NEW PERSPECTIVES ON THE LAW OF RAPE

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66 Tex. L. Rev. 905

Texas Law Review
March, 1988

Book Review

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I. Introduction

Fear that a jury will wrongly convict an innocent man of rape because it believes a woman who is ambivalent or deceitful after the fact historically has pervaded the law of rape. The common law’s solutions to this perceived danger are well-known: prosecutors had to prove that the woman resisted the man to establish lack of consent; juries heard in detail the woman’s sexual history, but not the man’s; and judges explicitly cautioned juries that a charge of rape was easy to make and hard to defend. Some jurisdictions at one time also required a prompt complaint and corroborating evidence of rape. Critics argued that these requirements traumatized rape victims who pursued prosecution of their attackers, discriminated against women who rationally submitted rather than risk death or injury, and focused inappropriately on the woman’s behavior rather than the man’s. In response, many jurisdictions in recent years have reformed their rape laws to eliminate these special evidentiary requirements. Some have removed lack of consent as a formal element of the crime and emphasize instead proof that the man forced the woman to submit. Yet these reforms have not had a significant impact on the legal system’s approach to sexual assault cases.

In Real Rape Susan Estrich uses critical and realist analytical techniques with a feminist perspective to argue that the problem with the law of rape ‘is not that ‘consent’ is the right test and ‘force’ the wrong one, or vice versa.’ Her central insight is that the law as applied has created two categories of nonconsensual sex. One rule applies to multiple attackers, men who employ extrinsic violence, or men with no prior relationship to their victims. This rule does prohibit sex without a woman’s consent. The other rule applies to incidents involving only one man, who is acquainted with the woman, whose initial encounter with her was voluntary, and who does not use a weapon or beat her—what Estrich calls simple rapes. This rule, however, allows sex without a woman’s consent because in effect the man is guilty of rape only if the woman resisted him physically with sufficient vigor, but without success. The consequence of this rule is to provide men broadened sexual access to women with whom they are ‘appropriately’ acquainted. The rule broadens a man’s access in the sense that it permits him to proceed lawfully despite a woman’s verbal objection.

Estrich argues that we can solve the problem of rape only if we change both the law and social norms to treat all sex without a woman’s consent as criminal. While her specific suggestions for legal reform are not so bold as this position suggests, if adopted they would advance the struggle for recognition of nonconsensual sex as rape. And perhaps the law can go no further because the ultimate problems are not amenable to a legal solution.

II. The Changing Law of Rape, Its Effects, and the Failure of Reform

Real Rape first reviews three areas of empirical research regarding rape: how the public defines nonconsent so that
sexual conduct becomes rape, how police and prosecutors exercise their discretion to determine which rape complaints to prosecute, and the reasons for attribution of rape prosecutions in the criminal justice system. The book concludes that simple rapes usually are not perceived as rape at all and rarely are prosecuted successfully.

In the next three chapters the book analyzes the law of rape from the mid-nineteenth century until the present. This analysis demonstrates that legislatures and courts have reinforced the notion that simple rapes are not criminal through their understanding and application of the law. The book’s summary of the law is clear, complete, and useful. Like some earlier works, it describes rape law as pervaded by antifemale bias and sexism and argues that it is used as an instrument of power against women. Earlier, simpler interpretations focused on men’s use of rape to express contempt for and hostility toward women and of the threat of rape to keep all women in a state of fear. In contrast, Estrich’s interpretation of how the law of rape exercises power over women is more subtle and refined. Not only does the law institutionalize suspicion of women, but in practice it also affords men broad sexual access to women despite their lack of subjective consent.

