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Commonsense Consent

ABSTRACT. Consent is a bedrock principle in democratic society and a primary means through which our law expresses its commitment to individual liberty. While there seems to be broad consensus that consent is important, little is known about what people think consent is.

This Article undertakes an empirical investigation of people's ordinary intuitions about when consent has been granted. Using techniques from moral psychology and experimental philosophy, it advances the core claim that most laypeople think consent is compatible with fraud, contradicting prevailing normative theories of consent. This empirical phenomenon is observed across over two dozen scenarios spanning numerous contexts in which consent is legally salient, including sex, surgery, participation in medical research, warrantless searches by police, and contracts.

Armed with this empirical finding, this Article revisits a longstanding legal puzzle about why the law refuses to treat fraudulently procured consent to sexual intercourse as rape. It exposes how prevailing explanations for this puzzle have focused too narrowly on sex. It suggests instead that the law may be influenced by the commonsense understanding of consent in all sorts of domains, including and beyond sexual consent.

Meanwhile, the discovery of "commonsense consent" allows us to see that the problem is much deeper and more pervasive than previous commentators have realized. The findings expose a large—and largely unrecognized—disconnect between commonsense intuition and the dominant philosophical conception of consent. The Article thus grapples with the relationship between folk morality, normative theory, and the law.

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INTRODUCTION

When Bill Cosby stood trial for sexually assaulting his former mentee Andrea Constand, the jury was tasked with deciding whether Constand had given consent.¹ The first jury deadlocked on this question, resulting in a mistrial.² The second jury, also flummoxed by the question, submitted an inquiry to the judge asking for the legal definition of consent. The judge replied that the jury had already been given the legal definition of the crime – penetration “without the complainant’s consent”³ – and that he could supply no further guidance.⁴ “[T]he jury will decide what consent means to them,” he instructed.⁵

This Article asks how the public understands the concept of consent. Consent is a pivotal concept in many areas of the law, from police searches, to contracts, to medical malpractice, to rape. “[C]onsent turns a trespass into a dinner party; a battery into a handshake; a theft into a gift; an invasion of privacy into an intimate moment; a commercial appropriation of name and likeness into a biography,” observes the legal theorist Heidi Hurd.⁶ Despite the prominent role consent plays in our moral and legal lives, little is known about what ordinary people, like the jurors in Cosby’s case, think consent actually *is*. This Article undertakes an empirical investigation of people’s commonsense understanding of when consent has been granted.

Under the standard philosophical account, consent is morally important because it expresses an agent’s autonomous will.⁷ Because consent is “intimately related to the capacity for autonomous action,”⁸ it must be given knowingly,

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1. See Jeannie Suk Gersen, *The Legal Meaning of the Cosby Mistrial*, NEW YORKER (June 18, 2017), <https://www.newyorker.com/news/news-desk/legal-meaning-of-the-cosby-trial> [https://perma.cc/2KPQ-XSD8].
 2. Maria Puente et al., *Bill Cosby Retrial, Day 13: Jury Adjourns for Night After Seeking Definition of Consent*, USA TODAY (Apr. 25, 2018, 10:07 AM), <https://www.usatoday.com/story/life/2018/04/25/bill-cosby-retrial-day-13-jury-begins-deliberations/548593002> [https://perma.cc/2ADC-BTZH].
 3. Pennsylvania defines “aggravated indecent assault” as penetration “without the complainant’s consent.” 18 PA. CONS. STAT. § 3125(a)(1) (2019).
 4. Puente et al., *supra* note 2.
 5. *Id.*
 6. Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 123 (1996).
 7. See, e.g., *id.* at 124 (“[C]onsent is normatively significant precisely because it constitutes an expression of autonomy”); Deborah Tuerkheimer, *Rape on and off Campus*, 65 EMORY L.J. 1, 42 (2015) (“To consent to sex is indeed to assert agency Likewise, for women to *not consent* to sex is to assert agency.”).
 8. Larry Alexander, *The Moral Magic of Consent (II)*, 2 LEGAL THEORY 165, 165 (1996).

competently, and freely. Consent is defective – it is mere *assent*⁹ – if it is marred by factors that compromise autonomous decision-making, such as coercion (undermining freedom), incapacity (undermining competence), or fraud (undermining knowledge).¹⁰ When such factors are present, the agent has not executed a valid waiver of her rights, and any intrusion into her person or property should be forbidden. This is why, in most cases, sex agreed to at gunpoint is rape;¹¹ a will signed by a person with apparent dementia is voidable;¹² and a faux doctor who lays his hands on another’s body for a “medical exam” has committed battery.¹³

This Article asks whether folk intuition accords with this canonical view of consent. The startling answer, it uncovers, is no – not by a long shot. While laypeople largely agree that coercion and incapacitation invalidate consent, they believe that deception does not. Indeed, this Article reveals that large majorities of American survey respondents believe that victims of intentional fraud, who are tricked into agreeing to an offer they would otherwise refuse, nonetheless grant valid, morally transformative consent.¹⁴ This finding holds true in more than two dozen contexts, including sex, surgery, participation in medical research, warrantless searches by police, and contracts.

This Article thus offers the first comprehensive account of *commonsense consent*: the layperson’s intuitive sense of what consent is. It argues that we have a distinct folk theory of consent, which can be differentiated from other folk theories about harm and general moral wrongness. It advances the core claim that

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9. This Article uses the terms “assent,” “agreement,” and “acquiescence” interchangeably to refer to simple empirical acquiescence, or what the theorist Peter Westen calls “factual consent.” See PETER WESTEN, *THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT* 16-17 (2004); *infra* text accompanying notes 173-174. *But see* Nancy S. Kim, *Relative Consent and Contract Law*, 18 NEV. L.J. 165, 178 (2017) (noting that “courts and commentators often use the terms ‘assent’ and ‘consent’ interchangeably,” particularly in contract law).
 10. *See, e.g.*, ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* 126 (2003).
 11. *See, e.g.*, Kimberly Kessler Ferzan & Peter Westen, *How to Think (Like a Lawyer) About Rape*, 11 CRIM. L. & PHIL. 759, 769-70 (2017) (“[N]o jurisdiction would claim – or has ever claimed – that assent extracted at the point of a gun suffices to constitute a defense to rape.”).
 12. *See, e.g.*, *Hernandez v. Banks*, 65 A.3d 59, 66-67 (D.C. 2015) (holding that a contract with a person who “by reason of mental illness or defect . . . is unable to understand in a reasonable manner the nature and consequences of the transaction” is “voidable” if “disaffirmed or avoided by the incapacitated party” (quoting RESTATEMENT (SECOND) OF CONTRACTS § 15 (AM. LAW INST. 1981))).
 13. RESTATEMENT (SECOND) OF TORTS § 892B(2) cmt. e, illus. 7 (AM. LAW INST. 1977).
 14. Consent is morally transformative in that it renders normally wrongful conduct morally permissible. Legally, it transforms otherwise-illicit conduct into lawful conduct. *See Hurd, supra* note 6, at 121 (“[W]hen we give consent, we create rights for others.”).

because this folk theory of consent accommodates significant forms of fraud, it contradicts prevailing normative theories, which conceive of consent's purpose as protecting individual autonomy.

The psychological phenomenon laid out in this Article carries several implications for the law. First, it introduces a new explanation for the longstanding legal puzzle about why the law refuses to treat fraudulently procured consent to sex as rape, or even as a crime at all. This Article details how in the vast literature on this topic, the puzzle is nearly always conceptualized too narrowly as a problem of rape exceptionalism.¹⁵ This Article instead suggests that judges may be influenced not (just) by patriarchal sexual moralism or sexist attitudes toward women but *also* by the commonsense understanding of consent, which conceives of deception as compatible with autonomous decision-making in all sorts of domains, including and beyond sex. Armed with this novel account of our moral psychology, we see that reformers who seek to bring the law in line with the canonical view that deception invalidates consent are up against more than just patriarchal attitudes. They are up against people's general mental representation of consent.

However, the puzzle of why the law tolerates fraudulently procured sex is now the least of our worries. The findings reported here show that the problem is much deeper and more pervasive than previously realized. People think patients give valid consent to surgery when their doctors lie to them and that contracts signed as a result of fraud are binding. They believe victims of deception act autonomously and voluntarily in numerous ways. These findings suggest that there is a large—and largely unrecognized—disconnect between commonsense intuition and the canonical conception of consent that appears in myriad areas of law.

This disconnect matters. Laypeople sit on juries and on campus sexual-misconduct panels. They are frequently entrusted to make decisions in cases involving consent, with little guidance from the law. Laypeople are also defendants in criminal cases. They have a right to be put on notice that their conduct is unlawful “in language that the common world will understand.”¹⁶ This Article argues that one cannot craft an effective jury instruction or a transparent criminal statute without taking into consideration the commonsense understanding of consent.

Finally, the findings suggest that laypeople who are the victims of deceptive practices may fail to complain or otherwise assert their rights because they mistakenly believe they have waived their rights by granting valid consent. Even if they do come forward, their peers may feel little moved to vindicate their rights

15. See *infra* notes 70–82 and accompanying text.

16. *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

if they, too, subscribe to a theory of consent that departs from the canonical conception.

The Article proceeds as follows. Part I introduces the longstanding puzzle of why the law sometimes departs from the canonical rule that fraud defeats consent. It shows that previous commentary has primarily understood these deviations under the rubric of rape exceptionalism and thus has understated the depth of the rift. Part II presents data showing that, among laypeople, many cases of fraud are seen as compatible with consent. Part III uses techniques from moral psychology and experimental philosophy to demonstrate that this attitude represents a deep moral belief, not merely a superficial disagreement about the term *consent*. Laypeople genuinely believe that a meaningful waiver has been executed when an offeree¹⁷ accepts a proposal as a result of deception. Furthermore, they react differently when an offeror uses coercion, as opposed to deception, to induce an offeree to acquiesce, suggesting that there is something special about deception that makes it seem uncorrupting of consent. Part IV investigates various hypotheses of why people think consent is compatible with deception. It uncovers a remarkable parallel between commonsense consent and the legal distinction between “fraud in the factum” (in which the lie pertains to the nature of the activity itself) and “fraud in the inducement” (in which the lie pertains to a tangential matter). Although judges, legal scholars, consent theorists, and reformers have roundly criticized this common-law doctrine, it appears to comport with commonsense morality.

But, as the remainder of this Article recognizes, surveying the public tells us what people think; it does not necessarily tell us what is morally right or what the law should be. Part V synthesizes the empirical findings to provide a descriptive account of the folk theory of consent. Part VI draws out the ways in which this commonsense intuition aligns and misaligns with the legal conception of consent. Finally, Part VII asserts that commonsense consent matters normatively—not because the law should track public opinion, but because laypeople must make legal decisions about consent and currently receive little guidance on how to do so. An understanding of commonsense consent can thus aid lawmakers, judges, and others working to craft and disseminate the law.

17. This Article uses the terms “offeree” (as opposed to “survivor” or “consent giver”) and “offeror” (as opposed to “perpetrator” or “consent seeker”) so as not to beg the question whether consent is present in these cases, which is, of course, precisely the subject of this Article’s empirical inquiry. The use of these neutral terms should not be taken to imply that other terms (e.g., “perpetrator,” “survivor”) are inapt. See Alexandra Brodsky, “Rape-Adjacent”: *Imagining Legal Responses to Nonconsensual Condom Removal*, 32 COLUM. J. GENDER & L. 183, 184 n.3 (2017) (collecting sources that discuss the limiting functions of “victim” and “survivor”).

I. DECEPTION AND CONSENT IN LAW: A PUZZLE

Under the canonical view, material deception vitiates consent.¹⁸ A doctor who secures a patient's agreement to undergo surgery by lying about the procedure's potential side effects has not obtained valid authorization to operate.¹⁹ A research subject who agrees to take part in a study due to misrepresentations made by the investigator has not consented to her participation in research.²⁰ A busybody who gains entry to a homeowner's property by posing as a meter reader has trespassed.²¹

The notion that deception thwarts autonomy dates back at least to Aristotle²² and is often associated with the work of Immanuel Kant.²³ In law, the canonical

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18. *E.g.*, *McClellan v. Allstate Ins. Co.*, 247 A.2d 58, 61 (D.C. 1968) (“Consent implies knowledge on the part of the person giving consent, and consent obtained on the basis of deception is no consent at all.” (footnote omitted)); *Kreag v. Authes*, 28 N.E. 773, 774 (Ind. App. 1891) (“Consent obtained by fraud is, in law, equivalent to no consent.”).
 19. *See, e.g.*, *Canterbury v. Spence*, 464 F.2d 772, 787 (D.C. Cir. 1972) (requiring physicians to communicate to patients “the inherent and potential hazards of the proposed treatment”); *Duncan v. Scottsdale Med. Imaging, Ltd.*, 70 P.3d 435, 440 (Ariz. 2003) (en banc) (“[I]f a patient’s consent is obtained by a health care provider’s fraud or misrepresentation, a cause of action for battery is appropriate.”).
 20. *See infra* note 150. This is why researchers planning to deceive participants must apply for a “waiver of consent” under the federal regulations governing human subjects research. *See* 45 C.F.R. § 46.116(f) (2020) (providing that an institutional review board (IRB) may approve research that leaves subjects unaware of some or all of the elements of informed consent (as is the case in most research involving deception), so long as the research meets the criteria for a waiver or alteration of consent); *see also Informed Consent FAQs*, U.S. DEP’T HEALTH & HUM. SERVS., <https://www.hhs.gov/ohrp/regulations-and-policy/guidance/faq/informed-consent/index.html> [<https://perma.cc/69MX-R7ZX>] (describing the regulations that apply to an IRB “waiver of alteration of informed consent or parental permission”).
 21. *See, e.g.*, *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1352 (7th Cir. 1995).
 22. “It is commonplace, going back at least to Aristotle, to think consent (or ‘voluntariness,’ a sister concept) as a function of some combination of understanding and freedom from coercion.” Brian H. Bix, *Contracts*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 251, 253 (Franklin G. Miller & Alan Wertheimer eds., 2010) (citing ARISTOTLE, *Nicomachean Ethics bk. III, in 2 THE COMPLETE WORKS OF ARISTOTLE* 1729, 1752–55 (Jonathan Barnes ed., 1984)).
 23. *See, e.g.*, CHRISTINE M. KORSGAARD, *CREATING THE KINGDOM OF ENDS* 295 (1996) (“According to Kant, you treat someone as a mere means whenever you treat him in a way to which he could not possibly consent Kant’s criterion most obviously rules out actions which depend upon force, coercion, or deception for their nature, for it is of the essence of such actions that they make it impossible for their victims to consent.” (footnote omitted)); WERTHEIMER, *supra* note 10, at 127 (“We can also understand the value of consent and autonomy in terms of Kant’s formula of humanity.”); Dan W. Brock, *Philosophical Justifications of Informed Consent in Research*, in *THE OXFORD TEXTBOOK OF CLINICAL RESEARCH ETHICS* 606, 606 (Ezekiel J.

principle that “consent induced by fraud is no consent at all”²⁴ has been operative for well over a hundred years.²⁵ As early as 1881, courts recognized that feeding a person chocolates sprinkled with poison was no less a battery than shoving the toxic powder down her throat,²⁶ and that allowing a fake doctor onto your property for a house call did not preclude a claim in trespass.²⁷ In 1888, a New Yorker named John De Leon was convicted of kidnapping when he tricked a young woman into boarding a steamship to Panama on the promise that a job as a governess to a Panamanian family awaited.²⁸ In fact, the defendant intended to employ her as a sex worker in a brothel.²⁹ The court reasoned that the young woman’s consent to board the ship was negated by De Leon’s deceit.³⁰ “[T]he law has long considered fraud and violence to be the same,” the court explained, holding that the defendant had violated New York’s abduction statute.³¹

These consent-by-deception cases are based on sound reasoning. A person who is deceived about a fact that is the basis for her decision-making is not able to exercise her autonomy.³² She cannot determine whether the proposed activity aligns with her values and preferences because she is misinformed about what the proposed activity entails.³³ As the legal theorist Joel Feinberg once explained, “One’s ‘choice’ is completely involuntary . . . when through ignorance one chooses something other than what one means to choose, as when one thinks

Emanuel et al. eds., 2008) (“Philosophical conceptions of autonomy derive largely from the work of Immanuel Kant . . .”).

24. *Chatman v. Giddens*, 91 So. 56, 57 (La. 1921); see Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1376-77 n.11 (2013) (collecting cases).
25. Rubenfeld, *supra* note 24, at 1372 (“[A]s courts have held for a hundred years in virtually every area of the law outside of rape, a consent procured through deception is no consent at all.”).
26. *Commonwealth v. Stratton*, 114 Mass. 303, 305 (1873) (stating that the deception “was a fraud upon her will, equivalent to force in overpowering it” and that this case is an example of “assault and battery without actual violence”); see also *State v. Monroe*, 28 S.E. 547, 548 (N.C. 1897) (affirming a conviction of assault and battery against a druggist who dropped diarrhea-inducing croton oil into a piece of candy as a prank against a customer).
27. *De May v. Roberts*, 9 N.W. 146, 149 (Mich. 1881); see also *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1352 (7th Cir. 1995) (listing “numerous modern counterparts” to *De May*).
28. *People v. De Leon*, 16 N.E. 46, 47 (N.Y. 1888).
29. David A. Fischer, *Fraudulently Induced Consent to Intentional Torts*, 46 CIN. L. REV. 71, 93 (1977) (citing *De Leon*, 16 N.E. at 46).
30. *De Leon*, 16 N.E. at 48 (“The consent of the prosecutrix, having been procured by fraud, was as if no consent had been given . . .”).
31. *Id.* (quoting *Regina v. Hopkins*, Car. & M. 254, 258 (1842)).
32. KORSGAARD, *supra* note 23, at 295 (“If I am deceived, I don’t know what I am consenting to.”).
33. See *supra* notes 7-8.

the arsenic powder is table salt, and thus chooses to sprinkle it on one's scrambled eggs."³⁴

Beyond autonomy, there are other reasons for law to treat deception as consent defeating. One is efficiency: as Richard Posner argues, fraud is best deterred by placing the burden of prevention on the deceivers, not the deceives. He writes: "[I]t is cheaper for the potential injurer not to commit fraud than for the victim to take measures of self-protection against it."³⁵ Another reason to treat deception as undermining consent is the principle that the law must "shield only those whose armor embraces good faith."³⁶ Treating consent as vitiated by deception prevents fraudsters from benefitting from their wrongful conduct.³⁷

Whatever the justification, scholars from diverse theoretical backgrounds – from libertarian thinkers such as Robert Nozick³⁸ and Ayn Rand³⁹ to feminist scholars such as Susan Estrich⁴⁰ and Robin West⁴¹ – agree that fraud cases

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34. Joel Feinberg, *Legal Paternalism*, in *PATERNALISM* 3, 7 (Rolf Sartorius ed., 1983) (emphasis omitted).
 35. RICHARD A. POSNER, *SEX AND REASON* 393 (1992). While it may be efficient for the law to deter overly trusting behavior, there are limits to what self-protection can accomplish. As David Bryden explains, "[S]elf-protection is less feasible today than it was in pre-industrial times, when one's business and social transactions were more likely to be with people who had a well-established reputation in the village." David P. Bryden, *Redefining Rape*, 3 *BUFF. CRIM. L. REV.* 317, 461 (2000). Thus, many believe that the law must deter fraudulent behavior so that people can trust one another in commercial transactions and beyond.
 36. *Ganley Bros., Inc. v. Butler Bros. Bldg. Co.*, 212 N.W. 602, 603 (Minn. 1927) (holding that parol evidence is admissible to show that a contract was induced by fraudulent representations notwithstanding the inclusion of a clause stating no reliance).
 37. See, e.g., Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 *J.L. & ECON.* 293, 298 (1975) ("The case against fraudulent misrepresentation is easy to make out. As a moral matter, a person should not profit by his own deceit at the expense of his victim; and as a general matter, no social good can derive from the systematic production of misinformation." (footnote omitted)); Gregory Klass, *The Law of Deception: A Research Agenda*, 89 *U. COLO. L. REV.* 707, 731 (2018).
 38. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA*, at ix (1974).
 39. Rand believed that deception involves an "indirect use of force: it consists of obtaining material values without their owner's consent, under false pretenses or false promises." AYN RAND, *The Nature of Government*, in *THE VIRTUE OF SELFISHNESS: A NEW CONCEPT OF EGOISM* 144, 150-51 (1964); see also Rubinfeld, *supra* note 24, at 1404 (noting that "libertarians object foundationally to both force and fraud").
 40. SUSAN ESTRICH, *REAL RAPE* 102-03 (1987).
 41. Robin West, *A Comment on Consent, Sex, and Rape*, 2 *LEGAL THEORY* 233, 239 (1996); see also Joan McGregor, *Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes: A Critical Reconstruction of Consent, Sex, and the Law*, 2 *LEGAL THEORY* 175, 199 (1996) ("Consent must be voluntary to have the moral force of changing the relationships in the world. It is not

should be treated as absence-of-consent cases. Indeed, scholars who write about the relationship between deception and consent tend to focus on harder questions, such as whether consent is undermined by failures to disclose or negligent misrepresentations.⁴² The intentional fraud cases are a yawn—“clear and obvious,” in the words of Onora O’Neill.⁴³

But there is a wrinkle. Even as the “principle is often stated, in broad and sweeping language, that fraud destroys the validity of everything into which it enters, and that it vitiates the most solemn contracts, documents, and . . . judgments,”⁴⁴ the reality is more complicated. In fact, the law occasionally deviates from the canonical rule and treats deception cases as consensual.

For example, in most states, it is not rape when sexual consent is procured by deception.⁴⁵ In most jurisdictions, it is not even a tort.⁴⁶ And, as Michele Lewis discovered in 2014, many states refuse to treat it as a crime at all. Lewis, a thirty-five-year-old nurse from New Jersey, had been in a relationship with a man who had lied to her about nearly everything: his name, his profession, his backstory, and his reasons for needing to borrow money.⁴⁷ It was not until the pair was engaged and Lewis was pregnant that she happened upon her fiancé’s wallet and discovered his true identity.⁴⁸ A quick web search revealed that he was a scam artist who had fathered thirteen children by six women, and that one of his former fiancées had written a book about his exploits, which included time served in prison for bigamy. Stunned, Lewis had an abortion and called the police. She hoped her ex-fiancé would be prosecuted for a sex crime, she later told

enough to get another person to utter the words. Deception or fraud, similarly to coercion, affects the voluntariness of an agent’s action.”).

42. See, e.g., Hugh Lazenby & Iason Gabriel, *Permissible Secrets*, 68 PHIL. Q. 265, 277-80 (2018).
43. Onora O’Neill, *Between Consenting Adults*, 14 PHIL. & PUB. AFF. 252, 269 (1985) (explaining that deceit precludes genuine consent).
44. *Sims v. Gernandt*, 459 S.E.2d 258, 261 (N.C. 1995) (Frye, J., dissenting) (citing 37 AM. JUR. 2D *Fraud and Deceit* § 8 (1968)); accord *Van Der Stok v. Van Voorhees*, 866 A.2d 972, 976 (N.H. 2005) (“[P]ositive fraud vitiates every thing—contracts, obligations, deeds of conveyance, and even the records and judgments of courts, incontrovertible as they are on every other ground.” (quoting *Jones v. Emery*, 40 N.H. 348, 350 (1860))).
45. See, e.g., 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, 1133 (2012) (stating that the use of deception to procure sex “is not proscribed in most states”).
46. Bryden, *supra* note 35, at 465 (“In most jurisdictions, sexual deception is not even a tort.”).
47. “*I Wanted Justice*”: *Con Victim Turns Focus to Changing Rape Law*, NBC NEWS (Jan. 25, 2015, 9:32 PM EST), <https://www.nbcnews.com/news/us-news/i-wanted-justice-con-victim-turns-focus-changing-rape-law-n291661> [<https://perma.cc/YJ87-H9WR>].
48. *Id.*

NBC News, because she wanted society to be “safe from predators like him.”⁴⁹ But in New Jersey, as in the vast majority of states, it is not sexual assault to con someone into having sex.⁵⁰

Another example of a doctrine that deviates from the canonical legal rule can be seen in the Fifth Amendment’s treatment of involuntary confessions. While other countries have outlawed deceptive interrogation tactics such as the “false-evidence ploy,” many jurisdictions within the United States permit police to lie to suspects about possessing evidence against them.⁵¹ Although confessions obtained via deception are often unreliable – false-evidence ploys have been shown to increase the risk of eliciting a false confession from an innocent suspect⁵² – the use of deceptive interrogation tactics persists in American interrogation rooms, suggesting that deception is not viewed as undermining suspects’ autonomous will.⁵³

Similarly, when it comes to warrantless consent searches, the Fourth Amendment prohibits police coercion but equivocates with respect to police deception. In 2017, a divided Eleventh Circuit panel held that “[t]he Fourth Amendment allows some police deception so long as the suspect’s ‘will was not overborne.’ Not all deception prevents an individual from making an ‘essentially free and unconstrained choice.’”⁵⁴ In the same vein, the Ninth Circuit distinguishes between “ruse entries” – where officers whose identities as government agents are plainly disclosed misrepresent their “purpose in seeking entry” – and “undercover entries” – where officers pose as civilians.⁵⁵ Ruse entries violate the Fourth

49. *Id.*

50. See Decker & Baroni, *supra* note 45, at 1133-41 (specifying the states that do treat consent procured through lies as sexual assault).

51. See, e.g., Katie Wynbrandt, Comment, *From False Evidence Ploy to False Guilty Plea: An Unjustified Path to Securing Convictions*, 126 YALE L.J. 545, 549 (2016).

52. See, e.g., Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791 (2006).

53. See, e.g., *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (finding that police fabrication of a coconspirator’s confession is “relevant” but “insufficient . . . to make [an] otherwise voluntary confession inadmissible”).

54. *United States v. Spivey*, 861 F.3d 1207, 1214 (11th Cir. 2017) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973)) (finding consent voluntary where officers entered the residence of a person suspected of credit-card fraud under the pretense of following up on a burglary the suspect had reported earlier).

