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

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In the summer of 2010, a Jerusalem man was convicted of rape – not for using force on his victim, but for posing as a Jewish bachelor seriously interested in her, when in fact he was an Arab husband with (as his lawyer would put it) only "one goal" in mind.[1] Said the court:

> If [the complainant] had not thought the accused was a Jewish bachelor interested in a serious romantic relationship, she would not have co-operated. . . .
> . . . The court is obliged to protect the public interest from sophisticated, smooth-tongued criminals who can deceive innocent victims at an unbearable price – the sanctity of their bodies and souls.[2]

Even as the *Kashour* case was pending in Israel, a bill was pending in Massachusetts that would have authorized 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*."[3] In Tennessee, rape is already defined to include "sexual penetration . . . accomplished by fraud."[4] In Idaho, as of 2011, a man commits rape 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.[5] In Canada, a supreme court justice has stated that rape is committed whenever sex is procured through "dishonesty."[6]

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[1] *See* Tomer Zarchin, *Arab Man who Posed as Jew to Seduce Woman Convicted of Rape*, HAARETZ, Jul. 20, 2010, http://www.haaretz.com/print-edition/news/arab-man-who-posed-as-jew-to-seduce-woman-convicted-of-rape-1.302895; *Israeli Palestinian Man to Appeal Rape-by-Deception Conviction*,CNN WORLD, Jul. 21, 2010, http://articles.cnn.com/2010-07-21/world/israel.rape.by.deception_1_appeal-plea-bargain-israeli-woman?_s=PM:WORLD.

[2] Kashour v. State of Israel, Crim.C. (Jer.) 561/08 (2010) (Isr.), slip op. at __-__. The facts remain disputed. Kashour denies 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. Note that the doctrine of rape-by-deception in Israel is not limited to Arab men allegedly posing as Jews. *See* Salimann v. State of Israel, Cr.A.2411/06 (2008) (Isr.) (upholding rape conviction of Jewish man who pretended to be a housing official able to procure apartments for women he slept with).

[3] House Bill No. 1494, House Docket No. 631, 186th Gen. Ct. Comm. of Massachusetts, filed January 9, 2009 (emphasis added), http://www.malegislature.gov/Bills/BillText/891?generalCourtId=2.

[4] TENN. CODE ANN. § 39-13-503(a)(4) (2003 & Supp. 2005).

[5] IDAHO STAT. 18-6101(8) (Supp. 2011).

[6] *See* R v. Cuerrier, [1998] 162 D.L.R.4th 513, ___ (Can.) (L'Heureux-Dubé, J., concurring).

Thus "*rape-by-deception*" is a live and intensifying issue in criminal law. The problem it poses is easy to describe. Most people don't think "rape-by-deception" is actually rape at all. I'll bet the reader doesn't think so. Neither, as a rule, do Anglo-American courts.[7] The problem is that we *ought* to think sex-by-deception is rape, and courts *ought* to so hold, given what we say rape is.

Rape, according to a widely shared view, means sex without the victim's consent. Rape was often defined in just these terms by common law judges;[8] it is explicitly so defined in many modern statutes, including those of the United Kingdom;[9] and it is frequently so understood 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]

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[7] *See infra* Part II(C); *see, e.g., Rape by Fraud or Impersonation*, 91 A.L.R.2d 591 § 2 (2009) ("[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.") (citations omitted).

[8] *See, e.g.*, R. v. Clarence,22 Q.B.D. 23, 43 (1888) (Stephen, J.) ("the definition of rape is having connection with a woman without her consent"); R. v. Fletcher, 1 [Bell] Cr. Cas. Res. 63, 70 (1859) (Willes, J.) ("if [the jurors] were satisfied that . . . the prisoner had connexion with [the girl] without her consent, it was their duty to find him guilty"); *see also* 1 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES § 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.*, Sexual Offences Act, 2003, c. 42, § 1(1) (Eng.); Sexual Offences Act, 2009, asp 9, § 1 (Scot.); MONT. CODE ANNO.§ 45-5-503; UTAH CRIM. CODE§ 76-5-402(1).

[10] *See, e.g.*, United States v. Thomas, 159 F.3d 296, 299 (7th Cir. 1998) (Posner, C.J.) ("Since unconsented-to sex is forcible rape . . . ."); People v. Cicero, 204 Cal. Rptr. 582, 590 (Cal. Ct. App. 1984) ("the 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"); *M.T.S.*, 609 A.2d at 1278; 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 (Jules L. Coleman & Allen Buchanan eds. 1994) ("Rape should be conceptualized as unconsented-to sexual intercourse . . . .").

[11] *E.g*, People v. De Leon, 16 N.E. 46, 109 N.Y. 226, 230 (N.Y. 1888) ("[t]he consent of the prosecutrix, having been procured by fraud, was as if no consent had been given"); Lawyer v. Fritcher, 29 N.E. 267, 268, 130 N.Y. 239, 244 (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."); Kreag v. Anthus, 28 NE 773, 774 (Ind. App. 1891) ("Consent obtained by fraud is, in law, equivalent to no consent."); Chatman v. Giddens, 91 So. 56, 150 La. 594, 599 (La. 1921) ("Consent induced by fraud is no consent at all."); McClellan v. Allstate Ins. Co., 247 A.2d 58, 61 (D.C. Ct. App. 1968) ("[C]onsent obtained on the basis of deception is no consent at all."); United States v. Sheard, 473 F.2d 139, 152 (DC Cir. 19__) (Skelly Wright, J., dissenting) ("Moreover, under elementary principles of law consent obtained by misrepresentation is no consent at all."); Farlow v. State, 9 Md. App. 515, 265 A.2d 578, 581 (1970) ("Consent . . . obtained by fraud . . . is the same as no consent so far as trespass is concerned."); State v. Ortiz, 92 N.M. 166, 584 P.2d 1306, 1308 (N.M. App. 1978) ("[A] consent obtained by fraud, deceit or pretense is no consent at all."); Jeffcoat v. United States, 551 A.2d 1301, 1304 (D.C. Ct. App. 1984) ("To be valid, consent must be informed and not the product of trickery, fraud, or misrepresentation."); Murphy v. I.S.K. Con. of New England, Inc., 571 N.E.2d 340, 352, 409 Mass. 842, 862 (Mass. 1991) ("Of course, if consent is obtained by fraud or duress, there is no consent."); Johnson v. State, 921 So. 2d 490, 508 (Fla. 2005) ("[c]onsent obtained by trick or fraud is actually no consent at all"); Dellavecchio v. Hicks, 2006 N.J. Super. LEXIS 235, at * 7 (N.J. Super. 2006) ("Consent given by virtue of fraud is no consent at all."); United States v. Hardin, 539 F.3d 404, 425 (6th Cir. 2008) (internal quotations omitted) (defining a "valid consent" as "uncontaminated by duress, coercion, or trickery"); United States v. Cavitt,

A person who enters your house pretending to be a meter reader commits trespass (entry onto real property without consent);[12] a thief who obtains your goods by trick commits larceny (taking property without consent);[13] a man pretending to be a doctor who "lays his hands on [a woman's] person" commits battery (offensive touching without consent).[14] "Fraud," Learned Hand once said, "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 non-consent; it also requires *force*, and deception isn't force.[16] But this answer hardly answers, not without an explanation of *why* rape requires physical 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 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 courts have begun to interpret it out of existence.[19]

But this means modern thinking about rape and modern rape law have a serious problem. Existing doctrine has no trouble dismissing rape-by-deception, but only because of the much-decried force requirement. Yet 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 even where their statutes still officially require force – then sex-by-deception would and should be rape, because the legal definition of rape would then be sex without consent, and a "consent" procured through deception is not a genuine or valid consent.

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550 F.3d 430, 439 (5th Cir. 2008) ("'Consent' induced by an officer's misrepresentation is ineffective.").

[12] *See, e.g.*, Theofel v. Farey-Jones, 359 F.3d 1066, 1073 (9th Cir. 2003); J.H. Desnick, D., Eye Servs., Ltd. v. ABC, 44 F.3d 1345, 1352 (7th Cir. 1995) (Posner, J.); *Farlow*, 265 A.2d at 581; *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."); [R. PERKINS, CRIMINAL LAW 245-46 (2d ed. ____).]

[13] *Jeffcoat*, 551 A.2d at 1304. For other larceny-by-trick cases, *see infra* note __.

[14] *See* RESTATEMENT (SECOND) OF TORTS § 892B(2), illus. (7)(1977); 1 WHARTON'S CRIMINAL LAW § 835 (12th ed. 1932) ("[I]n any view, consent obtained through fraud, by stupefaction or through the ignorance or incapacity of the party assaulted, is no defense."); Boyett v. State, 159 So. 2d 220, 222-23 (Ala. App. 1964); Comm. v. Gregory, 1 A.2d 501, 505 (Pa. Super. 1938).

[15] NLRB v. Dadourian Export Corp., 138 F.2d 891, 892 (2d Cir. 1943) (L. Hand, J.).

[16] *See, e.g.*, Suliveres v. Comm., 449 Mass. 112, 112, 865 N.E.2d 1086, 1087 (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) (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, 321-22 (2000).

[19] *See infra* notes __, __.

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 – much deeper.

Just as we speak of "anti-discrimination 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*.

The idea of sexual autonomy is simple: every adult should be free to decide for himself what sort of private, consensual sex to engage in. The legal fight for this principle has been waged on several fronts, including:

Constitutionalization. Constitutional sex law commenced in earnest fifty years ago with *Griswold v. Connecticut*,[20] and the Court's most recent sex law decision, *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 almost disappeared, reflecting a conviction that private, consensual sex was not an appropriate target of criminal law.[23]

Sex codes. Sexual misconduct regulations have long been common for particular spheres, such as college campuses. But while such sex codes used to aim at prohibiting sex, today their aim is 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 – such as the utmost-resistance requirement and the marital-rape exemption – have been abolished, reopening core questions about how rape ought to be defined.[25] Today, the central purpose widely ascribed to rape law is the protection of sexual autonomy.[26]

Thus does sexual autonomy increasingly provide a single, clear, intuitively appealing foundation for the regulation of sex in the United States, unifying several of its major components.

But there is an anomaly in the system: the fact that we don't punish rape-by-deception. Deception always violates its victim's autonomy. From autonomy's viewpoint, the two great evils in the world are force and fraud, both of which allow wrongdoers to exert their will over others without the latter's true consent.[27] Failing to punish rape-by-deception, our criminal sex

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[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 Part I(A)(1) *infra*.
[23] *See* Part I(A)(2) *infra*.
[24] *See* Part I(A)(3) *infra*.
[25] *See* Part I(A)(4) *infra*.
[26] *See infra* notes __-__.
[27] *See* Part II & n. __ *infra*.

law fails to vindicate sexual autonomy. This failure would seem to put rape law in tension not only with its own fundamental principle, but with the rest of American sex law, including *Lawrence*.[28]

The purpose of this Article is to demonstrate that the problem of sex-by-deception does in fact create all the difficulties just outlined. Rape-by-deception requires a rethinking of whether rape can or should be understood as sex-without-consent. It also requires sex law to pick its poison – to decide whether or not it really stands for sexual autonomy and to take the consequences of that position, whether that means reconsidering rape doctrine or reconsidering *Lawrence*. And finally, it requires a reevaluation of the ideal of individual autonomy itself, at least as applied to sexuality.

Part One will trace the emergence of sexual autonomy as the fundamental principle of sex law. Part Two will lay out the law of rape-by-deception, explain the covert premises that underlie it, and show how it cannot be squared with a consent- or autonomy-based understanding of rape. Part Three maps the three main options available to rape law once this difficulty is exposed: (1) sticking with the force requirement; (2) eliminating that requirement; and (3) staking out a compromise position in which *coercive* sex would be rape, but *deceptive* sex would not be. This compromise would best capture, I will argue, widely shared intuitions about rape, would beat a retreat from the worst aspects of the force requirement, and would allow at least a partial reconciliation between rape law and the principle of sexual autonomy.

Parts Four and Five of this Article – well, Parts Four and Five 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 self-contradictory. Instead, Part Four 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, from which sexual autonomy is derived, hits a kind of limit in sexuality, where the reality of bodily and psychological conjugation makes the pursuit of autonomy strangely out of place, chimerical, at odds with desire itself. Sexual autonomy, I will argue, is a myth – and an undesirable myth at that.

But how should rape be understood if not in terms of sexual autonomy? Part Five lays out an answer to this question. Rape, I will argue, is a not a crime against sexual autonomy; it is a crime of *sexual slavery*. A warning: this way of seeing rape will be strong in many respects, but will have one glaring weakness. Slavery can explain the distinctive violation rape inflicts on its victims; vindicate important feminist concerns; and make statutory and constitutional sex law foundationally consistent – all while also showing why rape-by-deception isn't rape. But it will suggest as well that the much-maligned force requirement might not be so malign after all.

[28] *See* Part III(A)(1) *infra*.

I
Sexual Autonomy as the Fundamental Principle of American Sex Law

Not long ago, the consensuality of a private sex act – sexual autonomy's pivotal concept – was irrelevant to its legality. And almost all sex was illegal.

If an unmarried man had sex with an unmarried woman, the crime was fornication.[29] If either had a spouse, it was adultery in the married party, fornication in the other, or else adultery in both.[30] If a man lured a woman into bed through a promise of marriage, he committed seduction.[31] If either was black and the other white, they could be guilty of miscegenation.[32] If both were male, it was sodomy.[33] If both were female, some kind of abomination took place, although authorities weren't exactly sure what.[34]

Even a married couple couldn't have just any kind of sex. If they had the wrong kind, they too committed sodomy.[35] If they sought to prevent pregnancy in certain ways, they ran into more criminal sanctions. As of 1885 twenty-four states and the federal government prohibited the sale of contraceptive devices.[36] Merely possessing or disseminating *information* about contraception could be a crime,[37] as was publishing any lewd description or depiction of sex.[38]

Thus went traditional American sex law. In general, sex was not supposed to be seen, spoken of, or engaged in. The only really safe sex was the unsafest: heterosexual, copulative, marital intercourse.[39] As Anne

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[29] *See, e.g.*, People v. Barnes, 2 Idaho 161, 164-65, 9 P. 532 (Idaho 1886) (holding consent irrelevant to conviction for fornication).

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

[31] "Seduction was not a crime at common law, but is quite generally made so by statutes in the United States. . . . The essence of the crime consist[s] primarily in an inducement to sexual intercourse under promise of marriage." 1 CHESTER G. VERNIER, AMERICAN FAMILY LAWS 288 (1931).

[32] At least 34 states in the 1860s, and 28 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 DISTINCTION IN AMERICAN LAW 78-81 (1910).

[33] Or "buggery," or the "crime against nature." *See, e.g.*, State v. Long, 133 La. 580, 63 So. 180, 180 (La. 1913).

[34] *See, e.g.*, Thompson v. Aldredge, 187 Ga. 467, 200 S.E. 799 (Ga. 1939) ("the crime of sodomy proper cannot be accomplished between two women, though the crime of bestiality [sic] may be"); *see generally* WILLIAM N. ESKRIDGE, DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861-2003 at 92 (2008) (describing 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] JANET FARRELL BRODIE, CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA 257 (1994).

[37] *See id*.

[38] *See, e.g.*, Comm. v. Holmes, 17 Mass. 336 (1821) (sustaining conviction of publisher of "Memoirs of a Woman of Pleasure"); Donna I. Dennis, *Obscenity Law and Its Consequences in Mid-Nineteenth-Century America*, 16 COLUM. J. GENDER & L. 43, 49-52 (2007).

[39] As late as 1978, the Supreme Court could refer to "marriage" as "the only relationship in

Coughlin has pointed out, sexual autonomy was no part of this legal landscape.[40] Indeed no kind of autonomy was recognized by traditional sex law – not reproductive, not male, not female, not marital.

Today, things are different. Sex is all over the place. A sign of the times is that pornography is now a multi-billion-dollar, constitutionally-protected industry.[41] But sexuality has won legal protection not only as a First Amendment matter. In the last several decades, a sex law revolution has taken place, in which sexual autonomy has emerged as something close to a fundamental right. This transformation has occurred across at least four different areas: the right to privacy; sex crimes; sex codes; and rape law.

A. *Sexual Autonomy and the Right to Privacy*

When the "right to privacy" first appeared in *Griswold*,[42] it did not remotely imply a broad-ranging right of sexual autonomy. The *Griswold* Court repeatedly emphasized that the case involved "marriage"[43] and stressed the "repulsive" prospect of police scouring the "sacred precincts of marital bedrooms" for evidence.[44] Thus *Griswold*'s privacy looked potentially quite narrow. These potential limits were not breached when *Loving v. Virginia*[45] invoked the right of privacy to strike down racial intermarriage laws.

But in *Eisenstadt v. Baird*,[46] invalidating a ban on the sale (rather than, as in *Griswold*, the use) of contraceptives, the Court declared that the right of privacy protected every individual, "married or single, . . . from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[47] Suddenly the right of privacy was no longer only about marriage, nor about stopping the government from entering private places. Under *Eisenstadt*, the new right of privacy seemed hardly to be about privacy at all.[48]

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 might really be a right to sexual autonomy. Arguably the most important element of sexual

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which the State ... allows sexual relations legally to take place." Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

[40] *See* Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 6 (1998) (in light of fornication and adultery prohibitions, "it seems clear that the official purposes of [traditional] rape law did not include the protection of sexual autonomy").

