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Rape Law Fundamentals

Corey Rayburn Yung†

ABSTRACT: Modern American rape law is the product of historical contingencies, compromises, legislative inattention, successful reforms, and backlash. It is neither a puzzle to be solved nor a coherent system of rules and values. Perhaps the clearest lesson to draw from our criminal laws regarding sex is that there is little logic, reason, or consistency among them. As a result of its checkered past, myths and misunderstandings about rape law abound. Jed Rubenfeld’s recent article, The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy, exemplifies the confusion many courts, scholars, and members of the public have about modern rape law. Rubenfeld’s specific proposal to base rape statutes on a right to self-possession, because it is derived from mistaken premises about rape law, would likely make legal over ninety percent of rapes in America. By replacing the non-consent element of modern rape statutes with a narrow force requirement, Rubenfeld’s recommendation essentially decriminalizes non-stranger rape and rape by a victim’s intoxication.

In this Article, I examine the missteps Rubenfeld makes to explain why he ends up supporting such a disastrous conclusion. For example, Rubenfeld sees the need for his right to self-possession theory because he believes that autonomy is the sole basis that scholars offer for the foundation of rape law. However, rape is also properly supported as an independent offense by the nature and severity of harm caused, gender dynamics involved, and terror inflicted on the general population by widespread sexual violence. He also uses specious analogies and idiosyncratic conceptions of autonomy to establish the critical components of his argument.

Despite the faults of his specific claims, Rubenfeld points rape scholars in a worthwhile direction. Instead of seeking diminishing returns with statutory tinkering, there is much to be gained by focusing on the foundations of rape law. By better integrating the fundamental values that warrant robust rape laws (autonomy, gender, harm, and terror), the major problems of high rape prevalence, law enforcement failure, and political hostility to rape victims that plague America can be better addressed.

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INTRODUCTION

Jed Rubenfeld offers a provocative and confused article, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, that reimagines substantive rape law. Rubenfeld’s theory, based upon a right of self-possession, contends that “sex is rape whenever exacted through the kind of

1. Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372 (2013). A reader might think that my tone and rhetoric in the Introduction and throughout this Article are unduly harsh. Indeed, a reader might conclude that I have some personal animus toward Jed Rubenfeld. However, we have never met and have no personal connection of which I am aware. My choice to use strong language at times is, nonetheless, a conscious one. As I describe throughout the Article, I believe that Rubenfeld’s theory is genuinely dangerous. If put into effect, his theory might set back rape law over fifty years. The struggles of rape law reformers would have been for naught. And rape victims, who already face an uphill battle in the criminal justice system, would see their rapists prosecuted and convicted at far lower rates than today. I believe such a proposal needs to be confronted with clear, strong language indicating that his ideas should be considered as outside of the bounds of ordinary scholarly disagreement.

2. *Id.* at 1426-27 (“The best way to explain how self-possession can be violated is to observe two acts that paradigmatically do so: enslavement and torture. . . . In both cases, the victim’s body becomes—not metaphorically, but physically and actually—someone else’s possession. The same is true of rape.”).
force that turns labor into slavery: roughly speaking, physical incapacitation, whether through restraint or imprisonment, or serious physical assault (or the threat of either)."³ His conception of rape would, if codified, prevent prosecutions of the large majority of cases because it would remove the non-consent element from rape statutes and replace it with a heightened force requirement. Because force, particularly of the degree that Rubenfeld suggests be proven by prosecutors, is rarely present in such cases,⁴ the result of enacting Rubenfeld’s theory would be that rape statutes would no longer cover most cases involving non-stranger rapes, rapes by virtue of a victim’s intoxication, and rapes when victims are unconscious.⁵ Rubenfeld’s proposal would, thus, likely decriminalize over ninety percent of rapes in America because of the high prevalence of non-stranger rape and rarity of severe injuries to prove the requisite force was applied or threatened.⁶

Notably, Rubenfeld seems aware that his proposal would entail legalization of rape in such cases, but refers to such concerns as mere “uncomfortable

³. Id. at 1437.
⁴. See Michelle J. Anderson, Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims, 13 NEW CRIM. L. REV. 644, 645-46 (2010) (“The classic rape narrative is women from a racist and sexist mythology specific to American history. . . . Extrinsic, violent assaults by a stranger are the weft and warp of the tale: the rapist’s wielding of a knife, his dragging her into an alley, his beating, his threat of death. Despite generations of repeated storytelling, this type of rape is, in terms of actual incidence, a statistical outlier—so different from the norm as to be exceptional rather than typical.”). According to data from the Center for Disease Control, 51.1% of victims reported that they were raped by a current or former intimate partner and 40.8% reported being raped by an acquaintance. MICHÈLE C. BLACK et al., CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 21 (2011); see also infra Part II.A.
⁵. Regarding non-stranger rape fact patterns, Rubenfeld recognizes that “no” will no longer mean “no.” Rubenfeld, supra note 1, at 1440 (“Accordingly, absent physical restraint, overpowering, violence, or the threat of violence, rape as a violation of self-possession would fail to give ‘no’ the categorical rape-creating effect a consent-based conception might give it.”). For rape by voluntary intoxication of the victim, Rubenfeld is similarly sanguine. Id. at 1440-42 (acknowledging that only involuntary intoxication, meaning that the victim did not realize they were ingesting the intoxicant, might be cognizable as a theory for rape due to intoxication). Concerning unconscious victims, Rubenfeld is less clear in his concession, but recognizes that legalizing rape of unconscious victims might be a result of his proposal. Id. at 1441-42 (contending that non-consensual sex with an unconscious person would be rape only if the requisite force were used). In the case of an unconscious victim, Rubenfeld includes this additional remark that seemingly supports the notion that he sees a limited downside in legalizing at least some sex with unconscious persons under his proposal: “But really: is it so clear that all unconscious sex should be criminal? Among well-settled couples, long used to sharing the same bed, sexual contact of various kinds with a sleeping person is common. No one thinks all such touchings are criminal. Doesn’t this undermine the idea of an ipso facto rule against sexual contact with the unconscious?” Id. at 1442.
⁶. The best available large-scale survey further found that serious injuries, other than the rape itself, occurred in approximately 4% of all rapes. NAT’L VICTIM CTR. AND CRIME VICTIMS RES. AND TREATMENT CTR., RAPE IN AMERICA: A REPORT TO THE NATION 4 (1992) [hereinafter NAT’L. VICTIM CTR.]. Because Rubenfeld’s proposal uses a narrow force requirement, the overwhelming majority of non-stranger rapes and rapes with limited force used will not be prosecutable. For further discussion of the likely impact of Rubenfeld’s proposal on rape prosecutions, see infra Part III.A.
results.” He simply fails to appreciate the magnitude and social significance that his retheorization of rape law would have if his ideas gain traction. Under Rubenfeld’s right to self-possession, rape law would, in most ways, be in a worse state than it was in the pre-reform era of the middle twentieth century.

However, I write this Article not just to repudiate Rubenfeld’s novel theory of rape law. Rather, I focus on explaining how and why Rubenfeld supports such a retrograde theory. Ultimately, Rubenfeld’s errors leading him to his disastrous conclusion highlight the need for a clearer articulation of rape law foundations. Indeed, precisely because of its mistakes, Rubenfeld’s article provides a useful springboard for addressing common misunderstandings and misstatements of American rape law.

The critical missteps made by Rubenfeld worth exploring in greater detail happen at the very early stages of his argument, when he assumes that he is on surer footing. Rubenfeld begins his investigation of rape law along two lines of inquiry. Initially, he focuses his article toward solving what he terms the “riddle” of why rape-by-deception is not recognized as rape in American law. The primary problem with his framing of rape-by-deception’s special status is that he gives an inaccurate summary of the state of rape law scholarship. Further, although the “riddle” holds a prominent place in the title of his article, as I will explain later, it is largely tangential to Rubenfeld’s most impactful claims.

More significant than his attempt to solve the rape-by-deception puzzle, Rubenfeld revives the question of why rape should be defined as a crime different from ordinary assault and/or battery. He believes that rape law

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7. Rubenfeld, supra note 1, at 1435 (“My purpose is not to show that a self-possession view of rape eliminates all difficulties (it doesn’t), but to test the limits of this view, to see what light it sheds on controversial issues, and to acknowledge that it will sometimes lead to uncomfortable results.”).

8. The “reform era” refers to the period beginning in the 1970’s and ending in the 1980’s when feminists and other rape law reformers had success in persuading state legislatures to amend statutes to reflect an updated understanding of rape. The specific reforms are discussed in greater detail in Part I.C.

