

## How to Expand Rape by Deception and Protect Consent

Ricardo Licea

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## **How to Expand Rape by Deception and Protect Consent**

Ricardo Licea\*

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### **ABSTRACT**

The trend towards accepting the violation of consent as the underlying wrong addressed by rape law conflicts with the almost universal rejection of rape by deception. Rape by deception is limited to fraud in the factum, however the exclusion of fraud in the inducement finds no support under a consent framework. The principal objections to the expansion of rape by deception are that it will criminalize common behavior, that rape by deception produces only minor harm, and that self-protection is a viable alternative. Analogizing from the criminalization of deception to obtain money shows that the criminal deception statutes need not be overbroad, and that self-protection is not an entirely feasible strategy. Moreover, rape by deception can in some circumstances produce the same core harms that distinguish forcible rape from other assaults. The problems raised by the critics of rape by deception can be avoided by adopting a test under which rape by deception is expanded to cover situations where a party has been made aware that the truth of an ascertainable representation relating to their person at the time of sexual intercourse is a prerequisite of consent to sexual intercourse and willfully deceives as to that representation with the intent of engaging in sexual intercourse. In recognizing the challenges surrounding such an expansion of criminalized rape by deception, a narrower test focused on core harms such as unwanted pregnancy and sexually transmitted infection is also offered.

### **AUTHOR'S NOTE**

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## INTRODUCTION

If rape is nonconsensual sex, then consent obtained by deception or fraud should not be valid and rape by deception should be criminalized.<sup>1</sup> However, the common law takes a narrow view of rape by deception by relying on a distinction between fraud in the factum, which it considers rape, and fraud in the inducement, which it does not.<sup>2</sup> Under this test, deception about whether sex is to take place vitiates consent, while deceptions that induce a person to have sex do not. For example, in *People v. Minkowski*, deception by a physician who purported to conduct a vaginal smear but then inserted his penis was held to constitute rape,<sup>3</sup> while in *Boro v. Superior Court*, deception that sexual intercourse would act to cure a disease did not.<sup>4</sup> *Minkowski* represents a classic example of fraud in the factum, but certain states have also prohibited spousal impersonation.<sup>5</sup> This narrow conception of rape by deception is in conflict with the growing scholarly consensus calling for the elimination of the force requirement in rape and a shift to a focus on consent.<sup>6</sup> The solution to this conflict might seem obvious: to protect consent we should treat the use of deception to obtain sex as rape regardless of whether the deception is in the factum or in the inducement.<sup>7</sup>

In 1986, Susan Estrich suggested it would be easy to “prohibit fraud to secure sex to the same extent we prohibit fraud to secure money.”<sup>8</sup> However, three arguments have been successfully employed against the expansion of rape by deception. First, a fear that the expansion of rape by deception would result in the criminalization of quotidian behavior that would frighten people from entering the sexual marketplace.<sup>9</sup> Given

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<sup>1</sup> Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1376 (2013) (although Rubenfeld does not himself embrace this view, he rightly points out that consent can be violated by deception as “the riddle of rape-by-deception”).

<sup>2</sup> Ben A. McJunkin, *Deconstructing Rape by Fraud*, 28 COLUM. J. GENDER & L. 1, 9 (2014).  
<sup>3</sup> 23 Cal. Rptr. 92, 98 (Cal. Dist. Ct. App. 1962).

<sup>4</sup> 210 Cal. Rptr. 122, 126 (Cal. Ct. App. 1985).

<sup>5</sup> McJunkin, *supra* note 2, at 12.

<sup>6</sup> Rubenfeld, *supra* note 1, at 1408-09; *see also* Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1, 15 (2015) (noting that while force requirement has been in retreat, it remains the majority rule).

<sup>7</sup> *See*, Jonathan Herring, *Mistaken Sex*, CRIM. L. REV. 511, 517-18 (2005).

<sup>8</sup> Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1120 (1986). Separately, Estrich’s point also serves to illustrate the value assigned to property and consent respectively.

<sup>9</sup> Stuart P. Green, *Lies, Rape, and Statutory Rape*, in LAW AND LIES: DECEPTION AND TRUTH-TELLING IN THE AMERICAN LEGAL SYSTEM 194, 220 (Austin Sarat ed., 2015) (noting a risk of overcriminalization particular in such a personal sphere of action); Rubenfeld, *supra* note 1, at 1416 (listing common ways people can deceive others into sex); Sherry F. Colb,

a universal tendency to lie or engage in puffery, and given that even a relatively minor lie might induce another into sexual intercourse, any practicable standard must give some ground to address overbreadth. Second, a belief that the harm caused by rape by deception is so minor that it is not worth criminalizing.<sup>10</sup> A small number of deceptions can produce the same “core harms” as forcible rape, such as pregnancy and sexually transmitted infections (STIs). However, rape by deception need not be so underinclusive, as judgements as to what types of deceptions can constitute rape by deception should be left to the individual as far as realistically possible. Third, it has been argued that victim self-protection should substitute for legal remedies.<sup>11</sup> However, even wealthy and sophisticated corporations are deceived out of their money and are protected by the criminal law when this happens; it is unreasonable to expect a single person to do better.

In the pages that follow, I argue that the primary limiting principle should be a requirement that potential deceivers receive notice by their prospective sexual partners on which subjects they require truthful representations to earn consent. This approach would inform potential deceivers about the seriousness of deception. Moreover, such subjects requiring truthful representations would be decided by the individual, as is inherent to consent. Subjects could include whether a prospective sexual partner is single or whether they are a member of a particular profession or ethnic group, but it is ultimately up to each individual to decide what they need to know to consent to sexual intercourse with a particular partner.

Part I of this Article establishes that rape by deception can produce the same core harms that distinguish forcible rape from other assaults and so is worthy of criminalization. Part II explores the criminalization of deception to obtain money for insights and analogies that might be applicable to deception to obtain sex, such as the shift from a caveat

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*Rape by Deception, Rape by Impersonation, and a New California Bill*, JUSTIA (May 1, 2013) <https://verdict.justia.com/2013/05/01/rape-by-deception-rape-by-impersonation-and-a-new-california-bill> [<https://perma.cc/C459-V5WG>] (arguing that the potential of rape by deception to criminalize the wearing of makeup or the use of perfume, or cosmetic surgery would trivialize the crime of rape). *But see* Herring, *supra* note 7, at 521 (rejecting the overcriminalization argument because it would also require the elimination of criminal laws that target other widespread behavior).

<sup>10</sup> Rubinfeld, *supra* note 1, at 1416 (arguing that rape by deception is not as bad as other crimes such as murder or theft).

<sup>11</sup> RICHARD A. POSNER, *SEX AND REASON* 393 (2nd ed. 1994) (arguing that, genetically, women should be carefully screening potential suitors, a practice that is also encouraged by parents, and that such self-protection is a plausible substitute).

emtpor standard. Part III thus describes the knowing and willful deception test which overcomes the overbreadth critique to the expansion of rape by deception, albeit at a high cost to its scope, and the core harm test, which would cover only those deceptions that related to the risks of pregnancy and sexually transmitted infections. In Part IV, the knowing and willful deception test is applied to various scenarios that have been presented as obstacles to the expansion of rape by deception. Part V of this article argues that the state's interests and the disproportionate power of the wealthy explain why financial deception has been treated more seriously than deception to obtain sex. Finally, Part VI argues for an expanded and improved sex education that fully explains consent.

### I. IT CAN BE “THAT BAD”

In describing rape by deception, Rubinfeld argued that “deceptive sex, however bad it may be, isn’t that bad.”<sup>12</sup> Rubinfeld did not cite any evidence to support this argument, but in his judgment, only forcible rape is so bad as to justify criminalization because it violates a victim’s right to “self-possession.”<sup>13</sup> To judge whether rape by deception is “that bad” is ultimately to judge whether rape by deception can produce the same harms which laws against forcible rape seek to prevent.

One way to understand the harms that rape law seeks to protect against is to explore the justifications for punishing rape as a distinct offense from other assaults. One perspective is the biblical justification for punishing rape as a crime against men’s property rights to women.<sup>14</sup> Such a view is antithetical to modern sensibilities concerning human autonomy and agency, and no longer provides a basis for our legal understanding. Another historical justification for rape law is the view that a woman’s sexual experiences, or lack thereof, are intrinsic to her value and that her experience of rape diminishes that value.<sup>15</sup> This justification is not too dissimilar to the first in that it ties a woman’s value to her sexual experiences, including involuntary ones, except only now the victim is the women herself. However, this justification remains focused on how sexual experiences impact a woman’s “value” to prospective male partners, and so reflects a highly patriarchal and

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<sup>12</sup> Rubinfeld, *supra* note 1, at 1416.

<sup>13</sup> *Id.* at 1425.

<sup>14</sup> See Robert J. V. Hiebert, *Deutoronomy 22:28-29 and Its Premishnaic Interpretations*, 56 CATH. BIBLICAL Q. 203, 204 (1994) (discussing the punishment for the rape of a virgin as recorded in the Bible, which called for the rapist to pay the victim’s father fifty shekels and marry the victim and never divorce her).

<sup>15</sup> Rubinfeld, *supra* note 1, at 1388-89.

ultimately religious perspective that should not be a basis for modern society's legal understanding of rape. The prevailing view in academia focuses on sexual autonomy or agency.<sup>16</sup> This justification does not explain why autonomy or agency is particularly important when it comes to rape but not other physical assaults.

