CRIMINAL SEXUAL ASSAULT: NO MEANS NO BURDEN SHIFTING

Late last night here, early this morning where many of you are, I saw an article pop up on the New York Times website by Judith Shulevitz on “Regulating Sex”. The title seemed benign enough, but thanks to my friend Scott Greenfield, and his blog Simple Justice, Ms. Shulevitz has been on my radar for a while. So I sent the article (which is worth a read) to Scott knowing he would likely pounce on it when he got up.

And Scott did just that, in a post called “With Friends Like These”, while I was still comfortably tucked in:

> A lot of people sent me a link to Judith Shulevitz’s New York Times op-ed, Regulating Sex. As any regular SJ reader knows, there is nothing in there that hasn’t been discussed here, sometimes long ago, at far greater depth. But Shulevitz is against the affirmative consent trend, which she calls a “doctrine,” so it’s all good, right?
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> What Shulevitz accomplishes is a very well written, easily digestible, version of the problem that serves to alert the general public, those unaware of law, the issues of gender and sexual politics, the litany of excuses that have framed the debate and the seriousness of its implications, to the

> existence of this deeply problematic trend. She notes that one of its primary ALI proponents, NYU lawprof Stephen J. Schulhofer, calls the case for affirmative consent “compelling.” She neglects to note this is a meaningless word in the discussion. Still, it’s in there.

On the one hand, I think Scott is right that there is really nothing all that new here in the bigger picture, and, really he is right that Ms. Shulevitz is far from a goat, even if a little nebulous and wishy washy.

No, what struck me like a hammer was the ease with which academics like Georgetown’s Abbe Smith and NYU professor Stephen J. Schulhofer, not to mention the truly formidable American Law Institute (ALI) are propagating the idea of alteration of criminal sexual assault law. In short, are willing to put lip gloss on the pig of shifting the burden of proof on a major felony crime of moral turpitude.

And it is an outrageous and destructive concession. This is not a slippery slope, it is a black ice downhill. You might as well be rewriting the American ethos to say “Well, no, all men and women are not created equal”. In criminal law, that is the kind of foundation being attacked here.

Scott did not really hit on this in his main post, but in a reply comment to some poor soul that weighed in with the old trope of “gee, it really is not too much to give” kind of naive rhetoric, Mr. Greenfield hit the true mark:

> The reason I (and, I guess, others) haven’t spent a lot of time and energy providing concrete examples is because it’s so obvious. Apparently, not to everyone. So here’s the shift:
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> Accuser alleges rape because of lack of consent, saying: “He touched me without my consent.” That’s it. Case proven.

> Nothing more is required and, in the absence of a viable defense, the accused loses.
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> Now, it's up to the accused student to prove, by a preponderance of the evidence (which means more than 50%) that there was consent. There was consent at every point in time. There was clear and unambiguous consent. And most importantly, that the accused's assertion of consent somehow is proven to be more credible than the accuser's assertion of lack of consent.
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> Let's assume the accuser says "I did not consent," and the accused says, "you did consent." The two allegations are equally credible. The accused loses, because the accuser's assertion is sufficient to establish the offense, and the burden then shifts to the accused, whose defense fails to suffice as being more credible than the accusation.
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> Mind you, under American jurisprudence, this shifting compels the accused to prove innocence, which is something our jurisprudence would not otherwise require, merely upon the fact of an accusation, or be peremptorily "convicted."
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> Is that sufficiently concrete for you?

Yeah, and do you want that star chamber logic in not just public university settings, but embedded with a solid foothold in common criminal law? Because those are the stakes. Constitutional law, criminal law, and criminal procedure are not vehicles for feel good patina on general social ills and outrages de jour, in fact they are instead designed, and must be, a bulwark against exactly those people who would claim the former mantle.

First they came for the Fourth and Fifth Amendments, and you poo poohed the cries from

criminal defense lawyers, going back to at least the mid-80’s, about the dangerous slippery slope that was being germinated. Whether the results have touched you, or your greater “family”, yet or not, it is pretty hard to objectively look at today’s posture and not admit the “slippery slope” criers thirty years ago were right. Of course they were.

People operating from wholly, or mostly, within the criminal justice system, whether as lawyer or client/family, just have a different, and more immediate, perspective. A position rarely understood without having tangible skin in the game.

Maybe listen this time. The battle over racial and sexual equality is far from over, but it is well underway intellectually, and headed in a better direction. It gets better. So, make it better in criminal justice too, do not let it be the destructive war pit morality betterment in the US falls in to.