

## Rape Law Reform at the Millennium: Remarks on Professor Bryden's Non- Millennial Approach

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*Redefining Rape*<sup>1</sup> builds on Professor Bryden's earlier, book-length article, *Rape in the Criminal Justice System*.<sup>2</sup> The 1997 piece looked backward. Relying heavily on empirical studies, Bryden and his colleague, Sonja Lengnick, examined "the first wave of rape law reforms"<sup>3</sup>—mainly, evidentiary and procedural,<sup>4</sup> as well as some substantive,<sup>5</sup> measures. They aimed to assess the extent to which these changes, targeted at sexist rules unique to this crime, had realized the goal of improving outcomes in "simple" rape cases<sup>6</sup> (commonly dubbed acquaintance or "date" rapes), which had been dogged by low rates of reporting, prosecution, and conviction.<sup>7</sup>

Their conclusions were mixed. As good news, they cited certain indications of modest progress: a decline in the rape rate since the Seventies; a rise in victims'

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1. David P. Bryden, *Redefining Rape*, 3 *Buffalo Crim. L. Rev.* 317 (2000) [hereinafter Bryden].

2. David P. Bryden & Sonja Lengnick, *Rape In The Criminal Justice System*, 87 *J. Crim. L. & Criminology* 1194 (1997) [hereinafter Bryden & Lengnick].

3. *Id.* at 1377. Others subdivide the "first wave" into two segments: the reforms of the Seventies, and of the Eighties and early Nineties. See, e.g., Stephen J. Schulhofer, *Unwanted Sex* 29-31, 40, 43-45 (1998).

4. These include the enactment of rape shield laws and the abolition of special cautionary instructions and formal corroboration requirements. See Bryden & Lengnick, *supra* note 2, at 1198; Schulhofer, *supra* note 3, at 29-30.

5. Among other things, formal resistance requirements and the marital exemption were eliminated or eroded; rape laws were rewritten in gender-neutral terms. See Schulhofer, *supra* note 3, at 29-30.

6. Simple rapes lack the aggravating characteristics of extrinsic violence (such as a weapon or a beating), multiple assailants, or no prior relationship between the victim and the rapist. See Susan Estrich, *Real Rape* 4 (1987). Professors Harry Kalven and Hans Zeisel first applied this typology, drawn from assault, to rape. *Id.*

7. See Bryden & Lengnick, *supra* note 2, at 1195-96. Bryden and Lengnick also aimed to assess the degree to which discrimination against rape victims accounted for these anomalies. See *id.* at 1199.

inclination to report; and greater jury sympathy toward date rape complainants.<sup>8</sup> The bad news, however, was that the much-touted legal reforms did not seem to have caused this headway: “[R]ape law reforms appear to play a much more secondary instrumental role than legal scholars like to believe.”<sup>9</sup> They ended on a cautionary note: “From the legal reformer’s perspective, realism about the limits of law reform is essential if false hopes are to be avoided.”<sup>10</sup>

The present article begins where the previous one left off. Looking to the future, Professor Bryden comprehensively discusses current proposals for substantive redefinition of rape law (again, with a virtually exclusive focus on the problems inherent in nonstranger rape). He brings to bear not only the usual normative perspective, inquiring whether a recommendation is desirable in principle,<sup>11</sup> but also the sober, pragmatic bent evident in his prior work. “What effects,” he asks, “would [the change] be likely to have on the conduct of men, of victims, and of the criminal justice system?”<sup>12</sup>

As earlier promised,<sup>13</sup> he continues to stress the limitations (at least, short-term) of legal reforms. Yet almost surprisingly, given Bryden’s repeated injunction against having “high, apple-pie-in-the-sky”<sup>14</sup> hopes, he closes on a relatively positive note: “There are . . . ample reasons for optimism about the historic problems in rape—if we choose our reforms wisely.”<sup>15</sup>

To summarize my reaction to the piece—it, too, is generally positive. The author covers all the bases on the

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8. See *id.* at 1384.

