DECONSTRUCTING RAPE BY FRAUD

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Abstract

In this Article, I critically examine the role of normative masculinity in determining the shape and scope of the criminal law doctrine of rape by fraud, which purports to criminalize sexual intercourse procured through certain material deceptions. In application, the rape by fraud doctrine is exceedingly narrow—deceptively induced sexual intercourse is rarely criminalized as rape, despite deception's profound impact on the voluntariness of sexual consent. As the Article explains, the rape by fraud doctrine is thus in tension with the prevailing view that rape law principally protects a thick norm of individual sexual autonomy. Despite this tension, the narrowness of the rape by fraud doctrine is frequently defended, often by those who are most committed to individual autonomy elsewhere in rape law.

Through an analysis of court decisions and academic commentary, I demonstrate that those defenses largely rest on appeals to a romanticized ideal of the practice of seduction. I illuminate the link between seduction and a prevailing ideology of normative masculinity that allocates social status for men on the basis of demonstrations of sexual conquest. That ideology perpetuates narratives in which women, through their capacity to grant or withhold consent, hold power over men when pursued as objects for sex. Indeed, within this account, the transgression of women's power is what makes sexual conquest worthy of masculine status. Deceptions used to procure sex are criminalized only in exceptional cases where the narratives of interpersonal power break down. Thus, the rape by fraud doctrine can be seen as codifying existing limits on masculine status transfer. Ultimately, I argue that understanding the rape by fraud doctrine in terms of normative masculinity exposes an important continuity between contemporary rape law and rape law historically, in which rape was a crime against men's property interest in women.

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* J.D., University of Michigan Law School; B.A., University of Vermont. I owe a tremendous debt of gratitude to Catharine MacKinnon, J.J. Prescott, Peter Rubin, and Marc Spindelman for years of unwavering support and encouragement. For extremely helpful feedback on this piece, I also wish to thank Gabe Mendlow, Eve Primus, Margaret Jane Radin, Clifford Rosky, Philip Soper, Sonja Starr, and all the participants of the University of Michigan Law School's Future Law Professor's Workshop, Student Research Workshop, and Student Research Roundtable. Lastly, I owe special thanks to the student editors of the *Columbia Journal of Gender and Law* for their hard work and excellent suggestions.

"Men do not want solely the obedience of women,
they want their sentiments."
– John Stuart Mill,
The Subjection of Women (1869)

INTRODUCTION

I find it curious that, both socially and legally, the narratives of contemporary rape law center on women. Socially, rape law reform is overwhelmingly regarded as a feminist undertaking. Legally, the laws against rape are overwhelmingly justified by the need to protect the sexual autonomy of (presumptively female) victims. Yet, rape is predominantly a male social practice.[1] As is law.[2] To understand rape law, then, we should seek to understand why men pass laws that purport to outlaw the men who rape.

This Article begins that inquiry by offering a critical examination of the criminal law doctrine of rape by fraud. Broadly speaking, rape by fraud refers to instances of sexual intercourse where a victim's consent is procured through fraud, deception, impersonation, or other material misrepresentation.[3] In theory, the fraud vitiates putative consent, rendering the intercourse nonconsensual and thus punishable as rape. As the justifications for contemporary rape laws coalesce around the protection of autonomous sexual decisionmaking, the rationale for treating rape by fraud *as rape* is increasingly obvious.[4]

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1 The overwhelming majority of rapes are perpetrated by men—most often against women, less often against other men and against children of both sexes. *See* CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 240–41 (2005). Rape is also a "man's act." *See* Carolyn M. Shafer & Marilyn Frye, *Rape and Respect*, *in* FEMINISM & PHILOSOPHY 333, 334 (Mary Vetterling-Braggin, Frederick A. Elliston & Jane English eds., 1977). This is not intended to deny that women can and do commit rape, nor to minimize the wrongfulness of rapes committed by women.

2 Men have historically dominated the institutions of law, and hence "doing law" has constituted masculinity. *See, e.g.*, Richard Collier, *Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender*, 33 HARV. J.L. & GENDER 431, 438–443 (2010); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 163 (1989) ("The state is male jurisprudentially, meaning that it adopts the standpoint of male power on the relation between law and society.").

3 Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 48 (1998) [hereinafter Falk, *Rape by Fraud*]. Throughout this article, I use the term "rape by fraud" to reference those instances of deception that are legally sufficient to invalidate a token of consent. Although rape by fraud laws, like most criminal laws, vary from state to state, I use the phrase "rape by fraud doctrine" to reference the archetypal prohibitions on fraudulent medical procedures and spousal impersonation. *See generally id.* at 49–52.

4 Of course, it has been obvious to feminists for quite some time. Nearly thirty years ago, Susan Estrich famously advocated that all deceptions about a "material fact" should be criminalized. *See* Susan Estrich, *Rape*,

In practice, however, deceptively induced sexual intercourse is rarely criminalized as rape. Courts and commentators have largely clung to the view that—outside of certain exceptional cases—rape by fraud is not rape at all, despite deception's profound impact on the voluntariness of sexual consent. In fact, interest in the subject of rape by fraud has only recently been revived by several controversial prosecutions that are viewed as overstepping the narrowly established boundaries of the doctrine,[5] as well as by an equally controversial article from Jed Rubenfeld suggesting that our cultural resistance to criminalizing sexual deception may be stronger than our commitment to sexual autonomy.[6]

The tension between rape law's internal justifications and the rape by fraud doctrine's narrow application implicates foundational debates about the special place of rape within the criminal law.[7] Accordingly, rape by fraud has been explored by some of the most prominent criminal law theorists of our time, nearly all of whom ultimately conclude that the limited reach of rape by fraud laws is justifiable.[8] To explain this seemingly untenable perspective, courts and commentators deploy a conceptual dichotomy that purports to distinguish between different species of frauds.[9] However, this dichotomy, a vestige of antiquated notions of female purity and ruination, reduces the legal construction of women's sexual autonomy to little more than binary permission. Nearly all sexual deceptions, including fundamental deceptions about one's sexual partner, are dismissed under the law as merely peripheral considerations.

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95 YALE L.J. 1087, 1182 (1985–86).

5 *See, e.g.*, CrimC (Jer) 561/08 State of Israel v. Kashour (2010) (Isr.); Adrian Blomfield, *Palestinian Jailed for Rape After Claiming to be Jewish*, THE TELEGRAPH, July 20, 2010, http://www.telegraph.co.uk/news/worldnews/middleeast/israel/7901025/Palestinian-jailed-for-rape-after-claiming-to-be-Jewish.html [http://perma.cc/PM29-DHPW].

6 Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1376–1380 (2013).

7 Among other things, it implicates the longstanding debate over whether rape is a crime of violence or one of sex. *See* MICHEL FOUCAULT, POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977-1984 200 (Lawrence Kritzman ed., 1988) ("[T]here is no difference, in principle, between sticking one's fist into someone's face or one's penis into their sex.").

8 *See, e.g.*, STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 158 (1998) ("[I]t may be preferable to leave to the individual the decision whether to believe, whether to rely, and whether to assume the risk of deception by trusting the other party."); Jeffrie G. Murphy, *Some Ruminations on Women, Violence, and the Criminal Law*, *in* IN HARM'S WAY 209, 222 (Joel Fienberg, Jules L. Coleman & Allen Buchanan eds., 1994); RICHARD POSNER, SEX & REASON 392–93 (1992).

9 *See infra* Part I.B.1.

Doing the unthinkable—that is, acknowledging that the failures of the existing doctrine are indeed *failures*—leads us to confront what the law is actually doing in those rare instances when it criminalizes deceptions employed to procure sex. Rather than focusing on the basis for criminalization, this Article chronicles the justificatory narratives that run through several widely offered defenses of sexual deception—essentially arguments for the non-criminalization of legitimately condemnable conduct. Upon examination, a common thread emerges: the romanticization of sexual seduction, part of a prevailing discourse of normative masculinity that links men's social status to performances of sexual conquest. Undergirding this discourse of sexual conquest are pervasive, and troubling, fictions about interpersonal power dynamics in men's pursuit of women for sex. Importantly, these fictions appear to break down at precisely the points of criminalization. Only when stripped of the insulating discourse of normative masculinity is sexual deception exposed for what it is, and thus unambiguously criminalized. Deconstructed, the rape by fraud doctrine is better explained by the prevailing norms of masculinity than by the abstract principle of individual autonomy that ostensibly animates domestic rape law.

For that reason, this Article proposes a conceptual break with sexual autonomy as rape law's motivating principle. Autonomy has proven insufficient to resist the influence of contemporary masculinities in shaping how impermissible sex is socially understood and legally contended with. One possibility for just such a break consists in embracing human dignity as rape law's touchstone. Dignity is taking an increasingly central role in legal discourse, particularly in the realms of gender and sexuality.[10] Domestically, the invocation of dignity is allowing the law to recognize gender-based harms in social contexts where they were otherwise invisible to legal liberalism.[11] Practically speaking, grounding rape law in human dignity may aid in resolving numerous issues that have arisen in the law's approach to sexual consent. More fundamentally, a turn toward dignity, and away from individual autonomy, holds the potential to sever the connection between the immanent justifications for criminalizing rape and the discourses of interpersonal power that reinforce and reproduce gender hierarchies in American society.

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10 *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2689, 2692–94, 2696 (2013) (invalidating a central provision of the Defense of Marriage Act on the basis of human dignity); Lawrence v. Texas, 539 U.S. 558, 567 (2003) (citing "the dignity as free persons" as a ground for invalidating Texas's criminal regulation of sodomy); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (citing personal dignity as a limitation on the government regulation of abortion).

11 *See, e.g.*, Camille Gear Rich, *What Dignity Demands: The Challenges of Creating Sexual Harassment Protections for Non-Workplace Settings*, 83 S. CAL. L. REV. 1, 6–9 (2009) (articulating a dignity framework for sexual harassment law).

Undoubtedly, some will claim that my proposed embrace of dignity is merely an indulgent flourish. They will argue that the problem of rape by fraud, to the extent they acknowledge a problem at all, consists of its doctrinal tension with the broader principle of autonomy—a problem that can arguably be solved by redoubling the commitment to autonomy in rape law, for example by articulating an account of autonomy that can better account for the contexts of women's sexual choices and social constraints under which those choices must labor. This Article emphasizes the dialectical relationship between law's internal justifications and masculinity's social discourse precisely to underscore the dangers of continuing along the current path. As rape has evolved from its historical roots as something akin to a property crime into its contemporary form as a violation of individual sexual autonomy, so too has normative masculinity reconfigured itself to respond to the entrenchment of liberal ideals. Contemporary masculinity now posits value in men's being chosen for sex, objectifies women as the source of such value, and eroticizes the transgression of women's resistance as sexual conquest. It has effectively co-opted the momentum of legal reform in the direction of liberalism and oriented the structures of subordination and domination along the axis of individual choice. If I am correct in this observation, there is considerable promise in the potential for deliberate legal reforms to direct the continued evolution of prevailing gender norms.

This Article proceeds in three Parts. Part I sets the stage. It recounts the contemporary trend among legal commentators to view the fundamental harm of rape as a violation of the victim's sexual autonomy. It then examines the doctrine of rape by fraud and details the myriad ways in which the autonomy justification fails to explain the narrowness of criminal liability. Of particular interest, it highlights the complacency of legal actors and academics with regard to the doctrine's failings.

Part II reorients the examination of rape by fraud as a question of decriminalization. It demonstrates that the widespread acceptance of rape by fraud's narrow and peculiar doctrinal contours stems from a normative commitment to insulate the practice of sexual seduction from the threat of criminalization. It exposes the centrality of seduction to a dominant account of normative masculinity—one in which men derive social status through performances of sexual conquest. It then explains how masculinity has embraced the discourse of female sexual autonomy to posit women, when pursued for sex, as a locus of power over men.

Part III extrapolates the lessons of rape by fraud to consider domestic rape law more broadly. It begins from the recognition that the criminalization of rape is, in large part, something done by men to men, and it explores the consequences of masculinity's role in

shaping rape law's doctrines. This Part draws parallels between contemporary rape law's autonomy regime and the property regime of rape law historically. Under both regimes, rape law can be understood as codifying the claims of men against other men regarding the status-value of the women that men possess. Lastly, this Part begins to sketch a path forward. It proposes that the criminal law respond to the continuing objectification of women by adopting human dignity as rape law's motivating principle.

I. The Current State of Rape Law

A. The Autonomy Regime

Contemporary rape law is defined by two related concepts. The principle of sexual autonomy justifies criminal prohibitions on rape. The legal construct of consent operationalizes the law's protection of the autonomy principle.

Rape law's convergence on consent and autonomy is a relatively recent phenomenon. Until well into the twentieth century, rape law in America shared much with the common law traditions inherited from England. At common law, the paradigmatic rape was effectively a physical fight.[12] "It required the victim to put up physical resistance against a sexual attack, and it required a rapist to overcome the victim's physical resistance with force."[13]

In the 1970s and 1980s, every state revised its rape laws.[14] Most of these revisions reflected feminist proposals to modify or abolish rape law's resistance and force requirements. Feminist critics attacked the resistance requirement as evidence of men's unwillingness to credit women's accounts of violation.[15] They noted how the element of resistance drew attention away from the difficult question of actual consent, allowing fact-finders instead to impute consent—or even repressed desire—whenever a woman failed to resist strenuously enough.[16] Similarly, feminist reformers sought to expand the force requirement to

12 Under English common law, rape was defined as "carnal knowledge of a woman forcibly and against her will." WILLIAM BLACKSTONE, 4 COMMENTARIES *210 (1870). American rape law largely mirrored the common law tradition until well into the twentieth century.

13 Michelle J. Anderson, *All American Rape*, 79 ST. JOHN'S L. REV. 625, 628 (2005).

14 *See, e.g.*, Stacy Futter & Walter R. Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN'S L.J. 72, 72–73 (2001).

15 *See* Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 753 n.50 (2007).

