

JED RUBENFELD

Rape-by-Deception – A Response

In this Essay, Professor Jed Rubenfeld responds to commentary on The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy, published in Volume 122 of the Yale Law Journal. Engaging with four different interlocutors, he suggests that sex-by-deception remains a serious puzzle in rape law, and that self-possession offers an especially promising means of rethinking rape law to address it.

Let me begin by thanking Professors Dougherty, Falk, Ramachandran, and Tuerkheimer for their incredibly thoughtful, provocative replies, as well as the editors of the *Yale Law Journal* for putting together this exchange.

For too long, rape law and many who think about it have suppressed a serious problem: the fact that in the United States, we generally don't criminalize "rape-by-deception"¹ even while, increasingly, we claim that rape is unconsented-to sex.² The problem is straightforward. Fraud invalidates consent just as force does.

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1. See, e.g., *Suliveres v. Commonwealth*, 865 N.E.2d 1086, 1089 (Mass. 2007) (holding that rape requires force and therefore rejecting a claim of rape-by-deception); *People v. Hough*, 607 N.Y.S.2d 884, 885, 887 (Crim. Ct. 1994) (same); *Commonwealth v. Culbreath*, 36 Va. Cir. 188 (1995) (same); see also, e.g., RICHARD POSNER, *SEX AND REASON* 392 (1992) ("[G]enerally it is not a crime to use false pretenses to entice a person into a sexual relationship."); B.K. Carpenter, Annotation, *Rape by Fraud or Impersonation*, 91 A.L.R.2d 591, § 2 (1963) ("[T]he prevailing view is that upon proof that consent to intercourse was given, even though [procured by] fraud . . . , a prosecution for rape cannot be maintained.").
 2. See, e.g., *United States v. Thomas*, 159 F.3d 296, 299 (7th Cir. 1998) ("[U]nconsented-to sex is forcible rape, or, at the least, battery."); *People v. Cicero*, 204 Cal. Rptr. 582, 590 (Ct. App. 1984) ("[T]he law of rape primarily guards the integrity of a woman's will and the privacy of her sexuality from an act of intercourse undertaken without her consent."); Joan McGregor, *Force, Consent, and the Reasonable Woman*, in *IN HARM'S WAY* 231, 250 (Jules L. Coleman & Allen Buchanan eds., 1994) ("Rape should be conceptualized as unconsented-to sexual intercourse . . ."); Julia Penelope, *Speaking Out*, in *COUNTERBALANCE: GENDERED*

In *The Riddle of Rape-by-Deception*,³ I try to bring this problem to the foreground. If we want to reject rape-by-deception, I argue, we have to stop trying to define rape as sex without consent. And we can no longer assert that rape law exists to protect “sexual autonomy,”⁴ because to protect autonomy is to protect consent from both fraud and force alike.

But if I’m right in these arguments, the implication is that we have to rethink our longstanding opposition to rape law’s force requirement. The force requirement is what permits rape law to exclude most cases of sex-by-deception; it may be that the much-maligned force requirement is not so malign after all. In fact, I suggest, that requirement makes good sense if the real violation inflicted by rape is a violation not of “sexual autonomy,” but of what I call the right to bodily self-possession.

Just to be clear, the force requirement, as I understand it, is satisfied whether force is used or threatened. It demands no resistance by the victim. And it can be met by any kind of assault, drugging, physical incapacitation, tying up, holding down, overpowering, and so on, or the threat, by word or action, of any of these.

I knew of course that *The Riddle of Rape-by-Deception* would elicit sharp criticism. Saying you’re in favor of rape law’s force requirement is, these days, practically like saying you’re in favor of separate-but-equal. So I’m especially grateful to all four of my critics here for the seriousness and rigor of their engagement with my article. I’ll address each of their replies in turn.

PERSPECTIVES FOR WRITING AND LANGUAGE 68, 72 (Carolyn Logan ed., 1997) (“In public discourse, rape has become ‘unconsented sexual activity.’”).

3. Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372 (2013).
4. See, e.g., *People v. Soto*, 245 P.3d 410, 418 (Cal. 2011) (describing rape as a violation of “sexual autonomy”); Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 187 (2002) (stating that the “central value protected by sexual offense provisions is sexual autonomy”); McGregor, *supra* note 2, at 236 (stating that the “moral wrongness of rape consists in violating an individual’s . . . sexual self-determination and the seriousness of rape derives from the special importance we attach to sexual autonomy”). Professor Coughlin’s well-known article may be the clearest and most important description of how the modern view that rape law protects sexual autonomy involved a radical reconceptualization of rape law’s basic purpose. See Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 6 (1998) (“[I]t seems clear that the official purposes of [traditional] rape law . . . did not include the protection of sexual autonomy.”).

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I'll start with Professor Dougherty's lucid and well-reasoned essay,⁵ which in some ways is the hardest for me to respond to.

Professor Dougherty understands my argument perfectly. Dougherty is a believer in the principle of sexual autonomy;⁶ he thinks (like most people, nowadays) that rape can be defined as sex without consent.⁷ Unlike most, however, Professor Dougherty comes fully to grips with the fundamental problem that arises from this way of understanding rape: so understood, rape ought to include vastly more sex-by-deception (because deception vitiates consent).⁸ As he puts it, "I take sexual autonomy seriously and feel the full force of Rubinfeld's . . . argument, which 'requires sex law to pick its poison'"⁹—either embracing a vastly expanded doctrine of rape-by-deception or abandoning the definition of rape as unconsented-to sex.

