

## Masturbation, Deception, and Rape

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**ABSTRACT** *'Rape by deception' occurs when the victim 'consents' to sexual penetration as a result of certain sorts of deception by the perpetrator. The legal and philosophical literature on rape by deception has almost exclusively concentrated on cases wherein victims are brought to 'consent' to sexual intercourse by deception. Broadening our focus to consider sexual penetration in other contexts reveals a puzzle: if penetration in the context of sexual intercourse premised on deception is rape, is sexual penetration in the context of masturbation as a result of deception rape?*

### 1. Introduction

Rape is 'sexual intercourse without consent'. This claim would raise few eyebrows in most 'folk' and many academic conversations about rape. Those with a knowledge of the history of the law might observe that until relatively recently the definition of rape was much narrower than that and that only certain sorts of sexual intercourse without consent – assaults committed by a man against a woman who was not his wife and who resisted to her utmost the man's attempts to spoil her virtue – counted as rape.<sup>1</sup> Those with a knowledge of the contemporary law of rape might retort that the definition offered above is still too narrow and that, increasingly, modern definitions of rape define it as 'sexual penetration without consent'.<sup>2</sup> Many jurisdictions now recognise non-consensual sexual penetrations performed with objects as rape.<sup>3</sup> Some statutes now allow that it is possible for Person A to rape Person B by compelling Person C to perform an act of sexual penetration with Person B.<sup>4</sup> Similarly, under at least two statutes, if Person A points a gun at Person B and tells them to sexually penetrate themselves or be killed, and Person B then does so, this may be deemed to be a case of sexual penetration without consent and therefore rape.<sup>5</sup>

Coercion, especially coercion involving force or threat of force, is antithetical to consent. Yet it is widely accepted that, in many contexts, consent may be vitiated by deception as well as by force. 'Rape by deception' occurs when the victim 'consents' to sexual penetration as a result of certain sorts of deception by the perpetrator.<sup>6</sup> The legal and philosophical literature on rape by deception has concentrated, almost exclusively, on cases wherein victims are brought to 'consent' to sexual intercourse by deception. Broadening our focus to consider sexual penetration in other contexts reveals a puzzle, which has not been much discussed.<sup>7</sup> If penetration in the context of sexual intercourse premised on deception is rape, is sexual penetration in the context of masturbation as a result of deception rape?

In this article, I suggest that there is a *prima facie* case that such cases should count as rape. However, I argue that the difficulties involved in thinking of masturbation as occurring without consent, as well as an intuition that compelled self-penetration is not a wrong of the same nature as sexual penetration by (or of) another person, should prompt us to

consider a revision of an alternative account of the nature and wrong of rape, originally put forward by Jed Rubenfeld, which understands rape as a violation of the right to self-possession, and which implies that these cases are not rape. Both the standard account of rape, as sexual penetration without consent, and my revision of Rubenfeld's account have advantages and disadvantages, which are well illustrated by their treatment of the wrong of compelling masturbation by deception: ultimately, I leave it to the reader to choose between them.<sup>8</sup> The distinctive contribution of my article, then, is to reveal a previously unacknowledged implication of accounts of rape as sexual penetration without consent – that penetrative masturbation compelled by deception is, *prima facie*, rape – and to show how Rubenfeld's much-criticised account of rape as a violation of the right to self-possession is more plausible than first appears insofar as it has the resources to explain how we might resist understanding cases of penetrative masturbation as a result of deception as rapes.

Whether someone is the victim or the perpetrator of the crime of rape will depend upon where and when the assault took place. However, rape is an ethical concept as much as it is a legal concept, and legal definitions of rape may be criticised and – as the history of feminist rape-law reform has shown – reformed on the basis of philosophical intuitions about the nature and significance of rape. My concern here is with a philosophical rather than a legal account of rape, although, of necessity, I will reference legal discussions, as well as the law of rape, for purposes of illustration in the argument that follows.

As several critics have observed, the philosophical attention paid to the idea of rape by deception is out of proportion to the number of cases of actual rape that are solely a consequence of deception.<sup>9</sup> The vast majority of cases of rape involve coercion, either via force or via the threat of force, or in the context of gendered power relationships, rather than deception. If the level of scrutiny paid to rape by deception by philosophers can be defended, it is because thinking about the impact of deception on consent has allowed scholars to better understand the significance of consent for rape, and for the ethics of sexual relations more generally, as well (sometimes) as to expose sexist assumptions made in the larger literature on rape. These insights have fed into a movement for rape-law reform, which in turn has led to social and institutional change in at least some jurisdictions, such that coercive rapes are more likely to be prosecuted. Similarly, I am interested in the possibility of rape by compelling masturbation by deception for the light that considering this possibility can shed on the nature of rape more generally. As the following discussion demonstrates, working out whether or not such cases are rape requires us to think deeply about the nature of consent, the harm and moral significance of penetration, and the definition of rape itself.

My investigation proceeds as follows. In Section 2, I introduce the idea of rape by deception. Section 3 makes explicit a number of preliminary definitional and methodological assumptions that frame the discussion that follows. In Section 4, I set out a number of hypothetical cases wherein people penetrate themselves as a result of deception and suggest that there is a strong *prima facie* case that at least some of these are rape. Section 5 addresses the question of whether it is appropriate to describe masturbation as a result of deception as occurring 'without consent' given that the victim penetrates herself or himself and is neither forced nor coerced to do so. In Section 6, I discuss what I take to be a more compelling objection to admitting that such cases count as rape, which is that when people penetrate themselves there seems to be a lesser violation of their bodily integrity than occurs when the victim is penetrated by (or is brought to penetrate) others. Drawing

on an argument in Rubinfeld,<sup>10</sup> I offer a revised definition of rape that takes account of this intuition. This account, which emphasises the violation of the right to self-possession that occurs when an individual's bodily boundaries are transgressed by the body of another, has the result that cases of self-penetration will not count as rape. In Section 7, I canvas two ways of responding to a possible objection to this account, which is that it cannot capture the nature and extent of the wrong involved in sexual assaults involving objects. I conclude my discussion by suggesting that determining whether cases of compelled (penetrative) masturbation by deception are rape requires us to choose between two competing accounts of the nature and wrong of rape, and by emphasising the potential of the inquiry to improve our understanding of key theoretical questions regarding the nature, and definition, of rape.

