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## Sex Without Consent

*Modern rape law lacks a governing principle. In The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy, Jed Rubenfeld contends that the most obvious candidate—sexual autonomy—is inadequate. I agree, though for vastly different reasons. Rubenfeld advances a conception of rape as a violation of a right to self-possession; this approach raises real problems. I introduce an alternative understanding of rape—rape as a violation of sexual agency. Theories of agency expressly contemplate its exercise under constraints. This framework thus can account for both women’s sexual violation and the value of women’s sexual subjectivity. The turn to agency provides new justification for defining rape as sex without consent.*

Modern rape law is undertheorized. Over time, its original justifications have eroded. In their place, certain propositions have become generally (if not universally) accepted: women are sexual beings; their chastity no longer needs protecting. All this time, however, rape has persisted. Indeed, we now know that the danger is less a stranger in an alley than a husband, co-worker, date, or hook-up. In response to profound shifts in the way we understand both rape and female sexuality, the law of rape has become unstable. It badly needs reconstructing. Yet the old rationales cannot tell us why rape ought to be specially criminalized in the present day (or how).

In *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, Jed Rubenfeld rightly observes the importance of filling this conceptual void.<sup>1</sup> Existing rape law rests on archaic understandings of female chastity and virtue that are indefensible. Yet we continue to recognize sexual assault as a unique violation. For the law to “treat rape as a distinct crime without relying on what

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1. Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1392 (2013) (“Rape law has officially repudiated the feminist-virtue premises of the traditional era. But how then does it explain why sexual assault is different from other assaults? If not defilement, what is the special violation that rape inflicts?”).

it claims to repudiate,”<sup>2</sup> a satisfactory justification must succeed those discarded. On this—the need for a “new structuring principle shorn of the sexism and defilement ideology of the traditional era”<sup>3</sup>—Rubinfeld is most convincing, and the contribution is an important one.

For a new structuring principle, the leading contender is sexual autonomy,<sup>4</sup> which Rubinfeld ultimately rejects. His case study is sexual fraud, which he deploys in service of conceptualizing the wrong of rape. As a descriptive matter, rape law did not historically prohibit sex-by-deception, except where it was outlawed as seduction.<sup>5</sup> This view of deceptive sex as *not rape* is the proper result according to Rubinfeld, who mounts a provocative defense of sex-by-deception.<sup>6</sup> If rape-by-deception is a misnomer, he says, autonomy is not the norm at stake. Liberal notions of autonomy simply cannot be reconciled with the absence of accepted preconditions for valid consent.

In keeping with autonomy’s rise, it happens that the law no longer gives deception a categorical pass.<sup>7</sup> But, for present purposes, let us set aside this development in order to address the more foundational challenge raised by *The Riddle of Rape-by-Deception*. The choices made by women and men regarding sexual activities are, after all, constrained. When a lover lies, or misrepresents, or neglects to share relevant information, we make decisions that are less than fully informed. Consent obtained under these circumstances is imperfect;

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2. *Id.* at 1387–88.

3. *Id.* at 1395.

4. According to Rubinfeld, autonomy has emerged as a principle central to our understandings of rape, both within the law and outside of it. *Id.* at 1394 (“Autonomy is the dominant concept in today’s leading rape scholarship.”); *id.* at 1392 (arguing that “modern rape law explains itself” by reference to sexual autonomy). It is not evident to me that modern rape law explains itself in any coherent way, but it is in transition, so this may change.

5. See Brian Donovan, *Gender Inequality and Criminal Seduction: Prosecuting Sexual Coercion in the Early-20th Century*, 30 LAW & SOC. INQUIRY 61 (2005); Stephen Robertson, *Seduction, Sexual Violence, and Marriage in New York City, 1886-1955*, 24 LAW & HIST. REV. 331 (2006); see also Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 18–23 (2012) (surveying mid-twentieth century seduction laws).

6. Rubinfeld, *supra* note 1, at 1415–17.

7. Most recently, the California Legislature passed a bill that would criminalize rape by impersonation. Act of Sept. 9, 2013, 2013 Cal. Stat. ch. 282 (amending CAL. PENAL CODE §§ 288a, 289); see *New Bill Closes Loophole for Sex Offenders*, LAKE COUNTY RECORD-BEE (Aug. 22, 2013), [http://www.record-bee.com/news/ci\\_23920975/new-bill-closes-loophole-sex-offenders](http://www.record-bee.com/news/ci_23920975/new-bill-closes-loophole-sex-offenders). For an overview of responses to this type of reform, see Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39 (1998); Jacqueline Syrnick, Note, *Challenging the Use of Fraud to Get into Bed After Suliveres v. Commonwealth—A Call for Legislative Reform*, 43 NEW ENG. L. REV. 321, 335–38 (2009).

depending on the specifics, it may be exceedingly problematic.<sup>8</sup> Once we see this, Rubenfeld argues, the idea of consent falters, at least insofar as it is thought to delineate the sex/rape divide.<sup>9</sup> And if rape law does not actually privilege consent, he suggests, sexual autonomy cannot be the central concern.<sup>10</sup> Instead, rape implicates a right of physical self-possession, which means that extreme amounts of force—enough to “dispossess” a woman of her body—is required for sex to be rape.

