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America's Enablement of Rape by Fraud & a Necessary Response

by
Derrick Grant

I. Introduction

Rape is one of the most controversial and emotion-provoking crimes there is. There is no crime short of murder that is more violative of an individual's bodily integrity and personal rights than when sex is procured without true consent to the act. Why then has American rape law continued to allow so many clear violators of bodily integrity to walk free without punishment? In fact, although it sounds absurd, American rape law has for a long time enabled what most would consider clear violations. Take for example, a woman who is tricked into thinking she is having sex with her significant other, when in reality it is a stranger who takes advantage in the dark and procures sex with a willing, but unaware victim. If unmarried this woman has historically been left without recourse from the criminal justice system in almost every jurisdiction.¹ Individuals have historically been free to lie about their identity in any way they please to procure sex, including lying about sexually transmitted diseases and marital status for example.

The law should also seek to protect those that are vulnerable in our society and punish those who prey on those vulnerabilities. A common scenario is a man who seeks out a woman who may be in need of something and falsely promises to help them to procure sex. For example, in an Israeli case involving a man posing as a housing official who promised to get a woman housing in exchange for sex, the man was convicted under a rape by fraud statute.² Under

¹ People v. Morales, 150 Cal. Rptr. 3d 920, 928 (Ct. App. 2013).

² Saliman v. State of Israel, Israel Supreme Court, (Sept. 17, 2008).

American laws as they exist this man would not be considered criminal under rape laws because the woman consented to the sex. However, this conduct clearly involves a predatory individual who has sought out weaknesses in another and exploited it for his own gain. A woman who submits to sex under this deceit is not truly consenting when she does not understand the circumstances under which she is submitting and ultimately winds up violated and greatly harmed by this predator. This fraud is one that the law can no longer allow and it needs to be criminalized.

There is no doubt in the eyes of a victim that when sex is procured through force without consent it is extremely harmful. In many cases it is equally true that sex procured through fraudulent and deceptive practices is also extremely harmful. But these individuals are not victims, at least not as far as most American law is concerned. In reality these individuals are victims and the law has for years enabled them to be victimized, rather than protected them. As this piece will explore, sex procured through the use of fraud or what many call rape by deception, ought to be more commonly criminalized in America. At the least the law needs to recognize the harm that occurs to women in many cases of fraudulently procured sex and criminalize these offenders. An individual should not be free to lie about anything and everything for sex, they should not be able to impersonate another, lie about their intentions or falsely promise benefits. Though finding a solution to this issue is tricky this piece will explore how the law can better protect victims of these deceptive practices through statutes that criminalize rape by fraud.

II. Carving Out a Place in Criminal Law for Sex Procured Through Deception

As modern courts have begun to recognize the archaic reasoning behind rejecting any form of criminalization of sex obtained through the use of fraud is no longer sound. Based on societal

expectations alone it is clear to me that there remains an issue in the law regarding the protection of victims who submit to sex under false pretenses. Though some states have started to codify laws that will criminalize conduct in certain sets of circumstances when sex is obtained through the use of fraud it still has a long way to go in order to vindicate victims and societal expectations. For the reasons set forth below the law is well equipped and should criminalize certain fraudulent practices when employed to obtain sex. However, despite the law's desire to fit deception into existing rape laws there is no reason why fraudulently obtained rape cannot remain separate and distinct in statutes from forcible rape as it is generally known. Ultimately, the law should seek to separately criminalize rape by fraud as its own crime.

a) Force vs. Fraud

Force and fraud are regularly distinguished between in all other areas of criminal law. Though the objective of the crimes may be the same, the manner in which those objectives are achieved vary greatly, and as a result are criminalized as separate offenses. To put it simply, trying to fit rape by fraud cases into existing rape through the use of force laws is like trying to fit a square peg into a round hole. This is evident from a divide in case law. Many courts have found ways to fit rape by fraud into rape through the use of force statutes to avoid unconscionable results that would find some of the most offensive crimes going unpunished.³ Other courts have regrettably made the decision to stick to the letter of their force required rape law and essentially find rape by fraud legal.⁴ The result is a complicated mess in sexual assault laws that allow many immoral and offensive actions to continue unpunished.

³ See People v. Borak, 301 N.E.2d 1 (Ill. App. Ct. 1973); See also Pomeroy v. State, 94 Ind. 96, 101 (Ind. 1884).

⁴ See State v. Mahon, 905 A.2d 678, 683 (Conn. App. Ct. 2006).

The beginning to the solution is recognizing that it is unnecessary and unwise to try and fit both types of conduct under one statute. Force and fraud can be used to achieve the same exact results just by very different means and in some cases the latter can be more offensive and harmful. Taking one of the more obvious crimes such as theft for example demonstrates the error in attempting to fit conduct committed by force and fraud in one category. When theft is committed through the use of force it is highly offensive and violates a victim's property rights and in a way bodily integrity. However, when theft is committed through fraudulent means, though the objective may be the same, the means are very different and often result in a violation of different rights.

Take Bernie Madoff for example, who fraudulently stole millions from unsuspecting victim's through his infamous ponzi scheme. If Madoff walked up to his victims and forcefully took the money his conduct violated property and bodily integrity rights. Instead, through the use of fraud, Madoff violated the same property rights as if he had committed the crime through force, but also took much more than that from his victims, which in many ways makes his crime even more offensive and deserving of punishment. When a crime such as Madoff's is committed through the use of fraud in addition to a violation of property rights there is a sense of moral expectations, security, dignity and trust that are also violated. Victims who are defrauded will often feel more violated than in a forceful scenario because in the latter they may know it was not their fault but in the former there is a sense of self-blame for the trust and faith placed in the defrauder which makes the offense all the more immoral.