9. Rubenfeld has an unusual aside in the roadmap in the introduction of his article that differentiates the latter portion of his piece from the early arguments. Rubenfeld, supra note 1, at 1380. He claims that the latter portions of his piece, articulating his theory of the right to self-possession, “should probably never have been written.” Id. The implied corollary is that the early sections of his article are not likely to raise the same level of objection.

10. Id. at 1379. See infra, Part I. (internal citations omitted). (“[S]exual autonomy seems to provide a single, clear, appealing foundation for the regulation of sex in the United States, unifying its major components. But there is an anomaly in the system: sex-by-deception... Precisely by failing to punish rape-by-deception, sex law fails to vindicate sexual autonomy.”).


12. Rubenfeld, supra note 1, at 1387-88 (“Why is rape a crime of its own? Every rape is an assault or battery. Every rapist could be punished on that ground alone.”); see infra, Part II.A. It is unclear if Rubenfeld is using the words “assault” and “battery” interchangeably or as separate concepts. Ordinarily, in criminal law, a simple assault is causing fear of immediate bodily injury. See, e.g., KAN. STAT. ANN. § 21-3408 (repealed 2010) (“Assault is intentionally placing another person in reasonable apprehension of immediate bodily harm.”). In contrast, a simple battery is usually the actual causing of the bodily injury threatened in an assault. See, e.g., KAN. STAT. ANN. § 21-3412(a) (repealed 2010)
scholars have never explained why rape should be codified separately instead of being prosecuted solely as a battery.\textsuperscript{13} Rubenfeld asserts that the only possible explanation for rape being separately defined is because rape violates an individual’s sexual autonomy,\textsuperscript{14} a concept that he considers “irrelevant” to rape law.\textsuperscript{15}

Rubenfeld commits three fundamental mistakes that lead him astray in discussing sexual autonomy as the sole distinguishing concept of rape law. First, he asserts that sexual autonomy is the only value embodied in modern rape law. That is simply wrong. In reaching his conclusion, Rubenfeld conflates the fundamental principles justifying the existence of rape statutes with those animating the non-consent element of the crime of rape. American rape law is justified as a distinct crime because of numerous reasons beyond autonomy, including the severity and nature of the harm caused, gender dynamics involved, and terror inflicted by widespread sexual violence on the general population. Although sexual autonomy is an important part of understanding rape because of its connection to the non-consent element of the crime, scholars do not contend that it alone provides a solid foundation for modern rape law.

Second, Rubenfeld seeks to reduce the history and substance of rape law, laden with historical baggage and political half-steps, to a single animating principle when it cannot and should not be unified as such.\textsuperscript{16} Modern rape law is the product of a set of imperfect compromises based upon historical contingencies. In particular, the roles of consent and autonomy have evolved slowly due to competing political forces.\textsuperscript{17} To attempt to reduce the explanation for rape law to a single value whitewashes and oversimplifies the muddled, ugly, and sometimes inspiring course that rape law has taken in America. The pursuit of the singular truth blinds Rubenfeld to the more complex picture of competing values and shifting concerns that provides a richer account of modern rape law.
Third, Rubenfeld concludes that autonomy is a “red herring” for rape law based upon an idiosyncratic definition of the concept to support an inappropriate analogy. In particular, he fails to appreciate how autonomy is a constrained value in activities that, by their nature, require mutuality. Rubenfeld relies on a strained comparison between smoking and sex to do the scholarly work of discounting the right to autonomy as a “myth” in modern rape law. He asserts that a person being forced to smoke a cigar tests the boundaries of smoking autonomy in a manner that sheds light on sexual autonomy. Rubenfeld then writes that “‘smoking autonomy’ is wholly irrelevant to the wrongness of [a person being forced to smoke a cigar].”

Thus, autonomy, under Rubenfeld’s view, is actually irrelevant to the debate about smoking as it is a “red herring” to rape law. There are numerous problems with Rubenfeld’s analogy including: the effects of second-hand smoke are an externality to the activity of smoking (which have no counterpart in consensual sexual encounters); smoking, unlike sex, is a solo activity and does not ordinarily require mutual consent; and confusing necessary and sufficient conditions for opposing rape (and forced smoking). Nonetheless, Rubenfeld exclusively relies on the comparison to make his case that autonomy has no utility in understanding rape law.

Despite my criticisms, Rubenfeld’s article does offer an important, incidental contribution to the debate about rape law: it demonstrates how having clearly articulated fundamental values underlying rape law can have significant substantive effects. In this Article, I explore each of Rubenfeld’s early mistakes in greater detail to offer a clearer picture of the real foundations of rape law. In doing so, I discuss the large segments of rape law literature that Rubenfeld overlooks creating his mistaken impressions about what scholars have and have not written. Further, moving beyond responding to Rubenfeld, I reconcile different strains of rape law theory to offer a clear explanation of rape law’s foundations based upon the principles of autonomy, gender, harm, and terror.

This Article is divided into three parts. First, I briefly discuss Rubenfeld’s riddle of rape-by-deception and his errors in analyzing it. Second, I explore Rubenfeld’s contention that rape can only be justified as a crime separate from battery through the unique violation of sexual autonomy and Rubenfeld’s misreading of the rape law literature about sexual autonomy. Third, I analyze

18. Rubenfeld, supra note 1, at 1424 (“In fact, sexual autonomy is a red herring when it comes to rape.”); see infra Part III.
19. Rubenfeld, supra note 1, at 1413 (“[T]he supposed right of sexual autonomy is a myth and should be rejected.”).
20. Id. at 1424-1425.
21. Id.
22. Id.
the catastrophic effects Rubenfeld’s theory would have if adopted by any jurisdiction.

I. RUBENFELD’S RIDDLE

Rubenfeld’s article explores various threads of substantive rape law as well as other scholarly discussions orthogonal to that topic. He writes of rape law’s history, the debate about rape-by-deception as a type of rape, the recent embracing of autonomy as a means of understanding consent, the Supreme Court’s jurisprudence regarding the constitutional right to privacy, anti-sodomy laws, torture, the right to self-possession, and traditional sexual mores. Rather than discussing mistakes in regards to each of the issues Rubenfeld addresses, I concentrate on his key claims. In this Part, my focus is on the device he uses to frame his article, the so-called “riddle” of rape-by-deception.

A. Deception Exception

Rubenfeld’s initial concern is solving what he terms a “riddle” about why rape-by-deception is not recognized as rape in American law.23 His end goal in solving the riddle is to make rape law theoretically consistent. The riddle of rape-by-deception, as laid out by Rubenfeld, is as follows:

Thus sexual autonomy seems to provide a single, clear, appealing foundation for the regulation of sex in the United States, unifying its major components. But there is an anomaly in the system: sex-by-deception. From autonomy’s viewpoint, fraud is as great an evil as force. Precisely by failing to punish rape-by-deception, sex law fails to vindicate sexual autonomy. This failure would seem to put rape law in tension not only with its own central principle, but with the rest of American sex law, including Lawrence [v. Texas].24

Before even delving into the riddle in detail, Rubenfeld makes an unusual concession recognizing that, under modern American law in many jurisdictions, one solution to it has already been implemented.25 He notes that the separate force element of rape, which necessitates the defendant use or

23. Rubenfeld, supra note 1, at 1376. Rubenfeld does discuss cases and courts in Israel, Germany, and England as well. Nonetheless, his focus is primarily on American rape law, which has developed in a different manner than in other nations.
24. Id. at 1379. The reference by Rubenfeld to Lawrence is certainly out-of-place, but it is not directly relevant to the riddle. I will return to Rubenfeld’s unusual, and fundamentally flawed, analysis of Lawrence in Part II.B.
25. Id. at 1378.
threaten less force than in Rubenfeld’s normative proposal, solves his riddle.\textsuperscript{26} The reason that the force requirement provides doctrinal consistency in regards to rape-by-deception is that such cases would not be prosecutable because no force ordinarily accompanies deception. The coherence of rape law doctrine is achieved by legalizing rape-by-deception in all cases when force is a statutory element of rape. So, if the riddle is solved by the force requirement and there is no glaring inconsistency in rape law, why proceed further?\textsuperscript{27}

At this point, Rubenfeld says there is still a riddle because scholars overwhelmingly want to eliminate the force requirement and many jurisdictions have removed it.\textsuperscript{28} Both those claims are true, but it does seem like the motivation for doctrinal purity is lessened a bit when focused primarily on a perceived inconsistency that would exist if most legal scholars had their way. Indeed, rape law and academic inquiry about it would be radically different if scholars had that level of influence in the policy realm.

