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REEXAMINING THE LAW OF RAPE

Janet E. Findlater*

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

"When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean — neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master — that's all."¹

The title to Susan Estrich's book immediately prompts the question: When is rape not "real" rape? The answer to that question is both easy and disturbing: when it is either "marital" rape or "simple" rape — when the assailant is either the victim's husband,² or an unarmed man who rapes a woman he knows.³ In these cases, the law refuses to recognize that "real" rape has been committed.

Susan Estrich's book is an examination of the law's treatment of cases of "simple" rape (p. 6). The book, based on a law review article Estrich published in 1986,⁴ is directed at an audience larger than the legal community because "[r]ape law is too important, too much a part of all of our lives, and too much in need of change, to leave to the lawyers" (p. 7). If the rape law reform movement of the last fifteen years has taught us anything, it is that victims of rape will cease to be victims of the legal system only when social change accompanies legal change. The words used to define the crime of rape have been changed, as have the rules governing proof of the crime at trial.⁵ But

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1. L. CARROLL, *THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE* 123 (1941).

2. At common law, a husband had complete immunity from prosecution for rape of his wife no matter how violent the sexual assault. This complete marital rape exemption has been abolished in thirteen states and the District of Columbia. In thirty-five states a husband continues to have substantial immunity from prosecution for the rape of his wife; charges can be brought only under limited circumstances, such as when the parties are living apart under court order, or when one of them has filed for divorce. In two states, a husband continues to have total immunity from prosecution for rape of his wife. See NATIONAL CENTER ON WOMEN AND FAMILY LAW, *MARITAL RAPE EXEMPTION: STATE BY STATE CHART* (1987). See generally D. FINKELHOR & K. YLLO, *LICENSE TO RAPE: SEXUAL ABUSE OF WIVES* (1985).

3. Unlike the case of marital rape, the law does not on its face state that this is not a crime. Estrich demonstrates that in practice, however, this is what the law provides.

4. Estrich, *Rape*, 95 *YALE L.J.* 1087 (1986).

5. Michigan, for example, no longer calls the crime "rape"; it has been renamed "criminal

until our understanding of the experience of rape changes, women will continue to be victimized by sexist assumptions that control the interpretation and application of the law of rape. As Estrich says, "changing the words of statutes is not nearly so important as changing the way we understand them" (p. 91).

The answer to Humpty Dumpty's question — which is to be master — has been and continues to be that the "master" in rape law is sexist notions that put women at substantial risk rather than protect them. Susan Estrich presents a compelling argument for the need to change the way we understand the law of rape. Her work is important, and will be the starting point for anyone concerned about rape law.

Estrich courageously begins her book by recounting for the reader her own experience as a rape victim (pp. 1-2). She describes herself as "a very lucky rape victim, if there can be such a thing" (p. 3). "Lucky" not because her assailant was arrested and prosecuted; he was never caught (p. 3). "Lucky" not because she was not, in addition to being raped, also shot, or slashed, or beaten up (although she was not). Rather, she was "lucky" because her assailant was an armed stranger who robbed as well as raped her, thus making her the victim of a "real" rape.⁶ Nobody questioned whether she was really raped; nobody blamed her for what happened (p. 3).

The "real" rape of which she was a victim — the rape by an armed stranger — is not the subject of Estrich's book. The law today generally treats as a rapist the man who uses a weapon to force a woman he does not know to have sexual intercourse with him.⁷ The subject of Estrich's book is instead the rape committed by a man against a woman he knows. He can be the victim's neighbor, friend, acquaintance, someone she has ended a relationship with, or someone she has just met. But if he "only" forces her to have sex with him against her will without using a weapon or beating her, she is the victim of "simple" rape, which the law does not consider to be "real" rape.

On its face, of course, the law does not distinguish between "real" rape and "simple" rape. Statutes typically define rape as sexual inter-

sexual conduct," and made gender-neutral. Estrich discusses problems created by these well-intentioned changes. Pp. 81-83.

The formal corroboration requirement has generally been eliminated; shield statutes protect a victim from complete disclosure of her sexual history; and the fresh complaint requirement has been relaxed. P. 57. See generally Bienen, *Rape III — National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 170 (1980).

6. P. 3. In addition, Estrich's assailant was black. The first question the police asked her was whether he was a "crow." The second question was whether she knew him. The police believed her when she said she did not, because "a nice (white) girl" like Estrich would not know a "crow." P. 3.

