Challenges surrounding the discrepancy between social ideals of equality and justice and the reality of discrimination against minorities and women defined social movements focused on civil and women's rights in the 1960s and 1970s. But these movements also spawned gaps between their own abstract ideals and practical possibilities. This book is concerned with one of these discrepancies, namely, the rise of a rape reform movement that was legislatively ambitious but in many ways ineffective. Through the 1970s, a rape reform movement did prevail in securing changes in rape laws across the United States. These legislative reforms, however, which began with the model in Michigan in 1974 and were enacted to varying extents in every jurisdiction a decade later, were accompanied by two unintended consequences.¹

UNINTENDED CONSEQUENCES

One by-product of rape reform was that precisely because all state jurisdictions altered legal codes, the salience of rape as a social problem tended to dwindle. In retrospect, victim advocates, the public, and other constituent bodies
seemed placated by the flurry of legislative resolutions aimed at redressing the persecution of rape victims in place of the prosecution of rapists. Concomitant with this, the liberal and radical feminist reform movement that was so engaged in critique transformed into more of a social service delivery bureaucracy that grew dependent on government funding to survive, which seriously dampened its critical edge (Miller and Meloy forthcoming: 286). In point of fact, the antirape movement drew less and less attention from feminists as the issue of rape drew less attention in the aftermath of legislative changes and was replaced by a growing concern about domestic violence. Feminist scholarship and activism concerning rape and sexual assault have been dissolving over the many years since the early dynamic days. Some have even characterized feminist inattention to sexual violence as stultifying “stagnation” since these early years (Mardorossian 2002: 1).

The second unintended consequence of rape reform laws is equally noteworthy, and understandable given the conciliative effect of sweeping legal change. Once reforms were enacted on the books, relatively little attention was paid to the impact of laws in action. Yet even the limited research on reforms has shown that results have fallen far short of objectives. For instance, reforms have failed to increase reporting, arrest, and/or conviction rates; they have similarly failed to remove consent and resistance standards and the influential role that past sexual history evidence plays at trials (see chap. 3).

Consequently, reforms have largely served a symbolic and educative function (Chappell 1982; Osborne 1985; Polk 1985). This frequently observed conclusion, though, underestimates the success of reforms. To say that attitudes about rape shifted because the laws changed is to say a great deal, especially if we pause to appreciate pre-reform era beliefs about rape victimization. Nonetheless, the reforms implemented in day-to-day discretionary decision making have been tainted by persistent problematic attitudes, as the many women—and sometimes men—who are victims of rape and sexual assault continue to be twice victimized (Burgess 1975).

**EXTANT MODELS OF REFORM**

The limited assessments of the practical impact of rape reform laws, though, inspired a subsequent group of feminist scholars, albeit only a few, to put forward alternative models of rape reform. These are, in the main, academic treatises that are more philosophical or idealistic than practical or realistic. Scholars like Estrich and Schulhofer are joined by others like Pineau (1996a),
Reeves Sanday (1996), and Burgess-Jackson (1999) in crafting proposals for further change in rape law. The two notable books for systematic and creative recommendations in this realm are *Real Rape* by Susan Estrich (1987) and *Unwanted Sex* by Stephen Schulhofer (1998). That Harvard University Press published both texts reflects the importance this subject has been accorded in social science and legal circles. What both books underscore is that rape, unless sensationalized through occasional high-profile cases, is not taken seriously despite decades of legal and social change. Simple rape—or nonaggravated or “he said, she said” rape—is still not taken seriously (for elaboration, see “He Said, She Heard” and “She Said (She Felt), He Heard (Thought)” in chap. 7). The similarity between these two works and this book is that all three conclude that the legal system persists in unfair treatment of women who are raped or sexually assaulted in spite of massive reforms repealing discriminatory standards in legal codes. Even more important, these two previous works—kindred with the book here—point beyond the identification of such failures to delineate new reform models aimed at remedying the injustices diagnosed in rape case processing.