16 *See* SUSAN ESTRICH, REAL RAPE 96 (1988) ("To use resistance as a substitute for intent unnecessarily and unfairly immunizes those men whose victims are afraid enough, or intimidated enough, or frankly smart

encompass not only the brute physicality of paradigmatic stranger rapes but also those impediments to individual sexual autonomy that arise much more frequently in women's lives.[17]

Unsurprisingly, academic conceptualizations of rape have evolved faster and further than the law itself. Virtually all modern criminal law scholars now agree that the definitive feature of the crime of rape is sexual nonconsent.[18] Rape law's use of consent to mark the limits of criminality reflects a commitment to protecting individual sexual autonomy. "[C]onceptually speaking, emphasis on nonconsent as definitive of rape views the crime fundamentally as a deprivation of sexual freedom, a denial of individual self-acting."[19]

The emphasis on consent and autonomy reflects the centrality of the liberal legal tradition in contemporary rape law.

> Under liberal legalism, choosing to do something typically legitimates that activity as long as it does not harm others. Conversely, being forced to do something is typically perceived as an infringement of personhood. For feminists, an example that comes easily to mind to demonstrate the significance of consent, and the principle of autonomy that underlies it, is the difference between sex and rape, a distinction that turns on consent. The absence of consent turns a socially approved and even celebrated act

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enough not to take the risk of resisting physically.").

17 *See, e.g.*, Jane E. Larson, *'Even a Worm Will Turn at Last': Rape Reform in Late Nineteenth-Century America*, 9 YALE J.L. & HUMAN. 1, 19 n.80 (1997) ("Modern definitions of 'force' include instances in which a victim is threatened or verbally coerced, where the rapist is known to the victim or is her friend or husband, and where the victim has been drugged into unconsciousness or is mentally incompetent.").

18 *See, e.g.*, Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1404 (2005) ("Arguing that requirements of a defendant's force and a victim's resistance are archaic and unfair, legal scholars have asserted that the crux of the crime of rape is sex without consent."); SCHULHOFER, *supra* note 8, at 254 ("Intercourse without consent should always be considered a serious offense."); ESTRICH, *supra* note 16, at 103 ("[T]he threshold of liability . . . should be understood to include at least those nontraditional rapes where the woman *says* no . . . ."); SUSAN BROWNMILLER, AGAINST OUR WILL 8 (1976) ("A female definition of rape can be contained in a single sentence. If a woman chooses not to have intercourse with a specific man and the man chooses to proceed against her will, that is a criminal act of rape."). *But see* Victor Tadros, *Rape Without Consent*, 26 OXFORD J.L. STUD. 515, 515–16 (2006); Donald Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1782 (1992).

19 Catharine A. MacKinnon, *Defining Rape Internationally: A Comment on* Akayesu, 44 COLUM. J. TRANSNAT'L L. 940, 941 (2006).

of love and expression into an act of violence.[20]

On a liberal view, autonomy is central to personhood; the social and political recognition of autonomy—including the recognition of sexual autonomy through rape law—is a precondition to human flourishing.[21] As such, the legal account of sexual autonomy is also generally robust. It encompasses a "right not only to decide whether to engage in sexual contact with another, but also to control the circumstances and character of that contact."[22]

B. The Rape by Fraud Doctrine

In theory, the doctrine of rape by fraud should be central to a rape law regime founded on the principle of individual sexual autonomy. Rape by fraud implicates fundamental questions about the nature of rape, the harms it causes, and the values that justify law's intrusion into sexual relationships. Indeed, rape by fraud is analytically fascinating precisely because it presents perhaps the most pure question of sexual consent: Unadulterated by violence, threats, or incapacity, what knowledge is necessary for an individual's expression of consent to be legally valid and enforceable? Given the thick account of sexual autonomy so often articulated in rape law jurisprudence, we should expect the answer to the above question to be quite broad. After all, deceptions that materially influence the decision to engage in sex undermine autonomy in very serious ways.

Contrary to expectations, sexual deceptions are currently punished as rape "only under

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20 Maneesha Deckha, *Pain, Pleasure, and Consenting Women: Exploring Feminist Responses to S/M and Its Legal Regulation in Canada Through Jelinek's The Piano Teacher*, 30 HARV. J.L. & GENDER 425, 425 (2007). *But see* CAROLE PATEMAN, *Contracting In*, *in* THE SEXUAL CONTRACT 2–18 (1988) (arguing that liberal contract theories are political fictions and that even consensual relationships between men and women are informed by, and contribute to, domination and subordination).

21 Robin West captures the relationship between consent and liberalism quite brilliantly:

> [I]n our obsessively value-producing liberal culture, if something is "consensual"—meaning, if some state of affairs is the result of a consensual transaction—then for that reason alone it must maximize our well-being. Why? Because that is just how consent, well-being, and value are defined. And, if whatever we have consented to maximizes well-being in that way, then it must be of value, and if it increases value, then it must be good, and if it does all of that, well then obviously it cannot also be injurious.

Robin West, *Desperately Seeking a Moralist*, 29 HARV. J.L. & GENDER 1, 20 (2006).

22 State *ex rel.* M.T.S., 609 A.2d 1266, 1278 (N.J. 1992); *see also* Rubenfeld, *supra* note 6, at 1417.

unusual, highly limited circumstances."[23] Rape by fraud is frequently dismissed as peripheral to rape law's protections—a marginal case, infrequently arising, and hardly warranting legal sanction. More surprisingly, the rape by fraud doctrine's failure to protect individual sexual autonomy is endorsed (or at least accepted) by many of the criminal law scholars most committed to the principle of autonomy elsewhere in rape law.[24]

1. The Factum/Inducement Dichotomy

At common law, whether deceptively induced sexual consent will be considered legally valid turns on a conceptual dichotomy between two types of fraud. Fraud "in the factum," we are told, is deception as to the nature of the sexual act itself. Such fraud fundamentally vitiates consent. Fraud "in the inducement," by contrast, is deception as to some collateral matter, and is insufficient to invalidate an expression of consent. Martha Chamallas provides the following handy overview:

> [In f]raud in the factum . . . the victim consents to the doing of act *X* and the perpetrator of the fraud, in the guise of doing act *X*, actually does act *Y*. [In] . . . fraud in the inducement . . . the victim is fraudulently induced to consent to the doing of act *X* and the perpetrator of the fraud does indeed commit act *X*.[25]

Of course, the factum/inducement dichotomy is an entirely unhelpful tool without a corresponding theory of act descriptions. Consent to *an act* is not necessarily consent to *any act* of the same type.[26] "The thicker the description of the act or the nature of the act—that is, the more features, circumstances, and aspects that constitute the act or the nature of the act beyond sexual intercourse itself—the more likely a given type of fraud will be construed as fraud in the factum."[27]

In rape by fraud cases, American courts have traditionally applied exceptionally thin

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23 SCHULHOFER, *supra* note 8, at 152.

24 *See* discussion *infra* Part I.C.

25 Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 831 n.224 (1988).

26 *See* Heidi Hurd, *The Moral Magic of Consent*, 2 L. THEORY 121, 127 (1996).

27 Russell L. Christopher & Kathryn H. Christopher, *Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape*, 101 NW. U. L. REV. 75, 85–86 (2007).

accounts of the sexual acts consented to. Two famous, and roughly contemporaneous, cases from California illustrate the factum/inducement dichotomy in its traditionally thin form.

In *People v. Minkowski*, the California Court of Appeal affirmed a rape conviction for a doctor who had intercourse with his patients while ostensibly providing medical treatment.[28] The victims were patients—teenage girls who had come to Dr. Minkowski complaining of menstrual cramps.[29] Minkowski informed the girls that their treatment would require a series of "vaginal smear" tests over the course of several visits.[30] On each visit, he instructed his victim to put on a hospital gown and to bend over a table with her back to him.[31] From this position, Minkowski would penetrate the patient with a medical instrument, then eventually remove the instrument and insert his penis.[32] During the assaults, Minkowski would fondle his victims' breasts, telling them that it was necessary to stimulate certain glands or to produce certain hormones for the vaginal test.[33] In affirming Minkowski's rape convictions, the appellate court concluded that, because they had consented only to penetration with a medical instrument, the victims were "unconscious of the nature of the act," as required under California law.[34]

Thirteen years later in *Boro v. Superior Court*—probably the most cited rape by fraud case in American history—the California Court of Appeal reversed the conviction of a defendant who posed as a doctor to procure intercourse in the guise of medical treatment.[35] Boro was a hospital worker who obtained the names and phone numbers of women who had recently come in for medical tests.[36] He called his victim, a recent immigrant from

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28 People v. Minkowski, 23 Cal. Rptr. 92, 105 (Cal. Ct. App. 1962).

29 *Id.* at 94–96.

30 *See id.* at 94.

31 *Id.* at 94–96.

32 *Id.*

33 *Id.* at 95–96.

34 *Id.* at 97. Dr. Minkowski was convicted under a California statute that codified the traditional common-law factum/inducement dichotomy by requiring the victim to be "unconscious of the nature of the act." 9 CAL. PEN. CODE ANN. § 261(a)(4). Although the defendant did not argue on appeal that the victims consented, the court noted, "Defendant does not, and in our view cannot, urge the insufficiency of proof with respect to [nonconsent]." *Minkowski*, 23 Cal. Rptr. at 97.

35 Boro v. Superior Court, 210 Cal. Rptr. 122, 126 (Cal. Ct. App. 1985).

36 *Id.* at 123.

Asia, and falsely informed her that she had a highly infectious and perhaps fatal disease.[37] Boro told his victim that she could be sued if she infected other people, and that the only surgical treatment available was highly painful, highly expensive, and would require an extended hospital stay.[38] Boro then proposed an alternative treatment, in which the victim would have sex with an anonymous donor who had been injected with a serum that could cure the disease.[39] This option would only cost her $4,500. The victim agreed, believing "that she would die unless she consented."[40] Boro, posing as the anonymous donor, met his victim at a hotel. He took $1,000 from her as a down payment, and then proceeded to have sexual intercourse with her.[41]

Distinguishing *Minkowski*, the *Boro* court wrote:

> The victims in *Minkowski* consented, not to sexual intercourse, but to an act of an altogether different nature, penetration by a medical instrument. The consent was to a pathological, and not a carnal act, and the mistake was, therefore, in the *factum* and not merely in the inducement . . . .
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> [W]e note that here, in contrast, there is not a shred of evidence on the record before us to suggest that . . . [the victim] lacked the capacity to appreciate the nature of the sex act in which she engaged. On the contrary, her testimony was clear that the she precisely understood the "nature of the act," but, motivated by a fear of disease, and death, succumbed to the petitioner's fraudulent blandishments.[42]

Here we see the California Supreme Court define "the nature of the act" in the thinnest possible way. Since the victim in *Boro* was aware that she was consenting to being penetrated by a penis, the fraud was merely as to an inducement—she was not deceived about the act to be done.

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37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.* at 124–26.

Tellingly, in all other respects, the features and circumstances of the assault in *Boro* are much more violative of individual autonomy than those involved in *Minkowski*. The perpetrator in *Boro* lied about his identity and his authority, misled the victim into believing that she faced debilitating illness and perhaps death, threatened her with the possibility of civil liability, and then leveraged her fears to extort not only sex but also money. Yet *Boro* represents the predominant view in American courts: "It is not necessary that a woman know the true identity of her sexual partner or know anything about him in order to consent, but she must be agreeable to the penetration of her body by a particular membrum virile."[43]

2. Spousal Impersonation Statutes

A minority of states have supplemented the common-law factum/inducement dichotomy with statutory prohibitions against impersonating a sexual partner's spouse. Eleven states, Puerto Rico, and the Model Penal Code expressly criminalize spousal impersonation.[44] "In the typical spousal impersonation case, a spouse consents to intercourse with someone whom s/he believes is his or her spouse (typically the victim is in the dark and barely awake), but instead receives intercourse with a non-spouse."[45]

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43 United States v. Traylor, 40 M.J. 248, 249 (C.M.A. 1994). *See also* ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 196 (1999):

> The standard view is that A commits fraud in the factum when B is deceived about what is done, as exemplified by [*Minkowski*]. A commits fraud in the inducement when B consents to what she believes to be intercourse, but does so because she is deceived about certain facts, such as (1) the purpose of intercourse [*Boro*], (2) A's nominal identity. . . , (3) A's characteristics . . . , (4) A's behavior . . . , or (5) A's mental status. The law has typically regarded only fraud in the factum as a crime.

44 *See* ALA. CODE § 13A-6-65(a)(1) (statutory commentary) ("This subsection includes the offense of carnal knowledge of a married woman by falsely personating her husband . . . ."); ARIZ. REV. STAT. ANN. § 13-1401(5)(d) (2000); CAL. PENAL CODE § 261(5) (West 1999 & Supp. 2006); COLO. REV. STAT. § 18-3-402(1)(c) (2004); IDAHO CODE ANN. § 18-6101(7) (2004); LA. REV. STAT. ANN. § 14:43(3) (2004); OHIO REV. CODE ANN. § 2907.03(A)(4) (West 1997 & Supp. 2005); OKLA. STAT. ANN. tit. 21, § 1111(A)(6) (West 2002); UTAH CODE ANN. § 76-5-406(7) (2003); WYO. STAT. ANN. § 6-2-303(a)(iv) (2005); P.R. LAWS ANN. tit. 33, § 4061(e) (2004); MODEL PENAL CODE § 213.1(2)(c) (Official Draft and Revised Comments, 1985). By contrast, the highest courts of only three states have affirmed rape convictions for spousal impersonation that were not explicitly authorized by statute. *See* State v. Shepard, 7 Conn. 54, 54–56 (1828); Pinson v. State, 518 So. 2d 1220, 1224 (Miss. 1988); State v. Williams, 37 S.E. 952, 953 (N.C. 1901). The highest court of one other state had indicated in dicta that spousal impersonation may constitute rape. *See* State v. Atkins, 292 S.W. 422, 426 (Mo. 1926).

45 Christopher & Christopher, *supra* note 27, at 78; *see also* SCHULHOFER, *supra* note 8, at 152–53 (recounting the facts of People v. Hough, 607 N.Y.S.2d 884 (Dist. Ct. 1994)).

Interestingly, this statutory extension of the rape by fraud doctrine almost never covers the impersonation of a non-spouse sexual partner. Nebraska is the only state with a rape statute that broadly criminalizes all fraud as to nominal identity.[46] In two other states, intermediate appellate courts have affirmed rape convictions for impersonation of the victim's fiancé.[47] However, no state court has ever affirmed a rape conviction for impersonation of a boyfriend, girlfriend, lover, or friend. Like the factum/inducement dichotomy, these statutes subvert our expectations for an autonomy-centered rape law regime—if contemporary rape laws are truly aimed at the violation of an individual person's sexual autonomy, we would not expect the law to so bluntly distinguish between classes of identity impersonation.

