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### What Makes Rape a Crime?

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# Review Essay: What Makes Rape a Crime?

REAL RAPE By Susan Estrich. Cambridge, Mass.: Harvard University Press, 1987. Pp. 160. \$15.95.

Reviewed by Lynne N. Henderson†

## INTRODUCTION

In 1986, the *Yale Law Journal* published an article by Professor Susan Estrich entitled *Rape*<sup>1</sup> which was revised and published as a book, *Real Rape*. A book on the law of rape aimed at a more general audience and written by a Harvard professor who is also a rape survivor could influence subsequent developments in the law of rape.

Rape remains an enormous threat to the well-being of women in this society, and I had hoped very much that this book would contribute significantly to our understanding of rape and the law of rape. I applaud Estrich's courage and candor about being a rape survivor and appreciate that she has reminded us of the problems the law still creates for rape survivors, but contrary to the views of two prominent professors quoted on the dust jacket, her book is not a "landmark," nor does it add anything particularly new to the existing literature. To the extent that the book addresses a general audience, the book may be misleading and its recommendations could harm more than help. Estrich's work does serve as a reminder that the law in several jurisdictions continues to look away from the continuing brutalization of women by men and clings to stereotypes about rape despite the efforts of women—and crime control advocates—to achieve law reforms. It also illustrates that many of the legal

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<sup>1</sup> Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

obstacles created during centuries of misogyny have not yet been eradicated. Rape is still a very real criminal law problem; at times, it seems the real myth is that rape is illegal. But, much of what Estrich says in this short book is conclusory and contradictory. She fails to recognize some progress in law and legal doctrine, and that not all reform efforts in the last fifteen years have resulted in absolute failure. To renew our commitment to taking rape seriously, perhaps we can start with this book, but we can by no means finish here. *Real Rape* is a rather sketchy outline of the legal problems in rape cases and not an altogether accurate one at that.

Prior to my review, I should clarify my perspective. Like Estrich, I am a rape survivor, so I cannot claim total "objectivity"—if any such thing exists on this topic—about rape. I shall discuss that experience more fully in the last Part of the essay. My perspective is also colored by my work as a rape crisis counselor, and that experience, listening to stories of rape, has affected me as well. Finally, I have occasionally worked with police officers, a victim-witness program worker, and district attorneys assigned to rape cases. Working as a rape crisis counselor and with law enforcement personnel revealed to me that the manner in which rape cases are now handled on the San Francisco Peninsula, at least, does not fit Estrich's portrayal.

This review of *Real Rape* is divided into two Parts. Part one of this essay examines Estrich's thesis and arguments. Part two discusses my own experience, thoughts about why I believe Estrich's argument ultimately fails, and suggestions about what might be done to have an effective prohibition on rape.

## I. THE LEGAL APPROACH TO RAPE

Estrich's book is largely an attack on existing legal doctrines pertaining to the crime of rape, defined as sexual intercourse with a woman—typically not the man's *wife*—accomplished by force or threat of force, without her consent. Estrich argues that despite more than fifteen years of reform efforts, criminal law still fails to recognize many rapes as criminal. It does so for two reasons: First, by focusing on force as an element of the offense, the law requires the victim to resist physically or to justify her non-resistance on the basis that the assailant was armed or explicitly threatened her with death or serious bodily harm. Second, by failing to focus on the defendant's state of mind regarding the woman's consent, the law unfairly requires the woman to resist. To remedy this problem, the law should focus on the defendant's *mens rea* as to the woman's consent, rather than examining the victim's behavior as a determinant of consent, and the law should be changed to include extortion or threats of economic loss as constituting "force." If the woman

says "no," and the defendant is negligent in believing that she has consented to intercourse, he should be guilty of rape. Estrich also argues that the "marital exemption" in most rape statutes should be abolished. Although one could surmise that Estrich believes it is nonconsensual intercourse itself—without any type of threats or force—that constitutes the crime, she never explicitly states this, nor does she advocate anything more radical than some doctrinal modifications in existing law.

One of the major messages in *Real Rape* is that the law is particularly deficient in recognizing non-aggravated rape—rape by a friend, date, acquaintance, or spouse. Rape by strangers may now be effectively prosecuted, but when the defendant and the victim know each other, Estrich contends that the law has failed. Such cases usually are not prosecuted, and if they are, appellate courts go out of their way to reverse convictions. Estrich consistently criticizes the courts and actors in the criminal justice system for failing to consider "simple rape" as rape and for perpetuating the "resistance requirement."

### A. Estrich's Argument

Estrich begins her book with a brief, factual account of her rape in 1974. Her experience was of the type that keeps all women in terror: An armed stranger in her car threatened her with death, raped her, and stole her car. (p. 1)<sup>2</sup> She found the attitudes and behavior of the police insensitive and racist; essentially, they were disinterested in her plight. She says she refuses to be silent about having been raped, in part because she believes in "full disclosure," but also because no one doubts that she was "really" raped. (pp. 2-3) Her concern is for those women whom society doubts were "really" raped. Thus, she moves from her own account to a discussion of other scenarios of rape: cases in which the victim and the offender are acquaintances, dates, or married to one another. (p. 4) Estrich uses the term "simple rape" to define these cases. (p. 5) "Simple rape" was used in Kalven and Zeisel's famous study of juries.<sup>3</sup> The term covers "non-aggravated" rapes, while "aggravated" rapes include situations of extrinsic violence such as weapons or beatings, of stranger rape, and of gang rape. (p. 4) The term "simple rape" also appears in the commentaries to the Model Penal Code section on rape, but in the context of a 1942 statute that defined simple rape as occurring when the victim was prevented from resisting because of incapacity or deception.<sup>4</sup> Thus, the term has meaning apart from the meaning Estrich gives it.

Choosing the term "simple rape" is unfortunate for several reasons.

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<sup>2</sup> All parenthetical page references are to S. ESTRICH, *REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO* (1987).

<sup>3</sup> H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966).

<sup>4</sup> 2 AMERICAN LAW INSTITUTE, *MODEL PENAL CODE AND COMMENTARIES* 278 (1980).

By labeling sexual assaults "simple," Estrich conveys the message that these rapes are not as serious as those involving physical violence or strangers. Estrich acknowledges this problem; she has struggled to find a way of naming rapes that do not fit the long-standing *cultural* image of rape as the "stranger in the bushes" rape. In her article, she referred to such rapes as "non-traditional" rapes,<sup>5</sup> a term that obviously could not work because these rapes are all too traditional.<sup>6</sup> Estrich chose the term used by Kalven and Zeisel because of their rationale that the criminal law of assault uses the terms aggravated assault and simple assault to distinguish between armed and unarmed assaults.<sup>7</sup> By analogy, "aggravated" rapes involve weapons or serious physical injury while "simple" rapes include all attacks where no weapons are used and no serious injuries occur. Yet in her book, she tends to use "simple rape" also to denote acquaintance, date or prior relationship rapes, all of which can involve serious violence. Estrich correctly argues that "rape is rape" throughout the book, but trivializing acquaintance rape by naming it "simple" undermines the message. Consequently, I refer to rape as rape throughout the remainder of this essay. To differentiate among the circumstances in which rapes occur, I refer to the distinguishing characteristics such as armed rape, date rape, spousal rape or acquaintance rape.

## 1. Why the Law Fails to Protect Women

In the initial chapter, Estrich asserts that "the law of rape stands as clear proof of the power and force of a male rape fantasy." (p. 5) "The male rape fantasy is a nightmare of being caught in the classic, simple rape." (p. 5) According to Estrich, the classic simple rape occurs when the man engages in sex when the woman says no but she does not fight. He may or may not have been aggressive, but he went ahead anyway. In this instance, however, the woman charges the man with rape. Estrich indicates that it is this nightmare fantasy which has subverted the law of rape. Additionally, Estrich alludes to a male wish to preserve sexual access to females as the driving force behind the refusal of the law to hold such men accountable. At the end of the book's chapter on the common law of rape, Estrich asserts that the resistance, corroboration, and "fresh complaint" rules, together with the infamous cautionary instruction that rape is a charge easily made and difficult to disprove, developed as a result of the male nightmare. (p. 55) At other times, she refers to the wish to protect "the right to seduce [and] the right of male sexual access"

<sup>5</sup> Estrich, *supra* note 1, at 1092.

<sup>6</sup> I have heard estimates as high as one in three women will be raped during her lifetime; one in four or one in ten are common figures, depending on geography. See, e.g., Dowd, *Rape: The Sexual Weapon*, 122 TIME, Sept. 5, 1983, at 27 (one in ten); Sweet, *Date Rape*, 14 MS., Oct. 1985, at 56, 58 (one in eight; one in four college women victims of rape or attempted rape).

<sup>7</sup> H. KALVEN & H. ZEISEL, *supra* note 3, at 252.

(p. 71) or "notions of male power and entitlement and female contributory fault" (p. 23) as the reason for the law's failure to recognize acquaintance rapes as criminal acts. Consequently, her analysis is confusingly oversimplified. The male nightmare seems an unsatisfactory explanation for the centuries of misogyny in rape law.

It is true, as Estrich acknowledges, that the male nightmare fantasy has never been empirically demonstrated. (p. 56) But by this she means that there is a paucity of evidence that women actually charge rape in the "went ahead anyway" situation, not the fact that men actually *fear* this possibility. Is it indeed true that men suffer from a fear that if they engage in sexual relations with a woman when consent is ambiguous, they will be charged with rape? Even if there is some truth to this, does it really explain the misogynist beliefs that women who consent to intercourse will falsely cry rape and that women lie about rape to "trap" men, to manipulate them, to avenge perceived wrongs? Or does it relate to the myths of virility, or how a man "proves" he is a man? Or is there an element of male guilt—there may have been one time in the back seat of a car or in the den when he got a little too insistent? Or is it the fact that if the rape laws were enforced *even as they are written in many states*, we might find a significant percentage of the male population in jail? Or are deep-seated beliefs fostered by the structures of patriarchy and male dominance the explanation? Or is it men's failure to understand rape unless there are other physical injuries, because it rarely happens to them and they have not had to understand it? Has our perspective been so constricted that our attitudes about women are such that we mistrust them? Do we continue to think "no" means "yes"? Do we want a man to make all the overtures and therefore are we reluctant to prosecute him if he "goes too far" (rather, we blame the woman)?

Estrich's work requires acceptance of her reason for the inadequacy of the law pertaining to rape. Her reason is unconvincing in light of what is known about cultural attitudes.<sup>8</sup> The hatred of women, the devaluation of women, and the patriarchal structure that has silenced women and promoted male aggression seem to be preferable places to search for an explanation. Additionally, the law's habitual practices and categories, combined with male judicial identification with men charged with rape rather than with women who have been raped, might play a role in perpetuating the problems Estrich identifies.<sup>9</sup> By "identification" I do not

<sup>8</sup> See, e.g., T. BENEKE, *MEN ON RAPE* (1982); S. BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975); S. GRIFFIN, *RAPE: THE POLITICS OF CONSCIOUSNESS* (1986); RAPE (S. Tomaselli & R. Porter eds. 1986); Taylor, *Rape and Women's Credibility: Problems of Recantations and False Accusations Echoed in the Case of Cathleen Crowell Webb and Gary Dotson*, 10 HARV. WOMEN'S L.J. 59 (1987).

<sup>9</sup> Scheppele, *The Re-Vision of Rape Law* (Book Review), 54 U. CHI. L. REV. 1095, 1104-16 (1987) (discussing how differences in male and female perceptions of rape create different "facts" in rape cases; factfinders are often men, which skews interpretations).

mean that the judges identify with the "nightmare fantasy." I mean that to the extent the defendant cannot be isolated from the population of men generally, cannot be made into a "*rapist*," male judges are likely to empathize with the defendant's situation or to deny that the case they are considering is a rape. Another factor, as I shall discuss in Part two, is ignorance or denial of the crime itself. All of these factors interact to produce skewed legal interpretations. None can be isolated as *the* sole cause of the law's misogyny.

