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Balancing Sexual Autonomy, Responsibility, and the Right to Privacy: Principles for Criminalizing Sex by Deception

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Abstract
Due to the reconceptualization of rape and other sexual offenses as violations of one's sexual autonomy, consent has replaced the element of force as the focal point of rape law. This shift to a "consent model" of rape has prompted much discussion about the scope of sexual autonomy and the problem of "rape by deception" in legal scholarship. Most theorists of consent argue that certain forms of deception invalidate any token of consent in the same way as forcible sexual contact. However, there is also a widely shared concern that criminalizing sex-by-deception poses serious problems in terms of drawing the line between deceptions that violate sexual autonomy and deceptions that do not. This Article offers an account of principles that should be considered when examining legal cases related to sex-by-deception. These principles are examined and articulated in a way that strikes a balance between responsibility, autonomy, and rights such as the right to privacy.

Keywords: Sexual offenses; rape by deception; sexual autonomy

A. Introduction

For a long time, sexual autonomy was not part of the legal landscape, and the question of consent was more or less irrelevant for the legal assessment of sexual acts.[1] Rape was understood as a property crime against a woman's husband or father because rape destroyed the sexual purity and hence the value of the victim.[2] From this perspective, it is not surprising that many legal systems traditionally defined rape as forced extra-marital sex.[3] Because any woman who claimed that she had been raped was conceding that she had participated in the unlawful act

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

[2]Donald A. Dripps, *Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1781–83 (1992); KEITH BURGESS-JACKSON, RAPE: A PHILOSOPHICAL INVESTIGATION, 44–49 (1996); Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy,* 122 YALE L.J. 1372, 1388-92 (2013).

[3]For a detailed discussion of the marital rape exemption see Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000).

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of extramarital sex, the force element was understood as the criteria that excused the woman for having engaged in illegal intercourse.[4]

In the last decades, the importance of consent in sexual relationships has been reflected more and more.[5] It became widely accepted that "[h]aving control over who touches one's body, and how, lies at the core of human dignity and autonomy."[6] The right to sexual autonomy has developed into a fundamental human right worthy of state protection.[7] Because states are obliged to protect this right, the importance of consent for the assessment of sexual acts is obvious. As Wertheimer states, consent and autonomy are inextricably connected: "[Sexual A]utonomy refers to the value that is to be protected, whereas consent refers to the means for protecting and promoting that value . . . ."[8]

The effect of this on criminal law has been twofold. On the one hand, the law became more permissive in dealing with sexual conduct that used to be considered "immoral" but was, in fact, consensual—as in the case of homosexuality and extra-marital sex. On the other hand, the law became more punitive in its approach to non-consensual sex—such as child sexual abuse and rape.[9] On account of the reconceptualization of rape and other sexual offenses as violations of one's sexual autonomy, and under the obligation of human rights law, the element of consent has replaced that of force as the focal point of rape law.[10] Consequently, more and more European legal systems organize their understanding of sexual offenses around the absence of the victim´s consent,[11] even though not all countries criminalize non-consensual sex in itself as rape or as another sexual offense.[12]

The shift to a "consent model" of rape has prompted much discussion in legal scholarship related to the question of what factors might vitiate consent in sexual relations. Similar to other legal areas—for example, medical law or property offenses—three sets of circumstances are usually considered when assessing whether or not a person's decision is a true expression of autonomy: Mental capacity, or lack thereof, coercion, and errors or deceptions.[13] This Article focuses on the informational aspect of autonomy and consent. In medical law and clinical

[4]*See generally* Coughlin, *supra* note 1, at 30–32 (observing that the traditional elements of rape mimic the substantive arguments that we would expect a woman to make if she were trying to defend herself against an accusation of fornication or adultery).

[5]Volkmar Sigusch, *The Neosexual Revolution,* 27 Archive Sexual Behav. 331, 353 (1998); Patricia J. Falk, R*ape by Drugs: A Statutory Overview and Proposals for Reform*, 44 Ariz. L. Rev. 131, 187 (2002) stating that the "central value protected by sexual offense provisions is sexual autonomy"; Coughlin, *supra* note 1, at 2; Dripps, *supra* note 2, at 1785; Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 Chi.-Kent L. Rev. 359 (1993).

[6]*See* R v. Ewanchuk, [1999] 1 S.C.R. 330 (Can.) at para 28. *See also* Joan McGregor, Is It Rape? On Acquaintance Rape and Taking Women's Consent Seriously 106 (2005).

[7]*See e.g.*, M.C. v. Bulgaria, App. No. 39272/98, (Dec. 3 2003), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22003-883968-908286%22]}.

[8]Alan Wertheimer, Consent to Sexual Relations 31 (2003).

[9]*See generally* Gunter Schmidt, Das Verschwinden der Sexualmoral 16 (1996).

[10]Susan Estrich, Real Rape 102 (1987); Joan McGregor, *Force, Consent, and the Reasonable Woman*, *in In Harm's Way: Essays in Honor of Joel Feinberg* 231, 236 (Jules L. Coleman & Allen Buchanan eds., 1994); Stephen J. Schulhofer, Unwanted Sex: The Culture of Intimidation and the Failure of Law 102–03 (1998); David Archard, Sexual Consent 1 (1998); Jonathan Herring, *Mistaken Sex*, Crim. L. Rev. 511, 516 (2005); Stuart P. Green, *Lies, Rape, and Statutory Rape, in* Law and Lies: Deception and Truth-Telling in the American Legal System 194, 206–207 (Austin Sarat ed., 2015).

[11]Amnesty International, *Europe: Spain to become tenth country in Europe to define rape as sex without consent* (3 March 2020), https://www.amnesty.org/en/latest/news/2020/03/europe-spain-yes-means-yes/.

[12]*See*, for instance, Code pénal [C. Pén.] [Penal Code] art. 222-23 (Fr.); Schweizerisches Strafgesetzbuch [StGB] [Criminal Code] Dec. 21, 1937, SR 757 (1938), Art. 189, 190 (Switz.). *See also* Nora Scheidegger, Das Sexualstrafrecht der Schweiz, Grundlagen und Reformbedarf (2018); Nora Scheidegger, Agota Lavoyer, & Tamara Stalder, *Reformbedarf im schweizerischen Sexualstrafrecht – Egoistisch, rücksichtslos, kaltherzig – aber strafrechtlich nicht relevant?,* sui generis 57–75 (2020), https://sui-generis.ch/article/view/sg.122/1253/.