Racism, which was part of Estrich's experience with the criminal justice system, and which is part of the law of rape, is not the subject of her book. The focus of Estrich's work is sexism in rape law. P. 6.

7. Estrich, *supra* note 4, at 1179.

course with a woman, not the assailant's wife, by force or threat of force, against her will and without her consent (p. 8). It is rather in the application of the law of rape to the facts of particular cases that Estrich finds the distinction between the rape that the law takes seriously ("real" rape) and the rape that the law condones ("simple" rape).

Fully half of Estrich's book is an analysis of the law of rape as reported in appellate court opinions and discussed in legal commentary from the nineteenth century to the present (p. 28). She divides the material into two chapters; in one, she examines the cases and commentary from the nineteenth century to the mid-1970s; in the other, from the mid-1970s to 1985. She finds — to the surprise of no one — blatant expressions of sexism in the "older" cases that probably would not find their way into print today (p. 28). But she also unveils a much more subtle, and therefore all the more invidious, sexism that pervades both the "older" and the "modern" cases; a sexism that not only guided decisions in the pre-1970s cases, but has survived the rape law reform movement of the last fifteen years. It continues to determine the outcome of rape cases despite the recent changes in legal rules, changes that were anticipated to produce different, and better, results (p. 80).

Turning to the cases of "simple" rape, Estrich begins her analysis with *Brown v. State*,⁸ a 1906 decision of the Supreme Court of Wisconsin. Estrich starts with the "old" cases not simply to illustrate yet again sexism at its ugly worst (although this is unavoidable in any description of these cases), but to demonstrate that for all that seems to have changed, the law of rape stays very much the same.

The victim in *Brown* was a sixteen-year-old virgin. The assailant was her neighbor. The victim testified that she saw and greeted the assailant as she was crossing the fields on her way to her grandmother's house. He grabbed her, tripped her, and forced himself on her.

I tried as hard as I could to get away. I was trying all the time to get away just as hard as I could. I was trying to get up; I pulled at the grass; I screamed as hard as I could, and he told me to shut up, and I didn't, and then he held his hand on my mouth until I was almost strangled.⁹

The jury convicted the assailant of rape. The Wisconsin Supreme Court reversed. The Justices were not convinced that the sixteen-year-old victim — who had been grabbed, tripped to the ground, told to shut up, and nearly strangled — had really been raped. The victim failed to demonstrate to the satisfaction of the court her nonconsent to the act of sexual intercourse (p. 30). She failed to resist her attacker to the "utmost." According to the court, "[n]ot only must there be entire

8. 127 Wis. 193, 106 N.W. 536 (1906).

9. P. 30. See *Brown*, 127 Wis. at 196, 106 N.W. at 537.

absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated."¹⁰

This standard of "utmost resistance" was a staple of the older case law. To demonstrate her lack of consent, the victim was required physically to resist the unwanted sexual act "to the utmost"; to fight (hitting or kicking) her assailant "until exhausted or overpowered."¹¹ This was said to ask of victims only what "every proud female" would "naturally" do in the face of an unwanted sexual assault.¹²

Not true, says Estrich (p. 31). Girls and women in this society are generally not taught to be physically aggressive or to resolve their differences with others through the use of physical force. Nor would they be wise to try to do so with men. Women are usually physically smaller than men, and generally not as strong. It should be no surprise, then, to learn, as we have, that the most common response of rape victims is not to fight — not to hit, kick, or punch — their assailants, but, as Susan Estrich did, to cry (pp. 1, 62). Victims of "simple" rape, like the sixteen-year-old woman in *Brown*, scream, say "no," and cry. Yet the law provides that unless they do that which they do not do (and, for their own safety, probably should not do)¹³ — unless they respond like schoolboys on a playground (p. 62) and physically fight their assailants — their rape is not a "real" rape. In so requiring, the law, rather than protecting women, victimizes them.

True, "modern" cases do not typically require the victim to resist an unwanted sexual assault to the "utmost"; she need only use "reasonable" resistance. But the victim of rape still must resist, and that resistance must be physical. Screaming, saying "no," and crying are not, either alone or in combination, enough.¹⁴

The victim in *Goldberg v. State*,¹⁵ a 1979 decision, was a high school senior who met her assailant while she was working as a sales clerk. He convinced her that he was a free-lance agent, and told her that she had an excellent chance of becoming a model (p. 67). She agreed to meet him after work, and went with him to his "studio."