55. *Whalen v. McMullen*, 907 F.3d 1139, 1147 (9th Cir. 2018).

Amendment, while undercover entries do not.⁵⁶ These doctrines represent a departure from the canonical rule, which governs in other circuits. In the Fifth Circuit, for instance, the “well established rule” is that a warrantless search is “unreasonable under the Fourth Amendment if the consent was induced by the deceit, trickery or misrepresentation” of the government agent.⁵⁷

Trespass offers another example – even though trespass is often taken as a paradigmatic legal arena in which fraud vitiates consent.⁵⁸ It was not trespass, the Seventh Circuit held in *Desnick v. American Broadcasting Co.*, when undercover reporters donning hidden cameras gained entry to a medical clinic by posing as patients.⁵⁹ Nor was it trespass when, in *Food Lion v. Capital Cities/ABC*, investigative journalists infiltrated a grocery store to report on unsanitary food-handling practices.⁶⁰ Even though the reporters submitted fake resumes and were hired under false pretenses, the Fourth Circuit dismissed the notion that “consent based on a resume misrepresentation turns a successful job applicant into a trespasser the moment she enters the employer’s premises to begin work.”⁶¹

Examples abound. Just two years after John De Leon was convicted of kidnapping the would-be Panamanian governess, a similar case arising in the same jurisdiction arrived at the opposite result. In *People v. Fitzpatrick*, a young man was tricked into boarding a ship to Mexico on the understanding that he would be employed as a railroad worker at a rate of thirty-five dollars per month in U.S. currency; in fact, the job would pay only one dollar per month in Mexican currency.⁶² This scheme did not amount to a kidnapping, the court determined, because the false promise was “a shabby trick, but not a crime.”⁶³

56. *Id.* at 1147-48 (holding that a suspect’s consent was “vitiating by . . . deception” where an officer “identified himself as a law enforcement officer and requested [the suspect’s] assistance in a fictitious investigation, gaining entry into her home using this ruse”).

57. *United States v. Tweel*, 550 F.2d 297, 299 (5th Cir. 1977); accord *United States v. Cavitt*, 550 F.3d 430, 439 (5th Cir. 2008) (“‘Consent’ induced by an officer’s misrepresentation is ineffective.”).

58. See Rubinfeld, *supra* note 24, at 1377; see also Laurent Sacharoff, *Trespass and Deception*, 2015 BYU L. REV. 359, 387 (describing the *Restatement (Second) of Torts* as “providing an easy rule” that most deceptive entries are trespass). Yet, as the Fourth Circuit noted in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, the trespass cases on deceptive entries “as a class are inconsistent.” 194 F.3d 505, 518 (4th Cir. 1999).

59. 44 F.3d. 1345 (7th Cir. 1995).

60. *Food Lion*, 194 F.3d. at 505-06.

61. *Id.* at 518.

62. 64 N.Y. Sup. Ct. 459 (App. Div. 1890).

63. *Id.* at 462.

So there is a puzzle. Scholars, judges, and treatises tend to parrot the canonical line that “[f]raud destroys all consent,”⁶⁴ but the case law paints a muddier picture.⁶⁵

Few commentators have grappled with this puzzle in full.⁶⁶ Those who have recognized deviations from the canonical view have tended to proceed as if the exceptions are confined to the domain of sexual consent.⁶⁷ “[I]n virtually every legal arena outside of rape law,” writes Jed Rubenfeld, “a ‘yes’ obtained through deception is routinely (and correctly) rejected as an expression of true consent.”⁶⁸ Bioethicists Danielle Bromwich and Joseph Millum acknowledge that the canonical view is “a minority position” when it comes to sexual relations, but claim that “in other domains in which consent operates it constitutes the majority view.”⁶⁹

Accordingly, the puzzle is nearly always conceptualized as a problem of rape exceptionalism.⁷⁰ Rape law is marked by “a peculiar history” of preoccupation with “the protection of a woman’s virtue,” posits Laurent Sacharoff, and this may explain why “courts seem to depart from the general rule that deception vitiates consent.”⁷¹ The refusal to treat sex-by-deception as rape is understood as a hold-over from a time when the criminal law cared not about protecting individual sexual autonomy but rather about protecting chaste, innocent women from defilement.⁷² Under the patriarchal values of the common law, a victim of sex-by-deception like Michele Lewis could not claim to have been raped, because as someone who was willing to *have sex*, she was not the kind of virtuous victim entitled to the law’s protection.⁷³ It mattered not that she was deceived about

64. *Ganley Bros. v. Butler Bros. Bldg.*, 212 N.W. 602, 603 (Minn. 1927).

65. As one commentator observed, we have “complete doctrinal inconsistency, in which some deceptions vitiate consent and others do not, according to no rhyme or reason.” Sacharoff, *supra* note 58, at 391.

66. “Fraud is the easy case,” writes Richard Epstein. Epstein, *supra* note 37, at 298 n.14.

67. *But see infra* note 88 (discussing counterexamples).

68. Jed Rubenfeld, *Rape-by-Deception – A Response*, 123 YALE L.J. ONLINE 389, 395 (2013).

69. Danielle Bromwich & Joseph Millum, *Lies, Control, and Consent: A Response to Dougherty and Manson*, 128 ETHICS 446, 447 (2018).

70. *E.g.*, Rubenfeld, *supra* note 24, at 1404 n.150 (“The problem was and is that everywhere else in the law, consent obtained by fraud is no consent at all.”).

71. Sacharoff, *supra* note 58, at 389.

72. Namely, virginal white women. *See, e.g.*, Corey Rayburn Yung, *Rape Law Fundamentals*, 27 YALE J.L. & FEMINISM 1, 24 (2015) (“Before the civil war, Black women, even those who had been ‘freed,’ were sexually victimized with little concern by prosecutors for their defilement.”).

73. *See* ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 216 (3d ed. 1982) (arguing that sex-by-deception is considered nonconsensual where “a woman . . . consents to what would

facts that were material to her willingness to consent; under the “defilement logic of traditional rape law,” she became instantly unrapeable when she proved willing to sleep with a man to whom she was not married.⁷⁴ With this history in mind, critics such as West have argued that the “state’s refusal to criminalize nonviolent fraudulent . . . sex evidences the state’s refusal to grant women full possessory, sovereign rights over their bodies.”⁷⁵ This denies women “the status of equal personhood”⁷⁶ and demonstrates fealty to the antiquated, patriarchal logic of traditional rape law.

Indeed, feminist writers have observed that the law on sex-by-deception seems “invested in male sexual supremacy,”⁷⁷ consistently prioritizing men’s “right to seduce – the right of male sexual access” over women’s interests.⁷⁸ Joan McGregor argues that the special treatment of sexual fraud is best explained by judges’ uniquely contemptuous attitudes toward women who are duped into sex: “It is worth speculating on the reasons for the law’s unsympathetic reaction to victims of sexual fraud. Often, what is at work is the suggestion that if these women are so gullible, so naïve, and so stupid, then they get what they deserve”⁷⁹ Martha Chamallas conjectures that courts tolerate sex-by-deception because they trivialize the experience of victims and normalize deceit as part of ordinary male sexual aggression.⁸⁰

Other commentators, meanwhile, believe that even if sex-by-deception were considered seriously morally wrong, there are “genuine administrative and evidentiary concerns” that weigh against making it illegal.⁸¹ Some argue, for instance, that adjudicating fraud claims is simply too difficult when the lies pertain

be entirely proper and chaste if the facts were as she believes them to be”); Rubinfeld, *supra* note 24, at 1401-02 (same).

74. Rubinfeld, *supra* note 24, at 1401 (emphasis omitted) (explaining that the common law is more sympathetic toward victims of sex-by-deception who mistakenly believe they are having marital sex).
75. West, *supra* note 41, at 242.
76. *Id.*
77. Brodsky, *supra* note 17, at 194.
78. ESTRICH, *supra* note 40, at 71.
79. McGregor, *supra* note 41, at 202; see also Vivian Berger, *Review Essay: Not So Simple Rape*, 7 CRIM. JUST. ETHICS 69, 76 (1988) (“I must confess to minimal sympathy for the idea that the law should protect, via criminal sanctions, the cheated expectations of women who sought to sleep their way to the top but discovered, too late, that they were dealing with swindlers.”).
80. Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 832 & n.227 (1988).
81. WERTHEIMER, *supra* note 10, at 199. Another concern is biased enforcement against transgender individuals who conceal their biological sex, or other perils of overcriminalization. See, e.g., Brodsky, *supra* note 17, at 194-95.

to matters of the heart, and this explains why sexual fraud is treated differently from other kinds of fraud.⁸²

Missing from this discussion, however, is the fact that the law departs from the canonical view of consent not just in rape cases but across many domains. It is hard to see how sexist attitudes, or the difficulty of proving deception, can explain why drug suspects are seen as voluntarily consenting to undercover police searches of their residences⁸³ or why Food Lion was seen as consenting to the infiltration of its store by undercover journalists.⁸⁴

This Article advances an alternative account, one that is based not in rape exceptionalism but in cognitive science. Through a series of psychological experiments, it demonstrates that the problem runs deeper than patriarchal attitudes toward female victims of male sexual deception. People think that consent is compatible with deception in many areas *beyond* sexual consent, including contracts, medical interventions, human subjects research, and police searches.

Although this Article does not claim that lay intuition aligns with the law in every instance, commonsense consent can shed new light on the puzzle of why various consent doctrines take inconsistent stances toward deception. Both the law and our moral intuitions seem to be of two minds when it comes to fraud cases. As we will see, deception cases feel intuitively compatible with autonomous choice, for reasons that go beyond traditional morality or gendered conceptions of sexual virtue.

As Part VI will elaborate, this discovery may come as welcome news for feminists and liberal reformers who wish to orient the law of rape around consent rather than physical force.⁸⁵ Before, proponents of the force requirement could trot out case after case of sex-by-deception and ask: is it really rape if you pretend you went to an Ivy League school? If you lie about your hobbies and interests?⁸⁶

82. *E.g.*, Bryden, *supra* note 35, at 461-63. For rebuttals of this position, see Rubinfeld, *supra* note 24, at 1400; and West, *supra* note 41, at 242 (“[I]t is only when *sex* is the subject of the fraud . . . that the state suddenly becomes squeamish about overreaching into personal affairs.”).

83. *See, e.g.*, Lewis v. United States, 385 U.S. 206 (1966).

84. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999).

85. *See, e.g.*, Robin West, *Sex, Law, and Consent*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE, *supra* note 22, at 221, 221 (“Liberal legal theory primarily, and liberal feminist legal theory derivatively” rely on consent to “demarcate[], broadly and imperfectly, sex that should be regarded as criminal from that which should not.”).

86. For example, Rubinfeld argues that we must “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.” Rubinfeld, *supra* note 68, at 390. He insists that “we have to stop trying to define rape as sex without consent,” *id.*, if we want to “explain” the “intuition” that “people who lie in order to have sex are doing something wrong, but not committing rape.” *Id.* at 397.

With the discovery of commonsense consent, one can now explain that if such cases do not intuitively seem like rape, it may be because they seem *consensual*, and not necessarily because they lack the element of force. Commonsense consent, then, offers a novel explanation for the deception cases — one that does not require accepting the force requirement or giving up on the idea that consent is what divides lawful from unlawful sex.⁸⁷

Notably, the commonsense consent account differs from a legal realist one. A legal realist would posit that judgments of consent are wholly determined by policy judgments, or by fact-finders' preferred outcomes. The data presented in this Article tell a different story. It is not the case that people see consent where the deception is socially beneficial and see no consent where the deception is malign.⁸⁸ Intuitions about consent are separate from general moral outrage, and reflect something beyond outcome-driven reasoning. This Article argues that there is a discrete folk theory of consent. The catch is that it looks nothing like the consent that legal theorists imagine.

II. DECEPTION CASES ARE VIEWED AS CONSENSUAL

How do ordinary people understand the concept of consent? This Article uses techniques from moral psychology and experimental philosophy to elicit people's intuitions through a series of carefully designed cases.⁸⁹ This Part presents data showing that many people believe consent is compatible with deception. Parts III and IV will present experimental evidence comparing respondents' intuitions about deception to their intuitions about other similar concepts.

As he writes, "My whole article [embracing the force requirement] is an effort to explain that thought." *Id.*

87. See *infra* text accompanying notes 258-261.

88. See *infra* Part III. Thus, this Article's theory is distinct from those put forth by Gregory Klass and Saul Levmore, which posit that the law tolerates deception where it is efficient to do so. See Klass, *supra* note 37, at 734 (suggesting that some deception cases "turn . . . on the social value of the deception"); Saul Levmore, *A Theory of Deception and Then of Common Law Categories*, 85 TEX. L. REV. 1359, 1371 (2007) (sketching "a large-scale theory loosely based on efficiency principles").

89. For an overview of such techniques, see Joshua Knobe et al., *Experimental Philosophy*, 63 ANN. REV. PSYCHOL. 81, 82-83 (2012). For an example applied to law, see Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. 1269, 1281-98 (2015).

A. Methodological Background

For this research, survey respondents were given short fact patterns and asked to judge whether the offeree in the vignettes gave consent. All studies were programmed on Qualtrics survey software and administered online to U.S.-based adults recruited through Amazon Mechanical Turk (MTurk) or Lucid Fulcrum Exchange. MTurk allows researchers to perform low-cost experiments online, whereas Lucid supplies nationally representative samples that mirror the demographic makeup of the United States.⁹⁰ Participants' demographic characteristics did not consistently predict consent judgments; Appendices A and B report the demographic characteristics of each study sample and discuss whether demographic covariates predicted consent judgments.

Deception comes in many shades, not all of which are morally offensive. This research uses scenarios designed to portray clear-cut cases of fraud.⁹¹ In all scenarios, the offeree has a “deal breaker”: a condition that must be satisfied in order for her⁹² to agree to the offeror's proposed activity. In each case, the offeror affirmatively misrepresents a fact known to be material to the offeree's decision-

90. The sample recruited from Lucid was nationally representative; the MTurk sample was not. However, participant samples drawn from MTurk tend to be more representative than other convenience samples researchers often use, such as college students. See, e.g., Adam J. Bernskey et al., *Evaluating Online Labor Markets for Experimental Research: Amazon.com's Mechanical Turk*, 20 POL. ANALYSIS 351, 352 (2012) (“[T]he demographic characteristics of domestic MTurk users are more representative and diverse than the corresponding student and convenience samples typically used in experimental political science studies.”). In addition, previous research has shown that surveys administered online via convenience samples often yield substantially the same results as surveys administered in person and among national samples. See, e.g., Alexander Coppock, *Generalizing from Survey Experiments Conducted on Mechanical Turk: A Replication Approach*, 7 POL. SCI. RES. METHODS 613, 613-14 (2019) (finding that across fifteen replications experiments, “results derived from convenience samples like Amazon's Mechanical Turk are similar to those obtained from national samples”); Krin Irvine, David A. Hoffman & Tess Wilkinson-Ryan, *Law and Psychology Grows Up, Goes Online, and Replicates*, 15 J. EMPIRICAL LEGAL STUD. 320, 320 (2018) (finding “marked similarities in subject responses” across several platforms, including Amazon Mechanical Turk and an in-person laboratory run by a university).

91. While there is considerable variation from state to state, common-law fraud often requires five elements: (1) false representation of a material fact, (2) the defendant's knowledge of falsity, (3) an intent to induce the plaintiff to rely on the misrepresentation, (4) justifiable or reasonable reliance by the plaintiff, and (5) damages proximately resulting from the reliance on the misrepresentation. See, e.g., *Lazar v. Superior Court*, 909 P.2d 981, 984 (Cal. 1996).

92. In many of the cases, the offeree is female and the offeror is male, but character genders and names are also randomly varied in some vignettes. My focus on heterosexual encounters should not be taken to imply that male-female sex is normative or more important than other sexual relations; I follow Jane Larson in noting that “the image of sexual relationships preva-

making. There are no omissions, equivocations, or mistakes: the offeror always intentionally tells a bald-faced lie. Nor are there exaggerations, puffs, or pledges that go unfulfilled: the deception always concerns a matter of fact and is false at the time it is uttered. In each case, the offeree agrees to the proposal in reliance on the offeror's misrepresentation. Thus, in each case, the offeror knows that he is violating the offeree's wishes. He knows the offeree's preferences, he knows he is lying, and he knows the offeree would refuse if she knew the truth.

These scenarios sidestep the much-debated question whether consent is properly considered a subjective state of mind, or rather a performative act *expressing* a state of mind.⁹³ In each vignette, the offeree unambiguously manifests an outward expression of consent by "agreeing" or "saying yes" to the activity proposed by the offeror. There is no miscommunication between parties; these vignettes are designed to portray one party successfully using deceit to manipulate the other party into acceptance.

The deceptions portrayed in the vignettes are designed to be incompatible with consent as defined by normative theory. For some consent theorists, this will be because the offeror's conduct falls outside the scope of possibilities that the offeree intends to allow.⁹⁴ For others, it will be because consent seekers have duties of disclosure that are violated in cases of deception.⁹⁵ For Kantians, it will be because "an act of consent makes a moral difference only if it is autonomous,"⁹⁶ and deceived individuals are insufficiently autonomous.⁹⁷ Whatever the theory of consent, there is little dispute among scholars that these kinds of intentional misrepresentations invalidate it. Thus, while commentators disagree about the necessary and sufficient features of morally valid consent, and about whether criminal punishment ought to attach to various kinds of lies, few would assert that the cases described here portray morally transformative consent.

lent in the law is almost exclusively heterosexual." Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374, 380 n.24 (1993).

93. For an overview of the debate, see Alan Wertheimer, *What is Consent? And Is It Important?*, 3 BUFF. CRIM. L. REV. 557, 566-75 (2000) (arguing for a performative account of consent and against a subjective or hybrid account).
94. E.g., Tom Dougherty, *Sex, Lies, and Consent*, 123 ETHICS 717, 734-37 (2013).
95. E.g., Franklin G. Miller & Alan Wertheimer, *Preface to a Theory of Consent Transactions: Beyond Valid Consent*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE, *supra* note 22, at 79-105.
96. Andreas Müller & Peter Schaber, *The Ethics of Consent: An Introduction*, in THE ROUTLEDGE HANDBOOK OF THE ETHICS OF CONSENT 1, 3 (Andreas Müller & Peter Schaber eds., 2018) [hereinafter ROUTLEDGE HANDBOOK].
97. E.g., Bromwich & Millum, *supra* note 69, at 456 ("When one party deceives another about a matter over which he has an autonomy right to decide for himself, she violates that duty by interfering with his decision-making.").

B. Study 1

Study 1 reports the findings from nearly two dozen consent-by-deception scenarios, summarized in Table 1.⁹⁸

1. Sexual Relations

As described earlier, the law deviates from the canonical rule when it comes to sexual consent.⁹⁹ This puzzling fact has drawn the attention of academics, reformers, and the reporters of the Model Penal Code.¹⁰⁰ “For more than a century,” Patricia Falk wrote in 1998, “courts, legislatures, and legal commentators have struggled with the controversial and highly charged question of whether accomplishing sexual intercourse by means of fraud . . . is blameworthy and appropriately condemnable as rape.”¹⁰¹ Today, the debate over sex-by-deception “rages on . . . inevitably implicating”¹⁰² the controversy over whether rape is “a crime of violence”¹⁰³ – requiring physical force – or whether it is instead “an offense against personal autonomy,”¹⁰⁴ in which case a lack of consent alone is sufficient to establish liability.¹⁰⁵

Only seven states treat consent to sexual relations as unequivocally vitiated by fraud.¹⁰⁶ Several others criminalize sex-by-deception only when the lies are particularly egregious, such as when a doctor touches a patient sexually under

⁹⁸. This series of survey findings is collectively referred to as “Study 1.” See *infra* Table 1.

⁹⁹. See *supra* notes 45-50 and accompanying text.

¹⁰⁰. See sources cited *infra* notes 121-122; see also MODEL PENAL CODE § 213.4 (AM. LAW INST., Discussion Draft No. 2, 2015) (“The question . . . is whether a lie used to obtain sexual consent should be punished under the same standards as a lie used to obtain a transfer of cash, or whether there is good reason to treat the situations differently.”). For an overview of the rape-reform movements of the 1950s and 1970s that were inspired by feminist scholarship, see generally Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 90-91 (1998).

¹⁰¹. Falk, *supra* note 100, at 44.

¹⁰². *Id.* at 45.

¹⁰³. *Id.*

¹⁰⁴. *Id.* at 141 n.488 (quoting Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35, 41 (1992)).

¹⁰⁵. See, e.g., Rubinfeld, *supra* note 24, at 1406-08; Stephen J. Schulhofer, *Consent: What It Means and Why It's Time to Require It*, 47 U. PAC. L. REV. 665, 671-73 (2016).

¹⁰⁶. Russell L. Christopher & Kathryn H. Christopher, *Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape*, 101 NW. U. L. REV. 75, 102, 122 (2007) (listing Alabama, Hawaii, Michigan, Rhode Island, Tennessee, Utah, and Virginia as the only states criminalizing all forms of sexual fraud).

the guise of performing a medical procedure.¹⁰⁷ This means that people like Michele Lewis are normally without recourse; indeed, her plight ultimately inspired a New Jersey state lawmaker to introduce a bill that would have criminalized “sexual assault by fraud.”¹⁰⁸

What do members of the public think of sex-by-deception? In the first survey, respondents were presented with a brief scenario, *Single*, which was drawn from Franklin Miller and Alan Wertheimer’s *The Ethics of Consent*.¹⁰⁹

Single ($n = 100$)

Ellen and Frank meet in a night class and have several dates. Ellen makes it clear that she refuses to sleep with married men. When asked, Frank lies and says that he is not married. Ellen agrees to sleep with Frank.

Respondents were asked, “Did Ellen give consent to sleep with Frank?” and were given an unmarked sliding scale that ranged from 0 (Not at all) to 100 (Very much), which was initialized at 50. They also rated Frank’s likeability on a scale from 0 (Not at all likeable) to 100 (Very likeable), as well as the wrongfulness of Frank’s behavior (0 = Not at all wrong; 100 = Very wrong).

Single presents a paradigmatic case of sex-by-deception.¹¹⁰ Bromwich and Millum contemplate an equivalent case involving a sexual encounter in which Riya asks Owen if he is single and “ma[kes] it quite clear that cheating is unacceptable to her.”¹¹¹ Owen falsely states that he is unmarried, and the two go to bed. According to Bromwich and Millum, Riya has not given valid consent to sex because she “waives her bodily rights against sex with Owen {person not in a relationship}. She does not—and would not—waive her bodily rights against sex with Owen {person in a relationship}. Hence, the act in which she engaged is not the act for which she waived rights.”¹¹² These authors, like many consent theorists,¹¹³ would likely give *Single* a rating of 0.

107. Rubenfeld, *supra* note 24, at 1395-98, 1435 n.227.

108. See *supra* text accompanying notes 47-49.

109. Miller & Wertheimer, *supra* note 95, at 87-88.

110. See, e.g., Bromwich & Millum, *supra* note 69, at 453; Lazenby & Gabriel, *supra* note 42, at 282 (“[W]e all know some things, including whether you are in a relationship or have an STD, are the kinds of things one is expected to disclose.”).

111. Bromwich & Millum, *supra* note 69, at 453.

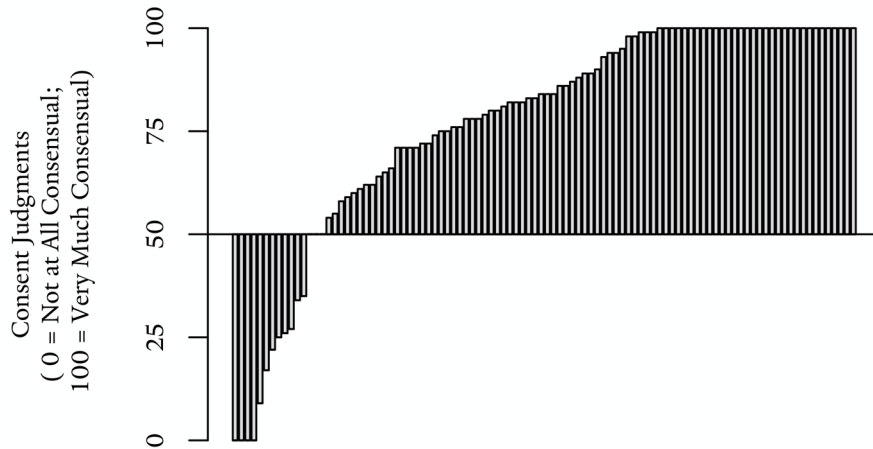
112. *Id.*

113. See, e.g., Dougherty, *supra* note 94, at 727; Lazenby & Gabriel, *supra* note 42, at 282; Hallie Liberto, *Intention and Sexual Consent*, 20 PHIL. EXPLORATIONS S127, S129 (2017); Rubenfeld, *supra* note 24, at 1399. But see Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L.J. ONLINE 335, 345 (2013) (“Suppose a woman seeking a long-term relationship consents to sex with a man who, unbeknownst to her, is married. I am willing to reject the claim that there

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Figure 1 shows how lay respondents reacted to *Single*.¹¹⁴ It displays each individual participant's response arranged from the lowest rating (0) to the highest rating (100), with the x-axis set at the midpoint of 50.

FIGURE 1.
SEX-BY-DECEPTION SCENARIO: *SINGLE*



Participants' reactions to *Single* indicate that most participants perceived the sex between Ellen and Frank as highly consensual. Responses cluster at the extreme ends of the scale, suggesting that most participants held a clear view of whether the situation was consensual. The most common response, reported by 32% of participants, was to give the maximum score of 100. Only 12% of participants rated the scenario below the 50 mark, and only a handful ($n = 4$) gave a rating of 0. The average rating was 77.17 ($SD = 27.25$). Thus, while responses to *Single* varied, the most common reaction was that Ellen had given consent.