This same logic applies to those who are the victims of sexual offenses procured through the use of fraud or deception. Though the bodily integrity violated in a rape by force case is incomparable to almost any harm a human can suffer, a victim may often feel equally violated

when their consent to sexual penetration is obtained through fraud. Indubitably when someone in a position of trust or authority, such as a doctor, procures sex through fraudulently passing the penetration off as medical treatment, the same violation of bodily integrity occurs. The fact that the realization of the violation does not come until after the offense is completed and done with, just like in Madoff's case, does not change that the violation occurs. In fact the violation will be accompanied with many of the same feelings of a loss of sense of trust and dignity as a victim in Madoff's case did. A defrauded victim may often have even stronger feelings of self-blameworthiness because of the way in which the crime was committed. A victim may lose a sense of dignity when they feel that they allowed the crime to happen to themselves and that they should have been smarter in preventing it. It is important that the criminal law focus on punishing objective behavior by an offender but the subjective experiences of victims do not need to be ignored entirely. The harm that these individuals suffer is real and often immense and these subjective victim experiences can be categorized through objective statutes.

The fact that these offenses are committed through entirely different means and often can result in different violations leads to the conclusion that they should be treated separately. It is evident that not only are separate rape by fraud and rape by force statutes advisable they should be required. Creating legal fictions in what constitutes force in the law stretches the word force to the point that it has no truly understandable meaning. Leaving rape by force statutes in place is perfectly acceptable because, like theft committed by force, the means of committing the crime have a long history of understanding that makes for easier applicability and predictability. Of course, this is assuming that separate and distinct rape by fraud statutes take the place of forcing fraudulent scenarios into a law that requires force. Fraud is a complex issue, which as we have seen in other areas of the law can develop new branches when there becomes a new means of

fraudulently inducing action from a victim. Having separate rape by fraud and rape by force statutes would likewise allow states to better respond to fraudulent conduct that does not fit into current statutes and adapt the law to cover the conduct when it is deemed offensive enough to criminalize.

b) Legal Moralism

Moral principles necessarily play an important role in criminalization and in turn, laws based on morality have a reciprocal effect on helping to form moral judgments.⁵ Legal moralists often believe that conduct must be both harm-producing and involve moral wrongfulness in order to be criminalized.⁶ As will be discussed in further detail below Jed Rubenfeld writes an article in which he discusses rape by fraud and argues that deception in the inducement of sex is a societal expectation.⁷ Despite Mr. Rubenfeld's contention that practicing deception to procure sex is a societal expectation, and one that he describes as not being that bad, it is evident that the opposite may be true.⁸ In many cases, using deception to procure sex is not a societal expectation of those that feel victimized by these practices. Though many may know it is a possibility, a woman does not expect to be lied to about a man's identity or about something as important as his marital status. Lying about important facts or deceiving a woman into thinking you are somebody you're not violates basic moral principles of truthfulness and forthrightness. When these principles are violated in a predatory nature to take advantage of another the actions should be criminalized.

⁵ See Stuart P. Green, Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements, 53 Hastings L.J. 157, 158 (2001).

⁶ Id.

⁷ Jed Rubenfeld, The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy, 122 Yale L.J. 1372, 1416 (2013).

⁸ Id.

More importantly, just because society has come to expect something does not mean the expectation is morally sound and that it should be accepted. Many deceptive practices in procuring sex are clearly morally wrong and should not be tolerated or accepted by the individuals that are victimized by them, nor by the law. The courts have struggled with this fact in having to determine whether they can fit rape by fraud into statutes that required force. The law often encourages moral practices in both criminal laws and elsewhere. Regardless of what you want to call it, rape by fraud, rape by deception, sex by deception, or something totally different, it is often morally wrong and when it results in harm to victims the law should respond by criminalizing the conduct. As an added benefit, criminalizing deceptive practices in the procurement of sex because it is deemed harmful, immoral behavior will play a reciprocal role in forming better moral judgments in individuals and developing healthy social mores. This would mean that those that have expected deception in efforts to induce sex may no longer have to expect it, or at least no longer have to accept it.

III. Development of Rape Law

a. Rape Reform as a Shift in Societal Expectations

Modern developments in rape law can largely be credited to new ways of thinking about sex and the criminalization of sex. Many of the developments and changes in what is criminalized by rape laws can be traced back to what the American society views as morally acceptable or wrong when it comes to sexual norms. One of the biggest problems we face with criminalizing sexual behavior is that what is deemed as the norm when it comes to a taboo subject like sex is an ever-moving target. This leads to constant changes in rape laws, and at times, extremely inconsistent laws from state to state. In the past, as shown by the traditional definition of rape, rape law only forbade a relatively narrow set of actions in a narrow set of

circumstances compared to the reaches of the law today. At common law rape was defined simply as “the carnal knowledge of a woman forcibly and against her will.”⁹ After years of development and reform of rape law, almost none of this traditional definition stands alone as good law anymore.

The law has changed from the basic outdated way of viewing rape defined above. Today the definition of rape has become gender neutral, New Jersey’s statute for example is written so that rape law no longer only applies to actions against women, but extends to cases where a man is raped and a man or woman can be the victim or perpetrator.¹⁰ Rape laws also no longer apply to only carnal knowledge but will generally extend to any type of penetration of a body cavity including forms of oral sex.¹¹ One of the most glaring examples of an outdated societal norm that was codified in our law was the marital exemption. Courts were unanimous in holding that once married a woman was deemed to have consented to sex and no matter what force was involved, or whether it was against her will or not, a wife could not be raped by her husband.¹² The marital exemption to rape existed in some jurisdictions into the 1980s before courts began to eliminate them.¹³ The elimination of the marital exemption was a realization that the exemption was based on ludicrous societal norms and expectations that no longer had any basis in modern American society. Many of these same outdated expectations having to do with the subordination of women offer reasoning for the complete rejection of the criminalization of rape by fraud. Like

⁹ Michael G. Walsh, Annotation, *Criminal responsibility of husband for rape, or assault to commit rape, on wife*, 24 A.L.R.4th 105 (1983); Com. v. Chretien, 417 N.E.2d 1203, 1206 (Mass. 1981).

