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Solving the Riddle of Rape-by-Deception

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INTRODUCTION

When people lie to obtain money, we call it theft.¹ When they lie to enter private property, we call it trespass.² When they lie to obtain sex . . . we have no idea what to call it. Some call it lawful seduction.³ Others call it criminal rape.⁴ An Israeli court recently aligned itself with the latter camp when it convicted an Arab man of rape-by-deception for falsely claiming that he was a Jewish bache-

1. See, e.g., *State v. Hogrefe*, 557 N.W.2d 871 (Iowa 1996) (holding that the defendant could be convicted of theft by deception for obtaining property by issuing a check that he never had an intention to pay).
2. See, e.g., *Mayfield Heights v. Riddle*, 670 N.E.2d 1019, 1022 (Ohio Ct. App. 1995) (asserting that a defendant is liable for criminal trespass by deception when she is “aware either that a false impression is created or perpetuated or, knowing that the victim holds a false impression, withholds or prevents the victim from obtaining information to the contrary”).
3. See, e.g., RICHARD POSNER, *SEX AND REASON* 392 (1994) (“Seduction, even when honeycombed with lies that would convict the man of fraud if he were merely trying to obtain money, is not rape.”).
4. See, e.g., Tom Dougherty, *No Way Around Consent: A Reply to Rubinfeld on “Rape-by-deception,”* 123 *YALE L.J. F.* 321, 333 (2013) (“[W]e should reluctantly accept that someone can be guilty of rape-by-deception by [obtaining sex as a result of] falsely saying he went to Yale.”).

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lor in order to have sex with a Jewish woman.⁵ So too did a Scottish court when it convicted a transgendered man of “sexual intimacy by fraud” for failing to reveal his gender history to his girlfriend.⁶ In contrast, a grand jury in New Jersey sided with those who call lying to obtain sex an act of lawful seduction when it refused to indict a man for sexual assault for having sex with his fiancée after lying about his nationality, profession, and marital status.⁷ In response, New Jersey Assemblyman Troy Singleton sought to amend the state’s rape laws to include a crime of sex obtained by fraud or deception.⁸ Assemblyman Singleton challenged those who opposed the bill to ask themselves: should the law “afford less legal protection to a person’s body than it does to that person’s property?”⁹ After all, he asked, “if it is a crime to deceive individuals out of their property, how can it be lawful to deceive them out of their bodies?”¹⁰ The criminal case and subsequent bill sparked a national conversation and a healthy dose of scholarly commentary on the limits of rape law and the fuzzy line between permissible sex and unlawful rape.¹¹

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5. Jeffrey Heller, *Israel Jails Arab in “Sex Through Fraud” Case*, REUTERS (July 21, 2010, 8:11 AM), <http://www.reuters.com/article/us-israel-sex-idUSTRE66K2EG20100721> [<http://perma.cc/Z5XH-ALXE>].
 6. *Sex Fraud Woman Put on Probation*, BBC (Apr. 9, 2013), <http://www.bbc.com/news/uk-scotland-north-east-orkney-shetland-22078298> [<http://perma.cc/566W-RLA7>].
 7. Most U.S. states do not generally criminalize sex by fraud. Instead, the majority criminalize deception that amounts to “fraud in the factum” as opposed to “fraud in the inducement.” Fraud in the factum occurs when the defendant’s deception causes the victim to believe that she is consenting to an act that is not sexual intercourse. The classic example is that of a physician who tells the victim that he will insert a medical instrument inside her vagina and instead sexually penetrates her. In contrast, fraud in the inducement takes place when the defendant’s deception persuades the victim to have sex, but does not cause the victim to believe that she is consenting to something other than intercourse. For a more detailed discussion of the distinction, see *infra* Section IV.C.
 8. Matt Friedman, *Rape by Fraud? N.J. Lawmaker Introduces Bill To Make it a Crime*, NJ.COM (Nov. 24, 2014, 3:27 PM), http://www.nj.com/politics/index.ssf/2014/11/rape_by_fraud_nj_lawmaker_introduces_bill_to_make_it_a_crime.html [<http://perma.cc/7VNM-TYG8>]. For the text of the bill, see A. 3908, 216th Leg., (N.J. 2014), http://www.njleg.state.nj.us/2014/Bills/A4000/3908_1.PDF [<http://perma.cc/KTM9-MH7T>].
 9. *Sexual Assault and the Evolution of Modern Law*, SUPPORT ASSEMBLYMAN TROY SINGLETON (May 7, 2015), www.troysingleton.com/sexual_assault_and_the_evolution_of_modern_law [<http://perma.cc/YQ9P-3F2H>].
 10. *Id.*
 11. For discussions of the New Jersey rape-by-deception bill in the media, see Elizabeth Nolan Brown, *Lying to a Lover Could Become ‘Rape’ in New Jersey*, REASON (Nov. 25, 2014, 1:08 PM), <http://reason.com/blog/2014/11/25/lying-to-get-someone-in-bed-could-be-cri> [<http://perma.cc/Y2DX-7GLG>]; Friedman, *supra* note 8;

Why is it so difficult to classify sex obtained by lies as either lawful seduction or criminal sexual assault? In an influential recent article titled *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, Professor Jed Rubenfeld suggested that our ambivalence towards punishing sex by deception is the product of a deep fissure in current rape law.¹² More specifically, he claimed that the refusal to broadly criminalize sex by deception is in tension with the modern conception of rape as unconsented-to sex. If modern rape laws define rape as sex without consent, why does sex that is obtained as a result of deception not satisfy the definition of the offense? Expressed in more general terms, if contemporary rape statutes seek to protect sexual autonomy, why do these laws leave sex by deception largely unpunished? After all, deception typically negates consent outside of rape law, and choices that are the product of deception are generally viewed to be incompatible with autonomy.

In light of this tension, Rubenfeld contends that contemporary rape reformers must grapple with what seems like an unsolvable riddle. If they want to hold on to autonomy as the linchpin of rape law, they should broadly criminalize rape-by-deception. On the other hand, if they want to punish rape-by-deception only in exceptional cases, they should admit that rape statutes do not primarily seek to enhance sexual autonomy. The challenge presented by this riddle extends well beyond the narrow confines of rape-by-deception. If there are strong reasons against broadly criminalizing sex obtained by fraud, and if the selective criminalization of rape-by-deception is truly incompatible with the modern definition of rape as nonconsensual sexual intercourse, then both the definition of rape and the rationale that justifies its criminalization are in need of a significant overhaul. The riddle of rape-by-deception thus threatens to unravel the theoretical edifice upon which contemporary rape law is built.

This Article argues that the riddle of rape-by-deception is based on a misunderstanding of the kind of autonomy that lies at the heart of modern rape reform statutes. Properly understood, the chief goal of contemporary rape laws is to neutralize the coercion inherent in sexual relationships that take place in a male-dominated society. Since minimizing deception is only tangentially related to this goal, respect for the kind of sexual autonomy that rape law is primarily designed to protect is compatible with selective criminalization of rape-by-deception. This solution to the riddle of rape-by-deception not only preserves the conceptual framework that undergirds modern rape statutes, but also sharpens our understanding of the interests that contemporary rape reform is designed to protect.

Amanda Marcotte, *The Drastic Overreach of the "Rape by Fraud" Bill*, SLATE (Nov. 25, 2014, 1:39 PM), http://www.slate.com/blogs/xx_factor/2014/11/25/_rape_by_fraud_bill_in_new_jersey_bad_for_legitimate_sexual_assault_legislation.html [<http://perma.cc/DM6V-35GT>]. For scholarly discussions regarding rape-by-deception, see Collection, *Responses to Jed Rubenfeld's Riddle of Rape-By-Deception*, 123 YALE L.J. F. 321 (2013).

12. Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372 (2013).

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The argument proceeds in four parts. In order to set the stage for a discussion of the kind of autonomy that undergirds modern rape reform and Rubinfeld's formulation of the riddle of rape-by-deception, Part I explores the nature and scope of autonomy both outside and within rape law. What emerges is a variety of changing and competing conceptions of consent that promote different degrees of autonomy depending on the circumstances and the conflicting interests at stake in any given interaction.

Part II shows that comprehending the multidimensional nature of consent and autonomy sharpens our understanding of the core commitments underlying the modern rape reform movement and contemporary scholarship on rape law. A close reading of this literature, along with an understanding of the historical and cultural backdrop against which rape scholars were working at the time, reveals that modern rape reformers were chiefly interested in changing social and legal views regarding the kinds of pressures that ought to vitiate consent to sex. That is, modern rape reform was primarily about securing added (female) freedom from (male) coercion, both subtle and overt, and expanding the meaning of coercion beyond the patriarchal notion of physical force. More broadly, feminist rape scholarship highlighted the inherently coercive nature of *all* sex in a patriarchal society, thus calling into question the possibility of any kind of consensual intercourse in a male-dominated culture.

Part III solves the riddle of rape-by-deception. It argues that much of the confusion surrounding rape law in general and the riddle of rape-by-deception in particular is the product of a fundamental misunderstanding of the conceptual nature of autonomy and consent and of the kind of autonomy that lies at the heart of the modern rape reform movement.¹³ More specifically, the failure

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13. Consent in rape law generates much confusion, including the classic confusion regarding whether consent ought to be viewed primarily as a mental state, such as subjectively wanting to engage in a certain act, or as a performative act that externally communicates willingness to engage in certain conduct. For a lucid analysis of the confusion generated by these competing views of consent, see Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415 (2016).

While it is important to address this confusion, the conception of consent advanced in this Article holds regardless of whether consent is viewed as a mental state or as an act that communicates acquiescence. To determine the moral import of a mental state such as desiring to engage in certain conduct, it is necessary to examine whether the desire was a product of coercion, whether it was formed on the basis of faulty information, and whether the subject was competent enough for the desire to have moral or legal weight. Regarding scalarity, desires that are the product of less coercion, heightened information, and maximal competency are more robust than desires that are the consequence of more coercion, less information, and diminished competency. The same can be said about the view of consent as an external act that communicates agreement. To assess the weight that will be placed on an external manifestation of agreement, one must consider the extent to which the communication was coerced, sufficiently informed, and competent. Communications that are less coerced, more informed, and maximally competent are more robust than manifestations that are more coerced, less informed, and minimally competent. Given that the claims regarding the multidimensionality

to grasp that modern rape reform primarily focused on enhancing the non-coercive dimension of autonomy prevents scholars from appreciating that drawing lines in the context of rape-by-deception serves to recognize different spheres and degrees of autonomy rather than to undermine the concept of autonomy writ large. Once this is fully appreciated, there is little tension between opposing the broad criminalization of sex by deception and the kind of sexual autonomy that lies at the core of contemporary rape reform.

After solving the so-called riddle of rape-by-deception, Part IV suggests some framing principles that can provide guidance to courts and legislatures when deciding whether to criminalize sex obtained by deception. Without intending to exhaustively cover all of the cases in which it is sensible to punish sex obtained by misrepresentations, I argue that obvious candidates for criminalization are cases that feature deception that is also coercive, deception that amounts to a breach of trust by a person in a position of authority, and deception that causes significant harm in addition to the infringement of the victim's autonomy. The suggested approach would only selectively criminalize sex obtained by deception. Contrary to what Rubinfeld suggests, such selective criminalization is not in tension with the kind of sexual autonomy that modern rape statutes seek to protect. As a result, the so-called riddle of rape-by-deception turns out not to be much of a riddle at all.

I. AUTONOMY, CONSENT, AND THE RIDDLE OF RAPE-BY-DECEPTION

A. *The Riddle of Rape-by-Deception*

According to Professor Jed Rubinfeld, the widespread resistance to criminalizing rape by fraud reveals a deep tension in modern rape law and scholarship.¹⁴ In his view, modern approaches to sexual assault law view the crime of rape as an affront to the victim's sexual autonomy.¹⁵ This view of rape inspired many scholars and reformers to argue that rape should be regarded as a crime against (sexual) freedom instead of as a crime of (physical) violence.¹⁶ By focusing on the injury to the victim's sexual autonomy, these scholars argued with some success that the force requirement should be dropped from rape statutes, given that the essence of the crime is not *forcible* sex but rather *nonconsensual* sex.¹⁷

and scalarity of consent do not depend on whether consent is viewed as a mental state or as a communicative act, this Article takes no position regarding whether consent ought to be viewed as a mental or performative act.

14. Rubinfeld, *supra* note 12, at 1379.

15. *Id.*

16. See generally Stephen Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35 (1992).

17. *Id.* at 77.

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Shifting the focus of rape from violence to autonomy allowed scholars to argue that rape should be redefined as engaging in sex without consent.¹⁸ But—as Rubenfeld cleverly argues—this superficially unimpeachable view of rape as a crime against sexual autonomy generates what appears to be an irresolvable riddle.¹⁹ If rape is defined as engaging in sex without consent, then it seems to logically follow that sex obtained by deception ought to be considered rape. After all, deception invalidates consent in many legal contexts, both civil and criminal.²⁰ Fraudulent consent deprives contracts of efficacy, transforms an otherwise lawful taking of property into criminal theft, and gives rise to tort liability for medical malpractice. Nevertheless, sex obtained by fraud does not usually amount to a crime under the vast majority of post-reform rape statutes and is not generally viewed as criminal in most contemporary accounts of rape.²¹

Rubenfeld argues that contemporary rape scholars and reformers cannot argue that rape is a crime against sexual autonomy that ought to be defined as having sex without consent while simultaneously refusing to endorse broad criminalization of rape by fraud.²² If such scholars and reformers are truly committed to the idea of sexual autonomy, logic should compel them to punish all sex obtained by deception.²³ If they refuse to do so—as many have done—then they must abandon sexual autonomy as the linchpin of rape law.²⁴ Either way, contemporary rape reformers and scholars are in a bind. Rubenfeld suggests that the way out of the bind is by acknowledging that rape law is not truly about sexual autonomy. Instead, he argues that rape is a crime against the victim's right to be in control of her own body.²⁵ Given that people who agree to have sex because of fraudulent misrepresentations maintain control over their

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18. While defining rape as “sex without consent” may seem unremarkable to most people, rape has historically been defined in the United States as having forcible sexual intercourse rather than having nonconsensual sexual intercourse. As a result, non-forcible sex has historically not been considered rape even if the sex is nonconsensual. *Id.*
 19. See generally Rubenfeld, *supra* note 12, at 1395–98.
 20. In order to invalidate consent, the deception must be “material” according to whatever standard of materiality applies. For a detailed discussion of different standards of materiality, see *infra* Section III.B.
 21. See, e.g., B.K. Carpenter, Annotation, *Rape by Fraud or Impersonation*, 91 A.L.R. 2d 591 § 2 (1963) (“[T]he prevailing view is that upon proof that consent to intercourse was given, even though [procured by fraud], a prosecution for rape cannot be maintained.”).
 22. Rubenfeld, *supra* note 12, at 1380.
 23. *Id.*
 24. *Id.*
 25. Rubenfeld calls this right the right to “self-possession.” *Id.* at 1426.

bodies while they are having sex, Rubinfeld concludes that rape by fraud should not be criminalized.²⁶

In what follows, I will show that, while smart and imaginative, Rubinfeld's account of rape law is wrong for two reasons. First, he fails to appreciate that consent and autonomy are scalar and multidimensional concepts that can be present to a greater or lesser degree. As a result, he is unable to perceive that the fact that rape law does not protect autonomy as much as other areas of law does not mean that rape law does not seek to enhance autonomy. Additionally, Rubinfeld misapprehends the nature of modern rape scholarship and reform, suggesting that the conceptual underpinnings of contemporary rape reform and scholarship commit them to the criminalization of rape by fraud when it really does not. The core of the modern rape reform movement had little to do with the informational dimension of consent, which is implicated in cases of rape-by-deception. Instead, as I show in Part II, contemporary rape scholarship has primarily focused on the inherently coercive nature of sexual interactions in a male-dominated society. Once this comes into full view, there is little contradiction between the commitment to sexual freedom displayed by rape reformers and scholars and their reticence to broadly criminalize rape by fraud.