Estrich's book was a hallmark in establishing that rape reforms affected only so-called real, rather than simple, rape. The distinction between the two, according to Estrich, was that “real” rapes are stereotypic, aggravated, stranger rapes as compared to the majority (three-quarters or more) of “simple” acquaintance or date rapes that do not involve additional injuries, accomplices, weapons, and so on.4 *Real Rape* was groundbreaking not just because Estrich identified that reforms affected only “real” rapes but because she proffered an alternative legal framework especially targeting criminal culpability. The crux of Estrich’s “negligent liability” model was that unreasonable mistakes of consent to sex (made by defendants) should confer criminal responsibility for rape. Her innovative thinking went on to make the analogy between economic crimes and sexual assaults, pointing out that if money, rather than sex, were being sought in deceitful interactions, the behavior would be considered criminal. In essence, she argues that sex procured by false pretense should be criminal, just as money procured by deceit is fraud.

Schulhofer's “sexual autonomy” model is more theoretical and philosophical, as well as more extreme or radical compared to the conceptualizations that Estrich and I advance. Schulhofer's paradigm goes beyond affirmative consent reforms like those familiar from the highly publicized Antioch College Sexual Assault Code, which calls for positive indications of assent to sex acts at every stage of sexual encounters. He argues for observable, “actual words or conduct indicating affirmative, freely given permission to the act of sexual penetration”
Going still further, he asserts that the right of women and girls to sexual autonomy is the right to be free from any and all circumstances of coerced permission as defined in this way and, even more, free from any “unwanted sex,” as his book title designates.

BUILDING FROM PRIOR MODELS

My model uses Estrich’s landmark approach as a springboard but goes beyond her work in several respects. First, I expand the notion of negligent liability to encompass criminal recklessness in addition to criminal negligence. Second, I extend the host of legal changes to encompass rules of evidence that judges and juries are allowed to consider and jury instructions pertaining to the principles juries must apply in rendering verdicts. Examples of such changes include the shifting of the burden of proof when the consent defense is used, the introduction of presumptive involuntariness, nonagreement, and the de jure articulation of the irrelevance of drinking, dancing, and dress style to case findings.

The model espoused in this book views “affirmative consent” (where the presence of “yes” has to be shown to refute rape charges), not to mention Schulhofer’s “sexual autonomy,” as a demanding edge of reform, justified under only tightly defined circumstances (i.e., only when the defense wants to introduce the consent or mistake of consent defense to an accusation of rape). The integrity of Schulhofer’s model is incontrovertible; at the same time, though, its practicality is questionable. Calling for a new right for women (sexual autonomy) when long-standing rights are yet to be fully accepted, let alone fully realized, seems an unworkable strategy. Asserting a policy perspective that calls for a right that goes beyond a policy (like affirmative consent) that is not socially and politically accepted constitutes a questionable tactic. The lack of popular support for an affirmative consent policy is evident in the national ridicule that attended Antioch College’s affirmative consent policy, as well as in the fact that only three states have enacted affirmative consent into law over the thirty some years of reform.

It is for these reasons that the model laid out in this book is neither as radical as Schulhofer’s nor as radical as the lesser but still demanding affirmative consent law approach. But there is more. I devised my model to be one of political compromise, because I think this renders it more acceptable both publicly and politically. It makes the changes I advocate more realistic and achievable.
THE BOOK’S MODEL: REFORMING RAPE REFORMS

Middle-Ground Strategy

The directions my model maps out represent a middle ground between a weak and an extreme reform position. The weak position sees reforming the law as, by and large, an ineffective measure for problem resolution, accomplishing not much more than minor or symbolic results. On the other hand, one type of extreme reform position holds that virtually any/all legal change will be effective; in fact, legal change is often seen as a panacea, with no recognition of the discrepancy between law enacted and law in action. So-called liberal terminology is often associated with such perspectives. Another type of extreme position views only those stances that are radical departures from the status quo, for example, affirmative consent or sexual autonomy (or strict liability, see chap. 5), as reforms viable to accomplish any real change. My approach is somewhere in between these positions, incorporating the bulk of rape reform laws, for example, shield legislation and the repeal of corroboration, resistance standards, and so on, but going further than these reforms through the modification of rules of evidence and jury instructions the better to synchronize the reforms on the books with the reform in action in order to accomplish real change. Proposals emanating from this book would correct for historic discrimination by better aligning rape prosecution with other criminal prosecution but not go so far as to create unique privileges or rights (for victims) in rape cases.