¹⁰ N.J. Stat. § 2C:14-2 (2014).

¹¹ Rose v. Locke, 423 U.S. 48, 52 (1975).

¹² 24 A.L.R. 4th 105.

¹³ See State v. Smith, 426 A.2d 38 (1981).

the marital exemption this flat rejection can no longer be supported by societal norms and expectations.

The issue of force in the definition of rape is still a mainstay in the law but has developed and taken on different meanings from jurisdiction to jurisdiction. Historically, rape law focused on rape as a physically assaultive crime against another. This fact is evidenced by the long-standing force and victim resistance requirements in rape laws. Although force seemingly has little to do with deception, a look into the development of rape crimes and the force requirement offers insight to why it has taken so long for rape by deception to even become an issue, and why it is time to seriously consider it as criminal behavior.

To be convicted of rape in the past many states required not only that the offender use some type of force, but also that the victim had resisted the offender.¹⁴ In some states resistance is a fact-based inquiry, which included looking at several factors such as the victim's age and physical attributes in relation to the offender.¹⁵ When a case did not involve a victim being threatened courts have went as far as requiring that a victim's resistance be by overt physical acts and finding that verbal refusal or resistance unaccompanied by physical acts is not enough to uphold a rape conviction.¹⁶ These courts viewed a failure to physically resist by the victim as akin to consent, and without this resistance the act could not be rape.¹⁷ Courts have even explained the resistance element as requiring a woman's utmost physical resistance be overcome to uphold a rape conviction.¹⁸ These requirements are relevant because they offer insight into why rape law did not cover fraudulently induced sex and show just how blatantly unprotected

¹⁴ 65 Am. Jur., Rape, § 4 (2014).

¹⁵ C.M. v. State, 889 So. 2d 57 (Ala. Crim. App. 2004).

¹⁶ Mills v. U.S., 164 U.S. 644 (1897).

¹⁷ Id.

¹⁸ State v. Schmeier, 135 N.W.2d 842, 845 (Wis. 1965).

women have been in regards to what the law considers conduct rising to the level of criminal in a rape case. These factor-based tests are more focused on making sure the victim is not lying about consenting to sex than they are about protecting them from victimization.

Requiring a victim to resist an offender with physical acts in order to meet the force requirement of rape law reveals that the crime of rape historically and in some cases still does focus on the physically assaultive nature of the offense. However, requiring a victim to physically resist and even considering factors such as the size of the victim in relation to the size of the offender ignores and leaves out acts which can be just as damaging or even more damaging to some victims. Although the assaultive nature of the crime will often leave victims physically and psychologically damaged, the event can in some cases be just as damaging, or even more damaging to some victims when the assaultive element is absent from the offense. Fraudulently induced sex, whether it be by impersonation or lies can be equally psychologically damaging, it is also just as physically violative of bodily integrity and additionally often destroys an individual's ability to trust in others or harms their own feeling of self-worth and intelligence because of the deception that they fell for. Recently there has been a shift in some states focusing on the sexual nature of the offense and the details leading up to the sexual act instead of focusing on force and resistance.

It is only very recently that some states have eliminated the resistance requirement in rape laws completely.¹⁹ Some courts have only went as far as holding that a state no longer needs to prove victim resistance, but that a state still needs to prove that the use of force or the threat of force caused the victim to engage in the intercourse.²⁰ Other states have removed the resistance requirement and now only require proof that the intercourse took place without the victim's

¹⁹ 65 Am. Jur., Rape, § 4.

²⁰ Mahon, 905 A.2d at 683.

consent.²¹ New Jersey, for example, has gone to the opposite extreme in doing away with the resistance requirement. The Supreme Court of New Jersey, in an opinion that is still controversial to many, held that the only force necessary to constitute sexual assault is the underlying act of sexual penetration if it was engaged in by the defendant without affirmative and freely-given permission or consent to that specific act.²²

It is clear from an overview of historical rape law that when it came to sex women were viewed as a property interest when married. When unmarried they fared no better, women had to physically resist or could not have possibly expected that a man know they were not asking for sex. The law was concerned that without these protections women might lie about what happened with men. Rape by fraud was not a consideration because if a woman was consenting to sex out of wedlock she was viewed as overly promiscuous and once she clearly consented to sex deserves not protection from the law and could not possibly be harmed regardless of whether she was fraudulently induced. The modern reforms in rape law have slowly but surely done away with these remnants of an archaic way of thinking about sex that were codified into our laws. However, even though the language in many statutes has been removed the greatest hurdle to true reform in rape law remains the approach to criminalization of sexual offenses. It is clear just from the fact that laws such as the marital exemption survived into the 1980s that their still exists in the law in general, but more specifically in rape law remnants of this patriarchal society's view on sex. Though some states have attempted to protect women from harm through broader rape laws more effectively than others, there still exists a great disconnect from what is criminalized and what sexual conduct causes harm.

²¹ Com. v. Andrulewicz, 911 A.2d 162, 165 (Pa. Super. Ct. 2006).

²² State in Interest of M.T.S., 609 A.2d 1266, 1277 (N.J. 1992).

