reinforced both of these traditions. Section 213.6(3) of the original Code sought to limit the impact of a complainant's sexual history on the adjudication of a claim, but it did so by codifying a version of the rule that allowed a defense based on the complainant's "sexual promiscuity." Similarly, Section 213.6(5) endorsed the notorious "Lord Hale instruction," providing that "the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private."[44]

Across American jurisdictions, there is wide variety in the continued operation of these procedural and evidentiary provisions. What is more, a wave of reform inspired by feminists in the 1970s and '80s led to enactment of "rape shield" statutes, which sought to better protect victims from the trauma of testifying, as well as to improve the factfinders' decision basis. These rules dramatically curtail the evidence that the defense may offer in a rape case.[45] The federal template upon which many states based their rules is extremely restrictive, arguably unconstitutionally so.[46] Across the states, however, equivalent provisions vary markedly. Some states permit a very narrow class of proof, whereas others are much more

44. MODEL PENAL CODE § 213.6(5) (AM. L. INST. 1962).

45. *See generally* Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 80 (2002).

46. The Supreme Court has nodded in that direction by holding that a similar statute had to yield to the defendant's constitutional right to probe bias in *Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam).

wide-ranging. Writing a substantive law on such an indeterminate evidentiary landscape poses real obstacles, as the drafters' intention may be undermined by rules that bias the proceedings in one direction or another.

Any effort at reform, therefore, must pay scrupulous attention to the potential application of procedural or evidentiary provisions and their likely impact on the substantive aims of the revision. In some cases, provisions specific to one class or category of crimes may be easily identified, and perhaps even subsumed within the larger reform project. In the MPC project, the procedural and evidentiary rules' specific applicability to sexual offenses was already nested within Article 213 of the 1962 Code and applied only to that article. Thus, it was both logistically feasible and logically defensible to strike those provisions and propose revised rules applicable only to sexual assault.

But where procedural or evidentiary rules are generally applicable to all criminal (or even criminal and civil) law, rather than specific to the area under review, they may be much more impermeable to reform. The example given earlier regarding the intoxication provision offers one example of a substantive rule that has general applicability, yet directly impacts any effort to revise a single offense. Similarly, the existence of generally applicable rules about the introduction of character evidence or the scope of discovery may influence discussions about the proper terms of substantive penal law. That certain forms of evidence may or may not be available, whether through discovery or as proof at trial, exerts a powerful influence over the degree to which liability ought to be defined expansively or narrowly. And, whereas addressing such provisions may fall clearly outside a reform project—indeed, even one that entails a wholesale revision of a substantive code—glossing over the impact of evidence or procedural law risks subverting or distorting the very goals of the substantive reform.

III.
POLITICAL CHALLENGES

In addition to the challenges of achieving substantive criminal justice reform while working within an existing framework of other substantive, procedural, and evidentiary law—as well as the operational realities of those laws—the political dimensions to criminal justice reform inescapably shape the course of progress. It is widely known that, at least within the United States, criminal law reform is a freighted topic. Criminal justice has been politicized, in varying degrees and in varying ways, over time. It has both unified and po-

larized the nation, as policies whipsaw between the draconian (e.g., mandatory minimums, three strikes) and progressive (e.g., legalization of marijuana, alternatives to incarceration, specialized courts).

Perhaps few areas of criminal law could lay better claim to the mantle of "most contentious" than the area of sexual assault. Sexual intimacy is a cherished part of our basic humanity, and thus efforts to regulate the permissible bounds of such intimacy inevitably engender great controversy. What is more, because sexual behavior tends to occur in private, individual expectations about what is "common" or "normal" may in fact vary dramatically. Sexual regulation is also bound up in deeper questions of female power and autonomy; the differences between the sexes; sexual orientation; domestic violence; religion and the value of chastity; and other social movements and debates that bring heavy baggage to the discussion. It is significant that the underlying mores upon which sexual assault law rests have changed dramatically in a relatively short period of time; indeed, whereas the MPC provisions on homicide have stood the test of time relatively well, Article 213 is commonly not even taught in first year law classes because it is already so outdated.

This section aims to tease out a handful of the ways in which criminal law reform must grapple with political reality. In other words, it explains why the project of reform has to take place within, and embrace, the highly charged and political context in which all criminal justice conversations occur (at least in the United States), rather than endeavor to take a more antiseptic or academic approach.