The common law provided that a man committed rape when he had sexual ‘intercourse with a woman not his wife; by force or threat of force; against her will and without her consent.’ One way to understand the problem with which Real Rape deals is to ask whether ‘force,’ ‘lack of consent,’ and ‘against her will’ are different elements of the crime, or whether these terms exemplify the law’s habit of doubling synonymous words. The common law treated them as synonymous, and in theory nonconsent was the crucial element. For a court to find nonconsent, however, the prosecution had to prove that the woman physically resisted the man. Indeed, the nineteenth-century cases purported to require the woman to resist to the utmost, because judges assumed that this would be the natural response of a ‘woman of any virtue.’

The level of resistance that courts required, however, varied greatly. Estrich concludes that to determine whether resistance was adequate in a particular case, a court would look at the woman’s ‘virtue,’ the amount of force the man used, and the appropriateness of the relationship between the man and the woman. A court’s evaluation of the social acceptability and likelihood of the woman choosing the man as a sexual partner determined the appropriateness of the relationship. The less appropriate the relationship, the less resistance the law required. The resistance requirement thus permitted broadened sexual access, but generally only in appropriate relationships. Estrich argues that the common-law judges framed and applied the requirement ‘so as to ensure just such access, no more and no less, while at the same time protecting men like themselves from the dreaded lies of the appropriate women they spurned.’

By the 1950s and 1960s the resistance requirement barely received lip service in stranger rape cases, and the rationale for the requirement had changed consistently with this development. Men believed that women who complained of simple rape were ‘confused and ambivalent in . . . potentially appropriate relationships.’ A law review note in 1966 argued that, to protect men from such women, the resistance standard should be high enough to assure that the resistance was not feigned and the complaint not the result of moralistic afterthought, but low enough that death or serious bodily injury was unlikely. Estrich argues that the resistance requirement in this form not only protected male access to women in appropriate relationships, but also ensured that men would receive adequate notice of nonconsent.

Estrich interprets the traditional evidentiary rules that applied only in rape cases as serving a similar function. While courts indicated that fear of lying women justified the rules, they applied them rigorously only in simple rape cases. The effect of this application was to enforce the implicit rule of broad male access in appropriate relationships. Estrich’s interpretations of the corroboration requirement and the admissibility of evidence about the woman’s sexual past are especially convincing. She shows that corroboration of a woman’s testimony was required only if the relationship was appropriate, and that questions about the woman’s sexual history often were prohibited in stranger rape cases.

Courts based this latter evidentiary rule on the ground that consent was not an issue. This rationale appears to respond to Estrich’s arguments: Only if the defendant claims that the woman consented to sex is credibility an issue, and all these requirements go to the credibility question. Resistance and corroboration are required to support the woman’s claim of nonconsent; her sexual history is relevant both to suggest that a woman of ‘easy virtue’ is more likely to consent and to cast doubt on her general credibility. But Estrich argues that the differences in the cases cannot be fully explained by whether the defendant raised a consent defense. Even in the era of the strictest resistance requirement, courts generally did not require such a level of resistance in stranger rape cases, especially when the defendant was black and the woman was white. Some courts expressly made this distinction, while others used the same rhetoric in all cases, but applied the rule differentially.
acquaintance cases, even if the defendant claimed that no sexual relations had occurred at all, and thus consent was not an issue, courts sometimes reversed convictions on the ground that the defense had been forbidden to explore the woman’s sexual history at trial. What really explains the cases, Estrich concludes, is whether the man raised the defense of consent, but whether the court saw reason to doubt or suspect the woman. If it did not doubt her, it had no reason to humiliate her, but if it had reason to distrust her, the law required the opportunity to humiliate.

These rules disproportionately emphasized the woman’s objective manifestations over the man’s prohibited acts. By the mid-1970s courts and commentators widely accepted this criticism. Legislatures responded by eliminating the formal requirements of corroboration and fresh complaint, enacting shield laws to limit inquiries into a woman’s sexual past, and revising the substantive definition of rape with the goal of making convictions easier. While Estrich found fewer reversals of rape convictions in this era than in earlier times, she concludes that the substantive changes were less successful than reformers had hoped.