10. P. 30 (quoting *Brown*, 127 Wis. at 199, 106 N.W. at 538).

11. *People v. Dohring*, 59 N.Y. 374, 386 (1874).

12. Pp. 30-31. See *State v. Rusk*, 289 Md. 230, 255, 424 A.2d 720, 733 (1981) (Cole, J., dissenting).

13. Studies indicate that women who physically resist their assailants are more likely to be seriously injured or killed than are women who do not physically resist. BATTELLE MEMORIAL INST. LAW AND JUSTICE STUDY CENTER, *FORCIBLE RAPE* 7, 14 (1977) (published by the Natl. Inst. of Law Enforcement and Crim. Justice, Law Enforcement Assistance Admin., U.S. Dept. of Justice).

14. The result would probably be different in cases involving more than one assailant (pp. 68-69). See *Commonwealth v. Sherry*, 386 Mass. 682, 688, 437 N.E.2d 224, 228 (1982). These, of course, are not cases of "simple" rape.

15. 41 Md. App. 58, 395 A.2d 1213 (1979).

Once there, the victim testified, "he started unbuttoning my blouse." She pulled her blouse together and said "no." She was "afraid"; "he was so much bigger than I was, and, you know, I was in a room alone with him, and there was nothing, no buildings around us, or anything" At his request, she removed her clothes; she said she was "afraid" she was "going to be killed." The victim kept telling her assailant that she "wanted to go home"; that she "didn't want to do this"; that she wanted to be left alone. Finally, the victim testified, when the assailant "moved up on me . . . I squeezed my legs together and got really tense, and I just started crying real hard. And I told him not to do that to me."¹⁶

The jury convicted the assailant of rape. The appellate court reversed.

Naïve to be sure, the victim in *Goldberg* had been "sold a story" by a twenty-five-year-old man she had just met, and ended up alone with him in an isolated room. He was determined to have sexual intercourse with her. She was afraid. Like the victim in *Brown*, she did not physically fight her assailant. Like the victim in *Brown*, she said "no," and she cried. But unlike the victim in *Brown*, she apparently demonstrated to the satisfaction of the court her nonconsent to the sexual intercourse. The court conceded that the sex act was committed against her will and without her consent. Nonetheless, concluded the court, it was not rape because the assailant did not force her to do it.¹⁷

What sense can one make of this paradox: The victim was not forced to have sexual intercourse, but she had sexual intercourse against her will and without her consent? *Goldberg* is not alone in presenting this dilemma.

The victim in *State v. Alston*,¹⁸ a 1984 decision, was a woman who had recently ended a six-month relationship with her assailant. During their relationship, her assailant repeatedly hit her when she refused to do what he wanted. She often had sex with him "just to accommodate him. On these occasions, she would stand still and remain entirely passive while [he] undressed her and had intercourse with her."¹⁹

The assailant confronted the victim at school, grabbed her arm, and told her she was going with him. She said she would walk with

16. 395 A.2d at 1215-16.

17. 395 A.2d at 1219-20.

The jury convicted Goldberg of rape in the second degree. The statute provided in relevant part: "A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person: (1) By force or threat of force against the will and without the consent of the other person" MD. ANN. CODE art. 27, § 463 (1987); 395 A.2d at 1217. The appellate court concluded that the victim's fear that the assailant would use force to overcome any physical resistance was not reasonable. 395 A.2d at 1219.

18. 310 N.C. 399, 312 S.E.2d 470 (1984).

19. P. 60 (quoting *Alston*, 310 N.C. at 401, 312 S.E.2d at 471).

him if he would let go of her arm. He told her he was going to "fix" her face to show her that he "was not playing." She reminded him that the relationship was over; he responded by saying that he had a "right" to have sex with her. They walked to the home of a friend of the assailant. Once inside, he asked her if she was "ready." The victim told her assailant that she did not want to have sex. He pulled her up from a chair, undressed her, pushed her legs apart, and had sexual intercourse with her. The victim cried.²⁰

The jury convicted the assailant of rape. The court of appeals affirmed. The North Carolina Supreme Court reversed.²¹

The court concluded that the assailant had sexual intercourse with the victim against her will and without her consent, but that it was not rape because he did not force her to do so (p. 61). Again, the paradox: The victim was not forced to have sexual intercourse, but she had sexual intercourse against her will and without her consent (p. 62).