[41] *See, e.g.*, John A. Humbach, *'Sexting' and the First Amendment*, 37 HASTINGS CONST. L.Q. 433, 441 & n.45 (2010).

[42] Griswold v. Connecticut, 389 U.S. 479 (1965).

[43] *Id*. at 485, 486.

[44] *Id*. at 485-86.

[45] 388 U.S. 1 (1967).

[46] 405 U.S. 432 (1972).

[47] *Id*. at 454.

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

autonomy for women is reproductive autonomy – the right to decide whether or when to bear a child. Thus did Richard Posner feel justified declaring that "in a series of decisions between 1965 and 1977, the Supreme Court created a constitutional right of sexual . . . autonomy, which it called privacy."[49]

But if *Roe* held out the promise of sexual autonomy, that promise was dashed in *Bowers v. Hardwick*,[50] which upheld a homosexual sodomy conviction. *Hardwick* explicitly sanctioned the use of criminal law against consensual sex acts traditionally considered immoral and offensive.[51]

Seventeen years later, *Lawrence* reversed *Hardwick*. Interestingly, the term "right to privacy" never appears in *Lawrence*. Instead, the majority opinion suggests a right to sexual autonomy. Justice Kennedy began that opinion by declaring, "Liberty presumes an autonomy of self that includes . . . certain intimate conduct."[52] He also quoted Justice Stevens's *Hardwick* 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 . . . persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the [Constitution].[53]

Where "two adults," the Court concluded, with "full and mutual consent from each other, engage[] in sexual practices," the "State cannot . . . control their destiny by making their private sexual conduct a crime."[54]

Given such statements, it's no wonder that so many read *Lawrence* to have enshrined sexual autonomy as a constitutional right.[55] Under *Lawrence*, a fornication statute would seem plainly unconstitutional.[56] 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

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[49] RICHARD POSNER, SEX AND REASON 324 (1992).

[50] 478 U.S. 186 (1986).

[51] *See id*. at 196.

[52] Lawrence v. Texas, 539 U.S. 558, 562 (2003).

[53] *Id*. at 578 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

[54] *Id*.

[55] *See, e.g.*, David S. Bogen, *Slaughter-House Five: Views of the Case*, 55 HASTINGS L.J. 333, 333 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*, 700 PLI/LIT 167, 171 (2003) (describing *Lawrence* as vindicating a "right to private consensual sexual 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 O'Scannlain, *Rediscovering the Common Law*, 79 NOTRE DAME L. REV. 755, 761 n.17 (2004) (reading *Lawrence* as standing for a right of sexual autonomy). *But cf., e.g.*, Robert C. Post, *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.").

[56] *See, e.g.,* Martin V. Ziherl, 269 Va. 35, 607 S.E.2d 367 (2005) (so holding).

to engage in private intimate conduct of his or her choosing."[57]

B. *Sexual Autonomy and Decriminalization*

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

Thus more than fifty years ago, citing widespread non-enforcement, the draftsmen of the Model Penal Code described penal adultery and fornication laws as "dead-letter statutes."[58] In many states, repeal followed.[59] Similarly, the old crime of seduction long ago passed into oblivion.[60]

Indeed, decades before *Lawrence*, many states had already repealed or stopped enforcing their sodomy laws.[61] Rather than being mandated by the Supreme Court, this widespread decriminalization surely paved the way for the Court's decision in *Lawrence.* By the mid-1980s, it was already fashionable to say that expressing one's "sexual identity" is or ought to be a "fundamental right,"[62] and the same thinking – that expression of sexual identity is beyond the proper reach of legal prohibitions – underlies the gains made today in protecting same-sex marriage, same-sex adoption, gender-change, and "alternative" sexual "lifestyles." Thus the twentieth century's broad-scale decriminalization of consensual sex was a vitally important component of the modern sex law revolution.

C. *Sexual Autonomy and the New Sex Codes*

Outside criminal law, sexual misconduct has long been targeted and regulated in particular spheres, such as college campuses. But the difference between the previous era's sex codes and ours could not be starker.

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[57] Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 744 (5th Cir. 2008).

[58] Model Penal Code § 213.6 note at 434-36 (Proposed Official Draft 1962).

[59] *See* Richard Green, *Fornication: Common Law Legacy and American Sexual Privacy*, 17 ANGLO-AM. L. REV. 226 (1988); Gabrielle Viator, Note, *The Validity of Criminal Adultery Prohibitions After* Lawrence v. Texas, 39 SUFFOLK U. L. REV. 837, 842 (2006). Such laws do still exist, however, and occasionally prosecutions still occur. *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 handful of such cases while noting that "there have been no prosecutions in most states in recent years"). In the military, adultery offenses are still 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).

[60] *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 movement, beginning in the 1930s, to abolish seduction statutes).

[61] *See* ESKRIDGE,*supra* note __, at 176-78.

[62] *See, e.g.*, 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").

Traditional student sex codes aimed at blanket suppression (through not only punishment, but also single-sex rules both at the college-wide level and in dormitories) and at reinforcing traditional sexual morality (through, for example, draconian penalties for homosexuality). By contrast, today's sexual misconduct regulations, motivated at least in part by a belated recognition of the harassment, pressures and violence to which women are routinely subject, typically seek only to ensure sexual consent.

The sexual misconduct provisions recently adopted at Yale University offer a good example and are worth quoting at length. The "Definition of Sexual Misconduct" provides:

> Sexual misconduct incorporates a range of behaviors including rape, sexual assault(which includes any kind of nonconsensual sexual contact),. . . and any other conduct of a sexual nature that is nonconsensual . . . . When there is a lack of mutual consent about sexual activity, or 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.[63]

And the "Definition of Sexual Consent" provides:

> Sexual activity requires consent, which is defined as clear, unambiguous, and voluntary agreement between the participants to engage in specific sexual activity. Consent cannot be inferred from the absence of a "no"; a clear "yes," verbal or otherwise, is necessary. Although consent does not need to be verbal, verbal communication is the most reliable form of asking for and gauging consent, and individuals are thus urged to seek consent in verbal form. 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 or otherwise mentally or physically incapacitated . . . . Consent must be clear and unambiguous for each participant throughout any sexual encounter. Consent to some sexual acts does not imply consent to others, nor does past consent to a given act imply ongoing or future consent.[64]

The authors of these provisions were plainly intent on avoiding a definition of sexual misconduct that would apply only to specified kinds of "wrongful" sex acts (for example, harmful, coercive, offensive) or that would focus on the accused's "mens rea." Instead, the provisions aim at all conduct

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[63] Yale College, *Definition of Sexual Misconduct, Sexual Consent, and Sexual Harassment*, http://yalecollege.yale.edu/content/definition-sexual-misconduct-sexual-consent-and-sexual-harassment.

[64] *Id*.

"of a sexual nature" and focus only on consent, defined as an unambiguously communicated prior agreement to the specific acts engaged in. As a result, these provisions dictate some interesting results.

If a female student spontaneously kisses her boyfriend, she's apparently guilty of sexual misconduct at Yale (conduct of a sexual nature with no clear "yes" beforehand). If she kisses him when he's asleep, she's plainly guilty. An argument can be made that kissing on the cheek in greeting (without advance permission) is now sexual misconduct at Yale. If two students engage in sex perfectly willingly, but with no unambiguous agreement about which particular acts are okay, both have apparently sexually assaulted the other (sexual assault being defined to "include[] any kind of nonconsensual sexual contact"). In fact, so intent were the authors on avoiding any specification of the wrongful acts or mens rea, they neglected to say which student is guilty when one is nonconsenting. Thus if a sexually aggressive student has non-coercive sex with a more passive student, failing to secure from the latter an advance unambiguous "yes," not only can the aggressive student be found guilty of sexual misconduct; the passive student apparently can as well, because she too has engaged in "conduct of a sexual nature that is nonconsensual."

Perhaps these consequences are unintentional, but perhaps not. It isn't ridiculous to ban unconsented-to kissing on the cheek; even in greeting, this practice might correctly be perceived as "sexual in nature," and might for some be highly unwelcome. Nor is it ridiculous to punish someone for failing to honor her own sexual autonomy. A person who, absent coercion, engages in sex without giving her advance unambiguous agreement can be said both to do an injustice to herself and to impose a cost on others, by reinforcing sexual norms and practices in which the more sexually aggressive believe it's okay to press ahead even in the absence of a clear "yes."

Whether intended or not, the sweeping prohibitions contained in these provisions conform to a particular logic and ideal of appropriate sexuality. On this view, sex is a specially intimate, important and perilous domain, where people – presumably especially women – are frequently violated, taken advantage of, or otherwise made to do things they don't really want. Unpressured, fully-thought-through advance agreement is therefore paramount. Here, then, is a perfect expression of the ideal of sexual autonomy: "positive" and permissible sexual experiences depend on each person's participating only in activity that he or she has unambiguously, knowingly, voluntarily and specifically agreed to.

D. *Sexual Autonomy and Rape Law*

Like the Supreme Court's right-to-privacy jurisprudence, rape doctrine too is a body of law that for decades was in search of a principle, but that now

has seemingly found that principle in sexual autonomy. Readers may find this statement surprising. In what sense was rape law in need of a principle, and how could it have found its principle only recently?

As explained below, there is a kind of riddle at the heart of rape law – a need to explain what it is about rape that distinguishes that crime from other forms of bodily violation or assault. Traditional rape law had a clear explanation of rape's distinctive wrongfulness, but beginning a few decades ago, modern rape law repudiated that traditional understanding, creating the need for a new self-understanding. That gap has now been filled by the principle of sexual autonomy.

1. *The Enigma of Rape Law*

Every rape is an assault or battery. Every rapist could be punished on that ground alone. But the law has always treated rape as much more than just another assault. 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,[65] and often by life imprisonment still today.[66] The crime of rape is in this respect unique. There is, for example, no special crime of assaulting someone's hands or face. Nor of penetrating the human body. Someone who force-feeds another has not committed any crime other than assault and battery, if he has committed an offense at all.

Thus a deep unanswered question lies at the heart of rape law. Why is rape singled out from other assaults and treated as a distinct and especially heinous crime of its own?

To ask this question is, I know, to fail to see something obvious; it may seem wantonly insensible. Rape victims probably don't see a "deep unanswered" mystery in the law's treatment of sexual assaults as independent, heinous crimes. 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 here isn't *whether* rape is a heinous crime, different from other assaults; the question is *why* this is so and *how* the law explains it. Traditional rape law had a simple – and, as we'll see in a moment, sexist – answer to these questions, which structured nearly every major element of rape doctrine. Modern rape law, however, has repudiated the traditional answer, leaving a kind of conceptual vacuum at the law's core.

Understanding traditional rape law is important for several reasons: first, to see the ways in which modern rape law has changed; second, to see how the idea of sexual autonomy came to contemporary rape law; and third, to

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

[66] *See, e.g.*, ALA. CODE § 13A-6-60 (2002); ARK. STAT. ANN. § 5-14-101 (2002); GA. CODE ANN. § 16-6-1 (2002); Sexual Offences Act, 2003, c. 42, § 1(4) (Eng.).

see how traditional rape law's precepts, although ostensibly repudiated by modern doctrine, remain operative even today – in the law of rape-by-deception.

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

Why then, for pre-modern judges, was rape so vile a crime, different from other assaults and batteries?[67] Their 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."[68] "There is no form of violence more odious either in law or in morals than rape."[69] In the torrid words of one state supreme court (and the judge is referring not to a virgin, but to a married woman):

> What is the annihilation of houses or chattels by fire and faggot, 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 houses may be rebuilt, but who shall repair this moral desolation? How many has it sent, suddenly, with unbearable sorrow, to their graves?[70]

To rape was to "shame and dishonour" a woman.[71] 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.[72]

This worldview was distinctly not gender-neutral. It was *women* and *girls* whom sex destroyed, leaving them a "blasted ruin."[73] Like all out-of-wedlock sex, rape violated "*female* purity."[74] For men, on the other hand,

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[67] I'm not looking here for an answer, however true it might be, of the form: "The purpose of treating rape as a distinct and vile crime was to subordinate women." I'm asking about the law's *self*-understanding: the kind of answer judges and lawyers and others of this era would have given.

[68] Callaghan v. State, 155 P. 308, 309 (Ariz. 1916).

[69] 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW§ 411 at 565 (2d ed. 1858).

[70] Biggs v. State, 29 Ga. 723, 728-29 (1860).

[71] HECTOR DAVIES MORGAN, 2 THE DOCTRINE AND LAW OF MARRIAGE, ADULTERY AND DIVORCE 351 (1826) ("shame and dishonor").

[72] John Cotton, *An Abstract of the Laws of New England* (1641), *reprinted in* THOMAS HUTCHINSON, A COLLECTION OF ORIGINAL PAPERS RELATIVE TO THE HISTORY OF THE COLONY OF MASSACHUSETTS-BAY 161, 175 (1769).

[73] "Ruin" is a frequent motif in sex cases from this era. *See*, e.g., Taylor v. State, 110 Ga. 150, 35 S.E. 161, 164 (1900) (referring to defendant in trial for adultery with step-daughter as "the author of her ruin"); Wood v. State, 80 Tex. Crim. 398, 403 (Tex. Crim. App. 1916). *See also, e.g.*, Litchfield v. State, 8 Okla. Crim. 164, 179, 126 P. 707 (Okla. Crim. App. 1912) ("moral desolation and spiritual assassination").

[74] *Biggs*, 29 Ga. at 729.

nonmarital sex was hardly an injury worse than death.[75] On the whole, sex buttressed manhood, whereas it destroyed maidenhood and ruined womanhood.

Traditional rape law's devotion to this picture of femininity and female purity is too well known to require much spelling out. Yet the connection between the old morality and certain of traditional rape law's basic doctrinal features has gone surprisingly underappreciated. Consider the infamous marital rape exemption.[76]

Today, that 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 Hale and repeated many times thereafter,[77] although judges and scholars have long noticed that Hale seems to have made up the rationale out of whole cloth.[78] The two other theories are that the common law viewed a wife as the husband's "property" or the marital couple as "one person."[79]

All three accounts overlook a far simpler explanation. The marital rape exemption is a natural and logical consequence of viewing rape as a crime of female defilement. Why? Because marital sex did not defile. Regardless of whether a wife consented to sex, wanted it, hated it, or was beaten into it, she wasn't morally defiled by it. 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 forget the marital *fornication* exemption, the marital *adultery* exemption, the marital *seduction* exemption, and so on. Nearly *all* traditional sex crimes had a marital exemption: that is, they were defined so as to exclude

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[75] Even men who criminally seduced unmarried girls were merely "rakes," "rascals," and "knaves" – not "ruins." Smith v. Milburn, 17 Iowa 30, 36 (1864) ("rake"); Adams v. State, 19 Tex. Ct. App. 250, 251 (1889) ("rascal"); Breon v. Henkle, 14 Ore. 494, 505, 13 P. 289, 294 (1887) ("knave"). In fact, the entire crime of "seduction" was built on female-purity premises: not only was seduction defined in gendered terms (only males could be guilty, only females victimized), but in most states the woman's prior "*chastity*" was an element of the crime. *See* BISHOP, *supra* note __, § 640 at 463-64; *see, e.g.*, People ex rel. Scharff v. Frost, 135 A.D. 473, 475, 120 N.Y.S. 491 (App. Div. 1st Dep't 1909).

[76] In the nineteenth century and for much of the twentieth, a man could not – as a matter of law – rape his wife. *See, e.g.*, Wilson v. United States, 230 F.2d 521, 526 (4th Cir. 1956) ("[i]t is well settled that a husband . . . cannot be convicted as a . . . principal in the rape of his wife"); 2 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES § 553 at 486 (8th ed. 1880); 2 JOEL PRENTISS BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW § 1119(2) at 645 (8th ed. 1892).

[77] 1 MATTHEW HALE**,** THE HISTORY OF THE PLEAS OF THE CROWN * 629 (1987) (1736); *see, e.g.*, State v. Scott, 11 Conn. App. 102, 112 (1987); Williams v. State, 494 So. 2d 819, 827 (Ala. Crim. App. 1986); State v. Smith, 85 N.J. 193, 200, 426 A.2d 38 (1981); People v. Meli, 193 N.Y.S. 365, 366 (1922); ESTRICH, *supra* note __, at 72-73; ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 12 (2003).

[78] People v. Liberta, 64 N.Y.2d 152, 162, 474 N.E.2d 567 (1984); SIR JAMES FITZJAMES STEPHEN, A DIGEST OF THE CRIMINAL LAW 186 & n.1 (3rd ed. 1883).

[79] *See, e.g.*, Comm. v. Chretien, 383 Mass. 123, 128, 417 N.E.2d 1203 (1981) ("chattel"); *Liberta*, 64 N.Y.2d at 164; ESTRICH, *supra* note __, at 83; Falk, *supra* note __, at ___.

sex between a husband and wife.[80] 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 husband and wife.

The one exception proved the rule: a husband *could* be convicted of raping his wife if he had *another man* force intercourse on her.[81] For in that case, the wife *had* been subjected to a sexual act "despoiling of [her] virtue."[82] Actually, a second kind of exception re-proved the rule. If a husband forced *unnatural* sex on his wife, which even for a married woman was an "infamous indignity,"[83] 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*).[84]

Rape as a crime against female purity explains other definitive features of traditional doctrine as well – for example, the staggering legal fact that men could not be raped.[85] Rape was ruin, and sex did not ruin men.[86] The "utmost resistance requirement"[87] also fit comfortably with the traditional view: a woman who failed to resist to her utmost failed to display the virtue that rape law existed to protect.[88]

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[80] Note that even a *subsequent* marriage was usually a defense to seduction. 2 WHARTON, *supra* note __, § 1760 at 518. Sodomy, however, had no marital exemption. *See supra* note __.