In the discussion that follows, I reckon with this slightly reformulated version of Rubenfeld’s argument. For reasons quite different from those he offers,<sup>11</sup> I agree that protecting autonomy is not the best structuring principle for contemporary rape law. Sexual autonomy may even be “mythical” insofar as autonomous decisionmaking in the sexual realm is impossible. A long tradition of feminist legal theorizing explains why this is so.<sup>12</sup>

As an alternative, I conceive modern rape law as protecting sexual agency.<sup>13</sup> Part I sketches the contours of sexual agency as a governing principle for rape law. With this framework in place, Part II recasts the “riddle” of sex-by-deception, showing how agency survives Rubenfeld’s challenge to autonomy, and Part III confronts the force requirement. A brief conclusion emphasizes how the move from autonomy to agency establishes consent’s boundary-marking status.

## I. SEXUAL AGENCY

The turn to agency is rooted in legal feminism’s attention to subordination and its consequences for women in particular. Kathryn Abrams has described

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8. For reasons I will explain, however, I disagree with the idea that “sex by deception is sex without consent, because consent obtained by deception . . . is no consent at all.” Rubenfeld, *supra* note 1, at 1376 (internal quotation marks omitted).
  9. *Id.* at 1372 (“If rape law were really to eliminate the force requirement—as so many argue it should, as many statutes have already seemingly done, and as courts have begun to do—then sex-by-deception would and should be rape, because the legal definition of rape would then be sex without consent, and a defrauded ‘consent,’ like a coerced one, is no consent at all.”).
  10. *Id.* at 1379 (“From autonomy’s viewpoint, fraud is as great an evil as force.”).
  11. In Rubenfeld’s estimation, autonomy fails as a governing principle because it cannot be reconciled with law’s (legitimate, in his view) hostility to a crime of rape-by-deception. My critique of autonomy as a structuring norm derives from other concerns altogether.
  12. Certainly not alone, but most influential in this regard, is the work of Catharine MacKinnon. See, e.g., CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).
  13. As will become apparent, this understanding is also quite different from Rubenfeld’s conception of rape as a violation of self-possession. Rubenfeld, *supra* note 1, at 1425-27.

how “the liberal norm of autonomy has been modified—or . . . ‘reconstructed’—by its encounters with contemporary feminist theory.”<sup>14</sup> Certain features of the “autonomous person” are incompatible with core feminist insights. For instance: “his tastes, opinions, ideals, goals, values, and preferences are all authentically *his*;<sup>15</sup> and he is not “systematically confined by differentials in power or circumstances that can shape internal processes of judgment.”<sup>16</sup>

What notions of autonomy overlook is that the self is socially constructed in a “context of intersecting power inequalities”<sup>17</sup>—a context featuring gender as a primary locus of subordination.<sup>18</sup> Unlike the autonomous self, the agentic subject operates under meaningful constraints. The disconnect between *her* reality and the premises of liberal autonomy warrants a theoretical reworking. Agency is the construct that results.

Abrams’s synopsis is most helpful:

[D]ifferences in assumptions, including the insistence on a closer fit between the conceptual and the empirical in defining autonomy, the acknowledgment of myriad ways in which social construction alters the conceptualization of autonomy, and the recognition of a context of unequal power relationships that animates and gives collective character to many forms of self-direction, give “autonomy” a different meaning than it has had in liberal philosophy. I will acknowledge this difference by using the term “agency” to characterize self-definition and self-direction under this distinct conceptual framework.<sup>19</sup>

The conceptual move from autonomy spotlights *sexual* agency as a related norm posing a separate set of concerns and complications. Sexuality is deeply

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14. Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 805 (1999). As to the relationship between autonomy and agency, Abrams noted: “It remains an open question whether the feminist influences I describe will, in fact, ‘reconstruct’ liberal autonomy, or transform it into something else altogether.” *Id.* For an earlier feminist discussion of the self, see Robin West, *Feminism, Social Theory and Law*, 1989 U. CHI. LEGAL F. 59, 84-96.

15. Abrams, *supra* note 14, at 810 (quoting Joel Feinberg, *Autonomy*, in *THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY* 27, 32 (John Christman ed., 1989)).

16. *Id.*

17. *Id.* at 806.

18. *Id.* at 821.

19. *Id.* at 823-24.

implicated both in self-definition<sup>20</sup> and in self-direction.<sup>21</sup> In particular, female sexuality is constructed in a world of rampant gendered violence; yet women continue to insist—perhaps more so now than ever<sup>22</sup>—that sexual subjectivity is of value. Even in a world of widespread sexual violation, women possess a sexuality of their own.

Although I do not want to overstate agency's departure from autonomy,<sup>23</sup> agency, it seems to me, is better able to contemplate the complicated, power-infused dynamics that surround sexual relations.<sup>24</sup> And agency leans toward a positive understanding of sex—sex not only as pleasure, but as resistance to subordination.<sup>25</sup> In particular, female sexuality has the potential to defy repronormative ideologies that linger still today.<sup>26</sup> In contrast, autonomy's stance on the subject of sex seems to contemplate neither its social construction nor its capacity to transform power dynamics within relationships and outside them.