Estrich identifies three major types of substantive reform. Most relevant to the central problem of her book is the elimination of nonconsent as an element of rape and the concomitant greater emphasis on the force requirement. This change, however, has had little effect on the legal treatment of simple rapes because of the way many courts have defined force. Estrich summarizes the courts’ interpretation as follows: ‘Even force that goes far beyond the physical contact necessary to accomplish penetration . . . is not itself prohibited. What is required, and prohibited, is force used to overcome female nonconsent. The prohibition of “force” or “forcible compulsion” ends up being defined in terms of a woman’s resistance.’ Because the implicit belief about men’s sexual prerogatives has not changed, the redefinition of rape had little effect. Courts interpreted force, like the earlier element of nonconsent, to protect male access.

As *Real Rape* demonstrates, while in theory a woman’s nonconsent always has been sufficient to make sexual conduct rape, courts have consistently interpreted the elements of nonconsent and force so that only physical resistance constitutes nonconsent. As a consequence, courts have not treated simple rapes as criminal.

### III. The Proposed Solution

Defining rape as sex without the woman’s consent raises three different problems. The first problem, and the primary concern expressed in the common law, is credibility: ‘When the man claims that sex was consensual and the woman denies it, who does the jury believe? The second problem, which explicitly surfaced in the 1950s and 1960s, is notice: “Given the risk of imperfect communication, when should the man be deemed on notice that the woman is not consenting to his overtures?” The third problem, which emerges from Estrich’s analysis of how courts have applied the law, is definition; Is a woman’s subjective lack of consent sufficient for a rape conviction, or is resistance, force, or both, also an element of the crime?

Estrich’s proposals address the issues of definition and notice. First, and not surprisingly, she argues that a woman’s subjective nonconsent should be sufficient to support a finding of rape. In its broadest interpretation this proposal creates the possibility that a man might be convicted of rape even though he mistakenly but honestly believed that the woman consented. To address this problem, Estrich proposes a mens rea requirement. American cases have not defined clearly the mens rea for the nonconsent element of rape. She argues that the way the substantive law has developed explains the inattention to the mens rea or rape: ‘The man who jumps from the bushes could hardly . . . persuade anyone that he thought the woman was consenting; and in more ‘appropriate’ circumstances, the doctrine of consent and force provide far more comprehensive protection for the defendant against any mistake as to consent’ than would a mens rea requirement.

Ordinarily, development of mens rea is favorable to defendants. Clearly, however, Estrich does not intend to create still another avenue of escape for real rapists. Because Estrich wants to change the underlying substantive rule, she turns to mens rea to protect the blameless man. Her inspiration was the notorious English case *Director of Public Prosecutions v. Morgan*, which held that a man is not guilty of rape if he honestly, though unreasonably, believed that the woman had consented. She nevertheless rejects the holding of *Morgan* as establishing the wrong normative rule and proposes instead that a man should be acquitted of rape only if he honestly and reasonably believed that the woman had consented.

In sparest summary, Estrich thus proposes that courts should find a man guilty of rape if the woman subjectively did not
reinforce what lines to be drawn short of the ideal. The challenge we face in thinking about rape is to use the legitimating power of law to define force from a female perspective at least in one sense: If a man believes that a woman is consenting, even though she has said no, he is unreasonable and has no defense to a charge of rape. As Estrich points out, perhaps neither was lying; because men and women understand force differently, light choking to her may have been a heavy caress to him. To the judges who voted to reverse Rusk’s conviction, the victim was unreasonable in believing that if she resisted, the defendant would not harm her or physically overcome her. In their view, according to Estrich, a reasonable woman is “one who does not scare easily, one who does not feel vulnerable, one who is not passive, one who fights back, not cries. The reasonable woman . . . is a real man.” To change this standard, Estrich argues that the law should define force from a female perspective at least in one sense: If a man believes that a woman is consenting, even though she has said no, he is unreasonable and has no defense to a charge of rape.