To better understand the challenges posed by the riddle of rape-by-deception and to identify a solution, the remainder of this Part examines the kinds of autonomy and consent that lie at the heart of modern rape statutes. To do so, I first explain why autonomy is central to our understanding of contemporary sexual assault laws. I then flesh out the connection between the philosophical concept of autonomy and the legal doctrine of consent. Finally, I distinguish autonomy from the related concept of freedom and point out that autonomy is both multidimensional and scalar. As I demonstrate in Parts II and III, both of these insights will prove essential to solving the riddle of rape-by-deception.

26. Most of the responses to Rubinfeld's article focus on arguing against his turn to self-possession without calling into question whether rape-by-deception actually presents a riddle. See, e.g., Vera Bergelson, *Sex, Lies and Law: Rethinking Rape-by-Fraud*, in LEGAL PERSPECTIVES ON STATE POWER: CONSENT AND CONTROL 152, 166 (Chris Ashford et al. eds., 2016); Dougherty, *supra* note 4; Patricia J. Falk, *Not Logic, but Experience: Drawing on Lessons from the Real World in Thinking About the Riddle of Rape-by-Fraud*, 123 YALE L.J. F. 353, 365 (2013) ("Rubinfeld is clearly correct when he observes that the cases of rape-by-fraud pose a riddle not susceptible of easy solution.").

While I also disagree with Rubinfeld's view of rape as a crime against self-possession, the challenge that I undertake in this Article is to show that once the notions of consent and autonomy that undergird modern rape law are understood, rape-by-deception does not generate a riddle. Unlike previous responses, my critique thus goes to the core of Rubinfeld's argument: if there is no real riddle of rape-by-deception there is no need to turn to self-possession.

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B. The Importance of Autonomy and Consent to Contemporary Rape Law and to the Riddle of Rape-by-Deception

Autonomy and consent are central to contemporary rape doctrine. Judicial and scholarly writings on modern rape law are rife with references to both concepts. In an oft-cited case, the New Jersey Supreme Court rejected a definition of sexual assault that required proof of victim resistance because “such a regime would be inconsistent with modern principles of personal autonomy.”²⁷ Instead, the court held, the only definition of rape that is compatible with respect for autonomy is one that requires “consent” to sex that is expressed in the form of an “affirmative and freely-given permission” to engage in intercourse.²⁸ Sexual autonomy and consent also lie at the core of many modern scholarly accounts of rape law. Professor Stephen Schulhofer—one of the most influential contemporary rape law scholars and Chief Reporter of the Model Penal Code’s draft revised sexual assault statute—developed a conception of sexual assault that highlights “sexual autonomy as a distinctive constituent of personhood and freedom.”²⁹ Once we view rape as an offense against sexual autonomy, Schulhofer argues, “intercourse without consent . . . would be unambiguously prohibited,” “even in the complete absence of force.”³⁰

Unsurprisingly, Rubinfeld’s formulation of the riddle of rape-by-deception also relies heavily on conceptions of autonomy and consent. Expressed in terms of autonomy, the challenge posed by the riddle is that contemporary rape reform’s refusal to broadly criminalize sex obtained by deception is incompatible with its commitment to sexual autonomy. In terms of consent, the riddle reveals an apparent tension between modern rape reform’s redefinition of rape as “sex without consent” and its failure to generally criminalize sex obtained by misrepresentations. More broadly, the riddle questions whether it is coherent to hold that engaging in sex without consent is wrong because it is a violation of autonomy while simultaneously holding that sex by deception should not be generally criminalized.

Predictably, responses to the riddle of rape-by-deception also traffic heavily on particular—and sometimes idiosyncratic—conceptions of autonomy and consent. In her response to Rubinfeld, Professor Vera Bergelson concedes that obtaining sex by material deception is a violation of autonomy, but then suggests that sometimes the violation is not significant enough to warrant the imposition of punishment.³¹ But it is unclear if Bergelson can escape from the rid-

27. State in the Interest of M.T.S., 609 A.2d 1266, 1277 (N.J. 1992).

28. *Id.*

29. Schulhofer, *supra* note 16, at 35. The most recent revised draft of the Model Penal Code sexual assault provision is Section 213.0(3). See MODEL PENAL CODE § 213.0(3) (AM. LAW INST., Tentative Draft No. 3, 2017).

30. Schulhofer, *supra* note 16, at 72.

31. Bergelson, *supra* note 26, at 169–70.

dle's grip once she makes this concession. An obvious reply—and one that is frequently deployed by Rubinfeld—is that if theft law broadly criminalizes takings obtained by deception because such takings violate the property owner's autonomy, shouldn't rape law at least match this policy?³² This response is especially strong given that sexual autonomy is seen as at least as valuable—if not more valuable—than autonomy regarding property.³³ As Professor Tom Dougherty notes, given that material misrepresentation “routinely vitiates consent in cases involving larceny, trespass, and contract,” refusing to criminalize such misrepresentations in the sexual consent context seems “arbitrary and unmotivated.”³⁴

Professor Dougherty's commitment to a certain conception of autonomy causes him to feel the rational pull of the riddle even more than Bergelson. According to Dougherty, “sex law [has] to pick its poison—to decide if it does or doesn't stand for sexual autonomy” by either “embracing rape-by-deception or reconsidering . . . a right to sexual autonomy.”³⁵ He then argues for the latter, claiming that “tak[ing] autonomy seriously” should lead to “adopt[ing] a more expansive conception of rape-by-deception,” even when doing so leads to “reluctantly accept[ing] that someone can be guilty of rape-by-deception by falsely saying he went to Yale.”³⁶ Dougherty's solution is logically sound but normatively unattractive. In arguing that it is rape to obtain sex by lying about going to Yale, Dougherty cheapens the significance of rape without getting anything in return other than avoiding falling prey to the riddle of rape-by-deception. This is surely too steep a price to pay for escaping the grip of Rubinfeld's argument.

A certain conception of sexual autonomy is also at the core of Professor Patricia Falk's response to the riddle of rape by fraud. Falk—the scholar who has devoted the most attention to the problem of rape-by-deception³⁷—acknowledges that “Rubinfeld is clearly correct when he observes that the cases of rape-by-fraud pose a riddle not susceptible of easy solution.”³⁸ Falk suggests that “the riddle of rape-by-fraud cases should be unraveled by retaining sexual

32. Rubinfeld, *supra* note 12, at 1432–33.

33. One way of surmising that sexual autonomy is of more value than autonomy regarding property is by comparing the punishment of rape with the punishment of theft. All factors being equal, rape is punished considerably more harshly than theft. See, e.g., PAUL H. ROBINSON, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT 362–67 (2013) (citing several studies that demonstrate that rape is punished more severely than theft).

34. Dougherty, *supra* note 4, at 322.

35. *Id.* at 334 (citing Rubinfeld, *supra* note 12, at 1379–80).

36. *Id.* at 333–34.

37. See, e.g., Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39 (1998).

38. Falk, *supra* note 26, at 365.

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autonomy as the foundation of modern rape law, understanding the limits on the right of sexual autonomy, and developing a more robust understanding of which types of fraudulent (or deceptive) representations violate our right to sexual autonomy and which do not.”³⁹ But it is unclear if Falk can non-arbitrarily distinguish between deception that violates sexual autonomy and deception that does not, especially given that she fails to provide a standard for coherently discriminating between deceptions that infringe autonomy and those that do not.

Regardless of the different ways in which Bergelson, Dougherty, and Falk try to solve Rubinfeld’s puzzle, these scholars agree that there is something deeply problematic about our reluctance to broadly criminalize sex obtained by deception. Bergelson rejects Rubinfeld’s self-possession argument but she “completely share[s]” the concern that rape-by-deception poses serious line-drawing problems if the violation of the victim’s sexual autonomy is the basis for punishing rape.⁴⁰ Dougherty considers the riddle to be “fundamentally sound” and therefore “feel[s] the full force of Rubinfeld’s powerful argument.”⁴¹ Falk concedes that Rubinfeld is “clearly correct” to point out that the selective criminalization of rape-by-deception generates a riddle.⁴² These scholars worry greatly that refusing to broadly punish sex obtained by deception is incompatible with both consent and autonomy.

In the remainder of this Article, I show that this worry is misplaced because it is based on a faulty conception of how consent and autonomy work in different domains of law and morality, and—as a result—of how these concepts actually operate in the context of rape law. In order to bear out this claim, this Part fleshes out the nature and scope of autonomy and consent both within and outside of sexual assault doctrine. The result will be a more nuanced view of consent and autonomy than the one that is generally presupposed by most rape scholars. It is a view that shows that—contrary to what Rubinfeld and others suggest—consent and autonomy can, and frequently do, coexist with certain kinds and degrees of deception. As I demonstrate in Parts III and IV, this will make it easier to appreciate that deception is not incompatible with the kind of autonomy and consent that modern rape statutes are designed to protect.

C. *The Connection Between Consent and Autonomy*

Consent is often described as an all-or-nothing proposition:⁴³ either there is full consent or there is no consent at all. There is little conceptual breathing

39. *Id.*

40. Bergelson, *supra* note 26, at 166.

41. Dougherty, *supra* note 4, at 331, 334.

42. Falk, *supra* note 26, at 365.

43. See, e.g., Adam Kolber, *Smoothing Vague Laws*, in *VAGUENESS AND LAW: PHILOSOPHICAL AND LEGAL PERSPECTIVES* 275, 286 (Geert Keil & Ralf Poscher eds., 2016).

room in law for the notion of partial consent.⁴⁴ If a person consents to someone else taking her property, the taking is lawful and, therefore, does not amount to theft.⁴⁵ By the same token, if a person consents to sexual intercourse with another person, the sex is lawful and, consequently, is not sexual assault or rape.⁴⁶ The same logic holds in the policing context, where a consented search is reasonable and, as a result, lawful under the Fourth Amendment.⁴⁷ There are, of course, circumstances in which consent is deemed legally ineffective. For example, a mentally ill person's consent to giving another his property is invalid.⁴⁸ Consent to sexual intercourse is not effective when given by a minor under the legal age of consent.⁴⁹ A police search is unlawful if consent was obtained as a result of coercion.⁵⁰

Still, these circumstances serve to fully invalidate consent. If the relevant circumstances are present to the required degree, there is no consent at all. On the other hand, if the circumstances do not meet the relevant legal threshold for invalidating consent, then there is full consent. This is the case even if the circumstances come close to meeting the threshold but fall just short. If, for example, the taking of property is consented to by a mentally ill person who is deemed to be just above the legal standard for competency, the taking does not amount to theft because it is fully consented to. Similarly, if the person who consents to sexual intercourse is one hour older than the legal age for consent, the conduct is fully consented to and does not constitute sexual assault.

In contrast to the all-or-nothing nature of consent, the related concepts of autonomy and freedom are typically described as forming part of a continuum. It is common to talk about more or less autonomy and about increasing or diminishing freedom. All things being equal, it is sensible to say that a teenager's choices are more autonomous than those of a toddler but less autonomous than

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44. It is possible for a party to consent to some act but not consent to some other related act. For example, a woman may consent to kissing but not to sexual intercourse. While one could describe these cases as ones of partial consent, it is better to treat them as cases involving full consent to one thing (kissing) and a lack of consent to the other (sexual intercourse). To claim that the woman who consents to a kiss "partially" consents to intercourse is both descriptively false and normatively unappealing.
45. See, e.g., *State v. Maxon*, 79 P.3d. 202, 209 (Kan. Ct. App. 2003) (noting that theft is consummated when "control [is] exercised over property of another without the consent of the owner").
46. Vermont's Penal Code, for example, defines sexual assault as engaging in a sexual act "without the consent of the other person." VT. STAT. tit. 13, § 3252(a)(1) (2017).
47. See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).
48. See, e.g., ANNE E. MELLEY, MICHIGAN CIVIL JURISPRUDENCE § 73 (2017) (explaining that mentally ill individuals are not competent to gift their property).
49. See, e.g., ALA. CODE § 13A-6-61(a)(3) (2017).
50. See *Schneckloth*, 412 U.S. at 228.

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those of an adult. We can also talk about convicts on probation having less freedom than non-convicted citizens but more freedom than imprisoned convicts.

The all-or-nothing nature of consent is difficult to square with the scalar nature of autonomy and freedom. After all, consent is the currency with which the law cashes out expressions of autonomy and freedom. That is, consent is the tool that law most commonly deploys in order to operationalize conceptions of freedom and autonomy. If a person consents to a taking of her property, that is typically taken to mean that the person exercised her autonomy with regard to her property. Similarly, consent to sex generally implies that the person was free to not engage in sex.

But if consent and autonomy are so intimately related, why is it that the law approaches consent in an all-or-nothing fashion while morality approaches autonomy and freedom in a more scalar way? If autonomy and freedom lie on a spectrum, why does consent not also lie on a similar spectrum?

The obvious answer is that the law often needs to adopt bright line rules in order to precisify vague moral standards. In the context of consent, courts and legislatures have pragmatic reasons for adopting an all-or-nothing conception of consent that serves as a rough proxy for the more scalar concepts of freedom and autonomy. As such, consent signals whatever minimum level of freedom and autonomy the legal system deems sufficient to legitimize a certain interaction or exchange.

However, there is more to the story than this. While the law largely refuses to describe consent as falling along a spectrum that goes from fully consensual to partially consensual to nonconsensual, consent is in fact defined in different ways depending on the context. In some contexts, such as medical malpractice law, consent is defined in a very robust way.⁵¹ In others—like consent to police searches in Fourth Amendment jurisprudence—consent takes a weaker form.⁵² In between these two extremes, consent is defined in weaker and stronger ways depending on the context and on the particular dimension of consent that the law focuses on. The end result is a varied and multifaceted approach to consent that belies what at first blush appears as a monolithic all-or-nothing view of consensuality.

If the law wants to require that robust autonomy be exercised before an interaction or exchange is deemed legally valid, it adopts a more stringent definition of consent. Medical malpractice is the paradigmatic example. If, on the

51. Consent in the medical malpractice context requires that the patient be informed of all material risks inherent in treatment. *See, e.g.,* *Martin by Scoptur v. Richards*, 531 N.W.2d 70, 76 (Wis. 1995).

52. Consent in the Fourth Amendment context needs to be uncoerced but does not need to be informed. *See* *United States v. Guidry*, 534 F.2d 1220, 1222 (6th Cir. 1976) (stating that “[the agent’s] stratagem in posing as a ‘helper’ to the Addressograph-Multigraph representative who had been asked by defendants to help sell a portion of their press was legitimate police activity in pursuance of an investigative lead and not prohibited by the Fourth Amendment”).

other hand, the law wants to deem an interaction legally valid with only a minimal degree of autonomy being exercised, the law will adopt a weaker consent standard. This is the case with consent to police searches. The law's more nuanced approach to consent is masked by the fact that the law uses the term "consent" in all of these varied contexts even though the term often means different things depending on the circumstances.

In what follows, I explore in considerable detail the nature of autonomy and consent and the connection between them. What emerges is a kaleidoscopic approach to consent that suggests that consent in law—much like the moral concepts of autonomy and freedom—lies on a continuum that ranges from quite robust to extremely weak varieties of consent. The idea of a spectrum of consent ranging from strong to weak packs a considerable explanatory punch, as it illuminates the chameleon-like nature of consent while simultaneously shedding light on the kinds of autonomy and freedom that lie at the heart of different legal doctrines.

D. *An Autonomy Primer*

Autonomy is defined in diverse ways by different scholars. As such, there is no universally agreed upon definition of the term. Nevertheless, there are certain features that lie at the core of most conceptions of autonomy. Perhaps the most central of these is the idea that to be autonomous is to be capable of "self-rule" or of governing oneself. To govern oneself requires having the capacity to reflect and revise one's identity and values.⁵³ Under this approach, choices are autonomous when they reflect preferences, values, and identities that we have embraced as our own.⁵⁴ This is essentially the view of philosopher Gerald Dworkin, who defines autonomy "as a second-order capacity of persons to reflect critically upon their first-order preferences, desires, wishes, and so forth and the capacity to accept or attempt to change these in light of higher order preferences and values."⁵⁵

This conception of autonomy requires the existence of two capacities. First, an autonomous being must be capable of assessing and criticizing one's preferences and desires. Second, autonomy requires the capacity to either accept one's existing preferences or desires or to try to change or revise them so that they better reflect one's higher order values. An example helps illustrate these two capacities. As I write these lines, I realize that I wish to eat sweets. I am not particularly thrilled by this realization, given that I am currently on a low carbohydrate diet. In light of my higher order commitment to healthy eating, I am cur-

53. See generally John Christman, *Liberalism, Autonomy, and Self-Transformation*, 27 *SOC. THEORY & PRAC.* 185 (2001).

54. This is the view espoused by Harry G. Frankfurt in his seminal essay. See Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, in *THE IMPORTANCE OF WHAT WE CARE ABOUT: PHILOSOPHICAL ESSAYS* 11 (1988).

55. GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 20 (1988).

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rently doing my best to stave off the desire to consume sweets. Even more, I am trying to abandon my desire to eat sweets and substitute it with one that is more compatible with my commitment to a healthier lifestyle, such as eating nuts. This thought process is reflective of autonomy, since it displays both the capacity to critically assess my preferences and desires and the capacity to revise them in order to make them more compatible with higher order commitments.

E. Autonomy and Freedom Distinguished

While the terms “autonomy” and “freedom” are often used interchangeably, many philosophers differentiate between them. The most common way of distinguishing the terms is by suggesting that autonomy is the capacity for self-determination in accordance with one’s authentic or true values, whereas freedom (or liberty)⁵⁶ is the ability of a person to act without significant external constraints. Freedom has been variously defined as “hav[ing] (significant) options that are not closed or made less eligible by the actions of other agents,”⁵⁷ as “freedom from some constraint or restriction on, interference with, or barrier to doing, not doing, becoming, or not becoming something,”⁵⁸ and as “absence of interference.”⁵⁹ Given that freedom is usually defined as the absence of significant external constraints on action, the typical forms of interference with freedom are the use of force and coercion.⁶⁰ In contrast with freedom, autonomy requires more than absence of coercion, since the concept is related to the more robust idea of “being a subject, of being more than a passive spectator of one’s desire’s and feelings.”⁶¹ In addition to our choices not being interfered with, autonomy requires that one be in charge of one’s values, desires, and preferences.

As defined here, freedom is typically a precondition for exercising our autonomy.⁶² It is difficult to be moved into action by one’s freely chosen values and dispositions if one’s choices are significantly constrained by external factors, such as force or coercion. Therefore, “the typical ways of interfering with

56. I use the terms “freedom” and “liberty” interchangeably.

57. DWORKIN, *supra* note 55, at 14.

58. Gerald C. MacCallum, Jr., *Negative and Positive Freedom*, 76 PHIL. REV. 312, 314 (1967).

59. DWORKIN, *supra* note 55, at 107 (noting that liberty “is conceived either as mere absence of interference or as the presence of alternatives”).

60. *Id.* at 14.

61. *Id.* at 107.

62. While it is arguable that freedom is a necessary condition for autonomy, some scholars have suggested that it is not. The paradigmatic example is that of Odysseus, who elects to have his freedom restricted when he faces the songs of the sirens. In that case, the restriction of freedom actually maximizes Odysseus’ autonomy. *See id.* at 106.

the liberty of an agent seem to also interfere with her autonomy.”⁶³ In contrast, many interferences with autonomy do not also interfere with freedom. The paradigmatic example is that of deception. A person who chooses to act in a certain way because she was deceived has her autonomy undermined without having her freedom constrained in any significant way. Accordingly, Dworkin points out that “[d]eception is not a way of restricting liberty.”⁶⁴ He gives the example of a “person who is put into a prison cell and told that all the doors are locked.”⁶⁵ Since the doors are not really locked, this person is “free to leave the cell.”⁶⁶ However, since “he cannot—given his information—avail himself of this opportunity, his ability to do what he wishes is limited.”⁶⁷ This shows that “self-determination can be limited without limiting liberty.”⁶⁸ That is, autonomy can be undermined in ways that go beyond interferences with freedom.

The distinction between freedom and autonomy is sometimes of considerable explanatory power. This is the case with rape law, where—as I will show in Parts II and III—the law is primarily designed to protect freedom rather than autonomy.

F. *The Multidimensional Nature of Autonomy*

Properly understood, autonomy can be measured along the dimensions of non-coercion, competency, and information. Regarding the first of these dimensions, since freedom is typically a condition for autonomy,⁶⁹ an important feature of autonomous conduct is the absence of coercion. Coercion can take many forms, although it is usually associated with the use or threat of use of physical force against a person. Beyond this classic case, there are also psychological forms of coercion that range from hypnotism, to social conditioning, to the use of emotional and social isolation techniques. Coercion can also take economic form, such as when a person compels another to act by threatening to withdraw certain economic benefits or by terminating her employment.⁷⁰

In addition to the lack of external coercion, certain “competency” conditions must be satisfied for conduct to be autonomous. As discussed in the previous section, these conditions include the capacity for exercising minimal ra-

63. *Id.* It is worth noting that Dworkin treats “freedom” and “liberty” as synonyms.

64. *Id.* at 14.

65. *Id.* at 105.

66. *Id.*

67. *Id.* at 14.

68. *Id.* at 105.

69. For the rare instance in which freedom may not be a condition for autonomy, see *supra* notes 63–64 and accompanying text.

70. For the definitive treatment of coercion, see generally ALAN WERTHEIMER, *COERCION* (1987).

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tionality and the absence of debilitating mental illness. The former is absent in very young children and develops slowly as we mature. Intoxication may induce a state in which minimal rationality is absent. Debilitating mental illness prevents a person from behaving autonomously if it significantly impairs his capacity to behave rationally. These capacities combine to create what I call the “competency” dimension of autonomy.

Conduct also needs to be sufficiently informed in order to qualify as autonomous. As Beauchamp and Childress point out, “[p]ersonal autonomy encompasses, at a minimum, self-rule that is free . . . from certain limitations such as an inadequate understanding that prevents meaningful choice.”⁷¹ This captures what I call the “informational” dimension of autonomy. Pursuant to this informational dimension, an autonomous choice is one that is “fully informed.”⁷² Thus, “[a]n action cannot be autonomous if the actor fails to have an understanding of his or her action.”⁷³ The kind of understanding that is relevant to the informational dimension of autonomy is that which allows the person to “understand the nature and implications of his or her actions”⁷⁴ and to appreciate the “foreseeable consequences and possible outcomes that might follow as a result of performing and not performing the action.”⁷⁵

In combination with the non-coercion and competency conditions, this informational component rounds out the three classic dimensions of autonomy. All three dimensions must be present to a certain degree in order for conduct to be considered autonomous.⁷⁶

G. *The Scalar Nature of Autonomy*

In addition to being multidimensional, autonomy is scalar. That is, autonomy can be present in different degrees. Some actions may be considered more autonomous, while others may be considered less so. Autonomy, then, lies on a spectrum that ranges from full autonomy to complete lack of autonomy. In between these two extremes, there are multiple intermediate degrees of autonomy.

Although there is scant reference to the scalar nature of autonomy in the literature, a handful of scholars have highlighted this feature. Ruth Faden and

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71. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 58 (5th ed. 2001).
72. Onora O’Neill, *The Inaugural Address: Autonomy: The Emperor’s New Clothes*, 77 *PROC. ARISTOTELIAN SOC’Y, SUPPLEMENTARY VOLUMES* 1, 5 (2003).
73. RUTH R. FADEN & TOM L. BEAUCHAMP, *A HISTORY AND THEORY OF INFORMED CONSENT* 248 (1986).
74. *Id.* at 250.
75. *Id.* at 151.
76. For a similar definition of autonomous action, see David Archard, *Informed Consent: Autonomy and Self-Ownership*, 25 *J. APPLIED PHIL.* 19, 21 (2008) (defining an autonomous act as one that is “informed, voluntary and rational”).

Tom Beauchamp, for example, argue that autonomy comes in degrees because some of the conditions that undergird it “may be placed on a broad continuum from fully present to wholly absent.”⁷⁷ In order to better understand the scalar nature of autonomy, Faden and Beauchamp suggest beginning with a hypothetical case of completely autonomous conduct.⁷⁸ A fully autonomous action is conduct “that is fully understood and completely noncontrolled by the influences of others.”⁷⁹ In these cases, “lack of understanding and control by others do not prevail in any degree.”⁸⁰ The degree of autonomy exhibited by a certain choice wanes as we begin to strip away the understanding, control, and information with which the action is performed.⁸¹ Eventually, the “pieces of the interlocking machinery are eroded” so that “the resultant action increasingly becomes less autonomous” until “[w]ith sufficient stripping the behavior becomes nonautonomous.”⁸²

Faden and Beauchamp recognize that there will often be practical reasons that require identifying a particular cutoff point for autonomous action.⁸³ This will frequently be the case in legal contexts, where courts must decide whether a particular interaction is sufficiently autonomous to be considered legally efficacious. In order to do so, it will be “necessary to establish thresholds above which all acts are *treated as* autonomous and below which all acts are treated as non-autonomous.”⁸⁴ This line drawing exercise will necessarily be “based on moral and policy considerations,” given that “no sharp line can be drawn purely on conceptual grounds to distinguish autonomous from nonautonomous action.”⁸⁵

It is important to note that the fact that lines will often need to be drawn between autonomous and non-autonomous acts does not undermine either the conceptual claim that autonomy is a scalar notion nor the practical import of locating autonomy within a continuum. The scalar nature of autonomy is essential to understanding why courts define consent in certain contexts differently than in others. Such disparities occur because courts draw the line between autonomy and non-autonomy at different points within the spectrum of autonomous action depending on the circumstances and the competing interests at stake in any given situation.

77. FADEN & BEAUCHAMP, *supra* note 73, at 238. More specifically, they argue that the condition of non-control and condition of understanding lie on spectrum.

78. *Id.*

79. *Id.*

80. *Id.* at 238–39.

81. *Id.*

82. *Id.* at 239.

83. *See id.* at 240.

84. *Id.*

85. *Id.*

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Not only is autonomy a scalar concept, but the specific components of autonomy are scalar as well. Therefore, the three dimensions of autonomy that I have identified are capable of manifesting themselves in a more or less robust fashion.

Like autonomy itself, the non-coercive dimension of autonomy comes in degrees. Choices can be more or less coerced depending on the circumstances of the case. As Walter Sinnott-Armstrong explains, “the degree of coercion varies with the amount of harm that is threatened as well as the probability of escaping harm if you don’t comply with the demand.”⁸⁶ Given that coercion is scalar and that it is a dimension of autonomy, the degree of autonomy exhibited by an action will vary depending on the amount of coercion that is present in the case. As Faden and Beauchamp indicate, “[t]he form of control exerted by the influence attempts of others also affects the degree to which an action is autonomous.”⁸⁷ If “there are degrees of threats and degrees of abilities to resist threats,” then it must be “that some threats render actions more nonautonomous than others.”⁸⁸

The competency dimension of autonomy is also a matter of degrees. That is, a person may be more or less competent to exercise meaningful autonomy in different circumstances. As Faden and Beauchamp point out, “[p]ersons may be judged more or less competent to the extent they possess a certain level of ability or number of abilities.”⁸⁹ As an illustration of this notion, they suggest that “an experienced surgeon is likely to be more competent to consent to surgery than a frightened young soldier.”⁹⁰ What emerges is a “continuum of competence” that ranges “without discernible breaks from full competence through various levels of partial competence to full incompetence.”⁹¹

Finally, the informational dimension of autonomy is also scalar. Depending on the amount of information available, a choice will range from fully informed to completely uninformed. The degree of autonomy that obtains in any given situation is directly proportional to the amount of information that the agent has prior to acting.⁹² As the quantity and quality of the information in posses-

86. Walter Sinnott-Armstrong, *Free Contrastivism*, in *CONTRASTIVISM IN PHILOSOPHY* 134, 148 (Martijn Blaauw ed., 2013).

87. FADEN & BEAUCHAMP, *supra* note 73, at 239.

88. *Id.*

89. *Id.* at 289.

90. *Id.*

91. *Id.*

92. The degrees of informational autonomy have been well documented in the medical context, where it has been pointed out that “patient competence to understand and participate in medical decision making comes in a spectrum, from the essentially nonexistent to the marginal to the well-informed and reflective.” STEPHEN WEAR, *INFORMED CONSENT: PATIENT AUTONOMY AND CLINICIAN BENEFACTENCE WITHIN HEALTH CARE* 82 (2d ed. 1998). Depending on the risks inherent in treatment and on the potential of confusion that may be generated by providing addi-

sion of the agent diminishes, the degree of autonomy that can be exhibited decreases as well. In contrast, “the more information a person understands, the more enhanced are the possibilities for autonomy of action.”⁹³

H. *From Autonomy to Consent*

Consent is the vehicle through which legal actors translate concerns about autonomy into legally workable standards and rules. As a result, courts and legislatures interested in enhancing autonomy will frequently require that the relevant interaction be consensual in order for it to be legally efficacious.⁹⁴ Consent is essential for deciding issues that are as varied as the validity of a contract, the rules governing medical malpractice, the takings of property that amount to theft, and the kinds of sexual intercourse that give rise to liability for sexual assault.

Given the strong link between consent and autonomy, one would expect that consent—like autonomy—be multidimensional. This seems to be the case, since coercion, competency, and information are all relevant to consent. That coercion is relevant to consent is confirmed by the fact that coerced consent is invalid in essentially every legally relevant context ranging from contracts to rape law. Competency is also clearly part of the legal landscape of consent. Certain people are not competent to enter into contracts, engage in sexual intercourse, or consent to medical treatment. Finally, courts and legislatures frequently make reference to consent’s informational dimension. The most obvious context is in medical malpractice, where courts often point out that patient consent must be adequately informed in order for medical treatment to be lawful. Since consent can be assessed along the same three dimensions that comprise autonomous conduct, there is little doubt about its multidimensional nature.

Contrary to what may appear at first glance, consent—much like autonomy—exists along a spectrum. Consent can thus range from very robust to quite weak. Consent in a certain case can be more or less coerced, competent, or informed than consent in a different case. If one focuses on the informational dimension of consent, for example, one can see that consent to medical treatment is more robust along this dimension than consent to sex, even if it is equally robust with regard to the remaining two dimensions.⁹⁵

tional information, “a patient’s place within this spectrum will be more or less acceptable.” *Id.*

93. FADEN & BEAUCHAMP, *supra* note 73, at 239.

94. See sources cited *supra* notes 51–52 and accompanying text.

95. In any given case, the factfinder must find consent to either exist or not exist, according to the applicable legal standard. In this narrow sense, consent is all-or-nothing rather than scalar. Nevertheless, consent is scalar in the broader sense that the legal standards of consent range from quite robust in certain contexts (e.g., medical malpractice) to quite weak in other contexts (e.g., consensual police searches). It is the latter kind of scalarity that is relevant for tackling Rubenfeld’s

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It is also possible for a certain kind of consent to be more robust along one dimension while simultaneously less robust along another dimension than some other kind of consent. This is the case with the kinds of consent required by the criminal offenses of theft and sexual assault. Consent in the law of rape is more robust than consent in the law of theft along the non-coercive dimension, but less robust across the informational dimension. Regarding the non-coercive dimension, modern sexual assault law often invalidates consent when it takes place in the context of an inherently coercive circumstance. Coercion is deemed inherent in the context of certain relationships, such as foster parent and foster child, mental health therapist and patient, and teacher and student.⁹⁶ Assessing the coercion inherent in a sexual relationship between a high school teacher and one of his students, a court affirmed a sexual assault conviction stating: “[i]n light of the disparity of power inherent in the teacher-student relationship, we conclude that both victims were situated in an inherently coercive relationship with the defendant wherein consent might not easily be refused.”⁹⁷ Referencing the inherent coercion that exists between a superior and a subordinate, a federal court held that “the nature of the relationship between [a lieutenant colonel] and [a private first class] . . . is such that consent might not easily be refused.”⁹⁸ Courts have made similar statements regarding the coercion inherent in relationships between clergy and their followers⁹⁹ and between correctional staff and the inmates under their supervision.¹⁰⁰

In many states it is also deemed inherently coercive for a minor who is otherwise capable of consent to have sex with someone who is older than her by a certain amount of years. In Alaska, for example, it is a crime for someone who is 16 years of age or older to have sex with someone who is under 13 years of age.¹⁰¹ More specifically, the statute contemplates that minors between 13 and 16

“riddle of rape-by-deception.” Rubinfeld claims that it is puzzling that deception negates consent in theft law but not in rape law. As I will show in Part III, *infra*, this claim is mistaken because consent is scalar in the sense that consent in certain legal contexts demands more information, a lack of coercion, or competency than in other contexts. See Rubinfeld, *supra* note 12, at 1432–33.

