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## Not Logic, but Experience: Drawing on Lessons from the Real World in Thinking About the Riddle of Rape-by-Fraud<sup>†</sup>

*In this Essay, Professor Patricia J. Falk argues that Professor Jed Rubenfeld's solution to the "riddle of rape-by-deception" goes too far in eviscerating the body of rape law that courts and legislatures have developed over the past decades. Falk suggests that eliminating nonconsent and foregrounding force is a mistake, and that it is instead critical to think more robustly about what meaningful consent and sexual autonomy might require.*

As we have become more civilized, we have come to condemn the more overt, aggressive and outrageous behavior of some men towards women and we have labelled it "rape."<sup>1</sup>

Amid the flux of scholarly debate and practical reform, one thing is clear: The law of rape has not ceased and in all likelihood will not cease to evolve. Nor, arguably, should it, for the law of rape, like any body of law – perhaps *more* than other bodies of law – reflects changing social attitudes and conditions, normative as well as material.<sup>2</sup>

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<sup>†</sup> "The life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Am. Bar Ass'n 2009) (1881).

1. *People v. Evans*, 379 N.Y.S.2d 912, 914 (Sup. Ct. 1975).

2. KEITH BURGESS-JACKSON, *RAPE: A PHILOSOPHICAL INVESTIGATION* 82 (1996); *see also* STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* (1998).

**INTRODUCTION**

Courts, legislatures, and legal scholars have been fascinated with rape cases involving fraud or deception for more than 150 years,<sup>3</sup> fueled by some vivid real-world examples.<sup>4</sup> Some legal scholars have argued that this fascination with rape-by-fraud has been to the detriment of the overall evolution of rape law.<sup>5</sup> In proposing a solution to the riddle of rape-by-deception, Jed Rubenfeld argues for replacing the “myth” of sexual autonomy with the right to self-possession.<sup>6</sup> In doing so, he goes too far in retrenching—or, perhaps more accurately, eviscerating—rape law doctrine while ignoring the modern “state of the art” of sexual offense provisions. After he has finished pruning rape law to deal with the conundrum of rape-by-deception, there is not much rape law left. Moreover, Rubenfeld’s critical foundational claim—that deceptive sex “isn’t *that bad*”<sup>7</sup>—is not empirically sound and is not respectful of the real harm experienced by victims. It is neither an accurate reflection of the normative development of rape law nor consistent with the evolving trajectory of rape law doctrine. Finally, Rubenfeld’s all-or-nothing solution may be far worse than the problem he seeks to remedy, especially in light of other, less drastic means of reconciling cases of rape-by-fraud with sexual autonomy. Rather than drawing the line at force and eliminating nonconsent, criminal rape law should develop a more robust understanding of sexual autonomy, the contours of effective consent, and cognizable fraudulent threats to that consent.

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3. See, e.g., *Lewis v. State*, 30 Ala. 54, 56 (1857); *Don Moran v. People*, 25 Mich. 356 (1872); *State v. Lung*, 28 P. 235 (Nev. 1891); *Walter v. People*, 50 Barb. 144 (N.Y. Gen. Term 1867); *Bloodworth v. State*, 65 Tenn. 614, 618-20 (1872). See generally Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39 (1998).
  4. E.g., Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1375 (2013) (discussing a recent Israeli case in which a man was convicted of rape for posing as a Jewish bachelor to entice a woman into a sexual relationship with him).
  5. See Lucy Reed Harris, Comment, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613, 628 (1976) (“The law’s failure to develop a well-defined concept of consent in rape, its strong tendency to rely on categorical assumptions in dealing with issues surrounding the central issue of consent, and the biases built into those categorical assumptions mirror the tone and substance of legal debate on consent in rape set in the early part of this century. . . . Scholarly discussion in rape gelled in an era when legal thinkers were emotionally distrustful of rape complaints in general, but were fascinated by cases where consent was allegedly induced by subterfuge.”); see also Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 832 (1988) (“Cases of alleged fraud are likely to trigger common prejudices about the behavior of men and women in sexual encounters.”).
  6. Rubenfeld, *supra* note 4, at 1423-27.
  7. *Id.* at 1416.

## I. A RADICAL SHRINKING OF MODERN RAPE LAW

Rubinfeld argues the legal system should not criminalize rape-by-deception because the notion that rape law<sup>8</sup> vindicates the victim's sexual autonomy is a myth that should be rejected. He proposes that we enshrine the right to self-possession, in place of sexual autonomy, as the guiding principle at the heart of rape law, likening rape under these circumstances to slavery and torture, and suggests that we only punish those who violate this right of self-possession. One result of this analysis is to resurrect the "much-maligned"<sup>9</sup> force requirement as the defining, indispensable element of rape. He argues: "States may criminalize all sex-by-deception if they choose, but violent rape violates fundamental rights in a way that sexual deception doesn't, offering a justification to states that choose to stick to the force requirement."<sup>10</sup>

Rubinfeld's proposed solution does not end there. He would also reject cases involving rape-by-coercion, because recognizing such cases would also require the recognition of rape-by-deception.<sup>11</sup> Further, he would eliminate any rape provision that relies exclusively on nonconsent, thereby excluding categories of rape that have existed since the inception of rape law<sup>12</sup>—rape of an unconscious, mentally incompetent, or physically incapacitated person<sup>13</sup>—and presumably, although he does not state this, a wide variety of modern sexual offenses written exclusively in terms of nonconsent. He would also restrict rape to only instances of forced intoxication, thereby requiring the defendant to administer the intoxicant to the victim before liability attaches.<sup>14</sup> He would not sustain a rape prosecution, absent force, simply because the perpetrator exploited a power imbalance to secure sexual submission<sup>15</sup> or the victim said "no."<sup>16</sup> Finally, Rubinfeld must also reject the traditional approach to rape-by-

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8. A brief note regarding terminology may be necessary. When I refer to rape or rape law, I am discussing the whole web of modern sexual offenses, not simply the traditional, common law definition of rape.