How can it be said that the victims in *Goldberg* and *Alston* were not forced to engage in sexual intercourse with their assailants? Only, says Estrich, if one has a very narrow view of the concept of force.²² The force that is required by the law to turn an act of sexual intercourse into rape is the force necessary to overcome the physical resistance required of the victim according to the male notion of how a woman would respond to the threat of unwanted sex (p. 62).

The victims in *Brown*, *Goldberg*, and *Alston* did not physically fight their assailants. The victim in *Brown* said "no" and cried, but because she did not hit or kick her assailant, she failed to demonstrate to the satisfaction of the appellate court her nonconsent. She was not the victim of a "real" rape. Similarly, the victim in *Goldberg* did not hit or kick her assailant, and, therefore, was not the victim of a "real" rape. Not, however, because she failed to demonstrate her nonconsent. On the contrary, she succeeded in convincing the appellate court that she did not consent to sexual intercourse. She said "no," told her assailant that she just wanted to go home, said more than once that

20. Pp. 60-61 (citing *Alston*, 310 N.C. at 401-03, 312 S.E.2d at 472-73).

21. *State v. Alston*, 310 N.C. 399, 312 S.E.2d 470 (1984).

22. Pp. 62-63. And, at least with regard to *Alston*, no understanding of the dynamics of battering. P. 62. The victim testified that she was afraid of the assailant because he had repeatedly beaten her in the past when she refused to do what he wanted. P. 60. The court concluded that although the victim's "general fear of the defendant may have been justified by his conduct on prior occasions . . . such general fear was not sufficient to show that the defendant used the force required to support a conviction of rape." Pp. 61-62 (quoting *Alston*, 310 N.C. at 409, 312 S.E.2d at 476).

Batterers will use whatever it takes — including physical violence — to control their victims and get what they want. Batterers threaten homicide and suicide, physical mutilation, and public humiliation; they bang on walls, and throw and break objects; they threaten to take away the children; and they use intimidating looks to warn their victims that they are "asking for" another beating. See E. PENCE, IN OUR BEST INTEREST 31, 37, 65, 75 (1987).

When a woman resists the sexual demands of her batterer, the risk of injury increases substantially. A. BROWNE, WHEN BATTERED WOMEN KILL 97 (1987).

she "did not want to do that" (p. 68), passively submitted to the sex act, and cried "real hard." Yet the court concluded that she was not raped because her assailant did not have to use physical force to overcome physical resistance; she did not fight her assailant.

In cases of "simple" rape, "force" and "nonconsent" are not separate issues.²³ It may well be better to ask whether the assailant forced the victim to have sexual intercourse, in an effort to focus on what he did, rather than ask whether the victim had sexual intercourse without her consent, and focus on what she did *not* do. As long as courts require the victim physically to resist her assailant, however, it matters not whether the discussion is framed in terms of "force" or "nonconsent." The focus is on the victim, and she is held to a male standard of how she should respond to the threat of unwanted sex (p. 90).

Why does the law require women to do so much more than say "no" before it will consider the sexual intercourse forced on them without their consent to be rape? The assailants in *Brown, Goldberg*, and *Alston* knew that their victims did not want to have sex with them. When the law condones their behavior, as it did, the law protects male sexual access (p. 69), at least in "appropriate cases" (p. 72), at the expense of female sexual integrity and physical safety.

In marriage, the "most appropriate case," male sexual access is completely protected. Consent is presumed and any amount of force is tolerated; even the wife who physically resists "to the utmost" is not raped when her husband succeeds in overpowering her (p. 72). In stranger rape, the "least appropriate case," especially where the assailant is armed or beats his victim, the law provides the least protection to male sexual access. Women are not as likely to be questioned as to whether they consented to sex or were forced to do so (pp. 3-4).

In cases where the assailant knows his victim and acts alone — in cases of "simple" rape — the law protects male sexual access unless the assailant uses a weapon, beats his victim, or overpowers her after she has unsuccessfully tried to physically fight him off. Even though he knows that she does not want to have sex with him and is submitting only because he has made her afraid not to, it is not rape when he proceeds to have sexual intercourse.

The law of "simple" rape, like the law of "marital" rape, was neither written by women (p. 31) nor written with the experience of women in mind. Three hundred years ago Lord Hale announced that rape is a charge "easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent" (p. 5). The misogyny behind this statement is not hard to detect. Women are liars. Women can be vindictive. And if a woman really wants to get back at a man, she will falsely accuse him of rape.