A. The Politicization of the Debate

Criminal justice is an area of law that many observers have strong intuitive feelings about, even if they do not themselves have any personal expertise. The news and entertainment media are rife with criminal justice stories, and it is easy to develop armchair opinions about how the system works or its optimal rules. Most importantly for the project of reform, constituents may have "sticky" ideas of precisely whom the criminal laws are apt to affect, and those views may color and shade their reactions to proposals for reform in ways that are less than constructive.

For instance, in the context of the MPC reform, the make-up of the "legislative" body unquestionably affects discussions about the wisdom of certain choices. The ALI skews heavily white, male, and older—largely because it is an elected body of elites in the profession and for much of recent history the legal profession itself was

white and male.[47] What is more, as a body of lawyers, the membership has attained a degree of education far beyond that of the ordinary citizen. The membership also by and large inhabits a socioeconomic class significantly higher than most subjects of criminal law, and may possess other qualities shared among lawyerly elites but not found as readily in society writ large (for instance, an affection for rules and a penchant for argument).

In light of these demographic characteristics, as well as the heavy press coverage given to the issues surrounding campus sexual assault, it is perhaps not surprising that ALI discussions often veered toward the campus context when testing out the application of various rules. To be clear: the reform project is entirely centered on a *penal* code, not a campus disciplinary code. The penal law applies in a far broader array of factual circumstances than a typical campus code, and the due process that attends criminal adjudication is not only clear, but completely distinct from that which is typical on a college campus.

Perhaps most importantly, the kind of cases that populate the criminal courts are at a far remove from the often-discussed college "he said, she said."[48] Penal law often addresses situations of domestic violence, and so the disputed sex occurs in the context of a violent relationship. Typical cases also tend to involve vulnerable victims, such as children, sex workers, consumers of certain professional services (like massages), young adults (like an 18 or 19-year-old assaulted by an uncle or family friend), or the involvement of drugs or multiple actors.

Nevertheless, despite the texture of the actual case law, the mental image seemingly held by many constituents in the reform process was that of their educated son at college, or of two young

47. *Membership*, AM. L. INST., https://www.ali.org/members/ [https://perma.cc/T45T-Y8BB] (last visited Jan. 11, 2021) (The ALI is a highly select, invitation-only body, whose "membership consists of eminent judges, lawyers, and law professors from all areas of the United States and from many foreign countries, selected on the basis of professional achievement and demonstrated interest in improving the law.").

48. *See*, e.g., Dawn Beichner & Cassia Spohn, *Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit*, 16 CRIM. JUST. POL'Y REV. 461, 488 (2005) (citing data and past research that indicate that prosecutors are most likely to charge sexual offenses involving weapons or injury and when the victim has no questionable moral character or behavior and engaged in no risk-taking actions such as "accompanying the suspect to his residence"); *id.* at 480, tbl. 3 (noting that the vast majority of cases involve either intimate partners or non-strangers). *See generally* CASSIA SPOHN & KATHARINE TELLIS, POLICING & PROSECUTING SEXUAL ASSAULT: INSIDE THE CRIMINAL JUSTICE SYSTEM (2014) (reporting on allegation and prosecution characteristics).

"co-eds" engaging in sexual intimacy in a state of extreme intoxication. As a result, conversations about some of the core pillars of the offense—the meaning of consent, liability for unconscious or sleeping persons, the definition of penetration, the effects of intoxication, etc.—were often refracted through the lens of the campus experience. The need arose to deliberately anchor the conversation by reminding constituents of the actual types of cases that arise regularly in criminal court. For instance, some constituents bristled at a definition of penetration that had longstanding and wide support in existing law, because that included any intrusion "however slight." In such conversations, it was important to remind them that a more demanding standard, rather than ensnaring hapless young freshmen, would instead serve to exculpate actors in two regularly occurring situations: when the actor attempts to force a flaccid penis inside another person, or when the actor has trouble fully penetrating a very young child.