At the same time, participants reported strongly disliking Frank ($M_{\text{liking}} = 13.38$; $SD = 15.85$) and judged his behavior to be highly immoral ($M_{\text{wrongness}} = 85.04$; $SD = 22.34$). As such, their judgments of consent followed a pattern distinct from their judgments of moral wrongness.

was no valid consent here, and I maintain that the wrong to her is qualitatively different from what it would have been had she not consented at all.”)

114. The demographics of the sample were as follows: 44% female; ages 19–67 years, median age = 29 years; 79% White, 8% Black, 7% Asian, 5% Hispanic, and 1% Other Race. Participants' education levels ranged from high school to postcollege degrees, with 47% having completed four years of college. Approximately 33% reported an annual income of less than \$30,000 and 20% reported earning over \$75,000. For all other studies, participants' demographic information is reported *infra* Appendix B.

In a separate study, the genders of the vignette characters were randomly varied, such that half of participants were told that Ellen deceived Frank about her marital status. No significant differences emerged between the two conditions, suggesting that the genders of the vignette characters were not driving participants' assessments of consent, liking, or wrongness.¹¹⁵

The finding that sex-by-deception is largely viewed as consensual was reproduced in nine scenarios reported in Table 1 and Appendix A. The nine replications encompass a wide variety of deal breakers: offerees who would refuse to sleep with someone who has a criminal record, who immigrated to the country illegally, who has served in the military, who is bisexual, and who opposes same-sex marriage. The finding holds true whether participants are asked about "consent" directly, or related concepts such as whether the act was "freely chosen" or agreed to "voluntarily."¹¹⁶ The pattern is clear: sex obtained by deception is generally seen as consensual sex.

115. Male Victim condition ($n = 50$): $M_{\text{consent}} = 76.46$, $SD = 26.31$; $M_{\text{liking}} = 16.90$, $SD = 21.14$; $M_{\text{wrongness}} = 87.68$, $SD = 17.10$. Female Victim condition ($n = 52$): $M_{\text{consent}} = 82.96$, $SD = 23.20$; $M_{\text{liking}} = 10.21$, $SD = 18.39$; $M_{\text{wrongness}} = 90.17$, $SD = 19.73$. For additional research on how gender interacts with perceptions of sexual consent (beyond cases involving sex-by-deception), see generally Naomi James, *Gender Differences in Attitudes Towards Sexual Assault*, 4 J. APPLIED PSYCHOL. & SOC. SCI. 83 (2018); and Laura J. Blauenstein, *Sexual Consent: Perceptions of Ambiguous Sexual Encounters of LGBTQ+ and Cisgender, Heterosexual Individuals* (2018) (unpublished M.S.W. thesis, University of Nevada, Reno), <https://scholarworks.unr.edu/handle/11714/4526> [<https://perma.cc/4UFM-2NP2>].

116. See *infra* Appendix C for six alternate phrasings.

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TABLE 1.
SUMMARY OF MEANS AND STANDARD DEVIATIONS FOR STUDY 1

Vignette	Offeree is Deceived About . . .	N	Did the Offeree Consent?	
			M	(SD)
Consent to Sexual Relations				
Single (Female Victim)	Prospective sexual partner's marital status	100	77.17	(27.25)
Single (Male Victim)	Prospective sexual partner's marital status	50	76.46	(26.31)
Married	Prospective sexual partner's marital status	101	77.4	(29.66)
Criminal Record	Prospective sexual partner's criminal record	54	61.96	(36.73)
College	Prospective sexual partner's alma mater	57	73.12	(32.15)
Bisexual	Prospective sexual partner's sexual orientation	50	89.62	(18.70)
Immigrant	Prospective sexual partner's immigration status	51	86.88	(21.65)
Veteran	Prospective sexual partner's military service	47	82	(25.29)
Views on Same-Sex Marriage	Prospective sexual partner's political views	47	82.87	(25.24)
HIV with Transmission	Prospective sexual partner's HIV status	52	49.42	(41.66)
HIV with No Transmission	Prospective sexual partner's HIV status	48	53.54	(42.42)
Consent to Medical Treatment				
Elective Ankle Surgery	Surgeon lies about insurance coverage	97	66.60	(39.83)
Elective Ankle Surgery (Wealthy Patient)	Surgeon lies about insurance coverage	51	69.25	(35.93)
Surgery Results Unspecified	Surgeon lies about insurance coverage	54	67.04	(38.58)
Surgery Results in No Infection	Surgeon lies about insurance coverage	37	68.08	(37.39)
Surgery Results in Infection	Surgeon lies about insurance coverage	48	71.08	(35.77)
Consent to Search by Police				
Warrantless Search	Police lie about what they are searching for	58	82.47	(24.83)
Warrantless Search (Find Child Pornography)	Police lie about what they are searching for	51	71.63	(31.02)
Warrantless Search (Find Bootleg Recording)	Police lie about what they are searching for	53	77.51	(25.66)

Consent to Participation in Research				
Research Purpose	Investigator lies about the purpose of the research	51	72.55	(33.96)
Consent to Contract				
Termites	Seller lies to homebuyers about the presence of termites	48	73.31	(30.86)

In an effort to establish a lower bound on consent judgments, participants ($n = 52$) were given an extreme case in which an HIV-positive individual lies to a prospective sexual partner about his HIV status and ultimately transmits the virus to her. Legally, in many jurisdictions, “the failure to disclose a communicable disease prior to intercourse vitiates consent.”¹¹⁷ Because a lack of disclosure in these cases “transforms ‘consensual’ intercourse into a battery,”¹¹⁸ it stands to reason that laypeople might regard *affirmative misrepresentation* regarding STI status as defeating consent.

Even in this extreme case, however, only half of participants saw the encounter as nonconsensual, as shown in Figure 2.¹¹⁹ In response to the question, “Did Allison consent to sleep with Rafael?”, the average rating was 49.42 ($SD = 41.66$).

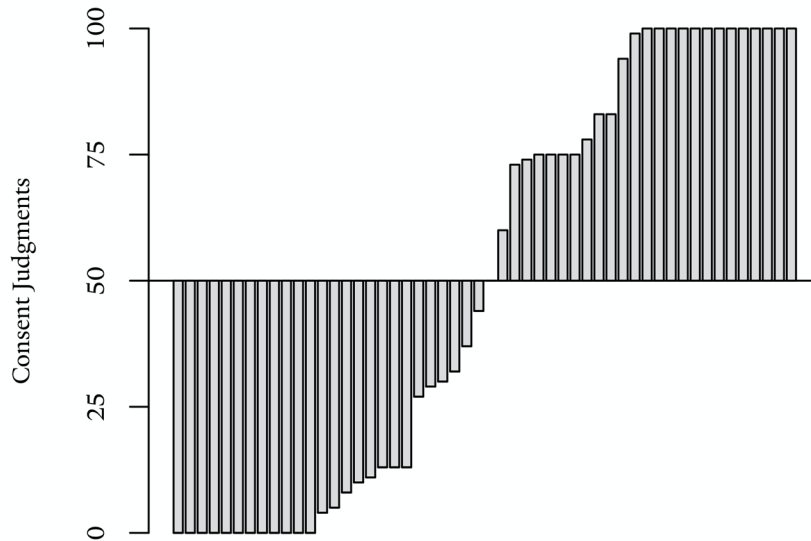
117. *In re Louie*, 213 B.R. 754, 764 (Bankr. N.D. Cal. 1997); accord *Brodsky*, *supra* note 17, at 192 n.34.

118. *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1352 (7th Cir. 1995) (citing *Crowell v. Crowell*, 105 S.E. 206 (N.C. 1920)).

119. The average consent rating was 49.42 ($SD = 41.66$). See *supra* Table 1.

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FIGURE 2.
SEX-BY-DECEPTION SCENARIO: HIV WITH TRANSMISSION



Moreover, when asked whether the encounter was rape, sixty percent of participants responded “no” on a dichotomous yes/no measure.

Many participants saw the deception as problematic but did not think it undermined the consensual nature of the encounter. Some viewed the HIV issue as separable from the consent issue:

It wasn't rape as Allison consented to have sex with Rafael. But I do think it was Attempted Murder [or] some kind of assault. Rape is to forcibly have sex with someone against their will. Allison willingly had sex. The HIV aspect is another scenario entirely.

He did not rape her because it was consensual sex to which she agreed. He did however, lie to her about HIV, which could or should result in some punishment, but is a separate charge than rape.

The finding that a majority of respondents view sex-by-deception as consensual carries implications for the debate over its moral and legal status. As described earlier, sexual fraud cases are seen as “inevitably implicating” the controversy over whether rape is a crime of violence requiring physical force.¹²⁰

120. See *supra* note 102 and accompanying text.

Scholars who write about fraudulently procured sex—and there are a lot of them¹²¹—come to divergent conclusions about whether sex-by-deception ought to be criminalized and, indeed, whether it is even seriously morally wrong.¹²² But many interlocutors who are on opposite sides of the debate nonetheless *agree* that deceived sex is nonconsensual sex; they merely draw different conclusions from this premise.

Some—like Susan Estrich,¹²³ Jonathan Herring,¹²⁴ and at least one former Justice of the Canadian Supreme Court¹²⁵—conclude that sex-by-deception ought to be illegal because sex without consent ought to be a crime.¹²⁶ Others, like Jed Rubenfeld, conclude that consent must not be as morally important as it seems because it would be absurd for the law to criminalize sex-by-deception.¹²⁷

121. *E.g.*, ESTRICH, *supra* note 40; ROLLIN M. PERKINS, PERKINS ON CRIMINAL LAW 164-67 (2d ed. 1969); STEPHEN J. SCHULHOFER, UNWANTED SEX 19 (1998); WERTHEIMER, *supra* note 10; WESTEN, *supra* note 9; Alexander, *supra* note 8; Bryden, *supra* note 35; Christopher & Christopher, *supra* note 106; Dougherty, *supra* note 94; Jonathan Herring, *Does Yes Mean Yes? The Criminal Law and Mistaken Consent to Sexual Activity*, 22 SING. L. REV. 182, 192 (2002); Hurd, *supra* note 6; Neil C. Manson, *How Not to Think About the Ethics of Deceiving into Sex*, 127 ETHICS 415, 415 (2017); McGregor, *supra* note 41; Rubenfeld, *supra* note 24, at 1376-77 n.11 (citing a collection of sources). Patricia Falk notes the “surprisingly large body of criminal cases” involving sex obtained by fraud. Falk, *supra* note 100, at 46. Some commentators believe that sex-by-deception has received too much attention. *See, e.g.*, Yung, *supra* note 72, at 38 (“The rape-by-deception puzzle is an unnecessary tangent, a minor quibble in a sea of contradictions. There are far more important issues in rape law . . .”).

122. Compare Rubenfeld, *supra* note 24, at 1416 (“[D]eceptive sex, however bad it may be, isn’t *that* bad We may disapprove of some [common] misrepresentations, but on the whole it would seem a pity to see them all go.”), with Dougherty, *supra* note 94, at 719-20 (“[W]hen someone is deceived into sex, the deception vitiates the victim’s sexual consent. . . . [D]eceiving someone into sex is seriously wrong.”).

123. ESTRICH, *supra* note 40.

124. Herring, *supra* note 121.

125. WESTEN, *supra* note 9, at 199-200 (citing an argument by Justice l’Heureux-Dub in *Regina v. Cuerrier*, [1998] S.C.R. 371 (Can.), that any material deception, even one not about a life-threatening condition, can vitiate consent to sex).

126. Or a tort. *See* Larson, *supra* note 92. Larson writes, “I begin from the premise that sexual fraud leads to nonconsensual sex because it deprives the victim of control over her body and denies her meaningful sexual choice.” *Id.* at 380.

127. Rubenfeld, *supra* note 68, at 402 (expressing the strong intuition that sex-by-deception cases cannot be rape, and stating to critics that these examples “speak for [themselves]”); *id.* at 391 (stating “I don’t believe my article offers a single conclusive argument” to someone prepared to ignore the intuition that lies are not rape); Rubenfeld, *supra* note 24.

He concludes, on the basis of the intuition that sex-by-deception cannot be rape, that rape must require force.¹²⁸

The results presented here offer an alternative explanation for why sex-by-deception cases do not intuitively seem like rape. Perhaps it is not because these cases lack the *force* element but because they lack the *nonconsent* element. That is, deception cases seem like they are consensual. Thus, we need not conclude, as Rubenfeld does,¹²⁹ that the intuition that sex-by-deception is not rape implies that rape must require force.

But why do people believe that there is autonomous, voluntary consent in sex-by-deception cases in the first place? Could it be because they are confident these cases are not rape, and they reason backwards to the conclusion that the scenarios must therefore be consensual? Indeed, even if people believed that sex-by-deception violates sexual autonomy, they might nonetheless resist criminalization for reasons that have little to do with consent, such as insurmountable evidentiary hurdles, fear of government intrusion into private matters, or the possibility that certain groups (e.g., individuals who are transgender or HIV-positive) would be disproportionately targeted.

The remainder of this Part will examine consent-by-deception cases in several nonsexual domains. It will demonstrate that even when questions of rape are not on the table, and these other potential concerns are not plausibly implicated, deception is still seen as compatible with consent.

2. Surgery

When it comes to consent to medical treatment, the law endorses the principle of patient autonomy. “Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient’s consent commits an assault, for which he is liable,” announced the New York Court of Appeals in the landmark case *Schloendorff v. Society of New York Hospital*.¹³⁰ Consistent with the principle of bodily autonomy, the tort of battery prohibits invasion of the person by a

128. Rubenfeld, *supra* note 24, at 1417 (“All the major components of sex law today have seemingly converged on a single, unifying principle: sexual autonomy. Sex-by-deception calls that principle into question.”); *id.* at 1436-43.

129. Rubenfeld, *supra* note 68, at 391 (“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.’”); Rubenfeld, *supra* note 24, at 1411 (arguing that the deception cases “drive[] a wedge into rape law, requiring it to choose between force and autonomy”).

130. 105 N.E. 92, 93 (N.Y. 1914).

wrongful touching regardless of whether an injury results.¹³¹ “The inviolability of the person is the core idea. Thus, if consent is to negate the battery, it must be because the autonomy-based right not to be touched has genuinely been waived.”¹³²

Tort law has come to embrace the idea that in order for consent to negate liability for battery, it “cannot have been induced by trickery on the part of the defendant.”¹³³ This means that surgery, like any other touching of a person, is actionable if undertaken without consent, and fraud destroys such consent.¹³⁴ This holds true even if the medical practitioner acts with benevolent intentions and the patient suffers no harm from the surgery.¹³⁵

In the vignette *Elective Surgery*, participants evaluated a situation in which a doctor deceives a cost-conscious patient into agreeing to an elective, non-emergency surgery that is not covered by insurance:

Elective Surgery (n = 97)

Marvin has been in physical therapy for ankle pain and is contemplating undergoing elective surgery to repair the tendon. He cares deeply about whether the surgery is covered by his insurance; he would refuse to have the surgery if he would have to pay out of pocket. Marvin’s doctor lies to

131. See, e.g., *Zoterell v. Repp*, 153 N.W. 692, 694 (Mich. 1915) (quoting the trial court’s jury instructions, directing that “in any case of an operation, the consent of the person operated upon is essential to justify the party operating in the performance of such operation, and regardless of how successful the operation may have been, how successfully performed, or how much such operation may have been needed, unless consent was given, it is an unlawful operation, and the party operating is liable for whatever damages may have resulted therefrom”).

132. JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *TORTS* 208 (2010).

133. *Id.* at 207-08.

134. The law since the eighteenth century has been that “[a]bsent an emergency, surgery [is] battery if performed on a competent adult without consent, and consent [is] invalid if obtained through misinformation.” Alexander M. Capron, *Legal and Regulatory Standards of Informed Consent in Research*, in *THE OXFORD TEXTBOOK OF CLINICAL RESEARCH ETHICS*, *supra* note 23, at 613, 614; see also *State ex rel. Janney v. Housekeeper*, 16 A. 382, 384 (Md. 1889) (holding that the “consent” of a person who “voluntarily submitted to” a surgical operation “will be presumed, unless she was the victim of a false and fraudulent misrepresentation”).

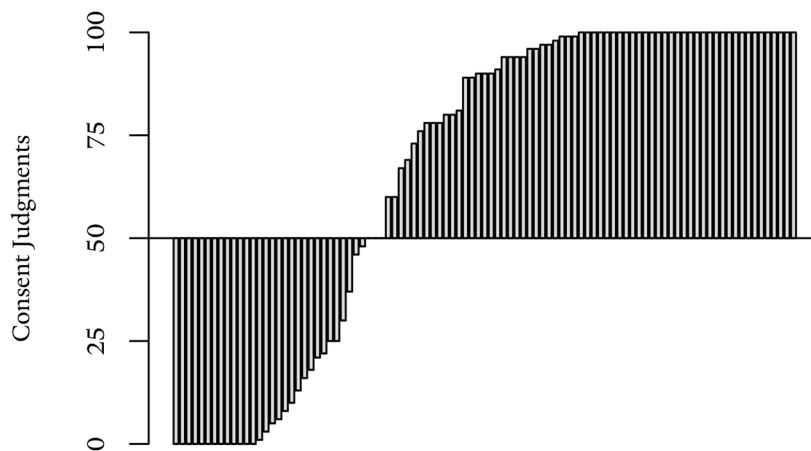
135. As long as the practitioner intends to deviate from the consent, it is a battery, even if the practitioner’s reasons for doing so are benevolent. See, e.g., *Cobbs v. Grant*, 502 P.2d 1, 8 (Cal. 1972) (“We agree with the majority trend. The battery theory should be reserved for those circumstances when a doctor performs an operation to which the patient has not consented. When the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present.”).

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him and says his insurance will cover the procedure, when really the doctor knows that Marvin will need to pay out of pocket. Marvin says yes to the surgery.

Participants rated the extent to which they believed Marvin had consented to the surgery. As Figure 3 shows, most participants (66%) gave a rating above the midpoint at 50, and the most common response, given by 35% of participants, was the maximum score of 100. The average rating was 66.60 ($SD = 39.83$).

FIGURE 3.
SURGERY-BY-DECEPTION SCENARIO: *ELECTIVE SURGERY*



In summary, a substantial number of laypeople reject the “settled”¹³⁶ and “well established”¹³⁷ legal view that when it comes to medical decision-making, “[t]rue consent to what happens to one’s self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available.”¹³⁸ Instead, most participants found that the patient consented to the procedure even though the doctor denied him the opportunity to make a truly informed decision.

¹³⁶. *Canterbury v. Spence*, 464 F.2d 772, 782 (D.C. Cir. 1972).

¹³⁷. *Id.* at 783.

¹³⁸. *Id.* at 780.

3. Warrantless Searches by Police

Under the Fourth Amendment, officials may conduct warrantless searches if they obtain free and voluntary consent.¹³⁹ Courts diverge on whether police deception renders consent involuntary.¹⁴⁰ But one thing is clear: officers “may not obtain consent to search on the representation that they intend to look only for certain specified items and subsequently use that consent as a license to conduct a general exploratory search.”¹⁴¹ For example, in *United States v. Montes-Reyes*, DEA agents gained entry to the hotel room of a suspected narcotics dealer by misrepresenting that they were looking for a kidnapped child.¹⁴² The search was deemed involuntary as a result of their ruse.

In *Warrantless Search*, uniformed police officers misrepresented the purpose of their search. As the court noted in *Montes-Reyes*, consent is rarely valid in such cases.¹⁴³ Various rationales apply: some courts emphasize that police officers are “figures of authority in the community” and citizens feel a civic duty to aid them when asked.¹⁴⁴ Others emphasize that the government’s search exceeded the scope of consent because the citizen agreed to a search for one thing but the officers looked for another.¹⁴⁵ A third rationale is the canonical view that fraud interferes with self-determination, thus vitiating consent. This third rationale was at work in *United States v. Harrison*,¹⁴⁶ a Tenth Circuit case on which *Warrantless Search* is based. “Not all . . . trickery is improper,” the Tenth Circuit stated, “but ‘when the police misrepresentation of purpose is so extreme that it deprives the

139. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (“[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.”).

140. *See supra* text accompanying notes 54-57.

141. An influential treatise describes this rule as “clear.” 4 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 8.2(n) (5th ed. 2012) (quoting *United States v. Dichiarinte*, 445 F.2d 126 (7th Cir. 1971)).

142. 547 F. Supp. 2d 281 (S.D.N.Y. 2008).

143. *Id.* at 290 (collecting cases and noting that such outcomes are not impossible, just “quite rare”).

144. *Id.* at 286; *see also* *Whalen v. McMullen*, 907 F.3d 1139, 1147 (9th Cir. 2018) (noting that consent was vitiated by deception where, as in this case, the law enforcement officer “appealed to [plaintiff’s] trust in law enforcement and her sense of civic duty to assist him in his . . . investigation”).

145. *E.g.*, *State v. Bailey*, 989 A.2d 716, 724-25 (Me. 2010) (holding that a search of all video files on a defendant’s computer exceeded the scope of his consent where the officer misrepresented that he would be looking for whether the computer had been hacked).

146. 639 F.3d 1273, 1280-81 (10th Cir. 2011) (holding that the search was involuntary where officers searching for firearms falsely implied that they were searching only for drugs and bombs).

individual of the ability to make a fair assessment of the need to surrender his privacy . . . the consent should not be considered valid.”¹⁴⁷

Warrantless Search ($n = 58$)

Johnny is at home in his apartment when he hears a knock on the door. Two men are standing outside. They say, “Police here. Can we come in and look around?” Johnny asks through the door, “What are you looking for?”

One of the police officers says, “We are just looking for drugs and drug paraphernalia. We got an anonymous call reporting drug dealing in this apartment.”

This statement is a lie. In truth, the police officers are looking for illegal firearms. They had received an anonymous tip about illegal weapons in the apartment.

Johnny knows that he has no drugs or drug paraphernalia in the apartment. He does, however, have two guns under his bed that he bought illegally. The reason he wants to know what the police are searching for is that he would say no to a search if he thought they were looking for firearms.

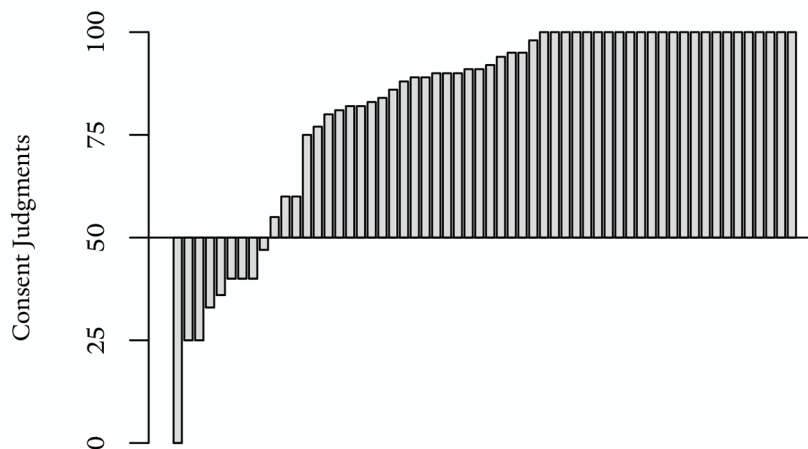
Under these conditions, Johnny lets the police in to search his apartment.

Participants rated the extent to which they thought Johnny had consented to the search. As Figure 4 shows, most participants saw the search as consensual.¹⁴⁸

147. *Id.* at 1280 (quoting 2 WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 3.10(c) (3d ed. 2007)).

148. The average consent rating for *Warrantless Search* ($n = 58$) was 82.47 ($SD = 24.83$).

FIGURE 4.
SEARCH-BY-DECEPTION SCENARIO: WARRANTLESS SEARCH



4. Participation in Research

The same phenomenon was observed when participants were asked to evaluate consent to participate in research. In *Research Purpose*, an investigator deceives a potential research participant about the purpose of the study. Most respondents indicated their belief that the prospective research participant consented to the research procedure,¹⁴⁹ in contrast to the standard rule that researchers are ethically and legally obligated to disclose to participants the purpose and nature of the research.¹⁵⁰ The full materials are reported in Appendix A.

5. Contract

Turning to contract law, it is useful to observe that consent is not a homogeneous concept across various areas of law. The kind of consent at issue in sex, surgery, searches by police, and scientific research involves a negative right against interference, implicating our right not to have our bodies or our properties invaded by others without our permission. But in contract law, the interest

149. The average rating for *Research Purpose* ($n = 51$) was 72.55 ($SD = 33.96$). See *supra* Table 1.

150. See, e.g., David Wendler & Franklin G. Miller, *Deception in Clinical Research*, in THE OXFORD TEXTBOOK OF CLINICAL RESEARCH ETHICS, *supra* note 23, at 315, 323 (“[A]ccurate disclosure about a study’s purpose is a basic element of informed consent.”).

at stake is our positive right to enter into arrangements on the terms we choose.¹⁵¹ This “freedom of contract” ideal allows us to undertake obligations that we would not otherwise have.¹⁵² Contract law is “predicated on something that has no counterpart elsewhere, namely, promise-making”¹⁵³ and thus many scholars regard it as unique.¹⁵⁴

Still, in contract law, as in other areas, material deception is understood to invalidate consent.¹⁵⁵ It is black-letter law that an agreement is voidable if one party’s assent was given in justified reliance on another’s fraudulent misrepresentation.¹⁵⁶ In other words, if one party deliberately asserts something false, knowing that this falsehood is likely to induce the other party to enter the agreement, the deceived party can cancel the contract as long as reliance on the misrepresentation was reasonable.

Participants evaluated *Termites*, a scenario involving fraudulent misrepresentation in the sale of real estate. The seller stated falsely that the house had no problem with termites after being asked whether the house had a termite problem. Most participants thought that the buyers had consented to the purchase, despite the fact that their assent had been induced by the seller’s fraudulent misrepresentation.¹⁵⁷ The full materials are reported in Appendix A.

