

Rape in the Twilight Zone: When Sex is Unwanted But Not Illegal*

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The rape reform movement still has a long way to go, but you would not know that from a lot of what you read and hear in the general media. If any of us might have thought that there is male power in our society, a book called *The Myth of Male Power*¹ informs us that this is not true, that male power is simply a myth.² The author argues that women are protected to the hilt by rape laws, even while false accusations of rape remain common.³

That sounds like something from the nineteenth century, but that book was published in 2001, and the author claims to be a former board member of NOW, the National Organization of Women.⁴

Most of what I read about rape and sexual harassment law in the newspapers and magazines pounds away at the theme that sex is hyper-regulated. Yet, most of us know that the story of feminist success in regulating rape is wildly exaggerated. In fact, the laws do not very successfully prevent the abuses that they are supposed to prevent. Part of the reason is that fundamental change in our culture is still very incomplete.

Throughout the law, it is a familiar problem that there can be a large gap between the law in the books and the law in action. In the area of rape law, that gap is really more of a chasm. That is probably our most important problem. But here I want to focus on a different part of the problem; one that is a bit more esoteric but also may ultimately be more fundamental. That is, many very serious abuses still are not covered by the law at all. Many unambiguous abuses are not covered, even in theory.

This topic requires me to move beyond the most egregious, brutal kinds of abuse that all of us are most concerned about. I will be moving to the edges, to things that are not as bad. In a sense the kinds of abuse I will mention might not be the highest priority for some reformers. But it is crucial to focus on

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1. WARREN FARRELL, *THE MYTH OF MALE POWER: WHY MEN ARE THE DISPOSABLE SEX* (2001).

2. *See generally id.*

3. *See id.* at 322-32.

4. *See id.* at 11.

these edges because there is a Twilight Zone where sex is unwanted, but not illegal. The existence of this Twilight Zone feeds back into a lot of the cultural attitudes that create the barriers to effective law reform. I am going to give you six examples.

I. SIX LOOPHOLES

The first example is a case from Illinois.⁵ It involves a young woman who was riding a bicycle along a path that goes around an isolated reservoir in a state park. She stopped to rest, and a stranger came up and they chatted for a few minutes. When she got ready to leave, he put his hand on her shoulder and said, "This will only take a minute. My girlfriend doesn't meet my needs."⁶ With that, he picked her up and carried her into the woods. No one was in sight, so she did not scream. He was over six feet tall and he weighed 185 pounds; she was 5' 2" and she weighed a hundred pounds, so she did not try to fight back. She said that she was terrified that any minute he might start choking her or beating her.⁷

As soon as he got her into the woods, he pulled off her pants, pushed up her shirt, and had sex with her. The police did find this guy, and despite all the games that trial lawyers can play, the jury did convict him of sexual assault.⁸ The Illinois appellate court, however, reversed the conviction because they said: "The record is devoid of any circumstances which suggest that the complainant was compelled to submit."⁹

Many of my students think this case must be a fluke, that the judges must just be Neanderthals, and there may be a lot to that explanation. The result, however, is not completely crazy. It is a little bit crazy, but legally at least, it is not completely crazy because rape is defined almost everywhere as requiring the defendant to compel submission by physical force. Beyond that, the law, as it is almost uniformly interpreted, holds that even physical force is not enough. Typically, courts require *aberrational* physical force, something that goes beyond what the courts can see as the physical actions of normal sex. Moreover, in our culture or in parts of our culture, physically aggressive advances are often seen as the normal way for a man to show his affection for a woman.

From that perspective, if you consider what happened in this case, the physical things that this man failed to do automatically count as force in the bad sense that the courts are looking for. The fact that he picked her up, carried her, and physically took off her clothes does not necessarily look like force in

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

6. *Id.* at 592.

7. *See id.* at 593.

8. *Id.* at 591.