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20. "Self-definition may be described as determining how one conceives of oneself in terms of the goals one wants to achieve and the kind of person, with particular values and attributes, one considers oneself to be." *Id.* at 824.
21. "Self-direction" includes "the definition of particular goals and the implementation of particular projects and lifeplans." *Id.* at 829.
22. I am referring to arguably the most significant feminist initiative to have emerged in decades—a movement called SlutWalk. See Deborah Tuerkheimer, *SlutWalking in the Shadow of the Law*, 98 MINN. L. REV. (forthcoming April 2014), <http://ssrn.com/abstract=2009541>.
23. Just as agency can be unduly abstracted, as I will discuss, autonomy can be deliberately contextualized. See Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1605-06 (1990).
24. Agency locates consensual sex squarely within the bounds of theoretical critique, notwithstanding that it may be properly off limits for legal intervention. Robin West has done groundbreaking work in this area. Most recently, she develops the "possibility that the sexual choices women make, when those choices are contrary to felt desires, are harmful." Robin West, *Sex, Law, and Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 221, 246 (Franklin G. Miller & Alan Wertheimer eds., 2010).
25. As Rosalind Dixon helpfully summarizes sex-positive feminism:
- Sex-positive feminists challenge the premises of dominance feminism. They argue that while sex might in some cases be a source of danger for women, it is also a potentially important site of pleasure, fulfillment, and even power. In this sense, they share the approach of other "partial agency" feminist theorists, who emphasize the possibilities for, rather than simply constraints on, female agency.
- Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277, 282 (2008) (citations omitted).
26. *Id.* ("A key source of injustice, for sex-positive feminists, is the way in which women's sexual agency is limited by prevailing ideologies, particularly 'repronormative' ideologies, i.e., those that valorize reproduction over other socially productive activities and cast[] non-reproductive sex for women as dangerous and illegitimate." (citation omitted)).

For agency, sexual desire, possible and fulfilled, is fundamental, and women's sexual subjectivity is afforded privileged status. This is of course an oversimplification. In fact, profound tensions inhere in the concept of sexual agency, confirming both its distance from autonomy and its relation to it.<sup>27</sup> The notion that sexuality is (or can be) abstracted from social constraints obscures a range of coercive practices—even short of rape<sup>28</sup>—that influence women's sexual choices.<sup>29</sup> Decontextualizing sexuality risks the elision of troubling (though not illegal) pressures on women's decisionmaking, sexual and otherwise.<sup>30</sup>

Sexual agency is bound by the circumstances under which it is exercised. By contextualizing consent, it is possible to generate an account of what unwanted consensual sex looks like. Consider Robin West's helpful explanation:

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. Women and girls do so from motives of self-aggrandizement, from an instinct for survival, out of concern for their children, from simple altruism, from friendship or love, or because they have been taught to do so. But whatever the reason, some women and girls have a good bit of sex a good bit of the time that they patently do not desire.<sup>31</sup>

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

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27. See *supra* note 23 and accompanying text.

28. It strikes me that many of these forces are more powerful than the kinds of deception that pose the riddle for Rubinfeld.

29. In a forthcoming article, I identify objectification, sexualization, and decontextualization as three core areas of tension. Here, I provide an overview of the last, which seems to bear most directly on the present inquiry. For a discussion of other quandaries embedded in sexual agency, see Tuerkheimer, *supra* note 22 (manuscript at 21-29).

30. I am thinking here about women's choices as opposed to the content of their desires.

31. West, *supra* note 24, at 236.

whose identities are not yet fully formed.<sup>32</sup> For many college women, expressions of sexuality are embedded in a pervasive “hookup culture.”<sup>33</sup>

In short, sexual agency is incomplete. As I have summarized this conception:

It contemplates rampant sexual violence by non-strangers and strangers alike, along with a culture that excuses this violence and conditions rape protection on sexual conformity. It acknowledges that women and girls consent to sex for reasons other than desire, and it resists the unthinking exaltation of this kind of sex. It recognizes that female sexuality is constructed along multiple axes, and that the path to liberation has as many forks. It is complicated, both contingent and tentative. And it is partial, positioning sexual agency not as everything, but as essential.<sup>34</sup>

In my view, the harm of rape is best described in relation to the promise, and the imperfection, of agency.<sup>35</sup> Using agency, rather than autonomy, as our referent, let us turn to two recurring doctrinal dilemmas: how to treat “deception,” and, more important, whether to define rape as necessarily involving force. I cannot exhaust these subjects here, but I begin mapping a different approach to modern rape law, one that is oriented toward sexual agency.

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32. See Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 18-19 (1994). According to the latest research, over forty percent of female rape victims are first raped before the age of eighteen. Michele C. Black et al., *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report*, CTRS. FOR DISEASE CONTROL & PREVENTION 18, 25 (2011), [http://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf).
33. See Paula England et al., *Hooking Up and Forming Romantic Relationships on Today's College Campuses*, reprinted in THE GENDERED SOCIETY READER 531, 535-36 (Michael S. Kimmel ed., 3d ed. 2008) (discussing the “orgasm gap” and nonreciprocal oral sex); see also Julie A. Reid et al., *Casual Hookups to Formal Dates: Redefining the Boundaries of the Sexual Double Standard*, 25 GENDER & SOC'Y 545, 564 (2011) (identifying a sexual script that “does not fully embrace women’s sexual agency”). It should also be noted that more than three quarters of female rape victims are first raped before the age of twenty-five. Black et al., *supra* note 32, at 25.
34. Tuerkheimer, *supra* note 22 (manuscript at 34) (citations omitted).
35. This claim is informed by my understanding of the phenomenology of rape. For instance, as one woman described her experience of date rape, “[w]hen you see the look in the person’s eyes when he is doing the act itself, it doesn’t even feel like you are human.” JODY RAPHAEL, RAPE IS RAPE: HOW DENIAL, DISTORTION, AND VICTIM BLAMING ARE FUELING A HIDDEN ACQUAINTANCE RAPE CRISIS 14 (2013) (quoting a rape victim). She added, “[y]ou have to have something wrong with you to think that she is lying there and not responding, and I am doing this to her.” *Id.* at 80 (emphasis added).