9. "This view of rape can explain the rejection of rape-by-deception, which current thinking cannot, but it will also suggest that rape law's much-maligned force requirement may not be so malign after all." Rubinfeld, *supra* note 4, at 1372.

10. *Id.* at 1434.

11. *Id.* at 1410-12.

12. "Whatever the limits of rape by fraud, there can be no question that rape, as a legal category, has long included many forms of nonviolent misconduct." Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 *LAW & PHIL.* 35, 63 (1992).

13. Rubinfeld, *supra* note 4, at 1440-42.

14. *Id.* at 1442.

15. *Id.* at 1436.

16. *Id.* at 1438.

fraud, disallowing the twin exceptions of fraudulent medical treatment and husband impersonation because neither requires force. Taken as a whole, then, Rubinfeld's fix for the rape-by-deception cases is to resurrect the force requirement for all rape and to eliminate the nonconsent requirement, such that traditional categories of rape and new, evolving categories of rape would be eliminated.<sup>17</sup> However, Rubinfeld does not fully explain how his account of the central harm of rape—injury to the right to self-possession—could be superior to the dominant account when adopting it would require the elimination of a huge part of existing rape doctrine. Nor does he explain why this elimination would be superior to dealing with the thorny rape-by-deception cases in a more modest and direct way.

## II. THE SOLUTION IS WORSE THAN THE PROBLEM

According to Rubinfeld, once the crime of rape is reduced to the most egregious forms of violation—which are comparable to the exceedingly serious offenses of slavery and torture—no conceptual or legal barriers exist to rejecting rape-by-deception claims as falling outside the realm of protection. Once we rid rape law of its focus on sexual autonomy, we can justifiably exclude cases involving fraud which violate such autonomy. Rubinfeld's all-or-nothing solution, however, is worse than the problem he seeks to remedy.

First, Rubinfeld's radical shrinking of rape law is diametrically opposed to the trajectory of the law's development to date, which has offered members of society greater protection from sexual exploitation over time. In some senses, rape law's evolution is not that different from the evolution of other common law crimes. For instance, at one time, theft merely consisted of the forcible taking of another's personal property. Later, nonforcible takings were criminalized.<sup>18</sup> Originally, burglary law was confined to night-time entries, but modern burglary statutes punish daytime break-ins.<sup>19</sup> Even with respect to murder, the law has evolved to encompass a broader range of conduct. “[M]urder’ originally meant a ‘secret killing’ and only gradually, from the fourteenth century onwards, came to be the name of the worst form of homicide characterized by . . . ‘malice aforethought.’”<sup>20</sup> Similarly, the trajectory

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17. *Id.* at 1424, 1436.

18. WAYNE R. LAFAVE, CRIMINAL LAW 1046 § 20.3 n.1 (5th ed. 2010) (quoting MODEL PENAL CODE § 223.1 cmt. at 128 (1980)).

19. *Id.* at 1077.

20. SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 374 (8th ed. 2007) (quoting ROYAL COMMISSION ON CAPITAL PUNISHMENT 1945-53, REPORT, ¶ 75 (1953)).

of rape law has been toward greater protection of individuals and their sexual autonomy as we have evolved as a nation. *Lawrence v. Texas* is consistent with that trend.<sup>21</sup> Rape law has evolved from its narrow focus on forcible sexual intercourse to a comprehensive array of sexual offense provisions covering a much broader range of conduct.

Second, Rubinfeld's proposal to resurrect the force requirement for all forms of rape and eliminate nonconsent as the critical element in a host of other statutes would require the complete overhauling of virtually every sexual offense statute in the United States, eliminating hundreds of provisions that offer the modern populace protection from multiple and very real forms of sexual exploitation. Although force continues to be a mainstay of some sexual offenses, especially the most serious ones, the force requirement's hegemony in rape law has been on the wane. In the real world, the once-unitary common law crime of rape,<sup>22</sup> with its heavy reliance on force, has given way to a vast array of criminal statutes differing in coverage and degrees of severity. Rape has transcended its constrictive, one-dimensional roots to become an umbrella for a large number of diverse offenses.

A cursory examination of the modern statutory landscape reveals a wide variety of sexual offenses, variously labeled rape, sexual assault, sexual battery, and criminal sexual penetration, which fall into at least seven different categories. First, abuse-of-trust statutes punish individuals who abuse their professional relationships with victims to secure sexual compliance, including statutes directed at doctors, psychologists, and clergy members.<sup>23</sup> Second, a host of rape statutes outlaw the abuse of positions of authority to obtain sexual intimacy; many of these are aimed at teachers, coaches, government officials, guardians, and prison guards.<sup>24</sup> A third category encompasses a growing number of criminal provisions that outlaw nonconsensual sexual behavior, and

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21. 539 U.S. 558 (2003).

22. One of the earliest definitions of rape was "the carnal knowledge of a woman forcibly and against her will." LAFAVE, *supra* note 18, at 891 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*210).