[81] 2 BISHOP, NEW COMMENTARIES, *supra* note __, § 1119(2) at 645; *e.g.*, Commonwealth v. Fogerty, 74 Mass. 489, 491 (1857); People v. Chapman, 28 N.W. 896 (Mich. 1886). *See also* note __ *infra* (describing the *Audley* case).

[82] *Chapman*, 28 N.W. at 898. *See also, e.g.*, State v. Dowell, 106 N.C. 722, 724, 11 S.E. 525, 525 (1890) (asserting that forcing wife into sexual intercourse with another man "prostitute[s]" her) (quoting HALE, *supra* note __, at * 629).

[83] Crutcher v. Crutcher, 86 Miss. 231, 235, 38 So. 337 (1905) (citation omitted).

[84] *See, e.g.*, Mahone v. State, 44 Ala. App. 372, 209 So.2d 435 (1968); Smith v. State, 150 Ark. 265, 268, 234 S.W. 32 (Ark. 1921); R. v. Jellyman,(1839) 8 Car.& P. 604, 604,[173 ER637] (Patteson, J.); United States v. Trudeau, 22 C.M.R. 485 (1956) (upholding conviction of assault with intent to sodomize wife); Quinn v. Quinn, 6 Pa. D. & C. 712, 714-15 (Pa. Ct. Comm. Pleas 1925).

[85] *E.g.*, 4 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND * 210 [hereafter BLACKSTONE] (defining rape as "the carnal knowledge *of a woman* . . . ") (emphasis added); 2 BISHOP, NEW COMMENTARIES, *supra* note __, 1115(2), at 643 ("Rape is a *man's* ravishment of a *woman* . . . .") (emphasis added).

[86] A study of the treatment of sexual assaults against children in New York in the early twentieth century concludes:

> 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. . . . What is missing . . . is a clear sense that such acts did the same harm to boys as sexual assault did to 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 & HISTORY 357, 360-61 (2006).

[87] A woman claiming rape used to be required to show that she had resisted the defendant "to her utmost." *E.g.*, People v. Dohring, 59 N.Y. 374, 382 (1874); Reynolds v. State, 27 Neb. 90, 91, 42 N.W. 903, 904 (1889); Brown v. State, 127 Wis. 193, 106 N.W. 536 (1906). For trenchant criticisms, see ESTRICH, *supra* note __, at 29-41; SCHULHOFER, *supra* note __, at 19-20.

[88] *See, e.g.*, *Dohring*, 59 N.Y. at 382 ("Can the mind conceive of a woman . . . revoltingly unwilling that this deed should be done upon her, who would not resist so hard and long as she was able?").

Similarly, traditional rape law was notoriously hostile to claims by "fallen" women.[89] Officially, under English and American law, the victim's past unchastity was irrelevant to the defendant's guilt.[90] Unofficially, however, the law was clearly otherwise. A woman's past sexual derelictions could always be, and often were, put before the jury to show not only consent,[91] but also, according to eminent authority, lack of credibility and even psychiatric instability.[92] Modern critics excoriate this doctrine, arguing that such evidence allowed rapists to be acquitted because their victims were sexually active.[93] This criticism was completely justified, but what it criticized was the doctrine's very point: tacitly, if not explicitly, (male) juries understood that rape was a crime of defilement – and how could a man have ruined a woman on whose "frontals" was already inscribed, "thy glory has departed"?[94]

Thus was traditional rape law deeply structured by the notion that rape was a crime of female defilement. This understanding not only generated a host of subsidiary doctrines, but also explained why rape was a distinct crime of its own, different from and more heinous than other assaults.

3. *The Turn to Sexual Autonomy*

In the last several decades, however, all the doctrines just described underwent radical change. The marital rape exemption is history.[95] The rape

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[89] According to Blackstone, eighteenth-century European rape law excluded prostitutes altogether. 4 BLACKSTONE at * 212-13.

[90] 2 BISHOP, NEW COMMENTARIES, *supra* note __, at § 1119(1) (even a "common strumpet" can charge rape). The rule dates back to the conviction of the papist Lord Audley for raping his wife by holding her down while a servant had sex with her. *See* The Trial of Mervin Lord Audley**,** Earl of Castlehaven, for a Rape and Sodomy (1631), reprinted in 3 A COMPLETE COLLECTION OF STATE TRIALS 401, 440 (T.B. Howell ed., London, T.C. Hansard 1816). Some judges explained this rule on the ground that every act of sex inflicted an additional defilement. *See* State v. Fernald, 88 Iowa 553, 558, 55 N.W. 534 (Iowa 1893) ("That which is impure or unclean may be defiled by making more impure or unclean."); *see also* 4 BLACKSTONE at * 213 (rape of prostitute possible because she could have "forsaken that unlawful course of life").

[91] *E.g.*, 2 BISHOP, NEW COMMENTARIES, *supra* note __, § 1119(1).

[92] *E.g.*, JOHN H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 924a (Supp. 1934). Some states disagreed. *See, e.g.*, Shay v. State, 299 Miss. 186, 90 So. 2d 209, 211 (1956) ("where want of consent is not an issue . . . evidence of the female's want of chastity is immaterial and inadmissible").

[93] *E.g.*, ESTRICH, *supra* note __, at 49 (stating that "the likelihood of convicting the defendant after [the exposure of the victim's past sexual activity] was questionable"); SCHULHOFER, *supra* note __, at 26 (referring to the law's "assumption that a woman who had sex with her boyfriend might have consented to sex with a stranger as well" and stating that "[j]uries often agreed or, perhaps, acquitted on the theory that a sexually experienced woman deserved whatever she got").

[94] Biggs v. State, 29 Ga. 723, 728-29 (1860).

[95] *See, e.g.*, Emily J. Sack, *Is Domestic Violence a Crime?: Intimate Partner Rape As Allegory*, 24 ST. JOHN'S J.L. COMM. 535, 554-55 (2010). In England, the House of Lords abolished the marital rape exemption in 1991. *See* R. v. R. (a Husband), [1991] 1 A.C. 599. A marital exemption remains, however, in *statutory* rape. *See, e.g.*, State v. Moore, 606 S.E.2d 127, 131 (N.C. Ct. App. 2004) (upholding that exemption).

of men and boys was finally recognized.[96] The utmost resistance requirement has been abolished.[97] New statutes exclude evidence of a rape claimant's past sexual conduct.[98] Thus has modern rape law ostensibly rejected the idea of rape as a crime against female virtue.

But these reforms have also created a conceptual gap. Rape law today cannot rest on premises of feminine defilement. How then does modern rape law explain why sexual assault is different from other assaults? What *is* the special violation that rape inflicts?

Enter sexual autonomy. The idea that rape law existed to protect sexual autonomy would have been inconceivable in an era when fornication, seduction, and sodomy were crimes.[99] Nevertheless, that's the purpose overwhelmingly attributed to rape law today.[100]

The earliest express judicial endorsement of this view may have been the Supreme Court's 1977 *Coker* decision – in which, ironically or not, the Court also held that rape was not sufficiently heinous to merit capital punishment. Said the Court:

> 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."[101]

This frequently-quoted passage from *Coker* offered a new explanation of the distinctive and outrageous violation effected by rape. Rape may not destroy a woman's virtue, but it did violate her "autonomy" – and specifically her *sexual* autonomy, her "privilege of choosing those with whom intimate relationships are to be established."

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

> Today [rape law] is indispensable to the system of legal rules that assures each of us the right to decide who may touch our bodies,

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[96] *See* Note, *Male Sexual Assault: Issues of Arousal and Consent*, 51 CLEV. ST. L. REV. 93, 111 (2004). England's reform rape statute also allows for the rape of both men and women. Sexual Offenses Act, ch. 42, s. 1(a) (2004) (Eng.).

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

[98] 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).

[99] Coughlin, *supra* note __, at 6.

[100] *Id*.

[101] Coker v. Georgia, 443 U.S. 584, ___ (1977).

> when, and under what circumstances. 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.[102]

With this language, the right of sexual autonomy or self-determination is fully articulated. It is unsurprising, then, that the *M.T.S.* court adopts a definition of consent (like the one recently adopted by Yale, which may well have copied from *M.T.S.*) as advance affirmative agreement to the specific act: "We conclude, therefore, that any act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to the specific act . . . constitutes the offense."[103]

Autonomy is undoubtedly the dominant concept grounding 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."[104] Criminal law scholar Stephen Schulhofer has argued extensively in favor of "sexual autonomy" and the "right to sexual self-determination" as the fundamental principle behind rape law.[105] 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."[106] The citations could be multiplied.[107]

Outside the United States, the sexual-autonomy view of rape is also widespread. Germany's criminal code expressly classifies rape as a crime "against sexual autonomy."[108] British scholars have invoked sexual autonomy to interpret England's recently reformed rape statutes.[109] In the words of the

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[102] In the Interest of M.T.S., 609 A.2d 1266, 1278, 129 N.J. 422, 446 (1992).

[103] *Id*.

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

[105] SCHULHOFER, *supra* note __, at 16-17.

[106] McGregor, *supra* note __, at 236.

[107] *See, e.g.*, Dan Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 598 (1996) ("A rape, for example, is often more reprehensible than an ordinary assault – even if the assault results in greater physical injury – because the violation of a woman's sexual autonomy conveys greater disrespect for her worth than do most other violations of her person."); 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) (discussing "sexual autonomy" as a principle for rape law, defined as "the freedom to refuse to have sex with any one for any reason"). Dorothy Roberts was among the first to thematize rape as a problem of women's autonomy. *See* Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359 (1993).

[108] [Germ.Crim. Code sec. 13.]

[109] *See, e.g.*, J. Herring, *Mistaken Sex*, [2005] CRIM L. REV. 511, 517 (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).

International Criminal Tribunal for the former Yugoslavia, the "true common denominator" of all acts of rape is the "violation[] of sexual autonomy."[110]

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."[111] Three years later, *Griswold* announced the right to privacy. Together, decriminalization combined with constitutionalization to produce a new, modern fundamental right: the right to sexual autonomy. What we are seeing today is the penetration of this same right into other arenas of sex law. It underlies workplace sexual harassment law. It is pursued in college sexual misconduct regulations. And it has entered deeply into rape law, which in recent decades found itself in need of a new structuring principle shorn of the sexism of the traditional era.

Sexual autonomy has two sides. First, if consenting adults *want* to engage in sexual intimacies of whatever variety in the privacy of their bedrooms, they have a right to do so. 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 in all its major components, American sex law today is arguably 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: rape law's refusal to punish sex-by-deception. In this Part, I'll lay out the basic contours of current rape-by-deception doctrine, trace its origins, and show how it's incompatible with modern autonomy-protecting principles.

A. *The General Rule and Its Two Exceptions*

The subject was already perplexing over a century ago. Ordinarily, as

[110] Prosecutor v. Kunarac, No. IT-96-23-T & IT-96-23/1-T, Judgment, P 440 (Feb. 22, 2001).
[111] MODEL PENAL CODE § 213.6 note at 439 (Proposed Official Draft 1962).

an important treatise observed, "if . . . consent is obtained by fraud . . . the law deems there was no consent."[112] 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."[113]

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 . . . . [For] 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, is also a case of rape. Many seductions would be rapes, and so would prostitution procured by fraud, as for instance by promises not intended to be fulfilled.[114]

Most judges, however, were unprepared to deny that fraud vitiates consent. Fortunately for them, a different definition of rape was available, supported by many venerable authorities, according to which rape required *force*.[115] 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 carnal knowledge of any female . . . 'by force and against her will,'" and "fraud is not force."[116] American courts have adhered to this reasoning ever since.[117]

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* (2 Q.B. Div. 410), in which consent was obtained

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[112] 1 BISHOP, COMMENTARIES, *supra* note __, § 343 at 384.

[113] *Id*. (emphasis added). There were dissenting voices, although they acknowledged the prevailing rule. *See, e.g.*, People v. Crosswell, 13 Mich. 427, 432 (1865) (Cooley, J.) (criticizing rule against rape-by-fraud); R. v. Flattery, 13 [Cox] [L.R.-]Cr. Cas. Res. 388, 2 Q.B.D. 410, [455] (1877) (Kelly, C.B.) ("I lament that it has ever been decided to be the law of England that where a man obtains possession of a woman's person by fraud, it does not amount to rape."); R. v. Case, 4 Cox Cr. Cas. Res. 220, 223 (1850) (Alderson, B.) ("[w]hen a man obtains possession of a woman's person by fraud, it is against her will; and if the question were *res nova*, I should be disposed to say that this was a rape").

[114] R. v. Clarence, 22 Q.B.D. 23, 43 (1888) (Stephen, J.).

[115] *See, e.g.*, 4 BLACKSTONE * 210 (defining rape as "the carnal knowledge of a woman forcibly and against her will"); 2 BISHOP, NEW COMMENTARIES, *supra* note __, §§ 1113-15 at 642-44 & nn.

[116] State v. Brooks, 76 N.C. 1, 3 (1877).*See also, e.g.*, Don Moran v. People, 25 Mich. 356, 364 (Mich. 1872) ("[i]f 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 (1855) ("*Fraud* and stratagem . . . cannot be substituted for *force*, as an element of this offence.").

[117] *See, e.g.*, Suliveres v. Comm., 449 Mass. 112, 116, 865 N.E.2d 1086, 1089 (2007) (holding that rape requires force and therefore rejecting claim of rape by deception); Comm. v. Culbreath, 36 Va. Cir. 188, 189 (Va. Cir. Ct. 1995) (same); People v. Hough, 159 Misc. 2d 997, 1000, 607 N.Y.S.2d 884 (1st Dist. Crim. 1994) (same).

> by representing the act as a surgical operation, the prisoner was held to be guilty of rape. . . . [W]here consent was obtained by 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. . . . There is abundant authority to show that such frauds as these vitiate consent both in the case of rape and in the case of indecent assault.[118]

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 fraud.[119] Both exceptions remain the law of England.[120] In Canada, these two exceptions were recognized until at least 1982 and are apparently still good law today.[121] In Australia, a well-known High Court decision expressly reaffirmed both exceptions in 1958.[122] In the United States, courts have long endorsed the medical exception in one form or another,[123] while the spousal-impersonation exception, which received significant expressions of judicial approval early on,[124] is the law of about fifteen states,[125] including California,[126] and is recognized in the Model Penal Code.[127]

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[118] *Clarence*, 22 Q.B.D. at 44 (Stephen, J.) An Irish decision recognized rape by husband-impersonation in 1884. R. v. Dee, L.R. 14 Ir. 468, 15 [Cox] [L.R.-]Cr. Cas. Res. 579 (1884). In Scotland, Martin Guerre came to life after the Great War, and the impersonator was found guilty of rape. *See* Advocate v Montgomery, (Scot.) [1926] Justiciary Cas. 2.

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

[120] *See, e.g.*, R v. Linekar**,** [1995] Q.B. 250, 255 (A.C.). 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) (Eng.).

[121] Until 1982, Canada's rape statute expressly included the case of "personating [the victim's] husband," CRIM. CODE, R.S.C. 1970, c. C-34, § 143(b)(2) (Can.), and allowed for medical-misrepresentation cases as well. [Cite.] The 1983 statute abolished the crime of rape, replacing it with "sexual assault" offenses. *See* CRIM. CODE, R.S.C. 1985, c. C-46, § 271-73 (Can.). The Canadian Supreme Court has interpreted the new statute to provide a "more flexible" rape-by-fraud doctrine. *See* R. v. Cuerrier, [1998] 162 D.L.R.4th 513, ___ (Can.) (holding that failure to disclose HIV-positive status vitiated consent).

[122] Papadimitropolus v. R., [1956] C.L.R. 249.

[123] *See, e.g.*, Story v. State, 721 P.2d 1020 (Wyo. 1986); People v. Minkowski, 204 Cal. App. 2d 832 (1962); Pomeroy v. State, 94 Ind. 96 (1883); People v. Crosswell, 13 Mich. 427, 438 (1865). 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, 163 Cal. App. 3d 1224 (1985). Others suggest the exception extends to patients convinced that sexual penetration is medically required. *See, e.g.*, Eberhart v. State, 134 Ind. 651, 34 N.E. 637 (1893); *cf*. Don Moran v. People, 25 Mich. 356, 365 (Mich. 1872).

[124] *See, e.g.*, *Don Moran*, 25 Mich. at 365 ("upon abstract principles of right and wrong, a sexual connection obtained by falsely and fraudulently personating the husband of a woman . . . must be considered nearly, if not quite, as criminal and prejudicial to society as when obtained by force"); Lewis v. State, 30 Ala. 54, 57 (1857).

[125] *See* Russell L. & Kathryn H. Christopher, *Rape by Fraud as a Defense to Statutory Rape*,101 N.W. L. REV. 75, 100 & nn. 164-65 (2007).

[126] CAL. PENAL CODE § 261(5) .

[127] MODEL PENAL CODE § 213.1(2)(c) (Official Draft and Rev. Comments 1985).