Professor Dougherty opts for the former position. "[A]ssuming certain pragmatic worries could be assuaged," he concludes, "we should reluctantly accept that someone can be guilty of rape-by-deception by falsely saying he went to Yale."¹⁰

I want to stress what is being said here. Professor Dougherty is admirably clear about it: any material misrepresentation can turn sex into rape.¹¹ If a seventeen-year-old girl says she's eighteen and thereby gets a man to sleep with her (who otherwise would not have), she has committed rape.

Against this position, I don't believe my article offers a single conclusive argument.

Most of my article takes the form, "*Unless* you're prepared to accept that people can be guilty of rape for lying about their college (or marital status, age, feelings, and so on), you're going to have a problem defining rape as sex without consent." Dougherty has the clarity and courage to accept the implications of his belief in sexual autonomy, and therefore most of my argument doesn't speak to him.

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

6. *Id.* at 334.

7. *Id.* at 333-34.

8. *Id.* at 334.

9. *Id.* (quoting Rubinfeld, *supra* note 3, at 1380).

10. *Id.* at 333.

11. *See id.* ("I remain convinced by Rubinfeld's central argument that it is *ad hoc* to carve out arbitrary exceptions for some types of material deception and not others. If impersonating someone's wife vitiates consent, then other forms of material deception should too.")

To be sure, I offer some independent reasons to doubt the principle of sexual autonomy. The idea of sexual autonomy often rests on a notion of sexual “self-determination” that is not, in principle or reality, remotely achievable. More fundamentally, sexual desire seems to contemplate a commingling of bodies and subjectivities in which the ideal of individual autonomy looks strangely out of place. When, for example, desire seeks to submit, it seeks the opposite of autonomy. But even when desire seeks to dominate, or even if it seeks a perfectly equal conjugation of two souls in mind and body, it seems to want relationships between one self and another that the ideal of individual autonomy is not well suited to capture.

Autonomy speaks in the name of the “I,” of reality and rationality, of a fundamental separation between self and others. Sexuality speaks – not always, but often enough to make things problematic – in the name of id, of fantasy and irrationality, of a fundamental interpenetration of self with others. Bringing autonomy to sexuality is like offering hunger the freedom to drink as much water as it likes, at whatever temperature it chooses.

But these considerations are not logical proofs. They are unlikely to persuade someone who holds a different view, particularly the view that I refer to in my article as “thin” autonomy,¹² which, I think, lies behind Dougherty’s position. Certainly my arguments are unlikely to persuade one who believes so firmly in sexual autonomy that he is ready to charge rape if a seventeen-year-old girl gets a man to sleep with her by saying she’s eighteen.

To me, this example (or the lying-about-attending-Yale example) speaks for itself – as an illustration that some other element is necessary in order for sex to be rape. But to Professor Dougherty, the example doesn’t speak for itself, and at this point in the argument I can only tip my hat to him, admiring (as I genuinely do) people who are willing to think through their beliefs and take an unpopular position when their principles require it.

I do want, however, to emphasize what seems to me one error in Professor Dougherty’s reasoning.

Dougherty’s reply is entitled “No Way Around Consent.” He repeatedly emphasizes – indeed, this is his chief point – that consent continues to play a very important role in my definition of rape.¹³ Violent sex is not rape, I argue, if the violence has been consented to. Sadoomasochistic sex, if consensual, is no crime.

12. See Rubinfeld, *supra* note 3, at 1422–23.

13. See, e.g., Dougherty, *supra* note 5, at 321 (arguing that “on examination, [Rubinfeld’s] principle gives a crucial role to consent”); *id.* at 325 (arguing that “consent remains at the center of Rubinfeld’s own proposal”).

Professor Dougherty thinks that this point involves me in a contradiction. Rape-by-deception, says Dougherty, can now return “via the back door.”¹⁴ If a person is tricked into submitting to violent or sadistic sex, this deception can vitiate her consent (as, for example, where the victim didn’t know she was going to be subjected to violence or was deceived about how violent the violence would be). Hence, Dougherty observes, the possibility of rape-by-deception cannot be ruled out after all.¹⁵ (For the record, my article notes the possibility of a rape-by-deception claim in such circumstances.¹⁶) Thus, Dougherty concludes, “Rubinfeld’s proposal fail[s] by its own lights”¹⁷—meaning, I guess, that my argument fails to rule out all possible cases of rape where consent was procured through deception, which, apparently, he takes to have been my goal.

But that wasn’t my goal. Dougherty here overlooks a simple point. My opposition to rape-by-deception is directed solely at cases in which *there was no force*. But in the case of sadistic or violent sex, *there is force*.

It’s no contradiction to say: (1) that most sex-by-deception is not rape (because there is no force); but (2) rape can occur when violent or sadistic sex is inflicted on someone through deception (because there is force).

My article doesn’t argue that rape law can give *no* role to consent. It argues that rape law has to include an element *in addition* to consent (force). I don’t argue against *all* autonomy protections in the law. I argue against the idea that there is a fundamental right to *sexual* autonomy (such that all unconsented-to sex, even in the absence of force, would or should be unlawful).¹⁸

Finally, one factual caveat. “[I]n the contemporary United States,” says Professor Dougherty, citing a well-known 2006 Department of Justice report, “the reality is that the majority of rapists are known to their victims and the majority of rapes do not involve the threat or use of physical harm.”¹⁹ Readers

14. *Id.* at 328.

