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## Delineating the Heinous: Rape, Sex, and Self-Possession

*In this Essay, Professor Ramachandran examines Professor Rubenfeld's concept of self-possession, which Rubenfeld presents as a helpful way to define the harm of rape. She argues that if the concept represents exclusive physical control over one's body, it is an elusive and undesirable ideal, and as problematic as the sexual autonomy concept that Rubenfeld critiques. Alternately, if it represents the narrower concept of mind-body integration, it makes a principled distinction between rape and battery impossible. The solution is to acknowledge that rape is a sex crime, unique because sex carries distinctive risks and meanings.*

Readers will recall the outrage during the 2012 presidential election over a House bill cosponsored by Representative Paul Ryan. The bill distinguished between forcible rape and non-forcible rape with respect to federal funding of abortions for rape victims.<sup>1</sup> Representative Todd Akin—a cosponsor of the bill—incited further controversy when he used the term “legitimate rape” to imply that some category of rapes are not “real” or “legitimate” rapes, and that only “illegitimate” rapes might result in pregnancy.<sup>2</sup> “Rape is rape,” President Obama said in response to the controversy, going on to explain his view that making distinctions among different categories of rape, including forcible and non-forcible rape, is wrong.<sup>3</sup> President Obama confidently asserted that the

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1. No Taxpayer Funding for Abortion Act, H.R. 3, 112th Cong. § 309(1) (as introduced on Jan. 20, 2011).
  2. See Lori Moore, *The Statement and the Reaction*, N.Y. TIMES, Aug. 20, 2012, <http://www.nytimes.com/2012/08/21/us/politics/rep-todd-akin-legitimate-rape-statement-and-reaction.html> (quoting Representative Akin's comments in an interview with a St. Louis television station).
  3. *Id.*

American people were on his side on that question,<sup>4</sup> and it seemed like they were: a few days later, even cosponsor Paul Ryan stated that “rape is rape” and evaded questions about the bill’s use of the term “forcible rape” by calling it “stock language.”<sup>5</sup>

With this recent history in mind, it is truly surprising that in his latest article, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, Jed Rubenfeld takes the position that not only should we distinguish between forcible and non-forcible rape, but we also shouldn’t call the latter “rape” at all.<sup>6</sup> In doing so, he is taking a stance that is not only deeply unpopular among scholars, as he notes,<sup>7</sup> but also apparently deeply unpopular with significant segments of the voting public.

One reason that some Democrats characterized Ryan and Akin as “out of touch”<sup>8</sup> is that the distinction between forcible and non-forcible rape seems to reflect the unsavory and antiquated belief that Rubenfeld aptly identifies<sup>9</sup> – namely, that rape is a crime in which a woman’s chastity is stolen. According to that belief, if a woman wants to have sex with anyone other than her husband, she isn’t chaste and is therefore incapable of being “really raped.” The connection between the force requirement and this chastity-protecting view of rape is that historically, some courts interpreted the force element to require proof that the victim put up the “utmost resistance” to being raped, for such resistance seemed to affirm the value of the victim’s chastity.<sup>10</sup> Thus, the force

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4. See Lynn Sweet, *Obama at Press Conference Rebukes Akin: “Rape is Rape” Transcript*, CHI. SUN-TIMES: SCOOP FROM WASH. (Aug. 20, 2012, 3:58 PM), [http://blogs.suntimes.com/sweet/2012/08/obama\\_at\\_press\\_conference\\_rebu.html](http://blogs.suntimes.com/sweet/2012/08/obama_at_press_conference_rebu.html).

5. Melissa Bell, *Paul Ryan Echoes Obama: “Rape is Rape,”* WASH. POST: POST POLITICS (Aug. 22, 2012, 10:05 AM), <http://www.washingtonpost.com/blogs/post-politics/wp/2012/08/22/paul-ryan-echoes-obama-rape-is-rape>; Felicia Sonmez, *Paul Ryan: The Term “Forcible Rape” Was “Stock Language,”* WASH. POST: POST POLITICS (Aug. 27, 2012, 7:29 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2012/08/27/paul-ryan-the-term-forcible-rape-was-stock-language>.

6. See Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1434 (2013) (“As with slavery and torture, so with rape: when law protects the fundamental right of self-possession, it demands bodily force.”).

7. *Id.* at 1378.

8. E-mail from Debbie Wasserman Schultz, Chair, Democratic Nat’l Comm. (Aug. 19, 2012), reprinted in Elizabeth Chan, “*Legitimate Rape*,” DEMOCRATS BLOG (Aug. 19, 2012), [http://www.democrats.org/news/blog/legitimate\\_rape](http://www.democrats.org/news/blog/legitimate_rape) (“I can’t sit by and watch as these out of touch Republicans like Mitt Romney, Paul Ryan, and Todd Akin continue to roll back women’s rights.”).