[13]*See e.g.*, Wertheimer, Consent, *supra* note 8, at 163; McGregor, Is it Rape? *supra* note 6, at 141; Archard, *supra* note 10, at 44–53.

research, deceiving someone about information that is relevant to the patient´s decision is taken very seriously.[14] However, when it comes to sex, laws and social norms seem to allow for a far broader range of manipulative practices.[15] As opposed to various common law jurisdictions,[16] civil law jurisdictions tend to avoid criminalizing deceptive sexual relations.[17] This seems inconsistent because if the decisive question in sexual assault law is the victim´s consent, it seems logical to look at all factors that undermine autonomy and consent.[18] Consequently, theorists of consent argue that certain forms of deception invalidate any semblance or token of consent, just as in the case of the use of force or coercion.[19] Yet, there is also a widely shared concern that the idea of rape-by-deception poses serious line-drawing problems between deceptions that violate sexual autonomy and those that do not.[20]

The first aim of this Article is to analyze the purpose and value of consent and why deception invalidates consent. The second aim is to propose principles for determining what forms of deception should be considered sufficient to vitiate consent. This Article will argue that the above-mentioned line-drawing problems do not justify abandoning consent as the focal point of rape law, and instead assert, that there are reasonable methods to decide where said lines should be drawn.

B. Sexual Autonomy and Consent

The right to sexual autonomy comprises negative and positive dimensions. The negative dimension includes the right to be free from non-consensual or unwanted sexual contact and the right to refuse to have sexual relations with anyone at any time. The positive dimension includes the right to engage in sexual activity one wishes to pursue with any consenting person.[21] However, this positive right to sexual self-determination is not unlimited. Sexuality is not a solo activity, and therefore has "built-in limits."[22] A person´s right to positive sexual self-determination can only exist as long as it is not in conflict with someone else's negative right to self-determination.[23] The negative right generates on others duties not to interfere. It is only through consent that the other person is released from non-interference and that consent makes it morally and legally permissible for others to engage with her in ways that would otherwise be impermissible.[24] This

[14]Ruth R. Faden & Tom L. Beauchamp, A History and Theory of Informed Consent 305–29 (1986). *See also* Rubenfeld, *supra* note 2, at 1372 ("[A]s courts have held for a hundred years in virtually every area of the law outside of rape, a consent procured through deception is no consent at all.").

[15]Wertheimer, Consent, *supra* note 8, at 199. But see Roseanna Sommers, *Commonsense Consent*, 129 Yale L.J 2232 (2020) (discovering that most people think that deceived individuals grant meaningful, morally transformative consent).

[16]Matthew Gibson, *Deceptive Sexual Relations: A Theory of Criminal Liability*, 40 Oxford. J. Legal. Stud. 82, 83 (2020).

[17]For an overview of the legal landscape, see Amir Pundik, *Coercion and Deception in Sexual Relations*, 28 Can. J.L. & Juris. 97, 98 (2015).

[18]Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 Brook. L. Rev. 39, 154 (1998).

[19]*See e.g.*, Estrich, *supra* note 10, at 102–03; Robin West, *A Comment on Consent, Sex, and Rape*, 2 Legal Theory 233, 239 (1996); McGregor, *supra* note 6, at 181; Herring, *supra* note 10, at 511 ("Deceit, like violence, manipulates people into acting against their will.").

[20]Scholars who write about the relationship between deception and consent often focus on this exact question. *See e.g.*, Vera Bergelson, *Sex, Lies, and Law: Rethinking Rape-by-Fraud*, in Consent and Control: Legal Perspectives on State Power (2016); Neil C. Manson, *How Not to Think About the Ethics of Deceiving into Sex*, 127 Ethics 415 (2017); Hugh Lazenby & Iason Gabriel, *Permissible Secrets*, 68 Phil. Q., 265, 277–80 (2018); Rita Vavra, *Täuschungen als strafbare Eingriffe in die sexuelle Selbstbestimmung*? ZIS 12/2018 611; Elisa Hoven & Thomas Weigend, *Zur Strafbarkeit von Täuschungen im Sexualstrafrecht*, KriPoZ 2018, 156; Rubenfeld, *supra* note 2, at 1372 (proposing an alternative principle of self-possession).

[21]Schulhofer, *supra* note 10, at 99; McGregor, *supra* note 6, at 111–12; Green, *supra* note 10, at 207. *See also* Tatjana Hörnle, *Sexuelle Selbstbestimmung: Bedeutung, Voraussetzungen und kriminalpolitische Forderungen*, 127 ZStW 851, 859–60 (2015).

[22]Corey Rayburn Yung, *Rape Law Fundamentals*, 26 Yale J.L. & Feminism, 1, 28 (2014).

[23]Schulhofer, *supra* note 10, at 99 ("Sexual autonomy, like every other freedom, is necessarily limited by the rights of others.").

[24]Tom Dougherty, *Sex, Lies, and Consent*, 123 Ethics 717, 734 (2013); Archard, *supra* note 10, at 3.

transformative power of consent is sometimes described as the "moral magic" of consent.[25] Thus, the key indicator for determining whether or not an individual's sexual autonomy is respected is consent.[26] Because of this strong link between autonomy and consent, a discussion of the principles of valid consent in the area of criminal law amounts to a discussion of the principles of legally protected autonomy. In other words, "consent is the vehicle through which legal actors translate concerns about autonomy into legally workable standards and rules."[27]

Beyond the conceptual discussion concerning the ontology of consent, and therefore the question of what consent is and what it does,[28] much has been written about the principles of valid consent. Here, it is important to distinguish between consent in its factual sense and consent in its normative sense. Consent that has been given in a factual sense does not necessarily amount to legally effective consent. A token of consent has the power to bring about a change in the nexus of rights and duties within a relationship only if it sufficiently reflects the agent's own will.[29] But what is valid consent and what factors undermine it? Based on the assumption that individuals are generally autonomous and thus responsible for their decisions, the question of validity is often determined by the absence of certain autonomy deficits.[30] As such, discussions usually center on three factors that invalidate any semblance of consent: Competence or capacity, (or lack thereof), coercion, and deception. In the presence of these autonomy deficits, even though a person may appear to have "given consent" in a factual manner, the consent is not morally or legally transformative.[31] First of all, competence is a key component of consent. Persons who are not able to understand the meaning and purpose, or the scope and significance, of their decisions are considered to be incapable of making an autonomous decision, and thus, incapable of giving valid consent. Second, consent is described as deficient or flawed if, due to coercion or deception, the consenting person makes a decision that does not correspond to her subjective value system.

Deceiving and lying violates autonomy because,

> [l]ying forces the victim to pursue the speaker's objectives instead of the victim's own objectives. If the capacity to decide upon a plan of life and to determine one's own objectives is integral to human nature, lies that are designed to manipulate people are a uniquely severe offense against human autonomy.[32]

[25]Heidi Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY, 121–46.

[26]There is an ongoing debate whether consent is sufficient to immunize a sexual act from moral wrongness or if something "more", like mutuality or the absence of exploitation, is needed—consent-plus approach. *See e.g.*, Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 SOUTHERN CAL. L. REV. 777 (1988); John Gardner & Stephen Shute, *The Wrongness of Rape*, in OXFORD ESSAYS IN JURISPRUDENCE, (Jeremy Horder ed., 2000); Vanessa E. Munro, *Concerning Consent: Standards of Permissibility in Sexual Relations*, 25 OXFORD. J. LEG. STUD. 335 (2005); ARCHARD, *supra* note 10, at 98–115.

[27]Luis E. Chiesa, *Solving the Riddle of Rape by Deception*, 35 YALE L. & POL'Y REV. 407, 437 (2017). *See also* Sommers, *supra* note 15, at 2232.