My middle-ground model can be conceptualized as a form of feminist (left) realism. Left realism is a theoretical position (in criminology) whose adherents typically address or reappropriate the real issues of serious street crime and victimization that earlier critical theorists tended to overlook in their efforts to expose the rampant crimes and enormous victimization by the rich and powerful, for example, state, organized, white-collar, corporate, and transnational deviance and criminality. Left realists and feminists have benefited one another, with feminists influencing left realists by inserting pivotal concern about women as a subjugated group, just like class and racial/ethnic minorities, while left realists have drawn critical attention and political agendas back to street crimes, among them those affecting women. Some left realists have broadened their perspectives by incorporating pragmatic solutions to the real problems to which feminists call attention, such as those surrounding the violent victimization of women (DeKeseredy, Alvi, and Schwartz 2006; DeKeseredy, Schwartz, and Alvi 2006).
Patriarchy, like capitalism, is a structure that molds gender inequality and the more individualistic pain and suffering that men’s violence inflicts on women. Real, pragmatic gains (and not just tinkering types of insignificant changes) can be realized within extant (infra)structural (and superstructural) arrangements. Put differently, the feminist contribution to left realist criminology can be drawn on as a way of realizing a critique of the broader structures of inequality and domination/subordination while offering pragmatic, viable, and palatable ways to change the institutional and microlevel manifestations in gender relations and woman abuse.

There are other lenses through which to elaborate the view of my model as a middle-ground position between the weak or symbolic and radical reform stances. First, I present the model in the critical recognition that while new laws can make a significant difference, passage itself does not guarantee changes from past laws and practices; that is, the model does not suffer from the naïveté of seeing changing law as a cure-all. Second, my model accepts existing rights of females and victims. This stands in contrast to Schulhofer’s stipulation of females’ new right to sexual autonomy. Third, my model, while extending beyond reforms implemented to date, is nonetheless predicated upon historically accepted or extant, and not new or altered, legal rights and principles. This is true in terms of substantive law, (e.g., notions of criminal culpability: mens rea), and procedural law (e.g., jury instructions). It is worth underscoring in this context that my model accepts historically established rights of defendants as well. More specifically, the Fifth and Sixth Amendment rights—against self-incrimination, to a public trial by a jury of peers, to counsel, to confront one’s accusers, to call witnesses on one’s own behalf, and so on—stand respected. I am also protective of the constitutional principles underlying the criminal legal system’s workings, specifically those of fundamental fairness for all parties to a case, of due notice about law, about criminal definitions and legal obligations, and about the Fourteenth Amendment’s guarantee of equal protection under the law for all parties to a case.

My model is also far-reaching, incorporating recognition of, indeed focus on, simple rapes and sexual assaults between acquainted parties where drinking, dating, dancing, and so on, are involved. It is broad as well in addressing substantive as well as procedural legal changes in statute and in processes that were previously neglected in reforms that stopped short at changing the law on the books.

Viability

The model here should be more palatable and hence, I argue, more viable than more extreme models. In other words, the proposed new model is more prob-
able to see enactment that corresponds with objectives and implementation that makes a significant difference. This is important because one additional problem with previous reforms is that they pertain predominantly to de jure law, and this is where all the rape reforms of the past three decades have faltered: they have failed to deal with the de facto practices involved in the implementation of laws, however well or badly written. Based on extant legal rights and procedural principles and informed by existing practices that go hand in hand with the implementation of reform law, my model ought to be more readily accepted by constituents and legislators alike and hence more likely to be put into law and practice.

Lynn Chancer’s work suggests a feminist context for appreciating how my model represents a compromise strategy beyond binary choices like the weak and extreme reform stances that can open new inroads or, in other words, is viable and potentially effective. In her book *Reconcilable Differences* (1998), Chancer describes how binary, “either/or” extremes in feminism have yielded debates that can more productively be resolved through analyzing differences to find common points of view. In parallel fashion, my model can be seen as a conciliatory tactic that attempts to resuscitate rape reform from the quagmire that has settled between the camps that hold reforms can do little good anymore and the camp that insists reforms must be extreme to do any good whatsoever. Detailing an innovative array of changes that stay within the parameters of established legal rights and standards, with an eye toward regular criminal procedures, holds out the promise of a midpoint where the poles may meet and join forces to make a positive difference in combating rape victimization.