15. *Id.* at 326.

16. See Rubinfeld, *supra* note 3, at 1438 n.235; Dougherty, *supra* note 5, at 326.

17. Dougherty, *supra* note 5, at 328.

18. I would note, however, that the question of what kinds of deception would turn violent sex into rape does not seem as clear to me as it does to Professor Dougherty. As I suggested in my article, that question would require a separate discussion. See Rubinfeld, *supra* note 3, at 1438 n.235. Dougherty seems to assume that virtually any relied-upon misrepresentation would suffice. I’m not sure about that assumption (because it may be letting the idea of sexual autonomy back in “via the back door”); I’ve accepted it solely for purposes of argument here.

19. Dougherty, *supra* note 5, at 324 (citing Nat’l Inst. of Justice, *Extent, Nature, and Consequences of Rape Victimization: Findings from the National Violence Against Women Survey*, U.S. DEP’T JUST. 24-26 (2006), <https://www.ncjrs.gov/pdffiles1/nij/210346.pdf>).

of this sentence might suppose that Dougherty is asserting (although if his paragraph is read carefully, it's clear that he isn't asserting) that most rapes in the United States do not involve force, and that this fact is supported by the 2006 DOJ report.

Force is a category much broader than physical harm. If a man rapes a woman by overpowering her or pinning her down, he has used force even if there is no physical harm. Hence the fact that the 2006 DOJ report found that a majority of rapes in the United States involved no actual or threatened physical harm – if that fact were true²⁰ – would not indicate that these rapes involved no actual or threatened force. On the contrary, the definition of rape used in the 2006 DOJ report included a force requirement: “rape was defined as an event that occurred without the victim’s consent *that involved the use or threat of force* in vaginal, anal, or oral intercourse.”²¹ In other words, a sex act was counted as rape in the DOJ data only if the victim had been made to have sex by force or the threat of force.²² Thus not only is the DOJ report no support for the proposition that a majority of rapes are committed without force; rather, *every* rape in that report was said to involve force.

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I turn now to Professor Tuerkheimer’s reply.²³ I found Professor Tuerkheimer’s critique and her concept of sexual “agency” very interesting. I think we actually agree on quite a lot, and I look forward to reading

20. The DOJ data do not necessarily support Dougherty’s assertion that “the majority of rapes do not involve the threat or use of physical harm.” *Id.* The data indicate, for example, that 37.8% of female rape victims were hit, kicked, bitten, choked, drowned, hit with an object, or beaten up; that 10.8% had a weapon used against them; and that 31.9% were subjected to a verbal threat of harm or death. Nat’l Inst. of Justice, *supra* note 19, at 4, 26. But the report does not indicate how much overlap there was among these groups. Without the overlap, the most that can be concluded from these numbers is that between 37.8% and 80.5% of raped women in the survey were subjected to actual or threatened physical harm. More important, the report doesn’t indicate how many more of the victims were physically restrained, held down, overpowered, tied up, and so on. These would be cases of forcible rape regardless of whether there was physical harm.

21. Nat’l Inst. of Justice, *supra* note 19, at 3 (emphasis added).

22. Respondents were not asked whether they had been “raped”; they were asked if they had been made to have sex by force or the threat of force, and they were considered to have been raped only if they said yes. *See id.* at 10 (describing survey methodology and stating that to “screen respondents for rape victimization,” respondents were asked, for example, whether “a man or boy has ever made you have sex by using force or threatening to harm you or someone close to you,” or whether “anyone, male or female, ever made you have oral sex by using force or threat of force”).

23. *See* Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L.J. ONLINE 335 (2013).

SlutWalking in the Shadow of the Law.²⁴ But in the end, I wished that Professor Tuerkheimer’s reply had come a little more fully to grips with the deception problem.

Professor Tuerkheimer believes, as I do, that most sex-by-deception should not be considered rape.²⁵ She also believes, as I do, that “sexual autonomy” is a false idol, not responsive to sexual realities.²⁶ But ultimately, as the title of her reply suggests, Professor Tuerkheimer defines rape exactly the same way that proponents of sexual autonomy do—as unconsented-to sex.²⁷ As a result, the problem for her agency-based account remains exactly the same as for autonomy-based accounts: if rape is unconsented-to sex, why isn’t sex-by-deception rape?

Professor Tuerkheimer’s answer is that in cases of deception, people *do* consent.²⁸ At the simplest level, her argument runs as follows. People can validly consent under conditions of imperfect information.²⁹ If perfect information were required, “there could be no valid consent.”³⁰ Accordingly, when people consent because they’ve been lied to, they still consent: “Consent was obtained; it cannot be discounted solely by virtue of its imperfection.”³¹

The difficulty with this position is that it proves far too much and fails to grapple with the fact that, in virtually every legal arena outside of rape law, a “yes” obtained through deception is routinely (and correctly) rejected as an expression of true consent.³²

24. See *id.* at 339 n.22 (referring to “arguably the most significant feminist initiative to have emerged in decades—a movement called SlutWalk” and citing to Deborah Tuerkheimer, *SlutWalking in the Shadow of the Law*, 98 MINN. L. REV. (forthcoming April 2014), <http://ssrn.com/abstract=2009541>).