Nonetheless, I want to engage Rubenfeld’s argument on his descriptive terms in a world where the only elements to rape are non-consent and a sex act (and no force requirement exists). In that case, Rubenfeld contends that rape-by-deception is a glaring mistake at the center of rape law.\textsuperscript{29} In particular, he writes that consent is always abrogated by force or fraud and that rape law’s failure to recognize the inconsistency is highly problematic.\textsuperscript{30}

\textsuperscript{26} Id. (“Existing doctrine has no trouble dismissing rape-by-deception claims, but only because of the much-decried force requirement.”).

\textsuperscript{27} In his response to some critics, Rubenfeld seemingly reverts to defending the status quo in regards to having both a force and consent element. However, his defense is incompatible with his original position. He states:

> My article doesn’t argue that rape law can give no role to consent. It argues that rape law has to include an element in addition to consent (force). I don’t argue against all autonomy protections in the law. I argue against the idea that there is a fundamental right to sexual autonomy.

\textit{Jed Rubenfeld, Rape-by-Deception—A Response,} \textit{123 Yale L.J.} \textit{F.} 389, 393 (2013). It is difficult, if not impossible to harmonize his new position with his original theory for numerous reasons. First, Rubenfeld previously stated that sexual autonomy was “irrelevant,” a “red herring,” and a “myth.” Rubenfeld, \textit{supra} note 1, at 1424-25. To now state that he supports autonomy and a consent element in addition to the force requirement is sheer revisionism. Second, his new statement amounts to a simple defense of many (if not most) jurisdictions in the United States, which use both a consent and a force requirement. If that is the case, his argument is neither novel nor helpful. Third, if consent is still an element under Rubenfeld’s proposal, what is the normative basis for it? The theory of self-possession does not support a consent element. And Rubenfeld contends that autonomy theory cannot provide a foundation because of the so-called “riddle” of rape-by-deception. So, is Rubenfeld merely supporting a consent element for pragmatic reasons (which is at odds with his project of doctrinal consistency) or is he simply abandoning his original project entirely? For purposes of this Article, I assume he still stands by the original claims he made in the \textit{Yale Law Journal}.

\textsuperscript{28} Rubenfeld, \textit{supra} note 1, at 1378.

\textsuperscript{29} Id. at 1395 (“But this picture of American sex law can’t account for a peculiar and thorny anomaly: sex-by-deception.”).

\textsuperscript{30} I have attempted to outline and represent Rubenfeld’s article as fairly and honestly as possible. However, in responding to some initial criticisms, Rubenfeld contends that his work has been misread. He argues:

> My account of rape, however, is not opposed to this “vast array” of different crimes. My article never says that there can be only one sex crime—rape. On the contrary, as I say repeatedly throughout my article, states are free to (and I think they should) criminalize many
B. Deception and Autonomy

Rubenfeld contends that any version of sexual autonomy must recognize the crime of rape-by-deception as rape or the doctrine is untenable. His claim is that autonomy's guarantee of true consent is violated by both fraud and force. Because modern rape law fails to recognize instances where fraud vitiates consent, Rubenfeld believes that rape law is not true to its core value of autonomy.

Rubenfeld faces a significant problem in that there is a much easier solution to the riddle than the one he proposes. Indeed, it is one supported by many of the same scholars that argue against the force requirement. If rape-by-deception is an unjustified exception, then it can be solved simply by criminalizing it. Many feminists and rape law reformers have argued as such.31 Such a proposal would address the doctrinal concerns of Rubenfeld while avoiding the legalization of most rape that Rubenfeld’s solution entails. Notably, though, the theory of self-possession solves the riddle in the other manner—he decriminalizes all rape-by-deception including the two instances when it is punished in modern America (as part of a medical procedure or when a victim wrongly believes that she is having sex with her spouse).32

sex acts that aren’t rape. Professor Falk’s reasoning is like saying that someone who argues that murder does not include negligent homicide is against the criminalization of negligent homicide. Rubenfeld, supra note 27, at 399 (internal citations omitted). Rubenfeld’s revision either undoes his entire argument or offers nothing of significance. If Rubenfeld is contending that non-forcible rape is still punishable as a lesser sexual assault based upon a non-consent element, then his project is for naught. Instead of calling his original article the “The Riddle of Rape-by-Deception,” it would simply need to be renamed “The Riddle of Sexual-Assault-by-Deception,” and Rubenfeld’s same criticisms would still apply. If this is his position, it also illustrates his confusion with modern rape law, as the terms “sexual assault” and “rape” are often used interchangeably (at least for the highest degrees of sexual assault). In fact, some jurisdictions do not use the word “rape” in their so-called “rape” statutes. See, e.g., N.J. STAT. ANN. § 2C:14-2 (West 2014). Following Rubenfeld’s citations to his original article yields a different interpretation of his new statement. Rubenfeld, supra note 1, at 1416–17 & n.185, 1435 n.227, 1440. The other crimes that Rubenfeld imagines are consistent with his proposal are: non-disclosure of a sexually transmitted disease, rape-by-deception through a medical procedure, rape-by-deception by fraudulently representing a spouse, and having sex with an unconscious person (although only punishable as an assault and/or battery). In other words, he reduces rape of an unconscious person to a mere battery and otherwise maintains the status quo rules for rape-by-deception. In no way do these concessions ameliorate the harms articulated in this Article because of the rollback of non-forcible rapes entailed by Rubenfeld’s proposal.

31. See, e.g., Patricia J. Falk, Rape by Fraud and Rape by Coercion, 64 BROOK. L. REV. 39, 180 (1998) (“As the twenty-first century approaches, the evolution of rape law to condemn those persons who accomplish sexual intercourse by means of fraud or coercion is long overdue.”). A response to Rubenfeld’s article has similarly supported this solution to the “riddle.” Tom Dougherty, No Way Around Consent: A Reply to Rubenfeld on “Rape-by-Deception,” 123 YALE L.J. 321, 333-34 (2013) (contending that rape by deception is an affront to sexual autonomy and should be criminalized as such).

32. Rubenfeld, supra note 1, at 1397-98 (“In the United States, courts have long endorsed the medical exception, while the spousal-impersonation exception is the law of at least fourteen states, including California, and is recognized in the Model Penal Code.” (internal citations omitted)). There is ambiguity as to the magnitude of those exceptions and whether other exceptions might exist. However, for purposes of this Article, there is no reason to quibble with Rubenfeld’s claim.
Of course, whatever a person believes about criminalizing rape-by-deception, such beliefs do not necessarily indicate a corresponding view that (de)criminalization is based upon consistency. Rubenfeld, however, believes that there is clearly tension and cites a wide range of court cases to support the general proposition that fraud always abrogates consent.\(^{33}\) As such, rape law seems like an outlier—one that Rubenfeld feels must be rectified.

However, there is a common thread to most of the citations and examples used by Rubenfeld: they stem from private, and not public criminal, law.\(^{34}\) Others concern criminal procedural issues separate from defining elements of crimes such as consent to search in regard to the Fourth Amendment.\(^{35}\) One of the realities that every scholar or practitioner in criminal law must recognize is that criminal statutes abuse basic vocabulary and co-opt language from other doctrinal areas with no respect for the source definitions or rules. For example, in criminal law the word “voluntary” is used and abused in a multitude of ways. For actus reus, “voluntary” acts include conduct that shows any volition of will, including situations where a person has a literal gun to her head when committing criminal acts.\(^{36}\) When discussing “voluntary” abandonment of inchoate crimes, the definition is much broader, recognizing that threats or resistance render acts “involuntary.”\(^{37}\) In the context of “voluntary” manslaughter, the word is normally used to indicate intentional killings committed due to the defendant being in a heat of passion and, unlike the previous two definitions, makes no reference to external influence by other

\(^{33}\) Id. at 1376 n.11.

\(^{34}\) See McClellan v. Allstate Ins. Co., 247 A.2d 58, 61 (D.C. Cir. 1968) (discussing how deception, in a civil action related to a driver giving a car to a parking attendant, vitiated consent); Kreag v. Anthes, 28 N.E. 773, 774 (Ind. App. 1891) (stating the general proposition that fraud abrogates consent in the context of a civil suit regarding a father’s unlawful abduction and sexual abuse of his child); Chatman v. Giddens, 91 So. 56, 57 (La. 1921) (examining how fraud to induce a contract implicated a mineral royalties dispute); Murphy v. I.S.K. Con. of New Eng., Inc., 571 N.E.2d 340, 352 (Mass. 1991) (discussing how duress and fraud vitiate consent in a child custody dispute); Dellavecchio v. Hicks, No. FD-04-1038-90, 2006 WL 727770, at *3 (N.J. Super. Ct. App. Div. Mar. 23, 2006) (per curiam) (analyzing consent and fraud in a child support dispute); Lawyer v. Fritcher, 29 N.E. 267, 268 (N.Y. 1891) (writing that “fraud vitiates all contracts and all consents” in an abduction case).

