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# Lies, Rape, and Statutory Rape

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## Lies, Rape, and Statutory Rape

Stuart P. Green\*

When a defendant lies or uses other forms of deception to induce an adult partner into sex, the law only rarely treats that as rape, even if the partner would not have engaged in the act absent the deception. But when the defendant himself is deceived into having sex with a partner who is underage, such deception is normally no defense to charges of *statutory* rape, even if, once again, it was a “but-for” cause of the act. To put it another way, in the case of rape, the lie-perpetrator normally escapes liability, while in statutory rape, the lie-victim is punished. At first glance,

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this seems reversed. Why does deception play what seems to be a morally inverted role in these two contexts? Can such a regime be justified?

As the analysis below suggests, there is no neat answer to these questions. The law of rape and of statutory rape each developed according to their own logic, in their own historical contexts, in response to distinctive policy concerns. Still, it is worth considering the two offenses in relation to each other, since both are ultimately concerned with questions of sexual autonomy and consent to sexual relations, and both are key components in a larger system of sexual offenses. On the view that I present here (and which will be developed in much greater detail in a book I am writing<sup>1</sup>), the law of sexual offenses is understood as protecting a wide range of “sticks” that comprise the “bundle” of sexual autonomy rights. Under this view, individual sexual offenses like rape and statutory rape are understood as protecting specific collections of sticks within that bundle, rather than sexual autonomy *in toto*.

Given that rape is the most serious of the sexual offenses, one would expect it to protect the most serious of the sexual autonomy rights. These would include, at the least, the right to decide whether or not to have sexual intercourse or other penetrative sex, and the right to decide *whom* one will have it with. Thus, where *D* induced *V* into sex by lying about the fact that they were having sex (say, in the course of a

<sup>1</sup> Tentatively titled *Criminalizing Sex: A Unified Theory* (under contract with Oxford University Press).

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fraudulent medical procedure), or about his identity (by impersonating her regular lover), that *would* constitute rape on my view. More difficult are cases in which *D* obtained sex from *V* by lying about matters, such as whether he was married, using birth control, carrying a sexually transmitted disease, or interested in a long-term romantic relationship. While I shall not attempt to resolve all of these issues in this brief chapter, I believe that the beginning of an answer lies in determining – as we do in other legal contexts, such as perjury and fraud – which kinds of deception are more wrongful or harmful than others.

Thinking more broadly about the sexual offenses can also shed light on the role that deception plays, or ought to play, in the context of statutory rape. Like the law of rape, the law of statutory rape is concerned with protecting potential victims' sexual autonomy – but it does so in a quite convoluted manner. Unlike adults, juveniles are not recognized as having sexual autonomy in those cases in which they genuinely wish to have sex; in such cases, lack of consent to sex is said to be “presumed.” Paradoxically, it is only when juveniles are subject to truly unwanted sex – as in the case of forcible rape – that their ability to consent is implicitly recognized. To avoid this paradox, I suggest that we abandon the idea of statutory rape as involving a presumption of nonconsent, and instead simply view it as analogous to other offenses that are intended to prevent the exploitation of potentially vulnerable members of society. Where the “victim” herself has used deception to induce the offender

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into having sex, however, the prevention-of-exploitation model breaks down – indeed, is turned on its head – and the rationale for imposing liability is thrown into doubt.

### I. Deception and the Law of Rape and Statutory Rape

I begin with a brief description of how deception-induced sex is currently treated in the law of rape and of statutory rape.

#### A. Rape

At common law, a successful prosecution for rape normally required proof not only that the victim did not consent to intercourse but also that such intercourse was obtained by “force.” Indeed, the issues of nonconsent and force were essentially merged: the only way to prove lack of consent was by presenting evidence of force. This meant that non-consensual sex obtained by means other than force, such as deception or coercion, was generally not subject to prosecution as rape. Sex induced by deception was treated, if at all, under the law governing the tort (and, later, the lesser crime) of seduction.<sup>2</sup> Thus, it was not rape if a man obtained a woman’s consent to sex by falsely claiming, for example, that he loved her, was single, would marry her, was a famous movie director, was using birth control, was sterile, or did

<sup>2</sup> See Jane E. Larson, “Women Understand So Little, They Call My Good Nature ‘Deceit’: A Feminist Rethinking of Seduction,” *Columbia Law Review* 93 (1993): 374.

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not have a venereal disease.<sup>3</sup> And this was true even if it could be proved that the victim would not have had sex with the defendant but for his lie.

There were, however, two important exceptions to the general rule: Courts generally held that it *was* rape if the man obtained consent to sex by deceiving his victim into believing that she was (1) undergoing a medical procedure, rather than intercourse, or (2) having sex with her spouse. In so doing, the courts relied on a distinction, borrowed from commercial law, between “fraud in the factum” and “fraud in the inducement.” Fraud in the factum was said to occur when the victim was unaware of the “true nature” of the transaction into which she was entering.<sup>4</sup> For example, if X was tricked into signing a document not knowing that it was, say, a contract or deed, that would be regarded as fraud in the factum, and the document would have no legal effect. This was to be contrasted to cases of fraud in the inducement, in which X was deceived not about whether she was signing a will or deed as such, but rather about the specific rights and obligations created by the documents. In such cases, the deception was said to be “collateral,” and the agreement would be enforceable.<sup>5</sup>

Applying the factum/inducement distinction in the context of sexual relations, courts held that it was rape if the

<sup>3</sup> See generally Patricia J. Falk, “Rape by Fraud and Rape by Coercion,” *Brooklyn Law Review* 64 (1998): 39.

<sup>4</sup> *People v. Morales*, 212 Cal.App.4th 583, 594 (2013).

<sup>5</sup> *McArthur v. Johnson*, 61 N.C. 317, 319 (1867).

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victim was unaware that the act to which she was consenting was sexual intercourse. This could happen, most commonly, when the woman was tricked by a doctor (or someone posing as a doctor) into believing that she was undergoing a vaginal examination or surgical operation, rather than having intercourse.<sup>6</sup> By contrast, when the victim understood the basic nature of the act, but was mistaken about certain material facts, her consent would not be vitiated. For example, it would not be rape if the victim understood that she was having sexual intercourse, but was misled into believing that such intercourse was a medical necessity.<sup>7</sup>

Many courts held that it was also rape if the defendant obtained sex by impersonating the victim's spouse. For example, in the Irish case of *Dee*, the defendant had sex with the victim after sneaking into her darkened bedroom and pretending to be her husband.<sup>8</sup> Reasoning that the victim had consented only to *marital* intercourse, not adultery, the court held that the defendant's act constituted fraud in the factum rather than merely fraud in the inducement.<sup>9</sup>

<sup>6</sup> E.g., *People v. Minkowski*, 23 Cal. Rptr. 92, 105 (Cal. Ct. App. 1962) (victims believed they were being penetrated with medical instrument for medical purposes).

<sup>7</sup> E.g., *Boro v. Superior Court*, 210 Cal. Rptr. 122 (Cal. Ct. App. 1985) (victims believed that intercourse was medically necessary).

<sup>8</sup> *Regina v. Dee*, 15 Cox 579 (1884).

<sup>9</sup> For a contrary rule, see *Lewis v. State*, 30 Ala. 54 (1857) (holding that there was no rape where the defendant, a slave, climbed into bed and had sexual relations with a white woman who believed she was having sex with her husband, as the defendant did not use force and the woman "consented" to the act).

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This traditional common law rule (now largely codified), which recognizes rape by deception only in cases of fraudulent medical procedures and spousal impersonation, continues to be the law in most Anglo-American jurisdictions, including England, Canada, and a majority of U.S. states.<sup>10</sup> But the broader law of rape has undergone tremendous change in the last generation or two, ranging from an expansion in the definition of penetration, to the softening or repeal of the resistance requirement and the abolition of the marital rape exemption.<sup>11</sup> And so it is not surprising that there has been some movement to expand the scope of rape by deception as well.

A handful of jurisdictions have done so. Under a recently enacted Idaho law, a man commits rape if he has sex with a woman who, because of his “artifice, pretense or concealment,” believes him to be “someone other than” who he is.<sup>12</sup> Tennessee, similarly, has defined rape to include “sexual penetration . . . accomplished by fraud.”<sup>13</sup> And a law was recently proposed (though never enacted) in Massachusetts that would have made it rape to have sexual intercourse with another person after “having obtained

<sup>10</sup> For a helpful survey, see Falk, “Rape by Fraud.” See also English Sexual Offences Act 2003 s. 76(2)(a) (identifying two sets of circumstances in which lack of consent is presumed: where *D* (1) deceived *V* as to the nature or purpose of the relevant act, or (2) induced *V* to consent by impersonating a person known personally to *V*).

<sup>11</sup> For a helpful summary, see David P. Bryden, “Redefining Rape,” *Buffalo Criminal Law Review* 3 (2000): 317.

<sup>12</sup> Idaho Code Ann. § 39-13-503(a)(4).

<sup>13</sup> Tenn. Code Ann. § 39-13-503(a)(4).



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that person's consent by the use of fraud, concealment or artifice."<sup>14</sup> Sometimes the sex-obtained-by-fraud cases are treated as rape, and other times as a lesser offense as in the Model Penal Code's sexual intercourse by imposition.<sup>15</sup>

Perhaps the most prominent, and controversial, example of the broadened approach to rape by deception can be seen in the Israeli district court decision in *State of Israel v. Kashur*.<sup>16</sup> The defendant misrepresented himself to a prospective sexual partner as unmarried, Jewish, and interested in a serious romantic relationship. Relying on these misrepresentations, the partner consented to sex. After his lies were discovered, the defendant was charged with rape under Israeli Penal Law, which is defined to include "intercourse with a woman . . . with the woman's consent, which was obtained by deceit in respect of the identity of the person or the nature of the act."<sup>17</sup>

The court's task on appeal was to determine whether lies about marital status and romantic intentions constitute lies

<sup>14</sup> Massachusetts Legislature, House Docket No. 631 (filed Jan. 9, 2009), <https://malegislature.gov/Bills/BillHtml/642?generalCourtId=2>.