B. *The Usual Justifications – and Why They Fail*

To explain the doctrine and its twin exceptions, contemporary courts and commentators repeat a kind of mantra. Fraud "in the factum" vitiates consent and therefore turns sex into rape, while fraud "in the inducement" does not.[128] The two exceptions (we are told) represent fraud "in fact," meaning a misrepresentation going to the very fact or nature of the activity consented to, while virtually all other misrepresentations amount only to fraud "in the inducement."[129] This distinction is said, moreover, to be the "traditional formula" operative throughout the law for separating lies that vitiate consent from lies that don't.[130]

No matter how often repeated, this argument makes no sense. First of all, 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,[131] trespass,[132] and of course contracts.[133] Moreover, among the lies that serve as paradigmatic consent-breakers are misrepresentations concerning the deceiver's occupation or other personal characteristics – exactly the kind of fraud that rape law refuses to see as undoing consent.[134] If the proverbial false meter reader cannot claim consent when he enters a person's home,[135] why can a false bachelor claim consent when he enters a woman's body?

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[128] *See, e.g.*, *Boro*, 163 Cal. App. 3d at 1228; U.S. v. Hughes, 48 M.J. 214, 216 (Ct. App. Armed Forces 1998); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 143 (3d ed. 2001); ROLLIN M. PERKINS & RONALD M. BOYCE, CRIMINAL LAW 215 (3d ed. 1982); WAYNE R. LAFAVE, CRIMINAL LAW 767 (3d ed. 2000); Christopher & Christopher, *supra* note __, at 83-84.

[129] *E.g.*, *Boro*, 163 Cal. App. 3d at 1225; Christopher & Christopher, *supra* note __, at 83; PERKINS & BOYCE, *supra* note 25, at 1080.

[130] *See, e.g.*, PERKINS & BOYCE, *supra* note 25, at 1079; Falk, *supra* note __, at 157 ("The traditional formula for distinguishing legally valid from invalid consent in fraud cases is the dichotomy between fraud in the factum and fraud in the inducement."); Christopher & Christopher, *supra* note __, at 83.

[131] *See, e.g.*, 18A CAL. JUR. 3d § 133 (summarizing numerous cases). The (supposedly) first larceny-by-trick case ever reported involved the false promise to return a horse within a few hours. King v. Pear, 1 Leach 212, 168 Eng. Rep. 208 (Cr. Cas. Res. 1779).

[132] *E.g.*, State v. Ortiz, 92 N.M. 166, 168, 584 P.2d 1306, 1308 (1978) (finding entry trespassory where victim was tricked into believing that defendants had come to her house to help her daughter); State v. Maxwell, 234 Kan. 393, 396-97, 672 P.2d 590, 596-97 (1993) (defendants procured entry to house by pretending interest in selling a watch). *See generally Use of Fraud or Trick as "Constructive Breaking" for Purpose of Burglary or Breaking and Entering Offense*, 17 A.L.R.5th 125 § 3a (2009) (describing numerous similar cases).

[133] It is hornbook contract law that a person "fraudulently induced to enter into a contract has not assented to the agreement." 26 WILLISTON ON CONTRACTS § 69.1, at 486 (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*") (emphasis added).

[134] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 173, comm. (b) & illus. (1) (1977).

[135] *See, e.g.*, Theofel v. Farey-Jones, 359 F.3d 1066, 1073 (9th Cir. 2003); J.H. Desnick v. ABC, 44 F.3d 1345, 1352 (7th Cir. 1995) (Posner, J.); Comm. v. Hayes, 314 Pa. Super.112, 460 A.2d 791 (1983); RESTATEMENT (SECOND) OF TORTS § 173, illus. (2) (1977).

On top of this, the fact/inducement distinction can't even explain at least one, and perhaps both, of the two exceptional cases it's supposed to explain. How exactly is impersonation of a husband "fraud in the factum," when the deceived woman still knows that she is having sex and consents to that activity? If impersonation of a particular individual known to the victim is supposed to somehow be definitive of "fraud in fact," then how can impersonation of someone *other than the woman's husband* – say, a paramour – be fraud "in the inducement"?[136] To be sure, impersonating a husband deeply changes the moral, emotional, factual, and legal implications of sex and its possible consequences, but if that's the test, then pretending to be a bachelor should also be fraud in the factum.

Even in the medical-misrepresentation scenario is not so easy to explain as fraud in fact. Assuming the medical case to be one where the woman knows she is being penetrated by the man himself (rather than, say, by a medical instrument), then the pseudo-doctor is not misrepresenting the brute facts of what's happening. He is misrepresenting, rather, something about himself and his purposes. But in that case, the pseudo-doctor is not so different from a man pretending to be in love. If the former misrepresents the "fact," "nature" or "quality" of the act, so does the latter. The former represents it as an act of professional care, the latter as an act of love.

Thus the fact/inducement distinction conflicts with countless fraud cases outside rape law, cannot capture paradigmatic examples of consent-vitiating lies, and does not even satisfactorily explain the two exceptions it is advanced to explain.

But there is a second, quite different argument that might come to mind to justify 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. That's why most deception claims are properly excluded from rape law, but also why rape law permits the two long-established exceptions. Both involve lies (misrepresenting medical treatment; claiming to be a husband) that concern not emotions, but rather objective facts easy to adjudicate.

In fact, emotions are routinely put before juries. The prosecution in a murder case might seek to prove that defendant was in love with the victim (as part of a showing of motive). In a rape case, the defense might well try to show that the *complainant* was in love with the accused. How then could the *accused*'s feelings for the complainant be ruled out of bounds? Suppose the

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[136] *See, e..g.*, PERKINS & BOYCE, *supra* note __, at 216, 1080 (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 infra* note __.

accused had boasted to a half-dozen friends that he persuaded the woman to have sex with him by falsely telling her he loved her. Why shouldn't such a statement be admissible to prove a knowing misrepresentation?

In any event, the judicial competence argument cannot sustain 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, told in sexual contexts. Claims about a person's marital status or job or wealth would be equally easy to test in court.

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 scenarios, but close their eyes to that knowledge 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 is all this to be explained?

C. *Deception and Defilement*

This mystery isn't really very mysterious. Our sex-by-deception doctrine developed before the modern revolution in sex law. Today's doctrine makes perfect sense – *within the defilement logic of traditional rape law*.

When courts determine that a person "consented" and therefore was not raped, what is it that the person is supposed to have consented *to*? The answer today is of course – to sex. That wasn't 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 – regardless of how deceived she might have been about any of the *other* facts or circumstances pertinent to the sexual activity – had done all the consenting she needed to do.

In other words, 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."[137] A virtuous female was *not*, therefore, one who knowingly had out-of-wedlock sex because a man falsely persuaded her that he was a bachelor or rich or interested in a serious relationship. Those facts were morally and legally irrelevant. Such a woman had willingly consented to nonmarital sex. She had not been ruined against her will. On the contrary, she had voluntarily participated in – consented to – her ruin. Which meant that she

[137] Marshall v. Territory, 2 Okla. Crim. 136, 101 P. 139 (Okla. Crim. App. 1909), *quoted in* State v. Dacke, 59 Wash. 258, 240, 109 P. 1050 (Wash. 1910), *and quoted in* Cloniger v. State, 91 Tex. Crim. 143, 237 S.W. 288 (1922).

hadn't been raped.

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* (but not a paramour, not a rich bachelor, etc.), the woman believed she was having *marital* sex; her consent was therefore "*innocent*."[138] Similarly, if a woman was convinced that she was undergoing a medical procedure, she believed that, in a moral sense, she wasn't having *sex* at all.[139] Thus in the two exceptional scenarios, the woman hadn't knowingly surrendered her virtue.[140] But in almost all other cases of deception, the 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 knowingly and willingly engaged in sex out of wedlock. Though deceived, she had consented to her own defilement and thus could not claim rape. But the twin exceptions also made perfect sense, because they involved virtuous women – women who had not knowingly participated in nonmarital sex.

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. The doctrine rests on and reflects the feminine-virtue premises of traditional rape law – in particular, the notion that women who knowingly and voluntarily have sex out of wedlock cannot claim rape. A rape law seeking to vindicate sexual autonomy would not limit rape-by-deception cases to the two old scenarios. It would see rape whenever sex was procured by misrepresentation.

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. Autonomy takes fraud to be one its two great enemies, along with force or coercion; just as coercion destroys autonomy, so too does

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[138] *E.g.*, Boro v. Superior Court, 210 Cal. Rptr. 122, 124–25 (Cal. Ct. App. 1985) ("'the woman's consent is to an innocent act of marital intercourse while what is actually perpetrated on her is an act of adultery'") (quoting ROLLIN M. PERKINS & RONALD M. BOYCE, CRIMINAL LAW 1081 (3d ed. 1982)); *see, e.g.*, R. v. Clarence, (1888) 22 Q.B.D. 23, 44 ("Consent to [sex] with a husband is not consent to adultery."); R. v. Dee, [1884] 15 Cox CC 579, 587 (Ir. Cr. Cas. Res.) ("She intends to consent to a lawful and marital act . . . . But did she consent to an act of adultery? Are not the acts themselves wholly different in their moral nature?").

[139] *E.g.*, *Boro*; 210 Cal. Rptr. at 124; PERKINS & BOYCE, *supra* note __, at 215.

[140] *Cf.* Coughlin, *supra* note __, at 30 (observing that in the two exceptional scenarios, but not in most other rape-by-fraud cases, the woman's actions would not have been criminal under fornication or adultery laws).

deceitful manipulation.[141]

Indeed, if someone forced us at gunpoint to say which way of undermining consent – deception or threat – was *more* undermining of autonomy, we might have to choose deception. A person who submits at gunpoint accurately and rationally opts for what actually happens next (wills it, chooses it) as the best course of action available. A deceived individual does not; what he thinks he's choosing is not, on some material point, what he gets. That is why some threats (to sue, for example, in appropriate circumstances), are not understood as vitiating consent (say, to a settlement).

In any event, the principle of sexual autonomy would have to reject rape law's force requirement and recognize that consent can be vitiated through other means, such as fraud, as well. From autonomy's point of view, "nonconsensual sex is rape" – pure and simple, whether force is used or not.[142] The *M.T.S.* decision, mentioned earlier, is illustrative. There the New Jersey supreme court held that where sex is not consented to, the force requirement *is satisfied by the act ofsexual intercourse itself*.[143] Thus force is present in all nonconsensual sex; or to put it another way, the force requirement is eliminated.[144] Accordingly, sex-by-deception ought to be rape.

Traditional rape law created rules for deception perfectly consistent with its other female-virtue-based doctrines, such as the marital rape exemption, the exclusion of male victims, the utmost resistance requirement, and the admissibility of the victim's prior sexual acts. Modern rape law has jettisoned every such doctrine except one – rape-by-deception doctrine, which ought to go too if rape really means sex without consent under principles of

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[141] "[L]ying is wrong because it violates human autonomy. Lying forces the victim to pursue the speaker's objectives instead of the victim's . . . . If the capacity to decide upon a plan of life and to determine one's own objectives is integral to human nature, lies . . . designed to manipulate people are a uniquely severe offense against human autonomy." David A. Strauss, *Persuasion, Autonomy, and the Freedom of Expression*, 91 COLUM. L. REV. 334, 355 (1991). *See also, e.g.*, JOSEPH RAZ, THE MORALITY OF FREEDOM 328 (1986) ("Coercion and manipulation subject the will of one person to that of another. That violates his independence and is inconsistent with his autonomy."); 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"). For a comparative view, see Jacques du Plessis, *Fraud, Duress, and Unjust Enrichment: A Civil Law Perspective*, in UNJUST ENRICHMENT: KEY ISSUES IN COMPARATIVE PERSPECTIVE 194, 200 (David Johnston & Reinhardt Zimmermann eds. 2002) (canvassing civil and common law tort regimes and stating that "it should be apparent that fraud and duress" are widely viewed as involving "serious violations of individual autonomy. In the case of fraud, the victim's freedom of choice cannot be exercised properly, because he was made to act on wrong information . . . .").

[142] McGregor, *supra* note __, at 233, 236 (arguing, within an expressly autonomy-based account of rape, that "what differentiates rape from other crimes is *sexual intercourse or contact without consent – nonconsensual sex is rape*" and therefore criticizing the force requirement) (original emphasis)); SCHULHOFER, *supra* note __, at 100-01 (analyzing violations of sexual autonomy in terms of invalid consent and therefore criticizing force requirement);

[143] [MTS cite.]

[144] For a very recent case interpreting a rape statute to eliminate the force requirement on principles of sexual autonomy, see State v. Meyers, __ N.W.2d __, __ (Iowa [June 24,] 2011). But note that Iowa's rape statute, as the court stressed, defines the crime as sex "by force *or* against the will." *Id*.

sexual autonomy.

E. *Objections*

A few objections to this conclusion should be dealt with. The first would be that a victim of deception does in fact consent.

When sex is imposed on someone through brute force, the victim's will is physically overborne. He never says yes; he never consents. But that's not so (it might be said) in sex-by-deception. Thus the problem of rape-by-deception is simple after all: of course deception isn't rape, because the victim consents.[145]

The correct comparison, however, is not to a victim totally overpowered by force, but to a victim compelled to submit at gunpoint, who *does* say yes. If a "consent" procured at gunpoint is properly rejected on grounds of autonomy – which of course it is – so too with a "consent" procured by fraud. Neither consent is given in conditions allowing the individual an autonomous choice.[146] That's why libertarianism, in which the ideal of individual autonomy is central, objects foundationally to both force and fraud.[147]

Still, it might seem there is a distinction. A person forced into sex by a deadly threat submits (it might be said) to *unwanted* sex, whereas in sex-by-deception, the victims *want* the sex they agree to – at least at the moment it takes place.

Do they? In fact, victims of deception don't want the sex they get any more than do victims of threat. Deceived parties want sex of one kind or under one set of circumstances – for example, sex with an unmarried man. What they get is sex under a different set of circumstances, which they don't want, not even at the time the sex takes place. Force and fraud both cause their victims to acquiesce in conduct that, from autonomy's point of view, they don't actually want.

But in a different sense, a deceived party might seem very differently situated. "There is a huge difference," some might say, "between having sex one physically desires and having sex one doesn't. A person who submits to sex because of a deadly threat acquiesces in sex he doesn't physically desire at

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[145] *See* Hyman Gross, *Rape, Moralism, and Human Rights*, 2007 Crim. L.R. 220, 224. This argument tracks traditional rape law's reasoning. *See, e.g.*, BISHOP, *supra* note __, § 1122, at 647 ("Though her consent was obtained by fraud, still she consented."). The problem is of course that virtually everywhere else in law, a fraudulently induced "yes" is not consent.

[146] *See* Strauss, *supra* note __, at 355, and the other sources cited note ___.

[147] *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE AND UTOPIA ix (1974); *see also* AYN RAND, *The Nature of Government*, in THE VIRTUE OF SELFISHNESS 107, 111 [150 hardback] (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").

the moment he has it. Deceived people are not in that position. They don't suffer the sickening experience of undesired sex."[148]

Perhaps – but perhaps not. Suppose the prospect of sex revolted the deceived party, but she considered it necessary for some other end – money, say, or a "serious relationship." If she wanted sex only in that sense, then she too was merely acquiescing in sex she didn't physically desire. Consider two women: each agrees to have sex with a man for the first time, both identically deceived about his occupation, marital status, and interest in her. The first actually desires sex with him and takes pleasure from it; the second is repulsed, but acquiesces in hope of financial benefit. Are courts really supposed to hold that the first woman was not raped (because she physically desired the sex), but the second woman was (because the sex disgusted her)? To be sure, the second woman knowingly chose to engage in sex she didn't want. But so too a victim of sex-by-threat knowingly chooses to engage in sex she doesn't want.

Let's turn now to a very different kind of argument a proponent of autonomy might make to defend rape law's exclusion of sex-by-deception. The sheer ubiquity of sexual lying, it might be said, precludes the criminalization of rape-by-fraud. This argument has two possible incarnations.

First, the claim might be that sexual lies are so rife that no one actually relies on them – or at least no reasonable person does. True, a healthy skepticism discounts much of what people say in sexual contexts, but this skepticism isn't boundless. At a certain point most of us come to believe certain things about the people we have sex with, and we can certainly be fooled – badly fooled. Moreover, if people started going to prison for rape-by-deception, fewer lies would be told and reliance would become more reasonable. So the first argument is not only overstated; it's circular.

Second, the claim might be that juries and judges would make a hash if called on to adjudicate the truth of what people say to each other in sexual contexts.[149] This claim is the institutional-competence argument discussed above; it fails to acknowledge that facts about emotions are put before juries all the time, and it fails to justify a categorical exclusion of rape-by-deception. Many lies told for sexual purposes – for example, lies about marital status, age, or occupation, to name only a few – could be easily policed and adjudicated. Concern about evidentiary difficulties is sensible, but as an account of the

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[148] *See* SCHULHOFER, *supra* note __, at 157 (arguing that when "the woman discovers the misrepresentations later, she will very likely feel cheated and used," but nevertheless "the encounter is one that – *at the time* – she believes she wants," from which "she may experience sexual pleasure"); *cf.* POSNER, *supra* note __, at 392-93 (when a person is deceived into sex through "the common misrepresentations of dating and courtship," it is "merely humiliating," rather than "disgusting as well as humiliating").

[149] *See, e.g.*, Gross, *supra* note __, at 224 (attempting to distinguish sex-by-deception from larceny by trick on the ground that "words said to arouse feelings and to 'put one in the mood' are understood to be part of a game that lovers play" and that "[s]eparating innocuous falsehoods from pernicious deceptions would present insurmountable difficulties in a court of law").

nearly wholesale exclusion of rape-by-deception, it is plainly a rationalization, not a justification.