25. See *id.* at 344 (“[E]xcept under narrow circumstances, [sexual misrepresentation] does not seem to be rape.”).

26. See *id.* at 338-39.

27. *Id.* at 345 (“This is sex without consent. This is rape.”).

28. See *id.* at 344-45.

29. See *id.* at 343 (“But lines can surely be drawn around consent that is informed enough to pass muster. Just as in other contexts in which consent must be evaluated, what constitutes being ‘informed’ is a matter of degree.” (citation omitted)).

30. *Id.* at 345.

31. *Id.*

32. See, e.g., *United States v. Cavitt*, 550 F.3d 430, 439 (5th Cir. 2008) (“‘Consent’ induced by an officer’s misrepresentation is ineffective.”); *United States v. Hardin*, 539 F.3d 404, 425 n.12 (6th Cir. 2008) (defining a “valid consent” as “‘uncontaminated by duress, coercion, or trickery’” (quoting *United States v. Jones*, 641 F.2d 425, 429 (6th Cir. 1981))); *United States v. Sheard*, 473 F.2d 139, 152 (D.C. Cir. 1972) (Wright, J., dissenting) (“Moreover, under elementary principles of law consent obtained by misrepresentation is no consent at all.”); *Jeffcoat v. United States*, 551 A.2d 1301, 1304 n.5 (D.C. 1988) (“To be valid, consent must be

If a “yes” procured through lies is a valid consent, then victims of larceny by trick haven’t been stolen from (theft requires the taking of property without consent); victims of trespass by deception haven’t been trespassed upon (trespass requires entry onto property without consent); victims of fraud who enter into a contract on false pretenses are still bound by their contract (because they consented); and victims of battery by deception lose their claim as well (because battery requires nonconsent).³³

When the law genuinely protects consent, it not only protects against force; it protects against fraud as well. “Fraud,” as Judge Learned Hand put it, “will vitiate consent as well as violence.”³⁴ How could it be otherwise? You give your savings to Bernie Madoff on his representation that he is a financial investor. It turns out he just pockets your money. If you “consented” to his taking your money, then there has been no theft. But of course there has been theft (theft-by-deception).

Yes, people can consent on the basis of incomplete information. They do so all the time. But when lies induce you to agree to something you otherwise wouldn’t have agreed to, you are differently situated. Every Ponzi scheme prosecution would have to be dismissed if a defendant could say, “Consent was obtained; it cannot be discounted solely by virtue of its imperfection.”

Does “the turn to agency” somehow help with this problem? It’s hard for me to see how. Presumably people don’t stop being “agents” when they leave the bedroom. The concept of “agency” is intended to capture, as Professor Tuerkheimer puts it, the reality that “the self is socially constructed in a ‘context of intersecting power inequalities’” and hence “operates under

informed and not the product of trickery, fraud, or misrepresentation.”); *McClellan v. Allstate Ins. Co.*, 247 A.2d 58, 61 (D.C. 1968) (“[C]onsent obtained on the basis of deception is no consent at all.”); *Johnson v. State*, 921 So. 2d 490, 508 (Fla. 2005) (per curiam) (“Consent obtained by trick or fraud is actually no consent at all”); *Kreag v. Authes*, 28 N.E. 773, 774 (Ind. App. 1891) (“Consent obtained by fraud is, in law, equivalent to no consent.”); *Chatman v. Giddens*, 91 So. 56, 57 (La. 1921) (“Consent induced by fraud is no consent at all.”); *Farlow v. State*, 265 A.2d 578, 580 (Md. Ct. Spec. App. 1970) (“Consent . . . obtained by fraud . . . is the same as no consent so far as trespass is concerned.”); *Murphy v. I.S.K.CON of New England, Inc.*, 571 N.E.2d 340, 352 (Mass. 1991) (“Of course, if consent is obtained by fraud or duress, there is no consent.”); *Dellavecchio v. Hicks*, No. FD-04-1038-90, 2006 WL 727770, at *3 (N.J. Super. Ct. App. Div. Mar. 23, 2006) (per curiam) (“Consent given by virtue of fraud is no consent at all.”); *State v. Ortiz*, 584 P.2d 1306, 1308 (N.M. Ct. App. 1978) (“[A] consent obtained by fraud, deceit or pretense is no consent at all.”); *Lawyer v. Fritcher*, 29 N.E. 267, 268 (N.Y. 1891) (“If the plaintiff’s consent was obtained by defendant through fraud it was void, for fraud vitiates all contracts and all consents.”); *People v. De Leon*, 16 N.E. 46, 48 (N.Y. 1888) (“The consent of the prosecutrix, having been procured by fraud, was as if no consent had been given”).

33. For further sources, see Rubinfeld, *supra* note 3, at 1377 & nn.12-14, 1399 n.136.

34. *NLRB v. Dadourian Export Corp.*, 138 F.2d 891, 892 (2d Cir. 1943).

meaningful constraints.”³⁵ But this social construction of the self, along with these meaningful constraints, surely exists outside the domain of sex.