9. Rubenfeld, *supra* note 6, at 1388–92.

10. *Id.* at 1391 & n.91 (collecting cases); see also Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1 (1998) (arguing that because heterosexual sex was historically unlawful if engaged in outside of marriage, courts would have been skeptical of victims’ claims of rape because they

element is understood by many as a means to distinguish chaste victims, who are capable of being “really raped,” from unchaste victims, who are not.<sup>11</sup>

It is clear that Rubinfeld rejects this way of thinking about rape. Indeed, one of the primary aims of his article appears to be to eradicate the chastity principle from rape law and replace it with something more egalitarian.<sup>12</sup> And so, perversely, when he ends up supporting the distinction between forcible and non-forcible rape, he is coming close to allying with those who support the very view he seeks to excise from rape law—the view that rape is no big deal when it happens to an unchaste woman. While he resists the chastity virtue that Akin and Ryan seem to prize, Rubinfeld does argue that sex lacking consent but also lacking force may still be a crime, such as battery, but it’s not rape.<sup>13</sup> Conversely, when it comes to forcible rape, Rubinfeld critiques the view that rape is “just another assault, like being punched in the stomach”<sup>14</sup>: he points out that it fails to “credit rape victims’ own experience of the crime.”<sup>15</sup> But this is precisely what his view of non-forcible rape does.

How did this happen? How does someone who rejects the chastity-protecting model of rape law end up arguing for virtually the same thing its modern subscribers want—to treat forcible rape as the only “legitimate rape”? Rubinfeld’s article reads as if he never wanted to end up where he does. He gives us the sense that he has been reluctantly boxed into this corner by simultaneously pursuing two aims:

1. Ridding rape law of the antiquated, sexist goal of protecting a chaste woman’s – and only a chaste woman’s – virtue, and

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read as attempts by the purported victim to escape criminal liability for fornication or adultery, and that in this context, the force requirement would have been useful to isolate cases in which the victim rightly had a defense to liability); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1099 & n.23, 1113, 1125-28 (1986) (collecting and excerpting cases that demonstrate the belief that the reasonable woman would fight, contrasting this to other crimes in which consent is a defense, but no physical resistance is required, and explaining that courts appear to believe that a woman, if truly not consenting, would fight to defend her virtue).

11. See Coughlin, *supra* note 10.
12. Rubinfeld, *supra* note 6, at 1429 (arguing that a rape victim’s “grief and torment” may reflect the “obsolete moral worldview in which sex ruined a woman, took away her virtue, made a whore of her”).
13. *Id.* at 1434; see also *id.* at 1440-41 (arguing that sex with an unconscious person who was not forcibly drugged could be handled through the law of battery).
14. *Id.* at 1430.
15. *Id.* at 1429.

2. Identifying a principled reason for singling out rape as an especially heinous crime, separate from battery.<sup>16</sup>

He examines the modern means of reconciling these two goals, which is to treat rape as a violation of sexual autonomy, but he rejects this effort on the grounds that the fundamental right to sexual autonomy is a myth, both “unattainable and undesirable.”<sup>17</sup> He then argues that we should instead treat rape as a violation of what he calls “self-possession.”<sup>18</sup> But once he does this, he says that the force requirement makes sense, because without force, there is no violation of self-possession.<sup>19</sup>

Attempting to achieve the two goals outlined above is laudable. I won’t go to the trouble of explaining why we should cheer the first, but I will say that we should be highly sympathetic to the second. If there is in fact no principled reason for singling rape out as an especially heinous crime, yet we continue to act as if there is, we may inadvertently reinforce the rather repugnant notions of feminine chastity and sexual virtue that historically supported the distinction between rape and ordinary battery. In doing so, we may aggravate the harm of rape by amplifying rape victims’ feelings of shame and disgrace.<sup>20</sup> Moreover, we may even encourage rape by perpetuating the notion that unchaste women are sexually available, and that their sexual violation is a lesser wrong.

While Rubinfeld has thus pursued worthwhile goals, he has failed to achieve them. Instead, he has put forth an argument that rests on whether self-possession is itself attainable and desirable, as well as whether its loss is a good way to understand the core harm of rape. In this response, I argue that self-possession is none of these things.

What is self-possession? Rubinfeld tells us that his article does not provide the proper forum to fully discuss it,<sup>21</sup> but he does give us some clues as to what he’s talking about. In particular, because he argues that the concept supports a revival of the force requirement, we can deduce much of what self-possession must mean by examining Rubinfeld’s definition of “force,” as elaborated with

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16. *Id.* at 1428-30 (outlining a dilemma posed by these goals and stating that self-possession “cut[s] this Gordian knot”).

17. *Id.* at 1417.

18. *Id.* at 1431-32.

19. *Id.* at 1432-34.

20. See JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 345-46 (2006) (arguing that feminism may have “a shaping contribution to make to women’s suffering,” and that by “affirming and identifying itself with female injury, it may thereby, unintentionally, intensify it”).

21. See Rubinfeld, *supra* note 6, at 1426.

numerous examples.<sup>22</sup> In Parts I and II of this response, I use his definition of force to help draw a clearer picture of what self-possession means. I interrogate the concept and argue that it is as mythical, and as inadequate, as sexual autonomy. Although a “thin” version of the concept might be attainable, just as Rubinfeld concedes of a thin version of autonomy,<sup>23</sup> this watered-down version so underplays the importance of sex that it fails to meet Rubinfeld’s second goal—to explain why rape is unique and should be a distinct crime from battery.