23. See, e.g., MICH. COMP. LAWS ANN. § 750.520b(1)(f)(iv) (West 2013) (establishing a criminal offense "when the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable."); MINN. STAT. ANN. § 609.344(1)(j) (West 2013) ("[T]he actor is a psychotherapist and the complainant is a patient or former patient and the sexual penetration occurred by means of therapeutic deception. Consent by the complainant is not a defense.").

24. See, e.g., ALASKA STAT. ANN. § 11.41.425(a) (West 2013) ("An offender commits the crime of sexual assault in the third degree if the offender . . . (2) while employed in a state correctional facility . . . for the custody and care of prisoners, engages in sexual penetration with a person who the offender knows is committed to the custody of the Department of Corrections to serve a term of imprisonment or period of temporary commitment.").

simply drops any force requirement.<sup>25</sup> A fourth category includes statutes prohibiting sexual intercourse when it is accomplished with coercion, extortion, or other nonforcible pressures.<sup>26</sup> Fifth, modern rape statutes are populated with provisions protecting those who are drunk or drugged, sometimes requiring that the drug have been administered by the defendant.<sup>27</sup> Sixth, an array of provisions protects unconscious, mentally incapacitated, physically helpless, and elderly persons.<sup>28</sup> Finally, a healthy number of modern statutes criminalize various forms of fraud in obtaining sexual compliance, although many of these are limited in scope to particular types of fraud or particular circumstances in which fraud is perpetrated.<sup>29</sup> The trend in state

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25. See, e.g., UTAH CODE ANN. § 76-5-402(1) (2013) (“A person commits rape when the actor has sexual intercourse with another person without the victim’s consent.”); N.H. REV. STAT. ANN. § 632-A:2(I)(m) (2013) (outlawing sexual assault when “the victim indicates by speech or conduct that there is not freely given consent to performance of the sexual act”).
  26. See, e.g., DEL. CODE ANN. tit. 11, § 774 (2013) (“A person is guilty of sexual extortion when the person intentionally compels or induces another person to engage in any sexual act involving contact, penetration or intercourse with the person or another or others by means of instilling in the victim a fear that, if such sexual act is not performed, the defendant or another will: . . . (7) Perform any other act which is calculated to harm another person materially with respect to the other person’s health, safety, business, calling, career, financial condition, reputation or personal relationships.”).
  27. Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131 (2002).
  28. See, e.g., LA. REV. STAT. ANN. § 14:42 (2013) (prohibiting aggravated rape on victims aged sixty-five or older or suffering from physical or mental infirmity); FLA. STAT. ANN. § 825.1025 (West 2013) (prohibiting lewd or lascivious offenses committed upon or in the presence of an elderly person or disabled person).
  29. See, e.g., CONN. GEN. STAT. § 53a-71 (West 2011) (“A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: . . . (7) the actor accomplishes the sexual intercourse by means of false representation that the sexual intercourse is for a bona fide medical purpose by a health care professional . . . .”); KAN. STAT. ANN. § 21-5503(a) (West 2011) (defining rape as “(4) sexual intercourse with a victim when the victim’s consent was obtained through a knowing misrepresentation made by the offender that the sexual intercourse was a medically or therapeutically necessary procedure; or (5) . . . was a legally required procedure within the scope of the offender’s authority”); CAL. PENAL CODE § 243.4(c) (West 2003) (“Any person who touches an intimate part of another person for the purpose of sexual arousal, sexual gratification, or sexual abuse, and the victim is at the time unconscious of the nature of the act because the perpetrator fraudulently represented that the touching served a professional purpose, is guilty of sexual battery.”); COLO. REV. STAT. § 18-3-405.5 (West 2013) (“The actor is a psychotherapist and the victim is a client and the sexual penetration or intrusion occurred by means of therapeutic deception.”). See also John F. Decker & Peter G. Baroni, “No” Still Means “Yes”: The Failure of the “Non-Consent” Reform Movement in American Rape and Sexual Assault Law, 101 J. CRIM. L. & CRIMINOLOGY 1081 (2011) (discussing rape-by-deception statutes and cases).

legislatures has not been to “stick to the force requirement.”<sup>30</sup> Instead, these legislatures have expanded rape law to cover diverse settings and situations, organizing many of these provisions around nonconsent and abuse of power rather than force. Thus, the real cost associated with Rubinfeld’s solution to the riddle of rape-by-deception would be the rolling back of decades of rape reform, leaving potential victims unprotected from many types of sexual exploitation.

Third, Rubinfeld’s position is only the latest version of an age-old penchant to keep the crime of rape narrow in focus. But narrowing the scope of rape law effectively privileges a host of morally blameworthy and socially intolerable behaviors.<sup>31</sup> In this context, it is impossible and undesirable to ignore the feminist critique of the history of rape law,<sup>32</sup> including the objection that rape law has privileged one gender at the expense of the other and that the resulting legal rules are “‘boys’ rules’ applied to a boys’ fight.”<sup>33</sup> Despite the gender-neutral language in most modern rape statutes, it is true that the vast majority of rape victims are women<sup>34</sup> and the vast majority of perpetrators of forcible rape are men.<sup>35</sup> Thus, truncating rape law’s protections will likely return us to a situation in which the law privileges men to take advantage of women, and does so by criminalizing only a very narrow set of heinous circumstances. Dorothy Roberts cogently argues:

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30. Rubinfeld, *supra* note 4, at 1410.

31. “Punishment is sometimes spoken of as the purpose of the criminal law, but this is quite erroneous. The purpose of the criminal law is to define socially intolerable conduct, and to hold conduct within the limits which are reasonably acceptable from the social point of view. . . . An incidental but very important function of the criminal law is to teach the difference between right and wrong.” ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 5-6 (3d ed. 1982).