## 2. The Law of Rape: Practice and Doctrine

The second chapter in *Real Rape* chronicles the criminal justice system's failure to acknowledge acquaintance rape as rape and criticizes police practices and district attorneys' attitudes toward such rapes. Estrich discusses how police officers, prosecutors, and survivors define rape and asserts that if it is not a "classic" violent armed stranger rape, no one, including the survivor, is likely to *name* the experience "rape." She states that women who say "no" but are still forced to have sex rarely think of themselves as rape victims and usually do not report the rape "with reason." (p. 14) According to Estrich, a major reason for the failure to report these incidents of forced sex as rape is the failure of the criminal system to treat them as legitimate. (pp. 14-15) She states that prosecutors and police officers usually do not take these cases seriously; the victim's relationship to the offender is "the key" in determining whether to issue a rape charge. The second major factor for prosecutors in deciding to charge or prosecute a case is the level of force used and the victim's physical resistance. (pp. 18-20) If a date rape is not violent, and the woman knows the offender well, prosecutors are reluctant to prosecute. Estrich suggests that distinguishing among cases on the basis of "prior relationship and force and resistance" is inexcusable discrimination, and concern with corroboration of the victim's word is also unjustifiable. (p. 20)

The main point of the chapter seems to be that prosecutors and the law do not take "prior relationship" cases or acquaintance/date rape seriously, so victims withdraw allegations. Estrich rapidly lists four other factors that influence prosecutors not to pursue these cases: a belief that prior relationship cases involve "private" disputes rather than public wrongs; a belief that the offender has a "claim of right" based on prior consent by the victim; a belief that "prior relationship cases involve contributory fault by the complainant, while offenses by strangers do not"; and a belief that an attack by a non-stranger is less terrifying. (pp. 23-25) These are all interesting hypotheses, and they undoubtedly influence whether the crime is identified as rape, but Estrich misses what may be the most determinative factor for many prosecutors. As the authors of a

study of Michigan's rape reform laws noted, prosecutors receive rewards for their conviction percentage, and the structure creates a disincentive to pursue cases that prosecutors believe will lead to jury acquittals.<sup>10</sup> As the community becomes less tolerant of forcible sex and more sympathetic to victims, prosecutors may be more willing to pursue these cases without much change in the legal definition or doctrines of rape.<sup>11</sup>

Estrich ignores the effect of racism on conviction rates, although she purports to discuss racism. (p. 6) The dilemma is that rape affects *all* women no matter what their ethnicity; *all* women are disadvantaged when the legal system fails to take rape seriously in a culture where *no* women are safe from being raped. Yet by failing to acknowledge the added burdens carried by rape victims of color, her analysis is vulnerable to the common accusation that feminism and feminist concerns are for middle-class white women only. Biases influencing the law's treatment of white rape victims are amplified when related to women of color. Indeed, in Estrich's review of what influences prosecutorial charging practices, she omits race as a factor altogether, although at least one study lists it as one of the five criteria that most influences charging decisions.<sup>12</sup>

Further, Estrich fails to articulate the many other factors that lead women to be silent or to fail to name their experience "rape." Estrich does not develop the notion that the boundary between culturally permissible male persistence and impermissible force is so vague that the victim does not perceive the forced sex as rape. (p. 13) Further, it is not *just* that police and prosecutors are unsympathetic, but also that the woman who does speak may confront opprobrium from or may be silenced by friends, family, and colleagues. One study determined that women indicated they would not report a rape because they felt others could be hurt, felt shame, felt fear of the rapist, and felt fear about their families knowing.<sup>13</sup> Asian and Hispanic women may face strong cultural pressures not to speak.<sup>14</sup> Black women may not trust a white-dominated law enforcement system. Thus, it may not be "worth it" to prosecute—never mind problems such as financial dependency on the rapist, fear, or pity. There are strong incentives not to report "rape."<sup>15</sup>

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<sup>10</sup> J. MARSH, A. GEIST & N. CAPLAN, *RAPE AND THE LIMITS OF LAW REFORM* 101 (1982); see also Loh, *Q: What Has Reform of Rape Legislation Wrought? A: Truth in Criminal Labeling*, 37 J. SOC. ISSUES, Fall 1981, at 28, 40-43 (significant positive relation between assessed "convictability" and charging decisions).

<sup>11</sup> Loh, *supra* note 10, at 49-50; see also Dowd, *supra* note 6, at 29.

<sup>12</sup> Loh, *supra* note 10, at 42 (race of whom is not specified, however); see also Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 117-22 (1983) (discussing the legal system's denial of the rape of Black women).

<sup>13</sup> C. HURSCH, *THE TROUBLE WITH RAPE* 95-114 (1977).

<sup>14</sup> *Id.* at 17; Feldman-Summers & Ashworth, *Factors Related to Intentions to Report a Rape*, 37 J. SOC. ISSUES, Fall 1981, at 65-66 (discussing why minority women expressed less inclination to report rape when surveyed for a sociological study).

<sup>15</sup> See, e.g., D. RUSSELL, *THE POLITICS OF RAPE* 62-67 (1975).



In the third chapter, Estrich concentrates on appellate cases from the nineteenth century to the mid-1970s in order to criticize the doctrine of resistance and evidentiary requirements in rape cases. She correctly observes that Lord Hale's seventeenth century misogyny, reflected in his claim that rape is a charge easy to make and difficult to disprove, was a part of the development of the American law of rape. (p. 28) She states:

The doctrines of rape law and particularly the patterns of their application make clear the central role of the appellate courts in giving substance to and legitimating Hale's distrust of women victims. The courts have succeeded in doing nothing less than translating Hale's generalized suspicion into a set of clear presumptions applied against the woman who complains of simple rape. (p. 28)

The primary emphasis of the chapter is on the resistance requirement: From the nineteenth century until the 1950s and 1960s, the courts essentially required victims to "resist to the utmost." (pp. 29-33) Substantial physical resistance by the victim was necessary in most cases to establish nonconsent. In the mid-1950s, the "utmost resistance" standard was replaced by a requirement of "reasonable resistance." (p. 37) A woman no longer had to risk death or serious bodily injury to "prove" nonconsent. But, Estrich contends, whether the resistance was "enough" may depend upon the nature of the relationship between the victim and the rapist:

Strangers need not be resisted, even if unarmed; dates must be. A step-daughter is not required to resist her stepfather, but she is required to resist the boy or man next door. Adult women are required to resist when the man is an adult neighbor, but not when he is a drunken youth. White women are not required to resist black men, but black women are. (p. 36)

Her summary of the resistance requirement may not be altogether accurate—except for the history of racism in the law of rape, the other "patterns" seem debatable.<sup>16</sup>

## B. The Consent-Force-Resistance Conundrum

Many commentators have noted the interplay of the elements of the crime of rape—force and nonconsent—with victim resistance (which is still an "element" of the offense in some jurisdictions).<sup>17</sup> A victim's physical resistance—biting, scratching, hitting—is strong evidence of nonconsent. Physical resistance also makes physical *injury* more likely, also providing strong evidence of force. But, as other commentators and Estrich have noted, there can be ample evidence of nonconsent and force

<sup>16</sup> Wiggins, *supra* note 12, at 117-21, discusses this point.

<sup>17</sup> S. BROWNMILLER, *supra* note 8, at 372-74; S. KADISH, S. SCHULHOFFER & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 372-86 (4th ed. 1983); Weiner, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN'S L.J. 143, 144-46 (1983); Harris, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613, 618-20 (1976) (Comment).

or fear without requiring physical injury to the woman. To make conviction for the crime of rape contingent on how much a woman resists physically is unconscionable. The word "no," crying, and other passive responses have often not been "enough." More than fifteen years since the beginning of the modern feminist movement, some appellate courts still demand more than a "no" from a woman to prove nonconsent. In a voyeuristic manner, some courts want a record of bruises, of slaps and hits, or perhaps, as Estrich puts it, a fight-among-boys-in-the-schoolyard exchange. On the other hand, at least one court has explicitly stated that "'no' means no."<sup>18</sup>

In chapter four, Estrich further develops her earlier themes. She argues that where women used to have to resist to prove they did not consent, now they have to resist to prove that the man used force. (pp. 59-60) She had criticized earlier law for concentrating on consent; in this chapter, she criticizes present law for concentrating on force. Estrich suggests that shifting the emphasis from consent to the amount of force the defendant employed has been unfortunate (p. 59); it still focuses on the survivor's resistance. (p. 60) The consent-force-resistance trilogy is evident in the appellate cases Estrich discusses: where there is clear non-consent, there is not enough force (pp. 61-62);<sup>19</sup> where there is evidence of force and fear, the fear is not *reasonable* and the victim should have resisted anyway. (p. 64)<sup>20</sup> Or, the force used must be "force as men understand it," rather than force as women perceive it. (p. 71)

The cases she uses to illustrate this point *are* troubling. In a 1984 North Carolina Supreme Court case,<sup>21</sup> for example, the offender and the victim had lived together for six months. The offender hit the victim until she finally left him. He tracked her down at the school she was attending, confronted her, and grabbed her by the arm, stating she was coming with him. She agreed to accompany him if he released her arm. He stated he had a "'right' to intercourse with her" and took her to a friend's house. Once there she said she did not want to have sexual relations, but the defendant "pulled her up from where she was sitting, undressed her, pushed her legs apart, and penetrated her." (p. 61) The North Carolina court, while acknowledging that her nonconsent was "unequivocal," held that "the element of force had not been established by substantial evidence." (p. 61) Estrich notes, "The force used outside the school and the threats made on the walk . . . were considered to be 'unrelated to the act of sexual intercourse.' " (p. 61) The victim's fear of the defendant based on his past conduct was "irrelevant" to the moment she was raped. (p. 61) Arguing that in one sense, the case stands for

<sup>18</sup> *State v. Lederer*, 99 Wis. 2d 430, 436, 299 N.W.2d 457, 461 (1980).

<sup>19</sup> *State v. Alston*, 310 N.C. 399, 312 S.E.2d 470 (1984).

<sup>20</sup> *State v. Rusk*, 289 Md. 230, 424 A.2d 720 (1981).

<sup>21</sup> *Alston*, 310 N.C. 399, 312 S.E.2d 470.

ignoring rape in order to continue male sexual access (p. 62), Estrich uses this case to illustrate that force as men understand it must be present in a rape case. Another explanation, however, could lie in the court's narrow view of the time in which force must be used: The court, while noting "substantial evidence of force, intimidation, and removal" when the defendant first encountered the victim,<sup>22</sup> found that neither his prior violence, nor his initial force and his threat were sufficiently related to the act of intercourse "to cause [the victim] to believe that she had to submit to sexual intercourse with him or suffer harm."<sup>23</sup> It is unclear that the use of this extremely narrow time frame to find the absence of force or reasonable fear on the part of the victim stems entirely from a peculiarly male understanding of force.<sup>24</sup> It seems more likely that the court was dubious about the crime and the punishment imposed: The victim and the defendant had violent sexual encounters before and at least once after the incident, none of which the victim had named rape.<sup>25</sup>

To illustrate that a victim must resist to establish force, Estrich relies on the intermediate court opinions in a Maryland case, *State v. Rusk*,<sup>26</sup> and the majority opinion of the Maryland Court of Appeals

<sup>22</sup> *Id.* at 405, 312 S.E.2d at 474.

<sup>23</sup> *Id.* at 407, 312 S.E.2d at 476.

<sup>24</sup> Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 614-16 (1981).