In Part III of this response, I argue that Rubinfeld’s concept of self-possession is not a good way to understand the core harm of rape because it reduces what is special about sex to having one’s physical body possessed, or taken, by another. Rubinfeld’s self-possession concept ignores that sex is particularly meaningful, in both good and bad ways, for reasons beyond the possession of one partner’s body by the other. The reasons sex is special range from its unique, long-term physical risks (pregnancy and disease) to its cultural valence. Perhaps Rubinfeld avoids acknowledging the cultural importance of sex because he is uncomfortable with the antiquated and sexist virtue of chastity that is so often tied up in this cultural meaning. But to explain why rape is an especially heinous crime, we must be realistic in our description of sex.

While rape is not always a crime against a woman, rape is an engine and manifestation of women’s subordination. As such, we should be extremely careful before deciding that rape—any rape—should be considered a less egregious offense or less important social problem.<sup>24</sup> How rape is treated under the criminal law can have significant effects on the status of women generally.<sup>25</sup> The law is a powerful creator of meaning, but law cannot turn the harm of rape into the harm of battery simply by fiat.<sup>26</sup> This makes revival of the force requirement an idea with not nearly enough to recommend it. Rubinfeld

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22. *Id.* at 1435-36.

23. *Id.* at 1422-23.

24. While Rubinfeld concedes in his article that non-forcible rape can be criminalized, *id.* at 1434, he insists that it is not really rape, thereby focusing on the discursive question of what we call “rape.” *E.g.*, *id.* at 1432 (“‘Slavery by deception’ is no more slavery than rape-by-deception is rape.”); *id.* at 1441-42 (arguing that incapacitated rape may be criminalized as battery but not as rape).

25. *See, e.g.*, Brief Amici Curiae for the ACLU et al. at 11-16, *Coker v. Georgia*, 433 U.S. 584 (1977) (No. 75-5444), 1976 WL 181482, at \*11-16 (arguing against the death penalty for rape on the grounds, in part, that it stems from archaic “chivalric protection” and that it makes rape cases harder to prosecute).

26. Law certainly can’t do this in the case of the many rapes that, unlike battery, create an unconsented-to risk of pregnancy and sexually transmitted diseases. Both rape-by-deception and incapacitated rape do this, and neither is forcible rape.

concludes that the only alternative is for law to embrace myth—namely, the myth of sexual autonomy. But parsing his shifting definitions of self-possession leads to another option: for law to embrace the reality that sex is, in fact, incredibly important to most people.

### I. SELF-POSSESSION AS A SUBJECTIVE CONCEPT

It is possible, on a quick read, to believe that by “loss of self-possession,”<sup>27</sup> Rubinfeld means something subjective—either a) the victim’s subjective experience of losing self-possession, or b) the perpetrator’s subjective intent to deprive her of it. He includes narrative description of a victim’s emotional response to the experience of forcible rape,<sup>28</sup> and he supports the appropriateness of treating rape as a loss of self-possession in part by arguing that it “would not be surprising if rape victims felt” this type of loss.<sup>29</sup> Comments like these may suggest that Rubinfeld defines rape as a loss of self-possession because that’s what victims say it is. At another point, he describes the core harm of rape as that of being used for someone else’s gratification or pleasure<sup>30</sup> and describes the parallel core harm of slavery as being made “to serve the other, to please the other, . . . to exist for his purposes and his satisfaction.”<sup>31</sup> This makes it seem as if rape and slavery constitute losses of self-possession because of what the perpetrators seek to accomplish. On the other hand, Rubinfeld disclaims the notion that the harm of rape is that of being treated like an object by someone else.<sup>32</sup>

In any case, neither of these subjective definitions of loss of self-possession can really be what Rubinfeld means, because they don’t support the force requirement at all. If the loss of self-possession were a test of the victim’s subjective experience or the perpetrator’s subjective intent, then force would be irrelevant. Force is not required for the victim to *experience* the act as if he were used for someone else’s ends. Likewise, someone can *treat* someone else as being for her own ends without using force. Tricking someone into sex is treating him as if he exists for your ends—his preferences and consent don’t matter.

Indeed, the force requirement is at odds with rape victims’ accounts of what made their experiences so horrible. Victims of non-forcible rape report

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27. Rubinfeld, *supra* note 6, at 1430.

28. *Id.* at 1428-29.

29. *Id.* at 1430.

30. *Id.*

31. *Id.* at 1427.

32. *Id.* at 1425.

the same experience of violation that victims of forcible rape report. In fact, a national survey funded by the Department of Justice found that incapacitated rape—defined as sex with a person who lacks capacity to give consent but voluntarily entered that incapacitated state—poses similar risks of post-traumatic stress disorder and depression as forcible rape and rape resulting from the rapist’s administration of incapacitating drugs.<sup>33</sup> Notably, these negative outcomes occur despite the fact that high percentages of the victims surveyed did not conceive of the incapacitated rape as “rape.”<sup>34</sup> Yet in Rubenfeld’s view, incapacitated sex is not rape,<sup>35</sup> though forcible rape and sex under the influence of incapacitating drugs administered by the rapist are.<sup>36</sup>

This is not to say that Rubenfeld ignores what rape victims say. Rather, my point is that Rubenfeld’s model of self-possession cannot be subjective, even if his occasional use of terms and victim narratives might create that impression. Instead, he must mean something objective, which would justify his decision to treat non-forcible rape differently from forcible rape in spite of what victims say. Rubenfeld’s concern is with acts that in some *objective sense* deprive the victim of self-possession. An objective standard makes sense in particular because he is so concerned with unloading the cultural baggage of chastity norms from our definition of rape. Incorporating the subjective experience of victims would risk importing chastity norms into the definition of rape via victims’ experiences—a risk Rubenfeld seems unwilling to take.