[28]For a general discussion see Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415 (2016); WERTHEIMER, *supra* note 8 at 144–52; MCGREGOR, *supra* note 6, at 118–31.

[29]Andreas Müller & Peter Schaber, *The Ethics of Consent: An Introduction*, *in* THE ROUTLEDGE HANDBOOK OF THE ETHICS OF CONSENT, 1, 3 (Andreas Müller & Peter Schaber eds., 2018); Thomas Gutmann, *Voluntary Consent*, *in* THE ROUTLEDGE HANDBOOK OF THE ETHICS OF CONSENT, 211 (Andreas Müller & Peter Schaber eds., 2018).

[30]Thomas Gutmann, *Zur philosophischen Kritik des Rechtspaternalismus*, in PATIENTENAUTONOMIE AM BEISPIEL DER LEBENDORGANSPENDE 189, 227 (Ulrich Schroth, Klaus A. Schneewind, Bijan Fateh-Moghadam eds., 2006). Scholars who write about autonomy and consent often structure their work in that sense by discussing the factors that undermine valid consent. *See e.g.*, WERTHEIMER, CONSENT, *supra* note 8; ARCHARD, *supra* note 10, at 44–53; SCHULHOFER, *supra* note 10, at 105; David Archard, *Sexual Consent*, in THE ROUTLEDGE HANDBOOK OF THE ETHICS OF CONSENT 179–81 (Andreas Müller & Peter Schaber eds., 2018); McGregor, *supra* note 6, at 139–93.

[31]PETER WESTEN, THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT 10 (2004) (distinguishing between "factual consent" and "legal consent").

[32]*See* David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 355 (1991). See also GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY, 14 (1988) (arguing from a Kantian perspective).

If a person is deceived about a fact that is the basis for her decision-making, then she is not able to exercise her autonomy[33] because she cannot determine whether her decision aligns with her preferences, which lie at the very core of autonomy.[34]

As Chiesa rightly points out, scholarship on rape traditionally regarded coercion as a bigger problem than deception because of the power imbalances between males and females in a patriarchal society.[35] Therefore, it is not surprising that modern rape reformers primarily target the force element requirement in rape statutes[36] and call for the criminalization of other non-physical forms of coercion and the abuse of power positions as well.[37] At the same time, the growing consensus on the importance of consent and autonomy has led scholars and lawmakers to focus on the issue of consent and *all* the factors that can potentially undermine it.[38] Since a person's choices made without access to the relevant information may not correspond to what she really would like to consent to, many scholars argue that it is a serious wrong to deceive someone into sex.[39] The argument usually runs as follows:[40] First, having sex with someone without her valid consent is seriously wrong and deserves punishment. Second, sex by—some kinds of—deception is having sex with someone without his valid consent. Therefore, sex by, some kinds of, deception is seriously wrong and deserves punishment.

If this argument is accepted, then there are adequate grounds to consider the criminalization of persons who "lie their way into bed." This increased focus on consent and autonomy has already resulted in an expansion of criminalization with regard to deceptive behavior in several countries. Courts have convicted people for obtaining consent to sex by lying about their marital status, ethnicity, religion,[41] or for misrepresenting their biological sex.[42] With more and more European countries introducing consent-based sex laws, it is expected that cases of sex-by-deception will increasingly appear in courts. Thus, it seems appropriate to take a closer look at the question of when sex obtained by deception should be considered a serious wrong.

C. Criminalizing Sex by Deception: Some Guiding Principles

When assessing sex-by-deception cases, one can usually diverge over two key criteria. The first criterion is whether words or conduct that amount to "active deception"—with respect to the possibly consent-invalidating information—are necessary, or if the exploitation of a false belief is enough. The second criterion concerns the *content* of the deception.[43] Before discussing these criteria, it is important to consider that sexual autonomy should not be conceptualized or understood with respect to some kind of "ideal." As Rönnau points out, errors—as well as constraints—are omnipresent in people's lives. If consent were to be measured against an idealized concept of autonomy, virtually all instances of consent would be regarded as deficient.[44] Consent cannot be

[33]Larry Alexander, *The Moral Magic of Consent (II)*, 2 Legal Theory 165, 165 (1996). *See* Danielle Bromwich & Joseph Millum, *Lies, Control, and Consent: A Response to Dougherty and Manson*, 128 Ethics 446, 456 (2018).

[34]A popular characterization of autonomous agents is discussed in Harry G. Frankfurt's seminal paper, F*reedom of the Will and the Concept of a Person*, in The Importance of What we Care About: Philosophical Essays 11 (1988).

[35]Chiesa, *supra* note 27, at 433.

[36]David P. Bryden, *Redefining Rape*, 3 Buffalo Crim. L. Rev. 317, 322 (2000); Estrich, *supra* note 10, at 69.

[37]Schulhofer, *supra* note 10, at 168–205.

[38]See e.g., Stephen J. Schulhofer, The Gender Question in Criminal Law, 7 Soc. Phil. & Pol'y 105, 135 (1990) stating, ("the next generation of issues [in rape law] will center on when or whether 'yes' . . . mean[s] yes.").

[39]Dougherty, *supra* note 24, at 721 (arguing that sex-by-deception involves a "serious wrong" that is comparable to other serious wrongs that are treated as rape).

[40]Adapted from Dougherty, *supra* note 24, at 720.

[41]CrimA 5734/10 Kashur v. State of Israel (2012) (Isr.).

[42]R v. McNally [2013] EWCA (Crim) 1051.

[43]Lazenby & Gabriel, *supra* note 20, at 265–66.

[44]*See* Thomas Rönnau, Willensmängel bei der Einwilligung im Strafrecht 210 (2001). *See also* Claudia Mills, *Politics and Manipulation*, Soc. Theory Prac. 97, 106 (1995).

contingent on one having every possible piece of information or even having all of the information one actually wants.[45] Similarly, Wertheimer states that we and the law must recognize that "there is a deep tension between insuring that the agent's consent is not seriously defective and not depriving her of the ability to effect morally transformative consent within the circumstances in which she finds herself."[46]

I. Autonomy and Responsibility

The first issue that must be addressed is whether it is important to distinguish between active deception concerning material facts or non-disclosure of material facts. In other words, should the *manner* in which the fraud is perpetrated matter when assessing whether the right to sexual autonomy has been violated?[47] Some scholars hold the view that non-disclosure of information should not attract criminal liability as long as there is no legal duty for the defendant (D) to disclose the relevant fact.[48] It seems preferable to follow this view, because it conforms with the principle of responsibility. Autonomy goes hand in hand with responsibility because they are two sides of the same coin.[49] One does not exist without the other. If the law allows its citizens to act without having to bear the consequences of their actions, it does not recognize them as autonomous persons but rather infantilizes the individual.[50] Giving consent is an act by which responsibility (for the consented action) is taken, thus owning the act in a moral sense.[51] According to the principle of responsibility, each person is—as a general rule—responsible for his or her own knowledgeability. Taking on responsibility for the consented act includes taking the responsibility for potential information deficits *unless* the deficit falls in the area of the responsibility of another person. If the victim's (V) consent is considered invalid even though the source or cause of ignorance or error falls within V's area of responsibility, V is not recognized as an autonomous person.[52] The invalidity of consent may only be considered if the interfering party holds leverage over the decision-making freedom of the victim, for example, when D exercises wrongful power over the creation of V's false beliefs,[53] either by active deception or non-disclosure in cases in which D has a duty to inform V.

