

RAPE-BY-DECEPTION IN CHINA: A MESSY BUT PRAGMATICALLY DESIRABLE CRIMINAL LAW

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Abstract

China's Criminal Law defines rape to include circumstances where a perpetrator "by violence, coercion, or any other means rapes a woman." We critically investigate whether and how this provision is applicable to the use of deception to obtain sexual intercourse, and make three contributions. First, through a quantitative and qualitative analysis of contemporaneous scholarly commentary and a systematic survey of court judgments from 2015 to 2020, we demonstrate that religious fraudulent sex, medical fraudulent sex, and impersonation of intimate partners are punished as rape in China. Second, we argue that the current Chinese law is normatively desirable vis-à-vis the general consensus among scholarly commentary and legal practices elsewhere. Third, we highlight the unique starting point of Chinese sexual offenses provisions as compared to both common law and civil law jurisdictions, and explain how this "blank slate" contributed to a legal evolution process that prioritizes attaining desired legal outcomes at the expense of neat, coherent principles. More broadly, our case study of China challenges the prevailing assumption in English-language literature that civil law jurisdictions are less receptive towards fraudulent sex criminalization. It also cautions against the practice of reviewing statutory provisions in isolation when determining the substantive law of civil law jurisdictions.

INTRODUCTION

Fraudulent sex (i.e., the use of deception to obtain sexual intercourse) has attracted widespread scholarly attention in English-language literature. The vast majority of the discussion has thus far focused on Western common law

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jurisdictions,¹ especially in the United Kingdom² and the United States,³ but also in Australia,⁴ Canada,⁵ and New Zealand.⁶ Emerging scholarship has also

¹ *C.f.*, Nora Scheidegger, *Balancing Sexual Autonomy, Responsibility, and the Right to Privacy: Principles for Criminalizing Sex by Deception*, 22 GERMAN L.J. 769, 776–77, 779 (2021) (In this article by a German legal scholar published in the English-language German Law Journal, albeit for an international symposium, the German legal position on the inducement/factum distinction in general—i.e., not specific to sexual consent—is sporadically and briefly mentioned).

² *E.g.*, Chloë Kennedy, *Criminalising Deceptive Sex: Sex, Identity and Recognition*, 41 LEGAL STUD. 91, 96–109 (2021) (advancing the concept of identity non-recognition as a basis of determining the scope of fraudulent sex criminalization); Karl Laird, *Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003*, 2014(7) CRIM. L.R. 492, 500–09 (2014) (observing that the general statutory definition of sexual consent has been utilized by English courts to sustain rape convictions for fraudulent sex that is not otherwise expressly provided for in the statutory provision); Jonathan Herring, *Mistaken Sex*, 2005(7) CRIM. L.R. 511, 519–20 (2005) (arguing that all forms of deception should vitiate sexual consent). For discussions about fraudulent sex criminalization on a more theoretical level that is still premised upon common law, see Matthew Gibson, *Deceptive Sexual Relations: A Theory of Criminal Liability*, 40(1) OXFORD J. LEGAL STUD. 82, 105–09 (2020) (arguing that all fraudulent sex should be criminalized as a lesser sexual offense).

³ *E.g.*, Roseanna Sommers, *Commonsense Consent*, 129 YALE L.J. 2232, 2295–98 (2020) (empirically surveying people’s attitudes as to when consent—including sexual consent—is vitiated, and arguing that it provides a better explanation as to the selective inclusion of fraudulent sex as rape); Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1423–42 (2013) (arguing that rape should be premised on self-possession rather than sexual autonomy, and thus should exclude most forms of fraudulent sex); Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 48–131 (1998) (providing an extensive survey of the cases and legislation across the United States).

⁴ *E.g.*, Jianlin Chen, *Fraudulent Sex Criminalization in Australia: Disparity, Disarray and the Underrated Procurement Offence*, 43(2) UNSW L.J. 581, 591–99 (2020) (examining how the interplay between rape and the lesser sexual offense of procuring sex through false representations has resulted in stark divergences on criminal liability vis-à-vis fraudulent sex across the eight Australian states and territories); Andrew Dyer, *Mistakes that Negate Apparent Consent*, 43 CRIMINAL L.J. 159, 162–79 (2019) (arguing for a rape provision with an expanded list of specific fraudulent sex that would constitute rape); Jonathan Crowe, *Fraud and Consent in Australian Rape Law*, 38(4) CRIMINAL L.J. 236, 238–45 (2014) (surveying the statutory provisions and judicial decisions on rape-by-deception in the various Australian states).

⁵ *E.g.*, Martha Shaffer, *Sex, Lies, and HIV: Mabior and the Concept of Sexual Fraud*, 63 TORONTO L.J. 466, 470–74 (2013) (discussing Canadian sexual assault cases involving non-disclosure of sexually transmitted diseases).

⁶ *E.g.*, Chris Gallavin, *Fraud Vitiating Consent to Sexual Activity: Further Confusion in the Making*, 23(1) NEW ZEALAND UNIVERSITIES L. REV. 87, 89–109 (2008) (comparatively analyzing the New Zealand statutory provision on sexual consent vis-à-vis the English statute and case law).

focused upon jurisdictions in Asia, including Hong Kong,⁷ India,⁸ Israel,⁹ Singapore,¹⁰ Taiwan,¹¹ and Thailand.¹² Nonetheless, with the exception of Taiwan and Thailand, these Asian jurisdictions share common law legal traditions and their criminal law frameworks are influenced and/or inspired by English common law jurisprudence.¹³

⁷ E.g., Jianlin Chen, *Lying about God (and Love?) to Get Laid: The Case Study of Criminalizing Sex Under Religious False Pretense in Hong Kong*, 51 CORNELL INT'L L.J. 553, 563–72 (2018) (examining the offense of procurement by false pretenses in Hong Kong, in particular, its application and the relationship with rape-by-deception).

⁸ E.g., Arushi Garg, *Consent, Conjugalty and Crime: Hegemonic Constructions of Rape Laws in India*, 28(6) SOCIAL & LEGAL STUD. 737, 739–46 (2019) (surveying the common prosecution and occasional rape conviction of defendants who have sex with victims under false promises to marry in India); Surya Bala & Rahul Saha, *Make No Promises and Tell Me No Lies: A Critique of Deelip Singh v. State of Bihar Air 2005 SC 203*, 2008 NUJS L. REV. 149, 151–60 (2008) (discussing Indian jurisprudence that treats false promises to marry as capable of vitiating sexual consent, and arguing for a more restrictive approach in line with the English common law position).

⁹ E.g., Amit Pundik, *The Law of Deception*, 93 NOTRE DAME L. REV. ONLINE 172, 175–80 (2018) (discussing Israel's case law on rape by deception as to identity, and the extent to which it may include deception as to attributes that are important to the victim); Aeyal Gross, *Rape By Deception and the Policing of Gender and Nationality Borders*, 24 TUL. J. L. & SEXUALITY 1, 4–23 (2015) (discussing the gender and ethnic impersonation rape cases in Israel). Notably, Israel fraudulent sex cases (e.g., *State of Israel v. Alkobi* [2003] Isr DC3341(3); *CrimA 5734/10 Kashur v State of Israel* [2012] (Isr.)) are frequently cited and discussed in journal articles in Western countries, e.g., Canada: Shaffer, *supra* note 5, at 468; U.K.: Gibson, *supra* note 2, at 83–84; U.S.: Rubinfeld, *supra* note 3, at 1375 (beginning the article with the *Kashur* case).

¹⁰ E.g., Jianlin Chen, *Fraudulent Sex Criminalisation in Singapore: Haphazard Evolution and Accidental Success*, 2020 SINGAPORE J. LEGAL STUD. 479, 481–97 (2020) (discussing both the unique position of Singapore's fraudulent sex criminalization and how the law has evolved from its original framework rooted in the Indian Penal Code to incorporate selective elements of the modern English position).

¹¹ E.g., Jianlin Chen, *Joyous Buddha, Holy Father, and Dragon God Desiring Sex: A Case Study of Rape by Religious Fraud in Taiwan*, 13(2) NTU L. REV. 183, 193–206 (2018) (examining how the language “other means against the person's will” in Taiwan's rape provision incorporates fraud, and critically discussing Taiwanese courts' broad application of this provision to criminalize religious fraudulent sex).

¹² E.g., Jianlin Chen & Phapit Triratpan, *Black Magic, Sex Rituals and the Law: A Case Study of Sexual Assault by Religious Fraud in Thailand*, 37 UCLA PAC. BASIN L.J. 25, 34–39, 43–46 (2020) (examining the evolution of Thai courts' applications of Thailand's rape provision in cases involving fraudulent sex over the last century. Importantly, Thai courts have found that a victim's naivety in being deceived is a form of inability to resist; thus utilizing deception in this manner constitutes rape).

¹³ Israel's legal system incorporates a mixture of civil law and common law traditions, though the English influence upon the criminal is significant, with explicit statutory references to English law provided until 1977. Yaniv Roznai & Liana Volach, *Law Reform in Israel*, 6(2) THE THEORY AND PRACTICE OF LEGISLATION 291, 304–06 (2018). Israeli criminal law scholar Amit Pundik

The absence of non-common law jurisdictions in fraudulent sex criminalization analyses represents a missed opportunity to approach and conceptualize the issue beyond the current dominant frame of consent (the otherwise bedrock foundation of rape and sexual offenses in the common law jurisprudence).¹⁴ In addition, the criminalization of fraudulent sex embroils the tortuous tension between, on the one hand, the long-standing legal penalization of deception in the conduct of human affairs,¹⁵ and, on the other, the common perception that lies are prevalent in sexual relationships.¹⁶ Expanding the inquiry to include non-Western jurisdictions can provide a more nuanced and contextual understanding of this complex dynamic of sexual morality and appropriate legal interventions.

In this Article, we critically examine how fraudulent sex is criminalized in China and make three contributions.

Our first contribution is descriptive. Determining the current scope and method of fraudulent sex criminalization in China is far from straightforward. Under China's Criminal Law, whether a "non-consensual"¹⁷ sexual intercourse

considered Israel as part of the common law jurisdictions, together with England, Canada, and various U.S. states. Amit Pundik, *Coercion and Deception in Sexual Relations*, 28 CANADIAN J. L. & JURISPRUDENCE 97, 98–99 (2015).

¹⁴ Gibson, *supra* note 2, at 92; See Rebecca Williams, *Deception, Mistake and Vitiating of the Victim's Consent*, 124(1) L. QTR. R. 132, 133–36 (2008). See also Sommers, *supra* note 3, at 2235 ("Consent is a pivotal concept in many areas of the law, from police searches, to contracts, to medical malpractice, to rape"). See *infra* Part IV.A.

¹⁵ AARON LEVINE, ECONOMIC MORALITY AND JEWISH LAW 53 (2012); Barbara Biscotti, *Debtor's Fraud in Roman Law: An Opportunity for Some Brief Remarks on the Concept of Fraud*, 17(2) FUNDAMINA: A JOURNAL OF LEGAL HISTORY 1, 2–10 (2011).

¹⁶ Rubinfeld, *supra* note 3, at 1405; Hyman Gross, *Rape, Moralism, and Human Rights*, 2007(3) CRIM. L.R. 220, 224–25 (2007).

¹⁷ The descriptor "non-consensual" here refers to factual circumstances wherein the victim has not agreed to the sexual intercourse, including where the agreement is defective as a result of factors such as fraud or abuse of authority. Examples of "consensual" sexual intercourse that may be criminalized include sexual intercourse between consenting adult family members (i.e., incest) or sexual intercourse in public places. In China, article 301 of the Criminal Law punishes the facilitation of or repeated participation in group "promiscuous activities" as a "disrupting public order" offense. Art. 301, 刑法 [Criminal Law] (promulgated by Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997) (P.R.C.). Notably, China has not criminalized incest, notwithstanding the fact that incest has been considered a criminal offense throughout Chinese history and that China's marriage law prohibits marriages between close relatives: Yongjun Li, "亲属相奸" 何以为罪? 对乱伦罪回归中国刑法的深层思考 [Why Is "Relatives Sex" a Crime? Reflection on the Re-Adoption of Incest in China's Criminal Law], 40(6) 兰州大学学报: 社会科学版 [J. LANZHOU UNIVERSITY (SOCIAL SCIENCES)] 69, 72–73 (2012) (discussing China's

not involving a minor is punishable is solely dependent upon how the statutory provision “by violence, coercion, or any other means rapes” is interpreted and applied.¹⁸ We present a nuanced and holistic understanding of how this provision—in particular the phrase “other means”—is applied to fraudulent sex. In addition to a default statutory analysis (wherein we examine the origin, evolution, and current manifestations of the relevant criminal code provisions), we systematically review scholarly opinions and judicial practices. For scholarly opinions, we first quantitatively tabulate the legal prescriptions on fraudulent sex in thirteen recent criminal law textbooks, before qualitatively analyzing arguments in journal articles and monographs that have substantive discussions on fraudulent sex criminalization. For judicial practices, we compile all available court cases involving rape prosecutions for fraudulent sex over a five-year period and scrutinize how the courts interpreted and applied the rape provision. We identify three types of fraudulent sex that are currently criminalized in China, namely religious fraudulent sex (e.g., obtaining sex through falsely claiming that sex is part of a luck-improving religious ritual), medical fraudulent sex (e.g., obtaining sex through falsely claiming that sex is part of medical treatment), and impersonation of intimate partners (e.g., obtaining sex through pretending to be the victim’s boyfriend).¹⁹

Our second contribution is normative. Situating current Chinese law amidst scholarly consensus in English-language literature and available legal practices in other jurisdictions, we argue that the current Chinese law is pragmatically desirable. The three types of fraudulent sex criminalized in China are generally regarded as normatively more problematic and/or prioritized for criminal sanctions.²⁰ Just as crucially, the current Chinese law has avoided technical distinctions (e.g., identity as to non-spousal intimate partners, *factum* vs *inducement/purpose*) that have resulted in heavily criticized acquittals elsewhere.²¹

Our third contribution is explanatory. We investigate the possible factors contributing to the desired legal outcomes vis-à-vis fraudulent sex criminalization. We highlight the unique starting point of the Chinese sexual offenses provision as compared to both common law and civil law jurisdictions. Unlike civil law jurisdictions that typically have a structured set of sexual

adoption of the Soviet model, which did not criminalize incest, and the marginalization of familial relationships under the dominant authoritarian communist ideology as reasons for omission).

¹⁸ Art. 236, Criminal Law, *supra* note 17. *See infra* Part I.D.

¹⁹ *See infra* Part II.D.

²⁰ *See infra* Part III.B.

²¹ *See infra* Part III.C.

offense provisions proscribing various forms of offending conduct (e.g., abuse of authority, fraud, taking advantage of incapacity),²² the entire sexual offense in China rests upon the singular *actus reus* of “by violence, coercion, or any other means.”²³ Unlike in common law jurisdictions, where binding judicial precedent has developed the contours of an otherwise elusive concept of consent,²⁴ there is no core underlying concept that can guide the interpretation of “other means.” Thus, the relevant legal actors in China (i.e., courts, law enforcement, and legal scholars) are essentially given a blank slate to develop the law on fraudulent sex criminalization and, indeed, the overall rape provision. By drawing on a similar dynamic vis-à-vis the criminalization of sex with mentally ill victims, we argue that this unique starting point necessitated an approach that prioritizes attaining desired legal outcomes at the expense of neat, coherent principles.

More broadly, this case study contributes to the emerging and important inquiry as to how fraudulent sex is criminalized across the globe. Together with prior relevant research on Taiwan and Thailand, our case study challenges the prevailing assumption (and the consequential normative argument for more restrictive criminalization) in English-language literature that civil law jurisdictions are less receptive towards fraudulent sex criminalization.²⁵ In addition, our finding that the actual scope of fraudulent sex criminalization in China far exceeds (or at the very least, is not apparent from) the express statutory language also cautions against the practice of reviewing statutory provisions in isolation when determining the substantive law of civil law jurisdictions.

This Article is organized into five parts, with an introduction and conclusion. Part I outlines the statutory framework, evolution, and current provisions of Chinese sexual offense. Part II sets out the extent and nature of fraudulent sex criminalization through an examination of regulatory interpretation, a quantitative and qualitative analysis of contemporaneous scholarly commentary, and a survey of relevant court judgments from 2015 to 2020. Part III demonstrates the alignment of the current Chinese law with the broad consensus among scholarly commentary and legal practices elsewhere. Part IV connects the unique nature of Chinese sexual offense with the outcome. Part V reflects upon the broader implications for the literature on fraudulent sex criminalization and the comparative analysis of civil law jurisdictions.

²² See *infra* Part IV.A.

²³ See *infra* Part IV.B.

²⁴ See *infra* Part IV.A.

²⁵ See *infra* Part V.

I. Sexual Offenses (Non-Consensual Sex Acts) in China: Statutory Framework and Provisions

We begin by examining the origin and evolution of the Chinese sexual offense provisions²⁶ relating to non-consensual²⁷ sex acts and explain why the scope of fraudulent sex criminalization rests upon the interpretation of the phrase “other means.”

A. 1979 Enactment

The Criminal Law was enacted in 1979 as a comprehensive criminal code for the People’s Republic of China.²⁸ The Criminal Law was a Continental-style code, based upon the German model,²⁹ with Soviet influences especially vis-à-vis the conception of criminality and other substantive provisions relating to maintaining Socialist governance.³⁰

There were two discernible sexual offenses provisions in the initial Criminal Law (1979). The core offense of rape was detailed in article 139, which provided that “[w]hoever by violence, coercion, or any other means rapes a woman shall be sentenced to imprisonment of not less than three years nor more

²⁶ “Sexual offense” is not a distinct legal category under the Chinese Criminal Law. The rape offense—together with murder, assault, kidnapping, etc.—is situated under the chapter titled “Crimes of Infringing Upon the Rights of the Person and the Democratic Rights of Citizens.” Chinese scholars tend to consider “性犯罪” [sexual offenses] as comprised of offenses involving sexual assault (i.e., rape and molestation), prostitution (e.g., forced prostitutions, inducement/accommodation of prostitution), group promiscuous activities, spreading of venereal diseases, and production/disseminating of obscene materials: Tao Jin, *在传统与现代之间: 性犯罪的构建与解释* [Between Traditional and Modern: the Construction and Interpretation of Sexual Offences], 6 南海法学 [SOUTH CHINA SEA L. J.] 29, 29–31 (2017); Yongxin Guan, *论性犯罪的主体与对象* [The Subject Matter and Target of Sexual Offences], 31 法制博览 [LEGALITY VISION] 65, 126–31 (2016). Given the scope of this article’s inquiry, this Part will not discuss offenses involving prostitution, group promiscuous activities, spreading of venereal diseases, and production/disseminating of obscene materials.

²⁷ See *supra* note 17 on the factual (i.e., non-legal) nature of this article’s use of the phrase “non-consensual.”

²⁸ For a historical discussion on the state of criminal sanctions and proceedings, see generally JEROME ALAN COHEN, *CRIMINAL PROCESS IN THE PEOPLE’S REPUBLIC OF CHINA, 1949–63: AN INTRODUCTION* (1968).

²⁹ JIANFU CHEN, *CRIMINAL LAW AND CRIMINAL PROCEDURE LAW IN THE PEOPLE’S REPUBLIC OF CHINA: COMMENTARY AND LEGISLATION* 11 (2013).