## II. DECEIT

For all the reasons that sexual agency is complicated, so, too, is it a mistake to idealize sexual subjectivity and consent along with it. Although consent may evidence a desire for sex, this is not always the case. Instead, consent and wanting can diverge.<sup>36</sup> When they do, women engage in sex that is neither rape nor apparent cause for celebration. This category of sexual conduct is inadequately described by an autonomy norm that negates social context. Agency provides a much richer account of the space between consenting and wanting.

So, too, does agency better position consent as the pivot point for distinguishing rape from sex. Women's sexual conduct might be inseparable from women's oppression.<sup>37</sup> Even so, living as a sexual subject means that one can consent to sex—for whatever the reason, without judgment. When one's sexual expressions count, one acts as a subject in the world. With this comes the possibility to “disrupt dominant sexual discourses,”<sup>38</sup> to assert power within a relationship, to contest imposed definitions of one's self, and to forge new definitions.<sup>39</sup> For women to consent to sex is to assert agency.

Likewise, for women not to consent to sex, too, is to assert agency. Nonconsent reflects an insistence that one's decision not to have sex matters—that it is not subordinate to the other's. If sex is done to a woman irrespective of this decision, her agency has been quintessentially violated. Put differently, if sex without consent is simply sex (and not rape), the nonconsenting woman is more akin to object than subject. As compared to the actor who imposed his will upon her, she is relatively powerless. Sex against one's will is sexual agency's antithesis.

An insistence that sex and rape are distinguishable by consent's presence or absence furthers sexual agency. *At a minimum*, affording meaning both to a woman's consent and to her nonconsent affirms her existence as a sexual subject. Consent qua consent thus becomes a matter of paramount importance.

On this view, it cannot be said that “defrauded ‘consent,’” which lies at the heart of Rubinfeld's *Riddle of Rape-by-Deception*, is “no consent at all.”<sup>40</sup> On

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36. See *supra* note 24.

37. As Catharine MacKinnon once remarked, “All women live in sexual objectification the way fish live in water.” MACKINNON, *supra* note 12, at 149.

38. Abrams, *supra* note 14, at 839.

39. See *supra* notes 20-21 and accompanying text.

40. Rubinfeld, *supra* note 1, at 1378.



the contrary, a woman's consent is significant, even if "defrauded."<sup>41</sup> This is not to say that deception can never vitiate consent. (As I discuss below, I think it can.) But lines can surely be drawn around consent that is informed enough to pass muster.<sup>42</sup> Just as in other contexts in which consent must be evaluated, what constitutes being "informed" is a matter of degree.<sup>43</sup> But especially in the sexual realm, where agency is constrained in all sorts of ways,<sup>44</sup> misinformation hardly seems like cause for absolutism.<sup>45</sup> Autonomy's preoccupation with information deficits ignores a social context that affects sexual decisionmaking and constructs sexual preferences in far more significant ways.<sup>46</sup> Of the asymmetries involved, those of the informational sort tend to pale in

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41. John Gardner has advanced a similar argument within a framework of autonomy. He asserts:

Even if, in a particular sexual encounter, the ultimate value of a person was denied (i.e. that person was used mainly as a means), the value of having a system of sexual relations in which people control by consent the treatment of their own bodies secures optimally respect for the ultimate value of people.

JOHN GARDNER, *The Wrongness of Rape*, in OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 1, 19 (2007). Gardner adds that, "in constructing and honouring people's rights, those people must be given a certain kind of moral credit." *Id.* at 20.

42. For a discussion of the knowledge condition of consent, see John Kleinig, *The Nature of Consent*, in THE ETHICS OF CONSENT, *supra* note 24, at 3, 16-17. Kleinig usefully observes that "underlying our judgments about the moral effect of misinformation are normative considerations concerning the seriousness of the deception." *Id.* at 17.
43. One example is consent to contract terms. See Brian H. Bix, *Contracts*, in THE ETHICS OF CONSENT, *supra* note 24, at 251, 253-254 ("One cannot consent to terms, in any robust sense of consent, without knowledge of the terms. Of course, there are different levels of knowledge (or, looking from the other direction, there are different levels of ignorance) possible."). In the context of medical care (where the requirement of informed consent may be at its most stringent), it is also accepted that knowledge exists on a continuum and that perfect information cannot be the standard. See Steven Joffe & Robert D. Truog, *Consent to Medical Care: The Importance of Fiduciary Context*, in THE ETHICS OF CONSENT, *supra* note 24, at 347, 350 ("On the conceptual side, defining what level of understanding is sufficient to serve as the basis for valid consent has proven elusive.").
44. See *supra* notes 30-35 and accompanying text.
45. For this reason, I am puzzled by Rubinfeld's reliance on deceived sex to jettison autonomy (and then to advocate a right of self-possession in its place).
46. See Abrams, *supra* note 14, at 819 (noting that forms of feminine social construction "may be punishing and pervasive enough to stunt women's tastes, values, and conceptions of themselves. Women who are routinely marginalized or objectified may come to see themselves as less worthy or capable human beings whose role is to support, or even service, men."); *id.* at 820 ("Through these forms of socialization, a woman also may end up embracing socially-enforced norms to such a degree that it becomes impossible for a woman (or anyone else) to be sure whether her norms have 'internal' or 'external' sources.").

comparison. Agency accounts for the full spectrum of forces at work, yet *still* values consent.

To be clear, sexual misrepresentation might be tortious<sup>47</sup> or even criminal.<sup>48</sup> But, except under narrow circumstances, it does not seem to be rape. Foregrounding agency, I will explain why before showing how impersonation is different.