In other areas, for example, within the medical context, non-disclosure of material information is typically enough to create criminal liability.[54] In the medical context, professionals are legally responsible that their patients possess all necessary information to make an informed decision. This obligation to disclose relevant information in the medical profession is a well-founded exception of the principle of (self-) responsibility.[55] The redistribution of responsibilities from patient to

[45]*Id.*

[46]Alan Wertheimer, *What is Consent? And Is It Important?,* 3 BUFFALO CRIM. L. REV. 557, 564 (2000).

[47]*Contra* R. v. Lawrance [2020] EWCA (Crim) 971 (UK).

[48]Lazenby & Gabriel, *supra* note 20, at 266 ("The majority of accounts defend the proposal that only deception concerning consent-invalidating information will invalidate consent to sexual relations.").

[49]MICHAEL PAWLIK, DAS UNRECHT DES BÜRGERS 219–20 (2012).

[50]*See id*; *see also* Florence Ashley, *Genderfucking Non-Disclosure: Sexual Fraud, Transgender Bodies, and Messy Identities*, 41 DALHOUSIE L.J. 339, 375 ("Consent is an act by which we take on moral responsibility, deliberately positioning ourselves as the source of the act and making it ours in a deep moral sense. To vitiate it too readily would be infantilising.").

[51]JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF 100 (1986) ("From the moral point of view, my consent to his action makes it as if it were my own.")

[52]*See* UWE MURMANN, DIE SELBSTVERANTWORTUNG DES OPFERS IM STRAFRECHT 458 (2005) ("Der Einwilligende ist als Rechtsperson nicht angemessen erfasst, wenn seinen defizitären Erklärungen die rechtliche Wirksamkeit auch dann genommen wird, wenn das Defizit in seinen Verantwortungsbereich fällt."). *See also* PAWLIK, *supra* note 49, at 234.

[53]*See* Mills, *supra* note 44, at 106 ("If autonomy is to be reduced to some normative core . . . we will say I act autonomously only if no one has interfered *wrongfully* with the conditions of my choice.").

[54]*See* Lazenby & Gabriel, *supra* note 20, at 266.

[55]*See* CLAUS ROXIN & LUÍS GRECO, STRAFRECHT ALLGEMEINER TEIL, BAND I, GRUNDLAGEN, DER AUFBAU DER VERBRECHENSLEHRE, § 13 n. 115, (5th ed., 2020).

medical provider seems appropriate in view of the structural inferiority causing the patient's relative lack of medical knowledge.[56]

To conclude that active deception invalidates consent, whereas the mere exploitation of a mistaken belief should typically not be enough, however, does not mean that the outcome of cases of so called "gender fraud"—like the case of McNally, in which it was concluded that active deception occurred and that McNally deliberately deceived the complainant into believing that he was male when in fact the defendant was biologically female—must be endorsed.[57] In this case, it might be argued that the characterization of a trans person's behavior as active deception rests on the problematic or even false assumption that the categories sex and gender are fixed and therefore unchanging. Only within these parameters is it possible to argue that to live one's life as a man, when one is biologically female, is a "deceptive" behavior.[58] By contrast, if it is accepted that a transsexual man is a man, it is impossible to qualify his way of living as "pretense" or "deception", but rather as a genuine expression of his identity. From this point of view, deception has not occurred. The only accusation that remains plausible against gender non-conformity is that they had kept their own "gender history" a secret from their sexual partner.[59]

The second criterion which needs to be taken into consideration concerns the different kinds or types of deceptions. Should all "active" deceptions about a subjectively important fact vitiate consent or should the content about which V was deceived be relevant?

II. The "Traditional" Approach

The traditional approach to classify the types of deceptions that vitiate consent versus those that do not distinguishes between *fraud in the factum* and *fraud in the inducement*.[60] The distinction between the two can be described as follows: If the deceived victim is unaware that sexual intercourse—or another sexual act—is taking place, the fraud is classified as fraud in the factum. If the victim is aware of engaging in sexual intercourse but has been induced to do so with a fraudulent lie, then the fraud is classified as fraud in the inducement.[61] A paradigmatic case of fraud in the factum involves the gynecologist who tells a patient he needs to insert a medical instrument into her vagina and then inserts his penis instead.[62] Two paradigmatic cases of fraud in the inducement are the physician who obtains consent by telling his patient that having sex will cure some malady,[63] and the singing teacher who tells his pupils that sex will advance their singing skills.[64] In the first case of fraud in the factum, V consents to the penetration by an instrument, not by the penis.

[56]Bijan Fateh-Moghadam, Die Einwilligung in die Lebendorganspende. Die Entfaltung des Paternalismusproblems im Horizont differenter Rechtsordnungen am Beispiel Deutschlands und Englands 191–92 (2008).

[57]Source cited *supra* note 42. In McNally, D, who was born with female genitals but identified as male, "claimed" to be a young man and entered into a relationship with the young woman V. D and V engaged in a number of sexual contacts, while V assumed that D was male. V stated that she would not have engaged in those activities had she known the truth about D´s sex. For a more detailed discussion of the case, see Alex Sharpe, *Criminalising Sexual Intimacy: Transgender defendants and the legal construction of non-consent*, Crim. L.R. 207 (2014).

[58]Sharpe, *supra* note 57, at 216–17.

[59]Sharpe, *supra* note 57, at 214–15; Gibson, *supra* note 16, at 91. Even if we reject this line of reasoning, we could still argue that "gender fraud" should be permissible, because gender and gender history are a private matter. *See* Ashley, *supra* note 50 at 356–57 and *infra* notes 104–124 and accompanying text.

[60]Falk, *supra* note 18, at 157.

[61]*See* Rollin M. Perkins & Ronald N. Boyce, Criminal Law 215 (3d ed. 1982).

[62]*People v. Minkowski*, 204 Cal. App. 2d 832 (1962).

[63]*Boro v. Superior Court*, 210 Cal. Rptr. 122 (Ct. App. 1985). A growing number of sexual assault statutes—including California´s Penal Code. *See* Section 261—expanded their definitions as inclusive of professional-purpose misrepresentations. Also, the English law has recently expanded to include fraud as to the purpose as well as the "nature" of the sexual act. *See* Sexual Offences Act 2003 76(2)(a). *See also* Crimes Act 1900 (NSW, AUS) Section 61HE (6)(b) ("mistaken belief that the sexual activity is for health or hygienic purpose").

[64]R. v. Williams [1923] 1 KB 340 (Eng.).

