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No Way Around Consent: A Reply to Rubenfeld on “Rape-by-Deception”

Recently, Jed Rubenfeld has argued for a new rape law principle that aims to unravel an intriguing riddle that he has posed about obtaining sex by means of deception. In this Essay, Tom Dougherty argues that Rubenfeld’s self-possession principle itself gives a role to consent that deception can effectively vitiate. In light of this difficulty, Dougherty suggests that the only tenable solution is to take rape-by-deception seriously.

With the goal of avoiding broadly construing sex-by-deception as rape, Jed Rubenfeld has proposed a novel principle for rape law—rape violates a “right to self-possession,” where self-possession is understood as physical control over one’s own body.¹ This reply argues that the self-possession principle fails to achieve this goal, for an instructive reason: on examination, the principle gives a crucial role to consent, and Rubenfeld himself has ably demonstrated how deception can vitiate consent. More generally, since any tenable rape law principle must take consent seriously, any such principle will have to allow the possibility of rape-by-deception.

I. RUBENFELD’S RIDDLE

Rubenfeld’s new rape law principle aims to unravel an intriguing riddle that he has posed about obtaining sex by means of deception. His argument turns on the fact that, in general, deception vitiates someone’s consent when it concerns a fact that is material to that person’s decision to consent. Rubenfeld argues that consistency requires applying this point to sexual consent. As a

1. Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372 (2013).

consequence, sex-by-material-deception is nonconsensual sex.² For example, if Jones agreed to sex with Smith only because Smith falsely claimed to have gone to Yale, then Jones did not validly consent to sex. This creates trouble for the “sexual autonomy” principle for sex law. One of the implications of this principle is that it is rape to have sex with someone who does not validly consent. Yet adherents of this principle are presumably unwilling to classify as rapists those who seduce people by lying about where they went to college.

Rubinfeld forcefully criticizes the way that the law has traditionally sought to avoid this trouble. It has done so by distinguishing “fraud in the factum” from “fraud in the inducement.” If the deceiver conceals the core nature of the act, then he commits “fraud in the factum.” This fraud vitiates sexual consent on the grounds that “what happened is not that for which consent was given.”³ Two paradigms are misrepresenting sex as a medical procedure and impersonating someone’s spouse.⁴ But if the deception concerns other matters of fact, then the deceiver merely commits “fraud in the inducement,” which does not vitiate sexual consent. A paradigmatic example would be lying about one’s *alma mater* in order to appear a more attractive sexual proposition. Commentators have discussed the difficulties in drawing the fact/inducement distinction in a defensible way and questioned the distinction’s validity.⁵ Rubinfeld adds the sharp criticism that its application here is *ad hoc*, noting that in contexts other than rape, “fraud in the inducement” standardly vitiates consent.⁶ In particular, misrepresenting one’s occupation or personal characteristics routinely vitiates consent in cases involving larceny, trespass, and contract. Carving out an exception for sexual consent is arbitrary and unmotivated.

This part of Rubinfeld’s argument is, in my view, fundamentally sound. As such, it has a profound significance for rape law, since it implies that we have to eschew the fact/inducement distinction and instead make a holistic choice

2. *Id.* at 1402.

3. ROLLIN M. PERKINS, CRIMINAL LAW 856 (2d ed. 1969).

4. Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35, 88 (1992).

5. See, e.g., JOAN MCGREGOR, IS IT RAPE? ON ACQUAINTANCE RAPE AND TAKING WOMEN’S CONSENT SERIOUSLY (2005); ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS (2003); Tom Dougherty, *Sex, Lies and Consent*, 123 ETHICS 717 (2013); Joel Feinberg, *Victims’ Excuses: The Case of Fraudulently Procured Consent*, 96 ETHICS 330 (1986).

6. Rubinfeld also argues that there is no principled basis for using the distinction to consider as fraud in the factum only cases involving medical misrepresentation and spousal impersonation. He argues that representing penetration as “professional care” is not different in kind from a “false lover” representing it as “emotional care.” Similarly, he argues that if impersonating a spouse vitiates consent, then impersonating a bachelor, i.e. pretending to be unmarried, should as well. Rubinfeld, *supra* note 1, at 1399.

about whether to seriously penalize anyone who deceives someone about a matter that is material to her decision to have sex. Thus, the critical part of Rubinfeld's argument leaves us with an uncomfortable dilemma: either we take more seriously quotidian sex-by-deception or we give up the sexual autonomy principle for sex law.

