STRANGER AND NONSTRANGER RAPE: 
ONE CRIME, ONE PENALTY

Emily C. Shanahan*

I. INTRODUCTION ............................................ 1371
II. ASSUMPTIONS ............................................. 1372
III. IDENTIFYING AND DEFINING THE HARM OF RAPE ............ 1374
 A. Physical Harm: Rape as Battery ............................ 1375
 B. A Broader Perspective: Additional Harms of Rape ........... 1376
  1. Psychic Harm ........................................... 1377
  2. Violation of Trust ....................................... 1379
  3. Harm to All Women ...................................... 1380
     a. Economic and Social Limitations ....................... 1380
     b. Male-Female Relationship Limitations ................. 1381
IV. THEORY: THE ULTIMATE CRIME MAY NOT BE THE GREATER 
 THREAT TO SOCIETY ......................................... 1382
 A. Foucault’s Argument ...................................... 1382
 B. Application of Foucault’s Policy Prescription to Rape ......... 1383
V. LAW AND SOCIETY: MODELS TO JUSTIFY EQUAL SENTENCING OF 
 STRANGER AND NONSTRANGER RAPE ............................ 1385
 A. Signaling Function of the Law ............................. 1385
 B. Expressive Function of Punishment ......................... 1386
VI. ECONOMIC ANALYSIS OF EQUAL SENTENCING OF STRANGER AND 
 NONSTRANGER RAPE .......................................... 1392
VII. CONCLUSION ............................................... 1394

I. INTRODUCTION

In her article, Rape, Susan Estrich identifies two types of rape: "traditional" rape (a violent rape committed by a stranger) and "nontraditional" rape (a less violent rape committed by an acquaintance of the victim). Estrich argues that "nontraditional" rapes should be subject to criminal penalties, "albeit reduced ones."2 This Note challenges Estrich's conclusion that nontraditional rape war-

* J.D., Georgetown University Law Center, 1999. The author would like to thank Professor Neal Katyal for his assistance with the development of this Note.
2. See id. at 1158. Estrich, like many commentators, takes this two-tier sentencing scheme as a given without providing any reasoned justification for it. Lynne Henderson criticizes Estrich for making this assumption. "If Estrich intends to say non-aggravated rapes are not as 'blameworthy' and therefore should not be punished as severely as aggravated rapes, she never explains why." Lynne N. Henderson, What Makes Rape a Crime, 3
rants a less severe penalty than traditional rape. Instead, this Note proposes and defends a sentencing structure in which the penalty for nontraditional rape is the same as that for traditional rape. Moreover, this base sentence should be significant. Force, if considered at all, should be treated as an aggravating factor that enhances the base sentence for rape; the absence of force, however, does not justify a reduction in the base sentence. The cornerstone of this proposal is that there is only one crime of rape.\(^3\)

Part II describes the underlying assumptions of this Note. Part III explores the different harms of rape. It first focuses on a narrow interpretation that identifies physical injury as the only harm of rape. It then proposes a broader perspective which recognizes that the harm of rape includes the injury to a victim’s psyche and sense of trust as well as the harm done to all women, both victims and nonvictims. An alternative definition of the harm of rape is a prerequisite to the analysis developed in Part IV. Part IV first describes Michel Foucault’s proposal for assigning criminal penalties in accordance with the disorder a crime is capable of initiating. It then combines the broader definition of rape’s harm with Foucault’s analysis to conclude that, at a minimum, nontraditional rape should be penalized commensurately with traditional rape because of the significant threat the former poses to the social fabric. Part V describes and applies to the rape context sociological models which support this Note’s sentencing proposal. Finally, Part VI explores whether economic models of crime support commensurate sentencing.

II. ASSUMPTIONS

It is common to distinguish between two types of rape, violent stranger rape and nonviolent nonstranger rape.\(^4\) This dichotomy, however, conflates two separate issues: the level of force used to commit the rape and the nature of the relationship between the attacker and his victim. Recognition of these two distinct axes—level

---

3. Cf. Dorothy E. Roberts, Rape, Violence, and Women’s Autonomy, 69 CHI.-KENT L. REV. 359, 381 (1993). Roberts suggests that “disconnecting all seemingly nonviolent sexual coercion from sex accompanied by physical violence will obscure the common nature of both. . . . An alternative approach would rethink the legal meaning of violence and explore how men use violence on many different levels to impose their will upon women.” Therefore, Roberts argues that “we should consider how often men use that capacity to control women without actually resorting to physical attack. What makes some sexual intercourse violent is not the mere disparity in size, strength, and fighting ability between the sexes, it is men’s systemic use of that disparity to dominate women through sex.” Id. at 380.

4. Although this Note defends a certain approach to sentencing rapists, it does not attempt to develop a complete or alternative definition of rape. This Note’s notion of “rape” is a narrow one; it considers only the case of a male attacker and a female victim, both of whom are adults. It does not address considerations that might arise in cases of homosexual rape or the rape of children. Issues of race also are not considered. Finally, rapes involving fraud or misrepresentation also are excluded from this Note’s analysis.
of force and relationship—may counsel expanding the range of possible rape scenarios to include not only violent stranger rape and nonviolent nonstranger rape, but also nonviolent stranger rape and violent nonstranger rape.

Considering a broader range of rape scenarios, however, seems to have limited analytic value. As a practical matter, nonviolent stranger rapes probably do not occur. Because the victim and attacker do not know each other, it is likely that an attacker must use some level of force—at a minimum, a verbal threat or brandishing a weapon—to gain initial control over his victim. Compared to a rape in which the victim knows her attacker, a stranger rape is “more likely to involve aggression by the offender (threats of bodily harm, hitting, slapping, and use of a weapon).” As a result, this Note retains the two-prong approach. The term “stranger rape” assumes that some level of violence or force is involved, whereas the term “nonstranger rape” assumes that violence or force is not involved.

Furthermore, this Note’s vision of rape is more sympathetic to the characterization of rape as a crime of violence. An alternative approach argues that rape is a crime of sex because it is based upon “accepted sexual practices that privilege male physical aggression and violence.” Catharine MacKinnon maintains that a woman is raped whenever she has sex and feels violated. “Compare victims’ reports of rape with women’s reports of sex. They look a lot alike. . . . In this light, the major distinction between intercourse (normal) and rape (abnormal) is that the normal happens so often that one cannot get anyone to see anything wrong with it.” Although MacKinnon acknowledges that the “rape-as-violence” view surfaces “rape’s previously effaced elements of power and dominance,” she thinks it is incomplete because it obscures rape’s elements of sex. “Aside from failing to answer the rather obvious question, if it is violence not sex, why didn’t he just hit her? this approach made it impossible to see that violence is sex when it is practiced as sex.”

Henderson rejects MacKinnon’s argument because it collapses the distinction between heterosexuality, and male aggression and violence. According to Hender-

7. Catharine A. MacKinnon, Feminism Unmodified 82 (1987) [hereinafter MacKinnon, Feminism Unmodified]; see also Catharine A. MacKinnon, Toward a Feminist Theory of the State 141 (1989) [hereinafter MacKinnon, Feminist Theory of the State] (“The assumption that in matters sexual women really want what men want from women, makes male force against women in sex invisible. It makes rape sex.”). MacKinnon adopts this argument more as a political strategy than as a policy prescription. Her point is not to send every man to jail but to “change the nature of the relations between women and men by having women ask [themselves], ‘Did I feel violated?’ . . . [P]art of the culture of sexual inequality that makes women not report rape is that the definition of rape is not based on [their] sense of [their] violation.” MacKinnon, Feminism Unmodified, supra, at 82.
9. Id. at 134.
10. Id.
son, MacKinnon’s “insistence on sex as violence encounters some of the difficulties that the rape is violence argument encounters: Men just don’t see the violence.” In contrast, the vision of rape as a crime of violence suggests that rape is “an act of power, anger, or hatred. Rape is an assaultive crime that attacks the physical integrity and mind of the victim. Rape is as brutal as any vicious, violent attack.” This approach too is limited because it does not succeed in “conveying the seriousness of the crime because of the particular understanding and image of violence we have.” Rather, the rape-as-violence argument enables “many men to distinguish what they have done from what rapists do, because they haven’t caused external physical damage that they can understand as violence.” A broader vision of rape that signals to men that such behavior—even though it does not conform to our traditional vision of the rapist as a violent offender—constitutes rape, is more appropriate.