In the other cases, V is deceived with regard to a collateral matter, namely her *reason* for consenting to sexual intercourse. Traditionally, engaging in intercourse by fraud in the factum vitiated consent and thus resulted in rape liability—or liability to a lesser criminal offense—while fraud in the inducement did not.[65] The factum/inducement distinction is similar to the approach taken by German criminal law doctrine. According to some scholars of consent theory, only those deceptions concerning essential features of the specific act are consent-vitiating (*rechtsgutsbezogen*), whereas deceptions concerning motives are not considered relevant.[66]

There has always been one widely accepted exemption to the above-mentioned rule: Traditional common law assumed that husband impersonation render a sexual act rape.[67] Some courts have argued that husband impersonation constitutes a fraud in the factum because the woman's consent is to intercourse with her husband, not to the impersonator and, as such, "what is actually perpetrated on her is an act of adultery."[68] Therefore, spousal impersonation was traditionally understood as changing the sexual act into adultery, thereby altering the nature of the act.

The question of whether spousal impersonation scenarios[69] should be considered as fraud in the factum illustrates a major problem regarding the factum/inducement distinction.[70] As illustrated above, the classification depends on how the act or the "nature" of the act is construed. As critics have noted, there is no principled way to determine what counts as "the act itself" and what is merely a collateral matter.[71] It is possible to say that V's decision to sleep with D who pretends to love her involves a decision to an act of love-making and not to sex without deeper feelings.[72] Therefore, "[e]verything turns on the way in which the case is described."[73] If too much is packed into the description of the nature of the act or of what has to be consented to, the factum/inducement distinction could be undermined altogether.[74]

Setting aside these definitional concerns—all conceptual boundary lines are hard to draw—we could go further and question the distinction's implication altogether.[75] The decision to only criminalize fraud in the factum and spousal impersonation makes perfect sense when considered from a historical perspective.[76] Historically, sex law was not about sexual autonomy. Rather, it was grounded on a puritanical and conservative sexual morality centered on sex within the boundaries of marriage. The only permissible sex during this time was marital intercourse. When a woman had consensual sex with someone else, she was found guilty of one of the crimes of adultery, fornication, or prostitution. Therefore, it is comprehensible that sexual fraud was recognized as relevant only in cases in which sex outside the marriage could be depicted as morally innocent.[77]

[65]Perkins & Boyce, *supra* note 61, at 215.

[66]This approach was developed by Gunther Arzt. *See* Willensmängel bei der Einwilligung 15 (1971), and has been adopted by many scholars since. *See e.g.*, Roxin & Greco, *supra* note 55, § 13 n. 99. As Sommers, supra note 15, at 2295 shows, even folk intuition roughly tracks the factum/inducement distinction.

[67]*See e.g.*, *Boro*, 210 Cal. Rptr. at 125 (stating that spousal impersonation is fraud in the factum and therefore rape). *See also* Russell L. Christopher & Kathryn H. Christopher, *Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape*, 101 NW. U. L. Rev. 75, 85 (2007); Westen, *supra* note 31, at 198–99.

[68]*Boro*, 210 Cal. Rptr. at 125 (quoting Perkins & Boyce, *supra* note 61, at 1081).

[69]Some jurisdictions have expanded the law to include not only husband impersonation, but the impersonation of any person known to the victim. *See. e.g.*, Sexual Offences Act 2003 76(2)(b); Cal. Penal Code § 261(5).

[70]Christopher & Christopher, *supra* note 67, at 85.

[71]Westen, *supra* note 31, at 198–99; Wertheimer, *supra* note 8, at 197; Falk, *supra* note 18, at 69.

[72]*See* Jane E. Larson, *Women Understand So Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction*, 93 Colum. L. Rev. 374, 466–67 (1993). *See also* Joel Feinberg, *Victims' Excuses: The Case of Fraudulently Procured Consent*, 96 Ethics 330, 335 (1986).

[73]*See* Wertheimer, *supra* note 8, at 206. *See also* Feinberg, *supra* note 72, at 345; McGregor, *supra* note 6, at 185.

[74]Feinberg, *supra* note 72, at 335.

[75]*See, e.g.*, McGregor, *supra* note 6, at 181–90; Wertheimer, *supra* note 8, at 206.

[76]Rubenfeld, *supra* note 2, at 1401–02.

[77]Coughlin, *supra* note 1, at 31–32.

Consequently, in historical terms, the only scenarios in which sex-by-deception could qualify as rape was when the woman believed she was not having sex at all—as in fraud in the factum—or when she believed she was having marital sex even though she was not—as in husband impersonation. In each of these cases, the woman would not have knowingly surrendered her virtue and her actions would not have been considered criminal under fornication or adultery laws.[78]

Despite the problematic historical background of the factum/inducement distinction, it may easily be argued that sexual autonomy provides a sufficient rationale for the criminalization in cases of fraud in the factum, or, in modern terminology, cases of deception regarding the "nature of the act." There is a difference between a lack of consent and a lack of *informed* consent. Sex by fraud in the factum should properly be described as sex without *any* consent. In the first example of the gynecologist, V consents to the insertion of a medical instrument, not to the insertion of a penis. Consequently, there is no consent at all "because what happened is not that for which consent was given."[79] The same reasoning can be applied to cases of "stealthing." We all accept the premise that different sexual acts require separate consent. So, for example, we accept that a person who consents to vaginal penetration does not automatically consent to anal penetration. As Brodsky argues, contact with the skin of a penis is significantly distinct from contact with a condom. Therefore, these two different sexual acts each require separate consent.[80] When D removes the condom and penetrates V without the condom, he has not just acted fraudulently with regards to consent, he has actually acted with no consent at all. V has been denied the right to choose whether or not to engage in this specific sexual act—a right which lies at the very core of sexual autonomy.[81]

Because cases of fraud in the factum are relatively unproblematic, the following paragraphs engage with the question as to why fraud in the inducement related to sexual intercourse is often not considered serious enough to be a crime at all.[82] Why is it not considered criminal if D obtains V's consent to sex by falsely claiming that he loved V, that he was single, that he had no criminal past, that he would marry V, that he was a football star, that (s)he was "male", or that (s)he was using birth control or was sterile?

III. New Developments: Rubenfeld's Riddle

Rubenfeld rightly points out that it is not compatible with the principle of sexual autonomy to exclude the majority of cases of fraud in the inducement from criminal liability.[83] In consent and autonomy theory, it is generally accepted that autonomy can be violated by lies and deception just as it can be with the use of force or by threat.[84] From this perspective, the key criterion should be whether or not the deception concerns a matter that is material to V's decision to have sex. If

[78] *Id.*

[79] Perkins & Boyce, *supra* note 61, at 215; see also McGregor, *supra* note 6, at 183. Similarly, some German scholars treat cases of deception as to the nature of the act as absence-of-consent cases. *See e.g.*, Alfred Göbel, Die Einwilligung im Strafrecht als Ausprägung des Selbstbestimmungsrechts 86 (1992); Rönnau, *supra* note 44, at 227.

[80] Alexandra Brodsky, *"Rape-Adjacent": Imagining Legal Responses to Nonconsensual Condom Removal*, 32 Colum. J. Gender & L. 183, 195 (2017).