\(^{35}\) See United States v. Cavitt, 550 F.3d 430, 439 (5th Cir. 2008) (finding that the consent of a defendant for a police search could not be based upon misrepresentations by the officer); United States v. Hardin, 539 F.3d 404, 425 n.12 (6th Cir. 2008) (discussing an officer’s use of a ruse to gain access to a defendant’s apartment as implicating valid consent in certain circumstances); United States v. Sheard, 473 F.2d 139, 152 (D.C. Cir. 1972) (Wright, J., dissenting) (contending that the police officer’s misrepresentations denied true consent by the defendant); Jeffcoat v. United States, 551 A.2d 1301, 1304 n.5 (D.C. Cir. 1988) (stating the general rule that fraud abrogates consent in a footnote that the court finds is “of no significance” to the present criminal matter).

\(^{36}\) RICHARD J. BONNIE, ANNE M. COUGHLIN, JOHN C. JEFFRIES, JR. & PETER W. LOW, CRIMINAL LAW 69 (3d ed. 2010).

\(^{37}\) Id. at 393-94.
Each definition of "voluntary" is separate within criminal law and to other doctrinal uses as well.

This does not mean that criminal law should operate in the manner that it does. However, because Rubenfeld relies heavily on his particular descriptive account of criminal rape law to enable the contentions in both his normative and descriptive theories, it is worth noting the disjunction between vocabularies in criminal and other areas of law. Further, the examples illustrate why it is so problematic to assume universality of the definitions of consent.

The concept of "consent" has different meanings across various areas of law. If a patient is about to have open-heart surgery, she must be properly and fully informed about the objective risks of the procedure and sign a knowing waiver of liability to have consented to the procedure. Certain contracts cannot be consented to, such as prostitution or organ sale, because of public policy reasons. Real estate sales have different rules of consent than spoken contracts for five-dollar loans to friends.

In substantive criminal law, "consent" is treated as a far broader concept than in other areas of law. In rape law in particular, affirmative consent is usually only abrogated by forcible compulsion (or threat thereof) or incapacitation. There are good reasons why consent is more broadly defined in criminal rape law. Unlike in a tort action, a defendant might be sentenced to long-term imprisonment if he is the losing party at trial. Further, in criminal law particular elements contain both actus reus (conduct) and mens rea (mental states). That means that a fact-finder must determine beyond a reasonable doubt that consent was not given (the act) and that the defendant's mistake of consent was either unreasonable or dishonest. Particularly because of the mens rea issues involved in a sexual encounter, which typically includes far less communication (written, verbal, or nonverbal) than even the most basic contract, rape law must use simpler bright-line rules. It is a pragmatic necessity because determining a defendant's mental state at the past moment of the act of the crime is extremely difficult even with simplified concepts. If every sex act

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38. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 535 (5th ed. 2009) ("Under common law principles, an intentional homicide committed in 'sudden heat of passion' as the result of 'adequate provocation' mitigates the offense to voluntary manslaughter.").
39. Id. at 117 (describing the structure of American criminal law wherein an act and mens rea are ordinarily both needed for a defendant to be guilty). My definition of mens rea is incomplete or slightly askew in the interest of brevity. Any larger discussion of the definition of mens rea would constitute an unnecessary diversion from the major points of this Article. As many scholars have documented, the difficulties in defining mens rea with precision are endemic to the concept. See, e.g., GEORGE FLETCHER, RETHINKING CRIMINAL LAW 398 (1978) ("There is no term fraught with greater ambiguity than that venerable Latin phrase that haunts the Anglo-American criminal law: mens rea."). The problems in defining the exact contours of mens rea have no bearing on the point I am arguing in this instance, so the brief definition I offer should suffice.
40. This is presuming the general intent mistake instruction of common law jurisdictions, which is the usual rule in American states, is used. DRESSLER, supra note 38, at 595.
41. Id. at 586.
was subject to a written and notarized contract, then borrowing definitions of consent from contract law would make sense. That is not the reality of sex in America, though.

Returning to Rubenfeld’s citations, there is a body of cases he references in a footnote that are worth exploring in greater detail. The cases that Rubenfeld identifies, which are closest to defining “consent” in the context of a criminal statute element, concern burglary, theft, or kidnapping based upon false pretenses. In Johnson v. State, cited by Rubenfeld, the defendant gained admission to a laundromat by tricking the owner into allowing him onto the premises. As elaborated upon later in greater detail in Part II.B.3, Rubenfeld’s discussion of burglary is notable because there are strong doctrinal connections between theft and rape (unlike battery and rape). Similarly, Rubenfeld cites cases concerning larceny and embezzlement as well as another burglary fact pattern that are inapplicable for the same reasons as Johnson.

The primary problem with Rubenfeld’s citations to burglary, theft, and kidnapping cases is that he fails to consider the issue of materiality. Materiality of a deception differentiates an ordinary lie from actual criminal fraud. In a burglary case, a defendant’s inaccurate statement that she works for the gas company is material to gaining consensual entry. Similarly, false promises of employment that turn into a kidnapping are directly relevant to the consent given by the victim. However, a door-to-door salesperson who wears a toupee is not committing fraud by virtue of hiding his baldness when selling his wares.

The two recognized exceptions cited by Rubenfeld to the rape-by-deception rule, medical procedures and confused identity of whether a victim is having sex with a spouse, can be persuasively argued to represent criminal law’s incorporation of the idea that the deception must be material for consent to be vitiated. Consider the following lies someone could use directed at another person in an effort to receive sexual consent:

1. “I am a millionaire.”
2. “I am good friends with your friend Steve.”
3. “I am 29 years old (and this is not my real age).”
4. “I love you.”

42. See, e.g., Johnson v. State, 921 So. 2d 490, 508 (Fla. 2005) (per curiam).
43. The court in Johnson treats the issue of consent as a defense and not an interpretation of the elements of the crime. Id. However, other burglary statutes do include an implicit consent element by differentiating “lawful” and “unlawful” access to a property. So, despite that procedural difference, Rubenfeld’s citation to the general issue of burglary-by-deception is appropriate.
5. “I am shipping out tomorrow to Afghanistan in the Army.”
6. “If you have sex with me, I will hire you for a high-paying job.”

Under existing rape law, those lies do not abrogate a victim’s consent to sexual activity. Importantly, none of the lies fit the two categories of criminal rape-by-deception presently recognized because there is neither a medical procedure nor spousal confusion. Yet, for at least some people in the world, each of those lies might be subjectively material to the decision to have sex. So why does criminal law focus only on the deceptions involving medical procedures and mistaken identity of a spouse?

The answer is in differentiating the types of lies made. In each of the six examples I gave above, a person would still be consenting to commit a mutual sex act with a specific person. That is, a person knows that the other person in front of her is the one that she will be having sex with and knows the sexual activity that will occur. In contrast, in the case of medical procedures such as surgery, the patient is not consenting to the sex act performed with the doctor even though she might be committing to penetration for surgery. Similarly, if a defendant sneaks into a dark room pretending to be someone’s spouse and has sex with her, the victim has never consented to have sex with the defendant in particular.

The rape-by-deception rule in its current form can be justified as embodying the objective materiality requirement for fraud. The forms of deception in the two recognized exceptions are universally material and not based upon subjective reasons that certain people choose to have consensual sex. Lies that call into question the acts being done (the medical procedure exception) and the identity of the person (the mistaken identity of the spouse case) are considered material. All other lies are considered immaterial because the person consenting knows the person and act to which she is agreeing. If I am right about the materiality of the recognized rapes-by-deception, then Rubenfeld’s riddle is solved on its own terms. This is because adding rape-by-fraud to modern statutes would only include material instances of such conduct—the medical procedure and mistaken identity cases. As such, there is no doctrinal inconsistency because only material deception is punished in rape-by-deception cases. And, consequently, there is absolutely no need for rape law to be fundamentally retheorized in the manner proposed by Rubenfeld.