## II. SELF-POSSESSION AS CONTROL OVER ONE’S BODY

### A. Exclusive Control over the Body’s Use

A better candidate for what Rubenfeld might mean by self-possession is the traditional definition of “possession”—exclusive control over the use of a thing. One reason to resist this reading is that he concedes that “our mastery of our bodies is partial in a thousand ways and absent in a thousand more.”<sup>37</sup> At the

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33. DEAN G. KILPATRICK ET AL., MED. UNIV. OF S.C., DRUG FACILITATED, INCAPACITATED, AND FORCIBLE RAPE: A NATIONAL STUDY 4 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf>.

34. *Id.* at 40-41. In one sample, fifty percent of victims of drug-facilitated rape (which even Rubenfeld would count as rape) and incapacitated rape described the incident as either not a crime, or a crime but not rape. *Id.* at 40. In a second sample, seventy-one percent conceived of the incident as not a crime or a crime but not rape. *Id.* at 41.

35. Rubenfeld, *supra* note 6, at 1441-42 & n.247.

36. *Id.* at 1434, 1440, 1442 & n.247.

37. *Id.* at 1426.

same time, Rubinfeld says self-possession is “binary,”<sup>38</sup> which supports the exclusivity of it. Self-possession, on this view, would be the right to exclusive control over the use of one’s body.

The problem with this understanding of self-possession is very similar to the problem with sexual autonomy—precisely the problem that Rubinfeld seeks to overcome. He correctly critiques the idea of sexual autonomy in part because it is an unachievable illusion of sorts,<sup>39</sup> but this kind of bodily self-possession is equally elusive. We don’t and can’t have exclusive control of the use of our bodies just as we aren’t and can’t be free to do whatever we want sexually.<sup>40</sup> Nothing we do can make our bodies completely “free” from or unencumbered by the environments that surround them. We all need, to varying degrees, the support of law, social constructs, and technology to do what we want with our bodies.<sup>41</sup>

For example, whether one can move one’s body from point *A* to point *B* fundamentally depends on social and legal constructs. If building owners and developers have to install wheelchair ramps, then the mobility of the bodies of persons who require wheelchairs is very different than if those ramps are not mandated and installed.<sup>42</sup> Similarly, the mobility of almost everyone is affected by the affordability of cars and public transportation. If, in order to keep her from escaping, a criminal seizes his victim’s crutches and bashes them to bits, we say that he has committed a crime against her person without even touching her body.<sup>43</sup>

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38. *Id.*

39. *Id.* at 1417-21.

40. *Id.* at 1417-22.

41. See Gowri Ramachandran, *Against the Right to Bodily Integrity: Of Cyborgs and Human Rights*, 87 DENV. U. L. REV. 1, 8-13 (2009).

42. See Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 429 (2000) (describing the acceptance of the social model of disability in the United States, in which “disability is attributed primarily to a disabling environment instead of bodily defects or deficiencies” (quoting Harlan Hahn, *Feminist Perspectives, Disability, Sexuality and Law: New Issues and Agendas*, 4 S. CAL. REV. L. & WOMEN’S STUD. 97, 101 (1994)) (internal quotation marks omitted)); Mairian Corker & Tom Shakespeare, *Mapping the Terrain, in* DISABILITY/POSTMODERNITY: EMBODYING DISABILITY THEORY 1, 3 (Mairian Corker & Tom Shakespeare eds., 2002) (describing the shift from the medical model of disability to the social model, in which activists raised awareness of the fact that disability is not caused by impairment alone, but rather social and economic conditions overlaying impairment).

43. See Gowri Ramachandran, *Assault and Battery on Property*, 44 LOY. L.A. L. REV. 253, 255 (2010) (presenting a similar example). Indeed, the common law tort of battery includes offensive touching of objects, such as a victim’s cane or dinner plate, for an individual’s “interest in the integrity of his person includes all those things which are in contact or connected with it.” *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 629 (Tex. 1967) (quoting WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 33 (3d ed. 1964)) (finding

Under these circumstances, the concept of bodily self-possession becomes complicated. One person might want to use her body to have sex with a beautiful person but can't because that person has no sexual interest in her whatsoever. A deaf person might want to obtain a cochlear implant so that she can hear, but she cannot afford one. Or she might *not* want to receive the implant—because she rejects such implants as a form of assimilation into the dominant hearing culture—but feels she can't afford to forego it since her employment prospects will be greater with the implant.<sup>44</sup> Another person might obtain plastic surgery, exercise a lot, or eat less in order to become more attractive to others, but by exercising her “right to self-possession” in these ways, she may increase the pressure on others to do the same, thus impinging on their rights to self-possession. And finally, consider the child whose parents exercise such control over his physical body that they decide whether or not he will be circumcised in the first few days of his life. Do we think a rape victim who is a child has not been raped at all, merely because he had no effective legal right to self-possession to begin with? Do we think his parents in particular can't be guilty of raping him?