Rubinfeld chooses the latter horn of the dilemma. This creates a theoretical lacuna for a normative foundation for rape law, which Rubinfeld fills with his novel principle. He holds that rape violates someone's "right to self-possession," in a way that is similar to the way in which slavery and torture violate this right.⁷ On this account, the profound wrong of rape consists in the victim losing possession of his or her body in sex.⁸ This possession is not to be understood as a "property right. . . . Rather, bodily possession is a matter . . . of physical control."⁹ As such, Rubinfeld proposes that we frame rape law to penalize those who forcefully take possession of others' bodies during sex. This principle would have the important consequence that rape law's "much-maligned force requirement might not be so malign after all."¹⁰ The principle also aims to rule out rape-by-deception since a "fraud victim retains his basic bodily self-governance. He is manipulated, but his person—elementally, physically—remains his own."¹¹

Ingenious as the self-possession principle is, I will argue in Part II that it still has to give an important role to consent, and as such it still entails that some commonplace sex-by-deception counts as rape. Indeed, given that consent cannot be eliminated from rape law and consent can be vitiated by deception, we have reason to take rape-by-deception seriously. This point is supported by our views of egregiously wrong acts like spousal impersonation, which I argue in Part III pose a problem for Rubinfeld's self-possession principle. Consequently, in Part IV, I will argue that we embrace the other horn of Rubinfeld's dilemma and adopt an expansive conception of rape-by-deception.

II. THE RETURN OF RAPE-BY-DECEPTION

Rubinfeld aims to avoid categorizing sex-by-deception as rape by conceiving of rape as the loss of elemental "physical control" of one's body

7. *Id.* at 1380.

8. I use the term "victim" here and throughout in the legal sense, noting that many people who have been raped find the term "survivor" to be more accurate.

9. Rubinfeld, *supra* note 1, at 1426.

10. *Id.* at 1380.

11. *Id.* at 1432.

during sex.¹² Thus, rape involves a violation of self-possession, which is defined as “the possession of one’s own body.”¹³ But it is not the only such violation; in addition, one’s right to self-possession can be violated by enslavement or torture. Rubenfeld thus proposes grouping these crimes together given that “the similarities [between the crimes] are unmistakable” insofar as the “victim’s body is utterly wrested from her control, mastered, possessed by another.”¹⁴ Indeed, positioning rape alongside slavery and torture makes more palatable a rape law principle that centers on a force requirement: “[P]laced next to the law of slavery and torture, rape’s force requirement is wholly unexceptional.”¹⁵

Force requirements in rape law have, of course, been subject to substantial feminist criticism. This criticism has particularly targeted laws that require victims to have engaged in physical resistance in order for their assailants to be guilty of rape. Such laws are unacceptable in light of the fact that a significant number of victims do not struggle or resist for a variety of legitimate reasons. Moreover, these problematic laws reflect and perpetuate a stereotype of rape as a crime committed by strangers and involving additional physical violence and threats. But in the contemporary United States, the reality is that the majority of rapists are known to their victims and the majority of rapes do not involve the threat or use of physical harm. Indeed, in the majority of cases the victims do not believe that they are at risk of serious harm or death. Similarly, only a minority of cases involve additional physical assaults besides the rape itself.¹⁶

Although Rubenfeld frequently uses the language of violence in the context of discussing rape, we should not infer that his self-possession principle must be premised on this mistaken stereotype of rape. Instead, his principle is most charitably read as conceiving of the rapist’s mastery of the victim’s body as itself a form of violence. When Rubenfeld discusses force, he makes clear that this mastery alone is sufficient to meet the force requirement: he states that violation of the right of self-possession “consists in another person mastering and taking possession of the victim’s body, wresting away the victim’s elemental control over her own person, and where there is no force, there is no such mastery or taking.”¹⁷ It is clear that this possession can be achieved even if

12. *Id.* at 1426.

13. *Id.* at 1425.

14. *Id.* at 1427.

15. *Id.* at 1433.