In this broader social context, then, *Addressing Rape Reform in Law and Practice* delineates a host of de jure and de facto problems with rape reform laws on the books and in practice. It moves beyond the limited academic literature on this subject by both analyzing existing reform laws and proposing a new model of rape and sexual assault law informed by the history of previous reform approaches’ successes and failures. At the same time, this book builds on the very few other theoretical approaches promulgated by scholars who have gone beyond critique to offer solutions for rape reform law. Moreover, my recommendations go beyond the legal model I advance to address pragmatic, organizational changes that influence daily implementation practices of law. Such changes make implementation with integrity more likely by targeting such things as informal decision making, compliance, and funding possibilities. My model is situated between the either/or positions of the liberal rape reform and radical feminist stances that have dominated approaches to this subject. My intention is to chart a new direction for sexual assault prosecution that prioritizes fairness in law and in implementation practices. This is simply crucial for it is de facto practices that
are pivotal and overlooked, an omission that has undermined the forging of authentic change in how rape and sexual assault are adjudicated.

Victim advocates, politicians, legislators, criminal justice officials, and the public ought to approve of the model for a number of reasons. It is designed to appease all these constituent groups and afford greater protection and justice for rape and its victims because it builds on successes instead of minimizing them. Symbolic, educative functions mean that some attitudes have changed; this is why there is evidence of the actual de facto removal of some discriminatory requirements, for example, resistance standards, and why we've witnessed a modicum of enhanced prosecution and conviction, as well as a measure of greater comparability between the ways rape and other crimes are handled in some jurisdictions (see chap. 3). This translates into improved outcomes and better treatment for rape victims. The model also is informed by the failures of reform. Instead of bemoaning that reforms didn't work or that changing rape law cannot solve the problems of discrimination against rape victims, the ensuing chapters develop step-by-step alternatives to remedy the problems that have persisted despite the best reforms. To put it in another way, relatively few works go beyond critique alone to map out the next wave of strategic moves, models, or paradigms. This is precisely the subject matter of this book.

The importance of statute change cannot be gainsaid. The law is a powerful, if not coercive, tool that can be harnessed in the struggle to alter the way we think about and treat rape and sexual assault. As Berliner put it, “the law can and should play a normative role in condemning [deceptive or threatening] behavior” (1991: 2703). The law is viewed by most as the ultimate account of what is right, good, and proper versus what is wrong, bad, and offensive. And this account is largely taken as neutral, configured to provide equal protection of all societal members’ best interests. This is how law so often gets taken for granted, or perceived as inherently, unquestioningly right, or becomes hegemonic. Because of this, the law can be a persuasive influence on attitudes: those of the public and those of criminal justice personnel. Criminal justice officials are supposed to be accountable to the public and influenced by any shift in the public’s attitudes toward the cases they process through the legal system. Criminal justice personnel are also likely to internalize some of what they must practice on a daily basis. These factors combine to facilitate making the law in action more closely mirror the law on the books.

Comprehensive Change

The comprehensive nature of the model strengthens the potential for its proposals to be effective. Suggesting changes beyond the legal model in order to render
change more viable and implementation more efficient in meeting goals (than previous reforms achieved) is one consideration that makes for comprehensiveness in change. Another lies in the comprehensiveness of the model itself.

The paradigm of reform is broad and detailed in terms of both its theoretical base and its incorporation of substantive and procedural law, for examples, rules of evidence and juror instructions, as written and practiced. The breadth of the paradigm extends beyond extant law yet does not stray from it to create law outside of existing legal principles; for instance, the model broadens conceptualization of what constitutes sexual assault, specifically sexual assault by duress and sexual assault by fraud or guile, within the purview of existing legal doctrine. Similarly, it extends the legal doctrine of mens rea from homicide offenses to rape. The focus, too, is extended, from reform that in the past was applied predominantly to the stereotypical stranger-out-of-the-bushes “real” rape to a systematic set of reforms aimed at the bulk of rape, which is “simple,” or date, acquaintance, nonaggravated rape. The way the reforms are interlocking and mutually reinforcing further strengthens the model. It safeguards against corrupt influences like sexist beliefs and reluctance to change, because the reforms are set up in such a way that each component props up the others in reciprocal fashion, that is, each part of the model complements what precedes and follows it, and in quite an explicit manner. This should help close the loopholes that previous reforms left wide open, letting discrimination in requirements, standards, and victim/case treatment continue to prevail. An additional feature of the model fleshed out in the following chapters that would facilitate the accomplishment of objectives concerns building up visibility and accountability for criminal justice decision makers, particularly for the informal decisions, for example, plea deals, that are routinely made. The last chapters suggest several concrete ways to ensure a better match among the goals, means, and end results of reform maneuvers.