³⁰ Harold J. Berman, Susan Cohen & Malcolm Russell, *A Comparison of the Chinese and Soviet Codes of Criminal Law and Procedure*, 73 J. CRIM. L. & CRIMINOLOGY 238, 248–55 (1982).

than ten years.”³¹ Article 139 further provided that rape would include sex with a female child under the age of fourteen and other circumstances of aggravated rape.³²

No provision specifically dealt with sexual acts that do not amount to sexual intercourse (e.g., fondling). Such sexual acts could arguably be punished under the general provision of hooliganism (article 160), which was defined to include “humiliat[ing] women,” among other conduct.³³

B. 1997 Revision

The Criminal Law (1979) was widely criticized for its brevity and imprecision.³⁴ Indeed, it was considerably shorter in terms of the number of provisions and the average length of each provision when compared to the Soviet Criminal Code (1960), which was referred to as a model in the drafting process.³⁵ The 5th National People’s Congress made a major revision to the 1979 Criminal Law in 1997, increasing the initial 192 articles to 452.³⁶ The number of provisions relating to sexual offenses increased correspondingly, but the basic approach and substantive prescriptions of criminal conduct remained unchanged.³⁷

³¹ Art. 139, 刑法 [Criminal Law] (promulgated by Nat’l People’s Cong., July 6, 1979, effective Jan. 1, 1980) (P.R.C.).

³² *Id.*

³³ Art. 160, *id.* Sexual conduct that may fall under the hooligan offense includes flashing of sexual organs, peeping, mass sexual orgies, a womanizer tricking many women for sex, and “women seducing males with their beauty and promiscuity for pure philandering purposes.” Liu Hua, *Hooliganism*, 27(3) CHINESE SOCIOLOGY & ANTHROPOLOGY 57, 59–60 (1995). For a general critique of the offense, see Harold M. Tanner, *The Offence of Hooliganism and The Moral Dimension of China’s Pursuit of Modernity, 1979–1996*, 26 TWENTIETH-CENTURY CHINA 1 (2000).

³⁴ CHEN, *supra* note 29, at 6–7.

³⁵ Berman, Cohen, & Russell, *supra* note 30, at 238.

³⁶ Criminal Law, *supra* note 17.

³⁷ For a brief overview of these sexual offenses in the English language, see Qihua Ye, *Introduction to the Issue of Rape in China as a Developing Country*, in INTERNATIONAL APPROACHES TO RAPE 57, 65–69 (Nicole Westmarland & Geetanjali Gangoli eds., 2011); Wei Luo, *China*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 137, 166–68 (Kevin Jon Heller & Markus Dubber eds., 2010).

Article 236 is the new provision for rape, and it retains both the definition of rape (“by violence, coercion, or any other means rapes a woman”)³⁸ and the age of consent (i.e., fourteen). Compared to the initial article 139, the main difference is a more elaborate stipulation of the circumstances that constitute aggravated rape.³⁹

Instead of being subsumed under the hooliganism offense (which was repealed), sexual acts not amounting to sexual intercourse are dealt with in a new provision. Article 237 adopts the same approach as rape and provides that an individual who “by violence, coercion, or any other means forcibly molests or humiliates a woman” has committed an offense.⁴⁰

C. Further Amendments

Since 1997, there have been two further notable amendments to the sexual offenses provisions. The first occurred in 2015, where article 237 was given a more—if still incomplete—gender-neutral treatment.⁴¹ Article 237 now stipulates that it is an offense when a person “by violence, coercion or other means forcibly molests any other person or humiliates a woman.”⁴²

Additionally, a new provision (article 236-1) was added in 2020 to create an offense for having sexual intercourse with a female who is between the age of fourteen and sixteen, and who is under one’s special care (e.g., guardianship, educational, medical).⁴³

D. Summary: The Centrality of “Other Means”

³⁸ Art. 236, Criminal Law, *supra* note 17.

³⁹ *Id.*

⁴⁰ Art. 237, *id.*

⁴¹ For a critique of gender inequality in Chinese sexual offenses, see Chang-jian Nie & Kai-han Tu, 强奸罪的立法争议和立法完善 [Legislative Dispute and Improvement of the Crime of Rape], 18(4) 太原师范学院学报(社会科学版) [J. TAIYUAN NORMAL U. (SOCIAL SCIENCE ED.)] 48, 50–52 (2019); Zuoya Zhao, 强奸罪的争议与完善 [Controversies and Reform of Rape Offence], 2019(8) 法制博览 [LEGALITY VISION] 217, 217 (2019).

⁴² Art. 13, 刑法修正案(九) [Amendment (IX) to the Criminal Law] (promulgated by Standing Comm. Nat’l People’s Cong., Oct. 29, 2015, effective Nov. 1, 2015) (P.R.C.).

⁴³ Art. 27, 刑法修正案(十一) [Amendment (XI) to the Criminal Law] (promulgated by Standing Comm. Nat’l People’s Cong., Dec. 26, 2020, effective Mar. 1, 2021) (P.R.C.).

The sexual offenses in China's Criminal Law have been subjected to considerable criticisms by Chinese scholars. Shortcomings commonly identified in the literature include a lack of gender neutrality, restrictive definitions of sexual intercourse, ambiguity on marital rape, and a lack of specific protection for vulnerable groups in special relationships.⁴⁴

For our inquiry on fraudulent sex criminalization, the key feature of China's sexual offenses framework is the prominent role of the phrase "other means." Under China's Criminal Law, there is essentially only the phrase "by violence, coercion, or any other means rapes/forcibly molests" that spells out the offending conduct that would constitute a sexual offense not involving a minor. The terms "violence" and "coercion" do afford some interpretative room that can affect the scope of sexual offenses. Indeed, both terms have been given significantly broader interpretations in the context of sexual offenses as compared to the identical terms in the offense of robbery. For example, the "violence" in robbery requires a higher threshold of directly suppressing resistance when compared to the slightly lower threshold of rendering the victim unable to resist for sexual offenses.⁴⁵ Similarly, "coercion" in robberies requires a physical threat (e.g., threatening physical assault) while "coercion" in sexual offenses includes non-physical extortions (e.g., threatening to reveal embarrassing information).⁴⁶ Nevertheless, in the absence of other provisions on sexual misconduct, the interpretation of "other means" becomes the key driver that delineates the contour of sexual offense, including the extent to which fraudulent sex is criminalized, if at all.

II. Criminalization of Fraudulent Sex: Regulatory Interpretation, Scholarly Commentary and Judicial Application

Given the centrality of "other means," this Part continues the analysis by examining how the phrase is understood and applied. This Part begins by

⁴⁴ For recent discussions, see Nie & Tu, *supra* note 41, at 48–50; Zhao, *supra* note 41, at 217–18. Fei Xie, 强奸罪立法完善之思考 [Thoughts on the Perfection of Legislation on the Crime of Rape], 35(5) 政法学刊 [J. POLITICAL SCIENCE & L.] 85, 33–34 (2018); Ran Tian, 我国性犯罪立法改革方向探讨 [Discussion of Legislative Reform Direction for the Rape Offence in China], 2017(5) 上海政法学院学报 [J. SHANGHAI U. POLITICAL SCIENCE & LAW] 124, 126–31 (2017).

⁴⁵ Jian Yang, 论强奸罪与抢劫罪客观行为之异同 [Similarities and Differences of Objective Actus Reus of Rape and Robbery], 137 湖北警官学院学报 [J. HUBEI U. POLICE] 63, 63–64 (2013).

⁴⁶ Shiwei Hu, 论强奸罪与抢劫罪在客观方面之异同 [On the Objective Similarities and Differences between the Crime of Rape and Robbery], 29(2) 上海公安高等专科学校学报 [J. SHANGHAI POLICE COLLEGE] 55, 57–58 (2019).

examining an early interpretative document jointly promulgated by the judiciary, prosecutor, and law enforcement authority. This is followed by a quantitative and qualitative review of contemporaneous scholarly commentary. Finally, this Part presents the findings from a survey of relevant court judgments from 2015 to 2020.

A. Explanations on Rape

In 1984, the Supreme People's Court, the Supreme People's Procuratorate, and the Public Security Bureau jointly issued the Explanations on Several Issues concerning the Application of Law in the Trial of Cases regarding Crimes of Rapes ("1984 Explanations").⁴⁷ The 1984 Explanations, which took the form of a series of questions and answers, explained that rape is "the act of forcibly having sexual intercourse with a woman by violence, coercion or other means against her will."⁴⁸ The 1984 Explanations stated that "other means" refers to non-violent and non-coercive means that nevertheless render women "unable to resist."⁴⁹ The 1984 Explanations further set out the various circumstances that may constitute rape, such as mental illness, being drunk/drugged, and abuse of authority.⁵⁰

In terms of fraudulent sex, the 1984 Explanations provided three mentions. First, religious fraudulent sex (i.e., "using superstition to intimidate or deceive") was stipulated as an example of coercion.⁵¹ Second, medical fraudulent sex (i.e., "pretending to administer medical treatment") is provided as an example of "other means."⁵² Third, romantic fraudulent sex (i.e., "toying with women in the name of love") was not framed as rape, but rather was to be punished with the hooliganism offense in circumstances where there were multiple victims and (unspecified) aggravating circumstances.⁵³

⁴⁷ 关于当前办理强奸案件中具体应用法律的若干问题的解答 [Explanations on Several Issues concerning the Application of Law in the Trial of Cases regarding Crimes of Rapes] (promulgated by Sup. People's Ct., Sup. People's Proc. & Public Security Bureau, Apr. 26, 1984, effective Apr. 26, 1984, invalidated Jan. 18, 2013) (P.R.C.). For a discussion of the various sources of criminal law in China, see Luo, *supra* note 37, at 140–42. For an English-language discussion of the 1984 Explanations, see Harold Tanner, *Chinese Rape Law in Comparative Perspective*, 31 THE AUSTRALIAN JOURNAL OF CHINESE AFFAIRS 1, 4–5 (1994).

⁴⁸ Question 1, 1984 Explanations, *supra* note 47.

⁴⁹ Question 2, *id.*

⁵⁰ Questions 1 & 2, *id.*

⁵¹ Question 2, *id.*

⁵² *Id.*

This 1984 Explanations was repealed in 2013 during a routine regulatory clean-up of outdated judicial interpretations and related documents that were issued between 1980 and 1997 (i.e., before the 1997 revision of the Criminal Law).⁵⁴ The reason offered for the repeal of the 1984 Explanations is that “the Criminal Law and related judicial interpretations” had provided new stipulations. This is certainly true with regard to any mention of the hooliganism offense⁵⁵ which was repealed in 1997, with its components now constituting separate offenses (e.g., article 237 for “humiliates women”). However, there is ambiguity regarding the extent to which other portions of the 1984 Explanations (e.g., definitions of rape and other means) survive the repeal.⁵⁶

B. Scholar Commentary

Compared to common law jurisdictions, legal scholars in civil law jurisdictions are considered dominant actors in the legal system. While scholarly writings are not formal sources of law, they are highly influential in the making and interpretation of law.⁵⁷ The extent to which this is true in China—given the gutting of legal education during the Cultural Revolution⁵⁸ and the continued

⁵³ Question 3, *id.* See Tanner, *supra* note 47, at 9 (“Chinese rape law exists in conjunction with hooliganism, an offense which includes virtually any sexual behavior the authorities find deserving of punishment”).

⁵⁴ Item 16, 关于废止1980年1月1日至1997年6月30日期间制发的部分司法解释和司法解释性质文件的决定 [Decision to Abolish Certain Judicial Interpretations and Documents of the Nature of Judicial Interpretations that are Issued from Jan. 1, 1980 to June 30, 1997] (promulgated by Sup. People’s Ct. & Sup. People’s Proc., Jan. 1, 2013, effective Jan. 18, 2013) (P.R.C.).

⁵⁵ For example, attempted rape falls under the hooliganism offense rather than the rape offense. Question 3, 1984 Explanations, *supra* note 47.

⁵⁶ For example, while the 1984 Explanations have been abolished, it is commonly recognized that its definition of rape (“the act of forcibly having sexual intercourse with a woman against her will”) remains the dominant definition under Chinese criminal law theory. *E.g.*, Hengtong Fang, 强奸罪入罪模式述评:兼对肯定性同意模式的提倡 [A Review of Rape Crime Models: Advocating the Affirmative Consent Mode], 229江西警察学院学报 [J. JIANGXI POLICE INSTITUTE] 84, 85 (2021); Guangying Zhou, Tingxia Hu & Lijuan Wang, 非典型性强奸罪司法认定之实践考察与理论转向 [Practical Investigation of and Theoretical Turn in Judicial Determination of Atypical Rape Crime], 2020(12) 法律适用 [J. L. APPLICATION] 104, 107 (2020).

⁵⁷ JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA, 61–62 (Stanford University Press 4th ed. 2019); Alexandra Braun, *Professors and Judges in Italy: It Takes Two to Tango*, 26(4) OXFORD J. LEGAL STUDIES 665, 665–66 (2006).

⁵⁸ Liu Kunlun, *Legal Education in China: Achievements, Problems and the Future (1949-2013)*, 9(4) FRONTIERS OF LAW IN CHINA 676, 681–85 (2014).

domineering Chinese Communist Party control⁵⁹—is inevitably debatable. Nonetheless, regardless of whether scholarly writings can be considered sources of law in China, they serve as useful data points in determining what the current law is. To this end, we adopt a two-fold survey of the relevant scholarly writings.

The first is a quantitative survey on how fraudulent sex criminalization is proscribed in general textbooks on criminal law. Essentially, we identify the types of fraudulent sex that are considered rape in the textbook, and tabulate the frequency with which each type of fraudulent sex is mentioned. This quantitative method is necessitated by the limited nature and scope of these textbooks, and it helps to reveal prevailing consensus (or lack thereof) among Chinese criminal law scholars.

To understand the arguments and reasoning of Chinese scholars, we further engage in a qualitative analysis of scholarly writings that specifically addressed the issue of fraudulent sex criminalization. This is essentially a standard literature review of the Chinese-language literature in China.

1. General Textbooks

We sourced for and assembled thirteen general textbooks on criminal law that were published relatively recently (i.e., after 2010). Our selection was primarily based on availability (i.e., we obtained as many post-2010 textbooks as possible).

Among these textbooks, there is an overwhelming consensus on the three types of fraud that would constitute rape, namely religious fraud, medical fraud, and impersonation of an intimate partner. Eleven textbooks mentioned all three types of fraud as constituting rape, while the other two textbooks omitted one or two of the frauds.

There are two notable features of this consensus. First, while religious fraud and medical fraud had been provided for in the 1984 Explanations, impersonation of an intimate partner (typically framed as a husband or lover) is a new and distinct category.

Second, while the textbooks treated religious fraud as constituting rape, there is some divergence as to why. Among the twelve textbooks that mentioned religious fraudulent sex, nine replicated the treatment in the 1984 Explanations

⁵⁹ Albert H.Y. Chen, *China's Long March towards Rule of Law or China's Turn against Law*, 4 CHINESE J. COMP. L. 1, 34–35 (2016).

and listed religious fraudulent sex as an example of “coercion.” However, five textbooks (including two that listed religious fraudulent sex as an example of “coercion”) listed religious fraudulent sex as an example of “other means” as distinguished from “violence” or “coercion.”

Table A sets out the textbooks sourced and their respective legal prescriptions.

Table A: Fraudulent Sex in Chinese Criminal Law Text Book

Textbook Author(s)	Year	Religious Fraudulent Sex (Coercion)	Religious Fraudulent Sex (Other Means)	Medical Fraudulent Sex	Impersonation of Intimate Partner
Bangjun Dong ⁶⁰	2010	X	X	X	X
Xihui Li ⁶¹	2012	X		X	X
Dong Wei ⁶²	2015				X
Xingliang Chen ⁶³	2015	X		X	X
Hong Li ⁶⁴	2016	X		X	X
Bingzhi Zhao & Xihui Li ⁶⁵	2016	X		X	X

⁶⁰ BANGJUN DONG, 侵犯公民人身权利、民主权利罪: 立案追诉标准与司法认定实务 [CRIMES OF INFRINGING UPON THE RIGHTS OF THE PERSON AND THE DEMOCRATIC RIGHTS OF CITIZENS: PROSECUTION CRITERIA AND JUDICIAL DETERMINATION] (China People's Public Security University Press 2010).

⁶¹ XIHUI LI, 刑法各论 [SPECIFIC THEORY OF CRIMINAL LAW] (2nd ed., China Renmin University Press 2012).

⁶² DONG WEI, 刑法各论 [CRIMINAL LAW] (Law Press 2015).

⁶³ XINGLIANG CHEN, 刑法各论精释 (上) [SPECIFIC INTERPRETATION OF CRIMINAL LAW (VOL. 1)] (People's Court Press 2015).

⁶⁴ HONG LI, 刑法学各论 [SPECIFIC PROVISIONS OF CRIMINAL LAW] (Law Press 2nd ed. 2016).

⁶⁵ BINGZHI ZHAO & HUIXI LI, 刑法各论 [THEORIES OF CRIMINAL LAW] (3rd ed. China Renmin University Press 2016).

Guangquan Zhou ⁶⁶	2016	X		X	X
Mingkai Zhang ⁶⁷	2016		X	X	X
Qilin Ruan ⁶⁸	2016	X	X	X	
Zuofu Wang ⁶⁹	2016	X		X	X
Yu Jia ⁷⁰	2019	X		X	X
Xianquan Liu ⁷¹	2020		X	X	X
Xiang Luo ⁷²	2020		X	X	X

2. Journal Articles and Monographs

Through the online journal database of Chinese National Knowledge Infrastructure⁷³ and general internet searches (including through university library catalogues), we assembled eight journal articles and monographs that contained substantive discussions on the issue of fraudulent sex criminalization.

There are two features to note about this contemporaneous literature. First, the Chinese scholars who specifically addressed the issue favor a restrictive approach towards fraudulent sex criminalization. While there have been some scholars who argued for a broader scope of fraudulent sex criminalization

⁶⁶ GUANGQUAN ZHOU, 刑法各论 [THEORIES OF CRIMINAL LAW] (3rd ed. China Renmin University Press 2016).

⁶⁷ MINGKAI ZHANG, 刑法学 [CRIMINAL LAW] (Law Press 5th ed. 2016).

⁶⁸ QILIN RUAN, 中国刑法各罪论 [THE VARIOUS CRIMES OF CRIMINAL LAW] (China University of Political Science and Law Press 2016).

⁶⁹ ZUOFU WANG, 刑法 [CRIMINAL LAW] (6th ed. China Renmin University Press 2016).

⁷⁰ YU JIA, 刑法学 (下册) [CRIMINAL LAW (2ND VOL.)] (Higher Education Press 2019).

⁷¹ XIANQUAN LIU, 刑法学 [CRIMINAL LAW] (5th ed. Shanghai People's Press 2020).

⁷² XIANG LUO, 刑法学讲义 [CRIMINAL LAW LECTURE NOTES] (Yunnan People's Press 2020).