Rubinfeld proposed a physical self-possession idea in which he analogized forceful rape to torture and slavery, emphasizing elements of physical pain and domination.<sup>17</sup> Torture, by definition, requires the infliction of severe pain or suffering.<sup>18</sup> Slavery implies that, either through law or customs, one person has recognized ownerships rights over another person.<sup>19</sup> Given that there is no requirement that the victim of rape experience severe pain and that after the abolition of the marital rape exemption,<sup>20</sup> neither American law nor custom recognize a right to rape, Rubinfeld's attempt to create a new justification for the special notoriety of rape through analogy with torture and slavery is unsuccessful. Rubinfeld also argued that unlike other assaults, rape violates self-possession because the rapist uses a person to "serve his gratification."<sup>21</sup> This ignores the "gratification" aspect seen in other crimes, for example when sadists enjoy battering others.<sup>22</sup> Therefore, physical self-possession cannot satisfactorily explain why rape is singled out and treated distinctly from other assaults. Furthermore, Rubinfeld created a double-standard in which the taking of one's body requires the violation of one's physical self-possession to be criminalized but the taking of property does not.<sup>23</sup> If Rubinfeld's standard were applied to the theft of property, all fraud would be legal and so would most robberies, as all but the most extreme robberies

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<sup>16</sup> *Id.* at 1372; see also Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L.J. 335, 337-41 (2013) (elucidating the subtle distinctions between autonomy and agency).

<sup>17</sup> Rubinfeld, *supra* note 1, at 1426-27.

<sup>18</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art 1., Dec. 10, 1984, 1465 U.N.T.S. 85.

<sup>19</sup> Jean Allain, *The Definition of Slavery in International Law*, 52 HOW. L.J. 239, 261 (2009).

<sup>20</sup> Julie C. Smyth & Steven Karnowski, *Some States Seek to Close Loopholes in Marital Rape Laws*, AP (May 4, 2019), <https://apnews.com/article/3a11fee6d0e449ce81f6c8a50601c687> (recognizing that although every state has criminalized marital rape, distinctions drawn on marital relationships persist).

<sup>21</sup> Rubinfeld, *supra* note 1, at 1430. I take Rubinfeld to mean gratification from the act itself, not satisfaction from any utility of the act, as all robbers are gratified to have committed a successful robbery just as any criminal would be following the successful commission of a crime.

<sup>22</sup> Roy F. Baumeister, *The Holocaust and the Four Roots of Evil*, in UNDERSTANDING THE GENOCIDE: THE SOCIAL PSYCHOLOGY OF THE HOLOCAUST, 253-56 (Leonard S. Newman & Ralph Erber eds., 2002) (considering just one, albeit extreme, example of the Holocaust, where at least some perpetrators seem to have enjoyed their participation in the genocide).

<sup>23</sup> Rubinfeld, *supra* note 1, at 1425-26.

cannot be analogized to torture or slavery.<sup>24</sup> This dichotomy is reflective of what has been termed “rape culture” where the taking of sex, mostly by men, is normalized in a way that the taking of other’s property is not.

To understand what distinguishes rape we should be less abstract and instead address the obvious. Unlike other assaults, rape involves sex. Homo Sapiens, like many other forms of life, reproduce via sex and are not the only species in which rape has been reported.<sup>25</sup> Rape has the potential to cause reproduction with a partner that is not the one that a woman would have chosen voluntarily or to cause reproduction at a time not judged appropriate.<sup>26</sup> Pregnancy itself is a dangerous experience and historically, maternal mortality rates have been very high and still are in poorer countries.<sup>27</sup> Additionally termination of pregnancies also involve certain physical risks.<sup>28</sup> Should the woman give birth, she will face a decades-long commitment to take care of the child and may be forced to abandon, at least temporarily, her work or education.<sup>29</sup> Raising

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<sup>24</sup> *Id.* at 1426.

<sup>25</sup> Richard W. Wrangham & Martin N. Muller, *Sexual Coercion in Humans and Other Primates: The Road Ahead*, in *SEXUAL COERCION IN PRIMATES AND HUMANS: AN EVOLUTIONARY PERSPECTIVE ON MALE AGGRESSION AGAINST FEMALES*, 455 (Martin N. Muller & Richard W. Wrangham eds., 2009) (discussing how among our closest relatives, the great apes, rape has been observed in chimpanzees and orangutans, but not among bonobos or gorillas). The occurrence of rape in nature does not mean it should be legal or acceptable, the naturalistic fallacy is not at issue here. After all, this article argues for an expansion of criminal laws to cover more behavior not for a reduction to only those behaviors not seen among other species.

<sup>26</sup> *Understanding Pregnancy Resulting from Rape in the United States*, CDC (June 1, 2020) <https://www.cdc.gov/violenceprevention/sexualviolence/understanding-RRP-inUS.html> [<https://perma.cc/Y67F-DSX9>] (estimating that almost 3 million women in the U.S. have experienced forcible rape-related pregnancies).

<sup>27</sup> Regine A. Douthard et al., *U.S. Maternal Mortality Within a Global Context: Historical Trends, Current State, and Future Direction*, 30 *J. WOMEN’S HEALTH* 168, 170 tbl.1 (2020) (showing the probability that a 15-year-old girl will eventually die from a maternal cause was 1 in 45 for low income countries in 2017 and the maternal mortality ratio per 100,000 live births ranged from 13 in Europe to 525 in Africa); Donald Todman, *Childbirth in Ancient Rome: From Traditional Folklore to Obstetrics*, 47 *AUSTL. & N.Z. J. OBSTETRICS & GYNAECOLOGY* 82, 84 (2007) (discussing evidence from rural England in the eighteenth century which indicates a maternal mortality rate of 25 per 1,000 or 2,500 per 100,000, much higher than even poor countries today).

<sup>28</sup> Karima R. Sajadi-Ernazorova & Christopher L. Martinez, *Abortion Complications*, NCBI (Nov. 18, 2020), <https://www.ncbi.nlm.nih.gov/books/NBK430793/> [[perma.cc/SRY7-VKY3](https://perma.cc/SRY7-VKY3)].

<sup>29</sup> DAVID COTTER, PAULA ENGLAND & JOAN HERMSEN, *MOMS AND JOBS: TRENDS IN MOTHERS’ EMPLOYMENT AND WHICH MOTHERS STAY HOME* 3-4 (May 10, 2007), [https://contemporaryfamilies.org/wp-content/uploads/2013/10/2007\\_Briefing\\_Cotter\\_Moms-and-jobs.pdf](https://contemporaryfamilies.org/wp-content/uploads/2013/10/2007_Briefing_Cotter_Moms-and-jobs.pdf) [<https://perma.cc/UZ5M-PUDK>]; Jenifer B. Kane et al., *Educational Consequences of Teen Childbearing*, 50 *DEMOGRAPHY* 2129, 2140-41 (2013).

a child also requires a tremendous expenditure of time, money and effort.<sup>30</sup>

Men have gone to great lengths to control women's reproduction and sexual activity whether consensual or not,<sup>31</sup> from engaging in garden variety mate guarding,<sup>32</sup> to genital mutilation,<sup>33</sup> sequestration and veiling.<sup>34</sup> Even now, a woman's relationships may be negatively affected by an existing partner's feelings about a forcible rape.<sup>35</sup> Men's worries about paternal certainty are likely the source behind the devaluation of women who have been raped.

If we assume that human mating strategies can be classified as either honest courtship, deceitful or manipulative courtship (rape by deception), and forcible rape,<sup>36</sup> then we should act to ensure that honest courtship is encouraged and that both forcible rape, as well as rape by deception, which vitiates consent, are discouraged. This biological view might be somewhat reductive, but it does have a powerful explanatory capacity.<sup>37</sup>

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<sup>30</sup> See e.g. MARK LINO ET AL., U.S. DEP'T AGRIC., PUB. NO. 1528-2015, EXPENDITURES ON CHILDREN BY FAMILIES, 2015 (Mar. 2017), [https://fns-prod.azureedge.net/sites/default/files/crc2015\\_March2017.pdf](https://fns-prod.azureedge.net/sites/default/files/crc2015_March2017.pdf) [<https://perma.cc/BR7N-8HDY>] (estimated expenditures for a single-parent household from birth through age 17 were \$172,200); *Average Hours per Day Parents Spent Caring for and Helping Their Children as Their Main Activity*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/charts/american-time-use/activity-by-parent.htm> [<https://perma.cc/A7KT-X2EJ>] (showing that mothers of children under age 6 spent an average of 2.75 hours per days caring and helping their children).

<sup>31</sup> See Bruce Wells, *Sex Crimes in the Laws of the Hebrew Bible*, 78 NEAR E. ARCHAEOLOGY 294, 294-300 (2015) (discussing the imposition of the death penalty for brides in ancient near east cultures who committed "adultery" even if they were raped).

<sup>32</sup> David M. Buss, *Human Mate Guarding*, 23 NEUROENDOCRINOLOGY LETTERS 23, 28 (2002) (describing how common and relatively benign behaviors such as asking a partner to wear a wedding ring, speaking ill of other potential partners, threatening to break up if cheating occurs, or staying in close physical proximity are examples of mate guarding).

<sup>33</sup> See Eva Ontiveros, *What is FGM, Where Does it Happen and Why?*, BBC (Feb. 6, 2019), <https://www.bbc.com/news/world-47131052> [<https://perma.cc/88EF-32UG>].

<sup>34</sup> Lloyd Llewellyn-Jones, *House and Veil in Ancient Greece*, in 15 BRIT. SCH. ATHENS STUD. 251, 251-58 (2007) (describing how the sequestration of women at home and even within homes in special domestic sections could have been lessened through the embrace of veiling that served to "house" women when they were outside).

<sup>35</sup> Lynda Lytle Holmstrom & Ann Wolbert Burgess, *Rape: The Husband's and Boyfriend's Initial Reactions*, 28 FAM. COORDINATOR 321, 323 (1979) (explaining how some men reported feeling repulsed by their partner, feeling ashamed, or even blamed their partner for her rape).

<sup>36</sup> William M. Shields & Lea M. Shields, *Forcible Rape: An Evolutionary Perspective*, 4 ETHOLOGY AND SOCIOBIOLOGY 115, 117-18 (1983). While the authors specifically refer to these as male strategies, I see no reason to limit them to males, and the authors even note that females may deceive males into investing in another male's offspring. *Id.* at 118.