C. Summary and Discussion of Study 1

To check for robustness, all five scenarios – *Single*, *Elective Surgery*, *Warrantless Search*, *Research Purpose*, and *Termites* – were administered to a nationally representative sample ($n = 252$).¹⁵⁸ As Figure 5 shows, no significant variation

151. See ALAN WERTHEIMER, COERCION 19 (1987); Bix, *supra* note 22, at 267.

152. Bix, *supra* note 22, at 263.

153. WESTEN, *supra* note 9, at 10.

154. Müller & Schaber, *supra* note 96, at 4 (“[T]he notion of consent that is at the core of modern contract law differs from the consent that is involved in many other transactions.”).

155. See Rubinfeld, *supra* note 24, at 1399 n.136.

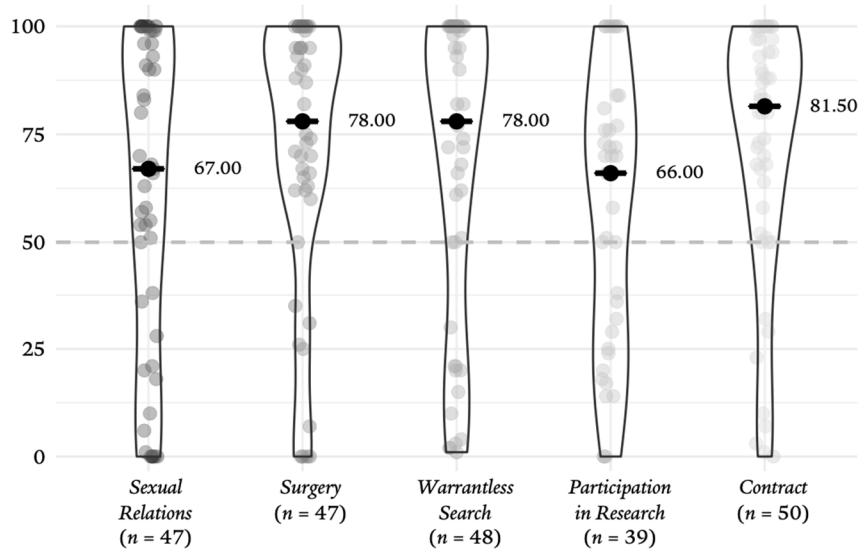
156. See, e.g., Willen v. Hewson, 622 S.E.2d 187, 190-91 (N.C. App. 2005) (finding a contract voidable due to fraud); 37 AM. JURIS. 2D *Fraud and Deceit* § 2 (2018).

157. The average consent rating for *Termites* ($n = 48$) was 73.31 ($SD = 30.86$). See *supra* Table 1.

158. Participants who failed an attention check were excluded from subsequent analyses, although study findings are substantially the same regardless of whether these participants are included in analyses. The resulting sample ($n = 231$) was 54% female; ages 18-89 years, median age = 47 years; 67% having completed some college or more; 10% Hispanic, Latino, or Spanish Origin; 72% White, 8% Black, 9% Asian or Pacific Islander, 1% American Indian or Alaska Native, 6% Other. Approximately 22% reported an annual income of less than \$30,000, and 28% reported earning over \$75,000.

across the five domains emerged.¹⁵⁹ In addition, the main result—that most respondents saw deception cases as consensual—held true in all five cases.

FIGURE 5.
CONSENT JUDGMENTS ACROSS MULTIPLE CONTEXTS



In summary, across numerous domains, most American respondents report that consent can be granted despite the offeror's use of material deception. Most laypeople thus appear to reject the canonical view that fraud vitiates consent.

Traditional sexual morality cannot fully explain these results. Although it is possible that patriarchal attitudes play a role in intuitive judgments of consent, the findings show that the core phenomenon—that deception is compatible with consent—is not unique to sex. Nor are these findings consistent with a legal realist account positing that people twist their consent judgments to serve their preferred outcomes. For instance, judgments of consent in the HIV case were not affected by whether or not the offeree contracted HIV.¹⁶⁰ In addition, participants judged the lying in question to be morally wrong and reported disliking the deceiver. Still, they judged these deceptive encounters to be consensual.

159. $F(4, 226) = 1.58, p = .18, \eta_p^2 = .03$. All post-hoc comparisons' Holm-adjusted p -values were ≥ 0.4 . Horizontal bars in Figure 5 represent sample medians. Widths of violin plots correspond to the number of observations at each value.

160. Consent ratings averaged 53.54 ($SD = 42.42$) for *HIV with No Transmission* and 49.42 ($SD = 41.66$) for *HIV with Transmission*, $t(98) = .49, p = .63$. See *supra* Figure 2. The same held true for a police search vignette that was devised such that the police found contraband that was

Study 1 raises a key question that will guide the analysis in the next Part: do people who say there is “consent” also believe that a *moral* transformation has taken place? Respondents may attest that a deceived individual has given “consent,” but do they believe that this “consent” converts the deceiver’s conduct into something less morally wrong?

Part III provides two pieces of evidence confirming that many respondents who say there is “consent” mean it in a morally significant way. First, Study 2 demonstrates that people believe an offeror deserves less punishment for proceeding with a bodily violation (e.g., sex or surgery) if he tricks the offeree into agreeing to it first. They thus believe that a meaningful waiver has been executed when an offeree accepts a proposal as a result of deception. Next, Study 3 demonstrates that respondents react differently when the offeror uses threats or intoxicants, as opposed to lies, to induce the offeree to acquiesce. Taken together, these studies establish that deceived assent—but not coerced assent or incapacitated assent—is viewed as morally transformative consent.

III. DECEIVED AGREEMENT IS VIEWED AS MORALLY TRANSFORMATIVE CONSENT

This Part provides evidence that consent granted as a result of deception is viewed as “real consent.” It does this through two studies, each of which uses an experimental design to compare deception cases to similar nondeception cases.

A. Study 2: Deceived Agreement Versus No Agreement

Study 2 examines how laypeople evaluate *deceived agreement* versus *no agreement*. Do they say, as judges and legal theorists often do, that agreement obtained via deception is morally meaningless—that deceived consent is no consent at all?¹⁶¹ Or do they attach some normative importance to deceived agreement,

either child pornography or a bootleg recording of a Broadway musical. See *infra* Appendix A. Although participants felt more strongly that the citizen was a “bad person” when he possessed child pornography than when he possessed the bootleg recording (Child Pornography condition: $M_{\text{badness}} = 86.33$, $SD = 21.41$; Bootleg condition: $M_{\text{badness}} = 43.91$, $SD = 29.45$; $t_{\text{Welch}}(95) = 8.43$, $p < .001$, $d = 1.64$), their consent judgments did not differ between conditions (Child Pornography condition: $M_{\text{consent}} = 71.63$, $SD = 31.02$; Bootleg condition: $M_{\text{consent}} = 77.51$, $SD = 25.66$; $t(102) = 1.06$, $p = .29$, $d = .21$). See *infra* Appendix C (reporting that judgments of how wrong the offeror’s behavior was do not significantly predict judgments of whether the offeree consented.).

161. E.g., *Johnson v. State*, 921 So. 2d 490, 508 (Fla. 2005) (“Consent obtained by trick or fraud is actually no consent at all.”); 3 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF* 287 (1986) (“[T]aking another’s property with his fraudulently induced ‘consent’ is no different in principle from taking it when there is no expression of consent at all.”).

treating it as more consensual than no agreement? Study 2a examines this question in the context of sexual consent; Study 2b examines it in the context of medical consent.

1. *Sexual-Consent Scenario*

Study 2a compares a case in which a person refuses sex to a case in which a person is deceived into agreeing to sex. Participants ($n = 101$) were asked to judge a scenario in which the offeree, Emily, does not want to sleep with her boyfriend, John, unless he has been tested for Zika, a sexually transmissible virus that can be contracted from mosquitos in certain geographic regions. John has recently traveled to Miami, a moderately Zika-prone area.

In the scenario *Zika*,¹⁶² the couple discusses plans to have sex at a later time. The purpose of including this time delay was to provide a plausible manner in which one person might perform an unconsented-to act on an unwilling partner *without* adding the confounding factor of violence, force, or physical overpowering. To accomplish this, *Zika* describes the couple as having an established practice of one party initiating sex while the other is asleep.

The scenario reads, in pertinent part, as follows.

Shortly after John returned from his business trip, he spent the evening at Emily's place. That night, Emily was too tired to make love. John asked her if she would instead like a "surprise in the morning." For the couple, a "surprise in the morning" is what they call it when John wakes Emily up by making love to her.

Emily thought about whether she wanted John to wake her up by making love to her. She replied, "No surprise in the morning if you haven't gotten tested yet. But yes if you got tested and are clean."

No Agreement condition ($n = 51$): John said, "I still haven't gotten tested yet." In reality, he had not gotten tested. He was telling the truth. Emily said, "OK, then no. Don't give me a surprise in the morning."

Deceived Agreement condition ($n = 50$): John said, "I've been tested and I am clean." In reality, he still hadn't gotten tested. He was lying. Emily said, "OK, then yes. Give me a surprise in the morning."

162. The full text of the scenario is available *infra* Appendix A.

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Shortly after this conversation, they both fell asleep. The next morning, John woke Emily up with a “surprise in the morning” – that is, by having sex with her – even though he had not yet been tested for Zika.

Note that in both versions of the scenario, John knowingly subjects Emily to the risk of contracting Zika despite her insistence that she does not want to sleep with him if he has not been tested. The key difference is that in one case, John uses deception to surmount Emily’s objection, and in the other, he uses the fact that she is sleeping.

After reading *Zika*, participants rated their agreement with a series of four statements, presented in random order, on a 1-7 Likert scale:

1. What happened between John and Emily was consensual.
2. John should be punished for sexually penetrating Emily against her wishes.
3. John raped Emily.
4. Though what John did might have been wrong, it would be a mistake for the law to punish him for it.

As Figure 6 shows, participants viewed the situation more positively overall when John deceived Emily into saying yes than when he violated her express refusal. They saw John’s behavior as more consensual,¹⁶³ less deserving of punishment,¹⁶⁴ and less akin to rape.¹⁶⁵ They also thought that legal sanctions were less appropriate when John obtained deceived agreement than when he obtained no agreement.¹⁶⁶

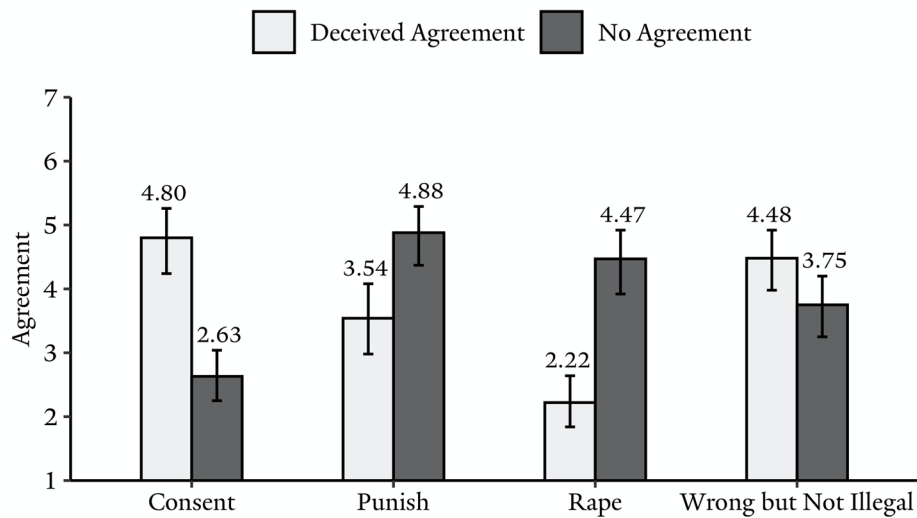
^{163.} In the Deceived Agreement condition, the average level of agreement with “What happened between John and Emily was consensual” was 4.80 ($SD = 1.87$), whereas it was 2.63 ($SD = 1.46$) in the No Agreement condition, $t(99) = 6.52, p < .001, d = 1.30$.

^{164.} Compare 4.88 ($SD = 1.68$) with 3.54 ($SD = 2.04$), $t(99) = 3.61, p < .001, d = .72$.

^{165.} Compare 4.47 ($SD = 1.85$) with 2.22 ($SD = 1.45$), $t(99) = 6.81, p < .001, d = 1.35$.

^{166.} Compare 3.75 ($SD = 1.70$) with 4.48 ($SD = 1.71$), $t(99) = 2.17, p = .032, d = .43$. Nonoverlapping 95% confidence intervals imply a statistically significant difference between means when $\alpha = .05$, but a statistically significant difference can still be observed even where, as here, the confidence intervals overlap.

FIGURE 6.
SEX-BY-DECEPTION SCENARIO: ZIKA



One might wonder whether participants assumed that John used more force, or that Emily resisted more, in the No Agreement case. If so, this difference could explain why they saw the No Agreement case as less consensual than the Deceived Agreement case.

This concern is addressed in Study 2b. Here, the offeree is under general anesthesia in both cases. There is no possibility that participants will assume that the offeree fought back harder in one case than the other.

2. Medical-Consent Scenario

Study 2b participants ($n = 101$) were randomly assigned to read one of two versions of a surgery-by-deception scenario, *Bunion Surgery*. The two conditions differed in whether the offeree *declined to undergo* an elective surgical procedure (No Agreement) or *would have declined* the same procedure for the same reasons were it not for the doctor's deception (Deceived Agreement).

Sophia has a bunion on her right foot and has been wearing splints to correct the problem. She is contemplating undergoing elective surgery to realign the joint.

Sophia will already be having surgery to address a torn ligament in her left ankle – an unrelated problem on the other leg. Her surgeon mentions that since she is already having the ankle surgery, it would be easy for him to also fix her bunion during the same operation.

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Sophia wants to have her bunion fixed, but she also cares deeply about whether the bunion surgery is covered by her insurance. She explains to her surgeon that she wants to have the bunion surgery if it is covered by her insurance, but she would refuse to have it if she had to pay for it out of pocket.

No Agreement condition (n = 49): Sophia's surgeon informs her that her insurance will not cover the bunion procedure. He knows that she will need to pay out of pocket. Sophia says no to the bunion procedure. She says the doctor may not fix her bunion while she is already under anesthesia for her ankle.

Deceived Agreement condition (n = 52): Sophia's surgeon lies to her and says her insurance will cover the bunion procedure, when really he knows that she will need to pay out of pocket. Sophia says yes to the bunion procedure. She says the doctor may fix her bunion while she is already under anesthesia for her ankle.

Imagine that during Sophia's ankle surgery, the doctor also performs the bunion procedure, knowing that it will cost her out of pocket.

Thus, in the No Agreement condition, the doctor performs the procedure in violation of the patient's express refusal. In the Deceived Agreement condition, the doctor equally knowingly violates the patient's wishes, but he deceives her into giving assent before he performs the procedure.

After reading *Bunion Surgery*, participants were asked, "Did Sophia consent to the bunion procedure?" (0 = Not at all; 100 = Very much). They also rated their level of agreement, on a 1-7 Likert scale, with four statements, presented in random order:

1. The doctor should be punished.
2. The doctor should be punished for lying to Sophia.
3. The doctor should be punished for performing an operation on Sophia against her wishes.
4. To the extent that the doctor did something wrong, it was that he lied to Sophia, not that he performed surgery on her bunion.

The purpose of these four questions was to help participants focus on the specific question of whether the doctor is blameworthy *for performing the surgery* (Question 3). Asking only whether the doctor "deserves punishment" could be ambiguous, because the doctor has potentially committed two misdeeds: lying

to Sophia and performing a medical procedure on her without proper authorization. This Article is primarily interested in the latter, as it aims to capture lay attitudes toward *consent*.

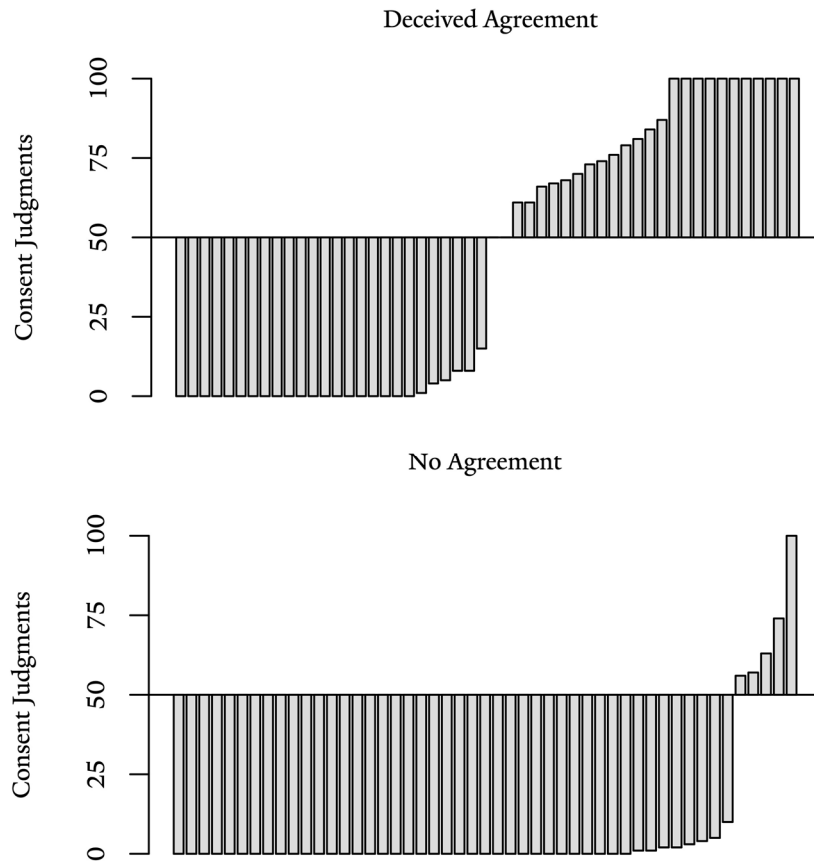
Finally, participants were asked to make a legal determination as to whether the doctor had battered the patient by touching her nonconsensually. They were instructed, "Imagine that Sophia sues the doctor for battery. You are called for jury duty and assigned to be a juror in the case. Battery consists of touching someone intentionally without their authorization." They were then asked, "By performing the bunion procedure, did the doctor commit battery?" and given unmarked sliding scale (0 = Not at all; 100 = Very much). They were also asked to render a dichotomous judgment: "If you had to vote as a juror, would you say that the doctor committed battery?" (Yes/No).

As Figure 7 shows, participants viewed the bunion surgery as more consensual when the doctor deceived Sophia into agreeing to the procedure than when he performed the operation in violation of her express refusal.¹⁶⁷

167. Average consent judgments were 42.08 ($SD = 42.74$) when the doctor obtained deceived agreement and 7.71 ($SD = 21.93$) when he obtained no agreement, $t_{Welch}(77.08) = 5.13, p < .001, d = 1.00$.

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FIGURE 7.
SURGERY-BY-DECEPTION SCENARIO: *BUNION SURGERY*



On the key question—“Should the doctor be punished for performing an operation on Sophia against her wishes?”—participants saw the doctor as less deserving of punishment in the Deceived Agreement condition.¹⁶⁸ This suggests

168. Punishment judgments in the Deceived Agreement condition averaged 5.04 ($SD = 2.11$), while they averaged 6.18 ($SD = 1.30$) in the No Agreement condition. This difference was significant, $t(85.58) = 3.30, p = .001, d = .65$. In addition, participants agreed more strongly with the statement, “To the extent that the doctor did something wrong, it was that he lied to Sophia, not that he performed surgery on her bunion,” in the Deceived Agreement condition ($M = 5.48, SD = 1.89$) than in the No Agreement condition ($M = 3.84, SD = 1.87$), $t(99) = 4.38, p < .001, d = .87$. This finding is consistent with the interpretation that participants in the No

that participants viewed the operation as less problematic when the doctor lied to obtain “consent” than when he simply proceeded with the unwanted surgery.¹⁶⁹

When it came to judging legal consequences, participants were less inclined to say that the doctor in the Deceived Agreement condition had committed battery.¹⁷⁰ When pressed to make a yes/no decision as a jury member, participants in this condition more readily categorized the case as a battery, but the difference between scenarios was not statistically significant on this dichotomous measure.¹⁷¹

B. Discussion of Study 2 Findings

Study 2 shows that laypeople’s attitudes toward consent and deception have moral depth. When they say that a deceived person consents, they follow through on this judgment by assigning less culpability for the bodily invasion.

Study 2 also allows us to rule out a few explanations for why participants generally view deception cases as consensual. It is not that participants are paternalistic, insisting that doctors are justified in performing any surgery in the patients’ best interest. Nor is it that participants refuse to respect a patient’s decision to decline a medical procedure for cost reasons or that participants think the patient benefitted by having her bunion removed. These features were equally present in the No Agreement scenario, and participants balked. Instead, it appears that there is something about deceived agreement that makes it seem like real consent.

Agreement condition thought the doctor’s main fault was performing an unauthorized surgery, whereas those in the Deceived Agreement condition thought the doctor’s main fault was lying about the insurance coverage.

169. When it came to punishment *for lying*, participants in the Deceived Agreement condition thought the doctor deserved more punishment ($M = 6.46$, $SD = .96$) than did participants in the No Agreement condition ($M = 5.98$, $SD = 1.36$), $t(85.75) = 2.05$, $p = .04$, $d = .41$. This was unsurprising, as the doctor in the No Agreement condition did not lie. There was no statistically significant difference in whether participants thought the doctor should be punished more generally, $t(99) = 1.15$, $p = .25$, $d = .23$.
170. Battery judgments in the Deceived Agreement condition averaged 51.71 ($SD = 37.75$), whereas they averaged 69.33 ($SD = 31.28$) in the No Agreement condition, $t(99) = 2.54$, $p = .012$, $d = .51$.
171. In the Deceived Agreement case, 60% of jurors thought it was battery, and in the No Agreement case, 69% thought it was battery. Unlike the continuous measure of battery judgments, this binary measure yields a difference that is not statistically significant: $\chi^2(1, N = 101) = .67$, $p = .41$, $\phi = .10$.

One might wonder whether the results of Study 2 can be explained by the difference in expressive “tokens”¹⁷² across the two conditions: the victim in the No Agreement condition says “no,” whereas the victim in the Deceived Agreement condition says “yes.” This hypothesis would not explain why participants thought the offeror acted more permissibly and deserved less punishment in the deception conditions, but it would explain why they said there was “consent.”

Study 3 will rule out this explanation. It will show that the same outward expression is understood differently when it is achieved through coercion rather than deception.

C. Study 3: Deceived Agreement Versus Coerced Agreement

The legal theorist Peter Westen draws a helpful distinction between “legal consent” and “factual consent.”¹⁷³ Legal consent has normative significance: it carries the moral force to transform illicit conduct into legally permissible conduct. By contrast, factual consent (which this Article has called both “assent” and “agreement”) simply denotes a “state of mind of acquiescence,” “a felt willingness to agree with – or choose – what another person seeks or proposes.”¹⁷⁴ Factual consent is not sufficient for morally valid consent. As Westen explains, a woman held at gunpoint who agrees to submit to intercourse with her attacker has factually consented, but she has not legally consented.¹⁷⁵ By contrast, a woman who fights back against her attacker and never relents gives neither factual nor legal consent.¹⁷⁶

Westen analyzes an infamous 1992 case from Texas in which a woman was attacked at knifepoint by a bedroom intruder who ordered her to take off her clothes. The woman, fearing that she would be stabbed or infected with HIV, agreed to submit to sexual intercourse with her attacker if he put on a condom. The attacker wore a condom and proceeded to have intercourse with the woman

172. See WERTHEIMER, *supra* note 10, at 152-57.

173. WESTEN, *supra* note 9, at 10.

174. *Id.* at 4.

175. *Id.* at 9, 53.

176. Under traditional rape law, a showing of “utmost resistance” was required. See, e.g., *Connors v. State*, 2 N.W. 1143, 1146 (Wis. 1879); *id.* at 1147 (“[V]oluntary submission by the woman, while she has power to resist, no matter how reluctantly yielded, removes from the act an essential element of the crime of rape [I]f the carnal knowledge was with the voluntary consent of the woman, no matter how tardily given, or how much force had been theretofore employed, it is no rape.”).

until she fled naked from her apartment to seek help from a neighbor.¹⁷⁷ The grand jury, in a decision that was widely condemned, voted not to indict the attacker for rape, apparently because “several grand jurors believed that [the woman’s] willingness to submit to sexual intercourse in return for [the attacker’s] wearing a condom constituted ‘consent’ on her part.”¹⁷⁸

Westen’s reading of this troubling case is that the grand jury—rather than being morally perverse—may have been *confused* about the definition of consent they were being asked to apply. That is, the jurors may have made a *category mistake*—“taking the term consent, which the Texas judge intended them to understand legally, and interpreting it factually.”¹⁷⁹ Under a factual definition, Westen notes, the complainant in this case did consent.¹⁸⁰

Setting aside the specifics of the Texas case, we can appreciate Westen’s point about the potential for category mistakes: perhaps participants in Studies 1 and 2 interpreted their charge as deciding whether the offeree factually acquiesced. Instead, what we mean to ask is whether the offeree gave morally valid authorization.

If this is the mistake participants are making, it would explain why Study 2 respondents largely regarded the surgery as consensual when Sophia was deceived into saying yes and as nonconsensual when she flatly refused.¹⁸¹ In addition, it would explain why Study 1 participants reported such high levels of perceived consent in deception cases across the board. Deceived individuals *do* factually consent because they have a state of mind of acquiescence. They say (and think) *yes*.¹⁸²

Study 3 largely rules out this category-mistake hypothesis. Study 3a randomly assigns survey respondents to evaluate an offeree who factually acquiesces

177. WESTEN, *supra* note 9, at 1; see also Carla M. da Luz & Pamela C. Weckerly, *The Texas ‘Condom-Rape’ Case: Caution Construed as Consent*, 3 UCLA WOMEN’S L.J. 95 (1993); Ross E. Milloy, *Furor Over a Decision Not to Indict in a Rape Case*, N.Y. TIMES, Oct. 25, 1992, at A30.