The principle that fraud vitiates consent does not of course apply to every misrepresentation in every legal context. If you consent to be operated on by a particular surgeon because he falsely claimed to be a bachelor, courts might well hold that your consent remained legally valid, provided he accurately informed you about all the medically relevant information.[150] 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.[151] Not every misrepresentation is legally material. A false claim of bachelorhood might be viewed as wholly immaterial to medical consent, but it could surely be material to *sexual* consent.

The only plausible limitation, from autonomy's viewpoint, would be reasonableness. But marital status, feelings, seriousness of interest, and even religion are all factors on the basis of which thousands of reasonable people make sexual decisions every day. Thus misrepresentations about these matters, if reasonably relied on, would certainly vitiate consent and should, on an autonomy-based view, turn sex into rape.

Let's consider one last argument against rape-by-deception. "To decide whether a legally valid consent was given in any context," someone might say, "the crucial question is whether the consent was induced by illegal means. Consent at gunpoint is legally invalid because the threat is a criminal offense in itself. By contrast, in rape-by-deception cases, the lies are not by themselves against the law. It's not a crime to say you're Jewish when you're Arab; or to say you're a bachelor when you're married; or to say you're interested in a serious relationship when you only want sex. We may be morally opposed to such lies, but they are not illegal."

In no other area of law does the independent illegality of a lie tell us whether a given misrepresentation vitiates consent. A man who gains entry to your home by pretending to be a meter reader commits trespass without reference to whether "impersonating a meter reader" is an independent offense. Fraud has never been defined to require independently illegal misrepresentations. Putting precedent aside, if rape law really protected sexual autonomy, there would be no basis for limiting rape-by-fraud to cases involving independently illegal lies. On the contrary, rape-by-deception would have to be recognized much more broadly. Just as judges in Canada and Israel have stated, an autonomy-based rape law should see rape in *every* material

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[150] *See, e.g.*, Duffy v. Flagg, 279 Conn. 682, 905 A.2d 15, 20 (2006) (holding that for 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).

[151] *See* J.H. Desnick v. ABC, 44 F.3d 1345, 1352 (7th Cir. 1995) (Posner, J.); *cf.* WESTEN, *supra* note __, at 199 ("Ultimately, . . . courts must make normatively contestable judgments as to the additional knowledge, if any, that subjects must possess if their subjective acquiescence to conduct . . . is to constitute a defense.").

misrepresentation reasonably calculated to induce one person to have sex with another.[152]

III
Three Options, Including a Compromise

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

A. *Sticking with Force – and Conflicting with Constitutional Law*

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. Husband-impersonation, on this view, would not be rape; neither would misrepresenting sex as a medical procedure. The advantage of this option is that it makes good on the widely-shared intuition that sex-by-deception isn't rape, without explicitly invoking traditional notions of feminine virtue or sex morality.

But this way of dismissing rape-by-deception flies in the face of the near-universal scholarly consensus decrying the force requirement. It offers no explanation as to why pressures and manipulations falling short of physical force should not turn sex into rape. Indeed, it is even a little puzzling on this view why *threats* of force turn sex into rape. For if the answer is that threats of force vitiate 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's in deep tension with *Lawrence v. Texas* – assuming that *Lawrence* stands for a right of sexual autonomy. I don't mean that rape law is therefore unconstitutional; statutes can conflict profoundly with constitutional law without being unconstitutional.

By way of analogy, imagine a state statute expressly declaring that no crime (or civil offense) was committed by any person who through lies, concealment, or other artifice prevented a pregnant woman from obtaining an abortion. Doctors could lie to pregnant women with impunity in order 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*. If you believe that *Roe* properly protects a woman's right to have an abortion, you will object

[152] *See* R. v. Cuerrier, [1998] 162 D.L.R.4th 513, ___ (Can.) (L'Heureux-Dubé, J., concurring) (asserting that Canada's new sexual assault statutes were enacted to protect "autonomy" and therefore that the victim's consent should be held vitiated whenever "the complainant would not have submitted" but for the defendant's "dishonesty"); Salimann v. State of Israel, Cr.A.2411/06 (2008) (Isr.).

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 prevent abortions by fraud, the statute would be a rebuke to the principle of women's reproductive autonomy – deeply in tension with *Roe*, 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 they don't want – would be logically identical to a statute permitting private actors to deceive women into a childbirth they don't want. It would be a rebuke to *Lawrence*. It would fail to vindicate a constitutionally protected interest. It would allow private actors to deny or obstruct a freedom that constitutional law has deemed fundamental.

Thus does the force requirement, which sustains existing rape-by-deception doctrine, turn its back on what is arguably the reigning constitutional 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. Assuming that *Lawrence* establishes such a right, the force requirement puts rape law in tension not only with the rest of sex law, but with constitutional law itself.

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, the kinds of people one will have intimate relations with – that *Lawrence* appears to establish. In addition, it would have the virtue of eliminating all those aspects of current rape law that critics of the force requirement most oppose. For example, a rape law untethered to force could finally penalize men who use nonviolent threats and manipulation and alcohol to induce sexual cooperation.

Unappealingly, however, sex-by-deception would also have to be a crime. If our criminal sex law were really designed to recognize and 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.

C. *The Compromise: Not Force, but Coercion*

Is rape law obliged either (1) to stick to the much-derided 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*. In other words, all coerced sex would be rape. 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, I suspect that many readers will find this solution appealing.

One of the most objected-to features of the force requirement is that it absolves defendants who have used nonviolent means of pressuring or manipulating vulnerable people, particularly women, into sex. In one particularly 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.[153] On her fourteenth birthday, the man ordered his ward to undress and serve him sexually.[154] When she refused, he threatened to send her back to jail, at which point she submitted.[155] 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.[156] Amazingly, the Pennsylvania courts acquitted Mlinarich of rape,[157] and commentators have blamed this result on the force requirement.[158]

A coercion-based rape law could easily have convicted Mlinarich, because his threat to return the girl to prison was plainly coercive, regardlelss of whether any actual physical force was used. Similarly, a coercion requirement would be satisfied where a principal compels a student to have sex by threatening to fail her, or where an employer threatens to fire a subordinate. Thus a coercion requirement would pick up the most egregious cases that fall through the cracks of the force requirement.

But a coercion requirement would *not* imply that sex-by-deception is rape. Deception is not coercion. So while it would expand rape law beyond cases of physical force, a coercion requirement would still exclude most cases of sexual deception.

At the same time, a coercion requirement would bring rape law closer to the principle of sexual autonomy. Criminalizing coercive sex is obviously consistent with vindicating sexual autonomy: every act of sexual coercion is by

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[153] Commonwealth v. Mlinarich, 518 Pa. 247, 250, 542 A.2d 1335, 1337 (1988).

[154] *Id*.

[155] *Id*.

[156] *Id*.

[157] Of course Mlinarich was guilty of "statutory" rape, but on the "real" rape charge, an appellate court reversed his conviction, and the supreme court affirmed that reversal by an equally divided vote. *Id*. at 1342. Interestingly, the supreme court opinion in favor of affirmance did not rely as much on the force requirement as on a finding that the victim had not been *coerced*. *Id*. at 1341-42 (asserting that the victim's decision to submit had been a "deliberate choice," not "involuntary").

[158] [Cites.]

definition a violation of sexual autonomy.

In some states, rape law's force requirement is already being opened up to become more of a coercion requirement; sex obtained through "mental" or "psychological" coercion has occasionally been expressly recognized as rape. It's a fair prediction that this trend will continue and that many readers will find in a coercion-based rape doctrine a happy medium between a law of rape so narrow that it prohibits only sex accomplished through physical force and a rape law so broad that it jails people who have sex while concealing their true age, income, or degree of romantic interest in the other.

Thus a coercion requirement offers an appealing compromise between the two, more extreme positions. It would reach desired results while taking rape law closer to the ideal of sexual autonomy.

D. *Conclusion: The Problem with Coercion*

Probably this Article should now be finished. We've 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, 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.

Why is coercion objectionable? Because a coerced "yes" does not reflect a valid or genuine consent. But a deceived "yes" also does not reflect a valid or genuine consent. An anti-coercion principle is immediately and strongly attractive because coerced sex is plainly 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 be based on something other than a consent principle? Duress, perhaps?

Someone might say that coercive sex is rape because it occurs under conditions of duress – through threats that would make a person of ordinary firmness submit.[159] Duress need not involve physical force (it might be said), so a duress-based rule diverges from the force requirement. But it would still exclude sex-by-deception, because deception is not duress.

But invoking duress adds nothing to the argument. For legal purposes, coercion and duress are essentially interchangeable terms.[160] The problem

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[159] *See* MPC § 2.09 (defining duress).

[160] United States v. Dowd, 417 F.3d 1080, ____ (9th Cir. 2005) (upholding jury instruction stating that terms "coercion" and "duress" are "interchangeable"); United States v. Helem, 186 F.3d 449, ___ (4th Cir. 1999) (same); United States v. West, 2010 U.S. Dist. LEXIS 33294 at * __ (N.D. Ill. Apr. 5, 2010) (using the terms "'economic coercion' and 'economic duress' interchangeably"). 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, 48 Ohio St. 2d 127, 136 (2005)

remains unchanged: what reason can be given for seeing rape in sex-by-duress that would not also apply to sex-by-deception?

When courts explain why duress is legally important, the reason they typically give is that duress disables its victim from making a "free" choice, causing him to act in a way that doesn't reflect his "free will or free agency."[161] But fraud has the very same effects. Duress, in other words, is important precisely because it is coercive – because it can cause people to take or submit to actions without their true consent.[162] But that is just what fraud does too.

If someone deceives you into turning over your car to him, he is just as guilty of theft as if he had coerced you into it. Your consent, in both cases, is equally invalid. Similarly, if coercive sex is rape because coercive sex is unconsented-to, then if someone deceives you into having sex with him, he should be equally guilty of rape. A coercion-based rape law is a consent-based rape law. And a consent-based rape law ought to punish rape-by-deception.

Ultimately, a coercion rule in rape law would draw its strength from the principle of sexual autonomy – the principle that people have a right not to engage in sex they don't genuinely consent to. But by excluding sexual deception, a coercion-based rape law would conflict with sexual autonomy just as much as it would further it. Its half-logic seems appealing in part because it rejects rape-by-deception, but it offers no reasoned basis for doing so.

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 war. The first is that sex-by-deception is not rape – nor even a crime, generally speaking. The second is that individuals have a fundamental right to sexual autonomy. The first is established by rape law's force requirement, which views rape in some basic sense as a crime of violence. The second is arguably supported by *Lawrence*, the general twentieth-century decriminalization of consensual sex, and modern sex codes as well. These two postulates cannot both stand.

Throughout this Article, I've assumed without argument that sex-by-deception should not be criminalized. Similarly, I've assumed that sexual autonomy is a right and principle worth championing. It's time to question both these assumptions, one of which has to give.

(emphasis added) (quoting MacKenzie-Hague Co. v. Carbide & Carbon Chem. Corp., 73 F.2d 78, 82 (8th Cir. 1934)).

[161] *E.g.*, Wheeler v. Commissioner, 578 F.2d 773, 779 (10th Cir. 2008) (quoting 28 RICHARD A. LORD, WILLISTON ON CONTRACTS § 71:11 (4th ed. 2007)).

[162] *See, e.g.*, Bogan v. City of Chicago, 2011 U.S. App. LEXIS 13667 at *10 (7th Cir. 2011).

Perhaps sex-by-deception *should* be rape – or at any rate a crime, even if called by another name. If so, our criminal sex law could and should embrace sexual autonomy without cavil. Perhaps, however, the problem is not with sex-by-deception doctrine, but with the principle of sexual autonomy. Perhaps sexual autonomy should not be a fundamental right, and if *Lawrence* stands for such a right, then *Lawrence* would to that extent be wrong.

In what follows, I take on these difficult and foundational questions. My conclusions will be: first, that good reasons underlie the widely-shared intuition that sex-by-deception is not rape or, generally speaking, any other criminal offense; and second, that 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. It can allow a manipulative person intimate access to another in offensive and ugly ways. And of course it prevents parties to the sexual bargain from reaching the efficient, welfare-maximizing, frictionless deals at which they rationally aim.

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 body (and not only women's) than it gives to chattel? We've already seen that our doctrine rejecting rape-by-deception rests on an obsolete morality of female sexual virtue that modern law has rejected. Why shouldn't the law rid itself of this final vestige of traditional rape law?

In this section, I offer reasons why a general crime of sex-by-deception would be unwise. What I say is not intended to champion deceptive sex. The goal is only to remind us that sound reasons lie behind our intuitive judgment that sex-by-deception isn't and shouldn't be a crime.

1. *A Disturbing Implication of Rape-by-Deception*

Say that a man, twenty-five, goes out with a seventeen-year-old girl. Thinking she's eighteen, he invites her back to his home, where they have sex. What crimes have been committed?

The man may well be guilty of statutory rape.[163] But assuming that the girl lied about her age and he wouldn't have slept with her otherwise, the girl

[163] *See* Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U.L. REV. 313, 385-91 (2003) (discussing general rule that mistake of age is no defense).

would be a criminal as well. She would have raped the man – if sex-by-deception were rape. As a minor, would the girl be immune from a charge of rape? On the contrary, minors are frequently prosecuted as adults for rape.[164]Hence man and girl might both serve time for raping each other.[165]

Why is this result dismaying? We can imagine two people picking each other's pocket at the same time. Or even killing each other at the same time. Yet the idea of two people raping each other – which would be quite ordinary if sex-by-deception were rape – is disconcerting.

Until quite recently, judges could have warded off this double-rape result by holding that women are legally incapable of raping men.[166] But today's rape law has rejected these notions.[167] Women can of course 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 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 most readers probably know, these facts are real. The Craigslist advertiser turned out not to be the woman, but rather a bitter ex-boyfriend, one Jebidiah Stipe, who, when the facts came out, was convicted of rape and sentenced to sixty years in prison.[168] A question much discussed at the time was whether McDowell, if his story were true, had also committed rape. He claimed that he sincerely believed his victim had consented; he was merely fulfilling her sexual fantasies. (The judge sentenced him to sixty years in jail as well.[169]) A question no one asked – and for very good reason – was whether McDowell had been the *victim* of rape.

But on the view that sex-by-deception is rape, McDowell *was* raped,

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[164] *See, e.g.*, State v. Pentland, 43 Wash. App. 808, 810, 719 P.2d 605, 606 (1986); Armer v. State, 773 P.2d 757, 758-59; *see also, e.g.*, N.J. STAT. ANN. § 2A:4A-26a (West 1987 & Supp. 2005) (providing for prosecution as adults of persons fourteen years of age or older charged with sexual assault); VA. CODE ANN. § 16.1-269.1 (2003) (providing for prosecution as adults of persons fourteen years of age or older charged with rape).

[165] *See* Christopher & Christopher, *supra* note __, at 79 (arguing that sex by "adult impersonation" constitutes "rape by fraud").

[166] *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.") (sic); Brooks v. State, 330 A.2d 670, 673 (Md. Ct. Spec. App. 1975).

[167] State v Stevens, 510 A.2d 1070 (Me. 1986); People v Liberta, 64 N.Y.2d 152, 170, 485 N.Y.S.2d 207, 474 N.E.2d 567 (1984); Ex parte Groves, 571 S.W.2d 888, 892-93 (Tex. Ct. Crim. App. 1975).

[168] *See* Caroline Black, *Ex-Marine Jebidiah James Stipe Gets 60 Years For Craigslist Rape Plot*, CBS News, http://www.cbsnews.com/8301-504083_162-20009162-504083.html.

[169] *See Craigslist rapist receives same sentence as man who solicited assault,* http://trib.com/news/local/article_4b04f85a-21a5-54b5-a3a0-798aa0b8f2bf.html.

provided we accept his story. If fraud vitiates consent, then two people were raped in this story: the woman by force, and McDowell by fraud.

Why is this result so obviously wrong? The reason is that McDowell was an assailant, and we reject categorically the idea that a man who commits a violent sexual assault is – at the moment he commits it – himself being raped. But on the view that deception turns sex into rape, there's no reason why a violent rapist could not himself be a rape victim even as he rapes. Indeed if the assault victim herself had told him a lie without which he would not have wanted to have sex with her, then the victim of *his* rape could be *his rapist* and might have to go jail along with him. It could happen quite frequently.

2. *The Merits of Deceptive Sex*

Now suppose we put aside the word "rape." Sex-by-deception could after all be treated as a lesser sexual offense than rape.[170] Or it could be subject to the same punishment as rape without using the term "rape."[171] Perhaps McDowell was the victim not of rape, but of "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 criminal behavior – of 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.

All romance is a lie: the very word is surrounded by a cloud of fictive connotations. Few people know the whole truth about those with whom they have sex the first time they have sex with them. Yes, we could have a legal regime of full and accurate disclosure prior to any sexual contact – a kind of Rule 10b-5 for sexual security. This would undoubtedly improve the rationality of sexual decisionmaking, but it doesn't sound like fun. Rationality has no monopoly on sex. There are allures in the world other than wealth-maximization.