9. *Warren*, 446 N.E.2d at 594.

the bad sense. I hope everybody understands that this is not by any means my own view. In the mindset that courts and jurors often bring to a situation like this, however, they may be thinking that what happened here does not necessarily amount to force in a bad sense.

The second example is a case from Montana.¹⁰ A high school principal was charged with rape after he had sex with a seventeen year old student at his school. She submitted only because he told her that if she did not, he would block her from graduating. After an investigation by the school board and the county prosecutor, the principal was charged with two counts of intercourse without consent. The Montana Supreme Court dismissed the charges however, even though there allegedly was an *explicit threat*: have sex with me or you do not graduate. That threat did not count as force, the court held, because there was no threat of any physical injury to this young woman.¹¹

The third case is another Illinois case.¹² A woman's husband had just left her, and she went to see a divorce lawyer. As a retainer, she paid him a big chunk of the only savings that she had access to at that point. She went to his office for a meeting, and he closed the door. He asked her to sit beside him on the sofa in his office, and he put his arm around her. Then he started pushing her head down toward his lap, and she pulled back. He did not twist her arm, and he did not push harder. If he had, those kinds of force would make this a traditional case of rape. But he did not do those things. He pulled his hand back, but he said, "This would make it much easier."¹³

This was a woman who was already traumatized by the separation. She was traumatized by her financial vulnerability and her emotional vulnerability. So she did what he wanted her to do. Actually, she did it that time and several other times.

By now, you know part of the problem here: there is no sexual assault because there is no physical force. After this incident, she found that out. She was astonished to discover that she could not have him prosecuted for sexual assault. So instead, she sued him for malpractice.¹⁴ The Illinois Supreme Court threw out her case, declaring that there can be no claim for malpractice when the attorney had done good legal research. He actually got her a good financial settlement. Thus, the court reasoned, there was no malpractice because there was no harm to her legal claim in the divorce case.¹⁵

There you have a vivid illustration of the legal system's priorities. What is important is who is going to get to keep the vacation house. That is important,

10. State v. Thompson, 792 P.2d 1103 (Mont. 1990).

11. *Id.* at 1104.

12. Doe v. Roe, 681 N.E.2d 640 (Ill. App. Ct. 1997); STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 240 (1998) (detailing facts of case).

13. Roe, 681 N.E.2d at 644; see SCHULHOFER, *supra* note 12, at 240.

14. See Roe, 681 N.E.2d at 641.

15. See *id.* at 647-48.

but her sexual autonomy is not important.

The fourth case poses a different kind of problem.¹⁶ In another high school case, this one from Indiana, a gym teacher started getting friendly with a sixteen year old girl who was on the swimming team, and he arranged for her to work as his student assistant. She worked for him during her study hall or her break, and he had sex with her right before she had to return to her next class. This went on almost for a year. She tried to break it off, but he pressured her and kept insisting. They had what the court called “quickie sex” about once a week for almost the entire school year.

She told her parents about this, and they were willing to face all that would be involved with bringing suit, but the teacher was not guilty of rape. You can see why: there was no physical force. Furthermore, he was not guilty of statutory rape because, in Indiana, the age of consent at the time was sixteen.¹⁷ The good news is that this teacher lost his job, so there was some sanction, but he was not liable for any money damages at all, because sexual harassment liability applies only to companies or to universities and schools. Those entities are liable for sexual harassment because of the hostile environment that they are responsible for creating or permitting to persist, but the individuals, the teachers or the job supervisors who actually perpetrate this abuse, are not personally liable.¹⁸

When the parents finally got their mind around that amazing gap in the law, which probably took quite a bit of explaining, they thought they would sue the school district. The school district probably would not be liable either, because in a sexual harassment case, the school district is not liable unless the administrators of the school district actually know about the conduct and deliberately fail to take action against it.¹⁹