Whether we consent to sex under the circumstances presented depends on factors that are highly context-dependent and, to some extent, idiosyncratic.<sup>49</sup> For *A*, anyone over forty is too old; for *B*, under forty is too young. For *C*, sex belongs in a long-term relationship; *D* could not disagree more. *E* wants sex only with a kind soul, *F* only with a professional success, *G* only with a committed environmentalist, *H* only with a non-felon and disease-free lover. The list could go on indefinitely—and this one doesn't even encompass which acts are consented to,<sup>50</sup> or the far more elusive aspects of sexual desire.

At times (oftentimes, Rubenfeld contends<sup>51</sup>) we agree to sex based on a misimpression of the “facts”—facts that are, let us say, material to our consent.<sup>52</sup> This misimpression might be created by outright lies calculated to

47. For a seminal treatment, see Jane E. Larson, “*Women Understand So Little, They Call My Good Nature ‘Deceit’*”: A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374 (1993).

48. See, e.g., N.J. STAT. ANN. § 2C:34-5 (West 2011) (criminalizing sexual intercourse “without the informed consent of the other person” by anyone infected with venereal disease or HIV) (cited in Rubenfeld, *supra* note 1, at 1417 n.185). For one proposal to criminalize fraud aimed at procuring sex, see Susan Estrich, *Rape*, 95 YALE L. J. 1087, 1120-21 (1986). On how the criminal law treats fraud and deception generally, see Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157 (2001); and Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729 (1999).

49. For a taxonomy of sexual variability, see Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461, 1494-95 (2012).

50. See *id.* at 1496-98 (discussing the behavioral dimension of sexual decisionmaking). When one is not consenting to sex acts at all, it becomes abundantly clear that there is no consent. The medical practice cases fall squarely within this category. See Falk, *supra* note 7, at 52-60.

51. See Rubenfeld, *supra* note 1, at 1416 (“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, at least at first. . . . 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 first thing we should do is jail all the beautiful people.”). For an altogether different perspective, see Laura A. Rosenbury & Jennifer E. Rothman, *Sex in and out of Intimacy*, 59 EMORY L.J. 809 (2010) (emphasizing the value of sex even when decoupled from emotional intimacy).

52. It is by no means apparent to me that a materiality standard would be satisfied by any of the “false information” cited by Rubenfeld: clothing and underclothing, make-up and hair dye, cosmetics, even cosmetic surgery. Rubenfeld, *supra* note 1, at 1416. Of course he’s right that

induce consent. It might also result because the party wanting sex misleads or conceals information that would, if known, lead to nonconsent.<sup>53</sup> There are plenty of names for people who behave like this, most unfit for academic discourse. (Interestingly, many are gendered.) But, barring additional facts, “rapist” is not among them. Consent was obtained; it cannot be discounted solely by virtue of its imperfection. Otherwise, in a world where sexual agency is constrained in all sorts of ways, there could be no valid consent.<sup>54</sup> Sexual subjectivity would falter, to say the least.

Sex does not become rape because one of the consenting parties is incompletely informed, though we might decide that some conduct calculated to induce this uninformed consent is sufficiently reprehensible that it is properly criminalized.<sup>55</sup> That said, a wide enough gap between what a party consents to and what actually transpires may mean that there is no consent to what actually transpires. *This* is sex without consent. *This* is rape.

I realize that this understanding of sex-by-deception also requires that lines be drawn. Suppose a woman seeking a long-term relationship consents to sex with a man who, unbeknownst to her, is married. I am willing to reject the claim that there was no valid consent here, and I maintain that the wrong to her is qualitatively different from what it would have been had she not consented at all.<sup>56</sup> The distinction is best understood by reference to sexual agency. Giving meaning to consent acknowledges that agency can be exercised within degraded relationships, and even within relationships of unequal power. Otherwise, assertions of agency would be impossible.

In any event, the prospect of line-drawing around rape—or, for that matter, around any kind of crime—is inescapable; the issue is how best to conceptualize the category. To my mind, inquiring whether a person chose

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many of us (including anyone who wears clothes, I suppose) would be in jail were these acts of deception criminal—but this doesn’t get us very far. Even so, I tend to agree that “material sexual facts” may defy objective characterization. *Id.* at 1408.

53. On the moral distinctions between lying, misleading, and falsely denying, see generally Green, *supra* note 48.
54. Coercive pressures exist on a spectrum. See Kleinig, *supra* note 42, at 14-16 (describing the voluntariness condition of consent). At the extreme (where Rubinfeld’s sex-at-gunpoint example lies, see Rubinfeld, *supra* note 1, at 1404), we would readily say that consent was involuntary and therefore invalid. More difficult questions are presented by cases involving an abuse of authority and cases where power is used to extort sex. See Falk, *supra* note 7, at 79-87.
55. See Victoria Nourse, *The “Normal” Successes and Failures of Feminism and the Criminal Law*, 75 CHI.-KENT L. REV. 951, 957-960 (2000) (identifying coercion as a problem for traditional rape law).
56. Perhaps she should be able to sue for damages. See Larson, *supra* note 47, at 453-71 (proposing tort of sexual fraud).

sex<sup>57</sup> with this particular human being, and affording meaning to her decision, is most consistent with an understanding of women and men as sexual subjects. When a person has been deceived as to *which* human being she is choosing sex with, what would be sex becomes rape. In this scenario, whatever consent was given was not directed to the one who (actually) engaged in the sex acts. Therefore, what (actually) occurred was unconsented-to sex. On a relational view, which agency adopts, when a woman's expressed choice is subordinated to another's, she is significantly deprived of her ability to self-direct and to self-define. For all the reasons we have seen, this is a pronounced violation of the sexual agency norm.