In fact, “power inequalities” are presumably at least as constraining, for many individuals, in the economic realm as they are in the sexual realm. If these inequalities and constraints somehow militate in favor of recognizing a person’s consent as valid even when she has been lied to, strange results follow. Consider how odd it would be to say, of a group systematically or structurally disempowered in society, that in order to protect and respect their agency, the law will honor their “consent” to give away their property or allow people into their homes even when that consent has been procured by lies. If a bank sets up shop in a poor neighborhood and begins taking people’s money by lying to them about when or whether they’ll be able to get it back, saying “[c]onsent was obtained; it cannot be discounted solely by virtue of its imperfection” would not seem very respectful of their agency. *If* rape were really defined as sex without consent (in the same way that theft is defined as the taking of property without consent, and trespass as the entry onto property without consent), protecting people’s “agency” would seem to point not against, but in favor of recognizing rape-by-deception.

Often in her essay, Professor Tuerkheimer argues the case against rape-by-deception simply by reiterating an intuition most people share: that people who lie in order to have sex are doing something wrong, but not committing rape. “There are plenty of names for people who behave like this,” says Tuerkheimer. “But, barring additional facts, ‘rapist’ is not among them.”³⁶

I sympathize with this intuition. My whole article is written to explain it. The problem is that Professor Tuerkheimer never really squares that intuition with her definition of rape.

Similarly, I share Professor Tuerkheimer’s basic thought that the “wrong” inflicted through sex-by-deception is “qualitatively different”³⁷ from the wrong inflicted through rape. Again, my whole article is an effort to explain that thought. The difficulty that we have not wanted to face for a very long time is that this “qualitative[] differen[ce]” cannot be captured by the idea of consent, which is vitiated by both force and fraud alike.

I’d like to mention just one more thing in connection with Professor Tuerkheimer’s reply: her statement that on my definition of rape, “extreme amounts of force” are “required for sex to be rape.”³⁸ That’s not true.

35. Tuerkheimer, *supra* note 23, at 338 (quoting Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 806 (1999)).

36. *Id.* at 345.

37. *Id.*

38. *Id.* at 337.

(Professor Dougherty reads me correctly on this point.³⁹) On my view, as stated above, a person who obtains another's sexual submission through *any kind of force or threat of force* commits rape. Such force can include not only an assault of any kind, but physical restraint of any kind—drugging, locking the victim up, holding the victim down, threatening any of these, abusing an unconscious body, and so on—nor is any resistance required.

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Let me turn now to Professor Falk's reply.⁴⁰ Professor Falk is one of the leading scholars in this field. Like everything she writes in this area, her strong reply to my article is supported by an expert knowledge of the law, sound policy judgment, and a keen awareness of rape law's failures (past and present) to protect women. Nevertheless, I think she misconstrues or misrepresents my argument in some basic ways.

Much of Professor Falk's reply is devoted to the claim that if, as I argue, force is a necessary element of rape, there would not be "much rape law left," that "traditional categories of rape and new, evolving categories of rape would be eliminated," and that there would be a "rolling back of decades of rape reform, leaving potential victims unprotected from many types of sexual exploitation."⁴¹

In a narrow sense, I think I know what Professor Falk means by these statements. If by "new, evolving categories of rape," Professor Falk is referring to rape-by-deception—which several states today purport to criminalize and which at least one country does criminalize,⁴² even though it remains generally rejected in America—she's absolutely right that my argument cuts against it. But Professor Falk seems to have a much broader claim in mind, which isn't right. In this broader claim, my view apparently rips from the statute books laws against marital rape, date rape, and a host of other sexual offenses prohibited under a variety of names.

I'll get to marital rape and date rape in a moment. But as to the host of other sexual offenses, I completely agree with Professor Falk when she says that "the once-unitary common law crime of rape, with its heavy reliance on force, has given way to a vast array of criminal statutes differing in coverage and degrees of severity," "variously labeled rape, sexual assault, sexual battery,

39. See Dougherty, *supra* note 5, at 324-25.

40. See Patricia J. Falk, *Not Logic, but Experience: Drawing on Lessons from the Real World in Thinking About the Riddle of Rape-by-Fraud*, 123 YALE L.J. ONLINE 353 (2013).

41. *Id.* at 354, 356, 359.

42. See Rubinfeld, *supra* note 3, at 1375 n.1 (citing Israeli cases).

and criminal sexual penetration.”⁴³ My account of rape, however, is not opposed to this “vast array” of different crimes.

My article never says that there can be only one sex crime—rape. On the contrary, as I say repeatedly throughout my article, states are free to (and I think they should) criminalize many sex acts that aren’t rape.⁴⁴ Professor Falk’s reasoning is like saying that someone who argues that murder does not include negligent homicide is against the criminalization of negligent homicide.

Consider—this is one of Professor Falk’s examples—a statute making it sexual assault in the third degree for prison guards to have sex with inmates,⁴⁵ regardless of proof of nonconsent or force. I’m in favor of such a law. (As an Assistant United States Attorney, I was involved in such a case years ago; the guard admitted the sex act but claimed consent and was never prosecuted.) Or consider a man who has sex with a prostitute with no intention of ever paying (a form of sex-by-deception), or an employer who conditions a promotion on an employee’s having sex with him. These acts should be illegal, too. And although Professor Kim Buchanan is doing interesting work that cuts the other way,⁴⁶ I’ve always thought it should be against the law for people who know they have a serious sexually transmissible disease to have sex without disclosing that fact. I have no problem with statutes making any of these (or many other) sex acts unlawful, either as crimes or torts or both; I just don’t believe that these are acts of rape.

It’s simply a confusion to think that my account of rape would somehow preclude punishment of these offenses. No “rollback” of these or other sex offenses is implied by my article.