III. IDENTIFYING AND DEFINING THE HARM OF RAPE

If we accept as a basic assumption that the penalty for a crime should be set according to the harm it causes, then it becomes necessary to develop a robust and complete definition of that harm. Because the harm of rape has been defined in a certain way, stranger rape and nonstranger rape have been viewed and treated as two distinct crimes. Traditionally, the law has recognized physical injury to the victim as the principal harm of rape. A stranger rape warrants a severe penalty because it often entails the potential for grave physical injury; in contrast, nonstranger rape has been deemed unworthy of severe penalty because it typically results in minimal physical injury to the victim.

11. Henderson, Rape and Responsibility, supra note 6, at 159.
12. Id. at 156.
13. Id. at 157.
14. Id.
15. See id. ("‘[V]iolence’ brings a certain image of the perpetrator as subhuman, evil, and dangerous; it fits the stereotype of the predatory psychopath as rapist, but fails to expand the stereotype. The image of the violent offender simply does not describe most men who rape.”).
16. Commensurate sentencing of stranger and nonstranger rape, as a means of achieving this goal, can be defended without resorting to the rape as sex view, which implicates issues beyond the scope of this Note.
17. See Estrich, supra note 1, at 1092. According to Estrich:

At one end of the spectrum is the ‘real’ rape . . . A stranger puts a gun to the head of his victim, threatens to kill her or beats her and then engages in intercourse. In that case the law—judges, statutes, prosecutors and all—generally acknowledge that a serious crime has been committed . . . Where less force is used or no other physical injury is inflicted, where threats are inarticulate, where the two know each other where the setting is not an alley but a bedroom, where the initial contact was not a kidnapping but a date where the woman says no but does not fight, the understanding is different. In such cases the law, as reflected in the opinion of the courts, the interpretation, if not the words, of the statutes, and the decisions of those within the criminal justice system, often tell us that no crime has taken place, and that fault, if any is to be recognized, belongs with the woman.

Id.
The argument that rape is just a form of battery illustrates this narrow definition of rape's harm as physical injury. After considering the rape-as-battery approach, this section rejects it because it fails to capture the many other injuries suffered by victims of rape and by all women, including those who have never been raped. By expanding the notion of the harms and injuries resulting from rape, the common nature between stranger and nonstranger rape becomes more apparent; these harms are experienced, in one form or another, by all victims of all types of rape. This broader vision suggests two conclusions: 1) nonstranger rape, as measured in terms of harm, is as serious as stranger rape; and 2) because there is a core harm of rape, regardless of whether physical force is used against the victim, there should be one crime of rape. Consequently, stranger and nonstranger rape warrant the same (serious) baseline sentence.

A. Physical Harm: Rape as Battery

Some scholars propose that the crime of rape should be eliminated; instead, rape should be treated as a form of battery. According to Michael Davis, rape "is not a very serious crime. Rape should be treated as a variety of ordinary (simple or aggravated) battery because that is what rape is. Treating rape in that way is theoretically sound." 18 Rape victims tend to suffer neither great bodily harm nor "serious long term psychic injury." 19 Martin Schwartz and Todd Clear argue that rape is more of an assault than a sexual attack because rape and assault involve similar motives, including domination and revenge. 20 Treating rape as a battery is a better approach because "there is no reason to separate a woman's sexual integrity from her general physical integrity. . . . Politically, the creation of this special sexual status is one of the barriers that prevents women from being the equals of men under the law." 21

In contrast to Schwartz and Clear, Donald Dripps recognizes that conduct traditionally defined as rape violates the rights and interests of its victim in two ways. First, the use of force violates an individual's interest in freedom from injury; in nonsexual contexts, this interest is protected by the punishment for assault. Second, use of another's body for sexual gratification "violates the interest in exclusive control of one's body for sexual purposes." 22 Instead of absorbing the crime of rape into the law of battery, Dripps proposes the definition of two new crimes intended to protect these separate interests: 1) sexually motivated assault, which would warrant enhancing a sentence for aggravated assault; and 2) sexual expropriation, which would include those cases involving "pressures to cause

---

19. Id. at 71.
21. Id. at 134-35.
sexual cooperation, short of violence."\(^{23}\)

Like the proponents of the rape-as-battery approach, Dripps believes that physical injury is the principal and most serious harm a rape victim suffers. As a result, Dripps argues that sexual expropriation merits only a modest penalty because "violence is more dangerous and more culpable than an unwelcome sex act."\(^{24}\) Physical violence causes greater damage to a victim’s welfare because it "expresses a more complete indifference, or a more intense hostility to the victim’s humanity."\(^{25}\)

The rape-as-battery approach is proposed, in part at least, to correct the defects in current rape law. A principal benefit of this analytical framework is to "draw attention to the acts of the offender,"\(^{26}\) rather than focusing on the behavior of the victim. Because this approach changes the focus of proof, "more evidence becomes relevant to proving the basic crime. Proving the basic crime becomes easier."\(^{27}\) According to Davis, his proposal may require accepting less severe penalties for rapes, but it "may be a recipe for relatively certain punishment of rapists."\(^{28}\)

B. A Broader Perspective: Additional Harms of Rape

The exclusive focus on whether a rape victim suffers physical injury fails to account for the core harm of rape—-a harm experienced by victims of all types of rape—the violence and injury of penetration itself.\(^{29}\) Henderson rejects Davis’ rape-as-battery approach because Davis:

"[I]gnores the terror of rape victims when he poses the question, which would you choose, being compelled by brute force to have sexual intercourse or being badly beaten without permanent harm? The question seems to assume that rape

---

23. Id. at 1797-99.
24. Id. at 1799.
25. Id. at 1800. Schwartz and Clear recognize that the "outrage" of rape "is not simply the sexual violation, but rather the fear, degradation and physical injury accompanying the act." Schwartz & Clear, supra note 20, at 144-45 (quoting Helen Glenn Furt, Washington’s Attempts to View Sexual Assault as More than a "Violations" of the Moral Woman, 1975 GUNZ. L. REV. 155). Their recognition of the "outrage" of rape, however, is meaningless because it does not prompt them to include in their calculus the harm of rape the injury of the sexual violation itself and the resulting fear and degradation of the act. Instead, they focus exclusively on the physical injury.
27. Davis, supra note 18, at 104.
28. Id. at 105-06.
29. See Robin L. West, Legitimating the Illegitimate: A Comment on Beyond Rape, 93 COLUM. L. REV. 1442, 1448 (1993) [hereinafter West, Legitimating the Illegitimate] (observing that "[f]rom the victim’s perspective, unwanted sexual penetration involves unwanted force, and unwanted force is violent"); see also Henderson, Rape and Responsibility, supra note 6, at 157 ("Metaphors for the pain of forced penetration—stabbing, tearing, tearing—do not really capture the body-shattering pain of forced intercourse."); MacKinnon, Feminist Theory of the State, supra note 7, at 180 ("The problem is that the injury of rape lies in the meaning of the act to its victim, but the standard for its criminality lies in the meaning of the act to the assailant. Rape is only an injury from women’s point of view. It is only a crime from the male point of view, explicitly including that of the accused.").
is not painful, that forcible intercourse is not violent, and that the rape victim
does not fear for her life in the way a beating victims does.\textsuperscript{30}