<sup>37</sup> I do not mean to say that biological aspects of rape are all that matters, only that it is the ultimate source of the cultural superstructures attached to it. Nor do I believe that humans

However, reproduction is not the only significant factor that distinguishes rape from other assaults. Bacteria and viruses use sex to spread from one person to another.<sup>38</sup> While some of these infections produce only temporary discomfort or may even be asymptomatic, serious life altering outcomes such as a limited dating pool,<sup>39</sup> infertility,<sup>40</sup> fetal death,<sup>41</sup> cancer,<sup>42</sup> liver failure,<sup>43</sup> central nervous diseases,<sup>44</sup> chronic abdominal pain in women,<sup>45</sup> and even death may result.<sup>46</sup> A simple assault does not involve an exchange of bodily fluids and thus does not put the victim at an additional risk of contracting disease.

For rape by deception to be “that bad” it should be capable of producing the same harms as forcible rape, namely the risk of unwanted pregnancies and STIs. A limited number of deceptions do have a direct bearing on these risks. However, many deceptions—such as wealth, profession, and religion—have no direct bearing on the risk of unwanted pregnancies or STIs. Nonetheless, the deceived party might only be willing to run those risks with actual millionaires, models, or Mormons.

## II. THE CRIMINAL LAW AND DECEPTION TO OBTAIN MONEY

Nobel prize-winning economist Gary Becker noted that the voluntary nature of marriages means that individual preferences matter and that competition among prospective marriage partners causes a

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always act to maximize their reproductive fitness. There are too many examples of ideology and religion influencing people to act contrary to their reproductive success.

<sup>38</sup> Sevgi O. Aral et al., *Sexually Transmitted Infections*, in *DISEASE CONTROL PRIORITIES IN DEVELOPING COUNTRIES* 311, 313 (Dean T. Jamison et al. eds., 2d ed., 2006), <https://www.ncbi.nlm.nih.gov/books/NBK11734/> [<https://perma.cc/2KKB-XHQ3>].

<sup>39</sup> S. E. Smith, *What It's Like to Date When You're Straight and HIV Positive*, *VICE* (June 29, 2017, 2:00 PM), <https://www.vice.com/en/article/xw8eqk/what-its-like-to-date-when-you-re-straight-and-hiv-positive> [<https://perma.cc/7LPK-Y5JR>].

<sup>40</sup> Aral et al., *supra* note 38, at 311.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Kara A. McElligott, *Mortality From Sexually Transmitted Diseases in Reproductive-Aged Women: United States, 1999-2010*, 104 *A. J. PUB. HEALTH* 101, 101 (2014) (discussing how some STIs, such as syphilis, genital herpes, gonorrheal infection, and chlamydial infection cause death directly, while others may cause death because of secondary sequelae such as HIV and HPV, which may cause cancer); *Fact Sheet-World AIDS Day 2021*, UNAIDS (Dec. 1, 2020), [https://www.unaids.org/sites/default/files/media\\_asset/UNAIDS\\_Fact\\_Sheet\\_en.pdf](https://www.unaids.org/sites/default/files/media_asset/UNAIDS_Fact_Sheet_en.pdf) [<https://perma.cc/PUG2-WSHX>] (approximately 32.7 million people have died from AIDS since the start of the epidemic).

marketplace to develop.<sup>47</sup> Further studies facilitated by the rise of online dating have demonstrated the significance of certain factors, such as age, race, or sex, and how such attributes are valued differently by different market participants.<sup>48</sup> While the sexual marketplace is likely to involve different factors, or the weighing of different factors, when compared to the marriage or dating marketplaces, the same underlying logic applies. The creation of a sexual marketplace thus makes the analogy between deception to obtain money and deception to obtain sex a powerful one.

### A. The Gradual Criminalization of Deception in the Economic Marketplace

The economic marketplace at common law was governed by the caveat emptor, or “buyer beware,” standard, which meant that the victim of deception had no legal recourse.<sup>49</sup> The expansion of the criminal law to cover additional types of economic deception had to overcome arguments for the maintenance of the caveat emptor standard that are not too dissimilar from those employed to argue for the maintenance of the caveat emptor standard in the sexual marketplace. There was a concern that an expanded definition of fraud “would put a stop to commerce itself in driving everyone out of it by terror of endless litigation.”<sup>50</sup> There was also a belief that the deceived deserved their fate.<sup>51</sup>

Societal and economic developments gradually made maintaining the caveat emptor standard untenable.<sup>52</sup> In the first half of the nineteenth century, multiple states began to regulate the economic marketplace via public inspection regimes meant to assure consumers that certain commodities met minimum standards, thus preventing deception about

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<sup>47</sup> Gary S. Becker, *A Theory of Marriage*, in *ECONOMICS OF THE FAMILY: MARRIAGE, CHILDREN, AND HUMAN CAPITAL* 299, 300 (Theodore W. Schultz ed., 1974).

<sup>48</sup> Perception and use of age in sexual decision making appears to differ across women and men, but neither gender is indifferent; men’s perception of women’s attractiveness by race varies by the race of the men and the women just as women’s perception of men’s attractiveness by race varies by the race of the women and the men. Even a substantial portion of self-identified bisexuals exhibit a preference for one sex. CHRISTIAN RUDDER, *DATAclysm: LOVE, SEX RACE AND IDENTITY—WHAT OUR ONLINE LIVES TELL US ABOUT OUR OFFLINE SELVES* 41-47, 110-18, 196-97 (2014).

<sup>49</sup> However, deception against the marketplace was criminalized as a misdemeanor. EDWARD J. BALLEISEN, *FRAUD: AN AMERICAN HISTORY FROM BARNUM TO MADOFF* 48 (2017).

<sup>50</sup> *Id.* at 50 (quoting *McFarland v. Newman*, 9 Watts 55 (Pa. 1839)).

<sup>51</sup> *Id.* (citing *Farrell v. Lovett*, 68 Me. 328 (1878)).

<sup>52</sup> See ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT)* 27 (2017); see also BALLEISEN, *supra* note 49, at 303.

their quality.<sup>53</sup> Another approach to diminishing deception was the expansion of licensing requirements.<sup>54</sup> In 1872, the first mail fraud statute made it a misdemeanor offense for anyone to use the mail for a scheme to defraud.<sup>55</sup> The mail fraud statute was defended on the grounds that sales made from a great distance did not permit the same self-protection as in-person sales.<sup>56</sup> The 1906 Pure Food and Drug Act aimed to prevent deception in food and drug products and provided criminal penalties.<sup>57</sup> The 1921 Martin Act in New York addressed securities fraud.<sup>58</sup> In particular areas like trademark law, courts noted that consumers often relied on quick appraisals of products in making their purchases and were thus vulnerable to deception.<sup>59</sup> In short, there was a recognition that the marketplace had changed significantly from the time “[w]hen people [could] appraise the quality of virtually all goods for sale on inspection, and nearly everyone [grew] what they [ate].”<sup>60</sup>

This article is not the proper place to catalog the various deceptions that have been criminalized at the federal or state level, suffice it to say that caveat emptor no longer governs.<sup>61</sup>

The shift in attitudes, though, is exemplified by a Supreme Court opinion written by Justice Hugo Black:

The fact that a false statement may be obviously false to those who are trained and experienced . . . does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of caveat emptor should not be relied upon to reward fraud and deception.<sup>62</sup>

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<sup>53</sup> BALLEISEN, *supra* note 49, at 67-68.

<sup>54</sup> *Id.* at 70.

<sup>55</sup> *Id.* at 132.

<sup>56</sup> *Id.* at 139.

<sup>57</sup> See Pure Food and Drug Act, Pub. L. No. 59-384, 34 Stat. 768 (1906).

<sup>58</sup> N.Y. GEN. BUS. LAW § 352 (2021).

<sup>59</sup> Pure Food and Drug Act, Pub. L. No. 59-384, 34 Stat. 768 (1906).

<sup>60</sup> ANDERSON, *supra* note 52, at 27; see also BALLEISEN, *supra* note 49, at 303.

<sup>61</sup> See, e.g., 18 U.S.C. § 287 (criminalizing false claims); 18 U.S.C. § 1001 (criminalizing lying to the federal government); 18 U.S.C. § 1015 (criminalizing false statements pertaining to immigration); 18 U.S.C. § 1344 (criminalizing bank fraud); 18 U.S.C. § 1347 (criminalizing health care fraud); 18 U.S.C. § 1348 (criminalizing securities and commodities fraud); 18 U.S.C. § 1351 (criminalizing fraud in foreign labor contracting).

<sup>62</sup> BALLEISEN, *supra* note 49, at 254 (citing *FTC v. Standard Educ. Soc’y*, 302 U.S. 112 (1937)).

### B. Deception in the Economic Marketplace in the Present Day

Despite this historical shift towards increasing de jure deviation from the caveat emptor standard, the modern trend has been to reembrace caveat emptor via a strong disinclination to utilize existing laws to take enforcement actions, as demonstrated during the 2007-2008 financial crisis.<sup>63</sup> Moreover, this trend has been a contributing factor to the rise of populism, a phenomenon that might be paralleled in the sexual marketplace.<sup>64</sup> In neither period, however, has commerce come to a halt due to a fear of criminal prosecution for deception.<sup>65</sup>

The most notable example of fraud in recent times is Bernie Madoff's massive Ponzi scheme.<sup>66</sup> In retrospect, one could argue that the fraud was obvious.<sup>67</sup> One intrepid analyst compiled a list of no less than twenty-nine red flags and found it likely that Madoff was running a Ponzi scheme, noting that Madoff had experienced only seven small monthly losses in fourteen and a half years, the largest of which was only 0.55% all while returning an annual average of 12% to investors.<sup>68</sup> Madoff was unduly secretive and was unwilling to explain how he

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<sup>63</sup> See, e.g., David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1435-52 (2014); Jean Eaglesham, *Missing: Stats on Crisis Convictions*, WALL ST. J. (May 13, 2012, 9:19 PM), <https://www.wsj.com/articles/SB10001424052702303505504577401911741048088> [<https://perma.cc/ETT4-TLG6>]; Nate Raymond, *Judge Criticizes Lack of Prosecutions Against Wall Street Executives for Fraud*, REUTERS (Nov. 12, 2013, 7:16 PM), <https://www.reuters.com/article/us-financial-judge/judge-criticizes-lack-of-prosecution-against-wall-street-executives-for-fraud-idUSBRE9AC00O20131113> [<https://perma.cc/c5BJD-XUR7>]; Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES (Apr. 30, 2014), <https://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html> [<https://perma.cc/LL8M-X8K9>].