9. *Id.*; see also Schulhofer, *supra* note 3, at 15 (“The legislative changes inspired by the feminist anti-rape movement accomplished very little.”). Indeed, some of what Bryden and Lengnick reported as progress (for instance, the lowering of the rape rate) does not even bear on their focus of inquiry: the incidence of reporting, prosecution and conviction in simple rapes.

10. Bryden & Lengnick, *supra* note 2, at 1384.

11. Bryden, *supra* note 1, at 317.

12. *Id.*

13. See Bryden & Lengnick, *supra* note 2, at 1384.

14. The quotation is from the Frank Sinatra song, “High Hopes.” Frank Sinatra, *High Hopes*, on *Love Looks So Well on You* (Capitol Records 1959).

15. Bryden, *supra* note 1, at 479.

end-of-century field of play in the exercise of rape definition: proposals to alter the crime's mens rea; to abolish force (and its controversial concomitant, resistance) as an element of rape; to specify the meaning of nonconsent (for example, by stipulating that "no means no" or requiring an affirmative expression of assent); to consolidate sexual and nonsexual assault law; and, finally, to criminalize certain sexual extortions and frauds,<sup>16</sup> some of which even civil law does not now sanction.

While not always agreeing with Bryden, I find his treatment of the issues to be knowledgeable, sensible, balanced and exhaustive. (Indeed, it can be *too* exhaustive; the listing of every pro and con of each argument becomes annoyingly "debaterish" at times).<sup>17</sup> His writing style, though not memorable, is brisk and clear. With rare exceptions,<sup>18</sup> he criticizes others' opinions fairly. In a nutshell, *Redefining Rape*, especially when considered in tandem with *Rape in the Criminal Justice System*, amounts to a notable contribution to the ongoing rape reform dialogue.

My aim in this space-constricted forum is not to comment on the broad array of topics examined by Professor Bryden but instead to respond briefly, in personal terms, to two topics that primarily piqued my interest. First, I will react to his general remarks on the culture of legal scholarship. Second, in relation to his discussions of "The Force-Resistance Requirement"<sup>19</sup> and "The Quest For

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16. See generally *id.* at 361.

17. An example of such "overkill" is Professor Bryden's argument against merging the crimes of rape and assault, on the ground that this would lead to higher assault penalties—which "in turn might increase . . . prison overcrowding." *Id.* at 434.

18. For instance, I think that Professor Bryden is unduly dismissive of Professor Martha Chamallas's views on sexual extortion: "In her scenario, a woman who wants economic security is needy—not greedy—but a man who wants sex is simply greedy." *Id.* at 445 (discussing Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. Cal. L. Rev. 777, 825-26 (1988)). He perhaps also underestimates the attention paid by other reformers to the practical results of their recommendations. See, e.g., Bryden, *supra* note 1, at 323. (discussing Schulhofer and Estrich).

19. See *id.* ch. II.

A New External Standard,”<sup>20</sup> I want to enlarge on (and revise) views I expressed in an earlier essay.<sup>21</sup>

I. ACADEMIC NORMS AND SCHOLARLY PROPOSALS FOR LEGAL REFORM

*Redefining Rape* provides acute, if undeveloped, insights into the ways in which the often “triumphalist bias”<sup>22</sup> of scholars’ recommendations for change reflect their academic genesis.<sup>23</sup> For instance, Bryden notes the prevailing normative tradition in legal scholarship—particularly strong in public law fields. Most law professors (regrettably, myself included) have little or no training in empirical social science research. Thus, we find it hard to predict or analyze in any systematic manner the real-world effects of our proposals. And to the extent we do attempt to rely on seemingly pertinent studies, rather than simply supporting our claims with speculative “logic,” we are likely ill-equipped to distinguish the good work from the bad.<sup>24</sup>

Bryden also locates the tendency toward triumphalism in the advocate’s natural bent to exaggerate the benefits of her prescription. Yet legal academia enhances this penchant. “No law professor,” he wryly asserts, “has ever been denied tenure for an overly sanguine estimate” of such results.<sup>25</sup> More broadly, the need to attract attention in the highly competitive law review sweepstakes virtually

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20. See *id.* ch. III.