178. WESTEN, *supra* note 9, at 2.

179. *Id.* at 9 (emphasis omitted).

180. *Id.* (“[The complainant] did factually consent to sexual intercourse with [the defendant]. She consciously chose to engage in sexual intercourse with [him] in the sense that she preferred sexual intercourse to the risks of death, injury, and disease she feared she would otherwise face.”).

181. It would not, however, explain why they thought the surgeon had acted more permissibly and deserved less “punish[ment] for performing an operation on Sophia against her wishes.” See *supra* note 168 and accompanying text.

182. Some jurisdictions take the position that consent consists of certain mental states of acquiescence (e.g., thinking yes) while other jurisdictions take the position that consent consists of a certain expression of subjective acquiescence (e.g., saying yes, nodding). WESTEN, *supra* note 9, at 87. Here, the distinction between subjective and expressive consent is not crucial. The key point is that deceived individuals do acquiesce in their minds and in their conduct.

to sexual relations either because she has been *deceived* or because she has been *threatened*. If participants view deception cases as consensual because they take “consent” to mean simple factual acquiescence, we should expect respondents to find similarly high levels of consent in a scenario in which an offeree is *coerced* into saying “yes.” But, as we will see, participants report strikingly low levels of consent when an offeree is coerced. Study 3b replicates and extends this finding.

1. Deception Versus Coercion

Study 3a participants ($n = 111$) read either *Married* or *Secret* and rated whether the offeree consented to sex with the offeror.

Married (Deception)

Kevin wants to sleep with Ann. Ann has said that she does not want to date or sleep with any man who is married. When she asks Kevin whether he is married, he lies and says no, even though he is married. Under these circumstances, Ann sleeps with Kevin.

Secret (Coercion)

Kevin wants to sleep with Ann. Ann had previously shared an embarrassing secret with Kevin. Kevin now says he will spread Ann’s secret unless she will sleep with him. Under these circumstances, Ann sleeps with Kevin.

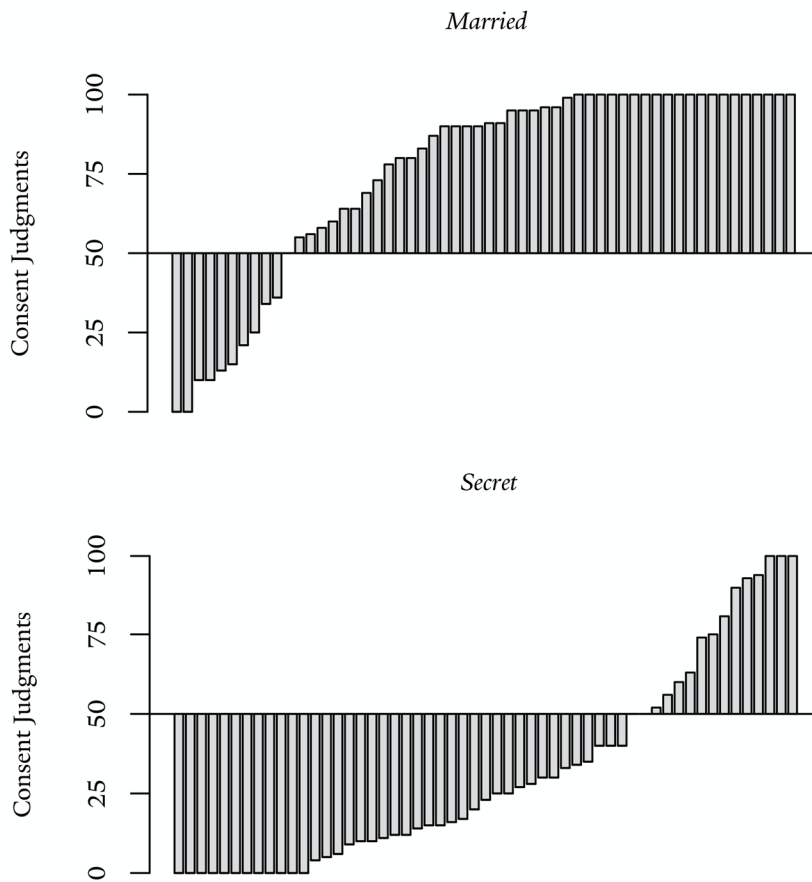
This pair of vignettes was chosen based on a pilot test in which participants ($n = 100$) rated lying about being married as equal in moral wrongness to threatening to spread someone’s secrets. In fact, they rated lying about being married as slightly more wrongful.¹⁸³

As Figure 8 shows, most participants who read the deception scenario *Married* thought Ann had consented to sex with Kevin, whereas most participants who read the coercion scenario *Secret* thought that Ann had not.¹⁸⁴

183. See *infra* Appendix C (showing that lying about being married garnered a wrongness rating of 92.44 ($SD = 12.96$), while threatening to spread a secret garnered a rating of 90.53 ($SD = 16.97$), a difference that is not significant, $t_{Welch}(185.13) = .89, p = .37$).

184. The average consent rating for *Married* was 75.70 ($SD = 31.55$), whereas the average consent rating for *Secret* was 31.35 ($SD = 31.43$). This difference was significant, $t(109) = 7.42, p < .001, d = 1.41$.

FIGURE 8.
SEX-BY-DECEPTION VERSUS SEX-BY-COERCION



Participants' written responses further underscore that they viewed Ann as acting more autonomously when she was deceived than when she was coerced:

Just because Ann had false information, she still had a choice, which she made. While it is true she would have chosen differently if she knew the truth, that doesn't remove Ann's freedom of choice. (Deception scenario)

This sex was completely consensual. Ann may be upset (and has every right to be) when she finds out that Kevin is married, but she did agree to sleep with him. (Deception scenario)

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It was not consensual because one person was forced into sex because the other person was threatening her. (Coercion scenario)

No, it was forced upon Ann because he gave her no choice. (Coercion scenario)

As these qualitative responses demonstrate, participants were not simply answering the factual question of whether Ann acquiesced. In both conditions, participants seemed to grapple with the normative question of whether Ann's acquiescence expressed her autonomous will. They were reasoning morally—and largely concluding that consent was vitiated in the coercion case, but not in the deception case.

A strong recurring theme in participants' responses was that deceived individuals were not "forced." They could have chosen to decline the proposal and thus gave meaningful consent.

She made the choice to have sex with him. He may have lied to her but he did not force her to do anything. (Deception scenario)

Although I think it was wrong of [Kevin] to deceive [Ann] about the circumstances of his and [Ann's] sexual encounter, in the end she did give consent to have sex. Even though she was wrongly informed, [Kevin] didn't rape her or force her to have sex, she made that decision. [Kevin] should not have lied about his situation but [Ann] decided to move forward. (Deception scenario)

Some participants who invoked force seemed to be speaking of *physical force*—the kind contemplated by the traditional definition of rape, which requires the use or threat of physical force.¹⁸⁵

If he didn't physically force her to sleep with him, then she consented. (Deception scenario)

Because he did not physically force her to have sex, she willingly went along with it because she thought he was not married. He lied to her, but didn't physically force her. He manipulated her. (Deception scenario)

But it seems that most respondents who mentioned "force" were not referring exclusively to physical force. Those who judged the coercion scenario *Secret* often said the offeree was "forced" to have sex, even though the threat she faced—of her embarrassing secret being exposed—was nonphysical.

¹⁸⁵. Today, most jurisdictions define rape as requiring force, or else define rape as nonconsensual sex and include force as a necessary component of nonconsent. See, e.g., Tuerkheimer, *supra* note 7, at 15 nn.73-74 (listing statutes).

No. It was blackmail. She might have agreed to it, but it was because she felt threatened. In my opinion, it doesn't matter if you feel threatened physically or emotionally, a threat is still a threat. (Coercion scenario)

It seemed important to participants that the deceived offeree had a meaningful opportunity to say no.¹⁸⁶ She was not forced, in the sense that she had reasonably available options and could have declined the proposal.

She could have chosen not to consent, or chosen to find out more about him before . . . engaging in sex with him. (Deception scenario)

The coerced person, by contrast, was seen as not having had reasonably available options because the threat foreclosed such options. In participants' eyes, she could not have said no.¹⁸⁷

Because Kevin was blackmailing her; what choice did she have? (Coercion scenario)

We might wonder why it should matter, normatively speaking, that a deceived person has options available to her when her rational capacity to choose among these options is impaired by another's manipulative deceit. The options may be available, but she has been misled about the value of pursuing them. "Both coercion and deception infringe upon the voluntary character of [an] agent's actions," explains the philosopher Gerald Dworkin.¹⁸⁸ "In both cases . . . [a person's] actions, although in one sense hers because she did them, are in another sense attributable to another."¹⁸⁹ Yet, as demonstrated by the results of Study 3, that is not how laypeople see things. In deception cases, they say a person's actions are hers because she did them; in coercion cases, they say her actions are attributable to another.

She made her own choice and decided to sleep with him even though it was based on a lie. (Deception scenario)

^{186.} For a discussion of how problematic this determination is, see Ferzan & Westen, *supra* note 11, at 776 & n.57, which notes that "reasonable people may disagree" about the kinds of coercion that render sexual intercourse nonconsensual and comparing approaches taken by different states.

^{187.} Maybe they favor something like O'Neill's argument that "a better test of whether someone was able to consent is whether the person had an authentic opportunity to say no." KORSGAARD, *supra* note 23, at 309 (citing Onora O'Neill, *Justice, Gender, and International Boundaries*, in *THE QUALITY OF LIFE* (Martha Nussbaum & Amartya Sen eds., 1992)).

^{188.} GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 14 (1988).

^{189.} *Id.*

The sex was consensual. She was told by Kevin that he was not married. She believed him and made up her own mind to sleep with him. No one forced or coerced her to do this. She made up her own mind based on the information she was given. (Deception scenario)

2. *Deception Versus Coercion Versus Incapacitation*

Study 3b extends these findings by adding a third condition in which Kevin gets Ann drunk.¹⁹⁰ Study 3b asks participants to evaluate not only consent but also whether Kevin's conduct was rape, deserving of punishment, or otherwise illegal.

Participants ($n = 151$) were randomly assigned to read a Deception scenario (*Married*), a Coercion scenario (*Secret*), or an Incapacitation scenario (*Drunk*).

Drunk (n = 49)

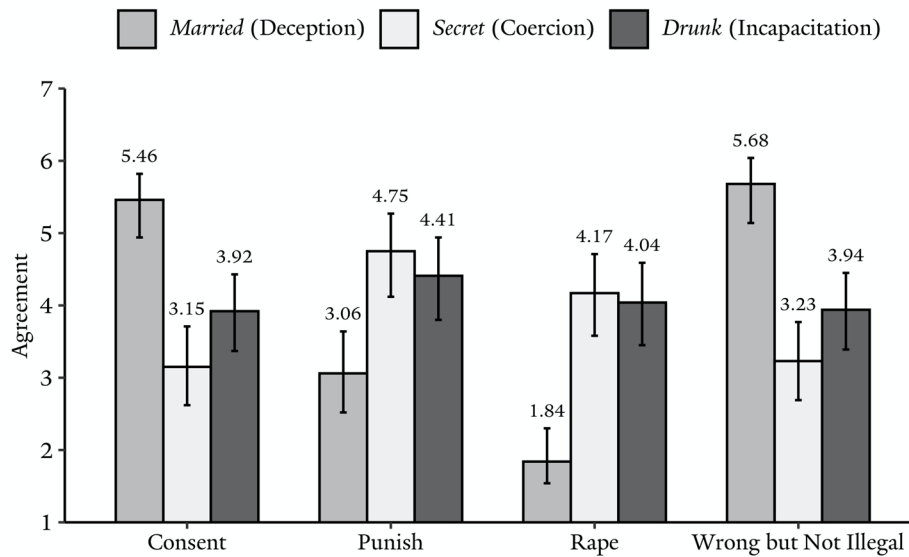
Kevin wants to sleep with Ann. Kevin sees Ann at a college party and buys her several drinks throughout the night. By the end of the night, she is extremely drunk and can hardly stand up on her own. When she speaks, her words are slurred. Kevin asks her back to Kevin's dorm room. Under these conditions, Ann agrees to sleep with Kevin.

Participants rated their level of agreement with a series of four statements (1 = Strongly disagree; 100 = Strongly agree), which were presented in random order:

1. The sex between Kevin and Ann was consensual.
2. Kevin should be punished for sexually penetrating Ann.
3. Kevin raped Ann.
4. Though what Kevin did might have been wrong, it would be a mistake for the criminal justice system to punish him for it.

¹⁹⁰. In Study 3b, the vignette characters' names were randomly chosen from a list of common names. For simplicity, here the offeror is named Kevin and the offeree is named Ann.

FIGURE 9.
MORAL JUDGMENTS OF SEXUAL-CONSENT SCENARIOS



As Figure 9 shows, participants had a qualitatively different reaction to deception than to coercion or incapacitation. Unlike sex-by-coercion or sex-by-intoxication, sex-by-deception was seen as highly consensual.¹⁹¹ It was seen as not worth punishing¹⁹² and certainly not as rape (indeed, rape judgments were near the floor (1) on the 1-7 scale ($M = 1.84$, $SD = 1.31$)).¹⁹³ In addition, participants more strongly agreed that sex-by-deception was wrong but not something the

191. The overall effect of condition on consent judgments was significant, $F(2, 148) = 19.74$, $p < .001$, $\eta_p^2 = .21$. Post-hoc Holm-adjusted pairwise comparisons reveal that participants judged *Married* to be more consensual ($M = 5.46$, $SD = 1.61$) than *Secret* ($M = 3.15$, $SD = 2.09$), $t(148) = 6.18$, $p < .001$, and more consensual than *Drunk* ($M = 3.92$, $SD = 1.91$), $t(148) = 4.07$, $p < .001$. They also judged *Drunk* to be more consensual than *Secret*, $t(148) = 2.04$, $p = .04$.

192. As with consent judgments, the effect of condition on punishment judgments was significant, $F(2, 148) = 9.38$, $p < .001$, $\eta_p^2 = .11$. Participants thought Kevin deserved less punishment in *Married* ($M = 3.06$, $SD = 2.02$) than in *Secret* ($M = 4.75$, $SD = 2.11$), $t(148) = 4.12$, $p < .001$, or in *Drunk* ($M = 4.41$, $SD = 2.08$), $t(148) = 3.23$, $p = .003$. Punishment judgments did not differ significantly between *Secret* and *Drunk*, $t(148) = .83$, $p = .41$.

193. The effect of condition on rape judgments was significant, $F(2, 148) = 24.56$, $p < .001$, $\eta_p^2 = .25$. Participants perceived less rape in *Married* ($M = 1.84$, $SD = 1.31$) than in *Secret* ($M = 4.17$, $SD = 2.13$), $t(148) = 6.28$, $p < .001$, or in *Drunk* ($M = 4.04$, $SD = 2.06$), $t(148) = 5.84$, $p < .001$. Rape judgments did not differ significantly between *Secret* and *Drunk*, $t(148) = .35$, $p = .72$.

criminal-justice system should punish, as compared to sex-by-coercion or sex-by-intoxication.¹⁹⁴

Taken together, Studies 2a, 2b, 3a, and 3b demonstrate that participants perceived consent when the unwanted act was achieved via deception but not when it was achieved via stealth (while the person is under general anesthesia), coercion (while the person is placed in fear of embarrassment), or incapacitation (while the person is inebriated). These results undermine the “category-mistake” hypothesis.

Participants appeared to be thinking normatively, but their intuitions traced a pattern that no existing theory of consent can explain. Commonsense consent is not Westen’s simple *factual acquiescence*, as that would require respondents to have found all three cases—deception, coercion, and incapacitation to be consensual. Nor is commonsense consent *canonical consent*, which would have required respondents to find all three cases—including the deception case—to be nonconsensual. But participants were not following *legal consent*, either. In most jurisdictions, it is not rape if sex is obtained through nonphysical forms of extortion.¹⁹⁵ Participants judged the coercion case *Secret* to be relatively low on consent, even though the threat was to share an embarrassing secret.¹⁹⁶

Ultimately, then, participants appear to have understood “consent” in a way that comports with neither factual, prescriptive, nor legal accounts. Commonsense consent, it seems, is its own special breed.

194. *Married* ($M = 5.68$, $SD = 1.58$); *Secret* ($M = 3.23$, $SD = 2.04$); *Drunk* ($M = 3.94$, $SD = 1.95$). Judgments in *Married* were significantly higher than in *Secret*, $t(148) = 6.60$, $p < .001$, and *Drunk*, $t(148) = 4.63$, $p < .001$. Judgments in *Drunk* were marginally higher than in *Secret*, $t(148) = 1.90$, $p = .060$.

195. See RICHARD A. POSNER & KATHARINE B. SILBAUGH, *A GUIDE TO AMERICA’S SEX LAWS* 5-34 (1996) for an overview of state rape statutes. For instance, New York defines forcible compulsion as “compel[ling] by either the use of physical force or a threat, express or implied, that places a person in fear of immediate death or physical injury to himself, herself, or another person, or in fear that any person will be kidnapped.” *Id.* at 23-24; see also Bryden, *supra* note 35, at 461 (“[L]aws . . . prohibiting sexual extortion” are “so far rare[.]”). For a counterexample, see DEL. CODE ANN. tit. 11, § 774 (2018) (defining sexual extortion to include “expos[ing] a secret . . . intending to subject anyone to hatred, contempt or ridicule”).

196. Thus, it is not the case that lay judgments of consent are always more permissive than legal consent. When it comes to coercion, at least in the case of *Secret*, lay judgments appear less tolerant of problematic sexual conduct.

IV. WHY DO PEOPLE THINK DECEPTION IS COMPATIBLE WITH CONSENT?

Thus far, we have seen that laypeople largely regard deceived individuals as granting “consent” (Study 1) and that this “consent” is morally meaningful in that it mitigates the perceived wrongness of conduct that would otherwise be tortious (Study 2a) or criminal (Study 2b). This finding appears to be specific to deception; it does not extend to other interferences to autonomy such as coercion (Study 3a) or incapacitation (Study 3b).

This Part searches for an explanation. Why are deception cases viewed as consensual when coercion and incapacitation cases are not? We can already rule out several hypotheses:

1. Respondents are applying a thin account or literal understanding of consent.¹⁹⁷
2. The offeree factually acquiesces or says “yes.”¹⁹⁸
3. The offeree ultimately benefits from or is not harmed by the offeror’s conduct.¹⁹⁹
4. The offeree’s deal-breaker is unsympathetic.²⁰⁰
5. In the absence of a written agreement, deception would be difficult to substantiate.²⁰¹

197. Commonsense consent does not seem to be a thin concept because people give moral weight to deceived assent; they view the offeror as deserving less punishment (Study 2, *supra* Section III.A). Furthermore, when it comes to cases involving coercion or intoxication, respondents do not apply a thin or literalistic understanding of consent, so this cannot explain why deception cases are uniquely seen as consensual (Study 3, *supra* Section III.C).

198. See Study 3, *supra* Section III.C. When the “yes” is induced by coercion or intoxication, factual acquiescence is insufficient for consent; it is only when the “yes” is induced by deception that people think it is sufficient for consent.

199. See Study 2, *supra* Section III.A. The patient benefits equally from the bunion procedure, yet only when she is deceived do participants judge the procedure to be consensual.

200. See Study 2, *supra* Section III.A. In both cases, the patient’s reason for declining the procedure was the out-of-pocket cost. Yet it is only when she is deceived that participants judge the procedure to be consensual. In addition, many of the cases deemed consensual depicted offerees with highly sympathetic deal-breakers, such as not wanting to sleep with a married person or undergo an elective medical procedure that carries a high out-of-pocket cost.

201. See Study 2, *supra* Section III.A. In both cases, the patient would have an equally difficult time proving that she had instructed the doctor not to perform the operation if the procedure was not covered by insurance. In neither case did she memorialize her wishes in writing. Yet she was only judged to have consented when she was deceived.

6. The deception at issue is something we see occurring in everyday life.²⁰²

What explanations remain? This Part explores three hypotheses. The first is victim blaming, a self-protective psychological coping mechanism. In their qualitative responses, participants often distanced themselves from the victim by blaming her for her fate, which may have enabled them to maintain the comforting belief that their environment is safe and predictable.

The second hypothesis is that deception cases were viewed as consensual because they, unlike coercion or intoxication cases, involved the phenomenological experience of choice. A deceived person, at least in the moment, *thinks* she wants to participate in the proposed activity. If the folk conception of consent is something like “wholehearted wanting,” it is easy to see why deceived individuals are considered autonomous, consenting agents.

These explanations are tempting, but they ultimately cannot explain all the data, including new evidence presented in Study 4. The better explanation, this Part will conclude, is that commonsense consent tracks judgments of *essentiality*. Roughly speaking, lies that pertain to the essence of the activity in question are seen as vitiating consent, whereas lies that pertain to mere tangential matters are not (Study 5). As we will see, this intuition loosely mirrors the famously slippery legal distinction between “fraud in the factum” and “fraud in the inducement.”²⁰³

This Part assesses each of these three hypotheses – victim blaming, wholeheartedness, and essentiality – in turn.

A. *Victim Blaming*

In participants’ qualitative responses, participants frequently blamed the victims of deception for being overly naïve, arguing that consent was present because the offeree could have “sniff[ed] out”²⁰⁴ the deception rather than credulously relying on the word of another:

202. See Study 3, *supra* Section III.C. When the offeror used alcohol to get the offeree to assent to sex, the sex was deemed nonconsensual even though plying a prospective partner with alcohol is a relatively commonplace occurrence, descriptively.

203. See *infra* text accompanying notes 236–240. Briefly, fraud in the factum is deception about “the act itself,” whereas fraud in the inducement is deception about “the reason for doing the act.” Falk, *supra* note 100, at 49. As Martha Chamallas explains, “Fraud in the factum typically denotes a situation in which the victim consents to the doing of act X and the perpetrator of the fraud, in the guise of doing act X, actually does act Y. . . . [In] fraud in the inducement, . . . the victim is fraudulently induced to consent to the doing of act X and the perpetrator of the fraud does indeed commit act X.” Chamallas, *supra* note 80, at 831 n.224.

204. As one participant wrote, “She consented based on a lie, she had to be careful and sniff things out. Fault’s partially on her.”

She did consent, even though she was lied to. She's not helpless, after all. For example, she could have done her "homework" and found out about [Kevin's] true marital status. She could have asked around, talked to others who know him, and then she could have found out the truth. It is incumbent upon all of us to make our decision as informed as possible. On the one hand, she was deceived, but on the other, she could have taken some time to make sure [Kevin] met her criteria to be single. It is up to her to make sure she knows what she is doing.

I believe [Marvin] should have asked his insurance company himself whether the procedure was covered or not. The doctor has every reason to have ulterior motives for saying what he did about the insurance. [Marvin's] a big boy. He should've taken it upon himself to find out.

Victim blaming is a well-documented psychological phenomenon.²⁰⁵ In general, we are motivated to believe that our social world is fair and controllable. When an innocent person is victimized, our dearly held "belief in a just world" is threatened.²⁰⁶ As a result, we seek out reasons why the victim deserved what she got.²⁰⁷ This tendency is especially pronounced when it comes to blaming victims of sexual assault.²⁰⁸

One problem with the victim-blaming hypothesis, however, is that it does not explain the divergence between judgments of deceived consent and judgments of coerced or intoxicated consent. The victim-blaming hypothesis requires that participants blame deceived victims more than coerced or intoxicated victims, but provides no explanation for why that might be. Indeed, in *Secret*, one could easily blame the blackmail victim for unwisely sharing her embarrassing secret with Kevin or for having a shameful secret in the first place. Similarly,

205. See, e.g., MELVIN LERNER, *THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION* 89-104 (1980); Melvin J. Lerner & Dale T. Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, 85 *PSYCHOL. BULL.* 1030, 1030 (1978); Melvin J. Lerner & Carolyn H. Simmons, *Observer's Reaction to the "Innocent Victim": Compassion or Rejection?*, 4 *J. PERSONALITY & SOC. PSYCHOL.* 203, 204 (1966).

206. Carolyn L. Hafer, *Do Innocent Victims Threaten the Belief in a Just World? Evidence from a Modified Stroop Task*, 79 *J. PERSONALITY & SOC. PSYCHOL.* 165, 165 (2000); see Adrian Furnham & Barrie Gunter, *Just World Beliefs and Attitudes Toward the Poor*, 23 *BRIT. J. SOC. PSYCHOL.* 265, 265 (1984).

207. See Jaime L. Napier et al., *System Justification in Responding to the Poor and Displaced in the Aftermath of Hurricane Katrina*, 6 *ANALYSES SOC. ISSUES & PUB. POL'Y* 57, 63-64 (2006).

208. See, e.g., Laura Niemi & Liane Young, *Blaming the Victim in the Case of Rape*, 25 *PSYCHOL. INQUIRY* 230, 230 (2014) (noting several studies showing that people judge victims of rape more harshly relative to victims of nonsexual crimes such as robbery).

with the *Drunk* scenario, one could easily blame the victim for voluntarily becoming intoxicated.²⁰⁹ Yet participants largely judged the coercion and intoxication scenarios to be nonconsensual.

A related potential explanation is the efficient-deterrence hypothesis, under which respondents might be motivated to punish overly trusting and naïve individuals in order to create certain incentives. If it is better for would-be victims to take self-protective measures against fraud than to be maximally trusting, it may make sense for participants to treat victims who have failed to take such measures as if they have consented. Like the victim-blaming hypothesis, however, the efficient-deterrence hypothesis suffers from a central weakness: it does not explain why fraud is seen as different from coercion or intoxication. One could easily maintain that Ann ought to be deterred from sharing (or having) an embarrassing secret, or from getting drunk at Kevin's prodding. Thus, neither victim blaming nor efficient deterrence can fully explain why fraud is seen as different from coercion or intoxication.