<sup>25</sup> *Alston* is a disturbing case because the facts that may have led the court to reverse *Alston's* conviction are ones that probably led the court to narrow the time frame so severely. The victim and the defendant previously had sexual relations which were marked by his violence and her passivity when they were living together. Then after the rape, the defendant contacted the victim and went to her apartment. "He threatened to kick her door down," so she let him in. *Alston*, 310 N.C. at 404, 312 S.E.2d at 473. He started to kiss her; she pulled away, but he picked her up and carried her to the bedroom. "He performed oral sex on her and she testified that she did not try to fight him off because she found she enjoyed it." *Id.* They had intercourse; the victim did not report the incident initially "because she said she was embarrassed." *Id.* There was more force within a narrow time in this incident, but apparently the victim did not say she was frightened despite the earlier rape. That she might have simply been so abused by this time that she had no sense of a self powerful enough to refuse such treatment, that she might have identified with her tormentor so much that she did "enjoy" the subsequent assault, probably did not occur to the court. Instead, faced with sorting out scenarios of a violent relationship with sexual encounters all but one of which were "consensual" and not called rape by the victim, the court was undoubtedly dubious as to whether the one event named "rape" was in fact rape. It is hard to justify an eight to ten year prison sentence for rape under such circumstances.

*Alston* has continued to trouble the North Carolina Supreme Court. In *State v. Strickland*, 318 N.C. 653, 351 S.E.2d 281 (1987), the court upheld a rape conviction despite the defendant's claim that *Alston* stood for the proposition that "general fear" did not establish the element of force. The court distinguished *Alston* on the facts, citing Estrich's criticism of the case. *Id.* at 655, 351 S.E.2d at 283. A month after *Strickland*, the court upheld a child molestation conviction, noting that "[s]exual activity between a parent and minor child is not comparable to sexual activity between two adults with a history of consensual intercourse." *State v. Etheridge*, 319 N.C. 34, 43, 352 S.E.2d 673, 681 (1987). (Curiously, the *Etheridge* court, in a case involving a boy victim, limited *Alston* "to its peculiar facts." *Id.* *Etheridge* overruled an earlier case which affirmed a reversal of a conviction for the rape of a fifteen-year-old girl. *State v. Lester*, *aff'g* 313 N.C. 595, 330 S.E.2d 205 (1985), 70 N.C. App. 757, 321 S.E.2d 166 (1984)).

<sup>26</sup> 43 Md. App. 476, 406 A.2d 624 (1979).

upholding the conviction.<sup>27</sup> She fails to note that Maryland law has a judicially-created "resistance requirement,"<sup>28</sup> something that is relevant to considering whether the court of appeals helped or hurt rape victims in *Rusk*. Estrich terms *Rusk* "a classic example of simple rape." (p. 63) The victim briefly met the defendant in a bar, and though the victim did not know the defendant, she thought a friend knew him. When she said she was leaving the bar, he asked for a ride home. When she reached his home, he invited her up. She declined several times. He reached over and took her car keys; she went with him to his room. He went to the bathroom; she did not leave. He pulled her onto the bed and started to undress her, then asked her to take off the remainder of her clothes, which she did. The look in his eyes frightened her. She tried talking him out of raping her and became very frightened. She asked "If I do what you want, will you let me go without killing me?" and started to cry. He put his hands on her neck and "started lightly to choke" her.<sup>29</sup> A jury convicted Rusk of rape. The Court of Special Appeals reversed (for reasons Estrich does not clearly explain), but Maryland's highest court affirmed the conviction on what Estrich characterizes as "the narrowest possible ground." (p. 65) Estrich attacks the court for its statement that the "light choking" "particularly" was evidence of force (p. 65), rather than praising the court for determining that there was sufficient evidence to establish that the victim's fear was honest and reasonable, and that her fear negated any obligation for her to resist.<sup>30</sup> While it is regrettable that the court did not eliminate the requirement of resistance from the law of rape in Maryland, the court did reject the Court of Special Appeals' holding that "the evidence was legally [in]sufficient to demonstrate the existence of 'a reasonable fear' which overcame [her] ability to resist."<sup>31</sup> Thus, *Rusk* made *some* progress away from archaic assumptions. But Estrich does not mention this; instead she quotes from the dissent in *Rusk* to demonstrate how perverse judicial thinking is:

(the woman) must follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person by a stranger or an unwelcomed friend. She must make it plain that she regards such sexual acts as abhorrent and repugnant to her natural sense of pride. (p. 65)

<sup>27</sup> 289 Md. 230, 424 A.2d 720 (1981).

<sup>28</sup> *Hazel v. State*, 221 Md. 464, 157 A.2d 922 (1960); *Rusk*, 289 Md. at 240, 424 A.2d at 725.

<sup>29</sup> *Rusk*, 289 Md. at 235, 424 A.2d at 722.

<sup>30</sup> *Id.* at 245-46, 424 A.2d at 728. The Maryland Court of Appeals in *Rusk* rejected the Court of Special Appeals' interpretation of *Hazel v. State*, 221 Md. 464, 157 A.2d 922 (1960), pointing to the change in the statute defining rape, and observing, "(t)he Court [in *Hazel*] noted that lack of consent is *generally* established through proof of resistance *or* by proof that the victim failed to resist because of fear." *Rusk*, 289 Md. at 241, 424 A.2d at 726 (emphasis supplied). "*Hazel* thus made it clear that lack of consent could be established through proof that the victim submitted as a result of fear of imminent death or serious bodily harm." *Id.* at 242, 424 A.2d at 726.

<sup>31</sup> *Rusk*, 289 Md. at 239, 424 A.2d at 727.

This statement *is* outrageous, and it does indicate the need to raise judicial consciousness, but her discussion of *Alston* and *Rusk* does not seem to support Estrich's conclusion that judges exhibit "continued unwillingness to empower women in potentially consensual situations with the weapon [sic] of a rape charge" and that it is this same unwillingness that explains why consent and nonresistance have been confounded. (p. 66)

## 1. Resistance

Much of Estrich's message unrelentingly attacks the law's demand that women physically resist unwanted sex. The myth of the "proud female" whose "natural instinct" is to resist physically allows rapists to go unpunished. This attitude discounts the horror of rape for countless victims who fail to perceive themselves as such because they did not resist, or certainly did not put up a fight. Resistance has become the crucial issue in case after case under numerous statutes in a way that is profoundly disturbing.

Estrich comments that the courts define adequate resistance using a *male* standard: "This version of a reasonable person is one who does not scare easily, one who does not feel vulnerable, one who is not passive, one who fights back, and one who does not cry. The reasonable woman, it seems, is not a schoolboy 'sissy'; she is a real man." (p. 65) This "reasonable victim" standard does not apply in other violent crimes: In cases of robbery, the element of fear or force is defined as what the victim subjectively experienced, rather than what a "reasonable victim" would experience. The victim's subjective fear is enough to preclude any requirement of resistance. But many appellate courts seem to have applied a "reasonable victim" standard to the rape survivor. This standard blames the victim once again. But why is the "reasonable victim" standard imposed only in rape cases? Is it, as Estrich contends, that male judges expect women to behave like men, or is there another explanation? An alternative explanation might encompass confusion about heterosexual relationships, perhaps a male nightmare, and the objectification of women. Further, contrary to Estrich's characterization, the proud female fighting to the utmost is not a "real man"; she is a particular vision of female "virtue"—as opposed to the "fallen" whore. If the victim does not fight, then she must be a fallen whore who consented. Because we expect the men to persist in this culture unless the woman does something drastic, it must be a "seduction" rather than a rape. I agree with Estrich that one very bad solution to this dilemma is to put a burden on the *victim* to resist physically. But while Estrich acknowledges the difficulty presented by the continuum of behaviors from seduction to rape, she does nothing

with it; she neither explains nor discusses it, but leaves it unsolved. (p. 69)

Estrich's argument about force or fear of harm is unclear: She conflates force and fear and physical resistance. In theory, either force *or* fear negates any resistance requirement, but she never really discusses the latter. Is it true that fear of harm is insufficient to sustain a rape conviction? Estrich indicates that the victim need not resist when weapons are involved, but in the case of an unarmed attack by a man six feet tall on a woman five feet tall, the difference in size is insufficient to establish the futility of resistance. (pp. 60-69) It is interesting that such should still be true of rape, when a developing line of doctrine in homicide, the so-called "battered woman" defense, does allow consideration of differences in size and strength.<sup>32</sup> Indeed, it is ironic that a woman can kill in self-defense and be exculpated because of her fear, but if she submits to intercourse rather than killing, she is unreasonable.

In challenging the validity of the judicially constructed reasonable victim, Estrich depicts women as being universally weak and passive. Estrich's victims do not fight, they cry. She says that crying "is, from my reading, the most common reaction of women to rape," (p. 62) an assertion that is questionable in light of the evidence that victims react in a number of ways.<sup>33</sup> I have no quarrel with her argument that the law should not require women to resist, but Estrich should not advocate that it is smarter *not* to resist physically. (p. 96) If the rapist is unarmed, resistance may be the best tactic. Physical resistance increases the likelihood of injury to the woman, but it also can prevent a completed rape.<sup>34</sup> Further, anecdotal evidence suggests it may be true that women who resist fare better in their recoveries. But perhaps most important, there is no "smart" way to deal with rape applicable to all rape situations,<sup>35</sup>

<sup>32</sup> Size and strength are obviously not the only issue in self-defense cases where a woman kills a man, but the leading case, *State v. Wanrow*, 88 Wash. 2d 221, 559 P.2d 548 (1977), applied a subjective standard of self-defense, taking into account the history of sexism and the difference in physical size and strength between the woman and her victim, in reversing Wanrow's conviction for murder.

<sup>33</sup> Notman and Nadelson, for example, observed that "[i]n the state of panic evoked during a rape, most women think about how to behave to avoid being physically injured or killed. Some talk, some resist, others become passive . . . ." Notman & Nadelson, *The Rape Victim: Psychodynamic Considerations*, 133 AM. J. PSYCHIATRY 408, 411 (1976). Burgess & Holmstrom found in one study that the majority of victims used verbal strategies to try to stop the assault; some took direct physical action, and one-third were physically or psychologically unable to avoid the attack. Many did cry *during* the rape, but others were angry; several talked, still others resorted to disassociation, denial, or rationalization. Burgess & Holmstrom, *Coping Behavior of the Rape Victim*, 133 AM. J. PSYCHIATRY 413, 414-16 (1976).

<sup>34</sup> Police advice on "proper" reactions has varied over time: Sometimes the advice is not to resist, but sometimes it is to put up a fight. Amir's study is often cited for the fact that he found a significant correlation between resistance and additional injuries. M. AMIR, PATTERNS IN FORCIBLE RAPE 164-65 (1971); see also *People v. Barnes*, 42 Cal. 3d 284, 721 P.2d 110, 228 Cal. Rptr. 228 (1986) (summary of studies and literature on resistance).

<sup>35</sup> Self-blame and feelings of guilt seem to be almost universal responses in rape victims, regardless of how much they resisted. Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981, 983 (1974); Notman & Nadelson, *supra* note 33, at 410; cf. Rose, "Worse

other than doing what you must to survive. The situations and offenders vary so greatly that generalizations about how victims "should" behave are pointless and damaging. The important question treated summarily by Estrich, is why a "reasonable victim" standard applies in rape at all.

Force, Estrich concludes, preserves male dominance and sexual access. (p. 71) In support of her claim that judicial interpretations of force can be absolutely horrifying, she cites a Pennsylvania case involving a 14-year-old girl living with a male guardian who threatened to return her to a detention home if she did not have sex with him. She "consented" to intercourse. The court held that "psychological duress" does not constitute "forcible compulsion" under Pennsylvania law and this was not rape!<sup>36</sup> (In all fairness, it should be noted that three judges stridently dissented.<sup>37</sup>)

Estrich's criticism of the courts' focus on force concludes with the statement:

But in a classic simple rape—where only one man is involved, even if he bears responsibility for intentionally creating the situation that the woman finds threatening—the force standard continues to protect, as "seduction," conduct which should be considered criminal. It ensures broad male freedom to "seduce" women who feel themselves to be powerless, vulnerable, and afraid. It effectively guarantees men freedom to intimidate women and exploit their weakness and passivity, so long as they don't "fight" with them. (p. 69)

It is not quite that simple, but, to the extent it is true, work remains to be done. Yet, Estrich does little but criticize efforts to improve the law regarding rape.