[81] *Id.*

[82] This is what Dougherty calls the "Lenient Thesis." *See* Dougherty, *supra* note 24, at 718. In defense of the "Lenient Thesis" see for example, Michael Bohlander, *Mistaken Consent to Sex, Political Correctness and Correct Policy*, 71 J. Crim. L. 412, 426 (2007). *See also* Robin West, *On Rape, Coercion, and Consent*, Jotwell (March, 15 2016), https://juris.jotwell.com/on-rape-coercion-and-consent/; Jed Rubenfeld, *Rape-by-Deception—A Response*, 123 Yale L.J. 389, 402 (2013); Manson, *supra* note 20 at 419–20. *But see* Estrich, *supra* note 10, at 102–103.

[83] Rubenfeld, *supra* note 2, at 1402–03.

[84] *See, e.g.*, Feinberg, The Moral Limits of the Criminal Law, Harm to Others 116 (1984); Bromwich & Millum, *supra* note 33, at 446.

the matter is material to V's decision—or as Dougherty says, a "deal-breaker"—[85]then deception should *prima facie* vitiate V's consent.

These considerations lead Rubenfeld to conceptualize his "riddle of rape by deception." Rubenfeld argues that when sex law takes sexual autonomy as its central value—and if it is accepted that deception about any fact that is material to V may vitiate consent—then the exclusion of what might be considered by some "trivial" deceptions as a means of committing the crime of rape—or at least of a serious wrong, as Dougherty puts it—seems inconsistent.[86] To solve the riddle, all instances of sex-by-deception must be taken more seriously or the principle of sexual autonomy and consent as the driving legal principle in sex law does not hold.[87]

1. The "Unrestricted View"

Some scholars choose the former horn of the "all or nothing" dilemma presented by Rubenfeld. [88] According to Herring, consent ought to be considered vitiated whenever V "is mistaken as to a fact," and, as such, would not have consented to sexual activities had she "known the truth about that fact" in circumstances where the defendant was aware of the same.[89] In this manner, all deal-breaking information should be considered as invalidating consent even when it appears irrational or ridiculous to external observers. For example, if D lies about his or her *alma mater*,[90] his criminal past, or deceives V as to whether he or she loves V[91] in order to get her to consent, knowing that V would not have consented to the sexual act had she known the truth about any of these matters, D's conduct amounts to serious violation of V's sexual autonomy.[92] The *mens rea* requirement would ensure that defendants would not be prosecuted if they did not realize the relevance of a certain fact for their partner's decision.[93]

By assessing the validity of consent in a purely subjective manner, it must be accepted that V's "deal-breaker" may be based on problematic worldviews held by V such as homophobia, transphobia, xenophobia, or anti-Semitism. To fully endorse this "unrestricted view"[94] means accepting that D might get punished for lying about her ethnic background to a racist person or lying about her gender history to a transphobic person. Herring acknowledges that his proposed model may have these sorts of consequences:[95]

> We may think it . . .unpleasant that V does not like to have sex with Jewish men, but ultimately it is for V to decide with whom to have sex with. She should not fall outside the law's protection simply because others do not agree with the reasons behind her sexual decisions. She is under no duty to supply sexual service to others on a non-discriminatory basis.

Nevertheless, this Article argues that the view supported by Herring and others is both too uncompromising and too one-sided because it ignores the fact that people "may be influenced by information to which they have no right or which others have a legitimate privacy-based

[85]Dougherty, *supra* note 24, at 719.

[86]Rubenfeld, *supra* note 2, at 1402-3.

[87]Rubenfeld, *supra* note 2, at 1423 and 1432 ("When rape law takes autonomy as its central value . . . the exclusion of deception . . . seems like a riddle, an unjustifiable exception.").

[88]*See e.g.*, Tom Dougherty, *No way Around Consent: A Reply to Rubenfeld on 'Rape-by-deception'*, 123 YALE L.J. 321 (2013).

[89]Herring, *supra* note 10, at 517.

[90]Dougherty, *supra* note 88, at 322.

[91]Herring, *supra* note 10, at 519.

[92]*See id.* at 524; *see also* Dougherty, *supra* note 88, at 333 reluctantly accepting that "someone can be guilty of rape-by-deception by falsely saying he went to Yale.".

[93]*See* Herring, *supra* note 10 at, 517; *see also* Gibson, *supra* note 16, at 99.

[94]Lazenby & Gabriel, *supra* note 20, at 268.

[95]Jonathan Herring, *Rape and the Definition of Consent*, 26 NATL. L. SCH. INDIA REV. 62, 71 (2014).

interest in protecting."[96] Unsurprisingly, only few scholars are willing to endorse the "unrestricted" position in its entirety[97] even though a lot of scholars criticize the validity of the factum-inducement-distinction and/or reject the assumption that fraudulent inducement generally fails to vitiate consent. The issue factors have led to different attempts to draw a new boundary line—often through defining categories of relevant and irrelevant deceptions.[98] A distinctive argumentative approach shall briefly be discussed below.

2. Freedom, not Autonomy?

Chiesa's solution to the riddle of rape-by-deception is to reject the central premise of this Article and to instead take the position that sex law is not primarily designed to protect sexual *autonomy* but rather sexual *freedom*.[99] To better understand this approach, it is important to highlight his distinction between freedom and autonomy. Chiesa considers a choice as *free* when it is not coerced by external forces—while internal constraints might result from a lack of competence. Accordingly, sexual freedom involves the choice to engage in sex without being pressured into doing so by external constraints. Autonomy on the other hand requires not only freedom from coercion, but equally a certain amount of information. Thus defined, freedom is typically a condition for autonomy, but not every interference with autonomy interferes with freedom.[100]

If Chiesa's premise that the law's goal is to protect sexual *freedom*—as opposed to sexual autonomy—is accepted, we may come to terms with the fact that sex-by-fraud goes largely unpunished as long as the victim's choice is not constrained by coercive or exploitative acts of others. Consequently, there are only a few examples of sex-by-deception that should be considered worth of criminalization. One of these is the example similar to the one found in the *Boro Case*, where V is falsely led to believe that she would likely die or suffer intense harm if she did not have sex with D.[101] In such cases, the victim is not only misinformed but also "pressured" into consenting.[102] Other examples are cases in which the deception amounts to an abuse of authority in the context of a relationship in which one party—for example, a doctor or a teacher—lies to patients or pupils in order to have them consent to sexual acts.

Chiesa is most likely correct in his empirical analysis that, until recently, law and scholarship have been mostly concerned with sexual freedom rather than with sexual autonomy, and that the paradigmatic case of non-consensual sex that rape law seeks to prevent is in fact *coerced* sex. Ultimately, however, what the law should actually protect is a normative and political question. If sexual autonomy is used as the leading moral and political principle, then sex-by-deception cases must be considered in legal cases. Moreover, the "freedom, not autonomy-view" seems to be under-inclusive because not all—at least intuitively—relevant cases of sex-by-deception involve an abuse of power.[103]

[96] WERTHEIMER, *supra* note 8, at 198.