The most common explanation offered by legal commentators for treating spousal—and exclusively spousal—impersonation as rape is that the result of the fraud is an act of adultery. The fact of adultery is considered legally salient for one of two reasons. One group of commentators argues that adultery is simply a different *act* than marital intercourse.[48] That is, these commentators accept the usefulness of the factum/inducement distinction, but simply argue that marital intercourse and adultery are distinct acts, such that consent to one precludes consent to the other.[49] This underscores the malleability of

46 *See* NEB. REV. STAT. § 28-318(8)(a)(iv) (1995). Under the Nebraska statutory scheme, among the ways sexual assault can be committed is sexual contact "without the consent of the victim." *Id.* § 28-320(1)(a) (1995). Nebraska defines absence of consent as including where the victim's "consent, if any was actually given, was the result of the actor's deception as to the identity of the actor." *Id.* § 28-318(8)(a)(iv) (1995). However, there are no reported Nebraska decisions construing this statutory language.

47 *See* People v. Crippen, 617 N.W.2d 760, 764 (Mich. Ct. App. 2000); State v. Mitchell, III, No. M1996-00008-CCA-R3-CD, 1999 WL 559930, at *16 (Tenn. Crim. App. July 30, 1999).

48 *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 585 (3d ed. 2001) (arguing that the spousal relationship is "a fundamental aspect of the sexual act" of marital intercourse); WAYNE R. LAFAVE, CRIMINAL LAW 767 (3d ed. 2000); ROLLIN M. PERKINS & RONALD M. BOYCE, CRIMINAL LAW 1080–81 (3d ed. 1982).

49 Perkins & Boyce offer the following illustration:

> [Consider] the rogue who, in the dark, got into bed with a married woman who knew he was not her husband but submitted to sexual intercourse in the belief that he was her paramour with whom she had arranged a meretricious tryst. Although he had learned of the tryst, detained the paramour elsewhere with a false message and fraudulently imposed upon the woman, he had not committed rape. This is not fraud in the *factum*. There was nothing comparable to the difference between marital intercourse and adultery. The woman consented to the adulterous intercourse, having been induced to consent because deceived as to the person—fraud in the inducement.

PERKINS & BOYCE, *supra* note 48, at 216. In other words, the *nominal* identity of the actors is merely an in-

a legal standard that turns on act descriptions. At this level, what is generally presented is not a substantive argument for the use of thicker act descriptions throughout rape law, but rather a dogmatic assertion about what this particular act *is*.[50] But, of course, this assertion is at odds with the overwhelming majority of courts that have held spousal impersonation to be a non-criminal fraud in the inducement.[51] Moreover, the argument is compromised by the very presence of the statutes it seeks to justify: if adultery and marital intercourse were so obviously different acts, the common law factum/inducement distinction would not need a statutory supplement to specify that spousal impersonation is rape. Oddly, this line of reasoning would also justify rape liability when spouses impersonate non-spouse sexual partners.[52]

A second, common argument is that spousal impersonation is rape by fraud because adultery is itself illegal.[53] This is a consequentialist argument: criminalization of spousal impersonation is justified because the perpetrator's deception exposes the victim to her own serious risk of criminal liability. Some commentators have gone so far as to say that spousal impersonation statutes originated primarily as a defense to adultery charges.[54] This argument can be coupled with the first approach to provide a normative argument for why adultery and marital rape are different acts within the factum/inducement framework, but it can also stand alone. Where it fails, however, is in responding to the fact that adultery is

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ducement, but the *relational* identity of the actors (as husband, fiancé, lover, or stranger) may be essential to defining the nature of the act.

50 *See id.* ("The act of marital intercourse and the act of adultery are as far apart as day and night and it is atrocious to suggest that willing submission by a wife to what is supposed by her in good faith, and on good grounds, to be lawful intercourse with her husband, is consent to an act of adultery with another.").

51 *See* PETER WESTEN, THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT 198–99 (2004) (noting the elasticity of the factum/inducement dichotomy in light of the disagreement about whether spousal impersonation should be criminal).

52 If marital intercourse and adulterous intercourse are viewed as fundamentally distinct acts, as this account advocates, then, for example, a wife who believes that she is committing adultery has *not* consented to sex with her husband (even though, as the account generally holds, she will be treated as having consented to sex with every man *except* her husband; see *supra* note 49).

53 *See, e.g.*, DRESSLER, *supra* note 48, at 585–86.

54 *See, e.g.*, Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 30 (1998) ("[T]he traditional elements of rape begin to mimic perfectly the substantive arguments that we would expect a woman to make if she were trying to defend herself against an accusation of fornication of adultery.").

actually not a crime in the majority of states (and is a relatively minor crime in others).[55] Furthermore, defining the scope of individual sexual consent by reference to the perceived lawfulness of the conduct consented to leads to a number of troubling paradoxes.[56]

C. The Riddle of Rape by Fraud

In a recent article, Yale law professor Jeb Rubenfeld examined the "riddle" that rape by fraud cases thus present to those who endorse rape law's commitment to individual sexual autonomy. Rape by fraud's doctrinal contours are both internally inconsistent and at odds with the broader commitment to autonomy embodied by modern rape law.[57] "If our criminal sex law were really designed to vindicate a right of sexual autonomy, sex plus lies should equal jail time, whether the lie was a false claim of bachelorhood, 'I love you,' or any other material misrepresentation reasonably calculated to induce another person to have sex."[58]

Rubenfeld decries the current state of the doctrine as a relic of rape law's historical moral judgments about female defilement. Under traditional law, he tells us, *any* consensual sex out of wedlock ruined a woman. The facts and circumstances of the encounter were morally and legally irrelevant. "So long as a woman had willingly engaged in nonmarital sex, she had not been ruined against her will. She had voluntarily participated in—consented to—her ruin."[59] Accordingly, the rape by fraud doctrine reflects the only two deceptions

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55 *See, e.g.*, Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1213 (2005) ("[C]ourts and legislatures in recent years have dismantled criminal laws against consensual sodomy, fornication, and adultery."); SCHULHOFER, *supra* note 8, at 157 ("Adultery is no longer a criminal offense in most states . . . ").

56 *See, e.g.*, Christopher & Christopher, *supra* note 27, at 116 (arguing that an adult is simultaneously the victim of a rape (by fraud) and the perpetrator of a (statutory) rape when deceived into having sexual intercourse with a minor).

57 Rubenfeld frames the riddle as follows:

> Courts know that fraud vitiates consent and recognize as much in rape law's two exceptional scenarios, but they close their eyes to that knowledge in virtually every other sex-by-deception case. Sometimes lies turn sex into rape; most of the time they don't. The official justification for this doctrine is no justification, and the most obvious alternative account—an institutional competence argument—fails just as badly.

Rubenfeld, *supra* note 6, at 1400–1401.

58 *Id.* at 1410.

59 *Id.* at 1401.

of significance to the defilement rationale. First, a woman must know that what she was consenting to was sex, rather than some other activity entirely. Second, a woman must know that the sex she consented to was nonmarital.

Even if Rubenfeld is right about the doctrine's origins—he is certainly correct that sexual deception is not a recent phenomenon, and that the legal responses to those deceptions first developed long before rape law's embrace of a sexual autonomy rationale—he merely provides an explanation for the tension between the rape by fraud doctrine and rape law's contemporary commitment to autonomy.[60] His account does not explain the doctrine's persistence in the face of those contemporary commitments. Abstractly, one would expect rape by fraud to have been among the first targets of liberal feminist rape law reforms.[61]

Rape by fraud's resistance to reform is explained, not by its historical origins, but by the fact that, as Rubenfeld himself acknowledges, "[m]any—perhaps most—of us don't think 'rape-by-deception' is rape at all."[62] Specifically, Rubenfeld believes that "good reasons underlie the intuition that sex-by-deception is not rape," despite the fact that rape by fraud's doctrinal foundation is an obsolete morality of feminine virtue.[63] Consequently, after meticulously analyzing the tension between the antiquated rape by fraud doctrine and the principle of individual sexual autonomy, Rubenfeld concludes that it is *autonomy* that needs jettisoning.[64] He writes:

> Two postulates of American sex law turn out to be at war. The first is that most sex-by-deception is not rape or even a crime. The second is that individuals have the right to sexual autonomy. . . . But these two postulates cannot both stand.[65]

60 For example, the 1872 case of *Don Moran v. People* involved a nearly identical scheme to that detailed in *Boro* more than a century later. *See* Don Moran v. People, 25 Mich. 356, 364–65 (1872).

61 And, indeed, many feminists have been calling for liberal reform of the rape by fraud doctrine for decades, with little-to-no success. *See, e.g.*, Estrich, *supra* note 4, at 1182.

62 Rubenfeld, *supra* note 6, at 1376.

63 *Id.* at 1413.

64 *See id.* In a subsequent response to his commentators, Rubenfeld bluntly admits, "Most of my article takes the form, '*Unless* you're prepared to accept that people can be guilty of rape for lying about their college (or marital status, age, feelings, and so on), you're going to have a problem defining rape as sex without consent.'" Jed Rubenfeld, *Rape-by-Deception—A Response*, 123 YALE L.J. ONLINE 389 (2013), http://www.yalelawjournal.org/forum/rape-by-deceptiona-response [http://perma.cc/L9NC-QB3Y].

65 Rubenfeld, *supra* note 6, at 1413.

Surprisingly, Rubenfeld is not alone. Despite its demonstrable failure to protect individual sexual autonomy, the narrowness of the rape by fraud doctrine is consistently defended by legal scholars, even by those who broadly embrace sexual autonomy in other areas of rape law. Troublingly, the arguments commonly advanced in defense of the existing rape by fraud doctrine are transparently poor and easily dispatched (frequently by other scholars attempting to come to the doctrine's defense).

For example, Stephen Schulhofer, perhaps the scholar most committed to a pure autonomy principle in rape law, defends the narrowness of rape by fraud liability. He cites pragmatic concerns about the judicial administration of a broader rape by fraud principle: "[l]egal evaluations of these questions after the fact can be heavy-handed, and it may be preferable to leave to the individual the decision whether to believe, whether to rely, and whether to assume the risk of deception by trusting the other party."[66] Other scholars have likewise cited problems of proof and judicial competence as a rationale for cabining the criminalization of rape by fraud.[67]

Even Rubenfeld rejects this argument, however, explaining that concerns regarding the institutional competence of courts "cannot come close to sustaining" the existing doctrine.[68] For one thing, courts are adept at making judgments about the reasonableness and materiality of individual considerations in innumerable other contexts.[69] Likewise, "facts concerning emotions are routinely put before juries," particularly in criminal matters.[70] Lastly, many of the facts that rape by fraud cases would put at issue—a person's job, marital status, or wealth, for instance—are easily amenable to objective proof.[71]

A second species of argument holds that inducement-like deceptions are not sufficiently harmful to warrant intervention by the criminal law. Richard Posner has articulated such a position. On this view, the common-law factum/inducement dichotomy merely codifies a

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66 SCHULHOFER, *supra* note 8, at 158.

67 *See, e.g.*, POSNER, *supra* note 8, at 393 ("The problems of proof of seduction by false pretenses—in particular the problem of distinguishing by methods of litigation between a false statement of one's feelings and a change in those feelings—are exquisitely difficult and argue for making a difference degree a difference in legal kind, substituting victim self-protection for legal remedies.").

68 Rubenfeld, *supra* note 6, at 1400.

69 *See id.* at 1407.

70 *Id.* at 1400.

71 *Id.*

proper understanding of the classic harm principle:

> The thinking may be that if the woman is not adverse to having sex with a particular man, the wrong if any is in the lies (and we usually do not think of lying in social settings as a crime) rather than in an invasion of her bodily integrity. It is otherwise if the man is impersonating the woman's husband or claims to be administering medical treatment to the woman rather than to be inserting his penis in her. In both cases the act itself, were the true facts know to the woman, would be disgusting as well as humiliating, rather than merely humiliating as in the case of the common misrepresentations of dating and courtship.[72]

Many scholars agree with Posner that rapes by fraud are generally not harmful, rendering criminalization unjustified.[73] Rubenfeld, for example asserts, "With respect to most crimes, it's hard to give a generally favorable account of the behavior in question—hard to defend letting people murder each other, steal each other's property, and so on. But deceptive sex, however bad it may be, isn't *that* bad."[74]

Here, it is Alan Wertheimer who provides the obvious rejoinder, explaining that deception may in fact provide greater *ex post* distress than force. "Whereas force simply overpowers or bypasses B's will, A's deception *uses* B's will against herself, making her an unwitting agent in the violation of her own rights."[75] Additionally, at least one criminal law scholar has advanced the view that experienced harm is only "epiphenominal to rape"—that we can plausibly imagine conduct that merits criminalization as rape without it being consciously experienced, such as in the case of a drugged or intoxicated victim.[76]

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72 POSNER, *supra* note 8, at 392–93. It is not entirely clear whether Posner regards this answer as an empirical statement about the harm victims of sexual deception generally experience or as a normative challenge to the legitimacy of victims' claims of harm.

73 *See, e.g.*, SCHULHOFER, *supra* note 8, at 156 (explaining that, for the victim, fraudulently induced sex is something "that—at the time—she believes she wants," and from which she "may experience sexual pleasure").

74 Rubenfeld, *supra* note 6, at 1416.

75 WERTHEIMER, *supra* note 43, at 202. Wertheimer also challenges Posner's claim more directly, noting how Posner's premise of a victim who is not "averse to having sex with a particular man" would lead to absurd results if extended to the commercial fraud context. *See id.* at 197.

76 *See* JOHN GARDNER, OFFENCES AND DEFENSES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 5–6 (2008).