<sup>15</sup> See text accompanying notes \_\_ below for a discussion of the original Model Penal Code approach, creating the lesser offenses of deviate sexual intercourse by imposition (Section 213.2(c)) and seduction (Section 213.3(d)).

<sup>16</sup> CrimA 5734/10 (Jerusalem District Court) (published in Takdin, Jan. 25, 2012) (Israel) (English translation obtained from VolokhConspiracy blog, <http://www.unz.org/Pub/VolokhConspiracy-2010oct-00078>).

<sup>17</sup> Penal Law, 5737-1977, Special volume LSI 1, § 345(a)(2)(1977)(Israel) (emphasis added).

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about the “nature of the act” within the meaning of the statute.<sup>18</sup> In upholding the conviction, the court reasoned that the:

defendant interfered with [the victim’s] ability to object by means of misrepresenting the facts of his personal situation – that he was a single man interested in a serious relationship. Consequently, the defendant exploited the accuser’s desire for a deep emotional connection, for only on account of this did she agree to have intercourse with him.<sup>19</sup>

In holding that rape by deception can exist in contexts well beyond cases of fraudulent medical procedures and spousal impersonation, the *Kashur* decision thus marks a significant departure from the prevailing rule in Anglo-American jurisdictions..

### **B. Statutory rape**

Deception plays a quite different role in the context of statutory rape. The focus here is not on the defendant’s lies, but

<sup>18</sup> The procedural posture of the case is a bit obscure, but it appears that the defendant was originally charged with forcible rape, and pled guilty to rape by deception, while preserving for appeal the right to have the court decide whether the facts as alleged established a case of rape by deception.

<sup>19</sup> *Kashur*, above. See also *Saliman v. State*, CrimA 2411/06 (Israel) [Aug. 17, 2008] Israeli Supreme Court (2008) (upholding conviction of rape by fraud where defendant procured sex from V by falsely claiming to be a Housing Department who could help her obtain an affordable apartment).

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on the lies of the supposed “victim.”<sup>20</sup> The clear majority rule in Anglo-American jurisdictions is that a defendant who is deceived into believing, even reasonably and in good faith, that an underage sexual partner has reached the age of consent has no defense. The traditional rule, creating strict liability as to the victim’s age, can be traced to the 1875 English case of *Prince*.<sup>21</sup> The defendant was convicted of eloping with a minor without her father’s permission. Despite the jury’s finding that the defendant did not know the girl was underage, the court denied a defense. It reasoned that, though the defendant lacked the intent to commit statutory rape, he did have an intent to do something wrong (namely, eloping with a young woman without her father’s permission), and this intent to do a “lesser wrong” was sufficient to establish the mental element necessary for statutory rape.

The rule in *Prince* has led to very harsh results, perhaps most notably in the Maryland case of *State v. Garnett*, in which a twenty-year old man with an IQ of 52 and social skills of an eleven-year old was seduced by a girl just shy of her fourteenth birthday, who became pregnant as a result of the intercourse.<sup>22</sup> Garnett’s conviction for statutory rape was upheld by the state Supreme Court, less on policy grounds than on the basis of strict statutory construction.

<sup>20</sup> I use scare quotes here to indicate my skepticism that mature juveniles who deceive adults into having sex should necessarily be regarded as victims.

<sup>21</sup> [1875] 2 L.R.C.C.R. 138.

<sup>22</sup> 632 A.2d 797 (Md. 1993).

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Although *Garnett* reflects the clear majority rule, that rule is not universal. In 1964, the California Supreme Court held in *People v. Hernandez* that an honest and reasonable belief regarding the defendant's age would constitute a defense to charges of statutory rape.<sup>23</sup> The court reasoned that, "if [the defendant] participates in a mutual act of sexual intercourse, believing his partner to be beyond the age of consent, with reasonable grounds for such belief," criminal intent is lacking.<sup>24</sup> Only a handful of states have followed the approach in *Hernandez*, though honest mistakes about age do now provide a defense to charges of statutory rape in most European jurisdictions (the UK, Ireland, Italy, and Norway excepted).<sup>25</sup>

## II. Conceptual Framework

Before we can begin to critique the legal rules described above, it will be helpful to have some basic conceptual tools with which to work. The framework offered here will be developed in much greater detail in my book.

<sup>23</sup> 393 P.2d 673 (Cal. 1964).

<sup>24</sup> *Id.* at 676.

<sup>25</sup> Belinda Carpenter et al., "Harm, Responsibility, Age, and Consent," *New Criminal Law Review* 17 (2014): 23, 35 (on European jurisdictions); Catherine L. Carpenter, "On Statutory Rape, Strict Liability, and the Public Welfare Offense Model," *American University Law Review* 53 (2003): 313, 316–317 (2003) (on minority U.S. jurisdictions).

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### A. Criminalization, blameworthiness, and sexual autonomy

Under liberal retributive principles, only conduct that is blameworthy can legitimately be subject to state punishment. Elsewhere, I have argued that blameworthiness should be analyzed in terms of at least two overlapping types of moral content: harmfulness and wrongfulness.<sup>26</sup> Harmfulness reflects the degree to which an act causes, or risks causing, what Feinberg called a “significant setback to another’s interests.”<sup>27</sup> Wrongfulness reflects the extent to which a criminal act involves the violation of a moral norm, rule, or right.<sup>28</sup>

<sup>26</sup> I addressed this issue in Stuart P. Green, *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age* (Cambridge, MA: Harvard University Press, 2012), 72–73. Intent, knowledge, and other forms of culpability constitute a third type of moral content under my scheme, but they are not directly relevant here.

<sup>27</sup> Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (New York: Oxford University Press, 1984), 31–36.

<sup>28</sup> Some examples will be helpful in explaining the distinction. Imagine a case in which X and Y engage in consensual sexual intercourse. Despite good intentions and reasonable precautions on X’s part, Y nevertheless finds herself with an unwanted pregnancy or a sexually transmitted disease brought on by the sexual act. To the extent that X has caused Y to suffer a setback to her interests, we should say that X has caused Y harm. We should not, however, conclude that Y has been wronged by X, since X committed no violation of a norm, rule, right, or duty. To put it another way, the harm caused to Y by X was not unjustified. We can think of what Y has to done X as a “wrongless harm.”

Finding an instance of harmless wrongdoing in this context is a bit more difficult. Consider a hypothetical case originally described in John Gardner and Stephen Shute, “The Wrongness of Rape,” in

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For present purposes, I shall assume that the wrongfulness in nonconsensual sexual offenses like rape and sexual assault comes from violations of a victim's sexual autonomy. But to make this assumption is only to begin the analysis, not to end it. What remains to be determined is what sexual autonomy means in particular circumstances and how particular offense provisions should protect it.

Sexual autonomy is often characterized as a kind of undifferentiated "self-determination in matters of sexual life."<sup>29</sup> This aggregative approach, however, is at odds with both how sexual autonomy is dealt with in law and how it is thought about by people in their normal lives. A better way to think about sexual autonomy is in terms of its component parts. I suggest that we conceive of sexual autonomy as loosely analogous to the concept of property. Property is often characterized as a "bundle" of rights organized around the idea of securing, for the right of the holder, exclusive possession or use or access to, or control of, a

Jeremy Horder (ed.), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford: Oxford University Press, 2000), 193. —X has sexual intercourse with Y while she is unconscious. X wears a condom and causes no physical injury to Y, and neither Y nor anyone else ever becomes aware that the act has occurred. Such an act undoubtedly involves a serious and unjustified violation of Y's rights, and is therefore wrongful. But, as Gardner and Shute argue, it seems that Y has not been harmed, in the sense described above.

<sup>29</sup> Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Cambridge, MA: Harvard University Press, 1998), passim.

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resource.<sup>30</sup> Sexual autonomy, similarly, can be thought of as a bundle of rights organized around the idea of securing for its possessor various forms of sexual self-determination.

Sexual autonomy, on this view, is not a single, monolithic right to choose one's own sexual path, but rather a complex, multifarious collection of rights to engage in, or refrain from, various forms of sexual activity and sex-related conduct. Such autonomy can be negative or positive in its form.<sup>31</sup> Negative autonomy is essentially freedom from interference by external bodies. The law of forcible rape epitomizes the protection of negative liberty in the sense that it protects people from being forced to have penetrative sex they do not wish to have, while having no separate effect on their freedom to engage in sex they do desire. Positive autonomy, by contrast, involves not just freedom *from* restraints, but the freedom to achieve self-realization. The law of marriage arguably provides a legal framework for achieving one form of positive autonomy in the sexual sphere.<sup>32</sup>

So what rights are, or should be, contained in the bundle of rights that comprise sexual autonomy (at least in the case

<sup>30</sup> For a useful discussion, see Joseph William Singer, *Introduction to Property*, 2nd ed. (Boston: Aspen, 2005), 2; A. M. Honoré, "Ownership," in Anthony G. Guest (ed.), *Oxford Essays in Jurisprudence* (Oxford: Clarendon Press, 1961), 107.

<sup>31</sup> See, most famously, Isaiah Berlin, "Two Concepts of Liberty" (originally published in 1958), in Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969).

<sup>32</sup> See Carlos A. Ball, "The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of *Lawrence v. Texas*," *Minnesota Law Review* 88 (2004): 1184, 1203–1207.

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of adults – I defer until later the question of sexual rights for juveniles)? Obviously, the list will be subject to debate, but I would suggest, for starters, the right to engage in (or forego) activities such as vaginal intercourse, anal intercourse, oral sex, kissing, fondling, foreplay, masturbation, preserving or giving up one's virginity, inflicting or receiving sexual pain, viewing sexual images and performances, using sex toys, displaying (or concealing) one's sexual identity and history, cross-dressing, changing one's gender identity, mutilating or modifying one's genitals, becoming pregnant, undergoing fertility treatments, having an abortion, using contraception, being protected from or allowing oneself to be exposed to sexually transmitted diseases, selling sex, buying sex, and thinking, talking, reading, or writing about sex. Having sexual autonomy means not only the right to decide whether to engage in such activities, but also the right to decide whom one will have sexual activity with, where and when one will have it, and under what additional circumstances.