The development in the law in states such as New Jersey, which have all but removed any true force requirement, represent an important change in how the crime of rape or sexual assault is approached. Though the law is still written in a way that requires force, the removal of the resistance requirement from the law and the requirement that affirmative consent be given to each independent sexual act shifts the focus away from the actual physical assault by the perpetrator and focuses on protecting the victim. In a state like New Jersey the force requirement essentially has become a pretense while the law now focuses on the facts surrounding the sexual acts from start to finish in determining whether the victim consented to each act. Focusing on the victim's decisions, choices and actions that go into consenting to a sexual act can only logically lead one to question. What facts should be considered in determining the offensiveness of a sexual act? If the law goes one step further in assessing what causes harm to a victim and truly seeks to vindicate an individual's intentions and to protect them from predatory conduct, then facts of deception and fraud should be included in the category of offensive sexual conduct rising to the level of criminality.

Putting the focus on whether the victim gave affirmative consent is the beginning of a shift away from the absurd, archaic notion of protecting a man from a woman scorned that may lie about the event, which was a part of the reasoning behind force and resistance requirements. Rape law has always subordinated women and even sought to put blame on the victim, whether it was through the marital exemption or requiring a woman to physically resist an offender. The law has now begun to recognize that the actions of an offender in a sexual act can be extremely damaging and harmful to a woman regardless of whether it took physical force to accomplish the act. The change in these laws reflects a change in societal norms and expectations of the equality of women.

Though the law has begun to recognize that rape laws need to be more protective of women, it has not gone nearly far enough. Just as a sexual act can be highly offensive and extremely harmful to women when accomplished without force and without affirmative consent, so too can a sexual act accomplished with affirmative consent but procured through the use of fraud. In fact, just like when a crime such as theft committed by fraud may be more harmful to a victim than theft by force, sex obtained through the use of fraud can also be more harmful to a woman than the force required rape laws in place today. This fact is recognized to an extent in very specific sets of circumstances, as explained below.

b. Rape Through the Use of Fraud is Already Criminalized to an Extent

In a very narrow set of circumstances the law has recognized that sex procured through the use of fraud is offensive, harmful and deservedly is criminalized. Where the traditional definition of rape as requiring force and non-consent is applicable, generally if consent to the sexual act was given the act will not be rape despite being obtained through fraudulent means.²³ However, rape by deception already exists in two distinct categories, rape by impersonation and rape by fraudulent representation. Rape by impersonation historically criminalized the act of pretending to be a woman's husband in order to procure sex from her.²⁴ Rape by fraudulent representation criminalizes the act of procuring sex under the guise of medical treatment.²⁵

Although rape by impersonation of a husband has been a known exception to the force requirement, it wrongfully remains a point of contention. Some states have statutory provisions

²³ B. K. Carpenter, Annotation, *Rape by fraud or impersonation*, 91 A.L.R.2d 591 (1963).

²⁴ 65 Am. Jur. 2d Rape § 9 (2014).

²⁵ Jay M. Zitter, Annotation, *Conviction of rape or related sexual offenses on basis of intercourse accomplished under the pretext of, or in the course of, medical treatment*, 65 A.L.R.4th 1064 (1988).

that expressly criminalize this fraudulent conduct as rape.²⁶ Quite amazingly, despite the obvious offensiveness and harm of procuring sex through impersonating the spouse of another, other states have not addressed this conduct statutorily and the courts have refused to extend current laws to criminalize rape by impersonation, simply holding that the requisite force is not present in these situations because the sex is consensual.²⁷ In jurisdictions where this conduct is rightfully criminalized it has recently been a subject of public criticism.

California was one state that has an express statute that criminalizes as rape a situation “where [the victim] submits, under the belief that the person committing the act is her husband, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce such belief.”²⁸ In *People v. Morales*, the state had charged the defendant with rape under this statute in a situation where the defendant was not impersonating the unmarried victim’s husband, but was impersonating the victim’s boyfriend.²⁹ The court ultimately “reluctantly” held, that despite the clear offensiveness of the conduct and harm caused that this statute as written does not apply to the impersonation of a boyfriend and therefore dismissed the rape charge.³⁰ This decision sparked public outrage in Californians who rightfully could not believe that the impersonation of a husband to procure sex would be criminal but the same circumstances for an unmarried woman would leave her without justice.

In response to the public outcry, just last year the California legislature adopted new statutory language for rape by fraud, which reads, “where a person submits under the belief that

²⁶ *State v. Navarro*, 367 P.2d 227, 228 (Ariz. 1961); *State v. Williams*, 37 S.E. 952, 953 (N.C. 1901).

²⁷ *Suliveres v. Com.*, 865 N.E.2d 1086, 1090 (Mass. 2007); *See People v. Hough*, 607 N.Y.S.2d 884 (1994); *See also Com. v. Duchnicz*, 59 Pa. Super. 527 (Pa. 1915).

²⁸ Cal. Penal Code § 261(a)(5) (2013).

²⁹ *Morales*, 150 Cal. Rptr. 3d at 928.

³⁰ *Id.*

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.”³¹ The language change was in direct response to the Morales case and now clearly criminalizes rape by impersonation broadly when a victim submits to sex because of the offender’s impersonation of anyone other than himself or herself. Although California’s rape by fraud statute still has a relatively narrow application the Morales decision, the resulting public opinion and these recent changes signify a desire from society and courts alike to expand the criminalization of rape by fraud or deception.

The second category of rape by fraud, which historically targeted the procurement of sex by a doctor under the pretense that his actions were for medical treatment, has been criminalized under traditional rape laws by courts and expressly through statutes. In cases where rape statutes required the action to be performed by force and against the victim’s will, courts have held that the requisite force was met by the sexual act alone when a doctor used a gynecological exam as pretext to have sex with his patient because the victim has no opportunity to consent when unaware of the intentions involved.³² Even in cases dating back to the 1800s’ courts were willing to hold that force requirements were met by the wrongful act itself when intercourse occurred under the pretense of a medical examination.³³

Despite the obvious wrongfulness of this conduct that courts in the 1800s’ were willing to recognize other courts still rejected this reasoning. Allowing what can only be described as a ludicrous result, some courts held that the element of force is not meant when a doctor procures

³¹ Cal. Penal Code § 261(a)(5) (2013).