Thus, assertions about whether a rape is both disgusting and humiliating or "merely humiliating" do not suffice to defend the limited criminalization of rape by fraud at the expense of individual sexual autonomy.[77]

Offering a third species of argument, Jeffrie Murphy has advanced the view that the features of sexual experiences traditionally categorized as inducements may simply be normatively less worthy of social intervention:

> [T]he distinction [is] based on what the inducement tells us about the way in which a woman values her sexuality . . . . Perhaps we could coherently conceptualize as rape any sex obtained through fraudulent inducement, *so long as the nature of the inducement itself does not provide strong evidence that the victim does not value sexuality in the way characteristic of the norms we seek to protect.* A woman trading sex for the promise of a mink coat would reveal such deviation (and thereby reveal an interest less worthy of protection) . . . .[78]

Other scholars have likewise expressed "minimal sympathy" for female victims of sexual deceptions who (explicitly or implicitly) condition their consent to sex on particularly unseemly inducements.[79]

Whatever the merits of this argument, it fails to extend to the law's blanket practice of thinly construing the nature of the act legally consented to. Unless we stand prepared to say that the victim in *Boro*, who agreed to sexual intercourse in order to cure a life-threatening illness, did not sufficiently value her sexuality, the hard lines drawn by the factum/inducement dichotomy cannot simply be moral ones.

Rubenfeld is right. Rape by fraud indeed presents a riddle. But the riddle is not *why* the

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77 I also note that Posner's use of a hypothetical victim who is not "'averse to having sex with a particular man'" entirely sidesteps the question of harm associated with fraud as to nominal identity, despite the fact that such frauds are one of the most common stratagems employed by men seeking to obtain sex fraudulently. *See* Falk, *Rape by Fraud*, *supra* note 3, at 149, 65–69.

78 Murphy, *supra* note 8, at 217 (emphasis in original). To be clear, Murphy advances this argument as hypothetical justification for the existing dichotomy; one he does not necessarily endorse. *See id.*

79 *See, e.g.*, Vivian Berger, *Not So Simple Rape*, 7 CRIM. JUST. ETHICS 69, 76 (1988) ("I must confess to minimal sympathy for the idea that the law should protect, via criminal sanctions, the cheated expectations of women who sought to sleep their way to the top but discovered, too late, that they were dealing with swindlers.").

doctrine fails to adequately protect individual autonomy. That failure appears to be not only well understood but affirmatively defended by legal commentators. Rather, the widespread defense of the doctrine *is* the riddle: As rape law otherwise converges on a robust principle of sexual autonomy, how is it that rape by fraud—a known exception[80]—remains insulated from further reform? Why do scholars and courts alike rush to explain away an antiquated and illogical doctrine with arguments that so obviously fail to withstand scrutiny? As a society, why are we so eager to protect the exchange of lies for sex?

II. Rape by Fraud Deconstructed

The widespread defense of the existing rape by fraud doctrine presents a riddle only because it tends to be framed as a question of whether criminalization is justified. Since John Stuart Mill first articulated the "harm principle" in admittedly simplistic form,[81] criminal law scholars have ingrained into social consciousness the idea that the existence of criminal prohibitions must be justified, if at all, by their prevention of harm and human suffering.[82] Law protects (or not), and thus is justified (or not), solely by reference to its animating value—the specific harm at which it is aimed. As we saw in the preceding section, the three species of arguments against expanding rape by fraud liability each attempt to demonstrate that a more robust law either would fail to protect against harm or would criminalize conduct that is not particularly harmful.

But criminalization is not required every time criminalization is arguably justified. Rape by fraud's narrow and peculiar doctrinal contours are entrenched against reform not because criminalization is unjustified by principles of autonomy, but because decriminalization is arguably justified by a competing, extra-legal value. The romanticized social practice of seduction—understood to encompass "the common misrepresentations of

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80 Rape by fraud doctrine is not only an exception to contemporary rape principles, but also an exception to contemporary fraud principles. *See* Jane E. Larsen, *Women Understand So Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 412 (1993) ("To put it plainly, a man may do things to get a woman's agreement to sex that would be illegal were he to take her money in the same way.").

81 *See* JOHN STUART MILL, ON LIBERTY (1859). Mill's notion was that the function of the criminal law is the prevention of "harm to others." Twentieth century liberal legal thinkers, most notably H.L.A. Hart and Joel Feinberg, have refined and elaborated upon the harm principle, valorizing it as the exclusive measure of the criminal law. *See, e.g.*, JOEL FEINBERG, 1 THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 10–11 (1984).

82 *See* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 113 (1999).

dating and courtship"[83]—purports to counsel in favor of *withholding* the criminal law's protection, even where such deceptions undermine individual autonomy.

A. The Value of Seduction

The affirmative argument for limiting rape by fraud liability centers on the value to society of what might be called the "ordinary seduction of a female acquaintance who at first suggests her disinclination."[84] An examination of the case law and commentary surrounding cases of rape by fraud reveals that a desire to protect the practice of seduction has been influential in constraining the scope of criminal protection. Even those generally in favor of expanding rape by fraud liability are careful to exculpate "persons who lied to others in the context of personal relationships, seducing prospective lovers with protestations of undying affection."[85] "Beliefs about seduction, and attitudes toward those who engage in it or are affected by it, are openly acknowledged as influences in some decisions about whether and when it is appropriate to invoke criminal law responses to assaultive sexual conduct."[86]

So what lies behind the determination that, as Richard Posner unabashedly puts it, "[s]eduction, even when honeycombed with lies that would convict the man of fraud if he were merely trying to obtain money, is not rape"?[87] Mirroring the species of legal arguments defending the factum/inducement dichotomy, arguments about the social practice of seduction arise when discussing the administrability of rape by fraud laws, the harms of sexual deception, and the normative value of the deceptive conduct.

As we have seen, the administrability argument for limiting rape by fraud liability turns on concerns about the institutional competence of legal actors to make accurate fac-

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83 POSNER, *supra* note 8, at 393.

84 State v. Rusk, 424 A.2d 720, 733 (Md. 1981) (Cole, J. dissenting).

85 Falk, *Rape by Fraud*, *supra* note 3, at 50–51. *See also* Patricia J. Falk, *Not Logic, But Experience: Drawing on Lessons from the Real World in Thinking about the Riddle of Rape-by-Fraud*, 123 YALE L.J. ONLINE 353 (2013), http://www.yalelawjournal.org/forum/not-logic-but-experience-drawing-on-lessons-from-the-real-world-in-thinking-about-the-riddle-of-rape-by-fraud [http://perma.cc/ADJ6-JF4B] [hereinafter Falk, *Not Logic, But Experience*] ("If we stopped here, and went no further, a large array of unwanted sexual exploitation would be criminally punished *without infringing on what occurs in purely social or romantic relationships*." (emphasis added)).

86 Lucinda Vandervort, *Sexual Consent As Voluntary Agreement: Tales of "Seduction" or Questions of Law?*, 16 NEW CRIM. L. REV. 143, 155 (2013).

87 POSNER, *supra* note 8, at 392–93.

tual determinations within the particularly murky context of sex. Similar arguments have been advanced regarding the capacity of courts and juries to distinguish between rape and commonplace seduction. Interestingly, this species of argument takes multiple forms. On the one hand, some commentators suggest that more robust rape by fraud laws would be nullified by legal actors who struggle to accept as rape those acts of sexual predation that too closely resemble "an artful seduction."[88] On the other hand, many courts have expressed the fear that expanded rape by fraud liability brings a risk of the law overreaching, criminalizing as rape seemingly innocuous, commonplace seductions. The *Boro* court, for example, voiced its concern that "where consent to intercourse is obtained by promises of travel, fame, celebrity and the like—ought the liar and seducer to be chargeable as a rapist? Where is the line to be drawn?"[89]

Unlike the traditional arguments against the administrability of rape by fraud laws, administrability arguments premised on the social acceptance of the practice of seduction cannot be easily dismissed. Predicting the social response to laws that challenge well-entrenched common perspectives—the problem of so-called "sticky norms"—can be a herculean task.[90] The magnitude of the law's deviation from common practice, the invocation of police power, and the severity of the associated penalties are all factors that increase the likelihood of backlash and nullification.[91]

Tales of seduction also play an important role in legal assessments of the harmfulness of sexual deception. The narrow construction of fraud in the factum, it is said, purports to reflect a social reality in which sex is routinely procured through falsehoods.[92] On this account, seductions are descriptively a fact of life, and thus cannot be conceptualized as warranting legal intervention.[93] The Supreme Court of Canada recently articulated such a

88 *See* James A. Durham, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 63 (1952) ("The rarity of [rape by fraud] cases today may be partly explained by the difficulty of presenting a convincing picture of such grossly impeded comprehension to skeptical jurors; the scene depicted may resemble more an artful seduction than forcible intercourse.").

89 Boro v. Superior Court, 210 Cal. Rptr. 122, 126 n.5 (Cal. Ct. App. 1985).

90 *See, e.g.*, Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607 (2000) (explaining that the problem of "sticky norms" arises when "the prevalence of a social norm makes decisionmakers reluctant to carry out a law intended to change that norm").

91 Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 627–28 (2009).

92 Hyman Gross, *Rape, Moralism, and Human Rights*, 2007 CRIM. L. REV. 220, 224 ("[W]ords said to arouse feelings and to 'put one in the mood' are understood to be part of a game that lovers play . . . .").

93 This is a common fallacy that has long impeded women's attempts to seek legal protection from harm;

view:

> Deceptions, small and sometimes large, have from time immemorial been the by-product of romance and sexual encounters. They often carry the risk of harm to the deceived party. Thusfar in the history of civilization, these deceptions, however sad, have been left to the domain of song, verse, and social censure.[94]

Because seduction is accepted as an archetype for normal sexual behavior, it functions as a contrast point to rape rather than an instance of it. Legal commentators see ordinary sexual deceptions as an innocuous baseline against which "serious" sexual crimes can be measured.[95]

Most frequently, however, appeals to seduction are simply normative. Sexual deceptions are romanticized as intrinsic to the values of love and affection.[96] In articulating his case against the principle of sexual autonomy, Jeb Rubenfeld invokes seduction to proclaim the merits of being deceived:

> There's a reason the word *romance* is surrounded by a cloud of fictive connotations. Few people know the whole truth about those with whom they have sex. . . . And love? A vast engine of deception. Even in a hook-up culture, love floats on the horizon, an obscure object of desire, and what is more common than love's blinding one person to the most basic facts about another? If fully informed consent were the key to lawful sex, the

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"atrocities . . . are authoritatively regarded as either too extraordinary to be believable or too ordinary to be atrocious. . . . [I]f it's happening, it's not so bad, and if it it's really bad, it isn't happening." CATHARINE A. MACKINNON, *Introduction: Women's Status, Men's States*, *in* ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES 1, 3 (2006).

94 R. v. Cuerrier (1998), 162 D.L.R. 4th 513 (Can.) (McLachlin, concurring).

95 *See, e.g.*, *If Your Neighbor Poses as Your Husband, Is It Rape?*, (NPR radio broadcast May 5, 2008) (transcript available at http://www.npr.org/templates/transcript/transcript.php?storyId=90186100 [http://perma.cc/5HZN-J6X5]) ("Prof. Volokh: If we are to have a crime here, I think it shouldn't be called rape. It shouldn't be treated as serious as rape. Sex is procured through falsehoods. I don't think it would generally be as serious as sex that actually happens through forcible coercion.").

96 WERTHEIMER, *supra* note 43, at 198 (quoting ANDRE COMTE-SPONVILLE, A SMALL TREATISE ON THE GREAT VIRTUES 241 (Catharine Temerson trans. 2001)) ("What is being in love, in fact, if not harboring certain illusions about love, about oneself, and about the person with whom one is in love?").

> first thing we should do is jail all the beautiful people.[97]

The view that seduction is a social good, a value in competition with (and typically besting) autonomy, is tied to changes in social norms regarding sex. Over the past half-century, American society has experienced a revolution in heterosexual sexual norms, much of which has played out in popular culture—magazines, newspapers, movies, television, internet, and social media. When *Playboy* magazine launched in 1953, it was billed as a sophisticated and intellectual liberation from puritanical sexual repression.[98] Sixty years later, sexual imagery is ubiquitous in our popular media. Our cultural climate now views satisfying sexual desire as an intrinsic good, an "essential component of complete, productive, and fulfilled existence."[99] Sex is currently regarded as something of a social and personal obligation, defined by an increasingly shared norm of casual sexual encounters devoid of expectations for longer-term commitments.[100]

Within the pervasive depictions of sexuality in popular culture, seductions are lauded as both producing and enhancing valuable sexual experiences. "Exaggerated praise, playful suggestions, efforts to impress, and promises intended to reassure and trigger emotions (but not strictly to be believed) are all part of the ritual of escalating erotic fascination that makes up a 'seduction' in the colloquial sense."[101] The capacity to persuade or cajole another person into value-producing sex through "charm, flattery, gifts, blandishments, and attention" trumps the capacity to make informed decisions about whether and when to have sex.[102] Indeed, attaining sex is itself seen as an expression of affirmative sexual autonomy. As one New York judge famously wrote:

> So bachelors, and other men on the make, fear not. It is still not illegal to feed a girl a line, to continue the attempt, not to take no for a final answer, at least not the first time. . . . It is not criminal conduct for a male . . . to assure any trusting female that, as in the ancient fairy tale, the ugly frog

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97 Rubenfeld, *supra* note 6, at 1416.

98 *See* Mike Conklin, *Playboy Magazine*, CHICAGO TRIBUNE, Dec. 1, 1953, *available at* http://www.chicagotribune.com/news/politics/chi-chicagodays-playboy-story,0,2454110.story [http://perma.cc/g32g-s2hp].

99 Edwin L. Rubin, *Sex, Politics, And Morality*, 47 WM. & MARY L. REV. 1, 17 (2005).

100 *See* Michelle Oberman, *Two Truths and a Lie: In re John Z. and Other Stories at the Juncture of Teen Sex and the Law*, 38 L. & SOC. INQUIRY 364, 377 (2013); *see also* Rubin, *supra* note 99, at 8.

101 Larsen, *supra* note 80, at 449.

102 Vandervort, *supra* note 86, at 156.

> is really the handsome prince. Every man is free, under the law, to be a gentleman or a cad.[103]

The thinness of act descriptions in the existing rape by fraud doctrine, and the corresponding reduction of victims' individual sexual autonomy, is thus defended by legal commentators as a small price to pay in order to protect seduction—perhaps even love itself—from the violence of government regulation. Rubenfeld himself admits that a legal regime criminalizing deceptively induced sex "would undoubtedly improve the rationality of sexual decisionmaking," but rejects it precisely because "it doesn't sound like fun."[104]

B. Seduction As Masculinity

My interest in this topic stems not only from a recognition of the frequency of appeals to the social practice of seduction in the jurisprudence of rape by fraud, but from an intuition that these appeals signify the importance of unspoken gender norms to the doctrine's development.[105] As just detailed, appeals to the value of seduction appear to underlie the resistance of both legal commentators and legal actors to expanding the criminalization of sexual deception. As this section will demonstrate, these appeals trace both well-known and emerging discourses regarding the social performances that embody masculinity in American society. Such discourses center on a principle of sexual conquest as a source of masculine status, cast men as the initiators of sexual encounters, and perpetuate a fiction in which women control men's sexual achievement.