The debate over choices among rules can also become so heavily burdened by political ideologies that it threatens to undermine the entire project of reform. For instance, persons opposed to mass incarceration might determine that no criminal law reform—even if intended to rationalize or make sensible otherwise outdated provisions—should proceed if the punishments are to be too harsh. Rather than fight individual battles about the reach and scope of law, those sympathetic to this view might instead determine that an outdated, inoperable criminal law is preferable to a functioning one.

Or, to take another example, specific topics may become too charged even to address. Again, drawing from the MPC process, the debate over the evidentiary treatment of false accusation evidence suffered from this problem. The mere mention of "false accusations" rings alarm bells for people on both sides of the debate. To some, the history of sexual assault is littered with instances in which complainants were dismissed as liars or scheming shrews; to others, the history of sexual assault law is tainted by false accusations, including those intended to excuse racial violence (e.g., against Emmett Till)[49] or perpetrate other discriminatory acts (e.g., against LGBTQ persons).[50] In such an atmosphere, mere mention of a scheme to regulate the admission of false accusation evidence pro-

49. *See, e.g.*, PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA (2003).

50. *See, e.g.*, David Alan Sklansky, *"One Train May Hide Another": Katz, Stonewall, and the Secret Subtext of Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 900–17 (2010) (recounting history of hostility and hysteria in America during the midcentury,

vokes ire from all sides, and the obvious course becomes to simply ignore it. To regulate it is, after all, to validate the idea that false accusations exist (and in significant enough numbers to warrant a special rule). Notwithstanding the need to collate this especially sloppy and multiplicitous area of doctrine, those efforts fell flat when met by political resistance to even broaching the topic.

In sum, the politically charged atmosphere in which reform takes place, coupled with strongly held, pre-existing beliefs about the nature and target of any reform effort, must be taken into account and managed for those efforts to meet with success.

B. Evolving, and Divergent, Social and Cultural Understandings

Because criminal law is tasked with condemning or deterring socially undesirable behaviors, it inherently depends to some degree on shared acceptance of what is in fact socially undesirable. I do not, in this subsection, intend to take on the larger debate over the proper purpose of criminal law, and whether it should hew tightly to the descriptive reality of individual behavior versus undertake a more normative project of social change. Instead, I mean only to underscore that there are areas of criminal justice reform in which divergent social mores may play a greater or lesser role. Specifically, sexual assault reform is burdened by significant generational shifts in understandings about sex, gender, and sexuality; the difficulty of talking about uncomfortable topics; and socio-economic and educational gaps in the messages transmitted through formal sex education.

First, the norms and expectations surrounding certain kinds of unlawful activity are particularly susceptible to generational shifts. Some categories of crime may remain relatively impervious to demographic influence; for instance, what constitutes homicide or motor vehicle theft may be more or less shared among large swathes of the population. But other offenses exhibit greater variation among demographic groups. Older people may consider it stealing to infringe a copyright by downloading a movie without permission, whereas young people consider it morally inoffensive. Older generations may think regulatory offenses, like driving while intoxicated or failing to wear a seatbelt, should be treated less seriously than those in younger generations steeped in risk-minimization.

Most pertinently, debates about the scope of sexual assault laws are deeply affected by both normative and descriptive accounts of

including the "Lavender Scare" period and Hoover's "Sex Deviates" program, exemplified by "gay-baiting").

what constitutes "consent." But less salient, yet equally important, divergences in basic premises about sex are also evident. How "normal" or "acceptable" are bondage and sadomasochism? Is male sexual drive so unrelenting that its nearly unthinkable to conceive of a man as unwilling to have sex? Should acts of oral, vaginal, and anal sexual penetration be treated as equivalently serious or intrusive, or is vaginal penetration the paramount offense? Should group sex be perceived as presumptively suspect? Is sexual intimacy in certain circumstances inherently coercive, such as between employers and employees, therapists and patients, or teachers and students? The intuitions about sex that underpin one's answers to those questions both explicitly and implicitly affect larger debates about the proper scope of liability.