That rape law, in essence, requires a rape victim to be physically injured before
it recognizes that a crime has been committed exposes a fundamental defect in the
law. According to Robin West, this defect is that “women’s injuries are often not
recognized or compensated as injuries by the legal culture. . . . Women’s suffering
for one reason or another is outside the scope of legal redress.”\textsuperscript{31} Dorothy Roberts
echoes West’s frustration with the criminal law’s inability “to comprehend
completely the particular harms of women’s sexual violation.”\textsuperscript{32} Limiting the
cognizable harm of rape to physical injury means that nonstranger rape, because it
often involves no physical injury, will not be recognized as a serious crime. In
contrast, a more complete identification of rape’s harm recognizes nonstranger
rape as a serious crime because this broader view accounts for 1) the psychic harm
to the victim; 2) the violation of trust suffered by a woman when she is raped by a
nonstranger; and 3) the harm done to all women, even those who are not victims of
rape.

1. Psychic Harm

According to Henderson, rape “is a form of soul murder. A crime which
confronts its victims with death is not sex.”\textsuperscript{33} For the victim of a rape, regardless of
whether her attacker is a date, a spouse, a friend, or a stranger, the very experience
of rape denies that she is a person, that she exists.\textsuperscript{34} “When a woman’s existence
just does not matter, intercourse becomes rape. . . . [T]he important factor is

\textsuperscript{30} Henderson, Rape and Responsibility, supra note 6, at 174-75; see also Estrich, supra note 1, at 1183
(“[W]hat makes violent rape different—and more serious—than an aggravated assault is the injury to personal
integrity involved in forced sex. The same injury is the reason forced sex should be a crime even when there is no
weapon or no beating. In a very real sense, what does make rape different from other crimes, at every level of the
offense, is that rape is about sex and sexual violation.”).

West, Hedonic Lives], “The pain we feel is itself different (as are our pleasures) . . . . The perceptual error [the legal
culture has made] is in failing to understand the difference—not the sameness—of our subjective hedonic lives. If
the pain women feel is in fact discontinuous from—different than—what is experienced by men, then it is not
really surprising that the injuries we sustain are trivialized or dismissed by the larger male culture.” Id. at 85.

\textsuperscript{32} Roberts, supra note 3, at 362; see also MacKinnon, Feminist Theory of the State, supra note 7, at 173
(arguing that many men do not understand how women who are not virgins can be raped because they do not
understand how such a woman “loses anything when subsequently raped. To them women have nothing to lose. It
is true that dignitary harms, because nonmaterial, are ephemeral to the legal mind. But women’s loss through rape
is not only less tangible; it is seen as unreal.”).

\textsuperscript{33} Henderson, Review Essay, supra note 2, at 225; see also West, Legitimating the Illegitimate, supra note 29,
at 1448 (“Rape accompanied by additional acts of violence is no doubt a worse experience than what we
misleading think of as ‘nonviolent’ rape—rape in which the only demonstrable violence is the violence of
penetration. . . . Both involve violent assaults upon the body. Both are experienced and typically described, as
more like spiritual murder than either robbery or larceny.”) (emphasis added).

\textsuperscript{34} Henderson, Review Essay, supra note 2, at 226.
non-existence.”

Lynn Hecht Schafran adopts a more clinical perspective to argue that the definition of violence must be expanded to include injury to a victim’s psyche. That is, rape, irrespective of whether a victim suffers physical injury, is violent because of the psychic trauma it inflicts upon the victim. According to one study Schafran cites, the prevalence and trauma of rape represents a “major determinant of American women’s mental health.”

The impact of rape upon its victim differs with respect to the type of rape. However, it is not necessarily clear that victims of stranger rape suffer greater psychological trauma than victims of nonstranger rape. One study cited by Julie Allison and Lawrence Wrightsman concluded that victims of highly violent rapes modified their life-style more than other rape victims. For example, victims of the most brutal rapes severely reduced their risk-taking behaviors; they often refrained from walking alone or even going out. These behaviors may cause the perceptions of vulnerability to become even more salient. In the same study, victims of nonviolent rapes reported as much difficulty as those who experienced violent rapes. The study suggested that the these victims “may be more prone to blaming themselves, and hence experiencing higher levels of guilt. . . . [T]hey may begin to question themselves and wonder if there was not more they could have done to avoid the situation.” Other studies suggest that victims of nonstranger rapes may experience longer periods of recovery in part because such rapes may act as “the catalyst for more feelings of guilt and self-blame and thus decrease the

35. Id.

36. See Lynn Hecht Schafran, Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist, 20 Fordham Urb. L.J. 439, 441 (1993) (“The inability to recognize the damage caused by a ‘nonviolent’ rape trivializes the seriousness of the crime and devalues the individual victim, Judges and attorneys must expand their definitions of violence to include injury to the victim’s psyche.”).

37. Id. at 453.

38. Id. The psychiatric community characterizes Rape Trauma Syndrome (RTS). “which identifies the victim’s psychological and emotional responses to rape,” as a post-traumatic stress disorder. Linda A. Purdy, Note, Distinguishing Rape: A Definitive Approach to Sexual Assault, 10 Vt. L. Rev. 353, 370 (1985). Broadly, the short term symptoms of RTS include “severe loss of control over the victim’s everyday activities, evidenced by an inability to eat or sleep, intestinal disorders, and fears of physical injury and death. During this phase a victim has vivid recollections of the attack and many experience intense feelings of degradation, humiliation, guilt, shame, anger, and revenge.” Id. (citations omitted). In the long-term phase of RTS, victims suffer from “long-term sleep disorder, depression, and a development of phobias based on the circumstances of the attack. These phobias include fear of being indoors or outdoors, of being alone or in [sic] crowd, and of sexual activity.” Id. at 371.

39. See ALLISON & WRIGHTSMAN, supra note 5, at 70.

40. Such evidence does not prove conclusively that a stranger rape inflicts greater harm on its victim than that inflicted by a nonstranger rape. The common element of rape victims’ post-rape experience, irrespective of the type of rape, is a sense of vulnerability. Presumably, women modify their behavior in ways that correspond to the source of that vulnerability. The study Allison and Wrightsman cite seems to support that conclusion. Victims of strangers modify their behavior in the public sphere, whereas victims of nonstrangers may modify their behavior in the private sphere.