The particular accounts of seduction employed by courts and commentators to defend limited rape by fraud liability reflect a commonly portrayed, and particularly gendered, paradigm of sexual attainment that ties masculinity to sexual agency. In this story, men are responsible for initiating and pursuing sexual relationships while women either resist men's overtures or, if all goes right, relent to them. Noted sociologist Michael Kimmel highlights the phenomenon:

> Boys are taught to try to get sex; girls are taught strategies to foil the boys' attempts. "The whole game was to get a girl to give out," one man told sociologist Lillian Rubin. "You expected her to resist . . . . But you kept pushing. Part of it was the thrill of touching and being touched, but, I've

103 People v. Evans, 379 N.Y.S.2d 912, 922 (Sup. Ct. 1975).

104 Rubenfeld, *supra* note 6, at 1416.

105 *Cf.* NICOLA LACEY, UNSPEAKABLE SUBJECTS: FEMINIST ESSAYS IN LEGAL & SOCIAL THEORY 128 (1998).

> got to admit, part of it was the conquest, too." . . . "I felt as if I should want to get it as often as possible," recalled another. "I guess that's because if you're a guy, you're supposed to want it."[106]

Men act; women are acted upon. "Men initiate sexual behavior; women surrender to male sexual initiation."[107] This is a well-known tale.[108]

Contemporary understandings of masculinity have begun to recognize the links between this paradigm and sexual attainment as a source of men's social status. Indeed, the dominant conception of normative masculinity in American society now equates men's sexual attainment with social standing.[109] "Normative masculinity," of course, does not purport to describe real men, but rather refers to a dominant ideology—a set of normative ideals toward which all men are expected to strive and that serve to keep men in power. "[W]e should understand hegemonic norms as defining a subject position in discourse that is taken up strategically by men in particular circumstances."[110]

Because it does not attach to embodied men, but rather gendered performances, the status associated with normative masculinity is both elusive—it must be earned—and tenuous—it must be continually refreshed through repeated public displays of normative alignment.[111] As a consequence, men's pursuit of sexual attainment is frequently motivated by anxiety concerning their performances of masculinity.[112] Gender anxiety increases the

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106 MICHAEL S. KIMMEL, THE GENDER OF DESIRE: ESSAYS ON MALE SEXUALITY 5 (2005).

107 Anderson, *supra* note 18, at 1409.

108 *See generally* Alan E. Gross, *The Male Role and Heterosexual Behavior*, *in* MEN'S LIVES 424, 426-27 (Michael S. Kimmel & Michael A. Messner eds., 2d ed. 1992) (surveying the literature on men as sexual aggressors).

109 *See* Katherine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 670–77 (1999) (explaining that, for men, "sex is often a means of gaining the esteem of their peers. 'Scoring' is seen as an individual accomplishment for which one earns prestige."). *See also* Gross, *supra* note 108, at 427 (noting the various ways that men tally sexual attainment: some count sexual acts, some count their own orgasms, and, more recently, some have begun counting the number of orgasms they can create in their partner).

110 R.W. Connell & James W. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 GENDER & SOC'Y 829, 846 (2005).

111 Lee Dye, *Guys Have to Earn Their Status*, ABC NEWS (May 11, 2012), http://abcnews.go.com/Technology/masculinity-guys-earn-status/story?id=13573672 [http://perma.cc/S56H-J8VG].

112 Sharon Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J. CRIM. L. & CRIMINOLOGY 965, 1003–04 (2012).

pressure on men to engage in exaggeratedly masculine performances to prove their status.[113]

A recent manifestation of such hyper-masculine behavior is reflected in the emergence of a seduction discourse in popular culture. This discourse focuses on men's use of exaggerated deceptions to obtain sex from women (and thereby status from other men). In 2005, investigative reporter Neil Strauss released a book that chronicled his experiences as part of a "seduction community." *The Game: Penetrating the Secret Society of Pickup Artists* became a New York Times bestseller, was later converted into a cable television series, and may soon become a movie.[114] The book's details, which spell out a number of deceptive techniques used by dedicated pick-up artists to attain sex, have been repeated and replicated over the last decade through a variety of pop culture media.[115]

Because hyper-masculine performances magnify the underlying normative commitments of social gender constructs, the behavior provides a uniquely useful window into normative masculinity in a given society at a particular time. Seduction communities, like those chronicled by Strauss, illuminate the way in which American men have come to conceptualize the sexual conquest of women as a game with formalized rules and objective measures of success.[116] Although gaming and sports metaphors for sex are a long-established currency among men, the prevailing discourse of seduction constructs sexual attainment as a product of specialized knowledge, emphasizing its amenability to

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113 *Id.*

114 *See* New York Times Best Seller List (September 25, 2005), *available at* http://www.hawes.com/2005/2005-09-25.pdf [http://perma.cc/B86H-8W3L].

115 *See, e.g.*, *The Big Bang Theory: The Lizard-Spock Expansion* (CBS television broadcast Nov. 17, 2008) (the character Howard attempts to use pick-up tactics including "peacocking" and "negging," two techniques described in Strauss's book); *How I Met Your Mother: The Playbook* (CBS television broadcast Nov. 16, 2009) (the character Barney unveils a seduction "playbook" that mirrors *The Game*'s black leather cover, gold-trimmed pages, and satin bookmark); *The Mentalist: Crimson Casanova* (CBS television broadcast, Feb. 10, 2009) (the episode centers around character Paul Fricke's career as a self-identified pick-up artist who reduces seduction to three words: "contempt, control, excitement"). These episodes averaged in excess of 10 million viewers on first airing, and all three series are now in syndication. *See* Robert Seidman, *Top CBS Primetime Shows*, TV BY THE NUMBERS (Nov. 25, 2008), http://tvbythenumbers.zap2it.com/2008/11/25/top-cbs-primetime-shows-november-17-23-2008/8765/ [http://perma.cc/QKQ5-3PBL].

116 The current methodological approach to seduction is typically traced back to motivational speaker Ross Jeffries, who promoted "speed seduction" techniques in the early 1990s (and who garnered mainstream attention following Tom Cruise's portrayal of a Jeffries-like motivational speaker Frank T.J. Mackey in the 1999 film *Magnolia*). However, organized pick-up artistry is not a new phenomenon. Jeffries' seminars bear a close relationship to Eric Weber's seminars following his 1970 novel *How To Pick Up Girls*.

rational modeling.[117] Seduction, properly taught, involves the application of simple rules, formalized technical procedures, and a handful of guiding principles in order to deceptively procure status-conferring sex from women.[118]

Again, sexual attainment of this sort is not sought solely for its own sake, but rather as evidence of masculinity.[119] It is well understood that, as men seek status from performances of masculinity, "the domination of women, sexual and otherwise, becomes the method of choice."[120] This is because the hegemonic pattern of American masculinity lies in the repudiation and denigration of women as contrast figures. "Would-be men must therefore struggle against and ultimately vanquish the seemingly feminine in themselves, and in others."[121]

Within the parameters of the seduction "game," women are thus depicted as opponents rather than as potential partners—at best, mere obstacles in the path to masculine status. "With such a view, sex becomes a contest, not a means of connection; when sexual pleasure happens, it is often seen as his victory over her resistance."[122] Coercive and deceptive approaches to sexual conquest are accepted as a means of lowering feminine resistance just enough to access the masculine status traditionally reserved for the idealized normative

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117 The desire to rationally model and theorize social behaviors that, traditionally, developed through the cultural transmission of practical knowledge implicates important questions in social and political theory. *See generally* MICHAEL OAKESHOTT, RATIONALISM IN POLITICS (1962). *See also* MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 155 (H. H. Gerth & C. Wright Mills eds. & trans., 1991) (1946) ("The fate of our times is characterized by rationalization and intellectualization and, above all, by the 'disenchantment of the world.'").

118 *See, e.g.*, Lisa Lombardi, *Fake Your Way Into Her Bed*, MAXIM, May 2001, at 74.

119 *Cf.* Baker, *supra* note 109, at 670 ("One finding emerging from the research conducted on date rapist populations indicates that men with a willingness to rape are under a disproportionate amount of pressure to have sex. . . . Many young men are eager to have sex because they want to think of themselves and to have others think of them as men worthy of esteem."); Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381, 408 (2005) ("[M]ost date rapists view their actions instrumentally, that is, as ways to obtain sex rather than express hostility or to degrade another human being."); Robin D. Wiener, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN'S L.J. 143, 147 (1983) ("Because both men and women are socialized to accept coercive sexuality as the norm in sexual behavior, men often see extreme forms of this aggressive behavior as seduction, rather than rape.").

120 Dolovich, *supra* note 112, at 1005.

121 *Id. See also*, Frank Rudy Cooper, *"Who's The Man?": Masculinities Studies, Terry Stops, And Police Training*, 18 COLUM. J. GENDER & L. 671, 676–77 (2009).

122 KIMMEL, *supra* note 106, at 5.

man.[123] Normative masculinity's seduction discourse also feeds off of America's increasingly "hook-up" oriented culture, in which courtship and dating have come to be viewed as nuisances, and supplication as evidence of femininity.[124] "The focus is almost exclusively on reaching the goal of conquest with all possible speed."[125]

The discourse of seduction has similarly concocted a pseudo-scientific basis to explain the status-value of sexual conquest. Premised on a commodity model of sex that draws from the dubious field of evolutionary psychology, the discourse perpetuates the by-now-familiar idea that masculine and feminine social scripts reflect residual evolutionary instincts: women are attracted to dominant males because women seek prime genetic material for their offspring; men displaying so-called "alpha" characteristics are entitled high status by virtue of their likelihood to be chosen by women for sex.[126] These narratives give the gloss of authority and inevitability[127] to male promiscuity and perpetuate the notion of hyper-monogamous females who selectively grant sexual access only to men exhibiting

123 The hyper-masculine approaches to seduction evidenced by pick-up artists exemplify how hegemonic gender norms function: the use of sexual deceptions to access otherwise unattainable normative status demonstrate men who remain "enmeshed by convention; subjectified, ordered and disciplined" by the very masculine ideals they fail to embody. *See* M. Wetherell & N. Edley, *Negotiating Hegemonic Masculinity: Imaginary Positions & Psycho-discursive Practices*, 9 FEMINISM & PSYCHOL. 335, 353 (1999).

124 Strauss himself viewed the cultish worship of hyper-masculinity as toxic to meaningful relationships—both among men and between men and women. He was quoted in an interview as stating that the systemization of seduction "can lower one's opinion of the opposite sex." Stephen Poole, *Sad Sack Artists*, THE GUARDIAN (October 22, 2005), http://www.theguardian.com/books/2005/oct/22/highereducation.news1 [http://perma.cc/Z4R4-B9SC]. *See generally* IRINA ANDERSON & KATHY DOHERTY, ACCOUNTING FOR RAPE: PSYCHOLOGY, FEMINISM AND DISCOURSE ANALYSIS IN THE STUDY OF SEXUAL VIOLENCE 6 (2008) ("Normative heterosexuality is imbued with a dominance-submission dynamic leaving little room for notions of women's active desire, pleasure or consent and little or no imperative for men to check that women are actively consenting to sex and/or finding the experience pleasurable.").

125 KIMMEL, *supra* note 106, at 5.

126 These narratives are not merely present in mainstream culture, but are endorsed, sometimes explicitly, by legal actors. *See, e.g.*, WERTHEIMER, *supra* note 43, at 113–18 (claiming that women must be picky in choosing mates who were likely to have both the resources and the desire to ensure that their children reach the age at which they too can procreate); RANDY THORNHILL & CRAIG PALMER, A NATURAL HISTORY OF RAPE: BIOLOGICAL BASES OF SEXUAL COERCION *passim* (2000) (arguing the fundamental premise that men are naturally programmed to rape women in order to maximize the number of children each man fathers).

127 I describe this as the mere "gloss" of authority because "it is commonplace among quite mainstream evolutionary biologists and philosophers of biology, with no particularly strong ideological axes to grind, to think that the literature [on evolutionary psychology] is undertheorized, conceptually vague, and above all, nearly bereft of rigorous empirical support." Mark Kelman, *Thinking About Sexual Consent*, 58 STAN. L. REV. 935, 954 (2005).

social and genetic desirability.[128] What it means to be masculine in this environment is to be rampantly virile; ready for any sexual opportunity at a moment's notice. By contrast, women are depicted as discriminating gatekeepers, who men must bribe, supplicate, cajole, manipulate or otherwise convince to grant sexual access. Because women are seen as controlling where and when sex happens, this narrative posits women as a locus of power over men at the same time that normative masculinity objectifies women as obstacles in the path to masculine status. Precisely because men overcome women's power to resist, their performances of sexual conquest become status worthy. Women's choice of sexual partner becomes the mark of masculinity.[129]

Of course, the illusion of choice masks the reality of sexual injury. As Robin West has repeatedly explained:

> Heterosexual women and girls, married or not, consent to a good bit of unwanted sex with men that they patently don't desire, from hook-ups to dates to boyfriends to cohabitators, to avoid a hassle or a bad mood the endurance of which wouldn't be worth the effort, to ensure their own or their children's financial security, to lessen the risk of future physical attacks, to garner their peers' approval, to win the approval of a high-status man or boy, to earn a paycheck or a promotion or an undeserved A on a college paper, to feed a drug habit, to survive, or to smooth troubled domestic waters.[130]

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128 For example, one common narrative is that sperm is cheap while eggs are correspondingly expensive. Men are therefore rationally incentivized to spread their seed widely in order to maximize his lineage, while women must carefully guard their genetic resources to ensure not only superior genetic stock but also a man's physical protection and material support. *See id.* at 953–54.