⁷³ CHINESE NATIONAL KNOWLEDGE INFRASTRUCTURE, <https://www.cnki.net/> [<https://perma.cc/DLP9-9TEZ>] (last visited June 1, 2022).

during the first decade since the enactment of the Criminal Law,⁷⁴ none of these contemporaneous scholars argued for any expansion of criminalization beyond the three types of fraudulent sex commonly recognized in textbooks (i.e., religious fraud, medical fraud, and impersonation of an intimate partner).⁷⁵

In contrast, two scholars have argued for a narrower scope of fraudulent sex criminalization. Echoing arguments raised in English-language literature,⁷⁶ Xiang Luo advocated against broad criminalization of fraudulent sex on several grounds: 1) as distinguished from property crime, sex is itself pleasurable for the “giver” as well; 2) fraud is part of romance; 3) judicial difficulty in intervening in private life; and 4) relationship security is not protected in law unlike body and property.⁷⁷ In turn, Luo argued that only the most serious types of fraudulent sex should be punished. For him, these would include fraud as to the nature of the act, impersonation of an intimate partner, and religious fraud.⁷⁸ However, this would not include fraud as to purpose, even if the purpose is

⁷⁴ For an overview of the range of scholarly views on whether fraudulent rape constitutes rape, see Xiaohong Guo, 强奸罪理论研究六十年 [Sixty Years of Theoretical Research on Rape], 108 山东警察学院学报 [J. SHANDONG POLICE COLLEGE] 17, 23–24 (2009) (citing a 1983 journal article by Xiaorong Gu); Xiang Luo, 论欺诈型强奸 [On Rape by Deception], 13(4) 中南大学学报 (社会科学版) [J. CENTRAL SOUTH U. (SOCIAL SCIENCE)] 413, 414 (2007) (citing a 1989 text by Yangtao Au). *C.f.*, Hong Zhang, 性侵之民事责任 [Civil Liability to the Sex Invasion], 72(1) 武汉大学学报 (哲学社会科学版) [WUHAN U. J. (PHILOSOPHY & SOCIAL SCIENCE)] 143, 148–49 (2019) [In discussing civil liability for sexual assault, Hong Zhang demonstrated that courts recognize only three types of fraudulent sex as rape (i.e., religious fraudulent sex, medical fraudulent sex, and spousal impersonation). Having noted the U.S., England, and Brazil’s approaches to fraudulent sex criminalization, Hong Zhang argued for civil liability for certain non-criminalized fraudulent sex (i.e., pretending to be a professor or to be wealthy)].

⁷⁵ To address religious and medical fraudulent sex, some scholars introduced a concept of fraud that results in a victim thinking that relinquishing sexual autonomy is their only option. Yanpei Cheng & Shan Wang, 关于骗奸行为的合理认定 [On the Reasonable Determination of Rape by Fraud], 2015(8) 法制与社会 [LEGAL SYSTEM & SOCIETY] 61, 61–62 (2015); YANG HE, 强奸罪：解构与应用 [RAPE: DECONSTRUCTION AND APPLICATION] 259–262 (Law Press 2014). See also JIAN LIANG, 强奸犯罪比较研究 [COMPARATIVE RESEARCH ON RAPE] 64–65 (People’s Public Security University Press 2010) [arguing that the key determinant is whether a victim has the freedom of choice—religious and medical fraudulent sex constitute rape because both forms exploit a victim’s fear and lack of knowledge, whereas fraudulent sex in furtherance of transactional purposes (e.g. marriage or a promotion) do not constitute rape].

⁷⁶ *E.g.*, Rubinfeld, *supra* note 3, at 1403–07; Gross, *supra* note 16, at 223–27.

⁷⁷ Luo, *supra* note 74, at 414–15. For a similar argument in his more recent monograph on sexual consent, see XIANG LUO, 刑法中的同意制度：从性侵犯罪谈起 [THE CONSENT IN CRIMINAL LAW: DISCUSSION FROM SEXUAL CONSENT] at 3.4.2 (Yunnan People’s Press 2021).

⁷⁸ Luo, *supra* note 74, at 415–17.

medical. Instead, Luo argued that such medical fraudulent sex should be a matter of professional discipline but not criminal law.⁷⁹

In a similar vein, Longquan Wang argued that for fraudulent sex to constitute rape, the fraud should be comparable to violence and coercion; namely, the fraud must render the victim “not knowing to resist” or “afraid to resist.”⁸⁰ Wang observed that while the medical fraud and religious fraud do satisfy these criteria, it is questionable for impersonation of an intimate partner, especially in light of how victims bear some responsibility in such cases.⁸¹ Thus, he argued for the creation of a lesser sexual offense to punish fraudulent sex involving fraud as to the nature of the act.⁸²

Second, and more tellingly, Chinese scholars struggle to formulate an overarching theory to explain and justify the preferred scope of fraudulent sex criminalization. This struggle is particularly notable for scholars who are not arguing for a more restrictive approach. For example, Hantao Wei comparatively surveyed the approaches of the Anglo-American common law and the German civil law and expressed a preference for the German civil law approach whereby the jurisprudential foundation for fraudulent sex criminalization is mistake as to legal interest [“法益”].⁸³ This jurisprudential foundation only covers fraud as to the sexual nature of an act. In order to encompass impersonation of intimate partners, Wei advocated for a modification to the German approach to include circumstances where freedom of realizing one’s course of action [“实现行为自由”] is denied. He argued that this includes impersonation of intimate partners because of freedom of choice of sexual partner.⁸⁴ It is also implied that this would cover religious fraudulent sex.⁸⁵ However, he did not explain why this freedom of realizing one’s course of

⁷⁹ *Id.* at 415.

⁸⁰ Longquan Wang, 欺诈奸淫法律思考 [Thoughts on Law on Deceptive Sex], 2017(3) 法制博览 [LEGALITY VISION] 148, 148 (2017).

⁸¹ *Id.* at 148–49.

⁸² *Id.* at 149. For a similar argument for criminalization of fraudulent sex as distinct from rape, see Ziwei Wang, 浅析侵犯性自治权类犯罪的难题 [Analysis of Difficult Issues Regarding Offences of Sexual Self-Determination Violation], 2020(6) 法制与社会 [LEGAL SYSTEM & SOCIETY] 44, 45 (2020).

⁸³ Hantao Wei, 骗奸案中错误同意的效力分析 [Analysis of the Efficacy of Mistaken Consent in Rape by Fraud Cases], 157 江西警察学院学报 [J. JIANGXI POLICE INSTITUTE] 66, 69 (2012).

⁸⁴ *Id.* at 69.

action is not present for fraud as to ancillary facts (e.g., fraud as to non-religious purposes, motivation, or personal attributes).

A similar dynamic is also evidenced in Longquan Wang's argument. Wang advocated for a punishment for the impersonation of intimate partners via a lesser sexual offense. As noted above, Wang's proposed offense would only punish fraud as to the nature of the act. However, to include impersonation of an intimate partner, Wang added that the "nature" would include both the "physical" ["自然属性"] nature (i.e., insertion of a penis instead of medical instrument) and the "legal" ["法律属性"] nature (i.e., there is a right to sex within an intimate relationship but not between strangers, thus the legal nature is different).⁸⁶ Again, notwithstanding the breadth and ambiguity of what might constitute a "legal" nature, Wang did not provide any citation or explanation as to this concept of "legal" nature.

In contrast, some scholars are forthcoming in their dispensation of formulating any underlying principle to connect all fraudulent sex criminalization. Yanpei Cheng and Shan Wang highlighted deficiencies in premising fraudulent sex criminalization on basic principles such as the accused's culpability for fraud (i.e., that it is too broad) or due to a mistake directly related to a legal interest (i.e., that it is too narrow).⁸⁷ Instead, they argued for assessing each type of fraudulent sex individually through holistic assessments of various competing concerns such as protecting legal interests, safeguarding human rights, and avoiding over-criminalization.⁸⁸ Similarly, having established his argument that only the most serious types of fraudulent sex should be punished, Luo proceeded to evaluate the various types of fraudulent sex vis-à-vis a whole host of type-specific considerations.⁸⁹

C. Cases

1. Preliminary Observations on Methodology

To systematically assess the enforcement and adjudication of fraudulent sex cases in China, our initial plan was to do a survey of all fraudulent sex court cases found in China Judgments Online within a five-year period. China

⁸⁵ *Id.* at 69 (mentioning the need for the theory to include religious fraudulent sex that does not involve fraud as to purpose before introducing the modification).

⁸⁶ Wang, *supra* note 80, at 148–49.

⁸⁷ Cheng & Wang, *supra* note 75, at 61.

⁸⁸ *Id.* at 61–62.

⁸⁹ Luo, *supra* note 74, at 415–17.

Judgments Online is the official online publication platform for Chinese court judgments.⁹⁰ It is widely considered by scholars to be the most comprehensive online database⁹¹ and is often utilized by scholars to engage in empirical surveys of Chinese courts' adjudication across different areas of law.⁹² The limitations of the database, including the significant portions of missing judgments and the non-random nature of the missing judgments, have been duly recognized by many scholars using the database.⁹³ Indeed, in an empirical study that examined the gaps in the China Judgments Online database, Benjamin L. Liebman et al. argued that administrative censorship, incentive bias (i.e., whether court disclosure is considered important by court presidents in evaluation of judges' performances), and diligence bias (i.e., the degree to which courts adhere to national guidelines on disclosure, especially with regards to exclusion) collectively explain the missing judgments.⁹⁴

Notwithstanding these issues, we encounter two further problems relating to using the China Judgments Online database. First, the search engine does not produce reliable results for search term searches. For some inexplicable technical reason and with particular relevance to this research, a search of the word “骗” [cheat] will often not include judgments with the phrase “诱骗”

⁹⁰ Art. 2, 最高人民法院关于人民法院在互联网公布裁判文书的规定 [Provisions of the Supreme People's Court on the Publication of Judgments on the Internet by the People's Courts] (promulgated by Sup. People's Ct., Aug. 29, 2016, effective Oct. 1, 2016) (P.R.C.).

⁹¹ Benjamin Minhao Chen & Zhiyu Li, *The Foundations of Judicial Diffusion in China: Evidence from an Experiment*, 14(3) REV. L. & ECON. 1, 5 (2018). For a discussion of the socio-political backdrop behind the creation of this database, see Benjamin L. Liebman et al., *Mass Digitization of Chinese Court Decisions: How to Use Text as Data in the Field of Chinese Law*, 8(2) J. L. & COURTS 177, 180–83 (2020).

⁹² E.g., Dr. Mark D. Kielsgard, *A Comparative Analysis of the Criminal Exclusionary Rule in the People's Republic of China with the United Kingdom*, 23 ASIAN-PAC. L. & POL'Y J. 67, 78–79 (2021); Li-Wen Lin, *Mandatory Corporate Social Responsibility? Legislative Innovation and Judicial Application in China*, 68 AM. J. COMP. L. 576, 587–88 (2020).

⁹³ E.g., Lianhan Zhang & Weimin Zuo, *Criminal Defense Rate and Underlying Wealth Effect: Data Analysis Based on Judgments of First Instance in Sichuan Province in 2015 and 2016*, 37 WIS. INT'L L.J. 441, 444–47 (2020); Michelle Miao, *Defining Death-Eligible Murder in China*, 67 AM. J. COMP. L. 327, 345–47 (2019).

⁹⁴ Liebman et al., *supra* note 91, at 185–90. See also Tobias Smith, *Body Count Politics: Quantification, Secrecy, and Capital Punishment in China*, 45 LAW & SOC. INQUIRY 706, 716–18 (2020) (discussing the tension of the Chinese government policy of keeping death penalty statistics secret and the imperative of judicial transparency through the publication of death penalty decisions on China Judgments Online).

[deceive].⁹⁵ This is despite the fact that the former is the second word of the latter two-word phrase. Second, the coverage of cases on China Judgments Online is quite limited, at least for our purpose of fraudulent sex criminalization research. Notably, this is not due to the lack of these cases or the lack of public access to these decisions. We had much greater success obtaining relevant cases when searching for cases on both the Wolters Kluwer legal database [威科先行]⁹⁶ and PKULAW [北大法宝],⁹⁷ even if neither are particularly comprehensive on their own. Indeed, many judgments that are accessible via these two databases are either not published on China Judgments Online, or are published selectively (e.g., only the sentencing but not the actual conviction).

This issue relating to coverage and accessibility of Chinese court judgments—whether vis-à-vis China Judgments Online or across the various online databases—deserves specific and systematic examination that is beyond the scope of this Article. For our current purpose, the limitations of coverage and access prevented us from meaningfully surveying the prevalence of fraudulent sex criminalization in the overall context of rape prosecutions. Instead, we aim to provide a more qualitative examination of how the courts interpret and apply the rape provisions when fraud is involved.

To this end, we use the following search term combinations: “诱骗 + 强奸” [deceive + rape], “骗 + 强奸” [cheat + rape], “冒充 + 强奸” [impersonate + rape], “假装 + 强奸” [pretend + rape], and “认错 + 强奸” [mistaken + rape] across all three databases. The date range of the search is a five-year period between January 1, 2016 to December 31, 2020. The date of access is July 1, 2021. In compiling the dataset, we excluded cases where fraud is not the direct cause in obtaining sex (e.g., fraud is used to lure the victim to a scheduled place where physical violence is used to compel sex;⁹⁸ fraud is used to get victim to consume drinks that are spiked with sedative drugs⁹⁹), and where the victims are

⁹⁵ E.g., 吕彦鹏强奸罪一审刑事判决书 [1st Instance Criminal Case Judgment of Rape Offence of Lv Yanpeng], 苏 [Jiangsu] 0505刑初 [Xing Chu] No. 637 (2020); 曾旭强奸罪一审刑事判决书 [1st Instance Criminal Case Judgment of Rape Offence of Zeng Xu], 渝 [Chongqing] 0108刑初 [Xing Chu] No. 893 (2018) .

⁹⁶ WOLTERS KLUWER LEGAL DATABASE, <https://law.wkinfo.com.cn/judgment-documents/list?tip=> (last visited June 1, 2022).

⁹⁷ PKULAW, <https://www.pkulaw.com/case/> (last visited June 1, 2022).

⁹⁸ E.g., 朱浩南强奸二审刑事裁定书 [2nd Instance Criminal Case Judgment of Rape Offence of Zhu Haonan], 豫 [Henan] 01刑终 [Xing Zhong] No. 594 (2020).

⁹⁹ E.g., 吴卫东强奸二审刑事裁定书 [2nd Instance Criminal Case Judgment of Rape Offence of Wu Weidong], 皖 [Anhui] 刑终 [Xing Zhong] No.169 (2017).

under the age of consent (i.e., 14 years old).¹⁰⁰ We assembled at a total of 138 distinct cases.

Table B sets out the number of cases in each year.

Table B: Number of Fraudulent Sex Cases by Year

Year	2016	2017	2018	2019	2020
No. of Cases	25	24	21	22	46

2. Breakdown of Cases

We organized the cases into five categories based on the type of fraud employed to obtain sex. The first and most common is fraud involving religious claims. We found fifty-five cases in total over a five-year period. This number appears unusually high from a Western perspective, given the prevailing understanding of religious freedom that precludes state assessment of religious truth.¹⁰¹ It is tempting to attribute these cases to the notoriously heavy-handed control of religious activities by the Chinese communist regime,¹⁰² no less the active suppression of perceived “evil cults.”¹⁰³ Nonetheless, as will be discussed below, religious fraudulent sex criminalization is not uncommon in Asia.¹⁰⁴ Notably, this includes Taiwan and Hong Kong, notwithstanding the purported adherence to liberal democratic notions of religious freedom in these two jurisdictions.¹⁰⁵

¹⁰⁰ E.g., 蒋世琛强奸、猥亵儿童一案一审刑事判决书 [1st Instance Criminal Case Judgment of Rape and Molesting Children Offences of Jiang Shichen], 湘 [Hunan] 1121刑初 [Xing Chu] No. 164 (2020) (pretending to be a director and having sex under pretext of training for kissing and sex scenes).

¹⁰¹ Anna Su, *Judging Religious Sincerity*, 5 OXFORD J. L. & RELIGION 28, 36–37 (2016); William P. Marshall, *Smith, Ballard, and the Religious Inquiry Exception to the Criminal Law*, 44 TEX. TECH L. REV. 239, 255 (2011).

¹⁰² RAY WANG, RESISTANCE UNDER COMMUNIST CHINA: RELIGIOUS PROTESTERS, ADVOCATES AND OPPORTUNISTS 90–93 (2019); KARRIE J. KOESEL, RELIGION AND AUTHORITARIANISM: COOPERATION, CONFLICT, AND THE CONSEQUENCES 45–47 (2014). For a systematic overview of China’s state regulation of religion, see JIANLIN CHEN, THE LAW AND RELIGIOUS MARKET THEORY: CHINA, TAIWAN AND HONG KONG 49–80 (2017).

¹⁰³ Guobin Zhu, *Prosecuting “Evil Cults:” A Critical Examination of Law Regarding Freedom of Religious Belief in Mainland China*, 32 HUM. RTS. Q. 471, 488–91 (2010).

¹⁰⁴ See *infra* Part III.B.3.

¹⁰⁵ HWEI-SYIN CHEN, 宗教團體與法律:非盈利組織觀點 [RELIGIOUS GROUP AND LAW: A NON-PROFIT ORGANIZATION POINT OF VIEW] 21–23 (Chuliu 2013); Puja Kapai, *Freedom of Conscience*

The second type of fraud involves medical claims. It is not particularly common, with fifteen cases in total. However, we list it as the second type because there is a degree of overlap with the first type. Some cases that we classified as religious fraudulent sex have had a medical component. For example, the defendant might have been the owner of a herbal medical shop who got to know the victim as a patient. The defendant then utilized “superstitious means” to have sex with the victim under the pretext of treating her illness.¹⁰⁶ In other cases, the proposed treatment that we classified as medically fraudulent sex had folk and spiritual elements even though the defendant was pretending to be a qualified mainstream doctor.¹⁰⁷ The overlap is arguably unsurprising given that Chinese traditional healing includes metaphysical elements and spiritual concepts.¹⁰⁸

The third type of fraud involves impersonation of intimate partners. There are twenty-two cases. We excluded cases where the victims were so drunk that they were unconscious or barely conscious.¹⁰⁹ We did include cases where victims were sufficiently aware of their surroundings and happenings (e.g., the victim testified that she thought that she was having sex with her partner), despite being tipsy.¹¹⁰

The fourth type of fraud involves impersonation of authority, for which there are thirty-seven cases. Thirty-one of these cases involved defendants pretending to be policemen and threatening to arrest sex workers if the sex workers refused to provide free sexual services. Since sex work is illegal in

and Religious Belief, in *LAW OF THE HONG KONG CONSTITUTION* 847, 856–80 (Johannes Chan & C.L. Lim eds., 2015).

¹⁰⁶ 舒景平犯强奸罪、诈骗罪一审判决书 [1st Instance Criminal Case Judgment of Rape and Fraud Offences of Shu Jingping], 平 [Pingyuan] 刑初字第(Xing Chu Zi) No. 162 (2015).

¹⁰⁷ 陈绍辉诈骗罪二审刑事判决书 [2nd Instance Criminal Case Judgment of Fraud Offence of Chen Shaohui], 闽[Fujian] 03刑终 [Xing Zhong] No. 428 (2019).

¹⁰⁸ Lin Shi & Chenguang Zhang, *Spirituality in Traditional Chinese Medicine*, 61 *PASTORAL PSYCHOLOGY* 959, 964–66 (2012); Nancy N. Chen, *Healing Sects and Anti-Cult Campaigns*, 174 *CHINA QUARTERLY* 505, 506–10 (2003). For a discussion of the cosmobiological theory underpinning Chinese traditional medicine, see generally Scott Davis, *The Cosmobiological Balance of the Emotional and Spiritual Worlds: Phenomenological Structuralism in Traditional Chinese Medical Thought*, 20 *CULTURE, MEDICINE AND PSYCHIATRY* 83 (1996).

¹⁰⁹ E.g., 陈晟强奸罪一审刑事判决书 [1st Instance Criminal Case Judgment of Rape Offence of Chen Sheng], 苏 [Jiangsu] 0507刑初 [Xing Chu] No. 696 (2017).

¹¹⁰ E.g., 刘佳逸、邹寅深强奸一审刑事判决书 [1st Instance Criminal Case Judgment of Rape Offence of Liu Jiayi and Zhou Yinshen], 沪 [Shanghai] 0112刑初 [Xing Chu] No. 943 (2020).