32. Susan Estrich, *Rape*, 95 *YALE L.J.* 1087, 1091 (1986) (footnotes omitted) (“Most of the time, a criminal law that reflects male views and male standards imposes its judgment on men who have injured other men . . . . In rape, the male standard defines a crime committed against women, and male standards are used not only to judge men, but also to judge the conduct of women victims.”).

33. *Id.*

34. According to a recent report, “[f]rom 1995 to 2010, approximately 9% of all rape or sexual assault victimizations recorded in the NCVS [National Crime Victimization Survey] involved male victims.” MICHAEL PLANTY ET AL., U.S. DEP’T OF JUSTICE, *FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010*, at 3 (March 2013).

35. The FBI Uniform Crime Reports for 2011 finds there were 11,934 male arrests and 135 female arrests for forcible rape. *Crime in the United States 2011: Ten-Year Arrest Trends*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-33> (last visited Aug. 31, 2013). Unfortunately, statistics regarding the gender of perpetrators and victims of other types of rape or sexual assault are not readily available.

If rape is violence as the law defines it (weapons, bruises, blood) [or “a violation of self-possession, on a par with slavery and torture”<sup>36</sup>], then what most men do when they disregard women’s sexual autonomy is not rape. If rape is committed only by violent men, then very few men are rapists. By defining most male sexual conduct as nonviolent, even when it is coercive, it has been possible to exempt a multitude of attacks on women’s autonomy from criminal punishment, or even critical scrutiny. The category of violence, far from punishing all sexual assaults, actually privileges most of them.<sup>37</sup>

To put it another way, the much-maligned force requirement is maligned for a reason: it privileged a great deal of conduct that we find morally repugnant in the twenty-first century. The cost of Rubenfeld’s solution to the riddle of rape-by-deception is too high, undoing decades of progress in making rape law fairer, less sexist, and more protective.

### III. “[D]ECEPTIVE SEX, HOWEVER BAD IT MAY BE, ISN’T THAT BAD.”

Deceit and violence—these are the two forms of deliberate assault on human beings. Both can coerce people into acting against their will. Most harm that can befall victims through violence can come to them also through deceit. But deceit controls more subtly, for it works on belief as well as action. Even Othello, whom few would have dared to try to subdue by force, could be brought to destroy himself and Desdemona through falsehood.<sup>38</sup>

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36. Rubenfeld, *supra* note 4, at 1427.

37. Dorothy E. Roberts, *Rape, Violence, and Women’s Autonomy*, 69 CHI.-KENT L. REV. 359, 362-63 (1993) (footnotes omitted); see also Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 649 (1983) (arguing the legal definition of rape corresponds to “the level of acceptable force starting just above the level set by what is seen as normal male sexual behavior, rather than at the victim’s, or women’s, point of violation”). Roberts also points out: “I fear as much that disconnecting all seemingly nonviolent sexual coercion from sex accompanied by physical violence will obscure the common nature of both.” Roberts, *supra*, at 381. Estrich concurs: “The ‘rape as violence’ approach may strengthen the case for punishing violently coerced sex, but it may do so at the cost of obscuring the case for punishing forced sex in the absence of physical violence.” Estrich, *supra* note 32, at 1150.

38. SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 19 (1978) (footnote omitted). Socrates is quoted as saying: “Then again, the very fact that he uses not force but persuasion makes him more detestable, because a lover who uses force proves himself a villain, but one who uses persuasion ruins the character of the one who consents.”

Rubinfeld's solution to the riddle of rape-by-deception is also premised on the dubious proposition that "deceptive sex, however bad it may be, isn't *that* bad."<sup>39</sup> Rubinfeld may be making either an empirical statement about the harm suffered by victims or a normative statement about the quantum of social harm necessary to criminalize this conduct.<sup>40</sup> As an empirical statement (because this riddle is not merely an academic exercise), his argument is not consistent with reality nor is it respectful of the harms suffered by victims. The real-life victims of rape-by-fraud experience multiple physical, psychological, and emotional harms.<sup>41</sup> The physical consequences of victimization include unwanted pregnancy, sexually transmitted diseases, and exposure to HIV and AIDS, possibly shortening or ending life.<sup>42</sup> The psychological consequences of rape-by-fraud can be equally severe. Deana Pollard Sacks, writing about fraudulent relationships, comments:

The loss of an intimate relationship can cause serious emotional and psychological distress, even in the absence of disease. Symptoms such as sleeplessness, panic attacks, loss of appetite, and deep depression are not uncommon. Betrayal in intimate relationships can cause lifelong emotional scars and permanent pain, including a lifelong inability to be

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XENOPHON, CONVERSATIONS OF SOCRATES 260 (Robin Waterfield ed., Robin Waterfield & Hugh Tredennick trans., Penguin Books, 1990). Similarly, Dante wrote: "Of every malice that gains hatred in Heaven the end is injustice; and every such end, either by force or by fraud, afflicts another. But because fraud is an evil peculiar to man, it more displeases God, and therefore the fraudulent are the lower, and more pain assails them." BOK, *supra*, at 45. The Michigan Supreme Court wrote: "And, upon abstract principles of right and wrong, a sexual connection obtained by falsely and fraudulently personating the husband of a woman, or by a physician fraudulently inducing a female patient to believe such connection essential to a course of medical treatment, must be considered nearly, if not quite, as criminal and prejudicial to society as when obtained by force or any apprehension of violence, and it might, and in my opinion would, be judicious for the legislature to make some provision for punishment in cases of this kind." *Don Moran v. People*, 25 Mich. 356, 365 (1872).