41. ALLISON & WRIGHTSMAN, supra note 5, at 164.

42. Id. at 165.
victim’s overall trust in others.”43

Moreover, as compared to victims of nonstranger rape, victims of stranger rape are more likely to seek support from others to deal with their experience. This difference is significant because talking about the ordeal has important therapeutic value.44 Victims of nonstranger rape tend not to discuss their attacks because they experience heightened feelings of guilt and self-blame. By remaining silent, victims of nonstranger rape may suffer a greater psychological cost than victims of stranger rape “whose open discussion of their experiences alleviates some of the psychological symptoms.”45

2. Violation of Trust

Another harm suffered by a victim of nonstranger rape is the violation of the trust she reposed in her attacker. The danger to a woman in a preexisting relationship—regardless of its duration or nature—is that a woman’s decision to trust a familiar person may make her less wary of the potential threat this person represents to her.46 If a rape occurs, the victim not only suffers the trauma and injury of the sexual violation itself, but she also suffers the injury to this trust relationship. According to Allison and Wrightsman, this breach of trust may cause the victim to doubt her “identity as a social being” and to ask herself whether she is “competent to function in relationships.”47

Beverly Balos and Mary Louise Fellows invoke the notion of trust to argue that a rapist should be held to a heightened duty of care with respect to his victim. According to the existing judicial assumption, proof of a prior acquaintance allows a defendant to invoke a consent defense to the charge of nonstranger rape. Balos and Fellows propose an alternative model of consent which is based upon the doctrine of confidential relationship.48 Under their model, evidence of a prior acquaintance between the victim and rapist would impose a higher duty of care upon the rapist to obtain consent by positive words or actions.49

43. *Id.* These authors note, however, that other studies report that there are “no differences in the responses of individuals one month after the rape as a function of different types of rapes.” *Id.* at 166. The authors interpret these inconsistent results as reaffirming the point that “each rape is a complex and perhaps idiosyncratic event.” *Id.*

44. See *id.* at 71.

45. *Id.*

46. See Beverly Balos & Mary Louise Fellows, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 MINN. L. REV. 599, 618 (1991) (“The key is whether a connection has been made so that the victim’s familiarity with the defendant may lead her to trust him to respect and act in her interest.”).

47. Allison & Wrightsman, supra note 5, at 69.


49. *Id.* at 605-07. “If the civil doctrine of confidential relationship were transported to the criminal arena, proof of a preexisting relationship would create a presumption that the parties reposed trust in each other and, based on that presumption, the law would require each party to exercise a heightened duty of care... [T]he criminal law should presume trust from the fact of familiarity between the parties.”.)
3. Harm to All Women

A further distinction between assault and rape is that assault, unlike rape, does not “create fear of half the population in many of its victims.” 50 Moreover, the fear of rape—and perhaps more important, the fear of men—is not necessarily limited to rape victims. “Almost all women, including those who have never experienced unwanted sex or battery, have experienced the fear of rape.” 51 In addition, all women modify their behavior because of the “threat of sexual harm,” even though “sexual violence happens only to some women.” 52 This suggests that the total social injury of rape—that is, the injury not only to a particular victim but to all women—must be taken into account. 53 Appreciation of this broader harm captures the cost rape imposes on the social fabric.

a. Economic and Social Limitations

As a group, women limit their lives, either consciously or unconsciously, because of the fear of rape. 54 Alexandra Wald argues that women’s vulnerability to the threat of sexual expropriation in the public sphere causes them to avoid participation in the public sphere and confines them to the private sphere. Women’s confinement to the private sphere diminishes the amount of female civic participation, limits women’s access to professions, and impairs women’s financial security and sense of self. 55 By modifying their behavior in response to the threat of rape, women are harmed economically. 56

The threat of rape, combined with the current structure of rape law, also influences women’s interactions with men in the public sphere. According to Lani

50. Henderson, Rape and Responsibility, supra note 6, at 175; cf. MacKinnon, Feminist Theory of the State, supra note 7, at 143 (“All this evidence of different forms of sexual abuse of women documents the extent and terrain of abuse and the effectively unrestrained and systematic sexual aggression by less than one-half of the population against the other more than half. It suggests that it is basically allowed.”). Davis observes that rape differs from other violent crimes in two ways. First, a rape victim, as compared to most victims of violent crimes, is less likely to have precipitated the attack. Second, a rape victim is “more likely than most to have her word doubted.” See Davis, supra note 18, at 71-72.


53. All types of crime may affect the behavior of and instill fear in nonvictims. For example, Dan Kahan observes that “law abiding citizens are more likely to leave a neighborhood that is pervaded by disorder. . . . Law-abiders who stick it out, moreover, are more likely to avoid the streets. . . . They are also more likely to distrust their neighbors. . . .” Dan M. Kahan, Social Influence, Social Meaning, and Deterrence, 83 Va. L. Rev. 349, 371 (1997) [hereinafter Kahan, Social Influence]. The difference with rape is that the only victim-avoidance strategy available to women is behavior modification. Unlike residents of a dangerous neighborhood who can shed their potential victim status by leaving the area, women do not have a choice about their potential victim status with respect to rape: by virtue of being female, something which a woman does not choose or control, a woman always is a potential rape victim.


55. Wald, supra note 52, at 492.

56. Id. at 493.
Anne Remick, current rape law “presents a woman with the choice of either refraining from all of the many behaviors the law or men might consider indicative of consent, or relinquishing her right to protection of her sexual autonomy.”

b. Male-Female Relationship Limitations

West’s work complements Wald’s argument that the threat of rape confines women to the private sphere. According to West, “the persuasive... unspoken and invisible fear of rape” prompts women to seek protection in a “consensual, protective, and monogamous relationship.” But even within the private sphere women may not be safe from the threat of sexual violence. Paradoxically, the very men to whom women look for protection may represent another source of danger to them.

The point at which the monogamous woman begins to feel that the sex in such a relationship is coercive, is precisely the point at which she has begun to re-define herself as self-regarding. When the woman begins to define herself as self-regarding rather than giving, the sex begins to look and feel more like rape—to feel scary—instead of feeling boring and unpleasant and deadening.

This potential danger, however, often is hard to detect; by the time a woman does detect it, it may be too late.

[O]ne reason why victims of acquaintance rapes may be less inclined to resist actively is a direct function of the characteristics of the rape. Before a rape can be resisted, the danger must be identified. . . . If the situation is not perceived to be dangerous at first, the act of resistance is altered. Initial reactions to intrusions of one’s limits may be that such intrusions are harmless. . . . Unfortunately, victims who wait too long before protesting are viewed as both desiring sex and sharing the blame for the rape.

Similarly, Balos and Fellows argue that by blaming rape victims, our culture reinforces women’s fear that they are vulnerable to attack by men. “Society constantly admonishes women for not taking adequate precautions against the ever-present risk of sexual assault. . . . Rather than seeking to create a society in which women need not fear male sexual aggression, society chides us for not being fearful enough.” Moreover, the failure to recognize that women do repose trust in male acquaintances—perhaps, as West argues, in order to seek protection from

59. Id. at 105.
60. ALLISON & WRIGHTSMAN, supra note 5, at 70.
61. Roberts, supra note 3, at 379.
male strangers—"is equivalent to saying that women have a duty to be wary." Balos and Fellows concede that not all women trust every male acquaintance, but they maintain that "this is no reason to deny women a right to trust."63

Women's fear of attack from both strangers and nonstrangers imposes a significant cost upon women as a class but also upon society in general. It is highly problematic and dangerous to the social fabric if half of the population either fears or distrusts the other half.64

IV. THEORY: THE ULTIMATE CRIME MAY NOT BE THE GREATER THREAT TO SOCIETY

This expanded vision of the harm of rape is the foundation for the argument that nonstranger rape should receive an equally severe penalty as stranger rape. All rape victims, irrespective of the nature of the rape or the identity of the rapist, suffer the same core harm. The injuries actually suffered by each rape victim may differ, but the total harm is the same to all victims. At a societal level, however, nonstranger rape poses a more insidious threat to the social fabric.

Although most people, male and female, probably are suspicious of strangers, they may be less attuned to the possibility that acquaintances represent a possible source of danger. Rape law's current policy signals to women that they must be equally, if not more, suspicious of nonstrangers than they are of strangers. Society is willing to provide women with some protection and redress if they are injured by strangers. In contrast, society assumes none, or only a small portion, of the burden of protecting women against nonstrangers.65 Women's need to be self-protective may have grave consequences for male-female relationships, and hence, the social fabric.

