THEORY, PRACTICE, AND PERCEPTION IN RAPE LAW REFORM

CAROLE GOLDBERG-AMBROSE

Susan Estrich. *Real Rape*. (Cambridge, MA: Harvard University Press, 1987). 160 pp. Notes, index. $15.95.

Zsuzsanna Adler. *Rape on Trial*. (London: Routledge & Kegan Paul, 1987). vii + 195 pp. Notes, bibliography, index. $47.50.

Susan Estrich's and Zsuzsanna Adler's books spring from profoundly different methodological impulses. Both seek to portray the way the legal system responds to rape. But while Estrich (a law professor) takes as her primary text American appellate court decisions, Adler (a sociologist) goes out and observes almost all of the rape trials in the English Central Criminal Court in a single year. Based on her observations, Adler's *Rape on Trial* confirms the standard feminist critique of rape law: the woman is really the one on trial, and her lifestyle and behavior must measure up to some high standard of traditional virtue before a rape conviction is possible. Estrich's reading of the case law in *Real Rape* leads her to a variation on the standard feminist critique: rather than treating all female rape victims equally poorly, the law reserves its greatest suspicion for women who are raped by men they know (either well or not so well); women raped by complete strangers fare relatively well.[1]

Both authors cast doubt on the effectiveness of recent rape law reforms, and both recommend further legislative or judicial efforts to combat sexism. Estrich focuses exclusively on changes in the definition of the crime and its defenses. Adler pays more attention to laws concerning the privacy of victims and the admissibility of evidence about the victim's sexual history. They concede that changing legal results will require changing the perceptions and judgments of prosecutors, judges, and jurors (male and female) who must apply the law of force, consent, and mistake of fact; but each advocates prosecuting a wider category of cases as rape (particularly those involving spouses and acquaintances), and

[1] Most of the feminist literature on rape suggests that a number of interrelated factors influence whether a rapist will be prosecuted or convicted, including the sexual history of the victim and the amount of force used by the defendant. Estrich acknowledges that these other factors are at work, but suggests that the relationship between defendant and victim is dominant in influencing outcomes. Thus, for example, she suggests that the resistance requirement is relaxed or dropped when a stranger is the defendant (p. 36).

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Estrich goes on to argue that judges should push juries hard to convict where broader rape laws would apply. Implicit in this argument is a theory of law as a force for social change, through its power to define wrongful conduct, and thereby either "legitimatize" or discourage value systems and the perceptions they foster.

Some of the strengths and weaknesses of these books mirror each other. Adler's forte is her command of what actually occurs during rape trials. This study is unique in the literature on rape, since it combines detailed description of trials with quantitative analysis of what contributes to conviction and sentencing. One of Adler's most interesting findings, particularly in light of Estrich's thesis, is that rape convictions are *not* less likely when the victim and defendant were voluntary companions (p. 113) and that the existence of a prior nonsexual relationship between victim and the defendant does *not* affect the likelihood of a more severe sentence (p. 113).

Adler's weakness, not surprising given her lack of legal training, is her unfamiliarity with relevant legal standards. For example, she repeatedly expresses dismay over the admission of certain evidence about victims' sexual histories that would seem fairly admissible even to lawyers concerned with treatment of rape victims at trial. One typical example is her failure to appreciate that a defendant should be able to introduce evidence of a victim's sexual experience when the prosecution has claimed that she is a virgin (p. 94; compare, e.g., Letwin, 1980: 72). These misunderstandings render her law reform recommendations less persuasive and suggest the importance of collaboration between lawyers and social scientists in research of this sort.

In contrast, Estrich's greatest strength is her acute power of legal analysis. She is at her best ripping apart the "reasoning" of judicial opinions, the commentaries on rape found in the latest version of the American Law Institute's *Model Penal Code*, or a widely cited state rape reform statute. Her most valuable contribution is her insight that the reference to "force" in the law of rape embodies only male experience. In a number of legal contexts, feminist scholars have shown how ostensibly sex-neutral concepts (one example is "self-defense" in homicide) ignore typically female patterns of experience and behavior (e.g., Schneider, 1980). Estrich suggests that in the law of rape, judges will conclude that a woman has been "forced" to have sex only if a man would have felt forced in comparable circumstances (pp. 60–62). Since women and men perceive threats differently, based on their experience and conditioning, judges and jurors find that women have consented to sex when the women do not perceive it that way at all. Though Estrich is not the first to suggest that women and men are taught to react differently to threats of force and may have different patterns of reaction (see Schwartz, 1983; Queen's Bench Foundation, 1976; and Symonds, 1976), her characterization

of the law as male centered is particularly graphic and compelling. Furthermore, her book is likely to reach a wider audience than the law review articles that made similar points, a value in and of itself.