<sup>64</sup> See John Cassidy, *Bernie Sanders and the New Populism*, NEW YORKER (Feb. 3, 2016), <https://www.newyorker.com/news/john-cassidy/bernie-sanders-and-the-new-populism> [<https://perma.cc/U2A6-Y65R>]; see also Philip Stephens, *Populism is the True Legacy of the Global Financial Crisis*, FIN. TIMES (Aug. 31, 2018), <https://www.ft.com/content/687c0184-aaa6-11e8-94bd-cba20d67390c> [<https://perma.cc/MX3P-GVCY>].

<sup>65</sup> U.S. BUREAU OF ECONOMIC ANALYSIS, *Real Gross Domestic Product*, FED. RSRV. ECON. DATA (Jan. 27, 2022), <https://fred.stlouisfed.org/graph/?g=eUmi> [<https://perma.cc/LLB9-625K>] (illustrating that U.S. GDP has continued to grow in both periods, but notably GDP growth has been lower since a shift towards caveat emptor began in the Obama years); *Corporate and White-Collar Prosecutions At All-Time Lows*, TRAC REPORTS, (March 3, 2020), <https://trac.syr.edu/tracreports/crim/597/> [<https://perma.cc/B4LT-T3WR>] (illustrating white-collar prosecutions of both corporate and natural persons have declined starting in the Obama administration).

<sup>66</sup> See generally BALLEISEN, *supra* note 49.

<sup>67</sup> See generally Memorandum from Harry Markopolos to the Sec. Exch. Comm'n (Nov. 7, 2005), available at <https://www.sec.gov/news/studies/2009/oig-509/exhibit-0293.pdf> [<https://perma.cc/EX32-FJZQ>] (explaining the signs that should have made it obvious that Madoff was perpetuating the fraud).

<sup>68</sup> *Id.*

generated such consistent returns.<sup>69</sup> Many of Madoff's victims were wealthy and sophisticated individuals and institutions such as Societe Generale, Bard College, Yeshiva University, Larry Silverstein, and Banco Santander.<sup>70</sup> Despite this, coverage of the victims was largely sympathetic.<sup>71</sup> Madoff eventually plead guilty to eleven counts, including securities fraud, investment adviser fraud, mail fraud, and wire fraud.<sup>72</sup>

Another notable example is the case of Theranos. Despite refusing to reveal how its technology actually worked,<sup>73</sup> investors, including notable names such as Betsy DeVos, Carlos Slim, Rupert Murdoch, and members of several wealthy families like the Waltons, Oppenheims, and Coxes, collectively invested over \$600 million.<sup>74</sup> The Theranos Board of Directors included former Secretaries of State Henry Kissinger and George Schultz, former Secretary of Defense William Perry, and future Secretary of Defense James Mattis, as well former senators Bill

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<sup>69</sup> Erin E. Arvedlund, *Don't Ask Don't Tell: Bernie Madoff Attracts Skeptics in 2001*, BARRON'S (May 7, 2001), <https://www.barrons.com/articles/SB989019667829349012?tesla=y> [<https://perma.cc/L7GW-28G5>].

<sup>70</sup> *Madoff's Victims*, WALL ST. J. (Mar. 6, 2009), [https://s.wsj.net/public/resources/documents/st\\_madoff\\_victims\\_20081215.html](https://s.wsj.net/public/resources/documents/st_madoff_victims_20081215.html) [<https://perma.cc/KB4C-YPDQ>].

<sup>71</sup> See, e.g., Scott Cohn, *The Stories of Madoff's Victims Vary Widely, as the Fraud Continues to Unwind 10 Years Later*, CNBC (Dec. 11, 2018, 9:44 AM), <https://www.cnbc.com/2018/12/10/the-stories-of-madoffs-victims-vary-widely-a-look-10-years-out.html> [<https://perma.cc/US3V-6N3P>]; Rob Copeland, James Sterngold & John Carreyrou, *Madoff Victims Recount the Long Road Back*, WALL ST. J. (Dec. 9, 2013, 6:21 PM), <https://www.wsj.com/articles/SB10001424052702303560204579248221657387860> [<https://perma.cc/SD67-3AJQ>]; Jim Zaroli, *For Madoff Victims, Scars Remain 10 Years Later*, NPR (Dec. 23, 2018, 6:00 AM), <https://www.npr.org/2018/12/23/678238031/formadoff-victims-scars-remain-10-years-later> [<https://perma.cc/M7TL-9L24>]; Pallavi Gogoi & Kevin McCoy, *Madoff Investor Who Lost \$1.4 B Apparently Committed Suicide*, ABC (Dec. 23, 2008, 9:48 PM), <https://abcnews.go.com/Business/story?id=6521133&page=1> [<https://perma.cc/957T-G4PK>]; Ben Sales, *How Have Victims Fared 10 Years After Madoff Ponzi Scheme Scandal?*, JERUSALEM POST (Dec. 23, 2018, 7:40 PM), <https://www.jpost.com/diaspora/how-have-victims-fared-10-years-after-bernie-madoff-ponzi-scheme-scandal-rocked-jewish-world-575120> [<https://perma.cc/DGG5-LMU4>].

<sup>72</sup> Press Release, Fed. Bureau of Investigation, Bernard L. Madoff Pleads Guilty to 11-Count Criminal Information and is Remanded Into Custody (Mar. 12, 2009), <https://archives.fbi.gov/archives/newyork/press-releases/2009/nyfo031209.htm> [<https://perma.cc/P4R2-2J6V>].

<sup>73</sup> Nick Bilton, *Exclusive: How Elizabeth Holmes's House of Cards Came Tumbling Down*, VANITY FAIR (Sep. 6, 2016), <https://www.vanityfair.com/news/2016/09/elizabeth-holmes-theranos-exclusive> [<https://perma.cc/GL76-65ZX>].

<sup>74</sup> John Carreyrou, *Theranos Cost Business and Government Leaders More than \$600 Million*, WALL ST. J. (May 3, 2018, 8:01 PM), <https://www.wsj.com/articles/theranos-cost-business-and-government-leaders-more-than-600-million-1525392082> [<https://perma.cc/C7BY-WXLG>].

Frist and Sam Nunn.<sup>75</sup> Theranos' supposed technical advances were eventually revealed to be illusory.<sup>76</sup> Ms. Holmes, the founder of Theranos, was charged with two counts of conspiracy to commit wire fraud and nine counts of wire fraud.<sup>77</sup> She was later found guilty of defrauding investors, and was convicted on four counts.<sup>78</sup>

What becomes clear from considering these examples is that even prominent and sophisticated persons fall prey to deception. Fortunately, when they do, we do not scoff at their misfortune or tell them to use the fraud as a learning experience. Instead, we extend sympathy for their financial loss and prosecute those who deceived them. However, when it comes to deception in the sexual marketplace, we are still governed by a caveat emptor standard reflecting a judgmental attitude that “the foolish and the deceived must bear the consequences of their folly and imbecility.”<sup>79</sup> The unfortunate truth is that all of us—even the most sophisticated and successful—may fall prey to deception.

### III. CREATING A NEW RAPE BY DECEPTION TEST

#### A. The Knowing and Willful Deception Test

As we have seen in Part II, criminalizing deception to obtain money did not destroy commerce, and self-protection is not always a feasible strategy to prevent deception. While prospective participants in the sexual marketplace currently enter into a caveat emptor or caveat amator system,<sup>80</sup> the evolution in our treatment of deception to obtain money shows that this need not always be the case. One way forward could be to follow Estrich's suggestion and act to “prohibit fraud to secure sex to the same extent we prohibit fraud to secure money.”<sup>81</sup> As a model, we probably could not do better than the wire fraud statute under which

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<sup>75</sup> Sara Ashley O'Brien, *Elizabeth Holmes Surrounded Theranos with Powerful People*, CNN (Mar. 15, 2018, 6:43 PM), <https://money.cnn.com/2018/03/15/technology/elizabeth-holmes-theranos/index.html> [<https://perma.cc/C6ZR-M6LW>].

<sup>76</sup> John Carreyrou, *Hot Startup Theranos Has Struggled With Its Blood-Test Technology*, WALL ST. J. (Oct. 16, 2015, 12:01 AM), <https://www.wsj.com/articles/theranos-has-struggled-with-blood-tests-1444881901> [<https://perma.cc/CV48-XWL4>].

<sup>77</sup> Press Release, U.S. Dep't of Just., U.S. Att'y Off., N.D. Cal., Theranos Founder and Former Chief Operating Officer Charged in Alleged Wire Fraud Schemes (June 15, 2018), <https://www.justice.gov/usao-ndca/pr/theranos-founder-and-former-chief-operating-officer-charged-alleged-wire-fraud-schemes> [<https://perma.cc/Y93H-2J7Q>].

<sup>78</sup> Miles Kruppa, *Theranos Founder Elizabeth Holmes Found Guilty in Criminal Fraud Trial*, FIN. TIMES (Jan. 4, 2022), <https://www.ft.com/content/8bde19f6-e8a5-4800-8882-fd799f0caac0> [<https://perma.cc/9CAQ-UAPA>].

<sup>79</sup> BALLEISEN, *supra* note 49, at 50 (quoting *Farrell v. Lovett*, 68 Me. 328 (1878)).

<sup>80</sup> Herring, *supra* note 7, at 511.

