THE YALE LAW JOURNAL

JED RUBENFELD

The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy

ABSTRACT. "Rape-by-deception" is almost universally rejected in American criminal law. But if rape is sex without the victim's consent—as many courts, state statutes, and scholars say it is—then sex-by-deception ought to be rape, because as courts have held for a hundred years in virtually every area of the law outside of rape, a consent procured through deception is no consent at all. Moreover, rejecting rape-by-deception fails to vindicate sexual autonomy, which is widely viewed today as rape law's central principle and, indeed, as a constitutional right. This Article argues against the idea of sexual autonomy and against the understanding of rape as unconsented-to sex. A better understanding, it is argued, can be arrived at by comparing rape to slavery and torture, which are violations of a person's fundamental right to self-possession. This view of rape can explain the rejection of rape-by-deception, which current thinking cannot, but it will also suggest that rape law's much-maligned force requirement may not be so malign after all.

AUTHOR. Robert R. Slaughter Professor of Law, Yale Law School. This Article benefited immeasurably from reactions and assistance given to me by a great many people, including Nomi Stolzenberg, Anne Dailey, Sandra Macpherson, Gideon Yaffe, Tracy Meares, Dan Kahan, Scott Shapiro, Daniel Markovits, Bruce Ackerman, Paul Gewirtz, Richard Brooks, Elizabeth Emens, Charles Fried, Katherine Franke, Adam Cohen, Suzanne Goldberg, Leah Bellshaw, Caroline Harkins, Elizabeth Hanft, Julia Malkina, Danielle Sassoon, Josh Meltzer, Sophie Brill, Lina Tetelbaum, Josh Geltzer, Marisa West, Noam Finger, and Amy Chua.

ARTICLE CONTENTS

INTRODUCTION

In 2010, a man was convicted of rape in Jerusalem – not for forcing sex on his victim, but for posing as a "Jewish bachelor" with a "serious romantic" interest in her:

> If [the complainant] had not thought the accused was a Jewish bachelor interested in a serious romantic relationship, she would not have co-operated with him. . . .
>
> . . . .
>
> The court is obliged to protect the public interest from sophisticated, smooth-tongued and sweet-talking criminals who can deceive innocent victims at an unbearable price – the sanctity of their bodies and souls.[1]

Even as the *Kashour* case was pending in Israel, a bill was pending in Massachusetts authorizing life imprisonment for anyone who "has sexual intercourse . . . with a person *having obtained that person's consent by the use of fraud, concealment or artifice*."[2] In Tennessee, rape is already defined to include "sexual penetration . . . accomplished by fraud."[3] A man commits rape in Idaho, under a 2011 amendment, when he has sex with a woman who, because of his "artifice, pretense or concealment," believes him to be "someone other than" who he is.[4] In Canada, a Supreme Court Justice has stated that rape is

1. CrimC (Jer) 561/08 State of Israel v. Kashour (July 19, 2010), Nevo Legal Database (by subscription), para. 13, 15. The facts of the case remain disputed. Kashour denied claiming to be Jewish, while the woman initially asserted forcible rape. *See* Lital Grossman, *From Rape to Racism: How and Why Did Charges Change Against Arab Man?*, HAARETZ, Sept. 17, 2010, http://www.haaretz.com/weekend/week-s-end/from-rape-to-racism-how-and-why-did-charges-change-against-arab-man-1.314319. The doctrine of rape-by-deception has been affirmed by Israel's Supreme Court in a case involving less politically charged facts. *See* CrimA 2358/06 Selimann v. State of Israel (Sept. 17, 2008), Nevo Legal Database (by subscription) (upholding the rape conviction of a Jewish man who pretended to be a housing official able to procure apartments for women in exchange for sex). In 2012, the Israeli Supreme Court reduced Kashour's sentence. CrimA 5734/10 Kashour v. State of Israel (Jan. 25, 2012), Nevo Legal Database (by subscription); Joanna Paraszczuk, *Court Cuts Arab-Israeli Rape-by-Deception Sentence*, JERUSALEM POST, Jan. 27, 2012, http://www.jpost.com/NationalNews/Article.aspx?id=255363.

2. H.R. 1494, 186th Gen. Court (Mass. 2009), http://www.malegislature.gov/Bills/186/House/H1494 (emphasis added).

3. TENN. CODE ANN. § 39-13-503(a)(4) (2010).

4. IDAHO CODE ANN. § 18-6101(8) (Supp. 2011). Interestingly, if a *man* is so deceived, it isn't rape. *Id.* §§ 18-6101(7) to (8), 18-6108.

committed whenever sex is procured through "dishonesty."[5]

Thus "rape-by-deception" is a live and intensifying issue in criminal law. The problem it poses is easy to describe. Many—perhaps most—of us don't think "rape-by-deception" is rape at all.[6] Neither, as a rule, do our courts.[7] The problem is that we ought to think it *is* rape, and courts ought to so hold, given what we say rape is.

According to a very widely shared view, rape means sex without the victim's consent. The crime was often so understood by common law judges;[8] it is explicitly so defined in many modern statutes;[9] and it is frequently so described in contemporary usage, both lay and legal.[10] But sex-by-deception *is* sex without consent, because a consent obtained by deception, as courts have long and repeatedly held *outside* of rape law, is "no consent" at all.[11]

5. *See* R. v. Cuerrier, [1998] 2 S.C.R. 371, 374 (Can.) (opinion of L'Heureux-Dubé, J.).

6. *See, e.g.*, Ryan McCartney, *Could a Pick-Up Artist Be Charged with 'Rape by Deception'?*, NBC NEWS, http://www.msnbc.msn.com/id/38430181/ns/us_news-crime_and_courts/t/could-pick-up-artist-be-charged-rape-deception (last updated July 27, 2010, 1:38 PM) (noting the "visceral reaction [of] many in the United States" against the *Kashour* ruling).

7. *See infra* Section II.A; *see also, e.g.*, B.K. Carpenter, Annotation, *Rape by Fraud or Impersonation*, 91 A.L.R.2d 591, § 2 (1963) ("[T]he prevailing view is that upon proof that consent to intercourse was given, even though [procured by] fraud . . . , a prosecution for rape cannot be maintained.").

8. *See, e.g.*, R v. Clarence, (1888) 22 Q.B.D. 23 at 43 (Stephen, J.) (Eng.) ("[T]he definition of rape is having connection with a woman without her consent . . . ."); 1 FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW § 556, at 490 (8th ed. 1880) ("[I]t may now be received as settled law that rape is proved when carnal intercourse is effected with a woman without her consent . . . .").

9. *See, e.g.*, COLO. REV. STAT. § 18-3-402 (2004) (defining "Sexual assault"); MONT. CODE ANN. § 45-5-503(1) (2011) (defining "Sexual intercourse without consent"); UTAH CODE ANN. § 76-5-402(1) (LexisNexis 2003); Sexual Offences (Scotland) Act, 2009, (A.S.P. 9), § 1; Sexual Offences Act, 2003, c. 42, § 1(1) (U.K.).

10. *See, e.g.*, United States v. Thomas, 159 F.3d 296, 299 (7th Cir. 1998) ("[U]nconsented-to sex is forcible rape, or, at the least, battery."); People v. Cicero, 204 Cal. Rptr. 582, 590 (Ct. App. 1984) ("[T]he law of rape primarily guards the integrity of a woman's will and the privacy of her sexuality from an act of intercourse undertaken without her consent."); CAROLYN LOGAN, COUNTERBALANCE: GENDERED PERSPECTIVES FOR WRITING AND LANGUAGE 72 (1997) ("In public discourse, rape has become 'unconsented sexual activity.'"); Joan McGregor, *Force, Consent, and the Reasonable Woman*, *in* IN HARM'S WAY: ESSAYS IN HONOR OF JOEL FEINBERG 231, 250 (Jules L. Coleman & Allen Buchanan eds., 1994) ("Rape should be conceptualized as unconsented-to sexual intercourse . . . .").

11. *E.g.*, McClellan v. Allstate Ins. Co., 247 A.2d 58, 61 (D.C. 1968) ("[C]onsent obtained on the basis of deception is no consent at all."); Johnson v. State, 921 So. 2d 490, 508 (Fla. 2005) (per curiam) ("Consent obtained by trick or fraud is actually no consent at all . . . ."); Kreag v. Authes, 28 N.E. 773, 774 (Ind. App. 1891) ("Consent obtained by fraud is, in law,

A person who enters your house pretending to be a meter reader commits trespass (entry onto real property without consent);[12] a Ponzi-scheme swindler commits larceny or theft (taking property without consent) "by deception";[13] a man posing as a doctor who "lays his hands on [a woman's] person" commits battery (offensive touching without consent).[14] "Fraud," as Judge Learned Hand put it, "will vitiate consent as well as violence."[15] Why, then, isn't sex-by-deception rape?

The answer, for American courts, is that rape requires more than

equivalent to no consent."); Chatman v. Giddens, 91 So. 56, 57 (La. 1921) ("Consent induced by fraud is no consent at all."); Farlow v. State, 265 A.2d 578, 580 (Md. Ct. Spec. App. 1970) ("Consent . . . obtained by fraud . . . is the same as no consent so far as trespass is concerned."); Murphy v. I.S.K.CON of New Eng., Inc., 571 N.E.2d 340, 352 (Mass. 1991) ("Of course, if consent is obtained by fraud or duress, there is no consent."); Dellavecchio v. Hicks, No. FD-04-1038-90, 2006 WL 727770, at *3 (N.J. Super. Ct. App. Div. Mar. 23, 2006) (per curiam) ("Consent given by virtue of fraud is no consent at all."); State v. Ortiz, 584 P.2d 1306, 1308 (N.M. Ct. App. 1978) ("[A] consent obtained by fraud, deceit or pretense is no consent at all."); Lawyer v. Fritcher, 29 N.E. 267, 268 (N.Y. 1891) ("If the plaintiff's consent was obtained by defendant through fraud, it was void, for fraud vitiates all contracts and all consents."); People v. De Leon, 16 N.E. 46, 48 (N.Y. 1888) ("The consent of the prosecutrix, having been procured by fraud, was as if no consent had been given . . . ."); *see also, e.g.*, United States v. Cavitt, 550 F.3d 430, 439 (5th Cir. 2008) ("'Consent' induced by an officer's misrepresentation is ineffective."); United States v. Hardin, 539 F.3d 404, 425 n.12 (6th Cir. 2008) (defining a "valid consent" as "uncontaminated by duress, coercion, or trickery" (quoting United States v. Jones, 641 F.2d 425, 429 (6th Cir. 1981))); United States v. Sheard, 473 F.2d 139, 152 (D.C. Cir. 1972) (Wright, J., dissenting) ("Moreover, under elementary principles of law consent obtained by misrepresentation is no consent at all."); Jeffcoat v. United States, 551 A.2d 1301, 1304 n.5 (D.C. 1988) ("To be valid, consent must be informed and not the product of trickery, fraud, or misrepresentation.").

12. *E.g.*, Theofel v. Farey-Jones, 359 F.3d 1066, 1073 (9th Cir. 2004); J.H. Desnick, M.D., Eye Servs., Ltd. v. ABC, Inc., 44 F.3d 1345, 1352 (7th Cir. 1995); *see also Farlow*, 265 A.2d at 581 (finding entry trespassory where entry was procured through fraud); *Ortiz*, 584 P.2d at 1308 ("Where the consent to enter is obtained by fraud, deceit or pretense, the entry is trespassory because the entry is based on a false consent."); ROLLIN M. PERKINS, PERKINS ON CRIMINAL LAW 245-48 (2d ed. 1969).

13. Elliott v. State, No. 05-10-00049-CR, 2011 WL 2207091, at *1 (Tex. App. June 8, 2011); *cf.* People v. Traster, 4 Cal. Rptr. 3d 680, 688 (Ct. App. 2003) (holding that fraudulent stock investment is larceny by trick (citing 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 8.7, at 396 (1986))).

14. RESTATEMENT (SECOND) OF TORTS § 892B(2) cmt. e, illus. 7 (1977); *see, e.g.*, Boyett v. State, 159 So. 2d 628, 630-31 (Ala. Ct. App. 1964); 1 WHARTON'S CRIMINAL LAW § 835 (12th ed. 1932) (discussing assault and battery) ("[I]n any view, consent obtained through fraud . . . is no defense.").

15. NLRB v. Dadourian Exp. Corp., 138 F.2d 891, 892 (2d Cir. 1943).

nonconsent; it requires *force*, and deception isn't force.[16] But this answer hardly answers, not without an explanation of *why* rape requires force—an explanation that has never been forthcoming. The force requirement makes rape law blind to all the situations in which people, often women, are coerced or manipulated into sex through social pressure or alcohol or other means falling short of physical violence.[17] As a result, "[v]irtually all modern rape scholars want to modify or abolish the force requirement as an element of rape,"[18] and some jurisdictions have already eliminated it.[19]

But this means rape law has a serious problem. Existing doctrine has no trouble dismissing rape-by-deception claims, but only because of the much-decried force requirement. If rape law were really to eliminate the force requirement—as so many argue it should, as many statutes have already seemingly done, and as courts have begun to do—then sex-by-deception would and should be rape, because the legal definition of rape would then be sex without consent, and a defrauded "consent," like a coerced one, is no consent at all.

This problem is by itself a considerable challenge. It implicates the most fundamental questions about what rape is and how the law ought to define it. But the problem runs deeper still.

Just as we speak of "antidiscrimination law," referring to an interlocking set of constitutional rights, statutes, regulations, and judicial decisions, so too we might speak of "sex law," comprising the same elements. And we might say that sex law in this country is converging on a single unifying principle: the right to *sexual autonomy*.

16. *See, e.g.*, Suliveres v. Commonwealth, 865 N.E.2d 1086, 1087 (Mass. 2007).

17. *See, e.g.*, SUSAN ESTRICH, REAL RAPE 69 (1987) ("[T]he force standard continues to protect . . . conduct which should be considered criminal. It ensures broad male freedom to 'seduce' women who feel themselves to be powerless . . . and afraid . . . [, and] to intimidate women and exploit their weakness and passivity . . . ."); STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 15 (1998) (arguing that the force requirement "places an imprimatur of social permission on virtually all pressures and inducements that can be considered nonviolent. It leaves women unprotected against forms of pressure that any society should consider morally improper and legally intolerable").

18. David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 322 (2000).

19. *See supra* note 9; *see also* Charlie Savage, *U.S. To Expand Its Definition of Rape in Statistics*, N.Y. TIMES, Jan. 6, 2012, http://www.nytimes.com/2012/01/07/us/politics/federal-crime-statistics-to-expand-rape-definition.html (reporting that the FBI has, after ninety years, eliminated the force requirement from its definition of rape in favor of a consent-based formulation).

The idea behind sexual autonomy is simple. People have a right to decide for themselves with whom and under what circumstances to have sex. The legal fight for this principle has been waged on several fronts, including:

Constitutionalization. Constitutional sex law commenced in earnest with *Griswold v. Connecticut*,[20] and the Court's most important recent decision in this field, *Lawrence v. Texas*,[21] is widely read to stand for a right of sexual autonomy.[22]

Decriminalization. Long before *Lawrence*, sodomy prosecutions were rare, and older sex crimes such as fornication and seduction had been abolished, reflecting a conviction that private, consensual sex was not an appropriate target of criminal law.[23]

Sex codes. Sexual misconduct has long been regulated privately on college campuses and elsewhere. But while such sex codes used to aim at prohibiting sex, today their aim is different: to ensure that sexual activities are consensual.[24]

Rape law reform. Finally, over the last several decades, radical transformation came to rape law as well. Old doctrines have been discarded, reopening core questions about how rape ought to be defined,[25] and today, the central purpose widely ascribed to rape law is the protection of sexual autonomy.[26]

Thus sexual autonomy seems to provide a single, clear, appealing foundation for the regulation of sex in the United States, unifying its major components. But there is an anomaly in the system: sex-by-deception. From autonomy's viewpoint, fraud is as great an evil as force.[27] Precisely by failing to punish rape-by-deception, sex law fails to vindicate sexual autonomy. This failure would seem to put rape law in tension not only with its own central principle, but with the rest of American sex law, including *Lawrence*.[28]

The purpose of this Article is to demonstrate that sex-by-deception does in fact pose all the difficulties just outlined. It requires a rethinking of what rape

20. 381 U.S. 479 (1965) (striking down a law banning the use of contraception).

21. 539 U.S. 558 (2003) (striking down a law criminalizing homosexual sex).

22. *See infra* Section I.A.

23. *See infra* Section I.B.

24. *See infra* Section I.C.

25. *See infra* Subsection I.D.3.

26. *See infra* notes 102-114 and accompanying text.

27. *See infra* Part II and notes 148 and 152.

28. *See infra* Section III.A.

really is. It also requires sex law to pick its poison—to decide if it does or doesn't stand for sexual autonomy, whether that means embracing rape-by-deception or reconsidering *Lawrence*. Finally, it requires a reevaluation of the ideal of autonomy itself, at least as applied to sexuality.

Part I will trace the emergence of sexual autonomy as the fundamental principle of American sex law. Part II will lay out rape-by-deception doctrine and the difficulties it creates. Part III maps the main options available to rape law once these difficulties are exposed: (1) sticking with the force requirement in order to say no to rape-by-deception; (2) embracing sexual autonomy and with it a much broader doctrine of rape-by-deception; and (3) staking out a compromise in which *coercive* sex would be rape, but *deceptive* sex would not. This compromise would, I will argue, capture many people's intuitions, beat a retreat from the force requirement's worst aspects, and bring rape law closer to vindicating sexual autonomy.

Parts IV and V of this Article—well, Parts IV and V should probably never have been written. Many readers will disagree with them. To begin with, I will reject the coercion-based compromise just described. Its half-logic is too unprincipled, its results contradictory. Instead, Part IV will oppose the principle of sexual autonomy altogether. Notwithstanding *Lawrence*, I will suggest that there is and should be no fundamental right to sexual autonomy. The great principle of individual autonomy hits a kind of limit in sexuality, where the pursuit of bodily and psychological conjugation makes the goal of autonomy strangely chimerical, at odds with desire itself.

But how should rape be understood if not in terms of sexual autonomy? Part V lays out an answer. Rape violates what I will call the right to self-possession. The right to self-possession is best illustrated by two other offenses that also violate it: slavery and torture. Rape should be thought about, I will argue, the way we think about those two crimes. Every act of rape may not be an act of slavery or torture, but all rape shares core elements of both.

A warning: this way of seeing rape will have at least one glaring weakness. It will suggest that the much-maligned force requirement might not be so malign after all.

Taking Parts I to V together, the argument will be as follows: Current rape-by-deception doctrine is unjustifiable given today's predominant, sexual-autonomy-based view of rape. If rape means sex without consent, sex-by-deception ought to be rape. At a minimum, given principles of sexual autonomy, sex-by-deception ought to be very broadly criminalized, if not under the name of rape, then as a separate (perhaps lesser) offense. My conclusion, however, is that sex-by-deception should not be broadly criminalized; instead the mistake lies in the autonomy-based view of rape—indeed in the whole notion of sexual autonomy as a fundamental right.

For American sex law in general, this conclusion suggests a rethinking of *Lawrence* and related cases. For rape law, the implication is that rape cannot be understood merely as unconsented-to sex; a certain kind of force, to be explained below, is in fact central to the crime.

I. SEXUAL AUTONOMY AS THE FUNDAMENTAL PRINCIPLE OF AMERICAN SEX LAW

Not long ago, the consensuality of a sex act was irrelevant to its legality. And almost all sex was illegal.

If an unmarried man and woman had sex, it was fornication.[29] If either had a spouse, it was adultery in the married party and fornication in the other, or adultery in both.[30] If a man lured a woman into bed through a promise of marriage, he committed seduction.[31] If one was black and the other white, they were chargeable with miscegenation.[32] If both were male, it was sodomy.[33] If both were female, it was plainly an abomination, although no one seemed to know exactly what kind.[34]

Even a married couple could go to jail for having the wrong kind of sex.[35] If they sought to prevent childbirth, they faced more criminal sanctions.[36] Merely

29. *See, e.g.*, People v. Barnes, 9 P. 532, 534-35 (Idaho 1886) (holding consent irrelevant for a conviction of fornication).

30. JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES § 656, at 474-75 (3d ed. 1901).

31. 1 CHESTER G. VERNIER, AMERICAN FAMILY LAWS 288 (1931).

32. At least thirty-four states and territories in the 1860s, and twenty-six as of 1910, criminalized miscegenation, often defined in terms not only of marriage, but of fornication or other "forms of illicit intercourse." GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 78-81 (1910).