At the end, though, the riddle of rape-by-deception is a distraction to the major arguments made by Rubenfeld at the foundational level of rape law. The various permutations of beliefs about the riddle are consistent with Rubenfeld’s self-possession theory and modern rape law theory articulated by other scholars. One could believe there is no riddle, support criminalization of rape-by-deception, and, thus, subscribe to modern rape law theory. Or, one could believe there is a riddle, support criminalization of rape-by-deception, and,
thus, subscribe to modern rape law theory. Or, like Rubenfeld, one could believe there is a riddle, support decriminalization of rape-by-deception, and, thus, subscribe to self-possession theory. Although Rubenfeld’s perceived riddle is worth debating, it is orthogonal to questions about sexual autonomy and the right to self-possession.

C. Rape Law Inconsistency

The implicit belief underlying Rubenfeld’s argument and line of inquiry is that rape should be understood through a single animating principle. Indeed, the focus on rape-by-deception as the critical problem in rape law highlights the idea that complete doctrinal consistency is the ultimate end sought. Universality in criminal law is a strange aim for a system where states enact statutes independent from each other representing a diversity of approaches.

The goal of doctrinal purity is questionable in regard to any area of law, but particularly inappropriate in regard to rape law. Rape law is part of a tapestry of statutes concerning sexual behavior. Such statutes are the product of a messy and ugly history of misogyny, sexual violence, and governmental indifference in America. A descriptive theory of rape law that hinges on a single concept is inevitably inaccurate, incomplete, and unwise.

Rubenfeld’s assumption that rape law can and should be treated as a set of rules without contradiction flies in the face of the history of criminal laws regulating sexual violence in America. Perhaps the clearest lesson drawn from our criminal laws regarding sex is that there is little logic, reason, or consistency among them. If criminal sex laws were coherent, a person who possesses child pornography would not ordinarily receive a far longer sentence than a child rapist. People guilty of public urination would not have to move far away from schools, playgrounds, and bus stops because they are classified as “sex offenders.” Legislatures would focus on the increasing incidence of rape instead of foolishly pursuing sex offender registries, residency restrictions, and post-imprisonment civil confinement that target offenders responsible for a small percentage of future sex offenses.


46. Pauline Vu, *Worth Noting*, STATELINE (Sept. 5, 2007), http://www.highbeam.com/doc/1G1-168408089.html (describing the concerns of one lawmaker who proposed making public urination a separate offense from indecent exposure so that New Hampshire would no longer be one of the states that lists such offenders on the state’s sex offender registry).

47. See infra Part III.B.1.

thousands of rape kits would not go untested, allowing serial rapists to find more victims while their DNA sits for years or decades on warehouse shelves.\textsuperscript{49} Attempting to decipher puzzles of sexual violence law is trying to reason the unreasonable.

Consider the modern history of rape law beginning with the reform movement gaining influence in the 1970s. Rape became a crime solely because of male interests in their current or prospective spouses.\textsuperscript{50} As a result, early common law definitions focused on protecting that concern with little regard to the rights of victims. The traditional elements of the crime of rape entering the reform era were: "(1) sexual intercourse; (2) between a man and a woman who is not his wife; (3) achieved by force or threat of severe bodily harm; and (4) without her consent."\textsuperscript{51} Although not always legislatively codified, jurisdictions regularly enforced the utmost resistance requirement such that rape victims had to resist a sexual assault to their dying breath for there to be a "rape."\textsuperscript{52} In 1973, a New York appellate court issued one of the last reported decisions upholding the utmost resistance requirement to overturn a jury verdict.\textsuperscript{53} Courts held that, even in the face of specific violent threats, consent could be given through "voluntary" submission to the rapist.\textsuperscript{54} As a result, if a victim eventually gave up resisting, courts would interpret the event as consensual sex.\textsuperscript{55}

Susan Brownmiller, Catharine MacKinnon, and other feminists attacked such outcomes and led an effort to reform rape law throughout America.\textsuperscript{56} In 1975, Michigan became the first state to adopt portions of the rape law reforms suggested by feminists.\textsuperscript{57} Rape law reformers achieved several victories in changing the application of substantive rape law: rape became gender-neutral; all types of sexual penetration were criminalized (and not only vaginal intercourse); and marital rape was finally made illegal.\textsuperscript{58} More recently, many

\textsuperscript{49} Nicholas Kristof, Want a Real Reason to Be Outraged?, N.Y. TIMES, Oct. 28, 2012, at 13 ("By most accounts, hundreds of thousands of these untested kits are stacked up around the country. . . . In Michigan, the Wayne County prosecutor, Kym Worthy, said she was shocked to discover more than 11,000 rape kits lying around untested—some dating to the 1980s. So far, of 153 kits tested, 21 match evidence in a criminal database and may involve serial rapists.")

\textsuperscript{50} See infra Part II.A.


\textsuperscript{52} DRESSLER, supra note 38, at 590.


\textsuperscript{55} Id. at 19-20.

\textsuperscript{56} Id. at 25.

\textsuperscript{57} Id. at 29.

jurisdictions eliminated the force requirement, making non-consent and the sex act the only two elements of rape.\(^59\)

However, despite those victories, the application of rape law in many cases did not change. Courts continue to define rape narrowly even without statutory language supporting such interpretations.\(^60\) Juries continue to be skeptical of rape victims and hold them to a much higher standard than victims of other crimes.\(^61\) Reforms have had no measurable effect in some jurisdictions, while others have shown only modest progress.\(^62\) What little success has occurred is largely attributable to increased cultural awareness of non-stranger rape rather than legal change.\(^63\) In many states, a strict requirement that the accuser show the defendant used or threatened actual force effectively blocks convictions even in extreme cases.\(^64\) Most states do not recognize a verbal “no” by a complainant as determinative of non-consent.\(^65\) Other states maintain a variation of the resistance requirement that is often applied in the same way as its more stringent predecessor.\(^66\) Consequently, while a formal “utmost resistance requirement” has been removed, it is de facto enforced by jurors and judges in rape trials across the country. Rubenfeld’s discussion of the right to self-possession is unfortunately silent on how to confront the multitude of obstacles and much greater inconsistencies in sexual violence law. Instead, his theory at best resolves a minor wrinkle while aggravating far greater problems.

It is also extremely difficult to discuss the history of rape law in isolation from other sex crime statutes. For example, child molestation was not a separate crime until the twentieth century and was recognized only as statutory rape previous to that time.\(^67\) Anne Coughlin’s work demonstrates that modern

\(^59\) SCHULHOFER, supra note 54, at 32-33.

\(^60\) Bryden, supra note 51, at 321-22.


\(^62\) Id. at 7.

\(^63\) Bryden, supra note 51, at 319 (internal citations omitted) (“Meanwhile, a growing body of social-scientific evidence indicates that, contrary to reformers’ expectations, the much-heralded evidentiary reforms have had little impact on reporting, processing, and conviction rates in rape cases. Although this evidence is not yet conclusive, it strongly suggests several tentative conclusions. First, women seem to be increasingly willing to report rapes. Anecdotal evidence indicates that juries are increasingly sympathetic to the prosecution. This progress, however, appears to be due mainly to evolving public attitudes toward acquaintance rape rather than specific legal changes, except insofar as national publicity accompanying the changes may have affected attitudes everywhere.”).

\(^64\) SCHULHOFER, supra note 54, at 4-10 (discussing numerous cases and scenarios where the force requirement blocks prosecution and conviction for rape).

\(^65\) Deborah Tuerkheimer, We preach “no means no” for sex, but that’s not what the law says, GUARDIAN (Jan. 12, 2014), http://www.theguardian.com/commentisfree/2014/jan/12/rape-definition-use-of-force (“in most states, the legal definition of rape still requires the use of physical force. In other words, a verbal ‘no’ isn’t always enough.”).

\(^66\) SCHULHOFER, supra note 54, at 127.

\(^67\) William N. Eskridge, Jr., Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946, 82 IOWA L. REV. 1007, 1061-62 (1997) (“In the first half of the new century, many states adopted new carnal abuse and child molestation statutes that explicitly applied to men’s molesting of boys as well as girls. Generally, the big population states were the first to act, starting in the very first decade of the century. . . .”) Following the early leads of Illinois and California,
Rape law was born out of adultery statutes as non-consent was treated as a defense in adultery cases in later time periods. The catch-all label "sex offender" has combined rapists, flashers, child pornographers, obscene movie distributors, voyeurs, and others into a single category, which allows prosecutors to offer plea deals for lesser crimes to rapists while ensuring the same collateral punishments of registration, residency restrictions, and civil commitment. Distilling the discussion of the legal history of rape in isolation, as Rubenfeld does, inextricably leads to erroneous conclusions about the nature and evolution of rape law.