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, neglecting to disclose every bit of potentially relevant

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[170] Alabama purports to criminalize all sex by "fraud or artifice" as a misdemeanor. *See* ALA. CODE § 13A-6-65(a)(1); *see also* VA. CODE ANN. § 18.2-67.4A(i) (2004) (defining "sexual battery," a misdemeanor, to include sexual touchings obtained by "ruse").

[171] Such was the strategy of the Massachusetts bill mentioned earlier. *See infra* note __.

information. And many of us – a great many, probably – tacitly misrepresent. 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, lost 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 example. But as a general matter, sex-by-deception should not be criminalized.

B. *The Myth of Sexual Autonomy*

But 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 convergence and that principle into question.

In this section I will argue against the idea of a fundamental right to sexual autonomy. The doubts I'll try to raise will be applicable not only to sexual autonomy, but to individual autonomy more generally. This article is not, however, the place to consider that larger subject. The central point will that sexual autonomy – if not all individual autonomy – is both unattainable and undesirable.

1. *Sexual Autonomy's Unattainability*

Consider once more the New Jersey supreme court's description of the autonomy right that rape law supposedly protects: 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."[172]We feel we know what this sentence means, but looking squarely at what it says – who has ever enjoyed such a right? No one.

Medieval kings are said to have asserted the right to sleep with any woman of their choice through the *droit de seigneur* or *jus primae noctis*. If this legend were true, these kings might have had something like a right to "decide whether to engage in sexual contact with another." But only one sort of person today imagines he has such a right – a rapist.

It's all very well to say that each person's right to sexual autonomy is limited by everyone else's, but that's only to concede that at every moment,

[172] In the Interest of M.T.S., 609 A.2d 1266, 1278, 129 N.J. 422, 446 (N.J. 1992).

each individual's sexual autonomy is in *conflict* with others' – which means that the principle of autonomy can't adjudicate between them. John's sexual self-determination would be perfectly realized if only he could have sex with Jane, who, sadly, isn't interested. Her sexual autonomy, we all understand, trumps his. But why is that, exactly? It's one person's sexual autonomy against another's; a different principle is necessary to decide between them.

And that's not the only problem. Not only do we lack the right to have sex with whomever we choose; we don't and largely can't "control the circumstances and character" of our own sexuality. We have little more control over what is sexually *attractive* to us than we do over who is sexually *attracted* to us. Sexual autonomy is in this sense quite thoroughly a mirage.

What is really meant, when sexual autonomy is cashed out in legal terms, is a right not to be subject to others' sexual will in certain ways. This kind of right is not unattainable; in fact it's indispensable. But it raises three questions.

First, when are we and aren't we permissibly subject to others' sexual will (why, for example, is sex-by-force prohibited, but sex-by-deception permitted)? Second, is autonomy the correct or best concept for understanding this right (given that it can't distinguish between force and fraud, and given that the word autonomy here seems deeply misleading, inviting us to say that a paralyzed hospital patient, conscious, entirely immobile, but legally protected from assault, enjoys perfect sexual autonomy)? And finally, what leads distinguished supreme court judges, like the ones who decided *M.T.S.*, to describe sexual autonomy in the language of an impossibly exaggerated right to determine and control one's own sexuality?

The third question is the easiest to answer. The grail of sexual autonomy, as we understand it today, is located in a realm of sexual self-realization, self-actualization, self-expression, and so on. It is a matter of exploring, shaping, and being true to our sexual identities. Sexual autonomy is sexual *self-determination*, and thus a right to sexual autonomy would indeed imply a right to control the character and circumstances of one's sexuality.

The ideal of self-determination is by no means limited to sexual autonomy. In philosophy and even in constitutional law (although not so much *American* constitutional law), the ideal of individual autonomy has long been interwoven – indeed nearly synonymous – with self-determination. But in the case of sexuality, it's too plain that such autonomy is a myth, a chimera. We don't control who we are, sexually speaking; the most basic facts of our sexuality, like gender, come to most of us as givens. And whatever sexual self-determination we might be capable of runs immediately and squarely into the competing self-determination of others.

We broach here very old and foundational problems in the theory of autonomy: how to resolve the clash between conflicting exercises of self-determination; and how self-determination is even possible when the self that's

supposed to be determining itself is always already so thickly constituted, if not at birth, then by the time it reaches maturity. It's worth taking a moment to see how the philosophy of autonomy has sought to deal with these intractable problems and why those answers don't work for sexual autonomy.

Kant – arguably the most important philosopher in this tradition – had the only perfect solution to these problems. He eliminated them conceptually. In Kant's thought, a person who is perfectly free to act on his desires and who does so, however deliberately and successfully, has not come close to autonomy, because he is still moved in his actions by desires that are external to his rational will. Kantian autonomy is not found in enjoyment. Rather, it is attainable only to a rational will that transcends all the appetites, ambitions, and pleasures that put human beings into conflict. Autonomy consists in reason heeding the call of its own laws. And reason in turn demands that a person act only in such a way that the maxim of his actions could be a universal law. Which means that clashes between conflicting claims of individual autonomy are ruled out a priori. My *desires* may well put me in irreconcilable conflict with other people and their appetites, ambitions, and so on. But my *autonomy* will never do so, because autonomous agents act only in such a way that all could do what they are doing. And an autonomous agent is perfectly self-determining, because the self is here conceived solely as a rational will, whose realization consists in its following reason's self-given laws.

Unfortunately, sexual autonomy defies this edifying solution to interpersonal conflict. Sexual autonomy is centrally about desire – about knowing what you want and acting on your wants. It reflects a picture of freedom and self-realization so far removed from Kant's thinking that the very concept of sexual autonomy, as we understand it, would have been for Kant a sickening contradiction in terms. "Taken by itself [sex] is a degradation of human nature," says Kant.[173] "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."[174] On Kant's view, the "juridical laws of pure reason" – and therefore autonomy – entirely forbade the degradation of sex, except between persons of opposite sex and only then within marriage. Needless to say, that's not what we mean by sexual autonomy, which implies a desiring self and therefore a self that finds itself in frequent, irreconcilable conflict with others.

A very different solution to the problem of clashing autonomies invokes the harm principle: one person's autonomy does not give him a right to harm anyone else. While a harm principle is undoubtedly vital in one form or another to law, it can't do the conceptual work that would be needed here. Paradigmatic exercises of sexual autonomy routinely do serious harm to others.

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[173] [*Lectures on Ethics*, p. 163.]
[174] [*Metaphysics of Morals*, p. 62.]

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, rivals for A's or B's affections. The harm principle as such cannot make sense of sexual autonomy.

Someone will say that the harm in these cases is not the "right" kind of harm, or not legally cognizable. But this response is question-begging as a matter of principle and wrong as a matter of law. Psychological harms are real, and they are legally recognized all the time (pain, suffering, extreme emotional distress) with or without physical injury. The concept of harm by itself cannot solve the problem of clashing sexual autonomies. Some other principle, in addition to harm, is necessary.

Another famous answer to this problem resembles both the harm principle and Kant's solution, but it takes a different form and does not depend on a distinction between self and desire. It holds that autonomy claims are always subject to the constraint that each individual's freedom must be consistent with the like and equal freedom of all. Or: the degree of freedom possessed by each is the greatest compatible with a like freedom for all. A's right to have sex with the consenting B may cause acute suffering in C, D, and E, but it is perfectly consistent with their like and equal freedom to have sex with consenting others. By contrast, when John want to impose his sexual desires on the unconsenting Jane, he has no autonomy right to do so, because his sexual autonomy ends, as it were, where Jane's like and equal autonomy begins.

Famous though it is, this solution doesn't generate the latter result – the prohibition of rape – with anything like the ease it's supposed to. Multiple equilibria satisfy the demands of the like-and-equal formula. As a matter of logic, in a world of embodied selves, everyone could be given the right to impose their sexual desires on whomever they can. In this sexual free-for-all, everyone would have a perfectly like and equal right. Indeed, they would have the maximum like-and-equal right; what's more, if nine out of ten wanted sex with the unconsenting tenth, the right-to-have-sex-with-anyone-you-can rule would generate more . To be sure, not everyone would be able to exercise this right successfully; strength might be advantaged. But other possible equilibria – for example, where everyone is free to have sex with whomever they can attract – will favor other arbitrary bodily attributes, producing the same consequence (many will be unable to exercise their right successfully). The prohibition of sexual assault that's supposed to follow from the like-and-equal-sexual-freedom formulation only follows if we presuppose as a hidden premise of the argument a special inviolability surrounding the body, so that the sexual harm of physical violation carries an intensity or forbiddenness categorically different from other kinds of sexual harms. But injecting this premise at the front end of the argument merely presupposes what was supposed to be proved; once again, it's not sexual autonomy, but some other principle, that

does the work here.

Individual autonomy first takes hold of Enlightenment philosophy as an expression and realization of pure reason, allowing the self to transcend earthly passion and desire. On this heavenly plane, the autonomy of one person never conflicts with that of others, and self-determination does not seek, impossibly, to be the author of the self's desires. It seeks instead to escape desire, by heeding the call of reason's universal laws. But as modernity progresses, autonomy comes down from the heavens and insists that the self to be realized is the earthly self, the desiring self, the preferring self. Reason for the desiring self is no longer pure, but becomes instead the practical or instrumental rationality under which a person is rational not when he acts to satisfy universalizable maxims, but when he acts to maximize satisfaction of his preferences. And individual autonomy becomes a battle waged on earthly terrain, fought out with desires we do not choose and with other persons whose desires inevitably conflict with our own.

Brought down in this fashion from the heavens, sexual self-determination becomes strictly and utterly mythical. It is impossible to attain, because we can neither determine our own desires nor impose them on others. The result is a welter of conflicting sexual desires, which autonomy cannot adjudicate – which cannot, indeed, even explain the categorical prohibition of rape.

Later I will return to this problem, offering a principle in place of sexual autonomy that would adjudicate this conflict and explain the prohibition of rape. Here, however, I want to turn to the flip-side of the very same coin: not only does sexual autonomy fail to prohibit what we *don't* want in our sexual interactions (a license to rape); it likewise fails to capture what we *do* want.

2. *And Its Undesirability*

The problem with individual autonomy, as applied to sex, lies not only in its demand that an individual choose and control what he can't control. The problem lies also in the fact that individual control is the wrong ideal for sexuality.

Sex is first and foremost a domain of interrelationship with others. Sexuality is the component of human nature that drives individuals into the most intimate possible relations with others. In these relations, physical pleasure is one important objective. But there is characteristically more to it. Without romanticizing or insisting on any one definition of "positive" sexual experiences, what is it that we want from sex in addition to physical satisfaction?

We could do worse than to begin with the Hegelian insight that desire

for another is always desire of the other's desire.[175] This postulate should not be read either too narrowly or too grandly. The excessively narrow interpretation: in desiring another, we desire the other's mere physical desire for us. The excessively grand: in desiring another, we always desire the other's love or recognition of our personhood.[176] The point is that in desiring another, we characteristically want something from the other's *subjectivity*– from her consciousness of us and of herself.[177] We want the other to feel a certain way toward us, whether this desired feeling is one of love, care, fear, submission, mastery, or something else entirely. So long as we want something from the other's subjectivity directed at ourselves, whatever it may be, we want a *relationship* between self and other. And if so, then we*don't want autonomy* – at least not individual autonomy.

This result should not be surprising. Not all love is sexual, and not all sex involves love, but sexual love is undoubtedly an important dimension of human sexuality, and nothing so bursts the confines of individual autonomy as love. If there's one thing on which the poets and psychologists agree, it's that love ruptures the boundaries, bodily and psychic, between the individuated self of the amorous person and the other. That is why love is a threat to ego[178] and excessive egoism is a threat to love. Love dissolves – it wants to dissolve – the very framework in which individual autonomy would operate. The other's pain becomes our pain; the other's happiness our happiness; the other's fate our fate. In other words, the *disintegration of individuality* is precisely what loves 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 rational control, for self-determination and self-realization. Love speaks for the rupture of the known self by or into another, with all the mystery and loss and gain that might entail. From autonomy's point of view, love is undesirable. From love's, autonomy is.

But love is not necessary to make sexuality unwelcoming of autonomy. Indeed the case is almost stronger when sex involves relations of power and inequality. Power is a famous aphrodisiac; those who find power sexually interesting are very unlikely to be seeking in any simple sense their own individual autonomy. Similarly, people who desire to be sexually dominated

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[175] Kojève famously read Hegel this way. *See* ALEXANDRE KOJÈVE, INTRODUCTION TO THE READING OF HEGEL 6 (Allan Bloom ed., James H. Nichols trans. 1980) ("in 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"); JACQUES LACAN, XI THE SEMINAR OF JACQUES LACAN: THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHOANALYSIS 235 (Jacques-Alain Miller ed., Alan Sheridan trans. 1981).

[176] *See* KOJÈVE, *supra* note __, at 6 (asserting that in desiring a woman, on the Hegelian view, a man "wants to be 'desired' or 'loved,' or, rather, 'recognized'").

[177] *See* G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT §§ 175-76 at 110 (A.V. Miller trans. 1977) ("self-consciousness achieves its satisfaction only in another self-consciousness").

[178] *See, e.g.*, SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 28 (James Strachey trans. 2005).

find satisfaction in their own surrender or submission – practically the opposite of autonomy. And even someone who desires to dominate is not necessarily in the business of individual self-realization, self-expression and so on. Knowingly or not, he may need and want the other's submission to constitute himself as dominant.[179] If so, then what he too desires is not individual autonomy, but a coupling of selves, in which two determine one another.

As opposed to the "I" of pure reason, the desiring self who is the subject of sexual autonomy is constituted – if not logically, then phenomenologically – by an ineradicable other-directedness. Even when sleeping, sexuality dreams not of the self, but of another. Individual autonomy can never be its lodestar. Fundamentally, this mismatch between autonomy and sexuality explains why the concept of sexual autonomy cannot provide anything like an adequate normative framework for sex law. It can't capture either what we want from sexual relations or what we don't.

[179] [Cite to Hegel's famous dialectic.]

V
From Autonomy to Slavery

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

To begin with, we'd have to acknowledge that the various components of sex law are not so unified and coherent after all. Even if criminal sex law does not do so, college sex codes could, for example, genuinely pursue an ideal of fully informed consent expressed in advance unambiguous agreement. On such a campus, all sexual deception could in principle be punished. There is no reason why regulatory sex codes for particular communities could not experiment with different visions of appropriate and "positive sexual experiences," visions not underlying criminal or constitutional sex law.

At the same time, new congruences might emerge. For example, rape law's sex-by-deception doctrine plainly overlaps with the abolition of the old crime of seduction (inducing sex through a false promise of marriage), which *was* an instance of criminal sex-by-deception. From this point of view, the entire decriminalization movement might turn out to be better understood both in itself, and in relation to rape law, if we stop thinking of that movement in terms of a purported decriminalization of consensual sex. The abolition of seduction did not decriminalize *consensual* sex; it removed punishment from an act of sexual intercourse to which a seeming consent had been procured illegitimately, through fraud. The license to seduce through lies, generally accepted throughout American sex law, is not made particularly intelligible through the rhetoric of sexual autonomy; it points instead to changing attitudes about women, sex, and sex law's basic purposes. Something similar is true of prostitution. While anti-prostitution laws can in theory be understood as vindicating sexual autonomy (on the ground that prostitution indicates lack of free will), the best understanding of those laws might well take a very different form. Removing the false rhetoric of sexual autonomy may open up more powerful, more insightful explanations of which sex crimes the twentieth century decriminalized, and which it didn't.

But by far the most profound consequence of jettisoning sexual autonomy would be the conceptual vacuum it would create for rape law and for 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, shorn of the old morality of feminine defilement,

rape law must protect sexual autonomy. What else could it protect, if not the right to have sex if and as one chooses? In fact, sexual autonomy is an utter 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 that there is such a right. Jane, a nonsmoker, denies it. John says smoking is central to and expressive of his identity, his personhood; 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 forces a lit cigar between her lips and covers her nose and makes her smoke it until she chokes.

Now: are we obliged to say that Jane was *wrong* – that there *is* a right of "smoking autonomy" – to conclude that she had a right not to have a cigar stuffed into her mouth? Surely not. Whatever made John's act wrongful had 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, we can: (1) either have no opinion on the asserted right to smoking autonomy or reject this right completely; *and* (2) hold that there's something plainly wrong with stuffing a cigar into someone's mouth and forcing her to smoke it.

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

Autonomy is the sort of thing that's "infringed." Rape is not an "infringement." We might as well explain murder as an infringement of the victim's right-to-die – his autonomy right in controlling the circumstances of his own death. Or torture as an infringement of the victim's bodily autonomy – his right to decide what to do with his own body. Many evils go beyond the infringement of autonomy. Their wrongfulness and harm cannot be captured in terms of autonomy or consent, even though consent will typically be lacking. Murder is one of those evils. So is torture. So is rape.

B. *Rape as Slavery*

There is a simple lesson in the cigar case just described. A difference exists between a right to engage in an activity if or 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 to do something one wishes not to do. People can be made to pay taxes. They can be inoculated to prevent contagion. If they drive, they can be made to buy insurance. When can people have actions forced on them, and when can't they?

Kant is once again a helpful place to start, because his famous dictum

against treating people merely as means seems so plainly relevant here. Earlier we recalled that Kantian autonomy consisted of rational wills willing themselves to act so that the maxim of their actions could be universal laws. That persons had an obligation to act this way was one formulation of Kant's categorical imperative, but not the only one; the anti-instrumentalization axiom – that persons must be treated as ends, and never solely as means – was another. Kant believed these two formulations to be somehow identical, but philosophers have long noticed that the arguments for the two take very different forms, so we might well embrace the second without at the same time embracing Kant's peculiar concept of autonomy, which pits the self against its own body and desires.