China,¹¹¹ these cases reflect the significant risks of violence and exploitation associated with sex work in China.¹¹² Indeed, we excluded cases where the defendants pretended to be policemen to prey upon sex workers, but ultimately utilized brute force to obtain sex.¹¹³ For the other six cases, five involved defendants pretending to be policemen and either threatening to arrest the victim on drug charges,¹¹⁴ threatening to circulate incriminating video/audio footage of the victim,¹¹⁵ or threatening retribution.¹¹⁶ In one case, the defendant impersonated an army officer and threatened to punish the victim's husband (who was also in the army).¹¹⁷

Given the element of coercion, we have some hesitation including these impersonation cases in the dataset. However, judges in other jurisdictions sometimes approached these sorts of cases on the basis of fraud. For example, the Western Australian case of *Michael v Western Australia* involved a man who pretended to be a policeman to obtain free sexual services from sex workers working illegally.¹¹⁸ Two of the three judges in the Western Australian Court of Appeal based their ruling upon differing opinions as to whether the fraud in question was sufficient to vitiate consent,¹¹⁹ while the third judge alone

¹¹¹ For a discussion of law and policies relating to sex work in China, see Susanne Y.P. Choi & Ruby Y.S. Lai, *Sex Work and Stigma Management in China and Hong Kong: The Role of State Policy and NGO Advocacy*, 247 CHINA QUARTERLY 855, 858–59 (2021).

¹¹² Tingting Shen & Joanne Csete, *HIV, Sex Work, and Law Enforcement in China*, 19(2) HEALTH & HUMAN RIGHTS J. 133, 137–38 (2017); Elizabeth A. Kelvin et al., *Vulnerability to Sexual Violence and Participation in Sex Work Among High-end Entertainment Centre Workers in Hunan Province, China*, 10 SEXUAL HEALTH 391, 397–98 (2013).

¹¹³ E.g., 陈荣荣抢劫、强奸、敲诈勒索、诈骗案 [Criminal Case Judgment of Robbery, Rape, Extortion and Fraud Offences of Chen Rongrong], 闽 [Fujian] 02 刑终 [Xing Zhong] No. 407 (2016).

¹¹⁴ E.g., 孙某某强奸、抢劫案 [Criminal Case Judgment of Rape and Robbery Offences of Mr. Sun], 粤 [Guangdong] 0802 刑初 [Xing Chu] No. 172 (2016).

¹¹⁵ E.g., 董江浩强奸一审刑事判决书 [1st Instance Criminal Case Judgment of Rape Offence of Dong Jianghao], 冀 [Hebei] 1125 刑初 [Xing Chu] No. 215 (2018).

¹¹⁶ E.g., 杜某、李某某强奸罪二审刑事裁定书 [2nd Instance Criminal Case Judgment of Rape Offence of Mr. Du and Mr. Li], 冀 [Hebei] 10 刑终 [Xing Zhong] No. 24 (2020).

¹¹⁷ 李琦诈骗罪一审刑事判决书 [1st Instance Criminal Case Judgment of Fraud Offence of Li Jiaqi], 川 [Sichuan] 0107 刑初 [Xing Chu] No. 291 (2020).

¹¹⁸ *Michael v The State of Western Australia*, [2008] WASCA 66 (WA C.A.).

¹¹⁹ *Id.* at ¶165–66 & 338–41 (Miller JA & EM Heenan AJA).

held that it was threat/intimidation—and not fraud—which was the operating cause of consent vitiation.¹²⁰ Chinese scholars Yanpei Cheng & Shan Wang also began their article on rape-by-deception with a police impersonation case.¹²¹ In the end, we have included these cases for two reasons. First, these cases are significant in number and constitute an important strand of non-violent rape cases in Chinese jurisprudence. Second, analyzing the cases—especially the acquittals—helps in delineating the boundary of rape-by-deception.

The fifth type of fraud involves impersonation over the internet. Typically, the defendants in these cases would create multiple fictitious personas over the internet to obtain sex from victims. As with the cases involving impersonations of authority figures, we have reservations about inclusion in this dataset. As detailed below in II.C.3(e), the end game of these otherwise elaborate deception schemes all contain a clear coercive element (e.g., threats to publicize nude photos or retributions by gangsters). We also, at times, had to determine whether the defendant's fraud was sufficiently proximate to the victim's sex. For example, we excluded cases where the defendant obtained the victim's nude photos through internet deception (e.g., through a fictitious online friend) and then demanded sex by threatening to publicize the photos.¹²² In contrast, we included cases where, having obtained the nude photos through fraud, the defendant demanded that the victim have sex with a purported third party (who was actually the defendant).¹²³ Ultimately, we included this category in the dataset because these cases provide important factual material to the emerging literature on sex obtained through internet fraud¹²⁴ and they help to affirm the boundaries of pure fraudulent sex.

Table C sets out the cases based on the types of fraud.

¹²⁰ *Id.* at ¶88–89 (Steytler P).

¹²¹ Cheng & Wang, *supra* note 75, at 61–62.

¹²² *E.g.*, 明汉才强奸罪二审刑事裁定书 [2nd Instance Criminal Case Judgment of Rape Offence of Ming Hancai], 皖 [Anhui] 02刑终 [Xing Zhong] No. 248 (2020).

¹²³ *E.g.*, 邓家敏强奸、诈骗一审刑事判决书 [1st Instance Criminal Case Judgment of Rape and Fraud Offences of Deng Jiamin], 赣 [Jiangxi]1026刑初 [Xing Chu] No. 33 (2019).

¹²⁴ *E.g.*, Asaf Harduf, *Rape Goes Cyber: Online Violations of Sexual Autonomy*, 50 U. BALT. L. REV. 357, 384–86 (2021); Irina D. Manta, *Tinder Lies*, 54 WAKE FOREST L. REV. 207, 234–37 (2019); Alisdair A. Gillespie, *The Electronic Spanish Prisoner: Romance Frauds on the Internet*, 81 J. CRIM. L. 217, 223–27 (2017).

Table C: Court Cases Based on Types of Fraud

	Religious	Medical	Impersonation of Intimate Partners	Impersonation (Authority)	Impersonation (Others & Online)
2016	11	1	3	10	0
2017	10	3	7	4	0
2018	11	1	2	6	1
2019	7	3	5	5	2
2020	16	7	5	12	6
Total	55	15	22	37	9

3. Doctrinal Analysis

Having set out the categories and distribution, this section examines how the courts interpret the rape provision for each category.

a. Religious Fraudulent Sex

Given the 1984 Explanations and the prevailing consensus in scholarly text, it is no surprise that religious fraudulent sex is widely regarded as rape by the Chinese courts. Of the fifty-five cases included, only one case resulted in an acquittal of the rape charges. There, the Court held that while the defendant was guilty of monetary fraud involving superstitious means, there was insufficient evidence for rape.¹²⁵ The Court did not explain why the evidence was insufficient. One conjecture is that the victim did not explicitly testify that the defendant told her that the sex was part of a religious ritual.¹²⁶

Before examining how these court cases interpreted and applied the rape provision to religious fraudulent sex, it is necessary to describe the relationship between the criminalization of religious fraudulent sex and the regulation of cults and superstitious activities. In 1997, a provision was introduced into the Criminal Law to punish attempts to “sabotage the implementation of any law or administrative regulation of the state” through evil cult and superstitious activities.¹²⁷ The provision further states that “[w]hoever also commits the crime

¹²⁵ 傅蕾诈骗、强奸一审刑事判决书[1st Instance Criminal Case Judgment of Rape and Fraud Offences of Fu Lei],津[Tianjin] 0113刑初[Xing Chu] No. 432 (2019).

¹²⁶ *Id.*

of raping a woman ... while committing a crime as mentioned in paragraph 1 shall be punished according to the provisions on the joinder of penalties for plural crimes.”¹²⁸ An interpretation issued by the Supreme People's Court and the Supreme People's Procuratorate in 1999 (“1999 Interpretation”) stated that “[t]hose who set up and make use of cult organizations, and utilize superstitious heresies to seduce, coerce, deceive and other means to have sex with women or young girls should be punished as rape or having sex with young girls in accordance to article 236 of the Criminal Law.”¹²⁹

Notwithstanding the broad language of “seduce” and “deceive,” there are two complications regarding how this 1999 Interpretation may facilitate the application of rape provisions to religious fraudulent sex. First, this interpretation requires the religious fraudulent sex to take place in a cult; in the interpretation, cults are defined as “illegal organizations that are set up using religions, Qigong or other things as a camouflage, [that] deify their leading members, and confuse, poison and deceive people, recruit and control their members, and endanger the society by fabricating and spreading superstitious heresies.”¹³⁰ Thus, it arguably does not apply to ad hoc interactions with a sole practitioner (e.g., a fortune teller conducting a luck-improving ritual), which constitutes the vast majority of the fifty-five religious fraudulent sex cases surveyed in this Article.

Second, this 1999 Interpretation has been replaced by a 2017 interpretation issued by the Supreme People's Court and the Supreme People's Procuratorate (“2017 Interpretation.”)¹³¹ Tellingly, while this 2017 Interpretation has almost doubled the provisions (sixteen versus nine) of the 1999 Interpretation and provides significantly more extensive and detailed descriptions of the various aspects of cultish activities, it lacks any mention of rape or sexual offenses.

¹²⁷ Art. 300, Criminal Law, *supra* note 17.

¹²⁸ *Id.*

¹²⁹ Art. 5, 关于办理组织和利用邪教组织犯罪案件具体应用法律若干问题的解释 [Interpretation on the Concrete Application of Law on Handling the Cases of Committing Crimes by Organizing and Using Cult Organizations] (promulgated by Supreme People's Court and Supreme People's Procuratorate, Oct. 9, 1999, effective Oct. 9, 1999, invalidated Feb. 1, 2017) (P. R. C.).

¹³⁰ Art. 1, 关于办理组织和利用邪教组织犯罪案件具体应用法律若干问题的解释 [Interpretation on the Concrete Application of Law on Handling the Cases of Committing Crimes by Organizing and Using Cult Organizations] (promulgated by Supreme People's Court and Supreme People's Procuratorate, Oct. 9, 1999, effective Oct. 9, 1999, invalidated Feb. 1, 2017) (P. R. C.).

¹³¹ Art. 16, *id.*

Thus, while punishing religious fraudulent sex as rape is part of the Chinese state's regulation of evil cult and superstitious activities, the doctrinal basis is—at least ostensibly—premised upon rape. Indeed, among the fifty-five cases, only one case cited the 1999 Interpretation in the judgment,¹³² while another cited article 300.¹³³ As evinced through the analysis below, the Chinese courts do make conscious attempts to fit religious fraudulent sex into the rape provisions.

The dominant feature of these fifty-five cases is that, insofar as details of the religious/supernatural claims are provided in the judgments, the victims were all aware that they would be engaging in sexual intercourse.¹³⁴ Many of these cases did involve coercion. For example, the defendant might have claimed that the religious ritual involving sexual intercourse was necessary to avert disasters to family members,¹³⁵ to cure the victim's severe medical condition,¹³⁶ to protect victim's unborn fetus,¹³⁷ to expel haunting evil spirits,¹³⁸ and/or to avoid divine retribution.¹³⁹

Nonetheless, a significant portion of these cases (12) do not involve coercion. For example, the victim might have sought luck-improving rituals that are meant to resolve difficulties in relationships or business.¹⁴⁰ Alternatively, the

¹³² 崔文饶强奸一审刑事判决书 [1st Instance Criminal Case Judgment of Rape Offence of Cui Wenrao], 粤 [Guangdong] 0882刑初 [Xing Chu] No. 533 (2016).

¹³³ 被告人刘纪东犯强奸罪一案 [Criminal Case Judgment of Rape Offence of Defendant Liu Jidong], 辽 [Liaoning] 0122 刑初 [Xing Chu] No. 269 (2016).

¹³⁴ E.g., 吴日胜、徐莉莉强奸一审刑事判决书 [1st Instance Criminal Case Judgment of Rape Offence of Wu Risheng and Xu Lili], 赣 [Jiangxi] 0121刑初 [Xing Chu] No. 281 (2020).

¹³⁵ E.g., 彭亮居强奸案 [Rape Offence of Peng Liangju], 桂 [Guangxi] 07 刑终 [Xing Zhong] No. 155 (2017).

¹³⁶ E.g., 侯某某、杨某某强奸、诈骗二审刑事裁定书 [2nd Instance Criminal Case Judgment of Rape and Fraud Offences of Mr. Hou and Mr. Yang], 云 [Yunnan] 25 刑终 [Xing Zhong] No. 110 (2020).

¹³⁷ E.g., 李朝富强奸一审刑事判决书 [1st Instance Criminal Case Judgment of Rape Offence of Li Chaofu], 云 [Yunnan] 0925 刑初 [Xing Chu] No. 125 (2020).

¹³⁸ E.g., 赵福义强奸罪一审刑事判决书 [1st Instance Criminal Case Judgment of Rape Offence of Zhao Fuyi], 吉 [Jilin] 0113刑初 [Xing Chu] No. 292 (2018).

¹³⁹ E.g., 张辉贵强奸罪二审刑事裁定书 [2nd Instance Criminal Case Judgment of Rape Offence of Zhang Huigui], 川 [Sichuan] 19 刑终 [Xing Zhong] No. 40 (2020).

victim might have agreed to sex in order to advance her spiritual training.¹⁴¹ The defendant might have asserted that sexual intercourse would provide a clear understanding of the victim's luck pattern,¹⁴² or that it was a method to revive and reincarnate the victim's deceased boyfriend.¹⁴³

The former category of cases (those involving threats/coercion) are theoretically more straightforward for the courts. Since threat and coercion are present, the courts can apply the explicit ground (i.e., "coercion") in the rape provision to sustain the rape conviction. This approach would be consistent with the prescriptions in the 1984 Explanations.¹⁴⁴ In some cases, courts highlighted this element of threat/coercion in upholding rape convictions.¹⁴⁵ Indeed, one court observed that the "the victims were rendered a state of both being afraid and unable to resist by the defendant's use of superstitious means, including the threat of the curse."¹⁴⁶ In such circumstances, it is interesting to observe that courts may still identify fraud in conjunction with threats and intimidation when elaborating upon how a defendant's conduct constituted rape.¹⁴⁷

For cases where there was no clear presence of threats/coercion, we discerned two approaches adopted by the courts to address the complications of interpreting "other means." Under the first approach, courts justified a rape conviction by finding that the defendants' fraud constituted psychological

¹⁴⁰ E.g., *Wu Risheng*, *supra* note 134.

¹⁴¹ E.g., *宋利军强奸二审刑事判决书* [2nd Instance Criminal Case Judgment of Rape Offence of Song Lijun], 京 [Beijing] 01刑终 [Xing Zhong] No.100 (2020).

¹⁴² *沈冬生强奸、诈骗一审刑事判决书* [1st Instance Criminal Case Judgment of Rape and Fraud Offences of Shen Dongsheng], 鲁 [Shandong] 0303刑初 [Xing Chu] No. 223 (2019).

¹⁴³ *王登文强奸罪一审刑事判决书* [1st Instance Criminal Case Judgment of Rape Offence of Wang Dengwen], 京 [Beijing] 0108 刑初 [Xing Chu] No. 578 (2018).

¹⁴⁴ See *supra* Part II.A.

¹⁴⁵ E.g., *王亮强奸罪一审刑事判决书* [1st Instance Criminal Case Judgment of Rape Offence of Wang Liang], 吉 [Jilin] 0381刑初 [Xing Chu] No. 473 (2018).

¹⁴⁶ E.g., *杨金钟、苏隐治强奸、强制猥亵、侮辱妇女、诈骗一审刑事判决书* [1st Instance Criminal Case Judgment of Rape, Forced Indecency, Insulting Women and Fraud Offences of Yang Jinzhong and Su Zhiyin], 厦 [Xiamen] 刑初字 [Xing Chu Zi] No.43 (2015).

¹⁴⁷ E.g., *倪玉龙诈骗、强奸二审刑事裁定书* [2nd Instance Criminal Case Judgment of Fraud and Rape Offences of Ni Yulong], 云 [Yunan] 01刑终 [Xing Zhong] No. 466 (2017).

suppression [“心理压迫”],¹⁴⁸ psychological coercion [“精神上受到胁迫”],¹⁴⁹ or psychological control [“精神控制”].¹⁵⁰ In contrast, courts that adopted the second approach were more comfortable framing fraud as the primary *actus reus*. The courts in these cases stated that rape had been committed because the defendant employed “superstitious means” to “deceive/defraud” the victim.¹⁵¹ Indeed, the courts have simply alluded to the deception or fraud, independent of superstitious means.¹⁵² In some cases, courts elaborated further as to why the deception constituted rape. For example, some courts found that the victim was mistaken as to the “actual nature of the sexual relationship” [“性关系的实际性质产生认识错误”] and thus the “real will” [“真实意志”] of the victim had been violated.¹⁵³ Courts occasionally alluded to the notion that the victim “did not know to resist” because of the deception.¹⁵⁴ In this regard, the court in *1st Instance Criminal Case Judgment of Rape Offence of Wu Risheng and Xu Lili* provides a rare exposition that draws on scholarly discourse. Without citing any sources, the court alluded to the concept of a “legal interest” [“法益”]. The court held that while the victim understood the physical nature of the sex [“性交行为的自然属性”], the victim was mistaken as to how she might exercise her “legal interest” of sexual autonomy. The defendants deceived the victim into believing that she could only improve her luck by forgoing this “legal interest,” thereby leaving the victim unaware that she could resist.¹⁵⁵

¹⁴⁸ E.g., *Zhang Huigui*, *supra* note 139.

¹⁴⁹ E.g., *孙某某强奸一审刑事判决书* [*1st Instance Criminal Case Judgment of Rape Offence of Mr. Sun*], 苏 [Jiangsu] 0281 刑初 [Xing Chu] No. 233 (2020).

¹⁵⁰ E.g., *周建伟强奸、非法侵入住宅、妨害公务一审刑事判决书* [*1st Instance Criminal Case Judgment of Rape, Trespassing, Disrupting the Order of Social Administration Offences of Zhou Jianwei*], 冀 [Hebei] 0609 刑初 [Xing Chu] No. 383 (2019).

¹⁵¹ E.g., *Song Lijun*, *supra* note 141.

¹⁵² E.g., *马来芹诈骗、强奸罪一审刑事判决书* [*1st Instance Criminal Case Judgment of Fraud and Rape Offences of Ma Laiqing*], 吉 [Jilin] 0781 刑初 [Xing Chu] No. 177 (2018); *赵岩强奸二审刑事裁定书* [*2nd Instance Criminal Case Judgment of Rape Offence of Zhao Yan*], 辽 [Liaoning] 02刑终 [Xing Zhong] No. 382 (2017).

¹⁵³ E.g., *段某强奸罪一审刑事判决书* [*1st Instance Criminal Case Judgment of Rape Offence of Mr. Duan*], 新 [Xinjiang] 0105 刑初 [Xing Chu] No. 256 (2019).

¹⁵⁴ E.g., *齐健翔诈骗罪一案二审刑事裁定书* [*2nd Instance Criminal Case Judgment of Fraud Offence of Qi Jianxiang*], 沪 [Shanghai] 01刑终 [Xing Zhong] No. 1174 (2016).

¹⁵⁵ *Wu Risheng*, *supra* note 134. For the corresponding scholarly argument, see *supra* notes 84–87 and accompanying text.

b. Medical Fraudulent Sex

All fifteen cases of medical fraudulent sex resulted in rape conviction.