39. Rubinfeld, *supra* note 4, at 1416.

40. At one point in his article, Rubinfeld acknowledges some of these harms, *id.* at 1413, but later in his text, he appears to downplay them, *id.* at 1416.

41. Cf. Leslie Bender, *Teaching Torts as if Gender Matters: Intentional Torts*, 2 VA. J. SOC. POL'Y & L. 115, 148-50 (1994) (arguing that tort law undervalues emotional as opposed to physical security and property claims, which harms women).

42. See, e.g., *State v. Whitfield*, 134 P.3d 1203, 1208 (Wash. Ct. App. 2006) ("During more than a thousand sexual liaisons . . . Whitfield rarely wore a condom, even when asked to. And he never informed any of his partners that he had been diagnosed HIV-positive. When asked about his sexually transmitted disease status, he would deny having any disease or would state that he had tested negative. At least five of the 17 women became HIV-positive or ill with . . . (AIDS) after having sex with Whitfield.").

intimate because of an inability to trust. The emotional fallout from deception in the most intimate of personal relations may have lasting consequences not just for the deceived person, but for those emotionally attached to him who experience emotional pain vicariously, such as spouses, children, siblings, and parents.<sup>43</sup>

Even courts recognize that victims who have been raped by their psychotherapists and other trusted persons must feel emotional devastation, a great sense of betrayal, and a violation of trust.<sup>44</sup> Thus, to say that rape-by-deception is “not *that* bad” is to trivialize the harm suffered by victims of such occurrences.

Nor is it true as a normative proposition that the harms at the heart of these offenses are not worthy of vindication in a criminal justice system designed to evolve to meet the needs of modern society. As a description of the quantum of social harm necessary for criminalization, Rubinfeld’s claim that deceptive sex is not *that* bad is eerily reminiscent of arguments that courts and commentators made throughout history to limit the scope of rape law. One of the clearest examples of a doctrine that constricted the offense of rape was the “infamous” marital immunity.<sup>45</sup> And a ubiquitous argument in favor of the marital exemption was, in effect, that rape within marriage was “not *that* bad”—after all, the parties were married to each other and the woman had had sexual intercourse with her husband on prior occasions. As Michelle Anderson observes, “a number of scholars have argued that spousal sexual offenses in general are not harmful enough for the justice system to criminalize.”<sup>46</sup> Similarly, Joshua Dressler explains: “When intercourse is coerced on a given occasion in the marital relationship, the argument proceeds, the wife’s autonomy is less seriously violated than if the perpetrator were a stranger or

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43. Deana Pollard Sacks, *Intentional Sex Torts*, 77 *FORDHAM L. REV.* 1051, 1071 (2008) (footnotes omitted). See also Joel Feinberg, *Victims’ Excuses: The Case of Fraudulently Procured Consent*, 96 *ETHICS* 330, 337 (1986) (noting that a deceived woman may suffer “depression, shame, loss of self-esteem, and tortured conscience, if not pregnancy and more obvious harms”); Jane E. Larson, “*Women Understand So Little, They Call My Good Nature ‘Deceit’*”: A Feminist Rethinking of Seduction, 93 *COLUM. L. REV.* 374, 380 (1993) (asserting that “sex induced by fraud has the potential to cause grave physical and emotional injury”).

44. See, e.g., *State v. Dutton*, 450 N.W.2d 189, 194 (Minn. Ct. App. 1990) (discussing the “emotional devastation that can result when a psychotherapist takes advantage of a patient”).

45. Rubinfeld, *supra* note 4, at 1389.

46. Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 *HASTINGS L.J.* 1465, 1509 (2003).

someone with whom the victim had not indicated a general willingness to have sexual relations.”<sup>47</sup>

Moreover, arguments that particular kinds of rape are “not *that* bad” can have insidious and long-lasting effects. For instance, despite Rubinfeld’s assurances that marital immunity is “history,”<sup>48</sup> a recent article reports that “at least twenty-four states retain some form of an exemption. These states criminalize a narrower range of offenses if committed within marriage, subject the marital rape they recognize to less severe sanctions, and/or create special procedural obstacles to marital rape prosecutions.”<sup>49</sup> As further evidence of the tenacity of the marital exemption, some jurisdictions have actually expanded the marital exemption to include those who live together in a cohabiting relationship.<sup>50</sup> Contrary to the claim that marital rape was “not *that* bad,” Jill Elaine Hasday reports: “[T]he best available empirical studies report that marital rape is both widespread and extremely damaging, frequently causing even more trauma than rape outside of marriage.”<sup>51</sup> Anderson concurs: “[C]ontrary to popular belief, wife rape tends to be more violent and psychologically damaging than stranger rape.”<sup>52</sup> Thus, the trend in the criminal justice system is to recognize that the harm of marital rape is significant and fully worthy of protection by sexual offense provisions—it is “*that* bad.”

Another example that cautions against categorically excluding large segments of potential offender behavior is the treatment that acquaintance or date rape has received in contrast to “real” stranger rape. One of the clearest articulations of this distinction is the 1962 Model Penal Code’s downgrading of a sexual offense when committed in the context of a voluntary social relationship:

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47. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 599 (5th ed. 2009).