33. Or "buggery," or the "crime against nature." *See, e.g.*, State v. Long, 63 So. 180, 180 (La. 1913).

34. *See, e.g.*, Thompson v. Aldredge, 200 S.E. 799, 800 (Ga. 1939) ("[T]he crime of sodomy proper cannot be accomplished between two women, though the crime of bestiality may be." (quoting 1 FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW § 754 (11th ed. 1912))). *See generally* WILLIAM N. ESKRIDGE JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861-2003, at 69, 92 (2008) (describing the express criminalization of lesbian sex beginning in the 1920s).

35. As late as 1976, a federal appellate court upheld the conviction of married defendants for consensual sodomy. *See* Lovisi v. Slayton, 539 F.2d 349 (4th Cir. 1976).

36. *See* JANET FARRELL BRODIE, CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA 257 (1994) (noting that as of 1885 twenty-four states and the federal government

possessing information about contraception could be a crime.[37]

Thus went traditional American sex law. The only safe sex was heterosexual, copulative, marital intercourse.[38] No kind of autonomy figured in this legal landscape – not sexual,[39] not male, not female, not marital.

Today, things are slightly different. In the last several decades, a sex-law revolution has taken place, in which sexual autonomy has emerged as something like a fundamental right. This transformation has occurred across at least four areas: the right to privacy; sex crimes; sex codes; and rape law.[40]

A. Sexual Autonomy and the Right to Privacy

When the "right to privacy" first appeared in *Griswold*,[41] it did not imply a right of sexual autonomy. The *Griswold* Court repeatedly emphasized that the case involved "marriage"[42] and stressed the "repulsive" prospect of police scouring the "sacred precincts of marital bedrooms" for evidence.[43] Thus *Griswold*'s privacy looked potentially quite narrow.[44]

But in *Eisenstadt v. Baird*,[45] striking down a ban on the distribution (rather than, as in *Griswold*, the use) of contraceptives, the Court declared that the right to privacy protected every individual, "married or single, . . . from unwarranted governmental intrusion into matters so fundamentally affecting a

prohibited the sale of contraceptive devices); *id.* at 253-55 (discussing the rise of anti-abortion laws).

37. *See id.* at 257.

38. In 1978, the Supreme Court could still refer to "marriage" as "the only relationship in which the State of Wisconsin allows sexual relations legally to take place." Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

39. *See* Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 6 (1998) ("[I]t seems clear that the official purposes of [traditional] rape law . . . did not include the protection of sexual autonomy.").

40. Another part of this story is the constitutional protection given to sexually graphic expression, which has allowed pornography to become a multibillion-dollar industry. *See, e.g.*, John A. Humbach, *'Sexting' and the First Amendment*, 37 HASTINGS CONST. L.Q. 433, 441 & n.45 (2010).

41. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

42. *Id.* at 486.

43. *Id.* at 485-86.

44. The idea that the right to privacy might apply only or specially to marital relationships was arguably buttressed by *Loving v. Virginia*, 388 U.S. 1 (1967), which held that a law banning interracial marriage violated the Due Process Clause.

45. 405 U.S. 438 (1972).

person as the decision whether to bear or beget a child."[46] Suddenly privacy reached far beyond marriage and private places like the bedroom. Under *Eisenstadt*, the new right to privacy seemed hardly to be about privacy at all.[47]

What, then, was it about? No one really knew. But a year later, when the Court decided *Roe v. Wade*, privacy began to look like it really might mean sexual autonomy. Arguably, one of the most important elements of sexual autonomy is reproductive autonomy. Thus did Richard Posner feel justified in declaring that "in a series of decisions between 1965 and 1977, the Supreme Court created a constitutional right of sexual or reproductive autonomy, which it called privacy."[48]

But if *Roe* held out the promise of sexual autonomy, that promise was dashed in *Bowers v. Hardwick*.[49] There the Court upheld the criminalization of consensual sex acts traditionally considered immoral and offensive.[50] Seventeen years later, however, *Lawrence* reversed *Bowers*.

Interestingly, the term "right to privacy" never appears in *Lawrence*. Instead, the majority opinion speaks of *autonomy*. Justice Kennedy began that opinion by declaring, "Liberty presumes an autonomy of self that includes . . . certain intimate conduct."[51] He also quoted Justice Stevens's *Bowers* dissent, calling the following two points "controlling":

> First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . . Second, individual decisions by married [and unmarried] persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the [Constitution].[52]

Where "two adults," the Court concluded, with "full and mutual consent from each other, engage[] in sexual practices," the "State cannot . . . control their

46. *Id*. at 453.

47. *See, e.g.*, Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 360 n.2 (2000) ("Many scholars suggest that the term 'privacy' itself is a misnomer . . . .").

48. RICHARD A. POSNER, SEX AND REASON 324 (1992).

49. 478 U.S. 186 (1986) (upholding a conviction for homosexual sodomy).

50. *See id*. at 196.

51. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

52. *Id*. at 577-78 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

destiny by making their private sexual conduct a crime."[53]

Given such statements, it's no wonder that so many read *Lawrence* to have enshrined sexual autonomy as a constitutional right.[54] Indeed, under *Lawrence*, the Fifth Circuit has struck down a ban on the sale of "sexual stimulation" devices, holding that such a statute violated an individual's "right to engage in private intimate conduct of his or her choosing."[55]

B. Sexual Autonomy and Decriminalization

Over the course of the twentieth century, private (noncommercial) consensual sex was almost wholly decriminalized. At times this transformation was constitutionally mandated. Often, however, state legislatures and prosecutors acted on their own.

Thus, fifty years ago, penal fornication and adultery statutes were already so widely unenforced that the draftsmen of the Model Penal Code described them as "dead-letter statutes."[56] In many states, formal repeal followed.[57]

---

53. *Id*. at 578.

54. *See, e.g.*, David S. Bogen, Slaughter-House *Five: Views of the Case*, 55 HASTINGS L.J. 333, 334 n.4 (2003) (reading *Lawrence* to support the proposition that "adults have [a] fundamental right to autonomy in intimate choices"); Erwin Chemerinsky, *Implied Fundamental Rights*, *in* 20TH ANNUAL SECTION 1983 CIVIL RIGHTS LITIGATION 167, 171 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. 700, 2003) (describing *Lawrence* as vindicating a "right to engage in private consensual homosexual activity"); James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1042 (2003) (asserting that *Lawrence* guarantees "a personal right of private sexual autonomy"); Hon. Diarmuid F. O'Scannlain, Speech, *Rediscovering the Common Law*, 79 NOTRE DAME L. REV. 755, 761 n.17 (2003) (reading *Lawrence* as standing for a "right to sexual autonomy"). *But see, e.g.*, Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 97 (2003) ("[T]he theme of autonomy floats weightlessly through *Lawrence*, invoked but never endowed with analytic traction.").

55. Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 744 (5th Cir. 2008); *see also, e.g.*, Martin v. Ziherl, 607 S.E.2d 367 (Va. 2005) (striking down a fornication statute under *Lawrence*).

56. MODEL PENAL CODE § 213.6 note on status of section, at 434-36 (Proposed Official Draft 1962).

57. *See* Richard Green, *Fornication: Common Law Legacy and American Sexual Privacy*, 17 ANGLO-AM. L. REV. 226, 226 (1988); Gabrielle Viator, Note, *The Validity of Criminal Adultery Prohibitions After* Lawrence v. Texas, 39 SUFFOLK U. L. REV. 837, 842 (2006). Over the last several decades, state prosecutions for fornication and adultery have not disappeared, although they have been rare. *See* Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 756-57 (2005) (describing a few such cases while also noting that "there have been no prosecutions in most

Similarly, the crime of seduction long ago passed into oblivion.[58]

Indeed, decades before *Lawrence*, many states had already repealed or stopped enforcing their sodomy laws.[59] Rather than being mandated by the Supreme Court, the widespread decriminalization of consensual sex paved the way for the "sexual revolution" of the 1960s and thus, ultimately, for the Court's own decisions in cases like *Griswold*, *Roe*, and *Lawrence*.

C. Sexual Autonomy and the New Sex Codes

Outside criminal law, private sexual misconduct regulations have long been common, especially at colleges. Traditionally, such sex codes aimed at blanket sexual suppression.[60] By contrast, the typical college sex code today permits sex on campus, seeking only to ensure one goal: consent.

For example, Duke University in 2010 defined "sexual misconduct" as "any physical act of a sexual nature perpetrated against an individual without consent."[61] Under this provision, no genuinely consensual sex is misconduct. Moreover, consent must be "informed,"[62] suggesting that deception might negate it, and "power differentials," whether "[r]eal or perceived," can be

states in recent years"). In the military, however, adultery offenses have still been regularly prosecuted. *See* Katherine Annuschat, Comment, *An Affair To Remember: The State of the Crime of Adultery in the Military*, 47 SAN DIEGO L. REV. 1161, 1191 & n.195 (2010).

58. *See* Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 394-98 (1993) (discussing the movement, beginning in the 1930s, to abolish seduction statutes).

59. *See* ESKRIDGE, *supra* note 34, at 176-78 ("For several years after Stonewall, sodomy decriminalization indeed proceeded rapidly in many states.").

60. *See* ERNEST EARNEST, ACADEMIC PROCESSION: AN INFORMAL HISTORY OF THE AMERICAN COLLEGE, 1636 TO 1953, at 108 (1953) (describing the ways that American colleges historically sought to "limit sexual activity"). The rules at the coeducational Hillsdale College in 1860 were probably not unusual: "Students are prohibited upon pain of expulsion from visiting those of the other sex at their rooms, or receiving visits from them at their own." FIFTH ANNUAL CATALOGUE OF THE OFFICERS AND STUDENTS OF HILLSDALE COLLEGE 40 (1860). Homosexual sex provoked, as usual, the harshest reprisals. *See, e.g.*, WILLIAM WRIGHT, HARVARD'S SECRET COURT: THE SAVAGE 1920 PURGE OF CAMPUS HOMOSEXUALS (2005) (describing the secret tribunal used at Harvard in 1920 to investigate and punish homosexuality).

61. THE DUKE COMMUNITY STANDARD IN PRACTICE: A GUIDE FOR UNDERGRADUATES 2012-2013, at 47 (Stephen Bryan, David Frankel & Valerie Glassman eds., 2012), http://registrar.duke.edu/sites/default/files/unmanaged/bulletins/communitystandard/2012-13/dcs%20guide%202012-13.pdf(reflecting policies for the 2012 to 2013 academic year).

62. *Id*.

coercive, even when such coercion is "unintentional."[63]

Yale's new 2011 provisions are similar. "Sexual misconduct" at Yale includes any "conduct of a sexual nature that is nonconsensual"; "sexual assault" includes "any kind of nonconsensual sexual contact."[64] Consent in turn is

> defined as clear, unambiguous, and voluntary agreement . . . to engage in specific sexual activity. Consent cannot be inferred from the absence of a "no"; a clear "yes," verbal or otherwise, is necessary. . . . Talking with sexual partners about desires and limits may seem awkward, but serves as the basis for positive sexual experiences shaped by mutual willingness and respect.
>
> Consent cannot be obtained from someone who is asleep . . . .
>
> . . . .
>
> Consent to some sexual acts does not imply consent to others, nor does past consent to a given act imply ongoing or future consent.[65]

Assuming these regulations are to be taken seriously—as a disciplinary code Yale intends to enforce, rather than, say, a display of legally useful institutional concern[66]—some interesting results follow. Blowing a kiss to one's boyfriend without asking him first could fit the definition of sexual misconduct at Yale ("conduct of a sexual nature" without a "clear 'yes'" or "unambiguous" "agreement" to that "specific . . . activity"). Kissing a girlfriend when she's asleep is apparently "assault." Even where two students willingly have sex, either (or both) could be charged with sexual assault if there was any "ambiguity" about which acts they had consented to.[67]

---

63. *Id.*

64. *Definitions of Sexual Misconduct, Sexual Consent, and Sexual Harassment*, YALE C., http://yalecollege.yale.edu/content/definition-sexual-misconduct-sexual-consent-and-sexual-harassment (last visited Apr. 19, 2012).

65. *Id.*

66. The Department of Education's 2011 "Dear Colleague" letter may have been a motivation. *See* Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Rosslyn Ali*, U.S. DEP'T OF EDUC. (Apr. 4, 2011), http://www.ed.gov/about/offices/list/ocr/letters/colleague-201104.html (warning universities of potential Title IX violations).

67. *Definitions of Sexual Misconduct, Sexual Consent, and Sexual Harassment*, *supra* note 64 (warning that when "there is ambiguity about whether consent has been given, a student can be charged with, and found guilty of, committing a sexual assault or another form of sexual misconduct").

Given such consequences, it may be wrong to take Yale's regulations at face value. Nonetheless, they strongly express a sexual-autonomy-based ideal of full disclosure, of "positive sexual experiences" achieved through "[t]alking," and of advance, affirmative consent to each specific act engaged in.

D. Sexual Autonomy and Rape Law

Like the Supreme Court's right-to-privacy jurisprudence, rape law has been for decades a body of law in search of a principle, but has now seemingly found that principle in sexual autonomy.

1. The Enigma of Rape Law

An unanswered question lies at the heart of rape law. Why is rape a crime of its own?

Every rape is an assault or battery. Every rapist could be punished on that ground alone. The law, however, does not treat rape that way. Rape law makes an assault involving particular body parts a special crime of its own—one of the most serious in all of criminal law, punishable by death until not long ago,[68] and often by life imprisonment still today.[69] The crime of rape is in this respect unique. There is, for example, no special crime of assaulting someone's hands or face.[70] Nor is there a general crime of penetrating the body. Someone who force-feeds another has committed assault and battery, if she has committed an offense at all.

To ask why rape is its own crime may, I know, seem deliberately obtuse or wantonly insensible. Rape victims probably don't see an "enigma" here. Perhaps only someone who hasn't been raped—or perhaps only a man who hasn't been raped—would see things that way.

But the question still needs to be asked. As we will see, in traditional rape law, a morality of feminine virtue gave a simple, clear explanation of rape's status as a distinct and vile crime. Modern rape law, however, has ostensibly repudiated that morality. The question is whether modern law can still treat

68. *See* Coker v. Georgia, 433 U.S. 584 (1977) (holding the death penalty unconstitutional for the crime of rape); *see also* Kennedy v. Louisiana, 554 U.S. 407 (2008) (reaffirming *Coker* in cases of child rape).

69. *See, e.g.*, ALA. CODE § 13A-6-61 (2012); ARK. CODE ANN. § 5-14-124 (2011); GA. CODE ANN. § 16-6-1 (2011); Sexual Offences Act, 2003, c. 42, § 1(4) (U.K.).

70. But cutting off a hand or disfiguring a face can be mayhem. *See, e.g.*, People v. Ausbie, 20 Cal. Rptr. 3d 371, 376 (Ct. App. 2004).

rape as a distinct crime without relying on what it claims to repudiate.

Understanding rape law's history is important for two reasons: first, to see why modern rape law embraced sexual autonomy in place of the old rejected sex morality; and second, to see how this morality remains covertly operative today—in the law of rape-by-deception.

2. *Rape as a Crime of Defilement—Female Defilement*

Why then, for traditional judges, was rape so vile and so different from other assaults?[71] The answer would have been simple: rape defiled women.

No injury to a woman short of death, and perhaps not even death, was worse than rape: "An injury to her person more violent than the rape of a young girl—her defloration and ruin—is impossible."[72] "There is no form of violence more odious either in law or in morals than rape."[73] In the torrid words of one supreme court:

> What is the annihilation of houses or chattels . . . compared with the destruction of female innocence; robbing woman of that priceless jewel, which leaves her a blasted ruin, with the mournful motto inscribed upon its frontals, "thy glory is departed?" Our sacked habitations may be rebuilt, but who shall repair this moral desolation? How many has it sent . . . with unbearable sorrow, to their graves?[74]

To rape was to "shame and dishonour" a woman.[75] Or in the sympathetic phrase of a seventeenth-century digest compiled for the governance of the New World, to rape a woman was to "make a whore" of her.[76]

This worldview was distinctly not gender neutral. It was *women* and

---

71. I'm not looking here for an answer, however true it might be, of the form: "The purpose of traditional rape law was to subordinate women and entrench men's property rights in them." I'm asking about the law's *self*-understanding—what judges, lawyers, and others of this era would have said.

72. Callaghan v. State, 155 P. 308, 309 (Ariz. 1916).

73. 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 411, at 447 (Boston, Little Brown & Co., 2d ed. 1858).

74. Biggs v. State, 29 Ga. 723, 728-29 (1860).

75. 2 HECTOR DAVIES MORGAN, THE DOCTRINE AND LAW OF MARRIAGE, ADULTERY, AND DIVORCE 351 (Oxford, W. Baxter 1826).

76. JOHN COTTON, AN ABSTRACT OF THE LAWES OF NEW ENGLAND, AS THEY ARE NOW ESTABLISHED 14-15 (1641).

girls whom sex destroyed, leaving them a blasted ruin.[77] For men, on the other hand, sex was hardly an injury worse than death; even men who criminally seduced unmarried girls were merely "rakes," "rascals," and "knaves"—not "ruins."[78] On the whole, sex buttressed manhood, whereas it destroyed maidenhood and defiled femininity.

Traditional rape law's picture of female purity is too well known[79] to require much spelling out. Yet the connection between the old morality and some of rape law's basic doctrines has been surprisingly underappreciated. Consider the infamous marital rape exception.[80]

Today, the marital exemption is almost invariably explained on one of three grounds. Most often, it is said to have rested on the notion that a wife permanently consented to sex with her husband—an explanation offered by

77. "Ruin" is a frequent motif in sex cases from this era. *See, e.g.*, Taylor v. State, 35 S.E. 161, 164 (Ga. 1900); Wood v. State, 189 S.W. 474, 477 (Tex. Crim. App. 1916); *see also, e.g.*, *Biggs*, 29 Ga. at 729 (rape violates "*female* purity" (emphasis added)); Litchfield v. State, 126 P. 707, 713 (Okla. Crim. App. 1912) (rape is "moral desolation and spiritual assassination").

78. Smith v. Milburn, 17 Iowa 30, 36 (1864) ("rake"); Breon v. Hinkle, 13 P. 289, 294 (Or. 1887) ("knave"); Adams v. State, 19 Tex. Ct. App. 250, 251 (1885) ("rascal"). In fact, the entire crime of "seduction" (intercourse obtained through a promise, especially a false promise, of marriage) was built on female-purity premises: only males could be guilty; only females victimized; and in most states the woman's prior "chastity" was an element of the crime. *See* BISHOP, *supra* note 30, §§ 638-640, at 462-65; *see also, e.g.*, People *ex rel.* Scharff v. Frost, 120 N.Y.S. 491, 491 (App. Div. 1909) (noting that a person was guilty of seduction if he, "'under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character'" (quoting statute)).

79. *See, e.g.*, Thomas A. Mitchell, *We're Only Fooling Ourselves: A Critical Analysis of the Biases Inherent in the Legal System's Treatment of Rape Victims (or Learning from Our Mistakes: Abandoning a Fundamentally Prejudiced System & Moving Toward a Rational Jurisprudence of Rape)*, 18 BUFF. J. GENDER L. & SOC. POL'Y 73, 77 (2010) ("Throughout most of history, rape was considered a crime against the chastity of the victim . . . ."); *see also, e.g.*, Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 53 (2002) ("Embedded within [traditional] rape law, therefore, was an informal, though powerful, normative command that women maintain an ideal of sexual abstinence in order to obtain legal protection . . . ."); Coughlin, *supra* note 39, at 45-46 (referring to the "social attitudes and practices that stigmatize female sexual activity" that used to be incorporated in the "definition of rape").

80. Under traditional law, a man could not rape his wife. *See, e.g.*, Wilson v. United States, 230 F.2d 521, 526 (4th Cir. 1956) ("It is well settled that a husband . . . cannot be convicted as a . . . principal in the rape of his wife . . . ."); 2 JOEL PRENTISS BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW § 1119(2) (Chicago, T.H. Flood & Co. 8th ed. 1892); 1 WHARTON, *supra* note 8, § 553, at 514 (10th ed. 1896).

Hale and repeated many times thereafter,[81] although judges and scholars have long noticed that Hale seems to have made up the rationale out of whole cloth.[82] The two other theories are that the common law viewed a wife as the husband's "property" or the marital couple as "one person."[83]

All three accounts overlook a far simpler explanation: marital sex did not *defile* a woman. Whether a wife consented to sex, wanted it, hated it, or was forced to submit to it, she wasn't defiled by it. Thus a law protecting women from sexual defilement had nothing to do with the plight of women sexually assaulted by their husbands.

When we today look back uncomprehendingly on the marital rape exemption, we tend to forget the marital *fornication* exemption, the marital *seduction* exemption, the marital *prostitution* exemption, and so on; there was a marital exception to almost *all* traditional criminal sex law.[84] Matrimony alone sacralized a woman's defloration, moralized erotic desire, and legitimized its issue. So long as rape was understood as a crime of female defilement, the crime was impossible between a husband and wife.