In a significant portion of the cases, there were doubts as to whether the victims (who were teenagers¹⁵⁶ or persons with mental disabilities¹⁵⁷) fully understood the sexual nature of the act. Among these four cases, the court in *2nd Instance Criminal Case Judgment of Rape Offence of Liu Zengbao* provided a more detailed reasoning in response to the defendant's argument that fraud alone applied, separate of violence or coercion. The Court held that the victims were deceived by the defendant's claim that the insertion of a penis into the vagina was necessary to remove impurity and improve health, and were thus was mistaken as to the "actual nature" of the sexual intercourse.¹⁵⁸

Notably, courts also applied this language of mistaking the "actual nature" of the sexual intercourse when addressing cases where the victims were clearly aware that they were engaging in sex. For example, in *2nd Instance Criminal Case Judgment of Rape Offence of Wang Jianlin*, the defendant told the adult victim that there was a lingering presence of sperm from the victim's prior sexual intercourse, and that the remedy was for the defendant to have sex with the victim. The medical pretext was that the defendant had taken medicine that enabled the defendant's sperm to kill the remnant sperm. The court held that rape occurs when the victim's consent is based upon a mistaken understanding of the nature of the sexual intercourse.¹⁵⁹ In this case, since the victim thought that she was undergoing medical treatment (rather than sex), the court found rape.¹⁶⁰

Courts similarly found that the victim's mistaken belief as to the medical purpose of the sex was sufficient to constitute rape.¹⁶¹ For example, in *2nd*

¹⁵⁶ E.g., *刘增保强奸罪二审刑事裁定书* [*2nd Instance Criminal Case Judgment of Rape Offence of Liu Zengbao*], 冀 [Hebei] 06刑终 [Xing Zhong] No. 128 (2020).

¹⁵⁷ E.g., *陈小林强奸一审刑事判决书* [*1st Instance Criminal Case Judgment of Rape Offence of Chen Xiaolin*], 黔 [Guizhou] 0325刑初 [Xing Chu] No. 117 (2018).

¹⁵⁸ *Liu Zengbao*, *supra* note 156.

¹⁵⁹ *王建林强奸二审刑事裁定书* [*2nd Instance Criminal Case Judgment of Rape Offence of Wang Jianlin*], 黔 [Guizhou] 23刑终 [Xing Zhong] No. 67 (2017).

¹⁶⁰ *Id.*

Instance Criminal Case Judgment of Fraud Offence of Chen Shaohui, the Court held that “the victim was deceived into believing that having sex is the necessary means of medical treatment, and thus has a mistaken understanding of the actual nature of the sex.”¹⁶² Indeed, the Court did not deviate from this finding even if the defendant was explicit about the sexual stimulative aspect of the act. In *2nd Instance Criminal Case Judgment of Rape Offence of Wang Jingan*, the victim approached the defendant for infertility treatment. The defendant claimed that sexual stimulation was necessary to enable pregnancy. The defendant first let the victim watch pornographic movies. After the victim claimed that she remained unaroused, the defendant offered to have sex with the victim with reassurances that his sperm would push forward the sperm of the victim’s husband (deposited earlier in the day) and would not impregnate the victim.¹⁶³

c. Impersonation of Intimate Partner

The twenty-two cases of impersonation of intimate partners all resulted in guilty verdicts.

In terms of fact patterns, the telling feature is a broad conception of intimate partners whose impersonation would constitute rape. There are obviously cases where the defendant impersonated the victim’s husband,¹⁶⁴ but in the majority of cases (15), the person impersonated by the defendant was not married to the victim. Indeed, the fact that the person impersonated only had a fleeting relationship with the victim (i.e., a casual and seemingly one-off sexual encounter) is no bar to the finding of rape.¹⁶⁵ Notably, such impersonations are occasionally knowingly facilitated by the victim’s intimate partners. In such

¹⁶¹ See also 许某、林德舜强奸罪二审刑事裁定书[*2nd Instance Criminal Case Judgment of Rape Offence of Mr. Xu and Lin Delin*], 闽 [Fujian] 03刑终 [Xing Zhong] No. 393 (2020) (the victim was an eighty-three year old woman who was initially reluctant because she did not want her children to become aware).

¹⁶² *Chen Shaohui*, *supra* note 107.

¹⁶³ 王景安强奸罪二审刑事裁定书[*2nd Instance Criminal Case Judgment of Rape Offence of Wang Jingan*], 晋 [Shanxi] 08刑终 [Xing Zhong] No. 279 (2017).

¹⁶⁴ E.g., 被告人管甲平强奸一案一审刑事判决书[*1st Instance Criminal Case Judgment of Rape Offence of Defendant Guan Jiaping*], 黔 [Guizhou] 0525刑初 [Xing Chu] No. 249 (2020).

¹⁶⁵ E.g., 徐超、祝王宇强奸罪一审刑事判决书[*1st Instance Criminal Case Judgment of Rape Offence of Xu Chao and Zhu Wangyu*], 浙 [Zhejiang] 0881刑初 [Xing Chu] No. 405 (2020). It is similarly irrelevant that the person who is impersonated is married to another (i.e., the victim is participating in adultery): 管世钢案[*Criminal Case of Guang Shigang*], 苏 [Jiangsu] 0506刑初 [Xing Chu] No. 1056 (2017).

cases, the victim's intimate partners would be charged as an accomplice and also convicted of rape.¹⁶⁶

Doctrinally, the notable feature is how the unanimous finding of rape convictions belies the variety of ways in which courts justified the guilty verdicts. In seven cases, courts simply concluded that the sex was “against the woman's will” and thus constituted rape.¹⁶⁷ In seven other cases, courts added the additional descriptor of “forcibly” vis-à-vis the sex.¹⁶⁸ Three cases categorized the conduct as constituting (and punishable under) “other means.”¹⁶⁹ Two cases alluded to how the defendants tried to take advantage of the sleeping victim.¹⁷⁰

Tellingly, two cases emphasized that fraud was the offending conduct, notwithstanding that the defendants' impersonations were quite passive.¹⁷¹ In both cases, the defendants simply gained access to the bedroom and tried to initiate sex. This behavior can be contrasted with cases in which defendants deliberately changed into the clothes of the impersonated person¹⁷² or colluded with the victim's intimate partner for a bait and switch in a darkened room.¹⁷³

d. Impersonation of Police

¹⁶⁶ E.g., 程某某、梁恒强奸罪案 [*Rape Offence of Mr. Chen and Mr. Liang*], 沪 [Shanghai] 0113 刑初 [Xing Chu] No. 163 (2016).

¹⁶⁷ E.g., 谢某某强奸罪一审刑事判决书 [*1st Instance Criminal Case Judgment of Rape Offence of Mr. Xie*], 青 [Qinghai] 2321 刑初 [Xing Chu] No. 7 (2016).

¹⁶⁸ E.g., 汪国文、卢城强奸罪一审刑事判决书 [*1st Instance Criminal Case Judgment of Rape Offence of Wang Guowen and Lu Cheng*], 苏 [Jiangsu] 0591 刑初 [Xing Chu] No. 209 (2020).

¹⁶⁹ E.g., 林侃强奸罪二审刑事裁定书 [*2nd Instance Criminal Case Judgment of Rape Offence of Lin Kan*], 浙 [Zhejiang] 01 刑终 [Xing Zhong] No. 219 号 (2019).

¹⁷⁰ E.g., 张艳平、李乐强奸罪一审刑事判决书 [*1st Instance Criminal Case Judgment of Rape Offence of Zhang Yanping and Li Leqiang*], 川 [Sichuan] 1423 刑初 [Xing Chu] No. 11 (2019).

¹⁷¹ 王义波强奸罪一审刑事判决书 [*1st Instance Criminal Case Judgment of Rape Offence of Wang Yibo*], 鲁 [Shandong] 1392 刑初 [Xing Chu] No. 297 (2020); 郝磊强奸罪一审刑事判决书 [*1st Instance Criminal Case Judgment of Rape Offence of Hao Lei*], 内 [Neimenggu] 0402 刑初 [Xing Chu] No. 125 (2019).

¹⁷² Wang Guowen, *supra* note 168.

¹⁷³ Xu Chao, *supra* note 165.

As discussed in II.C.2, the majority of the impersonation of police cases are comprised of defendants pretending to be policemen and threatening sex workers with arrest. The presence of coercion renders the cases seemingly straightforward, and indeed twenty-seven of the thirty-one cases resulted in rape convictions. For these convictions, the courts rightly identified that the defendants had utilized coercive means to obtain sex, and thus found that their actions constituted rape.¹⁷⁴ The courts duly recognized that the victims were under fear of being arrested and were thus “afraid to resist”¹⁷⁵ or under “psychological compulsion.”¹⁷⁶ In *1st Instance Criminal Case Judgment of Rape Offence of Mr. Pu, Mr. Liang et al.*, the court further noted that while the victim may have been compliant during sexual intercourse, her compliance was a result of her trying to avoid more adverse consequences in light of the stark power imbalance between the three defendants and herself.¹⁷⁷

Three of the four cases in which the defendants were acquitted of rape were appeals that only addressed issues unrelated to the trial court’s acquittal (i.e., because the prosecutor did not appeal the rape acquittal). Given the unavailability of the trial court judgments on the surveyed database and the mere cursory mention of the rape acquittal in the appellate judgments, we are unable to discern the reasoning of these three cases. For the fourth case, *1st Instance Criminal Case Judgment of Cheating and Bluffing Offence of Mr. Zha, Gan Yu, Tang Yinghao and et al.*, the trial court acquitted the defendant of rape charges on the grounds that, due to the nature of the deception, the court could not rule out the reasonable doubt that the victim was willing to have sex.¹⁷⁸ The critical evidence that sowed the court’s doubt included social media communications between the defendant and victim. In these communications, the victim said “you helped me, I don’t want to hurt you” and other expressions

¹⁷⁴ E.g., 刘显波、王立庆敲诈勒索二审刑事裁定书 [2nd Instance Criminal Case Judgment of Extortion Offence of Liu Xianbo and Wang Liqing], 黑 [Heilongjiang] 01 刑终 [Xing Zhong] No. 450 (2020).

¹⁷⁵ E.g., 王星一审刑事判决书 [1st Instance Criminal Case Judgment of Wang Xingyi], 粤 [Guangdong] 0309 刑初 [Xing Chu] No. 1017 (2019).

¹⁷⁶ E.g., 鲁春洪抢劫、强奸二审刑事判决书 [2nd Instance Criminal Case Judgment of Robbery and Rape Offences of Lu Chunhong], 云 [Yunnan] 01 刑终 [Xing Zhong] No. 465 (2020).

¹⁷⁷ 蒲某梁某等强奸罪一审刑事判决书 [1st Instance Criminal Case Judgment of Rape Offence of Mr. Pu, Mr. Liang and et al.], 甘 [Gansu] 1224 刑初 [Xing Chu] No. 31 (2018).

¹⁷⁸ 扎某、甘宇、汤鏊浩等招摇撞骗罪一审刑事判决书 [1st Instance Criminal Case Judgment of Cheating and Bluffing Offence of Mr. Zha, Gan Yu, Tang Yinghao and et al.], 川 [Sichuan] 0108 刑初 [Xing Chu] No. 254 (2020).

that indicated the victim had a certain level of understanding and trust with the defendant.¹⁷⁹ Notably, the defendants in each of these cases still received considerable prison sentences for the crime of “pos[ing] as state organ personnel to cheat and bluff” [“招摇撞骗”].¹⁸⁰

Interestingly, our searches revealed three cases where the defendants pretended to be policemen to gain the victims’ trust, and induced the victims into sex and also transfer of property. The defendants in these cases were not charged with rape, and thus are not formally included in the dataset. Nonetheless, these cases showed up in our searches because the term “rape” appeared in the judgment for some ancillary matter (e.g., the defendant had previously been convicted of rape). In two of these cases, the defendants were charged and convicted of “pos[ing] as state organ personnel to cheat and bluff.”¹⁸¹ In the other case, *1st Instance Criminal Case Judgment of Fraud Offence of Huang Zhonghua*, in which the financial gains were substantial, the defendant was charged with and convicted of fraud (Article 266).¹⁸² Notably, the prescribed sanctions for these two offenses are comparable to rape. For the offense of “pos[ing] as state organ personnel to cheat and bluff,” the penalty is a minimum of three years imprisonment with a maximum of ten years imprisonment if the defendant posed as a police officer.¹⁸³ The same penalty is applicable for the fraud offense when the case is serious,¹⁸⁴ as was the case in *Huang Zhonghua*.

e. Online Impersonation

¹⁷⁹ *Id.*

¹⁸⁰ Art. 279, Criminal Law, *supra* note 17. The exception is 陈昊、吴朝伟抢劫、敲诈勒索等二审刑事裁定书 [*2nd Instance Criminal Case Judgment of Robbery and Extortion Offences of Chen Hao and Wu Chaowei et al.*], 渝 [Chongqing] 01 刑终 [Xing Zhong] No. 247 (2020), where the court appears to find that there is insufficient evidence as to whether the sex occurred.

¹⁸¹ 榆林市榆阳区人民检察院指控被告人张某犯招摇撞骗罪一审刑事判决书 [*1st Instance Criminal Case Judgment of Cheating and Bluffing Offence of Yulin Yuyang District People's Procuratorate Against the Defendant Mr. Zhang*], 陕 [Shangxi] 0802 刑初 [Xing Chu] No. 272 (2017); 木则招摇撞骗一审刑事判决书 [*1st Instance Criminal Case Judgment of Cheating and Bluffing Offence of Mu Ze*], 川 [Sichuan] 3401 刑初 [Xing Chu] No. 342 (2019).

¹⁸² 黄忠华诈骗一审刑事判决书 [*1st Instance Criminal Case Judgment of Fraud Offence of Huang Zhonghua*], 云 [Yunnan] 0111 刑初 [Xing Chu] No. 748 (2018).

¹⁸³ Art. 279, Criminal Law, *supra* note 17. A similar penalty applies if the “circumstances are serious.” The typical penalty is a maximum of three years imprisonment.

¹⁸⁴ Art. 266, *id.*

The nine online impersonation cases all resulted in convictions.

Defendants in these cases typically interacted with victims through use of multiple fictitious online identities. While the initial approaches varied, the final act of obtaining sex from the victim fell into two basic fact patterns.

The first fact pattern involved the threat of publicizing nude photographs and encompasses four cases. In one case, the defendant solicited nude photographs from the victim under the pretext of identity verification for private access to famous singers by pretending to be a female ticketing agent. Having obtained the nude photographs, the defendant (as the female ticketing agent) demanded—under the threat of publicizing the nude photos—that the victim have sex with a client of the media company. The defendant then pretended to be the client and had sex with the victim.¹⁸⁵ In another case, the defendant was in a romantic relationship with the victim and created sex tapes with the consent of the victim. After the defendant and victim broke up, the defendant approached the victim as a fictitious online person who claimed that he picked up the defendant's lost phone and thus obtained the sex tapes. As this fictitious person, the defendant demanded—under the threat of publicizing the sex tapes—that the victim have sex with her ex-boyfriend (i.e., the defendant).¹⁸⁶

The second fact pattern involved retribution by gangsters. Some schemes were straightforward. In one case, for example, the defendant got to know the victim by using a fake online persona before claiming to be a gangster and threatening to cause problems for the victim unless the victim pretended to be his girlfriend and have sex with him.¹⁸⁷ Some schemes were more elaborate. In another case, for example, the defendant—through multiple online personas—simultaneously pretended to be a gangster seeking retribution against the victim and a friend trying to help the victim. As the gangster, the defendant demanded that the victim choose between having sex with the gangster or the friend.¹⁸⁸ The threat of retribution could also be against someone whom the victim cared about. In one case, the defendant first entered into an online romantic relationship with the victim via a fictitious persona. The defendant later

¹⁸⁵ *Deng Jiamin, supra* note 123.

¹⁸⁶ 翟某伟强奸、诈骗二审刑事裁定书[2nd Instance Criminal Case Judgment of Rape and Fraud Offences of Qu Mouwei], 粤 [Guangdong] 03刑终 [Xing Zhong] No. 288 (2020).

¹⁸⁷ 江郭李强奸一审刑事判决书[1st Instance Criminal Case Judgment of Rape Offense of Jiang Guoli], 辽 [Liaoning] 0211刑初 [Xing Chu] No. 338 (2020).

¹⁸⁸ 张某某强奸一审刑事判决书[1st Instance Criminal Case Judgment of Rape Offense of Mr. Zhang], 鲁 [Shandong] 0181刑初 [Xing Chu] No. 184 (2020).

approached the victim as a fake gangster and threatened to harm the victim's boyfriend (i.e., the fictitious persona) if the victim did not have sex with him (i.e., the fake gangster).¹⁸⁹

Given the element of threat, coercion is the predominant avenue through which the courts sustained the rape convictions.¹⁹⁰ Nonetheless, the courts in two cases categorized the defendant's offending conduct under "other means." In *1st Instance Criminal Case Judgment of Rape Offence of Luan Junpeng*, the court found that the defendant utilized "other means of fabrication of a coercive nature" to rape the victim.¹⁹¹ In *1st Instance Criminal Case Judgment of Rape Offence of Ou Wei*, the court held that the victim had sex under threat and inducement ["引诱"], and thus the defendant had utilized "other means" to rape the victim.¹⁹²

4. Summary of Cases

There are three takeaways from this survey and doctrinal analysis of fraudulent sex cases in China.

First, there are three types of fraudulent sex for which Chinese courts do not require the presence of coercion to sustain rape convictions. These are religious fraudulent sex, medical fraudulent sex, and impersonation of intimate partners. For these three types of fraudulent sex, the victims need not be in a state of distress or dire circumstances. This dispensation of coercion can be contrasted with cases involving impersonation of authority. The courts in police impersonation cases do pay close attention to the degree and extent of coercion experienced by the victim. Where there are doubts as to coercion, the courts are quite prepared to downgrade the conviction to the offense of "pos[ing] as state organ personnel to cheat and bluff" in lieu of rape. Thus, impersonation of police should not be considered a form of rape-by-deception in China. Similarly, while there are a few online impersonation cases that approached the conviction via "other means," the clear presence of coercion indicates that these

¹⁸⁹ 黄辉强奸罪、诈骗罪二审刑事裁定书 [2nd Instance Criminal Case Judgment of Rape and Fraud Offences of Huang Hui], 苏 [Jiangsu] 02刑终 [Xing Zhong] No. 387 (2018).

¹⁹⁰ E.g., *Jiang Guoli*, *supra* note 187.

¹⁹¹ 栾俊鹏强奸一审刑事判决书 [1st Instance Criminal Case Judgment of Rape Offence of Luan Junpeng], 京 [Beijing] 0108刑初 [Xing Chu] No. 853 (2020).

¹⁹² 欧伟强奸一审刑事判决书 [1st Instance Criminal Case Judgment of Rape Offence of Ou Wei], 湘 [Hunan] 3124刑初 [Xing Chu] No. 184 (2020).

two cases are neither an exception nor an expansion of the scope of fraudulent sex criminalization.

Second, courts do not distinguish between fraud as to the nature of the act and fraud as to the purpose of the act. Rather, courts are more concerned with the type of fraud (i.e., religious or medical) and sustained rape convictions in situations where the victims were fully aware that they were engaging in sex. Similarly, the courts adopt a loose definition of intimate partners; essentially, impersonation of someone with whom the victim intended to have sex would suffice for a rape conviction.