[97] Herring himself notes that few legal academics have been willing to endorse his position. *See* JONATHAN HERRING, CRIMINAL LAW: TEXT, CASES AND MATERIALS 493 (5th ed., 2020). *See also* Robert Jubb, *Consent and Deception*, 12 J. ETHICS SOC. PHIL. 223, 227 (2017).

[98] *See e.g.*, Hörnle, *supra* note 21, at 880–81.

[99] Chiesa, *supra* note 27, at 440–42.

[100] *Id.* at 421–22.

[101] Chiesa, *supra* note 27, at 452–54 (referring to *Boro v. Superior Court*). In German doctrine, a seminal position is held—in the non-sexual context—by, for example, ROXIN & GRECO, *supra* note 55, at § 13, n. 105 ("In solchen Fällen hat die Täuschung eine Nötigungswirkung.")

[102] Chiesa, *supra* note 27, at 454.

[103] Chiesa, *supra* note 27, at 458 (emphasizing that there "surely" may be other groups of cases of sex-by-deception that warrant criminalization).

3. The Right to Privacy

This section of the Article returns to the problematic aspects of the "unrestricted view" mentioned previously. As already noted, it seems that the "unrestricted view" fails to acknowledge that, while being an important right, the right to sexual autonomy is not an unlimited one and must be balanced against the right to privacy.[104]

Herring does acknowledge that his proposed model raises a possible clash between V's right to sexual autonomy and D's right to privacy. He argues, however, that the right to privacy is subservient to the right to sexual autonomy of their partner.[105] According to Herring the only way for D to avoid criminalization *and* to keep his information private is to refrain from sexual relations with V altogether.[106]

It might be argued that this "solution" is not always a suitable way to protect D's private information. Suppose D and V were married and had regular intercourse. Moreover, suppose V told D that she would never sleep with him again if he ever cheated on her. As such, D knew that faithfulness was a material fact for V's consent to have sexual intercourse. One day D cheats on V but chooses not to tell V and instead lies about the affair when being asked. According to Gibson and others, D then has two possibilities: He either continues to have sexual intercourse with his wife and risks criminalization, knowing that she would not consent if she knew the truth, or, D refrains from sexual activities with V, which would inevitably lead to further questions and distrust. Either way then, V is likely to know or at least suspect that D cheated on her. In this sense, it seems to be no way D may keep this information private. It is easy to imagine further examples. Suppose V told D: "I would never want to have sex with someone who used to be a sex worker. You have not worked in the industry, have you?" From this moment on, D risks criminalization or risks that V suspects and eventually finds out about her former work. To abruptly refrain from sexual contacts would, in practice, result in disclosure. Therefore, the only way to protect the information from scrutiny is to deceive V about the matter in question.

Setting aside these special cases, there is yet a more fundamental objection to the "unrestricted view." Why—if at all—should the right to privacy of D be outweighed by V's right to sexual autonomy?[107] Even though the right to sexual autonomy is one of the most important personal rights, there are other rights and interests of high value, the right to privacy being one of them.[108] The right to privacy is of paramount importance to human dignity, personhood, and communal life.[109] It is essential to the free development of an individual's personality and identity because it allows us to think freely, to leave our past behind us, and to avoid unjust discrimination.[110]

The right to privacy has an important social function because "[t]here is a close connection between our ability to control who has access to us and to information about us and our ability to create and maintain different sorts of social relationships with different people."[111] The right to privacy has an important protective function as well. Revealing oneself as transgender or as a former sex worker or admitting unfaithfulness might expose a person to considerable psychological

[104]*See* Alex Sharpe, *Queering Judgment: The Case of Gender Identity Fraud*, 81 J. CRIM. L. 417, 429–30 (2017).

[105]*See* Herring, supra note 10, at 522–23.

[106]*Accord* Gibson, *supra* note 16, at 104.

[107]We could imagine the same problem in another legal context: Should the fact that a doctor lies about, for example, his homosexuality, render the homophobic patient's consent invalid?

[108]HERRING, *supra* note 97, at 495 (acknowledging that a trans person's rights to privacy and their partner's right to sexual autonomy are both very important rights).

[109]Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, *in* PRIVACY: NOMOS XIII 1, 15–26 (J. Roland Pennock & John W. Chapman eds., 1971); *see generally* Ferdinand Schoeman, *Privacy: Philosophical Dimensions*, 21 AM. PHIL. Q. 199–213 (1984).

[110]Lazenby & Gabriel, *supra* note 20, at 274.

[111]James Rachels, *Why Privacy is Important*, 4 PHIL. & PUB. AFF. 323, 326 (1975) (arguing that privacy is central to a person's ability to maintain varying kinds of relationships).

and physical risks.[112] As Ashley notes in the context of the so-called gender fraud, privacy rights are "not just abstract protections desirable for their own sake. Privacy rights are a vehicle of . . . people's safety, emotional wellbeing, and substantive equality."[113]

This Article agrees with those scholars who argue for an adequate balancing of these somewhat competing rights. More specifically, this Article asserts that D's right to privacy plays an important role in structuring V's rights. It might be insightful to consider an analogy related to deceiving someone into granting consent compared with coercing someone into granting consent. Following Wertheimer, the rather simple idea that D coerces V in a legally relevant sense whenever D exerts extreme pressure on V and V yields to that pressure should be rejected.[114] Coercion should not be considered an empirical, but rather a normative concept. Wertheimer's rights-based theory of coercion distinguishes between rights-violating threats from threats or "proposals" that are not rights-violating.[115] A proposal is considered coercive—and hence nullifies the transformative power of consent—if, and only if, D proposes to violate V's rights—or fails to fulfil a rights-based obligation to V–should V reject the defendant's proposal.[116] If V gives consent so as to secure an interest to which she has no antecedent right—for example, if she consents to sex with the "lecherous millionaire" who proposes to pay for the surgery of V's child if V becomes his lover—her consent is valid because she has no right to being offered the money for free.[117] Of course, such "offers" are "ungenerous, hardhearted, and exploitative"[118] and can put a lot of psychological pressure on the victim, but the "moral problem of such an offer . . . does not lie in the fact that it undermines voluntary consent."[119] As another example, consider the case of two people dating, where D "threatens" to end the relationship if V does not have sex with him regularly. This is not a rights-violating threat, but a crude and insensitive offer—"I will continue the relationship if you have sex with me regularly"—relative to V's rights because V has no right that D continues dating V on terms that D does not embrace.[120] The central insight of a normative coercion theory is that the notion of coercion as a criterion for the validity of the coerced person´s consent cannot be explicated in abstraction from the rights and obligations of the parties involved.[121]

The conclusion that can be drawn from this analogy is that we might have to accept that not every deception necessarily vitiates consent, just as not every psychological pressure amounts to consent-invalidating coercion. Along the same lines of argument, just as V has no right that D continues dating her when she refuses to have sex with him, she also has no right to know if he is faithful during the relationship. When it comes to sexual orientation, gender history, a criminal past, or the faithfulness of D, all of which are aspects protected by D's right to privacy, V simply does not have a "right to know." Even if D lies about such matters in order to get V's consent to sex, by downgrading the "deal-breaker" to a fact of which V has no right to know, her token of consent is valid. If religious beliefs or faithfulness of a sexual partner are so material to V that they amount to a deal-breaker, it is up to V to bear the consequences of that attitude. It is not D's responsibility to make sure that V only has sexual relations that are consistent with her values

[112] Ashley, *supra* note 50, at 349-352 (discussing several murders of trans people). It is also long known that suspected or actual female infidelity is an important factor contributing to intimate femicide. *See e.g.*, Margo Wilson & Martin Daly, *An Evolutionary Psychological Perspective on Male Sexual Proprietariness and Violence Against Wives*, 8 VIOLENCE & VICTIMS 271, 288 (1993). *See also* R. Emerson Dobash et al., *Lethal and nonlethal violence against an intimate female partner*, 13 VIOLENCE AGAINST WOMEN 329–53 (2007).