But even here, in trying to understand what it means to treat someone as an end, to make this idea intelligible and give it life, the Kantian self must first descend from the heavens and take on corporeal form. Who knows what it means to treat a person solely as a means if one's humanity is rigorously distinguished from enjoyment and from the freedom to act on one's own bodily desires? Excluding women from citizenship; requiring that women serve their husbands; requiring them to submit their bodies to their husbands' "dominion" – all this did not, for Kant, amount to treating women solely as a means, apparently on the ground that giving women the freedom to act on their sexual desires outside of marriage, or letting them act on what he called their "emotional" nature, would contradict their true autonomy, whereas domestication into wifery respected and furthered women's natural, perfectly universalizable purpose and duty as mothers.[180] In other words, on Kant's view, denying women sexual license and making them servants of their husbands helped them achieve autonomy and hence the status of ends-in-themselves. What obstructs Kant's moral vision here – apart from his being a man of a particular era – is his refusal to take seriously the body and its desires as a central part of a person's status as an end, which makes him likewise insufficiently attentive to the role of the body in the converse status, that of being a mere means.

But reincorporating the self into its own body is still not enough to make serviceable the idea of treating people merely as means, or to convert that idea into a principle that would fill rape law's vacuum. Contrary to what some philosophers have claimed, to say that rapists use their victims is not a remotely adequate explanation of rape's wrongfulness or of the distinctive violation it inflicts on its victims.[181]Of course rape treats its victims as means, but if a wife rolls her sleeping husband's body to the edge of the bedto stop their dogs from leaping onto it, she also uses him as a means. Indeed she is arguably using him *solely* as a means. Nevertheless, her doing so is not a

[180] [E.g., Kant, Anthropology, 219-20.]

[181] *See* John Gardner & S. Shute, *The Wrongness of Rape*, OXFORD ESSAYS IN JURISPRUDENCE, FOURTH SERIES (J. Horder ed. 2000).

serious wrong, nor is it remotely comparable to rape.

Ultimately the axiom that people must be treated as ends, and not merely as means, sounds in autonomy, even if not the incorporeal autonomy that Kant believed in. Conventionally understood, to treat someone as an end is to respect his agency, his right to self-determination, and hence his autonomy. But we have already dismissed the concept of sexual autonomy, which can't adjudicate between conflicting claims of sexual self-determination, nor even explain why rape is categorically prohibited while other sexual harms (such as those caused by sexual deception) are not. We are looking for a principle, or for a reinterpretation of Kant's axiom, that can captures rape's distinctive violation and its categorical prohibition while breaking from autonomy altogether.

The key concept, I suggest, is the most extreme treatment as a means imaginable: *slavery*.

Slavery is undoubtedly a violation of autonomy, but that's not slavery's wrong. We can reject the idea of a fundamental right to individual autonomy, or to bodily autonomy, while still categorically opposing slavery. (Just as we can reject "smoking autonomy" while opposing what John did to Jane in the above example.) Slavery is a servitude. That's what distinguishes it from infringements of autonomy, most of which do not impose a servitude on their victims. Thus there can be – and is, in American constitutionalism – a fundamental right against slavery and involuntary servitude even though there is no right to individual self-determination or bodily self-determination. The prohibition of slavery does not sound in autonomy.

Which is why "slavery-by-deception" is not actually slavery in exactly the same way that "rape-by-deception" is not actually rape. Imagine a person agreeing to work a certain manual labor job for twelve hours a day because he has been falsely told that he will be paid a large amount of money. Alternatively, the employee might be properly informed about his pay, but deceived about what sort of project he is actually contributing to. Even though the laborer's "consent" in both cases has been procured through lies, he is still a victim merely of fraud, not enslavement. We could call him a slave, I suppose, but we'd be using slavery in a metaphorical sense, as we might call a person who works for hire a "wage slave." We would mean something very different from what was suffered by, say, African-American slaves in the ante-bellum United States.

The fact that the concept of slavery resists deception just as rape does is not a coincidence. Rape is slavery. Not metaphorically, but literally. Rape is an act of sexual enslavement.

What does it mean to be a slave? Historically and paradigmatically, for women especially, one distinctive and definitive feature of slavery was forced sexual servitude. Being forced into sexual service is a particularly extreme, vile and characteristic mark of slavery because of the utter submission forced

upon the victim, the physical possession taken of the body, and the demand to serve the perpetrator's physical pleasure. All these features are present in rape. Rape just is sexual servitude, a servitude much more fleeting of course than the condition of chattel slavery, but nevertheless similarly oppressive, totalizing, and subordinating. The close connections between slavery and sexuality explain why the word "slave" can without more carry an explicit sexual meaning, as in the term "white slave," which once referred to women forced into prostitution.[182] Here, then, is the simple reason why rape is so different from other assaults: because, overwhelmingly, other assault crimes do not impose on their victims anything like the kind of servitude that rape does.

C. *Enslavement as Opposed to Defilement*

But every attempt to capture the distinctive violation effected by rape, and to say what distinguishes it from other assaults, has to satisfy at least two criteria. The first is phenomenological: it has to be much more than merely philosophically attractive; it has to be attentive to what actually happens to the victim's body and to account for the acute trauma or sense of violation rape victims may experience. Second, it has to avoid the opposite trap – that of overstating rape's morally ruinous effects on its victims. Rape as sexual slavery does well on both these fronts.

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, 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.[183]

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[182] United States v. Beach, 324 U.S. 193, 197 & n.2 (1945) (Murphy, J., dissenting) (discussing the "White-slave traffic Act" of 1910 and noting the dictionary definition of "'white slave' as 'a woman held unwillingly for purposes of commercial prostitution.'") (citation omitted).

[183] Anthony Ramirez, *Firsthand Experience of Rape, and Resiliency*, N.Y. TIMES, Dec. 28, 2007, at B2.

The facts are so quotidian they can barely be distinguished from thousands of other rapes suffered by thousands of other women. The case is not even shocking – unlike, for example, that of the Columbia University graduate student, whose mouth was glued together and body burned during her extended rape.[184] What happened to Ms. Xenarios did not prompt a congressional hearing[185] – but it was more than enough.

The story continues:

> She was immediately taken to the emergency room. One thing she 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, GiorgosXenarios, 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.[186]

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 – if that's what she really felt – are as wrong and 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, only the detective's reaction – his get-over-it indifference to her psychic injury and nakedness – is right and justified.

This second reading returns us, finally, to modern rape law's core difficulty. Once upon a time, rape law had a clear explanation of why rape was singled out in criminal law as a distinct and heinous offense. But modern sex law has repudiated the female-virtue/sexual-defilement premises of that

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[184] John Eligon, *Prosecutor Details Rape That Lasted 19 Hours*, N.Y. TIMES, June 6, 2008, at B3, *available at* 2008 WLNR 10697399.

[185] Chris McGreal, *Rape case to force US defence firms into the open*, Guardian, Oct. 16, 2009, http://www.guardian.co.uk/world/2009/oct/15/defence-contractors-rape-claim-block.

[186] Ramirez, *supra* note ___, at B2.

traditional explanation. Does this repudiation leave modern sex law with no basis for treating rape as anything other than an assault? If we see something more and different and worse in rape, do we invest rape with the disgrace, the shame, the power to ruin, that the old law used to attribute to it?[187]

Feminists have been of two minds on this question for a long time. On the one hand, there is the inclination to credit rape victims' own experience of the crime, to understand the seriousness of rape's harm, to validate the outrageous violation that rape victims frequently feel it to be. On the other hand, there is an equally feminist desire not to oversell rape's violation, not to tell raped women they have suffered a murder of their "soul" or an irreparable injury redefining them for the rest of their lives.[188]

Both inclinations are understandable. To give both their due, we have to avoid fetishizing unwanted sex, but also to avoid erasing the profound sense of violation that many rape victims experience. The concept of sexual slavery provides a key.

Rape victims suffer, for the duration of the rape, the condition of being in another's possession. Sex – at least violent sex, forced on a person against her will – is a taking. A possessory act. Not a legal possession, but a physical one. Rape victims are forced to submit their bodies to the rapist and to serve his pleasure, at pain of being beaten, bound, maimed or killed. More abjectly still, their own helplessness, fear, and pain may themselves be a cause of pleasure to him.[189] They are made to belong to him, bodily. Rape as slavery is not "moral ruin" or "defilement" or "soul-murder" – ideas that confer a moral power on the rapist he doesn't wield and impute to rape an irreparable damage it needn't do. It is rather a loss of self-possession. For however short a time, a rape victim is no longer his or her own person,and being one's own person is vital to the fundamentally human values of dignity, equality, self-worth, personhood and selfhood themselves.

It's not so far off, then, to say that rape can be an "ultimate violation of self."[190] Selfhood implies a kind of self-ownership – in the sense of being one's own person and of one's person being one's own. There are certain bodily conditions necessary to such self-possession that arise not as a matter of logic but simply a fact of our actual existence as embodied selves. In rape

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[187] Switching the victim's sex can make the same problem even clearer. The male horror of being raped expressed as a running joke in American popular culture barely bothers to disguise its fraternity with the view that male homosexuality is disgusting or contaminating.

[188] For an excellent discussion, see 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").

[189] *See, e.g.*, LES SUSSMAN, THE RAPIST FILE: INTERVIEWS WITH CONVICTED RAPISTS 32, 33 (____) (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.").

[190] Coker v. Georgia, 443 U.S. 584, 597 (1977).

these bodily conditions are violated.

Self-possession – being one's own person – isnot the same as autonomy. For example, we may form relationships with others in which we mix our self-possession with theirs. When through love or sex or even deep friendships we combine our self-possession with another's, we don't lose our self-possession; we rather share and reconfigure it. By contrast, a rape victim's self-possession is wrested from her in the most physical, brutal, and elemental fashion. Rape is a taking of sexual possession – which is to say, an enslavement.

D. *Slavery and the Right to Privacy*

Shifting the focus from autonomy to sexual servitude would also put rape law into a profound congruence with the right to privacy. In earlier work, I've 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; instead it has always been much closer to a right against being instrumentalized, a right against being forced into state-dictated service.[191] The constitutional significance of slavery buttresses and clarifies this way of seeing *Roe*.

The argument against an autonomy reading of *Roe*, and in favor of a forced-servitude reading, is simple. The self-determination account of *Roe* holds that *Roe* stands for a right of reproductive autonomy (a right "to decide whether and when to bear a child") or, more generally, a right to determine one's own identity. But these rights are as chimerical as a right to sexual autonomy. No one has ever had a right to decide whether and when to bear a child; no one defines his own identity. But a law banning abortion plainly forces a pregnant woman into motherhood against her will. The principle such a law violates is the same principle that would forbid a state from dictating to people their occupation for the next several years – 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 the Court's actual privacy case law fits within this principle.[192]

Although this Article is not the place to elaborate on this alternative account of the right to privacy, a word about its constitutional foundations is important, because slavery figures centrally here. Basically, the principle I'm ascribing to *Roe* is an anti-totalitarian principle; it holds that states cannot too totally dictate the specific, affirmative future course of its citizens' lives. As an anti-totalitarian right, the right of privacy is in a sense of a condition of

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[191] *See* JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT ch. 12 (2001).

[192] *See id*.

democratic constitutionalism, rather than a right requiring enumeration.[193] But the anti-totalitarian principle is at the same time an anti-instrumentalization principle: the right it protects is a right against being forced into occupations or personal service against one's will. As a result, there is a strong textual warrant for such a right in the Thirteenth and Fourteenth Amendment.

The core purpose of those amendments was to forbid slavery and to prevent states in which slavery was abolished from replicating slavery's hallmarks and oppressions in other forms. Slavery paradigmatically means having specific occupations forced upon an individual against his will; and as noted earlier, for women in particular, slavery also paradigmatically means being forced into child-bearing against one's will. Thus *Roe* in particular and, more generally, a right not to be forced into an occupation of the state's choosing, find powerful textual grounding in the Reconstruction Amendments.[194]

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" – then *Lawrence* is also wrong. The United States 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.[195] If *Lawrence* comes to stand for an equality principle, then 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 the right to privacy being offered here. (Of course they should also have a problem with laws prohibiting incest among adults and laws prohibiting public sexuality. [196]) But readers who believe that *Lawrence*

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[193] *See id*. at 241-42.

[194] *See* JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 187-88 (2005). I am not saying that anti-abortion laws violate the Thirteenth Amendment. *But cf*. Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 526-33 (1990) (so arguing). It is the Fourteenth Amendment in combination with the Thirteenth – because the Fourteenth Amendment, foundationally directed at the Black Codes, plainly took aim at laws that recreated the hallmarks of slavery even though they did not actually enslave – that makes the Reconstruction Amendments into a powerful warrant for *Roe*. I do believe, however, that a law forcing a woman to have sex with a man against her will, even once, would make her a slave – and hence would violate the Thirteenth Amendment. It presumably follows that every act of forcible rape is a Thirteenth Amendment violation as well.

[195] *See Lawrence*, 539 U.S. at ___-__ (O'Connor, J., concurring) (concurring on equal protection grounds).

[196] Regardless of the possibility of genetic abnormalities, prohibiting *all* incest among adults would seem plainly unjustifiable or overbroad if there really were a constitutional right to sexual

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 a form of sex slavery, then a certain definition of rape, with concrete implications for rape doctrine, comes into view.

E. *Slavery and Force*

To be a slave is to be forced into servitude in particular ways, which may roughly be summarize as follows: through beatings, killings, torture, bondage, or confinement. These punishments, whether applied or threatened, are critical to the condition – the existence – of slavery. They differentiate the lot of real slaves from that of metaphorical slaves (slaves to love, wage-slaves, and so on). And they are the definitive attributes of slavery and involuntary servitude in the Thirteenth Amendment sense of those terms. 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."[197]

Slavery, in other words, implies force, and rape as slavery therefore implies a force requirement. Indeed seeing rape as sex slavery offers what rape law has lacked for a very long time: an explanation and justification of the much-decried force requirement. That requirement precisely conforms to the principle against forced sexual servitude. It recognizes that the wrongfulness of rape – the distinctive violation it inflicts, separating it from all other assault crimes – is that it forces sexual servitude on its victims.

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autonomy. And when activity is genuinely constitutionally protected, a state is not ordinarily free to ban people from engaging in it in public (*e.g.*, public displays of religious faith) – especially where the state interest lies in the asserted offensiveness of the activity, as it would in the case of public sexuality. To be sure, states might legitimately seek to "protect children" from seeing sexual conduct in public, but a complete ban would again seem plainly overbroad.

[197] United States v. Kozminski, 487 U.S. 931, 944 (1988) (emphasis added); Bailey v. Alabama, 219 U.S. 219, 240-45 (1911); United States v. Booker, 655 F.2d 562, 556 (4th Cir. 1981) (holding that slavery or involuntary servitude exists where "control over [individuals'] lives" is "maintained by threat of criminal sanctions or . . . through physical force") (citations omitted); United States v. Shackney, 333 F.2d 475, 481-85 (2d Cir. 1964) (Friendly, J.). This understanding may depart from international law, which defines slavery in terms not of forced service, but of the existence of any incidents of legal ownership, *see* Slavery Convention, Sept. 25, 1926, 212 UNTS 17, Art. 1(1). The international definition, however, is notoriously problematic; it suggests that professional team athletes who can be traded by ownership (a legal incident of ownership) are slaves, but that women held in sexual bondage in wartime are not (no legal incidents of ownership). In actual practice, international authorities do not insist on legal incidents of ownership, but recognize, as they should, the reality of slavery, and indeed of sex slavery, when they see it. *Cf.* United Nations, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict*, Final Report, E/CN.4/Sub.2/1998/13, ¶ 30 (1998) (stating that "the 'comfort stations' that were maintained by the Japanese military during the Second World War . . . and the 'rape camps' that have been well documented in the former Yugoslavia are particularly egregious examples of sexual slavery").

What used to be said of women in the "white slave" trade has particular pertinence here. "[T]hese women *are practically slaves in the true sense of the word*," stated a joint congressional report, in "that many of them are kept in houses of ill fame against their will; and that force, if necessary, is used to deprive them of their liberty."[198] All rape victims, *when rape is accomplished by force or threat of force*, are "slaves in the true sense of the word."

F. *An Objection: Sex Slavery a Floor, Not a Ceiling*

An objection to everything I've said: "You haven't provided a justification for the force requirement at all. Even if I were to concede that there's something valuable in your idea of rape as sexual enslavement, and even if I were to concede that the Thirteenth Amendment right against involuntary servitude requires force, you seem to have forgotten something obvious. Constitutional rights are a floor, not a ceiling. Nonviolent sexual predation may not be slavery, but states can still criminalize it. Rape law is free to prohibit more than slavery."

This objection is of course correct. That rape violates a fundamental right of constitutional status – the right against slavery, which, incidentally, is one of the few rights in the Constitution not limited by the state action doctrine – in no way prevents states from criminalizing other forms of sexual imposition, if they so choose. Nevertheless, once we see that violent rape violates a fundamental right, we can finally explain the distinction, which our law has always observed yet never quite been able to 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 are free to criminalize all sex-by-deception if they choose (although I find it hard to believe such a prohibition would really be enforced), but violent rape violates a fundamental rights in a way that sexual deception doesn't, offering a justification to states that choose to stick to existing rape law, with its well-known if much-disparaged force requirement.