<sup>81</sup> Estrich, *supra* note 8, at 1120.

both Mr. Madoff and Ms. Holmes were charged. The statute reads as follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.<sup>82</sup>

The deceptions under this statute must be material.<sup>83</sup> The statute encompasses not only misrepresentations but also the “omission or concealment of material information, even where no statute or regulation imposes a duty of disclosure” so long as the omission can induce a false belief.<sup>84</sup> Translated for deception to obtain sex and eliminating surplus language, a parallel statute might read as: “Whoever, having devised or intending to devise any scheme or artifice to obtain sex by means of false or fraudulent pretenses, representations, or promises shall be fined under this title or imprisoned not more than 20 years or both.”

Criminalizing all deceptions that could conceivably be used to obtain sex would do nothing to address the overbreadth concerns.<sup>85</sup> Unfortunately, all of us lie.<sup>86</sup> It is too much to ask prospective sexual partners to guess what another person—one they may not know very well—judges to be material for the purpose of deciding whether to engage in sexual intercourse. While some factors will be important to most of us, such as relationship status,<sup>87</sup> what is considered material by each person is ultimately subjective to each individual and therefore an

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<sup>82</sup> 18 U.S.C. § 1343.

<sup>83</sup> *Neder v. United States*, 527 U.S. 1, 25 (1999).

<sup>84</sup> *United States v. Morris*, 80 F.3d 1151, 1161 (7th Cir. 1996).

<sup>85</sup> *Herring*, *supra* note 7, at 520; *Green*, *supra* note 9, at 220.

<sup>86</sup> Nonetheless, we can distinguish serious and harmful lies from small harmless lies. See Bryan H. Druzin & Jessica Li, *The Criminalization of Lying: Under What Circumstances, If Any, Should Lies Be Made Criminal?*, 101 J. CRIM. L. & CRIMINOLOGY 529, 530 (2011).

<sup>87</sup> Sexual involvement with others is a second example. Deana Pollard Sacks, *Intentional Sex Torts*, 77 FORDHAM L. REV. 1051, 1083 (2008).

idiosyncratic determination. Covering omissions would be even more problematic. When it comes to fraud to obtain money or property, these problems are not as grave because the parties involved are chiefly concerned with money and property. This is not the case with sex. The deceptions covered by rape by deception would not be chiefly concerned with the nature of the sexual act, such as its duration, but with a great deal of factors that are unrelated to the act itself which are deemed significant by one party (such as the religious or political beliefs of a prospective partner).

Any predetermined list of material misrepresentations or omissions will be underinclusive and therefore will not fully protect consent. Different subcultures and persons have vastly different ideas about the material or requisite characteristics of a sexual partner. A singular list would likely reflect hegemonic cultural expectations and not respect minority views. Consent to sexual intercourse ultimately depends on the participants and their preferences.

Professor Pollard Sacks has proposed a test that would address some concerns on overbreadth for the purposes of a torts action, which states:

Materiality requires that the false statement upon which the plaintiff relied (1) relates to a past or present fact, (2) relates to a material aspect of the agreement, as opposed to a collateral aspect, (3) is not mere “puffing,” and (4) is not a mere prediction of future events over which the defendant lacks control.<sup>88</sup>

The temporal requirement serves to protect individual freedom and to prevent the resurrection of the antiquated tort of seduction.<sup>89</sup> I would go further and exclude any promises, even those that are entirely within the control of the promisor. Absent this requirement, the promisor is deprived of a legitimate right to change their mind. Imagine a situation where marriage is made a condition of sexual intercourse, but in the intermediate the promisor is repeatedly battered by their partner. In that circumstance, it would not be fair to expect that person to marry an abusive partner solely to escape a rape by deception charge. The future is too uncertain to make broken promises a cause of rape by deception.

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<sup>88</sup> *Id.*

<sup>89</sup> Seduction was a tort which, at first, protected a father’s property interests in his daughter and then protected a woman’s sexual chastity from false promises of marriage. Jane E., Larson, “*Women Understand So Little, They Call My Good Nature ‘Deceit’*”: *A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 379, 385 (1993).

Puffery or claims that cannot be comfortably adjudicated are excluded.<sup>90</sup> For example, representations about the love felt towards the deceived party or the beauty possessed by the deceived party: it would be difficult to adjudicate the truthfulness of such claims.<sup>91</sup> Statements about such vague concepts should not be grounds for rape by deception. Therefore, any expansion of rape by deception must exclude them by including an element of what I term “ascertainability.”

However, Pollard Sacks’s proposal does not provide a notice requirement and so a potential deceiver has no means to know what constitutes a material deception.<sup>92</sup> Without a notice element, there is a good chance that a criminal rape by deception statute would be struck down as unconstitutionally vague.<sup>93</sup> Additionally, the scope of rape by deception must be further limited to deceptions about a personal characteristic, attribute, or accomplishment and not as to some completely extraneous matter.<sup>94</sup> I propose the following “knowing and willful deception” test:

A person who: (1) has been made aware by another person that the truth of an ascertainable representation relating to their person at the time of sexual intercourse is a prerequisite for the other’s consent to sexual intercourse; and (2) willfully deceives that person as to that representation with the intent of engaging in sexual intercourse shall have committed rape by deception.

This test addresses the overbreadth concern about the expansion of rape by deception,<sup>95</sup> a valid concern that nonetheless should not prevent the expansion of rape by deception. The knowing and willful deception test limits the scope of rape by deception to exclude the types of deceptions that would be the most problematic—which are discussed at length in Part IV—by requiring the presence of four elements: notice, personalness, timeliness, and ascertainability. Perhaps it can be objected

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<sup>90</sup> Pollard Sacks, *supra* note 87, at 1083 (noting statements like “I love you” or “you are the one for me”); Herring, *supra* note 7, at 521-22 (remarking that the speaker of a representation of feelings might not fully grasp how they feel).

<sup>91</sup> POSNER, *supra* note 11, at 393.

<sup>92</sup> Pollard Sacks, *supra* note 87.

<sup>93</sup> The Due Process Clause requires fair notice of the conduct being punished or standards that prevent arbitrary enforcement. *Johnson v. United States*, 576 U.S. 591, 595 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)); *see* U.S. CONST. amends. V, XIV.

<sup>94</sup> Without such a limitation, deception about totally irrelevant statements, such as when California became a state or who is the leading scorer in the NBA, would be sufficient to cause rape by deception.

<sup>95</sup> *See* sources cited *supra* note 9.

that this standard is too formalistic, that it “doesn’t sound like fun,”<sup>96</sup> and that it therefore does not reflect how decisions on sexual intercourse are made in the real world. For those unwilling to explicitly condition their consent or who fear the bureaucratizing of sex, the current caveat emptor standard should apply. For those who set certain minimum requirements, the knowing and willful test would protect the individual’s right to consent to sexual intercourse to a much greater degree than existing law, without resulting in the parade of horrors feared by critics of rape by deception.

Nonetheless, arguments have been made that victim self-protection should substitute for legal remedies.<sup>97</sup> However, in the modern dating scene, where it is common to meet people online or in other transitory settings, uncovering deception is difficult, and the social consequences that follow from deception are inadequate to deter potential deceivers.<sup>98</sup> Modern society is simply more mobile and anonymous, making deception easier.<sup>99</sup> These changes are akin to those that occurred in the economic marketplace, as discussed in Part II. We do not require wealthy investors to rely solely on self-protection despite their use of analysts, accountants, and lawyers in the vetting of investments. Individuals do not have the time or resources to fully vet prospective sexual partners or to monitor the behavior of current sexual partners—much depends on the good will of one’s sexual partner. As in the financial sector, the responsibility for avoiding deception should be placed on the potential deceiver, provided they have notice.

### **B. The Core Harm Test**

It is likely that some critics of rape by deception may be willing to accept the criminalization of those deceptions that increase the risk of

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<sup>96</sup> Rubinfeld, *supra* note 1, at 1416; *see also* Chappelle’s Show: Love Contract, COMEDY CENT. (Feb. 11, 2014), <https://www.cc.com/video/jwmvxd/chappelle-s-show-love-contract> (parodying the idea of affirmative consent with a standardized “love contract” followed by a confidentiality agreement. Such a contract would indeed prove useful as evidence in showing rape by deception occurred).

<sup>97</sup> POSNER, *supra* note 11, at 393.

<sup>98</sup> Irina D. Manta, *Tinder Lies*, 54 WAKE FOREST L. REV. 207, 208 (2019) (noting that unlike dating through social settings where there are mutual acquaintances, online daters may not share any acquaintances which makes lying easier and harder to discover); *see also* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 919-20 (1996) (remarking that greater diversity in norm communities and easy entry and exit from these means that social pressures are not as potent in regulating behavior).

<sup>99</sup> David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 461 (2000) (noting that the change from living in villages, where people had well-established reputations, to a modern urban society has made self-protection from fraud harder in both the commercial and sexual spheres).

unwanted pregnancies or STIs but are unwilling to criminalize those deceptions that are unrelated to the risk of physical harm. Such a view implies that having sexual intercourse without consent is not sufficient harm in and of itself but must be accompanied by other, more serious harms, or risks causing a more serious harm. While a focus on deceptions that increase the risk of unwanted pregnancies or STIs would make for an underinclusive approach, it is worth discussing what such a test could look like. Such a core harm test could be as follows:

Whoever, having been made aware by another person that the truthfulness of an ascertainable representation relating to the risk of sexual intercourse resulting in an unwanted pregnancy or a sexually transmitted infection at the time of sexual intercourse is a prerequisite for their consent to sexual intercourse, and willfully deceives that person as to that representation with the intent of engaging in sexual intercourse, then he or she shall have committed rape by deception.

The core harm test would retain the knowing and willful deception test's four elements of notice, personalness, timeliness, and ascertainability.<sup>100</sup> The core harm test would certainly cover "stealth" which is the non-consensual "stealth" removal of a condom during intercourse, where consent to sex was premised upon a belief that a condom would be used.<sup>101</sup> Moreover, sexual fidelity is also a strategy to prevent the spread of STIs and therefore deception with regard to sexual fidelity would also constitute rape by deception.<sup>102</sup> That said, the trend towards the decriminalization of adultery is not at tension with the expansion of rape by deception, as the actions and interests at issue are distinct.<sup>103</sup> Adultery is about controlling the cheating partners' sexual activity, whereas rape by deception is about protecting the non-cheating partner's right to control the circumstances under which they will engage in sexual intercourse. Therefore, neither adultery in a sexless marriage, nor adultery that was timely disclosed, would constitute rape

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<sup>100</sup> Risks of unwanted pregnancies or STIs are necessarily personal.