This reasoning suggests that the medical misrepresentation and spousal impersonation cases are rightly classified as rape.<sup>58</sup> So, too, is the impersonation of someone other than a spouse (notwithstanding equivocal legal treatment).<sup>59</sup>

One court to expressly insist that identity matters is the Court of Military Appeals.<sup>60</sup> Following is the evidence in a case called *Traylor*:

Specialist G testified that Specialist Sly [with whom she was engaged in consensual intercourse from the rear] "slipped out but immediately reentered" two-three times. She testified that "he slipped out one more time and I thought it was him reentering but something felt different this time." She turned her head and saw that appellant had entered her. She testified that she "was shocked . . . mad, upset, and I just—all I said was, 'Hey, Traylor, what's going on?'" She testified that she "tried to pull away a little," but appellant "pulled me back."<sup>61</sup>

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57. I do not mean to suggest that consent to one kind of sex is consent to another. See *supra* note 49. To simplify the argument, however, I will refrain from emphasizing at every turn that I am referring to consent to a particular act.

58. See Rubinfeld, *supra* note 1, at 1398 (describing these two established exceptions to the rule precluding recognition of rape-by-deception).

59. See *infra* note 64. As Rubinfeld notes, the inconsistent treatment of spouse impersonation and "paramour" impersonation is a problem for modern rape law. *Id.* at 1399. The traditional view of fraud may indeed be "better explained as moral judgments hiding behind [the] supposedly analytic distinction" of "fraud in the factum" and "fraud in the inducement." *Id.* at n.139. The conceptual framework I offer presents an alternative.

60. To emphasize, "identity" is not used here in its psychological or philosophical sense, but merely to indicate that a person cannot impersonate another individual. This is an admittedly thin conception of identity. Under these particular circumstances, however, I believe it is justified.

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

On appeal, the defendant argued that this evidence was insufficient to support a finding of nonconsent, since the victim was engaging in consensual intercourse with Sly at the time the defendant entered her. The court disagreed, observing that “[a]ctual consent’ means consent not only to the act of intercourse, but also consent ‘based on the identity of the prospective partner.’”<sup>62</sup> To dispel any remaining confusion, the court concluded: “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*.’”<sup>63</sup>

*Traylor* shows the importance of attending to the scope of consent.<sup>64</sup> A relational perspective suggests why the identity of one’s sexual partner can be, and very often is, a critical component of sexual consent—enough to warrant a legal presumption of materiality. When we consent to sex with one individual, we are not consenting to sex with anybody else. When one chooses a “particular ‘*membrum virile*,’” as opposed to any other, that choice is rightly afforded meaning.

### III. FORCE

Controversy surrounding the force requirement is hardly new.<sup>65</sup> Rubenfeld, however, offers a defense consistent with his solution to the “riddle” of rape-by-deception.<sup>66</sup> Sexual agency, in contrast, exposes force as rape law’s “red herring.”<sup>67</sup>

The premise can be simply stated: sex without consent is rape regardless of the quantum of force, because disregarding consent vanquishes agency. Affording legal meaning to consent is consonant with a view of women as

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62. *Id.*

63. *Id.*

64. Nonconsent may still be insufficient to establish rape—a problem to which we will shortly turn. For now, it is enough to note that impersonating another in order to obtain consent does not always satisfy a separate statutory requirement of force. *See, e.g.,* *Suliveres v. Commonwealth*, 865 N.E.2d 1086 (Mass. 2007). *Cf. People v. Morales*, 150 Cal. Rptr. 3d 920 (App. 2013) (finding that the charge of impersonation only applies to impersonation of a spouse).

65. Rubenfeld aptly characterizes the force requirement as “much-maligned.” Rubenfeld, *supra* note 1, at 1380.

66. I am unconvinced that “sex-by-deception” poses a discrete riddle, or that Rubenfeld’s resolution of it requires a return to force. But, regardless, my view is that agency, rather than self-possession, better replaces autonomy as a governing principle.

67. Rubenfeld understands *sexual autonomy* as “a red herring when it comes to rape.” Rubenfeld, *supra* note 1, at 1424.

sexual subjects. To the extent rape law requires extra force, even today,<sup>68</sup> it discounts the importance of sexual agency. I say “extra force”—sometimes referred to as “extrinsic force”<sup>69</sup>—because, as a matter of physics, sex must involve force (that is, an influence that causes a change in movement). *How much* force matters only because rape was, since its legal inception, defined as sex against the will and with (surplus) force.<sup>70</sup>

Rubinfeld creates new conceptual space for this vestige of traditional rape law. He contends that rape violates a right of self-possession, or the right to physically possess one’s own body,<sup>71</sup> which means that without physical force—a good deal of it, apparently<sup>72</sup>—the interest at stake is not violated.<sup>73</sup> This returns us to a familiar place: physical force, not nonconsent, is what transforms sex into rape.

But the familiar place does not fully resemble what we know. Features of it are, or appear to be, novel.<sup>74</sup> For instance, I am unsure about the force required for a person to “actually take[] over your body—exercising such complete and

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68. Though the force requirement is “much-maligned,” Rubinfeld, *supra* note 1, at 1380, it remains an element of rape in most jurisdictions. See David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 321 (2000). The traditional rule has, however, begun giving way to broader rape definitions that do not require force. *Id.* at 322. On the subject of reform, Rubinfeld’s approach would offer “justification to states that choose to stick to the force requirement,” Rubinfeld, *supra* note 1, at 1434; mine would not. This issue is especially pressing, as the American Law Institute revisits, for the first time in over fifty years, the Model Penal Code provisions on rape. See *Current Projects*, AM. L. INST., [http://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=26](http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=26) (last visited Aug. 29, 2013).