There are, of course, significant limitations on such autonomy. In a liberal society that respects the harm principle, almost all of these rights will be circumscribed in some way by the potentially conflicting rights of others. Thus, *A*'s right to have sex with *B* – at a particular time, in a particular manner, under particular conditions – will be circumscribed by *B*'s willingness to have sex with *A*, under those conditions. Similarly, *C*'s right to observe *D* having sex will be circumscribed by *D*'s willingness to display her sexual behavior to *C*; *E*'s right to display his sexuality to the public will be



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circumscribed, in some way, by the public's right not to be offended by such activity; *F*'s right to inflict sexual pain on *G* will be limited by *G*'s willingness to receive sexual pain from *G*; and so on.

### ***B. How the law of sexual offenses protects (and sometimes undermines) sexual autonomy***

Assuming it is helpful to think about property *rights* as a model for understanding sexual autonomy rights, I would suggest that we also think about the property *offenses* as a model for understanding the sexual offenses. Different property offenses protect different sticks in the bundle of property rights in different ways.<sup>33</sup> Laws regarding trespass, joyriding, and unauthorized use of a movable, for example, prohibit offenders from temporarily using others' property without permission; laws regarding vandalism and criminal damage prohibit offenders from causing damage to an owner's property, but without dispossession; the law of theft applies to cases involving more substantial and permanent kinds of interference with an owner's property rights. Such offenses are graded depending on the seriousness of the infringement. Theft, for example, is normally treated as a more serious offense than joyriding, since it involves a more serious infringement of the property owner's rights.

The law of sexual offenses affects different sticks in the bundle of sexual rights in an analogous manner. In the main,

<sup>33</sup> The discussion here is drawn from Green, *Thirteen Ways to Steal a Bicycle* at 74–75.

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it protects people's sexual autonomy by preventing others from forcing them to engage in conduct in which they do not wish to engage. For example, laws against groping and sexual assault protect people from being sexually touched when they do not wish to be touched; statutes prohibiting indecent exposure, public lewdness, and public nudity protect people from having to witness the sexuality of others whose conduct they do not wish to witness; laws against voyeurism protect people from having their sexual activity observed when they do not wish it to be observed; and so on. As in the case of the property offenses, the sexual offenses are graded in a manner that is supposed to reflect the seriousness of the infringement. For example, touching someone sexually on the subway who does not wish to be touched is punished less severely than subjecting another to unwanted sexual intercourse.

Some sexual offenses, however, rather than *protecting* people's rights to sexual autonomy, have the effect of *infringing* those rights, by preventing them from engaging in sexual conduct that, in some significant number of instances, does no wrong or harm to others. This is true most obviously in the case of prohibitions on fornication, sodomy, consensual adult incest, and consensual sadomasochistic sex. But it can also occur in the context of offenses that are otherwise consistent with the harm principle. As we shall see below, the law of statutory rape, though protecting juveniles from unwanted sex in at least some cases, also chills juveniles' sexual freedom by subjecting their potential sexual partners to the prospect of criminal prosecution.

### C. Sexual autonomy and consent

One of the principal indicators for determining whether an individual's sexual autonomy is respected is consent. Consent, of course, is a highly complex concept, and it will be impossible to probe all of that complexity here. Nevertheless, several key issues can be identified.

First, there is a debate in the literature about whether consent should be understood primarily as a subjective mental or psychological state, or instead as a communicative or performative act.<sup>34</sup> To say that consent is a mental state is to say that when *A* consents to *B*'s touching her, she has a particular attitude toward *B*'s act. But what kind of attitude? One possibility is preference: when *A* consents to *B*'s touching her, *A* prefers the state of *B*'s touching her to his not touching her; all things considered, she wishes to acquiesce in the desired conduct.<sup>35</sup> Another possibility is that *A*'s consent is a means of expressing a decision that *B* should touch her. Obviously, *A* can consent to *B*'s touching her without expressing that wish. She can also express consent when she does not really mean it (say, if she feels pressured to do so).

<sup>34</sup> For an excellent account, see Alan Wertheimer, *Consent to Sexual Relations* (Cambridge: Cambridge University Press, 2003), 144–162. Among those who take the subjective view are Heidi Hurd, "The Moral Magic of Consent," *Legal Theory* 2 (1996): 121; Larry Alexander, "The Moral Magic of Consent II," *Legal Theory* 2 (1996):165.

<sup>35</sup> See Peter Westen, *The Logic of Consent* (Farnham, Surrey: Ashgate, 2004), 30.

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We also need to distinguish between consent in its communicative or factual sense and consent in its prescriptive or normative sense. Simply because consent has been given in a factual sense does not necessarily mean that it will be regarded as effective in a moral or legal context. Consent has prescriptive force in morality or law only if (among other things) it is made voluntarily, knowingly, and competently. There are also cases where consent is presumed, and therefore has prescriptive force, even if it has not been communicated (e.g., as in the case of some organ donor regimes).

Consent is normally deemed to be invalid when one or more of three kinds of condition exists. The first is incapacity. A person must be capable of understanding what she is consenting to and what the effects of her consent will be. A person who is unconscious or heavily intoxicated is presumed to be incapable of giving consent.<sup>36</sup> People who have very low intelligence or mental illness are also sometimes deemed to be incapable of giving consent. Juveniles are also sometimes said to be *per se* incapable of consenting – to sex, to contracts, to a waiver of constitutional rights – though, as we shall see below, this claim is problematic in at least some cases of statutory rape.

The second circumstance in which consent is said to be invalid is when it is obtained under coercion. For example,

<sup>36</sup> This is true at least contemporaneously; it's an open question whether a person could give consent to sex prospectively, so that it would apply even after one is incapacitated in the future, as in the case of advance directives or living wills.

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if *A* threatened to disclose embarrassing information about *B* unless *B* agreed to have sex or give up some piece of property, *B*'s consent would be coerced and therefore invalid. A good example of the difference between descriptive and prescriptive consent in this context can be found in the Hobbs Act, which defines extortion as “the obtaining of property from another, *with his consent*, induced by wrongful use of actual or threatened force, violence, or fear.”<sup>37</sup> The kind of consent being referred to here is expressive consent. Valid prescriptive consent would still be lacking, since expressive consent was given under the force of coercion.

Third, there is consent made invalid by deception, which is of course the main concern of this chapter. If *A* obtains *B*'s (factual) consent to some action by lying to *B* about the circumstances surrounding such action, and *B*'s consequent mistaken belief was a but-for cause of his consent – a “deal breaker,” in Tom Dougherty's phrase<sup>38</sup> – the consent will be deemed normatively invalid, even if it was effectively communicated or felt. An example of the difference between descriptive and prescriptive consent here can be found in Section 345(a) of Israeli Penal Law, which says that a person commits rape if the person “had intercourse with a woman . . . (2) *with the woman's consent*, which was obtained by deceit in respect of the identity of the person or the nature of the act.”<sup>39</sup> The consent referred to here is once

<sup>37</sup> 18 U.S.C. § 1951(b)(2) (emphasis added).

<sup>38</sup> Tom Dougherty, “Sex, Lies, and Consent,” *Ethics* 123 (2013): 717, 719.

<sup>39</sup> Israeli Penal Law, Section 45(a)(2) (emphasis added).

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again expressive. Consent in the prescriptive sense would be lacking.

Finally, it has been said that consent is “transformative,” in the sense that *B*’s consent has the potential to make *A*’s action morally or legally permissible in circumstances in which it otherwise would not be. In an oft-quoted phrase, consent is said to be capable of transforming “a rape into love-making, a kidnapping into a Sunday drive, a battery into a football tackle, a theft into a gift, and a trespass into a dinner party.”<sup>40</sup> Likewise, the withdrawal of consent is said to be capable of turning a “fond embrace” into “assault and battery.”<sup>41</sup>

As stated, however, this last set of claims is misleading. As we saw above, not all descriptive consent (or nonconsent) constitutes prescriptive consent (or nonconsent).<sup>42</sup> Consider

<sup>40</sup> Hurd, *Moral Magic* at 123.

<sup>41</sup> See Rollin M. Perkins and Ronald Boyce, *Criminal Law*, 3rd ed. (Mineola, NY: Foundation Press, 1982), 1075. The fact that consent was refused will not always make *A*’s action criminal, however. For example, *A*’s embrace of *B* without *B*’s consent might be a justified exercise of *A*’s police powers (though it is admittedly hard to imagine any circumstance in which sexual intercourse could be justified without the consent of both parties). But if *B* does consent to *A*’s embrace, then we can say unequivocally that *A*’s conduct did not constitute a battery. This is not to say that *A*’s conduct will necessarily be right or justified. There might be some other reason that *A*’s act is deemed wrongful; for example, it might reflect his bad temper or meanness. But if *B* did consent, and such consent was valid, then we can at least say that *A*’s act is exempt from criminal liability.

<sup>42</sup> Cf. William Eskridge, “The Many Faces of Sexual Consent,” *William and Mary Law Review* 37 (1985): 47 (arguing that consent is “contextual and status-based”).

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a case in which a corporate raider threatens to take over a target company unless his shares in its stock are bought out at a premium price. Descriptively, it appears that the target's sale of stock was nonconsensual. But, prescriptively, it is less clear that we should regard this as the kind of nonconsent that should give rise to extortion liability. Most people would regard this kind of coercion as less serious than a case in which *D* threatened to defame *V* or expose a secret of *V*'s, and such a distinction might be relevant to decisions about criminalization. Similarly, consider a case in which *V* consents to sex with her longtime partner, *D*, only after *D* threatens to break off their relationship unless *V* does so. Once again, we *could* treat this as rape, because the partner's consent was arguably invalid in a moral sense, but it's unclear whether we should want to treat it as a crime. Much more analysis remains to be done before it can be determined exactly which nonconsensual acts should be criminalized (whether as rape or as some other offense), and which should not.

### III. When Should Sex Obtained by Deception be a Crime?

Having considered some of the basic concepts that inform the law of sexual offenses, we can now return to where we left off, with the question of how the law of sexual offenses should treat deception-induced sex. We first consider deception used by the defendant (in the case of rape) and then deception used by the victim (in the case of statutory rape).