Sexual intimacy is one area in which a broad spectrum of deeply felt views may be found, on everything from the propriety or frequency of particular sexual acts to the nature of consent. Much has been written about the differences between men and women in this regard, but there are also stories to tell about other demographic differences. Dramatic changes have occurred in a wide range of areas that influence individual views about sexual intimacy, including with regard to: coeducation; sex and gender equality; gender identity; the acceptance of cohabitation outside of marriage (whether with a sexual partner or friend of the opposite sex); interracial and same-sex relationships and marriage; and the availability of pornography, contraception, or abortion services. Indeed, basic understandings about the essential qualities of sex and gender identity have undergone dramatic shifts in recent generations, as the right to same-sex marriage has won constitutional protection,[51] gender identity has become increasingly fluid,[52] and even the essential durability of the sexual impulse has received scrutiny.[53] What is obvious to one generation may be shocking to another, yet reform efforts must seek to find common ground.

Second, the act of legislating may require frank and explicit conversations that participants may be unaccustomed to and find uncomfortable. Debates about whether it is worse to kill with a

51. Obergefell v. Hodges, 574 U.S. 1118 (2015).

52. Mark Joseph Stern et al., *The Judicial and Generational Dispute Over Transgender Rights*, 29 STAN. L. & POL'Y REV. 159, 170 (2018) (reporting results from multi-prong assessment of high school students' views of gender identity and sexual orientation).

53. Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 303 (2014) (describing an "emerging identity category" of "asexuality," or people who do not feel sexual attraction).

knife or a gun may be relatively anodyne (if gruesome), but probing the details of a particular sexual act may cause discussants to talk in an evasive, rather than straightforward, manner. Out of politeness, respect, fear, shame, or privacy, divergent experiences may not always be shared openly. Those who do speak frankly—for instance, about the pleasures of bondage—may risk mockery, dismissal, or even professional and personal consequences. And to be clear, though these kinds of reservations may especially arise in an area of reform like sexual assault, other aspects of criminal justice reform that also carry the weight of social shame or embarrassment—such as the laws governing vice or narcotics crimes—may likewise encounter the problem of hard conversations.

Conversely, it also may be the case that reform efforts are stymied or shaped by the particular context in which they occur. In a room full of people with similar life experiences or perspectives, some norms of behavior or descriptive truths may be wholly unrepresented. For instance, as noted earlier, the members of the American Law Institute are by definition highly-educated elites in the later stages of their careers. Members have a legal degree; in contrast, two-thirds of the U.S. adult population do not have a bachelor's degree.[54] Educational differences may be particularly important in areas where norms are disputed or in flux. For instance, a recent study showed that only two of the eighteen states examined explicitly mention the concept of sexual consent in their K-12 health education programs.[55] In contrast, colleges and universities have increasingly emphasized sexual education, and particularly education about consent.[56] The challenge of criminal law reform in such a context is to try to bridge the divides of variable and divergent life experiences, whether they arise within the immediate constituent group or outside of it.

These challenges are particularly acute with regard to reform efforts likely to take place in the public arena. For instance, with regard to the MPC reform, even an act as simple as the titling of an offense—"rape" versus "sexual assault"—evoked reactions tied more to generational difference than substantive merits. When me-

54. Press Release, U.S. Census Bureau, Highest Educational Levels Reached by Adults in the U.S. Since 1940 (Mar. 30, 2017), https://www.census.gov/newsroom/press-releases/2017/cb17-51.html [https://perma.cc/D9ZK-TZXM].

55. Malachi Willis, Kristen N. Jozkowski & Julia Read, *Sexual Consent in K-12 Sex Education: An Analysis of Current Health Education Standards in the United States*, 19 SEX EDUC. 2 (2018), https://doi.org/10.1080/14681811.2018.1510769 [https://perma.cc/PA2S-QHTE].

56. *Id.*

dia become involved, they add another dimension to deliberations that require attention. Because criminal law reform is often of great interest to the general public, reporters may seek to write about areas of dispute or debate. The understanding that media take from those conversations, and the kind of messaging that they choose to engage in through their reporting, can likewise impact the success of the project. Apart from the decision to pursue particular paths of liability, considerations of this kind may affect drafting decisions—with perhaps the ancillary benefit of clarity for expressive purposes as well.

IV.
CONCLUSION

Efforts at penal law reform—whether a total overhaul of a jurisdiction's substantive law, or a strategic intervention in trouble spots—face numerous hurdles. Yet America's criminal law is desperately in need of attention. Drawing upon recent experience with one such reform, this chapter aims to elucidate some of the problems that such efforts may encounter, in the hopes of smoothing the road for future fellow travelers on this important journey.