



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 66 | Number 6

Article 9

9-1-1988

State v. Etheridge: The General Fear Theory and Intrafamilial Sexual Assault

Serina Montgomery Garst

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Serina M. Garst, *State v. Etheridge: The General Fear Theory and Intrafamilial Sexual Assault*, 66 N.C. L. REV. 1177 (1988).

Available at: <http://scholarship.law.unc.edu/nclr/vol66/iss6/9>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

***State v. Etheridge*: The General Fear Theory and Intrafamilial Sexual Assault**

A man drives his daughter to a secluded area. He tells her to lie down on the car seat. He has sexual intercourse with her. He began having intercourse with his daughter when she was eleven; she is now fifteen. Is this rape?

In 1985 the North Carolina Supreme Court, on similar facts, held no rape had occurred because the victim's submitting to the act out of a "general fear" of her father was insufficient to constitute forcible rape.¹ The North Carolina Supreme Court recently reversed that decision, holding such a general fear of a parent can suffice as the force necessary to commit a forcible sexual assault.² This decision, *State v. Etheridge*,³ represents a more realistic approach to intrafamilial sexual abuse and the relationship between the abuser and the victim.

The popular conception of a person who sexually assaults children is someone on the fringe of society, addicted to alcohol or drugs, insane, or sexually frustrated, but certainly a stranger.⁴ If this stereotype were accurate, preventing child sexual abuse through identification and prosecution of the assailant would be less difficult. Unfortunately, the stereotype is not accurate. The vast majority of victims of child sexual abuse know their abusers. Approximately eight out of ten abusers are members or friends of the victim's family.⁵

A special concept of force is required to adequately reflect the nature of these relationships. The decision in *Etheridge* stands as an attempt to accommodate the peculiar problems of intrafamilial sexual assault. This Note examines *Etheridge* and the history of the "general fear" theory in North Carolina. The Note concludes that *Etheridge* is a sound decision and was much needed to fill the gaps in North Carolina's statutory scheme of preventing child sexual abuse.

According to the State's evidence, Curtis Etheridge began sexual activity with his son when the son was age eight and with his daughter when she was

1. *State v. Lester*, 70 N.C. App. 757, 321 S.E.2d 166 (1984), *aff'd per curiam*, 313 N.C. 595, 330 S.E.2d 205 (1985).

2. *State v. Etheridge*, 319 N.C. 34, 47, 352 S.E.2d 673, 681 (1987).

3. 319 N.C. 34, 352 S.E.2d 673 (1987).

4. J. MOHR, R. TURNER & M. JERRY, *PEDOPHILIA AND EXHIBITIONISM* 20 (1964).

5. *Id.* at 28; R. ESKAPA, *BIZARRE SEX* 159-161 (1987); F. RUSH, *THE BEST KEPT SECRET 2* (1980); Summit, *Causes, Consequences, Treatment and Prevention of Sexual Assault Against Children*, in *ASSAULT AGAINST CHILDREN* 47, 49-51 (J. Meier ed. 1985). The overwhelming majority of child sexual abusers are male. F. RUSH, *supra*, at 2; Summit, *supra*, at 51. Most are under 35, of normal intelligence, and from a wide range of social, economic, and educational backgrounds. R. ESKAPA, *supra*, at 158-61. Although the abusers' motivations vary, "[m]ost offenders are relatively indifferent to the needs and feelings of children, even though the adult may see himself as uniquely caring and devoted to his child love." Summit, *supra*, at 52.

Surveys conducted on adult women indicate that 20 to 30 percent were sexually victimized before reaching age 13. Summit, *supra*, at 49-50. Estimation of male victims has proven difficult due to social attitudes making males reluctant to admit the abuse. *Id.* at 50. A high possibility exists that boys are abused more often than girls "since they are the preferred target of habitual pedophiles." *Id.* The average age of the victim is between 11 and 14, and parent-child sexual abuse usually begins when the child is age eight. *Id.*

six.⁶ Defendant did not use excessive violence or threats against his children.⁷ The charges arose from five sexual incidents in late 1984 and early 1985. Four of these incidents consisted of vaginal intercourse between the defendant and the daughter, then age twelve, the fifth was an instance of anal intercourse with his son, then age thirteen.

On the day of the fifth incident, Etheridge was home alone with his son.⁸ Etheridge told his son to go upstairs, followed him to his room, and ordered him to undress. The child refused. The father told him to "[d]o it anyway,"⁹ and the child complied. Etheridge then had anal intercourse with the boy.¹⁰ After the act, Etheridge threatened harm to the son if he revealed what had occurred. The son described the incident to a friend who alerted the Department of Social Services.¹¹

Etheridge was convicted of a second-degree sexual offense¹² for the incident with his son and four counts of first-degree rape for the four incidents with his daughter.¹³ Findings of force and lack of consent were not required to convict Etheridge of the first degree rape charges since the daughter was under thirteen and intercourse with her fell under the absolute prohibition of the "statutory rape" provision.¹⁴ The trial judge instructed the jury that the boy's fear of his father based upon the authoritarian nature of the parental relationship would be sufficient to constitute the force necessary to commit second-degree sexual offense.¹⁵ The defendant objected to this instruction and appealed, claiming the

6. *Etheridge*, 319 N.C. at 36, 352 S.E.2d at 675.

7. The boy testified his father once threatened to send the child to training school due to disciplinary problems. *Id.* at 37, 352 S.E.2d at 676.

8. *Id.* at 37, 352 S.E.2d at 675.