The one exception proved the rule: a man *could* be convicted of raping his wife if he helped *another man* force sex on her.[85] For in that case, the wife *was* subjected to an act "despoiling of [her] virtue."[86] Actually, a second exception re-proved the rule. If a husband forced *unnatural* sex on his wife, an "infamous

---

81. 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN *629 (Philadelphia, Robert H. Small ed., 1847); *see also, e.g.*, Williams v. State, 494 So. 2d 819, 827 (Ala. Crim. App. 1986); State v. Scott, 525 A.2d 1364, 1369 (Conn. App. Ct. 1987); State v. Smith, 426 A.2d 38, 41 (N.J. 1981); ESTRICH, *supra* note 17, at 72-73; ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 12 (2003).

82. People v. Liberta, 474 N.E.2d 567, 572 (N.Y. 1984); JAMES FITZJAMES STEPHEN, A DIGEST OF THE CRIMINAL LAW 186 & n.1 (London, MacMillan & Co. 1883).

83. *See, e.g.*, Commonwealth v. Chretien, 417 N.E.2d 1203, 1207 (Mass. 1981) ("It is generally thought . . . that the basis of the spousal exclusion probably lies in the ancient concept of the wife as chattel."); *Liberta*, 474 N.E.2d at 573; ESTRICH, *supra* note 17, at 73-74.

84. Neither fornication, adultery, nor seduction could be committed by a husband with his wife; indeed for seduction, even a *subsequent* marriage was usually a defense. 2 WHARTON, *supra* note 8, § 1760, at 518. Prostitution would have covered what many women did in the marital bedroom if marriage hadn't been exempted—an exception that still exists today. *See, e.g.*, COLO. REV. STAT. § 18-7-201(1) (2011).

85. 2 BISHOP, *supra* note 80, § 1119(2), at 645; *e.g.*, Commonwealth v. Fogerty, 74 Mass. (8 Gray) 489, 491 (1857); People v. Chapman, 28 N.W. 896 (Mich. 1886).

86. *Chapman*, 28 N.W. at 898; *see also, e.g.*, State v. Dowell, 11 S.E. 525, 525 (N.C. 1890) (asserting that forcing one's wife into sexual intercourse with another man "prostitute[s]" her (quoting 1 HALE, *supra* note 81, at *629)).

indignity,"[87] he could also be convicted—not of rape, but of sodomy (evidently she ceased to be his property, and they ceased to be one person, if he did *that*).[88]

Rape as a crime against female virtue explains other definitive features of traditional doctrine as well—for example, the staggering legal fact that men could not be raped.[89] Rape was ruin, and sex did not ruin men.[90] The "utmost resistance requirement"[91] also fit comfortably with the traditional view, as a test of whether women displayed the virtue that rape law existed to protect.[92]

Similarly, traditional rape law was notoriously hostile to claims by "fallen" women.[93] Officially, the victim's past unchastity was irrelevant.[94] But a woman's past sexual derelictions could still be put before the jury to show consent.[95] Modern critics excoriate this doctrine, arguing that it allowed rapists

87. Crutcher v. Crutcher, 38 So. 337, 337 (Miss. 1905).

88. *See, e.g.*, United States v. Trudeau, 22 C.M.R. 485 (1956) (upholding conviction of assault with intent to sodomize wife); Mahone v. State, 209 So. 2d 435 (Ala. Ct. App. 1968); Smith v. State, 234 S.W. 32, 32-33 (Ark. 1921); Quinn v. Quinn, 6 Pa. D. & C. 712, 714-15 (Ct. Com. Pl. 1925); R v. Jellyman, (1839) 173 Eng. Rep. 637 (Patteson, J.).

89. *E.g.*, 2 BISHOP, *supra* note 80, § 1115(2), at 643 ("Rape is a man's ravishment of a woman . . . ."); 4 WILLIAM BLACKSTONE, COMMENTARIES *210 (defining rape as "the carnal knowledge *of a woman* forcibly and against her will" (emphasis added)).

90. A study of the history of the legal treatment of sexual assaults against children observes: "On the rare occasions when reformers and commentators did mention sexual assaults on boys by men, they presented those acts differently from instances of sexual violence against girls. . . . Both did suffer physical injury. Girls, however, also experienced 'ruin' . . . ." Stephen Robertson, *'Boys, of Course, Cannot Be Raped': Age, Homosexuality and the Redefinition of Sexual Violence in New York City, 1880-1955*, 18 GENDER & HIST. 357, 360 (2006).

91. A woman claiming rape used to be required to show that she had resisted the defendant "to her utmost." *E.g.*, Reynolds v. State, 42 N.W. 903, 903-04 (Neb. 1889); People v. Dohring, 59 N.Y. 374, 382 (1874); Brown v. State, 106 N.W. 536, 538 (Wis. 1906). For trenchant criticisms, see ESTRICH, *supra* note 17, at 29-41; and SCHULHOFER, *supra* note 17, at 19-20.

92. *See, e.g.*, *Dohring*, 59 N.Y. at 384 ("Can the mind conceive of a woman . . . revoltingly unwilling that this deed should be done upon her who would not resist so hard and so long as she was able?").

93. *See* 4 BLACKSTONE, *supra* note 89, at *213 (asserting that European rape law excluded prostitutes).

94. 2 BISHOP, *supra* note 80, § 1119(1), at 645 (even a "common prostitute" can charge rape). Some judges explained this rule on the ground that every sex act inflicted an additional defilement. *See* State v. Fernald, 55 N.W. 534, 535 (Iowa 1893) ("That which is already impure or unclean may be defiled by making more impure or unclean.").

95. *E.g.*, 2 BISHOP, *supra* note 80, § 1119(1), at 645. Wigmore maintained that a young woman's unchastity was also admissible to prove lack of credibility and even psychological instability.

to be acquitted because their victims were sexually active.[96] This criticism is completely justified, but what it criticizes was the doctrine's very point: tacitly, if not explicitly, (male) juries understood that rape was a crime of defilement—and how could sex defile a woman who had no virtue to defile?

3. The Turn to Sexual Autonomy

In the last several decades, rape law has undergone radical change. The marital rape exemption is history.[97] The rape of men and boys was finally recognized.[98] The utmost resistance requirement has been abolished.[99] New statutes exclude evidence of a rape claimant's past sexual conduct.[100]

These reforms, however, have created a conceptual gap. Rape law has officially repudiated the feminine-virtue premises of the traditional era. But how then does it explain why sexual assault is different from other assaults? If not defilement, what *is* the special violation that rape inflicts?

One possible answer: there is none. On this view, the idea of rape as a unique, outrageous violation is merely a noxious residue of old, invidious sexual moralities. Later I'll return to this possibility.[101] For now, we are asking how modern rape law explains itself—how rape's existence as an independent crime, graver than almost any other assault, is explained today, now that the older feminine-purity premises are no longer available.

Enter sexual autonomy. The earliest judicial statement that rape violates a

JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 924a (2d ed. supp. 1934). Some states disagreed. *See, e.g.*, Shay v. State, 90 So. 2d 209, 211 (Miss. 1956) ("[W]here want of consent is not in issue . . . evidence of the female's want of chastity is immaterial and inadmissible.").

96. *See, e.g.*, ESTRICH, *supra* note 17, at 49; SCHULHOFER, *supra* note 17, at 25.

97. *See* Emily J. Sack, *Is Domestic Violence a Crime?: Intimate Partner Rape as Allegory*, 24 ST. JOHN'S J. LEGAL COMMENT. 535, 554 (2010) (noting the abolition of the exemption in every state); *see also, e.g.*, R v. R, (1992) 1 A.C. 599 (H.L.) (appeal taken from Eng.) (abolishing the exemption). A marital exemption remains in *statutory* rape. *See, e.g.*, State v. Moore, 606 S.E.2d 127, 131 (N.C. Ct. App. 2004).

98. *See* Siegmund Fred Fuchs, Note, *Male Sexual Assault: Issues of Arousal and Consent*, 51 CLEV. ST. L. REV. 93, 111 (2004) ("[A]ll but three jurisdictions in the United States have gender-neutral rape statutes.").

99. *See* Katherine E. Volovski, *Domestic Violence*, 5 GEO. J. GENDER & L. 175, 178-79 (2004).

100. Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 990-91 (2008) (discussing the passage of rape shield laws in every state and by Congress).

101. *See infra* Section V.C.

woman's sexual "autonomy" was probably the Supreme Court's 1977 *Coker* decision—in which the Court also held that rape was not sufficiently heinous to merit capital punishment:

> We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and *autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established*. Short of homicide, it is the "ultimate violation of self."[102]

This frequently quoted[103] passage offered a new explanation of the distinctive violation effected by rape. Rape may not violate a woman's purity, but it does violate her "autonomy"—and specifically her *sexual* autonomy, her "privilege of choosing those with whom intimate relationships are to be established."[104]

Subsequent cases would reaffirm this idea,[105] explaining that sexual choices are among an individual's most private and intimate. As the Supreme Court of New Jersey put it in the well-known *M.T.S.* case:

> The decision to engage in sexual relations with another person is one of the most private and intimate decisions a person can make. Each person has the right not only to decide whether to engage in sexual contact with another, but also to control the circumstances and character of that contact.[106]

With this language, the right of sexual autonomy is fully articulated, and rape becomes expressly understood as unconsented-to sex: "We conclude, therefore, that any act of sexual penetration engaged in by the defendant

---

102. Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion) (emphasis added).

103. *E.g.*, Kennedy v. Louisiana, 554 U.S. 407, 437 (2008); Evans v. Ercole, No. 07-CV-6686, 2010 U.S. Dist. LEXIS 37078, at *13 (S.D.N.Y. Apr. 13, 2010); Warren v. State, 336 S.E.2d 221, 224 (Ga. 1985); State v. Wilson, 685 So. 2d 1063, 1066 (La. 1996); State v. Brand, 363 N.W.2d 516, 518 (Neb. 1985).

104. *Coker*, 433 U.S. at 597.

105. *See, e.g.*, Gonzales v. Thomas, 99 F.3d 978, 990 (10th Cir. 1996) ("Rape is a traumatic and heinous violation of personal integrity and autonomy."); People v. Soto, 245 P.3d 410, 418 (Cal. 2011) (describing rape as a violation of "sexual autonomy"); People v. De Stefano, 467 N.Y.S.2d 506, 512 (Suffolk Cnty. Ct. 1983) ("Rape is an abomination not because it is an assault on innocence, but because it is an assault on freedom. The gravity of rape . . . is in the injury to autonomy . . . ." (citation omitted)).

106. State *ex rel.* M.T.S., 609 A.2d 1266, 1278 (N.J. 1992).

without the affirmative and freely-given permission of the victim to the specific act . . . constitutes the offense . . . ."[107]

Autonomy is the dominant concept in today's leading rape scholarship. To Patricia Falk, the "central value protected by sexual offense provisions is sexual autonomy . . . , the violation of which represents a unique, not readily comparable, type of harm to the victim."[108] Stephen Schulhofer has argued extensively in favor of "sexual autonomy" and the "right to sexual self-determination."[109] Philosopher Joan McGregor concludes that the "moral wrongness of rape consists in violating an individual's . . . sexual self-determination and the seriousness of rape derives from the special importance we attach to sexual autonomy."[110] The citations could be multiplied.[111]

Outside the United States, the sexual-autonomy view of rape is also widespread. Germany's criminal code classifies sexual offenses as crimes "against sexual self-determination."[112] British scholars have invoked sexual autonomy to interpret England's recently reformed rape statutes.[113] In the words of one international court, the "true common denominator" of all rape may be the "violation[] of sexual *autonomy*."[114]

---

107. *Id*. at 1277.

108. Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 187 (2002).

109. SCHULHOFER, *supra* note 17, at 16-17.

110. McGregor, *supra* note 10, at 236.

111. *See, e.g.*, Coughlin, *supra* note 39, at 2; Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1785 (1992) (defining "sexual autonomy" as "the freedom to refuse to have sex with any one for any reason"); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 598 (1996) ("[T]he violation of a woman's sexual autonomy conveys greater disrespect for her worth than do most other violations of her person."). Dorothy Roberts was among the first to thematize rape as a problem of female autonomy. *See* Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359 (1993).

112. STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, BUNDESEGESETZBLATT I [BGBL. I], at §§ 174-184 (Ger.).

113. *See, e.g.*, Jonathan Herring, *Mistaken Sex*, 2005 CRIM. L. REV. 511, 516 (treating sexual autonomy as rape law's central principle); Vanessa E. Munro, *Constructing Consent: Legislating Freedom and Legitimating Constraint in the Expression of Sexual Autonomy*, 41 AKRON L. REV. 923 (2008).

114. Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 440 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

E. Summary: Putting Privacy, Decriminalization, Sex Codes, and Rape Law Together

In 1962, when the American Law Institute omitted fornication and adultery from the proposed Model Penal Code, an explanatory note declared that "private immorality should be beyond the reach of the penal law."[115] Three years later, *Griswold* announced the right to privacy. Together, decriminalization and constitutionalization arguably produced a new, modern fundamental right: the right to sexual autonomy. Today this same right has entered into rape law, which found itself in need of a new structuring principle shorn of the sexism and defilement ideology of the traditional era.

Sexual autonomy has two sides. First, consenting adults have a right to engage in sex of whatever variety in the privacy of their bedrooms. That's the point of *Lawrence* and decriminalization. Second, if an individual *doesn't* want sex of whatever variety—whether with a certain person, or with persons possessing a certain trait, or in certain circumstances, or at all—he or she has a right not to have it. That's the point of modern sex codes and rape law.

Thus would American sex law today appear to be animated by a single principle. Every individual has the right to decide what kind of sex to have, with what sorts of people, and in what circumstances.

II. THE RIDDLE OF RAPE-BY-DECEPTION

Or so at least the story might go. But this picture of American sex law can't account for a peculiar and thorny anomaly: sex-by-deception.

A. The General Rule and Its Two Exceptions

The subject was already perplexing over a century ago. Ordinarily, as an important treatise observed, "if . . . the consent is obtained by fraud . . . the law deems there was no consent."[116] But in the "peculiar" case of rape, the rule was otherwise: "Still the majority of English judges have held, that the peculiar offense of rape is *not* committed where a fraudulent consent is obtained . . . ."[117]

115. MODEL PENAL CODE § 213.6 note on adultery and fornication, at 439 (Proposed Official Draft 1962).

116. 1 BISHOP, *supra* note 73, § 343, at 384.

117. *Id.* (emphasis added). There were dissenting voices, although they acknowledged the prevailing rule. *See, e.g.*, People v. Crosswell, 13 Mich. 427, 437-38 (1865) (Cooley, J.)

To rationalize this result, common law judges were obliged to reject one of two venerable propositions: (1) that fraud vitiated consent; or (2) that rape was sex without consent. Some chose the first option:

> It seems to me that the proposition that fraud vitiates consent in criminal matters is not true . . . . [F]or the definition of rape is having connection with a woman without her consent; and if fraud vitiates consent, every case in which a man . . . commits bigamy, the second wife being ignorant of the first marriage, is also a case of rape. Many seductions would be rapes, and so might prostitution procured by fraud, as for instance by promises not intended to be fulfilled.[118]

Most judges, however, were unprepared to deny that fraud vitiates consent. Fortunately for them, a different definition of rape was available, supported by many authorities, according to which rape required *force*.[119] Especially in America, where the force requirement was often laid down by statute, nineteenth-century courts had a clear basis for rejecting rape-by-deception: "Rape is the carnal knowledge of any female . . . 'by force and against her will,'" and "fraud is not force."[120] American courts have adhered to this reasoning ever since.[121]

(criticizing the rule against rape-by-fraud); R v. Flattery, (1877) 2 Q.B.D. 410 at 413 (Kelly, C.B.) (Eng.) ("This case is therefore not within the authority of those cases which have decided, decisions which I regret, that where a man by fraud induces a woman to submit to sexual connection, it is not rape."); R v. Case, (1850) 169 Eng. Rep. 381 at 384 (Platt, B.) (Eng.) ("If she did not consent, then it was a rape; for there can be no distinction in principle between a dissent which makes connexion an assault, and a dissent which makes it a rape: fraud and force stand on the same footing. [Our cases to the contrary] require reconsideration.").

118. R v. Clarence, (1888) 22 Q.B.D. 23 at 43 (Stephen, J.) (Eng.).

119. *See, e.g.*, 2 BISHOP, *supra* note 80, §§ 1113-15, at 642-44 (noting the "common" definition of rape as "unlawful carnal knowledge, by a man of a woman, forcibly and against her will," and setting forth a "corrected" definition as "unlawful carnal knowledge, by a man of a woman, forcibly, where she does not consent"); 4 BLACKSTONE, *supra* note 89, at *210 (defining rape as "the carnal knowledge of a woman forcibly and against her will").

120. State v. Brooks, 76 N.C. 1, 3 (1877) (quoting statute); *see also, e.g.*, Don Moran v. People, 25 Mich. 356, 364 (1872) ("If the statute . . . did not contain the words 'by force,' or 'forcibly,' doubtless a consent procured by such fraud as that referred to, might be treated as no consent . . . ."); Wyatt v. State, 32 Tenn. 394, 398-99 (1852) ("*Fraud* . . . cannot be substituted for *force*, as an element of this offence . . . .") (emphasis added).

121. *See, e.g.*, Suliveres v. Commonwealth, 865 N.E.2d 1086, 1089 (Mass. 2007) (holding that rape requires force and therefore rejecting a claim of rape-by-deception); People v. Hough, 607 N.Y.S.2d 884, 885, 887 (Crim. Ct. 1994) (same); Commonwealth v. Culbreath, 36 Va. Cir. 188 (Cir. Ct. 1995) (same).

There was just one problem. In certain circumstances, the law held that women deceived into sex *were* raped. By the end of the nineteenth century, British judges could identify two established exceptions: "In *Reg.* v. *Flattery* . . . representing the act as a surgical operation . . . was held to be . . . rape. . . . [W]here consent was obtained by the personation of a husband . . . the passing of the Criminal Law Amendment Act of 1885 . . . 'declared and enacted' that thenceforth it should be deemed to be rape . . . ."[122]

These two exceptions—sex falsely represented as a medical procedure, and impersonation of a woman's husband—have been for over a hundred years the only generally recognized situations in which Anglo-American courts convict for rape-by-deception.[123] Both exceptions remain the law of England.[124] In Canada, they were recognized until at least 1982 and are apparently still good law today.[125] In Australia, a High Court decision expressly recognized both exceptions in 1958.[126] In the United States, courts have long endorsed the medical exception,[127] while the spousal-impersonation exception is the law of at

122. *Clarence*, 22 Q.B.D. at 43 (Stephen, J.). An Irish decision recognized rape by husband-impersonation in 1884. R. v. Dee (1884) 14 L.R. Ir. 468 (C.C.R.). A Scottish "Martin Guerre" came to life after the Great War, and the impersonator was found guilty of rape. *See* H.M. Advocate v. Montgomery, (1926) J.C. 2 (Scot.).

123. *See* Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 119 (1998) (observing "the two archetypical rape by fraud cases, fraudulent medical treatment and husband impersonation").

124. *See, e.g.*, R v. Linekar, [1995] Q.B. 250 (C.A.) [255] (appeal taken from Eng.). By statute, England recently broadened the husband-impersonation exception to cover impersonation of any "person known personally to the complainant." Sexual Offences Act, 2003, c. 42, § 76(2)(b) (U.K.).

125. Until 1982, Canada's rape statute expressly included the case of "personating [the victim's] husband." Canada Criminal Code, R.S.C. 1970, c. C-34, § 143(b)(ii). The 1983 statute abolished the crime of rape, replacing it with "sexual assault" offenses. *See* Canada Criminal Code, R.S.C. 1985, c. C-46, §§ 271-73. The Canadian Supreme Court has suggested that the new statute provides a "more flexible" rape-by-fraud doctrine. R. v. Cuerrier, [1998] 2 S.C.R. 371, 372 (Can.); *see* R. v. Crangle, [2010] 266 O.A.C. 299 (Can. Ont. C.A.) (upholding a conviction where one twin had sex with the other twin's girlfriend).

126. *Papadimitropoulos v. The Queen* (1958) 98 CLR 249, 257-59 (Austl.).