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

17. Rubenfeld, *supra* note 1, at 1434.

the victim does not struggle, and even if the rapist does not use additional violence or threats. Therefore, although Rubinfeld endorses a force requirement, it is a sophisticated force requirement that need not involve the problematic commitments of other force requirements, which have justifiably received vigorous critique. His principle can avoid these commitments by setting a lower bar for what counts as a loss of self-possession—this lower bar would be met by the mere loss of physical control of one’s body to another person.

But this very virtue of Rubinfeld’s proposal brings with it a complication in light of the fact that some people do not want to retain “physical” control of their bodies in their sexual encounters. The example discussed by Rubinfeld is sadomasochistic sex. Of course, retaining verbal control is crucial to someone’s enjoyment of such sex. In other words, it is crucial that his or her partner will desist should he or she withdraw consent to the encounter—for example, by uttering a “safe word.” Rubinfeld would agree. He claims that “rape as a violation of self-possession . . . offers a simple approach to sadomasochistic sex” in that it “would ask whether the violence was consented to.”¹⁸

Here, Rubinfeld is conceiving of consent (as I myself do) as the “affirmative grant of permission (by word or conduct).”¹⁹ In other words, consent consists in an act of verbal or nonverbal communication, with the content that the other party is allowed to engage in conduct that he or she would otherwise not be allowed to engage in. The significance of this communicative act is that it waives a claim-right of the consenter. In the context of sadomasochistic violence, the consent would waive a claim-right against this violence.

A focus on consent to *violence* may be misleading, though. For although Rubinfeld only explicitly discusses sadomasochism, it is worth noting that the relevant phenomenon includes other forms of sex that do not include the giving or receiving of pain. In addition, an individual may consent to losing physical control in “rough sex” and sex that involves binding or restraint. Assuming these activities need not be violent, and are permissible when consensual, the self-possession principle needs to ask whether the relevant party consented to losing “physical control” of his or her body during a sexual encounter.

In this way, consent remains at the center of Rubinfeld’s own proposal. His proposal still contrasts with the sexual autonomy principle since the latter broadly values sexual consent, which controls whom one has sex with. Rubinfeld’s proposal more narrowly values consent that controls to whom one

18. *Id.* at 1437.

19. *Id.*

cedes physical control of one's body during sex. But even though the focus has shifted from sex to the loss of physical control during sex, Rubenfeld's principle remains rooted in consent.

This leads us to a serious problem with Rubenfeld's principle: it faces the same types of criticisms that he leveled against the sexual autonomy principle. He notes that "[s]o long as wronging is understood in autonomy-based terms—as the imposition of one person's sexual will on another without the latter's consent—deception should be as wrongful as force."²⁰ This point would apply also to Rubenfeld's own proposal, since it hinges on consent as well. As such, deceptively imposing sex-without-physical-control would count as rape. To illustrate, suppose Jones is willing to engage in sadomasochistic sex with Smith only if Smith has gone to Yale. Smith lies that he has gone to Yale. Since this deception is material to Jones's decision to consent to the loss of physical control of her body during sex, her consent is vitiated. To appropriate Rubenfeld's own language in his critique of the sexual autonomy principle, a right to self-possession

surely includes the right not [to lose physical control of your body while] hav[ing] sex with a married man if you don't want to. It surely includes the right not to [lose physical control of your body while] hav[ing] sex with someone who isn't interested in a serious relationship. These rights can be violated by lies just as much as they can by force or threat.²¹

Moreover, as we just noted, the self-possession principle needs to take seriously any consent to the loss of physical control of one's body during sex. Thus, a materially deceived victim would not validly consent to a loss of physical control of his or her body in "rough sex" or sex in which he or she is physically bound or restrained. Since appropriate self-possession turns partly on the issue of consent, it is not the case that "[f]raud is an offense against autonomy, not self-possession."²²

Rubenfeld anticipates this line of objection, stating in a footnote, "Deception could vitiate consent to sadomasochistic violence (perhaps counterintuitively, the argument presented thus far is agnostic on this point), but it seems plausible that at least some material deception should not be held to do so—because the goal is not sexual autonomy."²³

20. *Id.* at 1423.

21. *Id.* at 1402.

22. *Id.* at 1432.

23. *Id.* at 1438 n.235.