America's high level of sexual violence is what Horst Rittel and Melvin Webber term a "wicked problem." Wicked problems stem from an intersection of, among other factors, historical, cultural, and social circumstances. By their very nature, such problems require multiple avenues of solutions and are not resolved through single mechanisms. The history of rape in America illustrates that it fits the classic attributes of a "wicked problem" and should not be approached with the idea that a single theoretical panacea could provide any long-lasting solution. Even if Rubenfeld's proposal were a wise one, it is far too simplistic and reductionist to have significant substantive effect.

Further, Rubenfeld's project of explaining rape law, from a descriptive perspective, should not proceed along a highly reductionist view of history if it seeks accuracy on the subject. The singular focus ignores the roles of sexism of legislatures and judges who determined the direction of rape law. It ignores the systemic patriarchy that emboldened rapists while restraining government prosecution of sexual violence.

New York created a new felony for an adult who carnally abuses the body, or indulges in any indecent or immoral practices with the sexual parts or organs of a child under the age of ten years, and a misdemeanor for an adult who carnally abuses a child aged ten to sixteen. . . . Most of the urbanized states of the Midwest and the East and West Coasts followed this pattern. Typically, southern and noncoastal western states did not adopt such statutes until World War II and afterward.

See generally, Anne M. Coughlin, Sex and Guilt, 84 VA. L. REV. 1 (1998) (discussing how rape law emerged from an affirmative defense to adultery prosecutions).


change the application of rape law substantially.\footnote{SCHULHOFER, supra note 54, at 17 ("Social attitudes are tenacious, and they can easily nullify the theories and doctrines found in the law books. The story of failed [rape law] reforms is in part a story about the overriding importance of culture, about the seeming irrelevance of law.").} The story of rape law is a complex narrative and cannot be captured by the lone value of sexual autonomy, no matter how salient that value is in modern scholarly discussions. A robust approach to understanding rape law as outlined in the next Part, while not a panacea, offers flexibility in the face of fundamental inconsistencies in modern statutes and their applications.

II. RAPE LAW’S FOUNDATIONS

While the riddle frames his article, Rubenfeld’s contentions about the foundations of rape law are far more significant. Rubenfeld’s descriptions of rape law and rape law scholarship call into question the nature and purposes of sexual violence law reforms over the last forty years. He reduces rape law to a single value and overlooks discussion of the scholarship and law contrary to his thesis. For those reasons, it is far more important to engage Rubenfeld’s flawed arguments about fundamental issues of rape law than to debate the possible inconsistency in doctrine created by the rape-by-deception-riddle.

A. Rape Is Not a Simple Battery

Rubenfeld’s first major mistake in discussing the foundations of rape law is to contend that sexual autonomy is the sole, untenable foundation for modern rape law theory offered by scholars and courts.\footnote{One of the difficulties in reading Rubenfeld’s article is that he has a tendency to state conclusions attributed to pronouns with ambiguous references. For example, in the introduction, he writes that “[t]he problem is that we ought to think it is rape, and courts ought to so hold, given what we say rape is.” Rubenfeld, supra note 1, at 1376. In neither usage of “we” is it clear who “we” represents. As a result, to be fair to Rubenfeld, I have tried to include quotations of Rubenfeld’s arguments when his meaning might be ambiguous.} He argues that sexual autonomy cannot persuasively act as the singular foundational principle of rape law because it is entirely “irrelevant” to the subject.\footnote{Id. at 1424-25.} To illustrate the failings of autonomy theory, Rubenfeld follows a line of investigation focused on differentiating rape from assault and/or battery:

An unanswered question lies at the heart of rape law. Why is rape a crime of its own? Every rape is an assault or battery. Every rapist could be punished on that ground alone. The law, however, does not treat rape that way. Rape law makes an assault involving particular body parts a special crime of its own. . . . The crime of rape is in this respect unique. There is, for example, no special crime of assaulting
someone's hands or face. Nor is there a general crime of penetrating the body. . . . [W]hat is the special violation that rape inflicts? . . . For now, we are asking how modern rape law explains itself—how rape's existence as an independent crime, graver than almost any other assault, is explained today. 78

Rubenfeld's initial argument, that rape is simply assault and/or battery is not a new one. 79 Michael Davis, most prominently, advocates the idea that rape should be treated solely as a battery in his 1984 article on the subject. 80 Davis believes that the essence of rape is the battery and physical attack on a person's body. Notably, Davis further contends that rape is "not a very serious crime," 81 showing little regard for, or recognition of, the statements of rape victims on the subject. 82 Like Rubenfeld, Davis espouses his theory toward the altar of doctrinal coherence stating that rape should not be separately codified in order for criminal law to be "theoretically sound." 83 Notably, Rubenfeld did not engage the scholarship contemporaneous with or replying to Davis since he posited that rape is merely battery.

Battery statutes are very different than modern rape laws in text and application. For example, in a battery prosecution, a defendant might contend that she was provoked into an attack or engaged in self-defense. Such arguments are not colorable in rape cases as rape is not justifiable if provoked or as an act of self-defense. Similarly, the most common rape trials, where a victim knows her rapist, normally hinge on mens rea mistakes of consent. Unless someone is confused as to whether she may have entered a sanctioned boxing match, such mistakes are virtually unheard of in battery cases.

There is a more basic problem in Rubenfeld's methodology that illustrates why his aim is misdirected. He posits that rape is just a battery that targets particular regions of the body. He then asks if there is any reason to displace that assumption by making rape a separate crime. A difficulty with this path of scholarly examination is that it applies to any crime of violence. What is murder but a battery that results in death? Is not an aggravated assault just a battery that causes serious bodily harm? Assault with a deadly weapon? That is simply a battery with a particular means of harm. Why do we treat assault or battery of a law enforcement officer differently? Indeed, beyond assault and battery, one might ask why drug distribution is distinguished from simple possession or driving under the influence from reckless driving. Further, rape

78. Id. at 1387, 1392.
79. See, e.g., Michael Davis, Setting Penalties: What Does Rape Deserve, 3 LAW & PHIL. 61, 62-63 (1984) (contending that rape should be prosecuted "as a variety of ordinary (simple or aggravated) battery because that is what rape is.").
80. Id.
81. Id. at 62.
82. Id.
83. Id.
brings risks of pregnancy and sexually transmitted diseases that do not exist in battery cases.

The line of questioning used by Rubenfeld itself adds little to the debate and ultimately distracts from the obvious point that rape, as any rape victim can attest, is different than assault and battery (just as someone shot in the leg can explain why a bullet is different than a fist punch). There is still substantial value in exploring the foundational concepts differentiating each crime, but the particular method of inquiry used by Rubenfeld is of dubious utility.

Perhaps recognizing the difficulties with his question, Rubenfeld acknowledges that his investigation might "seem deliberately obtuse or wantonly insensible." However, the misapprehension with Rubenfeld’s question is not, as he suspects, that it pertains to a highly sensitive topic that scholars, activists, and victims would rather not discuss. Rather, the reason his question is particularly problematic is that he boldly asserts that it has remained "unanswered" like a missing piece of rape law theory that has been ignored for generations. In contrast to Rubenfeld’s claim, modern rape law theorists are not squeamishly clutching their metaphorical pearls and avoiding fundamental issues of rape law. Rather, the question that he asks has been addressed over and over again by a wide range of authors. Scholars, courts, and activists have articulated three major justifications, other than autonomy, for treating rape differently than ordinary batteries or other crimes: harm, gender, and terror.

1. Rape’s Harms

Rape causes greater and different harm than ordinary batteries. Rape is not merely an attack on the body, but a violation of the psyche of an individual.