127. *See, e.g.*, People v. Minkowski, 23 Cal. Rptr. 92 (Dist. Ct. App. 1962); Pomeroy v. State, 94 Ind. 96 (1883); People v. Crosswell, 13 Mich. 424, 438 (1865); Story v. State, 721 P.2d 1020 (Wyo. 1986). Some opinions hold that this exception applies only to patients who don't realize they are being sexually penetrated. *See, e.g.*, Boro v. Superior Court, 210 Cal. Rptr. 122 (Ct. App. 1985). Others suggest the exception extends to convincing a patient that sexual penetration is medically required. *See, e.g.*, Eberhart v. State, 34 N.E. 637 (Ind. 1893); *see also, e.g.*, MICH. COMP. LAWS § 750.90 (2004) (making such conduct a felony punishable by up to ten years in prison).

least fourteen states,[128] including California,[129] and is recognized in the Model Penal Code.[130]

B. The Conventional Justifications—and Why They Fail

To explain rape-by-deception doctrine with its twin exceptions, contemporary courts and commentators repeat a kind of mantra. Fraud "in the factum," we are told, vitiates consent; fraud "in the inducement" does not.[131] The two exceptions—medical misrepresentation and spousal impersonation—represent fraud "in the *factum*," while virtually all other misrepresentations are fraud "in the inducement."[132] This distinction is said to be the law's "traditional formula" for distinguishing lies that vitiate consent from lies that do not.[133]

No matter how often repeated, this argument makes no sense. First and foremost, it's simply false that "fraud in the inducement" fails to vitiate consent elsewhere in the law. Standing for the contrary proposition are countless cases involving larceny,[134] trespass,[135] and contract.[136] Among the lies that serve as

128. *See* Russell L. Christopher & Kathryn H. Christopher, *Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape*, 101 NW. U. L. REV. 75, 100 & nn.164-65 (2007).

129. CAL. PENAL CODE § 261(a)(5) (West 2008).

130. MODEL PENAL CODE § 213.1(2)(c) (Official Draft and Explanatory Notes 1985).

131. *See, e.g.*, United States v. Hughes, 48 M.J. 214, 216 (C.A.A.F. 1998); *Boro*, 210 Cal. Rptr. at 125; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 143 (3d ed. 2001); WAYNE R. LAFAVE, CRIMINAL LAW 767 (3d ed. 2000); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 215 (3d ed. 1982); Christopher & Christopher, *supra* note 128, at 83-84.

132. *See, e.g.*, *Boro*, 210 Cal. Rptr. at 123; PERKINS & BOYCE, *supra* note 131, at 1079-81; Christopher & Christopher, *supra* note 128, at 83.

133. Falk, *supra* note 123, at 157 ("The traditional formula for [determining the validity of] consent in fraud cases is the dichotomy between fraud in the factum and fraud in the inducement."); *see* PERKINS & BOYCE, *supra* note 131, at 1079; Christopher & Christopher, *supra* note 128, at 83.

134. *See, e.g.*, Glenda K. Harnad et al., *Criminal Law: Crimes Against Property*, 18A CAL. JUR. 3D § 137 (2012) (citing numerous cases of larceny achieved through fraudulent inducement). One of the most famous, early larceny-by-trick cases involved a false promise to return a horse within a few hours. The King v. Pear, (1779) 168 Eng. Rep. 208 (K.B.).

135. *E.g.*, State v. Maxwell, 672 P.2d 590, 594 (Kan. 1993) (finding entry trespassory where defendants feigned interest in selling a watch); State v. Ortiz, 584 P.2d 1306, 1308 (N.M. Ct. App. 1978) (finding entry trespassory where defendants claimed to have come to a house to help the owner's daughter); *see also* Jay M. Zitter, *Use of Fraud or Trick as "Constructive Breaking" for Purpose of Burglary or Breaking and Entering Offense*, 17 A.L.R.5TH 125 § 3a (1994) (citing numerous similar cases).

exemplary consent-breakers are misrepresentations concerning the deceiver's occupation[137] or other personal characteristics—the same kind of lies at issue in many rape-by-deception cases. If the false meter reader cannot claim consent when he enters a person's home,[138] why can a false bachelor or movie mogul claim consent when he enters a woman's body?

On top of this, the fact/inducement distinction fails to explain at least one, and perhaps both, of the two exceptional scenarios it is supposed to explain. A woman who has sex with a man posing as her husband knows she is having sex. Thus if husband impersonation is "fraud in the factum," such fraud includes lies about the partner's personal identity. But if that's so, how can impersonation of a *paramour* be fraud "in the inducement"?[139] Indeed, how can *bachelor* impersonation be ruled out? To be sure, impersonating a husband deeply changes the moral, emotional, factual, and legal implications of sex, but so does pretending to be unmarried.

Even the medical-misrepresentation scenario is not so easy to explain as fraud in fact. The lie here may concern solely the man's purposes.[140] But if a misrepresentation of purpose counts as fraud "in fact," what about a man who pretends to be in love? The false doctor represents penetration as an act of professional care, the false lover as an act of emotional care.

Thus the fact/inducement distinction conflicts with countless fraud cases outside rape law, cannot explain paradigmatic examples of consent-vitiating

136. It is hornbook contract law that a person "fraudulently induced to enter into a contract has not assented to the agreement." 26 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 69.1 (4th ed. 2003); *see, e.g.*, Blankenship v. USA Truck, Inc., 601 F.3d 852, 855 (8th Cir. 2010) (upholding claim that "fraud voids a contract *ab initio*—because *fraud in the inducement precludes mutual assent*") (second emphasis added).

137. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 173 cmt. b, illus. 1 (1965).

138. *See, e.g.*, Theofel v. Farey-Jones, 359 F.3d 1066, 1073 (9th Cir. 2004); J.H. Desnick, M.D., Eye Servs., Ltd. v. ABC, Inc., 44 F.3d 1345, 1352 (7th Cir. 1995); Commonwealth v. Hayes, 460 A.2d 791, 796-97 (Pa. Super. Ct. 1983); RESTATEMENT (SECOND) OF TORTS § 173 cmt. b, illus. 2 (1965).

139. *See, e.g.*, PERKINS & BOYCE, *supra* note 131, at 216 (asserting that impersonation-of-paramour is fraud in the inducement); *see also, e.g.*, PETER WESTEN, THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT 198-99 (2004) (arguing that courts' treatment of husband-impersonation as fraud "in the factum" undercuts the entire fact/inducement logic). The outcomes are much better explained as moral judgments hiding behind a supposedly analytic distinction. *See* text accompanying note 145.

140. This is *not* so when the woman doesn't even know the doctor is entering her, but it *is* so when the doctor (or pseudo-doctor) falsely convinces her that intercourse is a medical treatment.

lies, and does not even explain the two exceptions it is meant to. Let's consider, therefore, a quite different argument justifying existing doctrine.

Matters of the heart, it might be said, are beyond the limits of judicial competence. No evidence of a legally cognizable kind can prove what one person really feels for another; judges and juries would only make a mess of such matters.[141] That's why most deception claims are properly excluded from rape law, and also why rape law permits the two long-established exceptions, which involve provable facts, not subjective emotions.

But facts concerning emotions are routinely put before juries. In a murder case, the defendant might be shown to have hated the victim—or to have been in love with her and jealous. As a matter of fact, it's not uncommon for the defense in a rape case to try to show that the complainant was in love with the accused (and is lying about the alleged rape). How then could the *accused's* feelings for the complainant be ruled out of evidentiary bounds?

In any event, an institutional competence argument cannot come close to sustaining existing rape-by-deception doctrine. The two misrepresentations that already turn sex into rape are plainly not the only examples of "objective" lies, easily amenable to proof. Claims about a person's marital status or job or wealth would be equally easy to test in court.[142]

So the law's treatment of rape-by-deception presents a riddle. Courts know that fraud vitiates consent and recognize as much in rape law's two exceptional

141. *See, e.g.*, Hyman Gross, *Rape, Moralism, and Human Rights*, 2007 CRIM. L. REV. 220, 224 ("Separating innocuous falsehoods from pernicious deceptions would present insurmountable difficulties in a court of law . . . .").

142. A related argument might defend current rape-by-deception doctrine on the ground that the complainant might have slept with the deceiver anyway; how are courts to know if the deception really mattered, and shouldn't criminal law be reluctant to make the defendant's liability turn on the complainant's (counterfactual) state of mind? The obvious problem with this kind of argument is that it applies to all criminal fraud laws. *See, e.g.*, Neder v. United States, 527 U.S. 1, 22-23 (1999) (noting the "well-settled" rule that courts must determine materiality in fraud prosecutions). In securities cases, courts have managed to deal with the exceedingly difficult question of whether a single failure to disclose one piece of information is material against the backdrop of a great deal of true information. *See, e.g.*, Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309, 1318 (2011) (reaffirming that the "materiality requirement is satisfied when there is 'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available'" (quoting Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988) (internal quotation marks omitted))). To claim that somehow in sexual contexts, materiality suddenly becomes insuperable would not be an argument for, but a rationalization of, existing doctrine. That the prosecution might not be able to prove materiality in some rape-by-deception cases provides no reason to exclude all rape-by-deception cases.

scenarios, but they close their eyes to that knowledge in virtually every other sex-by-deception case. Sometimes lies turn sex into rape; most of the time they don't. The official justification for this doctrine is no justification, and the most obvious alternative account—an institutional competence argument—fails just as badly. How then is rape-by-deception doctrine to be explained?[143]

C. Deception and Defilement

The mystery isn't really very mysterious. Our rape-by-deception doctrine developed long before the modern revolution in sex law. Current doctrine makes perfect sense—*on the defilement logic of traditional rape law*.

When courts in rape cases determine that the alleged victim "consented," what is it that the person is supposed to have consented *to*? The answer today is, of course, to sex. But that was not the answer under traditional rape law.

Traditional law never defined rape as unconsented-to sex as such. Rape was *nonmarital* sex with a woman who had not consented to *that*. A woman who knowingly agreed to have sex *out of wedlock* had done all the consenting she needed to do. Regardless of how deceived she might have been about any *other* facts or circumstances, she had willingly had sex with a man to whom she was not married—and had therefore in fact consented to the very act that rape law was supposed to protect her against.

Sex without consent did not mean in the old days what those same words mean today. Consent in traditional rape law was not a measure of autonomy. It was a measure of virtue.

"A virtuous female," as the courts of the traditional era were happy to define her, "is one who has not had sexual intercourse . . . out of wedlock, knowingly and voluntarily."[144] A virtuous female was *not*, therefore, one who had engaged in sex with a man because she believed he was rich or Jewish or a bachelor interested in a serious relationship. Those facts were morally and legally irrelevant. So long as a woman had willingly engaged in nonmarital sex, she had not been ruined against her will. She had voluntarily participated in—consented to—her ruin. And therefore she could not claim rape.

---

143. Below I'll consider other arguments justifying rape law's exclusion of sex-by-deception (for example, sexual deception is ubiquitous; people expect to be lied to in sexual contexts), freed from the requirement of explaining the two exceptions. *See infra* Section II.E. Here, the question is the riddle posed by existing law.

144. Marshall v. Territory, 101 P. 139, 143 (Okla. Crim. App. 1909); *see also* Cloninger v. State, 237 S.W. 288, 290 (Tex. Crim. App. 1921) (quoting from this passage in *Marshall*); State v. Dacke, 109 P. 1050, 1051 (Wash. 1910) (same).

By contrast, in the two exceptional scenarios, where sex-by-deception *could* qualify as rape, the woman had precisely *not consented to out-of-wedlock sex*. If a man impersonated her *husband* (not a paramour, not a rich bachelor, not anyone else), the woman believed she was having *marital* sex; her consent was therefore "*innocent*."[145] Similarly, if a woman was convinced that she was undergoing a medical procedure, then she arguably believed, at least in a moral sense, she wasn't having sex at all.[146] Thus in the two exceptional scenarios, the woman hadn't knowingly surrendered her virtue.[147] But in almost all other cases of deception, the deceived woman had consented to nonmarital sex—the only consent that mattered.

So the riddle is solved. Rape law's exclusion of almost all sex-by-deception claims followed from the fact that in such cases the woman had willingly had nonmarital sex. Though deceived, she had willingly surrendered her virtue and thus could not claim rape. But the twin exceptions also made perfect sense, because they involved virtuous women—women who had not knowingly had sex with a man to whom they weren't married.

D. What Sexual Autonomy Says—or Ought To Say—About Rape-by-Deception

Unfortunately, to explain our rape-by-deception doctrine is also to show that it no longer makes sense—not, at least, in an autonomy-based rape law. Assuming that sexual autonomy means anything, it surely includes the right not to have sex with a married man if you don't want to. It surely includes the right not to have sex with someone who isn't interested in a serious relationship. These rights can be violated by lies just as much as they can by force or threat.

Fraud is one of autonomy's two great enemies, along with force. Just as

145. *E.g.*, Boro v. Superior Court, 210 Cal. Rptr. 122, 124-25 (Ct. App. 1985) (emphasis added) ("[T]he woman's consent is to an innocent act of marital intercourse while what is actually perpetrated upon her is an act of adultery." (quoting PERKINS & BOYCE, *supra* note 131, at 1081)); *see, e.g.*, R v. Clarence, [1888] 22 Q.B.D. 23 at 44 (Eng.) ("Consent to [sex] with a husband is not consent to adultery."); R v. Dee, (1884) 14 L.R. Ir. 468 (C.C.R.) [479] ("[S]he intends to consent to a lawful marital act . . . but did she consent to the act of adultery? Are not the acts themselves wholly different in their moral nature?").

146. *E.g.*, *Boro*, 210 Cal. Rptr. at 124; PERKINS & BOYCE, *supra* note 131, at 215.

147. *Cf.* Coughlin, *supra* note 39, at 31-32 (observing that in the two exceptional scenarios, the woman's actions would not have been criminal under fornication or adultery laws).

coercion destroys autonomy, so too does deceitful manipulation.[148] Thus a rape law genuinely committed to sexual autonomy would reject the force requirement, defining rape solely in terms of consent.[149] And if rape is sex without consent, sex-by-deception ought to be rape.

E. Squaring Sex-by-Deception with Sexual Autonomy?

Let's consider some objections to this conclusion. Each will argue that sex-by-deception is not rape, while insisting that rape means unconsented-to sex. This line of argument may tempt many readers. Those who have long believed both that rape is sex without consent and that rape-by-deception is not rape will naturally want to believe these two positions are not in conflict.

Let me begin, therefore, with a reminder: our law's almost categorical exclusion of rape-by-deception claims began in traditional rape law's rejection of sexual autonomy. A woman had no right, legal or moral, to have nonmarital sex; so long as she consented to that act of defilement, she had not been raped, no matter how deceived she was about any other facts. It would be quite surprising if rape law's deception doctrine, inherited virtually unchanged from the traditional era, could suddenly be justified on the basis of the very

148. "[L]ying is wrong because it violates human autonomy. Lying forces the victim to pursue the speaker's objectives instead of the victim's . . . ." David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 355 (1991); *see also, e.g.*, 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 116 (1984) ("[A] person's consent is fully voluntary only when he is a competent and unimpaired adult who has not been threatened, misled, or lied to about relevant facts . . . ."); JOSEPH RAZ, THE MORALITY OF FREEDOM 378 (1986) ("Coercion and manipulation subject the will of one person to that of another. That violates his independence and is inconsistent with his autonomy."). For a comparative view, see Jacques du Plessis, *Fraud, Duress and Unjustified Enrichment: A Civil-Law Perspective*, *in* UNJUSTIFIED ENRICHMENT: KEY ISSUES IN COMPARATIVE PERSPECTIVE 194, 196-200 (David Johnston & Reinhard Zimmermann eds., 2002), which canvasses civil and common law tort regimes and states that "it should be apparent that fraud and duress" are widely viewed as involving "serious violations of individual autonomy."

149. *See, e.g.*, SCHULHOFER, *supra* note 17, at 100-01 (analyzing rape and a right of sexual autonomy in terms of consent and therefore criticizing the force requirement); McGregor, *supra* note 10, at 233, 236 (criticizing the force requirement on sexual autonomy grounds). The *M.T.S.* decision, mentioned earlier, is also illustrative. There the New Jersey Supreme Court, having embraced a right of sexual autonomy, held that where nonconsent is proven, the force requirement *is satisfied by the act of intercourse itself*. State *ex rel.* M.T.S. 609 A.2d 1266, 1277 (N.J. 1992); *see also* State v. Meyers, 799 N.W.2d 132, 147 (Iowa 2011) (holding that Iowa's rape statute, which defines the crime as sex "by force or against the will," did not require physical force).

principle—sexual autonomy—whose rejection it was built on. Yet that is what every one of the objections about to be considered claims.

1. Victims of Deception Do in Fact Consent

First objection: when sex is imposed through brute force, the victim's will is physically overborne. He never says yes; he never consents. But that's not so with deception. Here the victim does in fact say yes. Of course sex-by-deception isn't rape (it might be said); the victim consented.[150]

The correct comparison, however, is to a victim compelled to submit at gunpoint, who *does* say yes. If that "consent" is rejected on grounds of autonomy, as it must be, the same should go for a "consent" procured by fraud. Neither consent is given in conditions allowing an autonomous choice.[151] That is why libertarians object foundationally to both force and fraud.[152]

2. Deceived Sex Is Wanted Sex

But at least in deception cases, someone might say, the victims *physically desire* the sex they engage in (at the moment they engage in it), and thus should be viewed as having consented to it. There is a huge difference between having sex one physically desires and (as in forcible rape) having sex one doesn't. When a person is deceived into sex, "the encounter is one that—*at the time*—she believes she wants," from which she "may experience sexual pleasure."[153]

This reasoning is badly flawed. To begin with, it marries consent to the physical "wantedness" of sex and hence to pleasure. That position has a venerable history, but it is unacceptable: it suggests that a rapist should videotape or brain-scan his victim, trying to preserve evidence that the victim

150. *See* Gross, *supra* note 141, at 224. This argument tracks traditional rape law. *See, e.g.*, 2 BISHOP, *supra* note 80, § 1122, at 647 ("Though her consent was obtained by fraud, still she consented."). The problem was and is that everywhere else in the law, consent obtained by fraud is no consent at all.

151. *See* Strauss, *supra* note 148, at 355, and the other sources cited *supra* note 148.

152. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA, at ix (1974); *see also* AYN RAND, *The Nature of Government*, *in* THE VIRTUE OF SELFISHNESS 144, 150-51 (1964) ("Fraud involves a similarly indirect use of force: it consists of obtaining material values without their owner's consent, under false pretenses or false promises.").

153. SCHULHOFER, *supra* note 17, at 156; *cf.* POSNER, *supra* note 48, at 393 (sex achieved through "the common misrepresentations of dating and courtship" is "merely humiliating," rather than "disgusting as well as humiliating").

actually "experience[d] sexual pleasure."[154] Pleasure is not consent. A person aroused by forced sex[155] is not a rape-free zone, susceptible to imposition by anyone at any time.

In any event, it simply is not true that all victims of sexual deception physically desire the sex they agree to. Consider two people, each of whom agrees to have sex with a man, identically deceived about the man's wealth, marital status, and feelings. The first person desires sex and takes pleasure from it; the second is repulsed, but submits in hope of a lucrative, long-term relationship. Are courts really to hold that the first was *not* raped (because the sex was physically desired), but the second *was* (because the sex was disgusting)?

3. Lies Are Customary and Expected in Sexual Contexts

Next objection: sexual lies are so rife that no one actually relies on them—or at least no reasonable person does. "[W]ords said to arouse feelings and to 'put one in the mood' are understood to be part of a game that lovers play . . . ."[156] Thus no one is deceived, because no one is (reasonably) taken in.

It's true that a healthy skepticism properly discounts much of what people say in sexual settings, but it seems overwrought to conclude that there can be no reasonable reliance at all. Sooner or later most of us come to believe certain things about the people we have sex with. We can be badly fooled; we might even marry into a lie. Whether on the first date or the tenth, the "it's a game that lovers play" argument will eventually run out. It will not explain why rape-by-deception goes unpunished when reasonable people are deceived about facts material to their sexual decisions.

Moreover, if sexual deceivers started going to prison in large numbers for rape-by-deception, many fewer lies would be told and reliance would become even more reasonable. So as a defense of existing rape-by-deception doctrine, this argument is not only overstated. It's circular.

154. SCHULHOFER, *supra* note 17, at 156.

155. *Cf.* ROBIN WEST, NARRATIVE, AUTHORITY, AND LAW 218, 223 (1993) (discussing *The Story of O* and the feminist response to the "conflict between pleasure and ideal posed by the undeniable female eroticization of sexual submission").

156. Gross, *supra* note 141, at 224.

4. Deception Need Not Undermine Autonomy

"You seem to be arguing that all deception vitiates autonomy," it might be objected. "No serious account of autonomy takes that view. An agent autonomously consents by assenting under conditions justifying the further conclusion that he has given a morally or legally significant permission. These conditions are not easy to specify, but clearly they don't require complete information or truth. For sexual autonomy, only a very few basic facts need be known; I'm not prepared to say exactly which facts, but they don't include the other's income, marital status, feelings, etc."

In fact I haven't argued that all lies undermine autonomy; only material lies reasonably relied on do. But the critical claim here is that knowing "a very few basic facts," even while being lied to about others, preserves the autonomy of sexual consent. Why should this be so? There are two versions of this claim.