## 2. The Attack on Reform

Much of what Estrich writes shows a definite feminist sensibility, including a profound distress with the treatment of female rape survivors by the criminal law and with the exclusion of the women's experience from the interpretation and application of rape laws. Moreover, her allusions to male rape fantasies and the male desire for continued sexual access seem feminist. But in discussing legal reforms in the area of rape, Estrich seems to hurl a *j'accuse* at feminist legal reform efforts. She denigrates the results of reform efforts: Even rape shield laws barring or sharply limiting evidence of a victim's sexual history are condescendingly dismissed as "lead[ing] one to question whether the reform effort wasn't limited to preventing humiliating questions." (p. 80) She overlooks the

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*Than Death": Psychodynamics of Rape Victims and the Need for Psychotherapy*, 143 AM. J. PSYCHIATRY 817, 819-20 (1986) (description and psychodynamic interpretations of inevitable self-blame).

<sup>36</sup> *Commonwealth v. Mlinarich*, 345 Pa. Super. 269, 498 A.2d 395 (1985).

<sup>37</sup> *Id.*

fact that "feminist reformers" had to reach compromises with other actors in the political system.<sup>38</sup> And she has missed legal reforms and cases that seem to do exactly what she advocates.

First, she complains that the trend toward gender-neutrality in sexual assault statutes—an egalitarian approach some feminists have used—denies that rape is overwhelmingly a crime against women. It is unclear that gender-neutral statutes send the symbolic message that rape is not a crime against women. Estrich also complains that the renaming of rape, or presumably the inclusion of other offenses such as forcible sodomy and forcible oral copulation in "criminal sexual conduct" or "sexual battery" statutes denies the "unique indignity" of rape. (p. 81) She quotes one crisis counselor to claim that such changes in terminology, made to reflect the criminal law's general prohibitions on assaults, and reinforcing the analogy of simple assault to simple rape, may "be very detrimental to our work with rape victims." (p. 82) Instead, Estrich argues, rape should remain rape—by which I must assume that she means penetration of the vagina. But surely forcible sodomy and forcible oral copulation are equally horrifying to the victims. Further, a Michigan study evinces that victims did not experience particular distress about the term "criminal sexual assault."<sup>39</sup> At least, the study found general agreement among rape crisis counselors that victims found the new legal regime less traumatic.<sup>40</sup>

Estrich states that "feminist reformers" had two choices in rewriting rape statutes: They could focus on the offender and seek "a broader definition of force," or they could focus on the woman "and rely on her word as to nonconsent." (p. 84) Estrich claims that by focusing on the man and force, reformers made a critical mistake. Indeed, she is extremely critical of the Michigan reform. (pp. 87-88) Yet at least one state, Wisconsin, seems to have enacted reform legislation that focuses less on force and more on consent: Sexual assault is defined in terms of sexual contact or intercourse "without consent."<sup>41</sup> But Estrich does not consider Wisconsin's novel approach at any point.

<sup>38</sup> J. MARSH, A. GEIST & N. CAPLAN, *supra* note 10, at viii, 14-19. In Michigan, for example, legislators "expressed fear of false accusation and talked at length about seductresses, orgies, blackmail, 'barroom floozies,' and 'vindictive wives,'" *Id.* at 15. The opposition to a proposal to eliminate the marital exclusion was so strong that the Task Force for Reform "compromised and accepted the spousal exclusion in order to win passage of the rest of the bill." *Id.* See also McDermott, *California Rape Evidence Reform: An Analysis of Senate Bill 1678*, 26 HASTINGS L.J. 1551 (1975) (Note) (legislation sponsored by feminists and crime control advocates).

The authors of the Michigan study did not report any findings relating to whether renaming the offense was detrimental. J. MARSH, A. GEIST & N. CAPLAN, *supra* note 10.

<sup>40</sup> Eighty-two percent of the respondents to the Michigan study believed the victim's experience was less traumatic. Crisis workers in particular were unanimous in their belief that victims were less traumatized under the recent system; however, many crisis workers did not have any experience under the old laws. *Id.* at 68-69.

<sup>41</sup> WIS. STAT. ANN. § 940.225 (West 1982 & Supp. 1987). The sexual assault law was enacted in 1976, about the time when other states were reforming their laws. Act effective Mar. 27, 1976,



She also claims reform has failed in Michigan, Washington, and California. Yet, citing a few disturbing court of appeals cases from Michigan (pp. 84-85) and a few studies done shortly after legislative changes in the law (pp. 88-90) does not establish reform's complete failure. Indeed, one of the studies she relies on to assert that feminist reformers failed is considerably more positive than she admits. She writes:

The single major study of the effects of law reform in Michigan found some statistical improvement in the conviction rates but concluded overall, "the law has very little impact on the system's approach to sexual assault cases." The reform effort did not lead women to report rapes, nor did it change the way prosecutors assessed the "convictability" of cases . . . The major change reported . . . was the decline in the importance attached to the victim's prior sexual history. (p. 88)

It is not quite that bleak. On the page from which Estrich quotes, the authors continue: "[the law's] most salutary effects appear to be reserved for those outside the system—the sexual assault victims themselves. And it also has a profound effect on another group outside the system—defendants who are now more often convicted and imprisoned."<sup>42</sup> Moreover, the researchers conclude that the change in the Michigan law had changed procedures in sexual assault cases to make them resemble other felony cases. Finally, the authors state that prosecutors had a better chance to win as a result of the shifting of the burden of proof by limits placed on sexual history evidence and the elimination "of the need to prove resistance and nonconsent."<sup>43</sup> The chances for conviction *were* improved, the experience of the victim/survivor *was* better. Prosecutors not only win more cases, but also "are able to win more types of cases than they were in the past, suggesting that the law's protection extends to more groups of people."<sup>44</sup> What failed to change was the criminal justice officials' basic attitude about women and rape. The perspective remained that "real rape" is "committed by sexual psychopaths who prey on strangers."<sup>45</sup> One respondent to the study commented that the "application of the law to other areas of sexual conduct" was "messing with the folkways,"<sup>46</sup> suggesting that changes in law do not necessarily change attitudes toward the crime.

Estrich suggests that reform in California has also failed: "there was no significant increase between 1975 and 1982 in either the percent-

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ch. 184, § 5, 1975 Wis. Laws 583, amended by Act effective June 29, 1976, ch. 421, §§ 470-471, 1975 Wis. Laws 1386.

<sup>42</sup> J. MARSH, A. GEIST & N. CAPLAN, *supra* note 10, at 65.

<sup>43</sup> *Id.* at 106.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 107.

<sup>46</sup> *Id.* One prosecutor stated, "Generally, I feel there's an obligation for healthy males to do whatever they can with every girl [sic] they come across. If he isn't physical about it, and doesn't go beyond the bounds of propriety, then we won't issue a warrant." *Id.* at 93.

age of rape complaints that resulted in arrests or the percentage of felony complaints that resulted in convictions." (p. 88) Only two major legislative reforms, a rape shield law<sup>47</sup> and increased penalties for sexual offenses,<sup>48</sup> occurred in California from 1975 to 1980. In 1979, the legislature redefined some sex offenses, making them gender-neutral.<sup>49</sup> During this period, the California Supreme Court abolished use of the standard Lord Hale instruction about rape being a charge easily made,<sup>50</sup> and adopted the mens rea approach that Estrich later advocates as a solution.<sup>51</sup> Estrich neglects to tell her readers that the California legislature enacted a marital rape statute in 1979,<sup>52</sup> abolished the resistance requirement in forcible rape in 1980,<sup>53</sup> and has defined "consent" in terms of knowing consent and active participation,<sup>54</sup> improvements with which she would presumably agree. In fact, in *People v. Barnes*, a case that may have been decided after her book was in press, although the intermediate appellate court decision exemplified the type of thinking that Estrich deplores, ultimately the California Supreme Court adopted an approach similar to the one that she advocates.<sup>55</sup>

In *People v. Barnes*,<sup>56</sup> the victim was a neighbor and acquaintance of the defendant. She had bought marijuana from the defendant once before the evening she was raped. The defendant called and asked the victim over for some drinks to celebrate. He called her several times; she finally agreed to come over, saying she wanted to buy some marijuana from him. The defendant persuaded her to come inside, where they conversed and smoked marijuana. The victim repeated that she just wanted to buy marijuana, but the defendant started to hug her, and she pushed him away. She finally got up and walked to the front gate; the defendant yelled that she could not leave. This frightened the victim, who did not know how to open the gate. She ultimately had intercourse with the defendant. When she finally escaped, she went to the hospital. A day later she reported the rape.<sup>57</sup>

<sup>47</sup> Act approved Aug. 30, 1974, ch. 569, § 1, 1974 Cal. Stat. 1388 (codified at CAL. EVID. CODE § 782 (West Supp. 1988)).

<sup>48</sup> Act approved Sept. 20, 1976, ch. 1139, § 154, 1976 Cal. Stat. 5106 (codified at CAL. PENAL CODE § 264 (West Supp. 1988)).

<sup>49</sup> Act approved Sept. 22, 1979, ch. 994, § 1, 1979 Cal. Stat. 3383 (codified at CAL. PENAL CODE § 261 (West Supp. 1988)).

<sup>50</sup> *People v. Rincon-Pineda*, 14 Cal. 3d 864, 538 P.2d 247, 123 Cal. Rptr. 119 (1975) (abolishing standard instruction).

<sup>51</sup> *People v. Mayberry*, 15 Cal. 3d 143, 542 P.2d 1337, 125 Cal. Rptr. 745 (1975) (reasonable and good faith belief as to consent a defense).

<sup>52</sup> Act approved Sept. 22, 1979, ch. 994, § 2, 1979 Cal. Stat. 3384 (codified at CAL. PENAL CODE § 261(2) (West Supp. 1988)) (90-day reporting requirement for the crime of rape of a spouse).

<sup>53</sup> Act approved July 17, 1980, ch. 587, § 1, 1980 Cal. Stat. 1595 (amending CAL. PENAL CODE § 261(2) (West Supp. 1988)).

<sup>54</sup> Act approved Sept. 16, 1982, ch. 1111, § 3, 1982 Cal. Stat. 4025 (codified at CAL. PENAL CODE § 261.6 (West Supp. 1988)).

<sup>55</sup> *People v. Barnes*, 42 Cal. 3d 284, 721 P.2d 110, 228 Cal. Rptr. 228 (1986).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 288-91, 721 P.2d at 111-13, 228 Cal. Rptr. at 229-31.