## 2. Rape by Deception

Traditionally, rape was forced sex.<sup>11</sup> Indeed, it was forced sex with a woman who was not the rapist's wife. For the most part, feminist activists have succeeded in achieving law reform that has removed both the force requirement and the marital exemption from rape law, with the result that rape is increasingly understood to consist in sexual penetration without consent. While the majority of rapes involve coerced sex in the context of gendered power relationships, the paradigmatic case of non-consensual sex arguably remains sex secured by force, or the threat of force, insofar as force and consent are antithetical.

As many scholars have observed, in other contexts deception as well as force vitiates consent.<sup>12</sup> Indeed, in many jurisdictions the law of rape already recognises the possibility of 'rape by deception'. Roughly speaking, there are three sorts of cases wherein it has seemed plausible, to at least some authorities, that deception vitiates consent to sexual penetration.

First, there are cases involving deception about the nature of the act to which the victim 'consents'. For instance, a woman may consent to a doctor examining her with a speculum whereupon he proceeds to penetrate her with his penis. This case is almost universally agreed to be rape on the basis that, although there is consent to an act of penetration, there is not consent to the act of sexual penetration that actually takes place.<sup>13</sup> A related case, which is slightly more controversial, concerns a sexually naïve woman who agrees to her doctor placing his penis inside her in order to conduct a 'medical procedure' without understanding that she is thereby consenting to sexual penetration.<sup>14</sup> In such a case we might conclude that she did not consent to sexual penetration because she did not understand the nature of the act to which she was consenting.

Second, there are cases involving deception about the identity of the person with whom the victim has sex.<sup>15</sup> If a stranger steals into a woman's bedroom in the dark and the woman has sex with him believing him to be her husband, this is usually held to be an instance of rape on the grounds that the woman did not consent to have sex with the person with whom she did in fact have sex.

Third, there are cases where a person is deceived about some other matter that was material to their decision to have sex with someone. For example, there are cases where a woman has agreed to have sex with a man because she believed, as a result of deception, that she was married to him.<sup>16</sup> Another, more controversial, case, which might still plausibly be judged to involve rape by deception, is one in which a man induces a sex worker to

have sex with him by paying her counterfeit currency.<sup>17</sup> The publicity given to the accusations against Julian Assange has led to increased attention to cases where a person was deceived about whether or not a person with whom they had sex was using a condom.<sup>18</sup> A still more controversial case, which resulted in a conviction for rape by deception in Israel, involved a woman being deceived about the ethnicity and religion of the man with whom she agreed to have sex.<sup>19</sup> In all of these scenarios, it might be argued, the victim's consent is vitiated by the deception, with the result that the act that takes place is rape.<sup>20</sup>

Rape by deception remains a topic of controversy in both the philosophical and the legal literature on rape for at least two reasons.<sup>21</sup>

Insofar as a person who has been raped by deception does not necessarily experience any suffering, or even need understand the experience as being rape at all, the possibility of rape by deception is challenging to accounts of both the wrong and the harm of rape that emphasise the trauma of the victim. Consequently, accounts that emphasise the subjective horror and trauma associated with rape in order to explain the wrong of rape will struggle to explain why rape is wrong in such instances.<sup>22</sup>

Perhaps a more important reason why critics have had difficulties with the idea of rape by deception is the concern that it will allow too much 'ordinary' sex to count as rape.<sup>23</sup> Minor deceptions, especially concerning the appearance or emotional commitments of the participants, are all too common in sex and romance.<sup>24</sup> Yet it seems hard to rule out the possibility that any matter about which a sexual partner was deceived might, in fact, have been material to their decision to have sex: attempts to determine what sorts of features of persons, or beliefs about them, should be held to be relevant to the validity of consent will inevitably be controversial.<sup>25</sup>

It is little wonder, then, that different jurisdictions respond differently to deception in the context of consent to sexual penetration. However, a number of jurisdictions distinguish between deception with regards to the nature of the act ('fraud in the *factum*') and deception related to the circumstances that lead an individual to consent to sex ('fraud in the inducement')<sup>26</sup> and insist that only fraud in the *factum* vitiates consent.<sup>27</sup>

Yet as Wertheimer and Rubenfeld, among others, have argued, this distinction is hard to maintain: it is even harder to defend its moral significance.<sup>28</sup> Before we can determine whether deception relates to the nature of the act or the inducement, we must first decide on the proper way of describing the act (Is it 'penetration'? Or 'sexual intercourse'? Or 'sexual intercourse with someone who is the first violinist in an orchestra'?). There is a very real risk that contestable moral judgements will be introduced surreptitiously in the course of this process.<sup>29</sup> Even in those cases where a person consents to penetration by a medical instrument but is in fact penetrated with a penis, or consents to an act without understanding that it constitutes sexual penetration – which are supposedly the paradigm cases of deception regarding the *factum* – the victim consents to 'penetration of the vagina' (or anus), which suggests that they are deceived about the reason for this penetration rather than the fact of it. While some courts have ruled that the only question relevant to whether there was deception in the *factum* is whether the victim of an alleged rape consented 'to sex', it seems implausible that the identity of the person with whom one is having sex is not part of the description of the act to which we consent when we consent to sex, except in very specific circumstances.<sup>30</sup> Finally, deception regarding the inducement to sex is just as deleterious to autonomy as deception about the nature of the act.<sup>31</sup> In the law of contract, for instance, as well as in a number of other contexts wherein consent is crucial, deceptions regarding inducements are acknowledged as invalidating what would

otherwise be consent.<sup>32</sup> In what follows, I will assume that at least some cases in which people are subject to sexual penetration without consent as a result of deception are properly thought of as rape. The question of precisely which sorts of deception vitiate consent is beyond the scope of this article: my purpose here is to investigate if it matters whether someone penetrates herself or himself as a result of deception or is penetrated by (or penetrates) someone else.