For a view that is sympathetic to the idea that consent is scalar, see Kolber, *supra* note 43, at 266–88. While Kolber seems to believe that it is plausible to think about consent as lying along a continuum, he does not do so by engaging in a multidimensional analysis of consent, as set forth in this Article.

96. An example of such statutes is Georgia’s sexual assault law, which criminalizes sex between a person who has supervisory or disciplinary authority and the individual over whom she has authority. GA. CODE § 16-6-5.1 (2017).
97. *State v. McKenzie-Adams*, 915 A.2d 822, 836 (Conn. 2007), *overruled on other grounds by State v. Payne*, 34 A.3d 370 (Conn. 2012).
98. *Loomis v. United States*, 68 Fed. Cl. 503, 519 (2005).
99. *Talbert v. State*, 239 S.W.3d 504, 512 (Ark. 2006).
100. *Commonwealth v. Mayfield*, 832 A.2d 418 (Pa. 2003).
101. ALASKA STAT. § 11.41.434 (2017).

years of age may consent to sex with someone under 16 years of age, but may not consent to sex with someone older than 16. While there are some minors whom the law assumes are simply incompetent to consent to sex, minors over a certain age are competent in many states to consent to sex, as long as the partner is not considerably older than the minor.¹⁰² The consent obtained in these cases is considered inherently coerced because “[a]lthough exploitation and coercion can occur in any sexual encounter involving a minor, the most obviously exploitative situations involve a large age difference or a position of trust between the minor and the other participant.”¹⁰³ In these situations, the older participant “is often viewed as a predator who specifically sought out an underage partner because of the power disparity.”¹⁰⁴ The rationale undergirding the invalidation of consent in these cases is that “when an adult engages in sexual activity with a minor, we assume that the minor’s decision to engage in that activity was the result of pressure, if not coercion, by the adult.”¹⁰⁵

Modern rape statutes protect the non-coercive dimension of autonomy considerably more than common law-based rape statutes. At common law, coercion would negate consent only if it was the product of considerable physical force.¹⁰⁶ As a result, non-physical threats would not give rise to rape liability at common law. In one case, a high school principal told a student that she would not be allowed to graduate unless she performed oral sex on him.¹⁰⁷ The student yielded to the threat and had oral sex with the principal. The court held that the principal’s conduct was not criminal because only physical threats may give rise to liability at common law.¹⁰⁸ Under more modern rape statutes, however, these kinds of threats are considered inherently coercive and thus give rise to liability for sexual assault.¹⁰⁹

In contrast, consent to a taking of property is typically valid under the law of theft even when it takes place in the context of situations that the modern law of rape describes as inherently coercive. As a result, contemporary law protects the non-coercive dimension of autonomy more in the context of rape than in the context of theft. It is useful to illustrate this concept with several examples. A mental health therapist may lawfully sell goods to his patients. A student may

102. *Id.*

103. Carissa Byrne Hessick & Judith M. Stinson, *Juveniles, Sex Offenses, and the Scope of Substantive Law*, 46 TEX. TECH L. REV. 5, 18 (2013).

104. *Id.*

105. *Id.*

106. *See, e.g.*, *Don Moran v. People*, 25 Mich. 356 (1872).

107. *State v. Thompson*, 792 P.2d 1103 (Mont. 1990), *overruled on other grounds by State v. Spreadbury*, 257 P.3d 392 (Mont. 2011).

108. *Id.*

109. *See, e.g.*, GA. CODE § 16-6-5.1 (2017) (criminalizing sex between teachers and students in Georgia).

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lawfully allow a teacher to borrow her vehicle. A fifteen-year-old can lawfully give personal property as a gift to her twenty-one-year-old boyfriend. The property exchanges in all of these cases are treated as consensual under the law of theft in circumstances in which sex between the same parties would be considered nonconsensual. This shows that the kind of consent required by modern rape laws is more robust along the non-coercive dimension than the type of consent that undergirds the law of theft.

Yet, consent in theft law is more robust than consent in rape law along the informational dimension. While neither consent to sex in rape statutes nor consent to takings of property in theft laws typically require that certain disclosures be made prior to the act in order for consent to be efficacious, theft law generally criminalizes obtaining property by fraud whereas sexual assault law does not often prohibit sex obtained by deception. More specifically, the law of theft broadly criminalizes lying in order to obtain property,¹¹⁰ whereas the law of rape only punishes sex obtained by lying in certain cases, such as when the defendant impersonates the victim's spouse or when the deception prevents the victim from understanding the nature of the act.¹¹¹

I. Autonomy and Consent: Summary

So far, I have demonstrated that autonomy and consent are both scalar and multidimensional. I also distinguished between freedom and autonomy. Freedom is defined primarily by reference to the non-coercive dimension of autonomy. A choice is free when it is not coerced by internal or external forces. In contrast, autonomy requires not only freedom from coercion, but also a certain degree of competency and a given amount of information. In what follows, I will explain how the distinction between freedom and autonomy and an understanding of the multidimensional and scalar nature of autonomy and consent allow us to better grasp the fundamental commitments of modern rape reformers (Part II) and to find a way out of Rubinfeld's riddle of rape-by-deception (Part III).

II. CONSENT AND AUTONOMY IN MODERN RAPE REFORM

Equipped with a better understanding of the scalar and multidimensional nature of consent and autonomy, I will now survey the scholarly literature on rape to identify the conceptions of consent and autonomy that undergird modern attempts to reform rape law. The analysis will show that the feminist rape reform movement was primarily about securing additional freedom from coercion in the context of sexual relations. It will also reveal that the conceptions of consent and autonomy that emerge from the modern rape reform movement

110. See MODEL PENAL CODE § 223.3 (AM. LAW INST. 1981).

111. For a more extensive discussion of the cases in which sex by deception is, or should be, punished by rape law, see *infra* Section IV.D.

are ones that considerably strengthen the non-coercive dimension of consent and autonomy while leaving the competency and informational dimensions largely untouched. Therefore, it should come as no surprise that contemporary rape statutes do not broadly criminalize sex obtained by deception.

A. *Rape as Individualized and Institutionalized Coercion*

Sustained scholarly attention to rape in the literature began with the writings of many second-wave feminists of the 1970s.¹¹² The main thrust of these writings was to conceive of rape as a crime of violence rather than a crime of passion or desire. The view is said to originate with Susan Brownmiller's assertion that "rape is a crime not of lust, but of violence and power."¹¹³ Similarly, Susan Rae Peterson stated: "rape is first and foremost a crime of violence against the body."¹¹⁴ According to this view, "rape has nothing to do with sexual passion; it is an act of power, anger, or hatred."¹¹⁵ Rape thus becomes "an assaultive crime that attacks the physical integrity and mind of the victim."¹¹⁶ These scholars also viewed rape as a tool used by males to exercise power over women in order to coerce them into behaving in ways that males found desirable.

Another important strand in this literature was the view that rape benefits not only the actual rapist, but also all males.¹¹⁷ All men benefit from rape because the crime is part of "a conscious process of intimidation by which *all men* keep *all women* in a state of fear."¹¹⁸ Accordingly, Carolyn Shafer and Marilyn Frye observe that "[w]omen in this society live generally under the threat of

112. MARIA BEVACQUA, *RAPE ON THE PUBLIC AGENDA: FEMINISM AND THE POLITICS OF SEXUAL ASSAULT* 48–60 (2000).

113. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 15 (1986).

114. Susan Rae Peterson, *Coercion and Rape: The State as a Male Protection Racket*, in *FEMINISM AND PHILOSOPHY* 360, 364 (Mary Vetterling-Braggin et al. eds., 1977).

115. Lynne Henderson, *Rape and Responsibility*, 11 *LAW & PHIL.* 127, 156 (1992).

116. *Id.*

117. I acknowledge that many modern rape statutes do not limit rape liability to male on female assault, but rather criminalize sexual assault regardless of gender. Nevertheless, the evolution of rape law has been strongly influenced by gendered factors and relationships. See, e.g., SUSAN J. BRISON, *AFTERMATH: VIOLENCE AND THE REMAKING OF A SELF* 98 (2002) (describing rape as "gender-motivated violence against women, which is perpetrated against women collectively, albeit not all at once and in the same place"). Given that this Part aims to elucidate the fundamental philosophical commitments that undergirded the feminist rape reform movement and that this movement has, in fact, focused on such gendered factors and relationships, the discussion proceeds based on that assumption. The aim of this Part is thus to describe the views that inspired the modern rape reform movement rather than to normatively justify them.

118. BROWNMILLER, *supra* note 113, at 15.

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rape.”¹¹⁹ This threat “limits the movements of women about their communities, restricts their access to various services and amusements,” and “restricts their pursuit both of comfort and of self-expression in their clothes and personal styles.”¹²⁰ Men take advantage of this fear by offering women protection from the threat of rape in exchange for sex and other benefits, such as love, monogamy, and motherhood. As one feminist scholar puts it, “the practice of rape effectively keeps women in their places; indeed, because many women fear being raped, they remain much more stationary and sedentary than men.”¹²¹

Rape is thus seen not only as an individualized crime that wrongs a specific victim, but also as a broader societal practice that our patriarchal society uses to coerce women into behaving in ways that males find appropriate.¹²² The conception that emerges is that of rape as something that is “not primarily [understood] as a specific, singular crime, but rather as the most blatant example of systematic misogyny and masculine dominance.”¹²³

The concept of consent that results from the view of rape as a crime of domination and subjugation is one that is directly tied to the presence or absence of violence or coercion. Rape is nonconsensual, violent, and coerced sex. Sex that is not rape is consensual, non-violent, and uncoerced. Thus, rape is defined as a case in which a “woman does not consent [to sex], or consents by coercion.”¹²⁴ Given the view of these scholars that rape is primarily a crime of violence, it is not surprising that the chief concern that underpins this literature is that of coercion. Because of its violence, frequency, and threat of victimization, rape generates a considerable amount of inherent social coercion that results in significant curtailment of female liberty.¹²⁵ Hence, the “rape as violence” view suggests that “what is wrong with rape is primarily its restriction of the freedom of bodily movement for women.”¹²⁶

The feminist scholars who advocate this approach adopt a broad definition of coercion and, therefore, of violence. While physical force and threats are coercive, so too are non-physical pressures that generate an inherently coercive environment in which any consent obtained is suspect. Much like sex obtained by physical force, sex obtained by the use of non-physical types of coercion is incompatible with consent and, therefore, amounts to rape. According to one respected scholar’s view:

119. Carolyn M. Shafer & Marilyn Frye, *Rape and Respect*, in FEMINISM AND PHILOSOPHY, *supra* note 114, at 333, 342.

120. *Id.* at 342–43.

121. Peterson, *supra* note 114, at 363 (internal quotation marks omitted).

122. *Id.* at 364.

123. ANN J. CAHILL, RETHINKING RAPE 15 (2001).

124. Peterson, *supra* note 114, at 366.

125. *Id.*

126. *Id.* at 360.

The women's folklore of rape—cases that seldom, if ever, reach a court of law—is an oral history of abuses by men in positions of authority. The therapist who applies his personal kind of sexual theory, the doctor or dentist who suddenly turns a routine examination into a physical overture that the bewildered patient feels helpless to halt, the producer who preys on a starlet's ambition, the professor who twists to his advantage his student's interest in his field of scholarship—these are examples of what men would call seduction since the sexual goal may be accomplished without the use, or even the threat, of physical force, but the imposition of sex by an authority figure is hardly consensual or “equal.”¹²⁷

There are two features of this view that I wish to highlight for the purposes of this Article. First, the feminist scholars who advance the view of rape as violence are primarily interested in showing that (1) rape is coercive and violent at an individual and institutional level, and (2) that the coercion is exercised by males upon females directly and indirectly, overtly and subtly, and physically and non-physically. This view of coercion is considerably broader than the view of coercion that is presupposed by the common law of rape. The common law of rape required that the perpetrator use or threaten to use physical force and that the victim physically resist.¹²⁸ In contrast, the feminists who argued that rape was violence adopted a considerably more robust definition of coercion that did not require physical threats or resistance. Pursuant to this account of rape, coercion “can take many forms,” including “economic and emotional coercion.”¹²⁹

Second, these scholars focused the vast majority of their energy on critically assessing the non-coercive dimension of consent. That is, their project was primarily geared towards analyzing the kinds of overt and subtle forms of coercion that rendered sex nonconsensual. More broadly, this feminist literature conceived of rape as a crime against women's freedom of movement. Because of the incessant fear of being raped, women do not feel free to do as they please and are therefore indirectly coerced to turn to men for protection and to abide by male-dominated rules regarding expected sexual behavior. Thus, these scholars were primarily concerned with *freedom* rather than *autonomy*.

As I explained in Part I, although many people use the terms “freedom” and “autonomy” interchangeably, philosophers often distinguish between the two.¹³⁰ A common way of doing so is by defining freedom as the absence of external constraints, while defining autonomy as the capacity to critically accept

127. BROWNMILLER, *supra* note 113, at 271.

128. See, e.g., *Rusk v. State*, 406 A.2d 624 (Md. Ct. Spec. App. 1979), *rev'd*, 424 A.2d 720 (Md. 1981).

129. BROWNMILLER, *supra* note 113, at 271.

130. See *supra* Section I.D.

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or revise the values, desires, and beliefs that ground the choices we make.¹³¹ So defined, freedom is primarily about the non-coercive dimension of autonomy and consent. To be free in this sense is to be unconstrained by coercion and other kinds of pressures. Freedom, then, is not about having sufficient information to make an informed choice. Instead, it is about not being physically or psychologically pressured by others into doing what you do not desire to do. This is precisely the kind of consent that lies at the core of the rape as violence literature. This is not to say that these scholars did not address the informational dimension of consent or that they did not care about the broader notion of autonomy; they were surely concerned about cases of uninformed or misinformed sex and frowned upon the use of deception to obtain sexual intercourse. Nevertheless, this was not their primary focus. This feminist movement was about domination, subjugation, and violence against women. As such, it focused primarily on coercion rather than on information and deception.

B. The Elusiveness of Consensual Sex in a Patriarchal Society

The rape-as-violence view distinguished between sex that was rape and sex that was not rape and, consequently, between sex without consent (rape) and consensual sex (non-rape). In contrast, a more radical feminist view argued that the distinction between sex that is violent and non-violent or consensual or nonconsensual is too elusive to ground a robust feminist theory of rape. These more radical scholars argued that it is difficult to distinguish between rape and non-rape in a male-dominated society. To be clear, these scholars did not argue that all sex is rape, as many have incorrectly suggested.¹³² They argue instead that the boundaries between (bad) rape and (good) sex are so blurred in our patriarchal society that it is hard to make sense of the distinction. Thus, these scholars are skeptical of theories that presuppose that “rape is definable as distinct from intercourse,” given that rape and intercourse are difficult for women “to distinguish . . . under conditions of male dominance.”¹³³

In criticizing the rape-as-violence literature, Professor Catharine MacKinnon states that although the approach “gave needed emphasis to rape’s previously effaced elements of power and dominance, it obscured its elements of

131. *Id.*

132. The claim that Professor Catharine MacKinnon asserted that “all sex is rape” can be traced back to DAPHNE PATAI & NORETTA KOERTGE, *PROFESSING FEMINISM: CAUTIONARY TALES FROM INSIDE THE STRANGE WORLD OF WOMEN’S STUDIES* 129 (1994) (claiming that “Andrea Dworkin and Catharine MacKinnon have long argued that in a patriarchal society all heterosexual intercourse is rape”). For documentation on the origins of this mistaken claim, see Cindy Richards, *Fighting a Lie that Just Won’t Die*, CHI. TRIB. (May 30, 1999), http://articles.chicagotribune.com/1999-05-30/news/9906030177_1_sexual-harassment-databases-journalism-ethics [<http://perma.cc/Z2K6-LN79>].

133. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS* 635, 647 (1983).

sex.”¹³⁴ Relatedly, MacKinnon rejects the rape-as-violence view because “to say rape is violence not sex preserves the ‘sex is good’ norm by simply distinguishing forced sex as ‘not sex.’”¹³⁵ This has the effect of perpetuating patriarchal norms regarding appropriate sexual behavior because it allows males to claim that non-violent and consensual sex is acceptable when such distinctions are notoriously difficult to make in a patriarchal society that defines men as dominant and females as passive.

According to this more radical view, male use of force to obtain sex is “romanticized” and “naturalized.”¹³⁶ There is a sense, then, in which force is sex and sex is force under conditions of male dominance.¹³⁷ The force that accompanies sex in a patriarchal society ranges from subtle pressures such as “gender socialization” and the “withholding of benefits” to harsher pressures such as physical force.¹³⁸ Accordingly, sexuality in contemporary society amounts to “a social sphere of male power to which forced sex is paradigmatic.”¹³⁹ This, in turn, generates a view in which “coercion [is] integral to male sexuality.”¹⁴⁰ What is wrong, then, with sex in a male-dominated society is that it takes place under inherently coercive circumstances. This makes it difficult to distinguish between coerced sex that is traditionally viewed as rape and uncoerced sex that is typically believed to be acceptable. MacKinnon then argues that the distinction between rape and sex is so blurred, that instead of asking “what is the violation of rape?” one should instead ask “what is the nonviolation of intercourse?”¹⁴¹ When the social conditions under which the sex is obtained are imbued with coercion, the distinction between forcible intercourse that amounts to rape and non-forcible sex breaks down.

Since this more radical view assumes that sex is inherently coercive, it is not surprising that consent plays little role in distinguishing unacceptable rape from acceptable intercourse. If the problem with sex in a male-dominated society is that it is inherently coercive, then consenting to sex does not solve the problem, for consent takes place under the same inherently coercive circumstances. As such, distinguishing between truly consensual acts and nonconsensual acts in a patriarchal social order is as elusive as distinguishing between (bad) rape and (good) sex.

134. Catharine A. MacKinnon, *Sexuality, Pornography, and Method: “Pleasure Under Patriarchy,”* 99 *ETHICS* 314, 323 (1989).

135. *Id.*

136. *Id.* at 325.

137. *Id.*

138. *Id.*

139. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 173 (1989).

140. *Id.*

141. *Id.* at 174.

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Under this view, rape is “an act of subordination of women to men” that “expresses and reinforces women’s inequality to men” rather than nonconsensual sex that violates a woman’s autonomy.¹⁴² Therefore, instead of asking whether sex was consensual, one ought to ask “whether consent is a meaningful concept.”¹⁴³ It seems clear to these radical scholars that it is not. Given that consent is insufficient to neutralize coercion in a male-dominated society, these scholars argue in favor of abandoning the notion of consent. They claim that the law needs to move beyond consent in order to neutralize this inherent coercion. As a result, several feminist scholars have attempted to come up with an alternative concept that better distinguishes between appropriate and inappropriate sexual relations. For these scholars—as for those discussed in the previous section—the chief problem that rape law needed to address was the inherent coercion of sex in a male-dominated society. As such, these scholars were more concerned with neutralizing inherent power imbalances than with securing autonomous consent.

One prominent approach to developing such an alternative conceptualization is that put forth by Lois Pineau in her influential article *Date Rape: A Feminist Analysis*.¹⁴⁴ She suggests that appropriate sexual intercourse is “communicative” rather than consensual.¹⁴⁵ The kind of communicative sexuality that Pineau references is one that is premised on the idea of “mutuality of desire.”¹⁴⁶ Sex anchored in mutuality takes place when “each person’s interest in continuing is contingent upon the other person wishing to do so too, and each person’s interest is as much fueled by the other’s interest as it is by her own.”¹⁴⁷ By requiring that people communicate before having sex and that they seek to do only that which the other party communicates that she wants, Pineau seeks to eradicate “manipulative, coercive, and exploitive behaviour.”¹⁴⁸ Under this model, coercive sex is thus defined as “noncommunicative” rather than non-consensual.¹⁴⁹

Another feminist account that purports to transcend consent as the vehicle for distinguishing rape from permissible sex is Professor Lynne Henderson’s. Henderson offers multiple frameworks through which we could interpret rape, one of which is critical of the prevailing conception of consent: “‘consensual’ in a thin sense of the word ‘consent’ that fails to take into account women’s subordinated status and assumes that women have equal power to act auto-

142. *Id.* at 182.

143. MacKinnon, *supra* note 133, at 650.

144. Lois Pineau, *Date Rape: A Feminist Analysis*, 8 *LAW & PHIL.* 217 (1989).

145. *Id.* at 236.

146. *Id.*

147. *Id.*

148. *Id.* at 239.

149. *Id.* at 241.

mously in sexual relations.”¹⁵⁰ Consent—at least as traditionally construed both in law and society—“protect[s] an irrational and irresponsible model of male sexuality, courting behavior, and female sexuality, giving women little access to law in protecting themselves against male sexual aggression.”¹⁵¹ In particular, Henderson points out that current approaches to rape often lead to cases in which consent can easily be obtained even when there is violence.¹⁵² Given this state of affairs, she proposes that we move to a model based on taking responsibility for and communicating about our sexuality.¹⁵³ This approach seeks to ensure that both man and woman are “interested” and “willing” to have sex and “communicating” with each other about what they want and do not want to do.¹⁵⁴ The goal is to encourage “[e]xploration of each other’s pleasure and desire in a context of empathy, communication, and care.”¹⁵⁵

Professor Martha Chamallas advanced another influential model of rape that was not primarily based on consent. Her goal was to develop an “approach to regulation designed to limit sexual coercion in amorous relationships, without eliminating sexual freedom.”¹⁵⁶ To do so, Chamallas develops an “egalitarian” view of sexuality that—like Pineau’s—is closely linked to the idea of mutuality. Borrowing heavily from sexual harassment doctrine, her model asks “whether the more passive target of sexual overtures actually welcomed the initiative.”¹⁵⁷ In order to decide if the sexual initiative was welcome, we try to determine “whether the target would have initiated the encounter if she had been given the choice.”¹⁵⁸ If we answer affirmatively, “there is some assurance of mutuality in the sexual encounter” and, therefore, there are good reasons for labeling the resulting sexual act as lawful.¹⁵⁹ If, however, we answer negatively, then we ought to be skeptical of mutuality and, consequently, have reason to consider the resulting sexual act to be unlawful.¹⁶⁰ This egalitarian view is geared towards maximizing choices made in circumstances of relative equality between the parties. If the male has more power than the female, then the choice to engage in sexual intercourse is suspect, even if no obvious force or coercion was

150. Henderson, *supra* note 115, at 143.

151. *Id.* at 151.

152. *Id.*

153. *Id.* at 171.

154. *Id.*

155. *Id.*

156. Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 780 (1988).

157. *Id.* at 836.

158. *Id.*

159. *Id.*

160. *Id.*

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used to obtain sex. Chamallas thus concludes that the most egalitarian and mutual kind of sex is that which seeks intimacy or pleasure. On the contrary, “sexual encounters in which money, power, prestige, or financial or physical security is traded for sexual pleasure or intimacy” are at odds with the egalitarian model.¹⁶¹ While it is true that in these encounters “each party might be said to have gained something,” they fail to comport to the egalitarian ideal since “they are not premised on mutuality because the gains of each are so different in character.”¹⁶²

While there are subtle variations amongst the proposals put forth by Pineau, Henderson, and Chamallas, they share two features. First, they all take as their point of departure that consent is not the best way to distinguish between appropriate and inappropriate sexual intercourse. Second, all of these models are primarily designed to counteract the inherently coercive environment in which consent to sexual relations is typically obtained under conditions of male dominance.

An example that demonstrates the failures of the traditional consent model is date rape. Date rape occurs when a person is raped by someone she knows.¹⁶³ The perpetrator is typically someone the victim has dated or is otherwise romantically involved with. The challenge that date rape presents for current rape law is that in many, if not most, date rape cases consent is not obtained by obvious use of coercion. In many instances the woman passively submits to a man’s sexual advances after initially expressing reservations about having intercourse.¹⁶⁴ In other cases, the woman may verbally say “no” but the male claims to have construed her non-verbal cues as indicating consent in spite of the verbal refusal.¹⁶⁵ The traditional consent model fails in many of these instances because courts often infer consent when a woman submits to a man’s repeated sexual advances even if the woman initially hesitated. Similarly, courts often infer consent from non-verbal cues such as kissing and other acts of foreplay, and they sometimes do so even when the woman verbally expresses that she does not wish to have sexual intercourse.

From a feminist perspective, these cases are problematic not only because it is unclear whether they are consensual or not, but also—and more importantly—because the sexual intercourse takes place under conditions of unequal power that make it difficult for the woman to meaningfully consent to intercourse. The power imbalance between men and women creates inherently coercive circumstances in much the same way that inherently coercive circumstanc-

161. *Id.* at 840–41.

162. *Id.* at 841.

163. See JULIE A. ALLISON & LAWRENCE S. WRIGHTSMAN, RAPE: THE MISUNDERSTOOD CRIME 61 (1993).

164. See, e.g., *State v. Rusk*, 424 A.2d 720 (Md. 1981).

165. See, e.g., *Commonwealth v. Berkowitz*, 609 A.2d 1338 (Pa. Super. Ct. 1992), *aff’d in part, vacated in part*, 641 A.2d 1161 (Pa. 1994).

es are created by the imbalance of power that exists between employers and employees, doctors and patients, and ministers and parishioners. As a result, the problem with consent, as Janet Halley recently pointed out, is that “much of the sex women have with men is consented to under coercive circumstances—subjectively consented to by women who nevertheless find the sex to be unwanted.”¹⁶⁶

In order to neutralize the coercion that is inherent in this power imbalance, these scholars propose that males communicate with females about whether they desire to have sex rather than merely inferring consent. As a result, much like the literature previously discussed, the scholarship that advocates for alternatives to consent is primarily driven by a desire to neutralize coercion rather than to make sure that sex takes place only when both parties are informed of material facts.

It is once again illustrative to think about why date rape cases are of such importance to this literature. The problem with date rape is not typically that the parties do not have full information about what is about to take place. The issue in these cases is inherent coercion, not lack of knowledge. More specifically, we worry that only token consent was obtained because it is difficult to fully credit female consent to male sexual advances when existing social norms encourage male aggression and female passivity.

It is not that these scholars did not object to using deception to obtain sex. They surely did. However, they did not identify this as the chief evil of sex obtained in conditions of male dominance. There is something more pernicious and more fundamental about sex in a patriarchal society than its simply being misinformed. A male-dominated social order does not need misinformation in order to make women submit to sex. Given the coercion inherent in this kind of social arrangement, women regularly give in to men’s aggressive sexual proposals even when they are informed of all relevant facts.

Therefore, the radical feminist movement regarding rape is best seen as one that intended to maximize women’s freedom to engage in sexual intercourse. Once again, the “freedom” that I have in mind is not one that is coextensive with autonomy. Rather, it is freedom in the technical sense of “unconstrained choice.” In the context of the radical feminist movement regarding rape, to be free is to engage in sex without being coerced to do so, either by overt physical force or by the subtler pressures that permeate sexual encounters that occur under conditions of male dominance. Whether the sex is also fully informed is tangential to this more general project.

C. *Strengthening Consent: From Negative Consent to Affirmative Consent*

While some rape law scholars advocated for the abandonment of consent, others argued that the best way to reform rape doctrine was to adopt a more robust standard of consent. These scholars argue that rape is wrong because it infringes on sexual autonomy. Pursuant to this approach, autonomy is con-

166. Janet Halley, *The Move to Affirmative Consent*, 42 *SIGNS* 257, 265 (2016).

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ceived as an affirmative exercise of choice as opposed to merely a choice that is not forced. According to Professor Stephen Schulhofer—the most well-known advocate of the affirmative consent view of rape—the serious physical intrusion that takes place during sexual intercourse demands that consent not “simply be the absence of clearly crystallized, clearly expressed opposition.”¹⁶⁷ Instead, “nothing less than positive willingness, clearly communicated . . . should ever count as consent.”¹⁶⁸ Neither ambiguous conduct, passivity, nor silence can count as consent to sex under this model. The approach is intended to “shift the emphasis of the consent inquiry away from concern over whether the woman explicitly communicated her opposition” to whether the man “has a clear indication of the other person’s consent.”¹⁶⁹ By requiring clear words or actions that signal consent, we are “placing [the] onus on those who initiate sexual contact to secure agreement.”¹⁷⁰

Schulhofer’s influential theory of affirmative consent is developed at length in his book *Unwanted Sex*. Although the entire tome amounts to an elaboration of his theory of sexual autonomy, Schulhofer devotes only seven pages to analyzing whether and how deception may impinge on sexual autonomy.¹⁷¹ In contrast, he devotes close to two hundred pages to discussing coercion and power in the context of sexual relations. Schulhofer is especially concerned about cases in which “a woman confronts sexual pressure from a man who holds professional power over her,”¹⁷² and he includes separate chapters discussing the pressures that are built into the superior/subordinate, doctor/patient, and lawyer/client relationships.¹⁷³ Schulhofer is particularly worried about these cases because the traditional approach to rape law “offers no help in these situations because the tactics men use, though sometimes flagrantly coercive, are not physically violent.”¹⁷⁴ Of course, the traditional approach to rape law also offers little help in situations in which sex is obtained by deception. Schulhofer acknowledges as much. Nevertheless, his autonomy-based view of rape has little implication for cases in which sex obtains as a result of material misrepresentations of fact.

What this reveals is that Schulhofer’s project is focused almost in its entirety on enhancing the non-coercive dimension of consent. The informational di-

167. STEPHEN SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 271 (1998).

168. *Id.*

169. *Id.*

170. Lise Gotell, *Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women*, 41 *AKRON L. REV.* 865, 872 (2008).

171. SCHULHOFER, *supra* note 167, at 152–59.

172. *Id.* at 5.

173. *Id.* at 168–253.

174. *Id.* at 5.

mension of autonomy, on the other hand, remains largely unaffected by his model. As a result, when Schulhofer talks about sexual autonomy, he is usually referring to the non-coercive aspect of autonomy. That is, he is primarily interested in ensuring that sex is uncoerced. While Schulhofer would surely prefer that sex also be informed, he clearly prioritizes freedom from coercion over freedom from misrepresentation. Schulhofer's project—much like the projects of most modern rape reformers—is thus better understood as one that seeks to maximize sexual *freedom* as opposed to sexual *autonomy*.

D. Modern Rape Reform: Sexual Freedom, Not Sexual Autonomy

The standard story about the evolution of rape law begins with rape as a crime against the property interests of men and typically culminates with a more enlightened, less sexist conception of rape as a crime against sexual autonomy.¹⁷⁵ In terms of the defining elements of the offense, rape has slowly evolved from a crime of violence that required the perpetrator to use, or threaten to use, physical force to an offense against freedom of choice that is consummated when the perpetrator engages in sexual intercourse without consent.¹⁷⁶

Of course, given that substantive criminal law is generally up to the states, the current state of rape in America varies widely from jurisdiction to jurisdiction. Some states continue to require that the defendant use physical force.¹⁷⁷ These states do not typically criminalize sex that is obtained by using non-physical forms of coercion or intercourse that takes place in the context of an inherently coercive relationship.¹⁷⁸ Many jurisdictions also continue to require that the victim resist the defendant's use of force.¹⁷⁹ Other states adopt the affirmative consent model of rape that views the offense as a violation of sexual autonomy.¹⁸⁰ States that come closer to adopting an autonomy-based model of sexual assault expressly criminalize sex obtained by the use of non-physical coercion, sometimes going as far as criminalizing any sex that takes place in inher-

175. For an overview of the history of rape and rape reform, see Timothy W. Murphy, *A Matter of Force: The Redefinition of Rape*, 39 A.F. L. REV. 19, 19–21 (1996).