[113] Ashley, *supra* note 50, at 356. Ashley is primarily concerned with the privacy rights of *transsexual* people. But her reasoning is applicable to other vulnerable groups as well.

[114] WERTHEIMER, COERCION, chs. 12, 14 (1987).

[115] *Id.* at 217.

[116] *See id*; *see also* Gutmann, *supra* note 29, at 214.

[117] WERTHEIMER, *supra* note 8, at 164, 175.

[118] *Id.* at 170.

[119] Gutmann, *supra* note 29, at 216.

[120] WERTHEIMER, *supra* note 8, at 170.

[121] Gutmann, *supra* note 29, at 214.

and beliefs. V either has to accept the insecurities of social interactions in a world which guarantees both D—and also V!—[122]a certain level of privacy, or she should consider refraining from sexual activities altogether.

There might be an exception to this rule where the health of V might be at stake, for example if D lies about having a sexually transmitted disease (STD) and has unprotected sex with V. The protection of V's health could be a legitimate reason for restricting D's right to privacy. But in this case, it is not the deception itself that worries us—because the fact of having a STD is highly private—but rather the possible physical consequences of the deception in terms of V's health and hence her rights to bodily integrity. The substantive wrong in such cases lies in the risk of transmission of a dangerous disease. That is why deception about—or the non-disclosure of—STDs should be treated as a non-sexual assault which inflicts bodily harm on V.[123]

It is beyond the scope of this Article to delineate an inclusive list of information which merits protection. Topics that are "taboo" in job interviews—such as race, gender, religious beliefs, and health—might serve as a guideline.[124] However, no privacy concerns arise with regards to the pretense of being a medical doctor or acting as someone else's husband or partner when you are not. These kinds of deceptions clearly vitiate consent. But what about other impersonations like acting as a football star or a movie actor? It seems an additional criterion to separate relevant from rather trivial deceptions is needed.

4. Reasonable Materiality?

With regards to trivial deceptions, it is useful to draw on an analogy related to coercion. If V has sex with D because D threatens to rip out a page of V's newspapers, this threat would not be considered enough to undermine V's consent and render D potentially liable for a sexual offense. Even though such a threat may be wrongful because it violates V's right to property, it would be considered too trivial to provide a good reason for V to acquiesce to the demand. Accordingly, weak threats might be enough to cause someone to comply but not enough to undermine the validity of consent. The relevant question is at what point the person who gives consent is "entitled" to yield to the coercer's threat.[125] This is what Gutmann calls the "resilience criterion" in the context of coercion.[126]

In deception cases, we might need a similar criterion.[127] When the law denies criminal protection to the coerced person who acts unreasonably and yields to trivial threats—or gives consent because of them—the same should apply to sex-by-deception. If V wants to be released from the moral and legal consequences of her consent, she has to accept that her decision is at least roughly assessed with regard to its general comprehensibility and reasonability.[128] Clearly it is a challenge to identify the proper threshold, but the same problem arises with the coercive undermining of consent as well.

Some scholars that defend the "unrestricted view" might claim that the attempt to distinguish between more and less serious forms of deception constitutes a kind of "sexual moralism."[129] However, this Article supports the idea that discernment of the seriousness of certain wrongdoings does not amount to sexual moralism nor that it is inconsistent with sexual pluralism.

[122]Lazenby & Gabriel, *supra* note 20, at 274.

[123]*See* RF v. EB [2006] EWCA (Crim) 2945. *See also* Green, *supra* note 10, at 236; SCHULHOFER, *supra* note 10, at 159. Even laypeople see deceptions about STDs as problematic, but they do not think that they undermine the consensual nature of the sexual encounter. *See* Sommers, *supra* note 15, at 2257.

[124]SCHEIDEGGER, *supra* note 12, at 93.

[125]WERTHEIMER, *supra* note 114, at 267.

[126]Gutmann, *supra* note 29, at 219.

[127]*See* AP SIMESTER & GR SULLIVAN ET AL., SIMESTER AND SULLIVAN'S CRIMINAL LAW 486 (6th ed. 2016).

[128]PAWLIK, *supra* note 49, at 234–37 (discussing what he calls the "Nachvollziehbarkeitskriterium").

[129]*See* Dougherty, *supra* note 24, at 730.

V is free to base her decisions about who she has sex with on aspects that other people might not understand—for example, sleeping only with people with a certain hair color or with a certain amount of fame. In these cases, however, society can decide to deny her criminal protection if her plans are not realized. Just as trivial coercion should not be punished, neither should trivial deception.

D. Concluding Remarks

This Article has argued that even though deception *prima facie* infringes upon the victim's autonomy, not all deceptive sexual intercourse constitutes a serious wrongdoing worthy of criminalization. The goal of the Article was to provide some guiding principles that may help readers consider which cases of sex-by-deception warrant criminalization. The suggested approach would only criminalize sex obtained by deception, whereas the exploitation of a known error should generally not be regarded as sufficient. The Article has argued that sex obtained by deception as to the nature of the act is properly described and qualified as sex without any consent at all. Finally, it was argued that even if D deceives about a matter material to V's decision to consent, some areas of deceit do not have the power to undermine legally valid consent because they are protected by D's right to privacy. One issue that was beyond the scope of this Article is the question to whether sex-by-deception should be understood as rape or if it should be considered a minor or a different kind of wrong which does not deserve the term "rape."[130] There are, however, good reasons for treating sex-by-deception differently than coercive sex or sex with no consent at all. As the philosopher Reitan notes, the word "rape" is a potent word: "[T]o call a sexual act ‹rape› is to attach to it the harshest sort of condemnation."[131] Therefore, in securing "fair labelling",[132] the term rape should be reserved for the most serious violations of sexual autonomy.

[130]For a more detailed discussion, see Feinberg, supra note 72, at 339–40; *see also* Pundik, supra note 17, at 123–25 (arguing for a separate offence); Gibson, *supra* note 16, at 105.

[131]Eric Reitan, *Rape as an Essentially Contested Concept*, 16 HYPATIA, 43 (2001).

[132]*See* ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 78 (6th ed. 2009). *See also* James Chalmers & Fiona Leverick, *Fair Labelling in Criminal Law,* 71 MOD. L. REV. 217, 239 (2008).

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