Now to marital and date rape. In the rest of her reply, Professor Falk basically zeroes in on three words in my article and builds a massive case around them. On the first page of her reply, she writes, “Rubinfeld’s critical foundational claim—that deceptive sex ‘isn’t *that* bad’—is not empirically sound and is not respectful of the real harm experienced by victims.”⁴⁷ This statement of mine, she argues, is comparable to defenses of the marital-rape exemption: “a ubiquitous argument,” writes Falk, “in favor of the marital exemption was, in effect, that rape within marriage was ‘not *that* bad.’”⁴⁸ Similarly, people who disparage the importance of rapes committed by people

43. Falk, *supra* note 40, at 357 (footnote omitted).

44. See, e.g., Rubinfeld, *supra* note 3, at 1416-17 & n.185, 1435 n.227, 1440.

45. See Falk, *supra* note 40, at 357.

46. See Kim Shayo Buchanan, HIV Criminalization: Sex and Consent (Oct. 25, 2013) (unpublished manuscript) (on file with author).

47. Falk, *supra* note 40, at 354 (footnote omitted).

48. *Id.* at 362.

known to the victim take the view “that the harm to those who are raped by their social acquaintances and intimates—the vast majority of rape survivors—is not *that* bad.”⁴⁹ Thus I am a defender not only of sexual deception, but of marital and date rape as well. Above all, Falk criticizes me for failing to see that deception “in intimate relationships can cause lifelong emotional scars and permanent pain, including a lifelong inability to be intimate because of an inability to trust.”⁵⁰

There are several things about this line of argument that I have trouble with.

To begin with, it’s a small point, but I do say a little more in my article than the three words Professor Falk quotes. For example: “Deceiving people into sex can be particularly invidious. It can be demeaning and humiliating. It can impose substantial risks and fateful consequences, including pregnancy or illness, on people without their genuine consent.”⁵¹ It seems to me that these sentences go at least some way toward recognizing the harms of sexual deception. At least they might give readers a more complete picture of what I was saying—and a better understanding of what I meant when I said that sexual deception “isn’t *that* bad,” which came in a paragraph raising the hypothetical of a criminal justice system that chose to legalize all murder and theft.⁵²

Moreover, the guilt-by-association logic of Professor Falk’s argument here is puzzling to me. What I say about sex-by-deception is very little different from what most people, including many feminists, say. Professor Tuerkheimer, for example, is just as clear on this point as I am: as noted earlier, she agrees that there is a “qualitative[] differen[ce]” between rape and sex-by-deception such that most people who lie on their way to sex should not be covered by rape law.⁵³ Until the day when rape law covers every sex act we might find objectionable, there will necessarily be some objectionable sex acts of which the law says, maybe they’re bad, but they’re not *that* bad.

Indeed, Professor Falk says the same thing herself. Reading the early passages in her reply, you might suppose that Professor Falk was going to argue for a thoroughgoing criminalization of rape-by-deception. Not so.

49. *Id.* at 364 (footnote omitted).

50. *Id.* at 361-62 (quoting Deana Pollard Sacks, *Intentional Sex Torts*, 77 *FORDHAM L. REV.* 1051, 1071 (2008) (footnotes omitted)).

51. Rubinfeld, *supra* note 3, at 1413.

52. *Id.* at 1416.

53. Tuerkheimer, *supra* note 23, at 345.

Unlike Professor Dougherty, it turns out she's unwilling to criminalize most sexual deception. Instead, she advocates "line-drawing."⁵⁴

For example, Falk never says that a person commits rape if he lies, say, about his fidelity or, as in the Israeli case with which I began my article, by misrepresenting his religion or marital status. It *is* rape, she says, when a doctor or psychotherapist tricks a patient into believing that sex is a proper medical treatment, and so too when other professionals or power-holders manipulate their positions of trust.⁵⁵ But Professor Falk is much more reticent about rape law "infringing" on what she calls "purely social or romantic relationships."⁵⁶ And she is clear that a deception perpetrated by, say, "cosmetics" or "hair dye" would not count.⁵⁷

It's not plain to me what the basis of this "line-drawing" is. If the test is the extent to which victims run the risk of "lifelong emotional scars and permanent pain, including a lifelong inability to be intimate because of an inability to trust,"⁵⁸ cheated-on spouses would seem to have among the strongest claims. Adultery was decriminalized decades ago;⁵⁹ is it now to be re-criminalized under the name of rape?

But my objection is not to line-drawing as such or even to the absence of clear principles explaining those lines. Although Professor Falk freely admits she has no general principle or "solution to the riddle,"⁶⁰ people don't always need to argue from general principles.

My point is simply this: *wherever* Professor Falk—or the law—draws these lines, the lines say, with respect to all the sex-by-deception deemed not to be rape, such deception "isn't *that* bad." Some deception, argues Falk, is "so coercive or so illegitimate" that rape law should criminalize it.⁶¹ As to the rest, it's bad, but apparently "not *that* bad."

Ultimately, it's not very interesting that Professor Falk is herself obliged to take the "not *that* bad" position as to some sex acts where the victim has been manipulated or pressured into sex in a way we object to, but aren't prepared to criminalize. Everyone is obliged to take that position. The real issue here goes to our basic understanding of what rape is.

54. Falk, *supra* note 40, at 365-68.

55. *Id.* at 365-66.

56. *Id.* at 367.

57. *Id.* at 368.

58. *Id.* at 361-62 (quoting Sacks, *supra* note 50 (footnotes omitted)).