Under Estrich's conception of the current law, the defendant's conviction for rape would be reversed on appeal. And, in fact, it was; the state court of appeal, in an unpublished opinion, held that there was no evidence of resistance, specific threats, or physical force.<sup>58</sup> The California Supreme Court, however, reinstated the conviction, pointing to the legislature's amendment of the penal code section governing rape by force or violence to exclude the requirement of resistance. In a unanimous opinion, the court noted that lack of physical resistance may *not* be probative of consent and that physical resistance was risky for the victim. The opinion's author, then-Chief Justice Bird, observed:

By removing resistance as a prerequisite to a rape conviction, the Legislature has brought the law of rape into conformity with other crimes such as robbery, kidnapping and assault, which require force, fear, and nonconsent to convict. In these crimes, the law does not expect falsity from the complainant . . . and thus demand resistance as a corroboration and predicate to conviction . . . . Nor does the law expect that in defending oneself or one's property from these crimes, a person must risk injury or death by displaying resistance in the face of attack.<sup>59</sup>

As to whether there was adequate force or fear, the court said, "Appellant should have realized that his threatening conduct, combined with Marsha's rejection of his sexual advances and repeated requests to leave, *created a situation where he was able to overcome rather than respect her will.*"<sup>60</sup>

*Barnes* is an acquaintance rape case in which the victim physically resisted only once by pushing the defendant away from her early in the sequence of events. The victim/survivor was not injured beyond the rape; she said "no" and the defendant ignored her "no." The California Supreme Court made clear in its opinion that physical resistance is no longer a requirement and suggested that threatening situations created by men are sufficient to negate consent. The court also stated that the elements of force, fear, and nonconsent in rape should be treated analogously to other crimes involving those elements. Suspicion of women victims is no longer to be a part of California law. Although one can be distressed that the court of appeal reversed the conviction, and that it took until 1986 for California law, both by statute and judicial interpretation, to reject the requirement of resistance, *Barnes* seems to be a triumph for women. This case surely is one of which Estrich would approve.

### C. Estrich's Solutions

Estrich argues that reformers' focus on force has simply given appel-

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<sup>58</sup> *Id.* at 293, 721 P.2d at 114, 228 Cal. Rptr. at 232.

<sup>59</sup> *Id.* at 302, 721 P.2d at 120-21, 228 Cal. Rptr. at 239.

<sup>60</sup> *Id.* at 305, 721 P.2d at 123, 228 Cal. Rptr. at 241.

late judges "new license to continue their distrust of women" and another excuse to require physical resistance. (p. 90) To solve this problem, Estrich proposes that the law establish a mens rea requirement as to consent, defined as a woman saying "no" as meaning no consent, and include as part of the definition of force "extortionate threats and misrepresentations of material fact." (p. 103) (Ironically, she takes Michigan's reformers to task for "limiting" threats to threats of violence or extortion. (p. 86) Instead, she should praise them for meeting her halfway.) She also hints at lesser blameworthiness in simple rapes as opposed to other rapes, without even beginning to explain how to avoid the traps of earlier attitudes by simply shifting attention from the definition of the offense to the punishment. Yet her proposed solution to the problems she has identified presents the very same difficulties as the earlier solutions she derides.

### 1. Mens Rea as to Consent

Estrich thinks the focus of reform legislation should be on the offender, but that it should be done via a mens rea requirement as to consent rather than via an emphasis on force. She begins with a discussion of the English gang rape case *Director of Public Prosecutions v. Morgan*,<sup>61</sup> a horrible case often taught in first year criminal law classes to illustrate mistake of fact. (pp. 92-94) *Morgan* held that an honest but unreasonable belief, or negligence, as to a woman's consent was *not* a culpable mental state for the crime of rape. (p. 82)<sup>62</sup> Although Estrich disagrees with the holding of *Morgan*, she agrees with its focus on consent and the defendant's intent. She then criticizes American courts for failing to discuss intent or mistake, because the resulting definitions of rape effectively exclude the acquaintance or date rape situation: American courts, she claims, "have provided protection for men who find themselves in . . . potentially ambiguous situations through the doctrines of consent, defined as nonresistance, and force, measured by resistance." (p. 95) Estrich argues that this leads to an almost exclusive focus on the victim by making "her intent, not his" the issue in dispute. (p. 96)

Estrich's analysis has two flaws. First, her assertion that American courts ignore the issue of mens rea as to consent is wrong.<sup>63</sup> Second, she is mistaken in thinking that shifting attention to the man's mental state about consent and reducing the mens rea requirement to negligence will relieve the victim of the burden of physical resistance and of having to "prove" she was raped. Estrich contends that absent a mens rea requirement for consent, the question becomes "was this woman raped?" rather

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<sup>61</sup> *Director of Public Prosecutions v. Morgan*, 2 W.L.R. 923 (1975).

<sup>62</sup> *Id.* at 937.

<sup>63</sup> See *infra* notes 61-71 and accompanying text.

than "is this man a rapist?" (p. 96) In fact, focusing on whether or not the man believed he had consent is no solution at all. First, it returns us to the dangers of the focus on consent of the nineteenth century. Second, the methods of proving mens rea will continue to focus attention on the woman and her credibility.

A 1975 California case illustrates the kinds of problems presented when courts focus on mens rea as to consent. In *People v. Mayberry*<sup>64</sup>—omitted from Estrich's analysis<sup>65</sup>—the California Supreme Court held that an honest and reasonable mistake of fact as to consent was a defense. In *Mayberry*, the victim, was on her way to a grocery store when the defendant, after harassing her, grabbed her arm. "She dug her fingernails into his wrist, and he released her. After she turned to leave, he kicked her, threw a bottle which struck her, and shouted obscenities at her."<sup>66</sup> The defendant followed her into the store at which time "[b]ecause of her own confusion and fear of Franklin [the defendant], she accompanied him outside . . . . During this time [she] observed no one available to assist her although two women left the store in her vicinity."<sup>67</sup> The victim testified that the defendant mentioned sex. When she refused, he hit her in the chest, knocked her down, and threatened her. "In an attempt 'to buy time,' she told Franklin she wanted to purchase some cigarettes." The defendant "accompanied her to a store." Feeling "completely beaten," and lacking faith in the clerk's willingness to help, she left without seeking assistance.<sup>68</sup> Since her arthritic condition affected her ability to run quickly, she tried to "fool" the defendant in order to escape.<sup>69</sup> The defendant angrily insisted that she leave with him. At the defendant's apartment, the victim tried to persuade the defendant to "change his mind."<sup>70</sup> The defendant "without her consent" engaged in "several acts of intercourse and oral copulation. During the sexual assault he struck her . . . ." <sup>71</sup> The defendant's brother arrived and assaulted her as well.<sup>72</sup> She broke free and reported the incident to her apartment manager, who called the police. An officer "observed much bruising and swelling on her face, left arm, and leg."<sup>73</sup>

In reversing Mayberry's conviction for kidnapping and rape,<sup>74</sup> the

<sup>64</sup> 15 Cal. 3d at 143, 542 P.2d at 1337, 125 Cal. Rptr. at 745 (1975).

<sup>65</sup> Estrich did cite *Mayberry* at the end of a footnote in her Yale article. Estrich, *supra* note 1, at 1098 n.22.

<sup>66</sup> *Id.* at 147, 542 P.2d at 1340, 125 Cal. Rptr. at 748.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 148, 542 P.2d at 1341, 125 Cal. Rptr. at 749.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 149, 542 P.2d at 1341, 125 Cal. Rptr. at 749.

<sup>74</sup> Oddly, the court upheld Franklin's conviction for forcible oral copulation and simple assault, as well as his brother's conviction for assault with intent to commit rape. *Id.* at 147, 542 P.2d at 1340, 125 Cal. Rptr. at 748.

court ruled that the jury should have been instructed to acquit Mayberry if it "had a reasonable doubt as to whether Franklin reasonably and genuinely believed that the victim freely consented to her movement from the grocery store to his apartment and to sexual intercourse with him."<sup>75</sup> The court noted that the defendant's testimony that the victim accompanied him willingly and agreed to intercourse, combined with the victim's own testimony "that her behavior was equivocal," provided evidence supporting the defendant's mistake of fact claim.<sup>76</sup> The "equivocal" behavior consisted of "her 'act' and admitted failure physically to resist him after the initial encounter or to attempt escape or obtain help."<sup>77</sup> This failure to physically resist or flee "might have misled him as to whether she was consenting."<sup>78</sup>

*Mayberry* illustrates all too well that focusing on the defendant's mens rea as to consent makes little difference in practice. Absent a confession or an admission by the defendant, the prosecutor must introduce evidence of the circumstances surrounding the event to prove mens rea. Consequently, although the woman's subjective state may not be an issue, her behavior is certainly relevant to establishing whether the defendant "honestly and reasonably" believed that she consented.<sup>79</sup> Thus, resistance once more becomes an issue. As the court in *Barnes* noted, "Absence of resistance may . . . be probative of whether the accused honestly and reasonably believed he was engaging in consensual

<sup>75</sup> *Id.* at 153, 542 P.2d at 1344, 125 Cal. Rptr. at 752.

<sup>76</sup> *Mayberry* has been extended to require trial courts to give an instruction on honest and reasonable belief on their own motion when a defendant claims a belief in consent. In *People v. Burnham*, 176 Cal. App. 3d 1134, 222 Cal. Rptr. 637 (1986), a court of appeal reversed a conviction on four counts of spousal rape and one count of attempted rape with a foreign object (in *Burnham*, a dog's penis) because the trial court failed to give such an instruction when the defendant testified that his wife was a "willing participant." This is despite the fact that, at least prior to the incident with the dog, the defendant had beaten the victim "severely," *id.* at 1142 n.8, 222 Cal. Rptr. at 638 n.8, severely enough to uphold the conviction for aggravated assault. See also *People v. Anderson*, 144 Cal. App. 3d 55, 192 Cal. Rptr. 409 (1983) (convictions for raping 14 and 15-year-old hitchhikers reversed because no instruction on honest and good faith belief in consent; the defendant need only raise a reasonable doubt as to whether he had an honest and reasonable belief). It is easy to understand why at least some California prosecutors with whom I have spoken are reluctant to charge and/or try potential "consent defense" cases.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> In *People v. Romero*, 171 Cal. App. 3d 1149, 215 Cal. Rptr. 639 (1985), a court of appeal observed:

The *Mayberry* defense . . . permits the jury to conclude that both the victim and the accused are telling the truth. The jury will first consider the victim's state of mind and decide whether she consented to the alleged acts. If she did not consent, the jury will view the events from the defendant's perspective to determine whether the manner in which the victim expressed her lack of consent was so equivocal as to cause the accused to assume that she consented where in fact she did not . . . .

*Id.* at 1155-56, 215 Cal. Rptr. at 639; see also *People v. Burnham*, 176 Cal. App. 3d 1134, 1144, 222 Cal. Rptr. 630, 640 (1986) (defendant's testimony regarding consent will normally fall into two categories: out-of-court statements by the victim and the defendant's observations of the victim's conduct).

sexuality."<sup>80</sup> It is likely that the victim would be scrutinized every bit as closely under Estrich's proposed standard as under prior standards. Thus, resistance once more becomes an issue. As one commentator observed:

Most jurisdictions strike the balance . . . in favor of [avoiding liability for someone who could not reasonably have known he was committing a felony] by evaluating whether an act was seduction or rape in terms of the defendant's belief about the victim's desires rather than the victim's actual state of mind. Thus, a mistaken but "reasonable" perception that a woman wants, expects, or invites sex frees the male from liability. Basing reasonableness on the defendant's perception of the victim's behavior and surrounding circumstances . . . puts a heavy burden on the victim.<sup>81</sup>

Given the cultural context of rape cases, proving a defendant's intent inevitably reverts back to an examination of the victim, including, as *Mayberry* and *Barnes* suggest, whether the victim physically resists.

Concentrating on the defendant's mens rea as to consent may bring back another nightmare: the survivor's sexual history. As of this writing, forty-nine states have rape shield laws limiting the introduction and use of a rape survivor's sexual history in rape trials.<sup>82</sup> These statutes do far more than prevent "humiliating questions" in rape trials—they block the introduction of highly prejudicial evidence having little or no relevance to a victim's credibility. Traditionally, the premise underlying the use of this type of evidence has been that unchaste women are liars and should not be believed. A more recent premise is that if a woman previously consented to sex, she likely consented this time. Because the defendant in a criminal prosecution has the sixth amendment right to confront his accuser, inquiries focusing on a defendant's mens rea as to consent are likely to reopen the door to more extensive explorations of a victim's sexual past. For example, Vivian Berger's article on rape shield laws specifically mentions an exception for a man's claim of reasonable mistake as to consent.<sup>83</sup> According to Berger, if a man has heard a woman is "easy," or if she behaves in a "seductive" way, the man may reasonably believe she is consenting regardless of whether she says no.<sup>84</sup> "Therefore, a wisely drafted statute will not prohibit proof of the woman's sexual history offered to show the defendant's honest (reasonable) belief that she yielded (sic) to him voluntarily."<sup>85</sup> Indeed, Berger's "model" rape shield statute permits exceptions to general prohibitions on

<sup>80</sup> *People v. Barnes*, 42 Cal. 3d 284, 302 n.19, 721 P.2d 110, 121 n.19, 228 Cal. Rptr. 228, 240 n.19 (1986) (citations omitted).