69. See *State v. Jones*, 299 P.3d 219, 228 (Idaho 2013) (defining “extrinsic force” as “anything beyond that which is inherent or incidental to the sexual act itself”).

70. Though some jurisdictions recognize non-physical force in the definition of rape, it remains generally true that force is equated with physicality. Only on occasion have courts acknowledged that the level of force falls on a spectrum. One oft-cited case is *M.T.S. State ex rel. M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992). For more recent judicial treatment, see *State v. Meyers*, 799 N.W.2d 132, 147 (Iowa 2011). Cf. *Jones*, 299 P.3d at 228 (noting that “the primary justification for the extrinsic force standard seems to be textual”).

71. Rubinfeld, *supra* note 1, at 1425 (identifying the “key concept” for rape as self-possession, understood as “the possession of one’s own body” in a physical sense).

72. *Id.* at 1426 (“[S]elf-possession is (again, like most forms of possession) binary; you either have it or you don’t. It’s not easy to be dispossessed of your body (just as it isn’t easy to be dispossessed of a house in which you remain an occupant).”).

73. The violation of the right of self-possession “consists in another person mastering and taking possession of the victim’s body, wresting away the victim’s elemental control over her own person, and where there is no force, there is no such mastery or taking.” *Id.* at 1434. By force, Rubinfeld means force well beyond what is required to accomplish nonconsensual intercourse. See *id.* at 1425 (noting that the wrongfulness and harm of rape “cannot be captured in terms of consent, even though consent will typically be lacking”).

74. Rubinfeld acknowledges that his discussion of the right is incomplete. *Id.* at 1426.

invasive physical control over it that your body is in an elemental sense no longer your own.”<sup>75</sup> I wonder whether the kind of force needed to “become master” of a body, or to “utterly wrest” a body from another, is even greater than what we’ve yet seen the law insist upon.<sup>76</sup> Perhaps not.<sup>77</sup> But it seems entirely plausible that the right of self-possession ratchets up the force requirement.

Even if I am wrong about this, the doctrinal implications of rape as a violation of self-possession are at odds with sexual agency and its privileging of consent. To highlight the differences between these two approaches, I will describe a set of cases where nonconsent and force are most likely to diverge.<sup>78</sup> These cases pose a discrete question for rape law: is nonconsent enough to make sex rape? In future work, I expect to provide a more comprehensive account of how these areas of law would look with sexual agency as a governing principle. For now, it is enough to identify the circumstances that tend to detach nonconsent and force.

As a rule, nonconsensual sex that lacks excess physical force occurs within relationships, loosely defined.<sup>79</sup> (Not coincidentally, this is where the law of rape is least effective.<sup>80</sup>) In some relationships, fear based on past threats or violence stands in for force.<sup>81</sup> Its need may also be obviated by the vulnerability that comes with trust.<sup>82</sup> Perhaps we can group these pressures under the

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75. *Id.*

76. *Id.*

77. Later, Rubinfeld articulates the “general rule” that “sex is rape whenever exacted through the kind of force that turns labor into slavery: roughly speaking, physical incapacitation, whether through restraint or imprisonment, or serious physical assault (or the threat of either).” *Id.* at 1436. Given that neither incapacitation nor serious physical assault is an element of traditional rape law, this rule is consistent with a force requirement that is new and different.

78. I should emphasize that the two do not invariably diverge in these cases. Physical force sufficient to satisfy the law’s traditional requirement can of course co-exist with nonconsent. For a collection of first-hand accounts, see RAPHAEL, *supra* note 35.

79. As I am using the term here, rape within relationships stands in opposition to stranger rape. I have in mind relationships between spouses, dating partners, and acquaintances, fleeting though the connection may be.

80. See Bryden, *supra* note 68, at 317-18 (comparing the criminal justice system’s response to “aggravated” rape and non-stranger rape, and finding the latter deficient). Many non-stranger cases that satisfy existing definitions of force are not prosecuted. I suspect that eliminating the force requirement would increase the successful pursuit of these cases.

81. See EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 24-25 (2007) (commenting on the technology of “coercive control”).

82. On the particular trauma associated with “confidence rape,” see Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 ST. JOHN’S L. REV. 979, 1018-20 (1993).

general rubric of “relationship-related substitutes for surplus force.” In non-physical ways, aspects of the relationship function to achieve nonconsensual sex.

Other force-substitutes are more tangible: they are sleep and intoxication.<sup>83</sup> As a rule, extra force is not used in these cases because it is unnecessary: whether a woman is unawake or substantially impaired, she is not in a position to exert her will.<sup>84</sup>

One view of these cases is that, because there is no force, there is no rape—even where there is no consent.<sup>85</sup> The question whether consent can be implied under certain circumstances<sup>86</sup> should not confuse the issue. If this view is correct, and force beyond penetration is required, *who* comes upon the sleeping woman is irrelevant: regardless of her nonconsent, she cannot be raped.<sup>87</sup> The same is true for the woman who is extremely intoxicated—perhaps even passed out—such that no force is necessary to overcome her nonconsent.