The strong version would assert that most deception, unlike physical threats, actually leaves autonomy basically intact. "Consider the *duress* defense in criminal law," it might be said, "and the absence of a corresponding *deception* defense. Threats of serious bodily harm make an action unattributable to an agent; if you rob a bank under duress, you're not guilty. But if you were merely *lied* to—about your take, for example, or your accomplice's romantic interest in you—you are guilty. The duress defense reflects the core insight that coerced parties lose their autonomy while deceived parties do not."[157]

This objection is important, but it relies on a misleading premise. It presumes that the traditional criminal defenses track autonomy, so that the absence of a general "deception defense" in criminal law would indicate that deceived persons retain their autonomy, or at least are so judged by the law. This premise is incorrect.

The traditional criminal defenses track not autonomy, but blameworthiness or guilt. Self-defense exonerates, but in no way undermines autonomy; it exonerates because it justifies. The reason a bank robber fooled by confederates who plan to abscond with all the loot has no defense is that this deception doesn't make him any less blameworthy or less guilty of bank robbery. If, by contrast, he had been fooled into believing that he was not robbing a bank, but simply making a lawful withdrawal of funds, he *would* have a defense. In other words, there *is* a deception defense in criminal law when the deception is such that it absolves the deceived person of blameworthiness or guilt.

When law does track autonomy—when it is directed at protecting

157. I thank Gideon Yaffe for bringing this objection to my attention.

autonomously given consent, rather than establishing an excuse from criminal liability—it almost invariably protects persons victimized by deception as well as by duress. Thus if you are gulled by the proverbial false meter reader, you can claim trespass because his deception undermined your right to decide who may and may not enter your house. Similarly, the false stockbroker uses no duress, but still takes your property without your autonomous consent, which is why you can claim theft.

A rape victim is not a criminal defendant. She is not called on to show that she has a valid "defense" or that she should be excused for having engaged in sexual activity. According to the autonomy-based view of rape, all she is required to show is that her autonomy—her right to make an autonomous choice about her sexual activity—was violated. And on that view, rape-by-deception ought to be rape, just as larceny-by-deception is larceny.

A weaker version of the "basic facts are enough" claim would focus on the particular lies involved in rape-by-deception. "Imagine a surgeon," this argument might go, "who had falsely told a patient he was a bachelor seriously interested in a relationship with her. Her consent would still be upheld in court, provided she knew all the medically relevant information.[158] Rape-by-deception doctrine is identical. Just as the law can reject this 'surgery-by-deception' claim while still protecting patient autonomy, so too can the law reject rape-by-deception while still protecting sexual autonomy."

But the analogy doesn't hold. Not every misrepresentation is material. The lies that break consent in any particular legal context will depend on what must be consented *to*, which will in turn depend on what values or interests the law in question is attempting to serve.[159] Patient consent laws are interested in *medical* consent, to which the only material facts might be said to be the *medical* facts, not the doctor's sexual intentions. But for the very same reason, lies about sexual intentions could not be deemed per se immaterial to sexual consent.

Materiality represents a judgment about what facts a person has reason to take into account in making a certain decision, given the interests that the law protecting that decision seeks to further. Thus a patient consent law aiming at

158. *See, e.g.*, Duffy v. Flagg, 905 A.2d 15, 20 (Conn. 2006) (holding that for the purposes of informed medical consent, only the nature of the procedure, its risks, its anticipated benefits, and the alternatives to the procedure are legally material).

159. *See* J.H. Desnick, M.D., Eye Servs., Ltd. v. ABC, Inc., 44 F.3d 1345, 1352 (7th Cir. 1995); *cf.* WESTEN, *supra* note 139, at 199 ("Ultimately, . . . [courts] must make normatively contestable judgments as to the additional knowledge, if any, that subjects must possess" if assent "is to constitute a defense.").

an informed medical decision will ask which facts a person has reason to take into account from a medical point of view.[160] But by the same logic, the question in sexual matters must be what a person has reason to take into account from a sexual point of view. And marital status, feelings, seriousness of interest, and even religion are all factors reasonable people could well take into account in making sexual decisions; thousands do so every day.

The only way to limit the material sexual facts to the "basic facts" (essentially the facts of the sex act) is, uncoincidentally, to adopt traditional rape law's judgment of materiality, in which the one decision that counted was the woman's decision to have sex, full stop. A rape law dedicated to autonomy has no basis for so cramped a judgment of what is material. To pretend otherwise is to cloak traditional sexual morality in the modern rhetoric of autonomy. At a minimum, an autonomy-based rape law should see rape whenever, to quote Israel's Supreme Court, someone "does not tell the truth regarding matters critical to a reasonable [person], and as a result of his misrepresentation [that person] has sexual relations with him."[161]

III. THREE OPTIONS, INCLUDING A COMPROMISE

The conundrum of sex-by-deception therefore leaves rape law in an uncomfortable position. Three principal positions are available. The first two are obvious, with obvious difficulties. The third is a compromise.

A. Sticking with Force

The first alternative is for rape law to stick with the force requirement. Rape isn't sex without consent; it's forcible sex without consent. The virtue of this option (if it is a virtue) is that it excludes rape-by-deception—and does so without invoking antiquated notions of feminine virtue.

But this way of dismissing rape-by-deception flies in the face of the

160. To which the best answer might be that a surgeon's falsely playing a lover *should* be held to invalidate the patient's medical consent. I am accepting the contrary position only arguendo.

161. CrimA 2358/06 Selimann v. State of Israel (Sept. 17, 2008), Nevo Legal Database (by subscription); *see also* R. v. Cuerrier, [1998] 2 S.C.R. 371, 374 (Can.) (opinion of L'Heureux-Dubé, J.) (asserting that Canada's new sexual assault statutes were enacted to protect "autonomy" and therefore the victim's consent should be held vitiated whenever "the complainant would not have submitted" but for the defendant's "dishonesty").

near-universal scholarly consensus decrying the force requirement.[162] It offers no explanation why pressures and manipulations falling short of physical force should not turn sex into rape. Indeed, without more, it offers no explanation why force *does* turn sex into rape: for if the answer were only that force vitiates consent, then sex-by-deception ought to be rape as well.

More fundamentally, the force requirement turns its back on the right of sexual autonomy. As a result, it not only conflicts with what is today understood as rape law's fundamental principle. It is also in deep tension with *Lawrence v. Texas*—assuming that *Lawrence* stands for a right of sexual autonomy.[163]

I don't mean that rape law's force requirement is unconstitutional; statutes can be in profound tension with constitutional principles without being unconstitutional. By way of analogy, imagine a state statute comprehensively regulating abortion, but specifically immunizing from all liability (criminal or civil) any person who uses deception or concealment to prevent a pregnant woman from obtaining an abortion. Doctors could lie to pregnant women with impunity to deceive them into childbirth. Pathologists could falsify amniocentesis results.

Depending on your views about abortion, you will presumably react to this scenario by condemning either the statute or *Roe v. Wade*.[164] If you believe that *Roe* properly protects a woman's right to choose abortion, you will object that the statute allows private actors to deny or obstruct that right. If on the other hand you consider abortion the killing of a human being, you might say that the statute is right because *Roe* is wrong. Either way, by permitting private actors to engage in abortion-prevention-by-deception, the statute would be a rebuke to *Roe*—deeply in tension with that case, even if not unconstitutional thereunder.

Now apply this logic to sexual autonomy. If *Lawrence* really holds that every individual has a right to sexual autonomy, rape law's permission of sex-by-deception—permitting private actors to deceive people into sex—would be analogous to a statute permitting private actors to deceive women into childbirth. It would be a rebuke to *Lawrence*. It would allow private actors to deny or obstruct a freedom that constitutional law had deemed fundamental.

---

162. *See, e.g.*, Bryden, *supra* note 18, at 322 ("Virtually all modern rape scholars want to modify or abolish the force requirement as an element of rape."); sources cited *supra* note 17.

163. *See supra* note 54 (citing authors who have read *Lawrence* as standing for a right of sexual autonomy).

164. 410 U.S. 113 (1973).

Thus does the force requirement, which sustains existing rape-by-deception doctrine, turn its back on what is arguably the reigning principle of American sex law. So long as rape law adheres to the force requirement, it permits sex-by-deception and refuses to vindicate the right to sexual autonomy.

B. Embracing Sexual Autonomy

The second alternative is the reverse: abandoning the force requirement and embracing instead the right of sexual autonomy. This option would have the mirror-image advantages and disadvantages of the first.

Appealingly, it would eliminate any conflict between rape law and the principle of sexual freedom—the privilege to choose for oneself, in an exercise of one's own autonomous will, under what circumstances to have sex. In addition, it would have the virtue of eliminating those aspects of current rape law that critics of the force requirement most vigorously oppose. For example, a rape law untethered to force could finally penalize men who use nonviolent pressures, manipulation, or alcohol to induce sexual cooperation.

On the other hand, sex-by-deception would have to be a crime as well. If our criminal sex law were really designed to vindicate a right of sexual autonomy, sex plus lies should equal jail time, whether the lie was a false claim of bachelorhood, "I love you," or any other material misrepresentation reasonably calculated to induce another person to have sex. To be sure, the crime need not be graded as severely as violent rape. It could be called rape-in-the-second-degree or just "rape-by-deception." But in one form or another, if rape is sex without consent, sex-by-deception ought to be rape.

C. The Compromise: Not Force, but Coercion

Is rape law therefore obliged either (1) to stick to the force requirement or (2) to criminalize sex-by-deception? No: a third way is possible.

Suppose rape law replaced the force requirement with a *coercion requirement*. A coercion requirement would cure the worst problems of the force requirement, reject rape-by-deception claims, and effect a partial reconciliation between rape law and sexual autonomy. For these reasons, many readers may find this solution appealing.

One of the most widely condemned implications of the force requirement is its absolution of defendants who use nonviolent means of pressuring or manipulating vulnerable people, particularly women, into sex. In an egregious

case called *Mlinarich*, a sixty-three-year-old man arranged to become the guardian of a thirteen-year-old girl, securing her release from a juvenile jail.[165] On her fourteenth birthday, the man ordered his ward to undress and serve him sexually.[166] She refused, but he eventually induced her to submit by threatening to send her back to jail.[167] Over the next few weeks, he tried twice to have sexual intercourse with her, failed both times, sodomized her, and finally succeeded in having intercourse.[168] Under the force requirement, the Pennsylvania courts acquitted Mlinarich of rape.[169]

A coercion-based rape law would easily produce a different result. Similarly, a coercion requirement would be satisfied where a principal compels a student to have sex by threatening to expel her,[170] or where an employer compels sex by threatening to fire the employee. Thus a coercion requirement would pick up at least some of the worst cases that fall through the cracks of the force requirement.

Moreover, a coercion requirement would bring rape law closer to the ideal of sexual autonomy. But deception is not coercion. So a coercion-based rape law would still exclude most cases of sexual deception.

Many readers may, therefore, find in a coercion-based rape doctrine a happy medium between a rape law so narrow that it prohibits only sex induced by physical force and a rape law so broad that it jails people who have sex while concealing their true age, looks, income, or degree of romantic interest. A coercion requirement offers an appealing compromise between the two extreme positions, reaching desired results while bringing rape law a step closer to sexual autonomy.

D. Conclusion: The Problem with Coercion

Probably this Article should now be finished. We have seen how the problem of rape-by-deception drives a wedge into rape law, requiring it to choose between force and autonomy. And now we've struck a compromise,

165. Commonwealth v. Mlinarich, 542 A.2d 1335, 1337 (Pa. 1988).

166. *Id.*

167. *Id.*

168. *Id.*

169. Of course Mlinarich was guilty of "statutory" rape, but an appellate court reversed his conviction of "real" rape, and the supreme court affirmed by an equally divided vote. *Id.* at 1342.

170. *See* State v. Thompson, 792 P.2d 1103 (Mont. 1990) (acquitting the defendant of rape).

offering a partial reconciliation between them.

The problem is that the compromise dissolves on contact with reflection. The coercion requirement's exclusion of rape-by-deception is contradicted by its own internal logic. Coercion is objectionable because a coerced "yes" does not reflect a valid or genuine consent. But the same is true of a deceived "yes." An anti-coercion principle is attractive because coerced sex is unconsented-to sex. But if unconsented-to sex is rape law's target, then *deceptive sex ought to be punished as well*.

Could a coercion-based account of rape claim to rest on something other than a consent principle? Duress, perhaps?

Invoking duress adds nothing to the argument. First of all, coercion and duress are largely interchangeable terms in law.[171] Thus to say that a coercion-based rape law could rest on duress is like saying that a coercion-based rape law could rest on coercion. Moreover, when courts explain why duress is legally important, they typically say that duress (like coercion) undermines "free" choice, causing the victim to act in a way that doesn't reflect his "free will or free agency"[172] or true consent.[173] But fraud does the same. Finally, as noted above, a duress-based rape law would make sense only if rape law were concerned not with the victim's autonomy, but rather with her blameworthiness or responsibility for having had sex.

A coercion rule for rape law would claim its strength from the principle of sexual autonomy—the idea that people have a right not to engage in sex they don't consent to. But by excluding sexual deception, the coercion compromise conflicts with sexual autonomy. It can exclude rape-by-deception only by contradicting its own logic.

171. United States v. Dowd, 417 F.3d 1080, 1086-87 (9th Cir. 2005) (upholding a jury instruction stating that the terms "coercion" and "duress" are interchangeable); United States v. Helem, 186 F.3d 449, 453 (4th Cir. 1999) (same). Where the two terms *are* distinguished, "duress" is typically said to be coercion accomplished by "*physical force*"—a qualification that would not assist the objection. *E.g.*, State v. Woods, 357 N.E.2d 1059, 1065 (Ohio 1976) (emphasis added) (quoting McKenzie-Hague Co. v. Carbide & Carbon Chems. Corp., 73 F.2d 78, 82-83 (8th Cir. 1934)).

172. *E.g.*, Wheeler v. Comm'r, 528 F.3d 773, 779 (10th Cir. 2008) (quoting 28 RICHARD A. LORD, WILLISTON ON CONTRACTS § 71:11 (4th ed. 2003)).

173. *See, e.g.*, Bogan v. City of Chicago, 644 F.3d 563, 568-69 (7th Cir. 2011) (citing Valance v. Wisel, 110 F.3d 1269, 1278-79 (7th Cir. 1997)).

IV. THE MERITS OF DECEPTIVE SEX AND OF SEXUAL AUTONOMY

Which leaves rape law with two paths to choose from. Two postulates of American sex law turn out to be at war. The first is that most sex-by-deception is not rape or even a crime. The second is that individuals have a right to sexual autonomy. The first is established by the force requirement. The second is supported by *Lawrence*, the decriminalization of consensual sex, and modern sex codes as well. But these two postulates cannot both stand.

It's time to question both these postulates. One of them has to give. Perhaps sex-by-deception *should* be rape—or at any rate a crime—in which case our criminal sex law could and should embrace sexual autonomy without cavil. Or perhaps instead the supposed right to sexual autonomy is wrong, in which case rejecting rape-by-deception is much less problematic, but *Lawrence v. Texas*, to the extent that it stands for such a right, would have to be reconsidered.

In what follows, I try to take on these difficult and foundational questions. My conclusions will be as follows. First, good reasons underlie the intuition that sex-by-deception is not rape or, generally, a crime. Second, the supposed right of sexual autonomy is a myth and should be rejected.

A. Should Sex-by-Deception Be a Crime?

The case for criminalizing sex-by-deception is obvious. Fraud is typically illegal. Deceiving people into sex can be particularly invidious. It can be demeaning and humiliating. It can impose substantial risks and fateful consequences, including pregnancy or illness, on people without their genuine consent. And of course it prevents parties to the sexual bargain from reaching the efficient, welfare-maximizing deals at which they rationally aim.[174]

It's a crime to trick people out of their property. How can it be lawful to trick them out of their bodies—how can the law give less protection to women's bodies (and not only women's) than it gives to chattel? We have already seen that existing rape-by-deception doctrine rests on an obsolete morality of female sexual virtue. Why shouldn't rape law rid itself of this final vestige of traditional rape law and extend unreservedly to deception?

In this Section, I offer reasons why a general crime of sex-by-deception

174. For the view that rape law should be understood as increasing the efficiency of sexual transactions, see Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1199 (1985) ("[T]he prohibition against rape is to the marriage and sex 'market' as the prohibition against theft is to explicit markets in goods and services.").

would be unwise. What I say is not intended to provide a knock-down argument proving that sex-by-deception cannot be criminalized. The goal is only to remind us that sound reasons lie behind the judgment that sex-by-deception isn't and shouldn't be a crime.

1. An Interesting Implication of Rape-by-Deception

Say that a man, twenty-five, invites a seventeen-year-old woman back to his home, believing that she's eighteen. They have sex. What crimes have been committed?

The man may well be guilty of statutory rape.[175] But assuming that the girl lied about her age and he wouldn't have slept with her otherwise, the girl would also be guilty of rape—if sex-by-deception were rape. As a minor, would she be immune from prosecution? On the contrary, minors are frequently prosecuted as adults for rape.[176] Hence man and girl might both serve time, he for "statutorily" raping her, she for "really" raping him.[177]

Until quite recently, judges could have warded off this double-rape result by holding that women are legally incapable of raping men.[178] But today's rape law has rejected these notions.[179] Women can be rapists, and they would be much more often if sex-by-deception were rape.

Now consider a much more egregious case. A man—call him McDowell—sees the following advertisement on Craigslist: "Need a real aggressive man with no concern for women." A photograph shows the sender to be an attractive female in her twenties. McDowell responds and receives by email a home address, more photographs, and more statements of the following kind: "looking for

175. *See* Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 352 (2003) (discussing the rule that a "mistake-of age" is no defense).

176. *See, e.g.*, Armer v. State, 773 P.2d 757, 758-59 (Okla. Crim. App. 1989); State v. Pentland, 719 P.2d 605, 606 (Wash. Ct. App. 1986); *see also, e.g.*, VA. CODE ANN. § 16.1-269.1 (2010) (providing for prosecution as adults of persons fourteen years of age or older charged with rape).

177. *See* Christopher & Christopher, *supra* note 128, at 79 (arguing that sex by "adult impersonation . . . constitutes rape by fraud").

178. *See, e.g.*, State v. Greensweig, 644 P.2d 372, 375 (Idaho Ct. App. 1982) ("Nature has provided that only a male can accomplish the penetration by sexual intercourse."); Brooks v. State, 330 A.2d 670, 673 (Md. Ct. Spec. App. 1975).

179. *See, e.g.*, State v. Stevens, 510 A.2d 1070, 1071 (Me. 1986); People v. Liberta, 474 N.E.2d 567, 575-78 (N.Y. 1984); *Ex parte* Groves, 571 S.W.2d 888, 892-93 (Tex. Crim. App. 1975) (en banc).

humiliation, physical abuse and sexual abuse." On a December afternoon in 2009, McDowell goes to the house, sees the woman, assaults her, ties her up, and rapes her at knifepoint.

As the reader may know, these facts are real. The Craigslist advertiser turned out to be an ex-boyfriend of the assaulted woman, one Jebidiah Stipe, who, when the facts came out, was convicted of rape and sentenced to sixty years in prison.[180] A question much discussed was whether McDowell had also committed rape: he claimed that he sincerely believed his victim had consented and that he was merely fulfilling her sexual fantasies.[181] (The judge sentenced him to sixty years as well.[182]) A question no one asked was whether McDowell had been the *victim* of rape.

But if sex-by-deception is rape, McDowell *was* raped, provided we accept his story. The woman was raped by force. He was raped by fraud.

It is of course possible for a given individual simultaneously to commit a crime and to be the victim of that crime (a person may steal and be stolen from, kill and be killed, at the same time). The notion, however, that a man who committed a violent sexual assault could himself claim rape on deception grounds seems patently ridiculous. Yet that would be a perfectly predictable result if sex-by-deception were rape.

And the assailant's putative rapist need not be a third party, as it was in McDowell's case. It could be the victim of the assault herself. A man who only rapes models could claim to have been raped by his victim if she falsely told him she was a model. There's nothing logically incoherent in these possibilities; a proponent of rape-by-deception could embrace them all. But they strongly suggest that the whole idea of rape-by-deception has left something out—that it misses something fundamental about what it means to be raped.

2. *The Merits of Deceptive Sex*

Now suppose we put aside the word "rape." Sex-by-deception need not be

180. *See* Caroline Black, *Ex-Marine Jebidiah James Stipe Gets 60 Years for Craigslist Rape Plot*, CBS NEWS, June 29, 2010, http://www.cbsnews.com/8301-504083_162-20009162-504083.html.

181. *See* William Browning, *'Terribly Sorry': Craigslist Rapist Receives Same Sentence as Man Who Solicited Assault*, STAR-TRIBUNE (Casper, Wyo.), June 30, 2010, http://trib.com/news/local/article_4b04f85a-21a5-54b5-a3a0-798aa0b8f2bf.html.

182. *See id.*

called rape and could be subjected to lesser penalties.[183] Perhaps McDowell was the victim of "sexual misconduct" or "sexual imposition"—or merely "sex-by-deception." If we stop using the term *rape*, do we get a better case for criminalizing sex-by-deception?