### 3. Masturbation and Deception: Some Preliminaries

As I observed at the outset of my discussion, at least one jurisdiction already recognises cases of coerced self-penetration as rape.<sup>33</sup> However, the legal and philosophical literature has paid little attention to cases wherein people are induced by deception to penetrate themselves. In the next section (Section 4), I provide some hypothetical examples where people are brought to penetrate themselves as a result of deception and set out the *prima facie* case that at least some of these should count as rape. In this section, I deal with some necessary preliminaries in order to prevent various possible misunderstandings and to head off various (misconceived) objections.

Where someone is voluntarily engaged in sexually penetrating herself or himself, it seems appropriate to describe this as a form of masturbation. Moreover, as we shall see, many (but not all) of the plausible scenarios in which someone is brought by deception to penetrate herself or himself involve the person doing so while understanding that they are masturbating. Whether the distinction between sex crimes involving penetration and non-penetrative forms of sexual assault has normative significance is, however, contested. Some have argued that non-consensual sexual penetration is just one form of sexual assault, which should be understood to constitute the fundamental moral wrong, with penetration perhaps being a factor in determining the harm associated with the wrong.<sup>34</sup> Consequently, some jurisdictions have removed all references to rape in legislation relating to sexual offences and replaced them with the crime of sexual assault,<sup>35</sup> with assaults involving sexual penetration sometimes being singled out for harsher punishment.<sup>36</sup> As shall become obvious in the discussion that follows, the moral significance of the distinction between penetrative and non-penetrative sexual activity is even harder to discern when the act is performed by the individual who is assaulted. However, it is important to be clear that, in setting out the *prima facie* case for masturbation by deception being rape, I am concerned solely with masturbation that involves penetration, so as to maintain the connection to a definition of rape as non-consensual sexual penetration. In the scenarios that I will consider, the act that takes place would ordinarily be counted as rape if another person had done it to the victim without their consent.<sup>37</sup>

For the reasons outlined earlier, I am sceptical about the coherence, let alone the significance, of the distinction between fraud in the *factum* and fraud in the inducement. However, it will assist in the discussion that follows to structure my treatment of deception in the context of masturbation according to this distinction. That way, those who find the distinction compelling may focus their attention on the argument about rape-by-compelling-masturbation-by-deception in the context of cases that clearly involve fraud in the *factum*, whilst those who deny the significance of the distinction should be able to easily highlight relevant analogies between what others insist are two separate classes of case. I will therefore begin, in the next section, with cases where people are deceived about the fact that they are

masturbating before proceeding to discuss cases where individuals are knowingly masturbating but as the result of deception.

In setting out the cases below, I concentrate on the *actus reus* of rape and assume that, in each case, the *mens rea* of rape is present. Where Person A deliberately deceives Person B in order to bring it about that Person B penetrates themselves, this is strong *prima facie* evidence that Person A does not believe (and therefore does not possess a reasonable belief) that Person B would consent to penetration in the absence of the deception.

Finally, although I will go on, in Section 5, to note that talk of consent risks seeming somewhat out of place in the context of discussion of masturbation, in my initial setting out of some scenarios in which it is plausible to think that masturbation is compelled by deception, I will suggest that it is plausible to describe the (penetrative) masturbation as occurring ‘without consent’. Again, I do so in order to maintain the link to a definition of rape as sexual penetration without consent.

#### 4. Masturbation and Deception: Cases

It is admittedly difficult to come up with a scenario in which someone engages in self-penetration because of fraud in the *factum*. Nevertheless, it is not impossible. Consider:

##### ‘Misunderstanding’

A sexually naïve woman is maliciously instructed by her doctor to insert what she believes to be a medical instrument, but is in fact a vibrator, into her vagina for the purpose of ‘clearing her airways,’ which she does *without understanding the sexual nature of the act*.

In such a case, it might be said that the woman penetrates herself without consenting to sexual penetration. This intuition might be strengthened were the woman to insist that, for instance, because of her religious beliefs, she never would have penetrated herself had she understood the nature of the object with which she was penetrating herself or if she had understood that the act would result in her experiencing sexual pleasure.

While the woman in the scenario above is deceived about the nature of the act which she performs, an external observer might nevertheless insist that there is a sense in which the act that she performs is indeed the same act that she was instructed to perform, even if her action was rendered heteronomous because of her misunderstanding of its nature. A second, slightly more elaborate, hypothetical involves a woman who is induced to penetrate herself in the context of masturbation when she ‘consented’ to sexual intercourse. Imagine:

##### ‘Sex doll’

A couple enjoy an unusual sexual practice. Every Saturday night they book a hotel room in town. The man arrives first, dresses himself in a leather bodysuit and facemask and lies down on his back in the bed in semidarkness, motionless, with his erect penis protruding from his clothing. The woman then enters the room and takes his penis into her vagina without speaking. Their aim, which they sometimes achieve, is that he should remain silent and motionless throughout while she brings herself to orgasm.

One Saturday night, the hotel concierge detains the man against his will and places a realistic latex sex doll dressed in the same costume, and with an erect prosthetic penis, on the bed on which the man usually lies. The woman enters the room and, without becoming aware of the substitution, takes the prosthetic penis into her vagina. She would not knowingly have consented to penetrate herself in this way had she known it was a sex doll and not her partner.

The first thing to observe in relation to this scenario is that although we might speak loosely of the woman 'having sex with' the sex doll as a result of the deception, it seems more accurate to say that she is brought to penetrate herself in the context of masturbation with a sex doll. Where there is only one person involved, as here, we have masturbation rather than sex. Denying this when it comes to sexual interactions with sex dolls is likely to lead to implausible conclusions when it comes to acts of penetration involving other sex toys such as dildos or male masturbation aids. We would not, for instance, typically think that it was appropriate to ask a sex toy for 'consent' before having sex with it.<sup>38</sup> Nor would most people hold that having used such devices meant that one had 'had sex' and therefore was not a virgin.