The fifth example is a prosecution in 1996 in New York.²⁰ A woman went to a restaurant with her date. They both were drinking very, very heavily. She went to the bathroom, and he stepped outside to wait for her in his truck. Meanwhile, there were four other men in the restaurant who noticed that she had staggered into the bathroom. So they went in after her, into the women’s room, and they carried her to a booth near the bar. They undressed her, and all four of these men had sex with her, and they admitted the act of intercourse. Their defense was, in effect, that she had consented. Imagine that experience as something a woman would consent to! At trial, their lawyer argued that if she had been so drunk, as she claimed, then how could she remember and how

16. See SCHULHOFER, *supra* note 12, at 191-92.

17. See SCHULHOFER, *supra* note 12, at 176-77.

18. See SCHULHOFER, *supra* note 12, at 176-77.

19. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).

20. See SCHULHOFER, *supra* note 12, at 7 (providing facts of unreported case); see also David Stout, *Man is Acquitted in Upstate Rape in Barroom in '91*, N.Y. TIMES, Mar. 26, 1996, at A17.

could she be sure she had not consented?²¹

This case never even got to an appellate court because the jury acquitted the men. It is a shocking result, but in a perverse way, the jury might have been technically correct, because incapacity to consent is a very vague concept.²² If a woman is unconscious, then it is rape even if you do not use aberrational force, but if the woman is not completely unconscious, the standard for determining how drunk you would have to be to make you incapable of consenting is totally unresolved.²³ Of course, they never compelled her physically; they never compelled her to submit by using aberrational force. They did not have to because of her condition. Yet again, because she was not able to resist them, you do not have the physical force required for rape.

My last example concerns abuse by psychiatrists and psychologists. Most estimates suggest that at some point in their careers, anywhere from 10-20% of male mental health professionals will have sex with a patient who is currently in their care, someone who very often is dependent on them for psychological and emotional support.²⁴ More than half of all mental health counselors report that they have treated at least one patient who reports having been sexually involved with a prior therapist.²⁵

The breach of trust in these situations and the potential for psychological damage are enormous.²⁶ Many of these victims are women, of course, and sometimes the victims are young men.²⁷ In several cases, teenagers have been sent into treatment by parents who think that the boy's confusion about his sexual orientation or his emerging gay identity is a psychological problem.²⁸ These parents have sent their son to a psychiatrist, a male psychiatrist, and the psychiatrist has then started having sex with his male patient.²⁹

These relationships are now illegal in about fifteen states, but in more than two-thirds of the states, a mental health professional who has sex with a current patient is not committing any crime.³⁰ It is a violation of professional ethics, but in practice, the offending psychiatrists and psychologists are hardly ever subject to professional discipline.³¹

The common element in all these examples is the fact that a flagrant,

21. See SCHULHOFER, *supra* note 12, at 7.

22. See Stephen J. Schulhofer, *Rape-Law Reform Circa June 2002: Has the Pendulum Swung Too Far?*, 989 ANNALS N.Y. ACAD. SCI. 276 (2003), at <http://www.annalsnyas.org/cgi/content/abstract/989/1/276>.

23. See *id.*

24. See SCHULHOFER, *supra* note 12, at 210-13.

25. See SCHULHOFER, *supra* note 12, at 213.

26. See SCHULHOFER, *supra* note 12, at 216 (detailing harmful consequences of sexual conduct with therapists).

27. See SCHULHOFER, *supra* note 12, at 213.

28. See SCHULHOFER, *supra* note 12, at 210-12. See generally *State v. Leiding*, 812 P.2d 797 (N.M. Ct. App. 1991).

29. See SCHULHOFER, *supra* note 12, at 212.

30. See SCHULHOFER, *supra* note 12, at 208.

31. See SCHULHOFER, *supra* note 12, at 224-25.

indisputable form of abuse goes unpunished because a conviction for rape requires proof of physical force. One reason why reforms have not had a dramatic impact in practice, even on forms of misconduct that technically are covered by criminal law, is the survival of this hurdle and the need to meet it by proving beyond a reasonable doubt that there was clear, excessive, *aberrant* physical force.