<sup>101</sup> Alexandra Brodsky, "Rape-Adjacent": *Imagining Legal Responses to Nonconsensual Condom Removal*, 32 COLUM. J. GENDER & L. 183, 184 (2017).

<sup>102</sup> CASEY E. COPEN, U.S. DEP'T OF HEALTH & HUM. SERVS., CONDOM USE DURING SEXUAL INTERCOURSE AMONG WOMEN AND MEN AGED 15-44 IN THE UNITED STATES: 2011-2015 NATIONAL SURVEY OF FAMILY GROWTH, 1, 9 (2017), <https://www.cdc.gov/nchs/data/nhsr/nhsr105.pdf> [<https://perma.cc/2E4F-57GV>] (noting how condom usage tends to fade as relationships become more established, implying a shift to a sexual exclusivity strategy with 72.4% reporting no condom usage when cohabiting, engaged or married, while only 26.5% reported no condom usage with more sporadic partners).

<sup>103</sup> Bryden, *supra* note 99, at 466 (arguing that since adultery has been decriminalized it would be perverse to criminalize lies about the non-criminal activity). *But see* sources cited *supra* note 61 (lies about non-criminal activities are criminalized in some contexts).

by deception. Further, because the focus is on the risk of physical harm and the use of sexual fidelity as a tool for that purpose, rape by deception in this scenario would not be limited to married couples or even dyads. Deception about the use of birth control would also be covered.<sup>104</sup> So too would deceptions pertaining to STI status or testing. In any case, the number of deceptions covered would be low.

The core harm test would exclude deceptions about ancestry, religion, profession, wealth, age, and so on, because these deceptions have no bearing on the risk of a core harm occurring. The minimal nature of the core harm test means it is entirely immune to an overbreadth critique. The idea that deceiving others into unwanted pregnancies or into contracting an STI is worthy of legal protection is risible, while the idea that a person should be able to control when they become a parent or their exposure to STIs is not.

### 1. Emotional and Pecuniary Harm

The focus on unwanted pregnancies and STIs may seem unduly limiting to some. Perhaps deceptions that produce serious emotional and pecuniary loss should also be criminalized. Larson proposed a test to cover serious emotional and pecuniary harm in the tort context:

One who fraudulently makes a misrepresentation of fact, opinion, intention, or law, for the purpose of inducing another to consent to sexual relations in reliance upon it, is subject to liability to the other in deceit for serious physical, pecuniary, and emotional loss caused to the recipient by his or her justifiable reliance upon the misrepresentation.<sup>105</sup>

This test should be modified by bringing in the notice, personalness, timeliness, and ascertainability elements of the proposed knowing and willful deception test. With the exclusion of promises of future action, including promises of compensation, it is difficult to see how rape by deception could cause serious pecuniary loss apart from the childcare costs or treatment of STIs. Emotional harm unrelated to unwanted pregnancies and STIs could be traced either to a fear of the perceived devaluation in the victim's worth or from feelings of violation of trust. Rubinfeld pointed out that because most rape by deception occurs outside of marriage, it was unlikely to cause the same level of

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<sup>104</sup> Because states now mandate that fathers support children, unwanted pregnancies are of more import to men than they have been historically. See Drew D. Hansen, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 *YALE L.J.* 1123, 1131-34 (1999) (tracing the emergence of child support laws to the anonymity and mobility afforded to men by increased urbanization).

<sup>105</sup> Larson, *supra* note 89, at 453.

reputational harm.<sup>106</sup> Indeed, the only deceptions that have been criminalized are those that a traditionally virtuous woman—who would only have sex once married, and only then with her husband—might virtuously fall prey to.<sup>107</sup> Moreover, the criminalization of actions that put others at risk of diminished social standing is strongly disfavored.<sup>108</sup>

As to violations of trust, deceptive acts of a stranger are unlikely to have the same emotional impact as deceptions by someone in a position of trust, such as a spouse. A similar emotional toll could also result from other circumstances, such as a partner leaving.<sup>109</sup> If one excludes core harms, then rape by deception would be unlikely to produce serious emotional harm such as PTSD at the same rate as forcible rape.<sup>110</sup> If the aim is to reduce the scope of rape by deception to only the most serious incidents, the inclusion of emotional harm resulting from antiquated notions of the value of women, or by unreciprocated love, would not meet this goal.

Moreover, covering deceptions that produce serious emotional harm is not likely to limit the scope of deceptions that are covered, as the scope of emotional harm is determined by widely varying understandings and beliefs.

#### **IV. CONSENT IS INDIVIDUAL, NOT SOCIETAL: PROBLEMATIC SCENARIOS UNDER THE KNOWING AND WILLFUL DECEPTION TEST**

Some have objected to the expansion of rape by deception in circumstances in which they deem the subject matter of the deception to

<sup>106</sup> Rubinfeld, *supra* note 1, at 1401.

<sup>107</sup> *Id.* at 1402 (these deceptions involve fraud in the factum, where a woman was unaware of the sex or in circumstances involving spousal impersonation in which a woman believed she was having sex with her husband).

<sup>108</sup> See *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966) (invalidating common law criminal defamation on grounds of vagueness because “[i]t involves calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments *per se.*”); *Gottschalk v. State*, 575 P.2d 289, 293-95 (Alaska 1978) (finding a criminal defamation statute unconstitutionally vague as what is defamatory depends on the values of the listener); see also Jonathan Heawood, *Let’s Cheer the Demise of Criminal Libel*, THE GUARDIAN (Oct. 27, 2009, 9:30 AM), <https://www.theguardian.com/commentisfree/libertycentral/2009/oct/27/criminal-libel-free-speech> [<https://perma.cc/DF9C-JYN7>] (discussing the repeal of criminal libel laws in England).

<sup>109</sup> See Melanie Greenberg, *The Neuroscience of Relationship Breakups*, PSYCHOL. TODAY (Apr. 17, 2011), <https://www.psychologytoday.com/us/blog/the-mindful-self-express/201104/the-neuroscience-relationship-breakups> [<https://perma.cc/GYJ5-9XTF>].

<sup>110</sup> Barbara O. Rothbaum et al., *A Prospective Examination of Post-Traumatic Stress Disorder in Rape Victims*, 5 J. TRAUMATIC STRESS 455, 462-63 fig.1 (1992) (finding that 94% of women met symptomatic criteria for PTSD soon after a rape or attempted rape and 47% still did twelve weeks later).

be problematic, such as when it relates to discrimination on grounds of ethnicity, transgender identity, or religion.<sup>111</sup> Under a consent framework, the individual has a right to condition their consent on whatever factors they may wish—no matter how misguided or ridiculous they may seem to others. When it comes to forcible rape, few would argue that a person is entitled to override lack of consent when it is grounded on a problematic reason such as racial bigotry. Under a consent framework, consent is individual, not societal.

An examination of some of these supposedly problematic deceptions shows that they are excluded either because they are missing an element required by the knowing and willful deception test, or because the rights of the victim of the deception to sexual autonomy outweigh the interests of the deceiver, save for the statutory rape scenario.

First is the scenario where a person is deceived about the ancestry of their prospective sexual partner, which was held by an Israeli court to be rape by deception.<sup>112</sup> The concern here is that such rulings would further the reification of national or ethnic identities.<sup>113</sup> While there is a strong argument that ethnic or racial classifications serve mainly to hierarchically rank people, it is nonetheless a factor commonly considered when choosing sexual partners.<sup>114</sup> Because rape by deception claims are not the principal way that ethnic hierarchies are established, and the personal interest of the individual to consent and maintain their sexual autonomy is so great, rape by deception claims in this situation should be allowed.

Second, consider the scenario in which a person is deceived as to the biological sex of their partner, which an English court held sufficient to convict a biological female presenting as male for sexual assault upon another female after using a strap-on dildo, believed by the victim to have been a penis.<sup>115</sup> Similar to the Israeli case, there is a concern about

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<sup>111</sup> Brodsky, *supra* note 101, at 195 (rejecting an individual right to discriminate for sexual intercourse based on partners' ethnicity, trans identity, or religion as a matter of public policy and characterizing any law that would permit this as racist and transphobic).

<sup>112</sup> Aeyal Gross, *Rape by Deception and the Policing of Gender and Nationality Borders*, 24 TUL. J.L. & SEXUALITY 1, 1-2 (2015) (citing CrimA 5734/10 Kashur v. State of Israel (2012) (Isr.)) [hereinafter *Gender and Nationality Borders*].

<sup>113</sup> *Id.* at 19.

<sup>114</sup> Men's perception of women's attractiveness by race varies by the race of the man and the woman, and women's perception of men's attractiveness by race varies by the race of the women and the men. RUDDER, *supra* note 48, at 110-18.

<sup>115</sup> Aeyal Gross, *Gender Outlaws Before the Law the Courts of the Borderlands*, 32 HARV. J.L. & GENDER 165, 172-73 (2009) [hereinafter *Gender Outlaws*]; *Gender and Nationality Borders*, *supra* note 112, at 13-14.

the reification of assigned genders and judicial rejections of transgender identity.<sup>116</sup> Even more so than ancestry, the biological sex of a partner is often the most crucial factor in the sexual marketplace.<sup>117</sup> Given its paramount importance in partner choice, individuals must be free to choose to consent or not based on biological sex.

Third, encompasses a scenario in which a person is deceived about a partner's real or potential STI status.<sup>118</sup> The issue with categorizing this as a rape by deception is that it could discourage testing, which would ultimately be detrimental to public health.<sup>119</sup> However, the expansion of rape by deception and threat of criminal liability could also cause more people to disclose STI status. Weighing the interests of the partners, on one side is a person seeking to avoid STIs and conditioning their consent on that premise, and on the other is a person willing to infect another person to deceive them into sex. Given the difficulty that prospective sexual partners would have in confirming claims about the absence of STIs, the balance of interests is in favor of rape by deception.

