Rape by Fraud: A note to American readers

This is the first of two essays about sex by deception in sexual assault law. The first essay, attached here, addresses a Canadian legal audience. The second will intervene in American scholarly discourse about sex by deception. In both jurisdictions, legal commentators have widely—and rightly—embraced the feminist argument that we should jettison all force and resistance requirements in rape law. Instead, most rape law scholars agree that all sex without consent is, or should be, sexual assault. I agree.

Many U.S. and Canadian scholars, though, have derived from this premise a misguided conclusion that wanted-but-uninformed sex should be treated as a form of sexual assault. The idea is that, if sexual consent is deceived or uninformed about some important matter that might have changed a person’s mind, her sexual consent is invalid. Thus, these scholars contend, if a woman agrees to sex without knowing about some important circumstance that would have changed her mind, the otherwise-voluntary sexual encounter violates her sexual autonomy and should be treated as rape. (In general, these arguments proceed from an unexamined assumption that the deceivers are men, and the deceived are women.)

Neither Canada nor any U.S. state broadly criminalizes sex by deception. At common law in both countries, only two deceptions could vitiate sexual consent: tricking the complainant into believing that the touching is nonsexual, and tricking the complainant into believing that she is having sex with a different man. In Canada, the Supreme Court of Canada has recently taken several steps toward criminalizing a broader scope of uninformed sex (mainly, sex without disclosure of HIV). The attached essay explains why this development, which the Court and many jurists have hailed as a feminist intervention that protects gender equality and sexual autonomy, actually threatens both values.

Such a doctrinal development is unlikely in the U.S., as nearly every state retains force requirements that preclude treating voluntary-but-deceived sex as sexual assault. Nonetheless, a pair of 2013 articles by Jed Rubenfeld and Tom Dougherty has sparked a lively scholarly debate which, I argue, is missing a crucial distinction: deceived sex is not like coerced sex, and it is less serious.

Rubenfeld and Dougherty agree that, if we take seriously the argument that sex without consent is rape, uninformed sex is rape. Material deception vitiates consent, they argue, just as it arguably does in commercial contract. Dougherty and several other scholars argue, then, that deceived sex is a moral wrong akin to rape. Others, including

1 Known in the U.S. as “fraud in the factum.”
2 In Canada and the United Kingdom, impersonation vitiates sexual consent, without formal restrictions as to the complainant’s relationship to the man she thinks she is having sex with. In the U.S., the states that recognize impersonation as vitiating consent restrict it to husband impersonation.
3 I have argued against the criminalization of HIV nondisclosure in When is HIV a Crime? Sexuality, Gender and Consent, 99 MINN. L. REV. vol.4 (forthcoming, April 2015).
Susan Estrich, have argued that it should be punished as sexual assault. Rubenfeld notes that, since we as a polity do not seem willing to criminalize deceived sex, we must abandon the idea that rape law should protect sexual autonomy, and adopt a very robust force requirement instead.

This scholarly conversation, I argue, wrongly conflates deceived sex with coerced sex. The feminist rape law reformers (including Estrich) who argued that sex without consent was rape were not trying to establish a unified theory of consent that would apply to sex the same way it applied to commercial contract. Rather, these reformers aimed to abolish a traditional system of rape law rules and regulations that systematically subordinated women to men by authorizing men to use what we now see as reprehensible kinds of force and pressure to coerce women into sex they did not want.

If we consider the scope of sexual assault law in light of the core values that feminist rape law reform aimed to protect, we might resist the conflation of deceived with coerced sex. The core concerns of contemporary sexual assault law, I argue, are moral retribution, harm, gender equality, and sexual autonomy. Viewed in light of each of these concerns, sex by deception is distinct from sex by coercion, and it is less serious.

The kinds of deception that Estrich and most other commentators are most concerned about are coercive. As arguments for criminalizing deceived sex, they invoke cases involving accused who slipped a drug into a woman’s drink to incapacitate her; who pretended to be a security guard and demanded a strip search; or who made nonviolent threats, such as to expel a girl from high school or to return her to juvenile detention; and con men who pretended to be photographers, talent scouts or modeling agents to lure women to remote locations, where the women became afraid and submitted without a fight. But the wrongfulness of these acts is not deceit: it is coercion. They would be just as blameworthy if no deception was involved.

Nor do we need to prohibit deception in order to punish the traditional common-law deceptions as rape. Properly understood, rape-as-nonconsent encompasses both impersonation and therapeutic fraud. Consent to a medical procedure, or other nonsexual touching, is not consent to sex. Agreement to sex with one person is not consent to sex with another.

These deceptions are difficult to characterize as rape not because criminal law fails to punish deception, but because it fails to recognize many reprehensible forms of coercion that do not involve physical force. The solution is not to criminalize deception, which is tangential to this concern. It is to abolish the force requirement, and expand our understanding of the kinds of coercion that can vitiate sexual consent. In Canada, for example, statutory and doctrinal rules establish that no consent is obtained where the person is unconscious, or where s/he submits because of threats, subjective fear, or abuse of trust, power or authority. This framework should—but as the attached Essay demonstrates, does not reliably—allow sexual assault law to respond to nonforcible coercion.


6 Estrich, id.; Decker & Baroni, id.; Ben A. McJunkin, Deconstructing Rape by Fraud, 28 Colum. J. Gender & L. 1, 2 (2014).

7 It can also be coercive: where the accused pretends that sexual touching is a medical procedure, or pretends that it is therapeutically necessary, it is an abuse of authority.
The Canadian experience demonstrates that these reforms are necessary but not sufficient to safeguard the core values of sexual assault law. Gender stereotypes and conventional gender expectations pervade the interpretation and application of rape by fraud in Canada, and likely will continue to do so until gender equality and sexual autonomy are taken more seriously in the broader legal and social context. Meanwhile, deceived sex is at best a red herring. At worst, criminalizing deceived sex would invite the kind of gendered, heteronormative and racialized conception and enforcement that we see north of the border.

—Kim Buchanan