But more underlies the changes that Estrich advocates than a different understanding of the meaning of force and coercion. Implicit in her position is a model of how people should conduct their sexual relations, a model that is quite intellectualized and verbal. They should not desire or approve of sexual conduct that includes an element of violence. They should understand and take responsibility for their own sexuality and be willing and able to express clearly their desires to potential partners. But many people today do not have this understanding of and respect for themselves and the willingness and ability to take complete charge of their sexual conduct. Many men and women still have notions that men should be masterful, dominant, and demanding. That some women believe this does not mean, as commentators argued in the 1950s and 1960s, that all women believe this. But unless and until most people come to accept the values that underlie Estrich’s proposals, attempts to distinguish acceptable seduction from illegitimate coercion remain problematic.

Some radical feminists would deny that any distinction needs to be made. They believe that the imbalance of power in specific relationships and between men and women generally makes consensual heterosexual relations inherently impossible. Notwithstanding the merit of this position, it provides no agenda for law reform. People simply will not criminalize all heterosexual sex. Moreover, people’s awareness of and responses to imbalances of power vary widely. Some women who are dominated in their relationships believe that their subservience is appropriate, while other women in similar relationships despise their position but do not know how to escape it. Men and women in other relationships are aware of the power imbalances between them and try—with varying degrees of success—to remedy them. To extend criminal penalties for rape beyond Estrich’s specific proposals, we would have to find some way to distinguish real rape from other sexual activity that arises in these different relationships, and we must take into account the fairness and utility of using the criminal sanction in particular situations.

Estrich recognizes that her proposals do not resolve these issues. She admits that it may be impossible—and unwise—to try to use the criminal law to articulate any of our ideal visions of male-female relationships. But recognition of the limits of the criminal sanction need not be taken to justify the status quo. . . . There are lines to be drawn short of the ideal. The challenge we face in thinking about rape is to use the legitimating power of law to reinforce what is best, not what is worst, in our changing sexual mores.
While her proposals do not help those women who say yes but who would say no if they could, at least they support those women who are able to say no.44

But perhaps the law can do more to empower women with the tool of a rape charge, while still avoiding unjust convictions. A major source of the problem of distinguishing seduction from rape, as I have said, lies in the different ways people handle imbalances of power in their relationships and, consequently, the different ways they understand the meaning of consent. To address these differences, the law might distinguish those allegations of rape that arise in ongoing relationships from those that arise between persons barely acquainted, such as a man and woman who meet casually in a bar.

When a woman claims that she did not consent to a sexual encounter that developed out of a casual acquaintance, generally we should believe her. Further, it is not unfair to expect men to act with the greatest caution to ensure that women in such situations have agreed to their sexual overtures.45 On the other hand, when a woman claims that she did not consent in the context of a developed relationship,46 but there is no evidence that the man used overt force or coercion, broadly defined,47 it seems unfair to subject the man to criminal penalties for doing what he may always have done in response to what she may always have done. To go beyond this and lend the support of the criminal law to a woman who has been in a psychologically destructive relationship and who is struggling to break free may well have unacceptable costs. Even if we assume that a man who fails to recognize or honor such a woman’s efforts has done wrong, we should not subject him to criminal sanctions, especially incarceration. He has not acted in a manner clearly inconsistent with general social norms or with the norms that have developed within the particular relationship. Putting him in jail would be unlikely to raise his consciousness.

I do not expect this proposal to become part of the criminal law in the near future. Unlike Estrich’s proposals for reform, mine has the difficulty of basing the legal consequences of a man’s actions on the difference between a casual and an ongoing relationship without providing a clear line to distinguish them. This flaw might well be fatal because of the constitutional requirement that criminal provisions must give fair warning that conduct is prohibited.48 Further, the normative changes essential to my proposal are perhaps more radical than those that underlie Estrich’s proposals. Given the current state of social mores, her proposed changes may go as far as is possible. But my proposal is consistent with and has been inspired by the new perspective Real Rape provides on the problem of abuses of power in sexual relations. This new perspective is the book’s greatest contribution.