The point, therefore, is that Rubenfeld's model of self-possession is every bit as unattainable and undesirable as the sexual autonomy model he rejects. Nobody's body exists in a vacuum, unaffected by or not affecting others' uses of their bodies.<sup>45</sup> We wouldn't want a world in which people do whatever they want with their bodies, no matter what the consequences to others, nor would we want a world in which people could not do anything with their bodies that might cause negative consequences for others.

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battery where the defendant snatched the plaintiff's plate during a racially discriminatory exclusion); *see also* *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 114 (Pa. 1784) (striking French diplomat's cane constituted battery because “anything attached to the person, partakes of its inviolability”).

44. *Cf.* *SOUND AND FURY* (PBS 2000) (documenting a deaf child's wish to obtain a cochlear implant in defiance of her deaf parents' wishes and the ensuing controversy in the extended family, which includes deaf and hearing members).
45. Even in the area of property law, many scholars have abandoned the idea that the core traditional elements of property ownership like possession and exclusion are or should be absolute in some Blackstonian sense. Concepts like nuisance, equitable servitudes, and easements by necessity all limit rights to possession and exclusion, and property is seen as a system of “social relations,” *see, e.g.*, Stephen R. Munzer, *Property as Social Relations*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 36, 36 (Stephen R. Munzer ed., 2001), rather than as a set of inviolable, binary “you either have it or you don't” rights, Rubenfeld, *supra* note 6, at 1426. *See also* Kristen A. Carpenter et al., *In Defense of Property*, 118 *YALE L.J.* 1022, 1027-28, 1065-79 (2009) (characterizing property as a system of social relations); David Fagundes, *Property Rhetoric and the Public Domain*, 94 *MINN. L. REV.* 652, 675-76 (2010) (same).

### B. *Mind-Body Integration*

While Rubenfeld could salvage his concept of self-possession by employing a “thin” version of it, much like the thin—and more viable—concept of sexual autonomy that he discusses,<sup>46</sup> this thin version ultimately cannot satisfy Rubenfeld’s second objective: to explain why rape is unique and should be a distinct crime from battery.

The thin version of self-possession could be a very narrow “mind-body integration” concept—the idea that if I think with my brain that I want to move my arm, I can do it. If I think that I don’t want to move it, I can keep it still. There might be social and financial consequences to whether I do it or not, but the point is that I am *physically* capable of doing what I want with my body, even if I am not legally, financially, or otherwise capable of it. One might think this is what Rubenfeld means because he uses the term “integration of mind and body”<sup>47</sup> and insists self-possession is binary: “you either have it or you don’t.”<sup>48</sup>

Moreover, this version of self-possession seems on its face to support a force requirement. It is true that unless someone is using force, most of us really can control the movement or lack of movement of our bodies most of the time, as a physical matter, save for some involuntary movements like our hearts beating. We might not accomplish anything we want with our bodies because of the constraints on them, but at least we can move or not move our bodies at will. The only way to take *that* away from us is usually to use force or to restrain us against our will.

“Almost all of us,” Rubenfeld says, have this form of self-possession.<sup>49</sup> Presumably by saying “almost,” he is conceding that those who are paralyzed or otherwise suffering from severe physical impairments might lack this form of self-possession (as do infants). But most of us have it, and this, he says, is what rape victims lose. They are not physically capable, whether temporarily or permanently, of doing what they want with their bodies, leaving aside any social, legal, cultural, and economic constraints.<sup>50</sup>

The problem with this definition of self-possession is that it doesn’t explain why rape is unique. I’ve been deprived of *this* form of self-possession if I’m put in handcuffs or tied to a chair, if someone grabs my arm to prevent me from defending myself against an attack, or if I’m force-fed a piece of chocolate cake.

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46. See Rubenfeld, *supra* note 6, at 1422–23.

47. *Id.* at 1426.

48. *Id.*

49. *Id.*

50. *Id.*

Many batteries seem to fit this definition of depriving the victim of self-possession. Rubinfeld nearly concedes that it's not just rape, slavery, and torture that fit the definition when he says in a footnote that kidnapping or being forced to smoke a cigar are on the "periphery" of the definition.<sup>51</sup> But if mind-body integration is "binary," as Rubinfeld tells us it is, it is far from clear how these hypotheticals (or others) could lie on the "periphery" of crimes against self-possession.

Put more bluntly, why is stuffing a cigar in someone's mouth on the periphery of depriving that person of her self-possession while stuffing a penis in her mouth is a core example of sexual assault? The answer must be that a cigar, unlike a penis, is not always considered to be *sexual*. But the thin version of Rubinfeld's definition of self-possession ignores this simple reality and, indeed, seems to ignore sex altogether. Rubinfeld strenuously argues that rape is very much like slavery and torture,<sup>52</sup> yet neither of these is inherently sexual.