Fourth, there is the scenario in which a man deceives a sex worker about his intention to pay for sex.<sup>120</sup> Because this involves a promise of future behavior after sexual intercourse concludes and does not relate to the personal characteristics of the customer, it fails on the timeliness and personalness elements and so is not included as rape by deception. Sex work is work, and ideally a sex worker would be able to pursue a wage theft claim, just like other workers whose jobs involve physical contact with clients.<sup>121</sup>

Fifth, would be a scenario involving religious claims regarding the necessity or usefulness of sex due to a real or feigned religious belief.

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<sup>116</sup> *Gender and Nationality Borders*, *supra* note 112, at 19; *Gender Outlaws*, *supra* note 115 at 227-28.

<sup>117</sup> Even most self-identified bisexuals exhibit a preference for one sex. RUDDER, *supra* note 48, at 196-97.

<sup>118</sup> By potential STI status, I mean a scenario where a person asks their prospective sexual partner if they have tested negative for STIs and the prospective sexual partner lies about having tested for STI status and insists they do not have an STI. The prospective sexual partner might or might not have an STI, they may even believe that they do not as they may be asymptomatic, however they cannot answer the question with the level of rigor requested by the questioner. Because they have not forthrightly answered the question, the risks of engaging in a sexual relationship cannot be properly ascertained and so informed consent is not present.

<sup>119</sup> Brodsky, *supra* note 101, at 193 (penalizing failure to disclose STI status could discourage testing for STIs).

<sup>120</sup> Bryden, *supra* note 99, at 466.

<sup>121</sup> Some examples would be personal trainers, physical therapists, nurses, health aides, doctors, massage therapists, barbers, and fire fighters.

The concern here would be conflicts with religious freedom.<sup>122</sup> Some of these deceptions would be excluded by the timeliness element, such as those implying that sexual intercourse will cure a disease or provide good fortune. Many would also be excluded by the personalness element because they won't relate to any personal characteristic but will instead be dependent on claims about the religious necessity of performing sexual acts. Lastly, religious claims would fail the ascertainability element, as the truthfulness of religious claims is the paramount example of a class of claims that courts have refused to adjudicate.<sup>123</sup>

Sixth, some argue that deception about things like hair color and other easily changeable physical characteristics are simply too trivial.<sup>124</sup> However, if someone wants to have sex only with natural redheads with green eyes that is their prerogative, and so deception after receiving notice that certain changeable bodily characteristics are a prerequisite should constitute rape by deception. Moreover, we should not overlook how important these purportedly trivial characteristics are in the sexual marketplace, as indicated by the very invention of hair dyes, hair curlers, hair straighteners, colored contacts, etc.

Seventh, there is a scenario in which a minor deceives an adult about their age, thereby causing the adult to commit statutory rape.<sup>125</sup> Age is a significant factor in the sexual marketplace.<sup>126</sup> Although general age ranges are physically manifested, a person's specific age is not, and so one must rely on a prospective sexual partner for this fact. In this scenario, the minor knowingly lies about their age to obtain their partner's consent for sex, and so this could constitute rape by deception. However, such a rule would only discourage minors from reporting statutory rape. Additionally, the harm to the minor arising from statutory

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<sup>122</sup> See Jianlin Chen, *Lying About God (and Love?) to Get Laid: The Case Study of Criminalizing Sex Under Religious False Pretense in Hong Kong*, 51 CORNELL INT'L L.J. 553, 558 (2018) (discussing the law at issue, which punished the procurement of sex through the use of false pretense or false representation).

<sup>123</sup> This reluctance stems from justified jurisprudential concerns about judicial involvement in religious disputes, not so much from any innate difficulties in seeing whether religious claims are truthful under the standards applied to secular claims. *See, e.g.*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060-61, 2063 n.10 (2020) (seeking to avoid the adjudication of religious matters, the Supreme Court has declined to extend secular authority over internal church property disputes, disputes over the appointment and authority of religious officials, and has exempted ministers and religious teachers from generally applicable employment discrimination laws).

<sup>124</sup> Rubinfeld, *supra* note 1, at 1416.

<sup>125</sup> GREEN, *supra* note 9, at 240.

<sup>126</sup> RUDDER, *supra* note 48, at 41-47 (examining how the importance of age appears to differ across women and men, but both are not indifferent to age).

rape is significantly greater than the harm to the adult arising from rape by deception, so this particular type of deception should be exempt from an expanded rape by deception universe.

Excluding the statutory rape scenario, the interests of the deceived party significantly outweigh the interests of the deceiver. Indeed, we must wonder why the interests of deceivers to obtain sex have so often been put at the forefront when the victims of deception to obtain money are treated much more sympathetically.

## V. EXPLAINING THE CRIMINAL LAW'S DISPARATE TREATMENT OF DECEPTION TO OBTAIN MONEY AND DECEPTION TO OBTAIN SEX

When deception is used to obtain money, the courts do not just consider whether the victim of the deception knew that they were giving money to another person (fraud in the factum), but as we saw with the Madoff and Theranos examples, whether and how money was to be invested (fraud in the inducement).<sup>127</sup> Criminalizing deception in the marketplace only when it is fraud in the factum would be a dangerous proposition. In the context of rape, the disparity in the treatment of deception is even more difficult to explain given the opprobrium that the criminal law has attached to forcible rape. Until 1977, rape was punishable by death,<sup>128</sup> and rape of a child could be punished by death until 2008.<sup>129</sup> Although they have been spared execution, rapists and other perpetrators of sexual offenses are subject to unique and onerous restrictions such as registration,<sup>130</sup> public notice,<sup>131</sup> residency

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<sup>127</sup> See generally Chad Bray & Tom Lauricella, "All Fake": Key Madoff Executive Admits Guilt, WALL ST. J. (Aug. 12, 2009, 12:01 AM), <https://www.wsj.com/articles/SB124999709846222617> [<https://perma.cc/67WV-P4SW>]; Norman A. Paradis, *The Rise and Fall of Theranos*, SCI. AM. (Apr. 22, 2016), <https://www.scientificamerican.com/article/the-rise-and-fall-of-theranos/> [<https://perma.cc/296Z-C6VH>].

<sup>128</sup> *Coker v. Georgia*, 433 U.S. 584, 599-600 (1977) (holding that while rape deserves serious punishment, the life of the victim is normally not beyond repair unlike that of the victim of a murder and so the rapist of an adult woman may not be sentenced to death).

<sup>129</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (holding that for crimes against individuals the death penalty should be limited to those crimes where death resulted or was intended thus prohibiting the application of the death penalty to child rape cases).

<sup>130</sup> Sarah W. Craun et al., "Anything That Can Be a Danger to the Public": Desire to Extend Registries Beyond Sex Offenders, 22 CRIM. JUST. POL'Y REV. 375, 376 (2011) (noting that while there are other registries such as gun crime and methamphetamine offender registries, these are not as widespread as sex offender registries).

<sup>131</sup> Kristen M. Zgoba, et al., *Megan's Law 20 Years Later: An Empirical Analysis and Policy Review*, 45 CRIM. JUST. & BEHAV. 1028, 1028 (2018).

requirements,<sup>132</sup> restrictions on internet use,<sup>133</sup> and even preventive detention.<sup>134</sup> We are presented with a contradiction in which the use of force and deception to obtain property are criminalized (robbery and fraud), and the use of force to obtain sex (forcible rape) and sex with minors (statutory rape), are treated as acts worse than robbery, but the use of deception to obtain sex (rape by deception) is almost entirely ignored by the criminal law. Such a disparity deserves examination. This disparity in treatment is predominantly due to the interests of the state, the power of the wealthy, and the fact that the harm of rape by deception is borne principally by the victims.

The state's interest in protecting consumption, or economic activity, from deception stems from the need to maintain social order and the benefits resulting from greater tax revenues when money is used for productive economic activity.<sup>135</sup> Social order and tax revenues are issues of paramount importance to the state. By contrast, deception in the sexual marketplace can produce unwanted pregnancies, STIs, and emotional trauma.<sup>136</sup> We can speculate that most of the harm of deception in the sexual marketplace is borne by the victim. Analogizing from the disappointment and anger experienced by many after the lack of prosecutions following the financial crisis,<sup>137</sup> it is reasonable to suppose that deception in the sexual marketplace has similar effects. Indeed, one often sees complaints about the dishonesty of participants in the sexual marketplace, frequently expressed through the lens of sex stereotyping.<sup>138</sup> Even if rampant deception in the sexual marketplace

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<sup>132</sup> *Id.*

<sup>133</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736-38 (2017) (holding that prohibiting a registered sex offender from accessing websites that children can use violates the first amendment while leaving an opportunity for a legislature to enact a more narrow ban).

<sup>134</sup> *United States v. Comstock*, 560 U.S. 126, 149-50 (2010) (holding that a federal statute that singled out those who, due to a mental illness, might be sexually dangerous for civil detention was permissible under the Necessary and Proper Clause).

<sup>135</sup> See, e.g., BALLEISEN, *supra* note 49, at 179 (fraud was thought to provide a pathway to radicalization and could even cause riots); *The Tax Gap*, INTERNAL REV. SERV. (Oct. 21, 2020), <https://www.irs.gov/newsroom/the-tax-gap> [<https://perma.cc/4XQN-B6TP>] (finding that for tax years 2011, 2012, 2013 the average tax gap was approximately \$441 billion although not all of this would be caused by fraud and while tax fraud is the most direct way that fraud impacts the government's tax revenues, as we see with the cases of Madoff and Theranos malinvestment and noninvestment means that when compared to non-fraudulent investments fraud reduces the revenues which the government can tax); Matt Hunter, *Tax-Refund Fraud to Hit \$21 billion, and There's Little the IRS Can Do*, CNBC (Feb. 11, 2015, 3:02 PM), <https://www.cnbc.com/2015/02/11/tax-refund-fraud-to-hit-21-billion-and-theres-little-the-irs-can-do.html> [<https://perma.cc/DT7G-7F29>].