The public generally assumes that intercourse is illegal in the absence of consent. If you talk to anybody who is not immersed in this field, they are likely to tell you that, of course, intercourse without consent is illegal. It, however, is not illegal. In most states the force requirement means that it is not necessarily illegal to have sex without consent.

In most states, rape still requires proof beyond a reasonable doubt of *both* force and nonconsent.³² Massachusetts law, for example, still uses the old formulation that the definition of rape is to compel submission by force against the will of the woman.³³ Just four years ago the Massachusetts Supreme Judicial Court acknowledged that since 1642, there has been no change in the language defining rape in Massachusetts.³⁴ The first step in an effective reform movement, therefore, is to extend the criminal prohibition to cover instances of intercourse without consent, *whether or not* the defendant used physical force.³⁵ Several states have now taken this step, but they remain in the minority.³⁶

II. CONSENT

Eliminating the force requirement, however, will not solve all the important problems because there are major difficulties with the concept of consent. What counts as consent in our culture is very slippery. In the first case that I outlined, the one involving a woman riding on a remote bike path, the Illinois court said, "Her failure to protest, when it was within her power to do so, conveys the impression of consent."³⁷ So even in states that do not require proof of force, there could still be an acquittal or a reversal of conviction in a case like this because the law often does not make clear what counts as consent.

How should consent be defined? One popular answer is to insist that "no means no." American jurisdictions, however, still do not universally accept that approach. Of more importance for present purposes, it is not a sufficient answer in the Illinois case that the woman did not say "no." Paradoxically, reformers' forceful repetition of the mantra that "no means no" can even make

32. See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 343 (7th ed. 2001).

33. See MASS. GEN. LAWS. ch. 265, § 22 (2004) (codifying elements of rape crime).

34. Commonwealth v. Lopez, 745 N.E.2d 961, 965 (Mass. 2001) (noting definition and elements of crime remained unchanged).

35. See SCHULHOFER, *supra* note 12, at 283-84 (discussing specific proposal for reform).

36. See KADISH & SCHULHOFER, *supra* note 32, at 343.

37. People v. Warren, 446 N.E.2d 591, 594 (Ill. App. Ct. 1983).

it seem natural to assume that nonconsent requires the “no.”

Was it appropriate for the Illinois court to equate silence with consent? Some reformers argue that nothing less than an explicit verbal “yes” should ever count as consent.³⁸ As of yet, no jurisdiction has adopted a standard quite so protective, but several states have come close. Either by statute or judicial decision, several jurisdictions now define consent as requiring words or conduct that indicates affirmative permission.³⁹ Anything less (such as silence) is treated as nonconsent.

Many who work in the reform movement do not realize that we are still a long way from winning the battle for that standard. States adopting an affirmative-permission requirement remain in a small minority.⁴⁰ Many leave the standard vague or undefined, and some have statutes stating that the required element of nonconsent is fulfilled only when *unwillingness* is expressed through words or conduct.⁴¹ These states at least acknowledge that “no means no,” but anything short of a clear rejection will be treated as consent.

In New York, the standard is even less protective.⁴² A new statutory definition of consent, adopted in 2001, states that nonconsent is established only when “the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the [defendant’s] situation would have understood such person’s words and acts as an expression of lack of consent to such act under all the circumstances.”⁴³ Notice the qualifier: unwillingness requires proof that the victim said no *and* that a “reasonable person” would understand that she really meant no. In other words, in New York “no” does not necessarily mean no. This recent statutory language actually rejects, indeed *expressly rejects*, the relatively modest reform demand for legal recognition that a clearly expressed verbal “no” should always establish nonconsent, regardless of how a defendant or men in general might have preferred to interpret it.