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***A. The argument for expanding the offense of rape by deception***

Scholars who have considered the so-called “riddle” of rape by deception have tended to take one of two main positions: One is that the law of rape should be expanded to include every, or almost every, instance in which deception plays a but-for role in securing consent to sex. The argument for this position consists of three steps: First is the idea, embraced by most contemporary criminal law theorists, that rape should be understood as involving a violation of a victim’s sexual autonomy.<sup>43</sup> Second is the notion that V’s sexual autonomy is violated, and rape is therefore committed, when she is subject to sex without her consent. Third is the claim that deception negates consent just as thoroughly as force.<sup>44</sup> If all these statements were true, it would seem to follow that all sex obtained by deception should constitute rape, at least so

<sup>43</sup> As one scholar has put it, “the moral wrongness of rape consists in violating an individual’s . . . sexual self-determination and the seriousness of rape derives from the special importance we attach to sexual autonomy.” Joan McGregor, “Force, Consent, and the Reasonable Woman,” in *Harm’s Way: Essays in Honor of Joel Feinberg*, eds. Jules Coleman and Allen Buchanan (Cambridge: Cambridge University Press, 1994), 231, 236.

<sup>44</sup> See Jonathan Herring, “Mistaken Sex,” *Criminal Law Review* (2005):511 (“Deceit, as much as force and threats, can ‘negate consent.’ Deceit, like violence, manipulates people into acting against their will. Like threats, deceit restricts the options available to another. It does this by making the other unaware of the options the other has available. . . . Restricting the information on which a person makes a choice can be as inhibiting of a free choice as making an option unattractive through a threat.”).



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long as the deception was a but-for cause of the consent. And, indeed, based on reasoning of this sort, a number of leading scholars – including, Susan Estrich and Jonathan Herring – have argued for a dramatic expansion in the scope of rape by deception, akin to that endorsed by the Israeli Supreme Court in *Kashur*.<sup>45</sup> Similarly, Tom Dougherty, while careful to avoid arguing that such conduct should be treated as rape as such, nevertheless believes that it involves a “serious wrong” that is comparable to other serious wrongs that *are* treated as rape.<sup>46</sup>

Other scholars have resisted the notion that we should criminalize every case in which *D*'s deception of *V* is a but-for cause of *V*'s consent, arguing instead for a more selective list of circumstances in which rape by deception (or perhaps a lesser offense) is said to occur.<sup>47</sup> They have argued, for example, that almost everyone, at some point in their lives, has engaged in, or been the target of, some form of deception in the context of sex. As Sherry Colb has put it, “[p]eople routinely wear perfume and deodorants that disguise their body odor; they wear makeup that disguises facial flaws or

<sup>45</sup> See Susan Estrich, “Rape,” *Yale Law Journal* 95 (1986): 1087, 1095–1096; Herring, “Mistaken Sex” at 511, 517 (rape is committed whenever *V* is “mistaken as to a fact” and “had s/he known the truth about that fact would not have consented to it”).

<sup>46</sup> Dougherty, “Sex, Lies, and Consent” at 721.

<sup>47</sup> See, e.g., Rebecca Williams, “Deception, Mistake and Vitiating of the Victim’s Consent,” *Law Quarterly Review* (2008): 132; Hyman Gross, “Rape, Moralism, and Human Rights,” *Criminal Law Review* (2007): 220; Wertheimer, *Consent to Sexual Relations* at 209;

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install hair plugs that disguise baldness; some color, straighten or curl their hair or undergo cosmetic surgery.”<sup>48</sup> Any of these deceptions could serve as a but-for cause of V’s consent to sex. But, these scholars say, to treat all such cases as rape would trivialize the offense, and chill private, socially positive or neutral behavior.<sup>49</sup>

I am inclined to agree with those scholars who have expressed concerns about the policy implications of over-criminalizing rape by deception. I am also skeptical about the ability of courts to determine when a defendant’s deception should be considered a but-for cause of the victim’s decision to have sex. Such a determination will inevitably be based on the consideration of a complex counterfactual: *how would the victim have behaved differently had she*

<sup>48</sup> Sherry Colb, “Rape by Deception, Rape by Impersonation, and a New California Bill,” Justia.com, <http://verdict.justia.com/2013/05/01/rape-by-deception-rape-by-impersonation-and-a-new-california-bill#sthash.N0uIxiPS.dpuf> (May 1, 2013).

<sup>49</sup> There is also a third position. Apparently out of concern with the practical effects of wholesale expansion, on the one hand, and frustration with the supposed ad hoc-ness and inconsistency of selective incorporation, on the other, Jeb Rubinfeld has written a controversial article urging a rejection of the view that rape should be understood as involving a violation of sexual autonomy. Jeb Rubinfeld, “The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy,” *Yale Law Journal* 122 (2013): 1372. Because this argument seems to me based on a non sequitur, and because it has already generated numerous responses from others – see <http://www.yalelawjournal.org/forum> – I shall not be concerned with it further here: As explained in the text, merely because we view the law of rape as concerned with protecting sexual autonomy does not mean that all deception-induced sex must be treated as rape.

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*known the truth* – a determination that will have to be made on the basis of the victim’s testimony, which in some cases will be tinged with regret and the distorting lens of hindsight.

I hope to consider these policy and evidentiary issues in my book. For present purposes, however, I would like to focus instead on what I perceive to be a *conceptual* error that underlies much of the analysis on this issue. That error, as I shall explain in the next section, is to think of “sexual autonomy” and “consent to sex” as undifferentiated, all-or-nothing concepts that are either respected, and therefore legal, or disregarded, and therefore criminal. As I will explain, things are actually more complicated than such an account would suggest.

### ***B. Grading moral blameworthiness***

As suggested above, many scholars have approached the sexual offenses in what we can think of as either/or terms: Intercourse is either “lovemaking” (if consensual) or “rape” (if not); consent is either valid (if voluntary, knowing, and competent) or invalid (if one of these conditions is lacking); sexual autonomy is either respected (and therefore exempt from criminal sanctions) or violated (and therefore criminal).

I believe that this binary approach lacks the flexibility and nuance that a liberal society should demand of its system of sexual offenses. My alternative approach is motivated by three basic premises: The first is that sexual

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autonomy is a highly variegated concept. Not every stick in the bundle of sexual autonomy rights is equally important; some will be valued more highly than others. The second is that, in a liberal society, we need to be wary of the potential for overcriminalization, especially in an area as personal and intimate as that involving sexual conduct. Third, we need to abide by the principle of “fair labeling” – the idea that “widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signaled by the law, and that offences should be divided and labeled so as to represent fairly the nature and magnitude of the law-breaking.”<sup>50</sup> Rape, in particular, should be viewed as just one weapon in a diversified arsenal, reserved for a small collection of very serious, “core” violations of sexual autonomy.

If this view of the criminal law is correct, it raises the possibility that not all nonconsensual “lovemaking” should be viewed as morally or legally equivalent. Some deception- or coercion-induced sex might be more or less blameworthy than other deception- or coercion-induced sex. Obviously, moral judgments will need to be made: we will have to ask, for example, whether obtaining sex by lying to one’s sexual partner about the use of birth control or the fact that one has a sexually transmitted disease is more or less wrongful or

<sup>50</sup> The *locus classicus* is Andrew Ashworth, *Principles of Criminal Law*, 4th ed. (Oxford: Oxford University Press, 2003), 89–90; see also James Chalmers and Fiona Leverick, “Fair Labelling in Criminal Law,” *Modern Law Review* 71 (2008): 217, 239.

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harmful than obtaining sex by lying to one's partner about whether one is married or is interested in a serious romantic relationship.

Tom Dougherty has rejected a moral line-drawing approach of this sort. He argues that, “[o]ne 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. . . . [I]t is up to each individual to determine which features of a sexual encounter are particularly important to her.”<sup>51</sup> According to Dougherty, one person might think that a person's false claim about his marital status or romantic intentions is a “deal breaker” in terms of deciding whether to have sex, while another person may view it as basically inconsequential. To attempt to distinguish between more and less serious forms of deception, he says, constitutes a kind of “sexual moralism.”<sup>52</sup>

I believe that Dougherty is mistaken. As properly understood, moralism, at least in the context of law, refers to criminalizing or otherwise prohibiting conduct that may be immoral or wrongful, *but is not harmful*, and therefore fails to satisfy the harm principle.<sup>53</sup> In the case of the sexual offenses, criminal law moralism arguably occurs when we criminalize acts like adultery and adult incest. But moralism

<sup>51</sup> Dougherty, “Sex, Lies, and Consent” at 730.

<sup>52</sup> *Id.* at 727.

<sup>53</sup> See generally Joel Feinberg, *Moral Limits of the Criminal Law: Harmless Wrongdoing* (New York: Oxford University Press, 1988).

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has never been understood to refer to the making of judgments about which kinds of admittedly harmful acts should be regarded as more wrongful or harmful than others, and therefore punished more severely.

Indeed, the criminal law makes such distinctions all the time. In the context of perjury, we distinguish between misrepresentations that are literally false and those that are merely misleading, criminalizing only the former.<sup>54</sup> In the context of false statements, the law traditionally distinguished (though it no longer does) between lies that are exculpatory and those that are inculpatory, punishing the latter and exempting the former from liability.<sup>55</sup> And in the case of fraud, we sometimes distinguish between deception by act and deception by omission, regarding the former as more blameworthy, other things being equal.<sup>56</sup>

We make fine moral judgments in the realm of the sexual offenses as well. For example, we normally judge unwanted voyeurism as less serious than unwanted touching, unwanted touching as less serious than unwanted penetration, and unwanted penetration of an adult as less serious than unwanted penetration of a child. None of this is in any way inconsistent with a system that respects “sexual pluralism.”

<sup>54</sup> *Bronston v. United States*, 409 U.S. 352 (1973).

<sup>55</sup> See *Brogan v. United States*, 522 U.S. 398 (1998) (rejecting exculpatory no doctrine).

<sup>56</sup> See Green, *Thirteen Ways to Steal a Bicycle* at 129–131.

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### *C. What should count as deception about a core matter?*

If the foregoing argument is correct, it suggests that there is no reason in principle why we should not base criminalization and grading decisions on judgments that some kinds of deception-induced sex are worse than others. The real problem, of course, is determining which is which.