³² Borak, 301 N.E.2d at 5.

³³ Pomeroy, 94 Ind. at 101; *See also State v. Atkins*, 292 S.W. 422 (Mo. 1926).

sex under a false pretense of medical treatment.³⁴ But this reasoning was not limited to courts in the 1800s'. A Massachusetts court in 1959 held that when the rape statute requires force, fraudulently procured sex under the guise of a proposed medical treatment cannot take the place of force requirements and therefore was not criminal.³⁵ The court reasoned that, "the essence of the crime was not the fact of intercourse but the injury and outrage of the feelings of the woman by the forceful penetration of her person."³⁶ This reasoning is another example of an outdated approach to rape law, which focused only on the physically assaultive nature of the crime and operated under the false assumption that no harm occurs to those who have their bodies violated by an offender who uses a position of trust to procure sex without the consent of a woman rather than using force to achieve the same objective. In either scenario there is a victim who has had a sense of trust, security, and, or bodily integrity violated who deserves to be protected by the law.

Despite some courts' rejection of rape by fraud under statutes that require force, other states have codified rape by fraud in statutes that are specifically targeted to apply to medical misrepresentation, but were also written broadly. California for example, in addition to having branch of the law that criminalizes specifically rape by impersonation also has a broad rape by fraud statute that criminalizes medical misrepresentation. California's rape by fraud statute states that rape occurs when sex is accomplished "where a person is at the time unconscious of the nature of the act, and this is known to the accused."³⁷ The statute goes on to state that a person is unconscious of the nature of the act when the person "was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact or was

³⁴ Don Moran v. People, 12 Am.Rep. 283 (Mich. 1872); See Walter v. People, 1867 WL 6248 (N.Y. Gen. Term. 1867).

³⁵ Com. v. Goldenberg, 155 N.E.2d 187, 192 (Mass. 1959).

³⁶ Id.

³⁷ Cal. Penal Code. § 261(a)(4) (2013).

not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose.”³⁸

This statute clearly aims to criminalize the scenario where a doctor procures sex from a patient by a fraudulent representation that the sexual penetration is for medical treatment when it did not serve any medical treatment. However, more importantly the statute does not specifically state medical treatment but rather criminalizes the conduct when it is fraudulently obtained through any false professional purpose. In fact, in *People v. Bautista*, the statute was already broadly constructed when the court applied the professional purpose element to a clergyman who fraudulently obtained sexual penetration of a female under the guise of a professional purpose.³⁹ In *Bautista*, the defendant used his position of trust as a clergyman with a young girl to procure penetration, explaining to her that his penetration was to check her virginity for religious reasons.⁴⁰ The court held that this conduct was a fraudulent representation that the penetration served a professional purpose, reasoning that the focus of the statute was to criminalize “the perpetrator’s fraudulent representation that is used to take advantage of an unknowing and vulnerable victim.”⁴¹ This line of reasoning by the court is relatively new in American law but it is the crux of the reasoning behind rape by fraud criminalization. Although this statute has yet to be applied more broadly than in these impersonation or professional purpose situations it is a promising start for the criminalization of rape by deception. The fact that courts have already broadly construed the law leaves open the possibility of a broader category of conduct being criminalized when sex is procured through fraud or deception. The important recognition of the

³⁸ Id.

³⁹ People v. Bautista, 77 Cal. Rptr. 3d 824 (Ct. App. 2008).

⁴⁰ Id. at 828.

⁴¹ Id. at 835.

Bautista court is that victims can certainly be violated and harmed when they are taken advantage of in fraudulent scenarios just as they are harmed when they are taken advantage of by force.

c. Why Fraud in the Fact vs. Fraud in the Inducement is an Improper Distinction

As stated above, the California rape by fraud statute also includes as a victim, a person who is not aware of an essential characteristic of the act due to an offender's fraud in fact⁴² Historically, jurisdictions that did recognize rape by fraud distinguished between two categories, fraud in the fact and fraud in the inducement. Fraud in the fact refers to a situation in which an offender obtains consent to perform one act but engages in another.⁴³ Because consent was obtained only to a non-sexual act and that consent was fraudulently used to obtain nonconsensual sexual penetration, the court was willing to find that fraud in the fact vitiated consent and constituted rape under existing laws.⁴⁴ For example, the doctor who obtains consent to perform a gynecological exam but uses that consent to procure sexual penetration commits fraud in the fact. Fraud in the inducement occurs when a perpetrator uses deception or misrepresents a fact leading up to the act but performs the exact act that they stated relying on the misrepresentation to gain consent.⁴⁵ For example, the predatory man who lies about his marital status in order to procure sexual penetration commits fraud in the inducement. In fraud in the inducement cases, courts were unwilling to extend criminal liability because although it was obtained through

⁴² Cal. Penal Code § 261(a)(4) (2013).

⁴³ People v. Pham, 103 Cal. Rptr. 3d 366, 370 (Ct. App. 2009).

⁴⁴ Id.