21. Vivian Berger, *Not So Simple Rape* (Review Essay), 7 *Crim. J. Ethics* 69 (1988).

22. Bryden & Lengnick, *supra* note 2, at 1293. That term refers to reformers’ exaggerated expectations that changing the law will change the underlying condition to which a proposed reform is addressed.

23. See generally Bryden, *supra* note 1, ch. VII (“Law-Blaming and The Culture of Legal Scholarship”). Bryden does not believe that academic reformers are uniquely credulous, but suggests they should be less so than others. See Bryden & Lengnick, *supra* note 2, at 1289.

24. Happily, these problems may be mitigated by what I perceive to be increasing collaboration between traditionally trained scholars and those with empirical research expertise.

25. Bryden, *supra* note 1, at 477.

ensures that the article will stress the importance of its recommendations: "What law review editor would accept an article whose author conceded that the reforms being offered were mostly just peripheral, or symbolic or educational?"<sup>26</sup>

How very true! In my opinion, law academia<sup>27</sup> at present disproportionately admires—and hence, rewards—perceived novelty.<sup>28</sup> An environment where the label "pedestrian" constitutes the ultimate putdown will naturally lead to less concern for being correct than for being "interesting." To the extent that practical scholar-reformers fail to find outlets for their work in prestigious legal journals, the cause of law reform generally suffers.<sup>29</sup> In this environment, the Buffalo Criminal Law Review's decision to showcase the Bryden piece is especially welcome.

Finally, Bryden makes the obvious, yet nevertheless telling, point that law professors tend to focus unduly on appellate law—especially, the odd and marginal cases that furnish fodder for classroom debate but frequently give misleading guidance on the complicated "relationship between law and social reality."<sup>30</sup> If one's only tool is a hammer, all problems begin to look like nails. In other words, those whose success, first as students and then as teachers, derived mainly from the ability to parse cases will likely overstate law's significance in changing disfavored human behavior. Once again, I agree.

Whatever the flaws of a too doctrinal approach, however, one should keep them in perspective. I believe

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26. *Id.*

27. Under this heading, I include (as Bryden seems to) law professors' most ardent student imitators: law review editors.

28. My point is not limited to law reform literature; it is at least as true now of non-reformist theoretical writing. See *infra* text accompanying notes 31-33.

29. I'm not sure if Professor Bryden would concur, given his view of the limited potential of legal reform. Yet, on balance, I do not consider him a "naysayer" since he ends on a note of optimism. See *supra* text accompanying note 15.

30. Bryden, *supra* note 1, at 477. "These case are often unrepresentative of appellate decisions, more so of trials, and even more so of social reality outside the courtroom." *Id.*

District of Columbia Court of Appeals Chief Judge (and Law Professor) Harry T. Edwards had it right when he opined that “too much of the law review literature is ‘theory wholly divorced from cases’”<sup>31</sup>—indeed, from any *legal* moorings. The same criticism can be made of certain books on legal topics that are widely quoted in law reviews.<sup>32</sup> In the area of rape, for example, the provocative and sometimes brilliant work of Professor Catharine MacKinnon, which virtually collapses the distinction between forced intercourse and “ordinary” sex, does not advance (and may impede) the attempt to draw workable legal lines.<sup>33</sup>

This is, of course, not the place for extensive critique of styles and trends in reformist or other legal writing. Suffice it, therefore, to note that Professor Bryden’s reliance on empirical analysis in assessing past and proposed changes implicitly endorses what I consider the most productive “law and”<sup>34</sup> discipline to have emerged in the law school arena in recent years: the marriage of law with social-scientific methodology.<sup>35</sup> My own scholarly