9. *Id.*

10. *Id.*

11. *Id.*

12. The North Carolina statute prohibiting such sexual offenses provides in part:

(a) A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person:

(1) By force and against the will of the other person. . . .

. . . .

(b) Any person who commits the offense defined in this section is guilty of a Class D felony.

N.C. GEN. STAT. § 14-27.5 (1986). "Sexual act" is defined as: "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes." *Id.* § 14-27.1(4). A Class D felony is "punishable by imprisonment up to 40 years, or a fine or both." *Id.* § 14-1.1(a)(3).

13. *Etheridge*, 319 N.C. at 36, 352 S.E.2d at 675. Defendant was also convicted of one count each of taking indecent liberties with a child and crime against nature for the incident with the boy. *Id.* Neither of these offenses requires force or a lack of consent. N.C. GEN. STAT. §§ 14-177, 14-202.1 (1986).

The jury found Etheridge guilty of four counts each of first degree rape, taking indecent liberties with a child, and incest for the four instances of sexual intercourse with his daughter. *Etheridge*, 319 N.C. at 36, 352 S.E.2d at 675.

14. See N.C. GEN. STAT. § 14-27.2(a)(1) (1986).

15. The trial judge initially instructed the jury to return a conviction if it found that:

[T]he son, out of fear and respect for the father, did what his father instructed him to do . . . and that he would not have [submitted to the act] except for such fear and the knowl-

State's evidence insufficient to prove force.¹⁶

The defendant appealed directly to the North Carolina Supreme Court, arguing that the verdict was contrary to prior decisions of that court. The defendant's argument relied heavily on *State v. Alston*¹⁷ and its progeny, *State v. Lester*.¹⁸ In *Alston* the court held an adult victim's general fear of an attacker based on knowledge of prior acts of violence by the attacker was insufficient to show the force necessary to uphold a conviction of rape.¹⁹ In *Lester* the court affirmed a North Carolina Court of Appeals decision holding such fear insufficient to support a father's conviction for second degree rape of his fifteen-year-old daughter.²⁰

The North Carolina Supreme Court in *Etheridge* overruled *Lester* and upheld the defendant's conviction for second degree sexual offense.²¹ The court stated "[t]he youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose."²² The court concluded that the relationship between *Etheridge* and his son could support a finding of constructive force.²³

Force and lack of consent are elements of both first and second degree rape and sexual offense unless the victim is under twelve years of age or incapacitated.²⁴ Consent is a defense to a sexual offense charge, but consent induced by

edge that his father, who was an adult, could discipline him in one or more ways if he did not obey the instructions . . . that the force was sufficient to overcome any resistance which [the boy] might have normally gained from some other person.

Record at 24, *Etheridge*, 319 N.C. 34, 352 S.E.2d 673 (No. 141A86). The defendant objected to this instruction and asked for a curative instruction, which the judge gave as follows:

[W]hen the son failed to remove his clothes, his father then instructed him again in a more forceful or louder voice in such a manner as to imply the threat of force or discipline to the son by the father if he did not do what the father directed him to do, and the father then directing him to get on the bed and lay down, which the son did, and that such force or threat of force, out of respect and fear for the father, was sufficient to overcome any resistance.

Id. at 26.

16. *Etheridge*, 319 N.C. at 44, 352 S.E.2d at 680. Defendant also appealed the admission of the testimony of a nurse from whom he sought medical treatment while in police custody. *Id.* at 38-39, 352 S.E.2d at 676. The nurse testified that the defendant, fearing he had a venereal disease, told the nurse he had sexual contact with his son and daughter. *Id.* Defendant argued this testimony violated his physician-patient privilege, the *Miranda* ruling, and N.C. GEN. STAT. § 130A-163 (1986) which provides for confidentiality of records of venereal disease. *Etheridge*, 319 N.C. at 38-44, 352 S.E.2d at 676-680. The court found each of these arguments to be without merit. *Id.*

17. 310 N.C. 399, 312 S.E.2d 470 (1984).

18. 70 N.C. App. 757, 321 S.E.2d 166 (1984), *aff'd per curiam*, 313 N.C. 595, 330 S.E.2d 205 (1985).

19. *Alston*, 310 N.C. at 409, 312 S.E.2d at 476.

20. *Lester*, 70 N.C. App. at 761, 321 S.E.2d at 168.

21. *Etheridge*, 319 N.C. at 47, 352 S.E.2d at 681.

22. *Id.*

23. *Id.*

24. If the victim is "under the age of 13 years," the rape or sexual offense is in the first degree. N.C. GEN. STAT. §§ 14-27.2, 14-27.4 (1986). If the victim is "mentally defective, mentally incapacitated, or physically helpless," and the defendant knows or reasonably should know the victim's condition, the offense is in the second degree. *Id.* §§ 14-27.3, 14-27.5. Consent and lack of force are not defenses to charges involving either of these victims. *See, e.g., State v. Cobb*, 395 N.C. 1, 20, 243

fear of bodily harm is invalid.²⁵ The requisite force need not be actual physical force. Threats of serious bodily injury are sufficient to constitute constructive force.²⁶

What acts constitute constructive force is determined on a case-by-case basis. In *State v. Alston*²⁷ the North Carolina Supreme Court rejected as constructive force a history of physical abuse perpetrated on the victim by the defendant.²⁸ For six months the defendant and the victim in *Alston* lived together in a consensual sexual relationship.²⁹ Like any couple, they argued; unlike most couples, however, the defendant sometimes resorted to violence. After one such violent argument, the victim ended the relationship. One month later the defendant approached the victim outside the school she attended.³⁰ He grabbed her arm and the two began walking. The defendant released the victim's arm, but because she was afraid, she did not run away.

