"A powerful indictment . . . This is an important book, well researched and tightly argued . . . Estrich addresses the issues directly, cogently and with the sense of urgency and outrage the seriousness of the crime deserves."

—San Francisco Examiner

REAL RAPE

Susan Estrich

How the legal system victimizes women who say no

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To my family

PREFACE

I have been blessed to find at Harvard Law School wonderful friends who have supported me in every way possible. My special thanks to Alan Dershowitz, Phil Heymann, Lance Liebman, Martha Minow, Larry Tribe, and Jim Vorenberg for their encouragement of this book, to Julie Taylor and Jane Leslie Newberry for all their work, and especially to Kathleen Sullivan and Nancy Tompkins for telling me what worked and what didn't, and how to make it work better, and for reminding me every day that I really could do it. No one could ask for better friends.

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Chapter 1

MY STORY

In May 1974 a man held an ice pick to my throat and said: "Push over, shut up, or I'll kill you." I did what he said, but I couldn't stop crying. When he was finished, I jumped out of my car as he drove away.

I ended up in the back seat of a Boston police car. I told the two officers I had been raped by a man who came up to the car door as I was getting out in my own parking lot (and trying to balance two bags of groceries and kick the car door open). He took the car, too.

They asked me if he was a crow. That was their first question. A crow, I learned that day, meant to them someone who is black. That was the year the public schools in Boston were integrated.

They asked me if I knew him. That was their second question. They believed me when I said I didn't. Because, as one of them put it, how would a nice (white) girl like me know a crow?

Now they were really listening. They asked me if he took any money. He did; but though I remember virtually every detail of that day and night, I can't remember how much. It doesn't matter. I remember their answer. He did take money; that made it an armed robbery. Much better than a rape. They got right on the radio with that.

We went to the police station first, not the hospital, so I could repeat my story (and then what did he do?) to four more policemen. When we got there, I borrowed a dime to call my father. They all liked that.

By the time we went to the hospital, they were really on my team. I could've been one of their kids. Now there was something they'd better tell me. Did I realize what prosecuting a rape complaint was all about? Did I think I could handle it, I seemed like a nice girl, what a defense lawyer could do . . .

Late that night, I sat in the Police Headquarters looking at mug shots. I was the one who had insisted on going back that night. My memory was fresh. I was ready. They had four or five to "really show" me; being "really shown" a mug shot means exactly what defense attorneys are afraid it means. But it wasn't any one of them. After that, they couldn't help me very much. One shot looked familiar until my father realized that the man had been the right age ten years before. It was late. I didn't have a great description of identifying marks or the like: no one had ever told me that if you're raped, you should not shut your eyes and cry for fear that this really is happening, but should keep your eyes open and focus so you can identify him when you survive. After an hour of looking, I left the police station. They told me they'd get back in touch. They didn't.

A clerk called one day to tell me that my car had been found minus all its tires and I should come sign a release and have it towed—no small matter when you don't have a car to get there and are slightly afraid of your shadow. The women from the rape crisis center called me every day, then every other day, then every week. The police detectives never called at all.

At first, being raped is something you simply don't talk about. Then it occurs to you that people whose houses are broken into or who are mugged in Central Park talk about it *all* the time. Rape is a much more serious crime. If it isn't my fault, why am I supposed to be ashamed? If I'm not ashamed, if it wasn't "personal," why look askance when I mention it?

And so I mention it. I mention it in my classes. I describe it here. I do so in the interest of full disclosure. I like to think that I am an informed and intelligent student of rape. But I am not unbiased. I am no objective observer, if such a thing exists (which I doubt; I think the major difference between me and those who have written

"objectively" about the law of rape is that I admit my involvement and bias). In writing about rape, I am writing about my own life. I don't think I know a single woman who does not live with some fear of being raped. A few of us—more than a few, really—live with our own histories.

Once in a while—say, at two o'clock in the morning when someone claiming to be a student of mine calls and threatens to rape me—I think that I talk too much. But most of the time, it isn't so bad. When my students are raped (and they have been), they know they can talk to me. When my friends are raped, they know I survived.