G. *Doctrine*

In this last section, I'll spell out a few doctrinal implications of rape as sexual slavery. This view makes many problematic cases easy – deception cases, for example.[199] But I won't discuss easy cases here. Instead I'm going

[198] United States v. Beach, 324 U.S. 193, 197 (1945) (Murphy, J., dissenting) (emphasis added) (quoting H. Rep. No. 47, 61st Cong., 2d Sess., p. 10; S. Rep. No. 886, 61st Cong., 2d Sess., p. 11 (1910)).

[199] Sex-by-deception, without more, would never be rape on a slavery-based view. Even the traditional exceptions (medical fraud; husband impersonation) should not be rape. This is not to say that sexual deception can never be unlawful. On the contrary, if a lie or omission threatens serious harm to the victim, it is battery under traditional common-law principles. *See, e.g.*, Leleux v. United States, 178 F.3d 750, 755 (5th Cir. 1999) ("where an individual fraudulently conceals the risk of sexually transmitting

to take up some harder issues. My purpose is not to show that a sexual-slavery 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. *Coercion and the Definition of Force*

The idea of "force" is hardly self-defining. Psychological forces could be included, and so could pecuniary forces. If an employer procures sex by threatening to fire a subordinate, there is arguably coercion, but is there rape? Viewing rape as sexual slavery suggests not (because the threat of discharge, which is omnipresent in most employment contexts, doesn't turn employment into slavery). This result conforms to existing law (because of the force requirement); it may not, however, conform to some readers' intuitions. But the position that all coerced sex is rape is pretty difficult to sustain.

Imagine a boyfriend and girlfriend. Although hopelessly in love, the boy is religious and cannot have sex until marriage. One night, the girl threatens to break up with him unless he surrenders that scruple. Assume that the prospect of breaking up is devastating to him. As a result, despite his religious compunctions, he sleeps with her. Nearly everyone will say he wasn't raped. Certainly he isn't a slave, except perhaps in the metaphorical sense (a slave to love), which, as mentioned earlier, isn't the kind that counts.

But this boy *was* coerced, wasn't he? Perhaps it will be replied that the girl threatened an action she had a legal right to take and such a threat doesn't count as coercive. By contrast, the argument would go, an employer's threat to fire an employee for refusing to have sex with him *would* be unlawful, which is why he *would* be guilty of rape.[200]

This independent-illegality definition of coercion might well produce appealing doctrine in many cases. But defining coercion by reference to the independent illegality of the threat is analytically inadequate and normatively puzzling. To begin with, that a threat was *lawful* for the *threatener* doesn't make it less *coercive* for the *threatenee*. The threatenee's consent is not made any more "voluntary" because the threat was lawful.

Moreover, in the employer's case, it can't be assumed that the threat to fire was independently unlawful. Suppose that the employment is at-will (discharge permissible for any reason or no reason), that Title VII is inapplicable, and that other no local law is on point. In that case, his threat may *not* be unlawful. Is the employer no longer a rapist? Is his threat less coercive because it is not independently illegal?

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a disease, that action vitiates the partner's consent and transforms consensual intercourse into battery"); *see also* MacPherson v. MacPherson, 712 A.2d 1043, 1045 (Me. 1998) (noting and approving nationwide rule that concealing sexually transmissible disease can give rise to liability in tort).

[200] *Cf.* WERTHEIMER, *supra* note __, at 174 (suggesting that threats are coercive only when they "propose to violate [someone's] rights").

Conversely, it's not hard to construct hypotheticals in which an unlawful threat *doesn't* seem to turn sex into rape. Suppose a man decides to break off a sexual relationship with a woman, but she changes his mind by threatening to publicize damaging facts or falsehoods about him. This threat is probably unlawful, but most will agree that the man has not been raped. He may be the victim of a crime, but that crime is blackmail or extortion.

Ultimately, the difficulty with coercion-based theories of rape is the difficulty brought out earlier: a coercion-based account is a consent-based account. The idea behind coercion is that the victim's consent was not genuine or meaningful or valid. But as we know, the very same logic applies to deception. If all coerced sex is rape, all unconsented-to sex ought to be rape, including rape-by-deception.

The truth is that a great deal of sex is engaged in under conditions seriously diverging from uncoerced autonomy. A man who threatens to divorce his spouse for refusing to have sex with him would be applying intense psychological and material pressure; if divorce would be sufficiently devastating to her, these pressures can surely be coercive. But again, nearly no one will call this a case of rape. People who have sex with someone irresistibly attractive to them are, frankly, also coerced – even if this form of coercion never makes it into the discussion.

Neither coercion nor consent has ever been able to explain why these nonviolent undermining of autonomous will don't turn sex into rape. Slavery can. What kinds of threat can turn employment into slavery? Not a threat to fire, which, however coercive, is part and parcel of the rules of work. But forcing people to keep working at gunpoint does turn employment into slavery. Slavery requires violence; coercion doesn't. If rape is sex slavery, not all coerced sex is rape; only sex coerced by violence is.

Return now to the notorious *Mlinarich* case,[201] in which a man induced his fourteen-year-old ward to have sex with him by threatening to send her back to jail. Suppose Mlinarich's guardianship was "at-will," meaning that he could return his ward to juvenile prison for any reason or no reason. On that assumption, he was threatening to take an action he had a legal right to take. Would Mlinarich, in that event, no longer be a rapist?

Slavery explains why *Mlinarich* should have been an easy case. Imprisonment is an act of physical force, and as we have seen, a threat of imprisonment is one of the kinds of violence notoriously and characteristically directed at slaves to force them into service. Sex is rape whenever it is forced on a person through bondage, beating, torture, imprisonment, or any other instrument of enslavement.

2. *Masochism and Mistake*

[201] *See* Part III(C) *supra*.

Traditionally, rape law has understood consent as a "mental state," a state of willingness, so that the question becomes whether the sex was wanted or unwanted – and whether the defendant knew or had reason to know it was unwanted. Rape as sex-without-consent can therefore put the victim on trial, allowing defense counsel to probe whether she wanted or liked the sex she got.

Rape as slavery, it seems to me, offers a clear improvement. Whether the complainant wanted or consented to the sex she had is autonomy's question, not slavery's. Rape as slavery asks whether the victim consented *to the violence* to which she was subjected.

In this way, rape as slavery also offers a simple approach to sadomasochistic sex that rape as sex without consent can't. In sadomasochistic sex, ascertaining consent-to-sex can be highly problematic; that may be part of the point. Yes, "safe words" can be employed, but maybe the parties in question don't play the game that way. If the question is whether each person consents to each sex act engaged in, the answer may be very difficult to determine when one of the parties is gagged and bound.

Rape as slavery asks whether the sexual *violence* was consented to, and it understands consent as a permission given in advance. In sadomasochistic sex, people had better have each other's permission before binding, gagging and so on. If they don't, they commit rape. On the other hand, if a person *does* consent in advance to be bound and gagged, then decides later he doesn't want sex but can no longer express it, he has *not* been raped – despite the fact that there is arguably (if not plainly) sex without consent in such a case.

Consent to violence is not quite as subject to mistake as is consent to sex. Whether a person wanted sex may be easily put in question; whether a person wanted 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 submitted to sex because she reasonably believed the other's words or actions communicated a threat of violence to her if she refused. A man who uses words or actions reasonably calculated to induce a fear of violence, and then procures sex as a consequence, may mistakenly believe the other really wants it – but he has sex in those circumstances at his peril.

3. *No Means No – but It May Not Mean Rape*

What about sex that takes place after one party has said no? The appealing position here is categorical: sex over a clearly articulated no is always rape. Unappealingly, rape as sexual slavery would not be able to take this position. This point is probably reason enough to reject the entire argument made so far. Unfortunately, I see no way out of the problem.

According to some reports, men frequently have sex with women after a woman's "no."[202] Sometimes men do so through violence, which would of course be rape. And in many other cases, the victim may reasonably be in fear of violence (if only because her "no" was not heeded). Thus most of the time, a force requirement will match up unproblematically with the view that sex in the face of a "no" is rape. But not always.

The issue is not hypothetical. In one notorious case, a court found no rape where a male and female undergraduate had sex in his dorm room even though the woman, according to both parties' testimony, was "moaning" "no" throughout; there was, however, even in the woman's testimony, no allegation of violence or of any threat of violence, and the door to the room was unlocked, which the woman knew, so that she could have simply walked out throughout most of the episode.[203] It's possible that victims, perhaps especially women, "freeze" in the face of an unwanted sexual advance – that they "go numb" or experience a kind of "paralysis."[204] But the question is whether this numbness reflects a reasonable fear of *violence*.

If the victim has not been bound or otherwise rendered physically helpless, if there is neither injury nor fear of injury, if the victim could have walked out the door at any moment had he or she chosen to do so, a sexual-slavery-based conception is obliged to say that there is no rape – even though one party said "no" while the other carried on. The point is not that the victim failed to resist; slavery carries no resistance requirement. The point is simply that there was no force and hence no forcible sexual servitude.

I'm emphatically *not* saying that the victim's "no" means yes – or that the defendant might have so believed. The claim that a "no" meant yes belongs to the vocabulary of sexual consent. It tries to establish that sex was wanted despite the "no". As I have said, rape as slavery does not ask that question. It asks whether the victim was forced into sexual submission through violence. A "no" does not show that there was violence. On the contrary, people do sometimes take actions while saying "no" without being

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[202] A 1988 survey found that 39% of Texas undergraduate women had pretended not to want sex they actually wanted. *See, e.g.*, Charlene L. Muehlenhard & Lisa C. Hollabagh, *Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women's Token Resistance to Sex*, 54 J. PERSONALITY & SOC. PSYCH. 872 (1988).

[203] Comm. v. Berkowitz, 537 Pa. 143, 641 A.2d 1161 (1994).

[204] Evidence reportedly exists that women victims of sexual assault may fall into a state of "tonic immobility" characterized by "dissociation" and "paralysis." Jennifer J. Freyd, *What Juries Don't Know: Dissemination of Research on Victim Response is Essential to Justice*, TRAUMA PSYCHOLOGY NEWSLETTER 15, 16 (Fall 2008); s*ee also* People v. Barnes, 42 Cal. 3d 284, ___, 228 Cal. Rptr. 228 (1986) (asserting that "many women demonstrate 'psychological infantilism' . . . in the face of sexual assault," in which the woman "'may smile, even initiate acts, and may appear relaxed and calm'") (citation omitted). Although I myself would proceed with extreme caution before accepting the notion that women are prey to "psychological infantilism," note that this "paralysis" or "infantilism" is said to be a response to "*assault*" – meaning violence or a threat thereof. *Id*.; Freyd, *supra*, at 16. If so, then there would be rape.

forced into them.[205]

Accordingly, rape as slavery would fail to give "no" the categorical rape-creating effect a consent-based conception might give it. Unattractive as this result may seem, I can't bring myself to believe it's as wrong as many appear to think. Remember that we are not dealing here with situations in which the victim was tied down or assaulted or reasonably put in fear of violence. The law does not empower women when it presumes them too weak to stand up and walk away through an unlocked door (in the absence of force or threat) if they don't want to have sex.

A counter-argument 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, Under-age, and Intoxicated Sex*

A final important difficulty concerns sex with individuals who because of unconsciousness, minority or intoxication may be deemed "incapable of consent." In another blow to the picture of rape described here, seeing rape as a crime of violence would not cover some of these cases.

Take unconscious sex. Under prevailing law, sex with an unconscious person is "ipso facto" rape[206] because rape is understood to be sex without consent, and the unconscious cannot consent.[207] Rape as sexual slavery would not be able to take this position – and, as we have seen, rape law can't really take it either, because it assumes that rape means sex-without-consent, which in turn implies that sex-by-deception is rape as well. To be sure, where the perpetrator injures the unconscious victim, or perhaps even carries him or her somewhere to take sexual advantage, there would be rape. But in other cases, the result might not be so clear.

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[205] Although not on a par with sex, someone might say "no," for example, while allowing himself to be guided into a seat on a roller coaster or while jumping with friends off a high rock into a river. This "no" need not mean yes. It could express intensely mixed feelings or a knowledge that what the speaker is doing conflicts with his better judgment. A person's "no" can also express a wish or request or even command that others not go forward with some action, while yet acknowledging that if they don't stop, the speaker will then choose to go forward too. Thus we might say "no" or "don't" or "stop" as someone serves us dessert. Again, the point is not that any of these cases are just like having sex while saying no; the point is simply that these cases show the distinction between the saying of "no" and being forced into an action by violence. If the other ignores our "no," and we end up eating the dessert, it would not be the case that violence had been used against us, that we had been forced to eat, or that we had in any sense been enslaved.

[206] *See, e.g.*, State v. Moorman, 320 N.C. 387, 392, 358 S.E.2d 502, 506 (1987); Sexual Offences Act, 2003, c. 42, §§ 1, 75 (Eng.).

[207] *See, e.g.*, Ex parte 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.").

Perhaps we could say that every act of sex with an unconscious body is necessarily violent. In that case, the prevailing rule would be sustained. On the other hand, we're all aware that among well-settled couples, long used to sharing the same bed, sexual contact of various kinds with a sleeping person is not uncommon. No one thinks all such touchings are criminal. Doesn't this undermine the idea of an "ipso facto" rule for sexual contact with the unconscious?

Undoubtedly, sexual contact of any kind with an unconscious *stranger* should be a crime. But it is a crime already, under traditional assault-and-battery law, which reaches any sexual contact both unconsented-to and "patently offensive."[208] Surely, however, sexual contact with just any sleeping person should not categorically be a crime – unless we want to jail the girlfriend who kisses her sleeping boyfriend. The ultimate issue here is whether sexual penetration of an unconscious body automatically and necessarily inflicts the profound and criminal violation of rape (even though the victim doesn't experience it). It seems to me that this need not be so in the case of couples, and that thinking it *is* so might be a residue of outdated notions of defilement. The law of battery, rather than rape, appears better-suited to address these cases.

Statutory rape is often said to be rape for the same reason – because minors are legally incapable of consent.[209] A violence-based conception of rape could not take this view, but it would not therefore decriminalize statutory rape. The truth is existing law doesn't really take the view that minors can't consent to sex. The law knows perfectly well that, say, a seventeen-year-old can do so. That's why an adult who has sex with a seventeen-year-old can be convicted of both statutory *and* non-statutory rape. The prosecutor will try to determine whether the minor *did in fact consent*: if so, the only charge will be statutory rape; if not, then defendant can be charged with "real" rape as well.[210] The truth is that states 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 they consider such sex immoral and harmful (unless of course the two are married, in which case it's sacrosanct). In other words, statutory rape is not an *instance* of unconsented-to sex and *therefore* rape. Statutory rape is a different and independent crime, comparable to a prohibition on selling pornography to minors. Which is to say, defining "real" rape as a crime of violence would have no effect on statutory rape laws.

As to intoxicated sex, the decisive question would be how the intoxication came about. Note that one kind of unconscious sex that rape-as-a-crime-of-violence *would* categorically cover is sex with someone whose

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[208] *See, e.g.*, United States v. Bayes, 210 F.3d 64, 68-69 (1st Cir. 2000).

[209] *See, e.g.*, Sy Moskowitz, *American Youth in the Workplace: Legal Aberration, Failed Social Policy*, 67 ALB. L. REV. 1071, 1082 (2004) ("Statutory rape statutes conclusively presume that an underage victim is incapable of giving consent in most states.").

[210] *See* Carpenter, *supra* note __, at 337

unconsciousness the defendant himself violently brought about. If the perpetrator knocked his victim out, he clearly procured sex by force. Drugging a person would also meet any sensible definition of force: there's little difference between drugging someone into physical helplessness and tasing him into the same condition. The same logic holds for intoxication – and here the distinction just described already exists in the case law.

In many jurisdictions, the rule for cases of sex with someone drunk but not unconscious or blind-drunk (someone who, although aware and able to make decisions, acquiesces because of impairment or disinhibition in sex acts to which he or she would never have consented if sober) is that rape will be found only if the intoxication was not *self-induced*.[211] On the view that rape is sex without consent, this rule can seem wholly unjustifiable. If the victim's inebriation was manifest to the defendant and sufficient to render her consent invalid, wasn't the sex nonconsensual whether or not it was self-induced?[212] The answer, it seems to me, is yes, but rape is a crime of violence, and if the defendant never used or threatened force, he has not committed the crime.

Conclusion

The right not to be forced into sexual service is the right genuinely implicated in both *Roe* and rape. This right explains why making a woman bear a child against her will is unconstitutional, while prohibiting prostitution isn't. It explains why rape is not like other assaults without relying on the myth of sexual autonomy. And it explains why sex-by-deception isn't rape, which it should be if rape were really sex without consent.

This principle would, however, look favorably on rape law's force requirement, and it would cast doubt on *Lawrence*'s libertarian leanings. These costs may be too high. If so, law always has room for myth.

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[211] *See, e.g.*, State v. Galati, 365 N.W.2d 575, 578 (S.D. 1985) (finding that state law "does not protect persons incapable of consenting to an act of sexual penetration because of an intoxicating, narcotic, or anesthetic agent . . . unless the agent . . . was administered by . . . the accused"); Regina v. Bree, [2007] EWCA (Crim) 804, [34], [2008] Q.B. 131 (Eng.).

[212] *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. LAW 318 (2009).