The two walked around the neighborhood discussing their relationship. During the conversation, the defendant threatened to "fix" her face³¹ and claimed the right to have sex with her. The defendant and the victim walked to the home of a friend of the defendant where the victim told the defendant she would not have sex with him. The defendant took off the victim's pants; she pulled them back on and he removed them again.³² He ordered her to lie down on a bed, pushed her legs apart, and had sexual intercourse with her.

The defendant was convicted of second-degree rape, and the North Carolina Court of Appeals affirmed the conviction finding the intercourse forcible and nonconsensual.³³ In reversing, the North Carolina Supreme Court held the

S.E.2d 759, 770 (1978) (force is not an element of the rape of a 12 year old); *State v. Cox*, 280 N.C. 689, 695, 187 S.E.2d 1, 5 (1972) (consent is not a defense to a rape of a child under 12).

The difference between a first and second-degree sexual offense involving a victim over 13 with no mental or physical debilitations is the presence of at least one of three aggravating factors. First-degree rape or sexual offense is forcible and non-consensual if the defendant:

- a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
- b. Inflicts serious personal injury upon the victim or another person; or
- c. The person commits the offense aided and abetted by one or more other persons.

N.C. GEN. STAT. § 14-27.4 (1986).

Rape and sexual offense differ in the type of contact prohibited. Rape pertains only to vaginal intercourse, whereas sexual offenses are acts of penetration involving other than the penis and vagina. See *supra* note 12.

25. See, e.g., *State v. Alston*, 310 N.C. 399, 407, 312 S.E.2d 470, 475 (1984); *State v. Hall*, 293 N.C. 559, 563, 238 S.E.2d 473, 476 (1977); see Note, *State v. Moorman, Can Sex with a Sleeping Woman Constitute Forcible Rape*, 65 N.C.L. REV. 1246, 1257 (1987). Consent is not a defense to a statutory rape or sexual offense or such acts with a helpless victim. See *supra* note 24.

26. See, e.g., *Alston*, 310 N.C. at 408, 312 S.E.2d at 476.

27. 310 N.C. 399, 312 S.E.2d 470 (1984).

28. *Id.* at 409, 312 S.E.2d at 476.

29. *Id.* at 400, 312 S.E.2d at 471.

30. *Id.* at 401, 312 S.E.2d at 471.

31. *Id.* at 402, 312 S.E.2d at 472.

32. *Id.* at 403, 312 S.E.2d at 473.

33. 61 N.C. App. 454, 459, 300 S.E.2d 857, 860 (1983). Judge Webb, writing for the court of appeals, found the intercourse to be nonconsensual and the victim to be in such a position that any resistance would be futile. *Id.* at 460, 300 S.E.2d at 860.

State's evidence insufficient to support a conviction.³⁴ Although the evidence established that the intercourse was nonconsensual, it was not achieved by actual or constructive force.³⁵ In reaching its decision the court focused on the relation the force must bear to the act to support a rape conviction. The force or threat must be connected to the act of intercourse:³⁶ the defendant must use force or threats *for the purpose* of quelling any resistance by the victim.³⁷ The court found the defendant's use of force in grabbing the victim's arm and his threats that he would "fix" her face unrelated to the intercourse despite the fear they induced in the victim.³⁸

The court then considered whether the victim's fear of the defendant based on past episodes of violence at his hands could be a factor in finding force.³⁹ The court did not require an explicit threat; rather, constructive force could be found if "the totality of the circumstances gave rise to a reasonable inference that the unspoken purpose of the threat was to force the victim to submit to unwanted sexual intercourse."⁴⁰ However, the court held the "totality of the circumstances" did not infer such a purpose:

Although [the victim's] general fear of the defendant may have been justified by his conduct on prior occasions, absent evidence that the defendant used force or threats to overcome the will of the victim *to resist the sexual intercourse alleged to have been rape*, such general fear was not sufficient to show that the defendant used the force required to support a conviction of rape.⁴¹

The extent of the *Alston* holding and the reasoning on which it rested are ambiguous. The clearest holding of the case is that the victim's general fear of the defendant, based on past acts she witnessed during their relationship, alone cannot be the basis for satisfying the force requirement. This result could be

34. *Alston*, 310 N.C. at 409, 312 S.E.2d at 476.

35. *Id.* Professor Estrich in her article on rape strongly criticizes this result:

That these decisions [*Alston* and *Lester*] depart so straight forwardly from established criminal law doctrine is noteworthy but not unusual in the law of rape. More interesting is the apparent paradox that they create. In each case, the court says—and this is explicit, not implicit—that sex was without the woman's consent. It also says that there was no force. In other words, the woman was not forced to engage in sex, but the sex she engaged in was against her will.

Estrich, *Rape*, 95 YALE L.J. 1087, 1111 (1986).

36. *Alston*, 310 N.C. at 408, 312 S.E.2d at 475.

37. *Id.* at 408, 312 S.E.2d at 476.

38. *Id.* According to the court:

[The defendant] told [the victim] he was going to "fix" her face so that her mother could see he was not "playing." This threat by the defendant and his act of grabbing [the victim] by the arm at the school, although they may have induced fear, appeared to have been unrelated to the act of sexual intercourse between [the victim] and the defendant.

Id.

39. *Id.* at 409, 312 S.E.2d at 476.

