

THEORIZING CRIMINAL LAW REFORM CONFERENCE  
**WRITING ON AN UNCLEAN SLATE:  
CHALLENGES IN SUBSTANTIVE REFORM OF A PENAL CODE**

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In the Spring of 2012, the American Law Institute (ALI) initiated a project to revise Article 213 of its Model Penal Code.<sup>1</sup> Although the ALI historically engaged in “restatements” of existing law, when the ALI leadership turned its attention to a restatement of the criminal law, they found “existing law too chaotic and irrational to merit ‘restatement.’”<sup>2</sup> Thus, led by law professor Herbert Wechsler, the Institute authorized the creation of a *Model Penal Code* (MPC) that would reflect the best in contemporary penal theory and practice. The project finished in 1962 with the publication of the full complete official draft as adopted by the full membership of the ALI.<sup>4</sup> A final version containing consolidated and revised commentaries (which are not formally adopted by the membership) was published in six volumes in 1985.<sup>5</sup> Without question, the project was met with resounding success, and provisions were adopted in part or whole by roughly thirty-four states.<sup>6</sup>

Over the years, many provisions of the MPC have stood the test of time, despite dramatic changes in social mores and criminal justice practices. Although the MPC has engendered serious critiques and calls for wholesale reform,<sup>7</sup> the original document still stands.<sup>8</sup> But in 2012 the ALI agreed to consider calls to revise Article 213, the sexual

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<sup>1</sup> Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 *New Criminal L. Rev.* 319, 323 (2007). See generally [ali.org](http://ali.org).

<sup>2</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 326-28.

<sup>7</sup> See, e.g., Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Model Penal Code*, 4 *Buff. Crim. L. Rev.* 53 (2000).

<sup>8</sup> In 2009, the ALI initiated its first project to revise the MPC: an effort to re-examine the death penalty provisions of the Code that ultimately resulted in a vote to withdraw the existing provisions (although not take a formal stand against capital punishment). [Report of the Council to the Membership of The American Law Institute On the Matter of the Death Penalty](#), April 15, 2009 (contains the Steiker study); Annual Meeting, May 19, 2009; final Council vote, Oct. 23, 2009.

assault provisions of the MPC. Although that Article embraced some positions considered progressive at that the time, it had aged poorly in light of dramatic changes in sexual mores and the successes of sex and gender orientation and identity equality movements. As a result, Article 213 was commonly criticized as a benighted provision in need of total overhaul.<sup>9</sup>

In 2012, the ALI leadership agreed, and selected Stephen Schulhofer – an NYU Law Professor well known for his book about rape -- as the Reporter.<sup>10</sup> 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, some of the difficulties that we have encountered undoubtedly will arise with regard to any similar effort. In this chapter, I cover three overarching challenges that the project has faced. Specifically, the difficulty of undertaking piecemeal reform within an existing penal structure (both substantive and procedural); the difficulty of drafting a suitably complex statute, when it will be read by a wide array of audiences; and the challenge of reform in a politically-charged area.

## **I. Reform from with 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 different values, and the contemporary goals or mores 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 structures 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.*

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<sup>9</sup> 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).

<sup>10</sup> Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Fialure of Law* (2000).

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 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.* 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,<sup>11</sup> 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 whether a defendant 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 that

- (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.”<sup>12</sup>

This rule largely follows the common law practice, which was 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.<sup>13</sup> Under this principle, if the mental state of the elements of any sexual assault offenses can be satisfied by proof of recklessness – which

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<sup>11</sup> See, e.g., Vanessa Grigoriadis, Meet the College Women Who Are Starting a Revolution Against Campus Sexual Assault, N.Y. Mag. Sept. 21, 2014.

<sup>12</sup> Model Penal Code § 2.08(1).

<sup>13</sup> See Commentary to 2.08, describing the general rule prior to the MPC as harmonizing with the MPC’s formulation.

also happens to be the presumptive mental state of the MPC overall<sup>14</sup> -- then an intoxicated actor is liable regardless of intoxication.