But contrary to Rubinfeld's claim, there seems no principled ground for agnosticism here: the self-possession principle must acknowledge that sadomasochistic violence or loss of control in sex is permissible when consensual, and Rubinfeld himself has forcefully made the case for why it would be *ad hoc* to carve out arbitrary exceptions to the general rule that material deception vitiates consent. So even if the goal of his principle is not sexual autonomy, there appears to be no principled reason for denying that all material deception vitiates consent to a loss of bodily control. Perhaps Rubinfeld's point is merely that his position does not entail that all material deception vitiates consent to sex? If so, then that point is entirely correct. But a consequence of Rubinfeld's proposal is that whether rape occurs in sex-by-deception depends on whether the sex is "vanilla sex" or involves the loss of physical control. This is a problematic consequence, since this distinction is irrelevant in this context. Recall our earlier example in which Jones willingly engages in sex with Smith because he has lied about going to Yale. Suppose the encounter begins with penetrative sex and proceeds to involve physical restraint. It is hard to believe that the sex is innocent up until the point at which Jones requests that Smith bind her with rope, at which point the encounter suddenly becomes rape. But this would be the consequence of Rubinfeld's proposal. After all, when Smith binds Jones, the encounter involves Jones's losing physical control of her body and Smith's deception has vitiated Jones's consent to this loss of control. At this point, Smith takes possession of Jones's body, and Jones does not properly consent to this.

At this point, one could modify Rubinfeld's position by removing any role for consent in his rape law principle. Instead, the principle could hold that at least certain extreme forms of sadomasochism are categorically impermissible violations of self-possession, even in the context of valid consent.²⁴ But it is not possible to justify a restriction here only for extreme forms of sadomasochism. To do so would mean taking a narrow view of what counts as a violation of self-possession. However, it is necessary to take a broad view of this, if self-possession is to be the guiding concept of rape law. This is because of a key lesson to be learned from the aforementioned feminist critique of force requirements: rape law must criminalize assaults that do not involve physical violence besides the rape itself. The modification would thus have to consider as rape all consensual sex that involves the loss of control of one person's body. And this is a deeply counterintuitive position to take.²⁵

24. I owe both the substance and much of the wording of this modification to the editors of the *Yale Law Journal*, as well as part of the response to it.

25. A comprehensive assessment of this modification would have to wait until after an evaluation of Rubinfeld's case against the category of "rape-by-deception," which I discuss later in this Essay. Only then will we be able to assess the relative seriousness of the cost of

But without modification, Rubinfeld's proposal does not succeed in its goal of avoiding categorizing forms of sex-by-deception as rape. Moreover, we have seen that his proposal is committed to considering, for example, sadomasochistic sex-by-deception as rape, even when the deception merely concerns which college someone went to. But not only does Rubinfeld's proposal fail by its own lights; worse, it makes the classification of sex-by-deception as rape turn on the irrelevant feature of whether the sexual encounter involved, say, bondage. The problem arises because Rubinfeld's proposal takes seriously consent to the loss of physical control of one's body in sexual encounters. But as Rubinfeld himself has insightfully pointed out, in general consent can be vitiated by deception. As a result, rape-by-deception returns via the back door.

III. RAPE-BY-DECEPTION REVISITED

If the "self-possession principle" cannot avoid the possibility of rape-by-deception, then where do we go from here? We might look for a third alternative principle besides the self-possession principle and the sexual autonomy principle. But I suspect that any such alternative will recognize some forms of rape-by-deception. This is because any normatively tenable principle will have to give a key role to some form of consent. Since deception can vitiate consent, this means that rape-by-deception looms large.

Criminalizing sex-by-deception need not mean equating it with violent or forceful rape. Instead, it could be a lesser, but still serious, offense that might be called, for example, "rape-in-the-second-degree."²⁶ Another alternative is to not call sex-by-deception "rape" at all, but instead criminalize it as a serious form of "sexual misconduct" or "sexual imposition."²⁷ I happen to prefer the latter terminological choice, but am happy to continue to follow Rubinfeld in discussing the issue in terms of rape-by-deception, for this terminological issue is not the pressing one. Instead, the crux of the matter concerns the serious normative question of which forms of sexual misconduct should be heavily penalized by the arm of the law that denotes specific sex crimes (i.e. "rape

considering these consensual forms of sex as rape. To anticipate, I will defend the alternative that everyday forms of sex-by-material-deception should count as rape, and this is itself a counterintuitive position. On balance, this alternative position seems to me to have less intuitive cost than the modification discussed here. However, I have no additional argument for this claim, and instead must rest my case with an appeal to the reader's own balancing of the relevant intuitions.