176. GUYORA BINDER, *THE OXFORD INTRODUCTIONS TO U.S. LAW: CRIMINAL LAW* 239–43 (2016).

177. See, e.g., OHIO REV. CODE § 2907.02(A)(2) (2017) (punishing rape when a person “compels the other person to submit [to sex] by force or threat of force”); see also *Suliveres v. Commonwealth*, 865 N.E.2d 1086 (Mass. 2007).

178. *Id.*

179. See, e.g., LA. REV. STAT. § 14:42.1 (2017) (defining rape as a case “[w]hen the victim is prevented from resisting the act by force or threats of physical violence”); see also *State v. Jones*, 299 P.3d 219 (Idaho 2013).

180. See, e.g., *State in the Interest of M.T.S.*, 609 A.2d 1266 (N.J. 1992).

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ently coercive relationships, regardless of whether the sex was nominally consensual.¹⁸¹

While many states continue to require force, the trend in recent years is towards dropping the force requirement and instead criminalizing nonconsensual intercourse. The trend is inspired in great part by feminist critiques of traditional rape law and by the sexual autonomy model put forth by scholars like Schulhofer. As a result, it has become commonplace for courts and commentators to claim that the chief goal of modern rape reform is to protect sexual autonomy.¹⁸² While this claim seems plausible at first glance, it turns out to be misleading in several ways, some of which have allowed scholars like Rubinfeld to mistakenly claim that rape-by-deception presents an irresolvable riddle for modern rape reformers.

It is true that many contemporary rape reformers argue that rape is a crime against sexual autonomy. It is also true that modern rape statutes protect sexual autonomy more than traditional common law rape laws. However, as my brief recount of feminist and liberal rape literature reveals, modern rape reform has disproportionately focused on one dimension of autonomy, leaving the other two dimensions mostly intact. Although there are considerable differences amongst the different groups that have advocated for rape law reform during the last several decades, they all focused primarily on devising ways of enhancing the non-coercive dimension of autonomy.

This is the best way of making sense of why modern rape reformers targeted some features of traditional rape law doctrine and not others. Contemporary critiques of traditional rape law unanimously called for the abolition of both the defendant force and victim resistance requirements,¹⁸³ while also calling for the criminalization of non-physical forms of coercion.¹⁸⁴ However, most did not call for broad criminalization of uninformed or misinformed sex.¹⁸⁵ To be sure, some scholars argued in favor of broadly criminalizing sex obtained by fraud.¹⁸⁶ Nevertheless, no rape law scholar has ever argued in favor of imposing a duty to inform prospective sex partners of all material facts related to intercourse, and only a handful of scholars have suggested that all material misrepresentations

181. See, e.g., GA. CODE § 16-6-5.1 (2017); see also *State v. Baptista*, 894 A.2d 911 (R.I. 2006).

182. For judicial references describing rape as a crime against autonomy, see *State in the Interest of M.T.S.*, 609 A.2d at 1277–78. For an autonomy-centered approach to rape in the scholarly literature, see generally Schulhofer, *supra* note 16.

183. See, e.g., Schulhofer, *supra* note 16, at 45–46.

184. *Id.* at 92–93.

185. See, e.g., Falk, *supra* note 37 (arguing for selective criminalization of rape by fraud).

186. See, e.g., Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1120 (1986).

that result in sex ought to be punished.¹⁸⁷ Others, like Feinberg¹⁸⁸ and Schulhofer,¹⁸⁹ have argued that sex obtained by fraud should be criminalized when the deception is coercive but generally not criminalized when it is not coercive.

The approach to rape law that emerges from this literature is one that primarily seeks to neutralize coercion rather than deception. While sex obtained by deception is certainly viewed by these scholars as pernicious, the problems raised by most cases of sex by deception pale in comparison with those raised by sex obtained by coercion. Given that the primary concern of contemporary rape scholars was neutralizing the coercion inherent in sexual relations that take place under conditions of male dominance, modern rape statutes are best understood as seeking to advance sexual freedom, not sexual autonomy.

III. SOLVING THE RIDDLE OF RAPE-BY-DECEPTION

Professor Jed Rubenfeld argued in a recent influential article that modern rape reform generates a “riddle of rape-by-deception.”¹⁹⁰ The riddle is that if rape is primarily an offense against sexual autonomy—as most modern approaches to sexual assault claim it is—then the law should prohibit sex by deception just as much as it prohibits sex by force. After all, deception—like force—negates autonomy in many contexts outside of rape doctrine, including the laws of theft and contracts. Yet, contemporary rape statutes do not generally criminalize sex obtained by deception. So either rape statutes are guilty of a profound, inexplicable oversight, or rape law is not really about sexual autonomy. Rubenfeld argues for the latter, claiming that rape law is really about the right to self-possession rather than about autonomy.¹⁹¹

Rubenfeld’s account of rape law fails to grasp that autonomy and consent are multidimensional and scalar concepts that allow for the recognition of more and less robust conceptions of consent and autonomy across several distinct but interconnected dimensions. As I argued in Part I, autonomy is scalar in the sense that it can exist along a spectrum ranging from minimal to maximal autonomy. It is multidimensional because (lack of) coercion, competency, and information are all important components of autonomy.

Rubenfeld’s failure to account for the scalar and multidimensional nature of consent and autonomy prevents him from appreciating that we can selectively criminalize rape-by-deception without calling into question the kind of sexual autonomy (and consent) that lies at the core of rape offenses. More specifi-

187. *Id.* Estrich argues that material deception to obtain sex should be punished as sexual assault in much the same way as material deception to obtain property is punished as theft.

188. Joel Feinberg, *Victims’ Excuses: The Case of Fraudulently Procured Consent*, 96 ETHICS 330, 337 (1986).

189. Schulhofer, *supra* note 16, at 93.

190. Rubenfeld, *supra* note 12.

191. *Id.* at 1425–27.

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cally, he fails to appreciate that rape offenses principally seek to safeguard the non-coercive dimension of autonomy.¹⁹² Since modern rape laws are primarily about preventing coercion in sexual encounters, rather than deception, there is nothing perplexing about rape laws that only selectively criminalize deception.

This is not to say, however, that modern rape laws are wholly indifferent to deception. While courts and scholars certainly do not require full disclosure of all material facts before valid consent to sex can obtain, they sometimes require disclosure of certain material facts (e.g., whether a person is HIV positive)¹⁹³ and often prohibit deception regarding certain other material facts (e.g., facts pertaining to the identity of the parties or to the nature of the act).¹⁹⁴

Reasonable people will surely disagree about how stringently courts ought to police the informational dimension of consent in the sexual context. However, this disagreement is not about whether we actually care about sexual autonomy in these cases, as Rubinfeld appears to suggest. Rather, the disagreement is about the *degree and kind* of autonomy that should be recognized as legally relevant in this context. Acknowledging that a certain degree of autonomy is enough to generate legally valid consent, even when more autonomy could be required, simply specifies the kind of autonomy that is relevant in these contexts rather than undermining the very notion of sexual autonomy. As courts and legislatures continue to rethink the boundaries of consent and sexual autonomy in cases of rape-by-deception, the degree of autonomy that is deemed necessary for legally valid consent to sex to obtain will surely shift. But the change will occur within the domain of autonomy rather than outside of it. Recognition of more (or less) autonomy presupposes that some degree of autonomy is already present. As a result, the failure of courts and modern rape reform statutes to criminalize all sex obtained as a consequence of material deception does not show that rape law is primarily about something other than sexual autonomy. Instead, it reveals that autonomy is a scalar notion that may be coherently protected more or less depending on the way in which the balance is struck between the competing interests at stake in any given situation.

192. The claim that rape laws are primarily about the non-coercive dimension of (sexual) autonomy is essentially identical to the claim that rape laws are primarily about (sexual) freedom, given that “freedom” is defined as the absence of coercion. It is important to note that the concepts of “freedom” and “autonomy” are not in tension with each other. “Freedom” is simply another way of referring to the “non-coercive” dimension of autonomy.

193. See, e.g., ARK. CODE § 5-14-123 (2017) (making it a crime to have sex without first informing the other person of the presence of HIV). For a more detailed discussion of these cases, see *infra* Section IV.B.

194. See, e.g., *Boro v. Superior Court*, 210 Cal. Rptr. 122, 122 (Cal. Ct. App. 1985), *superseded by statute*, CAL. PENAL CODE § 289(d)(4) (2017), *as recognized in* *People v. Robinson*, 370 P.3d 1043 (Cal. 2016) (reviewing the scholarly literature on sex by deception). For more discussion of the selective way in which current rape law criminalizes rape-by-deception, see *infra* Section IV.C.

A. *The Misleading Analogy Between Consent in Theft and Rape Law*

Rubinfeld argues that rape law does not really protect autonomy because it fails to criminalize sex by deception as broadly as theft law criminalizes obtaining property by deception.¹⁹⁵ If consent is not typically invalidated by deception in the context of rape law, then it must be because consent is not really essential at all. Once again, Rubinfeld's reasoning is flawed because he fails to appreciate the scalarity and multidimensionality of consent.

By focusing solely on the informational dimension of consent, Rubinfeld ignores the fact that consent in sexual assault law is sometimes more robust than consent in theft law and that—as a result—it is not really the case that consent in rape law is weaker than consent in theft law. An interdimensional analysis of consent and autonomy in the context of rape and theft doctrine reveals that both areas of law protect a comparable degree of autonomy, but that they do so along different dimensions. Theft law emphasizes the informational dimensions of consent and autonomy, whereas rape law focuses more on the non-coercive dimension. Furthermore—and perhaps more importantly—neither rape law nor theft law protects the informational dimension of autonomy as robustly as it is protected in other legal realms. Modern rape reform prohibits some instances of misinformed consent but not all.¹⁹⁶ It also does not prohibit uninformed consent, given that it does not generally require that parties disclose material facts prior to having sex.¹⁹⁷ In contrast, modern theft law broadly prohibits affirmative misrepresentations that lead to misinformed consent.¹⁹⁸ However, like rape law, it does not generally prohibit uninformed consent that is the product of a failure to disclose material facts. Consent in medical malpractice is more robust than consent in either rape or theft law—there is an affirmative duty to disclose material facts to patients prior to obtaining their consent to treatment.

Unfortunately, Rubinfeld glosses over these important distinctions because he approaches consent and autonomy as all-or-nothing concepts. Where Rubinfeld sees deception he cannot see consent, and where he sees autonomy he cannot see misrepresentation. But since consent and autonomy are matters of degree, they are consistent with certain amounts and kinds of deception. The amount of deception that is compatible with the kind of consent and autonomy that we demand in a particular context will depend on the circumstances. We will tolerate more deception in some situations and less in others, depending on many factors, including the harms that will ensue if deception takes place and

195. Rubinfeld, *supra* note 12, at 1407.

196. For a more detailed discussion of the classic instances of deception prohibited by modern rape law, see *infra* Section IV.C.

197. However, statutes often impose some criminal liability for a person who fails to disclose that he is infected with a dangerous STD prior to having sex. See *infra* Section IV.B.

198. See, e.g., MODEL PENAL CODE § 223.3 (AM. LAW INST. 1981).

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whether there is considerable asymmetry of information between the parties. As the magnitude and likelihood of harm from misinformation increases, the case for broadly prohibiting deception gets stronger. By the same token, the more that a certain interaction is plagued by information asymmetry, the stronger the case for broadening the prohibition on deception. Since the need for prohibiting deception varies widely from situation to situation, we will draw the line between permissible and impermissible deception differently depending on context. But the fact that different lines will need to be drawn does not mean that consent and autonomy cease to be meaningful concepts. Sometimes the line drawn in one context will enhance informational autonomy compared to another context. On other occasions it will not.

Relatedly, Rubenfeld is mistaken to claim that rape law must match the lines drawn by the law of theft regarding permissible and impermissible deception because his comparison point is arbitrary. Why should rape law not match the lines drawn by medical malpractice law regarding deception? For that matter, why should theft law not protect autonomy as much as it is protected in the context of medical treatment? Once we acknowledge that consent can be valid even if informational autonomy is not fully secured, then we are merely haggling about price. Rubenfeld claims that a rape law committed to sexual autonomy should draw the same lines that theft law does regarding deception.¹⁹⁹ But I can pick another legal doctrine as a point of reference and argue that the line should be placed elsewhere both for rape law and for theft doctrine. If I take the Fourth Amendment doctrine of consent to police searches as my baseline, then rape law protects informational autonomy more than adequately. If instead I choose medical malpractice as my baseline, it does not. Surely whether informational autonomy in particular and autonomy in general are sufficiently protected by rape law should not depend on what legal doctrine I take as my baseline. Instead, it should depend on whether the circumstances that typically surround the kind of interaction at issue demand robust protection of informational autonomy or not. For modern rape reformers, the chief threat to sexual autonomy comes from coercion, not deception. If this is the case, there is nothing mysterious about the fact that modern rape statutes do not protect the informational dimension of autonomy as much as the non-coercive dimension.

B. Rape-by-Deception and the Materiality Problem

Rubenfeld argues that a view of rape that takes consent seriously must acknowledge that “material” deception negates consent to sex.²⁰⁰ He then argues that modern rape law does not respect autonomy because it fails to prohibit material deception as broadly as it is prohibited pursuant to contract law or theft law. This argument is flawed because it mistakenly assumes that standards of materiality hold constant across different areas of law.

199. Rubenfeld, *supra* note 12, at 1407.

200. *Id.*

To understand why this assumption is mistaken, it is useful to compare the meaning of material deception in the law of medical malpractice with the meaning of material deception in the context of theft by false pretenses. In the medical malpractice context, a failure to disclose important facts related to a given medical treatment is typically considered “material” deception.²⁰¹ It is material in the non-legal sense because it makes a difference to the patient’s decision-making process. It also satisfies the legal threshold for materiality that courts have crafted in the medical malpractice context. In contrast, a failure to disclose important facts related to a property exchange is generally not considered “material” deception under the law of theft by false pretenses.²⁰² While more kinds of deception count as material under the law of medical malpractice than under the law of theft by false pretenses, it would be erroneous to infer from this that there is something wrong with the standard of materiality in the theft by deception context or that the law of theft is not really concerned with consent or autonomy.

Rubinfeld makes the same mistake when he argues that if deception is material enough to negate consent in the context of theft, it ought to be enough to negate consent in the context of rape. While he is correct that more kinds of deception count as material under the law of theft than under the law of rape, this does not mean that the standard of materiality in the law of rape is wrong or that consent is not taken seriously by the law of rape.

Ultimately, what counts as material in a certain context depends on a multiplicity of competing factors. Sometimes the balance of these factors suggests that we ought to set the bar for materiality quite low, as in the case of medical malpractice. On other occasions, analysis of the competing factors counsels in favor of setting a higher standard of materiality. Whether such decisions are correct does not depend on some fixed materiality measure, as Rubinfeld’s analysis presupposes. Rather, it depends on whether there are good reasons for setting the materiality bar higher or lower in any given context. In the particular context of rape, I believe there are good reasons for setting the materiality bar quite high when it comes to deception. I take up an analysis of these reasons in the next two sections.

C. The Nature of Modern Rape Reform, the Purposes of Rape Law, and the Problem of Rape-by-Deception

I have argued that a plausible case can be made for a conception of consent in the context of rape law that is quite robust along the non-coercive dimension and considerably less so along the informational dimension. According to this

201. See, e.g., *Martin by Sceptur v. Richards*, 531 N.W.2d 70, 76 (Wis. 1995).

202. See 3 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 19.7(b)(3) (2d ed. 2003) (“A misrepresentation for false pretenses generally requires some affirmative conduct.”).

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view, consent to sex must be significantly uncoerced but it can be somewhat uninformed.