The MPC rule on intoxication has been the subject of sharp scholarly criticism for failing to attend to the important distinction between subjectively culpable and non-culpable mental states.<sup>15</sup> 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 they in turn 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 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 the impeding provision either precludes passage of a statutory scheme around which there is otherwise consensus, because forces rally against the consensus proposal in light of the way it interacts with the offensive provision (i.e., “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 (i.e., “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 (i.e., “The MPC intoxication rule does not apply to Article 213”), but to do so may work an injustice, or at the very least requires justification for such exceptionalism. Observers on all sides of the question of the provision’s merits are likely to decry the carving of a special exception removing application of a generally applicable provision simply because the reform proposal happened to arise at an independent time.

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<sup>14</sup> See 2.02(3).

<sup>15</sup>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 not unfair 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.”<sup>15</sup>

In the case of the MPC, the irritating substantive provision pertained to intoxication, but it is easy to see that such an issue could arise in any number of situations, such as a where a general mens rea scheme fails to account for a desired mental state, or a generally applicable principle of accessorial or vicarious liability thwarts a specific aim, or when a term is defined elsewhere in a provision in a manner at odds with its use in the reform effort.

*2. Existing punishments distort 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,<sup>16</sup> 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 an essentially arbitrary task of fixing criminal punishments. Even if one subscribes to a particular penal theory, it is difficult to defend any specific term of years versus another – at least within a reasonable range – as clearly justified.

In such a context, how should a reformer determine the proper punishment for a revised provision of a penal code? In the American system, the problem is setting punishment in the context of an unduly harsh penal code; but it is also possible to imagine the challenge from another direction, where the penal code is otherwise lenient and a stricter penalty feels appropriate, even while it sits poorly within the larger scheme.

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<sup>16</sup> National 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).

For instance, the sexual assault revision defines a range of conduct as criminal, from the most egregious violations of another person (such as a forcible rape causing serious bodily injury) to less offensive, although still criminal, kinds of acts (such as unwanted groping or fondling). In between are a range of offenses of varying severity, with only loose consensus about how serious one particular act is over another. How should one rank order sex between a prison guard and inmate versus sex where the person suffers severe intellectual disability? Still more complex are questions of sex that occurs without 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? 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.

That is, the extent that such violations can be ordered, how should the penalty be apportioned – according to an absolute sense of right, or relative to the existing (and presumably inalterable) penal scheme? 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 does assigning such a penalty fit within the existing punishment scheme of the MPC? If recklessly subjecting an animal to cruel mistreatment is a misdemeanor, it seems absurd to suggest that penetrating another person without consent could be as well. Theft of goods over \$500 is a third-degree felony;<sup>17</sup> and recklessly causing serious bodily injury is a second-degree felony.<sup>18</sup> How might a revision square those rather harsh punishments with a low level sanction for imposing on another person sexually without their consent, even if those punishments are deemed unduly harsh for the crimes they describe?

To the extent that existing penal law is perceived as excessively severe, and yet not subject to the specific reform provision, any attempt at revision could create bad optics, if not outright injustice. In stark, illustrative terms: how can a reform project defend a 5 year maximum sentence (deemed appropriate in absolute sense) when a crime universally acknowledged to be much less serious (however that is measured) carries twice the penalty? Creating anachronistic punishments that reflect either shifts in penal philosophy

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<sup>17</sup> 1962 Code §§ 223.1 and 250.11.

<sup>18</sup> 1962 Code § 211.1.

or application of the same philosophy to less (or more) punitive ends undermines the reform effort's perceived legitimacy, and in fact may cause outside observers to question the entire project of imposing punishment terms 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.<sup>19</sup> Sweeping in topics as wide ranging as housing, voting, and licensing to registration and immigration consequences, these collateral consequences often operate as 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 up to a year and restrictions on residence and workplace locations, among other things.

Any conversation regarding substantive reform of the law – in particular reform in an area susceptible to such collateral consequences – will thus be affected by individuals' perceptions of the application collateral consequences. Basic decisions such as, “should this conduct be criminal” or “what is the appropriate mens rea” will inevitably be refracted through the lens of the consequences of conviction of the offense – not just in terms of a period of incarceration but in terms of the conviction itself, by means of these collateral effects, operating to effectively disable an individual from productive life in the future. 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 remain will prohibit some persons who might otherwise agree with a particular reform from being able to lend support.