B. "At That Moment, Given What She Knew": Consent as Wholehearted Wanting

Perhaps, when laypeople think of consent, they think of something like "wholehearted wanting." People who are deceived, unlike people who are coerced, have the phenomenological experience of choice. In their minds, they *want* to accept the offeror's proposal. Indeed, they may give something that resembles the "enthusiastic consent" now recommended by many university codes of conduct.²¹⁰

What [Kevin] did was horribly wrong, but it doesn't change the fact that, at that moment, given what she knew, [Ann] wanted to have sex with him, and chose to have sex with him.

Perhaps when laypeople evaluate consent, they think about the offeree's subjective experience of choice, rather than focusing on the more abstract concept of the offeree's autonomous will. For example, perhaps people think Sophia, the deceived patient, consented to the bunion operation because she experienced an

209. Recall that Kevin "buys her several drinks throughout the night." See *supra* notes 190-191 and accompanying text.

210. Yale University, for instance, instructs students to "[h]old out for enthusiasm." Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 925 (2016). Gersen and Suk observe that "enthusiasm . . . [is a] term[] that we increasingly see schools recite in the mode of didactic training on how to have sex." *Id.* at 929.

affirmative desire for the procedure. Note that this would suggest that the folk conception of consent is about how the offeree *feels*, rather than about her ability to control access to her body on her own terms.

This explanation is attractive because it echoes a familiar position in the debate over the legal wrong of rape. Broadly speaking, the “experiential view” is that “rape is wrong because of the bad experience of being raped.”²¹¹ This position has been rejected by many modern commentators, who insist that rape is wrong because it violates the victim’s sexual autonomy—not because, or not merely because, it is violent or upsetting in the moment.²¹² For instance, the legal philosopher John Gardner argues that nonconsensual sex is wrong “even when unaccompanied by further affronts, because the sheer use of a person, and in that sense the objectification of a person, is a denial of their personhood. It is literally dehumanizing.”²¹³ Deborah Tuerkheimer similarly asserts that the gravamen of rape is “the negation of women as sexual subjects”²¹⁴ and argues that “whether the victim experiences the violation . . . is beside the point.”²¹⁵

In addition, the wholeheartedness hypothesis would explain why sex-by-deception is seen as consensual while sex-by-coercion is not. As Wertheimer observes, “Women abhor coerced sex, but the synchronic experience of sex is typically not affected by deception Indeed, that is precisely why some commentators argue that the wrong of rape cannot be based on experience.”²¹⁶

As we will see, however, the wholeheartedness hypothesis is belied by Study 4’s findings. Study 4 tests whether some lies are considered more consent defeating than others, and it unearths a salient counterexample in which deception is *not* viewed as compatible with consent, even though the offeree wholeheartedly chooses to accept the proposal “at that moment, given what she knew.”²¹⁷

211. JOHN GARDNER, *The Wrongness of Rape*, in OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 1, 1 (2007).

212. See Müller & Schaber, *supra* note 96, at 1 (“[N]on-consensual sex, whether it is violently imposed or not, is now widely acknowledged to be a serious moral wrong . . .”).

213. GARDNER, *supra* note 211, at 16.

214. Tuerkheimer, *supra* note 113, at 352.

215. *Id.* at 351.

216. WERTHEIMER, *supra* note 10, at 194; accord Bryden, *supra* note 35, at 469 (“While it is true that deception impairs autonomous choice, . . . the victim in a deceptive romantic relationship may not be as severely hurt as one who has been forced by a threat to have sex.” (citing SCHULHOFER, *supra* note 121, at 156)).

217. See *supra* note 210 and accompanying text.

C. Study 4: Different Lies Are Treated Differently

In Study 4, participants ($n = 152$) evaluated one of three sex-by-deception vignettes. In *Twin Brother*, the offeree is deceived about the identity of the person propositioning her: she believes that she is speaking with her boyfriend but really it is her boyfriend's twin brother. In *HIV Status*, the offeree is deceived about the offeror's HIV status. In *Married*, the offeree is deceived about his marital status. Appendix A presents the full text of the vignettes.

Participants rated the extent to which they believed the offeree had consented to "sex with the person who got into her bed in the morning." They also rated the degree to which they thought the offeror had raped the offeree (0 = Not at all; 100 = Very much).

As Figure 10 shows, most participants viewed *Twin Brother* as nonconsensual,²¹⁸ *HIV Status* as middling,²¹⁹ and *Married* as highly consensual.²²⁰ Most people considered *Twin Brother* to be rape,²²¹ while few believed *HIV Status*²²² or *Married* constituted rape.²²³ These differences were statistically significant.²²⁴

218. $M = 25.92$, $SD = 38.60$.

219. $M = 45.61$, $SD = 38.64$.

220. $M = 78.60$, $SD = 28.96$.

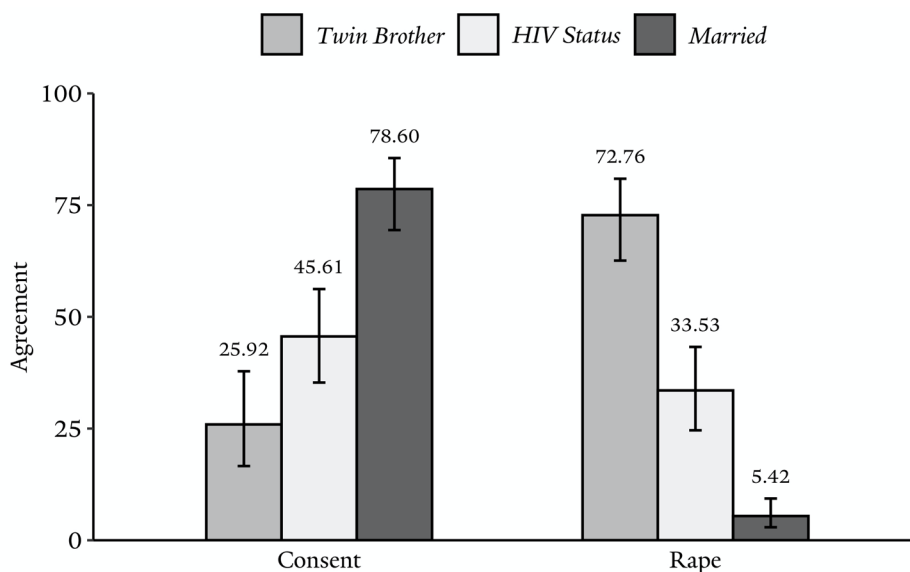
221. $M = 72.76$, $SD = 33.12$.

222. $M = 33.53$, $SD = 34.33$.

223. $M = 5.42$, $SD = 11.29$.

224. The main effect of condition on consent judgments was significant, $F(2, 149) = 27.98$, $p < .001$, $\eta_p^2 = .27$, as was the effect of condition on rape judgments, $F(2, 149) = 71.80$, $p < .001$, $\eta_p^2 = .49$.

FIGURE 10.
MORAL JUDGMENTS OF DIFFERENT SEX-BY-DECEPTION SCENARIOS



The findings demonstrate that some types of deception were perceived as more consent defeating than others. Most saliently, respondents were willing to call *Twin Brother* rape, even though the offeree wholeheartedly wanted to sleep with the offeror in the moment.

Why is the twin deception different from the others? Undoubtedly, it is a disturbing case. The offeree would be horrified and disgusted to learn that she had slept with the wrong person. But it is not clear that being lied to about your partner's identity is worse, or more horrifying, than being lied to about your partner's HIV status. Moreover, the deceived party could more easily uncover the deception in *Twin Brother*, where a simple conversation might uncover that one twin is impersonating another, than in *HIV Status*, where the key information lies in confidential health records.

Perhaps the twin-brother case is different because it involves impersonation. The law has long treated impersonation as a particularly serious form of sexual fraud. In Idaho, for instance, it is rape if a victim "submits under the belief that the person committing the act is someone other than the accused."²²⁵ Nebraska, too, treats sexual contact induced by "deception as to the identity of the actor"²²⁶ as a crime. England and Canada also recognize impersonation cases as criminal

225. IDAHO CODE § 18-6101(9) (2019).

226. NEB. REV. STAT. § 28-318(8)(a)(iv) (2019).

sexual conduct,²²⁷ as do the official proposed revisions to the Model Penal Code.²²⁸

In the literature on sex-by-deception, there are two main theories about impersonation cases: the *materiality* theory and the *essentiality* theory.

The materiality theory posits that what matters is the subjective importance the individual offeree places on the factor in question. On this account, impersonation cases are distinguishable from deception about factors such as marital status and occupation because people tend to care more about *whom* they are sleeping with than whether their partners are married, unemployed, and so on. To commentators like Neil Manson, this distinction justifies treating “fantastically strong deal breaker[s]” (e.g., impersonation) as consent defeating, while treating “weak deal breakers” (e.g., lies about occupation) as consent compatible.²²⁹

The essentiality theory, meanwhile, posits that impersonation cases are non-consensual because the deception pertains to the nature of what is being consented to. That is, the “identity of the person doing the act is part of the essence” of sexual relations.²³⁰ And because *which person* is an “intrinsic part of the act,”²³¹ the victim in *Twin Brother* is “defrauded as to *the act itself*.”²³² The encounter is therefore nonconsensual.²³³ By contrast, when a person is “misled about [an] encounter’s peripheral features, such as the other person’s natural hair color, occupation, or romantic intentions,” the deception does not go to the core of what is being consented to.²³⁴ Such encounters are deemed consensual because the lies, however important to the defrauded individual, are not “essential lies.”²³⁵

227. See Rubinfeld, *supra* note 24, at 1397 (listing examples).

228. Under the proposed revisions to the Model Penal Code, an impersonator is guilty of a fourth-degree felony if he or she “knowingly leads” the victim to “believe falsely that he or she is someone who is personally known to the complainant.” MODEL PENAL CODE § 213.4(2)(c) note on sexual intercourse by exploitation (AM. LAW INST., Proposed Official Draft 2016).

229. Manson, *supra* note 121, at 419–20.

230. Christopher & Christopher, *supra* note 106, at 86 n.60 (citing Ernst Wilfred Puttkammer, *Consent in Rape*, 19 ILL. L. REV. 410 (1925)); *accord* Reg. v. Dee [1884] 15 Cox 579, 594 (Ir.) (“The person by whom the act was performed was part of its essence.”).

231. Jocelynn A. Scutt, *Fraudulent Impersonation and Consent in Rape*, 9 U. QUEENSLAND L.J. 59, 61 (1975) (quoting the judicial logic in *Dee*, a husband-impersonation case from 1884).

232. Christopher & Christopher, *supra* note 106, at 86 n.60 (emphasis added).

233. *Id.* (explaining that impersonation is fraud “as to the act itself, which is fraud in the factum and, therefore, rape.”).

234. Dougherty, *supra* note 94, at 729.

235. See Ernst Wilfred Puttkammer, *Consent in Rape*, 19 ILL. L. REV. 410, 423 (1925) (describing mistakes regarding identity as “essential mistake[s]”).

This fuzzy distinction roughly corresponds to the common-law doctrine differentiating “fraud in the factum” from “fraud in the inducement.” As Perkins and Boyce explain,

[I]f deception causes a misunderstanding as to the fact itself (fraud in the factum) there is no legally-recognized consent because what happened is not that for which consent was given; whereas consent induced by fraud is as effective as any other consent . . . if the deception relates not to the thing done but merely to some collateral matter (fraud in the inducement).²³⁶

Unfortunately, as critics have noted, there is no principled way to determine what counts as “the fact itself” and what is merely “some collateral matter.”²³⁷ Still, the essentiality theory is the primary legal explanation courts offer when holding that impersonation cases are nonconsensual.²³⁸ Thus, it is worth studying, even though the distinction “has plagued theorists”²³⁹ with its “problematic elasticity”²⁴⁰ and “illusory nature.”²⁴¹

Study 5 pits the two theories against one another. It asks which is seen as more undermining of consent: a lie that is more essential to the act but less material to the individual, or a lie that is more material to the individual but less essential to the act.

D. Study 5: Essentiality or Materiality?

Are impersonation cases seen as nonconsensual because one’s partner’s identity is highly *material* to one’s willingness to have sex, or because one’s partner’s identity is a highly *essential* feature of a sexual encounter? Study 5 deployed three nonsexual vignettes devised to disentangle the two explanations.

Participants ($n = 604$) were randomly assigned to read either the Material Lie version or the Essential Lie version of one scenario, which was either about a medical exam (below), a contract for sale, or a tattooing. Appendix A contains the full text of all three scenarios.

236. PERKINS & BOYCE, *supra* note 73, at 215.

237. WERTHEIMER, *supra* note 10, at 206 (“Everything turns on the way in which a case is described . . .”); FEINBERG, *supra* note 34.

238. CHRISTOPHER & CHRISTOPHER, *supra* note 106, at 84-85 (collecting cases).

239. KIMBERLY KESSLER FERZAN, *Clarifying Consent: Peter Westen’s The Logic of Consent*, 25 LAW & PHIL. 193, 199 (2006) (reviewing WESTEN, *supra* note 9).

240. FALK, *supra* note 100, at 69.

241. FISCHER, *supra* note 29, at 79.

COMMONSENSE CONSENT

TABLE 2.
STUDY 5 MEDICAL-EXAM SCENARIO

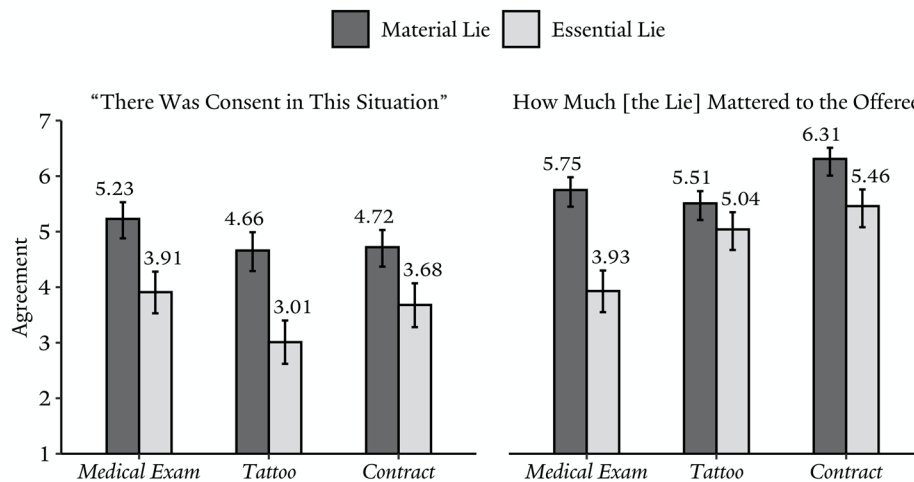
Material Lie	Essential Lie
Imagine Brett is volunteering to help medical students learn how to practice medicine. Brett chooses to volunteer because he feels strongly about making a difference. Whenever he thinks about how he should spend his time, he prioritizes activities that will have the most impact.	
As a volunteer, Brett's job is to sit still while an experienced professor of medicine performs an exam on him in front of a class of medical students.	
Imagine that the professor who will perform the exam tells Brett beforehand that the exam <i>will teach the students new material that will help them learn how to be doctors.</i>	Imagine that the professor who will perform the exam tells Brett beforehand that the exam <i>will be of his abdomen.</i>
But when Brett gets on stage in front of the class of medical students, <i>it turns out that the students have already learned about the content being covered.</i>	But when Brett gets on stage in front of the class of medical students, <i>the professor examines Brett's ears.</i>
As he gets examined, Brett realizes that the professor lied about <i>whether the students will learn anything from watching him be examined.</i>	As he gets examined, Brett realizes that the professor lied about <i>what part of the body the exam will be of.</i>
"There was consent in this situation." (7-point Likert scale: Agree/Disagree)	
If you had to guess, how much do you think it mattered to Brett <i>whether the exam done on him involved new material that helped the medical students learn, versus was old material that taught them nothing?</i>	If you had to guess, how much do you think it mattered to Brett <i>whether the exam done on him was of his abdomen, as opposed to his ears?</i>
(7-point Likert scale: Matters not at all /Matters a great deal)	(7-point Likert scale: Matters not at all /Matters a great deal)

This scenario was written such that the essential lie (which body part would be examined) was less material to Brett than the nonessential lie (whether the exam would be edifying to the medical students). *Tattoo* and *Contract* had the same design. For example, in *Contract*, a man sought to make a purchase in order to earn reward points that would enable him to redeem a trip to Europe. He did

not care much about what he bought; he planned to donate the item to a charity. The store clerk deceived him either about what item he was ordering (a more essential, less material lie) or about whether the purchase would qualify for reward points (a less essential, more material lie).

The results indicate that participants perceived more consent in the Material Lie condition than in the Essential Lie condition.²⁴² For instance, Brett's consent was seen as more undermined when he was lied to about what body part would be examined, even though he cared much more about whether the exam was edifying to the students (Figure 11).²⁴³ Thus, a lie that was *more* important to the offeree was viewed as *less* defeating of consent.

FIGURE 11.
ESSENTIAL VERSUS MATERIAL DECEPTION



242. A significant main effect of condition was observed, $F(1, 598) = 80.40, p < .001, \eta_p^2 = .12$. There was no significant interaction between condition and domain/scenario, $F(2, 598) = 1.38, p = .25$, indicating that the difference between the material lie and the essential lie did not differ across the three scenarios (*Medical Exam, Tattoo, Contract*).

243. As expected, there was a significant main effect of condition on judgments of materiality, $F(1, 598) = 65.58, p < .001, \eta_p^2 = .10$. This indicates that the materiality manipulation was successful: participants judged that that fact in question mattered more to offerees in the Material Lie conditions than in the Essential Lie conditions. This manipulation made a significant difference in each of the three scenarios ($p < .04$ for *Tattoo*; $p < .001$ for *Medical Exam* and *Contract*).

Study 5 establishes that consent judgments track the essentiality of the lie, not the subjective materiality. It seems that folk intuition roughly tracks the factum/inducement distinction, as imprecise as the distinction may be.

V. PUTTING IT ALL TOGETHER: WHAT IS THE FOLK THEORY OF CONSENT?

Laypeople have a distinct conception of consent that differs from both canonical and legal understandings. Their view, which this Article has called “commonsense consent,” is a moralized construct: it tracks judgments of punishment and moral permissibility,²⁴⁴ and participants’ open-ended responses show them to be thinking normatively about concepts such as voluntary choice and autonomous will.²⁴⁵ Crucially, intuitions about consent can be differentiated from intuitions about other moral concepts, such as harm or general moral badness.²⁴⁶ Indeed, respondents report disliking the deceptive offerors, and they judge the intentional lying to be morally wrong.²⁴⁷ Despite these judgments, they do not think that deception invalidates consent.²⁴⁸

This discrete psychological construct—the folk theory of consent—needs to be articulated. This Part summarizes its features. First, laypeople see assent procured by deception—but not assent procured by coercion or intoxication—as “consent.”²⁴⁹ Assent procured by deception, moreover, is understood as morally transformative: it converts behavior that is normally verboten (e.g., penetrating, inking, cutting with a scalpel) into something less wrong.²⁵⁰ Deceived individuals are seen as “making up their own minds” and exercising meaningful choice.²⁵¹ Thus, assent procured by deception is understood as “real consent.”

But some lies *do* vitiate consent. These lies, however, are not the ones that are the most harmful or the most material to the offeree.²⁵² Rather, the lies that

244. See *supra* Section III.A.

245. See *supra* Section III.B.

246. See, e.g., *supra* note 160 (finding that consent judgments do not track judgments of wrongness); *infra* Appendix C (same).

247. See *supra* Section II.B.1 (noting that deceptive offerors garnered low likeability ratings).

248. As one participant explained, “Just because Kevin lied doesn’t automatically negate Ann’s consent. What Kevin did was immoral, but it doesn’t make the sex non-consensual.”

249. See *supra* Section III.C.

250. See *supra* Part III.

251. See *supra* Section III.C.

252. See, e.g., *supra* Section IV.D (showing that consent was seen as *less* vitiated when Brett was deceived about the worthwhileness of his volunteer efforts and seen as *more* vitiated when his

vitate consent are those that seem to transform the proposed activity into something else entirely: the wrong body part is touched; the wrong product is purchased; the wrong person is taken to bed. In this way, commonsense consent tracks the oft-criticized legal distinction between “fraud in the factum” and “fraud in the inducement.”

Most important, the folk moral theory of consent is not subjectivized to the idiosyncratic preferences of the individual giving consent. Rather, commonsense consent embeds an objective judgment about the kinds of information a decision-maker must know in order to make a sufficiently autonomous decision. It seems that so long as one knows the truth about certain primary features—such as which body part will be touched—one gives “consent,” even if deceived about other features relevant to the decision. If one cares deeply about some other feature of the touching—such as its purpose or likely effects, as in the case of Brett the medical volunteer—those features are of secondary status.²⁵³ One can be deceived about those secondary features and still be deemed to have given consent. It does not seem to matter that, based on Brett’s individual preferences, the secondary features were more important than the ostensibly primary ones.

Thus, commonsense consent is hegemonic, not pluralistic. For this reason, it is almost unrecognizable as “consent.” The whole point of consent—the reason for its normative significance—is that it vindicates individual autonomy.²⁵⁴ Theorists may disagree about the sorts of lies that defeat consent, but they generally accept the premise that the purpose of consent is to allow people to choose for themselves the activities that are, by their own lights, worth pursuing. That is why we may not force a Jehovah’s Witness to accept a blood transfusion against his wishes, even to save his life; it is why people may refuse to have sex based on any reason they please.²⁵⁵ As Tom Dougherty explains,

One of the key achievements of waves of sexual liberation has been the promotion of a sexual pluralism that allows each individual to pursue his or her own conception of the sexual good, so to speak. Appropriately valued, sexual autonomy permits “individuals to act freely on their own unconstrained conception of what their bodies and their sexual capacities

ears were examined instead of his abdomen—even though it is difficult to see how Brett was harmed by the latter substitution).

253. *See id.*

254. *See, e.g.,* Tuerkheimer, *supra* note 7, at 42 (“To consent to sex is indeed to assert agency—especially for those whose sexuality has, over time, been variously denigrated, co-opted, denied, stigmatized, mythologized, and punished.”).

255. *See, e.g.,* DWORKIN, *supra* note 188, at 98; Tuerkheimer, *supra* note 7, at 42 (“[L]iving as a subject means that one can consent to sex—for whatever the reason, without judgment.”).

are for.” As such, it is up to each individual to determine which features of a sexual encounter are particularly important to her.²⁵⁶

Commonsense consent imposes a fixed, universal standard regarding the features of an activity that are important enough to defeat consent. Thus, it fails to do the pluralistic work that consent must do in order to vindicate individual autonomy.

VI. THE PUZZLE REVISITED

We started with a legal puzzle: the law sometimes deviates from the canonical principle that deception vitiates consent. Previous commentary on the puzzle has largely elided the fact that numerous counterexamples crop up in legal domains beyond sexual consent.

This Article offers a new diagnosis of the puzzle, one that suggests that courts are not necessarily motivated by traditional sexual morality or patriarchal attitudes (although those motivations may still be at play). Perhaps judges are *also* influenced by an intuitive conception of consent that sees deception as compatible with autonomous decision-making in all sorts of domains. This alternative account has the virtue of explaining why we see deviations from the canonical rule in legal arenas other than rape, such as policing and trespass.

To be clear, this Article does not claim that commonsense consent maps perfectly onto the erratic case law. As we have seen, folk intuition can treat deceivers more punitively than the law in some cases (e.g., nonphysical threat cases) and less punitively in others (e.g., research on human subjects). The key claim of this Article is that the law is pervasively ambivalent toward deception cases, and insights from moral psychology can suggest a reason: it is because many people do not really believe that deception invalidates consent. Despite the claim by moral philosophers that “[e]veryone agrees”²⁵⁷ that fraud invalidates consent, this Article demonstrates that for large swaths of the public, the canonical view is not intuitive. Thus, judges who deviate from the canonical rule may be responding to commonsense consent, either because their own moral intuitions are marked by the same patterns as laypeople’s, or because they are loath to stray too far from public morality.

This alternative account should be welcome news for feminists and progressive reformers who wish to see the law of rape turn on sexual consent, rather

256. Dougherty, *supra* note 94, at 730 (quoting Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 *LAW & PHIL.* 35, 70 (1992)).

257. Collin O’Neil, *Consent in Clinical Research*, in *ROUTLEDGE HANDBOOK*, *supra* note 96, at 297, 301; accord Bromwich & Millum, *supra* note 69, at 446 (“Most people agree that lies can invalidate consent.”).

than on physical force. A chief liability of the prevailing academic account is that it lends itself to the conclusion that sex-by-deception is an anomaly in a sea of doctrines that all follow the canonical rule. Under this understanding, critics have been able to argue that the only way to harmonize rape doctrine with the rest of the law is to “choose” between “two paths”²⁵⁸: start treating sex-by-deception cases as rape, or give up on consent as the driving legal principle.²⁵⁹ Some conclude that the law must give up on consent and “stick[] with the force requirement in order to say no to rape-by-deception.”²⁶⁰ The alternative account offered here makes clear that one can reject rape-by-deception without necessarily giving up on a consent-based regime. This is because one can now argue that sex-by-deception cases intuitively seem like they are not rape because deception, *in general*, feels compatible with consent. This Article has supplied a novel psychological explanation for the strong moral intuition that it is not rape to con someone into sex – one that does not require the feminist legal movement to “pick its poison.”²⁶¹

VII. BROADER IMPLICATIONS

Thus, we can make some progress on the puzzle of why we see such inconsistency in how the law treats deception cases. The commonsense consent account does a better job than the rape exceptionalism account at explaining why deviations from the canonical rule surface in legal domains other than rape, and it gives progressives a way out of the dilemma that sex-by-deception cases seem to pose for centering rape law around consent.

But this puzzle is now the least of our worries. This Article has uncovered a novel empirical fact about our moral psychology: that there is something about consent that makes it seem unperturbed by deception. This intuition is deeper and more pervasive than previously imagined, extending to numerous domains

²⁵⁸. Rubenfeld, *supra* note 24, at 1413.