A. Foucault's Argument

Michel Foucault argues that society's notion of the "ultimate crime," that is, "a deed of such enormity that it violates all the most respected laws," is the reason

62. Balos & Fellows, supra note 46, at 605-06.
63. Id. at 606.
64. See, e.g., Allison & Wrightsman, supra note 5, at 69 ("In contrast, the date rape victim may have her identity as a social being brought into question—is she competent to function in relationships?").
65. This argument is premised on the idea that both the government and private individuals share the responsibility of law enforcement; the level of public law enforcement signals to individuals the extent of private precaution in which they should engage. See Omir Ben-Shahar & Alon Harel, Blaming the Victim: Optimal Incentives for Private Precautions Against Crime, 11 J.L. Econ. & Org. 434, 434 (1994). This Note, however, does not embrace Ben-Shahar's and Harel's model of contributory fault as the mechanism by which public law enforcement can produce socially optimal levels of private enforcement. See id. at 435 (proposing contributory fault regime in which victims who satisfy "due enforcement" standards are entitled to a high sanction against their offenders, whereas victims who do not meet "due enforcement" standards are entitled only to a low sanction against their offenders).
punishment exists. Foucault maintains, however, that the horror of the "ultimate crime" is not necessarily the proper standard according to which criminal penalties should be set. Rather, criminal penalties should address the consequences of the crime; that is, the "series of disorders that [the crime] is capable of initiating." As a result, the proper measure of proportionality between the penalty and the quality of the offense is "the influence that the violation of the pact has on the social order." The horror of the crime may not be in direct proportion to its influence; "a crime that horrifies the conscience is often of less effect than an offense that everyone tolerates and feels quite ready to imitate. There is a scarcity of great crime: on the other hand, there is the danger that everyday offences may multiply."

Foucault asserts that the penalty for a crime should be calculated in terms of its possible repetition; the penalty should account for the future disorder, not the past offense. The penalty should ensure that the particular criminal has no desire to recommit the crime and that the crime does not spawn imitators. Foucault's vision of a proper system of penalties is grounded in his assumption that the injury a crime inflicts upon the social order is "the disorder that it introduces into it: the scandal that it gives rise to, the example that it gives, the incitement to repeat it if it is not punished, the possibility of becoming widespread that it bears within it."

B. Application of Foucault's Policy Prescription to Rape

In the rape context, stranger rape—in particular, the sadistic rape—represents the "ultimate crime." A. Nicholas Groth identifies three patterns of forcible rape: 1) the anger rape, "in which sexuality becomes a hostile act;" 2) the power rape, "in which sexuality becomes an expression of conquest;" and 3) the sadistic rape, "in which anger and power become eroticized." Sadistic rapists derive intense gratification from intentionally maltreating their victims. Because such rapists find their victims' torment, anguish, distress, helplessness, and suffering pleasurable, these rapes often involve bondage and torture and frequently are characterized by a "bizarre or ritualistic quality." According to Groth, the amount of media attention paid to sadistic rapes is far out of proportion to their actual incidence. Groth concludes that the rarity and atypicality of these crimes explain the "inordinate amount of attention they receive."

66. MICHEL FOUCALT, DISCIPLINE AND PUNISH 92 (1975).
67. Id.
68. Id. at 92-93 (citation omitted); see also CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 64 (1764) ("[T]he true measure of crimes is—namely, the harm done to society.").
69. FOUCALT, supra note 66, at 93.
70. Id.
71. Id. at 92.
73. Id. at 44.
74. Id. at 58. In Groth's sample, only 5% of the offenders committed sadistic rapes. Of the three patterns of
Despite its rare occurrence, the cultural stereotype of rape embraces the sadistic rape model: Rape is a crime committed by a violent psychopathic stranger against an "innocent" woman. More recent estimates suggest, however, that nonstranger rape may pose the greater threat to women because "in most rapes the victim and her assailant were familiar to each other." Under Foucault's approach, even though the horror of sadistic rape is undeniably great it should not be the benchmark for punishing rape. The effects of rape law's focus on the sadistic rape include 1) enabling "many men who have forced their partners to have sex to distinguish their actions from those of 'a rapist,'" and 2) preventing victims of nonstranger rape "from complaining to authorities or seeking counseling, because they fail to meet the societal standard for what it means to have been raped."

Foucault's measure of the injury a crime inflicts upon society supports imposing severe penalties on nonstranger rapists. The current system of punishing nonstranger rape less harshly (if at all) than stranger rape violates two of Foucault's basic tenets: current rape law neither deters an individual rapist from repeating the crime nor discourages imitators. For example, a nonstranger rapist is likely to commit a number of rapes over a period. According to the results of one study, thirty percent of the college men surveyed responded that they would rape if they thought they could get away with it and fifty percent indicated that they would force sex on a woman if they thought they could get away with it.

This data suggest that the effect of nonstranger rape on the social fabric may be greater than that of stranger rape. If women must view all men—strangers and nonstrangers—as potential threats, women may respond by limiting their activities and participation in not only the public sphere but also the private sphere. That is, women may be wary of trusting even familiar men. The need for women to resort to increased self-protection even in their interactions with male acquaintances, friends, and partners could impede the development of male-female relationships, which in turn could have a significant impact on society at large.

Moreover, the potential for the future repetition of—and thus increased social disorder introduced by—nonstranger rape is even greater if the accepted baseline for "normal" heterosexual relations includes some level of coercion and force.

---

75. Henderson, Rape and Responsibility, supra note 6, at 132.
76. ALLISON & WRIGHTSMAN, supra note 5, at 63.
77. Henderson, Rape and Responsibility, supra note 6, at 133.
78. ALLISON & WRIGHTSMAN, supra note 5, at 65, 68.
79. See Henderson, Rape and Responsibility, supra note 6, at 171 (arguing that if the law made clear that men could not get away with rape "because women would not automatically be blamed for provoking men" many of these men might be deterred).
MacKinnon believes that "it's fairly common, and is increasingly known to be common, for men to seek sexual access to women in ways that we find coercive and unwanted. On those occasions the amount and kind of force are only matters of degree."  

Resort to MacKinnon's vision of heterosexuality is not necessary to argue that nonstranger rape is likely to be repeated given society's current vision of male-female relations. Henderson articulates an alternative model of heterosexuality, which she describes as the story of "male innocence-female guilt." According to Henderson, the primary impediment to recognizing rape as a real and frequent crime is the:

widely accepted cultural 'story' of heterosexuality that results in an unspoken 'rule' of male innocence and female guilt in law. By 'male innocence and female guilt,' I mean an unexamined belief that men are not morally responsible for their heterosexual conduct, while females are morally responsible both for their conduct and for the conduct of males.  

As long as this cultural story persists, rape victims will remain "silent and ashamed." As a result, "the violation of women's sexual autonomy is not the aberrant behavior of a few deviant men, but a pervasive social phenomenon supported by institutions and ideology."