A second observation is that in the converse case, wherein a woman enjoyed masturbating with a sex doll and a man substituted himself for that doll without her knowledge, this would be a clear case of rape by deception. In such a case, the woman would experience sexual penetration, in the context of intercourse, without her consent.

A third observation, which follows from the second, is that, in both the original and the converse case, the deception plausibly involves the nature of the act rather than the inducement to penetration. Sexual intercourse and masturbation appear to be different 'acts'. Thus, in this case it seems clear that the fraud concerns the *factum* rather than the inducement to sex.

In contrast to cases involving fraud *in the factum*, cases that involve (what those who find the distinction compelling call) fraud in the inducement are easy to generate. I will offer two sorts of cases, which are homologous with cases in the larger literature on rape by deception.

First, there are cases where a person is deceived about the identity of another individual when this is material to their decision to penetrate themselves. Thus, we might imagine:

#### **'Impersonation'**

A man breaks into a woman's house and, while impersonating her spouse, encourages her to insert a dildo into her vagina, which she does believing that she is doing this for the pleasure of her husband. She would not have consented to penetrate herself at the request of another man.

A second sort of cases involve deception about other matters that are material to the deceived person's decision to penetrate herself or himself in the context of masturbation. We might, for instance, imagine:

#### **'Counterfeit currency'**

A man pays a sex worker with counterfeit currency to penetrate herself, which she does believing – and only because she believes that – he has paid her to do so.

Insofar as it might be held that the ethics of sexual deception is different in the context of prostitution as opposed to non-commercial sexual encounters, it may also be useful to consider another of this sort of case:

**‘Cad’**

A woman meets a man in a bar. He tells her that he is the First Violinist in a famous orchestra that is currently touring the city in which the bar is located. After spending the evening talking about the music that they ‘both’ love, they go home together, whereupon the man asks the woman to penetrate herself, insisting that because he is married he is unwilling to have intercourse with her, which she does. She would not have penetrated herself had she known that the man was neither a musician nor married.

We might insist that, in such a scenario, the woman has been caused to penetrate herself without consent and has therefore been raped by deception.

None of these cases is that far-fetched, although one imagines that they are also not all that common. However, there are related cases that are actually, one suspects, fairly common, wherein the use of telecommunications technologies means that self-penetration is the only sort of penetration possible and also serves to make deception easier.<sup>39</sup>

I take this series of cases to establish both that compelling masturbation by deception is possible and that there is at least a *prima facie* case that some of these instances constitute rape.<sup>40</sup> If only fraud in the *factum* vitiates consent then only the first two cases will involve sexual penetration without consent. If fraud in the inducement – or at least particularly egregious instances thereof – can vitiate consent, then in all of these cases we may have sexual penetration without consent.

## 5. Masturbation and Consent

Although, as I have argued, there is a *prima facie* case that rape by compelling penetration by deception is possible, it must also be admitted that such cases seem to be even more puzzling and controversial than rape by deception involving sexual intercourse. A part of the reluctance to countenance penetrative masturbation as a result of deception as rape derives, I believe, from the difficulties involved in thinking about consent in the context of masturbation.

Even in case of coerced masturbation, it is slightly awkward to say that the victim does not consent to sexual penetration, despite it being clear both that the victim penetrates themselves against their will and that they are not acting autonomously when they penetrate themselves. When someone penetrates herself or himself as a result of deception, it is even less clear that she or he has done so without consenting to do so. We would not normally look for consent when someone masturbates because we typically think of consent as something that one person provides to actions performed by another.<sup>41</sup> This is especially the case if we adopt a communicative model of consent wherein we understand consent to require a clear communication of a moral permission to someone who intends to do something that would otherwise be morally impermissible.<sup>42</sup> In ordinary circumstances, when someone wishes to masturbate, we do not expect her or him to vocalise – or otherwise clearly indicate – their permission to themselves to do so before they



masturbate. Even if we adopt a subjective theory of consent, such that we understand consent to involve some sort of mental attitude towards – typically an endorsement of – the act to which the individual is consenting,<sup>43</sup> we usually understand consent as something that one person provides to another when they authorise them to perform a specific action. Although, presumably, when people masturbate, they usually genuinely desire to do so, it strains credulity to say that they ‘authorise themselves’ to do so.

If, therefore, we wish to understand masturbation as a result of deception as rape, then perhaps we should admit that talk of consent in this context is a term of art and reflects our judgement that the actions of those who compel penetration are morally wrong rather than an explanation as to why it is morally wrong.<sup>44</sup> Alternatively, we might focus on the fact that in such cases the victims are brought to penetrate themselves ‘against their will’ rather than ‘without consent’. This will, in turn, place pressure on the definition of rape as ‘sexual penetration without consent’ and lend support to accounts that emphasise sexual autonomy as playing a key role in determining what is and is not rape.

## 6. Rubenfeld, Rape, and Self-Possession

One reason, then, to think that the phenomenon of compelling masturbation by deception deserves more attention than it has yet received relates to the opportunity it provides to think about larger questions about the significance of consent in the context of a broader range of sexual activity than is usually considered. However, even if we grant that in some of the cases discussed earlier sexual penetration occurs without consent, it is difficult not to wonder if cases of compelled masturbation involve assaults of the same gravity as cases of rape by deception involving intercourse. Especially in the absence of force, being brought to penetrate oneself does not seem to involve the same assault on the bodily integrity of the victim as does penetration by another party.<sup>45</sup>

In a controversial paper, Jed Rubenfeld argues that the US law’s failure to treat all instances wherein ‘consent’ to sex was secured by deception as rape demonstrates the inadequacy of sexual autonomy as a foundation for rape law.<sup>46</sup> Rubenfeld’s paper – and especially his arguments that we should return a ‘force requirement’ to the centre of our account of rape – has been subjected to extensive and trenchant criticism,<sup>47</sup> much of which, as I will discuss further below, I am entirely in agreement with. In keeping with my policy of agnosticism on the question of when, precisely, deception vitiates consent, I do not wish to engage with Rubenfeld’s claim that rape by deception is not really rape, although it should be clear from the preceding sections of argument that I do not share his belief. Rather, it is his suggestion that the right that rape infringes is, what he calls, the ‘right to self-possession’, rather than any right to sexual autonomy, which I wish to consider and that, I believe, might point us towards a productive way of understanding the precise nature of masturbation compelled by deception.