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31. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34, 46 (1992) [hereinafter Edwards, “Disjunction”]. This seminal article generated a huge response, which in turn prompted two follow-up pieces. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 Mich. L. Rev. 2191 (1993); Harry T. Edwards, *Another “Postscript” to “The Growing Disjunction Between Legal Education and the Legal Profession,”* 69 Wash. L. Rev. 561 (1994). Let me be clear that, like Judge Edwards, see Edwards, *Disjunction*, *supra*, at 35-36, I am not opposed to theory. I merely object to a disproportionate emphasis on it—coupled, at times, with an arrogant dismissal of other approaches.

32. See, e.g., Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (1989). A search of the Westlaw database TP-ALL (legal journals), with the terms “MacKinnon w/s toward & ‘feminist theory’ & state,” yielded 755 entries.

33. See Schulhofer, *supra* note 3, at 53-57. For one thing, as Professor Schulhofer notes, it has produced “a potent cultural backlash.” See *id.* at 57-58 (quoting Katie Roiphe, *The Morning After* (1993)). Professor Bryden also gives short shrift to such views. Witness his sarcastic comment: “Granted, some feminists [MacKinnon] argue that rapists are hard to distinguish from the average male. If valid, this theory would be a strong argument for leniency toward rapists, though of course it is not so intended.” Bryden, *supra* note 1, at 342 (footnote omitted).

34. See Edwards, *Disjunction*, *supra* note 31, at 34-35.

35. Bryden and Lengnick strongly imply that it should form a greater part of

efforts have focused on real-world problems in a number of fields, and how to solve them.<sup>36</sup> Because I respect the talents of academic lawyers, I would be loathe to lose useful input from them on the day's important issue<sup>37</sup>—whether these be sexual coercion or anything else. In encouraging and exemplifying<sup>38</sup> a practical (“non-millennial”) approach to legal reform, *Redefining Rape* benefits both the profession and society at large.

## II. NOT SO SIMPLE CONSENT<sup>39</sup>

The narrow definition of rape in most jurisdictions requires proof either of force (in effect, victim resistance) or threat of force (which excuses resistance); except in unusual circumstances,<sup>40</sup> mere absence of consent to engage in intercourse does not suffice to establish the crime. Though virtually unanimous in wishing to abolish or modify the Force-Resistance Requirement, modern rape scholars, as Bryden points out, have reached “no consensus about the rest of the reform agenda.”<sup>41</sup>

Two of the major current proposals for reconstructing substantive rape law not only would dispense with force as

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the law school curriculum. See Bryden & Lengnick, *supra* note 2, at 1289.

36. See, e.g., Curtis Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 *Colum. Rev.* 289 (1999) [hereinafter, Berger & Berger, *A Guide to Fair Process*]; Vivian Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 *Colum. L. Rev.* 1665 (1990); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 *Colum. L. Rev.* 1 (1977) [hereinafter Berger, *Man's Trial, Woman's Tribulation*].

37. Cf. Edwards, *Disjunction*, *supra* note 31, at 36 (“Because too few law professors are producing articles or treatises that have direct utility for judges, administrators, legislators, and practitioners, too many important social issues are resolved without the needed input from academic lawyers.”).

38. In *Redefining Rape*, Professor Bryden reports the results of a poll he arranged to test the attitudes of women toward criminalization of sexual deception. See Bryden, *supra* note 1, at 470-75. Cf. Berger & Berger, *A Guide to Fair Process*, *supra* note 36, at 295-300 (discussing a survey the authors took of process accorded by institutions of higher education to students charged with academic misconduct).