Third, while the conviction rates of the surveyed cases are high, there is no consistent jurisprudential principle or approach that may be teased out from the doctrinal analysis. Reflecting the problematic but common Chinese judicial tendency of simply stating conclusory holdings with limited reasoning,¹⁹³ courts in the surveyed cases are causal and unprincipled in using otherwise distinct concepts such as “actual nature [of the act],” “violation of will,” and “forcibly.” In particular, victims are deemed to be deceived as to the “actual nature” of the sexual acts regardless of whether the victims knew that they were having sex. Indeed, courts employed a variety of legal terminologies to justify the application of the rape provision. This is readily apparent in religious fraudulent sex and impersonation of intimate partners where fraud has remained a notable, albeit intermittent, justification. Just as salient is how the clear presence of coercion did not prevent some courts in online impersonation cases from alluding to fraud and categorizing the offending conduct under “other means.”

D. Stating the Current Law

In summary, we can conclude that three types of fraudulent sex are considered rape in China, namely religious fraudulent sex, medical fraudulent sex, and impersonation of intimate partners. These three types of fraudulent sex reflect the strong consensus in the scholarly commentary. They are also prominently featured in our survey of recent cases, with numerous prosecutions and extremely high rates of convictions.

Notably, the criminalization of these three types of fraudulent sex is premised on the context of the fraud (i.e., is it a fraud relating to religion) rather than on the presence of coercion. Unlike other forms of fraudulent sex (e.g., impersonation of authority), the courts do not critically scrutinize the victims’ circumstances and/or state of mind for coercion. The criminalization of

¹⁹³ Chen & Li, *supra* note 91, at 5; William Jing Guo, *Cases as a New Source of Law in China: Key Features of and Reflections on China's Case Guidance System*, 1 CHINA L. & SOC'Y REV. 61, 65 (2016).

fraudulent sex is also not premised on any distinction between the nature of the act and the purpose of the act. Either will suffice for a conviction.

However, while the scope of criminalization is clear, the jurisprudential rationale is not. The quantitative survey of the general criminal law textbooks identified that a significant number of scholars—in a departure from the 1984 Explanations—view religious fraudulent sex as punishable under “other means.” The qualitative analysis of targeted scholarly commentary further revealed the ongoing struggle by Chinese scholars to formulate a coherent theory to connect and justify the various types of fraudulent sex criminalization. In this context, it is perhaps inevitable that the survey of court cases would find a myriad of inconsistently applied justifications.

Two further observations can be made vis-à-vis the evolution of Chinese law in these areas. First, impersonation of intimate partners was not provided for in the 1984 Explanations, but is now clearly considered as rape under Chinese law. Second, while religious fraudulent sex was considered as a form of coercion in the 1984 Explanations, coercion is no longer a necessary element for religious fraudulent sex. Instead, there is increased consensus among judges and scholars that the fraudulent nature of religious fraudulent sex is sufficient to constitute rape. Overall, we observe a steady expansion of the scope of fraudulent sex criminalization since the 1984 Explanations.

III. Outcome: Criminalizing the Most Problematic, without Undue Technical Distinction

Having examined how the concept of “other means” in the Chinese rape provision has been interpreted and applied to criminalize the three types of fraudulent sex, this Part proceeds to discuss the extent to which this outcome is normatively desirable.

A. Controversy over Fraudulent Sex Criminalization

The issue of fraudulent sex criminalization is a hotly contested topic that has galvanized passionate disagreement among legal scholars in the English language literature. The debate over Jed Rubenfeld’s article in 2013 provides a good illustration of this dynamic in the context of U.S. legal literature. In his article, Rubenfeld argued for a radical conception of rape premised on self-possession rather than sexual autonomy. Rubenfeld’s conception of rape would reintroduce the force requirement and exclude most fraudulent sex as rape.¹⁹⁴ This extreme position challenges many of the existing, if otherwise still limited, criminalizations of fraudulent sex and has unsurprisingly prompted many

¹⁹⁴ Rubenfeld, *supra* note 3, at 1423–42.

vigorous criticisms. However, while these criticisms reject Rubinfeld's extreme position, they vary considerably as to the normatively appropriate extent of fraudulent sex criminalization. For example, Tom Dougherty argued that the law should be amended to criminalize all fraudulent sex, preferably as a sexual offense distinguished from rape, in order to give full recognition to sexual autonomy protection.¹⁹⁵ On the other hand, Patricia Falk agreed with the notion that sexual autonomy is violated by deception but was against the criminalization of all fraudulent sex. Instead, she argued for judicious expansion of categories of consent-vitiating fraud (e.g., deceptions by professional actors or scenarios involving abuse of authority).¹⁹⁶ Deborah Tuerkheimer advocated for the alternative concept of sexual agency as the conceptual justification for rape law. This concept seeks to recognize the various constraints limiting the exercise of consent to sex. For fraudulent sex, this concept of sexual agency does not consider that all fraudulent sex should be considered as rape, since misinformation is a matter of degree and only one of many possible forms of constraints.¹⁹⁷ Similar divergences in opinions abound in the debate in the United Kingdom.¹⁹⁸

This lack of consensus is mirrored in the global diversity of law on fraudulent sex criminalization, at least vis-à-vis jurisdictions that have been surveyed in the English-language literature. For example, England reformed its criminal law statute in 2003 to expand the prior narrow common law categories of consent-vitiating fraud. Instead of only fraud as to the nature of the act and impersonation of spouse, the 2003 reform provided that fraud as to the purpose of the act and identity of any person known personally will be sufficient to

¹⁹⁵ Tom Dougherty, *No Way Around Consent: A Reply to Rubinfeld on "Rape-by-Deception,"* 123 YALE L.J. ONLINE 321, 331 (2013).

¹⁹⁶ Patricia J. Falk, *Not Logic, But Experience: Drawing on Lessons from the Real World in Thinking about the Riddle-by-Fraud,* 123 YALE L.J. ONLINE 353, 365–66 (2013).

¹⁹⁷ Deborah Tuerkheimer, *Sex Without Consent,* 123 YALE L.J. ONLINE 335, 344–46 (2013).

¹⁹⁸ For scholarship advocating for the punishment as rape for all forms of fraudulent sex, see Omar Madhloom, *Deception, Mistake and Non-Disclosure: Challenging the Current Approach to Protecting Sexual Autonomy,* 70 N. IR. LEGAL Q. 203, 214–19 (2019); Herring, *supra* note 2, at 517–20. For scholarship that argues for restricting fraudulent sex to the existing narrow categories (i.e., nature of the act and impersonation of intimate partners), see Michael Bohlander, *Mistaken Consent to Sex, Political Correctness and Correct Policy,* 71(5) J. CRIM. L. 412, 425 (2007); Gross, *supra* note 16, at 226–27. For examples of in-between positions, see Kennedy, *supra* note 2, at 103–08 (advancing the concept of identity non-recognition as a basis for determining the scope of fraudulent sex criminalization, which would include fraud relating to contraception/fertility while excluding fraud as to religious and political views and marital status); Gibson, *supra* note 2, at 109 (arguing that all fraudulent sex should be criminalized, albeit as an independent crime and not as the principle sex offense).

vitiates sexual consent.¹⁹⁹ In addition, the provision of a positive definition of consent (i.e., “a person consents if he agrees by choice, and has the freedom and capacity to make that choice”)²⁰⁰ has enabled courts to hold that fraud relating to gender representation could constitute rape as well.²⁰¹ In contrast, after the repeal of a provision punishing a form of fraudulent sex wherein victims are deceived into believing that sex is in the course of the marital relations, no form of fraudulent sex is currently subjected to direct criminalization under German criminal law.²⁰²

Indeed, the divergence can be stark even within the same country. In Australia, the differences in criminal law provisions among the eight states and territory means that the same scenario (based on actual Australian cases, such as falsely claiming sex is part of a mafia initiation ritual) would result in convictions ranging from rape (or its equivalent), to a lesser sexual offense, or to a finding of no criminal liability altogether.²⁰³ This disparity in criminal liability vis-à-vis fraudulent sex is a notable exception to the otherwise “strong degree of convergence in the criminal provisions governing sexual offenses in the various Australian jurisdictions over the past 10-20 years.”²⁰⁴

B. Exceptions to the Rule

¹⁹⁹ §76(2), Sexual Offences Act 2003, c. 42 (U.K.). For an overview of the reform, see generally Jennifer Temkin & Andrew Ashworth, *The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent*, 2004(5) CRIM. L.R. 328 (2004).

²⁰⁰ §74, Sexual Offences Act (U.K.).

²⁰¹ *R v. McNally*, [2014] QB 593, 595–96 (Eng. C.A.). For critical discussion of this extension, see Alex Sharpe, *Expanding Liability for Sexual Fraud Through the Concept of “Active Deception”: A Flawed Approach*, 80(1) J. CRIM. L. 28, 39–44 (2016); Gavin A. Doig, *Deception as to Gender Vitiates Consent*, 77(6) J. CRIM. L. 464, 466–68 (2013).

²⁰² THOMAS VORMBAUM, *A MODERN HISTORY OF GERMAN CRIMINAL LAW* 227 (2013).

²⁰³ Chen, *supra* note 4, at 596–97. See also Jianlin Chen, *The Hidden Sexual Offence: the (Mis)Information of Fraudulent Sex Criminalisation in Australian Universities*, 42(4) SYDNEY L. REV. 425, 435–44 (2020) (critically surveying and discussing the varied—and inaccurate—representations of the law relating to fraudulent sex criminalization in the sexual misconduct websites and policies in Australian universities).

²⁰⁴ Wendy Larcombe, *Rethinking Rape Law Reform: Challenges and Possibilities*, in *NEW DIRECTIONS FOR LAW IN AUSTRALIA* 143, 151 (Ron Levy et al. eds., 2017). For a critical analysis of the legislative process vis-à-vis fraudulent sex in Australia, see Jianlin Chen, *Two Is a Crowd: An Australian Case Study on Legislative Process, Law Reform Commissions and Dealing with Duplicate Offences*, 42(1) STATUTE L. REV. 70, 75–79 (2021).

Amidst this lack of consensus on the general issue of fraudulent sex criminalization, there are some notable agreements on specific types of fraudulent sex criminalization.

1. Medical Fraudulent Sex

In English-language literature, the criminalization of medical fraudulent sex as rape has been widely accepted as desirable. For example, while the “sexual agency” concept advanced by Deborah Tuerkheimer in response to Jed Rubenfeld does not treat all fraudulent sex as rape, it would include both medical misrepresentation and impersonation as fraudulent sex.²⁰⁵ Similarly, in seeking to identify the types of fraudulent sex that should be punished as rape, Patricia Falk identified medical fraudulent sex as top of the list, and sought to expand the scope of both the actors (i.e., to include all types of professional actors such as therapists, counselors, and clergy members) and the actions (i.e., not just fraud in the factum, but fraud in the inducement).²⁰⁶ Stephen Schulhofer was against criminalizing fraudulent sex as a general matter, and instead advocated for singling out certain types of fraudulent sex that are more problematic, namely fraud as to medical purpose, impersonation of intimate partners, and fraud that exposes victims to physical injury or illness.²⁰⁷ This scholarly consensus is unsurprising. The fiduciary nature of the medical context aggravates both the wrongfulness of the sexual exploitation and the propensity of victimization.²⁰⁸

This position also echoes legislative interventions. In a survey of U.S. statutes, Patricia Falk found that, when expanding the scope of fraudulent sex criminalization, state legislatures usually focus upon the specific context of medical treatment.²⁰⁹ In Australia, three out of the eight states/territories (New South Wales, South Australia, and Victoria) did not specifically stipulate that fraud as to purpose would vitiate sexual consent. However, these three states did

²⁰⁵ Tuerkheimer, *supra* note 197, at 346.

²⁰⁶ Falk, *supra* note 196, at 368–69. For an earlier work by Falk that summarizes the legislation and scholarly commentary on fraudulent sex, see Falk, *supra* note 3, at 157–72.

²⁰⁷ STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 284 (Harvard University Press 1998). See also Stuart P. Green, *Lies, Rape, and Statutory Rape*, in LAW AND LIES: DECEPTION AND TRUTH-TELLING IN THE AMERICAN LEGAL SYSTEM 194, 225 (Austin Sarat ed., 2015) (critically considers these three categories of fraudulent sex as “leading candidates for rape by deception.”)

²⁰⁸ Green, *supra* note 208, at 226–27.

²⁰⁹ Falk, *supra* note 3, at 101.

expressly provide that fraud as to medical or hygienic purposes would vitiate sexual consent.²¹⁰

2. Impersonation of Intimate Partners

Impersonation of intimate partners is another type of fraudulent sex where there is wide-spread support for criminalization. By the nineteenth century, the English common law courts had begun developing an exception that impersonation of a victim's husband would constitute rape. This was crystallized in statute by the legislature in 1885.²¹¹ Notably, this doctrine was already incorporated in the Indian Penal Code in 1860.²¹² Such exceptions are also provided for in many U.S. states.²¹³ Similarly, while fraudulent sex is typically not explicitly proscribed by criminalization in civil law jurisdictions, where it is criminalized (e.g., Germany²¹⁴ and Norway²¹⁵) the punishable deceptions are restricted to those relating to marital relations. When the Criminal Code was first enacted in the Republic of China in 1934, there was also a specific provision that criminalized obtaining sex through spousal impersonation.²¹⁶

These provisions have expanded over the years in common law jurisdictions. In England, as noted above in II.A., the 2003 reform now expanded rape to include impersonation of any person known personally to the victim.²¹⁷ In Australia, fraud as to the identity of a sexual partner would now

²¹⁰ Chen, *supra* note 4, at 596–97; Crowe, *supra* note 4, at 238–39.

²¹¹ Laird, *supra* note 2, at 495–98.

²¹² §375, Penal Code (1860) (India). The Indian Penal Code was drafted on the basis of English law with elements from civil law jurisdictions. David Skuy, *Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century*, 32(3) MODERN ASIAN STUDIES 513, 538–45 (1998).

²¹³ Russell L. Christopher & Kathryn H. Christopher, *Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape*, 101 NW. U. L. REV. 75, 99–100 (2007) (noting that 11 states have explicit recognition in their statutes, while five other states have explicit judicial recognition).

²¹⁴ §179, Penal Code of 1871 (1953 version) (Germany) in the GERMAN PENAL CODE OF 1871 (translated by Gerhard O. W. Muller & Thomas Burgenthal, Sweet & Maxwell 1961).

²¹⁵ §194, Penal Code of 1902 (1961 version) (Norway) in the NORWEGIAN PENAL CODE (translated by Harald Schjoldager & Finn Backer, 1961).

²¹⁶ Art. 229, 刑法 [Criminal Code] (R.O.C.) (1934).

²¹⁷ §76(2), Sexual Offences Act (U.K.).

constitute rape in every state and territory, with some states and territories going further by not placing a limitation on the relationship of the person that is being impersonated to the victim.²¹⁸ The European civil law jurisdictions of Germany and Norway repealed their provisions in the 1960s as part of a general reform to reduce criminal law's role in regulating sexual morals, also abolishing provisions relating to adultery, same-sex sodomy, and bestiality.²¹⁹ In contrast, Taiwan (as Republic of China) retained and updated its provision (rendering it gender-neutral) during its major sexual offenses reform in 1999.²²⁰

This general legislative receptivity towards the criminalization of impersonation of intimate partners echoes scholars' positions. As noted above in the previous section, Deborah Tuerkheimer's "sexual agency" would treat impersonation as rape.²²¹ Similarly, impersonation of intimate partners is one of the three categories of fraudulent sex recognized by Stephen Schulhofer as particularly problematic.²²²

3. Religious Fraudulent Sex

Thus far, religious fraudulent sex has received much less scholarly attention in English-language literature.²²³ A likely reason is that the determination of religious fraudulent sex would often require an assessment of the veracity of the purported religious claims.²²⁴ Such assessments are largely prohibited under the

²¹⁸ Dyer, *supra* note 4, at 169–72; Crowe, *supra* note 4, at 239.

²¹⁹ Huang-Yu Wang, 強制手段與被害人受欺瞞的同意：以強制性交猥褻罪為中心 [Force Methods and Agreement under Deception: Based on the Sexual Assault Crime], 42(2) 臺大法學論叢 [NATIONAL TAIWAN U. L. J.] 381, 387 (2013). See §§191-214 Penal Code of 1902 (1994 version) (Norway), available at <https://perma.cc/62Z3-TCMN>. See Tapio Lappi-Seppälä, *Penal Policies in Nordic Countries 1960-2010*, 13 J. SCANDINAVIAN STUDIES CRIMINOLOGY & CRIME PREVENTION 85, 94–95 (2012) (discussing the feminist women's rights movement influence in prompting an increase in penalties for sexual offenses in the 1990s and 2000s).

²²⁰ Chih-Chieh Lin, *Failing to Achieve the Goal: A Feminist Perspective on Why Rape Law Reform in Taiwan has been Unsuccessful*, 18 DUKE J. GENDER L. & POL'Y 163, 169–76 (2010).

²²¹ Tuerkheimer, *supra* note 197, at 346.

²²² SCHULHOFER, *supra* note 207, at 284.

²²³ In one Tennessee case, the defendant induced the victim to have sex with him by telling her that he had magic powers that he could give her through sex. The Court of Appeal held that this constituted the "fraud" necessary to sustain the conviction of rape by fraud. *State v. Collazo*, 2011 WL 4529643, at 16; This case was briefly mentioned in the context of demonstrating the variety of sexual fraud. Manta, *supra* note 125, at 215.

²²⁴ Bradley J. B. Toben & Kris Helge, *Sexual Misconduct with Congregants or Parishioners: Crafting a Model Statute*, 1 BRIT. J. AM. LEGAL STUD. 189, 209–14 (2012).

religious freedom protections in the U.S.²²⁵ and Europe.²²⁶ Nonetheless, relevant scholarship acknowledges the risks and problems of sexual abuse by clergies. Of particular concern is the manner in which trust and confidence between clergy members and adherents creates a power imbalance even among adult adherents.²²⁷ Scholars have advocated both for the recognition of a fiduciary duty (and the corresponding civil liability for breaches) between clergy and adherents,²²⁸ and specific legislation that would criminalize sexual misconduct.²²⁹ Indeed, when surveying states' rape by fraud statutes in the U.S., Patricia Falk observed that U.S. state legislatures have increasingly explicitly mentioned clergy in provisions detailing abuse of trust sexual offenses, in recognition of the substantive similarity of these abuses with abuses within the healthcare context.²³⁰

Notably, religious fraudulent sex is actively criminalized in several of the Asian jurisdictions that have been surveyed in English-language literature. For example, religious fraudulent sex dominates prosecutions of the "procurement by false pretences" offense in Hong Kong. This offense punishes any person who "procures another person, by false pretences or false representations, to do an unlawful sexual act" as a lesser sexual offense, distinct from rape.²³¹ In a systematic survey of reported decisions involving this offense over the period from 2007 to 2017, seven of the eleven cases pertained to religious fraud.²³² Singapore amended its Penal Code in 2019 to set out the types of

²²⁵ *United States v. Ballard*, 322 U.S. 78, 84–87 (1944). For critical discussion of the case and the sincerity test, see Marshall, *supra* note 101, at 255.

²²⁶ Su, *supra* note 101, at 36–37; Nicholas Gibson, *Faith in the Courts: Religious Dress and Human Rights*, 66 CAMBRIDGE L. J. 657, 686–87 (2007).

²²⁷ Toben & Helge, *supra* note 224, at 200–06.

²²⁸ E.g., Zanita E. Fenton, *Faith in Justice: Fiduciaries, Malpractice & Sexual Abuse by Clergy*, 8 MICH. J. GENDER & L. 45, 58–68 (2001); Janice D. Villers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U. L. REV. 1, 37–48 (1996).

²²⁹ Toben & Helge, *supra* note 225, at 207–14.

²³⁰ Falk, *supra* note 3, at 99–101.

²³¹ Crimes Ordinance, (1997) Cap. 200 §120 (H.K.).