²⁵⁹. *Id.* at 1403 (“[I]f rape is sex without consent, sex-by-deception ought to be rape.”). Robin West also views the deception cases as a chief stumbling block in the “dominant reform position” of defining rape as unconsented-to sex. She argues that one of the “problems” posed by reforms that seek to “simply define rape as nonconsensual sex” is that “[s]ex obtained by fraud, for example, (obtaining sex by lying about one’s intentions or background) might be both immoral and nonconsensual in some important sense, but probably shouldn’t be a crime.” Robin West, *On Rape, Coercion, and Consent*, JOTWELL (Mar. 15, 2016), <https://juris.jotwell.com/on-rape-coercion-and-consent> [<https://perma.cc/VE23-KZEE>]. Unlike Rubenfeld, however, she does not support the force requirement.

²⁶⁰. Rubenfeld, *supra* note 24, at 1380.

²⁶¹. *Id.*

where the law still follows the canonical view. Armed with the discovery of commonsense consent, we can see that many laypeople are likely to find canonical doctrines unintuitive. We can also see that if reformers succeed in their efforts to bring the deviant doctrines in line with the canonical rule, large swaths of the American public are going to regard the new laws as unintuitive. This Part grapples with the normative implications and practical challenges of building a legal system at odds with popular morality.

A. Should Law Conform to Popular Morality?

Where the law deviates from the canonical view, it has been subject to criticism on normative grounds. Critics have objected that the use of deception in police interrogations prompts innocent people to confess and that it ought to be considered one of the factors that renders confessions involuntary.²⁶² Similarly, judges have puzzled over how a consent search can be voluntary if police deceit is what caused the defendant to grant the officer entry.²⁶³ As for the factum/inducement distinction, commentators have derided its “essential arbitrariness,” arguing that it “makes no sense”²⁶⁴ and is “ultimately pointless.”²⁶⁵ Finally, there is an entire cottage industry of scholarship attacking the law’s incoherent treatment of consent in cases of fraudulently procured sex.²⁶⁶

One might wonder whether the empirical findings reported here—which suggest that the deviant doctrines may comport with commonsense morality—caution against these critics’ efforts to bring the law in line with the canonical view. Indeed, a prominent jurisprudential position would advocate that the law should strive to maintain alignment with commonsense morality. This is what Paul Robinson calls “democratizing criminal law”²⁶⁷—“shaping criminal law rules to track the justice judgments of ordinary people”²⁶⁸—and what Joshua

^{262.} See, e.g., Gohara, *supra* note 52, at 795.

^{263.} Cf. *United States v. Spivey*, 861 F.3d 1207, 1220–23 (11th Cir. 2017) (Martin, J., dissenting) (arguing that the suspect’s consent was not voluntary where “officers used deceit, trickery, and misrepresentation to hide the true nature and purpose of their investigation”).

^{264.} Falk, *supra* note 100, at 159.

^{265.} Kenneth W. Simons, *The Conceptual Structure of Consent in Criminal Law*, 9 *BUFF. CRIM. L. REV.* 577, 647 n.84 (2006) (reviewing WESTEN, *supra* note 9).

^{266.} See *supra* note 121 and accompanying text.

^{267.} Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 *NW. U. L. REV.* 1565, 1566 (2017).

^{268.} *Id.* at 1565.

Kleinfeld calls the “democratic justice view”²⁶⁹—structuring the law such that “lay citizens take part in it and see their sense of justice at work in it.”²⁷⁰ These legal theorists argue that a political community must see its norms reflected in the law if it is to enjoy collective self-determination.²⁷¹ This is particularly true of the criminal law, they say, because the criminal law’s “distinctive social function” is expressing social solidarity around shared norms following a tear in the social fabric.²⁷²

Robinson and Kleinfeld also argue their case on utilitarian grounds. They posit that laypeople will refuse to follow laws that strike them as unfair or unreasonable.²⁷³ Relying on empirical studies of citizen cooperation, deference, and resistance to authorities, they argue that the “moral credibility” of the law depends on its tracking commonsense views.²⁷⁴ While Robinson and his coauthor John Darley do not believe that community views ought to be “determinative” of legal rules, they insist that public attitudes “ought to be an influential factor in the policy-making and code-drafting process.”²⁷⁵

A key premise of the democratic justice position is that community views are sufficiently homogenous to guide lawmaking.²⁷⁶ In the findings reported here, commonsense consent is a majority view but not a universal one. Across the five studies, somewhere between one-eighth²⁷⁷ and one-half²⁷⁸ of respondents disagreed with the notion that assent obtained by deception is morally transformative consent.

269. Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1378 (2017); see also *id.* at 1400 (advocating for “lay involvement and community values”).

270. Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 NW. U. L. REV. 1455, 1457 (2017).

271. *Id.* at 1456.

272. *Id.* Kleinfeld elaborates upon this view in *Manifesto of Democratic Criminal Justice*, *supra* note 269, at 1400; and Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1553-55 (2016).

273. See Kleinfeld, *supra* note 269, at 1405; Robinson, *supra* note 267, at 1580; see also Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1401 (2005) (providing empirical evidence of the “Flouting Thesis”).

274. Robinson, *supra* note 267, at 1580-81; see Kleinfeld, *supra* note 269, at 1405-06.

275. PAUL ROBINSON & JOHN DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VALUES AND THE CRIMINAL LAW* 4 (1995).

276. Cf. Robinson, *supra* note 267, at 1573-74 (describing a “community view” of criminal justice).

277. See *supra* Section II.B.1 (“Only 12% of participants rated the [Single] scenario below the 50-mark.”).

278. See, e.g., *supra* note 119 and accompanying text (“[H]alf of participants saw the encounter as nonconsensual.”).

The democratic justice theory does not demand perfect consensus, however. Robinson explains that one need not see “a high degree of agreement . . . on the exact punishment that should be imposed in any particular case”; rather, one need only see “agreement on the relative blameworthiness of different offenders, a rank-ordering of cases according to the punishment they deserve.”²⁷⁹ Consent judgments would seem to fulfill this requirement: coercion, intoxication, and stealth cases are viewed as more consent defeating than deception cases; deception about more essential matters is viewed as more consent defeating than deception about less essential matters.

This Article does not endorse the democratic justice approach, even if it were to prove workable. The larger problem with “having criminal law adopt liability and punishment rules that track community views”²⁸⁰ is that community views can be wrong. As previous research amply demonstrates, moral intuitions can be tribal, short-sighted, and cruel.²⁸¹ Commonsense consent should be evaluated normatively before it is adopted as the blueprint for lawmaking. Subjected to such scrutiny, it may well fail.²⁸² The folk notion of consent, as we have seen, is illiberal: it imposes an objective and generic standard rather than accommodating the subjective, individualized preferences of the particular offeree. A chief weakness of the democratic justice approach, then, is that it would implement a legal conception of consent that is one-size-fits-all and thus antithetical to the pluralistic ambitions of consent.

If one rejects the democratic justice approach, however, one would need to find an independent way of determining what the law should be. One would need, in other words, to work out a theory of consent, which may differ across various areas of law. For example, whether deceptive policing tactics should be taken to undermine the voluntariness of a consent search depends in part on the theory of consent contemplated by the Fourth Amendment. That answer might be quite different from the answer to whether deceptive advertising should be

279. Robinson, *supra* note 267, at 1567.

280. *Id.* at 1580.

281. See, e.g., Nick Bostrom & Toby Ord, *The Reversal Test: Eliminating Status Quo Bias in Applied Ethics*, 116 *ETHICS* 656, 658-62 (2006) (documenting intuitive status quo bias); David Pietraszewski et al., *Constituents of Political Cognition: Race, Party Politics, and the Alliance Detection System*, 140 *COGNITION* 24, 32-37 (2015) (documenting intuitive tribalism); Cass R. Sunstein, *Moral Heuristics*, 28 *BEHAV. & BRAIN SCI.* 531, 536-41 (2005) (collecting examples).

282. See, e.g., sources cited *supra* notes 22-43, 113 (arguing that fraudulently procured assent ought not be treated as having the moral force of legally valid consent). *But see* Stephen Shute & Jeremy Horder, *Thieving and Deceiving: What Is the Difference?*, 52 *MODERN L. REV.* 458, 459, 552 (1993) (defending a legal distinction between theft-by-deception (“obtaining by false pretences”) and ordinary theft on the grounds that one has acted more voluntarily when one has “given property” than when one has “had property taken”).

taken to vitiate consent in commercial transactions. The answer for medical research might differ from the answer for sexual assault. Ultimately, a substantive normative argument is needed about whether our consent intuitions get it right, and that substantive argument may differ for different offenses.²⁸³ Such questions cannot be resolved by survey data.

However, even if the findings reported here cannot tell us what the legal rules should be, they still matter for law. Data on lay attitudes can help us decide *how* to implement the laws once we decide what laws to have. Numerous translational problems arise when law misaligns with lay morality, as many consent doctrines currently do. Thus, the rest of this Part explores these translational problems in light of our new understanding of commonsense consent.

B. Laypeople as Deciders: Implications for Jury Instructions

“The question of consent is a question of fact for you to decide, approaching it in a commonsense way.”²⁸⁴

— Judge Leo Clark’s remarks to a jury in a Canadian rape trial

In some legal domains, laypeople are tasked with deciding consent.²⁸⁵ Recall that when the jury in Bill Cosby’s criminal trial asked for the legal definition of consent, their request was denied.²⁸⁶ In essence, the jurors were required to make a legal judgment based on their commonsense notion of consent, even as they tried to seek guidance from the law. Although Cosby’s case did not involve deception, it nonetheless illustrates the degree to which our legal system places trust in the layperson’s intuitive conception of consent—a construct that, this research suggests, is something of a wildcard.

283. For example, whether sex-by-deception ought to be criminalized as rape depends on a theory of what the crime of rape is. See, e.g., WESTEN, *supra* note 9, at 200 (“[I]t is a fallacy to infer that valid acquiescence to sexual intercourse requires at least as much knowledge as valid acquiescence to transfers of property, unless one knows *why* jurisdictions regard rape as such a serious offense.”).

284. R. v. Olugboja, [1982] Q.B. 320, 327 (Can.).

285. In plenty of domains, however, consent is not ultimately a question of fact for a jury to decide. See generally Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962 (2019) (highlighting ambiguity in consent search jurisprudence about whether voluntary consent is a factual or legal determination).

286. See *supra* notes 3-5 and accompanying text.

Consent is not defined in the criminal codes of twenty-one states, including eight states that punish sexual penetration “without consent.”²⁸⁷ With such little guidance, juries can be expected to apply their commonsense understanding, which may diverge from the legal understanding. One can expect the same problem to arise in other areas of law, such as fraudulently induced contracts, theft-by-deception, and medical battery cases. Unless instructed otherwise, lay decision-makers are likely to conclude that a defendant’s knowing falsehoods do not invalidate a plaintiff’s consent.²⁸⁸

Thus, where the law seeks to embody the canonical rule, yet empowers laypeople to decide consent, jurors should be instructed on the relationship between consent and deception. Jury instructions should say explicitly that the legal definition of consent may differ from how laypeople might ordinarily think about the term.

Future research should test model jury instructions to ensure that they have the intended effect. Suppose, for instance, that a legislature agreed with *Model Penal Code* reporter Steven Schulhofer that the fraudulent transmission of STIs should constitute assault, because the deception “not only affects the ‘inducement’ to have sex but also conceals *the nature of the physical contact*” visited upon the victim.²⁸⁹ The legislature might be tempted to draft something like Arizona’s criminal statute, which defines sexual assault as engaging in sexual intercourse without consent, including cases where “the victim is intentionally deceived *as to the nature of the act.*”²⁹⁰

Using such language to criminalize the fraudulent transmission of STIs would be a mistake. Recall that nearly half of participants judged the *HIV with Transmission* case as consensual.²⁹¹ Their written responses showed that they thought the victim had not been “intentionally deceived as to the nature of the act” – to them, the nature of the act was *sex*, and the victim knowingly agreed to sexual intercourse. She just did not agree to the HIV exposure. Thus, many laypeople would refuse to treat intentional transmission cases as assault, despite the

287. See MODEL PENAL CODE § 213.2(1)(a) cmt. at 44-46 (AM. LAW INST., Discussion Draft No. 2, 2015).

288. Future research should investigate whether group deliberation, as well as other distinct features of jury decision-making, affect judgments of consent. For an overview of methodological considerations, see Steven D. Penrod et al., *Jury Research Methods*, in RESEARCH METHODS IN FORENSIC PSYCHOLOGY 191 (Barry Rosenfeld & Steven D. Penrod eds., 2011).

289. SCHULHOFER, *supra* note 121, at 159 (emphasis added).

290. ARIZ. REV. STAT. ANN. § 13-1401A(7)(c) (2018).

291. See *supra* Section II.B.1.

legislature's intention. Lawmakers would do well to take account of folk psychology, including how laypeople are inclined to delineate "acts" and their essential natures. Empirical research can assist in this effort.

C. *Laypeople as Subjects: Fair Notice*

In general, if the law is to offer guidance for how people should behave, the public must be put on notice about how the law may apply to them.²⁹² Take the example of Iowa's kidnapping statute, which prohibits the removal of a person without "the consent of the [person] to do so."²⁹³ A kidnapping-by-deception case that came before the Iowa Supreme Court illustrates the problem posed by commonsense consent.²⁹⁴

In *State v. Ramsey*, defendant Carl Ramsey approached a truck driver named James Clark and asked for a ride to a party three miles away. Clark "willingly obliged" and accepted gas money in exchange for giving Ramsey a lift.²⁹⁵ Clark later testified that "at no time" during the drive "was he threatened with a weapon or made to feel in any danger."²⁹⁶ Clark did not realize until they reached the "party" that the whole thing had been a ruse to lure him to a remote location where Ramsey planned to attack him and steal his car.²⁹⁷ Ramsey was charged with first-degree kidnapping in addition to attempted murder and robbery.²⁹⁸

Clearly, Clark did not consent to being attacked and robbed, but the question raised by the first-degree kidnapping charge was whether Clark was "removed without consent" when he, under false pretenses, "willingly obliged" Ramsey's request to be driven to a location three miles away in exchange for a few dollars in cash. Ramsey argued that Clark voluntarily drove to the scene, and that because the word "deception" does not appear in Iowa's kidnapping statute, Clark consented to his removal.²⁹⁹ But the state high court disagreed. "Whether the removal was accomplished by force or artful deception, the end result remains the same," it declared.³⁰⁰

292. See, e.g., Bruno Celano, *Publicity and the Rule of Law*, in 2 OXFORD STUDIES IN PHILOSOPHY OF LAW 122, 123 (Leslie Green & Brian Leiter eds., 2013).

293. IOWA CODE ANN. § 710.1 (West 2019).

294. *State v. Ramsey*, 444 N.W.2d 493 (Iowa 1989).

295. *Id.* at 493.

296. *Id.* at 494.

297. *Id.* at 493.

298. *Id.* at 494.

299. *Id.*

300. *Id.*

Ramsey is not a sympathetic defendant. He knew he was doing something illegal when he lured Clark to the remote location. But a layperson would not see this kidnapping-by-deception as the same offense as kidnapping-by-force. The court, in arguing that the offense is the same whether accomplished by fraud or force, endorsed the canonical understanding of consent, not the lay understanding.

To avoid confusion, legislatures that seek to treat deception cases as absence-of-consent cases should single out deception for special doctrinal treatment. For example, Iowa's false-imprisonment statute is admirably clear. It prohibits a person from "intentionally confin[ing] another against the other's will" and specifies that confinement occurs "when the person's freedom to move about is substantially restricted by force, threat, or deception."³⁰¹

D. Laypeople as Victims: Vulnerability to Deception

More broadly, the findings from these studies matter for citizens beyond their roles as jurors and would-be defendants. People make judgments about consent every day, in their ordinary capacities. These results suggest that they may fail to assert themselves when they are exploited, manipulated, or deceived. One participant spontaneously shared a story from his own experience, in which he recognized that he may have had legal recourse for being deceived but did not feel entitled to it given that, in his view, he had only himself to blame.

I've actually had a similar scenario happen to me where the doctor lied about the procedure being covered when it wasn't. Though I may have been angry and might have grounds to contact an attorney and start a suit, I still consented to the procedure of my own free will. I feel similarly about [Marvin's] situation. He really did make a decision to have the surgery despite being deceived. He should have contacted the insurance company to double-check if he was concerned he couldn't cover the costs.

Psychologists who study the processes of naming, blaming, and claiming an injury find that most victims who suffer legal injuries choose not to pursue claims to which they are entitled.³⁰² This often occurs because they do not recognize themselves as victims (naming), or they fault themselves rather than the

301. IOWA CODE ANN. § 710.7 (West 2019).

302. See, e.g., JENNIFER K. ROBBENOLT & VALERIE P. HANS, *THE PSYCHOLOGY OF TORT LAW* 17 (2016); David M. Engel, *Lumping as Default in Tort Cases: The Cultural Interpretation of Injury and Causation*, 44 *LOY. L.A. L. REV.* 33, 36 (2010); William L.F. Felstiner et al., *The Emergence*

injurer (blaming).³⁰³ The findings reported here raise the prospect of a similar dynamic with respect to fraud: individuals who are deceived may fail to assert their legal rights if they believe – mistakenly in many cases – that they have waived them by giving consent.³⁰⁴ They may fault themselves for their naïveté, rather than faulting those who exploited their trust. In such cases, their folk moral theory would lead them to see themselves as autonomously choosing, and therefore to blame.

CONCLUSION

This Article has discovered a new fact about our moral psychology: many people – perhaps most – think that deceived individuals grant meaningful consent. Across five studies and over two dozen scenarios, it has demonstrated this phenomenon in several legally salient domains, including sex, medicine, contracts, research, and warrantless searches by police.

The easiest explanations for this result find little support in the data. Participants do not seem to be applying a technical or literal understanding of consent as opposed to a normative one. Indeed, participants' responses show that many of them are reasoning morally and are concluding that deceived individuals – unlike coerced or intoxicated individuals – exercise meaningful choice when they “consent” to the offer in front of them.

Commentators who have reckoned with the law's uneven treatment of deception cases have generally assumed that the problem is one of sex exceptionalism. They think it obvious, and uncontroversial, that deception invalidates consent in all other contexts besides sex.³⁰⁵ This Article has shown, on the contrary, that consent is commonly understood to be unperturbed by deception – and that this intuition extends beyond sexual consent. It thus offers a new explanation for the puzzle of why deception cases are given inconsistent doctrinal treatment.

and Transformation of Disputes: Naming, Blaming, Claiming . . ., 15 LAW & SOC'Y REV. 631, 632 (1980-1981).

303. See Felstiner, *supra* note 302, at 631.

304. This argument is elaborated in a separate paper. Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine-Print Fraud*, 72 STAN. L. REV. 503 (2020) (presenting four original studies suggesting that victims of fraud are deterred from pursuing legally valid claims because they believe they have consented to, and are bound by, contracts they signed as a result of deception).

305. *E.g.*, Jonathan Herring, *Mistaken Sex*, 2005 CRIM. L. REV. 511, 517 (“Few people would have difficulties in saying that a doctor who misled a patient into consenting to an operation is acting without her consent and had committed a criminal offence. We can take a similar approach to sexual relations.”).

Its account is based not in rape exceptionalism or sexual moralism but in broader folk morality.

Beyond the puzzle, these findings carry important implications for the law, which still endorses the canonical rule in many areas. Where the law treats deception as negating consent, we can expect a stark mismatch between lay and legal views. This mismatch matters because lay decision-makers serve as fact finders in cases involving consent and may apply commonsense consent in situations where the law calls for canonical consent. Lay decision-makers might also be defendants, who may fail to realize that victims tricked into assenting will be understood to have acted “without consent.” Lawmakers would do well to take account of commonsense consent when crafting jury instructions and legal rules that are meant to put would-be defendants on notice.

The findings also suggest that victims of fraud may fail to seek recourse, mistakenly believing they have waived their rights. When they do pursue their legal claims, the law will sometimes fail to protect them, as the law occasionally deviates from the canonical view and embraces the commonsense understanding of consent.

Consent touches numerous areas of law and many areas of life. This Article has taken a first step toward understanding how the public views this ubiquitous moral concept, revealing that large swaths of the public reject the “settled” and “well established” understanding of consent.³⁰⁶

306. See *supra* notes 136-137 and accompanying text.

APPENDIX A: STUDY STIMULI*A. Study 1**Single (Female Victim)*³⁰⁷

Ellen and Frank meet in a night class and have several dates. Ellen makes it clear that she refuses to sleep with married men. When asked, Frank lies and says that he is not married. Ellen agrees to sleep with Frank.

*Single (Male Victim)*³⁰⁸

Frank and Ellen meet in a night class and have several dates. Frank makes it clear that he refuses to sleep with married women. When asked, Ellen lies and says that she is not married. Frank agrees to sleep with Ellen.

*Married*³⁰⁹

Matthew wants to sleep with Amanda. Amanda has made clear that she does not want to date or sleep with any man who is married. When she asks Matthew whether he is married, he lies and says no, even though he is married. Under these circumstances, Amanda sleeps with Matthew.

*Criminal Record*³¹⁰

Kevin wants to sleep with Ann. Ann has said that she does not want to date or sleep with any man who has a criminal record. When she asks Kevin whether he has a criminal record, he lies and says no, even though he does have a criminal record. Under these circumstances, Ann sleeps with Kevin.

307. For demographic information, see *supra* note 114.

308. 56% female; ages 19-82 years, median age = 34.5 years; 78% White, 10% Black, 9% Asian, 2% Hispanic, 1% Other; 49% had four years of college education. Approximately 36% reported an annual income of less than \$30,000 and 18% reported making over \$75,000.

309. 51% female; ages 18-64 years, median age = 35 years; 82% White, 9% Black, 3% Asian, 4% Hispanic, 2% Other; 48% had four years of college education. Approximately 31% reported an annual income of less than \$30,000 and 26% reported making over \$75,000.

310. 46% female; ages 19-61 years, median age = 29.5 years; 71% White, 15% Black, 12% Asian, 2% Hispanic; 48% had four years of college education. Approximately 33% reported an annual income of less than \$30,000, and 22% reported making over \$75,000.

COMMONSENSE CONSENT

*College*³¹¹

Kevin wants to sleep with Ann. Ann has said that she does not want to date or sleep with any man who went to community college. When she asks Kevin whether he went to community college, he lies and says no, even though he did go to community college. Under these circumstances, Ann sleeps with Kevin.

*Bisexual*³¹²

Sean wants to sleep with Christina. Christina has made it clear that she would never date or sleep with a bisexual – that is, someone who is attracted to men as well as women. When she asks Sean about his sexuality, Sean lies. He says he is straight, even though he has had boyfriends in the past and is attracted to both men and women. Under these circumstances, Christina sleeps with Sean.

*Immigrant*³¹³

Allison and Rafael meet at the bakery where Rafael works and go on several dates. Allison opposes illegal immigration and has said that people in the United States illegally “should get out of our country and go back to where they came from.” She has made it clear that she does not want to date or sleep with any man who is in the country illegally. When she asks Rafael about his immigration status, Rafael lies. He says he is here legally, even though he is in the country illegally. Under these circumstances, Allison sleeps with Rafael.

*Veteran*³¹⁴

Sean wants to sleep with Christina. Christina has made it clear that she would never date or sleep with a veteran – that is, anyone who has served in the military or participated in warfare. When she asks Sean his background, Sean lies. He says he has never served in the military, even though he did two tours in Iraq as a marine. Under these circumstances, Christina sleeps with Sean.

311. 44% female; ages 19-55 years, median age = 31 years; 69% White, 10% Black, 12% Asian, 10% Hispanic; 46% had four years of college education. Approximately 35% reported an annual income of less than \$30,000, and 17% reported making over \$75,000.

312. 41% female; ages 19-56 years, median age = 32 years; 71% White, 10% Black, 10% Asian, 6% Hispanic, 2% Other; 45% had four years of college education. Approximately 27% reported an annual income of less than \$30,000, and 19% reported making over \$75,000.

313. See statistics noted *supra* note 312. The same group of participants judged both *Bisexual* and *Immigrant*, presented in random order.

314. 50% female; ages 20-67 years, median age = 31 years; 70% White, 15% Black, 9% Asian, 7% Hispanic; 54% had four years of college education. Approximately 33% reported an annual income of less than \$30,000, and 15% reported making over \$75,000.

*Views on Same-Sex Marriage*³¹⁵

Allison and Rafael meet at the bakery where Rafael works and go on several dates. Allison strongly supports gay rights and has said that people who oppose same-sex marriage are “ignorant bigots.” She has made it clear that she does not want to date or sleep with any man who opposes same-sex marriage. When she asks Rafael about his views on gay marriage, Rafael lies. He says he supports gay marriage, even though he is firmly against it and refuses to bake wedding cakes for same-sex weddings. Under these circumstances, Allison sleeps with Rafael.

*HIV with Transmission Versus HIV with No Transmission*³¹⁶

Allison and Rafael meet at the bakery where Rafael works and go on several dates. Rafael proposes that they sleep together. Allison says she will not sleep with any man who has HIV. She asks Rafael whether he has HIV. Rafael lies and says he has been tested recently and is perfectly clean. In reality, Rafael knows he is HIV positive. Under these circumstances, Allison agrees to sleep with Rafael.

HIV with Transmission Condition: After they have sex, Allison contracts HIV from Rafael.

HIV with No Transmission Condition: After they have sex, Allison does not contract HIV from Rafael.

*Elective Surgery*³¹⁷

Marvin has been in physical therapy for ankle pain and is contemplating undergoing elective surgery to repair the tendon. He cares deeply about whether the surgery is covered by his insurance; he would refuse to have the surgery if he would have to pay out of pocket. Marvin’s doctor lies to him and says his insurance will cover the procedure, when really the doctor knows that Marvin will need to pay out of pocket. Marvin says yes to the surgery.

315. See statistics noted *supra* note 314. The same group of participants judged both *Veteran* and *Views on Same-Sex Marriage*, presented in random order.

316. 37% female; ages 19–60 years, median age = 31 years; 73% White, 7% Black, 13% Asian, 7% Hispanic; 50% had four years of college education. Approximately 29% reported an annual income of less than \$30,000, and 19% reported making over \$75,000.