39. Cf. Berger, *supra* note 21.

40. See Bryden, *supra* note 1, at 321.

41. *Id.* at 322.

an overlay on nonconsent but also would define the latter with some precision, rather than leaving decision makers free to inject their personal biases into the concept. Under the first proposal, commonly labeled "no means no," nonconsent would be made out if the woman conveyed her unwillingness to have sex by either physical or verbal resistance. Prominently identified with Professor Susan Estrich,<sup>42</sup> this rule also appeals to Professor Bryden. Under the second, more radical alternative—advanced, among others,<sup>43</sup> by Professor Stephen Schulhofer in his recent "landmark"<sup>44</sup> book, *Unwanted Sex*,<sup>45</sup> and rejected by Professor Bryden—the burden would fall on the man to obtain an affirmative expression of consent before proceeding to engage in sex.<sup>46</sup>

As for me, while reasonable feminists can disagree, I now come down on the Schulhofer side. That may well surprise readers of my *Not So Simple Rape*,<sup>47</sup> a 1988 review of Estrich's book, *Real Rape*. Because I believe what I wrote in that piece on the force/nonconsent issue was somewhat misleading and because my ideas have developed over time, I take the occasion to voice my present thoughts on the matter with (I hope) greater clarity.<sup>48</sup>

In the earlier essay, I commented on Estrich's

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42. See Estrich, *supra* note 6, at 98, 101-02; Susan Estrich, *Rape*, 95 *Yale L.J.* 1087, 1182 (1986); see also Lynne Henderson, "Just What Part of No Don't You Understand?", 2 *Tex. J. Women & Law* 41 (1993).

43. See, e.g., Beverly Balos & Mary Louise Fellows, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 *Minn. L. Rev.* 599, 602, 607 (1991).

44. The characterization is Professor Bryden's, see *supra* note 1, at 323, but I heartily agree.

45. See Schulhofer, *supra* note 3.

46. As defined in his model sexual abuse statute, consent would "mean[] that at the time of the act of sexual penetration there are actual words or conduct indicating affirmative, freely given permission to the act of sexual penetration." *Id.* at 283.

47. Berger, *supra* note 21.

48. Although *Not So Simple Rape*, a brief essay, is hardly a "landmark," cf. *supra* text accompanying note 44 (describing Professor Schulhofer's book), I am aware that it has been fairly widely assigned in connection with criminal law courses. See, e.g., Sanford H. Kadish & Stephen J. Schulhofer, *Criminal Law and Its Processes* 344 (6th ed. 1995). Correcting—and updating—the record might, accordingly, be worthwhile.

treatment of *State v. Alston*.<sup>49</sup> This decision, which has provided much material for academic discussions of date rape,<sup>50</sup> prompted certain remarks by me that do not reflect my current position (or even, in some respects, my past one). Since *Redefining Rape* sets out the salient facts,<sup>51</sup> I will not rehearse them further except to note that the case involved an “on-again, off-again”<sup>52</sup> abusive relationship and that, on the day in question, the woman, Cottie, passively submitted to Alston’s advances after verbally declining intercourse. Although holding that Cottie had not consented to sex, the appellate court reversed the conviction for lack of proof of force (resistance) or threats sufficient “to overcome the will of the victim to resist.”<sup>53</sup> It specifically discounted her “general fear of the defendant,” based on her prior experience with him, as irrelevant.<sup>54</sup>

In response to Estrich’s outrage over Alston, I wrote that I considered “‘rape’ at least arguably a misnomer” for what had happened to the woman: “Her stated ‘no,’ while not a ‘yes,’ bore greater resemblance to a mental reservation or a ‘do what you will’ than to a firm and clear rejection, when viewed against the totality of the couple’s ongoing interactions.”<sup>55</sup> This analysis now seems to me wrong in the sense that I found ambiguity regarding the nonconsent element, which even the court had failed to find—when, simply put, it did not exist.<sup>56</sup>

Unfortunately, my reaction to Alston’s particular facts

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49. 312 S.E.2d 470 (N.C. 1984) (discussed in Estrich, *supra* note 6, at 60-63).