Footnotes

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d Hereinafter cited by page or chapter number only.

a Associate Professor of Law, University of Oregon. Thanks to David Schuman for commenting on a draft of this Review, and to Gretchen Miller for helping me to think about the problems with which it deals.


2 P. 5.

3 P. 29.

4 P. 47.

For a discussion of the meaning of an ‘appropriate’ relationship, see infra note 32 and accompanying text.

See infra text accompanying notes 59-66.

See infra text accompanying note 83.

See ch. 2. The first chapter serves as a prologue, telling the story of the author’s own experience as the victim of a stranger rape.

Perhaps the best known work expressing this thesis is S. Brownmiller, Against Our Will: Men, Women and Rape (1975).
See D. MELINKOFF, THE LANGUAGE OF THE LAW 331 (1963). The definition of rape is not among Mellinkoff’s examples of this phenomenon.

Through modern rape reform statutes, the law has eliminated consent as an element and focused on force. See infra text accompanying note 56. One consequence has been to fracture the equation of nonconsent with force, even though the evidence established unequivocally that the victim had not consented and that the act of sex was against her will. Id. at 405, 312 S.E.2d at 475-76, discussed at pp. 60-62.

Pp. 29-30. As late as 1906 an appellate court expressed doubt about whether a man could physically rape an unwilling woman at all. See Brown v. State, 127 Wis. 193, 199-200, 106 N.W. 536, 538 (1906), discussed at p. 30.

Relationships ranged in ‘appropriateness’ from the black stranger, against whom no resistance was required, to the husband, who was legally incapable of rape because he was his wife’s partner in the most appropriate sexual relationship of all. P. 37. For development of the appropriateness rationale to explain why men traditionally have been legally permitted to rape their wives, see pp. 72-79. In some instances a relationship would be considered appropriate if the victim’s conduct appeared to ‘encourage’ the man. P. 100; cf. S. BROWNMILLER, supra note 22, at 353 (discussing the concept of victim precipitation generally and its application to rape). Brownmiller says:

Some men might consider a housewife who lets a strange man into her house for a glass of water guilty of precipitant behavior, and more men would consider a female hitchhiker who accepts a ride from an unknown male guilty of precipitant behavior. Rape-minded men would accept both actions tantamount to an open invitation. I, on the other hand, would consider the housewife and the hitchhiker insufficiently way, but in no way would I consider a woman who engages in sex play but stops short of intercourse guilty not only of precipitant behavior, but of cruel, provocative behavior with no excuse, yet I and my sister feminists would argue that her actions are perfectly allowable and quite within the bounds of human decency and rational decisions. Id. at 354.
P. 37. In appropriate relationships, the law had moderated to require only ‘reasonable’ resistance. P. 37.


P. 40. Estrich notes that this standard apparently tolerated the death of some women. P. 39.


P. 42.

The corroboration requirement was often equivalent to the resistance requirement because rape is usually private; therefore, corroboration ordinarily consisted of bruises and torn clothing. P. 47.

See pp. 43-44.

See p. 50.

P. 47.

P. 32.

Pp. 50-52.

P. 51.

See p. 51.

Pp. 58-59; see MODEL PENAL CODE AND COMMENTARIES § 213.1 comments at 280-81, 303-04 (1980).

Pp. 42, 57. Though most of the old rules have been repealed, ‘many of them are still applied, if not quite as often in the opinions of the appellate courts, then in the day-to-day working of the [criminal justice] system.’ P. 42.

P. 57.
The reforms include writing rape laws that are gender neutral, p. 81, expanding prohibited conduct to include sexual assaults short of penetration, p. 83, and replacing nonconsent with a renewed emphasis on force, p. 84.