The weakness in Estrich's book stems from its attempt to portray the law by drawing selectively from statutes and state high-court decisions. There is little sense of the actual trial process and the systematic relationship between legal definitions and outcomes. For example, she suggests that a jurisdiction that proffers defenses of mistake generously to rape defendants will be more likely to dispense with strict resistance requirements (pp. 95–96). But she does not bother to test her proposition. In fact, Adler's English evidence, from the country that practically invented the mistake defense, suggests otherwise.

Estrich also fails to suggest any means, other than her own prodding, to achieve the restructuring of rape law that she advocates. She seems to be in the position of both advocating statutory reforms and discounting their effectiveness. What is needed, I think, is a fuller understanding of the way law influences how people characterize sexual encounters.

The most daunting question facing feminist theorists in the area of rape is whether to characterize rape as violence or as sex. "Rape as violence" posits that rape is sex accompanied by an unacceptable level of violence or coercion; traditional rape law ignored the coercive element in all but the most violent encounters, and modern rape law should remedy that error. Rather than judge rape defendants according to some special etiquette of sexual encounters, society should judge them according to whether they have exceeded some general standard of coercion or disregard for the victim's expressed will. This is essentially Estrich's position, although she is careful to note that "violence" must be understood broadly to include nonphysical forms of coercion that form the basis for property crimes such as extortion. "Rape as sex" posits that gender relations are so permeated with expectations of male dominance and aggression, female submissiveness and passivity, that there is no clear way to separate rape from sex. According to this view, heterosexual arousal has become dependent on male sexual aggressiveness. The most forceful exponent of this position is Catharine MacKinnon (1983).

I view sexual encounters between men and women as ranging along a continuum based on the existence, amount, and nature of pressure involved. At one extreme would be totally consensual, mutually initiated sex. At the other extreme would be sex resulting from undesired physical violence. Between these extremes would be, among other things, sex initiated by one but receiving the enthusiastic response of the other, sex resulting from one persuading the other, sex resulting from complaints or criticisms of the other, sex resulting from threats of a nonviolent nature (e.g.,

to withdraw from the relationship, to deny a needed recommendation), and sex resulting from threats of physical harm. Understanding sexual transactions this way, the lawyer's challenge is to determine whether and when the differences in degree emerge into a difference in kind, warranting criminalization of some behavior but not the rest. This seems closer to the "rape as violence" approach of Estrich, although she does not develop her view of heterosexual relations fully.

For feminists who see no principled basis for differentiating coercive from noncoercive sex, this is a dangerous exercise. To them, in isolating certain forms of sexual interaction and calling them rape, the legal system serves the cause of male supremacy by making all the coercive sex that is not called rape seem more acceptable to women. MacKinnon implies that the only way around the problem is to say that sex should be a crime whenever a woman is prepared to characterize it as nonconsensual, presumably either before or after the fact (1983: 652).

As Frances Olsen points out, approaching rape in this manner can be a valuable heuristic device (1984: 408, n.100). By reversing the position of the normally more vulnerable and more powerful sexes, such a proposal heightens awareness of women's lack of power. But if I am right about the continuum of heterosexual relations, this feminist version of rape empowers women at a fearsome expense of possibly unjust convictions. Furthermore, while I agree with the general and obvious proposition that women as a group occupy a subordinate position in Western culture, I do not think it follows that every sexual interaction between men and women pairs a dominant, coercing man with a submissive and unwilling woman. Sex is just too complex to conform invariably to that pattern. While MacKinnon's observation that male dominance has become eroticized has some intuitive appeal, experience also suggests the possibility, under some currently existing circumstances, of heterosexual relations between persons who trust, respect, and feel affection for one another.

Even though I disagree with the "rape as sex" position, I wish Estrich had taken it more seriously and attempted a more searching response. Estrich assumes that broadening the statutory categories of rape will advance women's interests, without showing that it will change perceptions and values about appropriate male-female interactions.

I want to suggest that both Estrich and MacKinnon may overestimate the impact that legal definitions have in revising social understandings, either for good or for ill. That is not to say that Estrich's proposed reforms are ill-advised. It is a valuable exercise to attempt to reconcile our notion of coercion in rape cases with our notions of coercion in a variety of other legal contexts, including extortion to obtain money. And even though the empirical research cited by Estrich shows that rape reform legislation has not

substantially changed judicial treatment of rape (pp. 88–89), neither do the studies confirm MacKinnon's view that this legislation makes matters worse.

As Estrich herself demonstrates, however, it is not primarily the absence of statutory language that prevents juries from convicting rapists or judges from upholding their convictions in situations that women find coercive but men do not. In some states (Washington, for example), the reforms Estrich advocates have been enacted at the legislative level, and yet little has changed in actual rape cases. While Estrich is right in saying that "changing the words of statutes is not nearly so important as changing the way we understand them" (p. 91), she does not really help us figure out how to get from the legal system's current understanding of sexual interaction to one more sensitive to the confusion between sex and violence and the ways women are pressured into having sex.