23. Pp. 102-03. See R. PERKINS & R. BOYCE, *CRIMINAL LAW* 211 (3d ed. 1982).

It is not only vengeful, lying women of centuries past who need to be feared. Law review commentators writing within the last thirty years, bolstered by Freudian theory, proclaimed that women are confused and ambivalent about whether they want to have sexual intercourse with men they know (p. 39). It is "customary" for women to say "no, no, no" when they mean "yes, yes, yes" (p. 38); women "need" to be taken forcibly both to enhance their pleasure and assuage their guilt (p. 39). However, after sexual intercourse, women's ambivalence and guilt often cause them to unjustly accuse their sex partners of rape.²⁴

Much of the law of rape has been built upon this fear of confused, if not vengeful, women wrongly accusing innocent men of rape. As discussed above, the victim must physically resist, and her assailant must overpower her by using substantial force so that we can be sure she was "really" raped. In addition, evidentiary rules, such as those that require corroboration and allow the use of the victim's sexual history (many of which have been changed in the last fifteen years), were based on this inherent distrust of women (pp. 42-56).

Estrich debunks the myth that the legal rules built on distrust of women are necessary to protect innocent men. The assailants in *Brown*, *Goldberg*, and *Alston* were blameworthy; they knew their victims were not consenting to sexual intercourse. The function served by the rules that condone their conduct is not the protection of innocent men; it is the assurance of broad male sexual access (p. 43).

It is time to understand the law of rape differently. Rape — whether seen as a crime of sex or a crime of violence — is about the abuse of power (p. 83). Estrich does not claim, as do some,²⁵ that all sex between men and women in a society of unequal power is coerced.²⁶ Nor does she propose that all acts of sexual intercourse that could be characterized as coerced be punished.²⁷ She does, however, demonstrate that the law has too narrowly defined the coerced sex that constitutes rape. The use or threat of physical violence is just one way men force women they know to have sex with them. Men also use other kinds of threats, such as to leave women stranded,²⁸ to publicly humiliate them,²⁹ and to fire them from their jobs. And men obtain sex by fraud; they lie to women, intentionally creating situations that

24. This view of women — as conflicted about sex and likely to construe their own ambivalence after the fact as nonconsent — is reflected in the *Model Penal Code*. See MODEL PENAL CODE § 213.1 comment at 302-03 (1980). See also Estrich, *supra* note 4, at 1134-44.

25. See, e.g., C. MACKINNON, FEMINISM UNMODIFIED 5-8 (1987); A. DWORKIN, INTERCOURSE (1987); D. RUSSELL, THE POLITICS OF RAPE: THE VICTIM'S PERSPECTIVE 276 (1975).

26. Estrich, *supra* note 4, at 1093.

27. *Id.*

28. *State v. Rusk*, 289 Md. 230, 233-34, 424 A.2d 720, 721-22 (1981).

29. *Commonwealth v. Biggs*, 320 Pa. Super. 265, 467 A.2d 31 (1983).

frighten women into submitting to sex without a fight.³⁰ It is long past time for the law to stop condoning these and other cases of “simple” rape. Men who abuse their power to intimidate and exploit women are rapists, not seducers. The law should define nonconsent so that “no” means “no.” And the law should broaden the definition of the force that negates consent (p. 103). Threats and deceptions that would be prohibited by laws against extortion, fraud, or false pretenses as a way to obtain money should be prohibited by rape law as a way to obtain sex.³¹

Estrich’s work is important not because it provides all the answers. It does not.³² Estrich’s contribution is to challenge the law (and all of us) to let go of the sexism of the past, and, in this era of changing attitudes about men, women, and sexuality (pp. 100-01), to condemn, not condone, coerced and nonconsensual sex. “Simple” rape is “real” rape (p. 104).

30. *Goldberg v. State*, 41 Md. App. 58, 395 A.2d 1213 (1979); *People v. Evans*, 85 Misc. 2d 1088, 379 N.Y.S.2d 912 (N.Y. Sup. Ct. 1975), *affd.*, 55 A.D.2d 858, 390 N.Y.S.2d 768 (1976).

31. Estrich, *supra* note 4, at 1093.

32. For example, distinctions will have to be drawn between coercion and bargain in the law of rape, as they are in the law of extortion. *See* Estrich, *supra* note 4, at 1182. In addition, grading of offenses needs to be addressed. Estrich does not suggest that “simple” rape be punished as severely as rape committed with a weapon, or accompanied by beatings or other serious bodily injury. P. 103.