40. *Id.*; see *State v. Barnette*, 304 N.C. 447, 460, 284 S.E.2d 298, 306 (1981). This "totality of the circumstances" inquiry itself has two issues. First, there must be at least a threat. Overt force, of course, is actual rather than constructive force. Second, if that threat is not explicitly directed at overcoming the victim's resistance, the situation in which the threat was made reasonably must imply such a purpose. The reasonableness is apparently objective—thus the question is not whether the victim so interpreted the threat, but whether such an interpretation is reasonable.

41. *Alston*, 310 N.C. at 409, 312 S.E.2d at 476 (emphasis in original).

rooted in the requirement that the threat be for the purpose of accomplishing the sexual act: the defendant's acts of violence or threats in the past cannot be for the purpose of overcoming the victim's resistance to sexual intercourse in the present. Alternatively, the court could have created a special rule to deal with a particular situation—allegations of rape made by one person against an ex-lover.⁴² Consistent with the general law on the topic,⁴³ however, the court discussed the prior consensual relationship's bearing on the issue of consent,⁴⁴ not force, explicitly stating that the intercourse was nonconsensual.⁴⁵

Within one year, the court in *State v. Lester*⁴⁶ expanded *Alston* to situations not involving a prior consensual sexual relationship. In *Lester* the defendant had sexual intercourse with his fifteen-year-old daughter.⁴⁷ He began sexual activity with the girl when she was eleven and also engaged in sexual activity with his other two daughters. The family life was quite violent; the defendant often beat his ex-wife, his son, his girlfriend, and once pointed a gun at his children.⁴⁸ The defendant's ex-wife learned of his sexual activity with their daughter and confronted the defendant, who threatened to kill his ex-wife or daughter if either revealed to anyone what had occurred. In the two incidents of sexual intercourse from which the charges arose, the defendant ordered his daughter to undress. The daughter initially refused, then submitted when she perceived the defendant getting angry.⁴⁹ After one of these incidents, the defendant slapped the victim, accusing her of "messing with other boys."⁵⁰ The defendant was convicted of two counts of second-degree rape.⁵¹

The North Carolina Court of Appeals found evidence the sexual intercourse between the father and daughter was against the daughter's will.⁵² Under *Alston*, however, the evidence showed neither actual nor constructive force.⁵³ Without acknowledging the differences between the relationship of an adult woman to her ex-boyfriend and a minor child to her father, the court

42. The court simply may have found the victim incredible because she slept with the defendant after the alleged rape. *Id.* at 403, 312 S.E.2d at 472.

43. See *State v. Way*, 297 N.C. 293, 296, 254 S.E.2d 760, 761 (1979).

44. The court stated:

Where as here the victim has engaged in a prior continuing consensual sexual relationship with the defendant, however, determining the victim's state of mind at the time of the alleged rape obviously is made more difficult. Although inquiry in such cases still must be made into the victim's state of mind at the time of the alleged rape, the State ordinarily will be able to show the victim's lack of consent to the specific act charged only by evidence of statements or actions by the victim which were clearly communicated to the defendant and which expressly and unequivocally indicated the victim's withdrawal of any prior consent and lack of consent to the particular act of intercourse.

Alston, 310 N.C. at 407-08, 312 S.E.2d at 475.

45. *Id.* at 408, 312 S.E.2d at 475.

46. 70 N.C. App. 757, 321 S.E.2d 166 (1984), *aff'd per curiam*, 313 N.C. 595, 330 S.E.2d 205 (1985).

47. *Id.* at 761, 321 S.E.2d at 168.

48. *Id.* at 758-59, 321 S.E.2d at 167.

49. *Id.* at 759, 321 S.E.2d at 167.

50. *Id.*

51. *Id.* at 758, 321 S.E.2d at 166.

52. *Id.* at 761, 321 S.E.2d at 168.

53. *Id.* For a criticism of this result see *supra* note 35.

vacated the verdict: "As *Alston* makes clear, the victim's fear of defendant, however justified by his previous conduct, is insufficient to show that defendant *forcibly* raped his daughter."⁵⁴

Judge Phillips dissented from the majority opinion, finding two significant circumstances which rendered *Lester* clearly distinguishable from *Alston*. First, Phillips found the threat of force ever present since "the child was under defendant's constant and continuing control and dominion."⁵⁵ Second, he found the location of one of the incidents of intercourse, the defendant's and victim's home, bore heavily on the issue of force.⁵⁶ Although he did not explain the significance of the latter point, it implies the daughter's inability to resist or avoid the attack. In effect, she had nowhere else to go.⁵⁷ The North Carolina Supreme Court unanimously affirmed *Lester* without a written opinion.⁵⁸

Following the decision in *Lester* the rejection of the general fear theory appeared total and without exception. Within two years, however, the court cast doubt on the extent of the applicability of *Alston*. In *State v. Strickland*⁵⁹ the victim and the defendant were neighbors and had never engaged in sexual activity prior to the attack.⁶⁰ On the night of the attack, the victim was ill and home alone. The defendant broke a locked screened door, entered, grabbed the victim from behind, dragged her into a bedroom, and had sexual intercourse with her.

On appeal to the North Carolina Supreme Court from a conviction of second-degree rape, the defendant challenged the State's evidence as proving no more than the victim's general fear of the defendant, and thus insufficient under the *Alston* analysis.⁶¹ The court held the defendant inappropriately invoked *Alston*, stating that only in "fact situations similar to those in *Alston*" will general fear not satisfy the force requirement.⁶² The court noted the defendant and victim had no shared sexual history and, in addition, the State introduced substantial evidence that the defendant employed actual physical force as well as constructive force against the victim.⁶³

Although evidencing a trend towards allowing the general fear theory in certain situations, the *Strickland* court did not explain the extent of this allowance. Permitting the State to prove force through the victim's general fear of the defendant *except* in "fact situations similar to those in *Alston*" could give the

54. *Lester*, 70 N.C. App. at 761, 321 S.E.2d at 168 (emphasis in original).