50. See, e.g., Schulhofer, *supra* note 3, at 34, 76; Dorothy E. Roberts, Rape, Violence, and Women’s Autonomy, 69 Chi.-Kent L. Rev. 359, 374-75 (1993); Mary Lundergan Hahn, From *State v. Alston* to *State v. Hardy*: A New Way to Define Constructive Force As an Element of Second-Degree Rape in North Carolina, 70 N.C. L. Rev. 2027 (1992).

51. See Bryden, *supra* note 1, at 350.

52. See Berger, *supra* note 21, at 75.

53. Bryden, *supra* note 1, at 351 (citing Alston, 312 S.E.2d at 476).

54. *Id.* at 350-51.

55. Berger, *supra* note 21, at 76 (footnote omitted). These interactions included not only violence but also some passive, accommodational sex. See *id.* at 75.

56. Hence, I agree with Professor Bryden: “[I]n a case like Alston, where nonconsent is clear, Estrich is right that the conviction should be affirmed despite the victim’s failure to resist.” Bryden, *supra* note 1, at 355. (emphasis added).

tended to obscure my broader, more important point: I, like Professor Estrich, saw no place for a Force-Resistance Requirement. Writing in the context of appellate reversal, I stated: "When a jury credits the woman's no, that should usually be the end of it."<sup>57</sup> Rereading this sentence, I realize one could interpret the word "credits" to imply that the jury must believe the "no" was sincere. What I intended to convey, however, was merely that the jury has to believe she *did* say "no;" my use of the term "mental reservation," with its unfortunate connotations of "no means yes," admittedly may have obscured my meaning.<sup>58</sup> Mea culpa.

With 20-20 hindsight (only fitting at the end of the Twentieth Century!), I feel I relied on the wrong case as a springboard for what I still consider a point worth making: Women should not be *over*protected. I feared then, and still do, that a global portrayal, reflected in rape law, of females as weak, subordinate creatures, incapable of withstanding pressure of any sort, invites nullification and backlash<sup>59</sup> and, on a philosophical level, cheapens rather than celebrates "the rights to self-determination, sexual autonomy, and self- and societal respect of women."<sup>60</sup> Thus, for example, I reject, as wrongheaded, the proposal by Professors Balos and Fellows<sup>61</sup> that a history of physical abuse of the woman (as in Alston) should vitiate even positive consent to sexual relations, thereby imposing "a mandatory divorce"<sup>62</sup> on the parties. A legal rule of "yes means no" would effectively turn adult sex into statutory rape—women into children—and only limit the life options of victims who have far too few choices already.<sup>63</sup>

But (accepting Schulhofer's criticism of my earlier

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57. Berger, *supra* note 21, at 75.

58. But cf. *id.* at 76 ("regarding the 'no means no' principle, my disagreements with Estrich are marginal and affect only its application").

59. See *supra* note 33.

60. Berger, *supra* note 21, at 75.

61. See Balos & Fellows, *supra* note 43, at 609-11.

62. Bryden, *supra* note 1, at 352 (footnote omitted).

63. As Professor Schulhofer stresses, sexual autonomy involves the right to seek intimacy as well as refuse it. See Schulhofer, *supra* note 3, at 276.

piece),<sup>64</sup> I have changed my opinion of what approach to nonconsent “patronize[s] women.”<sup>65</sup> As I said, I now view a “no means no” standard as insufficient to safeguard *legitimate* interests of women in the setting of sexual assault. Schulhofer writes: “[W]e seldom think it ‘patronizing’ to insist on permission, not just silence, when the interests affected are ones that men can easily recognize as important.”<sup>66</sup> He claims, persuasively, that non-verbalization may denote “confusion, ambivalence, or fright,” often complicated by intoxication, as opposed to willingness to have sex.<sup>67</sup> If autonomy is the central value that modern rape law ought to vindicate (and I, like Schulhofer, think it is), Schulhofer makes a powerful case for reversing the present presumption of consent.<sup>68</sup>