Conversely, it is easy to imagine in another context that the existence of collateral consequences will drive decision-making the opposite direction. If the desired outcome of the revision project is to sweep certain offenders within the ambit of certain consequences,

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<sup>19</sup> See <https://niccc.csgjusticecenter.org/> for an online inventory compiled by the American Bar Association.

then that may affect drafting or other such decisions. For instance, if an offense must specifically apply to domestic violence situations in order for a particular collateral effect to apply, then reformers must ensure inclusion of the triggering language in the proposed statute, even if it otherwise ill fits the overall scheme. In both cases, the key is that these 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 systems and procedures.*

*1. Systems*

Shared knowledge about the institutions and systems that execute substantive criminal law in a particular jurisdiction unquestionably affects any efforts at undertaking meaningful criminal law reform. In particular, two effects are notable: first, that approvers of the reform will be freighted with their own expectations – often divergent – as to how the law plays out “on the ground,” and second, that 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. But because the aim of the project is, of course, to inform actual legislation, such concerns rightly take center stage. The following list is intended to relay a smattering of “ground-truths” that regularly intrude on antiseptic discussions of the best choice among substantive standards: police routinely disbelieve certain complainants; prosecutors regularly exercise discretion in ways that thwart substantive law (e.g., choosing not to prosecute certain kinds of cases, pursuing prosecutions based on discriminatory criteria; laying unduly harsh charges for bargaining purposes, etc.); the quality of counsel for most defendants is low; the rate of plea bargaining is high; pressure to plea bargain is inescapable; and so on.

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 are divorced from substantive merits, but instead reflect these kinds of operational realities. A lesser charge is no longer simply a lesser; it is now assessed as a bargaining chip that will enable or thwart justice. An element is no longer simply an

element; it is now a piece of the offense that will make the crime unprovable, and thus unchargeable, because sufficient evidence is practically speaking 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, and to the effect that these rights may affect decisions about substantive rules, they do so more in the "systems" 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, historically proof of the offense was laden with procedural doctrines that posed an obstacle to prosecution. In fact, 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, no matter how relaxed. 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 protections,” notwithstanding that it is, ostensibly, a substantive code.<sup>20</sup>

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 freighted 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 Model Penal Code 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 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 instruction 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.”<sup>21</sup>

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 improve the factfinders’ decision basis. These rules dramatically curtail the evidence that the defense may offer in a

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<sup>20</sup> Robinson & Dubber, *supra* note 1, at 324.

<sup>21</sup> MPC § 213.6(5).

rape case.<sup>22</sup> The federal template upon which many states based their rules is extremely restrictive, arguably unconstitutionally so.<sup>23</sup> Across the states, however, they vary widely. Some states permit a very narrow class of proof, whereas others are much more 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 (as with the sexual assault rules), provisions specific to one class or category of crimes may be easily identified, and perhaps even subsumed within the larger reform project. But, as discussed above in connection with parallel substantive provisions, there may also exist generally applicable procedural or evidentiary rules that are much more impermeable to reform. Indeed, even a wholesale revision of a substantive code may fail to directly address questions of procedure or evidence. And yet to gloss those important areas risk subverting or distorting the very goals of the substantive reform.

## **II. 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 operational realities of those laws – the political dimensions to criminal justice reform inescapably shape the course of any progress toward reform. 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 polarized the nation, as policies whipsaw between the draconian (e.g., mandatory minimums, three strikes) and progressive (e.g., legalization of marijuana, specialized courts).

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<sup>22</sup> 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).

<sup>23</sup> 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).

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” behavior 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 themselves 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 relatively stood the test of time, 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 an antiseptic or academic approach alone.

*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. 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, the last quality because it is an elected body of elites in the profession, and the former qualities because for much of history the legal profession itself was white and male. What is more, as a body of lawyers, the membership is composed of people who by and large now inhabit a socio-economic class at odds with the likely subjects

of most criminal law reform, have attained a degree of education far beyond that of the ordinary citizen, and may possess other qualities shared among the lawyerly elites but not spread among all people in society as broadly (for instance, an affection for rules).