I don't think so. With respect to most crimes, it's hard to give a generally favorable account of the behavior in question—hard to defend letting people murder each other, steal each other's property, and so on. But deceptive sex, however bad it may be, isn't *that* bad.

There's a reason the word *romance* is surrounded by a cloud of fictive connotations. Few people know the whole truth about those with whom they have sex, at least at first. Yes, we could have a legal regime of full disclosure prior to any sexual contact—a kind of Rule 10b-5 for sexual security.[184] This would undoubtedly improve the rationality of sexual decisionmaking, but it doesn't sound like fun. Rationality has no monopoly on sex.

And love? A vast engine of deception. Even in a hook-up culture, love floats on the horizon, an obscure object of desire, and what is more common than love's blinding one person to the most basic facts about another? If fully informed consent were the key to lawful sex, the first thing we should do is jail all the beautiful people.

It would be a gross exaggeration to say that everyone lies on the way to sex, in the sense of verbally stating untruths. On the other hand, almost all of us surely conceal; we rarely disclose every last bit of potentially relevant information. And many of us—a great many, probably—tacitly mislead. Clothing and underclothing can falsify. Make-up and hair dye can deceive. All cosmetics misrepresent. They can designedly and quite effectively convey false information concerning age, hair color, teeth, skin color or quality, bodily characteristics, genetic predispositions, ethnicity, and so on. And just think of cosmetic surgery. We may disapprove of some of these misrepresentations, but on the whole it would seem a pity to see them all go. Many of us would undoubtedly be in jail were every one of them criminal.

Certain lies told to obtain sex could be sensibly singled out by statute and criminalized. Concealing a sexually transmissible disease would be a good

183. In Alabama, "sexual misconduct," a misdemeanor, includes sex by "fraud or artifice." ALA. CODE § 13A-6-65(a)(1) (LexisNexis 2012); *see also* VA. CODE ANN. § 18.2-67.4(A)(i) (2004) (defining "sexual battery," a misdemeanor, to include sexual touchings obtained by "ruse").

184. *See* 17 C.F.R. § 240.10b-5 (2012) (making it unlawful for any person to "make any untrue statement of a material fact or to omit to state a material fact . . . in connection with the purchase or sale of any security").

example.[185] But it is hard to believe that all sex-by-deception could or should be criminalized, under whatever name, even if the punishment were only a year or two in jail.

B. The Myth of Sexual Autonomy

The permissibility of sex-by-deception throws a serious wrench into the gears of American sex law. All the major components of sex law today have seemingly converged on a single, unifying principle: sexual autonomy. Sex-by-deception calls that principle into question. In this Section, I will argue against the idea of a fundamental right to sexual autonomy, which, I will suggest, is both unattainable and undesirable.

1. Sexual Autonomy's Unattainability

Autonomy is a big and loaded concept, with multiple possible meanings across a variety of contexts. Speaking roughly, we can distinguish thick accounts of autonomy from thin ones. Later I'll consider a thin version, but *sexual* autonomy, at least as courts describe it, is thick—very thick.

Recall the Supreme Court's formulation: rape law protects an individual's "privilege of choosing those with whom intimate relationships are to be established."[186] Or the New Jersey Supreme Court's description of sexual autonomy: the "right not only to decide whether to engage in sexual contact with another, but also to control the circumstances and character of that contact."[187] We may feel we know what these sentences mean, but looking squarely at what they say—who has ever enjoyed such rights and privileges?

Medieval kings are said to have claimed the right to sleep with any woman they chose under the *droit de seigneur*. But only one person today imagines he has the unfettered "privilege of choosing those with whom intimate relationships are to be established"—a rapist. No one can hope to "control" *all* "the circumstances and character" of his sexual activities. Why does sexual autonomy find expression in a mythic language of unattainable rights?

The reason is twofold. First, autonomy is sometimes understood simply as

185. *See, e.g.*, N.J. STAT. ANN. § 2C:34-5 (West 2011) (criminalizing sexual intercourse "without the informed consent of the other person" by anyone infected with venereal disease or HIV); *see also* CAL. HEALTH & SAFETY CODE § 120291(a) (West 2012) (similar). But note that this is already assault or battery. *See infra* note 227.

186. Coker v. Georgia, 433 U.S. 584, 597 (1977).

187. State *ex rel.* M.T.S., 609 A.2d 1266, 1278 (N.J. 1992).

a synonym of freedom, so that complete sexual autonomy would indeed be a freedom to act on all one's sexual desires (a freedom no one has ever had). But there is a deeper current in the idea of sexual autonomy, which points to a similarly unattainable ideal.

For many, sexual autonomy means sexual "*self-determination*"[188]: the "fundamental right" to define and express one's "sexual identity."[189] In this identitarian mode, the grail of sexual autonomy holds the heady liquors of sexual fulfillment, emancipation, and self-realization. It promises liberation from the invidious sexual pressures society imposes on us, whether repressive and discriminatory, or over-sexualizing and objectifying.

But guaranteeing everyone a right to sexual "self-determination" is quite impossible. First, one person's sexual self-determination will inevitably conflict with others': John's will require that he sleep with Jane, but Jane's will require otherwise. Second, the sexual self is heavily determined by forces beyond its control: for most of us, the basic constituents of our sexuality are givens, not choices. We broach here foundational problems in the theory of autonomy. It's worth taking a moment to see how philosophy has sought to answer them—and why those answers don't work for sexual autonomy.

Kant, arguably the most important philosopher in this tradition, had the only perfect solution: he eliminated these intractable problems conceptually. In Kant's thought, a person who acts on his desires, however freely and enjoyably, has *not* achieved autonomy; on the contrary, he is a slave to his own passions. Kantian autonomy is achieved only by a rational will that, transcending appetite and ambition, follows reason's self-given laws, and reason demands that agents act under universalizable rules (maxims that all could follow).[190] Thus, conflicting individual autonomies are ruled out a priori. Our desires invariably conflict; our autonomy never does. Moreover, a perfectly autonomous agent *is* perfectly self-determining, because the self is here conceived as a rational will giving itself law through reason alone.

Unfortunately, sexual autonomy defies this edifying solution. Sexual

188. *E.g.*, SCHULHOFER, *supra* note 17, at 16-17; McGregor, *supra* note 10, at 236; Robert Uerpmann-Wittzack, *Personal Rights and the Prohibition of Discrimination*, *in* EUROPEAN FUNDAMENTAL RIGHTS AND FREEDOMS 67, 70 (Dirk Ehlers ed., 2007).

189. *See, e.g.*, Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 4, 9 (1995); Note, *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 219 (1986) (referring to the "current societal trend of recognizing that individuals have a fundamental right to define their own sexual identities").

190. *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 56-57 (H.J. Patton trans., Harper & Rowe 1964) (1785).

autonomy, at least as we understand it today, is not Kantian autonomy. It's all about desire—about exploring what you want and acting on your wants. What we call "sexual autonomy" would have been for Kant a degrading contradiction in terms. "Taken by itself [sex] is a degradation of human nature," says Kant.[191] "For the natural use that one sex makes of the other's sexual organs is *enjoyment* . . . . In this act a human being makes himself into a thing, which conflicts with the right of humanity in his own person."[192] On Kant's view, "pure reason's laws of right"—and therefore autonomy—forbade sex altogether except in (heterosexual) marriage.[193] Needless to say, that's not what sexual autonomy means today.

It is tempting to think that Kant's autonomy can be easily modernized, stripped of obsolete moralities and updated with Freudian or other contemporary insights into the centrality of sex to who we are. From this point of view, a right protecting "the capacity to choose whether or how or with whom one will have sexual relations" could be said to derive from the very principle of autonomy that for Kant made sex dehumanizing.[194]

But once autonomy takes bodily desire as constitutive, the problems noted above reappear with a vengeance. One man's "capacity to choose whether or how or with whom [he] will have sexual relations"[195] will necessarily conflict with others'. Some limit, therefore, must be imposed on sexual liberty. The most common formulation is a "like and equal" principle: the sexual liberty possessed by each must be compatible with—or in some formulations, it must be the greatest possible sexual liberty compatible with—a like liberty for all.[196]

Observe that the like-and-equal-liberty formula does not provide any solution to the problem of how a self is supposed to determine itself when so much of itself is beyond its control. On the contrary, by taking the capacity to act on bodily desire as constitutive of self-determination, sexual autonomy makes this problem quite unsolvable. But at least the like-and-equal formula is supposed to adjudicate sexual conflicts in a way that delivers attractive results. Regrettably, it fails to do so.

191. IMMANUEL KANT, LECTURES ON ETHICS 163 (Paul Mentzer ed., Louis Infield trans., 1963).

192. IMMANUEL KANT, THE METAPHYSICS OF MORALS 62 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797).

193. *Id.*

194. DAVID A.J. RICHARDS, SEX, DRUGS, DEATH, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION 54 (1982).

195. *Id.*

196. *See, e.g.*, *id.* at 117 (arguing that people should be "guaranteed the greatest equal liberty of autonomous sexual expression compatible with a like liberty for all").

After all, everyone could be given the right forcibly to impose their sexual desires on whomever they can. In this sexual free-for-all, everyone would have a perfectly like and equal liberty—indeed, the maximum possible like and equal liberty. Yes, this maximal liberty would be unlike and unequal in the degree to which different persons could exercise it; morally arbitrary qualities such as strength would be favored. But the same is true of the more palatable solution in which all are free to have sex with anyone who consents to it. Here, good looks will be favored, not to mention wealth. Multiple equilibria satisfy the like-and-equal formula, and the most expansive like-and-equal liberty would be a freedom to rape.

Consider, therefore, one more, equally famous way of limiting liberty under a principle of autonomy: the harm principle. This principle—that one person's autonomy does not give him a right to harm anyone else—might claim to deliver a clear prohibition of rape. But the harm principle is manifestly inadequate as a solution to sexual autonomy's problems.

Paradigmatic exercises of sexual autonomy routinely do serious harm to others. *A*'s refusal to have sex with *B* can cause *B* acute suffering. Or *A*'s agreeing to have sex with *B* can cause even greater suffering in *C*, *D*, and *E*. The idea that autonomy reaches its limit when its exercise harms another, taken seriously, would make sexual autonomy impossible.

Someone will say that the harm of hurt feelings is not the right kind of harm—not morally or legally cognizable. But this response is question-begging. Psychological harms are real; they are legally recognized all the time (pain, suffering, extreme emotional distress). More fundamentally, a proponent of sexual self-realization is particularly ill-placed to dismiss these harms. When *A* refuses *B*'s sexual advances, *A* precisely does harm to *B*'s sexual self-determination. The notion that such refusals do no harm is simply unavailable to a proponent of sexual self-determination as a fundamental right or core human interest.

Individual autonomy first takes hold of Enlightenment philosophy as a marriage of Christian morality and universal reason, in which the autonomous self transcends its body, its earthly passions. On this heavenly plane, no man's autonomy conflicts with anyone else's, and self-determination does not seek, impossibly, to determine the self's desires, seeking instead to escape desire altogether. But as modernity progresses, autonomy comes down from the heavens and insists that the self to be realized is the chthonic self—the desiring, preferring self. Reason now is no longer pure; it becomes instead the instrumental rationality that calls on an agent not to act under universal laws, but to maximize satisfaction of his preferences. Modern individual autonomy becomes a battle waged on earthly terrain, fought out among real-world persons with real-world desires.

The irony and paradox is this: brought down from the heavens, sexual self-determination becomes utterly mythical. We can neither determine our own desires nor avoid the interpersonal clashes of desire that necessarily pit one person's sexual autonomy against others'.

2. And Its Undesirability

But the problem with individual autonomy, as applied to sex, lies not only in its demand for control over what cannot be controlled. Individual control is simply the wrong demand. Indeed individuality itself is in a sense the wrong demand.

No self can do without a boundary separating it from others. This boundary presents itself to us first and foremost as physical in nature, demarcated by our bodies. But autonomy and sexuality are situated very differently with respect to this boundary. Autonomy jealously guards it, fearful of every puncture or penetration. Sexuality, by contrast, desires nothing other than this boundary's violation, both physically and psychologically.

Consider sexual love. Not all love is sexual, and not all sex is loving, but love is undoubtedly an important dimension of human sexuality, and nothing so bursts the confines of individual autonomy as love. Love dissolves the very framework of individuation in which autonomy would operate. The other's pain becomes our pain; the other's happiness our happiness; the other's fate our fate. Love wants the other united with the self, and it wants the other to want that same unity. In this way love desires a rupture—indeed it may effect a rupture—in the boundary between self and other. That's why love, for Freud, was so deep a threat to ego[197] and egoism a threat to love. Bodily integrity, on which individual autonomy depends, is not love's ideal. On the contrary, the *disintegration of individuality* is precisely what love desires.

Love and individual autonomy are in this respect strangers, speaking for different sides of human nature, for different kinds of human desire. Autonomy speaks for the ego, for control, for rationality and self-determination. Love speaks for the self that wants irrationally or a-rationally to break the ego's boundaries. It speaks on behalf of one self's intermingling with another, with all the mystery and loss and gain that might entail.

---

197. *See, e.g.*, SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS (1930), *in* 21 THE STANDARD EDITION OF THE COMPLETE WORKS OF SIGMUND FREUD 64, 66 (James Strachey ed. & trans., 1961) ("At the height of being in love, the boundary between ego and object threatens to melt away.").

But love is not necessary to make sexuality at odds with autonomy. Indeed the case is almost stronger when sex is mixed with power or domination, rather than or along with love. Those who find another's power sexually interesting are very unlikely to be seeking, at least in any simple sense, their own individual autonomy. They find satisfaction in surrender or submission.

As opposed to the "I" of pure reason, the desiring self is constituted by an ineradicable other-directedness – by a desire, as Hegel suggests, not only for another's body, but for something from the other's subjectivity, whether love, fear, control, submission, or something else altogether.[198] Individual autonomy is the last thing sexuality wants. From autonomy's point of view, sexuality is undesirable. From sexuality's, autonomy is.

3. Sexual Autonomy as a Right Against Wrongful Conduct

But what about a much thinner concept of sexual autonomy? Suppose autonomy has nothing to do with an agent's actual capacity to act on or realize his will; suppose it requires only that he be free from the wrongful imposition on him of anyone else's will.[199] Sexual autonomy would then eschew the rich fulfillment of sexual emancipation and self-realization, insisting only on a right against others' wrongful sexual impositions.

Unlike thick sexual autonomy, a right against sexual wrongs is not unattainable. Some such right is indispensable. It underlies the crime of rape.

But *autonomy* is the wrong concept for this right. For one thing, do we

198. For Hegel, at least as Kojève famously read him, desire always desires the other's desire. *See* ALEXANDRE KOJÈVE, INTRODUCTION TO THE READING OF HEGEL 6 (Allan Bloom ed., James H. Nichols trans., 1980) ("[I]n the relationship between man and woman, for example, Desire is human only if the one desires, not the body, but the Desire of the other."); *see also* 11 JACQUES LACAN, THE SEMINAR OF JACQUES LACAN: THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHOANALYSIS 235 (Jacques-Alain Miller ed., Alan Sheridan trans., 1981) ("Man's desire is the desire of the Other."). But the desire desire desires is not primarily physical. The idea is that human desire not only seeks pleasure from the other, but also needs something from the other's consciousness. *See* G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT §§ 175-76, at 110 (A.V. Miller trans., Oxford Univ. Press 1977) (1807) ("Self-consciousness achieves its satisfaction only in another self-consciousness.") (emphasis omitted). If so, there is something in human sexual desire irreducible to, and longing to break from, individual self-determination.

199. Ripstein has been particularly attentive to these difficulties. *See, e.g.*, ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 15 (2009) (articulating a principle of "independence" along these lines and contrasting it with "more robust accounts of autonomy"). Ripstein finds this "independence" in Kant's Universal Principle of Right. *Id.* at 13.

really want to describe a homeless man without the use of his limbs, shunned by society, kept alive by scraps of food thrown at him every now and then, as perfectly autonomous—and in particular, as sexually autonomous? Thin autonomy would have it so.[200] In any event, thin autonomy can't be rape law's principle for the simple reason that it can't distinguish between force and fraud.

So long as wronging is understood in autonomy-based terms—as the imposition of one person's sexual will on another without the latter's consent—deception should be as wrongful as force.[201]

Autonomy, whether thick or thin, can't be rape law's principle. It can't explain why sex-by-deception differs from sex-by-force. Neither the like-and-equal liberty principle nor the harm principle can solve this problem. The next Part offers a principle that may do better.

V. FROM AUTONOMY TO SELF-POSSESSION

So: if we jettisoned autonomy as sex law's lodestar, what would the consequences be?

To begin with, we'd have to acknowledge that American sex law is not so unified after all. Cross-currents abound. Autonomy animates some sex regulations, but not others—which is as it should be. Colleges, for example, should be free to pursue norms of "informed consent" and "positive sexual experiences" not reflected in criminal or constitutional sex law.

At the same time, new congruences might emerge. For example, consider again the abolition of the crime of seduction, which, when defined to require a *false* promise of marriage, was a form of sex-by-deception.[202] Decriminalizing seduction is not a legalization of *consensual* sex. Instead, it's closely tied to rape law's refusal to punish sex-by-deception—and neither of these phenomena is well understood in the language of sexual autonomy.

Prostitution laws furnish another example of a contemporary sex crime potentially much better understood when the rhetoric of sexual autonomy is stripped away. While prostitution laws can in theory be understood as

200. As a right solely against others' affirmative wrongs, thin autonomy is not measured by an agent's actual "ability to get what he or she wants." *Id.* at 33. If thin autonomy were violated by others' refusing to have relations with the agent, or increased the more the agent could satisfy his desires, it would become thick autonomy, subject to all the difficulties discussed above.

201. *See, e.g.*, *id.* at 43-44, 128-29 (condemning force and fraud, both of which vitiate consent).

202. *See supra* notes 58 and 78.

vindicating autonomy (on the ground that prostitutes lack free will), that explanation has never been very strong.[203] American sex law remains deeply moralized. Exploding the myth of sexual autonomy may open up more powerful insights explaining which sex crimes the twentieth century decriminalized, and which it did not.

But by far the most profound consequence of jettisoning sexual autonomy would be the conceptual vacuum it would create for rape law and the right to privacy. How is rape to be defined if not as unconsented-to sex? Can *Lawrence* be saved if there is no such thing as a fundamental right to sexual self-determination? This final Part tries to answer these questions.

A. Sexual Autonomy's Irrelevance to Rape Law

We might think that modern rape law *must* protect sexual autonomy. Isn't every rape a violation of autonomy? What else could rape law possibly protect once female virtue is taken out of the equation?

In fact, sexual autonomy is a red herring when it comes to rape. Seeing why will point the way to an alternative principle. Imagine two friends debating whether individuals have a fundamental right of "smoking autonomy" (meaning something like a right to smoke if and as one chooses). John, a cigar smoker, claims there is such a right. Jane, a nonsmoker, denies it. John says smoking is central to and expressive of his identity; Jane says no one has a right to inflict on others unpleasant and perhaps harmful smoke. In a subtle parry of Jane's nuanced logic, John physically forces her to smoke the cigar against her will.

Now: are we obliged to say that Jane was *wrong*—that there *is* a right of

203. While forced prostitution and crimes against prostitutes are sickeningly common, *see* Margaret A. Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 YALE J.L. & FEMINISM 47, 87 (1992) (describing prostitutes as "rapable, beatable, killable"), if sexual autonomy were a fundamental, constitutional right, the mere fact of selling sex for money could not be taken as a surrender of autonomy sufficient to sustain a categorical ban on prostitution any more than selling stories for money indicates a surrender of autonomy sufficient to sustain a ban on for-profit fiction or journalism. Instead, the idea of sexual autonomy as a fundamental right implies that prostitution should be constitutionally protected. *See, e.g.*, RICHARDS, *supra* note 194, at 84-127 (arguing that autonomy, properly understood, argues in favor of a right to prostitution); Gowri Ramachandran, *Against the Right to Bodily Integrity: Of Cyborgs and Human Rights*, 87 DENV. U. L. REV. 1, 53 (2009) ("[I]t is arguable that not only should we abandon the claim that prostitution violates fundamental rights to bodily integrity, but we should also recognize a fundamental right to engage in prostitution, given the importance of sexual activity to identity formation and culture.").

"smoking autonomy"—in order to conclude that she had a right not to have a cigar stuffed into her mouth? I don't think so. What makes John's act wrongful has nothing to do with whether it violated Jane's supposed right of "smoking autonomy"—a concept we might want to reject altogether. In other words, "smoking autonomy" is wholly irrelevant to the wrongness of John's act.

So too with "sexual autonomy" and rape. No one needs to believe in "sexual autonomy" to be against rape. S*exual autonomy is irrelevant to rape law*.