129 This line of reasoning encapsulates one of feminist theory's foremost challenges with supporting a principle of individual sexual autonomy: it is fundamental to the autonomous person that his choices manifest "tastes, opinions, ideals, goals, values, and preferences [that] are all authentically *his*." Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives of Self-Direction*, 40 WM. & MARY L. REV. 805, 810 (1999) (emphasis added). As feminists well understand, women's choices are frequently constrained by differentials in power and circumstance that may be invisible to men acting from positions of privilege. *Id.*

130 Robin West, *Sex, Law, and Consent*, *in* THE ETHICS OF CONSENT: THEORY AND PRACTICE 236 (Franklin G. Miller & Alan Wertheimer eds., 2010). *See also* Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L.J. ONLINE 335, 340–341 (2013), http://www.yalelawjournal.org/forum/sex-without-consent [http://perma.cc/WW7H-4QP9] [hereinafter Tuerkheimer, *Sex Without Consent*] ("Women make decisions about whether to consent to sex in a fraught social context. The fallacy of equating consent with desire may be pronounced for teenage girls, who often consent to sex for reasons other than sexual desire and whose identities are not yet fully formed [emphasis removed].").

To the extent that some women have the capacity to commoditize their sexuality—to rationally exchange sexual access for social goods in a sexual market[131]—they continue to do so under oppressive social norms and conditions of substantive inequality. Patriarchy empowers beautiful, young, single women only to the extent that they are desired for sex. Resistance is assured by sex inequality and by social norms that devalue women who are complicit in men's sexual accomplishments.[132] And overcoming resistance is eroticized as the transgression of (imagined) asymmetric power relationships.[133]

C. Law As Limit

Normative masculinity's embrace of sexual conquest has developed contemporaneously with the liberal rape law reforms that valorize sex as the product of individual choice. In a peculiar way, the institution of rape law mirrors the macro-discourse of pop-culture seduction—men's pursuit; women's choice. Indeed, the very construction of rape law in terms of consent presupposes a subordinate position for the targets of masculine sexual-

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131 The narrative of the sexual marketplace is a common one. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 202 (3d ed. 1986) (arguing that rape laws serve to protect a marriage market in which women sell their property interest in bodily integrity to their husbands); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, & Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1124–27 (1972) (arguing that rape laws serve to deter individual actors from turning property rules governing bodily integrity into less efficient liability rules). It is also a dangerous one. *See* Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1880–81 (1987) (arguing that marketplace rhetoric that treats bodily integrity as a fungible commodity threatens personhood "because it detaches from the person that which is integral to the person").

132 *See* Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461 (2012) [hereinafter Tuerkheimer, *Judging Sex*]; Judith A. Howard, *Gender Differences in Sexual Attitudes: Conservatism or Powerlessness?*, 2 GENDER & SOC'Y. 103, 105 (1988) ("Women who voluntarily give up that which makes them desirable as objects of an exclusive sexual relationship have lost one of the few resources they have in this sexual marketplace."); *see also* Robin L. West, *Legitimating the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1454 (1993):

> As most women know, being accompanied by a man on the street is the only sure way to avoid street hassling, and in a directly analogous way, being accompanied by a man, through marriage, in life, and in the home, is the "best way" to avoid more dangerous and damaging forms of sexual assault. This is the sense in which all men, even safe men who would never dream of touching a woman who does not want to be touched, benefit from rape; rape makes the practice of consensual heterosexuality and the institution of marriage desirable measures of safety.

133 *Cf.* MACKINNON, *supra* note 2, at 321 ("If we knew the boundaries were phony, existed only to eroticize the targeted transgressable, would penetrating them feel less sexy?").

ity.[134] Consent thus responds to power by legitimizing the pursuit; "consent is currently understood not in terms of mutuality but rather in relation to a set of arrangements initiated, by implication, by the defendant, in an asymmetric structure which reflects the stereotypes of active masculinity and passive femininity rehearsed above."[135] Rape law's contractual model of sex, by its nature, underscores that "it is permissible for men to try to attain sexual gratification for themselves without much regard for the woman's interests, and it is the woman's role to play 'gatekeeper' if she so desires."[136]

Rape law also appears to mirror the social narratives that link men's performances of sexual conquest to masculine status. For example, to the extent that rape by fraud law privileges nothing more than a woman's consent "to the penetration of her body by a particular membrum virile,"[137] it maps evolutionary psychology narratives by presuming that the woman involved *wants* to engage in sex first-and-foremost with the person displaying certain readily observable characteristics. Intangible characteristics—marital status, affection, even nominal identity—are legally less salient than the presumption that the victim desires whichever man happens to be physically present.[138]

In the context of rape by fraud, the law reinforces normative masculinity's seduction discourse—perpetuating the fiction that women hold power over men when pursued for sex—by tasking the victims of sexual deception to uncover fraudulent representations. *Caveat amator*, an oft-quoted maxim in rape by fraud scholarship,[139] depicts women as discriminating purchasers, both empowered and obligated to see through mere "seller's

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134 LACEY, *supra* note 105, at 114 (citing WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 163 (1995)).

135 *Id.*

136 WERTHEIMER, *supra* note 43, at 212

137 United States v. Traylor, 40 M.J. 248, 249 (C.M.A. 1994).

138 For an example of this privileging, see Corey Rayburn Yung, Rape Law Fundamentals 14 (Feb. 2, 2014) (unpublished manuscript) (*available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2337621 [http://perma.cc/TLT5-A9ZM]) (describing valid legal consent as situations in which, "a person knows that the other person in front of her is the one that she will be having sex with and knows the sexual activity that will occur."). Even feminists strongly in favor of more robust rape-by-fraud laws have a tendency to privilege physical presence in determining who and what a particular person consents to. *See, e.g.*, Tuerkheimer, *Sex Without Consent*, *supra* note 130, at 347 ("[T]he identity of one's sexual partner [in the sense of physical presence] can be, and very often is, a critical component of sexual consent—enough to warrant a legal presumption of materiality.").

139 *See, e.g.*, WERTHEIMER, *supra* note 43, at 197 (comparing the maxim "caveat emptor," let the buyer beware, with the maxim "caveat amator," let the lover beware).

puffery."[140] Richard Posner has suggested that this form of victim-blaming is efficient thanks to deeply ingrained gendered social practices:

> Girls are taught by their parents to be suspicious of the blandishments of suitors; and the careful screening of suitors is the essence of the optimal female sexual strategy . . . . Ordinarily, to be sure, the law does not place the burden of preventing fraud on the victim; it is cheaper for the potential injurer not to commit fraud than for the victim to take measures of self-protection against it. Nevertheless, a person who has acted the fool is likely to feel slightly less offended at having been fleeced.[141]

Society's moral intuitions about whether sexual deception is a problem are thus contaminated by the law's institutionalization of distinctly gendered performances, and by its reflection of this gendered conception of "seduction" back upon society as prescriptive norm.[142] At least some of the social permissiveness toward sexual deception is shaped by the law's failure to treat rape by fraud as a serious moral matter.[143] As Rubenfeld aptly points out, "if sexual deceivers started going to prison in large numbers for rape-by-deception, many fewer lies would be told and reliance would become even more reasonable."[144]

Despite the general acceptance of coercive and deceptive tactics in service of "seduction," both normative masculinity and the criminal law impose limits on the means of sexual attainment. In fact, the criminal law and masculinity frequently converge in this regard. "Most men . . . do not rape, much less gain esteem from the number of 'rapes' committed."[145] Procuring legally valid consent—even when the product of questionable

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140 *See* Christopher & Christopher, *supra* note 27, at 89–90 ("Obtaining intercourse by wearing 'alluring make-up or a false moustache,' or by false representations that one drives a Ferrari or owns a mansion on the French Riviera is deemed, like misleading advertising, as seller's puffery and too trivial to be classified as rape.").

141 POSNER, *supra* note 8, at 393.

142 WERTHEIMER, *supra* note 43, at 199.

143 *See, e.g.*, Ryan McCartney, *Could a Pick-Up Artist Be Charged With Rape By Deception?*, NBC NEWS (July 27, 2010), http://www.nbcnews.com/id/38430181/ns/us_news-crime_and_courts/t/could-pick-up-artist-be-charged-rape-deception [http://perma.cc/4MPB-XVLF] (describing "the visceral reaction many in the United States" exhibited in response to an Israeli prosecution for rape by fraud).

144 Rubenfeld, *supra* note 6, at 1405.

145 Taslitz, *supra* note 119, at 409. *See* Sarah Swan, *Triangulating Rape*, 37 N.Y.U. REV. L. & SOC. CHANGE 403, 409 (2013). Much feminist literature on rape law continues to miss this essential feature of normative

tactics—is as vital to the masculine ideology of sexual conquest as it is to the criminal law.[146]

Similarly, both the common-law and statutory lines of rape by fraud doctrine outlaw those species of sexual deception that undermine the narratives of choice and power that justify viewing performances of sexual conquest as status-worthy. Deception about the occurrence of sex itself, as in the common-law medical treatment cases, removes the target of conquest from the sexual context that is necessary to ensure resistance. The victim of such deceptions no longer experiences the psychological, biological, or societal pressures to protect her sexuality as a resource—she is no longer on guard against puffery.[147] Accordingly, her choice no longer manifests her assailant's worth.

Spousal impersonations likewise relocate the victims' sexual consent outside of the ordinary sexual marketplace, and thus beyond the resistance that it generates. Indeed, the law has long reflected this understanding as a spousal exception to rape.[148] Unlike other-deceptions as to nominal identity, spousal impersonation can be understood as rendering

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masculinity. *See, e.g.*, Baker, *supra* note 109, at 674 (positing that gender norms motivate men's willingness to disregard the issue of sexual consent).

146 *See, e.g.*, ANDREW TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 26 (1999). ("[M]en believe that the ultimate victory is one won by verbal aggression and fear of their prowess and skill, which make physical violence unnecessary.").

147 Indeed, the world of pick-up artists has translated evolutionary psychology narratives into justifications for ignoring victims' literal resistance encountered during attempts at sexual conquest. For example, pick-up artists have coined the phrase "Last-Minute Resistance" (or "LMR") to recast certain expressed apprehensions about agreeing to sex as a purportedly evolutionary response to the high stakes of pregnancy: "Every woman has hardwired into her head a behavior circuit that works to protect her from getting pregnant by a man who has no intention of sticking around to help raise the child." URBAN DICTIONARY, http://www.urbandictionary.com/define.php?term=lastminuteresistance [http://perma.cc/FKU9-8M9D].

148 *See* DIANA E. H. RUSSELL, RAPE IN MARRIAGE 17 (2d ed. 1990) (quoting MATTHEW HALE, HISTORIES OF THE PLEAS OF THE CROWN (1736)) ("[T]he husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto the husband which she cannot retract."). For a thorough history of the marital rape exemption, see Morgan Lee Woolley, Note, *Marital Rape: A Unique Blend of Domestic Violence & Non-marital Rape Issues*, 18 HASTINGS WOMEN'S L.J. 269 (2007). Twenty-six states still maintain some form of spousal immunity for marital rape. Michelle J. Anderson, *Marital Immunity, Intimate Relationships, & Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1468 (2003).

nonconsent virtually impossible.[149] For men, the resulting sexual conquest is seen as illegitimate.

Thus, the criminal prohibition of rape by fraud—the line that separates rape from seduction—maps the limits of masculine status transfer within the ideology of sexual conquest. Criminal deceptions, like paradigmatic stranger rape, fail to confer normative masculinity. Permissible deceptions, by contrast, function to make and remake their victims as women while simultaneously confirming their perpetrators' masculinity. The rape by fraud doctrine provides the rules to a gendered game—functionally, it determines which scores "count."

By constructing sex as a game in which masculine status is conferred through women's choices, the ideology of sexual conquest adorns the powerless with the trappings of power. Power is thrust upon women as desire and then taken from them as sex. The overcoming of victim autonomy is the very gamesmanship of sexual seduction. In the end, rape law's commitment to individual sexual autonomy feeds a discourse of power that masks sexual injury, perpetuates sex inequality through gender, and makes both of those things sexy for men.

III. Rape Law's Continuity

Unlike the standard account of contemporary rape law, in which the commitment to individual sexual autonomy represents a sharp break from rape law's roots as property law, the account just presented casts contemporary rape law as a strategic modification of the structures of male dominance, rather than their overthrow.[150] The shift from a property regime to an autonomy regime reflects genuine changes in sexual prescriptions, but also important continuities with the past. It represents the adjustment of masculine power—a "tactical shift and reversal in the great deployment of sexuality"—in response to collective

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149 Even after the legal recognition of spousal rape in the last quarter of the twentieth century, *social* norms continue to exert pressure on married women to make themselves sexually available to their husbands, even when they do not desire to do so. West, *supra* note 130, at 236 ("Married, mid-twentieth-century women consented to undesired sex, in other words, well after they were formally and legally entitled to say 'no,' in part because a chorus of advice from well-meaning or not-so-well-meaning friends, family members, marriage counselors, advice columnists, and religious advisors urged them to do so.").

150 *Cf.* Christina Simmons, *Modern Sexuality & the Myth of Victorian Repression*, *in* PASSION AND POWER: SEXUALITY IN HISTORY 158 (arguing that a "myth of Victorian repression" employed new power narratives to entrench male dominance in response to women's greater political and economic activity in the 1920s and 1930s).

resistance to the prior regime.[151] Yet, to the extent that rape law continues to map masculine norms about the status-value of sexual conquest, it remains something done by men to men.[152] Its boundaries continue to establish men's claims to status—claims made against other men and regarding women.

A. Rape Law As Property Law

There were times in our history when the hierarchical nature of rape law was more explicit. Ancient rape law protected men's interest in women as property.[153] Bride capture—the process by which men staked a proprietary claim to unmarried women through their forcible seizure and rape—existed in England as late as the fifteenth century.[154] More commonly, virgin girls were simply sold into marriage at a standard price.[155] The rape of a virgin was consequently punished through payment of the bride price to the dishonored father, and the forced marriage of the victim to her rapist.[156]

English law expanded the property paradigm from daughters to wives. The Statutes of

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151 MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY: AN INTRODUCTION 131 (1978).

152 *See* Matthew R. Lyon, Comment, *No Means No?: Withdrawal of Consent During Intercourse and the Continuing Evolution of the Definition of Rape*, 95 J. CRIM. L & CRIMINOLOGY 277, 282 (2005) (noting that the American inheritance of common law rape laws has limited our ability to reform a system designed to regulate "competing male interests in controlling sexual access to females, rather than protecting women's interest in controlling their own bodies and sexuality").