One place to begin such an analysis is with empirical data about how people “in the street” view the wrongfulness of various kinds of deception-induced sex. As I have explained elsewhere, the point of such an approach is not that the criminal law should always follow popular opinion, or that widely-held moral intuitions are necessarily correct.<sup>57</sup> Nor should empirical studies of public perceptions be expected to serve as a substitute for serious normative reflection about desert. Rather, I am merely suggesting that, where such data are available, they can provide a useful reference point for thinking about what kinds of conduct are more blameworthy than others, and whether they are deserving of punishment.

In the case of rape by deception, such data do in fact exist. As part of a larger work on the fundamentals of rape law, David Bryden conducted a study in which he asked respondents to consider eighteen hypothetical cases in which deception was used to obtain sex, and decide which ones should be treated as “criminal” (the study does not, however, explicitly ask respondents whether such conduct

<sup>57</sup> *Id.* at 56–57.

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should be treated as “rape”).<sup>58</sup> A majority of respondents, female and male, young and old, favored criminal penalties in only five of the eighteen cases: where the perpetrator (1) had intercourse while pretending to be conducting a gynecological examination, (2) impersonated the victim’s husband, (3) lied about a venereal disease, or (4) failed to reveal a venereal disease. (The fifth case seemed to involve coercion or exploitation rather than, or in addition to, deception.) In all of the other cases, including misrepresentations about infidelity, wealth, marital status, intention to marry, intention to pay a prostitute, and even use of birth control (by a woman), a clear majority rejected criminal liability.

This study, together with the common law of rape by deception itself, provides a useful place to begin an analysis of why certain kinds of sex-by-deception cases were viewed as more blameworthy than others, what additional questions need to be asked, which kinds of cases should be treated as rape (or perhaps a lesser offense), and how such prohibitions should be formulated. (In the interest of space, and because they do not rank as criminalizable in the Bryden study, I leave to the side for now interesting cases involving misrepresentations about use of contraception and transgender status, though I intend to take these up in my book.<sup>59</sup>)

<sup>58</sup> Bryden, “Redefining Rape” at 470–475, 480–487.

<sup>59</sup> On contraception deception, see *R. v. Hutchinson* (Canadian Supreme Court, 2014, <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13511/index.do>). On transgender deception, see Aeyal Gross, “Rape by Deception and the Policing of Gender and Nationality Borders,” *Law and Sexuality* 24 (2015): 1; Alex Sharpe,



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### ***D. Leading candidates for rape by deception***

In this section, I consider three kinds of cases that we might want to consider treating as rape by deception. These involve sex obtained through: (1) fraudulent medical procedures, (2) spousal or other impersonation, and (3) misrepresentations regarding the offender's sexually transmitted disease.

**1. Fraudulent medical procedures.** There are two kinds of cases in which sex is obtained as a result of fraudulent medical procedures. Both involve a doctor or someone pretending to be a doctor. In one sort of case, the offender purports to be engaging *V* in some nonsexual act (such as a routine vaginal examination) when actually engaging *V* in intercourse. In such cases, the victim is unaware that she is having intercourse at all. As discussed above, courts almost always say that such fraud-in-the-factum cases constitute rape. In the second kind of case, the defendant tells the victim that sexual intercourse is necessary for therapeutic purposes. In such cases, the victim understands that she is having intercourse, but is deceived as to the need for such conduct. These fraud-in-the-inducement cases are rarely held to be rape.

The Bryden study considered the first sort of case, but not the second, so it is unclear how respondents would have rated the latter. I think a reasonable argument can

“Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent,” *Criminal Law Review* 3 (2014): 207.

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be made that the first sort of case should be regarded as morally worse than the second. The first kind of deception seems closer to the core of sexual autonomy than the second. The victim in the first sort of case has not consented to the act of sexual intercourse as such, while the second has. The first victim has been denied the right to choose *whether* to have intercourse, a right which lies at the very core of our sexual autonomy. The same cannot be said of the second case. There, the victim has chosen to engage in what she knew to be intercourse, if for spurious reasons. This is not to suggest that *D*'s conduct in the phony medical necessity case is not terribly wrongful, or that it should be exempt from criminal liability (he could, for example, be prosecuted for a lesser sexual offense). It is merely to say that the crime he has committed does not seem to be rape.

There are two other factors that distinguish the phony medical procedure cases from the kind of deception-induced sex we saw in cases like *Kashur*. The first is that such acts often are committed by persons who have a special duty to the victim – such as a doctor, nurse, or other medical professional. This factor cuts in two different directions: On the one hand, it adds to the wrongfulness of the act. On the other hand, it raises the possibility that such cases could be dealt with under alternative sexual offense provisions such as those involving abuse of position of trust. The second factor is that only the most inexperienced and gullible persons are likely to be susceptible to such schemes. This factor

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also seems to cut in two different directions: On the other hand, it could be argued that this is exactly the kind of vulnerable victim with whom the criminal law should be most concerned. On the other hand, it might suggest that, more than in some other cases, the victim of such deception is partly to blame for her plight.

Assuming that do we want to criminalize at least some phony medical procedure cases, what should such a provision look like? The original, 1963 version of the Model Penal Code agreed with the common law position that sex obtained from a person who was “unaware that a sexual act is being committed upon” her should be a crime, though it treated it as the lesser offense of deviate sexual intercourse, rather than as rape proper.<sup>60</sup> The American Law Institute is currently considering a proposed revision to the sexual offense provisions. Unfortunately, the proposal expands the corresponding offense beyond what seems to me sensible. Section 213.3(2), titled Sexual Intercourse by Exploitation, applies to cases in which the “actor represents that the act of sexual intercourse is for purposes of medical treatment or that such person is in danger of physical injury or illness which the act of sexual intercourse may serve to mitigate or

<sup>60</sup> Section 213.2(2). MPC § 213.3(d) also criminalizes “seduction,” defined as having sex when “the other person is a female who is induced to participate by a promise of marriage which the actor does not mean to perform.” The proposed revision to the MPC also creates a lesser offense of “sexual intercourse by exploitation,” discussed in the text below.


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prevent.”<sup>61</sup> (I leave to the side fair labeling concerns about referring to this as “exploitation,” having addressed the difference between exploitation, coercion, and deception at length elsewhere.<sup>62</sup>)

In my view, the proposed revision paints with too broad a brush. The problem is that the phrase “for purposes of medical treatment” would seem to cover both fraudulent and arguably legitimate sex therapy. Consider, for example, the therapy depicted in the 2012 film *The Sessions*, based on a true story, in which a man suffering from polio and forced to live in an iron lung has a series of sexual encounters with a professional sex surrogate.<sup>63</sup> Although not without controversy, such therapy (originally described by Masters and Johnson in their 1970 textbook, *Human Sexual Inadequacy*) is viewed by many in the medical profession as effective and appropriate.<sup>64</sup> Under the broad language of the proposed Model Penal Cause provision, however, all such conduct would constitute Sexual Intercourse by Exploitation. (Whether it would also constitute prostitution is a separate question). I think this is a mistake. In my view, the criminal law should not presume

<sup>61</sup> American Law Institute, Model Penal Code: Sexual Assault and Related Offenses, Tentative Draft No. 1 (April 30, 2014), Section 213.3(2).

<sup>62</sup> Stuart P. Green, *Lying, Cheating, and Stealing: A Moral Theory of White Collar Crime* (Oxford: Oxford University Press, 2006).

<sup>63</sup>  *The Sessions*” (Fox Searchlight, 2012).

<sup>64</sup> See T. Rosenbaum et al., “Surrogate Partner Therapy: Ethical Considerations in Sexual Medicine,” *Journal of Sex Medicine* 11 (2014): 321.

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to intervene in disagreements within the medical profession about the acceptability of various controversial treatments. The provision should either expressly provide that only intercourse that is *misrepresented* as therapeutic is covered, or it should create an exception to liability for bona fide treatment as recognized by the medical profession.<sup>65</sup>

**2. Spousal impersonation.** The other major category of rape by deception at common law consists of cases in which the defendant obtains sex by impersonating the victim's spouse. Subjects in the Bryden study agreed that such cases should be treated as a crime. Some commentators have said that the reason this was treated as rape by deception is that the victim was being deceived into committing what was then a crime – namely adultery.<sup>66</sup> But, as stated, this is a non sequitur. Certainly, it would make sense to relieve the victim who was deceived into committing adultery of liability for that crime. But that is very different from saying that the deceiver himself should be held liable for rape.

A better explanation for why impersonation of a spouse, and not a non-spouse, was treated as rape at common law is that marital sex was the only kind of sex that was legally

<sup>65</sup> Thanks to Ken Simons for helping me think through these issues.

<sup>66</sup> See Russell Christopher and Kathryn Hope Christopher, "Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape," *Northwestern University Law Review* 101 (2007): 79–80.

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protected. If *V* believed she was having sex with her spouse, but was tricked into having sex with someone else, that was a matter that properly concerned the law of rape, since *V*'s legally recognized sexual autonomy was being infringed. But if *V* believed she was having sex with someone who was not her spouse, that apparently was of no concern to the common law, since *V* had no legal right to have sex with someone who was not her spouse in the first place.

In our more sexually permissive time, one would expect a broader rule. Adults are now legally entitled to have sex with almost any other adult who wishes to have sex with them (though there are a few important exceptions, as discussed below). Thus, if *V* believes that she is having (legal) sex with *A*, and is deceived into having sex with someone other than *A*, that deception would undermine a key stick in the bundle of sexual autonomy rights, regardless of whether *A* was her spouse or not. (Subjects in the Bryden study were asked only about cases of spousal impersonation, not about non-spousal impersonation. Given the way in which sexual autonomy rights have expanded since the days of the common law, it seems quite plausible that, had they been asked about such cases, they would have treated them as criminal as well.)

A recent proposed revision to the Model Penal Code seems like a step in the right direction, though it is still flawed. Unlike the provision regarding phony medical procedures (which I argued was overinclusive), this provision is underinclusive. Proposed Section 213.3(3) of the MPC

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defines Sexual Intercourse by Exploitation to include cases in which the “actor knowingly leads such person to believe falsely that he or she is someone *with whom such person has been sexually intimate*.”<sup>67</sup> While sensibly broadening the offense beyond just cases in which A impersonates B’s spouse, to include impersonation of others with whom B might enjoy intimacy, the proposed provision is still too narrow.