Bryden’s eminently fair treatment of Schulhofer’s views lists virtues that I have described, as well as others; I refer the reader to his discussion.<sup>69</sup> I believe that his critique, however (to which, once more, I refer the reader)<sup>70</sup> consists more of counter-punching than convincing argumentation.<sup>71</sup> Yet I do acknowledge the force of his major—typically, practical—point: In our day the proposed rule may be too ambitious.<sup>72</sup> He poses exactly the right questions: “To what extent should or must the law follow the folkways rather than trying to change them?”<sup>73</sup> Wisely noting that “the timing of a reform is critical,” since wide gaps between custom and law can lead

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64. See *id.* at 269.

65. Berger, *supra* note 21, at 75.

66. Schulhofer, *supra* note 3, at 269.

67. *Id.*

68. He also does not overstate that case, sensibly rejecting an unrealistic insistence on obtaining explicit *verbal* permission. See *id.* at 272.

69. See Bryden, *supra* note 1.

70. See *id.*

71. For instance, Professor Bryden devotes too much space to poking holes in Schulhofer’s non-essential analogy to the need for affirmative consent to surgery. See *id.* at 402.

72. See *id.* at 409.

73. *Id.* at 406.

to unfairness or nullification,<sup>74</sup> Professor Bryden concludes that the hour is simply not ripe to take this step, despite its many conceded advantages.

I think he is wrong. Yet none of us has a crystal ball. That is just the kind of issue on which committed people may differ. A domain as controversial as rape law ineluctably brings to the fore questions about the complex connection between legal and cultural change. Which is the chicken, which the egg? Depending on specific circumstances, the likely answer is either or both. As I wrote over two decades ago: "To some extent and over time, the law converts as well as mirrors cultural norms and expectations."<sup>75</sup>

Bryden, ever the cautious pragmatist, downplays the role of legal reform in affecting attitudes;<sup>76</sup> he prefers to run the risks of overdue rather than premature change. Schulhofer, by contrast, is more sanguine about the potential of law to alter public mores; he also worries about the continuing danger to women while societal views on date rape evolve.<sup>77</sup> He, like Professor Estrich, inclines toward "us[ing] the law to push forward,"<sup>78</sup> insisting that we do not have to adhere in the future to traditional unsatisfactory standards of male-female interaction.<sup>79</sup>

Temperamentally, I probably fall in the middle of this spectrum. But it has been a good quarter-century since feminists placed rape law reform on the front burner of their agenda. The need for resistance, the meaning of consent, and related topics have been much mooted in the popular media and on college campuses as well in the legal literature. In several states, statutes already criminalize

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74. *Id.* at 409.

75. Berger, *Man's Trial, Woman's Tribulation*, *supra* note 36, at 100.

76. Bryden asserts that to the extent new laws can change our ideas of what constitutes "real rape," they will likely "do so only by a glacial process that will affect men's conduct, if at all, only after a critical mass of socio-legal change has occurred." Bryden, *supra* note 1, at 420.

77. See Schulhofer, *supra* note 3, at 258.

78. Estrich, *supra* note 6, at 101.

79. See Schulhofer, *supra* note 3, at 265.

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sex procured without affirmative agreement.<sup>80</sup> I ask, therefore, if not now—when? What better time than the millennium to nudge the culture a step forward in the right direction?

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“You’ve come a long way, baby,” the Virginia Slims ad effused, in paying tribute to women’s advances (with unconscious condescension). So, too, the debate about rape law reform—although not always reform itself—has advanced significantly over the years. While feminist theory has definitely deepened our understanding of the root problems in this area, Professor Bryden’s common sense and worldly focus are what we need most just now to consolidate our past gains and to complete the work in progress.

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80. See Bryden, *supra* note 1, at 396 & n.283 (citing statutes). Fairness to men counsels that any such new legislation be advertised as widely as possible. Cf. Schulhofer, *supra* note 3, at 264 (“we should not change the law retroactively and without fair warning”).