III. COERCION AND DURESS

A common reaction among reformers is to say that because of this problem, we should not focus so much on consent. They prefer to stay focused on the concept of force and to argue simply that the concept of force is too narrow. One reform approach, for example, would be to say that we should prohibit sex obtained by any type of coercion, not just physical force. Moreover, some

38. See generally Lani Anne Remick, Comment, *The Consent Standard in Rape*, 141 U. PA. L. REV. 1103 (1993).

39. See *In re M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992); see also WIS. STAT. § 940.225(4) (1999).

40. See KADISH & SCHULHOFER, *supra* note 32, at 344.

41. See generally WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 17.4 (2d ed. 2005).

42. N.Y. PENAL LAW § 130.05(2)(d) (McKinney 2001).

43. *Id.*

reformers add, in our society, male power over women—social power, economic power, and psychological power—is so pervasive that it is an ever present fact of life. The standard conservative critique of that view is to argue that if you say sex that results from any type of coercion should be considered rape, and if you say that male power to coerce women is pervasive, then, in effect, you are saying that women are infantile; that they have no ability to protect themselves, and you are saying that *all* sex is rape.

For myself, I think that these claims about male power are still pretty accurate. The critique that male power is a myth, it seems to me, just flies in the face of reality. The problem with this approach is not that the premise about male power is false. None of us, however, are ever free from social, economic, and psychological pressures on the choices that we make. So for a criminal offense or even for civil sanctions, things like college codes and discipline and so on, we have to have some clear way to decide when pressure is excessive and when it is not excessive. Unfortunately, there is really no way to draw that line.⁴⁴

In most contexts, psychological and social pressures, even extremely strong psychological and social pressures, do not render involuntary the choices we make—choices, for example, about what kind of job to accept or whether to work at all. So it would be very hard to think that these kinds of pressure, even when they are powerful, could count as coercion in any context outside of sex. If we want to go down that path, if we want to argue for treating sex as somehow different from other choices that people make, the resistance to that step is implacable.

IV. AUTHENTIC PERMISSION

The problem in the six situations just discussed is very different. It is not just the pressure, and it is not that we have to treat sexuality differently. The problem is that we are actually devaluing sexuality. The flaw that runs through all my examples is the view that sex is not really bad unless it is compelled by threats of death or physical injury, as well as the view that other intrusions on freedom of choice are not damaging. That view is blind to what should be an obvious point: what we should keep clearly in mind the right of every person to freely choose or refuse any sexual encounter.

In other words, what we should be looking for is *not* the absence of coercion. What we should be looking for is genuine, actual *permission*. Think about any other situation in which important interests are at stake. The law does not protect us only from force; the law protects us from any kind of interference. It protects us from non-violent threats, it protects us from takings by stealth, and it usually protects us from breach of trust and deception. The

44. See SCHULHOFER, *supra* note 12, at 82-98.

puzzle is that sexual autonomy is treated so differently and given so much less protection. Sexual intimacy has far fewer protections than we give automatically to the sale of land and to the purchase of a used car. Sexual choices are not given even that much protection. Sex, in effect, is *under-protected*.

In other contexts, when a victim's behavior or her choices leave her vulnerable, we would never think that those choices should excuse the responsibility of somebody who violated her autonomous control over her own person and property. If she left her keys in the ignition of her car, and if a neighbor then stole the car, we would never think that because of her actions, the neighbor riding off in the car was not a thief or was somehow excused from responsibility. If she leaves open her window on a hot night and someone climbs in through her window and takes her television, we would never think that the homeowner is to blame and, therefore, that the thief or the burglar should be excused.

Yet, when women seek protection for their sexual boundaries, they are disparaged, as if in some sense they are pleading for special protection. We should start from the assumption that sexual choice will be treated like any other decision to keep or to relinquish interests that are important to us. If we approach the problem that way, then "consent" would clearly mean affirmative consent. Actual permission should be required.

The question then is whether permission is *sufficient*. We might say no means no, but does that mean that yes always means yes? In many of the troubling examples I gave you, there *was* a yes.

Genuine permission would have to mean that consent cannot be the result of threats, whether they are threats of physical injury or threats to inflict any other kind of injury to a person's rights. It should be clear, for example, that the high school principal was guilty of a crime.