In many respects I am a very lucky rape victim, if there can be such a thing. Not because the police never found him: looking for him myself every time I crossed the street, as I did for a long time, may be even harder than confronting him in a courtroom. No, I am lucky because everyone agrees that I was "really" raped. When I tell my story, no one doubts my status as a victim. No one suggests that I was "asking for it." No one wonders, at least out loud, if it was really my fault. No one seems to identify with the rapist. His being black, I fear, probably makes my account more believable to some people, as it certainly did with the police. But the most important thing is that he was a stranger; that he approached me not only armed but uninvited; that he was after my money and car, which I surely don't give away lightly, as well as my body. As one person put it: "You really didn't do anything wrong."

Had the man who raped me been found, the chances are relatively good that he would have been arrested and prosecuted and convicted. Stranger rape is prosecuted more frequently, and more successfully, than many violent crimes.[1] And the punishment on conviction tends to be substantial. In some states, until very recently, it could have been death.[2] Not without costs for me, to be sure: under the best circumstances, prosecuting a rape case has unique costs for the victim. And many jurisdictions have made it harder still, by imposing unique obstacles in rape cases, from the requirement that the victim's testimony be corroborated by other evidence to the requirement that she resist her attacker to the

inquiry into her sexual past. But although the requirements were theoretically imposed in all cases, victims like me surely fared best. We could count on prosecutors to take our cases more seriously, on juries to be more sympathetic, and on courts to manipulate the doctrinal rules to protect a conviction.

But most rape cases are not as clear-cut as mine, and many that are, like mine, simply are never solved. It is always easier to find the man when the woman knows who he is. But those are the men who are least likely to be arrested, prosecuted, and convicted. Those are the cases least likely to be considered real rapes.

Many women continue to believe that men can force you to have sex against your will and that it isn't rape so long as they know you and don't beat you nearly to death in the process. Many men continue to act as if they have that right. In a very real sense, they do. That is not what the law says: the law says that it is rape to force a woman "not your wife" to engage in intercourse against her will and without her consent. But while husbands have always enjoyed the greatest protection, the protection of being excluded from rape prohibitions, even friends and neighbors have been assured sexual access.[3] What the law seems to say and what it has been in practice are two different things. In fact, the law's abhorrence of the rapist in stranger cases like mine has been matched only by its distrust of the victim who claims to have been raped by a friend or neighbor or acquaintance.

The latter cases are cases of "simple rape." The distinction between the aggravated and simple case is one commonly drawn in assault. It was applied in rape in the mid-1960s by Professors Harry Kalven and Hans Zeisel of the University of Chicago in their landmark study of American juries.[4] Kalven and Zeisel defined an aggravated rape as one with extrinsic violence (guns, knives, or beatings) or multiple assailants or no prior relationship between the victim and the defendant. A simple rape was a case in which none of these aggravating circumstances was present: a case of a single defendant who knew his victim and neither beat her nor threatened her with a weapon. They found that juries were four times as willing to convict in the aggravated rape as in the simple

one. And where there was "contributory behavior" on the part of the woman—where she was hitchhiking, or dating the man, or met him at a party—juries were willing to go to extremes in their leniency toward the defendant, even in cases where judges considered the evidence sufficient to support a conviction for rape.[5]

Juries have never been alone in refusing to blame the man who commits a "simple rape." Three centuries ago the English Lord Chief Justice Matthew Hale warned 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."[6] If it is so difficult for the man to establish his innocence, far better to demand that a woman victim prove hers; under Hale's approach, the one who so "easily" charges rape must first prove her own lack of guilt. That has been the approach of the law. The usual procedural guarantees and the constitutional mandate that the government prove the man's guilt beyond a reasonable doubt have not been considered enough to protect the man accused of rape. The crime has been defined so as to require proof of actual physical resistance by the victim, as well as substantial force by the man. Evidentiary rules have been defined to require corroboration of the victim's account, to penalize women who do not complain promptly, and to ensure the relevance of a woman's prior history of unchastity.