If it seems odd to define rape without reference to sex, it is. Usually, if I say rape is "like" some other nonsexual crime, I run the risk of being understood to be dismissive of the seriousness and special heinousness of rape—the dynamic Rubinfeld was explicitly trying to respect and explain. Of course, nobody is going to think Rubinfeld is treating rape lightly when he analogizes it to "mere" slavery and torture. But they may in fact think this if he analogizes it to kidnapping or being forced to smoke a cigar. I doubt that Rubinfeld aims to be dismissive, but I do think that his effort to rid law of the principle that sex is very important—in part because he wants to rid law of the repugnant chastity-protecting principle, his first goal—makes it incredibly difficult to define what is so especially bad about rape, his second goal. If mind-body integration is at the core of self-possession, these goals seem to remain in tension.

### C. Bodily Control and Force

An added problem with both these "bodily control" interpretations of self-possession is that they are at odds with Rubinfeld's broad definition of force. Under Rubinfeld's definition, custody, including legally justifiable custody, amounts to force.<sup>53</sup> Rubinfeld does not state or imply that the physical restraint entailed by such custody must be severe to constitute force. Thus, when describing *Commonwealth v. Mlinarich*,<sup>54</sup> a case in which a guardian threatened to send a girl back to juvenile detention if she did not have sex with

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51. *Id.* at 1427 n.208.

52. *Id.* at 1426-27.

53. *See id.* at 1435-36.

54. 542 A.2d 1335 (Pa. 1988).

him, Rubenfeld argues that the guardian used force to elicit sex, regardless of whether he had a legal right to send her back to juvenile detention.<sup>55</sup> But since we can assume that in juvenile detention, the victim would have been free to move her limbs, walk about, perhaps even run around in an outdoor space, it cannot really be that the physical experience of being immobilized or made to experience pain is necessary to lose self-possession. If it were, then the victim in that case would not have lost her self-possession, and Rubenfeld would not have stated that she was indeed raped.

One might argue that when placed in custody, there is *some* physical restraint on a person, however mild, and that this restraint amounts to a loss of mind-body integration, or a loss of control over one's body. If the victim in *Mlinarich* had wanted to travel to Italy, she would not have been able to while in custody, even if she had the financial means to do so. The lock on the door of the juvenile facility would have kept her from doing so. If she'd tried to escape, someone would have grabbed her, perhaps cuffed her, and physically forced her to stay. Thus, she was in fact physically restrained, and any physical restraint means force, so sex obtained through any physical restraint or threat of it is rape.

However, this extremely broad definition of force is not sustainable because we only need to imagine the case of bargained-for access to private property. If someone seeks access to a private building with a locked door, and another who holds the key unlocks the door on the condition that the entrant have sex with him, then he has obtained sex through physical restraint. The keyholder physically restrained the person seeking access by locking the door, and used that restraint to elicit sex. However, without more, this is not an instance of rape. It is an instance of prostitution.

Regardless of whether the keyholder had every right to lock the door—a distinction with which Rubenfeld appears unconcerned—Rubenfeld's framework seems to suggest that the keyholder's actions in this case (as with the guardian in *Mlinarich*) unquestionably constituted force.<sup>56</sup>

It's no answer to say that the keyholder is denying access rather than restraining exit. Suppose the victim in the juvenile detention case had not been released from detention, but rather had been relieved of the obligation to wear an ankle bracelet that alerted whenever she attempted to come within one thousand feet of a school. While she was under monitoring, she was free to move anywhere else she liked, even travel to Italy, but she could not get close

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55. Rubenfeld, *supra* note 6, at 1436; *see also id.* at 1433 n.223 (citing *United States v. Booker*, 655 F.2d 562 (4th Cir. 1981) for the proposition that the threat of criminal sanctions is sufficient to establish the involuntary element of involuntary servitude).

56. *Id.* at 1436.

to a school. (Perhaps she herself was convicted of a sex offense.) As in the original case, suppose that someone demanded sex on the threat of returning her to this circumscribed condition. Would she be denied access to all the areas within one thousand feet of a school, and therefore not subject to force, or would she be confined to the rest of the universe, and therefore subject to force?

The sensible answer to this question depends on whether one thinks the kinds of restrictions placed on sex offenders are intrusive enough, both in terms of their material effects on the offenders' lives and in terms of their social meaning, that they should be considered close enough to the kind of restraint on freedom imposed by traditional forms of custody, like jail.<sup>57</sup> People disagree on the answer, of course, but the point is that the way to resolve the puzzle of why the keyholder is guilty of solicitation while the guardian is guilty of rape is to say that the social meaning and material effects of custody are different from the social meaning and material effects of being locked out of private property. A definition of self-possession based purely on physical control over one's body fails to make this type of distinction.

Of course, even if nobody has complete control over the use of his body, a loss of some significant *degree* of control can be a severe harm. But Rubenfeld claims that self-possession is *not* a matter of degree: he says it is "binary."<sup>58</sup> Perhaps what he means is that even though nobody has complete control over his or her body, there are particular constraints, intrusions, and attacks on the body that cross some threshold, and that these deprivations of control amount to something like a loss of the victim's sense of control over his or her "self" — a self that is defined not solely by the physical borders of the organic body, but also by what one can effectively do with that body in light of social and legal constraints as well as technological supports. We can objectively say that some intrusions on the body carry with them a particular social meaning that, in combination with the physical experience of the intrusion, constitutes a significant loss of the degree of control the victim had over her self. Occasionally, a physical experience alone is enough to constitute such a loss, as might be the case in some examples of torture.<sup>59</sup> But rape and slavery are

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57. See Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1073-74 (2012) (arguing that the philosophy that harsher sex offender registration laws are more effective for protecting children is "unconstitutional for its excessive and punitive effect").