To his credit, Rubenfeld discusses the plausibility of this approach. Since “a coercion-based rape law would still exclude most cases of sexual deception” because “deception is not coercion,”²⁰³ Rubenfeld acknowledges that the result would be “a happy medium between a rape law so narrow that it prohibits only sex induced by physical force and a rape law so broad that it jails people who have sex while concealing their true age, looks, income, or degree of romantic interest.”²⁰⁴ Thus, “[a] coercion requirement offers an appealing compromise between the two extreme positions, reaching desired results while bringing rape law a step closer to sexual autonomy.”²⁰⁵

In spite of the admittedly attractive nature of this approach, Rubenfeld rejects it because “[t]he coercion requirement’s exclusion of rape-by-deception is contradicted by its own internal logic.”²⁰⁶ In order to demonstrate that viewing rape as uncoerced sex is conceptually problematic, Rubenfeld relies on an analogy between coercion and deception: “[a]n anti-coercion principle is attractive because coerced sex is unconsented-to sex.”²⁰⁷ However, “if unconsented-to sex is rape law’s target, then deceptive sex ought to be punished as well.”²⁰⁸ Expressed syllogistically, the argument goes like this:

- (1) All nonconsensual sex is punished as rape.
- (2) Sex obtained by deception is nonconsensual.
- (3) Therefore, sex obtained by deception should be punished as rape.

Rubenfeld’s argument falters because premise (2) is objectionable on both conceptual and practical grounds. From a conceptual perspective, he once again fails to consider that autonomy and consent have a non-coercive, and an informational dimension and that in some contexts lawmakers have decided to prioritize protection of one dimension over the other. Furthermore, if we believe that the chief threat to the legitimacy of sexual interactions is coercion, and not deception, then we may wish to draw the lines between sex and rape in precisely the way that Rubenfeld objects to.

From a practical perspective, Rubenfeld’s argument against viewing rape as uncoerced sex fails because he does not fully appreciate the real world concerns that generated the modern rape reform movement. The turn from force to consent in modern rape reform was not the product of a sudden realization that sexual autonomy mattered. Traditional rape law came under fire because it was erected upon conceptions of male aggressiveness and female passivity that are

203. Rubenfeld, *supra* note 12, at 1411.

204. *Id.*

205. *Id.*

206. *Id.* at 1412.

207. *Id.*

208. *Id.* (emphasis omitted).

characteristic of a patriarchal society.²⁰⁹ The requirements that the perpetrator obtain sex by physical force and that the victim physically resist were objectionable because they perpetuated a male-centered view of appropriate sexual conduct, regardless of whether consent to sex was nominally obtained. Under conditions of male dominance, female consent to sex was viewed as inherently suspect anyway.²¹⁰ In the language of coercion, we would say that sex in a male-dominated society was viewed as problematic because it was inherently coercive for women. It was this belief that heterosexual sex in a patriarchal social order was inherently coercive that spurred modern rape reform, not an abstract concern for maximizing autonomy.²¹¹

It is thus unsurprising that the reforms that ensued focused on outlawing coerced sex rather than sex obtained by deception. To borrow from Justice Holmes' oft-cited phrase, the life of rape reform "has not been logic . . . [i]t has been experience."²¹² Rape scholars focused on the non-coercive dimensions of consent and autonomy because the female experience of sex in a male-dominated society was characterized by aggression. Once placed in its proper context, consent in rape law emerges as a tool to counteract male aggression in both its physical and non-physical forms. Since modern rape reformers and scholars were primarily concerned with addressing coercion, their frequent references to sexual autonomy as the centerpiece of modern approaches to rape law should be understood against this backdrop.

This suggests that what contemporary rape reform scholars usually mean when they argue that we should embrace a given change in rape law, because doing so promotes the foundational right to sexual autonomy, is that the proposed change enhances the non-coercive dimension of autonomy. Since the informational dimension of autonomy is largely tangential to the central feminist project of rethinking the coercive component of autonomy, most references to autonomy in the rape reform literature are of limited usefulness in the rape by fraud context. To be sure, the move from force to consent also served to enhance the more liberal, abstract, and gender neutral notion of (sexual) autonomy. But this was only a salutary side effect of the main project, which was to do what could be done to counteract the aggressive view of sexuality imbued into the fabric of a patriarchal social order. The strong commitment to enhanced freedom in the coercive dimension that modern rape reform scholars display does not necessarily commit them to advocating for an equally robust recognition of informational autonomy. Once the view of rape as uncoerced sex is placed in its proper historical and social context, the tension that Rubinfeld perceives between broadly criminalizing sex by coercion and only exceptionally punishing sex by deception disappears.

209. See authorities discussed *supra* notes 132–41.

210. See *supra* notes 142–43.

211. *Id.*

212. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881); see also Falk, *supra* note 26.

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In more philosophical terms, defining rape as uncoerced sex is justified if we view the modern rape reform movement as one that sought to maximize sexual freedom or the non-coercive dimension of autonomy²¹³ as opposed to sexual autonomy itself. That is, as a movement that emphasized sexual choices that were not constrained by external pressures as opposed to sexual choices that were fully informed. I believe that this view of rape is more compatible with both the theoretical commitments of rape reformers and the practical reality of rape. Regarding the conceptual underpinnings of rape reform, the common thread that holds modern rape literature together is the worry that—under conditions of male dominance—female submission to sex is problematic even when physical force is not used. The concern with better understanding and counteracting the overt and subtle forms of coercion that shape sexual interactions in a patriarchal society is perfectly compatible with an approach to rape that primarily defines the crime as uncoerced sex. With regard to the practical reality of rape, the general experience of rape that informs modern rape law reform is that of sex that occurs because men want it even when women do not want it. Women submit to sex even when they do not want to because there are obvious and not so obvious social pressures that consciously and unconsciously constrain a woman's decision to have sex. An approach to rape that defines the crime as uncoerced sex is well-equipped to neutralize these pressures.

Once rape is viewed as a crime against sexual freedom, Rubinfeld's argument against defining rape as sex without coercion loses its force. Since coercion impinges on freedom in ways that deception does not, there is no contradiction in broadly prohibiting coerced sex and only selectively punishing deceptive sex.

An objection to this solution of the riddle is that the kind of freedom that is protected by this view of rape is nugatory. But this is not so. While more freedom or autonomy could obviously be protected both along the non-coercive and the informational dimensions, ensuring that sexual intercourse takes place without undue pressures is not a trivial matter. This is especially the case given the history of rape and rape reform. To the extent that the chief issue that rape reformers sought to address was the inherent compulsion that permeates sexual encounters under conditions of male dominance, a definition of rape that significantly broadens the kinds of coercion that give rise to liability is a logical and welcome development.

D. Defending the View of Rape as Uncoerced Sex

So far, I have argued that defining rape as uncoerced sex is perfectly compatible with the goals that modern rape reforms sought to advance. But can a definition of rape that mostly focuses on the non-coercive dimension of autonomy be defended on other grounds? Are there good reasons for viewing rape as

213. It is once again worth clarifying that what I mean by (sexual) freedom is coextensive with the non-coercive dimension of (sexual) autonomy.

a crime that seeks primarily to advance sexual freedom as opposed to sexual autonomy? I believe there are.

It could be argued that we ought to prioritize freedom over autonomy because freedom from coercion is more important than freedom from deception. More specifically, it is plausible to argue that coercion is—all things being equal—more wrongful than deception. This view is implicit in our legal system. Coercion is generally regarded as criminal. Physical coercion is typically punished as assault or battery. Non-physical forms of coercion are often punished as extortion or blackmail.²¹⁴ Coercion that results in sex is generally punished as rape, while coercion that results in takings of property is typically punished as theft or robbery. In contrast, deception is not generally regarded as criminal. The most blameworthy kind of deception—lying²¹⁵—is only punishable in certain contexts, such as theft by false pretenses and perjury. The other two kinds of deception—misleading²¹⁶ and passively deceiving²¹⁷—are generally not punished at all. If coercion is more wrongful than deception, then it is defensible to impose criminal liability in most cases of coerced sex while not doing so in most cases of sex by deception. While both coerced and deceived sex may be wrongful, it can be plausibly argued that coerced sex more often rises to the degree of wrongfulness that should trigger the imposition of criminal liability than sex by deception.

There are also good reasons to believe that coercion is more of a problem than deception in the specific context of rape. This is especially the case when we take into account the power imbalance that exists between males and females in a patriarchal society and how this power disparity creates inherently coercive circumstances when it comes to sexual relations between men and women. While heterosexual sex and coercion are intertwined in a patriarchal society, conditions of male dominance do not generate any special connection between sex and deception. Although some men surely use deception to obtain sex, so do some women. An empirical study on the deceptive practices of men and women in dating situations found that both men and women believe that “women are more likely to lie about their physical attractiveness, while . . . men are more likely to lie about their financial status, and their likelihood for com-

214. Regarding extortion, see generally *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 407–08 (2003), which explains that “extortion necessarily involves the use of coercive conduct to obtain property.” Regarding blackmail, see generally *Miller v. Lewis*, 381 F. Supp. 2d 773, 791 (N.D. Ill. 2005), stating that the “gravamen” of blackmail “is the exercise of coercion or an improper influence.”

215. Lying is asserting something that one knows is false. See STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME 78 (2006) (defining lying verbal deception as “asserting what one believes is literally false”).

216. Misleading is making an incomplete but true statement with the intent of leading the listener to believe something that is false. *Id.*

217. Passively deceiving is deliberately withholding material information. See, e.g., Lars-ry Alexander & Emily Sherwin, *Deception in Morality and Law*, 22 LAW & PHIL. 393, 414 (2003).

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mitment to a relationship.”²¹⁸ As a result, “both men and women . . . expect that members of the opposite sex will lie” in the context of social and sexual interactions.²¹⁹ It is thus unclear whether deception in the sexual context is more of a problem for women than for men. Since sex in a patriarchal society is inherently coercive but not inherently uninformed, the effects of patriarchal conceptions of appropriate sexual conduct are considerably more problematic in the context of coercion than in the informational context.

More importantly, it is not really necessary for men to use deception in order to obtain sex in a male-dominated society. Under social conditions that encourage male aggressiveness and female passivity, coercion is so infused into the fabric of sexuality that there is little need for men to use deception in order to obtain sex. Until we succeed in weeding coercion out of sexuality, there are contingent reasons for feminist rape reformers to care more about coercion than about deception.

An additional rationale that may justify protecting the informational dimension of consent more in medical malpractice and theft cases is the informational asymmetry that often characterizes the typical doctor/patient relationship and that is sometimes present in commercial property exchanges. In run-of-the-mill cases, doctors know exponentially more than patients about the nature and risks of medical treatment. In light of this asymmetry, disclosure rules that level the disparity of information seem sensible. To a lesser extent, the same is true regarding property exchanges. Given the nature of commercial transactions in modern times, it is common in some contexts for certain actors to consistently have more information than others.²²⁰ There is no such asymmetry in the context of sexual intercourse. When it comes to sex, there is no inherent reason why one party will regularly have more information than the other. In terms of information asymmetry, property exchanges seem to occupy an intermediate position between sexual interactions and doctor/patient relationships. Property transactions are more often plagued with informational asymmetry than sexual relations but less often than medical treatment decisions. This provides a plausible explanation of why theft law prohibits deception more broadly than modern rape law but less broadly than medical malpractice law.

IV. FRAMING PRINCIPLES FOR CRIMINALIZING RAPE-BY-DECEPTION

218. Joseph J. Benz, Mary K. Anderson & Richard L. Miller, *Attributions of Deception in Dating Situations*, 55 *PSYCHOL. REC.* 305, 312 (2005).

219. *Id.* at 313.

220. See Ronald J. Mann, *Verification Institutions in Financing Transactions*, 87 *GEO. L.J.* 2225, 2226 (1999) (“One of the most common problems in commercial transactions is the resolution of information asymmetries, situations in which one party to the transaction knows more about a relevant fact than the other party.”).

So far I have argued that modern rape law is best understood as seeking to protect sexual freedom as opposed to sexual autonomy itself. Expressed in terms of the dimensions of autonomy, I have argued that to the extent that modern rape law is concerned with autonomy, it is largely concerned with the non-coercive aspect of autonomy. Sexual freedom is about choosing to engage in sex without being pressured into doing so by external constraints. That is, sexual freedom is about the non-coercive dimension of autonomy rather than the informational or competency dimensions. According to this view, we can consent to have sex even when not fully informed of all relevant facts, as long as our choice is not constrained by the coercive acts of others. The paradigmatic case of nonconsensual sex that rape law seeks to prevent is thus *coerced sex*.²²¹ Uncoerced sex, on the other hand, is not generally rape. Given that deception is not usually coercive, sex by deception would not generally amount to rape under this view. As a result, the riddle of rape-by-deception is solved, since there is no tension between the view of rape as coerced sex and the refusal to broadly criminalize sex obtained by lies.

This does not mean, however, that sex by deception should never be criminalized. Although a thorough analysis of all of the circumstances in which obtaining sex by deception ought to be punished is outside the scope of this Article, in what follows I provide some brief framing principles that may help animate future discussions about what to call sex obtained by lies and whether to criminalize it.

A. *Coercive Deception*

While deception does not generally coerce, there are exceptional cases in which it may. The most obvious case is that of a misrepresentation that may lead a person to believe that their choices are constrained when they actually are not. Take the case of a police officer who deceptively tells a suspect that custody of her children will be taken from her if she does not confess to a certain crime. This lie can be described as coercive because it pressures the suspect into confessing. To be clear, the coercion does not emanate from the lie itself. Many lies do not pressure us into making a certain choice. There is no coercion if the suspect asks the police officer if he is a God-fearing person and the officer falsely responds affirmatively with the hope that this will endear him to the suspect. While the officer has certainly lied in this case, the lie is not coercive. This is the case even if the lie makes it more likely that the suspect will confess.

By definition, a view of rape as coerced sex would prohibit sex obtained by coercive deception. Two oft-discussed cases are illustrative. In *Don Moran v.*

221. It is worth repeating that the notion of coercion that I have in mind is quite expansive. Sex can be coerced if it is the product of physical force, but also if it results as a consequence of non-physical pressures. There can also be inherently coercive relationships and circumstances that may lead to a finding of coercion in the context of sexual relationships.

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People, a doctor told a fifteen-year-old girl that she had a life-threatening, ulcerated, inverted uterus and that the only way to save her life was to “enlarge her parts.”²²² He explained that this could be done with instruments, but that she would likely die in the process.²²³ A less dangerous alternative, he said, would be for her to have sexual intercourse with him.²²⁴ After initially objecting, the girl finally agreed to have sex with the doctor in order to save her life.²²⁵ Once the girl’s parents found out that this was all a ruse, the doctor was charged and convicted of rape by fraud.²²⁶ The conviction was overturned on appeal because rape required that sex be obtained by physical force and fraud does not amount to such force.²²⁷

The kind of deception used by the defendant in *Don Moran* in order to obtain sex certainly qualifies as coercive. The defendant’s lies did not merely amount to garden-variety deception that simply makes the victim’s choice less informed. His lies had the effect of pressuring the girl into consenting to sex when she did not desire to do so. The pressure was considerable, since she was falsely led to believe that she would likely die if she did not have sex with the defendant. Given the obviously coercive nature of the deception in *Don Moran*, the defendant’s conduct can easily be described as rape under the coerced sex view of the offense.

A modern case with a similar fact pattern is *Boro v. Superior Court*.²²⁸ The defendant in *Boro* falsely told the victim that he was a doctor and that he was in possession of medical tests that showed that she had a dangerous blood disease that could be lethal.²²⁹ He then told the victim that she could be cured by having sex with an anonymous donor that had been injected with a special serum that counteracts the disease.²³⁰ The victim had sex with the donor, who happened to be the defendant.²³¹ The prosecution charged the defendant with raping the victim, alleging that his fraud made her unconscious of the nature of the act.²³² The Court of Appeals disagreed with the prosecution’s reading of the statute, finding that the defendant’s conduct amounted to “fraud in the in-

222. 25 Mich. 356, 357 (1872) (internal quotation marks omitted).

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 356–57.