⁴⁵ Id.

fraudulent pretenses, the act that occurred was consented to by the victim and that the fraud did not vitiate the consent as it does in a fraud in the factum scenario.⁴⁶

The distinction between fraud in the fact and fraud in the inducement serves no purpose and offers little as to what conduct should be, or even has been criminalized. First off, in the case of the man posing to be a woman's husband she is consenting to the act itself but the act is induced by fraud. Despite this clearly being a case of fraud in the inducement and not fraud in the fact is has already been commonly criminalized. The worthlessness of the distinction is further evidenced by the fact that modern rape by fraud laws and courts have all but eliminated the distinction. By expressly adopting laws criminalizing rape by fraud in fraud in the inducement scenarios such as professional misrepresentation and impersonation California has essentially done away with the idea that only fraud in the fact could constitute rape because of the consent present in a fraud in the inducement scenario. California courts have further invalidated this distinction by construing statutes broadly to find scenarios that are criminal under the rape by fraud statute despite being considered rape in the inducement in cases such as *Bautista*. As stated above the *Morales* court expressly stated that there is clear harm in these inducement cases and California reacted by expanding the law.⁴⁷ These decisions point to the fallacy in the reasoning that only fraud in the fact vitiates consent or that it is somehow automatically more harmful than fraud in the inducement.

Under today's societal expectations it cannot reasonably be believed that when a doctor lies about what procedure they are going to perform to have sex it is rightfully criminal as fraud in the fact because the sex was consented, but when a perpetrator impersonates a significant other and a victim has sex with them believing them to be their significant other, it is not

⁴⁶ Id.

⁴⁷ Morales, 150 Cal. Rptr. 3d 920 at 928.

criminal as fraud in the inducement, because the sexual act was consented to. As the California courts realized this distinction leads to ludicrous results that criminalizes some individuals and protects others despite equally morally wrong, offensive and harmful conduct. More importantly, fraud in the inducement can and often will lead to an individual who was wrongfully taken advantage of because of a misrepresentation and is harmed in some cases even more than an individual who was the victim of fraud in the fact and just as the latter deserves to be protected by our criminal laws, so does the former. This was clearly evidenced by California post-*Morales* and needs to be widely recognized elsewhere. Just because a victim in a case like *Morales* consents to the act and is only fraudulently deceived in the inducement of sex it does not mean she is unharmed. The same violation of bodily integrity exists in both scenarios and the same offensive predatory intention is present and therefore the same criminal laws should apply to both scenarios.

IV. Jed Rubenfeld's Riddle of Rape-by-Deception

In his article entitled *The Riddle of Rape-By-Deception and the Myth of Sexual Autonomy*, Jed Rubenfeld describes the issues of the criminalization of rape-by-deception. He ultimately reaches the conclusion that rape by deception should not be criminalized.⁴⁸ Rubenfeld discusses what he and others believe would be the implications of accepting rape by deception and dismisses the possibility of a workable rape by deception scheme.⁴⁹ His article is important to explore in depth because it raises several important questions about criminalizing rape by fraud, all of which need to be answered.

⁴⁸ Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 *Yale L.J.* 1372, 1399 (2013).

⁴⁹ Id.

Despite acknowledging that deception to procure sex can in some cases vitiate consent, Rubinfeld comes to the conclusion that rape by deception should not be criminalized.⁵⁰ In reaching his conclusion Rubinfeld argues that a general criminalization of sex by deception would lead to bad results in the law.⁵¹ He specifically raises a scenario of a minor lying about her age, having sex with an adult and argues that if sex by deception were criminalized this scenario would lead to her being a victim of statutory rape and rape by deception.⁵² First off, this is one type of conduct that laws against rape by deception could be preventing from happening by essentially protecting possible offenders from themselves. Criminalization is an important deterrent for the conduct that Rubinfeld discusses and it is possible that criminalizing deceiving someone about their identity would prevent a minor from committing the act in the first place. Secondly, in addition to potentially stopping many juveniles from falling victim to the urge to lie about their age to those older than them it would also further protect them from predatory statutory rapists.

Additionally, the result that a minor's foolish conduct may result in them being both the victim and an offender is nothing new to the law. In today's technological era an issue regularly faced is child pornography. Often young girls send images of themselves to others, which under the law is distribution of child pornography and then in turn become victims when the picture gets sent elsewhere. This result has led to increased awareness of the danger of this conduct and has likely deterred the conduct in some. Whether to charge the minor who is clearly a victim and an offender by statutory definitions becomes one of prosecutorial discretion and it is perfectly reasonable to expect just as in the case of child pornography that children are not going to be

⁵⁰ *Id.* at 1399.

⁵¹ *Id.* at 1414.

⁵² *Id.* at 1416.

charged with serious crimes at will because of the understanding that they are also a victim in the scenario. Therefore, Rubinfeld's argument that this result would lead to absurd results does not have merit and it by no means should be the reason for rejecting the criminalization of rape by deception. The biggest flaw in Rubinfeld's reasoning of why sex by deception ought not be criminal is the idea that people expect to be lied to in a sexual context.⁵³ He even intimates that in a world of general rape by deception laws something as simple as cosmetics misrepresent and could be considered criminal.⁵⁴ Though it is clear that Rubinfeld does not actually believe that this would ever be a possible result of criminalization of sex by deception, he uses these extreme examples in an attempt to dismiss the idea of rape by deception.⁵⁵ However, Rubinfeld does concede the possibility that certain deception could be singled out as qualifying as criminal by statute.⁵⁶

Rubinfeld ultimately reaches the conclusion that the violation of an individual's right to self-possession is what should be criminalized.⁵⁷ His theory is based off the idea that everyone has the right to self-possession, meaning, the possession of one's own body and that violations of this right to obtain sex is what should be considered rape.⁵⁸ He offers this theory of rape laws as a rationale for the continuing requirement of force and rejects the idea that psychological forces could be included in rape laws under a the theory of self-possession.⁵⁹ His right to self-possession theory ultimately casts aside rape by deception because in a fraud scenario an individual consenting to the acts, though under false pretenses, is not losing the right to possess

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id. at 1399.

⁵⁶ Id.

⁵⁷ Id. at 1425.

⁵⁸ Id. at 1426.