In light of the heavy press coverage given the issues surrounding campus sexual assault – including the due process concerns attending the adjudication of those claims – 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 (not campus disciplinary) code. Yet the kind of cases that populate the criminal courts are a far remove from the standard college “he said, she said,” and instead tend to involve situations of domestic violence, vulnerable victims (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 son or daughter, or of two young “co-eds” engaging in sexual intimacy in a state of extreme intoxication. Thus 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 to develop anchors – to remind people, for example, that applying a more exacting definition of penetration than that found in existing law would be more likely to exculpate an actor who tried without success to force himself inside a child than it would to exculpate a hapless college freshman.

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 may determine that no criminal law reform – even if intended to rationalize or make sensible outdated provisions of the code – should proceed. Rather than fight individual battles about the reach and scope of law, those sympathetic to this view may instead determine that 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 some 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 checkered with false accusations intended to excuse racial violence (e.g., Emmett Till) or perpetrate other discriminatory acts (e.g., against LGBTQ persons). In such an atmosphere, mere mention of a scheme to regulate the admission of false accusation evidence provokes ire from all sides, and the obvious course becomes to simply ignore it.

*B. Evolving and divergent socio-cultural experiences.*

Because criminal law is inherently tasked with condemning or deterring socially undesirable behaviors, it also has an inherent relationship to some degree of shared acceptance of what is in fact socially undesirable. Some categories of crime may remain relatively impervious to demographic influence; for instance, what constitutes homicide or robbery may be more or less shared among large swathes of the population. But other offenses may find much more variance among different 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 without wearing a seatbelt should be treated as less serious than those in younger generations steeped in risk-minimization.

Of course, sexual intimacy is one area in which a broad spectrum of deeply felt views may be found, on everything from the propriety of certain kinds of activity 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 generational differences. Dramatic changes have occurred in a wide range of areas that influence individual views about sexual intimacy: including coeducation, cohabitation outside of marriage (whether with a sexual partner or friend of the opposite sex), interracial relationships, strides gender equality, the availability of pornography, the acceptance of same-sex relationships and marriage, and the availability of contraception and abortion services. What is obvious to one generation may be shocking to another, and yet reform efforts must seek to find common ground.

Debates of this kind are difficult to engage directly, and rarely do occur in a straightforward manner. Out of politeness, respect, and a sense of privacy, divergent

experiences are not always shared openly. This may be particularly true of an area of reform like sexual assault, but other aspects of criminal justice reform that are heavily linked to demographic difference – such as the laws governing vice or narcotics crimes – may likewise encounter the problem of hard conversations. The challenge of criminal law reform in such a context is to try to bridge the divides of unstable and divergent life experiences, whether they arise within the immediate constituent group or outside of it.

Again, to give an example, the Model Penal Code establishes a default mental state of recklessness, which it presumes applicable to every element of the offense unless something contrary is indicated.<sup>24</sup> Early drafts of the revision, therefore, relied on this principle and omitted any mention of mens rea unless a higher mens rea was warranted. However, it quickly became apparent that both those unfamiliar with the Model Penal Code structure, as well as outsiders approaching the material for the first time, either interpolated their own imagined mens rea (for instance, assuming that negligence was the standard) or else assumed 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 specified mental state. But even that became a source of disagreement, as the term of art “reckless,”<sup>25</sup> defined at length in the Code itself, held different meanings to different people. Thus a decision had to be made whether to include an excerpt of the actual definition – which would likely confuse MPC experts, who would wonder whether the determination to include a partial definition held its own significance – or a complete definition (which was too unwieldy), or the signifier “reckless” alone. No conclusion could satisfy all constituents, and thus the decision rested more on pragmatic rather than substantive considerations.

## **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. Drawing upon recent experience with one such reform, this chapter aimed 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.

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<sup>24</sup> MPC § 2.02.

<sup>25</sup> MPC § 2.02(2)(c).