<sup>81</sup> Massaro, *Experts, Psychology, Credibility and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 410-11 (1985).

<sup>82</sup> Haxton, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 WIS. L. REV. 1219, 1222 (Comment).

<sup>83</sup> Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 60 (1977).

<sup>84</sup> *Id.* at 63.

<sup>85</sup> *Id.*

evidence of sexual history. Section 1(b)(3) of the proposed statute permits introduction of

evidence of a pattern of sexual conduct so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that she consented to the act or acts charged or behaved in such a manner as to lead the defendant (reasonably) to believe she had consented.<sup>86</sup>

Subsection four would permit "evidence of prior sexual conduct, known to the defendant at the time of the act or acts charged, tending to prove that he (reasonably) believed that the complainant was consenting to these acts."<sup>87</sup> Amsterdam and Babcock make similar suggestions in their *Proposed Position on Issues Raised by the Administration of Laws Against Rape*.<sup>88</sup> Professor Letwin argues that this type of evidence *must* be admissible in California to demonstrate a defendant's reasonable but mistaken belief that the victim had consented,<sup>89</sup> and if a woman has slept around, or has an "m.o." of picking up men in bars and taking them home, the reasonable man of the 1980s will probably assume she was consenting. Because the "reasonable man" would think this "type of woman" was consenting, concentrating on mens rea merely reestablishes the good girl/bad girl, madonna/whore nightmare.

Estrich's solution lies in her definition of consent and her opposition to the resistance requirement. Throughout the book, she argues that "no means no," not yes. Under Estrich's proposal, the "reasonable man" is presumed to know that no means no. (p. 98) Although verbal manifestations of non-consent certainly should be sufficient, concentrating on the rapist's mens rea is not necessary to accomplish this objective. If verbal non-consent is sufficient, Estrich's proposal for making negligence the culpable mens rea as to consent is unnecessary: a woman's "no" would put a man on notice and alert him to the risk of committing rape. For the man to continue his sexual advances would seem, at the very least, to constitute recklessness. Rather than get tied into mens rea knots that lead back to the consent-force-resistance conundrum, it might be better to define consent in unequivocal terms—"no means no"—and presume recklessness by imposing strict liability on men who continue. Of course, this approach raises problems under our culture's existing models of sexual interaction—it raises the questions did the victim really *mean* "no," and did she really *say* "no." This inevitably leads back to an examination of the victim's credibility.

<sup>86</sup> *Id.* at 98.

<sup>87</sup> *Id.*

<sup>88</sup> Amsterdam & Babcock, *Proposed Position on Issues Raised by the Administration of Laws Against Rape* (memorandum for ACLU of N. Cal. 1974), reprinted in B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* 840-41 (1975).

<sup>89</sup> Letwin, "Unchaste Character," *Ideology, and the California Rape Evidence Laws*, 54 S. CAL. L. REV. 35, 79-80 (1980); see also Haxton, *supra* note 82.



Estrich dismisses strict liability as an answer to the consent issue. Her reluctance to impose strict liability on the element of consent, even after it is established that the woman did not consent, reflects the very male nightmare that she seeks to combat. Estrich states that strict liability regarding consent would result in punishment of men who engaged in intercourse when "no one would realize the woman was not consenting." (p. 95) Yet as Kelman has observed:

[i]f . . . we view the decision to have intercourse where consent is ambiguous as a separate decision [from the negligent perception as to consent], we are prone to be less sympathetic to the defendant. It is not as if the defendant is "trapped" into criminality either unavoidably or in the course of doing perfectly ordinary or protected acts. By avoiding sexual intercourse with women who are not clearly consenting, the defendant can avoid criminality.<sup>90</sup>

The question becomes whether, as a society, we wish to continue to allow aggressive unwanted male sexual advances.

Moreover, if the standard is "no means no," how can any man possibly claim not to have known of the woman's lack of consent? Such a belief can only be justified if one assumes that men need not accept a woman's "no," that male persistence pays off, and that such persistence is in fact what women desire. The survival of Byron's phrase "[a]nd saying she would n'er consent, consented" certainly captures a vision of how male-female relationships are perceived in this culture, and it does not carry entirely negative connotations.

If Estrich's rejection of strict liability reflects a concern about women engaging in sexual relations who fail to outwardly manifest their non-consent, that is a different problem. Sexual intercourse with an adult woman who has not indicated her subjective opposition may be beyond the scope of what modern society can or should punish. That is, we must accept the notion that men should not be punished for engaging in sexual activity when the woman does not convey her subjective state in any tangible way. But, once the woman has managed *some* manifestation of that subjective state, whether by verbal, physical, or emotional behavior, imposing strict liability if the man proceeds seems justified. By the end of her book, Estrich seems to advocate precisely this point. (p. 103)

What about the woman who does not want intercourse but fails to say anything because she is frightened of the man? Estrich's solution, because it focuses solely on the *verbal* "no"—although one assumes crying would count—fails to address the problem of what constitutes sufficient fear and/or force to make it seem pointless for the woman to speak the word "no." (p. 102) By focusing solely on the defendant's mens rea as to consent, Estrich leaves unprotected the woman who, frozen with fear, neither cries nor says "no." Estrich also offers little protection to the

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<sup>90</sup> Kelman, *supra* note 24, at 626 n.94.

woman who says "no" long before the actual event, but who finally, giving up, "consents," as did the victims in both *Mayberry* and *Barnes*. Further, when must the "no" be said? At "the crucial genital moment," as Susan Griffin put it,<sup>91</sup> or at any time during the interaction? Traditionally, women were supposed to fight and resist until actual penetration occurred: this extremely narrow time frame remains a potential problem. In a situation where the victim says "no" early on and then becomes paralyzed, speechless with fear—does the focus on consent or the "reasonable man" standard help or hurt? What if she says no, he persists, and she decides to go along—under the male persistence paradigm the reasonable man would think he has consent.

The definition of fear should include consideration of differences in size, verbal threats including harassment ("you bitch," etc.) and, as the court in *Barnes* observed, the generally threatening circumstances created by a particular man. In this type of situation, focus on force may be superior to Estrich's focus on consent. When the victim has been frightened into passive silence, justice is better served by focusing on the victim's fear and the nature of the threatening situation created by the defendant than on his mens rea as to her consent, or on whether she consented. Weapons negate consent; fear should too.

If it seems I do not trust Estrich's "reasonable man" standard, it is for a reason: Indications are that the reasonable man would infer consent where the reasonable woman would not. A woman might think it is reasonable to engage in necking, or invite a date into her home for coffee, as the end of an evening, without inevitably having it signal consent to intercourse. The reasonable man may consider the same conduct as foreplay rather than a pleasant exercise in itself. The reasonable woman might believe a verbal "no," said breathlessly or placatingly, sufficiently conveys her non-consent. The reasonable man may believe he is justified in disregarding anything short of a firm "no" followed by an implicit threat to do him physical harm. Reasonable men have determined the law of rape all along, and it has not helped us much; so calling it "mens rea" and concentrating on consent seems only to promote stereotypical attitudes, not combat them. Estrich's "answer" to this problem is in reality an abandonment of the "reasonable man" standard in any event. She writes that the law should hold "a man to a higher standard of reasonableness" than it has in the past, presumably by redefining non-consent to mean "no means no." (p. 98)

The focus on mens rea as to consent has theoretical as well as practical flaws. Arguably, women do not voluntarily consent to heterosexual sex in a society in which they are subordinate to male power. Some feminists go so far as to argue that heterosexual intercourse itself is the

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<sup>91</sup> S. GRIFFIN, *supra* note 8, at 15.

evil.<sup>92</sup> While I disagree with this claim, I do think that women do not experience the same freedom and autonomy in heterosexual relations as men experience. Consensual sex is not an "arm's length bargain." No one reads women their rights before seeking "consent." Women may *hope* men will ask, but they do not take the initiative in sex unless they are "bad" girls, or incredibly lucky in their relationships. Women frequently consent because they are frightened, because they want to please men, or because they think it is their duty. (And, there is also the ironic consequence of the "sexual revolution": women are no longer virgins so how can they say no?). The word "consent," therefore, does not adequately encompass women's experience of unwanted sex.<sup>93</sup>

The absence of an objective manifestation of non-consent does not necessarily mean consent; a woman may experience sex in such a situation as tantamount to rape. Yet, if women are regarded as absolutely choiceless in the face of male sexuality, women will always and forever be victims. Women must not only take responsibility for their sexuality, but use the law to empower themselves when their sexuality is expropriated. Estrich's proposal is one of two possible approaches to this problem. The other approach involves a statutory redefinition of consent as "words or overt actions by a person who is competent . . . indicating a freely given agreement to have sexual intercourse or sexual contact,"<sup>94</sup> or as "positive cooperation in act or attitude pursuant to an exercise of free will . . . . The person must act freely and voluntarily . . . ."<sup>95</sup>

Estrich's definition of consent ("no means no") empowers women formally by offering them a method of expressing non-consent men must heed. Statutes requiring *positive* manifestations of consent minimize the relevance of resistance and protect women who are completely passive because of fear, even if those statutes embody *male* understandings of what constitutes consent.<sup>96</sup> (An unsympathetic court could conceivably find that a woman who, out of fear, submits to sexual acts at the defendant's demand, has manifested "positive cooperation," I suppose.) Perhaps a combination of approaches, "no means no" and "positive cooperation," would adequately encompass the possible variations in women's experiences of and reactions to rape.

Estrich's other proposal that extortion or material misrepresentations of fact should constitute coercion is not well developed. Her limited analysis makes it unclear whether she is simply advocating the transplantation of theft doctrines into the law of rape, criminalizing

<sup>92</sup> See, e.g., A. DWORKIN, *INTERCOURSE* (1987).

<sup>93</sup> See Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 427-28 (1984); Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1187-95 (1985).

<sup>94</sup> WIS. STAT. ANN. § 940.225(4) (West 1982).

<sup>95</sup> CAL. PENAL CODE § 261.6 (West Supp. 1987).

<sup>96</sup> See West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 92-93 (1987).

threats that would constitute actionable sexual harassment, or proposing some other approach.<sup>97</sup>

## 2. The Problem of Blameworthiness

After advocating the "no means no" approach, Estrich next suggests that "simple rape" may not be as "blameworthy" as aggravated, stranger-in-the-bushes rape.<sup>98</sup> (pp. 96-97) The reason Estrich views negligent rape as less blameworthy is unclear. Whether she holds the general view that the mental state of "negligence" is less culpable (pp. 97-98); believes non-aggravated rape should be punished less severely than aggravated rape (pp. 103); or merely accepts that society does not consider non-aggravated, acquaintance/date rapes as all that blameworthy is unclear. This undeveloped assertion places readers in yet another quandary without providing a resolution.