58. Rubenfeld, *supra* note 6, at 1426.

59. See ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 37-38 (1985) (noting that in torture "one person gains more and more world-ground not in spite of but because of the other[] [person's] sentience" and "the torturer's . . . expanding world-ground depends on a demonstration of the prisoner's absence of world").

typically attacks on the body that are particularly invasive of a person's self for *both* reasons—most enslaved and raped bodies endure pain *and* an attack on social identity. That the victim was used for someone else's ends, as even Rubenfeld notes at times,<sup>60</sup> seems to matter.

But once we concede that it's not the physical experience alone that makes rape so uniquely harmful, we seem to have arrived at what Rubenfeld calls the identitarian view, which he claims to reject.<sup>61</sup> We aren't necessarily looking at whether the victim or perpetrator subjectively *feels* like the victim's self-possession was taken away, but we are looking at whether, in the current cultural moment, what happened to the victim carries with it the objective meaning of having his or her identity, social self, or other intrinsic part of one's being taken away or controlled by another. Rape is a much bigger deal in this analysis than, say, a nonconsensual vaccination, in part because sex is a big deal in our contemporary context. Sex is, quite simply, important to the reasonable person.

Although Rubenfeld says he rejects the identitarian view, when we take a look at his definition of force, it appears that he does not in fact mean self-possession to represent purely physical control over one's body. He says that when a person is forced to have sex against her will, “especially penetrative sex,” her whole body is possessed by another, taken over.<sup>62</sup> But this is simply not true of every instance of forcible rape as defined by Rubenfeld. The victim of rape by threat of custody does not have her whole body *physically* taken over by another. She may be able to move, or keep still, various of her body parts at will, and she may even have some measure of input into how the sexual act will occur, even as she has lost input into the crucial fact of whether it will occur at all. Despite the way his definitions of self-possession read, his definition of force implies that having or not having self-possession is really a question of social meaning.

When he says that the rape victim is “taken possession of,”<sup>63</sup> he must mean this metaphorically, much as women who say they want to be “taken” during sex often mean this metaphorically. They typically do not mean that they want to lose complete physical control over their entire bodies in a literal sense. And the metaphorical version of being taken, as these women mean and as Rubenfeld must as well, is distinctly *sexual*. He falters in his goal of identifying the core harm of rape when he takes the metaphor literally and infers that force

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60. Rubenfeld, *supra* note 6, at 1427.

61. *Id.* at 1418, 1430.

62. *Id.* at 1426.

63. *Id.*

is required for rape while letting sex slip out of sight. Accordingly, understanding what makes sex special is the subject to which I turn next.

### III. THE IMPORTANCE OF SEX

Rubinfeld's concept of self-possession acknowledges that sex is important, but only in physical terms. Having one's physical body "taken possession of" by another is what he says is unique about sexual violation, and what makes it a form of deprivation of self-possession. The idea of sex as a form of being "taken" by someone else, in either a good or a bad way, is a common metaphor. But it could mean many things, including the idea that one's body is physically taken possession of by another, that one's agency is diminished in some significant way, that one's vulnerabilities are exploited, that one's chastity is stolen, or that one is transported away from the physical realm. Whichever of these meanings, if any, dominates in our discourse, it seems clear that a purely physical account of the importance of sex is far too narrow. Many people find sex particularly meaningful, in both good and bad ways, for many different reasons.

Perhaps Rubinfeld focuses so much on the physicality of sex because he is so anxious to rid rape law of the chastity norm. He would, in other words, rather explain why sex is special without explicit reference to its cultural valence. But if he were willing to openly embrace a non-autonomy-based identitarian view of sex, he would be on a plausible path to pursue his two goals in tandem. He could acknowledge that sex is a big deal, for both universal and culturally contingent reasons, not all of which rely on repugnant norms of feminine sexual virtue.

Why is sex special? Why, other than antiquated cultural norms, does anyone think sexual decisions are important? For starters, and this is only a start, there is the fact that sex with men entails a risk of pregnancy for many women. Having that kind of sex (or not, and having some other kind of sex) is indeed an important decision for women, independent of both chastity norms and overly lofty ideas of what sexual liberation can achieve. Pregnancy, childbirth, and being a co-parent are such physically, mentally, and socially overwhelming experiences that making someone take on that risk, or take it on with someone they don't want to take it on with, is a unique harm.

In an article he wrote many years ago, *The Right of Privacy*,<sup>64</sup> Rubinfeld grasped this. He acknowledged just how significant pregnancy is, how it profoundly shapes and directs a person's life. But pregnancy and sex have a lot to do with each other, and this may be part of what's missing from his current

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64. Jed Rubinfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).

analysis. Women who have very little say over their sex lives also have very little say over whether they become pregnant and whose children they bear. Of course, if we gave women access to highly effective and inexpensive birth control, we might also give them more of a say over those important questions, independent of sexual control. It's no wonder feminists find reproductive rights so crucial. But it's also no wonder that being sexually "liberated" feels to so many like an appropriate term. It represents, in part, being liberated from unwanted pregnancy and the life-altering consequences that childbearing involves. Of course, pregnancy is but one example of the long-term, physical consequences of sex. The rape of a man or of a girl too young to get pregnant is no less horrific than the rape of a fertile woman,<sup>65</sup> I expect, in large part because these crimes too entail physical risks unique to sex—namely, disease and reduced capacity to have pleasurable sex in the future.