V. LAW AND SOCIETY: MODELS TO JUSTIFY EQUAL SENTENCING OF STRANGER AND NONSTRANGER RAPE

A. Signaling Function of Law

A dialogue between law and culture exists. Dan Kahan posits that individuals commit crime, in part based upon "their perception of the values, beliefs, and behavior of other individuals." The law, through its "expressive and norm-regulatory effects," plays a role in shaping those perceptions. Laws that generate the appropriate social meaning enable a community to "point social influence in a

80. MacKinnon, Feminism Unmodified, supra note 7, at 83.
81. Henderson, Rape and Responsibility, supra note 6, at 130-31.
82. Id. at 177. Allison and Wrightsman echo Henderson's concern. They explain that a victim of nonstranger rape often does not label her assault a "rape" because she blames herself for contributing to its occurrence. See Allison & Wrightsman, supra note 5, at 63; see also Schafer, supra note 36, at 444 ("It is critical for judges and others to be aware that the severity of victims' responses is not lessened when the victim and rapist know one another... Indeed, research demonstrates that victims of nonstranger rape often experience even more severe and long lasting psychological trauma than the victims of strangers because they experience more self and societal blame for failing to prevent the rape.").
83. Roberts, supra note 3, at 387 (citation omitted); see also MacKinnon, Feminist Theory of the State, supra note 7, at 182 ("This analysis reveals the way the social conception of rape is shaped to interpret particular encounters and the way the legal conception of rape authoritatively shapes that social conception.").
direction that discourages criminality."85 Similarly, Estrich concludes that conduct is labeled “criminal” in order to “to announce to society that these actions are not to be done and to secure that fewer of them are done.”86

Both law and culture define the crime of rape. “The two reciprocally influence the understandings of what is and is not the crime of rape.”87 Traditional rape law not only reflected the greater sexist society but also legitimized and contributed to its sexist views.88 Under the current scheme, a rape victim is entitled to “vindicate her right to control sexual access to her body” only if she affirmatively expresses her nonconsent to the intercourse.89 As a result, rape law implies that a woman’s “freedom from nonconsensual sex is a privilege rather than a right. Furthermore, it suggests that a woman who fails to take such actions has caused her own rape.”90

B. Expressive Function of Punishment

In addition to imposing “disutility” on the offender, punishment is intended to express “the community’s moral condemnation” of the offender’s act.91 “[p]unishment is meaningful.”92 “By selecting an affliction of the appropriate form and

85. Id.
86. Estrich, supra note 1, at 1183 (arguing that society should be ready to announce its “condemnation of coerced and nonconsensual sex and to secure that we have less of it”) (quoting H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY 6 (1968)). In contrast, Davis argues that categorizing rape as a major felony means that it is likely that only the “cruellest rapes will be punished at all and then only if committed by social outcasts.” Davis, supra note 18, at 109 (observing that assigning severe penalty to a crime signals that it is a heinous act). Rape statutes also signal that rape should be feared more than battery, which in turn maintains the “unrealistic picture of rape and rapists.” Id.
87. Henderson, Rape and Responsibility, supra note 6, at 132. Stephen Schullhofer agrees and argues that we “want new legal norms eventually to change behavior and social consciousness. Meanwhile we want existing social conventions not to impede enforcement of the new norms.” Stephen Schullhofer, Taking Sexual Autonomy Seriously: Rape Law and Beyond, 11 LAW & PHIL. 35, 58 (1992). Schullhofer also argues that there needs to be a relatively close fit between legal terminology and ordinary usage. When labeling conduct as “rape” or “force,” legislators should not assign unfamiliar meanings to these familiar terms; if they do, “nullification” will occur because “[j]urors misunderstand the new message (it’s not really force, not really rape). Citizens do not even hear it.” Id.; see also Neal Kumar Katyal, Deterrence’s Difficulty, 95 MICH. L. REV. 2385, 2457 (1997) (“If, however, the law is out of step with community norms, its preference-shaping ability will be circumscribed by such norms.”). Schullhofer observes that a disconnect between the legal meaning and the common meaning of rape exists. Schullhofer, supra, at 60. The “uneasy relationship between law and language therefore makes rape law’s concern for sexual autonomy an ambiguous precedent.” Id. at 64. As a result, Schullhofer concludes that rather than expanding the definition of “rape” to include “other forms of nonviolent interference with free choice,” a better strategy is to create a class of crimes, distinct from rape, that place autonomy concerns at the center; this new class of offense would include “other unacceptable interferences with autonomous choice.” Id. at 65.
88. See Estrich, supra note 1, at 1093-94.
89. Remick, supra note 57, at 1112.
90. Id.
91. See Kahan, Social Influence, supra note 53, at 383 (“This expressive function of punishment matters for deterrence, because the information that punishment conveys about the attitudes of a society’s members helps to determine the direction of social influence.”).
severity, the community expresses condemnation of the wrongdoer and reaffirms its commitment to the values that the wrongdoer’s own act denies. Kahan acknowledges that to achieve the goal of deterrence society should and does use a mix of public law enforcement and private precautions. He observes, however, that the two deterrence mechanisms may not have equivalent social meaning. Rather, "one might convey public aversion to crime more effectively than the other, and hence exert a considerably greater deterrent effect through the mechanisms of social influence."

For example, the current mechanism for deterring nonstranger rape relies heavily—if not almost exclusively—on private precautions. Women are not entitled to the protection of the public rape law unless they meet the appropriate vision of the rape victim. The deterrent effect of private precautions, however, is sub-optimal because reliance upon private precautions does not adequately signal to men that society values women’s autonomy. “[T]he consent defenses, by drawing inferences of consent from certain actions of a woman, unjustly require her to refrain from those actions in order to protect her right to sexual autonomy.” Greater public enforcement—for example, prosecution of men who violate an affirmative verbal consent standard—would better deter nonstranger rape. “The problem of unjust inferences from a woman’s actions or inaction could be resolved by a standard mandating that the only legally recognizable signals of consent are verbal statements.”

Just as public law enforcement and private precaution may not have the same social meaning, Kenneth Dau-Schmidt argues that not all forms of public law

93. Id. See also Katyal, supra note 87, at 2457 (“The penalty reveals not only the power of the government, but the laws’ content as well. Each instance of punishment is, in short, a kind of fable, designed not only to shape preferences of the individual who is punished, but also those of society at large. . . . What follows is that the act of punishment generally serves as a preference shaper. If, however, the law is out of step with community norms, its preference-shaping ability will be circumscribed by such norms. . . .”).

95. Remick, supra note 57, at 1121.
96. See id. at 1105. Compare Estrich, supra note 1, at 1182 (proposing a "no means no" consent standard) with Remick, supra note 57, at 1105 (proposing an affirmative consent standard, under which "no" would mean "no," "yes" would mean "yes," and the lack of any verbal communication as to consent would be presumed to mean "no."). Remick’s consent standard is preferable to Estrich’s because it shifts the focus away from the victim to the rapist. The burden is not on the victim to establish nonconsent; any doubt about consent is resolved against the rapist, rather than against the victim. From a deterrence perspective, Remick’s affirmative consent standard is better than Estrich’s because it is intended to shape the behavior of the criminal rather than that of the victim. In contrast, a "no means no" consent standard focuses on the victim’s behavior and sends the message to potential victims (i.e., women) to modify their behavior rather than signaling to potential rapists to change theirs. Henderson criticizes Estrich’s "no means no" consent standard and focus on the rapists' mens rea because this approach leaves certain victims unprotected, including the “woman who, frozen with fear, neither cries nor says "no"” and the woman who “says ‘no’ long before the actual event, but who finally, giving up, ‘consents.’” Henderson, Review Essay, supra note 2, at 216–17. Henderson posits that a combination of the approaches might be optimal because it would “encompass the possible variations in women’s experiences of and reactions to rape.” Id. at 218.
97. Remick, supra note 57, at 1121.
enforcement have equivalent social meaning. According to Dau-Schmidt, criminal penalties represent more than the "price" of crime; they also express society's condemnation of the act and represent "an effort to discourage preferences for such activity."98 As a result, fines and imprisonment are not equivalent forms of punishment.99 The traditional economic model of crime argues in favor of using fines because it assumes that society promotes desired behavior by "shaping the individual's opportunities."100 Dau-Schmidt proposes an alternative model for shaping desired behavior. Instead of shaping preferences by constraining opportunities (i.e., "pricing" conduct), society should shape an individual's preferences "by increasing her taste for desired behavior."101