153 *See* SUSAN BROWNMILLER, AGAINST OUR WILL 6–22 (1976). Brownmiller is considered the preeminent scholar of rape law's history. She explains, "As the first permanent acquisition of man, his first piece of real property, woman was, in fact, the original building block, the cornerstone of the 'house of the father.' . . . Concepts of hierarchy, slavery, and private property flowed from, and could only be predicated upon, the initial subjugation of women." *Id.* at 8. For more recent discussion of rape as a property crime, see Meredith J. Duncan, *Sex Crimes & Sexual Miscues: The Need for a Clearer Line Between Forcible Rape and Nonconsensual Sex*, 42 WAKE FOREST L. REV. 1087, 1092 n.28 (2007), and Joshua Dressler, *Where We Have Been and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 410 (1998).

154 BROWNMILLER, *supra* note 153, at 7–8; *see also* Note, *To Have & To Hold: The Marital Rape Exemption & The Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1256 (1986) (discussing both bride capture and "stealing an heiress," whereby a man kidnapped a woman into marriage).

155 *See* BROWNMILLER, *supra* note 153, at 8–10.

156 The punishment of forced marriage has existed since at least the Hebrew social order. *Id.* at 10; *Deuteronomy* 22:28–29. Forced marriage reflected an understanding that part of the bride price was relieving a father's economic burden of supporting his daughter.

Westminster first criminalized the rape of another's wife.[157] Rape of a married woman was analogized to deprivation of the husband's right to possession of his chattel.[158] If the wife was suspected of not having resisted strenuously enough, the perpetrator could be charged with a lesser crime of ravishment, a sort of misdemeanor.[159] "The aggrieved party in those cases was the husband, and the wife was peremptorily stripped of her dower."[160] However, a wife could never be raped by her husband; "prosecuting a husband for raping his wife made no more sense than indicting him for stealing his own property."[161] Marriage was thus the purchase of unfettered sexual access at the cost of protection and support.[162] This property regime was simply inconsistent with notions of female autonomy. "Rape could not be envisioned as a matter of female consent or approval; nor could a definition acceptable to males be based on a male-female understanding of a female's right to her bodily integrity."[163]

Rape law thus developed as an instrument of male power. It protected first a father's salable interest in his daughter's virginity, and later a husband's right to the exclusive violation of his wife. The claims were men's, the interests protected were men's, the law was men's, and the women were objects.[164] "Rape was legally constructed as a wrong that one

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157 BROWNMILLER, *supra* note 153, at 21.

158 *See* Katherine M. Schelong, *Domestic Violence & the State: Responses to Rationales for Spousal Battering, Marital Rape, & Stalking*, 78 MARQ. L. REV. 79, 86–87 (1994); Martin D. Schwartz, *The Spousal Rape Exemption for Criminal Rape Prosecution*, 7 VT. L. REV. 33, 33 (1982). Guido Calabresi and Douglas Melamed provide a theoretical justification for the switch from compensation for rape to punishment for rape, noting that the punishment model is a more efficient property rule, rather than a liability rule. *See* Calabresi & Melamed, *supra* note 131, at 1124–27.

159 *See* BROWNMILLER, *supra* note 153, at 21.

160 *Id.*

161 Schelong, *supra* note 158, at 87 (quoting Sandra L. Ryder & Sheryl A. Kuzmenka, *Legal Rape: The Marital Rape Exception*, 24 J. MARSHALL L. REV. 393, 394 (1991)).

162 For centuries, Anglo-American law has commanded that the husband has a duty to support his wife, and the wife has a corresponding duty to the provide domestic services for her husband; despite this contract rationale, there was no direct right of action under English law for non-support in marriage. *See* 1 BACON, A NEW ABRIDGEMENT OF THE LAW 713-23 (7th ed. 1832). Occasionally, an unsupported wife could use her husband's credit to purchase life's "necessaries," although this doctrine was strictly limited in application. *See generally* Note, *The Unnecessary Doctrine of Necessaries*, 82 MICH. L. REV. 1787 (1984).

163 BROWNMILLER, *supra* note 153, at 8.

164 *See also* Brief for American Civil Liberties Union et al. as Amici Curiae, Coker v. Georgia, 433 U.S. 584 (1977) ("The history of rape as a crime against man's property, not against the woman herself, sheds light on

man did to another, by having an unauthorized sexual encounter with a woman in whom the other man had a proprietary interest."[165] In this way, rape also blurred the lines between public and private wrong; men's ownership of women was a source of status, and thus the rape of a woman both harmed a particular man's proprietary interests and threatened the patriarchal structures of men's relationships more generally.[166]

B. Autonomy As Continuity

As discussed previously, contemporary understandings of rape have rapidly evolved away from notions of property and toward a paradigm of female sexual autonomy.[167] However, rape law's transition from a property crime to a crime against individual sexual autonomy is rarely explored in detail. Most commonly, the transition is attributed to feminist legal reforms of the late twentieth century.[168] First-wave, liberal feminists largely sought formal equality from rape law reform, targeting anachronistic doctrines that reflected gender-role stereotypes.[169] For example, first-wave feminists were among the first to challenge the marital rape exemption and to advocate gender neutrality in identifying

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the ambivalent treatment of the victim, who is viewed not simply as the virgin whose violation inspires outrage but also as the temptress who threatens every man with conviction.").

165 Swan, *supra* note 145, at 409.

166 *See id.* at 410–413.

167 *See* discussion *supra* Part I.A. *But cf.* Berger, *supra* note 79, at 75–76 ("To treat as victims in a legal sense all of the female victims of life is at some point to cheapen, not celebrate, the rights to self-determination, sexual autonomy, and self- and societal respect of women.").

168 *See, e.g.*, Dressler, *supra* note 153, at 410 ("Boys' rules have certainly not been eradicated everywhere and in every case, but feminists can take legitimate pride in the fact that rape law has undergone significant reform in just the past decade or two, largely as a result of their efforts."); Duncan, *supra* note 153, at 1090 ("The 1960s marked the beginning of the much needed reformation of rape law provisions nationwide. Prior to that time, much of American rape law was based on the common law, which was antiquated in terms of acknowledging female autonomy and sexual violence."); Jeannie Suk, *"The Look in His Eyes": State v. Rusk and Rape Reform*, *in* CRIMINAL LAW STORIES (Robert Weisberg & Donna Coker eds., 2012) ("Starting in the 1970s, under the influence of feminism, social attitudes changed significantly.").

169 *See* Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 752–53 (2007). For a definition of liberal feminist, see Mary Becker, *Patriarchy and Inequality: Toward a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 32–33 ("Liberal feminism assumes that people are autonomous individuals making decisions in their own self-interest in light of their individual preferences . . . . The solution to inequality between men and women is to offer individuals the same choices regardless of sex. The legal standard of formal equality is an expression of this solution.").

rape victims.[170] Many second-wave feminists, motivated at least in part by the work of Catharine MacKinnon, recognized that the lack of enforcement was part of a larger ideology of male dominance and female submission. These reformers challenged facially neutral doctrinal requirements that impeded prosecution and reflected a distrust of women's accounts of violation.[171] Thus, both first- and second-wave feminists contributed in rerouting the power of rape laws to serve the ends of female autonomy: for liberal feminists, it was an essential precondition to well-being; for radical feminists, it was an important resistance to patriarchal norms.[172]

Or so the story goes. The move from property to autonomy leaves much to be explained. The standard account offers both a simplistic model of top-down juridical power and an implausible account of regime change that flaunts the very power model it presupposes. In this narrative, women laboring under sexist laws and conditions of social inequality inexplicably came together in collective resistance and carved out a space for genuine sexual autonomy at the expense of the patriarchal order. Indeed, feminist reformers were able to expropriate and turn to their advantage the very set of laws that were premised on women's designation as objects of male status within patriarchy.

Normative masculinity's embrace of sexual conquest begins to explain this story's inadequacy. The reconstruction of rape law in terms of individual sexual autonomy is occurring contemporaneously with the reconfiguration of masculinity along the same axis. As the preceding deconstruction of rape by fraud illustrates, rape law and gender norms are engaged in an active, dialectical exchange. As rape law reforms to valorize individual choice, being chosen becomes the designation of masculine status. Meanwhile, rape by fraud laws remain entrenched against reform by a discourse of "seduction," employed by normative masculinity to eroticize, as sexual conquest, the permissible transgression of

170 Gruber, *supra* note 169, at 755–56.

171 *Id.* at 753–54. For a detailed discussion of second-wave feminism, see Judith Kegan Gardiner, *Introduction, in* MASCULINITY STUDIES & FEMINIST THEORY 2–6 (2002).

172 Mary Becker explains how female autonomy purports to resist patriarchy:

> Patriarchy denies that women can be sexual agents making moral decisions in light of their own sexual desires. Patriarchy teaches that a woman should agree to have sex with "her" man when he desires it regardless of whether she desires it or is likely to find it pleasurable. As being with their own ends and purposes, women should be encouraged to develop as sexual agents capable of saying "no" to sex they do not desire and of seeking their own sexual pleasures.

Becker, *supra* note 169, at 50–51.

women's autonomous resistance.

It is well understood that, in patriarchy, "men author scripts to their own advantage, women and men act them out."[173] These scripts are not static. Men's methods of using women to obtain masculine status have transformed, both informing and informed by liberal rape law reforms.[174] Though the power of sexuality in this story is fluid, it is not contingent. Contemporary rape law represents a continuation of the structures of male dominance that were once explicitly embraced by the property regime. Rape law still exists to protect the claims of men against other men, and it still contributes to the objectification and abuse of women.

C. Constructing A Path Forward

If I am correct about the ideology of sexual conquest, legal liberalism—and its concomitant commitment to individual sexual autonomy—is no longer a meaningful pushback to male dominance, at least in the realm of rape law. While individual autonomy-based reforms—such as the use of thicker act descriptions in the rape by fraud doctrine—may function to outlaw specific troubling conduct, rape law's systemic commitment to individual autonomy is itself contributing to the victimization of women through the entrenched narratives of normative masculinity.[175] Those who take gender hierarchy seriously therefore need to consider new tools to disrupt the currents of power that continue to constitute female identity as subordinated and violable. Refurbishing rape law to protect women themselves—rather than protecting women only as incidents of male power—remains a core need of the feminist legal project.[176]

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173 MACKINNON, *supra* note 2, at 128.

174 Reva Siegel has written at length about the capacity for a socio-legal regime's "preservation through transformation." Concisely, Siegel argues that efforts at legal reforms can and do produce change, but that lawmakers and jurists are often able to reframe, and thus preserve, existing status privileges through new rules and rhetoric. *See generally* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

175 Moreover, as this Article has attempted to demonstrate, the rape by fraud doctrine has proven resistant to further reform in the direction of autonomy, even where the doctrine's tension with autonomy is well understood. *See* Part I.C, *supra*.

176 LIBBY S. ADLER, LISA A. CROOMS, JUDITH G. GREENBERG, MARTHA L. MINOW, & DOROTHY E. ROBERTS, WOMEN AND THE LAW 185 (4th. ed. 2007). Ann Cahill put it succinctly: "Rape is, for many feminists, the ultimate expression of a patriarchal order, a crime that epitomizes women's oppressed status by proclaiming, in the loudest possible voice, the most degrading truths about women that a hostile world has to offer." ANN J. CAHILL, RETHINKING RAPE 2 (2001).

In contemplating a course correction, I believe we should begin by identifying the set of norms that we wish to assume center stage in the culture we seek to construct. This may strike some as a peculiar suggestion with respect to the criminal law. Perhaps more so than any other legal discipline, criminal law theory has been beholden to the traditions of Western thinking, in which truth is sought through the identification and pursuit of so-called "foundational" concepts.[177] Nevertheless, a number of influential schools of philosophical thought are converging on the recognition that humanity is, in a sense, self-creating—that through our individual actions and collective social practices we generate the normative engagements that constitute our identity.[178] "[S]ubject and norms are now seen to be engaged in a dynamic and dialectic relationship in which neither side provides a starting point or a resting place relative to the other."[179] The foregoing analysis of rape by fraud demonstrates exactly this; our legal doctrines have the capacity simultaneously to inform and to be informed by our social norms. Our moral justifications for criminal prohibitions must therefore properly account for the law's effects outside of formal legal settings.[180] Extra-legal realms, while easily overlooked from a doctrinal perspective, constitute a critical site for assessing the role that law plays in constructing society. Simplified: we have the potential to affect the nature of rape in society by altering the law that responds to it.

In light of the peculiar form of female objectification at the center of contemporary normative masculinity, I find it interesting to consider how rape law might look if centered around the recognition of human dignity, rather than individual autonomy. At its most basic, the notion of "human dignity" connotes something like a fundamental respect for each person's humanity.[181] Over the last half-century, dignity has taken an increasingly central

177 *See* Jack M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 745 (1987). We see this clearly in rape law: sexual autonomy currently dominates all discussion about the law's justification, shape, function, and effect. Before autonomy, it was property.

178 *See* Meir Dan-Cohen, *Constructing Selves*, *in* MORALITY, ETHICS, AND GIFTED MINDS 151–154 (Don Ambrose & Tracy Cross eds., 2009) [hereinafter Dan-Cohen, *Constructing Selves*].

179 *Id.*, at 152.

180 Legal scholars are increasingly recognizing and examining law's ability to shape social phenomena conventionally thought to be wholly extra-legal. *See, e.g.*, Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, *passim* (2009); Lucy A. Williams, *The Legal Construction of Poverty: Gender, 'Work' and the 'Social Contract'*, 22 STELLENBOSCH L. REV. 463, *passim* (2011).

181 *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 198 (1977) ("This idea, associated with Kant, but defended by philosophers of different schools, supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust.").

place in our legal discourse, and is becoming an increasingly accepted justification for the normative regulation of public life both domestically and internationally.[182] Dignity has been of particular interest to criminal law theorists, who see it as a potential substitute for the classic harm principle.[183] Yet dignity has largely eluded feminist jurisprudence in this realm.