Rubenfeld introduces the right of self-possession with reference to the wrong involved in slavery and torture. In both these crimes, he argues, ‘another individual becomes master of the victim’s body’.<sup>48</sup> This violates a right to bodily self-possession that, according to Rubenfeld, ‘is central to our selfhood and intimately connected to dignity’.<sup>49</sup> Rubenfeld suggests that rape is also best conceived of as a violation of the same nature. In cases of rape, according to Rubenfeld, the ‘victim’s body is taken over, invaded, occupied, taken control of – taken possession of – in a fashion and to a degree not present in ordinary acts

of theft, robbery, assault, and so on'.<sup>50</sup> As a result, 'Rape victims suffer, against their will, the condition of belonging bodily to someone else, of having their bodies possessed by someone else'.<sup>51</sup>

Rubinfeld's belief that we should understand rape by analogy with slavery or torture leads him to the self-avowedly controversial conclusion that 'Only sex coerced through bodily violence wrests from the victim her fundamental bodily self-possession – and is therefore rape'.<sup>52</sup> According to Rubinfeld, therefore, in the absence of force or the threat of force, there is no rape.

I concur with Rubinfeld's critics that the reintroduction of a force requirement into the definition of rape would be disastrous because it would leave the vast majority of the victims of sexual coercion without adequate legal recognition of their experience of non-consensual sex. As a proposal for rape-law reform, then, Rubinfeld's position is a non-starter.

However, I can see no reason why we could not think of the right to self-possession as being violated whenever anyone engages in sexual penetration with another individual without that individual's consent (or brings an individual, 'C', to engage in sexual penetration with another individual, 'B', without B's consent) including in cases wherein consent is vitiated by deception. We remain in possession of ourselves when we have the power to control our bodies and, in particular, to exclude the bodies of others from intermingling with our own. Our right to self-possession is violated – we are 'possessed' by another – when the body of another penetrates (or is penetrated by)<sup>53</sup> our own without our consent, whether as a result of force, coercion, our being unconscious, or deception.

To be sure, Rubinfeld denies that deception can impinge on self-possession, stating, 'Sex-by-deception, without more, would never be rape on a right-to-self-possession view'.<sup>54</sup> Yet Rubinfeld himself admits that his insistence that rape requires the presence, or threat, of force has the implication that sex with an unconscious person is not rape. This seems implausible: it ignores the extent to which the body of an unconscious victim is possessed by the rapist. Indeed, insofar as an unconscious victim is entirely at the mercy of their assailant, who is able to use the victim's body however the assailant desires, this would seem to be a paradigm case of a violation of the right to self-possession. Thus, *contra* Rubinfeld, considering the case of unconscious victims lends substantial weight to the idea that violations of the right to self-possession may occur in the absence of force.

It might seem that, by emphasising consent, this revised account of the right to self-possession collapses into the idea of sexual autonomy. In ordinary cases, it does. That is to say, when a rapist has intercourse with his victim without consent, whether as a consequence of force, coercion, or deception, then he violates her right to self-possession: we might say that he 'possesses her'. This possession is a physical – a bodily – act: the victim loses control of her bodily boundaries and is brought into intimate contact with the body of another against her will. However, importantly, in cases when people are brought to penetrate themselves, then, although the will of the victim is bent to the will of the person who compels the penetration by deception (or even by coercion), the victim remains in possession of their own body. The right to self-possession is not violated when someone penetrates herself or himself, even if they do so against her or his will, because the body of another party is not implicated in the act.

Accounts of the nature and wrong of rape that emphasise the transgression of bodily boundaries that occurs in sexual penetration lend weight to the idea that the threat to self-possession occurs as a result of the involvement of the body of the rapist (or their

proxy) in rape. The same set of intuitions that implies that the violation of bodily integrity involved in penetration is especially profound<sup>55</sup> also suggests that such violations are more egregious when they consist in the body of another person penetrating (or being penetrated by) the victim's body. Conversely, it is much harder to see that the distinction between a sexual assault that involves penetration and a sexual assault that does not is morally significant when the victim is not subjected to the imposition of the body of another party. Thus, for instance, the wrong involved in bringing a man to masturbate as a result of deception does not seem any less than that involved in bringing a woman to masturbate by deception, even if the latter's masturbation involves penetration while the former's masturbation does not. Although it is less obvious, it is nevertheless also plausible to think that there is no difference in the wrong involved in coerced penetrative and non-penetrative masturbation.

## 7. An Objection: Sexual Assaults Involving Objects?

Insofar as it emphasises the role of bodily intermingling in the wrong of rape, the account I have developed here would seem to imply that sexual assaults wherein the victim is penetrated by an object wielded by another person constitute lesser wrongs than sexual assaults (rapes) involving penetration by a bodily part of another person. It also seems to imply that coerced self-penetration with an object is not rape. Both these implications seem problematic. Even though some jurisdictions have insisted that rape must be performed with the penis (or at least with a part of the rapist's body), as noted earlier, many jurisdictions now allow that sexual penetrations by objects may also count as rapes.

However, there are two ways in which these observations can be at least be partially reconciled with the account I have been countenancing here. We might simply insist that sexual assaults involving objects are often especially brutal and physically traumatic for the victim and so deserve to be condemned especially strongly, even though the violation of bodily autonomy involved is technically less intrusive than in cases where a rape involves the body of the rapist. That is, we might say that in such cases the wrong of the assault is magnified by its harm. Alternatively, in the case of forcible penetrations by objects wielded by another person, we could claim that objects held by an assailant should be treated as a part of the assailant's body insofar as they serve as an extension of that body. There is some precedent for this in the way people understand prosthetics, for instance.<sup>56</sup> In such cases, we might insist that the rapist takes possession of the victim's body using an object: for this to be plausible, the rapist must be wielding the object. This would explain why forcible sexual penetrations committed with objects violate the victim's right to self-possession but would still concede that coercing someone to penetrate herself or himself with an object is less wrong than coercing them to have intercourse. It seems likely that this latter approach might therefore need to be supplemented by the former if we wish to continue to identify coerced self-penetrations with objects as equally wrong as coerced intercourse.