59. See Rubinfeld, *supra* note 3, at 1384.

60. Falk, *supra* note 40, at 365.

61. *Id.* at 368.

Is a seventeen-year-old girl raping a man when she has sex with him, having secured his consent by lying about her age? I don't think so. Does Professor Falk think so? She doesn't mention this kind of example, and because she offers no principle, it's impossible to know. If she says it *is* rape, then we are back to what I said in response to Professor Dougherty: I admire the willingness to take an unpopular position, but in my view the example speaks for itself.

Let's assume, therefore, that Professor Falk agrees with me that this is *not* a case of rape. Why isn't it? Perhaps Professor Falk will say that the harm to the man isn't serious. He will not, she may say, bear "lifelong emotional scars and permanent pain."

Maybe so, but the harm to the man could still be extremely serious. Specifically, he may go to jail (in many states, sleeping with a minor is a strict liability offense). So if the threat of serious harm is supposed to be the key factor, that factor won't help Professor Falk explain why the seventeen-year-old girl hasn't committed rape. In reality, I think Professor Falk will have a very difficult time explaining why this situation is not rape. I understand, as the title of Professor Falk's reply suggests, that she wants to give "logic" a diminished role in rape law, but in the end I guess I still believe that it's a real problem when the law, or a position taken about what the law should be, can't be logically defended. And no, I don't think rape law gets an exemption from this requirement.

* * *

Finally, Professor Ramachandran's insightful critique.⁶² Ramachandran takes me to task on so many scores I can't summarize them all here. I do want, however, to say a few words about one of her main themes, the one she returns to at the end of her piece. The last paragraph of Professor Ramachandran's reply reads:

Above all, I think it bears repeating that rape subordinates women. Neither sexual autonomy nor physical self-possession captures this fact. But at least sexual autonomy, even the "thin" version of it, recognizes that sex is important for its social effects and cultural meaning. If law must make room for lofty abstractions, I'd suggest the one a little closer to earth.⁶³

62. See Gowri Ramachandran, *Delineating the Heinous: Rape, Sex, and Self-Possession*, 123 YALE L.J. ONLINE 371 (2013).

63. *Id.* at 388.

I agree with much of this passage, but it seems to me that the right to bodily self-possession does capture the deep connection between rape and the subordination of women. At least it was supposed to.

It's pretty uncontroversial, I would have thought, that a cardinal feature of women's subordination over the centuries—perhaps the defining feature—has been the notion that women's bodies don't, fundamentally, belong to them. Rather, women's bodies exist to serve men, to be disposed of, given away, taken, corrected, ordered around, and governed by men—and of course those bodies should look the way men want them to look. Women's bodies are there for the taking: this kind of thinking has been a definitive feature of the crime of rape, as it has been engaged in by men against women, for about as long as recorded history describes it. In this way, the assertion that women's bodies belong to men sums up what might be called the ideology of rape and, in a sense, the whole history of women's subordination.⁶⁴

By protecting bodily self-possession, then, rape law would in fact protect a core right—perhaps *the* core right—the deprivation of which has always been definitive of women's subordination. So no, I don't think it's correct to say that the right of self-possession fails to capture the deep connection between rape and the subordination of women.

This same principle, moreover, reveals the profound links between rape law and the doctrine of *Roe v. Wade*.⁶⁵ Both stand for the idea that women have a fundamental right to bodily self-possession—a right not to have their bodies physically taken over against their will.

The challenge, then, for rape law and for theories of rape law is to give content to the fundamental right we have to the possession of our own bodies. Articulating this right is not trivial. Our possession of our bodies is not well understood in ordinary propertarian terms, as if the body were like a car a person happens to own. Moreover, the right to self-possession plainly isn't a

64. See, e.g., Nomi Maya Stolzenberg, *Marriage as a Legal Metaphor: Commentary on Rachel Adler*, 7 S. CAL. REV. L. & WOMEN'S STUD. 203, 206 n.17 (noting that under the law of coverture, "[a] woman's body belong[ed] to her husband") (quoting *A Brief Summary in Plain Language of the Most Important Laws Concerning Women*, in ON THE PROPERTY OF MARRIED WOMEN AND THE LAW OF DIVORCE 6 (Monckton Miles ed., 1975)); see also, e.g., Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 308 (1995) (referring to Susan Brownmiller's characterization of "rape as a widespread and violent effort to assert power and possession over women's bodies" (citing SUSAN BROWN MILLER, *AGAINST OUR WILLS: MEN, WOMEN, AND RAPE* (1975))); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 57 (1988) ("[W]hile women's bodies may continue to be 'materially connected' to others as long as they are women's bodies, they need not forever be *possessed* by others. Our connection to the other is a function of our material condition; our possession by the other, however, is a function of patriarchy.").

65. 410 U.S. 113 (1973).

right to “control” your body in the sense of being able to do whatever you please with it; your physical liberty is restricted in a hundred thousand ways.⁶⁶ How, then, can we give content to the fundamental right of self-possession? That’s the question my article is trying to answer.

(Yes, in the last paragraph, I switched to gender-neutral language, referring not to women’s bodies, but to “our” bodies, “your” liberties, and “the fundamental right of self-possession.” I’m not trying to hide that switch. Notwithstanding the deep connection between rape and women’s subordination, I reject the idea that rape law should, in its basic understanding of the offense, dismiss, put aside, or systematically undercount—as Professor Falk’s reply might cause readers to do⁶⁷—male victims of the crime.)