Despite the lack of overt attention, many contemporary arguments in favor of reconceptualizing rape law already sound in the language of dignity. For example, in several recent articles, Deborah Tuerkheimer proposes casting rape law in terms of sexual agency. Unlike autonomy, agency is contextual, and is therefore capable of accounting for the myriad social constraints and pressures under which decisions about sex are frequently made.[184] So too is dignity. Because dignity demands that our actions, practices, and institutions convey the appropriate respect to persons *qua* persons, dignity is both an expressive value[185] and a contextually malleable one.[186] The question whether particular conduct is consistent with the demands of dignity would be situated within the contexts of both individual understandings and shared social meanings.[187] A rape law grounded in dignity would

182 Internationally, human dignity is guaranteed by such documents as the Preamble to the Charter of the United Nations, 26 June 1945, 59 Stat. 1031, T.S. No. 933, the Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), and the South African Constitution, 1996, No. 108 of 1996, §§ 1, 7, 10, 35, 36, 39, 165, 181, 196, & Sched. 2. Domestically, "dignity" has been cited with surprising frequency in the recent opinions of the United States Supreme Court, *see* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PENN. L. REV. 169, *passim* (2011) (chronicling the use of the "dignity" in Supreme Court jurisprudence), and rests at the heart of much of the recent litigation over gay and lesbian civil rights, *see, e.g.*, Katherine Franke, *Dignifying Rights: A Comment on Jeremy Waldron's* Dignity, Rights and Responsibilities, 43 ARIZ. ST. L.J. 1175, 1184–97 (2012).

183 *See, e.g.*, Meir Dan-Cohen, *Thinking Criminal Law*, 28 CARDOZO L. REV. 2419, 2420–22 (2006); GARDNER, *supra* note 76, at 16. Although the "harm" of rape is also readily understandable in the language of human dignity, if one wished to think in those terms. *See, e.g.*, West, *supra* 130, at 227 ("The physical invasion of the self and body, the interruption and denial of sovereignty over one's physical boundaries that the invasion entails, the fear of death foremost in the mind of the victim, the sure knowledge that one's will is irrelevant, the immediate and total reduction of one's self to an inanimate being for use by another, and the sustenance of multiple injuries, both vaginal and non-vaginal, internal and external—all of this, simultaneously experienced, typify and constitute the experience.").

184 Tuerkheimer, *Sex Without Consent*, *supra* note 130, at 339–41; Deborah Tuerkheimer, *SlutWalking in the Shadow of the Law*, 98 MINN. L. REV. (forthcoming April 2014), *available at* http://ssrn.com/abstract=2009541.

185 *See generally* Cass Sunstein, *On the Expressive Function of Law*, 144 U. PENN. L. REV. 2021 (1996).

186 *See* Meir Dan-Cohen, *Defending Dignity*, *in* HARMFUL THOUGHTS 161–66 (2002) [hereinafter Dan-Cohen, *Defending Dignity*].

187 *Id.* at 163–66.

capture the meaning of the sex act to the parties involved—whether a titillating anonymous encounter or an expression of love between long-term partners. It would also better capture sexuality's potential values[188]—including self-expression, connection, intimacy, pleasure, and relationship—as well as its expressive harms—mistrust, deceit, shame, humiliation, and objectification. Dignity is thus a particularly useful consideration if our goal is to evaluate morally complex and meaning-laden social practices, of which rape is unquestionably one.[189]

More poignantly, the claimed principal benefit of an agency approach to rape law would be to restore women's sexual subjectivity.[190] Here, too, dignity seems promising. Ensuring respect for (and deference to) the subjectivity of others has long been fundamental to dignity's project. In the Kantian tradition, for example, the paradigmatic violation of dignity consists of "[e]xploiting a person for one's own ends by inflicting on him harm or suffering with disregard for his own needs, interests, and desires."[191] In certain religious traditions, the dignity of humanity is defined by the authentic relation of subject to subject.[192] Even constitutional law has come to recognize that personal dignity entails respecting a sphere of personal authority necessary to "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[193] Against this backdrop, the contemporary masculine norms of sexual conquest appear untenable.

A foundation for human dignity can likewise be found in a number of other recent feminist calls to remake rape law. Those who would conceptualize rape law as an instance

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188 *Cf.* Lacey, *supra* note 105, at 106 ("There is little trace in criminal law, then, of those things which contemporary social discourses of sexuality mark as its values and risks.")

189 *See* Catharine A. MacKinnon, *Creating International Law: Gender as Leading Edge*, 36 HARV. J.L. & GENDER 105, 105 (2013) ("[S]ex crimes are gender based—that is, they happen because of the social meaning of sex: being a woman or a man in societies of femininity and masculinity.").

190 *See* Tuerkheimer, *Sex Without Consent*, *supra* note 130, at 340 ("For agency, sexual desire, possible and fulfilled, is fundamental, and women's sexual subjectivity is afforded privileged status."); *id.* at 352 ("Rape is the negation of women as sexual subjects. With sexual subjectivity positioned as the alternative, the wrong of rape can be discerned in starkest relief.").

191 Dan-Cohen, *Defending Dignity*, *supra* note 186, at 161.

192 *See generally* MARTIN BUBER, I AND THOU (Walter Kaufmann trans., 1970) (1923).

193 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992).

of the prohibition of slavery,[194] or as preventing the abuse of power inequalities,[195] rely upon the centrality of women's agency and subjectivity that would be well situated under the umbrella of dignity. Even Rubenfeld's contentious[196] proposal to treat the wrong of rape as the denial of "self-possession" traces dignity's historical connection to theories of inviolable personal sovereignty.[197]

A move toward recognizing human dignity, and away from autonomy, would also have a number of pragmatic benefits for rape law. For one, it would shift the focus of legal inquiry away from the victim and, more properly, toward the conduct of the defendant. By their very nature, consent-based prohibitions require inquiry into the mental state and actions of the victim.[198] The ability for legal institutions to perform such inquiry adequately, fairly, and without additional trauma remains a heavily contested question for feminists interested in rape law enforcement.[199] Dignity, by contrast, describes not simply a state of affairs, but a standard of treatment. Its fundamental legal questions would revolve around whether the defendant's conduct conveyed adequate respect for the victim as a full and equal participant.[200] Doctrinally, consent is an attendant circumstance whereas dignity informs the *actus*

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194 *See* Jane Kim, *Taking Rape Seriously: Rape as Slavery*, 35 HARV. J.L. & GENDER 264, 294 (2012) ("Held against her (or his) will, dominated, dehumanized, degraded, and used as an object to service another, rape is a form of slavery . . . ."); *id.* at 305 (arguing that Federal rape laws would send the message "that the larger community is committed to the value of human dignity equality").

195 Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147, 211 (2011) ("Under this theory, when a person in a powerful position exploits a person's lack of realistic choices, his or her conduct amounts to impermissible interference with free will and thus justifies criminal regulation.").

196 *See, e.g.*, Falk, *Not Logic, But Experience*, *supra* note 85; Gowri Ramachandran, *Delineating the Heinous: Rape, Sex, and Self-Possession*, 123 YALE L.J. ONLINE 371 (2013).

197 *See* Rubenfeld, *supra* note 6, at 1423–1436 (reimagining rape law as the violation of a foundational right to self-possession); *id.* at 1426 ("[B]odily self-possession is central to our selfhood and intimately connected to dignity."). In its social constructions, individual dignity is frequently viewed as a microcosm of the inviolability of the political sovereign—both as a physical person and a *dignitas*-bearing status. *Cf.* CARL SCHMITT, POLITICAL THEOLOGY: FOUR ESSAYS ON SOVEREIGNTY (G. Schwab trans., 2005).

198 Buchhandler-Raphael, *supra* note 195, at 159–61. Even in cases where *actual* consent is clearly absent, contemporary rape law requires inquiry into whether the victim's conduct supports a reasonable mistake as to the existence of consent. *See* Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 958 (2008).

199 *See generally* Tuerkheimer, *Judging Sex*, *supra* note 132, at 97.

200 At this stage, I am primarily proposing a thought experiment. Actual elaboration of a rape law grounded in human dignity would of course require extensive consideration of, among other things, the "fair warning"

reus.

A well-articulated account of dignity may also assist us to better distinguish bodily harms from personal ones. One straightforward example of this common conflation is seen in the assumption that dignity flatly prohibits bodily commodification.[201] A more thorough understanding of human dignity would permit nuanced evaluations of the meaning of the practice of commodification, the conditions under which it occurred, and the message it conveys within society regarding the value of the persons whose bodies are for sale. This may require a transformation in courtroom conduct, or the implementation of rules of evidence that would permit both the defendant and the victim to more fully express their narratives of the encounter. Rape itself provides another salient example of the body/person divide. While many (perhaps all) rapes are physically injurious, invasive, and even mutilating, so too are many lifesaving medical treatments.[202] Rape is rape not because of its effects on the body, but because of its social *meaning*—the degradation of the person being abused and the cultural hierarchies of subordination and domination being constructed through its practice.

It is important to recognize the distinction between human dignity, when framed this way, and the sort of autonomy that contemporary rape law purports to protect. A proper respect for human dignity requires, among other things, that one not intentionally subvert the *conditions* for another person's exercise of autonomy, regardless of whether any given instance of sexual conduct might be construed as sufficiently autonomous.[203] Intentional

requirements of due process. *See, e.g.*, United States v. Lanier, 520 U.S. 259, 265–66 (1997) (describing the fair warning requirement). However, there is no reason to believe that rape laws aimed at protecting human dignity would necessarily be more vague or difficult to implement than rape laws aimed at protecting individual autonomy or property interests.

201 *See, e.g.*, Catharine MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1, 10–11 (2011) ("Not being used for another's ends would help women in some respect. It certainly condemns prostitution, for example . . . ."). Arguments about the incommensurability of persons generally stem from a Kantian tradition of viewing dignity as a kind of value or "worth" that precludes tradeoffs. *See generally* IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS 39–41 (James W. Ellington trans., 3d ed. 1993) (1785). It should be noted that this is far from the only conception of dignity on offer, and indeed may be a wholly inappropriate conception for the context of law. *See* JEREMY WALDRON, DIGNITY, RANK, & RIGHTS 137–38 (Meir Dan-Cohen ed., 2012) (arguing that legal dignity is a normative social status, not a type of intrinsic Kantian worth).

202 *See* Meir Dan-Cohen, *A Concept of Dignity* 44 ISRAEL L. REV. 9, 21–22 (2011).

203 *Cf.* Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 136–37 (1969) ("[I]f the essence of men is that they are autonomous beings, authors of values, of ends in themselves . . . then nothing is worse than to treat them as if they were not autonomous, but natural objects . . . whose choices can be manipulated.").

misrepresentations made for the purpose of procuring sex that might otherwise not be forthcoming are an affront to dignity, full stop. So too, I suspect, is much coercive and exploitative sex that our current rape law regime considers sufficiently autonomous.

But, of course, the most far-reaching implications of implementing a rape law centered on dignity would be discursive and generative. It would embrace and engage with rape law's role in constructing social sexualities and would express an unambiguous commitment to the integrity and full humanity of both potential victims and accused defendants. It would be a call to remake the dominant conceptions of society by focusing on aspects of human existence that have largely been subordinated both to the liberal legal subject and its contractarian ideals of welfare and autonomy. It would adopt an alternative vision of what it means to be human—an affirmation of human possibilities that have been overlooked or forgotten or thusfar relegated to the periphery.[204]

I do not intend here to articulate a comprehensive account of dignitarian rape law reforms, much less of dignity itself. This is, at best, a sketch of a proposed direction, undoubtedly one of many. By now, we should recognize that no principle is self-sufficient, and this is no less true in the criminal law. "Crimes" are social artifacts: they are created by criminal law, simultaneously a diagnosis and a treatment of social ills.[205] The legal lens we choose bends the way we see the world—not only the conduct law touches, but also the social practices that law insulates by failing to reach.[206] I suggest only that, as a precondition to devising behavior-guiding norms through the criminal law, we should consider and adopt an image of the subjects and the society that we want our laws to produce.

CONCLUSION

It is important to recognize the continued role of normative masculinity, and hence of

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204 Balkin, *supra* note 177, at 745. Recently, Costas Douzinas has argued that the rising interest in human dignity reflects attempts by competing ideologies to hegemonize their particularity through the language of a claimed (but ultimately vacuous) universal concept. COSTAS DOUZINAS, HUMAN RIGHTS AND EMPIRE: THE POLITICAL PHILOSOPHY OF COSMOPOLITIANISM 8 (2007). With apologies for eliding the depth of Douzinas's political skepticism, perhaps this Part can be understood as my call for feminism to enter this very fray—to appropriate dignity as the language of women's subjection.

205 *See* Anita Bernstein, *Better Living Through Crime & Tort*, 76 B.U. L. REV. 169, 169 (1996).

206 The use of criminal law imposes its own way of conceptualizing, organizing, and managing social problems. The translation of an issue into a legal one not only repackages the problem, but often promotes the fiction of a purely legal solution to issues that are multifaceted. Nicky Priaulx, *On Law's Promise: Thinking About How We Think About Law's Limits*, 57 STUDIES IN L. POL. & SOC. 201, 223 (2012).

men, in defining the boundaries of rape law. Permitting or outlawing instances of rape is no less a normative social practice than rape itself. As I have attempted to show, the rape by fraud doctrine both reflects and reinforces a particular masculinity—one in which performances of sexual conquest serve to allocate status among men. Here, at least, rape law can be understood as codifying the internal limits on men's valid claims to the status of normative masculinity. Indeed, it appears better suited to that purpose than to protecting the principle of individual sexual autonomy that ostensibly animates it. Masculinity, for its own part, has appropriated rape law's rhetoric of autonomy and employs it to posit women as a locus of power over men when pursued as objects for sex. The transgression of that power, however fictional, is experienced as sexual pleasure. The discourse of choice masks the sexual injury. Rape law continues its long tradition as an instrument of male power—a means by which men make claims against other men regarding the value of the women that men possess.

My purpose is to call attention to both our need and our capacity to disrupt the discourses of power supported by the current rape law regime. Further reforms in the direction of individual sexual autonomy, whatever their particular merit, are unlikely to provide resistance to the structures of gender inequality in our society. I believe it is time for the criminal law to respond more directly to the continuing objectification of women. I have proposed one path. By constructing a rape law regime grounded in emerging understandings of human dignity, we can decouple rape law from normative masculinity, and from the gendered hierarchies of subordination and domination more generally. Perhaps, in so doing, we can also create space for authentic female subjectivity in the domain of sexuality.