Consider (a much simplified version of) the “bed trick” in Shakespeare’s *Measure for Measure*: Angelo’s former lover is Mariana; he called the wedding off, but she would still like to marry him. Angelo is now interested in Isabella, but the feeling is not reciprocated. Isabella and Mariana hatch a plan to deceive Angelo. Isabella sends word to Angelo that she will meet him for a sexual encounter, on the condition that their meeting occur in perfect darkness and in silence. Mariana, disguised as Isabella, goes in Isabella’s place, and has sex with Angelo, who has been deceived about the identity of his sexual partner.

This case would clearly fall outside the scope of proposed Section 213.3(4), because it is not the case that the actor (Mariana) led Angelo to believe falsely that she was someone with whom Angelo had been sexually intimate.<sup>68</sup> Angelo had in fact previously had sexual relations with Mariana, so his belief was not false. Rather, Angelo was tricked into believing, falsely, that he would be having sex with someone with

<sup>67</sup> MPC Tentative Draft No. 1, Section 213.3(3) (emphasis added).

<sup>68</sup> Section 213.3(4).

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whom he had never been intimate – namely, Isabella. Yet it is hard to see why it is any less wrongful to mislead a victim into believing (he or) she is having sex with someone with whom she has *not* previously been intimate than it is to mislead a victim into believing she is having sex with someone with whom she previously *has*.

The real wrong in these cases lies in the offender's leading the victim to believe that she is having sex with someone *other than the person with whom she believes she is having sex*, regardless of whether they have had sex in the past. For this reason, I believe that a better approach than that offered in the revised Model Penal Code provision is that contained in the English and recently revised California provisions, which define rape or sexual assault as including cases in which the defendant impersonates someone who is "known" to the victim.<sup>69</sup> Unlike the proposed MPC provision, the English and California provisions would apply to cases like that in *Measure for Measure*.

<sup>69</sup> Cal. Penal Code Section 261(5) (victim "submits under the belief that the person committing the act *is someone known to the victim other than the accused*, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief"). This formulation raises an interesting question as to whether rape by impersonation should include cases in which *D* impersonates someone who is not personally known to the victim, such a celebrity with whom she has not had contact previously. In the interest of space, I have omitted this analysis, though I intend to take it up my book. The issue is discussed in Joel Feinberg, "Victims' Excuses: The Case of Fraudulently Procured Consent," *Ethics* 96 (1986): 330, 343.



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There is one further issue that needs to be considered. As noted, a rule that limited rape by deception to cases of impersonation of spouses, as opposed to non-spousal lovers, seems too narrow for a world in which non-marital sex is commonplace and legal. But what if *V* believed that she was having sex that was *illegal*? For example, suppose that *V* was in a jurisdiction that criminalized adult incest or prostitution. Or imagine that *V* was serving in the U.S. Military and thereby subject to the Uniform Code of Military Justice, which makes adultery a crime. Would it be rape by deception if *V* believed that she was having sex with her brother, a prostitute, or her adulterous lover, and was tricked into doing so with someone else?

This seems to me a close call. On the one hand, it could be argued – as it was at common law – that since *V* had no legal right to engage in such sex in the first place, such cases should fall outside the scope of rape law’s protection. On the other hand, regardless of whether *V* had a legal right to engage in such sex, it might still be argued that *V* was wronged, that society still has an interest in promoting a regime that values sexual autonomy, and that the criminal justice system still has a need to prevent and punish *D*’s conduct.

The problem is analogous to one that occurs in the law of theft. Imagine that *V* has money or property stolen from him that he himself had previously stolen from a third party or earned through illegal activities such as drug dealing. Should the law regard such stealing as theft, given that

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V has no “legitimate” property interest in the money or property stolen from him? I have argued elsewhere that such cases *should* be prosecuted as theft. Theft law is intended not merely, or even primarily, to protect the interests of individual property owners; that is the purpose of the private law of conversion, misappropriation, and trespass to chattel. Rather, the law of theft is intended to protect the interests that society as a whole has in preserving the system of private property. If people felt free to steal each other’s illegal drugs and stolen goods with impunity, that would undermine society’s sense of property security and potentially create a potential for violence, notwithstanding the fact that such things are illegal to own.<sup>70</sup>

The law of nonconsensual sexual offenses arguably follows a similar logic. Prohibitions on rape and sexual assault do more than simply protect the interests of individual victims. They are also intended to protect the interests of society as a whole in the “system” of sexual autonomy. If people who engaged in prostitution, adult incest, or adultery could be tricked into having sex with someone other than the person with whom they believed they were having sex, and if there were no consequences for such trickery, that would tend to weaken people’s sense of sexual security generally, even though the underlying conduct itself was illegal.

<sup>70</sup> The discussion here is borrowed from Green, *Thirteen Ways to Steal a Bicycle* at 212.

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**3. Lies about sexually transmitted diseases.** Another significant kind of deception-induced sex that the subjects in the Bryden study said should be treated as a crime occurs in cases in which the offender misrepresents the fact that he has a sexually transmitted disease. Indeed, Bryden's subjects believed that both affirmatively lying about the fact that one has a sexually transmitted disease and failing to tell one's partner that fact should be treated as criminal.

As noted, one of the limitations of the Bryden study is that subjects were not asked to specify whether such cases should be treated as rape, or whether they should be treated as some other offense instead. In the case of misrepresentations regarding STDs, this ambiguity is quite significant. Consider the English case of *B*.<sup>71</sup> The defendant, who was HIV-positive, but had not disclosed this fact to his sexual partner, was charged with rape under Section 76 of the English Sexual Offences Act 2003, which provides that deception will be presumed to vitiate consent to sex only where "the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act." The Court of Appeal held that rape could not lie on the facts of the case since his deceit did not go to "the nature or purpose of the relevant act." According to the court:

Where one party to sexual activity has a sexually transmissible disease which is not disclosed to the other party any consent that may have been given to that activity by the

<sup>71</sup> *B* [2006] EWCA Crim 2945, [2007] 1 W.L.R. 1567.

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other party is not thereby vitiated. The act remains a consensual act. However, the party suffering from the sexually transmissible disease will not have any defence to any charge which may result from harm created by that sexual activity, merely by virtue of that consent, because such consent did not include consent to infection by the disease.<sup>72</sup>

In other words, otherwise consensual sex between *A* and *B* will not be rendered nonconsensual by *A*'s failure to disclose that he had a sexually transmissible disease, and this is so even if it could be proved that *A*'s misrepresentation regarding his STD was a but-for cause of *B*'s consenting to sex. Rather, the law should treat such nondisclosure as a nonsexual assault. For this reason, prosecutors in England are instructed to charge defendants in such cases under the nonsexual assault provisions of the Offences against the Person Act 1861, for inflicting grievous bodily harm, rather than for sexual assault or rape under the Sexual Offences Act 2003.<sup>73</sup>

<sup>72</sup> *Id.*

<sup>73</sup> See Sharon Cowan, "Offenses of Sex or Violence? Consent, Fraud, and HIV Transmission," *New Criminal Law Review* 17 (2014): 135 (endorsing the English approach); see also Crown Prosecution Guidelines, "Intentional or Reckless Sexual Transmission of Infection," [http://www.cps.gov.uk/legal/h\\_to\\_k/intentional\\_or\\_reckless\\_sexual\\_transmission\\_of\\_infection\\_guidance/#Reckless1861](http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/#Reckless1861). For a contrary view, see Atli Stannard, "When Failure to Disclose HIV-Positive Status Vitiates Consent to Sex in Canada," *Journal of Commonwealth Criminal Law* (2012): 366; Martha Shaffer, "Sex, Lies, and HIV: *Mabior* and the Concept of Sexual Fraud," *University of Toronto Law Review* 63 (2013): 467.

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This seems to me basically the right approach. The real wrong in cases like *B* lies in the nonconsensual transmission, or risk of transmission, of a venereal disease, rather than in any nonconsensual sex. Imagine two cases: In one, the victim consents to sex but is deceived about the fact that her partner is HIV-positive. In the other, a victim consents to a blood transfusion but is deceived about the fact that the blood is infected with HIV. In both cases, the underlying “core” transaction is consensual; the wrong to the victim is that her health has been endangered and that she is deprived of information about such endangerment to which she is entitled. The fact that in one case the underlying transaction was a sexual encounter while in the other it was a blood transfusion is, from a moral perspective, irrelevant. The proper charge in both cases is the same: assault rather than sexual assault or rape.

This is to be contrasted to two parallel cases in which the underlying transaction is nonconsensual. In one, *V* is forced to have unwanted, unprotected sex with HIV-positive *D*. In the other, *V* is forced to undergo an unwanted transfusion of HIV-infected blood. In such cases, the victim is subjected to two distinct wrongs: unwanted sex (or an unwanted blood transfusion) *and* endangerment. Here, the offender should be prosecuted for two kinds of offense: The first, involving the unwanted underlying transaction, whether it is rape (in the case of unwanted sex) or aggravated assault (in the case of the unwanted transfusion); and the second, involving the knowing or reckless transmission of disease.

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#### IV. Should an Adult Offender who is Deceived About his Juvenile Partner's Age Have a Defense to Statutory Rape?

In the previous section, we considered whether and under what circumstances we should treat as rape (or perhaps a lesser sexual, or nonsexual, offense) cases in which an offender uses deception to induce his adult victim into having sex. This section considers cases in which the offender himself is deceived into having sex with an underage victim he mistakenly believes has reached the age of consent, and as a result is prosecuted for statutory rape. Despite the different context, the methodology to be followed is similar to that used previously. We will need to ask what interests and rights are protected (or undermined) by the law of statutory rape, what wrongs and harms such conduct causes, and how those interests, rights, wrongs, and harms are affected by the so-called victim's use of deception regarding her age.