⁵⁹ Id. at 1435.

their own body or the ability to do what they want with their body, in fact they could walk away from the situation at any moment because no force exists.⁶⁰

Rubinfeld's right to self-possession theory opens loopholes for the offender who impersonates a loved one, or the professional who obtains sex through misrepresentation. It falls in line with old law that for years ignored the harm caused to victims by this conduct. Under this theory neither would have to be criminal because the victim never loses their right to self-possession as they are in complete control over themselves at all times, are consenting in the moment to the action that is taking place and could walk away if they so chose. Secondly, the idea that it is a societal norm to expect deception in the world of sex is exaggerated and it is no excuse for protecting an offender who uses offensive deceptive practices to procure sex. Although it may be true that in the world of sex there exists some negligible deceptions that society has come to accept and expect this does not lead to a blanket conclusion that no rape by deception can be criminalized.

In fact, despite the fact that society expects that they may be deceived by cosmetics and certain clothing when making a decision of who to have sex with, it is equally true that society has many expectations that are not vindicated when sex by deception is a legal practice.⁶¹ Ultimately, Rubinfeld's logic falls flat because just as some deception is expected many other forms of deception are not expected. Most glaring of these societal expectations that would not be vindicated is in cases where an individual is taken advantage of and violated by someone impersonating a significant other or passing off an action as having a professional purpose when it does not. These cases would be criminalized even more narrowly and less often than they are now. It would also be a societal expectation that certain facts would be revealed before deciding

⁶⁰ Id.

⁶¹ Id. at 1416.

to have sex with another, such as marital status, gender and the presence of sexually transmitted diseases, that when lied about would leave an individual feeling violated. Though people are aware that people do lie about these things an individual does not expect to be lied to about details of such import about another's identity. The idea that the law should vindicate these individual's expectations and protect them from fraudulent practices that leave them feeling victimized is far from impractical and is not much of a riddle at all.

V. How to Criminalize Rape by Fraud

There is no doubt that criminalization of rape by fraud comes with issues and questions that need to be answered. As Rubinfeld points out there are many arguments against its criminalization that each need to be addressed as well. First, we must make the determination that rape by fraud is conduct that should be criminalized. Second, you need to determine how it will be criminalized and lastly and most difficultly the law must define the contours of rape by fraud.

a) Drawing the Line

The biggest obstacle that the criminalization of sex by deception faces is in determining what conduct would be considered criminal fraud. However, this is no new challenge in determining the criminalization of fraudulent activity and is certainly no reason to back down and allow the continued victimization of so many. The issue of rape by fraud is not specific to America and looking to international laws could offer some insight in how to approach this issue. Rape by fraud has recently been a point of contention in Israel specifically. In Israel rape includes intercourse obtained "with consent that was given through the use of fraud as to the nature of the actor or the essence of the act."⁶² Israeli law separates rape by fraud similarly to the

⁶² Saliman v. State of Israel, Israel Supreme Court, (Sept. 17, 2008).

way American law does. Fraud as to the essence of the act includes cases where a sexual act is performed under the guise of a professional purpose, while fraud as to the nature of the actor includes cases where someone fraudulently represents himself to procure sex.⁶³ However, fraud as to the nature of the actor has been construed to apply far more broadly than American courts have interpreted the law. In *Saliman v. Israel*, the rape by fraud as to the nature of the actor doctrine was affirmed when the defendant was convicted after he misrepresented himself as a housing official and promised a house to his victim if she had sex with him.⁶⁴ In another Israeli rape by fraud case a defendant was convicted under the rape by fraud statute when he lied about being both Jewish and single.⁶⁵

Once you criminalize rape by fraud distinctly separate from rape by force these decisions beg the question, where do you draw the line and what would qualify as criminally fraudulent in the procurement of sex? For starters the *Saliman* decision seems obvious. Though existing American rape law would never be able to find the defendant's actions criminal, they should be. A defendant who fraudulently represents himself as an authority figure in the manner that the defendant in *Saliman* did is arguably the most offensive of criminals. Although other criminal statutes may prevent an individual from posing as a government official they do not vindicate the harm caused to a victim and often will not be as seriously punished. These defrauders prey on the vulnerable. First an offender determines what their weakness is and then exploits it for their own personal gain. Whether the objective of the fraud is to steal money or to procure sex it should be criminalized rather than enabled. The issue gets murkier in a case like *Kashur*. Surely, as

⁶³ *Id.*

⁶⁴ *Id.*; See also Rubinfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, (2013).

⁶⁵ *State of Israel v. Kashur*, Jerusalem District Court, (July 19, 2010); See also Rubinfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, (2013).

Rubinfeld stated Americans regularly lie about many facts like whether they are single or not in an effort to procure sex. But regularity of occurrence does not mean the law should permit these lies. People should have the right to decide whether or not to have sex with someone who is married for example, like the defendant in *Kashur*. When the decision to have sex is grounded in a fact that turns out to be untrue because of a carefully calculated move by a fraudulent man, like the defendant in *Kashur*, the conduct is morally wrongful and can certainly be harmful enough to warrant being criminal. The issue is, as the *Saliman* court and Rubinfeld intimated, is what about more innocent or “white” lies that are regularly told at the beginning of relationships? Should all lies used to procure sex be criminal?

b) A Solution

The answer is obviously, no. But that does not mean there is no solution that can allow for the criminalization of certain frauds and still leave as noncriminal, the innocent white lies. First off, as mentioned above having rape by fraud distinct from rape committed through the use of force in statutes is necessary. The distinction has already proven to allow for easier expansion of criminality when it is clearly deserved as we have seen from the California courts in *Bautista* and their changes in the law following *Morales*.