Sex is unique for cultural reasons, too. Who one has sex with often signifies something important about one's social identity. It communicates what one finds desirable, who one is desirable to, even sometimes what one thinks about gender, domestic labor, and children. Rubinfeld criticizes the sexual autonomy view for treating sexual acts as an expression of "autonomy" despite the numerous constraints under which we make our sexual choices: "It promises liberation from the invidious sexual pressures society imposes on us, whether repressive and discriminatory, or over-sexualizing and objectifying."<sup>66</sup> While he's right that "autonomy" and "liberation" are not accurate descriptions of this dynamic, we would be wrong to ignore that one's sexual decisions carry a great deal of cultural meaning, both positive and negative.

Meaningful cultural performance and meaningful cultural change can occur in the presence of economic, social, and even state coercion. For instance, private economic power gives a great coercive power to those with financial resources. But at the same time, private economic power can provide the freedom, to some, to deviate from longstanding social and cultural norms. This contributes to the creation of new subcultures.<sup>67</sup> For instance, John D'Emilio has pointed out that capitalism opened up a venue for the flourishing of queer culture.<sup>68</sup> When seen in this light, nonconformist sexual acts may not "liberate" us from repressive sexual pressures, but they may help move culture

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65. See Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259 (2011) (criticizing the neglect of male rape in scholarship about rape).

66. Rubinfeld, *supra* note 6, at 1418.

67. See Ramachandran, *supra* note 41, at 41.

68. See John D'Emilio, *Capitalism and Gay Identity*, in *THE LESBIAN AND GAY STUDIES READER* 467, 470-73 (Henry Abelove, Michèle Aina Barale & David M. Halperin eds., 1993).

in one direction or another, and as such, may be as important and meaningful as the exercise of speech rights.

Exactly how this dynamic operates, and whether it supports the outcome in *Lawrence* or not,<sup>69</sup> are questions beyond the scope of this Essay. But at the very least, we should acknowledge that sex is important because of its social meaning and implications, not only for the physical experience. Any definition of rape that fails to acknowledge this is bound to fall short.

That said, Rubinfeld has identified, and is grappling with, a difficult problem. If Rubinfeld's versions of self-possession are insufficient to support revival of the force requirement in rape law, but his argument that sexual autonomy is illusory is correct, how *should* we define rape? My view is that while sexual autonomy is a "leaky abstraction," many legal concepts are, and yet the concepts may still be useful as a proxy for something more nuanced. This might be so in the area of sex law.

In any case, if we want to be more nuanced and less elegant, we can. We don't need to use words like "autonomy" or "possession" to decide that we all ought to enjoy a right to refuse sex as well as to engage in it with consenting partners, given its extremely important long-term physical effects and social meaning. We could say something like, "neither the state nor anyone else should have a monopoly on one's sexuality," or "individual rights to define sexual identity facilitate cultural contest and change."

One might also wonder how we should solve the riddle of rape-by-deception. After all, if rape is the violation of one's right to refuse sex, whatever principle that right derives from, then why isn't rape-by-deception rape?<sup>70</sup> The short answer is that we *should* count many cases in which sex is elicited by fraud or deception as rape. We can define as strictly as we need to what counts as a "material" fact in the context of eliciting consent to sex, and we can also treat sexual partners as "on notice" of certain common misrepresentations and exaggerations, if we are worried about people who are too eager to say "I love you," for instance. What about sex-by-coercion, then? If we use a concept a bit more nuanced than "autonomy," one that acknowledges that while our sexual choices are always coerced to some degree, they are still meaningful, we can then take account of the *degree* of coercion. Violation of autonomy is not the only reason coerced sex need be a matter of concern. For example, if sexual choices are meaningful, even when constrained, then leaving severely coerced sex unpoliced may give those with financial, physical, and social power too

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69. *Lawrence v. Texas*, 539 U.S. 558 (2003).

70. Rubinfeld also posits the criminalization of prostitution as something of a riddle for proponents of sexual autonomy. Rubinfeld, *supra* note 6, at 1423-24, 1432. I am in favor of decriminalizing prostitution, so for me there is no riddle.

much say over something too important in our culture—sexual identity and sexual behavior. Specifically, men would have too much say, and women too little.

Above all, I think it bears repeating that rape subordinates women. Neither sexual autonomy nor physical self-possession captures this fact. But at least sexual autonomy, even the “thin” version of it, recognizes that sex is important for its social effects and cultural meaning. If law must make room for lofty abstractions, I’d suggest the one a little closer to earth.

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Preferred citation: Gowri Ramachandran, *Delineating the Heinous: Rape, Sex, and Self-Possession*, 123 YALE L.J. ONLINE 371 (2013), <http://yalelawjournal.org/2013/12/1/ramachandran.html>.