## 8. Conclusion

If rape is sexual penetration without consent, and we allow that deception may sometimes vitiate consent then, *prima facie*, cases where individuals are brought to engage in

penetrative masturbation as a result of deception should sometimes be recognised to be rape. This may well be an implication that we should accept. However, it is also worth noticing that there is little discussion of this possibility in the literature and few prosecutions for rape of this sort of which I am aware.

Yet, as I have observed here, there are at least two reasons why, I believe, many people will resist the implication that cases of penetrative masturbation compelled by deception are rape. First, there is a certain amount of difficulty involved in describing masturbation as occurring ‘without consent’: it may be, though, that such cases do not differ fundamentally from other cases wherein individuals make voluntary choices under duress. Second, when people are brought, via deception, to penetrate themselves, it is difficult to understand this as involving the same sort of violation of their bodily integrity as assaults by other people.

I have therefore developed an alternative account of rape as a violation of the right to self-possession, which occurs when people are brought to engage in a bodily intermingling against their will via sexual penetration. This generates the intuitively plausible result that cases of masturbation as a result of deception will not count as rape – although they may still constitute sexual assaults. When a person penetrates herself or himself, there is no violation of the right to self-possession. This has the unsettling implication that cases of coerced self-penetration, including, perhaps, even with objects, will also not count as rape. However, I believe that it speaks in favour of this account that it also suggests – although it does not strictly imply – that the fact of penetration is of less importance in the context of compelled masturbation and that bringing a person, via coercion or deception, to masturbate without penetration should be considered no less morally wrong than bringing it about that they penetrate themselves.

When considering the phenomenon of masturbation compelled by deception, it seems that we must choose between the current consensus account of rape as sexual penetration without consent, in which case (penetrative) masturbation compelled by deception should count as rape, or the revised account I have developed here, which avoids this conclusion at the cost of also excluding coerced self-penetrations from the definition of rape. I am, myself, equivocal about the relative merits of these two options. While it is difficult to countenance that cases of masturbation compelled by deception are crimes of the same magnitude as other sorts of rape, there are both philosophical and political reasons to be cautious about changing our account of rape, especially given that the cost of doing so may be to exclude coerced self-penetrations involving objects from the definition of rape. I will leave it to the reader to decide which way she or he prefers to go here. Either way, however, I hope that the investigation has highlighted the potential of thinking about the phenomenon of masturbation compelled by deception to contribute to our philosophical understanding of the nature of rape and, in particular, of rape by deception.

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## NOTES

- 1 Estrich, Susan. 1986. "Rape." *Yale Law Journal* 95(6): 1087–184.
- 2 Archard, David. 2007. "The Wrong of Rape." *Philosophical Quarterly* 57(228): 374–93; West, Robin. 2010. "Sex, Law, and Consent." In *The Ethics of Consent: Theory and Practice*, edited by Franklin G. Miller and Alan Wertheimer, 221–50. New York: Oxford University Press; FBI. "Frequently Asked Questions about the Change in UCR Definition of Rape." <https://ucr.fbi.gov/recent-program.../new-rape-definition-frequently-asked-questions>. Accessed 15 January 2022.
- 3 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ss. 1–4 (S. Afr.); Crimes Act 1958 (Vic) ss 39–48 (Austl.); Tenn. Code Ann. § 39-13-501 (2017); Wash. Rev. Code § 9A.44.010 (2002).
- 4 Lov om Straff (Straffeloven) [Criminal Law (Sexual Offences and Related Matters) Amendment Act] 20. May 2001 nr. 28 §291(c) (Nor.); Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 s. 4 (S. Afr.); Crimes Act 1958 (Vic) ss 39–48 (Austl.).
- 5 Lov om Straff (Straffeloven) [Criminal Law (Sexual Offences and Related Matters) Amendment Act] 20. May 2001 nr. 28 §291(c) (Nor.); Crimes Act 1958 (Vic) ss 39–48 (Austl.). South African law criminalises compelled self-sexual penetration as 'Compelled self-sexual assault'. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 s. 7 (S. Afr.).
- 6 Falk, Patricia J. 1998. "Rape by Fraud and Rape by Coercion." *Brooklyn Law Review* 64(1): 39–180; Feinberg, Joel. 1986. "'Victims' Excuses: The Case of Fraudulently Procured Consent." *Ethics* 96(2): 330–45.
- 7 The closest thing to a consideration of this question that I have been able to locate is a discussion of the UK cases of *R. v Devonald* [2008] EWCA Crim. 527 and *R v. Bingham* [2013] EWCA Crim 823, 2 Crim. App. 29. See, for instance, Rook, Peter, and Robert Ward. 2016. *Rook and Ward on Sexual Offences: Law & Practice*, 5th ed. London: Sweet and Maxwell, 1.321. However, because the UK Sexual Offences Act (2003) (Section 4) criminalises cases of compelled self-penetration as 'Causing a person to engage in sexual activity without consent', the question whether bringing someone to penetrate themselves by deception constitutes rape does not arise in this literature.
- 8 It has proved remarkably difficult even to find a term to describe the phenomenon that interests me in this article. Talk of 'compelling masturbation by deception' risks the objection that compulsion and deception are different acts. Yet 'causing masturbation by deception' risks the objection that the person responsible for the deception does not strictly speaking cause the masturbation, while 'bringing about masturbation by deception' is arguably too insipid as a description of the nature of the wrong. As the jurisdiction with which I am most familiar criminalises rape by self-penetration as 'rape by compelling penetration', I have chosen to use 'rape by compelling penetration by deception' to describe cases wherein a person is brought by deception to sexually penetrate themselves.
- 9 Larson, Jane E. 1993. "Women Understand so Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction." *Columbia Law Review* 93(2): 374–472; Yung, Corey Rayburn. 2015. "Rape Law Fundamentals." *Yale Journal of Law and Feminism* 27(1): 1–46, p. 38.
- 10 Rubinfeld, Jed. 2013. "The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy." *Yale Law Journal* 122: 1372–443.
- 11 This section of the article follows closely a similar discussion in Sparrow, Robert, and Lauren Karas. 2020. "Teledildonics and Rape by Deception." *Law, Innovation, and Technology* 12(1): 175–204.
- 12 Chamallas, Martha. 1988. "Consent, Equality, and the Legal Control of Sexual Conduct." *Southern California Law Review* 61(4): 777–862, p. 814; Feinberg op. cit.; Larson op. cit., p. 420.
- 13 Boyce, Ronald N., Donald A. Dripps, and Rollin M. Perkins. 2016. *Criminal Law and Procedure: Cases and Materials*, 13th ed. New York: Foundation Press, p. 311; Falk op. cit., pp. 53–4.