²³² Chen, *supra* note 7, at 563–72. See also Jianlin Chen, *Hong Kong's Chinese Temples Ordinance: A Cautionary Case Study of Discriminatory and Misguided Regulation of Religious Fraud*, 33 J. L. & RELIGION 421, 433–37 (2018) (explaining that in Hong Kong, there is a certain level of political resonance vis-à-vis arguments in favor of legal interventions to tackle religious fraud).

“misconception of fact” that would vitiate consent.²³³ The “misconception that he is extracting an evil spirit” was stipulated in the statutory provision as an illustration of a consent-vitiating misconception of fact.²³⁴ In Thailand, the online judgment database revealed four religious fraudulent sex cases reaching the final appellate court (i.e., Supreme Court) over the past four decades.²³⁵ In Taiwan, the number was higher, with three to five such cases annually over the past decade.²³⁶

C. No Undue Technical Distinction

In addition to its consistency with the broad trend of scholarly discourse and legal practice, the criminalization of fraudulent sex in China has avoided the technical distinction drawn by courts in certain much-criticized decisions.

The most infamous decision in the U.S. context is the *Boro v. Superior Court* decision.²³⁷ The defendant in the case, Boro, was a hospital worker. After accessing a patient’s record, he pretended to be a doctor and contacted the victim to tell her that she had contracted a dangerous, highly infectious and perhaps fatal disease. Boro told the victim that there were two possible treatments: one was an expensive and painful surgical procedure, the other involved sexual intercourse with an anonymous donor who had been injected with a serum.²³⁸ The victim chose the second option and had sex with Boro (who was separately pretending to be the anonymous donor).²³⁹ The California Court of Appeal dismissed the prosecution. Applying the fraud in the factum and fraud in the inducement dichotomy, the Court of Appeal found against rape because the victim had appreciated the nature of the sex act she had engaged in.²⁴⁰ Resultant public outcry against the acquittal prompted the

²³³ Chen, *supra* note 10, at 490–94.

²³⁴ Penal Code, (Cap. 224) §377CB (Sing.).

²³⁵ Chen & Triratpan, *supra* note 12, at 39–46.

²³⁶ Chen, *supra* note 11, at 200–01. This criminalization of religious sexual fraud can and should be conceived as a form of religious fraud regulation: Jianlin Chen, *Regulating Religious Fraud in Taiwan and Hong Kong: A Comparative Study on the Convergences and Deviations in the Understanding of Religious Freedom*, 7 CHINESE J. COMP. L. 150, 169–81 (2019).

²³⁷ 163 Cal. App. 3d 1224 (1985). See Ben A. McJunkin, *Deconstructing Rape by Fraud*, 28 COLUM. J. GENDER & L. 1, 10 (2014) (describing the case as “probably the most cited rape by fraud case in American history”).

²³⁸ *Boro*, 163 Cal. App. 3d 1224, 1225.

²³⁹ *Id.*

Californian state legislature to amend its criminal statute to include a new provision expanding its rape definition to explicitly include situations involving “fraudulent representation[s] that the sexual penetration served a professional purpose when it served no professional purpose.”²⁴¹

Australian courts have followed a similar trend. In *R v Mobilio*, the Victorian Court of Appeal reversed the rape conviction of a radiographer who had inserted a transducer into the complainant’s vagina, under the pretext of internal medical examination, when the insertion was in fact solely for the defendant’s own sexual gratification.²⁴² The Court of Appeal distinguished between the purpose of an act and the nature of an act, and held that because the complainant knew the nature and character of the act in question, the complainant’s consent was not vitiated.²⁴³ As in California after *Boros*, public outcry prompted swift legislative action in Victoria²⁴⁴ and other states²⁴⁵ that overruled the decision by explicitly prescribing that sexual consent would be vitiated by mistakes as to the medical or hygienic purposes of the act.

In addition to technical distinctions premised upon the nature of the act, courts’ considerations of the marital status of the impersonated identity in given cases has also led to controversial acquittals. In *People v. Morales*, the California Court of Appeal reversed the rape conviction of a defendant who had sex with the complainant in a dark room while pretending to be the complainant’s boyfriend.²⁴⁶ The Court of Appeal felt constrained by California’s explicit provisions on spousal impersonation (“under the belief that the person committing the act is the victim’s spouse”) and “reluctantly” barred impersonation of non-married lovers from constituting rape.²⁴⁷ Unsurprisingly, California’s legislature promptly modified the material phrase from “victim’s spouse” to “someone known to the victim other than the accused.”²⁴⁸

²⁴⁰ *Id.* at 1230.

²⁴¹ J. Richard Broughton, *The Criminalization of Consensual Adult Sex After Lawrence*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 125, 136 (2014).

²⁴² *R v Mobilio* [1991] 1 VR 339, 353.

²⁴³ *Id.* at 350, 352. For a detailed discussion of the case, see Jenny Morgan, *Rape in Medical Treatment: The Patient as Victim*, 18 MELBOURNE U. L. REV. 403 (1991).

²⁴⁴ §3, Crimes (Rape) Act 1991 (No. 81 of 1991) (Vic, Austl.).

²⁴⁵ *E.g.*, Sch. 1 §4, Criminal Legislation (Amendment) Act 1992 (No. 2 of 1992) (NSW, Austl.); §2, Criminal Law Consolidation (Rape) Amendment Act 1992 (No. 9 of 1992) (SA, Austl.).

²⁴⁶ *People v. Morales*, 212 Cal. App. 4th 583, 586 (2013).

²⁴⁷ *Id.* at 594–95.

These undesirable technical distinctions are not inevitable. Courts can and sometimes do interpret technical distinctions so as to sustain convictions. For example, courts in Australia²⁴⁹ and England²⁵⁰ have held that the impersonation of non-married sexual partners constitutes rape *before* their respective legislatures have amended relevant statutory provisions that otherwise only provide for spousal impersonation. Similarly, the highest court in Hong Kong endorsed and applied the traditional English common law approach wherein deception has to be as to the nature of the act.²⁵¹ However, citing but ultimately departing from *R v Mobilio*, the Court found that the victim was deceived as to the nature of the act when the defendant touched her chest and the inner thigh under the pretext of a first-aid demonstration.²⁵²

Thus, our argument is not that China uniquely avoided the pitfalls of undesirable technical distinctions. The argument is simply that China has thus far avoided these pitfalls.

D. Summary: A Reasonable and Defensible Legal Position

The selective punishment of medical fraudulent sex, religious fraudulent sex and impersonation of intimate partners in China is not only consistent with broad scholarly consensus regarding the types of fraudulent sex that should be criminalized, but also reflects legal practices of many jurisdictions across the world. Moreover, the criminalization of fraudulent sex in China has thus far avoided technical distinctions that resulted in controversial acquittals in other jurisdictions.

In sum, the scope of fraudulent sex criminalization in China is reasonable and defensible, notwithstanding the inevitable critiques of either over or under-inclusiveness flowing from the ongoing and deeply divided debate surrounding the issue more generally.

IV. Methodology: A Unique Blank Slate, Neither Civil Law Nor Common Law

²⁴⁸ Kari Hong, *Rape by Malice*, 78 MONT. L. REV. 187, 211 (2017).

²⁴⁹ *R v Pryor*, [2001] 124 A Crim. R. 22 (Qld. Ct. App. 2001).

²⁵⁰ *R v Elbekkay*, [1995] Crim LR 163 (Eng. Ct. App. 1994).

²⁵¹ *Chan Wai Hung v HKSAR*, 3 HKCFAR 288, 290–91 (H.K. Ct. Final App. 2000).

²⁵² *Id.* at 292.

The previous Part argued that the scope of fraudulent sex criminalization in China is normatively desirable (or at least justifiable) vis-à-vis scholarly consensus and legal practices. In the following Part, we analyze the process in which this positive outcome is achieved.

A. An Absence of Concept and Structuring

This positive outcome appears particularly remarkable given how sexual offenses are prescribed in China. As set out in I.D., “by violence, coercion, or any other means” is the singular focal point for which all forms of non-juvenile sexual offenses (including fraudulent sex) must find expression. Excepting fraud that has a coercive element, the bulk of fraudulent sex criminalization rests upon courts’ interpretation of “other means.”

A catch-all phrase like “other means” in a statutory provision is not unusual. Such terminology can preserve courts’ flexibility and avoid technicalities that distort legal outcomes (though at the cost of ambiguity and overbreadth).²⁵³ However, the unique problem in China’s rape provision is that the interpretation of the scope and content of “other means” is severely hampered by the absence of any statutory guidance. The provision provides no over-arching concept that might have anchored the interpretation. Indeed, there is a circularity in the manner in which the provision is drafted: the rape offense is committed when the defendant “*rapes* a woman by violence, coercion, or any other means.” Under this formulation, the interpretation of “other means” determines the concept of “rape” as much as the concept of “rape” determines the interpretation of “other means.” Notably, the Chinese sexual offense laws not only depart both from common law and civil law approaches, but also from how robbery and property offenses are structured in China.

1. Distinction from Common Law

Until reforms beginning in the 1970s, many common law jurisdictions (such as England or Australia) similarly did not define rape in their criminal

²⁵³ RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW 151–52 (2002). For examples of critiques vis-à-vis other specific statutory provisions, see Jason J. Lee, *Does China Have Alimony?: A Study of China’s Current Post-Divorce Financial Relief System*, 36 PACIFIC BASIN L. J. 113, 120 (2019) (“The law [on alimony] is short, ambiguous, and painted with a broad brush. Without linguistic precision, it is hard to apply in judicial practice.”); Colin Hawes & Alex K.L. Lau et. al., *Lifting the Corporate Veil in China: Statutory Vagueness, Shareholder Ignorance and Case Precedents in a Civil Law System*, 15 J. CORP. L. STUD. 341, 373 (2015) (“the vagueness of article 20 [that governs corporate veil piercing] has led to inconsistency and unfairness in a number of cases.”).

statutes.²⁵⁴ However, common law courts have long approached rape via the concept of consent,²⁵⁵ through which they developed a robust set of binding precedents that progressively enabled the criminalization of many scenarios wherein sex is not obtained through violence or coercion. For example, courts may find that fraud as to the nature of act vitiated consent,²⁵⁶ or that the victim lacked the capacity to consent because of their unconsciousness or mental disability.²⁵⁷

As discussed in Part III.C., the distinction between nature of the act and purpose of the act vis-à-vis consent vitiation has resulted in controversial acquittals that spurned legislative amendments to reverse the law. In terms of developing common law jurisprudence, the distinction is defensible. Fraud as to the nature of the act is, as a general matter, a categorically more serious violation of consent when compared to fraud as to the purpose of the act.²⁵⁸ When extending the rape offense from the traditional domain of force and violence to fraud, it made sense to start with fraud as to the nature of the act.²⁵⁹ The problem in *Boro* and *Mobilio* is that in certain circumstances (e.g., in the medical context), the severity of fraud as to the purpose of the act is comparable to the nature of the act, or at least serious enough to warrant punishment as rape.²⁶⁰ However, having established the distinction, the common law

²⁵⁴ Catarina Sjolín, *Ten Years on: Consent under the Sexual Offences Act 2003*, 79(1) J. CRIM. L. 20, 22–24 (2015); Peter D. Rush, *Criminal Law and the Reformation of Rape in Australia*, RETHINKING RAPE LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 237, 238–43 (Clare McGlynn & Vanessa E. Munro eds., 2010). In the U.S., many state statutes explicitly included the requirement of force/resistance in addition to the absence of consent; reforms removed those requirements and provided a definition of consent. See Cassia C. Spohn, *The Rape Reform Movement: the Traditional Common Law and Rape Law Reforms*, 39(2) JURIMETRICS 119, 120–24 (1999).

²⁵⁵ Laird, *supra* note 2, at 495–98; Williams, *supra* note 14, at 133–36.

²⁵⁶ Laird, *supra* note 2, at 495–98; Williams, *supra* note 14, at 133–36.

²⁵⁷ Ralph Sandland, *Sex and Capacity: The Management of Monsters?*, 76(6) MODERN L. REV. 981, 983–86 (2013); Janine Benedet & Isabel Grant, *Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief*, 52(2) MCGILL L. J. 243, 269 (2007).

²⁵⁸ Williams, *supra* note 14, at 153–54; ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 204–09 (2003). See Sommers, *supra* note 3, at 2290–95 (observing how folk intuitions as to moral culpability and legal liability track the fraud in the factum and fraud in the inducement distinction).

²⁵⁹ GUYORA BINDER, CRIMINAL LAW 263–64, 281–82 (2016); Rubinfeld, *supra* note 3, at 1395–1401.

²⁶⁰ McJunkin, *supra* note 237, at 11–12; Morgan, *supra* note 243, at 412–16.

jurisprudence could not readily carve out a principled exception for medical fraudulent sex, or for that matter, religious fraudulent sex.

2. Distinction from Civil Law

In contrast, consent is not the focal point for rape in civil law jurisdictions. Instead, the criminal codes of the civil law jurisdictions usually have rape provisions that stipulate the *actus reus* requirement of “violence” and “coercion,”²⁶¹ especially if prior to reforms in the past few decades.²⁶² This violence and coercion-centric rape provision is complemented in turn with other sexual offenses provisions that do not require the otherwise high threshold of violence/coercion. For example, the German Penal Code traditionally separated abuse of authority (§174); taking advantage of unconsciousness or insanity (§176(2)), and marital-related deceptions (§179).²⁶³ Similar structure and provisions are replicated in Taiwan as well.²⁶⁴ The existence of these other sexual offenses would unsurprisingly shape courts’ ensuing interpretations of the core rape provision to avoid duplication of offenses.²⁶⁵

For example, the current rape provision in Taiwan stipulates the *actus reus* as “sexual intercourse with a male or female by force, threat, intimidation, hypnosis or other means against the person’s will.”²⁶⁶ Notably, the qualifier

²⁶¹ §177, Penal Code (Germany), *supra* note 214; §192, Penal Code (Norway), *supra* note 215; Ch 6 Sec. 1, Penal Code of 1962 (1972 version) in the PENAL CODE OF SWEDEN (translated by Thorsten Sellin, Sweet & Maxwell 1972). *See* Bohlander, *supra* note 198, at 420–25.

²⁶² For discussion of amendments to the German Penal Code, *see* Tatjana Hornle, *The New German Law on Sexual Assault and Sexual Harassment*, 18 GERMAN L.J. 1309, 1317–24 (2017).

²⁶³ Penal Code (Germany), *supra* note 214. In conjunction with the adoption of the “no means no” model towards rape in 2016, taking advantage of unconsciousness or insanity was reworded and subsumed under the rape provision, while the marital-related deception provision had been abolished in the 1970s. Hornle, *supra* note 262, at 1317–24. For a discussion of the impact on actual enforcement, *see* Ralf Kolbel, “Progressive” Criminalization? A Sociological and Criminological Analysis Based on the German “No Means No” Provision, 22 GERMAN L.J. 817, 823–29 (2021).

²⁶⁴ Art. 228 (abuse of authority), 225 (taking advantage of mental/intellectual defects) & 229 (spousal impersonation), Criminal Code, 刑法 [Criminal Code] (Taiwan) (1999). For an academic overview, *see* 盧映潔 LU YING-CHIEH, 刑法分則新論 [THE SPECIFIC PROVISIONS OF CRIMINAL LAW] 381–427 (2020).

²⁶⁵ Thomas Lundmark & Helen Waller, *Using Statutes and Cases in Common and Civil Law*, 7(4) TRANSN’L LEGAL THEORY 429, 438–45 (2016); John M. Golden, *Redundancy: When Law Repeats Itself*, 94 TEX. L. REV. 629, 655–58 (2016); Claire M. Germain, *Approaches to Statutory Interpretation and Legislative History in France*, 13 DUKE J. COMP. & INT’L L. 195, 201–03 (2003).

“against the person’s will” was a 1999 addition pursuant to a sexual autonomy ethos that underpinned the feminist-led reform.²⁶⁷ Nonetheless, the retention of the other sexual offense provisions continued to contribute to the current controversies and uncertainties relating to the interpretation of “other means.”²⁶⁸ Relying heavily on the existence of these other provisions, some scholars continued to argue that a high-level of compulsion (akin to force and direct threat) is required for an act to constitute rape.²⁶⁹ Courts rejected the need for high-level compulsion but wavered between low-level of compulsion and no compulsion.²⁷⁰

This wavering is particularly salient with regards to fraudulent sex. Courts have sustained rape convictions for fraud involving a threat (*e.g.*, when a defendant pretended to be a policeman and threatened to arrest the victim)²⁷¹ or fraud as to the nature of the act (*e.g.*, insertion of penis instead of medical instrument),²⁷² while acquitting defendants of rape charges for fraud related to consideration (*e.g.*, promise of money)²⁷³ or ancillary information (*e.g.*, HIV positive status).²⁷⁴ While this pattern comports with the position of low-level compulsion, Taiwanese courts also specifically carved out an interpretation to apply the rape provision to instances of religious fraudulent sex, which, as in

²⁶⁶ Art. 221, Criminal Code (Taiwan), *supra* note 265.

²⁶⁷ Lin, *supra* note 220, at 169–76; Marietta Sze-chie Fa, *Rape Myths in American and Chinese Laws and Legal Systems: Do Tradition and Culture Make the Difference?*, 2007 CONTEMP. ASIAN STUD. 1, 92–100 (2007).

²⁶⁸ Lin, *supra* note 220, at 178–80.

²⁶⁹ Jung-Chien Huang, 2010年刑事法發展回顧：慾望年代，慾望刑法？ [Developments in the Law in 2010: Criminal Law], 40(S) 臺大法學論叢 [NATIONAL TAIWAN U. L. J.] 1795, 1835 (2011); Tze-Tien Hsu, 面臨合法惡害威脅下的性自主 [Sexual Autonomy Under Legal Duress], 181 臺灣法學 [TAIWAN L. J.] 120, 124–25 (2011). See also 陳子平 ZIPING CHEN, 刑法各論 [CRIMINAL LAW: SPECIFIC PROVISIONS] 222–223 (2019) (on the basis of the continued existence of the other offenses, critiquing judicial judgments that attempt to shift focus to “against will” as the core actus reus instead of “forcible”).

²⁷⁰ Chen, *supra* note 11, at 194–99.

²⁷¹ *E.g.*, 最高法院 [Supreme Court], 刑事 [Criminal Division], 95台上 [Tai Shang] No. 7201 (2006) (Taiwan).

²⁷² *E.g.*, 最高法院 [Supreme Court], 刑事 [Criminal Division], 98台上 [Tai Shang] No. 3312 (2009) (Taiwan).

²⁷³ 最高法院 [Supreme Court], 刑事 [Criminal Division], 102台上 [Tai Shang] No. 248 (2013) (Taiwan).

²⁷⁴ 高等法院臺中分院 [High Court Tainan Branch Court], 刑事 [Criminal Division], 103上訴 [Tai Su] No. 1567 (2014) (Taiwan).

China, often involve victims who are aware of the sexual nature of the acts and are not coerced by perpetrators to participate.²⁷⁵ Under this interpretation, rape is constituted if the defendant induces sexual intercourse with victims who are in psychologically vulnerable mental states, through methods that cannot be verified by science (e.g., divine powers, supernatural forces, religion, or superstitions).²⁷⁶ The allusion of psychological vulnerability reflects the doctrinal constraints against a full embrace of fraudulent sex criminalization. Nonetheless, the requisite psychological vulnerability can appear trivial: desires to reconcile with a boyfriend or “difficulties at work” have each sufficed.²⁷⁷ Courts also did not explain the exclusion of scientifically verifiable fraud (i.e., non-religious fraud), even though this sort of fraud poses no difference in terms of the harm to victim and moral culpability of the defendant. The problems²⁷⁸ and possible reasons²⁷⁹ of this doctrinal interpretation have been more fully addressed elsewhere. The takeaway for this Article is simply that the existence of these other provisions can cast a long shadow over the interpretations of “other means.”