55. *Id.* at 762, 321 S.E.2d at 169 (Phillips, J., dissenting).

56. *Id.*

57. Judge Phillips may have been considering the doctrine of retreat and analogizing the victims of intrafamilial sexual abuse to the victim of assault and battery who is attacked in her own home. This doctrine, requiring a person to "retreat to the wall" before using force to defend against an attack does not apply to unprovoked attacks in one's dwelling. See 6 AM. JUR. 2D *Assault and Battery* § 75 (1963).

58. *State v. Lester*, 313 N.C. 595, 330 S.E.2d 205 (1985) (per curiam).

59. 318 N.C. 653, 351 S.E.2d 281 (1987).

60. *Id.* at 654, 351 S.E.2d at 282.

61. *Id.* at 655, 351 S.E.2d at 282.

62. *Id.* at 656, 351 S.E.2d at 283.

63. *Id.*

general fear theory a broad or narrow application depending upon the significance given to the individual facts of *Alston*.⁶⁴ These facts could be interpreted narrowly, as involving a prior consensual sexual relationship with instances of violence between the adult victim and defendant, or broadly, as concerning a situation where the victim is aware of prior acts of violence by the defendant. A narrow view of the exception would allow the State to prove force through general fear in most cases and would overrule *Lester*.⁶⁵ Classifying the facts broadly would render the availability of the theory quite limited,⁶⁶ leaving the decision in *Lester* untouched. Any interpretation in between leaves *Lester* uncertain. The *Strickland* decision, therefore, without overruling *Lester*, cast doubt on its continuing validity.⁶⁷

Etheridge, decided one month after *Strickland*, removed all doubts surrounding the viability of *Lester*. The court called the *Lester* decision a "misbegotten offspring"⁶⁸ that "carried *Alston* far beyond its intended scope."⁶⁹ Noting "[s]exual activity between a parent and a minor child is not comparable to sexual activity between two adults with a history of consensual intercourse,"⁷⁰ the *Etheridge* court expressly allowed convictions for forcible intrafamilial sexual assault solely upon a showing of general fear. Having overruled *Lester* the court considered the separate issue of whether the evidence presented by the State reasonably supported the finding of force inherent in the conviction. The evidence was held sufficient because the abuse began at an early age and because of the nature of the parent-child relationship. The defendant's abusive practices "conditioned [the victim] to succumb to defendant's illicit advances at an age when he could not yet fully comprehend the implications of defendant's conduct."⁷¹ The court found the parental relationship to be one of domination and control: "the parent wields authority as another assailant might wield a weapon. The authority itself intimidates; the implicit threat to exercise it coerces."⁷²

A defendant who plays a parental role in the victim's world can greatly

64. Justice Webb, dissenting in *Strickland*, argued its result could not be justified without overruling *Alston*:

I note that the majority opinion contains the following statement. "This 'general fear' theory is applicable only to fact situations similar to those in *Alston*." If the majority means by this that *Alston* on its facts has no precedential value I might concur. There are other interpretations however, and I therefore dissent.

Id. at 663, 351 S.E.2d at 286.

65. The victim in *Lester* was not an adult. See *supra* text accompanying notes 47-48. Though she had engaged in a prior sexual relationship with the defendant, that relationship began before the victim could legally consent. See *supra* note 24.

66. Interpreting the facts in *Alston* broadly may effectively render the general fear theory unavailable to the State. A reasonable general fear must be based on knowledge of past acts, but under the broad classification, the theory would not apply in that situation.

67. Since *Strickland* arguably rests on the defendant's use of actual, overt physical force to accomplish the act of intercourse, the opinion in *Strickland* rendered the validity of *Lester* and the extent of the applicability of *Alston* uncertain.

68. *Etheridge*, 319 N.C. at 44, 352 S.E.2d at 680.

69. *Id.* at 45, 352 S.E.2d at 680.

70. *Id.* at 47, 352 S.E.2d at 681.

71. *Id.*

72. *Id.* at 48, 352 S.E.2d at 682.

influence and dominate that world.⁷³ He or she is the victim's authoritarian, enforcing that authority through the role of disciplinarian.⁷⁴ *Etheridge* recognizes that in any order given by a parent these dual roles create an implied threat of some sort of disciplinary action.⁷⁵ As one researcher of intrafamilial sexual abuse noted, "Because of the actual physical violence or the aura of it, in many of these families a well spoken word has as much power as a slap."⁷⁶ The court acknowledged that "force can be understood in some contexts as the power one need not use."⁷⁷ The victim is young, inexperienced, and perhaps ignorant of the "wrongness" of the conduct. The child may submit because he does not know he can resist or because he assumes the conduct is acceptable. *Etheridge's* son, for example, did not learn that the sexual acts to which he submitted were considered reprehensible until he viewed a film at school on child abuse.⁷⁸

The traditional definition of constructive force as "threats of serious bodily harm"⁷⁹ is an adult standard and does not adequately reflect the coercion exerted by a parent on a child. The abusive parent often obtains the victim's silence through threats to the stability and survival of the family,⁸⁰ or to the victim's loved ones.⁸¹ The concept of serious bodily injury may be less comprehensible to the child than traditional punishments such as being grounded or being deprived of something the child wants.⁸² Fear for the parent resulting from love or respect may play an equal or greater role than fear of threats of serious bodily harm in coercing the child to submit to the sexual act.⁸³