##### A. *Statutory rape as strict liability offense*

Statutory rape is normally defined as requiring proof of nothing more than that the defendant (1) had intercourse with, or penetrated (2) a juvenile below a particular age (typically, sixteen).<sup>74</sup> Some jurisdictions also provide that the offender must be at least some particular number of

<sup>74</sup> For a useful summary, see Richard A. Posner and Katharine B. Silbaugh, *A Guide to America's Sex Laws* (Chicago: University of Chicago Press, 1996), 44–64.

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years of age (typically, eighteen) or at least some number of years older than the juvenile victim (typically, three). Any adult defendant who has sexual relations with a juvenile is liable for statutory rape, even if the juvenile “actually” consents (I will have more to say about what this means below). Moreover, and of particular significance here, it does not matter whether the offender actually knew that his victim was below the age of consent. Statutory rape is a strict liability offense. Under the clear majority rule, statutory rape has been committed even if the adult was unaware of – indeed, is affirmatively misled by the victim herself about – the fact that his victim is a juvenile. As we saw above, a small minority of American state jurisdictions, as well as various European jurisdictions, follow a contrary rule.

In at least some cases in which a juvenile victim lies about her age to an older sexual partner, that lie will serve as a but-for cause of the defendant’s decision to have sex with the juvenile, just as the *offender’s* lie was a but-for cause of the victim’s decision to have sex in the rape by deception cases discussed above. Note that, in such cases, the statutory rape defendant is being deceived not about the fact that he is having intercourse as such (as in the case of the doctor fraud cases) or about the identity of his sexual partner (as in the spousal impersonation cases). Rather, the defendant’s mistake goes only to the age of his sexual partner.

One pair of commentators has suggested that, in such cases, the statutory rape offender himself has been subject

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to rape (by his juvenile victim).<sup>75</sup> But whether this is true depends on whether one believes that one who lies about one's age should be prosecuted for rape by deception. I would distinguish here between two sorts of cases: In the first, a 20-year old obtains sex by falsely claiming to be 25. In the second, a 15-year old obtains sex by falsely representing himself as 20. The person in the first case seems to have done nothing more morally wrong than a person who lies about the fact that he is a Navy SEAL or went to Harvard. The person in the second case, however, has done something more culpable. He has induced his partner to have sex with an underage partner and in doing so commit a crime (though it should be pointed out that under the traditional rules of accomplice liability, the juvenile victim/deceiver could not be held as complicit in his own statutory rape).<sup>76</sup>

Many scholars have been quite critical of the regime of statutory rape. Some are opposed to strict liability in any context.<sup>77</sup> Others believe that, while strict liability might be acceptable for low-stigma, low-punishment, regulatory

<sup>75</sup> See Christopher and Christopher, "Adult Impersonation" (arguing that, in such cases, the juvenile should be prosecuted for rape by deception).

<sup>76</sup> See, e.g., *Gebardi v. United States*, 287 U.S. 112, 119 (1932) (woman who is transported willingly across state lines for the purpose of engaging in illicit sexual intercourse is not an accomplice to the male transporter's Mann Act violation).

<sup>77</sup> Vera Bergelson, "A Fair Punishment for Humbert Humbert: Strict Liability and Affirmative Defenses," *New Criminal Law Review* 14 (2011): 55, 60 (expressing antipathy for regime of strict liability



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offenses, it should not be used for more serious offenses like statutory rape.<sup>78</sup> Yet others believe that, while statutory rape laws are not necessarily unjust in principle, they are frequently enforced in an unjust manner, including, in particular, when they are used as a means to avoid bringing more serious and difficult-to-prove charges of forcible rape.<sup>79</sup>

Statutory rape laws have also been criticized as being paternalistic.<sup>80</sup> But it is important to be clear about exactly what this might mean. The most familiar kinds of paternalistic offenses are those like failing to wear a motorcycle helmet or a seatbelt: offenders, who are themselves members of the protected class, are punished for causing, or risking, harms to self. Statutory rape statutes function quite differently. Like assisted suicide statutes, they punish offenders who are not members of the protected class for causing harm

generally, but conceding that it may help prevent “certain socially undesirable conduct”).

<sup>78</sup> Catherine L. Carpenter, “On Statutory Rape, Strict Liability, and the Public Welfare Offense Model,” *American University Law Review* 53 (2003): 313.

<sup>79</sup> See, e.g., Michelle Oberman, “Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law,” *DePaul Journal of Health Care Law* 8 (2004): 109; Michelle Oberman, “Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape,” *Buffalo Law Review* 48 (2000): 703.

<sup>80</sup> Catharine A. MacKinnon, “Reflection on Sex Equality Under Law,” *Yale Law Journal* 100 (1991): 1281, 1300; Frances Olsen, “Statutory Rape: A Feminist Critique of Rights Analysis,” *Texas Law Review* 63 (1984): 387, 412.

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to others who are. They are paternalistic only in the sense that they apply even when members of the protected class consent to the harm. (By criminalizing potential partners, they also have the indirect effect of prohibiting sexual activity by juveniles themselves.)

I put these concerns to the side for present purposes, however, in order to focus solely on the narrower mistake-of-fact question: To wit, even assuming that strict liability is appropriately applied, in the main, to offenders who have “consensual” sex with juvenile partners, should there be an exception where the partner has affirmatively misled the offender into believing that she has reached the age of consent?<sup>81</sup>

### ***B. The wrongs and harms of statutory rape***

We can begin the analysis by asking both why statutory rape is a crime and why it is formulated as a strict liability offense. As before, we will want to consider the harms and wrongs the prohibited activity is said to entail.

<sup>81</sup> Also put to the side are interesting statutory rape cases involving defendants who are females, see Kay L. Levine, “No Penis, No Problem,” *Fordham Urban Law Journal* 33 (2006): 357; defendants suffering from mental deficiencies, see Elizabeth Nevins-Saunders, “Incomprehensible Crimes: Defendants with Mental Retardation Charged with Statutory Rape,” *NYU Law Review* 85 (2010): 1067; and adult defendants who are prosecuted for statutory rape when the minor with whom they have had sex has subjected them to forcible rape, see Russell L. Christopher and Kathryn H. Christopher, “The Paradox of Statutory Rape,” *Indiana Law Journal* 87 (2012): 505.

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Some history will be relevant here. Since at least 1576, English law has sought to criminalize sexual relations between adults and children. But the age of consent under early English common law was very low – typically, ten years of age.<sup>82</sup> It was not until the late nineteenth century that the law of statutory rape went through a major transformation. The “child rescue movement,” established in most modern liberal democracies between approximately 1870 and 1890, was premised “upon ideas of children as innocents in need of protection from the harshness of the adult world.”<sup>83</sup> New patterns in immigration, urbanization, and prostitution caused concerns about the welfare of young females.<sup>84</sup> Girls were moving into the cities, working in factories, offices, and stores, free from the supervision of family and neighbors. Social reformers believed that the potential for exploitation was great, and that legal protections needed to be enforced. Forcible rape, however, was difficult to prove. By eliminating the *mens rea* requirement, statutory rape provided an

<sup>82</sup> Stat. 18 Elizabeth (1576). For a useful history, see Carolyn Cocca, *Jailbait: The Politics of Statutory Rape Laws in the United States* (Albany: State University of New York, 2004).

<sup>83</sup> Dorothy Scott and Shirley Swain, *Confronting Cruelty: Historical Perspectives on Child Protection in Australia* (Melbourne: Melbourne University Press, 2002), 71, quoted in Belinda Carpenter, et al. “Harm, Responsibility, Age, and Consent,” *New Criminal Law Review* 17 (2014): 23, 27.

<sup>84</sup> Estelle B. Freedman, *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation* (Cambridge, MA: Harvard University Press, 2013), at 126.

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alternative route for every case in which a young female was involved.

The problem is that with the elimination of the *mens rea* requirement, questions concerning blameworthiness arise. When the defendant knows that his victim is under-age, sexual relations are likely to be exploitative. But when the defendant believes that the victim has reached the age of consent, a different explanation is needed. The court in *Prince* reasoned, as we saw above, that though the defendant lacked the intent to commit statutory rape, he did have an intent to do something wrong (namely, fornication), and it was this intent to do a “lesser wrong” that was sufficient to establish the mental element necessary for statutory rape.

The extent to which the concerns of the child rescue movement are still valid today is unclear. On the one hand, society (in general) no longer views sex outside marriage as immoral in itself. And norms regarding adolescent sexuality have changed significantly: According to a recent report from the Guttmacher Institute, sixteen percent of American teenagers had sexual intercourse by the age of fifteen, one-third by the age of sixteen, and nearly half by the age of seventeen – with little difference by gender.<sup>85</sup> Moreover, with the elimination of the resistance requirement, forcible rape is

<sup>85</sup> Guttmacher Institute, “Fact Sheet: American Teens’ Sexual and Reproductive Health” (May 2014), <http://www.guttmacher.org/pubs/FB-ATSRH.html>. These figures are slightly down from what they were a decade or so ago.

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easier to prove than it was in the early part of the twentieth century – suggesting that the need for the statutory rape alternative may be less pressing (though concerns about the underenforcement of rape law persist).

On the other hand, significant concerns remain – indeed, have deepened – about the widespread sexual abuse of children, much of which goes undetected and unpunished.<sup>86</sup> Moreover, rates of unwanted pregnancy and STD transmission tend to be higher among adolescents than in the general population, and contraceptive use is lower.<sup>87</sup> And while those convicted of what we continue to call statutory *rape* are not stigmatized to the same extent as other kinds of rapists, they are hardly free of censure: among other things, they are subject to many of the same severe reporting obligations as other sexual offenders.

I do not propose to resolve these issues here. For present purposes, I shall simply assume that it is just and effective to impose criminal liability on adults who engage in sex with willing partners they know or believe to be underage, and focus on whether it would also be proper to impose liability

<sup>86</sup> A. J. Sedlak et al., U.S. Department of Health and Human Services, Administration for Children and Families, “Fourth National Incidence Study of Child Abuse and Neglect” (2010), [http://www.acf.hhs.gov/sites/default/files/opre/nis4\\_report\\_congress\\_full\\_pdf\\_jan2010.pdf](http://www.acf.hhs.gov/sites/default/files/opre/nis4_report_congress_full_pdf_jan2010.pdf); U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, “National Crime Victimization Survey” (2011), <http://www.bjs.gov/content/pub/pdf/cv11.pdf>.