<sup>136</sup> See generally McElligott, *supra* note 46.

<sup>137</sup> See sources cited *supra* note 63.

<sup>138</sup> See Fiona Woods, *Are Men Really More Unfaithful Than Women?*, BBC (June 2, 2012), <https://www.bbc.com/news/magazine-18233843> [<https://perma.cc/WFG5-KBXS>];

causes some to withdraw from or engage in burdensome protective measures, such actions would not substantially affect state interests, unlike in the commercial marketplace where the state would feel the effects through declining consumption or economic activity.<sup>139</sup> Although rape by deception might result in some persons having less sex, it could also result in some having sex they would otherwise not have had, thus, it is doubtful whether rape by deception has any impact on childbirths, which would be of concern to the state since it would result in a smaller workforce paying into a pension system and paying other taxes, or from a belief that a larger population makes the country more powerful.<sup>140</sup> Even if it did, such an impact would be attenuated and less apparent than that of economic fraud. Moreover, there is a significant contingent of the population that views less participation in the sexual marketplace as morally desirable and too willing participation as a sign of personal failing.<sup>141</sup> The economic costs of rape by deception via unwanted pregnancies, STIs, and emotional harm are untallied since this concept is understudied.

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Amelia Tait, *Spitting out the Red Pill: Former Misogynists Reveal How They Were Radicalised Online*, NEW STATESMEN (Sep. 9, 2021, 3:05 PM), <https://www.newstatesman.com/science-tech/internet/2017/02/reddit-the-red-pill-interview-how-misogyny-spreads-online> [<https://perma.cc/8D8Q-LXXB>] (while the classic stereotype, at least in the modern West, is that men are more likely to cheat, some subgroups of men believe the opposite to be true).

<sup>139</sup> *Shares of Gross Domestic Product: Personal Consumption Expenditures*, FED. RES. ECON. DATA (Oct. 29, 2020), <https://fred.stlouisfed.org/series/DPCERE1Q156NBEA> [<https://perma.cc/5233-9BZC>] (showing that personal consumption constituted 68% of the U.S. GDP in Q3 2020).

<sup>140</sup> See e.g., Stephanie H. Murray, *How Low Can America's Birth Rate Go Before It's A Problem?*, FIVETHIRTYEIGHT (June 9, 2021, 10:00 AM), <https://fivethirtyeight.com/features/how-low-can-americas-birth-rate-go-before-its-a-problem/> (last visited Apr. 19, 2022) (pointing out the economic and fiscal problems that arise when birth rates fall below the replacement rate of 2.1); Michael Safi, *Iran Ends Provision by State of Contraceptives and Vasectomies*, THE GUARDIAN (June 15, 2020), <https://www.theguardian.com/world/2020/jun/15/iran-bans-vasectomies-and-contraceptives-to-improve-birth-rate> (explaining the desire of Iran's leaders for a larger population, which they view as a source of strength which will help in producing "soldiers for Islam").

<sup>141</sup> See, e.g., William Saunders, *Pre-Marital Sex: Lessons from Reason, Scripture*, CATH. NEWS AGENCY (1997), <https://www.catholicnewsagency.com/resources/life-and-family/marriage/pre-marital-sex-lessons-from-reason-scripture> [<https://perma.cc/MSX9-VUNY>]; Jerry Walls, *Is Premarital Sex a Sin? Bible Scholars Respond*, SEEDBED (Aug. 7, 2012), <https://www.seedbed.com/is-premarital-sex-a-sin-bible-scholars-respond/> [<https://perma.cc/AHN3-WFUQ>]; Nadja Sayej, *"It's My Ass and My Instagram": Amber Rose Is Over Your Slut-Shaming*, BAZAAR (Sept. 25, 2018), <https://www.harpersbazaar.com/culture/features/a23357956/amber-rose-slutwalk-interview/> [<https://perma.cc/YL6W-ZSHX>] (explaining how shaming and moral disapproval is not limited to the particularly religious).

As shown in Part II with the examples of Madoff and Theranos, victims of monetary deception can be individuals and institutions with significant power. The moneyed have an interest in the criminalization of deceptions that would deprive them of that money. Consider, for example, how securities fraud legislation provides protection to financial instruments held predominantly by a small minority of the population.<sup>142</sup> While it is true that the wealthy elites may use deception to augment their wealth, the two-tier structure of enforcement in which established elites have been essentially immunized from prosecution means that they can be reasonably assured that absent the most flagrant frauds, they will not be prosecuted.<sup>143</sup> Policymaking is dominated by the wealthy and special interest groups, many of which represent businesses, so it should not be surprising that deceptions harming their interests have been more likely to be criminalized.<sup>144</sup>

A contributing factor, or an alternative explanation, for this disparity could be that it is primarily male policymakers acting to preserve a male prerogative to deceive women into sex.<sup>145</sup> According to CDC estimates, if we define rape as involving forced penetration, 98.1% of female victims and 93.3% of male victims were raped by males.<sup>146</sup> If we move away from this narrow definition by including being made to penetrate another, the picture shifts towards finding more female perpetrators, particularly with male victims, although male perpetrators still predominate.<sup>147</sup> Rape by deception is different as it requires neither the willingness nor ability to use or threaten violence. Again, the analogy

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<sup>142</sup> Edward N. Wolff, *Household Wealth Trends in the United States, 1962 to 2016: Has Middle Class Wealth Recovered?*, 53 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24085, 2017) (finding that the wealthiest top 10% of Americans in 2016 held 93.2% of stocks and mutual funds and 93.8% of financial securities).

<sup>143</sup> See Raymond, *supra* note 63; see also Eisinger, *supra* note 63.

<sup>144</sup> Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POL. 564, 567-73 (2014) (finding that economic elites and organized interest groups have significant influence on public policy while the opinions of average citizens had relatively minimal impacts; most interest groups are also representative of businesses and professionals).

<sup>145</sup> Larson, *supra* note 89, at 375-79 (implying that men are prone to using deception to obtain sex).

<sup>146</sup> MICHELE C. BLACK ET AL., CTR. DISEASE CONTROL, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010 SUMMARY REPORT (2011), [https://www.cdc.gov/violence-prevention/pdf/NISVS\\_Report2010-a.pdf](https://www.cdc.gov/violence-prevention/pdf/NISVS_Report2010-a.pdf) [<https://perma.cc/57FX-4EW9>].

<sup>147</sup> Lara Stemple et. al., *Sexual Victimization Perpetrated by Women: Federal Data Reveal Surprising Prevalence*, 34 AGGRESSION AND VIOLENT BEHAV. 302, 302-11 (2017) (critiquing the CDC's focus on penetration and suggesting that female perpetrators are undercounted because sex stereotypes that depict women as passive and harmless discourage reporting).

with robbery and fraud is illustrative because while women commit only 7% of robberies,<sup>148</sup> women account for 31% of those in state prison for fraud.<sup>149</sup> We should assume that, like men, women are perfectly able to deceive to obtain sex or to be deceptive about sex as a means to another end. It may well be that men on average commit more rape by deception, but the idea that this is an overwhelmingly gendered issue is more likely than not incorrect.

## VI. THE NEED FOR IMPROVED SEX EDUCATION

Any expansion of rape by deception should be accompanied by, and likely requires, an expansion in public education on consent. As of 2020, only eight states and the District of Columbia have enacted legislation that requires the teaching of consent as part of sex education.<sup>150</sup> Expanding these efforts to include a full understanding of consent via the inclusion of rape by deception would be a considerable advancement. Although most Americans probably have some understanding of why deception to obtain money is morally wrong and worthy of criminalization, it is unlikely that they have the same understanding about why rape by deception is morally wrong.<sup>151</sup> The concept of rape by deception has been undertheorized in legal scholarship and has shockingly even been presented as a reason to retreat from consent.<sup>152</sup> However, if understanding and acceptance of consent as the standard of proper sexual relationships continues to spread, perhaps one day we will see the same shift we saw in the commercial marketplace away from caveat emptor.

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<sup>148</sup> LAWRENCE A. GREENFELD & TRACY L. SNELL, DEP'T JUST., NCJ 175688, WOMEN OFFENDERS (Oct. 03, 2000), <https://www.bjs.gov/content/pub/pdf/wo.pdf> [<https://perma.cc/5ETT-78DP>].

<sup>149</sup> *Id.* (explaining that if opportunities to commit fraud were evenly distributed, then perhaps the percentage of women committing fraud would be higher, however, sex discrimination may prevent women from achieving positions in which they could commit fraud).

<sup>150</sup> Sophia Naide, *State Lawmakers Say Yes to Consent Education*, GUTTMACHER INST. (Jan. 15, 2020), <https://www.guttmacher.org/article/2020/01/state-lawmakers-say-yes-consent-education> [<https://perma.cc/3NMF-LM5S>].

<sup>151</sup> An unrepresentative survey from around 2000 of 206 law students, 148 law school staff, and 165 law school professors found a willingness to criminalize rape by deception in only five scenarios (i) lies about an STI, (ii) failure to disclose an STI, (iii) false gynecological exam, (iv) impersonating a husband, and (v) lies creating economic coercion. Bryden, *supra* note 99, at 470-71.

<sup>152</sup> *See generally* Rubinfeld, *supra* note 1.

## CONCLUSION

This article described two tests—the knowing and willful deception test and the core harm test—that could both provide more protection for victims of rape by deception when added to the common law’s fraud in the factum test. Moreover, by requiring the four elements of notice, personalness, timeliness, and ascertainability, both tests avoid the pitfalls that critics of the expansion of rape by deception raise. Thus, the way to solve the “riddle of rape by deception” is not to discard consent but to embrace it more fully,<sup>153</sup> for doing so could improve the quantity and quality of sexual interactions.<sup>154</sup>

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<sup>153</sup> *Id.* at 1408.

<sup>154</sup> Larson, *supra* note 89, at 438.