Assuming negligence as to consent is even *possible* once the woman outwardly manifests non-consent, this factor does not make the man's conduct any less "blameworthy" for the purposes of determining culpability. The man purposely or knowingly (traditionally more "blameworthy" mental states) engages in intercourse and is negligent as to only one element of the offense, consent.<sup>99</sup>

If Estrich intends to say non-aggravated rapes are not as "blameworthy" and therefore should not be punished as severely as aggravated rapes, she never explains why. Is the rape of your date, your best friend, your wife, less "blameworthy" than an attack on a stranger? I suppose it depends on your point of view as to entitlements, rape myths, and women as human beings. Since in most states the marital exemption to the rape law still obtains, it apparently is not all that blameworthy to rape your wife in this culture, although at least one researcher has found the extent of trauma to victims of stranger rape and wife rape to be simi-

<sup>97</sup> Estrich seems uncertain of what she would want here. The Yale article argued that she would advocate the transplantation of doctrines similar to theft by false pretenses, extortion, and even simple larceny. Estrich, *supra* note 1, at 1119-21. But then she states that "[c]riminal coercion statutes are, at best, poor substitutes for an expanded understanding of the 'force' that makes sex rape." *Id.* at 1121. The problems with wholesale transplantation of the property concepts of theft are several. First, we have battled to overcome the notion that rape is a crime against a man's property. Second, as Estrich acknowledges, the nature of the crime simply is not like theft. And while Catharine MacKinnon's *SEXUAL HARASSMENT OF WORKING WOMEN* (1979) powerfully describes sexual harassment and its effects, if *force* is the touchstone of rape, then the sex-for-job-security threat may not meet that criterion. Whether civil or criminal penalties would be best in these situations is beyond the scope of this Review.

<sup>98</sup> Cf. "The crime I have described may be a lesser offense than the aggravated rape in which life is threatened [sic] or bodily injury inflicted . . . but it is a serious offense that should be called 'rape.'" (p. 103).

<sup>99</sup> If the purpose of punishing rape is deterrence, one might consider raising the penalty for aggravated rapes involving weapons, serious bodily injury, and so forth, and lessening the penalty for non-aggravated rape and for other non-aggravated sexual assaults, while using the same framework at the guilt determination stage.

lar and more severe than acquaintance or date rape.<sup>100</sup>

Rape has traditionally carried the harshest penalties in the criminal law, including the death penalty. The harsh nature of the penalties, while perhaps preserving proportionality to the harm inflicted on the victim, may have also resulted in jury nullification and reluctance to prosecute "ordinary rapists." The cultural ambivalence about sexual relations makes all but the clearest stereotypical case difficult from this perspective. Real rapes go on all the time; real rape is not perceived as especially blameworthy if assertions about where we stand along the continuum from seduction to rape in our culture are true.<sup>101</sup> If he is guilty, then we are all guilty, is a constant problem in the case of non-aggravated rape. If power and domination are the themes of sexuality and sexual practices in this culture, the norm is also criminal. And if this is so, the non-aggravated case of rape will inevitably remain unpunished.

## II. ANOTHER APPROACH

One major unwritten assumption in Estrich's book is that people share her sensitivity to the victim's experience and her knowledge of criminal rape law, and that everyone easily distinguishes rape from sex except a group of judges who suffer from "male rape fantasies" and wish to ensure male sexual access. In truth, many people—men and women—do not agree on, or understand, either the nature and effect of rape or the meaning of sexuality in American culture. These failures of understanding cannot help but influence and permeate the criminal law; they affect what we determine is punishable and what is not. Under current conditions, the consent-force-resistance trilogy seems inevitable.

Despite Estrich's claims to the contrary, reform has considerably helped victims both by increasing conviction rates and by making it easier for victims to recognize and to survive the experience of rape. There is still a long way to go, but progress will not be achieved through further doctrinal manipulation of the old criminal definition of rape as sexual intercourse without consent by force or fear. Rather, progress requires our understanding of what makes rape such a heinous offense, and distinguishing that from sexual relations generally. In this section, by sharing my own experience as a rape survivor, I hope to advance the understanding of the crime and the problems associated with rape.

### A. The Experience of Rape

It is hard to talk about rape and sexuality because talking seriously

<sup>100</sup> D. RUSSELL, *RAPE IN MARRIAGE* 192-93 (1982).

<sup>101</sup> T. BENEKE, *supra* note 8, at 6-33; Sanday, *Rape and the Silencing of the Feminine*, in *RAPE*, *supra* note 8, at 84.

about sexuality in our culture is next to impossible. One risks lapsing into the pornographic, the titillating. People must combat the monster of their sexuality. Additionally, people must confront the centuries of religious messages about sex; the "courting rituals" that are really preludes to rape; the myths of rape; and the miscues and misfires between people of opposite sexes. Furthermore, these messages exist in a deeply gendered society: there is much in male culture that is woman-hating and there is also female rage against men caused by eons of oppression and subjugation. Rape is not an easy subject to confront honestly. But until we confront and discuss rape, we can hardly expect to reform criminal law beyond what has already been done. The women's movement of the mid-1970s took a crucial first step by bringing rape to public attention largely through consciousness raising. What I am advocating is a form of *cultural* "consciousness raising" reaching beyond that step. And consciousness raising must begin with concrete stories and breaking silence.

Although five and a half years have passed since I was raped, it takes but a moment to remember the forty-five minutes of terror and horror of the event and the aftermath of guilt, shame, fury, and isolation. I was asleep in my bed, when I awoke to find a man on top of me. I struggled to get up; "what are *you* doing here," I demanded. "I'm going to fuck you" was the response. "The hell you are," was mine. In the brief struggle, I told myself, "look, look at everything so you can remember, so you can describe." His fist hit my face repeatedly; I felt nothing except pressure. It seemed clear to me that this was a battle I wouldn't win; I turned my head and thought "oh God, this *is* really happening." I noticed I was bleeding. Time to switch gears—I tried talking assertively. That didn't do any good. My cat started crying: he threatened her. On and on it went: "I'll kill you, I'll kill you." He had a weapon, a screwdriver. "Spread your legs! Spread your legs!" At some point, I realized he might very well kill me if I did not cooperate, and if he killed me, I would not live to "get him." "Better a 261 than a 187" was my weird formulation. I left my body but I didn't: I remember thinking how can something so beautiful be so horrible? After he was done, he started insistently asking where was my jewelry, stating over and over that he would kill me if I moved (something I did not have any doubt about). At some point, my face was covered by a pillow. I could not hear well, but I took a chance, got up, and called the police. The only part of that call I remember was also the only time I encountered the legendary insensitivity of the system: the dispatcher asked "are you sure it was a rape?" "Look, it was a righteous 261. There was penetration." What else was I supposed to say? To this day, I hope that dispatcher caught "hell" for her incredible insensitivity.

I became properly hysterical for a moment after the police arrived; I

then went into a controlled mode to do everything I could to catch the rapist. He was caught; he denied everything. I had to testify at the preliminary hearing and the trial. It was a "cold" case, a sure winner, and district attorneys were fighting for it. But if it were such a sure thing, why a trial? I suppose because there were no offers made. And there was an eyewitness identification issue. I "blew" the line-up: he had changed his appearance; *thirteen* other women were also there trying to identify men who had raped *them*; the cast had just been removed from my nose; and I was sick, frightened and acutely aware of the potential importance of a line-up (that in this case the forensic evidence made identification much less crucial was of no moment).

And maybe, just maybe, like the myth of all rape trials, the jury would not convict, but instead put me on trial. For what? Being asleep in my own bed? Having possibly too much wine that night with some friends at dinner? For not having bars on the windows? For having a house in disarray? For being stupid enough to live on the fringes of what passes for a ghetto on the San Francisco Peninsula?

I really have no complaints about the actors in the criminal justice system; other than the dispatcher's initial incredulity, they were all sensitive and non-sexist. Although the delay between the arrival of the police and getting treatment seemed forever, I guess I just understood that to catch the man who did this, I had to help. Two show-ups and a stop at the stationhouse later, I was taken to the emergency room. An officer called a victim advocate then stayed with me during the long wait at the hospital emergency room. The doctor who examined me held my hand when I became hysterical. The district attorney met with me, stayed in touch, and asked if I wanted to continue the prosecution at each new stage in the proceeding. The police officers worked long hours to "make" the case. The defense lawyer never hinted at my foibles or my sexual history. He apparently did have the temerity to suggest in his closing argument that because there were no internal injuries, there was no rape. A broken nose, a dislocated jaw, and bruises and cuts in the relevant external areas apparently were not enough. After the case was over, I learned from a law student that the district attorney had a picture of me, taken immediately after the police arrived, prominently displayed in his office—a trophy. I passed along a strong objection to this; who knows if he ever removed it. The jury did not take much time to come back with a guilty verdict and was hunting for additional charges on which to convict the offender. Perfect, right?

Well, yes and no. Many people, men and women, were kind, but many men I knew could not handle the rape at all. Subtle messages of blame, denial—believe it or not—*prurience*, snuck through. None of the nice, middle- and upper-middle class males I knew had apparently given rape much thought; certainly the man I was dating had not. Three

weeks after the assault, and only one week after the cast was taken off my nose, he said irritably, "Why are you still so angry?" I was scared—at the least little noise I would jump and sometimes scream; I was in pain; I was furious with men and my vulnerability; I was in mourning. I never thought I would recover—at times I thought I was losing my mind. I had nightmares. I felt guilty because I had not resisted "enough." This was beyond denying—I had some close calls as a teenager and some scares as an adult, but only one had come close, and I'd bitten him and gotten away. Through a combination of forgetting, self-blame, and relief, I had handled those incidents. I had never confronted the utter helplessness of rape, of knowing that it just *did not matter* that I existed; that I did not want this; that I was a human being; not a thing to be invaded, punched, or possibly killed.

For a year, I did not get over a kind of perpetual state of panic—a state not helped, perhaps, by the prospect of testifying against the rapist in another case, frighteningly similar to my own, that fortunately settled. It took three years to get over the "anniversary" nightmares. It took two years of my life to get over my absolute fear and distrust of men, and yet more time to overcome occasional flashbacks. And all the time I tried to act normally—work, function, and rebuild. I remember—what a triumph!—the first night I was able to go alone to a friend's house for dinner, stay, and come home without absolutely panicking.

My experience was not atypical, I think. Based on the stories of rape I have heard from other survivors, the feelings are similar. I thought I'd die; I wish I *had* died; I'm scared; I was terrified; the world isn't safe; I can't trust; I have/had nightmares; I feel guilty; I felt ashamed.

My experience, however, was in some ways "different." I had been a public defender. (Indeed I had represented some men charged with sexual offenses<sup>102</sup> and that undoubtedly took some of the fear out of testifying.) The courtroom was, after all, familiar turf.<sup>103</sup> I manifested a great deal more anger than many survivors with whom I have talked. I am more likely to mention the assault than many survivors. I was also very "lucky"—the rapist was caught, convicted, and sent to prison for a long time. Unlike other survivors, I do not worry about him finding me

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<sup>102</sup> In an example of Estrich's theory—with a vengeance—I also represented a rape survivor who was charged with making a false police report in an acquaintance rape case. The man denied raping her and the result was a misdemeanor prosecution of the victim. I remember almost yelling at the D.A. that if he wanted twelve people to hear how she was raped, it was fine with me. The charge was finally dismissed.

<sup>103</sup> I was quite upset, actually, but kept reminding myself I had him on my turf. In counseling survivors who are going to testify, I have expanded this notion to say that the courtroom is always the survivor's turf—the terms of the battle *this* time are verbal, not physical. I have been told this has helped them to feel empowered in an otherwise threatening, or at least intimidating, setting.



(at least not for a long while), telephoning me, or being at the office every day.

Although my experience is in some ways "unrepresentative," the only story I can tell is my own, and there is nothing I have heard or read in the stories of others that makes me think mine rings false. And this is true whether their rape experiences fit the stereotypical circumstances of mine, or were acquaintance rapes or date rapes or wife rapes; whether they were physically bruised and bleeding or not. I feel the pain of women who spoke and were hushed by family or friends, even if my anger at their being silenced means I am inept in simply acknowledging their pain. I also recognize the pain of women who have received insensitive treatment from police or doctors, even if the insensitivity was not "outrageous" by some "objective" standards. (For example, an emergency room physician speaking, in a dismissive tone, to a badly injured survivor of an assault with intent to commit rape: "Is it going to bother you that I'm a man?"). I know there are countless women out there who have rape stories—terrible, tragic stories—that they have never told.