Devising a paradigm of reform to serve as a model for the states is really nothing new. The federal government does it all the time: federal rules of evidence, federal sentencing guidelines, federal rules of criminal procedure, the model penal code, and so on. These exert a good deal of influence on the laws states develop individually. In addition to the obvious advantage of a national example to influence state law is the added benefit of greater consistency in changes across jurisdictions, as well as, once again, the reinforcing potential of one jurisdictional change on another.

It is important to reinvigorate rape reform to pursue progress for rape victims. In the interests of fairness, justice, and crime prevention and control, we simply must level the playing field. Victims remain at serious disadvantage, suf-
ferring a veritable host of injustices and discrimination. To say that balancing the scales to promote greater equality for rape victims is long overdue is an understatement. Defendants enjoy special privileges, like requiring victims to have resisted, like legally impugning the character, truthfulness, and reputation of rape victims with their past sexual activities and even past interactions (even if not involving coitus), and like the need for them to express nonconsent—which is not required in other crimes and prosecutions. It is high time to give victims a fair shake, to dismantle the zealous overprotections for men accused of this crime, which have been buoyed up by the myths about false accusation, ulterior motives, and so on, commonly embraced when rape charges are levied. Because of such factors, rape continues to be, as the FBI claimed over thirty years ago, the “most notoriously underreported offense in the country” (1975: 15). The unique barriers those victimized by rape face dissuade them from reporting and prosecuting offenders; the effect is that they are discriminated against: denied access to and protection from the criminal justice system. Just think about the Kobe Bryant case. The publicity and resultant trauma were so overwhelming that the alleged victim finally had to retreat and withdraw her charges. The physically disabled have been empowered to sue to gain access to courts; rape victims, disabled for different reasons, are entitled to similar recourse (Lane 2004: A1). Leveling, balancing, and seeking comparability are not efforts to seek privileges or advantages for victims. Rather, serious changes are desperately needed in order to counterweigh what has been a gross level of inequality and unequal access to legal protection for a crime that is “particularly difficult to prosecute” (Temkin 2002: 238; also see Adler 1987; Du Mont and Myhr 2000; Estrich 1987; Fairstein 1993; Hunter, Burns-Smith, and Walsh 2000; Vachss 1993). If a “serious imbalance between the rights of criminal defendants and the rights of crime victims” (Kilpatrick, Beatty, and Howley 1998: 1) characterizes adjudication of crime in general to the point of arguing for a constitutional amendment (as with victims’ rights legislation), the degree of “imbalance” between the rights of the accused and the rights of victims in rape cases cannot be gainsaid.

POLITICAL CLIMATE AND BACKLASH

The dire need to rectify such inequity is even more pronounced given the regression and erosion of gains brought about by the reign of the conservative religious right and the backlash against the civil rights and feminist movements in general and the rape reform movement in particular. In many quarters across the country, backlash criticism of exaggeratedly overreaching protection for victims, of
excessive vilification of men, and of the criminalization of uncomfortable sex by feminist rape reforms has replaced concern about reforming rape law. A new generation of young women thinks equality has arrived and that women need no special help or special protections. This third generation of alleged feminists condemns second-wave feminist and rape reform movements for their allegedly radical tenets. These new myths have to be addressed. As Allred and Somers recently put it (when commenting on the Kobe Bryant rape case), fallacies about rape and rape law are so pronounced that it is “time to reread Susan Brownmiller’s Against Our Will” (2004: 63). I would go much further: we must confront and correct these new backlash myths about rape, rape law, and rape victimization before they wreak more destruction in the struggle for equality and fairness for all. A new wave of changes will go far in such an effort.