This seems not to trouble Rubinfeld, who poses the question “whether every penetration of any unconscious body necessarily inflicts the profound violation of rape” (as opposed to assault-and-battery).<sup>88</sup> His answer: “It seems to me that this is plainly not so for some persons in some circumstances.”<sup>89</sup>

83. Whether or not unconscious women are “incapable of consent,” as some versions of rape law would have it, the more important fact is that they *did not consent*. See Tuerkheimer, *supra* note 22 (manuscript at 36-41) (discussing law’s construction of the passive victim).

84. See Rubinfeld, *supra* note 1, at 1442 (“As to intoxicated sex, let’s distinguish between people who are passed out or blind-drunk (covered by whatever rules apply to unconscious sex) and people who, because of impairment or disinhibition, willingly participate in sex acts to which they would not have consented if sober.”); *infra* note 94. Alcohol consumption is of course not a factor in all non-stranger rapes, or perhaps even in most. See RAPHAEL, *supra* note 35, at 88-89 (citing statistics on alcohol- and drug-facilitated rape among college women).

85. See *supra* note 73.

86. I do not deny that previous interactions between individuals can give rise to implied consent. I also do not assume it. The perseverance of beliefs about sex rights within marriage is best understood in historical context. See Lisa R. Eskow, Note, *The Ultimate Weapon? Demythologizing Spousal Rape and Reconceptualizing its Prosecution*, 48 STAN. L. REV. 677, 679-684 (1996) (tracing the marital rape exemption to contract theories of wives’ “irrevocable” or “implied” consent to sex,” and to the property rights of men in their wives). Even today, marriage may be “a proxy for unlimited male sexual access.” *Id.* at 681.

87. Some of this may depend on one’s normative intuitions. For instance, Rubinfeld asserts that, “[a]mong well-settled couples, long used to sharing the same bed, sexual contact of various kinds with a sleeping person is common. No one thinks all touchings are criminal.” Rubinfeld, *supra* note 1, at 1440. But some people, myself obviously included, think sex with a sleeping person is generally rape (again, as I have said, absent previously given consent).

88. *Id.* at 1441.

89. *Id.*



The notion of sex with (or, more accurately, to) an unconscious *body* hints at a distinction that Rubinfeld identifies as potentially relevant to this inquiry—namely, whether the victim experiences the violation.<sup>90</sup> For me, this is beside the point.<sup>91</sup> Sex with a comatose woman?<sup>92</sup> Rape. As is sex with someone who is passed-out drunk. Sex with a woman unable to perceive her sexual violation because of severe developmental delays is rape too, on agency’s account. Yet as I understand it, the right of self-possession may not be implicated in these scenarios.<sup>93</sup> After all, on this view, the absence of consent does not make sex rape.

If rape is a violation of sexual agency, as I have argued, none of this makes sense. Sex with a (nonconsenting) sleeping woman is akin to sex with an object, not a subject; the woman is acted upon. In the same way, a nonconsenting woman, because of intoxication, can be forced absent force to have sex.<sup>94</sup> Since sex without consent is sex without agency, it is rape.<sup>95</sup>

This setting of rape’s parameters raises questions of its own.<sup>96</sup> But they are the questions to be asking as we enter the next generation of law reform.

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90. *Id.*

91. I have already explained that sex without consent is harmful, regardless of whether, and when, and how, this violation is perceived by its victim. I do not mean to suggest that harm is all that matters, however. Rubinfeld’s approach seems in tension with the fundamental criminal law principle that an actor’s mental state—not just the degree of perceived violation—affects culpability. To my mind, the willingness to impose sex on a woman without her consent is blameworthy, even if she is too intoxicated to know at the time what is being done to her.

92. Rubinfeld, *supra* note 1, at 1441 n.243 (referencing Pedro Almodovar’s film, *TALK TO HER* (Sony Pictures Classics 2002)).

93. Rubinfeld might perhaps classify sex with the cognitively impaired, like statutory rape, as “not an instance of ‘real rape,’” but a “different and independent crime.” *Id.* at 1442.

94. No-force, no-consent cases are different from cases involving the presence of consent, albeit due to intoxication—in other words, where women “willingly participate in sex acts to which they would not have consented if sober.” *Id.* A sexual agency-based rape law would conceive this latter category as *not rape*, if problematic for other reasons. See *supra* notes 14–34 and accompanying text (discussing the construct of agency as constrained). Where an intoxicant is “administered,” however, the calculus may shift. If so, I suspect it is because we no longer view consent as voluntary, rather than because the administration of alcohol counts as “force.” *But see* Rubinfeld, *supra* note 1, at 1442 (“Requiring . . . that the defendant ‘administered’ the intoxicant would make little sense if rape were really sex without consent. But it does make sense if rape requires force.”).

95. In future work, I hope to describe the differences among common patterns of rape and to explore how the criminal law should respond.

96. Primarily, I am referring to how consent should be defined, and whether (and under what circumstances) good-faith mistakes as to the existence of consent exculpate.

## CONCLUSION

For most of our history, women's sexuality has been variously denied, controlled, and harnessed. Today, women insist on the positivity of sexuality, or at least its potential. While social forces continue to construct sexuality in ways that warrant resistance, it can be said – emphatically – that expressions of sexual consent have meaning.

Traditional notions of autonomy tend to deemphasize a context of unequal power that is key to understanding these realities. Autonomy thus falls short of explaining both the promise and the perils of sex for women in particular. This leaves rape law vulnerable to remaking in a direction that accounts for neither the value of female sexual subjectivity, nor the harm that results when it is denied. This leaves rape law prone to fetishizing force.

Modern rape law demands new conceptual justification. Attending to sexual agency is, in my view, the way forward. 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. The law of rape can never perfect sexual agency; but the law can provide a remedy for its most egregious violations.

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