P. 84. Force was traditionally an element of rape, but so long as the law focused on female nonconsent, it remained a secondary, undeveloped issue. P. 59.

P. 94. Some courts have held that the law imposes strict liability regarding the defendant’s intent, and thus his beliefs about consent are not relevant. Pp. 94-95.

[1975] 2 W.L.R. 923 (H.L.). Morgan is an odd source for this reform proposal. Estrich recognizes that American defendants occasionally have used mens rea arguments as last-ditch attempts to avoid liability when the facts on consent, force, and resistance were hopelessly against them. See p. 95. Ironically, Morgan is such a case. The victim had struggled fiercely and screamed her objections. In support of their mens rea defense, the defendants claimed that the victim’s husband, who had participated in the crime, had told them that his wife would protest their sexual advances because she was ‘kinky,’ and that subjectively she really would be consenting to the gang rape.

In support of her suggestion, Estrich provides a helpful summary of the classic argument about the fairness of punishing someone for negligence, which would be helpful to laypeople and lawyers whose criminal law is rusty. P. 97.

Estrich implicitly suggests that the crime might be graded according to the defendant’s mens rea, though this point is not entirely clear. See p. 97. Some modern reform statutes do grade sexual assault. See S. BROWNMILLER, supra note 22, at 380 (discussing and supporting feminist arguments for a rape sentencing system that ranges from six months to twenty years depending upon the severity of the crime); Loh, supra note 27, at 550 (describing reform legislation that matches different conduct and degrees of culpability over a range of punishments).
67 See, e.g., State v. Alston, 310 N.C. 399, 312 S.E.2d 470 (1984) (reversing conviction because evidence of force was not demonstrated, despite unequivocal evidence that the woman had not consented), discussed at pp. 60-62; State v. Lester, 70 N.C. App. 757, 321 S.E.2d 166 (1984) (holding that defendant’s sexual intercourse with his 15 year old daughter, with whom he repeatedly had intercourse, did not constitute forcible rape even though he had threatened to kill her and her mother, and the daughter had on the occasion in question initially refused to remove her clothes), discussed at p. 35, 119 n.26; Commonwealth v. Biggs, 320 Pa. Super., 265, 467 A.2d 31 (1983) (finding insufficient force when defendant had intercourse with his 17 year old daughter after telling her that it was her Biblical duty and that if she did not comply, he would go to her younger sisters), discussed at p. 19 n.26; Brown v. State, 127 Wis. 193, 106 N.W. 536 (1906) (ruling that the resistance of a 16 year old who struggled and screamed was insufficient to demonstrate nonconsent), discussed at pp. 29-30.

Because these proposals refocus the law’s emphasis away from fear that a woman is lying, they also would preclude reversals for failure to permit exploration of a woman’s sexual history in those cases in which consent is not an issue. See supra text accompanying note 46.

68 Even if courts and legislatures adopt these proposals, however, much of the evidence that reformers consider offensive still will be admissible in some cases because of the persistent possibility of credibility contests and the continuing question of what consent means. When the defense claims consent, the prosecution still must prove the woman’s subjective nonconsent and the unreasonableableness of the man’s belief. Ideally, eliminating the rules that require prompt complaint, resistance, and corroborotation will eliminate reversals for insufficient evidence and will mandate changes in jury instructions regarding the evaluation of evidence. But if the defendant claims that the woman in fact consented, thus raising a credibility issue, evidence about whether she promptly filed her complaint and whether she resisted would still be relevant. Additionally, in some cases limited inquiries into the woman’s sexual history might still be considered probative. See pp. 47-48, 53. If the defendant claims that he reasonably believed that the woman consented, evidence about resistance and their prior relationship, if any, would be relevant.