73. One professor of psychiatry noted that even where the contact is not ultimately harmful, sex is a situation in which the participants should meet each other equally rather than the vastly one-sided encounter of adult-child relationships:

It should be enough to understand unequivocally that sexualization of a child-caring relationship is, in itself, a violation of ethics. . . . The child has no power to say no and has no information on which to base a decision. Since the long-term psychological effects are so uncertain, and since the adult has such a vested interest in minimizing those risks, no modern concept of ethics, liability, or consumer protection could ever endorse such a lopsided contract. The child is just as powerless within the intimidating or ingratiating relationship as the adult rape victim would be at the point of a knife.

Summit, *supra* note 5, at 52.

74. *Etheridge*, 319 N.C. at 48, 352 S.E.2d at 681-82.

75. *Id.* at 48, 352 S.E.2d at 682.

76. M. DE YOUNG, *THE SEXUAL VICTIMIZATION OF CHILDREN* 34 (1982).

77. *Etheridge*, 319 N.C. at 48, 352 S.E.2d at 682. For this proposition, the court cited Professor Estrich's article, which strongly criticized the holdings of *Alston* and *Lester*. See Estrich, *supra* note 35.

78. *Etheridge*, 319 N.C. at 47, 352 S.E.2d at 681.

79. See, e.g., *Alston*, 310 N.C. at 408, 312 S.E.2d at 476; *State v. Barnette*, 304 N.C. 447, 460, 284 S.E.2d 298, 306 (1981).

80. M. DE YOUNG, *supra* note 76, at 37-38; Summit, *supra* note 5, at 67. The abuser may expressly tell the victim he will abandon the family or will be removed by the criminal justice system if the victim discloses the abuse. M. DE YOUNG, *supra* note 76, at 38. The child may also learn the precariousness of the family stability from the nonabusive parent's reaction to disclosure of the abuse. Summit, *supra* note 5, at 67. The child may deny or recant the existence of the abuse in order to keep the family together by keeping the family secret. *Id.*

81. M. DE YOUNG, *supra* note 76, at 38.

82. Intrafamilial sexual abuse is by no means devoid of violence. Many sexual abuse victims are also victims of physical abuse or witness such abuse of family members. M. DE YOUNG, *supra* note 76, at 37-38.

83. I. I. SLOAN, *PROTECTION OF ABUSED VICTIMS* 83 (1982) ("There is rarely an application of force or threat of bodily harm, and more often the child is psychologically enticed by loyalty to,

Etheridge applies a more flexible definition than the traditional definition of constructive force. The court described force as "threats or other actions by the defendant which compel the victim's submission to sexual acts,"⁸⁴ and affirmed the conviction despite, as defendant argued in his brief,⁸⁵ the absence of evidence that defendant threatened the child with serious injury or that the child feared such injury.⁸⁶ The general fear theory assumes a present fear based on past acts, and those acts and the totality of the circumstances lead to a reasonable inference that an implicit threat exists. The defendant in *Etheridge*, unlike those in *Alston* and *Lester*, had no history of violent acts.⁸⁷ The general fear, therefore, need not be based on knowledge of specific past acts of violence by the defendant but can be based on threats which themselves need not be of serious bodily harm.

The sexual assault is not examined in isolation; rather, the age of the child at the initial assault is significant. Repetitive sexual abuse, like any continuous abuse, often conditions the child to submit.⁸⁸ The first sexual act may have been committed forcibly, even under an *Alston* analysis, but after the second, third, or fourth, resistance seems more futile when the child believes the adult will inevitably accomplish the act.⁸⁹ Ironically, the first sexual act may have been statutorily prohibited regardless of whether it was forcibly accomplished because the victim was under the age of consent.⁹⁰

Not only may a child victim be conditioned from past experience to submit to sexual acts with the parent, the child may be effectively unable to prevent such acts in the future. Other than running away from home or employing violence against the parent, telling someone who can stop the activity is the only method a child can use to end the abuse. Assuming the child can muster the courage to overcome any embarrassment, the child could tell the nonabusive parent. The other parent, however, is often not a member of the household, is

affection with, and dependence upon the adult caretaker."); Summit, *supra* note 5, at 59-60; cf. M. DE YOUNG, *supra* note 76, at 37-38 (sexual abuse often occurs in families in which physical abuse is prevalent).

84. *Etheridge*, 319 N.C. at 45, 352 S.E.2d at 680.

85. Brief for Defendant-Appellant at 13-14, *Etheridge*, 319 N.C. 34, 352 S.E.2d 673 (No. 141A86).

86. The boy testified that the defendant had threatened to send him to a training school, but the only threat of physical harm to the boy occurred after the act of anal intercourse. *Etheridge*, 319 N.C. at 37, 352 S.E.2d at 675.

87. See *supra* text accompanying note 7. The daughter testified that she had been disciplined by defendant but not in connection with any sexual acts. Brief for Defendant at 13.