26. *Id.* at 1410.

27. *Id.* at 1416.

law”). It is with respect to that substantive issue that I suggest that we take seriously “rape-by-deception.”

Indeed, allowing the possibility of rape-by-deception is independently attractive, since there are some forms of sex-by-deception that should strike us as worthy of stern criminal sanction. As noted earlier, many rape laws criminalize sex by means of misrepresenting a sexual encounter as a medical procedure, or impersonating someone’s spouse. Patricia Falk catalogues several such cases, of which I will mention but two.²⁸ First, posing as a doctor, Daniel Boro persuaded certain women that they had a fatal blood disease that could be cured by having sex with a man – Boro himself – who had been injected with a curative “serum.”²⁹ Second, Raymond Mitchell posed as women’s partners on the telephone, persuading them to indulge his fantasy of blindfolded sex by leaving their doors open and waiting in bed blindfolded.³⁰ I hope you will agree that these forms of sex-by-deception are seriously wrong, and that there is at least a strong presumptive case that they should be criminalized and heavily sanctioned. As such, they are counterexamples to Rubinfeld’s self-possession principle: since the victims retained “physical control” of their bodies, the self-possession principle finds nothing wrong in the deceivers’ misconduct. This is not a welcome result. In trying to avoid criminalizing lies about one’s *alma mater*, for example, Rubinfeld’s proposal also ends up avoiding criminalizing all forms of sex-by-deception. The baby has been thrown out with the bathwater.

IV. RUBENFELD’S CASE AGAINST “RAPE-BY-DECEPTION”

We have seen two problems with the self-possession principle. In Part II, we saw that it considers sex-by-material-deception as rape when, but only when, the sex involves the deceived party’s loss of bodily control in sex, and this restriction is implausible. In Part III, we saw that it fails to criminalize the conduct of someone like Mitchell, who impersonated his victims’ partners in order to have sex with them. These are costs, but we cannot assess their overall significance without considering a key part of the initial motivation for Rubinfeld’s self-possession principle – namely, his case for the claim that sex-by-deception should not be criminalized.

28. Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 55-69 (1998) (discussing cases in which defendants lied about the purported benefits of sexual intercourse as medical, psychological, religious, and even musical treatment).

29. *Boro v. Superior Court*, 210 Cal. Rptr. 122, 123 (Ct. App. 1985).

30. *State v. Mitchell*, No. 1996-00008-CCA-R3-CD, 1999 WL 559930, at *2 (Tenn. Crim. App. July 30, 1999).

Here Rubinfeld's reasoning is interesting and powerful. There are two strands to his argument.³¹ First, he notes that if violent rapists were deceived about their victims, then the rapists would be able to submit that they themselves were victims of rape-by-deception. In his example, a "man who only rapes models could claim to have been raped by his victim if she falsely told him she was a model."³² Second, Rubinfeld points out that deception features in seduction in multiple everyday ways: "Clothing and underclothing can falsify. Make-up and hair dye can deceive. All cosmetics misrepresent."³³

There are two promising lines of response to the model-rapist objection. The first is that it is dubious that there is a robust sense in which the rape victim is imposing nonconsensual sex upon the model-rapist. It is true that as a result of her deception, the rapist engages in sex to which he does not validly consent. But it appears inappropriate to say that the victim is having nonconsensual sex with the rapist. One possibility, then, is to criminalize impositions of nonconsensual sex.

The second line of response to the model-rapist objection would be to argue that the model-rapist has forfeited his right against nonconsensual sex, and so is not wronged by his victim. For in general, wrongdoers frequently forfeit their rights against the very types of wrongs they commit. If, without provocation, a man assaults another man, then the assaulter forfeits his right against being hit back in self-defense. However, there is a difficulty with this response in that the rape victim's deception precedes the rapist's physical coercion.³⁴ Why then does the victim not forfeit her right against being raped