48. Rubinfeld, *supra* note 4, at 1392.

49. Jill Elaine Hasday, *Protecting Them from Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Equality*, 84 N.Y.U. L. REV. 1464, 1471 (2009) (footnotes omitted); see, e.g., MD. CODE ANN., CRIM. LAW § 3-318 (West 2013) (“A person may be prosecuted under § 3-303(a), § 3-304(a)(1), or § 3-307(a)(1) of this subtitle for a crime against the person’s legal spouse if: (1) at the time of the alleged crime the person and the person’s legal spouse have lived apart, without cohabitation and without interruption: (i) under a written separation agreement executed by the person and the spouse; or (ii) for at least 3 months immediately before the alleged rape or sexual offense; or (2) the person in committing the crime uses force or threat of force and the act is without the consent of the spouse.”); NEV. REV. STAT. § 200.373 (2011) (“It is no defense to a charge of sexual assault that the perpetrator was, at the time of the assault, married to the victim, if the assault was committed by force or threat of force.”).

50. Anderson, *supra* note 46, at 1522.

51. Hasday, *supra* note 49, at 1471-72 (footnotes omitted).

52. Anderson, *supra* note 46, at 1475.

Rape is a felony of the second degree unless . . . the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which case the offense is a felony of the first degree.<sup>53</sup>

Susan Estrich's groundbreaking book and article critiqued the notion that "real" rape only occurs when the parties are strangers to one another, when force and violence is manifest, and when physical injuries are sustained by the victim.<sup>54</sup> She argued for recognition that simple rape—perpetrated by a friend or acquaintance, when the defendant uses more subtle types of pressures, and when the injury is perhaps more psychological, emotional, or psychic than physical—is also "real" rape and worthy of protection under the law.<sup>55</sup> Again, rape reform has produced a steady erosion in the sentiment that the harm to those who are raped by their social acquaintances and intimates—the vast majority of rape survivors<sup>56</sup>—is not "*that bad*."

Thus, if Rubinfeld is making a normative statement about the quantity of social harm needed for criminalization, his argument resembles the same arguments made in different eras to restrict the scope of rape law's application. The argument is familiar—the harm suffered by victims of unwanted sexual exploitation in the marital bedroom, on a date, or by nonviolent means that would be punishable if used to secure money or property<sup>57</sup> are unworthy or less worthy of social protection. This is simply another way of privileging certain types of sexual exploitation. In the guise of solving the riddle of rape-by-deception by limiting rape to circumstances resembling the crimes of slavery and torture, Rubinfeld offers a conception of rape that is narrower and less protective than the current legal regime, and quite reminiscent of a long line of justifications for restricting the scope of rape law.

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53. MODEL PENAL CODE 213.1 (1) (1962); see also Deborah W. Denno, *Why the Model Penal Code's Sexual Offense Provisions Should be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207 (2003) (characterizing provision as controversial and arguing for its elimination).

54. SUSAN ESTRICH, *REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO* (1987); Estrich, *supra* note 32.

55. ESTRICH, *supra* note 54, at 4 ("But while husbands have always enjoyed the greatest protection, the protection of being excluded from rape prohibitions, even friends and neighbors have been assured sexual access.") (footnote omitted).

56. According to the Bureau of Justice Statistics, *supra* note 34, at 1: "In 2005-10, 78% of sexual violence involved an offender who was a family member, intimate partner, friend, or acquaintance."

57. Estrich, *supra* note 32, at 1120.

#### IV. RETAINING SEXUAL AUTONOMY AND ESCHEWING AN ALL-OR-NOTHING APPROACH IN FAVOR OF DIFFICULT LINE-DRAWING

Rubinfeld is clearly correct when he observes that the cases of rape-by-fraud pose a riddle not susceptible of easy solution. For me, the answer to this riddle lies not in rejecting sexual autonomy as a myth and erecting the right of self-possession as the social harm underlying rape law. The cost of this solution is too high. However, I do not believe that the right to sexual autonomy should be understood as virtually unlimited. Sexual autonomy cannot mean that we have the right to engage in sexual relationships with every one of our choosing. We have the Sixth Amendment right to counsel, but we do not have the right to be represented by Gerry Spence.<sup>58</sup> Sexual autonomy has limits and it involves the ability to choose whether one wishes to participate in sexual conduct with a consenting partner. Finally, not all cases that might fall under the umbrella of rape-by-deception should be treated equally. The all-or-nothing approach is too simplistic.<sup>59</sup> Instead, the riddle of rape-by-fraud cases should be unraveled by retaining sexual autonomy as the foundation of modern rape law, understanding the limits on the right of sexual autonomy, and developing a more robust understanding of which types of fraudulent (or deceptive) representations violate our right to sexual autonomy and which do not. How do we draw the line?<sup>60</sup> That is the real conundrum of rape-by-fraud.

Although I cannot offer a simple, elegant, or perfect solution to the riddle that has vexed our criminal justice system for more than 150 years, I can offer a few line-drawing suggestions. We should start with one of the traditional exceptions to the common law exclusion of rape-by-fraud – fraudulent medical treatment, usually limited to cases involving fraud in the factum and not fraud in the inducement.<sup>61</sup> This exception should be expanded to include all types of professional actors, not simply doctors, but also dentists, therapists, psychiatrists, psychologists, counselors, clergy members, nurses, paramedics, and a host of other persons whom we encounter in the context of professional alliances. One added benefit is that many statutes like this already exist in our

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58. *Wheat v. United States*, 486 U.S. 153, 159 (1988) (“[A] defendant may not insist on representation by an attorney he cannot afford . . .”).

59. Rubinfeld, *supra* note 4, at 1417 (“But it is hard to believe that all sex-by-deception could or should be criminalized, under whatever name, even if the punishment were only a year or two in jail.”).

60. Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2176 (1995) (“[T]he job of legal scholarship is not finished until a workable boundary between permitted and regulated conduct has been identified. And in the case of rape, the boundary problem is acute.”).

61. Rubinfeld, *supra* note 4, at 1398-99.

web of modern sexual offenses,<sup>62</sup> a web that is much larger and more complex than the one-dimensional definition of rape under the common law. Further, this exception should not be limited to those who practice only fraud in the factum, but should also include cases involving fraud in the inducement.<sup>63</sup> Thus, a psychiatrist lying to a client about the psychological benefits of sexual intercourse with him would be equally guilty as a doctor pretending to give a patient a physical exam and secretly engaging in sexual penetration of the patient. Fraud practiced in the context of such professional alliances to secure sexual compliance should result in criminal liability for a sexual offense. The related questions of whether to call the crime “rape” or by another term, and how to grade the crime, are secondary. Criminally punishing those who use fraud to secure sexual compliance in the context of a professional, trust-based relationship would clearly communicate that some arenas of modern life should be free of sexual predation—zones in which fraud and deception are simply not acceptable.

Similarly, given the significant overlap between fraudulent and coercive inducements or pressures, a second line should be drawn to include rape-by-coercion, particularly as an abuse of a position of authority. Rather than rejecting claims of rape-by-coercion,<sup>64</sup> we should accept them in the context of authority-based relationships, such as teachers, coaches, guardians, principals, prison guards, and many others who hold positions of power over potential victims. Although the perpetrator practices no fraud here, the inherent power imbalance in these situations so gravely affects the victim’s ability to give meaningful consent that it violates sexual autonomy.<sup>65</sup> Some scholars have already noted the criminality of sexual conduct in this context. Joel Feinberg explores the overlap between fraud and coercion.<sup>66</sup> Stephen Schulhofer

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62. Several medical-treatment statutes, for instance, explicitly mention fraud or deceit, while a number of states rely on the notions of therapeutic deception or emotional dependence in psychotherapist-patient or clergy provisions. See, e.g., MINN. STAT. ANN. §§ 609.344(1)(k) (West 2013) (“[T]he actor accomplishes the sexual penetration by means of deception or false representation that the penetration is for a bona fide medical purpose. Consent by the complainant is not a defense . . . .”); MINN. STAT. ANN. §§ 609.344(1)(j) (West 2013) (“[T]he actor is a psychotherapist and the complainant is a patient or former patient and the sexual penetration occurred by means of therapeutic deception. Consent by the complainant is not a defense . . . .”).

63. Accord Rubinfeld, *supra* note 4, at 1398-99.

64. *Id.* at 1411-12.

65. See generally Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147 (2011) (opening with the discussion of a real-life case involving a judge and his employee).

66. See generally Joel Feinberg, *Victims’ Excuses: The Case of Fraudulently Procured Consent*, 96 ETHICS 330 (1986).

discusses illegitimate pressures in the context of protecting institutional and professional relationships from sexual exploitation.<sup>67</sup> An additional selling point is that the existing statutory picture is much clearer in the context of rape-by-coercion because forty jurisdictions have at least one criminal provision outlawing the abuse of a position of power to obtain sexual compliance.<sup>68</sup> If we stopped here, and went no further, a large array of unwanted sexual exploitation would be criminally punished without infringing on what occurs in purely social or romantic relationships. However, it may be possible to go a bit further than drawing the line at trust-based alliances or power-based relationships.

In drawing some finer lines, we should consider the work of legal scholars who have sought to describe in greater detail the types of fraud that should result in criminal liability. Feinberg proposes that some fraudulent inducements, like bluffing warnings, can be so coercive that they prevent meaningful victim consent.<sup>69</sup> For instance, if a perpetrator impersonated a doctor and falsely told a vulnerable patient that it was necessary for him to have sexual intercourse with her or she might die, then such a circumstance should be considered a coercive infringement on consent—and, I believe, a violation of sexual autonomy.<sup>70</sup> Feinberg also suggests that false promises should result in criminal liability, again, if they are coercive enough (i.e., avoiding or eliminating an intolerable evil rather than offering an attractive prospect). He gives the example of a wealthy man who falsely promises to financially assist the mother of a sick child in return for her sexual favors. But he would exclude the same rich man who merely offers a desirable, but not desperately needed, alternative to the woman.<sup>71</sup> Similarly, Schulhofer argues that some forms of deception are so illegitimate that criminal sanctions should apply. He specifically mentions falsehoods about pecuniary interest and nondisclosure or misrepresentations concerning significant health risks,<sup>72</sup> a point that Rubinfeld appears to concede.<sup>73</sup> Schulhofer would also add any deceptions “intended to create feelings of isolation, physical jeopardy, or

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67. Schulhofer, *supra* note 12, at 79-84.

68. Falk, *supra* note 3, at 102 n. 309; *see also* Decker & Baroni, *supra* note 29 (reporting that eighteen states protect victims who have consented to sexual acts because of coercion).

69. Feinberg, *supra* note 66, at 342-45.

70. These facts are loosely based on *Boro v. Superior Court*, 210 Cal. Rptr. 122 (Cal. Ct. App. 1985). *See also* Feinberg, *supra* note 66, at 342-43.