84. Rubenfeld, supra note 1, at 1387.
85. In case of confusion on my metaphor, I am referencing a rhetorical move commonly used on feminist blogs. The feminist authors criticize arguments that assume feminists are too squeamish or delicate to engage in substantive discussion about the issue debated by referencing “pearl clutching.” The idea is that women clutch their pearl necklaces in shock or horror at what is being stated. This is, of course, a misogynist assumption that feminists and women are incapable of “real” discussion about tough issues (especially when the conversation involves so-called “women’s issues”). Rubenfeld’s statement appears to support such an assumption in the way he characterizes that his argument might appear “deliberately obtuse or wantonly insensible.” Id. For more discussion of the growing use of the “pearl clutching” metaphor more broadly, see Torie Bosch, A Plague of Pearl Clutching: How Clutch the Pearls Became a Lady Blogosphere Cliché, SLATE (Jan. 20, 2012, 11:26 AM), http://www.slate.com/articles/doublex/doublex/2012/01/pearl_clutching_how_the_phrase_became_a_feminist_blog_cliche_.html.
86. Throughout this subpart of the Article, I make heavy use of quotes. I do this for two reasons. First, in addition to arguing for the substantive claims made in the quotes, I want to clearly counter Rubenfeld’s position that scholars have left “unanswered” the question of why rape is separately codified. Second, in many cases, I believe that quotes about the experience of rape are important to give appropriate weight and voice to victims.
87. DRESSLER, supra note 38, at 581 (“[R]ape surely involves more than bruises or breaks to the body. . . . It is an internal assault, an assault on the psyche, and a severe violation of the privacy of the victim.”).
Susan Brownmiller rightfully explains how rape is degrading and humiliating to victims, not because of outdated sexual mores, but because of the inherent sexual domination of the act. Studies repeatedly show that rape victims have substantially higher risks of physiological and psychological effects including post-traumatic stress disorder (PTSD), depression, and suicide. Robin West persuasively contends that the experience of individualized terror combines with the physical pain to make rape distinctive. Rape victims are also stigmatized in a manner quite different than the treatment given to other crime victims. One rape counselor explained how social sanctions isolate rape victims:

Rape is different from other crimes and should be treated differently. . . . Face it, [rape] isn’t the same as having your wallet stolen. If you’re the victim of a theft or mugging, no one will look at you cross-eyed

88. There is an ongoing discussion as to whether “rape victim” or “rape survivor” is the most appropriate label for those persons who were raped. David Mills, Semantics of Rape Language vs. What’s “Politically Correct,” WASH. POST, Nov. 22, 1991, at B5. The argument against using the word “victim” is primarily because the passivity of the word is disempowering. Edward W. Gondolf & Ellen R. Fisher, Battered Women as Survivors: An Alternative to Treating Learned Helplessness 17-18 (1988); Evelyn Mary Aswad, Torture by Means of Rape, 84 Geo. L.J. 1913, 1916 n.11 (1996); Martha R. Mahoney, Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings, 65 S. CAL. L. REV. 1283, 1311 n.115 (1992). “Survivor” is a preferred term for many people because it indicates that the person who was raped had moved past the trauma of the experience of rape. See, e.g., Rhona Dowdeswell, Why I Must Forgive to Get Over My Rape; Analysis, W. DAILY PRESS, Jan. 25, 2002, at 8. In contrast, Andrea Dworkin offers perhaps the strongest defense of using the word “victim” in this context:

It’s a true word. If you were raped, you were victimized. You damned well were. You were a victim. It doesn’t mean you are a victim in the metaphysical sense, in your state of being, as an intrinsic part of your essence and existence. It means somebody hurt you. They injured you. . . . And if it happens to you systematically because you are born a woman, it means that you live in a political system that uses pain and humiliation to control and to hurt you.

Andrea Dworkin, Woman-Hating Right and Left, in The Sexual Liberals and the Attack on Feminism 28, 38 (Dorchen Leidholdt & Janice G. Raymond eds., 1990). Similar to Dworkin, some people who have been raped prefer “victim” because they feel that it better reflects their experiences. Kate E. Bloch, A Rape Law Pedagogy, 7 YALE J.L. & FEMINISM 307, 308 n.6 (1995). I ultimately decide to use “victim” because of those persuasive arguments but recognize that my choice might be objectionable to some.

89. See Susan Brownmiller, Against Our Will 376-78 (1975). Rubenfeld is largely dismissive of the unique psychological and physiological harms associated with rape because he associates them entirely with sexual mores of a bygone era. That response is ultimately unpersuasive because of the numerous studies cited herein which explore the effects unassociated with what Rubenfeld refers to as defilement harms. Further, even accepting Rubenfeld’s argument that all of the harms described here are a relic of Victorian sensibilities, such harms are still a reality for victims. Simply saying that the world should move past such concerns does nothing to address the incredible damage suffered by rape victims. This, of course, is not to say that we should make the mistake of assuming the worst and rhetorically escalate the described harms. Rather, I am just calling for truth in harm.


91. Robin West, Caring for Justice 102 (1997) (“[T]his coupling of unwanted and painful sexual penetration with the experience of terror . . . is the most gender-specific aspect of the experience of rape.”).
and blame you, ask you what you were doing in that part of town, or why you were wearing tight clothes, or what you did to deserve it.\(^2\)

Courts, which have not been a particularly progressive force in rape law, have long recognized that the severity of harms justifies separate treatment of rape. For example, over thirty years ago, the New York Court of Appeals wrote: “The fact that rape statutes exist, however, is a recognition that the harm caused by a forcible rape is different, and more severe, than the harm caused by an ordinary assault.”\(^3\) Illustrating the very unusual long-term effects of rape, many rape victims annually recognize the anniversaries of their rapes because of the disjunction in their life that resulted from the attack.\(^4\) It is the higher level and distinct nature of harm, including but not limited to the violation of autonomy, which serve as the primary basis for codifying rape as a separate crime in modern America.\(^5\)

Rubenfeld’s response to rape’s unique harms is disconcerting. He classifies all of the related physical and psychic harms of rape as solely the product of outdated sexual puritanism.\(^6\) In particular, he contends that victim shame from those ancient social mores of female defilement account for why modern victims experience greater harm from rape.\(^7\) He ultimately concludes that self-possession theory is the only explanation for why rape is worse because it encapsulates the “helplessness, fear, and pain” experienced by rape victims.\(^8\)
It is this last point that illustrates how Rubenfeld’s argument defeats itself. He starts by saying the only explanation scholars and courts give for rape being different than battery is the violation of autonomy (ignoring the utilitarian harms that have been documented for decades). Next, he states that the fear and pain experienced by rape victims is due to the legacy of sexual defilement norms. He then concludes that self-possession theory is superior because it explains the harms (“helplessness, fear, and pain”) that he ignores in his initial claim and dismisses as explainable by negative cultural norms in his second point. By recognizing the very harms he earlier ignores and dismisses, he ends up articulating a basis separate than autonomy theory for rape law.

Regardless of the tension in his argument, the much larger problem with Rubenfeld’s account of rape harms is that he misunderstands the history of sexual defilement morality. Rubenfeld’s story is that rape was considered a separate crime in early America because of a “simple” reason: “rape defiled women.” He so concludes because he takes the judges of the time at their word that the motivation for punishing rape was to protect women.

Rubenfeld’s narrative is contrary to the well-documented history, in many of the sources he cites and discusses, that defilement of White women was only a concern to the male legislators and judges because rape of a woman amounted to destruction of male property. When White women were raped, courts cared that they were ruined not because of empathy or humanity, but because such women were no longer considered worth marrying. Without virginity, prospective wives were deemed worthless whether the virginity was given consensually or taken against their will. Rubenfeld dances around this distinction when he recognizes the role of women-as-property in discussing the marital rape exception, but misses the mark in providing an accurate history of why rape was criminalized into the twentieth century.

The reason for my focusing on defilement of White women in the previous paragraph is that it is virtually impossible to discuss rape law history without also addressing the disparate treatment of both Black victims and alleged rapists. And yet, Rubenfeld’s history of rape law’s focus on female defilement is oddly silent on the subject of race. Indeed, Rubenfeld refers to a universal

99. Id. at 1388, 1391. Rubenfeld’s claim that “[r]ape as a crime against female virtue explains other definitive features of traditional doctrine” such as rape formerly being a crime that could only be committed against women.

100. Id. at 1388-1389. See also id. at 1391 (“Rape was ruin, and sex did not ruin men.”).

101. Zanita E. Fenton, An Essay on Slavery’s Hidden Legacy: Social Hysteria and Structural Condonation of Incest, 55 HOW. L.J. 319, 331 (2012) (“Rape for white women was originally offense trespass against the property interest of the father or husband as owner of the woman violated.”).


103. Id.

104. Rubenfeld, supra note 1, at 1388-92 (discussing the historical reasoning for punishing rape based upon female defilement).
“woman” in discussing why rape was punished in much of American history. However, the truth for Black women and other women of color victims was far different. Before the civil war, Black women, even those who had been “freed,” were sexually victimized with little concern by prosecutors for their defilement. Even well into the twentieth century, Black women were not recognized as rape victims because they were perceived as overly promiscuous and not capable of being defiled.

Similarly, the fear of female defilement through rape was largely constructed against myths about wild Black men terrorizing White women. The Black beasts narrative has long dominated rape law and was famously exemplified in trials of the “Scottsboro Boys” in the 1930s, where in which Black teenagers in the South were wrongfully convicted for rape and sentenced to death. The death penalty for rape was largely derived from lynchings of Blacks in southern states and almost never applied to White defendants. The story of rape as defilement that Rubenfeld tells simply whitewashes the ugly racial dynamics that shaped rape law through most of American history.