What happens when there is no specific threat, but instead, you have a large imbalance of power? Some relationships, it would seem, are intolerably coercive. An example would be a relationship between a professor and a current student, or between a psychotherapist and a current patient, or between a divorce lawyer and a client. In those settings, we should consider a *per se* prohibition, just as we have a *per se* prohibition on sex with a woman who is under the age of consent. It does not mean that we are infantilizing a woman who is a mature adult. It simply means that when a woman is going through a divorce and dealing with a divorce lawyer, her incapacity to make genuine choices is too fundamentally impaired.

Consider the problem of relationships between professors and students. Most universities do not categorically prohibit professors from trying to have sex with their current students.⁴⁵ There cannot be any possible excuse for

45. See SCHULHOFER, *supra* note 12, at 193-94.

making sexual advances in that situation. At many colleges and universities, however, the guidelines say that relationships between professors and students are merely *unwise*.⁴⁶ Most colleges do have rules on this subject.⁴⁷ At the Massachusetts Institute of Technology, for example, the rule is that if a professor and a student start a relationship, the professor should disqualify himself from grading the student's work.⁴⁸

This relatively modern, supposedly protective rule is worth pondering for a minute. What this says to the professors, and what it says to the broader public, for that matter, is in effect that *conflicts of interest* are very bad. It is very bad to distort the grading process. Those concerns are important. Therefore, if the student accepts the relationship, then we have to deal with the conflict of interest problem because we need to preserve the integrity of the grading process.

What protection is there for the student who did not really want to accept the relationship in the first place? There is no protection for the student who prefers to turn it down, and again, our society's approach makes it vividly clear which interests are important and which ones are not. The integrity of the grading process is very important. A student's sexual autonomy, her freedom to choose freely whether to have or not have a sexual relationship with her professor, that interest is not so important. This is an area where there should be a *per se* prohibition. A similar prohibition is justified in the case of relationships between doctors and their patients, or between divorce lawyers and their clients.

We have to be careful though, because we should not take the same approach for every relationship in which there is any imbalance of power. Relationships between a professor and a current student, or between a doctor and a current patient, or between a divorce lawyer and his client have special features because their duration and their boundaries are inherently limited.

Should there also be an automatic prohibition on any relationship at work? A prohibition like that would impose an extraordinary burden on sexual freedom. It would dramatically constrict people's capacity to find compatible partners and to form intimate relationships.

Notice that a *per se* prohibition of that sort, as extreme as it may sound, is not impossible to imagine. The military has such a rule.⁴⁹ The military categorically prohibits any relationship between personnel at significantly different levels in the hierarchy.⁵⁰ That rule, though it is very familiar, is, in fact, very destructive to the freedom and sexual independence of people in the military. We have to be cautious about extending this sort of prohibition too

46. See SCHULHOFER, *supra* note 12, at 193-94.

47. See SCHULHOFER, *supra* note 12, at 193-94.

48. See SCHULHOFER, *supra* note 12, at 194.

49. See SCHULHOFER, *supra* note 12, at 188.

50. See SCHULHOFER, *supra* note 12, at 170-71.

far. Yet, in contrast, the six cases previously mentioned should be uncontroversial examples of situations in which the law needs to do much more if it is to take seriously the idea of sexual autonomy—that is, the idea that people should have clear, legally protected rights to control their own sexual boundaries.

Finally, it is important to return to one of the original points. The kinds of problems that have been discussed may seem less pressing than the situations of brutality and extreme violence that many of us know about. Yet if we can get across the idea that sexual autonomy must be *fully* protected, we will do much more than simply tinker with a legal problem. Education and culture may ultimately be the decisive factors. The law can be very important, however, in consolidating and legitimating an idea like this, and identify the core rights that must be protected in order for people to lead a flourishing life. If we can use law to spotlight and reinforce this idea, then it may be possible to make a little more progress in changing the ways that men treat women and the ways that men view sex in our society.