The first potential solution is one that is suggested by the *Saliman* court, which states that the test for criminality of certain lies could be focused on whether the lies “are critical in the eyes of a reasonable woman.”⁶⁶ A reasonableness test has its benefits. It would ensure that no victim of fraud in severe cases would suffer without justice because of non-inclusive laws. It would also allow for the screening out of what would be considered innocent lies that a reasonable person would not see as critical in the decision making process. However, the reasonableness test would

⁶⁶ *Saliman v. State of Israel*, Israel Supreme Court, (Sept. 17, 2008).

have several problems as well. For starters American criminal law often craves congruity and predictability in order to run efficiently. A reasonableness test would lead to major incongruities in what is found criminal because by its nature it is an uncertain test. Incongruity also leads to unpredictability which would likely bog down courts in a system that already suffers to remain efficient. Additionally, leaving the power to determine what is reasonable to the courts in a courtship situation also puts too much power in a court to set standards of societal morality.

The second potential solution is to write rape by fraud statutes narrowly so that only specific lies and conduct are criminalized. Statutes would be written in a manner that criminalizes the procurement of sex through fraud or deception. The statute would go on to list conduct that qualifies as criminal deception such as misrepresentation of identity or lies about marital status or about whether an individual has sexually transmitted diseases. This solution would criminalize conduct in a manner that would often be reactive but would make for far more predictability. As long as these rape by fraud statutes are in place, the hope would be that when an offender commits a harmful act it can be fit into the constructs of the listed categories of deception like California did in the *Bautista* case. But the law would also need to be reactive and willing to change the law when cases come up that are clearly offensive but cannot fall within the constructs of the law like California did after the *Morales* case. Taking California as a test case, it is likely that the *Saliman* case would have come out the other way under California's existing laws. The aim of this solution would be to take cases like *Saliman* after the fact, and amend the rape by fraud statute to include conduct that is clearly harmful and offensive fraud.

The biggest downfall under this criminalization scheme would be that cases like *Saliman* would slip through the cracks until lawmakers could respond. However, this statutory scheme would allow for congruity in what is considered criminal because it would be listed by statute.

Clearly defining what is criminal fraud statutorily allows the law to be predictable and for the judicial system to run more efficiently. Though both solutions have their pros and cons this solution is ultimately more desirable. The key to the solution is of course that rape by fraud statutes are put into place. The existence of separate rape by fraud statutes alone would be a great step forward in preventing some of the fraudulent practices that our law has allowed for so long. The exact decisions on specific lies to be criminalized under this method would be left to lawmakers who would be more ably equipped to respond to the expectations of victims. It is most important that the criminal law begin to recognize the clear harm in some rape by fraud cases and criminalize the conduct by statute in order to put a stop to the inconsistencies in the law and the enablement of rape by fraud. For example, the incongruity between states like California criminalizing misrepresentation of identity in a case like *Morales* where the defendant was believed to be the victim's boyfriend as rape, while other states like Massachusetts have not even found this type of conduct to be criminal at all cannot be tolerated.

At the least, States need to have clear rape by fraud statutes that criminalize deception such as misrepresentation of authority figures, misrepresentation of medical treatments or professional purpose and impersonation of another. The next step would be to determine what other lies leave an individual feeling victimized. Having these statutes as a baseline then allows the law to determine whether it be through studies done to determine psychological harm to victims caused by these lies or in a reactive manner like in California post-*Morales*. Potentially criminal lies about important details of ones identity in a courtship situation could even include lying about marital status or whether an individual has a sexually transmitted disease. Although to some criminalization of these lies as rape may seem radical, it is not totally out of left field. As discussed above Israel has already upheld similar statutes criminalizing as rape by fraud lies

about marital status and religion.⁶⁷ California has rape by fraud statutes and since they were put into place the statutes have been broadly applied by courts and expanded by the legislature.

Most recently lawmakers in New Jersey have introduced a rape by fraud bill that would go beyond any rape by fraud statute currently existing in America.⁶⁸ The bill was introduced by Assemblyman Troy Singleton and would criminalize “sexual assault by fraud” which would be defined as “an act of sexual penetration to which a person has given consent because the actor has misrepresented the purpose of the act or has represented he is someone he is not.”⁶⁹ Singleton stated that “we have to look at the issue of rape as more than sexual contact without consent.”⁷⁰ It is his belief that fraud invalidates consent just as forcible sexual contact does.⁷¹ The bill was in response to a woman who was victimized by a serial bigamist and would therefore seem to extend to lies about details such as marital status.⁷² Although this bill has just been introduced and may not pass, it further evidences that society is ready for a different approach to rape law. Lawmakers are beginning to recognize that rape by fraud victimizes many leaving them with no redress from the law. It is time that other States follow suit and introduce legislation of their own to criminalize rape by fraud.

V. Conclusion

What is most evident in deciding whether rape by deception should be criminalized is that determining the parameters would be far from easy. However, the law has enabled violative

⁶⁷ Id.

⁶⁸ Matt Friedman, *Rape by fraud? N.J. lawmaker introduces bill to make it a crime*, NJ.com, (Nov. 24, 2014, 3:27 PM), http://www.nj.com/politics/index.ssf/2014/11/rape_by_fraud_nj_lawmaker_introduces_bill_to_make_it_a_crime.html.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id.

⁷² Id.

fraudulent practices in the procurement of sex leaving many individuals victimized without any recourse or justice for far too long. It is clear that the law has failed and it is time the law do more to protect victims from these invidious fraudulent practices. Whether States decide to call it rape or something entirely different such as fraudulently obtained sex, or sexual assault by deception it is time the laws recognize this conduct as criminal. The enactment of rape by fraud statutes separate and distinct from rape by force statutes as we have seen in California across all jurisdictions would be a promising beginning. From there it would be up to courts and lawmakers to make the difficult determinations of what fraudulent acts would constitute criminal rape by fraud. So long as rape by fraud statutes are in place the law will finally begin preventing rather than enabling the victimization of individuals through rape by fraud.