31. In addition, Rubinfeld offers a critique of sexual autonomy principles. To my mind, the most plausible of these principles is a "thinner concept of sexual autonomy" that "requires only that [someone] be free from the wrongful imposition on him of anyone else's will," thus "insisting only on a right against others' wrongful sexual impositions." Rubinfeld, *supra* note 1, at 1422. Rubinfeld allows that there may be such a right, but counters that "autonomy is the wrong concept for this right." *Id.* (emphasis added). His counterexample is "a homeless man without the use of his limbs, shunned by society, kept alive by scraps of food thrown at him every now and then," who, in Rubinfeld's view, is not sexually autonomous. *Id.* at 1423. I lack the space to respond to this critique in the length that it deserves, but will briefly note that most people's conceptual intuitions do allow for conceiving freedom from another person's arbitrary will as a form of autonomy. Indeed, this "positive" concept of liberty as self-rule is the central plank of the so-called republican tradition of political philosophy. See ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969); PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997).

32. Rubinfeld, *supra* note 1, at 1415.

33. *Id.* at 1416. The editors of the *Yale Law Journal* have pointed out to me that it appears an over-generalization to say that all cosmetics misrepresent, noting that lipstick may make lips more attractive, but does not ordinarily mislead people about the color of the wearer's lips.

34. Thanks to the editors of the *Yale Law Journal* for raising this important point.

by pretending to be a model? The reason why is presumably that the victim is not deceiving with the intention of having sex with the rapist, and as such does not forfeit her rights against nonconsensual sex. But the forfeiture response would not extend to a variation of Rubenfeld's case that brings out his objection in its strongest form. We might modify a detail of the case so that the victim was pretending to be a model with the intention of deceiving the rapist into consensual sex; however, before she could express or act on this desire for sex, the model-rapist coercively raped her. In this version of the case, it is hard for the forfeiture response to avoid implying that the victim would forfeit her right against nonconsensual sex. All the same, some of the sting of this objection can be drawn by noting that there are other rights that the victim would not forfeit, including a right against being physically threatened, and a right against suffering experiential and physical harm. And there is some plausibility to thinking that in this version of the case, the threats and harms account for the rapist's wrong.

Leaving aside the model-rapist, what could one say in response to Rubenfeld's objection about everyday deception? This objection is troublesome because Rubenfeld's central argument strikes me as fundamentally sound: if the deception by Boro and Mitchell vitiates their victims' sexual consent, then common material deception does too. Ultimately, I suggest that we must bite this bullet: when the deception is material to someone's sexual consent, then sex-by-deception is a serious wrong. Pushing for criminalizing sex-by-deception will seem to many a draconian stance. But Rubenfeld's central argument forces us to make an unpleasant choice. Either we take seriously wrongs such as those committed by Boro and Mitchell, or we allow everyday forms of sex-by-deception. Rubenfeld notes that "on the whole it would seem a pity to see" all misrepresentations on the way to sex "go."³⁵ However, I suggest that it would be much worse to see the conduct of Boro and Mitchell escape without penalty.

These responses go some way toward lessening the force of Rubenfeld's objections. But they remain powerful objections, and I do not think the responses, considered on their own merits, are entirely satisfactory. However, we must weigh this dissatisfaction against the dissatisfaction of pardoning the conduct of Boro and Mitchell. The latter dissatisfaction strikes me as greater and so on balance, I suggest that we take the other horn of Rubenfeld's dilemma: we should hold that there is a powerful case for rape law to consider sex-by-deception as a serious sexual crime whenever the deception is material to the victim's consent. I stop short of saying that this sex-by-deception should certainly be penalized in criminal law, only because of pragmatic worries about

35. Rubenfeld, *supra* note 1, at 1416.

the framing of the legislation. Two common worries voiced by commentators are that there are evidentiary problems establishing whether someone culpably deceived another into sex, and that there are difficulties in framing a law that penalizes only seriously wrong misconduct.³⁶ I cannot address these worries in sufficient depth here, but will briefly note two points. First, in nonsexual contexts, there are not insurmountable barriers to providing evidence that pertains to whether someone's consent has been vitiated by deception. Now it may be that aspects of sex like desire and intimacy make the evidentiary questions more complicated.³⁷ But the likely upshot of these complications is that it is hard to prove beyond reasonable doubt that the deception was material to the victim's decision to have sex and hence that the victim did not validly consent to sex. As a result, it may often be hard to prosecute perpetrators. But this does not mean that such a law would be idle because there will still be some cases in which it is possible to establish beyond reasonable doubt that the deception was material. Second, in nonsexual contexts, it has proved possible to frame laws that only penalize deception that vitiates consent. Indeed, promising proposals for laws against sex-by-deception are extant in the literature.³⁸ We might cautiously hold out hope that any