88. See M. DE YOUNG, *supra* note 76, at 35; Summit *supra* note 5, at 60-63. Many adult abusers consciously condition the child victim through continuous physical contact with the child which gradually changes in nature from the merely affectionate to the overtly sexual. M. DE YOUNG, *supra* note 76, at 35 (fathers of thirty-one percent of victimized daughters studied "rehearsed" incest with the victim). Another frequently employed technique is the father getting into bed and initiating sexual contact with the sleeping victim. *Id.* The victim invariably awakens, but remains immobile pretending to be asleep. *Id.* at 35-36; Summit, *supra* note 5, at 59-60. Studies indicate that perhaps eighteen to thirty-five percent of incest begins in this manner. M. DE YOUNG, *supra* note 76, at 35.

89. Ongoing sexual assault is rarely disclosed. Summit, *supra* note 5, at 63. If disclosure occurs, it may be a by-product of the victim entering adolescence and the desire for autonomy that stage brings. *Id.*

90. See *supra* note 24.

afraid of the abusive parent, or finds the situation too embarrassing or painful to admit.⁹¹ Often the child who knows the conduct is illegal is prohibited by that very knowledge from telling the authorities.⁹² Police involvement means the parent will "get into trouble." Despite all, the child is often bound as much by love as fear.⁹³ Consequently, informing someone outside the household—someone in a position of authority—may be an impossible alternative from the child's standpoint. The *Etheridge* standard is more sensitive to the child's dilemma by not requiring a clear showing of force on each occasion independent of the victim's past experience, even after the victim exceeds the age of consent.⁹⁴

The *Etheridge* decision is significant in its protection of minors above the statutory age of consent.⁹⁵ The need for clearly defined criminal offenses occasionally results in arbitrary line drawing between conduct of fairly equivalent culpability. No legal area more clearly demonstrates this arbitrariness than the area of sexual offenses against minors. Such offenses differ from other crimes in that the conduct is condemned because of the nature of the victim and not the nature of the conduct. The line is drawn at a certain age with victims who are above or below that age treated differently by the law.

North Carolina has three categories of statutes specifically aimed at preventing child sexual assault. The first category consists of the statutory first-degree rape⁹⁶ and sexual offense⁹⁷ provisions which prohibit sexual intercourse, vaginal and nonvaginal,⁹⁸ between adults and children below the age of consent. At thirteen,⁹⁹ North Carolina's age of consent for sexual intercourse is the lowest in the United States.¹⁰⁰ A child who is thirteen can consent to sexual intercourse and is a victim of rape or a sexual offense only if she was forced to

91. DEPT. OF JUSTICE, PROTECTING OUR CHILDREN: THE FIGHT AGAINST MOLESTATION 2 (1984); Summit, *supra* note 5, at 65-67. The nonabusive parent, usually the mother, is often unaware of the abuse or protectively denies its existence. Summit, *supra* note 5, at 65. This parent often turns her anger toward the child, accusing the child of seducing the father and threatening the stability of the family. *Id.* at 67.

92. The child who is aware of the illegality of the conduct may fear the effect disclosure will have on the family. See *supra* note 83 and accompanying text.

93. See Summit, *supra* note 5, at 60-63.

94. This may have been a consideration of the court when it stated, "[t]he child was conditioned to succumb to defendant's illicit advances at an age when he could not yet fully comprehend the implications of defendant's conduct." *Etheridge*, 319 N.C. at 47, 352 S.E.2d at 681.

95. The age of consent is the age at which a child is deemed able to consent to the sexual activity. See *supra* note 24.

96. N.C. GEN. STAT. § 14-27.2(a)(1) (1986).

97. *Id.* § 14-27.4(a)(1).

98. See *supra* notes 12 and 24.

99. N.C. GEN. STAT. § 14-27 (1986).

100. Michigan and New Mexico also prohibit intercourse only with persons under thirteen. MICH. COMP. LAWS ANN. § 28.788(2) (West 1982); N.M. STAT. ANN. § 30-9-11 (1978). Most states have a statutory structure which graduates the severity of the penalty according to the age of the victim. See, e.g., 18 PA. CONS. STAT. §§ 3122-3123 (1983); S.C. CODE ANN. § 16-3-650 (Law. Co-op. 1976); TENN. CODE ANN. §§ 39-2-603, -605 (1982); VA. CODE ANN. §§ 18.2-61, -63 (1982). In those states other than North Carolina, Michigan, and New Mexico which have only one relevant age, that age varies between 14 and 16. See, e.g., DEL. CODE ANN. tit. 11, §§ 762-763, 768 (1974) (16 years old); D.C. CODE ANN. §§ 22-2801, -3502 (1981) (16 years old); GA. CODE ANN. §§ 16-6-3 to -4 (1984) (14 years old); HAW. REV. STAT. § 707-731, -734 (1985) (14 years old); IDAHO CODE § 18-6101 (1987) (18 years old); KAN. STAT. ANN. § 21-3503 (1981) (16 years old). For a thorough comparative survey of incest and child sexual abuse laws, see I. SLOAN, *supra* note 83.

submit.¹⁰¹ The second category prohibits taking indecent liberties with a child under sixteen.¹⁰² The prohibited acts may fall short of acts of penetration and are defined as being "for the purpose of arousing or gratifying sexual desire."¹⁰³ Taking indecent liberties with a child is not a lesser included offense of rape or sexual offense.¹⁰⁴ Since the offenses are independent, a defendant can be convicted of both for the same incident or of taking indecent liberties for an incident which was not a statutory rape or sexual offense. The child is legally deemed unable to consent and force is irrelevant.¹⁰⁵ The third category prohibits sexual acts between a person and someone in that person's custody.¹⁰⁶ This statute expressly prohibits sexual acts, consensual and nonconsensual, between a parent and minor child.¹⁰⁷

The facts of *Etheridge* illustrate the gaps in these North Carolina statutes at their extreme. The defendant was convicted of first degree rape for having sexual intercourse with his daughter. To obtain that conviction, the State had to prove two facts: the act occurred, and the child was below thirteen years old. To convict the defendant of a second degree sexual offense for the incident of anal intercourse with the boy, who was only a year older than the girl, required proof that the act occurred with force and without consent. Any rigid age limit results in arbitrariness. By allowing a child's general fear of a parent to suffice as force, *Etheridge* lessens the rigidity of the law and provides more protection for children above the age of consent.