I do not think I can ever overcome the nasty rumors about me that were spread because I have been open about the assault. That may be the price you pay for speaking out, and I understand why other rape survivors find that price too high to pay. I know I felt a chill reading that Estrich gets occasional late-night harrassing phone calls. But we are doomed to stay in the traps of rape mythology unless we look at what rape really *is*. Women *and men* must confront the horror, not deny it, and do everything in their power to end it.

## B. Talking about Rape

Myths about rape affect both men and women in this culture. These myths include: all women want to be raped; no woman can be raped against her will; women who *are* raped "ask for it"; and finally, "if you are going to be raped, you might as well enjoy it."<sup>104</sup> These myths, unchallenged, perpetuate fundamental misunderstandings about rape and permit rape to flourish. Talking about rape, about the painful and evil consequences of rape, is itself difficult and painful, but it is absolutely essential to understanding and eradicating it.

Although women consciously or unconsciously limit their lives in many ways because of the threat of rape,<sup>105</sup> they rarely discuss rape unless there is some concrete reason like a serial rapist on the loose, or there is a consciousness-raising session. Rape survivors do not want to talk about rape either, unless they know they are talking to another sur-

<sup>104</sup> S. BROWNMILLER, *supra* note 8.

<sup>105</sup> T. BENEKE, *supra* note 8, at 1-6; *Rape: The Boundaries of Fear* (produced by Wisconsin Public Broadcasting) is a powerful documentary on this issue.

vivor and that it is "safe," and maybe not even then. When I have taught cases involving rape the students think I am overly sensitive or humorless when I announce loudly that *rape is not funny* and that the probabilities are that there is at least one rape survivor in the class. Our discomfort with the topic comes from confusing rape with sex: we are taught to be embarrassed about sex and to deny the existence of rape.

Many men, as indicated in a videotape about the efforts to raise male consciousness by a sexual assault prevention center, generally do not think about rape.<sup>106</sup> If they do, they perceive it as a woman's problem (displacement), or the rapist's problem (differentiation), or maybe "society's" problem (abdication of personal responsibility).<sup>107</sup> According to the *Hite Report*, those men who do think about rape—and have committed rape—believe it is the fault of the woman, either because she "asked for it," "deserved" it, or "wanted" that sort of behavior, or because they felt entitled.<sup>108</sup>

Men do not *talk about* rape with each other and thus have little comprehension of its nature and effect.<sup>109</sup> Men do not see rape as a man's problem, even though it is men who commit rape, perhaps because they themselves are not likely to be raped. Under these circumstances, contrary to what Estrich indicates, it is amazing reformers have made as much progress as they have in defining and punishing rape. Estrich's proposed reform, or any other reform, will not improve the situation until both sexes start talking—men with men, women with women, and men with women—about rape, including its phenomenological and experiential aspects. Male legislators and judges must be educated about the nature of rape, and the distinction between consensual sex and violence.

Rape does involve sexual organs, and is overwhelmingly a crime of one gender against the other, but it is ludicrous to call it sexual. Rape is a form of soul murder.<sup>110</sup> A crime which confronts its victims with death is *not sex*. Men must learn how that crime affects the Other; what it means to her. Men must talk, among themselves, about their attitudes, beliefs, and experiences. By talking first with other men, they may find it easier to realize how ridiculous the assumption is that "if women and children would just change their behavior, men would stop assaulting them."<sup>111</sup> Discussions with women, including survivors, may have mini-

<sup>106</sup> Untitled video (on file with Mid-Peninsula Rape Crisis Center, Palo Alto, California).

<sup>107</sup> *Id.*

<sup>108</sup> S. HITE, *THE HITE REPORT ON MALE SEXUALITY* 742-54 (1981); cf. Fremont, *Rapists Speak for Themselves*, in D. RUSSELL, *THE POLITICS OF RAPE* 243 (1974) ("I don't think I've ever raped anyone, but like most men I've played the coercive sexual games that border on rape.").

<sup>109</sup> Untitled video, *supra* note 104.

<sup>110</sup> Cf. Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 151-52 (1987) ("spirit-murder" is disregard for others centered around fear and hate; one of its manifestations is racism).

<sup>111</sup> Untitled video, *supra* note 106.

mal impact on men while they still are in the denial-antagonistic-defensive stage. Given the pervasive sexism in our society, it is a fact that men *listen* to other men and not to women who they perceive as "hysterical," "strident," "militant," or "man-hating." (Which is what happens when you raise your voice, get combative, or get frustrated in making a point.)

Communication is not aided by those who argue that all heterosexual sex is rape. As a rape survivor, I disagree with those radical feminists who adhere to that philosophy. Whether they mean that the criminal law technically applies to most current forms of heterosexual relations is unclear; however, Andrea Dworkin's new book, *Intercourse*,<sup>112</sup> would seem to support that inference. Having realized at the time I was raped that there was a difference between *sex* and *rape*, I simply cannot support such theories, which may make me vulnerable to the charge of "false consciousness" from people seeking to better the lot of women. But for me, *as a woman*, the difference between rape and lovemaking, between rape and undesired sex, is phenomenologically real. Robin L. West has written, "[t]here is a fine line between the feeling of being threatened by an implied threat of force and the feeling of the sheer inevitability of sex. Nevertheless they are . . . distinctly different experiences . . ."<sup>113</sup> To lose the distinction, however tenuous and unamenable to bright line distinctions it may be, is to trivialize what rape *is* and what it *does* to a woman.

Rape denies that you are a *person*, that you *exist*. In contrast, lovemaking affirms your existence, and *undesired* sex at least does not completely *deny* your personhood. Women are *not* helpless in lovemaking, or even in the going-along-with-it instance where sexual desire may not exist but affection does; whereas women experience total helplessness and obliteration during rape. When a woman's *existence just does not matter*, intercourse becomes rape. Her existence may not matter whether the attack is by a date, a spouse, a friend, or a stranger. Thus, the important factor is non-existence. "Equality" is not important—submission may be desired and chosen, and good, as Robin West has argued.<sup>114</sup> Even if our culture is patriarchal, I still exist and choose, and mutuality through empathy and caring is life-affirming, possible, and desirable. Trust between two human beings is *good*; rape is life-negating; it is death. Thus I also disagree with theorists who see rape as an invasion of bodily integrity or privacy or personal autonomy. It is those things, too, but it is

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<sup>112</sup> A. DWORIN, *INTERCOURSE* (1987), concedes heterosexual sex might be a pleasurable and positive experience only once, as nearly as I can determine. The book is a polemic and thus its strategy may simply be to describe the negative, but one finishes it thinking that the author sees all heterosexual sex as bad, as rape. Catharine MacKinnon, on the other hand, seems to have modified her earlier argument that sex that is expropriated from women is rape, MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 *SIGNS* 515 (1982) in her new book, *FEMINISM UNMODIFIED* (1987).

<sup>113</sup> West, *supra* note 96 at 103.

<sup>114</sup> *Id.* at 135-38.

more. Transforming this information into an effective statute is the puzzle that must be solved.

By talking, by writing, by seeking to understand this crime, we might be able to come to terms with the lingering effects of beliefs that continue to validate rape in "appropriate" situations, or envision women as having to fight "to the utmost" (or even "reasonably," whatever that means) to preserve their integrity, their souls, when the odds are vastly against them. We might get to the point of understanding that consenting to sexual relations with the defendant—or anyone else for that matter—in the past does not mean willingness to engage in *this* sexual act at *this* time. We might also get a notion of shared vulnerabilities as well as misconceptions that must be clarified—that women want force imposed on them, that women cannot be raped if they do not want to be, that women are scheming, castrating bitches, that they divide into categories "madonna" and "whore," that they will cry rape at the least provocation (in fact it seems they have kept quiet when there is more than enough provocation). *Then* maybe we can understand what it is we should make criminal. Must there be physical force, physical resistance? Does "I'll marry you" count as fraud, deception? Threatening a 14 year-old with a detention home seems criminal and culpable. But does saying "I'll tell the manager that you're a whore" count as a threat? Does *that* capture the phenomenological harm of thinking you are experiencing your own death? What does consent mean—that no is no, or that the man has an affirmative burden coming from recognition of another human being to assure that his partner is willing? And how do you *punish* people for failure to recognize other people in intimate relationships? How else can we say it—"consent" sounds contractual; "willing" summons up age-old visions of ravishment. But at least with some understanding of what rape is, courts, in interpreting the law of rape, will not find the proper recourse is to old shibboleths about women and rape, but rather to an application of what this society means when it says that it is a crime to abuse sexually a human being.

In the meantime, we will have more than enough to do in getting people to take rape as it is presently defined seriously. As long as university administrations hush up forcible rapes of female undergraduates—rapes with knives, rapes with beatings, rapes with pushing and shoving and ripped clothes—for the sake of the reputations of male undergraduates; as long as survivors of stranger rapes like the rape victim in New Bedford are considered to have "asked" for it; as long as I was indirectly blamed for having bought a house in a ghetto with a "crime problem"; as long as families and "friends" tell victims of "righteous" rapes that it was their fault because they were out late, or that they will be crucified by "the system," or better just to forget it, or he is such a nice boy, we have quite enough to do to enforce the law as it is.

### III. CONCLUSION

Although Estrich states in both her article and book that she has chosen to focus solely on the legal system because "the law of rape, particularly of the 'simple rape,' has not been widely addressed" (p. 6), it is evident from reading the book that much more is involved, such as stereotyped cultural beliefs about women. The law is inextricably tied to the history and context of gender relations, a point that needed to be developed. The book skips from topic to topic, making it difficult to follow; occasionally, Estrich's thesis is ambiguous or contradictory. Moreover, much of her argument is buttressed by dubious assertions of fact which probably would not hold up upon closer examination. While her recitation of the dreary misogyny in appellate courts' treatment of rape cases is the best part of the book, her critique of law reform efforts and her proposed solutions add little to the literature because they seem poorly researched and thought out.

Estrich's text is filled with assertions about male nightmares of being accused of rape, caustic remarks about all-male appellate courts, suggestions that it is "smarter" not to resist an assault physically, and indirect attacks on feminist law reformers. Clearly, Estrich is angry and her anger is understandable. Yet, her anger seems to have led her to form a perspective on rape and rape laws that is shaped not by a comprehensive examination of the case law and literature but by a few outrageous decisions from a handful of states. Inevitably, this biases her conclusions.

The question remains regarding what message Estrich really wanted to convey. The information neglected in Estrich's critique of the criminal law's approach to rape may be crucial to any reform of existing laws. Confusion and ambivalence about rape are deeply embedded in our cultural consciousness and structures; Estrich reflects those confusions and contradictions by essentially remaining within the structure of rape law as currently defined, even as she ostensibly attempts to offer a critique of those tensions.

Estrich's book fails both legally sophisticated and general audiences. She fails the former by eschewing anything but broad, simplistic claims about the law. Potential reformers should recognize that Estrich's few proposals for reform have either already been implemented by some states or suffer from the same flaws and difficulties as current laws, only in a different guise. Lay people who are unfamiliar with this topic would do better to read Brownmiller's *Against Our Will* and Griffin's *Rape: The Politics of Consciousness*. Regrettably, while Estrich accuses earlier reforms of being merely symbolic, at best, her suggestions fare no better given existing ideologies about sexual relationships between men and women. The best solution may be the one that Estrich studiously ignores: to enforce the laws that exist while concentrating feminist

efforts on fostering an understanding that rape, “simple” or otherwise, is *always* a crime.