69 Real Rape provides several examples of cases in which the woman acquiesces. In the first chapter, for instance, Estrich describes a man who is ‘a bit aggressive’ with a woman. She ‘says no but doesn’t fight very much. Finally, she gives in.’ P. 6. Estrich notes that physical contact cannot be the basis for a bright-line rule, because sex, even when both parties consent, necessarily involves contact, sometimes even rough contact. See p. 60.

70 Estrich recognizes that the law did not invent the notion that ‘no’ means ‘yes,’ and she provides some evidence that this societal attitude is changing. See p. 101. One example of attitudinal change is the gradual acceptance of date rape as real rape. Even Parade has recognized the problem of date rape. See Brothers, Date Rape, PARADE MAGAZINE, Sept. 27, 1987, at 4.


72 Pp. 30-31. As Estrich points out, the law punitively celebrates female chastity and refuses to protect women who lack it. See pp. 30, 48-49, 80. Sociological studies have found a significant correlation between a victim’s chastity and the perceived seriousness of a rape. P. 49; cf. S. BROWN MILLER, supra note 22, at 370-71 (discussing the admissibility into evidence of prior sexual conduct and criticizing a court’s conclusion ‘[t]hat a reputation of ‘loose moral character’ probably has a basis in fact and that a girl with such a character is more likely than not to consent to intercourse in any given instance’).

73 P. 62.

Pp. 63-64.

See P. 64.

P. 65.

P. 83.

See supra text accompanying notes 35-36.

Whether this will happen and in a sense whether it is even desirable is debatable.

See L. CLARK & D. LEWIS, RAPE: THE PRICE OF COERCIVE SEXUALITY 27-28, 128-29 (1977); A. MEDEA & K. THOMPSON, AGAINST RAPE 45 (1974); MacKinnon, supra note 71, at 646. Estrich discusses this issue in her analysis of whether rape should be considered a crime of sex or of violence. She argues that rape is a crime of violence in part because she believes that treating rape as a crime of sex will cause a return to the idea that rapists are sexually aberrant. P. 83; cf. S. BROWNMILLER, supra note 22, at 176-84 (describing the stereotypical rapist as a weirdo, attributing this belief in large part to Freudian psychology, and discussing a study which concluded that rapists actually are unextraordinary, violence-prone men). The feminists who characterize rape as a sex crime do not adhere to the idea that rapists are perverts; rather, they believe that rape is a crime of sexual politics and that no one can be totally free of the sexist structure of society. See, e.g., MacKinnon, supra note 71, at 646-47.

Not only would such a position be absurd in a practical sense, it is objectionable philosophically because it fails to respect individuals' own understandings of what they believe and desire.

P. 101. Susan Brownmiller makes a similar point:
I am of the opinion that the most perfect rape laws in the land, strictly enforced by the best concerned citizens, will not be enough to stop rape. Obvious offenders will be punished, . . . but the huge gray areas of sexual exploitation of women who are psychologically coerced into acts of intercourse they do not desire because they do not have the wherewithal to physically, or even psychologically, resist will remain a problem beyond any possible solution of criminal justice.
S. BROWNMILLER, supra note 22, at 400-01.

P. 102.

This proposal would call for a normative change greater than Estrich’s proposal would require. I recognize that there are women who go looking for Mr. Goodbar and who in some subjective sense might well be viewed as consenting. Still, a woman in a casual relationship who claims that she did not consent should be believed. In such a case, we could not look to a prior relationship between the parties to determine if the man and woman had accepted a pattern of interaction that included a measure of coercion.

Of course, I do not advocate retention of the marital rape exemption, much less its extension to other, less permanent relationships. Instead, my proposal would distinguish developed relationships only when the man did not use express force or coercion, broadly
defined. This proposal seeks to expand liability beyond that which the law would impose if Estrich’s specific proposal, discussed supra text accompanying notes 59-66, were adopted.

87 See supra text accompanying notes 70-77.

88 For a general discussion of this principle, see W. LaFAVE & A. SCOTT, CRIMINAL LAW § 2.3 (2d ed. 1986).