The effect of the *Etheridge* decision on sexual assaults on minors by persons other than parents is unclear. *Etheridge* can be interpreted as a narrow application of the general fear theory in that a victim's general fear of a sexual attacker can be considered force only in cases of intrafamilial sexual assault.¹⁰⁸ Under this narrow interpretation, general fear could not constitute force if the defendant was not in a parental role in relation to the victim. However, *Etheridge* by its reasoning should at least extend to any assault by an authoritarian adult upon a minor. Thus, a teacher or other custodian who takes advantage of his author-

101. N.C. GEN. STAT. § 14-27.4 (1986); see *supra* note 24.

102. *Id.* § 14-202.1. The defendant must be at least 16 years old and 5 years older than the child.

103. *Id.*

104. *State v. Weaver*, 306 N.C. 629, 636, 295 S.E.2d 375, 379 (1982); see Survey, *Criminal Law*, 61 N.C.L. REV. 1060, 1082-87 (1983).

105. See *supra*, notes 24-25.

106. N.C. GEN. STAT. § 14-27.7 (1986).

107. Section 14-27.7 provides in part:

If a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home, . . . the defendant is guilty of a Class G felony. Consent is not a defense to a charge under this section.

Id. A Class G felony is punishable by a fine or imprisonment up to 15 years or both. N.C. GEN. STAT. § 14-1.1 (1986). For the definition of "sexual act," see *supra* note 12.

Incest is "carnal intercourse" between person who are of a particular blood or legal relation. N.C. GEN. STAT. §§ 14-178 to 179. Incest pertains only to vaginal intercourse and is divided into two levels of severity according to the closeness of the relation. *Id.* Incest is not a crime specifically aimed at the protection of minors, and arguably a literal reading of the statute would include as offenders minors who participated in sexual intercourse with a listed relative.

108. *Etheridge*, 319 N.C. at 47, 352 S.E.2d at 681.

ity to intimidate the child into sexual submission could be guilty of a forcible sexual assault.

Whether the justification for allowing a general fear to suffice as force applies where no authoritarian relationship other than age exists is more problematic. If the victim is a minor over the age of twelve and defendant is an adult who has no authority over the child and in fact may not know the child prior to the act, can the *Etheridge* rationale apply? Arguably the North Carolina statutes contemplate such a situation and *Etheridge* should not apply. The sexual offense statutes assume a degree of knowledge at certain ages. At thirteen a child is presumed to be able to consent to sexual intercourse, yet an adult defendant who engages in such acts with the child before the child reaches sixteen may face criminal charges.¹⁰⁹ Thus, the legislature has made a determination of the ages of various levels of sexual maturation and the severity of punishment for sexual activity with persons below those ages. Nonetheless, the general fear theory should be available if warranted by the circumstances. Children are taught to obey adults. A defendant who relies on a child's general respect of his elders to accomplish a sexual act may be as culpable as an authoritarian who relies on the child's specific respect of that authority.

In addition to overruling *Lester*, the court's decision in *Etheridge* stands as a limitation of the *Alston* rejection of the general fear theory in sexual assaults against adults.¹¹⁰ The extent of the limitation is unclear. The language in *Strickland* and *Etheridge* can be read to strip *Alston* of any viability beyond its peculiar facts. Under this view, general fear can be a basis for constructive force in any case in which the defendant was not in a prior consensual sexual relationship with the victim. The justification for retaining the *Alston* rule in such situations is the fear of unfounded rape accusations resulting from conflicts in the relationship. The *Alston* holding may help to address this fear by effectively precluding conviction where actual force or explicit threats are not used. However, the *Alston* rule acts at the expense of valid accusations by victims whose fear is justified and is relied upon by the defendant.¹¹¹ The existence of a prior consensual sexual relationship is an issue affecting consent and not force. A person who has experienced violence at another's hands should be able to act on that knowledge, and submit to unwanted intercourse rather than risk injury.

The North Carolina Supreme Court's decision in *Etheridge* is certainly a step in the right direction. The court strongly rejected *Lester*, a decision which exacerbated the problem of child sexual abuse by ignoring the realities of the parent-child relationship. The court also voiced disapproval of the *Alston* rejection of the general fear rationale. Perhaps *Etheridge* will be the first of many

109. Until the child reaches 16, sexual activity is prohibited as taking indecent liberties with a child. See *supra* text accompanying notes 102-05.

110. *Etheridge*, 319 N.C. at 44, 352 S.E.2d at 680.

111. Justice Webb, author of the later reversed court of appeals' decision upholding the defendant's conviction in *Alston*, has urged for its reversal. *Etheridge*, 319 N.C. at 51-52, 352 S.E.2d at 683-84 (Webb, J., dissenting); *Strickland*, 318 N.C. at 662-63, 351 S.E.2d at 286 (Webb, J., dissenting); see *Estrich*, *supra* note 35, at 1105-11.

decisions stripping *Alston* of any continued validity and dragging North Carolina's rape law into the twentieth century.

SERINA MONTGOMERY GARST