- 14 R v. Williams [1923] 1 K.B. 340 (H.L.).
- 15 Herring, Jonathan. 2005. "Mistaken Sex." *Criminal Law Review* July: 511–24, p. 512.
- 16 Falk op. cit., n. 28; Kleinig, John. 2010 "The Nature of Consent." In *The Ethics of Consent: Theory and Practice*, edited by Frankling G. Miller and Alan Wertheimer, 3–24. New York: Oxford University Press, p. 17.
- 17 Puttkammer, Ernst Wilfred. 1924. "Consent in Rape." *Illinois Law Review* 19: 410–28, p. 422. R v. Linekar, [1995] Q.B. 250 (C.C.A.) determined that this does *not* constitute rape under British law.
- 18 For some discussion of recent Canadian case law, see Gotell, Lise, and Isabel Grant. 2020. "Does 'No, Not Without a Condom' Mean 'Yes, Even Without a Condom'? The Fallout from R v Hutchinson." *Dalhousie Law Journal* 43(2): 767–92.
- 19 CrimC (Jer) 561/08 State of Israel v Kashour [2010]. For discussion, see Gross, Aeyal. 2015. "Rape by Deception and the Policing of Gender and Nationality Borders." *Tulane Journal of Law and Sexuality* 24: 11–21.
- 20 Herring op. cit.
- 21 McJunkin, Ben A. 2014. "Deconstructing Rape by Fraud." *Columbia Journal of Gender and Law* 28(1): 1–47, p. 3.
- 22 In absence of a premise about the psychological impacts of the experience of sexual penetration, it might seem that we have no way of explaining the distinctive wrong of rape as opposed to other forms of battery or infringements of autonomy. For proposed solutions, see Wertheimer, Alan. 2003. *Consent to Sexual Relations*. Cambridge: Cambridge University Press, pp. 89–118, and McGregor, Joan. 2005. *Is It Rape? On Acquaintance Rape and Taking Women's Consent Seriously*. Aldershot, UK: Ashgate, pp. 219–42.
- 23 Berger, Vivian. 1988. "Review Essay/Not So Simple Rape." *Criminal Justice Ethics* 7(1): 69–81, p. 77; Bergelson, Vera. 2016. "Sex, Lies and Law: Rethinking Rape-by-Fraud." In *Legal Perspectives on State Power: Consent and Control*, edited by Chris Ashford, Alan Reed, and Nicola Wake, 152–84. Newcastle upon Tyne: Cambridge Scholars, pp. 166–67.
- 24 Buss, Sarah. 2005. "Valuing Autonomy and Respecting Persons: Manipulation, Seduction, and the Basis of Moral Constraints." *Ethics* 115(2): 195–235, pp. 220–22.
- 25 Dougherty, Tom. 2013. "Sex, Lies, and Consent." *Ethics* 123(4): 717–44, p. 730.
- 26 Green, Stuart. 2015. "Lies, Rape, and Statutory Rape." In *Law and Lies: Deception and Truth Telling in the American Legal System*, edited by Austin Sarat, 194–253. New York: Cambridge University Press, pp. 197–200.
- 27 Bergelson op. cit., pp. 154–55; Dressler, Joshua. 2015. *Understanding Criminal Law*, 7th ed. New Providence, RI: Lexis Nexis, p. 590.
- 28 Wertheimer op. cit.; Rubinfeld op. cit.; Kleinig op. cit., p. 17; McGregor op. cit., pp. 181–90.
- 29 Feinberg op. cit., p. 335; McJunkin op. cit., pp. 9–14.
- 30 For instance, at a masked sex party: Kleinig op. cit.; Hurd, Heidi M. 1996. "The Moral Magic of Consent." *Legal Theory* 2(2): 121–46, p. 146; Tuerkheimer, Deborah. 2013. "Sex Without Consent." *Yale Law Journal Online* 123: 335–52, p. 347.
- 31 Bogart, John H. 1991. "On the Nature of Rape." *Public Affairs Quarterly* 5(2): 117–36, p. 125; Dougherty op. cit.; Herring op. cit.
- 32 Estrich op. cit., p. 1120; Falk op. cit., pp. 154–55; Harris, Lucy Reed. 1976. "Towards a Consent Standard in the Law of Rape." *University of Chicago Law Review* 43(3): 613–45, p. 639.
- 33 Crimes Act 1958 (Vic) s 41 (Austl.). A number of other jurisdictions classify coerced self-penetrations as grave sexual assaults. The UK Sexual Offences Act (2003) criminalises 'Causing a person to engage in sexual activity without consent'. Where the sexual activity involves sexual *penetration*, perpetrators are 'liable, on conviction on indictment, to imprisonment for life' (§ 4). South African law classifies such cases as 'compelled self-sexual assault'. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 s. 7 (S. Afr.). Some US Courts have also allowed that cases of coerced self-penetration should be adduced to cases of coerced penetration more generally. See, for instance, *People v. Keeney* 29 Cal. Rptr. 2d 451 (Ct. App. 1994) and *State v. Green*, 746 S.E.2d 457 (N.C. 2013). My thanks to Sarah Deibler for drawing my attention to the US case law.
- 34 Brownmiller, Susan. 2013. *Against Our Will: Men, Women and Rape*. New York: Simon and Schuster; Schulhofer, Stephen J. 1992. "Taking Sexual Autonomy Seriously: Rape Law and Beyond." *Law and Philosophy* 11(1): 35–94, at p. 39.
- 35 Conn. Gen. Stat. § 53a-65-73a (2015); Haw. Rev. Stat. § 707-700 (2017); Ill. Crim. Code 720 Ill. Comp. Stat. 5/11-1.20 through 1.60 (2012); Crimes Act 1900 (NSW) ss 61-80 (Austl.).
- 36 Alaska Stat. § 11.41.410-427 (2016) and Haw. Rev. Stat. § 707-730 through 733 (2017).