71. Feinberg, *supra* note 66, at 343-44.

72. Schulhofer, *supra* note 12, at 93.

73. Rubinfeld, *supra* note 4, at 1416-17 (“Certain lies told to obtain sex could be sensibly singled out by statute and criminalized. Concealing a sexually transmissible disease would be a good example.”).

economic insecurity.”<sup>74</sup> In terms of existing legislation, some states specify a limited set of conditions involving fraud under which the victim’s consent, as traditionally understood, does not relieve the defendant of liability. For instance, California outlaws consent induced by fear based on fraud.<sup>75</sup> Thus, the criminal justice system has made some progress in moving beyond purely professional alliances into a zone involving personal, social, or romantic relationships when the fraud is either so coercive or so illegitimate that its insulation from criminal penalty is unwarranted.

On the other side, we should draw the line to exclude “deceptive” practices such as clothing, underclothing, make-up, hair dye, cosmetics, and cosmetic surgery.<sup>76</sup> These examples might be understood to trivialize the real problem raised by the rape-by-fraud cases. Perhaps we should consider Estrich’s suggestion that rape law should “prohibit fraud to secure sex to the same extent we prohibit fraud to secure money, and prohibit extortion to secure sex to the same extent we prohibit extortion to secure money.”<sup>77</sup> Importing into rape law notions of fraud from offenses criminalizing the deprivation of money or property (tangible and intangible) may also yield some guidance on these difficult line-drawing issues. For example, in federal mail fraud doctrine, courts distinguish between intent to defraud and intent to deceive, thereby recognizing that not all lies are sufficient to trigger prosecution.<sup>78</sup> As Rubenfeld acknowledges, materiality is an important component of this analysis.<sup>79</sup>

Whatever else might be written about rape-by-fraud, it is clear that the law of rape is evolving. The expansion of the circumstances under which fraud constitutes rape has been slow, conservative, and incremental. But perhaps this is as it should be in an area so fraught with controversy and disagreement. Many of the new statutes enacted by state legislatures were the result of courts’ calls for legislative action,<sup>80</sup> reactions to specific cases that occurred in the

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74. Schulhofer, *supra* note 12, at 93. The case of *People v. Evans*, 379 N.Y.S.2d 912, 921 (Sup. Ct. N.Y. County 1975), might be an example of this phenomenon.

75. CAL. PENAL CODE § 266c (West 2001) (“Every person who induces any other person to engage in sexual intercourse, sexual penetration, oral copulation, or sodomy when his or her consent is procured by false or fraudulent representation or pretense that is made with the intent to create fear, and which does induce fear, and that would cause a reasonable person in like circumstances to act contrary to the person’s free will.”).

76. Rubenfeld, *supra* note 4, at 1416.

77. Estrich, *supra* note 32, at 1120.

78. See, e.g., *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1180-81 (2d Cir. 1970).

79. Rubenfeld, *supra* note 4, at 1407.

80. In *State v. Leiding*, 812 P.2d 797 (N.M. Ct. App. 1991), a psychologist persuaded his male patient to have sexual relations with him. The state tried to prosecute Leiding under a relatively new, gender-neutral statute, but the case was dismissed. The court commented:

jurisdiction, or both.<sup>81</sup> In other words, legislative bodies created laws to fix problems in statutory coverage that arose from factual scenarios in the real world. A living law must change to deal with the contingencies of the modern era. In the real world, the question is not really whether to criminalize rape-by-fraud—because we already do so in many ways—the real question is when and under what circumstances. One cost of Rubinfeld’s proposal would be to halt this gradual evolutionary process. This would be a real shame, because more progress has been made in solving the conundrum of rape-by-fraud in the last quarter-century than in the previous 125 years.

## CONCLUSION

Rubinfeld’s article is a self-consciously provocative contribution to the long-standing debate surrounding the question of criminalizing rape by fraud or deception. In the final analysis, I cannot agree with his elegant proposal because it represents too radical a rewriting of existing rape law, one that is inconsistent with a modern understanding of intolerable sexual practices. Leaving behind its narrow focus, dominated by force, modern rape law has been evolving as our notions of appropriate inducements to sexual conduct also evolve, and as our protection of women from male exploitation increases. To argue that we should return to an earlier statutory regime or an even narrower one—rolling back wave after wave of rape reform—seems regressive, anti-feminist, and inconsistent with a huge body of commentary arguing that sexual autonomy is an interest worthy of protection by the criminal law. The cost associated with Rubinfeld’s solution to the riddle of rape-by-deception is simply too high.<sup>82</sup> The beneficiaries of Rubinfeld’s proposal will be the perpetrators of all forms of nonviolent, nonforcible rape. Reverting to a more limited understanding of what constitutes rape will be a disservice to those who want to live in a society free of unwanted sexual exploitation.

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“[I]f the legislature desires to make psychologist/patient sex a crime, it can certainly do so, subject only to constitutional limitations. But doing so requires legislative therapy, not judicial surgery.” *Id.* at 800. In 1993, New Mexico amended its statutes by expanding force or coercion to include penetration or contact “by a psychotherapist on his patient, with or without the patient’s consent, during the course of psychotherapy or within a period of one year following the termination of psychotherapy.” N.M. STAT. ANN. § 30-9-10(A)(5) (2013).

81. See, e.g., Tony Rizzo, *Case Shows Need for Rape Law Change, Prosecutors Say; Judge Drops Felony Charges in Incident That Didn’t Involve Force*, KAN. CITY STAR, July 29, 1995, at C2 (discussing a case involving a phlebotomist, who induced three women to allow him to intimately examine them with his fingers). Shortly thereafter, Kansas amended its rape law. Jim Sullinger, *Legislature Expands Rape Law to Include Deception*, KAN. CITY STAR, Apr. 30, 1996, at B4; see KAN. STAT. ANN. § 21-5503 (West).

82. Rubinfeld, *supra* note 4, at 1443.

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