Autonomy is the sort of thing that's "infringed." Rape is not a mere "infringement." We might as well explain torture as an infringement of the victim's "bodily autonomy"—his right to do what he likes with his own body. Some evils go beyond the infringement of autonomy. Their wrongfulness and harm cannot be captured in terms of nonconsent, even though consent will typically be lacking.

B. Rape as a Violation of Self-Possession

There is a simple lesson in the case of the cigar. A difference exists between an autonomy right to engage in an activity if, as, or when you please, and a right not to have that activity affirmatively pressed on you against your will. What is the nature of the latter right?

There is no universal right against being forced into activity against your will. You can be made to pay taxes. When can people have actions forced on them, and when can't they?

It might be tempting to invoke Kant again and to say that forcing an activity onto someone is wrongful when it uses them—or treats them as an object, or merely as a means. But such formulations, while frequently advanced in connection with rape,[204] cannot serve rape law's purposes. Lying uses people too. And if a wife rolls her sleeping husband over to stop the dog from leaping onto the bed, she may treat him solely as a means and an object, but her act involves no serious wrong—nothing remotely comparable to rape.

The key concept, then, for rape law, is not objectification. Rather, I will suggest, it is self-possession.

By self-possession, I don't mean perfect self-control or composure. I'm referring to a self-possession far more basic—and more physical. Self-possession, as I will use the phrase, refers to the possession of one's own body.

---

204. *See, e.g.*, John Gardner & S. Shute, *The Wrongness of Rape*, *in* OXFORD ESSAYS IN JURISPRUDENCE, FOURTH SERIES 193 (J. Horder ed., 2000).

In rape, to state the obvious, something unusual is done to a person's body. A rape victim's body is taken over, invaded, occupied, taken control of—*taken possession of*—in a fashion and to a degree not present in ordinary acts of theft, robbery, assault, and so on. The fact that the rapist uses the victim's body for sex is central here—violent sex, especially penetrative sex, forced on a victim against her will, is a taking of the body, a possessory act—but forcing sex on people is not the only way to take possession of their bodies. Rape is only one of several crimes that violate what might be called an individual's right to self-possession.

This Article is not the place for a full discussion of this right. In brief, however, self-possession is not a property right. You don't own your body the same way you own a car. Rather, bodily possession is a matter (like most forms of possession) of physical control. While no one fully controls his body—our mastery of our bodies is partial in a thousand ways and absent in a thousand more—almost all of us enjoy a basic integration of mind and body that gives us an irreducible measure of physical governance over our bodies and makes our bodies our own. Although normally taken so for granted that we are not even aware of it, this bodily self-possession is central to our selfhood and intimately connected to dignity.[205]

Dignity, however, is possessed in degrees; it's something you can have more or less of. By contrast, self-possession is (again, like most forms of possession) binary; you either have it or you don't. It's not easy to be dispossessed of your body (just as it isn't easy to be dispossessed of a house in which you remain an occupant). You lose self-possession not when another person merely wounds, embarrasses or constrains you, but when the other actually takes over your body—exercising such complete and invasive physical control over it that your body is in an elemental sense no longer your own.

The best way to explain how self-possession can be violated is to observe two acts that paradigmatically do so: enslavement and torture. In both slavery

205. For an interesting treatment connecting self-possession and dignity, see GEORGE KATEB, HUMAN DIGNITY 164-69 (2011). Waldron has also made this connection. *See* Jeremy Waldron, *Dignity, Rights and Responsibilities*, 43 ARIZ. ST. L.J. 1107, 1126-27 (2012). Self-possession—and especially a woman's right to it—has occasionally been cited as an important interest protected by rape law. *See, e.g.*, Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1413-14, 1421-22 (2000); Larson, *supra* note 58, at 425-26. But in these discussions, the word is sometimes used as a synonym of self-determination or self-expression, a meaning substantially different from what I have in mind. *See, e.g.*, Larson, *supra* note 58, at 425 (defining "sexual self-possession" in terms of "a person's interest in sexual self-expression through acts and with partners that satisfy her present desires and purposes").

and torture, another individual becomes master of the victim's body. With slavery, this mastery consists of a power to force the victim wholly and bodily to serve the other: to please the other, to be occupied with any task he commands, to exist for his purposes and his satisfaction. With torture, mastery consists of a power to inflict on the victim such excruciating pain, suffering, or terror that the victim's own bodily self-governance is nullified and sundered. In both cases, the victim's body becomes—not metaphorically, but physically and actually—someone else's possession.

The same is true of rape. In fact, on this dimension, rape is very close to both slavery and torture. Like slaves, rape victims are made bodily to serve another's pleasure—to exist, if briefly, only for his satisfaction. Like many torture victims, rape victims' bodies are immobilized, penetrated, exposed to wanton bodily cruelty or death, and their extreme pain and fear is often part of what the perpetrator seeks to achieve. Rape may not in every case be an act of enslavement,[206] and not every act of rape literally involves torture,[207] but the similarities are unmistakable. It is no coincidence that when women are enslaved or tortured, sexual abuse is the norm.

Rape, we might say, is poised halfway between slavery and torture, sometimes more like the one, sometimes more like the other, always sharing core elements with each. In particular, rape shares with slavery and torture the same fundamental violation. The victim's body is utterly wrested from her control, mastered, possessed by another.[208]

Suppose, then, that we thought of rape as a violation of self-possession, on a par with slavery and torture. How might this view help solve rape law's core problems?

---

206. *But cf.* Jane Kim, *Taking Rape Seriously: Rape as Slavery*, 35 HARV. J.L. & GENDER 263 (2012) (arguing that all rape should be considered a form of slavery).

207. Needless to say, many rapes do involve torture. *See, e.g.*, John Eligon, *Prosecutor Details Rape That Lasted 19 Hours*, N.Y. TIMES, June 6, 2008, http://www.nytimes.com/2008/06/06/nyregion/06rape.html (describing the ordeal of a Columbia University graduate student whose lips were glued together and body burned during her extended rape).

208. Because I have described the right to self-possession primarily by reference to paradigmatic or core violations, I've said very little about cases lying more toward the periphery of the concept (Is kidnapping a violation of self-possession? What about someone forced to smoke a cigar against her will?). In this Article, my hope is only to have provided a working idea of the right to self-possession; if the core cases are clear, that is enough for present purposes. I hope in future work to develop a fuller account of the right to self-possession and its connection to dignity.

C. Rape Law's Core Problem Revisited

Every attempt to say what distinguishes rape from other assaults has a complex problem or dilemma to solve. On the one hand, it has to be adequate phenomenologically, not merely philosophically, capturing in some way the acute experience of violation rape victims may actually feel. On the other, it has to avoid the opposite trap—that of exaggerating or presupposing rape's ruinous effect, thereby falling back into old moralities of sexual defilement. Seeing rape as a violation of self-possession offers a way to cut this Gordian knot.

Consider the following story:

> In 1974, when Ms. Xenarios was 28 and working as a city social worker, she was raped on a sunless day on a rooftop in Harlem.
>
> It was just before Thanksgiving—she has blotted the exact date from her memory—and she was about to interview someone in the urgent case of a baby missing from Harlem Hospital Center. She said a man grabbed her in the stairwell of an apartment building and held a knife the size of a switchblade to her neck.
>
> Fevered, frantic and spitting racial insults, the man forced Ms. Xenarios, who is white, to the rooftop. She did not scream but said to him, "You really don't want to do this . . . ." The man said he was going to throw her off the roof. He raped her.
>
> Without explanation, the man let her live. He fled. Ms. Xenarios walked unsteadily down the stairwell and attended a previously scheduled social-work meeting at the Harlem hospital. At mid-meeting, she collapsed in grief and torment.[209]

These facts can barely be distinguished from thousands of other rapes suffered by thousands of other women. Given the prevalence of rape in our society, the case might not even seem shocking. What happened to Ms. Xenarios did not prompt a congressional hearing[210]—but it was more than enough. The story continues:

> She was immediately taken to the emergency room. One thing she

209. Anthony Ramirez, *Firsthand Experience of Rape, and Resiliency*, N.Y. TIMES, Dec. 28, 2007, http://www.nytimes.com/2007/12/28/nyregion/28lives.html.

210. *Contra* Chris McGreal, *Rape Case To Force US Defence Firms into the Open*, GUARDIAN (London), Oct. 15, 2009, http://www.guardian.co.uk/world/2009/oct/15/defence-contractors-rape-claim-block.

> remembers is a doctor and a police detective interviewing her as she lay exposed from the waist down for a gynecological examination. The man was never caught.
>
> . . . .
>
> She told her new husband, Giorgos Xenarios, a Greek painter she had met after living in Greece, about the rape. "A lot of my energy was focused on helping him with this because there's enormous shame and losing face" attached to the husband of a rape victim in Mediterranean culture, she said.[211]

Why tell this story? To get at the root of modern rape law's problem.

Here is one reading of Ms. Xenarios's story. Her husband's "shame" is inexcusable: how dare he feel that his wife, being raped, is now a source of shame to him? The police detective's indifference is also inexcusable, as he subjects the raped woman to a visual violation—interrogating her even as she lies exposed and naked—grotesquely similar to the physical violation she has just endured. Only the woman's reaction, her "grief and torment," is right and justified and deserving—and all the worse because she has to suffer it alone.

But here is another reading. The woman's grief and torment are as unjustified as the husband's shame. In fact her reaction is little different from his. Both react as if she's been "ruined" and "defiled," as if the rapist succeeded in inflicting permanent and fundamental damage to her soul just by virtue of inserting one part of his body into hers. Both reactions are the residue of that obsolete moral worldview in which sex ruined a woman, took away her virtue, made a whore of her. Ironically, on this view, only the detective's reaction—his indifference to her psychic injury and nakedness—is right and justified.

This second reading—not one I accept, but one that requires a response—returns us at last to modern rape law's core problem. If today we see in rape something different from and worse than most other assaults, do we invest rape with the disgrace, the shame, the power to ruin, that the old law used to attribute to it?

Feminists have been of two minds on this question for a long time. On the one hand, there is the need to credit rape victims' own experience of the crime, to appreciate the seriousness of rape's harm and psychological impact, to speak out against its outrageousness.[212] On the other, there is an equally feminist

211. Ramirez, *supra* note 209.

212. *See, e.g.*, ESTRICH, *supra* note 17, at 1-15.

impulse not to oversell rape's violation, as if every rape "murders" a woman's "soul" or inflicts an irreparable injury redefining its victim for the rest of her life.[213]

Both inclinations are understandable. And both are necessary; either without the other is one-sided. Doubtless the horror attaching to rape in contemporary culture still reflects a measure of the old defilement moralities.[214] But the idea that there is no distinctive violation inflicted by rape whatever—that it is just another assault, like being punched in the stomach—goes too far in the other ideological direction. Sex is not specially central to virtue or self-definition in the way the old moralizers or the new identitarians both suppose. But forcing sex on someone against her will *is* a special kind of harm. The concept of self-possession helps explain why.

Rape victims suffer, against their will, the condition of belonging bodily to someone else, of having their bodies possessed by someone else. Rape victims are forced to submit their bodies to the rapist to serve his gratification. Their own helplessness, fear, and pain may themselves be a cause of pleasure to him.[215] Like slavery and torture, rape is not "moral ruin" or "soul-murder"—ideas that impute to the rapist a moral power he doesn't wield and to rape an irreparable damage it needn't do. But for however short a time, rape victims are no longer their own person—a condition vital to selfhood. It would not be surprising if rape victims felt this brutal loss of self-possession. There are worse things in the world than rape, but it may not, after all, be so far off to see in rape an "ultimate violation of self."[216] The loss of self-possession explains why rape is different from other assaults, and it does so without dependence on sex-defilement moralities.

213. *See, e.g.*, JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 345 (2006) (asking whether "the politics of injury and of traumatized sensibility" might be "helping to authorize and enable women as sufferers").

214. This is particularly obvious in the case of male rape-horror, which, as expressed in contemporary American culture, barely bothers to disguise its fraternity with the view that male homosexuality is disgusting or contaminating or feminizing.

215. *See, e.g.*, LES SUSSMAN & SALLY BORDWELL, THE RAPIST FILE: INTERVIEWS WITH CONVICTED RAPISTS 32-33 (2000) (quoting convicted rapists) ("What I really enjoyed was when I tied them down. . . . The pain part of it was the best part."); *id.* at 213 ("This time my excitement was at a peak because this young girl, who wasn't more than 17, was actually trembling with fright. . . . I used to threaten murder, slicing their throats with a knife I produced, which was the best, it excited me to see the fright and sheer dominance I had over each and every one of them.").

216. Coker v. Georgia, 433 U.S. 584, 597 (1977) (quoting LISA BRODYAGA ET AL., NAT'L INST. OF LAW ENFORCEMENT & CRIMINAL JUSTICE, RAPE AND ITS VICTIMS: A REPORT FOR CITIZENS, HEALTH FACILITIES, AND CRIMINAL JUSTICE AGENCIES 1 (1975)).

D. Self-Possession and the Right to Privacy

Shifting rape law's focus from autonomy to self-possession would actually put rape law into a profound congruence with the right to privacy. In earlier work, I have suggested that the constitutional right to privacy for which *Roe v. Wade* stands was never well understood as a right to self-determination or self-definition, but has always been much closer to a right against being instrumentalized in a particularly totalizing way—a right against being forced into state-dictated service.[217]

The argument for a forced-servitude reading of *Roe* is simple. A law banning abortion forces a pregnant woman into motherhood against her will. It conscripts her for as much as nine months (and arguably much longer) into a particular, life-occupying role.[218] The principle it violates is the same one that would forbid a state from dictating to people their occupations—not because the law violates a right to self-definition, but because it violates the right not to be forced into state-dictated service against one's will. A great deal of right-to-privacy case law fits within this principle.[219] And this principle is closely connected to the right of self-possession; the body of a woman denied an abortion is also taken over and occupied against her will.

Where does this leave *Lawrence*? It depends on how we read that case.

If *Lawrence* is read as a pure sexual-autonomy case, then according to the arguments laid out above, *Lawrence* is wrong. There is no constitutional right to sexual autonomy. Or again, if *Lawrence* is taken as a pure libertarian decision—holding that states cannot criminalize homosexuality because "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice"[220]—then *Lawrence* is also wrong. The Constitution does not enact *Atlas Shrugged* any more than it enacts *Social Statics*.

But equality and invidious discrimination were also in play in *Lawrence*—very obviously so.[221] If *Lawrence* comes to stand for an equality principle, then

217. *See* JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 223-27, 248-53 (2001).

218. *See* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 243 (1985) (describing the prohibition of abortion as "conscript[ing] women . . . as involuntary incubators").

219. *See* RUBENFELD, *supra* note 217, at 221-55.

220. Lawrence v. Texas, 539 U.S. 558, 577 (2003) (quoting approvingly Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

221. *See Lawrence*, 539 U.S. at 579-85 (O'Connor, J., concurring) (concurring on equal protection grounds). To be sure, antihomosexuality laws, at least in the past, were aimed at forcing

nothing I have said counts against it. Readers who believe that states cannot constitutionally criminalize consensual sex should have a serious problem with the account of privacy being offered here. (Of course they should also have a problem with laws prohibiting prostitution, incest among adults, and public sexuality.[222]) But readers who believe that *Lawrence* can be defended on equal protection grounds should not.

Whatever the fate of *Lawrence*, we are now in a position to return to rape law. If rape is seen as a violation of self-possession, comparable to slavery and torture, then a new understanding of rape law, with concrete implications for rape doctrine, comes into view.

E. Self-Possession and Force

To begin with, return to the problem of deception. When rape law takes autonomy as its central value, and rape is compared to trespass, theft, or other consent-based crimes, the exclusion of deception (as a means of committing the crime) seems like a riddle, an unjustifiable exception. But this exceptionality disappears when rape is instead laid alongside slavery and torture.

"Slavery-by-deception" is no more slavery than rape-by-deception is rape. Imagine a person working at manual labor sixteen hours a day because he was lied to about how much money he will be paid or what sort of project he is contributing to. He is the victim of fraud, not slavery. Similarly, a person made to confess on the rack is tortured, but a person made to confess through a ruse in which his interrogator masquerades as a confederate is not.

Slavery, torture, and rape all resist deception in precisely the same way because they are all crimes against self-possession. A fraud victim retains his basic bodily self-governance. He is manipulated, but his person—elementally, physically—remains his own. Fraud is an offense against autonomy, not self-possession.

Now consider the force requirement. Once again, held up against the

individuals into specific, state-dictated heterosexual relationships. Hence, such laws in the past could have been said to violate the antitotalitarian right I have ascribed to *Roe*. To the extent that such laws continued to bear their past purpose, they still could.

222. If consensual sex were genuinely constitutionally protected on autonomy grounds, engaging in it for profit should not be prohibitable—just as for-profit religious practices or novels can't be proscribed. *See supra* note 203. Similarly, regardless of the possibility of genetic abnormalities, prohibiting *all* incest among adults would seem plainly unjustifiable, and as to public sexuality, states might legitimately seek to protect children from exposure, but a complete ban would again seem plainly overbroad.

standard of autonomy and juxtaposed with trespass, theft, and so on, rape law's force requirement seems perplexing and anomalous. But placed next to the law of slavery and torture, rape's force requirement is wholly unexceptional.

Thirteenth Amendment doctrine, for example, has a force requirement very similar to that of rape law. As the Supreme Court has put it, reconfirming a long line of precedent, the "Thirteenth Amendment prohibition of involuntary servitude" applies only to servitude "enforced by the use or threatened use of physical or legal coercion. The guarantee of freedom from involuntary servitude has never been interpreted specifically to prohibit compulsion of labor by other means, such as psychological coercion."[223]

The Thirteenth Amendment's force requirement is no accident. It conforms with our basic understanding of what slavery is—and with the right to self-possession. If the only power a master held over his slaves was the power to fire them from their labor, his slaves would not be slaves. They would be employees. It's precisely this bodily freedom to walk away from a job that (at least in principle) leaves the employee a free man, self-possessed. Out of work, he may be poorer, but he will retain the basic governance over his own body that self-possession requires. That's the sense, for better or worse, in which all employees (as opposed to slaves) remain fundamentally their own persons.

But if the master makes his employees continue at their labor by chaining and whipping them, they are no longer employees. They are slaves, and the reason is that no self-possession now remains open to them. Their bodies are no longer their own. If they don't "voluntarily" submit to bodily servitude, they will be physically incapacitated and beaten until they do submit (or until they're dead).

Torture is similar. Under federal law, torture is the intentional infliction (or attempted infliction) of "severe physical or mental pain or suffering" on a person in the "custody or physical control" of the torturer.[224] Inflicting physical pain is an obvious act of force, and "mental pain or suffering" is further defined to cover exactly four situations that also involve force (including threats of

223. United States v. Kozminski, 487 U.S. 931, 944 (1988); *see* Bailey v. Alabama, 219 U.S. 219, 240-45 (1911); United States v. Booker, 655 F.2d 562, 566 (4th Cir. 1981) (concluding that slavery or involuntary servitude exists where "control over [individuals'] lives" is "maintained through the threat of criminal sanctions . . . or through physical force" (citations omitted)); United States v. Shackney, 333 F.2d 475, 481-85 (2d Cir. 1964). This understanding may depart from international law, which defines slavery in terms not of forced service, but of the existence of legal incidents of ownership. *See* Slavery Convention art. 1(1), Sept. 25, 1926, 212 U.N.T.S. 17 (as amended in 1953).

224. 18 U.S.C. § 2340(1) (2006).

force).[225] International law may be more receptive to claims of purely psychological torture, but the kinds of acts envisioned by those who champion a broader definition of psychological torture—for example, prolonged isolation, gross sleep deprivation, placing a victim in a box with animals that terrify him—involve at a minimum custody, imprisonment, and incapacitation, which are all acts of force.[226]

Thus does the right of self-possession offer rape law what it has always lacked: a legal and theoretical framework in which the force requirement finds its proper place and explanation. As with slavery and torture, so with rape: when law protects the fundamental right of self-possession, it demands bodily force. The simple reason is that the violation of this right consists in another person mastering and taking possession of the victim's body, wresting away the victim's elemental control over her own person, and where there is no force, there is no such mastery or taking.

F. An Objection: Self-Possession a Floor, Not a Ceiling

"You haven't provided a justification for the force requirement at all," it might be said. "You seem to have forgotten something obvious. Nonviolent sexual predation may not be a loss of self-possession in your sense, but states can still criminalize it. Rape law is free to prohibit more than the bare minimum."

This objection is of course correct. States are perfectly free to criminalize forms of sexual imposition other than forcible rape. Nevertheless, once we see that violent rape violates a fundamental right—the right to self-possession—we can finally explain the distinction, which our law systematically tracks yet can't account for, between sex violently forced on a person against her will, which is invariably recognized as rape, and non-forcible sex, including sex-by-deception, which is not. States may criminalize all sex-by-deception if they choose, but violent rape violates fundamental rights in a way that sexual deception doesn't, offering a justification to states that choose to stick to the force requirement.