- 37 Focusing on penetrative masturbation renders an account of the ethics of compelling masturbation by deception gendered in ways that are themselves arguably of significant philosophical interest. Some men do penetrate themselves digitally or with an object in pursuit of sexual pleasure, but most male masturbation does not involve sexual penetration. Women are more likely to penetrate themselves, digitally, or with a dildo or vibrator, when masturbating than are men, especially when they are masturbating at the suggestion of men or for the male gaze. This gendered difference in sexual practices means that, if only *penetrative* masturbation counts as rape, women are significantly more likely to be victims of rape-by-compelling-masturbation-by-deception than are men. When men are tricked into masturbating, the question of rape will typically not arise because there will be no sexual penetration involved. Whether it makes sense to distinguish the wrongs or harms involved in penetrative and non-penetrative masturbation in this way will be considered in Section 6 below.
- 38 Sparrow, Robert. 2017. "Robots, Rape, and Representation." *International Journal of Social Robotics* 9(4): 465–77.
- 39 See, for instance: *R. v Devonald* [2008] EWCA Crim. 527; *R v. Jheeta* [2007] EWCA Crim 1699, 1 WLR 2582; and DH (Hi) 12-54901-03 *State of Israel v. Danino* (May 7, 2012), Nevo Legal Database. I owe the latter citation to Gross op. cit. pp. 12–3. My attention was drawn to the possibility of rape-by-compelling-masturbation-by-deception while I was working on a manuscript on internet-enabled sex toys. When sexual partners are separated in space, the possibilities for deception, including deception about the nature of the act, multiply enormously. See Sparrow and Karas op. cit.
- 40 It might be objected that it is the (implied) presence of the other party in the scenario and the violation of a right to (sexual) privacy that this involves that is driving our intuitions that these cases constitute serious rights violations. However, the sexual penetration as a result of deception that occurs in the course of masturbation in these scenarios seems to be no less morally problematic if the masturbation occurs in a different location to the deceiver or even without their knowledge.
- 41 Yung op. cit., pp. 32–3.
- 42 Kleinig op. cit., p. 10; McGregor op. cit., pp. 125–31; Schulhofer, Stephen J. *Unwanted Sex: The Culture of Intimidation and the Failure of Law*. Cambridge, MA: Harvard University Press, pp. 271, 280.
- 43 Hurd op. cit., pp. 123–24; Alexander, Larry. 1996. "The Moral Magic of Consent (II)." *Legal Theory* 2(3): 165–74; Westen, Peter. 2004. *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct*. Burlington, VT: Ashgate, pp. 27–31.
- 44 Wertheimer op. cit., p. 3.
- 45 In writing about offences against the person, it is difficult to avoid relying on intuitions about the relative harms caused by various forms of assault. Such speculation, involving as it does generalising on the basis of the experience of one person, should be treated with suspicion. If we are interested in the harm that results from assaults, we should survey and defer to those who have experienced them: we should also acknowledge that different people respond to similar events in very different ways. Nevertheless, as I have already noted, it is particularly obvious in relation to rape by deception, observations about the harm of rape do not necessarily settle the question of the extent of the wrong involved. Deliberation about the wrong of rape will inevitably involve reference to intuitions about the moral rights of individuals and relative extent to which different sorts of trespasses infringe upon those rights.
- 46 Rubenfeld op. cit.
- 47 Dougherty, Tom. 2013–2014. "No Way Around Consent: A Reply to Rubenfeld on Rape-by-Deception." *Yale Law Journal Forum* 123: 321–33; Falk, Patricia J. 2013. "Not Logic, but Experience: Drawing on Lessons from the Real World in Thinking about the Riddle of Rape-by-Fraud." *Yale Law Journal* 123: 353–70; Yung op. cit.
- 48 Rubenfeld op. cit., pp. 1426–27.
- 49 Rubenfeld op. cit., p. 1426.
- 50 Rubenfeld op. cit., p. 1426.
- 51 Rubenfeld op. cit., p. 1430.
- 52 Rubenfeld op. cit., p. 1436.
- 53 Self-possession is infringed whenever a person's body is made to intermingle with the body of another, via sexual penetration, without their consent, and thus a person's right to self-possession is violated when they are brought to penetrate someone without their consent as much as when they are penetrated without consent. For an extended argument that the wrong involved in being brought to penetrate someone without consent is comparable to that involved in being penetrated without consent, see Weare, Siobhan. 2017. "'Oh You Are a Guy, How Could You Be Raped by a Woman, That Makes No Sense': Towards a Case for Legally

- Recognising and Labelling 'Forced-to-Penetrate' Cases as Rape." *International Journal of Law in Context* 14(1): 1–22.
- 54 Rubinfeld op. cit., n. 227.
- 55 Wertheimer op. cit., pp. 92, 106; West op cit., p. 227; Dworkin, Andrea. 1997. *Intercourse*. New York: Free Press Paperbacks, pp. 122–24; Cahill, Ann J. 2001. *Rethinking Rape*. Ithaca, NY: Cornell University Press, p. 11.
- 56 Brown, Bayard. 2013. "A Farewell to Arms (and Legs): The Legal Treatment of Artificial Limbs." *Columbia Journal of Law and Social Problems* 47(1): 69–102.