I think it’s possible that Professor Ramachandran doesn’t see the right to self-possession as connected to women’s subordination because of another failing she finds in it. She says that my account of rape views sex only as a “physical experience,” shorn of its social meanings. “[A]t the very least,” she writes, “we should acknowledge that sex is important because of its social

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66. Professor Ramachandran makes this argument very effectively in her essay, refuting the idea that people have a right to full or exclusive control over their own bodies. See Ramachandran, *supra* note 62, at 378-79. Unfortunately, she seems to believe that I was advocating such a right. See *id.* at 378 (arguing that the right to “self-possession,” on my view, is the “right to exclusive control over the use of one’s body” and hence that self-possession is unattainable because “[w]e don’t and can’t have exclusive control of the use of our bodies just as we aren’t and can’t be free to do whatever we want sexually”). That was certainly not my intention. See Rubinfeld, *supra* note 3, at 1426 (“[N]o one fully controls his body.”); *id.* (“You lose self-possession not when another person merely wounds, embarrasses or constrains you, but when the other actually takes over your body—exercising such complete and invasive physical control over it that your body is in an elemental sense no longer your own.”).
67. Professor Falk says that “the vast majority of rape victims are women,” citing a report observing that “[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.” Falk, *supra* note 40, at 359 & n.34 (quoting MICHAEL PLANTY ET AL., U.S. DEP’T OF JUSTICE, FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010, at 3 (March 2013)). The horrendous rates at which women are raped in the United States—it is estimated that one in six women are victimized by rape or attempted rape at some point in their lives, see Nat’l Inst. of Justice, *supra* note 19, at 7—cannot be overemphasized, but as is common in the reporting of rape statistics, Professor Falk has here omitted prison rape. When prison rapes are counted, it’s no longer clear that the vast majority of victims are women, even if it’s not the case, as some claim, that the majority are actually men. See, e.g., Christopher Glazek, *Raise the Crime Rate*, N+1, Jan. 26, 2012, <http://nplusonemag.com/raise-the-crime-rate> (“The Justice Department now seems to be saying that prison rape accounted for the majority of all rapes committed in the US in 2008, likely making the United States the first country in the history of the world to count more rapes for men than for women.”).

meaning and implications, not only for the physical experience. Any definition of rape that fails to acknowledge this is bound to fall short.”⁶⁸

But it isn’t true that the right of self-possession views sex as important “only for the physical experience.” Earlier in her reply, Professor Ramachandran perceptively observes that as I define rape and self-possession, the truth is that “having or not having self-possession is really a question of social meaning.”⁶⁹ She is right on that point—and therefore misses the mark, I think, when she suggests the opposite later on (that self-possession “acknowledges that sex is important . . . only in physical terms” and therefore fails to consider sex’s “social meaning and implications”⁷⁰).

Rape, as I understand it, requires force (actual or threatened). But while the use of force in a given case can be understood in purely physical terms, the thesis that rape is a violation of self-possession cannot be. That rape is a possessory act—a taking of possession of another’s body—is not and cannot be wholly captured by a merely physical description. The mastery of another’s person involved in every act of rape is not only physical; it’s also a matter of social, cultural, and psychological meanings—especially what it means to have sex forced on you against your will.

But in saying all this, I’m avoiding many of Professor Ramachandran’s other trenchant criticisms. The reason I’m avoiding them is simple: I’m not sure I could answer them all. Ultimately, Professor Ramachandran’s fascinating and powerful work on rights in the body may simply be too different from my right of bodily self-possession to bring the two conceptions into line.

In an important article, Professor Ramachandran has argued that “there should be no one-to-one mapping between the physical borders of the organic, integrated human body and the legal borders of the rights derived from it.”⁷¹ On her view, “the organic, integrated body” should not mark “*any* border between what we have human or fundamental rights in and what we do not.”⁷² For this reason, she is against “any monolithic right to bodily integrity.”⁷³ Instead, she suggests that the law should take “a proceduralist approach,” protecting bodies when or to the extent that doing so “protects the public

68. Ramachandran, *supra* note 62, at 387.

69. *Id.* at 384.

70. *Id.* at 385, 387.

71. Gowri Ramachandran, *Against the Right to Bodily Integrity: Of Cyborgs and Human Rights*, 87 DENV. U. L.R. 1, 2 (2009).

72. *Id.* at 4 (emphasis added).

73. *Id.* at 3.

interest in cultural velocity” and promote creative identity-formation.⁷⁴ For her, rape law should not try to articulate and enforce a fundamental right against forced bodily invasion as such; rather, the question raised by rape is “in what way does the right to refuse or consent to bodily intrusion and invasion promote the possibility of new and creative exercises of agency in the formation of identity?”⁷⁵

I agree with almost all of Professor Ramachandran’s thinking in the article just quoted, but my fundamental position, when it comes to rape, remains grounded—far too much, from her point of view—in the reality and centrality of the “organic, integrated body.” The idea of an inviolable right to self-possession does indeed take the body as marking a crucial legal “border.” To be sure, a legal borderline of any kind is an “abstraction,” but perhaps one “lofty abstraction” can be excused if, precisely because it’s mapped onto the body, it at least has the virtue of remaining relatively close to earth.

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74. *Id.* at 4, 44-45.

75. *Id.* at 40.