Family, friends, and associates play the greatest role in shaping an individual's preferences. Society too has a role in shaping preferences because these subgroups may not adequately promote society's interests. Even in the absence of such failure, society plays a role in "reinforcing the preference-shaping activities of family, friends, and associates, and ensuring that the preferences learned in these relationships are applied to people outside them."102

The optimal preference-shaping policy would change "those preferences for which the social benefits of the change exceeded the social costs."103 Preferences which give rise to what is characterized as criminal activity are those "whose realization is assigned no value in the social welfare function and which interfere with preferences whose realization is highly valued in the social welfare function."104 For example, stranger rape has been criminalized because society attaches a high value to a woman's preference for bodily security and integrity. Society is willing to protect this preference from interference by a rapist's little-valued105 preference for using violence and sex to act out his hostilities and frustration on a nonconsenting woman.106

In contrast, the law's current treatment of nonstranger rape, as viewed from the

99. See id.
100. Id. at 1.
101. Id. at 17. Dau-Schmidt's "preference shaping technology" relies upon three critical elements. First, the party seeking to shape another person's preferences must have a legitimate claim of authority over that person, or, at a minimum, have the confidence of that person. Second, this authority figure characterizes certain behavior as "good" or "bad" and reinforces that through rewards, punishments, and education. Third, either positive or negative examples can shape preferences. Id. at 17-18.
102. Id. at 19.
103. Id. at 20.
104. Id. at 21.
105. Richard Posner proposes that it might be necessary to account for the pleasure some rapists derive from their victims' lack of consent. Accordingly, he suggests that, at least in theory, a rapist should not be punished if the satisfaction he derives from the rape exceeds the pain and distress his victim suffers. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 218 (1992).
106. See GROTH, supra note 72, at 2 ("[Rape] is the sexual expression of power and anger. Forcible sexual assault is motivated more by retaliatory and compensatory motives than by sexual ones. Rape is a pseudosexual
perspective of Dau-Schmidt’s theory, suggests that society values the preferences of a nonstranger rapist more than it values those of his victim.\textsuperscript{107} That society is reluctant to label nonstranger rape a crime indicates that a nonstranger rapist’s preference for proceeding against a woman who does not consent to sexual intercourse with him is included within the social welfare function and is assigned a positive value. That the introduction of the element of a prior relationship affects the value assigned to a rapist’s preferences exposes society’s willingness to legitimate “notions of male entitlement and female contributory fault.”\textsuperscript{108} In contrast, a victim’s right to assert her sexual autonomy and control sexual access to her body is either not included in the social welfare function or is assigned a minimal value.\textsuperscript{109} As long as society assigns values to these competing interests in this way, the criminal law will not effectively deter nonstranger rape. To decrease the incidence of nonstranger rape, the criminal law’s preference-shaping ability must be harnessed to change both the preferences of individual potential offenders and societal norms.

Legal theory assumes that “the amount and form of criminal punishment is based on individual culpability.”\textsuperscript{110} Criminal punishment should be varied to take into account each offender’s characteristics and the extent to which they “indicate more or less deviant preferences and more or less susceptibility to different methods of preference modification.”\textsuperscript{111} That is, an individual should be subjected to punishment only if his “mental state and actions evidence culpability in the form of preferences that deviate from societal norms. Criminal law is viewed as part of an overall social process of shaping people’s preferences to conform to established social norms and notions of morality.”\textsuperscript{112}

\begin{itemize}
\item \textsuperscript{107} But see Remick, supra note 57, at 1137 (arguing that affirmative verbal consent standard would represent “a declaration that a woman’s interest in sexual autonomy is greater than a man’s interest in engaging in sexual activity without having to bother to inquire as to consent”).
\item \textsuperscript{108} Estrich, supra note 1, at 1162 (“Moreover, the reliance placed on prior relationship between victim and defendant and the circumstances of their initial contact, which may be the most important factors in determining disposition, tends to legitimate the very notions of male entitlement and female contributory fault which are at the core of the common law tradition that I have criticized.”).
\item \textsuperscript{109} See, e.g., supra text accompanying notes 22-25. But see Wald, supra note 52, at 461-62 (“[T]his Article argues that the ability to consent to or to refuse sex is a form of property that women have been denied. Moreover, it contends that the deprivation of this form of property is not accidental, but is a product of the historical treatment of women as property and of women’s relegation to the private sphere.”); cf. Porter, supra note 105, at 219 (“An important aspect of the increasing independence of women is the increasing control they demand over their sexual and reproductive capacity. Any form of involuntary intercourse impairs that control.”); Remick, supra note 57, at 1147 (“By respecting clearly stated expressions relating to willingness to participate in sexual activity rather than reinterpreting them to fit male visions of sexuality, it promotes female self-determination. It tells women that they have the absolute right to control sexual access to their bodies, thus making it clear to them when they have been unfairly victimized.”).
\item \textsuperscript{110} Dau-Schmidt, supra note 98, at 30.
\item \textsuperscript{111} Id. at 31.
\item \textsuperscript{112} Id. at 37.
\end{itemize}
Accordingly, a man who commits a violent rape against a stranger is deemed morally culpable because his conduct deviates significantly from established social norms and morality governing heterosexual relations. The less severe penalty (if any) imposed upon a man who forces a female acquaintance, against her consent, to have sexual intercourse with him indicates that society does not view his preferences as deviating as significantly from established social norms and morality governing heterosexual relations. Remick explains that “rape law reflects the sexually coercive society in which it operates. Although frowning upon aggressive sexual behavior at the extremes, our male-dominated society accepts a certain amount of coercion, aggression or violence against women as a normal, even desirable part of sexual encounters.”113 As a result, nonstranger rapists will not be held morally culpable until the baseline for normal heterosexual relations changes.

The criminal law’s “educative impact” can deter crime by shaping social norms and mores.114 Penalties send “messages” to society and these messages “exert a moral influence to inculcate social norms.”115 According to Neal Katyal, the educative impact of penalties is transmitted in a trickle-down fashion: The “information vanguards” observe the sentence structure and are the first to be influenced by “its relative treatment of crimes.” The information vanguards may transmit this information either as they learned it or in the form of “lore.” As time passes, knowledge of the treatment of crimes trickles down, “but now in a way no longer tied to sentencing. Instead, it may simply be said that activity X is worse than activity Y.”116 Regardless of the method of transmission, the information passed along effectively shapes social norms. Katyal explains that “lore—arising in the shadow of the law— influences behavior regardless of whether its origin is known.”117 Transmission by lore, however, faces a significant obstacle, which Katyal describes as the “lag of lore” or “the tendency for old messages from criminal law to stay entrenched when new messages take their place. The lag of lore predicts that the effect will be most pronounced when an old message is entrenched into public consciousness.”118

Katyal’s theory supports Henderson’s conjecture that, at some level, nonstranger rape may be among the most deterrable crimes.119 The key is to make use

113. Remick, supra note 57, at 1104.
114. Katyal, supra note 87, at 24-49 (“[A] penalty can have an unconscious deterrent effect—through a subtle change of people's mores.”).
115. Id. at 2448; see also Henderson, Rape and Responsibility, supra note 6, at 169 (“While radically changing the definition of a crime does not alone end criminal behavior, occasionally law reform can help shift or lead the way in affecting attitudes and behavior.”).
117. Id. at 2449-50.
118. Id. at 2452.
119. See Henderson, Rape and Responsibility, supra note 6, at 170.
of the law’s relative treatment of stranger rape and nonstranger rape to shape the baseline of heterosexual relations. “If the law of rape held men responsible for their actions by explicitly rejecting the story of male innocence and female guilt, it might help us in the larger project of redefining culture stories of heterosexuality and heterosexual behavior.”