Men have written for decades about women's rape fantasies—about our supposed desire to be forcibly ravished, to "enjoy" sex without taking responsibility for it, to be passive participants in sexual ecstasy which, when we are spurned in the relationship or caught in the act and forced to explain, we then call "rape."[7] That was Hale's concern. It ignores the burdens and humiliation of prosecuting a rape case. It converts the harmless fantasy of some women that a favorite movie star would not take "no" for an answer into a dangerous stereotype that all women wish to be ignored and treated like objects by any man we know.

Yet if the female rape fantasy is open to challenge, and I think it is, the law of rape stands as clear proof of the power and force of a male rape fantasy. The male rape fantasy is a nightmare of being caught in the classic, simple rape. A man engages in sex. Perhaps

he's a bit aggressive about it. The woman says no but doesn't fight very much. Finally, she gives in. It's happened like this before, with other women, if not with her. But this time is different: she charges rape. There are no witnesses. It's a contest of credibility, and he is the accused "rapist."

It is important to note that the male rape fantasy is not a nightmare about all rapes, and all women, but only about some; the law of rape has focused its greatest distrust not on all victims, but only on some. The formal prohibitions of the statutes do not distinguish between the stranger and the neighbor, between the man who climbs in the car and the one offered a ride home. The requirements of force and resistance and corroboration and fresh complaint have been formally applicable in every case, regardless of the relationship between victim and defendant. In practice, distinctions have always been drawn. It is in the male fantasy cases—the "simple" cases in which the unarmed man rapes the woman he knows—that these rules have been articulated and applied most conscientiously to punish the victims and protect male defendants. And it is in those cases that prosecutors, courts, and juries continue to enforce them in practice.

The law's treatment of these simple rape cases is the subject of this book. The cases that I examine are those involving the rape of a competent, conscious, adult (above the legal age of consent) woman by a man.[8] I have put aside the additional problems presented when young girls or unconscious women are raped; it is enough for one book to examine the application of the law to women who are not special or different in these ways. The same is true, although to a lesser extent, of race. The history of rape in the United States is clearly a history of both racism and sexism. It is impossible to write about rape without addressing racism, and I do. But my primary focus is on how the law has understood and punished women as women.

Although rape has emerged as a topic of increasing research and attention among feminists in recent years,[9] the law of rape, particularly of the "simple rape," has not been widely addressed.[10] When I began law school, a few months after being raped, I expected to

learn the law of rape. I was wrong. Rape was, I discovered, just not taught. When I started teaching, seven years later, rape was still not being taught. When I asked why, I was told that it was not interesting enough, or complicated enough, or important enough to merit a chapter in a criminal law casebook or a week in a course. That attitude is, at long last, beginning to change. But it is not enough that lawyers begin to understand the law of rape as a serious subject. Rape 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. This book is aimed at a broader audience.

Ultimately this book is an argument for change: for an understanding of rape that recognizes that a "simple" rape *is* a real rape. In recent months the problem of "date rape" has been discovered by the popular media. Magazine after magazine includes accounts of past instances of forced sex that the victims are only now beginning to label rape.[11] For the first time colleges are recognizing and trying to deal with date rape on their campuses.[12] This discovery of date rape is surely an important part of the effort to change the way men and women in our society think about nonconsensual sex. The truth, however, is that cases of alleged rape among friends, acquaintances, and neighbors have found their way into the courts since the earliest reported decisions. If we are to change the way the law addresses these cases, that history must be confronted and understood. By doing so, ideally what will emerge is not only an understanding of the law as part of the problem, but a direction for the law to serve as part of the solution. That is the purpose of this book.

Chapter 2

IS IT RAPE?

A man commits rape when he engages in intercourse (in the old statutes, carnal knowledge) with a woman not his wife; by force or threat of force; against her will and without her consent. That is the traditional, common law definition of rape, and it remains the essence of even the most radical reform statutes.[1]

But many cases that fit this definition of "rape" are not treated as criminal by the criminal justice system, or even considered rape by their women victims. In the cases on which this book focuses, the man is not the armed stranger jumping from the bushes—nor yet the black man jumping the white woman, the case that was most likely to result in the death penalty prior to 1977, and the stereotype that may explain in part the seriousness with which a white male criminal justice system has addressed "stranger" rape. Instead the man is a neighbor, an acquaintance, or a date. The man and the woman are both white, or both black, or both Hispanic. He is a respected bachelor, a student, a businessman, or a professional. He may have been offered a ride home or invited in. He does not have a weapon. He acted alone. It is, in short, a simple rape.