---

225. The term is defined as "prolonged mental harm caused by" (1) the intentional infliction of severe physical pain; (2) the administration of "mind-altering substances"; (3) the threat of imminent death; or (4) the threat that another person will be imminently subjected to any of these things. *Id.* § 2340(2).

226. *See, e.g.*, David Luban & Henry Shue, *Mental Torture: A Critique of Erasures in U.S. Law*, 100 GEO. L.J. 823, 836-37 (2012).

G. Doctrine

In this last Section, I'll spell out a few doctrinal implications of rape as a violation of self-possession. This view makes many problematic cases easy—deception cases, for example.[227] But I won't discuss easy cases here. Instead I will take up some harder issues. My purpose is not to show that a self-possession view of rape eliminates all difficulties (it doesn't), but to test the limits of this view, to see what light it sheds on controversial issues, and to acknowledge that it will sometimes lead to uncomfortable results.

1. Defining Force

"Force" is hardly self-defining. Psychological forces could be included; so could pecuniary forces. Anything that results in coercion, it might said, should count as force. For example, shouldn't a high school principal who threatened to expel a seventeen-year-old student unless she had sex with him be found to have used force for rape law's purposes?

An understanding of rape as a violation of self-possession says no. This result conforms with existing law in some states.[228] It will not, however, conform with many readers' intuitions.

But a coercion rule for rape law is pretty difficult to sustain. To begin with, as seen earlier, coercion-based theories of rape run headlong into the rape-by-deception problem. Coercion matters because it renders the victim's consent not genuine, meaningful, or valid. But as we know, the same logic applies to deception. If all coerced sex is rape, all unconsented-to sex ought to be rape, including rape-by-deception.

---

227. Sex-by-deception, without more, would never be rape on a right-to-self-possession view. Needless to say, egregious acts of sexual deception—for example, lying about a sexually transmissible disease or perhaps even impersonating a spouse—could be independently criminalized, *see supra* note 185, or they could amount to battery. *See, e.g.*, Leleux v. United States, 178 F.3d 750, 755 (5th Cir. 1999) ("[W]here an individual fraudulently conceals the risk of sexually transmitting a disease, that action vitiates the partner's consent and transforms consensual intercourse into battery . . . ."); Boyett v. State, 159 So. 2d 628, 630-31 (Ala. Ct. App. 1964) (affirming the assault conviction of a man who posed as a doctor to examine a woman); R. v. Cuerrier, [1998] 2 S.C.R. 371 (Can.) (reaching a similar conclusion to that reached in *Leleux*).

228. *See, e.g.*, State v. Thompson, 792 P.2d 1103 (Mont. 1990) (holding that a high school principal who coerced sex from a student by threatening not to allow her to graduate could not be convicted of sexual intercourse without consent, absent evidence that he threatened her with imminent death, bodily injury, or kidnapping).

Moreover, imagine a young woman who threatens to break up with her boyfriend unless he violates his religious ban on sex until marriage. Breaking up would devastate him, so he sleeps with her. Nearly everyone will say the boy wasn't raped, but he *was* coerced, wasn't he? He was made to have sex through a threat with devastating consequences.[229]

Neither coercion nor consent has ever been able to explain why sex induced by deception, by a threat to break off a relationship, or by any other nonviolent undermining of autonomy isn't rape. Self-possession can. Only sex coerced through bodily violence wrests from the victim her fundamental bodily self-possession—and is therefore rape.

Return now to the notorious *Mlinarich* case,[230] in which a fourteen-year-old girl submitted sexually to her guardian because he had threatened to send her back to juvenile detention. The judges who overturned Mlinarich's rape conviction evidently believed that imprisonment did not amount to the kind of force required for rape[231]—an idea that goes a long way back in rape law.[232] Rape as a violation of self-possession rejects this holding, and the comparison to torture and slavery is helpful here. Imprisonment, as noted in the case of torture, is itself an act of physical force; moreover, imprisonment was among the forms of violence notoriously and characteristically directed at slaves. Keeping laborers at work through a threat of imprisonment turns employment into slavery. Sodomizing a girl through the same threat turns sex into rape.

As a general rule, we might say that sex is rape whenever exacted through the kind of force that turns labor into slavery: roughly speaking, physical incapacitation, whether through restraint or imprisonment, or serious physical assault (or the threat of either). Absent such force, sex under conditions of power imbalance, material want, or psychological pressure isn't rape. If it were, sex would very frequently—perhaps ordinarily—be a criminal offense.

229. *But cf.* WERTHEIMER, *supra* note 81, at 174 (suggesting that threats are coercive only when they "propose to violate [someone's] rights"). This test is puzzling. That a threat was lawful for the *threatener* doesn't make it less coercive for the *threatened*. In any event, odd results follow. For example, in *Mlinarich*, where the defendant induced a 14-year-old girl to have sex with him by threatening to return her to a juvenile prison, apparently the defendant did *not* commit rape, provided that he had the legal right to return her to prison (which he may well have had).

230. Commonwealth v. Mlinarich, 542 A.2d 1335 (Pa. 1988).

231. *See id.* at 1342.

232. *See, e.g.*, People v. Dohring, 59 N.Y. 374 (1874) (reversing a rape conviction where the defendant had locked a fourteen-year-old girl in a barn).

2. Masochism, Wantedness, and Mistake

Historically, rape law has understood consent as a mental state, a state of wanting or desire, so that judges often disregarded what women said, asking instead if they were inwardly "willing."[233] Thus were rape victims frequently put on trial, with defense counsel probing their sexual past, and defendants exonerated by raising a doubt about whether the complainant "wanted it."

Rape as a violation of self-possession offers a clear improvement. Whether the complainant wanted or consented to sex is a question that sounds in sexual autonomy, not self-possession. Rape as a violation of self-possession *doesn't ask whether the victim wanted or consented to sex*. It asks instead whether the victim consented *to the violence* to which she was subjected, and this consent refers to a communicated permission, not a mental state of desire or willingness.[234]

In this way, rape as a violation of self-possession also offers a simple approach to sadomasochistic sex. Ascertaining consent to sex in sadomasochism can be problematic. Yes, "safe words" can be employed, but maybe the parties don't play the game that way. Perhaps some people precisely want their sexual refusal to be overridden. In any event, if the question is whether each person currently consents to each sex act engaged in, the answer can be difficult to determine when one of the parties is gagged and bound.

Rape as a violation of self-possession would ask whether the violence was consented to. Does this place a special burden on sadomasochistic sex, requiring an affirmative grant of permission (by word or conduct) for any violence used? Yes. People had better get each other's permission before binding, gagging, whipping, and so on. If they do not, they commit rape. On the other hand, if a person *does* consent to be bound and gagged, then decides

---

233. *E.g.*, Whittaker v. State, 7 N.W. 431, 432 (Wis. 1880) ("Consenting is to be willing, as a condition of the mind."). Traditional-era judges expressed acute concern about men who had sex with women who outwardly said no to sex while actually "burning" for it. *E.g.*, Jones v. State, 16 S.E. 380, 383 (Ga. 1892) (warning of the "charming woman, . . . wishing beyond adequate expression what she must not even attempt to express, and *seemingly* resisting what she burns to enjoy" (citation omitted) (emphasis added)). In essence, traditional judges asked whether the woman's *body* was saying yes—the most egregious example of which was the ancient rule that pregnancy barred a claim of rape. *See, e.g.*, 18 CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY 153 (London, G.G.J. et al. eds., 2d ed. 1793) ("If the feme at the time of the supposed rape conceives with child by the ravisher, this is no rape; for no woman can conceive, unless she consents." (emphasis omitted)).

234. *See, e.g.*, JOAN MCGREGOR, IS IT RAPE?: ON ACQUAINTANCE RAPE AND TAKING WOMEN'S CONSENT SERIOUSLY 117 (2005) ("There are two major accounts of the nature of consent: the attitudinal and the performative.").

later that he does not want sex after all, but can no longer express it, he has *not* been raped—because he consented to the violence, even if he ends up (arguably) subject to unconsented-to sex.[235]

Consent to violence is not as subject to mistake as is consent to sex. Whether a person wanted sex may be easily put in question; whether a person affirmatively gave her permission to be bound, cut, whipped, threatened, and so on, is more difficult to make an issue of. To be sure, mistake cases would still arise. In particular, there will always be cases in which one person fears violence (or says so) but the other intended no threat (or says so).

The only question in such a case should be whether the person claiming rape reasonably believed the other's words or actions communicated a threat of serious violence if she refused to sexually submit. It makes no difference whether the perpetrator believed his victim wanted sex with him, or whether in fact he intended no harm. A man who knowingly uses words or actions reasonably likely to induce a fear of violence, and then procures sex as a consequence, does so at his peril.

3. No Means No—but It May Not Mean Rape

What about sex in the face of a "no"? The appealing position here is categorical: sex in the face of a clearly articulated "no" is always rape. Unappealingly, rape as a violation of self-possession would not be able to take this position. This point will probably be reason enough for many readers to reject the entire argument made so far. Unfortunately, I see no way out.

According to some reports, women frequently have sex after first saying "no."[236] If men force this sex on women through violence, they of course commit rape. Or if they put the woman in fear of violence, they also commit rape. Often, then, a force requirement will be satisfied in such cases. But not always.

The issue is not hypothetical. In a well-known case called *Berkowitz*, a rape

235. Deception could vitiate consent to sadomasochistic violence (perhaps counterintuitively, the argument presented thus far is agnostic on this point), but it seems plausible that at least some material deception should *not* be held to do so—because the goal is not sexual autonomy.

236. A 1988 survey found that over thirty-nine percent of undergraduate women at a Texas university had pretended not to want sex they actually wanted before having it. *See, e.g.*, Charlene L. Muehlenhard & Lisa C. Hollabaugh, *Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women's Token Resistance to Sex*, 54 J. PERSONALITY & SOC. PSYCHOL. 872 (1988).

conviction was reversed where an undergraduate male had pressed forward with sexual activity, culminating in intercourse, even as his female classmate repeatedly "moaned" "no"; there was no allegation of violence or threatened violence in the case, the door to the room was unlocked, and the woman knew it was unlocked, so that she would have been free to leave at any time prior to intercourse.[237] Many find *Berkowitz* deeply offensive.[238] But depending on the facts, rape as a violation of self-possession could accept this outcome. The point is not that the victim failed to resist, that her "no" meant yes, or that the defendant might have so believed. The point is simply that where there is neither violence nor fear of violence, where the victim could have walked away at any moment, there has been no violation of self-possession.

The claim that a "no" meant yes belongs to the vocabulary of sexual consent. It tries to establish that sex was wanted. As I have said, rape as a violation of self-possession does not ask that question. It asks whether the victim was forced into sexual submission, and the fact that sex took place while a person was saying "no" doesn't prove force. People are quite capable of voluntarily taking an action, or voluntarily participating in it, even as they say—and mean—"no."[239]

---

237. Commonwealth v. Berkowitz, 641 A.2d 1161 (Pa. 1994).

238. *See* Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 741 (2010) (describing reactions to the case). Some claim that women frequently "freeze" in response to unwanted sexual advances. *See, e.g.*, Jennifer J. Freyd, *What Juries Don't Know: Dissemination of Research on Victim Response Is Essential for Justice*, TRAUMA PSYCHOL. NEWSL. (Div. 56, Am. Psychological Ass'n, Washington, D.C.), Fall 2008, at 16 (claiming that studies show that many women in these circumstances fall into a "tonic immobility" characterized by "dissociation" and "paralysis" (citation omitted)); *see also* People v. Barnes, 721 P.2d 110, 118 (Cal. 1986) (en banc) ("[M]any women demonstrate 'psychological infantilism' . . . in the face of sexual assault." (citation omitted)). I would proceed with extreme caution before accepting these claims of women's "infantilism." *See* Vivian Berger, *Not So Simple Rape*, 7 CRIM. JUST. ETHICS 69, 76 (1988) (reviewing ESTRICH, *supra* note 17) ("[O]verprotection risks enfeebling instead of empowering women . . . ."). But note that this reaction is said to be a response to "assault," *Barnes*, 721 P.2d at 118; Freyd, *supra*, at 16, and if there has been an assault, then of course the force requirement is satisfied.

239. Although not on a par with sex, someone might say "no," for example, while allowing himself to be seated on a roller coaster or while jumping with friends off a high rock into a river. This "no" need not mean yes. It could mean that the speaker has intensely mixed feelings or that what he is doing conflicts with his better judgment. Such a "no" can also express a sincere wish, request, or even command that another stop what he's doing even though if the other *doesn't* stop, the speaker knows he will then choose to go forward too, as when someone says "no" or "don't" or "please stop" as someone serves him dessert—then eats the dessert. Again, the example is obviously not comparable to sex; it serves simply to

Accordingly, absent physical restraint, overpowering, violence, or the threat of violence, rape as a violation of self-possession would fail to give "no" the categorical rape-creating effect a consent-based conception might give it. A counterargument might be that the law needs a bright-line rule—"no means rape"—to protect against much worse assaults and violations. This may or may not be a good argument, but it concedes the main point. Someone who says that sex over a "no" must be called rape for purely prophylactic purposes admits that the "no" itself does not turn sex into rape.

4. Unconscious, Underage, and Intoxicated Sex

A final difficulty concerns sex with individuals who because of unconsciousness, age, or intoxication may be deemed "incapable of consent." In another embarrassment for the picture of rape described here, rape as a crime against self-possession would not cover some of these cases.

Take unconscious sex. Under prevailing law, sex with an unconscious person, including someone asleep, is ipso facto rape[240] because rape is understood to be sex without consent, and the unconscious cannot consent.[241] Rape as a violation of self-possession would not be able to take this position.

If one person knocks another out (whether by violence or drugs) and takes sexual advantage of the unconscious body, there is clearly sex by force. But in other cases, the result might not be so clear. Yes, I could say that every act of sex with an unconscious body is inherently violent, making the force requirement consistent with prevailing law. But really: is it so clear that all unconscious sex should be criminal? Among well-settled couples, long used to sharing the same bed, sexual contact of various kinds with a sleeping person is common. No one thinks all such touchings are criminal. Doesn't this undermine the idea of an ipso facto rule against sexual contact with the unconscious?

Sexual penetration of an unconscious stranger (or mere acquaintance) should certainly be a crime. But it *is* a crime under traditional assault-and-battery law.[242]

illustrate the distinction between saying "no," which can accompany voluntary action, and being forced into an action by violence.

240. *See, e.g.*, Sexual Offences Act, 2003, c. 42, §§ 1, 75(2)(d) (U.K.); State v. Moorman, 358 S.E.2d 502, 505-06 (N.C. 1987).

241. *See, e.g.*, *In re* Childers, 310 P.2d 776, 778 (Okla. Crim. App. 1957) ("It is easily understood, and universally recognized, that a person who is unconscious . . . is incapable of exercising any judgment in any matter whatsoever.").

242. *See, e.g.*, United States v. Bayes, 210 F.3d 64, 69 (1st Cir. 2000) ("patently offensive"); People v. Gray, 131 Cal. Rptr. 3d 674, 684 (Dist. Ct. App. 2011) (any "harmful or offensive"

The question is whether every penetration of any unconscious body necessarily inflicts the profound violation of rape, even though the victim doesn't so experience it at the time and may not see it that way later.[243] It seems to me that this is plainly not so for some persons in some circumstances. The law needs to ask instead whether the act was patently offensive, potentially injurious, or otherwise harmful. Rape law does not ask these questions; the law of battery does and hence may be better suited to address unconscious sex.

Statutory rape is conventionally said to be rape for the same reason as unconscious sex: because minors, like the unconscious, are incapable of consent.[244] Rejecting the idea that rape is unconsented-to sex, a conception of rape based on self-possession could not take this view (and therefore would not apply to every act of sex with a minor). The truth, however, is that existing law doesn't really take it either.

If an adult has sex with, say, a seventeen-year-old, the law knows perfectly well that the latter may in fact have consented: if so, the only charge against the adult will be statutory rape; if not, the defendant can be charged with "real" rape as well.[245] In other words, states distinguish between consenting and nonconsenting minors, and they criminalize sex between an adult and a consenting seventeen-year-old not for the illogical reason that a consenting minor can't consent, but because such sex is deemed immoral and harmful even though consensual[246] (unless of course the two are married, in which case

touching (quoting People v. Pinholster, 824 P.2d 571, 622 (1992))), *reh'g granted*, 264 P.3d 821 (Cal. 2011).

243. Gardner and Shute, *supra* note 204, at 3-8, go so far as to describe an idealized sex act with an unconscious woman, doing no harm to her and not even remembered by her, as the only form of "pure rape," on the ground that rape victims' actual experiences (of fear, violation, degradation, pain, and so on) are mere "distracting epiphenomena" that a genuinely "philosophical" account of rape should ignore. But Gardner and Shute fail to consider whether every act of sex with an unconscious person is always rape in the first place; they simply assume it. For a quite different point of view, see TALK TO HER (Sony Pictures Classics 2002), which portrays a comatose ballet dancer whose longtime caretaker has intercourse with her; she becomes pregnant and wakes from her coma, apparently as the result of childbirth. I thank Professor Sandra Macpherson for bringing this film to my attention in connection with this issue.

244. *See, e.g.*, Sy Moskowitz, *American Youth in the Workplace: Legal Aberration, Failed Social Policy*, 67 ALB. L. REV. 1071, 1083 (2004) ("Statutory rape statutes conclusively presume that an underage victim is incapable of giving consent in most states.").

245. *See* People v. Young, 235 Cal. Rptr. 361, 365-67 (Ct. App. 1987); Carpenter, *supra* note 175, at 337.

246. *See, e.g.*, People v. Soto, 245 P.3d 410, 418 (Cal. 2011) ("Unlike rape, the wrong punished by the lewd acts statute is not the violation of a child's sexual autonomy, but of its sexual *innocence*.").

it's sacrosanct). Statutory rape is not an instance of "real" rape; it is a different and independent crime. Thus seeing "real" rape as a violation of self-possession (and therefore requiring force) should have no effect on statutory rape.

As to intoxicated sex, let's distinguish between people who are passed out or blind-drunk (covered by whatever rules apply to unconscious sex) and people who, because of impairment or disinhibition, willingly participate in sex acts to which they would not have consented if sober. And let's further narrow the latter cases to exclude those in which physical force or threats are used against the intoxicated person (which would obviously be rape under any definition). The question, then, is under what circumstances having otherwise-willing sex with an intoxicated person, who might or would not have participated but for his or her intoxication, amounts to rape. In such cases, the decisive question would be how the intoxication came about. If it came about by force, there would be rape; otherwise, not.

Here the rule I am describing already exists in the case law. In many jurisdictions, rape will be found in intoxicated sex only if the intoxicant was not voluntarily consumed, but rather "administered" by the accused.[247] If rape were sex without consent, this rule would seem dubious.[248] Instead the doctrine ought to consider only the degree of impairment of judgment and whether this was visible to the defendant; perhaps the rule should be like California's, under which it is rape to have sex with anyone who because of intoxication is no longer exercising "reasonable judgment"[249] (a standard implying that a significant fraction of the state's college-age population may be guilty of the crime). Requiring in addition that the defendant "administered" the intoxicant would make little sense if rape were really sex without consent. But it does make sense if rape requires force.

247. *See, e.g.*, State v. Galati, 365 N.W.2d 575, 578 (S.D. 1985); *see also* R v. Bree, [2008] Q.B. 131 ¶ 24 (Eng.) (distinguishing between "voluntary" intoxication and "situations in which the complainant is involuntarily at a disadvantage" as for example "when a drink is 'spiked'").

248. *See, e.g.*, Shlomit Wallerstein, *'A Drunken Consent Is Still Consent'—Or Is It? A Critical Analysis of the Law on a Drunken Consent to Sex Following* Bree, 73 J. CRIM. L. 318, 328 (2009) (arguing, on the premise that rape is unconsented-to sex, that the "only question is . . . whether the victim was able to give a valid consent" and that "the question of how" the victim's inebriation "came about (through . . . voluntary conduct of the victim or otherwise) is irrelevant").

249. *See, e.g.*, People v. Giardino, 98 Cal. Rptr. 2d 315, 324 (Ct. App. 2000).

CONCLUSION

The right to self-possession implies the freedom not to have another person forcibly take sexual possession of one's body, which in turn implies the freedom not to be forced into sexual service. This freedom links rape law directly to *Roe*. It explains why rape is not like other assaults without relying on the myth of sexual autonomy. And it explains why sex-by-deception is not rape.

The right to self-possession would, however, look favorably on rape law's force requirement and, because it rejects the principle of sexual autonomy, cast doubt on *Lawrence*'s libertarian leanings. These costs may be too high. If so, law always has room for myth.