<sup>87</sup> Jim Leitzel, *Regulating Vice: Misguided Prohibitions and Realistic Controls* (New York: Cambridge University Press, 2008), 178–179.

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on adults who are deceived by their partners into believing that such partners have reached the age of consent (also leaving to the side cases in which the offender is deceived by a third party, such as the juvenile's parent or guardian.)

### C. *The logic of statutory rape*

As noted above, the modern understanding of rape is that it involves a violation of the victim's sexual autonomy. But, in the case of children, this conception is problematic. If children do have sexual autonomy, it is autonomy of an unusually thin type. The law of statutory rape, though it does protect children from unwanted sex in at least some cases, also has the effect of *undermining* juveniles' sexual freedom by preventing them from having *wanted* sex (at least with adults).

Part of the problem here is the peculiar way in which statutory rape statutes are formulated and interpreted. Courts almost invariably say that, when juveniles have sex with adults, lack of consent should be "presumed."<sup>88</sup> But it is hardly clear what this means. One possible interpretation is that children, as a rule, lack the mental capacity to consent to sex. Under this view, children would be viewed as unable to consent to sex in the same way that people who are unconscious or highly intoxicated are unable to consent to sex. This understanding may well make sense in the case of small children. While such children have the capacity to consent

<sup>88</sup> See, e.g., *In re M.V.* 225 Cal.App.4th 1495, 1522–2 (2014); *State v. Collins*, 508 S.E.2 390, 394 (Ga. 1998).

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to some acts – say, being kissed by Grandma or being shipped off to summer camp – it seems unlikely that they are capable of understanding the true nature and possible consequences of sexual intercourse. Lack of consent in this context is a result of a lack of cognitive capacity. Just as children are too immature in “mind and experience” to enter into contracts, they are too immature to have sex.<sup>89</sup>

But do older children of normal intelligence – above, say, the age of thirteen – also lack the mental capacity to consent to sex? It is true, as the Supreme Court has recognized in the context of the death penalty, that juvenile brains are still evolving.<sup>90</sup> And, certainly, many adolescents lack the emotional maturity that most adults possess. But this does not necessarily mean that juveniles should be viewed as cognitively unable to consent to sex in the same way that the unconscious, the highly intoxicated, or even small children lack the ability to consent to sex.

A more plausible understanding of the presumption that children are “incapable” of consenting to sex is that it is based on some reason independent of their cognitive capacities. The assumption seems to be that juveniles having sex with adults are so likely to be exploited that such conduct should be categorically banned. What is striking, however, is

<sup>89</sup> Michelle A. Sargent, Note, “Misplaced Representations: Why Misrepresentation-of-Age Statutes Must be Reinterpreted as they Apply to Children’s Online Contracts,” *Michigan Law Review* 112 (2013): 301.

<sup>90</sup> E.g., *Roper v. Simmons*, 543 U.S. 551 (2005); *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

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that children are deemed incapable of consenting to sex only in certain limited circumstances. Under so-called Romeo and Juliet provisions, for example, sex between teenagers has essentially been decriminalized. The implicit presumption, whether valid or not, is that exploitation is less of a danger in cases where the sexual partners are close in age.

There is also another inconsistency that needs to be noted. The law of sexual offenses makes an important distinction between cases in which a child's lack of consent is *presumed* (as in statutory rape) and cases in which it is *actually* lacking (as in forcible rape of a minor), with the latter being treated as the more serious offense. Other contexts in which lack of consent to sex is presumed reflect no such a distinction. For example, we do not distinguish between the forcible and "statutory" rape of a person who is heavily intoxicated or unconscious; we simply say that the sexual act was nonconsensual and that a rape was committed.<sup>91</sup> We are thus presented with something of a paradox: when a child is subject to genuinely *unwanted* sex, the presumption is that she is capable of consenting to sex; but when she is involved in *wanted* sex, the law presumes that she is *incapable* of consenting.

#### **D. Statutory rape as regulatory offense**

One way to avoid this paradox, and in the process take statutory rape law beyond its moralistic nineteenth century

<sup>91</sup> Patricia J. Falk, "Rape by Drugs: A Statutory Overview and Proposals for Reform," *Arizona Law Review* 44 (2002): 131.



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roots, would be to abandon the notion that the offense involves a presumption of nonconsent, and instead simply view it as analogous to other strict liability offenses that are intended to prevent harm to potentially vulnerable members of society. If this approach were followed, it might also change the way we approach cases involving deception-induced mistakes about the victim's age.

Scholars have typically divided the strict liability crimes into two basic categories: One category consists of the so-called public welfare offenses. A leading example is the adulteration or mislabeling of pharmaceuticals under the Federal Food and Drug Act.<sup>92</sup> Such offenses are regulatory in nature. Their penalties are typically minor, sometimes involving only a fine, and the stigma associated with them is relatively light. The other category of strict liability offenses consists of non-public-welfare crimes, leading examples of which are statutory rape and possession of child pornography.<sup>93</sup> These offenses carry significant stigma and relatively heavy penalties.

In thinking about the cases in which victims deceive offenders into underage sex, however, we would do better

<sup>92</sup> The *locus classicus* is Francis Sayre, "Public Welfare Offenses," *Columbia Law Review* 33 (1933): 55. See also Laurie L. Levenson, "Good Faith Defenses: Reshaping Strict Liability Crimes," *Cornell Law Review* 78 (1993): 401.

<sup>93</sup> See *United States v. Ray*, 699 F.3d 1172, 1177–78 (10th Cir. 2012) (holding that the guideline enhancement for distribution of child pornography is a strict liability provision that does not require proof of any *mens rea* to apply).

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to focus not on the distinction between more or less stigmatizing, or more or less punitive, offenses, but rather on who the offense provision is primarily intended to protect. Pure regulatory provisions such as the Food and Drug Act are intended to protect the general public. Statutes that make it a crime to sell alcohol or cigarettes to juveniles seem intended to protect less the general public than individual, would-be, underage buyers of alcohol or tobacco.

The question of who a given strict liability statute is intended to protect seems relevant to the question whether mistake of fact should provide a defense. Consider first the public welfare offenses, like selling adulterated or misbranded drugs. That the defendant committed the offense by mistake does not change the fact that the public was endangered. Indeed, to allow mistake of fact as a defense in such cases would be to convert a strict liability regime into one based on negligence, even though these are the core cases to which strict liability is intended to apply. It is no surprise, then, that mistake of fact is not recognized as a defense to prosecutions brought under the Food and Drug Act.<sup>94</sup>

Statutes prohibiting the sale of alcohol or tobacco to juveniles present a different sort of case. Here, the risk of harm is much narrower in scope: when the seller is tricked into selling alcohol or tobacco to an underage customer, it is only (or primarily) the customer himself who is endangered, rather than the public at large. This may explain why statutes of this sort have typically been interpreted to allow a

<sup>94</sup> See, e.g., *United States v. Dotterweich*, 320 U.S. 277 (1943).

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defense in those cases where the defendant's mistake regarding the minor's age was the result of an affirmative misrepresentation by the minor himself.<sup>95</sup>

Should an analogous rule apply in the case of statutory rape? I am inclined to think that it should. My argument is not based on any lack of concern about the welfare of juveniles who engage in sex. I believe that we should try to protect juveniles from themselves even when they lie about their age. The same kind of emotional immaturity that makes juveniles less than fully competent to consent to sex in the first place may also help explain a propensity to lie in such circumstances. Rather, my concern is with the unfairness and ineffectiveness of imposing statutory rape liability on the adults who are duped. A defendant who, despite his due care, is affirmatively misled into believing that his sexual partner has reached adulthood is significantly less culpable, other things being equal, than a defendant who is not so misled. In such cases, it is the adult who is being exploited by the juvenile, rather than the other way around. To prosecute the adult in such circumstances would be to compound the effects of that exploitation.

### Conclusion

In this chapter, I have sought to use the law's response to deception as a means to probing the underlying logic of two

<sup>95</sup> See, e.g., ~~Code of Virginia § 4-1-305~~. Indeed, in some cases, the deceiving juvenile is herself liable for an offense.

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key sexual offenses: rape and statutory rape. Given the theme of this volume, it seems appropriate to conclude with some thoughts about what the sexual offenses might tell us about the nature and normative force of deception itself.

First, it is not deception as such that is criminal in cases of rape, but rather sexual acts performed on the basis of deception-induced (and therefore invalid) consent. Deception in rape cases thus differs from deception in cases of perjury and false statements, where the lie itself constitutes the *actus reus* of the offense, and lack of consent is not an issue.

Second, what counts as consent-negating deception in the context of sexual offenses is not necessarily the same as what counts as consent-negating deception in other criminal contexts, such as fraud and battery. To know what impact deception has on criminal liability in each case, we need to consider the underlying rights and interests the criminal offense provision is meant to protect.

Third, despite some formal similarities, force, deception, coercion, and incapacity each negate consent to sexual conduct in different ways. We should not assume that obtaining consent to sex by means of force or coercion is necessarily equivalent, morally or legally, to obtaining consent to sex by means of deception or incapacity.

Fourth, deception in the sexual context can be used to cause harm to others and also, arguably, to self. In the case of rape, deception is used as a means to violate some aspect of another's sexual autonomy. In the case of statutory rape, the

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victim uses deception to facilitate what the law regards as harm to herself. Thus, judgments about the proper role that deception should play in defining liability will depend on unsettled questions concerning the harm principle and the use of criminal law for paternalistic purposes.

Finally, there are significant differences in what should count as actionable deception for purposes of rape law. Some deception probably *is* sufficient to invalidate consent for purposes of rape law: examples are misrepresentations regarding the fact of sexual penetration and the identity of one's partner. Other deception-induced sex arguably should be dealt with under more specialized, less serious offense provisions within the suite of sexual offenses: an example is misrepresentations regarding whether one is carrying a sexually transmitted disease. There are also lesser forms of misrepresentation, such as those regarding marital status, income, and professional achievement, that should probably lie beyond the scope of the criminal law entirely.