3. Distinction from Robbery in China

This interpretative dynamic can also be witnessed in China vis-à-vis the robbery offense. Both the rape and the robbery offenses have the identical core *actus reus* of “by violence, coercion, or any other means.”²⁸⁰ However, unlike

²⁷⁵ Chen, *supra* note 11, at 206–08.

²⁷⁶ 最高法院 [Supreme Court], 刑事 [Criminal Division], 102台上 [Tai Shang] No. 3692 (2013) (Taiwan). For academic discussion of the seminal nature of the case, see Sheng-Wei Tsai, 論強制性交罪違反意願之方法 [*Forcible Means in the Crime of Forced Sexual Intercourse*], 18中研院法學期刊 [ACADEMIA SINICA L. J.] 41, 62, 69 (2016).

²⁷⁷ *Supreme Court Judgment 102/3692*, *supra* note 276.

²⁷⁸ One concern involves the Taiwanese courts’ marked lack of sympathy towards victims’ vulnerability where non-religious fraud is employed. In one case, the court held that there was insufficient violation of will when a defendant used the false promise of payment to obtain sex from a mildly intellectually disabled twelve-year-old girl. Jianlin Chen & Shao Yuan Chong, *The Curse of the Lecherous Spiritual Charlatans: Law, Moral Panic and Newspaper Reports of Rape by Religious Fraud in Taiwan*, 17 U. PA. ASIAN L. REV. 89, 103–05 (2021).

²⁷⁹ *Id.* at 121–23 (using thematic and discourse analysis of Taiwanese media reports to highlight a moral panic narrative that drives the otherwise arbitrary singling out of religious fraudulent sex for criminalization).

²⁸⁰ Art. 263, Criminal Law, *supra* note 17.

for sexual offenses, there are other specific offenses (e.g., theft,²⁸¹ fraud,²⁸² extortion²⁸³) for property offenses. The presence of these other property offenses in turn have enabled a constrained definition of “other means” that closely aligned with the preceding phrases of “violence” and “coercion.” Thus, “other means” for robbery requires the perpetrator to cause the victim’s unconsciousness (i.e., not merely taking advantage of a victim who was already unconscious) and does not include the use of fraud.²⁸⁴

B. Pros and Cons of a Blank Slate

Without the existence of an underpinning concept (i.e., consent) or a structure of various types of offenses, the relevant legal actors in China (i.e., courts, law enforcement, legal scholars) are essentially given a blank slate to develop the law on fraudulent sex criminalization. The urgency and importance of translating the scantily worded provision into a workable set of sexual offenses meant that the development process inevitably prioritized the attainment of desired legal outcomes rather than neat and coherent principles. This dynamic is evidenced in the 1984 Explanations. During this initial attempt to map the contours of rape, the 1984 Explanations identified that religious fraudulent sex and medical fraudulent sex should be punished as rape. As discussed in Part III.B., this is the correct outcome. However, the rationale for criminalization provided in the 1984 Explanations is not necessarily well thought-out. As noted in Part II.A., religious fraudulent sex was considered as an example of coercion, while medical fraudulent sex was stated as an example of “other means.” Of course, religious claims can be coercive and can rightly be considered as the second limb (i.e., “coercion”) of the provision. However, this arguably renders redundant the addition of “or deceive” when describing the offending conduct (i.e., “using superstition to intimidate or deceive”). It also potentially leaves out forms of religious fraudulent sex that are non-coercive. As discussed above, some scholars²⁸⁵ and courts²⁸⁶ have since moved away from this position and now regard religious fraudulent sex as part of “other means.”

²⁸¹ Art. 264, *id.*

²⁸² Art. 266, *id.*

²⁸³ Art. 274, *id.*

²⁸⁴ Hu, *supra* note 46, at 58–59 and 63–64; Yang, *supra* note 45, at 65.

²⁸⁵ *See supra* Part II.B.1.

²⁸⁶ *See supra* Part II.C.3.a.

Similar issues can be raised with regard to medical fraudulent sex. The 1984 Explanations set the threshold of “unable to resist” for “other means.”²⁸⁷ There are situations, such as the *Boro v. Superior Court* case, that arguably have a coercive element.²⁸⁸ However, this threshold is arguably not satisfied in some of this Article’s surveyed cases, even if this did not prevent the convictions.²⁸⁹ Relatedly, there is no mention of intimate partners impersonation in the 1984 Explanations, even if there is now a consensus that this would constitute “other means.” In any event, it is questionable whether impersonation of an intimate partner would satisfy the requirement of a victim’s inability to resist.²⁹⁰ Thus, it is not surprising that while the current scope of fraudulent sex criminalization is desirable, there remains an absence of an overarching theory to explain and justify the scope of fraudulent sex criminalization in scholarly literature.²⁹¹

Indeed, this pattern of desirable outcomes supported by questionable logic is endemic in other aspects of rape criminalization under Chinese law. A particularly salient example is where the victim is a person with a mental illness or disability. Without question, it should be a serious sexual offense if a person knowingly has sexual intercourse with someone who lacks the mental capacity to give meaningful consent.²⁹² While having sex with a mentally ill or disabled person is not explicitly provided for in the Criminal law, the 1984 Explanations rightly recognized that this act would constitute rape, regardless of the means used to procure sex.²⁹³ However, this otherwise correct legal conclusion is not supported by any reasoning, and is indeed at odds with the preceding statement

²⁸⁷ See *supra* Part II.A.

²⁸⁸ Luis E. Chiesa, *Solving the Riddle of Rape-by-Deception*, 35 YALE L. & POL’Y REV. 407, 453–54 (2017); accord *McJunkin*, *supra* note 237, at 12.

²⁸⁹ See *supra* Part II.C.3.b.

²⁹⁰ Wang, *supra* note 80, at 148–49.

²⁹¹ See *supra* Part II.B.2.

²⁹² Notwithstanding recognition of the need to address the high risk of sexual abuse to persons with mental disabilities, a body of critical scholarship challenges the otherwise prevailing practice of categorical punishment premised upon a victim’s mental incapacity. *E.g.*, Julia L Wacker & Susan L. Parish et. al., *Sexual Assault and Women with Cognitive Disabilities: Codifying Discrimination in the United States*, 19(2) J. DISABILITY POL’Y STUD. 86, 88–89 (2008) (discussing how the current approach prosecutes the disability rather than the perpetrator); Janine Benedet & Isabel Grant, *Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief*, 52 MCGILL L. J. 243, 286–87 (2007) (arguing that mental capacity should be evaluated in the context of whether there is consent).

²⁹³ Questions 1, 1984 Explanations, *supra* note 47.

that explained “the crime of rape refers to the use of violence, coercion or other means to violate a woman’s will and forcibly have sex.”²⁹⁴

This dilemma unsurprisingly spurred diverse scholarship and judicial treatment. In the textbooks surveyed in II.B.1, five replicated the treatment in the 1984 Explanations.²⁹⁵ Three textbooks made a direct analogy with having sex with a child, notwithstanding the fact that the punishment of sex with a child under the age of fourteen is explicitly provided for.²⁹⁶ Notably, two textbooks rationalized the punishment by including it under “other means.”²⁹⁷ Two textbooks did not make any mention.²⁹⁸ Finally, the textbook by Mingkai Zhang recognized the tension and pointedly observed that the punishing of all sex with mentally ill or disabled victims challenged the prevailing understanding of rape as a plural-act offense [“复行为犯”].²⁹⁹ For cases, preliminary searches quickly revealed judgments that explicitly stated that there is no requirement of any particular means to obtain sex,³⁰⁰ judgments that regarded it as part of “other means”,³⁰¹ and judgments that simply made the conclusory finding of “forcible” [“强行”] to fit into the rape provision.³⁰²

C. Summary: Messy But Pragmatically Desirable

²⁹⁴ Questions 1, *id.*

²⁹⁵ *E.g.*, YU, *supra* note 70, at 126.

²⁹⁶ *E.g.*, LIU, *supra* note 71, at 24.3.1.1.2.

²⁹⁷ *E.g.*, ZHOU, *supra* note 66, at 31.

²⁹⁸ LUO, *supra* note 72, at 235–42; WEI, *supra* note 62, at 125–29.

²⁹⁹ ZHANG, *supra* note 67, at 871. As understood in the Chinese legal literature, a plural act offense occurs where a criminal offense requires two or more *actus reus* that are independently not punishable, of different natures, and connected by a relationship of means and objective: Xue Han, 复行为犯既遂形态研究 [*Research on Accomplishment of Plural Act Offense*], 30(2) 华北水利水电大学学报(社会科学版) [J. NORTH CHINA U. OF WATER RESOURCES & ELECTRIC POWER (SOCIAL SCIENCE EDITION)] 85, 85-86 (2014).

³⁰⁰ *E.g.*, 赵恢生强奸一审刑事判决书 [*1st Instance Criminal Case Judgment of Rape Offence of Zhao Huisheng*], 鄂 [Hubei] 0222刑初 [Xing Chu] No. 433 (2019).

³⁰¹ *E.g.*, 徐森腾强奸罪一审刑事判决书 [*1st Instance Criminal Case Judgment of Rape Offence of Xu Senteng*], 闽 [Fujian] 0302刑初 [Xing Chu] No. 469 (2018).

³⁰² *E.g.*, 陈如北强奸二审刑事裁定书 [*2nd Instance Criminal Case Judgment of Rape Offence of Chen Rubei*], 粤 [Guangdong] 02刑终 [Xing Zhong] No. 251 (2018).

With the benefit of hindsight, the poor drafting of the Chinese sexual offense provisions turns out to be a mixed blessing in disguise. The absence of guidance from either an underlying concept or a coherent structure of complementary offenses prompted continued tensions and controversies when courts and scholars formulate the overarching theory and principles for sexual offense criminalization.³⁰³ In turn, however, these obstacles compelled a results-oriented interpretative process that reached normatively desirable outcomes without complications from undue technical distinction.³⁰⁴

V. Implications: It's Complicated (for Civil Law Jurisdictions)

Beyond providing a descriptive, normative, and explanatory account of China's fraudulent sex criminalization framework, this Article has broader implications for scholarship addressing fraudulent sex criminalization and the comparative analysis of civil law jurisdictions.

As noted above, discussions of fraudulent sex in English-language literature typically focus upon common law jurisdictions. Occasionally, scholars reference the criminal law of civil law jurisdictions by way of comparison to perceptions of common law jurisdictions' more receptive attitudes towards rape-by-deception recognition. For example, Amit Pundik wrote that "[w]hether and how obtaining consent to sexual relations by deception is criminalized varies significantly between countries, with an apparent division between common and civil law jurisdictions. Some European jurisdictions tend to avoid criminalizing deceptive sexual relations. In particular, using deception to obtain consent to sexual relations between mentally-sound adults is not generally criminalized in Germany and Spain, while Italy does not criminalize types of deception other than impersonation. In contrast to these countries, most common-law systems

³⁰³ Indeed, Chinese scholars remain in dispute over what core value underpins the rape provision. For discussion about the debate between the rape provision's dual purposes (addressing the use of coercive means to obtain sex and prohibiting sex that is against a victim's will) and the various compromises and alternative theories in-between, see Wang, *supra* note 83, at 45; Hantao Wei, 强奸罪的本质特征与立法模式之反思 [*The Fundamental Characteristics of Rape and Reflection on Legislative Model*], 2012(4) 环球法律评论 [GLOBAL L. R.] 116, 117 (2012).

³⁰⁴ See Yun-Chien Chang & Ke Xu, *Decentralized and Anomalous Interpretation of Chinese Private Law: Understanding A Bureaucratic and Political Judicial System*, 102 MINN. L. REV. 1527, 1538–39 (2018) ("Chinese jurists are far less dogmatic than, for example, German jurists, and are arguably more liberal in statutory interpretations than their American colleagues to begin with. ... If Chinese judges were as doctrinal and legalistic as their German counterparts, they would seek to find the correct interpretation of a given statute, but in our observation, very few Chinese judges think this way. ... Above all, judges in China appear to prioritize solving problems and maintaining social order (harmony) over simply following legal logic.").

acknowledge that consent can be vitiated by some types of deception.”³⁰⁵ This sentiment is repeated by Nora Scheidegger, who observed that “[a]s opposed to various common law jurisdictions, civil law jurisdictions tend to avoid criminalizing deceptive sexual relations.”³⁰⁶

Beyond providing a comparative descriptive account, this allusion to civil law jurisdictions may be explicitly used to support a restrictive approach towards fraudulent sex criminalization. In his vigorous rebuttal of Jonathan Herring’s argument that all forms of fraudulent sex should be punished as rape under English law,³⁰⁷ Michael Bohlander (in additional doctrinal arguments specific to English law) relied heavily on the idea that dominance of “consent” in the discourse of rape is largely unique to common law jurisdictions.³⁰⁸ Bohlander described the “well-researched and reasoned judgment” of the Trial Chamber II of the International Criminal Tribunal (“ICTY”) for the Former Yugoslavia in the case of *Kunarac et al.*³⁰⁹ and highlighted three broad categories for how domestic jurisdictions approach rape that the judgment elucidated. These categories included force or threat of force, force or specific circumstances which go to the vulnerability or incapacity of the victim, and an absence of consent.³¹⁰ Noting that England belonged to the third category, Bohlander argued that English law should follow the approach of “most jurisdictions,” which attach—and indeed restrict—a finding of absence of consent to the existence of what he calls “exploitative factors.”³¹¹ For fraudulent sex, this would be “mostly confined to the nature of the act or the person of the partner.”³¹² Interestingly, the trial chamber mentioned and categorized China’s approach as falling under the first category (i.e., force or threat of force).³¹³

This categorization of China’s approach is incorrect. China’s criminalization of fraudulent sex does not require a coercive element in the

³⁰⁵ Pundik, *supra* note 13, at 98; *see also* Gibson, *supra* note 2, at 82–83 (citing Amit Pundik and repeating this claim when framing the debate in the Introduction).

³⁰⁶ Scheidegger, *supra* note 1, at 771.

³⁰⁷ Herring, *supra* note 2, at 511–15.

³⁰⁸ Bohlander, *supra* note 198, at 417–20.

³⁰⁹ *Id.* at 421–24.

³¹⁰ *Id.* at 421.

³¹¹ *Id.* at 425.

³¹² *Id.*

³¹³ *Id.* at 421.

fraudulent act.³¹⁴ No demonstration of force, threat, or other means is required if the victim is a person with physical or mental disabilities.³¹⁵ At the very least, the trial chamber should have placed China in the second category (i.e., force or specific circumstances which go to the vulnerability or incapacity).

An examination of the trial chamber judgment reveals why this mischaracterization occurred. When reviewing the rape law in the various jurisdictions, the ICTY reviewed and cited statutory provisions without analyzing case law or scholarly commentary.³¹⁶ In reference to China's statutory framework, the trial chamber judgment noted the statutory language "[w]hoever by violence, coercion or other means rapes a woman" as its basis for placing China under its first category.³¹⁷

Notably, this mischaracterization problem is not unique to the ICTY. In advancing her argument for introducing consent as an essential element of the crime of rape,³¹⁸ María Alejandra Gómez Duque observed that "[j]ust like in Europe, countries in Latin America, Africa, and Asia fail to address consent in their legal definition of rape and focus on the use of 'violence' instead."³¹⁹ She specifically included China in a list of such countries, but only referenced and cited the aforementioned statutory provision.³²⁰

Thus, the implication of this Article is two-fold:

First, it is erroneous to assume that civil law jurisdictions, as a general matter, are adverse towards fraudulent sex criminalization, or even rape-by-deception recognition. The scope of rape-by-deception criminalization in China is broader than traditional common law positions in many significant respects. The impersonation of intimate partners beyond spouses would suffice for rape convictions in China, as would any fraud in the religious and medical context

³¹⁴ See *supra* Part II.D.

³¹⁵ *Supra* notes 293–303 and accompanying text.

³¹⁶ Prosecutor v Kunarac et al., Case No. IT-96-23-T & IT-96-23/1-T, Judgment, at ¶443–56 (Feb. 22, 2001).

³¹⁷ *Id.* at ¶444.

³¹⁸ María Alejandra Gómez Duque, *Towards a Legal Reform of Rape Laws Under International Human Rights Law*, 22 GEO. J. GENDER & L. 487, 532 (2021).

³¹⁹ *Id.* at 521.

³²⁰ *Id.* at 524 n.286.

(even if only to purpose or consideration). Indeed, China's approach (as framed in this Article) echoes that of earlier studies on Taiwan³²¹ and Thailand,³²² which reveal a more extensive and vigorous scope of fraudulent sex criminalization than apparent from any analysis of relevant statutory provisions alone. Tellingly, this assumption is particularly problematic when used in conjunction with normative arguments in favor of a more restrictive scope of fraudulent sex criminalization.

The second implication is that scholars should not limit their comparative analyses of civil law jurisdictions to reviewing statutory provisions alone, especially where substantive law is at stake.³²³ Given the prevalence of civil law jurisdictions, it is desirable to include them so as to provide a more complete understanding of legal practices around the world. However, statutory provisions in isolation can present an incomplete picture of laws in practice.³²⁴ In particular, scholars should not underestimate the capacity and willingness of courts in civil law jurisdictions to develop doctrinal interpretations that significantly expand and/or modify the scope of statutory provisions³²⁵—courts in China, Taiwan³²⁶ and Thailand,³²⁷ have certainly been willing and capable in the realm of fraudulent sex criminalization.

CONCLUSION

This Article illustrates how a single phrase (“of other means”) in a single provision (“by violence, coercion, or any other means rapes a woman”) provides the basis for robust fraudulent sex criminalization in China. Notwithstanding (or

³²¹ Chen, *supra* note 12, at 193–206.

³²² Chen & Triratpan, *supra* note 11, at 34–39, 43–46.

³²³ Part IV.A of this Article, where the reference and citation of the statutory provisions of various civil law jurisdictions establishes the uniqueness of the Chinese statutory provisions, is arguably an example where reviewing statutory provisions alone is, in fact, appropriate.

³²⁴ In fairness, focusing only upon statutory provisions is less of an issue in legal research that examines a singular or small number of jurisdictions. Indeed, as alluded to in Part II.C.1, scholars frequently survey court judgments to tease out the actual interpretation and application of Chinese law.

³²⁵ Indeed, Thomas Lundmark and Helen Waller observed that while statutory analogy (i.e., analogy that goes far beyond the language of the statute) is practically non-existent in California and England, such examples are not uncommon in Germany: Lundmark & Waller, *supra* note 265, at 440–45.

³²⁶ *Supra* notes 267–280 and accompanying text.

³²⁷ Chen & Triratpan, *supra* note 12, at 34–39, 43–46 (interpreting “inability to resist” to include naivety).

arguably because of) the lack of guidance from an underlying structure of complementary sexual offenses, Chinese legal actors have collectively developed an impressive rape-by-deception approach that addresses religious fraudulent sex, medical fraudulent sex, and the impersonation of intimate partners. Avoiding undue technical distinctions, this outcome-driven approach sacrifices concise principles to punish serious and widely recognized forms of fraudulent sex. This case study thus not only challenges the general scholarly perception that civil law jurisdictions are not disposed towards fraudulent sex criminalization, but also cautions against sole reliance upon statutory provisions when determining the actual substantive law of civil law jurisdictions. As with judge-made law in common law jurisdictions, there is more than meets the eyes when it comes to civil law statutory provisions.