Although many men are motivated to rape by anger, hatred, power, and control, others may reject rape and “sexual abuse as a behavior option” if they knew that they would be held responsible for their actions.

The lore of commensurate sentencing represents one possible mechanism for reshaping and raising the standards governing heterosexual relations. First, it is assumed that the conduct constituting nonstranger rape does not change from the pre-commensurate to the post-commensurate sentencing period. Rather, society’s response to such conduct changes. Commensurate sentencing signals society’s determination that morally and legally culpable deviations from the acceptable baseline of heterosexual relations include not only the most egregious forms of male aggression, but also the slightest forms of force or coercion. That a man’s same conduct suddenly constitutes rape, when formerly it was regarded as sex, means that the baseline defining the acceptable model of heterosexual relations (at least implicitly) has been raised. To conform their conduct to the legal standard, men will have to abandon the coercive practices that were inherent in the former model of heterosexual relations.

The “lag of lore” presents a significant obstacle to the practical implementation and effectiveness of enhanced penalties for nonstranger rape. The long history of men’s entitlement to control female sexuality and the entrenched position of the story of male innocence and female guilt will impede the law’s ability to transmit new mores governing heterosexual relations. That the change in societal norms will not be immediate is not, however, a persuasive argument for maintaining the current treatment of nonstranger rape. Instead, the power and legitimacy of the law should be harnessed to “reinforce [sic] what is best, not what is worst, in our changing sexual mores.” Changing the criminal law so that it rejects the paradigm of male innocence and female guilt can contribute to society’s abandonment of it, thereby offering the possibility of having “a positive effect on

120. Id.
121. Id.
122. A potential, and unintended, effect of commensurate sentencing is that nonstranger rape will not be viewed as a more serious crime than before but that stranger rape will be viewed as a less serious crime than before because it is equated with conduct traditionally not treated as morally or legally culpable. As a result, “lore” will be an effective method of transmitting the seriousness of nonstranger rape only if the penalties for stranger and nonstranger rape are equalized to a common high, not low, penalty. The penalty imposed must be severe in order to transmit society’s condemnation of both types of conduct.
123. Estrich, supra note 1, at 1181.
heterosexuality as participated in this country."124

VI. ECONOMIC ANALYSIS OF EQUAL SENTENCING OF STRANGER AND NONSTRANGER RAPE

In the criminal law context, a simple economic model of balancing costs and benefits dictates that an activity should be criminalized if the total costs it generates exceed the total benefits derived from it. If the principal "cost" of rape is defined only in terms of physical injury, nonstranger rape would not be criminalized under this model because it generates no cognizable costs. In contrast, a broader definition of the harm of rape exposes that nonstranger rape generates significant costs that outweigh the "benefits"125 of nonstranger rape.126

Although this cost-benefit approach suggests that nonstranger rape should be criminalized, it does not advance the argument that nonstranger rape should be punished commensurately with stranger rape. Rather, the economic concept of marginal deterrence provides the strongest argument against this proposal.

According to George Stigler, marginal deterrence represents a source of limitation on punishment. Stigler argues that criminals make marginal decisions; as a result, "the marginal deterrence of heavy punishments could be very small or even negative."127 Stigler explains the concept of marginal deterrence with the following example: "If the thief has his hand cut off for taking five dollars, he had just as well take $5,000."128

Richard Posner explains that marginal deterrence is "the incentive to substitute

124. Henderson, Rape and Responsibility, supra note 6, at 171.

125. See, e.g., Posner, supra note 105, at 218. Posner questions whether rape should be viewed as "a pure coercive transfer of either wealth or utility from victim to wrongdoer." Id. at 217-18. Rather, Posner proposes that rape may represent a bypass of the market of sexual relations. Id. at 218. Rape should not necessarily be perceived as a pure coercive transfer of utility if a rapist derives utility from his victim's lack of consent and if his utility outweighs the injury to the victim. Id.

126. Moreover, in the case of a nonstranger rape, the man, arguably, is the "cheapest cost avoider." That is, the man is in the best position to assure that nonconsensual sexual intercourse does not occur: he does not proceed unless he has received affirmative verbal consent from his partner. See Remick, supra note 57, at 1138 ("Given the harm to be avoided, it seems a small price to require this simple inquiry [as to whether the woman affirmatively consents to sexual intercourse].") It is reasonable, then, to impose a penalty on a man who fails to satisfy his duty to minimize costs (i.e., the harm of nonstranger rape).


128. Id.
less for more serious crimes."\textsuperscript{129} According to this classic model of marginal deterrence, irrespective of the nature of the relationship between the attacker and his victim, a nonviolent rape should never be punished as severely as a violent rape. Commensurate sentencing for violent and nonviolent rape would give a rapist the incentive to use greater physical force and violence against his victim.

Groth, whose study was limited to men who committed forcible rapes, found that rape is principally an aggressive act.\textsuperscript{130} Most forcible rapes are precipitated by the rapist’s attempt to “deal with stresses which he feels will otherwise destroy him.”\textsuperscript{131} As a result, the rapist often is unaware of or attaches no meaning to the consequences of his behavior: such a rapist “is not deterred by such logical considerations as punishment, disgrace to his family, injury to his victim, etc.”\textsuperscript{132} If a violent rapist essentially is undeterrable, marginal deterrence is irrelevant because punishment would serve the function of retribution and incapacitation, but not deterrence.

In contrast, the primary goal of punishing nonstranger rape is deterrence. Henderson is relatively optimistic that nonstranger rape is a fairly undeterrable crime. “The most deterrable group would undoubtedly be middle- and upper-class men of all colors; they would have the most to lose if convicted of rape. Another reason to have some confidence about deterrence is that rape is an easily avoidable offense. . . . By avoiding sexual intercourse with women who are not clearly consenting, the defendant can avoid criminality.”\textsuperscript{133} The concern that commensurate penalties for stranger and nonstranger rape will give a nonstranger rapist an incentive to use greater force against his victim probably is unfounded. For example, the results of one study indicate that “the most common type of strategy used by [a nonstranger rapist] was holding the victim down or twisting her arm. . . . Many times the kind of verbal threats used in acquaintance rapes and date rapes are different from those by strangers; they more likely capitalize on verbal “manipulation.”\textsuperscript{134} Assuming that the profile of a nonstranger rapist is sufficiently different from that of a stranger rapist, a nonstranger rapist’s use of force probably will be limited to that which is necessary to overcome his victim’s nonconsent. If overpowering his victim is the nonstranger rapist’s primary interest in force, then a commensurate sentencing structure should not cause him to increase the level of force he uses beyond the “more subtle types of coercion”\textsuperscript{135} he already employs under the existing sentencing regime.

\textsuperscript{129} Posner, supra note 105, at 226.
\textsuperscript{130} Groth, supra note 72, at 12.
\textsuperscript{131} Id. at 6.
\textsuperscript{132} Id.
\textsuperscript{133} Henderson, Rape and Responsibility, supra note 6, at 171 (citation omitted).
\textsuperscript{134} Allison & Wrightsman, supra note 5, at 65.
\textsuperscript{135} Id.
VII. CONCLUSION

Even though each incident of rape may be different, there is only one crime of rape. Rape is a distinct crime and should be treated as such. As a result, it is sound, both from a theoretical and policy perspective, to establish a unitary sentence for rape. Given the harm rape inflicts upon its victims and the damage it causes to the social fabric, the penalty imposed should be a severe one. Applying the term “rape” to a broader range of conduct would represent a significant departure from the current norms governing heterosexual relations. That such a change in policy would encounter resistance or be ineffective initially does not counsel against adopting the proposed commensurate sentencing scheme. Rape law carries within it the potential to do justice for individual victims and to improve the social norms governing heterosexual relations.