The man telling me this particular story is an assistant district attorney in a large Western city. He is in his thirties, an Ivy League law school graduate, a liberal, married to a feminist. He's about as good as you're going to get making decisions like this. This is a case he did not prosecute. He considers it rape—but only "technically." This is why.

The victim came to his office for the meeting dressed in a pair of tight blue jeans. Very tight. With a see-through blouse on top. Very revealing. That's how she was dressed. It was, he tells me, really something. Something else. Did it matter? Are you kidding!

The man involved was her ex-boyfriend. And lover; well, ex-lover. They ran into each other on the street. He asked her to come up and see *Splash* on his new VCR. She did. It was not the Disney version—of Splash, that is. It was porno. They sat in the living room watching. Like they used to. He said, let's go in the bedroom where we'll be more comfortable. He moved the VCR. They watched from the bed. Like they used to. He began rubbing her foot. Like he used to. Then he kissed her. She said no, she didn't want this, and got up to leave. He pulled her back on the bed and forced himself on her. He did not beat her. She had no bruises. Afterward, she ran out. The first thing she did was flag a police car. That, the prosecutor tells us, was the first smart thing she did.

The prosecutor pointed out to her that she was not hurt, that she had no bruises, that she did not fight. She pointed out to the prosecutor that her ex-boyfriend was a weightlifter. He told her it would be nearly impossible to get a conviction. She could accept that, she said: even if he didn't get convicted, at least he should be forced to go through the time and the expense of defending himself. That clinched it, said the D.A. She was just trying to use the system to harass her ex-boyfriend. He had no criminal record. He was not a "bad guy." No charges were filed.

Someone walked over and asked what we were talking about. About rape, I replied; no, actually about cases that aren't really rape. The D.A. looked puzzled. That was rape, he said. Technically. She was forced to have sex without consent. It just wasn't a case you prosecute.

This case is unusual in only one respect: that the victim perceived herself to be a victim of rape and was determined to prosecute. That is unusual. The prosecutor's response was not.

The Response of Victims

Much has been written about the incidence of rape and of rape reporting today. Some feminists have claimed that rape is at near epidemic levels, and that if the official statistics do not reflect this, it is because rape is the single most underreported major crime.[2] Defenders of the system claim that rape is relatively uncommon and that reporting rates are not atypical and are relatively high.[3] In a sense everyone is right, since no one is defining terms.

The dimensions of the problem of rape in the United States depend on whether you count the simple, "technical" rapes. If only the aggravated cases are considered rape—if we limit our practical definition to cases involving more than one man, or strangers, or weapons and beatings—then "rape" is a relatively rare event, is reported to the police more often than most crimes, and is addressed aggressively by the system. If the simple cases are considered—the cases where a woman is forced to have sex without consent by only one man, whom she knows, who does not beat her or attack her with a gun—then rape emerges as a far more common, vastly underreported, and dramatically ignored problem.

The Uniform Crime Reports are the official FBI tabulation of reported crime. Released annually, they are based on actual statistics contributed by state and local agencies. For purposes of the Uniform Crime Reports, forcible rape is "the carnal knowledge of a female forcibly and against her will." Assaults or attempts to commit rape by force or threat of force are also included. An estimated 69 of every 100,000 females in the nation were reported rape victims in 1984, a slight decrease since 1980, but an increase from the preceding year. Forcible rape was much more common than murder, but many times rarer than robbery, aggravated assault, and motor vehicle theft, and tens of times rarer than burglary and larceny.[4]

Even the Uniform Crime Reports acknowledge that rape is underreported.[5] By how much is another question. The government's answer to underreporting is found in the official victimization surveys compiled by the Department of Justice's Bureau of Justice