Worrying about the definition of crimes and defenses is a lofty preoccupation of law professors, but it may do less to alter general perceptions of the harms to women from coerced sex than other legal changes that focus attention directly on those harms during rape trials. Notably absent from Estrich's book is any attention to the use of rape-trauma-syndrome evidence to prove rape. Adler describes the medical and psychological research performed during the 1970s that led to the discovery of this particular collection of symptoms found in almost all self-reported rape victims, later recognized as a subcategory of the psychiatric disorders known as posttraumatic stress. But she also ignores the legal implications of this evidence.

Prosecutors, however, have found such evidence invaluable in rebutting assertions that rape victims welcomed or reluctantly submitted to sex (Rowland, 1985). The reason this evidence has been so effective is that it deflects attention from the conflicting stories surrounding the sexual encounter and focuses it instead on the physical and psychological sequelae for the victim. Empirical studies, many of them cited by Estrich, have shown that the existence of corroborating evidence is a powerful determinant of rape convictions; and evidence of rape trauma syndrome provides just such corroboration. In the process, it demonstrates to victim, jurors, and judge alike that the victim was wronged. When people have nightmares, nausea, and phobias following a sexual encounter, we have passed the point in the continuum of sexual relations where male behavior is acceptable.[2] Social scientists have shown that women as well as men hold women responsible for controlling both

[2] I am assuming, of course, that the statutory definition of rape is not an obstacle to conviction. Also, there may be cases where the woman has been raped but the defendant has a genuine and reasonable mistake defense. In such cases, rape-trauma-syndrome evidence could still be consistent with a not guilty verdict.

sexes' sexuality; hence there has been a strong inclination for women to blame themselves for sexual encounters, however unpleasant they may be. But as Richard Abel has pointed out (Felstiner *et al.*, 1981: 641), a complex process exists by which injurious experiences are perceived as such, others are blamed for them, and redress is sought. I believe that evidence of rape trauma syndrome can play an important role in such transformation.

Regrettably, the courts have not been uniformly receptive to the use of such evidence, despite the fact that considerable scholarship supports its scientific soundness and probative value (Cling, 1988). Even the Supreme Court of California, which has shown great sensitivity to the plight of rape victims, has closed its door to expert testimony regarding rape trauma syndrome, at least for purposes of proving victim nonconsent (*People* v. *Bledsoe*, 36 Cal. 3d 236, 1984). The loss of insight from using this evidence may inhibit the changes in perception and interpretation that Estrich rightly recommends; we need empirical research comparing outcomes in states that have and have not allowed the admission of rape trauma syndrome. Indeed, rape seems a fruitful area of law for studying the general phenomenon of the transformation of disputes.

Adler's and Estrich's books provide useful information about how rape trials actually operate and how appellate judges reviewing rape trials perceive gender roles and relations. There has been so much written about rape over the past fifteen years, however, that neither book seems startling. What we need more is a legal strategy with transformative potential that will enable men and women alike to perceive the harm to women from a range of sexual relations that women have suffered in silence.

CAROLE GOLDBERG-AMBROSE is Professor of Law and Associate Dean at the UCLA School of Law. She was coeditor of *Felix S. Cohen's Handbook of Federal Indian Law* (1982) and author of "The Protective Jurisdiction of the Federal Courts," 30 *UCLA Law Review* 542.

REFERENCES

CLING, B. J. (1988) "Rape Trauma Syndrome: Medical Evidence of Non-Consent," 10 *Women's Rights Law Reporter* 243.

FELSTINER, William, Richard ABEL, and Austin SARAT (1981) "The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming," 15 *Law and Society Review* 631.

LETWIN, Leon (1980) " 'Unchaste Character,' Ideology, and the California Rape Evidence Laws," 54 *Southern California Law Review* 35.

MacKINNON, Catharine (1983) "Feminism, Marxism, Method, and the State," 8 *Signs: Journal of Women in Culture and Society* 635.

OLSEN, Frances (1984) "Statutory Rape: A Feminist Critique of Rights Analysis," 63 *Texas Law Review* 387.

QUEEN'S BENCH FOUNDATION (1976) *Rape Prevention and Resistance*. San Francisco: Queen's Bench Foundation.

ROWLAND, Judith (1985) *The Ultimate Violation*. New York: Doubleday.

SCHNEIDER, Elizabeth (1980) "Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense," 15 *Harvard Civil Rights–Civil Liberties Law Review* 623.

SCHWARTZ, Susan (1983) "An Argument for the Elimination of the Resistance Requirement from the Definition of Forcible Rape," 16 *Loyola Los Angeles Law Review* 567.

SYMONDS, Martin (1976) "The Rape Victim: Psychological Patterns of Response," 36 *American Journal of Psychoanalysis* 27.