36. See, e.g., STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 154-58 (1998). Alan Wertheimer also suggests both diagnoses, maintaining that the "permissive approach to sexual deception derives from 'line-drawing' . . . difficulties" concerning how to distinguish "morally wrong" from "puffing" or "storytelling," and also from "adjudication difficulties" in establishing what the deceiver said and whether he was intending to deceive. WERTHEIMER, *supra* note 5, at 198-99.

37. Thanks to the editors of the *Yale Law Journal* for raising this point.

38. With respect to the civil law, Jane Larson proposes the following tort for sexual fraud:

One who fraudulently makes a misrepresentation of fact, opinion, intention, or law, for the purpose of inducing another to consent to sexual relations in reliance upon it, is subject to liability to the other in deceit for serious physical, pecuniary, and emotional loss caused to the recipient by his or her justifiable reliance upon the misrepresentation.

Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374, 453 (1993). Similarly, Canadian Supreme Court Justice L'Heureux-Dubé offers the following expansive proposal for sexual fraud:

Where fraud is in issue, the Crown would be required to prove beyond a reasonable doubt that the accused acted dishonestly in a manner designed to induce the complainant to submit to a specific activity, and that absent the dishonesty, the complainant would not have submitted to the particular activity

R. v. Cuerrier, [1998] 2 S.C.R. 371, 374 (Can.) (opinion of L'Heureux-Dubé, J.). Peter Westen thinks that this proposal would be widely rejected on the grounds that it would extend to someone lying about his or her occupation or wealth, but allows that the "view produces a rule that is easily understood and applied." PETER WESTEN, THE LOGIC OF

pragmatic problems concerning how to frame rape-by-deception laws are covered by solutions to similar problems in fraud law in general.

Even if we adopted legislation that criminalized all sex procured by deception that is material to someone's decision to consent, there would be two important limits to the scope of this legislation. First, much deception in romance is not material to someone's decision to consent to sex. This deception would remain legal. So if someone's decision to have sex were not affected by his or her partner's wearing foundation, then this cosmetic's misrepresentation would not affect his or her consent to sex. Second, concealment is different from deception. (I am currently concealing from you the color of my eyes, but I am not deceiving you.) So taking rape-by-deception seriously need not logically commit us to "a legal regime of full disclosure prior to any sexual contact."³⁹ Indeed, our weighty interests in privacy would counterbalance reasons for disclosing. The outcome of this balancing would determine the appropriate extent of a "regime" of appropriate "disclosure prior to any sexual contact."

CONCLUSION

Since Rubinfeld's self-possession principle wisely relies on the notion of consent, it is committed to holding that some forms of everyday sex-by-deception are rape-by-deception. More broadly, since consent cannot be eliminated from rape law, and deception vitiates consent, rape law should take seriously rape-by-deception. This point is attractive on its own terms since most of us independently think that rape law should criminalize misrepresenting sex as surgery or spousal impersonation.

Despite these points of disagreement, I remain convinced by Rubinfeld's central argument that it is *ad hoc* to carve out arbitrary exceptions for some types of material deception and not others. If impersonating someone's wife vitiates consent, then other forms of material deception should too. So the moral that I take from Rubinfeld's article is that we should adopt a more expansive conception of rape-by-deception. Indeed, assuming certain pragmatic worries could be assuaged, we should reluctantly accept that someone can be guilty of rape-by-deception by falsely saying he went to Yale. I say "reluctantly" because I do share Rubinfeld's intuition that "deceptive sex, however bad it may be, isn't *that* bad."⁴⁰ However I feel ineluctably driven to

CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT 200 (2004).

39. Rubinfeld, *supra* note 1, at 1416.

40. *Id.*

overturning this intuition, because I take sexual autonomy seriously and feel the full force of Rubenfeld’s powerful argument, which “requires sex law to pick its poison—to decide if it does or doesn’t stand for sexual autonomy, whether that means embracing rape-by-deception or reconsidering . . . a right to sexual autonomy.”⁴¹

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41. *Id.* at 1379-80.