317. 49% female; ages 19–73 years, median age = 33 years; 82% White, 6% Black, 7% Asian, 3% Hispanic, 1% Other; 57% had four years of college education. Approximately 25% reported an annual income of less than \$30,000, and 30% reported making over \$75,000.

*Elective Ankle Surgery (Wealthy Patient)*³¹⁸

Michael is a wealthy executive. He has been in physical therapy for ankle pain and is contemplating undergoing elective surgery to repair the tendon. Michael cares deeply about whether the surgery is covered by his insurance; he would refuse to have the surgery if he would have to pay out of pocket. Michael's doctor lies to him and says his insurance will cover the procedure, when really the doctor knows that Michael will need to pay out of pocket. Michael says yes to the surgery.

*Surgery Results Unspecified Versus Surgery Results in No Infection Versus Surgery Results in Infection*³¹⁹

Nicholas has been in physical therapy for ankle pain and is contemplating undergoing elective surgery to repair the tendon. The ankle surgery carries the risk of causing an infection: 1 in 4,000 patients who receive the surgery will develop an infection due to the operation. Nicholas's doctor informs him that he has a 1 in 4,000 chance of developing an infection due to the surgery. Nicholas decides he is okay with that level of risk.

Nicholas next raises a separate concern. He cares deeply about whether the surgery is covered by his insurance; he would refuse to have the surgery if he would have to pay out of pocket. Nicholas's doctor lies to him and says his insurance will cover the procedure, when really the doctor knows that Nicholas will need to pay out of pocket. Nicholas says yes to the surgery.

Unspecified Condition: [blank]

Results in No Infection Condition: After the surgery, Nicholas's ankle pain completely disappears. It appears that the surgery went smoothly and that Nicholas did not develop an infection.

Results in Infection Condition: After the surgery, Nicholas's ankle pain gets worse. It appears that sometime during the surgery, Nicholas developed an infection. He will need antibiotics and a month of rest before he can walk again.

318. 53% female; ages 18-67 years, median age = 31 years; 82% White, 6% Black, 6% Asian, 4% Hispanic, 2% Other; 46% had four years of college education. Approximately 24% reported an annual income of less than \$30,000, and 20% reported making over \$75,000.

319. 49% female; ages 20-69 years, median age = 32 years; 78% White, 7% Black, 7% Asian, 7% Hispanic; 50% had four years of college education. Approximately 30% reported an annual income of less than \$30,000, and 20% reported making over \$75,000.

*Warrantless Search*³²⁰

Johnny is at home in his apartment when he hears a knock on the door. Two men are standing outside. They say, "Police here. Can we come in and look around?" Johnny asks through the door, "What are you looking for?"

One of the police officers says, "We are just looking for drugs and drug paraphernalia. We got an anonymous call reporting drug dealing in this apartment."

This statement is a lie. In truth, the police officers are looking for illegal firearms. They had received an anonymous tip about illegal weapons in the apartment.

Johnny knows that he has no drugs or drug paraphernalia in the apartment. He does, however, have two guns under his bed that he bought illegally. The reason he wants to know what the police are searching for is that he would say no to a search if he thought they were looking for firearms.

Under these conditions, Johnny lets the police in to search his apartment.

*Warrantless Search (Find Child Pornography Versus Find Bootleg Recording)*³²¹

William is sitting at home reading his mail when he hears a knock at the door. Two police officers are standing outside. They say, "Police here. Can we come in and look around?" William asks through the door, "What are you looking for?" One of the officers says, "We are looking for illegal firearms and other weapons. We got an anonymous call reporting firearm trafficking in this apartment." This statement is a lie. In reality, the police officers are looking for evidence on William's laptop of drug trafficking and other illegal online activity. They had received an anonymous tip that William is an online drug dealer for a "dark web" drug marketplace. William does not have any firearms or other weapons in his apartment. He does, however, have some things on his computer he does not want the police to see. The reason he wants to know what the police are searching for is that he would say no to the search if he thought they were going to look through his computer. William says, "I don't have any weapons. Is that all you're looking for?" The police officer replies, "Yes, that's all. If we don't find any weapons after taking a look around, we'll leave." William decides to let the police in.

The police search William's apartment, find his computer, and open it up to look through his folders and web browsing history. They don't find any evidence of drug dealing or dark web activity, which is what they were searching for.

320. 55% female; ages 21-68 years, median age = 33 years; 80% White, 4% Black, 7% Asian, 9% Hispanic; 45% had four years of college education. Approximately 33% reported an annual income of less than \$30,000, and 29% reported making over \$75,000.

321. 47% female; ages 18-77 years, median age = 32 years; 78% White, 8% Black, 9% Asian, 5% Hispanic, 1% Other; 47% had four years of college education. Approximately 29% reported an annual income of less than \$30,000, and 19% reported making over \$75,000.

Find Child Pornography Condition: The police do, however, find child pornography in William's trash folder. William apparently made nude films of his 8-year-old stepdaughter and two of her classmates and sold the videos online.

Find Bootleg Recording Condition: The police do, however, find an illegal recording of a Broadway musical in William's trash folder. William apparently snuck a video camera into a live performance, recorded the show, and sold the videos online.

"You are in serious trouble," the officers tell William, as they confiscate his laptop.

*Research Purpose*³²²

Dr. P is conducting a scientific experiment designed to test whether men are innately better than women at mathematical reasoning.

Dr. P hopes Deborah will agree to be a participant in this research. Deborah asks about how long the study will take, how much it will pay, and whether she faces any risks. Dr. P answers all of these questions honestly. He describes to her that for the study, she will complete a math quiz while undergoing a brain scan.

Deborah asks what the data will be used for. She makes it clear that she only wants to do the study if she will be contributing to an important cause such as finding a cure for a serious illness.

Dr. P lies and says he is studying Alzheimer's disease and her participation could eventually help researchers find a cure for the disease. He hides the fact that the research is about gender differences in mathematical ability, because he knows that Deborah will refuse to participate if she knew what her data would be used for.

Deborah participates in the study.

Did Deborah consent to undergo the brain scan?

*Termites*³²³

Mr. and Mrs. Jones are looking to buy a house. After picking out a house they like, Mr. and Mrs. Jones ask the owner if the house has a termite problem. The house has a terrible termite problem, but the owner lies. He knows that Mr. and

322. 39% female; ages 19-58 years, median age = 30 years; 69% White, 6% Black, 14% Asian, 12% Hispanic; 43% had four years of college education. Approximately 43% reported an annual income of less than \$30,000, and 6% reported making over \$75,000.

323. 48% female; ages 18-66 years, median age = 35.5 years; 71% White, 10% Black, 17% Asian, 2% Hispanic; 52% had four years of college education. Approximately 33% reported an annual income of less than \$30,000, and 21% reported making over \$75,000.

Mrs. Jones will not buy the house if they hear about the termite problem, so he tells the Joneses that there is no termite problem. The Joneses and the owner sign a contract for Mr. and Mrs. Jones to buy the house for \$300,000.

B. Study 2

*Study 2a (n = 101)*³²⁴

Emily and her boyfriend John have been dating for nearly a year. John often spends the night at Emily's apartment.

John's job frequently requires him to travel. Most recently, he spent several weeks in Miami, an area with the Zika virus.

Zika is a contagious virus that is transmitted by mosquitoes. Adults who have been infected with Zika often do not have symptoms and very rarely experience serious health complications. The real problem with Zika is that it causes severe birth defects in fetuses, including defects in the brain, eyes, and ears. Because of this, pregnant women are advised not to travel to areas with Zika. In addition, medical experts now believe that Zika can be transmitted sexually. This is true even if the infected person does not have any symptoms.

Miami, where John traveled for business, used to be on the "Red List" of high-alert Zika zones, but it was taken off several months before his trip. When he left for his trip, it had been many weeks since officials had identified any new cases of Zika transmission in Miami.

Emily was not planning to get pregnant any time soon, but she still wanted John to get tested for Zika. Before he left, she asked him to get tested once he got back from his trip.

Shortly after John returned from his business trip, he spent the evening at Emily's place. That night, Emily was too tired to make love. John asked her if she would instead like a "surprise in the morning." For the couple, a "surprise in the morning" is what they call it when John wakes Emily up by making love to her.

Emily thought about whether she wanted John to wake her up by making love to her. She replied, "No surprise in the morning if you haven't gotten tested yet. But yes if you got tested and are clean."

No Agreement Condition: John said, "I still haven't gotten tested yet." In reality, he had not gotten tested. He was telling the truth. Emily said, "OK, then no. Don't give me a surprise in the morning."

324. 47% female; ages 20-77 years, median age = 34 years; 75% White, 6% Black, 8% Asian, 11% Hispanic; 58% had four years of college education. Approximately 31% reported an annual income of less than \$30,000, and 28% reported making over \$75,000.

Deceived Agreement Condition: John said, “I’ve been tested, and I am clean.” In reality, he still hadn’t gotten tested. He was lying. Emily said, “OK, then yes. Give me a surprise in the morning.”

Shortly after this conversation, they both fell asleep. The next morning, John woke Emily up with a “surprise in the morning” – that is, by having sex with her – even though he had not yet been tested for Zika.

*Study 2b (n = 101)*³²⁵

Sophia has a bunion on her right foot and has been wearing splints to correct the problem. She is contemplating undergoing elective surgery to realign the joint.

Sophia will already be having surgery to address a torn ligament in her left ankle – an unrelated problem on the other leg. Her surgeon mentions that since she is already having the ankle surgery, it would be easy for him to also fix her bunion during the same operation.

Sophia wants to have her bunion fixed, but she also cares deeply about whether the bunion surgery is covered by her insurance. She explains to her surgeon that she wants to have the bunion surgery if it is covered by her insurance, but she would refuse to have it if she would have to pay for it out of pocket.

No Agreement Condition: Sophia’s surgeon informs her that her insurance will not cover the bunion procedure. He knows that she will need to pay out of pocket. Sophia says no to the bunion procedure. She says the doctor may not fix her bunion while she is already under anesthesia for her ankle.

Deceived Agreement Condition: Sophia’s surgeon lies to her and says her insurance will cover the bunion procedure, when really he knows that she will need to pay out of pocket. Sophia says yes to the bunion procedure. She says the doctor may fix her bunion while she is already under anesthesia for her ankle.

Imagine that during Sophia’s ankle surgery, the doctor also performs the bunion procedure, knowing that it will cost her out of pocket.

325. No demographic data were collected for this study.

C. Study 3

Study 3a ($n = 111$)³²⁶ randomly assigned participants to read either *Married* or *Secret*. Study 3b ($n = 151$)³²⁷ added a third condition: *Drunk*.

Married

Kevin wants to sleep with Ann. Ann has said that she does not want to date or sleep with any man who is married. When she asks Kevin whether he is married, he lies and says no, even though he is married. Under these circumstances, Ann sleeps with Kevin.

Secret

Kevin wants to sleep with Ann. Ann had previously shared an embarrassing secret with Kevin. Kevin now says he will spread Ann's secret unless she will sleep with him. Under these circumstances, Ann sleeps with Kevin.

Drunk

Kevin wants to sleep with Ann. Kevin sees Ann at a college party and buys her several drinks throughout the night. By the end of the night, she is extremely drunk and can hardly stand up on her own. When she speaks, her words are slurred. Kevin asks her back to Kevin's dorm room. Under these conditions, Ann agrees to sleep with Kevin.

D. Study 4

Study 4 ($n = 152$)³²⁸ randomly assigned participants to one of three sex-by-deception scenarios: *Twin Brother*, *HIV Status*, or *Married*.

Twin Brother

Mike and Alexandra meet in a night class and go on several dates. Mike proposes that they sleep together. Alexandra agrees. She comes over to Mike's apartment, where he lives with his identical twin brother Barry. She spends the night with Mike.

326. 47% female; ages 18-73 years, median age = 29 years; 73% White, 11% Asian, 9% Black, 5% Hispanic, 3% Other; 51% had four years of college education. Approximately 31% reported an annual income of less than \$30,000, and 22% reported making over \$75,000.

327. 40% female; ages 19-69 years, median age = 33 years; 76% White, 7% Black, 7% Asian, 10% Hispanic; 48% had four years of college education. Approximately 34% reported an annual income of less than \$30,000, and 24% reported making over \$75,000.

328. No demographic data were collected for this study.

COMMONSENSE CONSENT

The next morning, while Alexandra is still sleeping, Mike leaves the house to get coffee. His brother Barry gets into bed with Alexandra, pretending to be Mike. When Alexandra wakes up, Barry asks her if she'd like to have sex. Thinking that Barry is actually Mike, she says yes.

HIV Status

Barry and Alexandra meet in a night class and go on several dates. Barry proposes that they sleep together. Alexandra says that she will not sleep with any man who has HIV. She asks Barry whether he has HIV. Barry lies and says he has been tested recently and is perfectly clean. In reality, Barry knows he is HIV positive. Under these conditions, Alexandra agrees to spend the night with Barry.

The next morning, while Alexandra is still sleeping, Barry leaves the house to get coffee. When he gets back, he gets into bed with Alexandra. When Alexandra wakes up, Barry asks her if she'd like to have sex. Thinking Barry is not HIV-positive, she says yes.

Married

Barry and Alexandra meet in a night class and go on several dates. Barry proposes that they sleep together. Alexandra says that she will not sleep with any man who is married. She asks Barry whether he is married. Barry lies and says he is unmarried, even though in reality, he is married. Under these conditions, Alexandra agrees to spend the night with Barry.

The next morning, while Alexandra is still sleeping, Barry leaves the house to get coffee. When he gets back, he gets into bed with Alexandra. When Alexandra wakes up, Barry asks her if she'd like to have sex. Thinking Barry is unmarried, she says yes.

E. Study 5

Study 5 ($n = 604$)³²⁹ used a 2 (Material Lie versus Essential Lie) by 3 (*Medical Exam* versus *Contract* versus *Tattoo*) factorial design. Participants were assigned to one of six conditions.

329. 51% female; ages 18-87 years, median age = 35 years; 75% White, 10% Black, 8% Asian, 5% Hispanic, 2% Other; 59% had four years of college education. Approximately 23% reported an annual income of less than \$30,000, and 28% reported making over \$75,000.

Medical Exam

Material Lie	Essential Lie
Imagine Brett is volunteering to help medical students learn how to practice medicine. Brett chooses to volunteer because he feels strongly about making a difference. Whenever he thinks about how he should spend his time, he prioritizes activities that will have the most impact.	
As a volunteer, Brett's job is to sit still while an experienced professor of medicine performs an exam on him in front of a class of medical students.	
Imagine that the professor who will perform the exam tells Brett beforehand that the exam <i>will teach the students new material that will help them learn how to be doctors.</i>	Imagine that the professor who will perform the exam tells Brett beforehand that the exam <i>will be of his abdomen.</i>
But when Brett gets on stage in front of the class of medical students, <i>it turns out that the students have already learned about the content being covered.</i>	But when Brett gets on stage in front of the class of medical students, <i>the professor examines Brett's ears.</i>
As he gets examined, Brett realizes that the professor lied about <i>whether the students will learn anything from watching him be examined.</i>	As he gets examined, Brett realizes that the professor lied about <i>what part of the body the exam will be of.</i>
"There was consent in this situation." (7-point Likert scale: Agree/Disagree)	
If you had to guess, how much do you think it mattered to Brett <i>whether the exam done on him involved new material that helped the medical students learn, versus was old material that taught them nothing?</i>	If you had to guess, how much do you think it mattered to Brett <i>whether the exam done on him was of his abdomen, as opposed to his ears?</i>
(7-point Likert scale: Matters not at all /Matters a great deal)	(7-point Likert scale: Matters not at all /Matters a great deal)

COMMONSENSE CONSENT

Contract

Material Lie	Essential Lie
<p>Imagine that Steve has a loyalty card at a store called Mickey's. He is trying to spend enough money to qualify for a travel reward points promotion so that he can get a free trip to Europe. If Steve can spend \$1,000 on certain kinds of purchases at Mickey's in the first three months of having the loyalty card, he will earn enough points for the trip to Europe. Steve is close to getting to \$1,000, so he decides to go to Mickey's that weekend and order a \$50 toy to donate to a toy drive.</p>	
<p>The salesperson tells Steve that <i>the purchase qualifies for the travel reward points promotion.</i></p>	<p>The salesperson tells Steve that <i>he will be receiving a bicycle in the mail.</i></p>
<p>Later, after the package arrives, Steve realizes that <i>the purchase did not qualify because weekend purchases do not qualify.</i></p>	<p>Later, after the package arrives, Steve realizes that <i>the purchase was of a camera.</i></p>
<p>Steve looks back at the contract he signed the previous weekend with Mickey's and realizes that the salesperson lied to him about whether the \$50 order <i>qualified for the travel reward points promotion.</i></p>	<p>Steve looks back at the contract he signed the previous weekend with Mickey's and realizes that the salesperson lied to him about whether the \$50 order <i>was for a bicycle or a camera.</i></p>
<p>"There was consent in this situation." (7-point Likert scale: Agree/Disagree)</p>	
<p>If you had to guess, how much do you think it mattered to Steve whether the toy he ordered for the toy drive that weekend <i>qualified for the travel reward points promotion?</i></p>	<p>If you had to guess, how much do you think it mattered to Steve whether the toy he ordered for the toy drive that weekend <i>was a bicycle or a camera?</i></p>
<p>(7-point Likert scale: Matters not at all /Matters a great deal)</p>	<p>(7-point Likert scale: Matters not at all /Matters a great deal)</p>

Tattoo

Material Lie	Essential Lie
<p>Imagine there is a religion called Oneia. In this religion, having a tattoo on your shoulder is considered offensive. Amber lives in a city with a large Oneian population. Amber is not herself Oneian, but many of her clients at work are.</p> <p>At the tattoo parlor, the tattoo artist tells Amber that Oneians are offended by lower back tattoos. Unbeknownst to Amber, the artist is lying: Oneians are offended by shoulder tattoos. He gives her a tattoo on her shoulder.</p> <p>When Oneians see Amber's shoulder, they are offended.</p>	<p>Imagine that Amber is seeking to get a tattoo. At the tattoo parlor, the tattoo artist tells Amber that he will give her a tattoo of the Japanese word for "wisdom."</p> <p>Unbeknownst to Amber, the artist is lying: he plans to give her a tattoo of the Chinese word for "wisdom."</p> <p>He gives her a tattoo of the Chinese word for "wisdom."</p>
<hr/> <p>"There was consent in this situation." (7-point Likert scale: Agree/Disagree)</p> <hr/>	
<p>If you had to guess, how much do you think it mattered to Amber <i>whether the part of the body where Oneians find tattoos offensive is the shoulder (where she got a tattoo) versus some other part of the body?</i></p> <p>(7-point Likert scale: Matters not at all /Matters a great deal)</p>	<p>If you had to guess, how much do you think it mattered to Amber <i>whether the tattoo was the Chinese word for "wisdom" or the Japanese word for "wisdom"?</i></p> <p>(7-point Likert scale: Matters not at all /Matters a great deal)</p>

APPENDIX B: DEMOGRAPHIC DIFFERENCES IN PERCEPTIONS OF CONSENT

No consistent differences in judgments of consent based on participants' gender, age, race/ethnicity, education, or household income were observed. This Appendix reports all demographic covariates that significantly predicted perceptions of consent, with the caveat that one must be cautious about overinterpreting these results. By random chance, approximately 1 in 20 tests will register as statistically significant at the $\alpha = .05$ level, even if there is no relationship whatsoever between the variables. Because over two dozen scenarios were administered and five demographic covariates were examined for each, we should expect to see false positives.

Gender differences were observed for *College*, *HIV with Transmission*, and *HIV with No Transmission*. Male participants perceived more consent than female participants in *College*, whereas the reverse was true in the other two vignettes.

Age differences were observed for *Married*, *Elective Ankle Surgery (Wealthy Patient)*, *Surgery Results in No Infection*, *Termites*, Study 2a (Zika Scenarios) and Study 5 (Essential versus Material Lies). Older adults perceived more consent than younger adults.

Participants with more years of education perceived less consent in *Bisexual*, *Immigrant*, *Warrantless Search*, *Research Purpose*, and Study 5 (Essential versus Material Lies).

Finally, no significant differences by race/ethnicity were observed when Black/African American, Hispanic/Latino, Asian/Asian American/Pacific Islander, and Other were analyzed as separate groups.³³⁰ If these groups are pooled together as a single "nonwhite" category, significant differences emerge for *HIV with Transmission* and *HIV with No Transmission*. White participants perceived less consent than nonwhite participants in these two vignettes.

330. One exception was Study 2a (Zika scenario), in which Hispanic participants gave significantly lower consent judgments than Asian participants. We should be cautious about interpreting this result, given the small number of Hispanic participants ($n = 11$) and the high potential for false positives as a result of multiple comparisons.

APPENDIX C: PILOT TESTS AND SUPPLEMENTAL ANALYSES

Participants ($n = 100$) rated ten items on a scale from 0 (*Not morally wrong at all*) to 100 (*Completely despicable*). All participants rated all items, presented in random order.

For each of the following questions, imagine that John wants to sleep with Ann. On a scale from 0 to 100, please rate how morally wrong it would be if John did the following things to Ann in an effort to try to get her to sleep with him.

TABLE C1.
MEANS AND STANDARD DEVIATIONS OF MORAL WRONGNESS PRETEST ITEMS³³¹

Pretest Items	M	(SD)
Pretend to have tragically lost a child, when in reality he has never been a father.	93.37	(12.33)
<i>Say he will post nude pictures of Ann on the internet, unless she will sleep with him.</i>	93.23	(15.52)
Lie about being married – that is, say he is unmarried even though he has a wife.	92.44	(12.96)
<i>Say he will spread Ann's embarrassing secret unless she will sleep with him.</i>	90.53	(16.97)
Pretend not to have any children, even though he has a child from a previous relationship.	86.51	(17.89)
Lie about being transgender – that is, he was born female but he pretends to have been born male.	83.44	(22.14)
<i>Say he will not drive Ann home from dinner, unless she will sleep with him.</i>	81.31	(21.95)
<i>Say he will break up with Ann unless she will sleep with him.</i>	76.66	(27.50)
<i>Say he will not drive Ann to the airport like he previously agreed to, unless she will sleep with him.</i>	76.05	(25.07)
Lie about what his job is.	65.19	(27.06)

331. Italicized items are coercion pretest items; nonitalicized items are deception pretest items. All scales ranged from 0 (*Not morally wrong at all*) to 100 (*Completely despicable*).

COMMONSENSE CONSENT

A *t*-test confirmed that two actions – lying about being married and threatening to spread Ann’s embarrassing secret – were rated as not significantly different in their moral wrongness.³³² The means differed by a mere 1.91 on a scale ranging from 0 to 100. To the extent that there was any difference in wrongness ratings, the deception case was seen as slightly *worse* than the threat case.

In Study 3a, participants evaluated deceived agreement versus coerced agreement. In addition to rating whether Ann consented to sex with Kevin, they also rated several additional questions, presented in random order:

1. Did Ann voluntarily have sex with Kevin?
2. Did Ann have sex with Kevin of her own free will?
3. Did Ann willingly have sex with Kevin?
4. Did Ann freely choose to have sex with Kevin?
5. Did Ann let Kevin have sex with her?
6. Did Ann give Kevin permission to have sex with her?

Participants largely viewed coercion but not deception as infringing Ann’s autonomy. This is consistent with their judgments of “consent.” As Table 4 shows, perceptions of voluntariness, free will, willingness, and free choice diverged widely between the two scenarios (*ps* < .001). Perceptions of whether Ann “let” or “permitted” Kevin to have sex with her also showed significant differences, although the divergence is less stark for each of these two questions than the others.

TABLE C2.
COERCION VERSUS DECEPTION³³³

Did Ann . . .	Deception		Coercion	
	<i>M</i>	<i>SD</i>	<i>M</i>	<i>SD</i>
Have sex with Kevin of her own free will?	84.46	(21.88)	30.29	(32.21)
Freely choose to have sex with Kevin?	82.82	(23.13)	30.04	(32.47)
Willingly have sex with Kevin?	84.30	(21.86)	28.42	(30.29)
Voluntarily have sex with Kevin?	84.89	(20.63)	33.44	(33.38)
Give Kevin permission to have sex with her?	81.59	(23.53)	56.53	(34.90)
Let Kevin have sex with her?	82.62	(24.41)	56.55	(35.06)

332. $t_{Welch}(185,13) = .89, p = .37, d = .13$.

333. All scales ranged from 0 (not at all) to 100 (very much).

Finally, participants were also asked to rate how *wrong* Kevin's behavior was. In other words, participants assigned to read *Married* rated how wrong it was for Kevin to lie about his marital status, while participants assigned to read *Secret* rated how wrong it was for Kevin to threaten to spread Ann's secret.

This measure revealed that the stark difference observed between the two scenarios in how participants rated "consent" cannot be explained by differences in how morally repugnant people found Kevin's behavior. A regression analysis indicates that participants' ratings of how wrongful Kevin's behavior was did not significantly predict their consent judgments.³³⁴ Moreover, when participants' wrongfulness judgments are included in the regression equation along with condition (deception versus coercion), the resulting model demonstrates that condition is still just as strongly related to consent judgments even after adjusting for the perceived wrongfulness of Kevin's behavior.³³⁵ Thus, the moral wrongness of threatening (versus lying) does not explain why participants saw less consent in the coercion case.

334. $b = -.37$, $SE = .23$, $p = .10$. In other words, the correlation between judgments of consent and judgments of wrongfulness of Kevin's behavior was only $-.16$ and was not statistically significant ($p = .10$).

335. Without adjusting for wrongfulness, condition is a significant predictor of consent judgments, with deception being associated with a 44-point increase over coercion, $b = 44.35$, $SE = 5.98$, $p < .001$. After adjusting for wrongfulness, the relationship between condition and consent judgments remained significant, with deception being associated with a 43-point increase in consent judgments, $b = 43.02$, $SE = 6.55$, $p < .001$.