227. *Id.* at 367.

228. 210 Cal. Rptr. 122 (Cal. Ct. App. 1985), *superseded by statute*, CAL. PENAL CODE § 289(d)(4) (2017), *as recognized in* *People v. Robinson*, 370 P.3d 1043 (Cal. 2016).

229. *Id.* at 123.

230. *Id.*

231. *Id.*

232. *Id.* at 123–24.

ducement” rather than “fraud in the factum,” and only the latter kind of fraud could generate liability for rape.²³³ The court explained that fraud in the factum takes place when the defendant deceives the victim as to the nature of the act or when the defendant impersonates being the victim’s husband.²³⁴ It then held that the defendant in *Boro* did not deceive the victim as to the nature of the act, given that the victim was aware that she was consenting to intercourse.²³⁵ Instead, the defendant’s deception amounted to fraud in the inducement, which is not punishable as rape.²³⁶

Like the deception in *Don Moran*, the lies told by the defendant in *Boro* were clearly coercive. The deception not only made the victim’s decision to have sex misinformed, but also pressured her into consenting. As a result of the defendant’s lies, the victim believed that she would die unless she engaged in sexual intercourse. In light of the coercive nature of the deception in *Boro*, the defendant would be convicted of rape under an approach to rape that views the offense as coerced sex.

B. Deception that May Result in Serious Physical Harm

Medical malpractice law protects the informational dimension of autonomy because the consequences of misinformed consent in the medical context are often quite dire. In addition to violating patient autonomy, uninformed consent to medical treatment may lead to serious bodily injury or even death. As a result, the rules governing medical malpractice require not only that doctors abstain from lying to patients, but also that they affirmatively disclose material facts related to treatment so that a patient can make a well-informed decision.

A similar argument can be made in certain limited contexts when it comes to sexual relations. The most obvious case involves people who engage in sexual intercourse without disclosing to their partners that they are infected with a dangerous sexually transmitted disease (STD). The failure to disclose this information not only makes the resulting sex uninformed in a material way, but also may result in considerable physical injury and—in extreme cases—death. Failure to disclose such a condition prior to engaging in sex can thus be said to not only violate the partner’s sexual autonomy, but also her physical well-being. As a result, a strong case can be made in favor of making it a crime to have sex without prior disclosure of a dangerous STD.

If rape is primarily conceived of as coerced sex, it is not evident that having sex without disclosing a serious STD should amount to rape. While engaging in this conduct certainly creates a risk of considerable physical and non-physical

233. *Id.* at 125–26.

234. *Id.*

235. *Id.* at 124–25.

236. *Boro* was subsequently superseded by statute, as the California Supreme Court acknowledged in *People v. Robinson*, 370 P.3d 1043 (Cal. 2016).

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harm, it is difficult to describe a failure to disclose an STD as coercive. Consequently, sex obtained without such a disclosure would likely not amount to rape if the offense is limited to coercive sex. Nevertheless, the considerable potential for harm that is inherent in engaging in this kind of conduct counsels in favor of punishment. For example, an obvious way of doing so is by creating a crime of intentional or reckless exposure to HIV. This is the approach taken by many jurisdictions in the United States.²³⁷ These statutes are often enforced.²³⁸ In 2008, for example, an HIV-infected man was convicted by an Iowa court of “criminal transmission of HIV” for having sex without disclosing to his partner that he was infected with HIV.²³⁹

It is important to note that the reason this kind of deception may rise to the level of blameworthiness necessary to trigger the imposition of a criminal sanction is because it exposes people to serious physical injury rather than solely because it violates their sexual autonomy. As such, the decision to criminalize this kind of deception does not lead to any particular conclusion regarding whether to criminalize deception in other contexts.

C. Deception that Amounts to an Abuse of Authority by a Person in a Position of Trust

There are some cases in which deception also amounts to an abuse of authority in the context of a relationship in which one party is entrusted with the care of another. When the party entrusted with the care of another engages in harmful deception, she has abused her authority and thus harmed the party that she was supposed to care for in a special way. There is a sense in which the deception in these contexts is doubly blameworthy. On the one hand, it is blameworthy for the same reason that all deception is worthy of blame: it interferes with the other person’s informational autonomy. On the other hand, deception in this context is also blameworthy because it amounts to a breach of that trust. It is because of this added blameworthiness that these acts of deception are strong candidates for the imposition of criminal liability.

237. See, e.g., ARK. CODE § 5-14-123 (2017) (making it a crime to have sex without first informing the other person of the presence of HIV); see also ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 1080 (3d ed. 1982) (giving prosecution statistics).

238. The Center for HIV Law and Policy reported 279 prosecutions and arrests for HIV exposure in the United States from 2008 to 2016. See Positive Justice Project, *Prosecutions and Arrests for HIV Exposure in the United States, 2008–2016*, CTR. HIV L. & POL’Y (Jan. 18, 2017), <http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/Chart%20of%20U.S.%20Arrests%20and%20Prosecutions%20for%20HIV%20Exposure%202008-2016%20%28January%202017%29.pdf> [<http://perma.cc/29A6-NDBJ>].

239. Saundra Young, *Imprisoned over HIV: One Man’s Story*, CNN (Nov. 9, 2012, 8:42 PM), <http://www.cnn.com/2012/08/02/health/criminalizing-hiv/index.html> [<http://perma.cc/3QY9-ZQ8B>].

Such breaches of trust are exemplified by cases in which doctors falsely tell their patients that they are going to perform a medical examination when what they actually end up doing is engaging in a sexual act. The most obvious example is that of a gynecologist who tells the patient that he will insert a medical instrument in her vagina but instead inserts his penis. In *McNair v. State*, for example, a gynecologist asked patients to bend over in order to perform a routine medical examination, but instead anally penetrated them with his penis.²⁴⁰

By deceiving the patient in this manner, the doctor is not only violating her sexual autonomy, but also egregiously breaching the trust that patients place in their physicians. When doctors take advantage of this trust, they abuse their authority in a most flagrant kind of way. This was the view taken by the court in *McNair* when it upheld the defendant's conviction for rape. In explaining why the defendant's conduct amounted to rape, the court pointed out that he "held a position of trust and respect reserved for members of the medical community,"²⁴¹ and that because of this "[h]is patients came to his office on the premise that they would receive ethical, professional medical treatment for their ailments."²⁴² The deception in this case was particularly blameworthy because the defendant "abused his professional status and trust during medical examinations that were staged to exploit his unsuspecting and vulnerable patients and gratify his personal sexual desires."²⁴³

This view of the wrongfulness of these cases is not intended to minimize the harm to the patient's sexual autonomy that ensues when a doctor tricks the patient into having sex with him. Rather, it is meant to supplement that harm with the additional harm that follows from the physician's breach of trust. This kind of sex by deception is thus more blameworthy than the run-of-the-mill deception used to obtain sex. As the *McNair* Court explained, these cases are particularly worthy of condemnation because the deception amounts to a "misuse[] [of the doctor's] professional status" and to a breach of "trust" that "place[s] his patients in situations where they became his vulnerable and unsuspecting prey."²⁴⁴

The standard approach to these kinds of cases in judicial opinions is to treat them as instances of "fraud in the factum" that amount to rape because they negate the victim's consent.²⁴⁵ They amount to fraud in the factum because the deception prevents the victim from understanding the nature of the act. That is, the deception causes the victim to believe that she is consenting to something other than sexual intercourse.

240. 825 P.2d 571, 572–73 (Nev. 1992).

241. *Id.* at 575.

242. *Id.*

243. *Id.*

244. *Id.*

245. See, e.g., PERKINS & BOYCE, *supra* note 237.

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The problem with the fraud in the factum approach is that it fails to criminalize deception that induces patients to have sex with the doctor if the patient/victim was aware that she was consenting to sexual intercourse. In *Commonwealth v. Goldenberg*, for example, a woman seeking an abortion had sex with her doctor after he told her that having sexual intercourse with him would help with the procedure.²⁴⁶ The defendant was convicted of rape, but the conviction was later overturned on appeal because “[f]raud cannot be allowed to supply the place of the force which the [rape] statute makes mandatory.”²⁴⁷

The *Goldenberg* case would be decided differently pursuant to the approach that I advocate here. The considerable degree of blameworthiness in these kinds of cases is not the product of the somewhat arbitrary distinction between fraud in the factum and fraud in the inducement. While it is true that the victim in a fraud in the factum case (like *McNair*) is unaware that she is consenting to intercourse whereas a victim in a fraud in the inducement case (like *Goldenberg*) is cognizant that she has acquiesced to having sex with the physician, both cases feature deception by physicians in a position of authority that flagrantly breaches the trust that their patients have placed in them. As a result, both doctors seem like appropriate candidates for criminal liability.

My approach would also generate liability in abuse of authority cases outside of the medical context, such as in the English case of *Rex v. Williams*.²⁴⁸ The defendant in *Williams* had sex with his music student after he pretended to be testing her breathing power with an “instrument” and told her that her voice would improve if she had sexual intercourse with him, as doing so would open her air passages.²⁴⁹ The deception in this case does not amount to fraud in the factum because the student was aware that she was consenting to sex. As a result, it would not generate liability in the many jurisdictions that embrace the fraud in the factum/fraud in the inducement distinction. In contrast, the defendant in *Williams* would be punished pursuant to the approach that I defend here because the teacher’s deception amounted to a breach of the trust that the student justifiably placed in him. As such, the deception results in an abuse of authority that is particularly worthy of condemnation.

D. Other Cases of Deception

As I argued in Part II, modern rape statutes primarily seek to protect against sexual coercion. Since sex obtained by deception is not usually coerced, refusing to broadly criminalize sex by deception is not in tension with the chief goals of contemporary rape reform. There may nevertheless be cases of sex by deception that we wish to criminalize for reasons that go beyond those that inspired the modern rape reform movement. I have suggested three groups of

246. 155 N.E.2d 187, 189 (Mass. 1959).

247. *Id.* at 192.

248. 27 Cox C.C. 350, 350–51 (1922).

249. *Id.*

cases that I believe are worthy candidates for criminal punishment. They include cases in which the deception used to obtain sex is also coercive, instances in which great harm over and above the violation of sexual autonomy may ensue as a result of the deception, and situations in which the deception amounts to a breach of trust by a person who occupies a special position of authority.

This list is not intended to be exhaustive. It merely accounts for cases in which criminalization ought to be uncontroversial because the harms caused in each of these instances go well beyond the violation of the informational dimension of autonomy. In the coercive deception cases, the misrepresentations also violate the non-coercive dimension of autonomy. In the second group of cases, the failure to disclose prior to having sex may result in considerable harm to the physical well-being of the person and, in some cases, death. Finally, the deception in abuse of authority cases amounts to a flagrant breach of trust that is of considerable blameworthiness.

There will surely be other groups of cases of sex by deception that warrant criminalization. While identifying such cases is beyond the scope of this Article, it is useful to briefly highlight several considerations that ought to be taken into account when deciding whether to punish additional cases of sex by deception.

1. Lying To Obtain Sex Is Generally Worse than Having Sex Without Prior Disclosure of Material Facts

As an initial consideration, it is important to take into account how much the deception impacted the informational dimension of autonomy. As shown in Part I, the informational dimension of autonomy is scalar. Consequently, choices can range from being fully informed, to partially informed, to completely uninformed. Different kinds of deception will have a differential impact on how informed the resulting choice is. Some choices will be misinformed because of affirmative misrepresentations (i.e., lying), whereas some will simply be uninformed because of failure to disclose material facts (i.e., passive deception).

There are three reasons that make the case in favor of criminalizing sex obtained by lying stronger than the case supporting criminalization of sex without prior disclosure of material facts. First, criminalization of lying infringes less on our liberty than punishing failures to disclose. The duty imposed when lying is criminalized is solely to abstain from intentionally making false assertions. In contrast, the duty imposed when an obligation to disclose is required is to affirmatively reveal facts about your person. The latter duty is considerably more liberty-infringing than the former. Second, lying usually impacts informational autonomy more than passive deception, given that misinformed choices are less autonomous than uninformed choices. Third, lying is generally more blameworthy than passive deception.²⁵⁰ It follows that obtaining sex as a result of af-

250. See generally Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 165 (2001).

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firmative fraud is more worthy of condemnation than obtaining sex as a result of failing to disclose material facts.

While there are good reasons to abstain from criminalizing sex that is obtained without previous disclosure of material facts, there are exceptional cases in which criminalization may be warranted. The most obvious example is the failure to disclose a dangerous STD. These kinds of cases were discussed in some length in Section IV.B. of this Article.

2. Abstain from Criminalizing Deception that Furthers Privacy or Autonomy Interests

There are some cases in the sexual context in which the use of deception directly or indirectly furthers the privacy interests of the deceiving party. The case of the Scottish transgendered man discussed in the Introduction is a good example. The man was convicted of sexual assault by fraud for hiding his gender history from his girlfriend.²⁵¹ Without minimizing how the man's failure to disclose may have infringed on his girlfriend's informational autonomy, a strong case can be made in favor of not punishing this kind of deception.

The problem with punishment in cases like this is that the defendant's decision to hide information about his gender history can be justified as a way of furthering his privacy interests. To impose a duty to disclose his gender history would force him to reveal very personal information that he may legitimately want to keep private. It can plausibly be argued that in cases like this the harm to informational autonomy that is caused by the lack of disclosure is outweighed by the harm to privacy that would be caused if disclosure is required.

Privacy interests could also be implicated in cases in which defendants make assertions regarding their feelings for the other person. We may have good reasons for not wanting judges involved in figuring out whether expressions of love are sincere. Any process designed to ferret out the sincerity of such assertions will inevitably end up delving into private matters that should not generally be of concern to a liberal polity.

3. Other Cases

There are surely other cases in which sex obtained by deception causes serious harms that transcend the infringement of the victim's informational autonomy. Perhaps some cases of sex by deception cause considerably more emotional harm than others. If so, the argument in favor of punishing sex by deception gets stronger in direct proportion to the amount of emotional harm caused by the deception.

Compare the following two cases. In the first case, a Ryan Seacrest look-alike convinces a diehard fan of Seacrest's to have sex with him by falsely claiming that he is, in fact, the celebrity. In the second case, a man obtains sex from his longtime girlfriend after courting her for months and falsely claiming that

251. *Sex Fraud Woman Put on Probation*, *supra* note 6.

he will marry her, that he is childless, and that he is single. While the deception in both cases can be described as material to the victim's decision to have sex, the second case will likely cause considerably more emotional harm than the first. If so, the arguments in favor of criminalizing the second case are stronger than those in favor of punishing the first. We may still abstain from criminalizing the second case if we find that the emotional harm caused is not of a sufficient magnitude to trigger the imposition of criminal liability. Still, the case for criminalization is stronger in this case than in cases where less emotional harm is caused.

There are doubtless many other cases of sex by deception that cause serious emotional harm in addition to the infringement of informational autonomy. A comprehensive discussion of such cases exceeds the scope of this Article. Nevertheless, a sound general rule when approaching these cases is that the more serious the emotional harm that is caused by the deception, the stronger the argument in favor of criminalization.

CONCLUSION

The history and nature of modern rape reform, coupled with an analysis of the meaning and scope of consent and autonomy, reveal that the best understanding of contemporary rape doctrine is as a body of law that seeks to protect against coerced sex. While sex obtained by deception is obviously problematic, it simply does not raise the same concerns that sex obtained by coercion does under conditions of male dominance. It is thus unsurprising that modern rape statutes broadly criminalize coercion but only selectively punish deception. As a result—and contrary to what Rubinfeld argues—our current approach to rape-by-deception does not threaten to unravel the conceptual framework upon which modern rape law is erected.

While there is no inherent tension between a view of rape that primarily seeks to prohibit coerced sex and the refusal to broadly criminalize sex by deception, I have provided some guiding principles that may help courts and legislatures decide when to criminalize sex obtained by deception. The suggested approach would only selectively criminalize sex obtained by deception. In contrast to what Rubinfeld suggests, such selective criminalization is not incompatible with the kind of sexual autonomy that lies at the core of modern rape statutes. The riddle of rape-by-deception is thus solved.