In this case, the historical difference matters quite a bit. When rape was punished as a defilement of male property, the woman victim was left out of the equation. In contrast, in modern America, the psychic, traumatic, and physical injuries of rape victims are understood differently because the punishment of the rapist is inflicted in retribution for the harm to the victims (and not their dear husbands).

105. See, e.g., Rubenfeld, supra note 1, at 1388 (“[R]ape defiled women. No injury to a woman short of death, and perhaps not even death, was worse than rape. . . . To rape was to shame and dishonour a woman. Or in the sympathetic phrase of a seventeenth-century digest compiled for the governance of the New World, to rape a woman was to make a whore of her.”) (internal quotation marks omitted).

106. Jeffrey J. Pokorak, Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities, 7 Nev. L.J. 1, 7-8 (2006) (“The history of rape prosecution has always been inextricably intertwined with the history of race relations in this county. . . . Raping a Black woman was not a crime for the majority of this Nation’s history. First, the rape of a Black woman was simply not criminalized. And even when there was an argument that a statute was race neutral as to victimization, prosecutorial inaction and Court holdings made clear the lack of recourse for Black women who were raped.”).

107. Id. at 22-23 (“Although the laws no longer defined crimes and punishments by race of victim and race of offender, those with the discretionary power to wield the law—police, prosecutors and judges—mostly acted as if nothing had changed. . . . This resulted in the stark continuation of the two-pronged gendered racism in criminal prosecution and punishments for rape. . . . Black men and women were still considered sexually promiscuous in a way that allegedly endangered White women and made rape of a Black woman legally impossible. . . . Similarly, no Black woman was presumed virgin or chaste and was therefore presumed promiscuous.”).


110. This is not to discount the ongoing role of patriarchy and misogyny in rape law. Rather, I only seek to show that the rape-as-property-damage theory has largely disappeared from mainstream discussions.
post-traumatic stress disorder can be attributed to the violence of the Middle Ages in Western Europe.

The unique harms experienced by rape victims are understood without a theory of self-possession because those victims articulate their pain and suffering and should not have it summarily dismissed as a historical relic of a bygone age. Further, self-possession theory is especially tone-deaf in this regard because it ultimately discounts the harms suffered by the large majority of rape victims by only recognizing rapes with an excessive amount of force used.111

2. Rape and Gender

Rape is different than other assaults and personal violations because it is inextricably intertwined with gender and patriarchy. Rape is a heavily gendered crime whose perpetrators are almost exclusively male and victims, outside of prison, are overwhelmingly female.112 This is not to deny or diminish rape involving other gender combinations, including male-male, female-female, or female-male. Rather, it is a simple statement about how gender explains and potentially justifies rape’s unique status in American law. As Susan Estrich states in her classic book Real Rape: “Rape is different from assault. . . . Ignoring these differences allows the exclusion of the simple ‘technical’ rape from the working definition of the crime to appear neutral, when it is not.”113

Much like modern hate crime statutes, rape laws are justified as attempts to prevent and punish a crime of gendered violence.114

It is surprising how gender is largely missing from Rubenfeld’s article. There are obviously references to men and women. But discussions of feminist theories of patriarchy or systemic biases against women are largely omitted.115

He regularly cites and discusses feminist scholars who created the backbone of modern rape law theory, but leaves out gender-conscious portions of their arguments. This gender blind-spot helps to explain why Rubenfeld focuses exclusively on universal (gender-neutral) theories of autonomy and self-possession. Rubenfeld simply fails to recognize how social misogyny provides a foundational value for separate codification of rape law.

However, it is important to note the significant recent work that I. Bennett Capers is doing in describing how the rhetoric that rape is different because of

111. See infra Part III.A.
114. Dan M. Kahan, What Do Alternative Sanctions Mean, 63 U. CHI. L. REV. 591, 598 (1996) (“A rape, for example, is often more reprehensible than an ordinary assault—even if the assault results in greater physical injury—because the violation of a woman’s sexual autonomy conveys greater disrespect for her worth than do most other violations of her person.”).
115. The words “patriarchy” and “patriarchal” are absent entirely from his article, which is especially striking in an article that discusses so much history of rape law.
its gendered qualities is used to support rules and laws of questionable value. He ultimately concludes that having unique evidentiary rules for rape because of gender concerns undermines feminism and gender equality. While Capers’s contentions warrant a thoughtful response, they do not call into question the idea that rape law is justified, in a descriptive sense, by gender concerns. As a result, Capers’s claims are inapposite to the difficulties with Rubenfeld’s argument. Rubenfeld is focused solely on the question of substantive law of justifying why rape should be codified separately. In contrast, Capers is concerned with the procedural and evidentiary accommodations that have been made for rape cases because of gender concerns. There is no inherent tension between contending that rape, because of gender dynamics, should be a separate substantive offense but should have no distinct procedural or evidentiary rules.

3. Rape and Terror

Related to the gender dynamics issue, rape is different because it creates an atmosphere of terror in the face of widespread sexual violence. Catherine MacKinnon famously explains the unique terror effects of rape when she writes: "[A] rape is not an isolated event or moral transgression or individual interchange gone wrong but an act of terrorism and torture within a systemic context of group subjection, like lynching." Elizabeth Stanko similarly writes that: "To be a woman . . . is to experience physical and/or sexual terrorism at the hands of men . . . . We are wary of going out at night, even in our own neighbourhoods."

Studies have long documented how the fear of rape substantially alters the decisions people make in their daily lives. Alexandra Wald finds that women are less likely to enter or stay in the public sphere because of the fear of sexual violence. Robin West observes how women often try to escape the terror inflicted by rape by seeking protective men, who often end up representing the
very danger that women are trying to escape. The net result of the terror inflicted upon women by rape is that they bear, as a class, a unique social burden. Those collateral terror effects make the status of rape quite different than ordinary batteries because even persons who are not directly victimized by rapes are secondary victims.

Rubenfeld fails to recognize how the pattern of sexual violence creates harms that differentiate rape as a crime. Further, he is simply wrong that his question concerning why rape should be codified as an independent offense has gone unanswered. He misses the overwhelming bulk of the relevant literature in reaching this conclusion and misreads the cases in the general sphere of sex laws. He, of course, would be free to argue that his self-possession theory is still a better basis for rape law than existing justifications (a position I discuss later). However, his failure to engage the larger scholarship that properly offers a foundation for rape laws renders his theory of a right to self-possession a solution in search of a problem.

B. (Mis)understanding Sexual Autonomy

Given the breadth and depth of writings describing alternate justifications for rape statutes, why does Rubenfeld fixate on autonomy as the sole foundation for modern rape laws? Rubenfeld's mistaken focus seems to be based upon a misreading of rape law scholarship and court cases. His failure to appreciate the way rape law scholars write about autonomy is likely due to the unusual dynamics of autonomy in a mutual activity such as sex. Ultimately, Rubenfeld seems quite comfortable in discussing classic philosophical texts on general human autonomy theory, but is out of his element in recognizing why sexual autonomy is inherently different.

1. Asexual Autonomy

Rubenfeld offers many ideas and beliefs about autonomy, but precious few are helpful or applicable in differentiating rape from consensual sex. Indeed, Rubenfeld so misunderstands how concepts related to sexual autonomy are different than a general autonomy principle, that he views autonomy as fundamentally at odds with sexuality. He posits this convoluted metaphor to illustrate his incommensurability argument: “Bringing autonomy to sexuality is

123. Rubenfeld, supra note 1, at 1422 (“Individual autonomy is the last thing sexuality wants. From autonomy’s point of view, sexuality is undesirable. From sexuality’s, autonomy is.”).
like offering hunger the freedom to drink as much water as it likes, at whatever
temperature it chooses.”124

The primary factor in separating sexual autonomy from other forms of self-
determination is that sex, at least the sex that can be part of a rape, requires
more than one person. Whereas autonomy for a solo activity might imply
uninhibited freedom, sexual autonomy has built-in limits. Rubenfeld simply
ignores this fundamental distinction and treats sexual autonomy as a libertarian
concept of unbounded choice.

Rubenfeld uses his idiosyncratic view of sexual autonomy to make his
arguments viable. For example, in discussing the impossibility of sexual
autonomy, Rubenfeld creates a strawman argument by defining autonomy in
terms that no actual rape law scholar supports:

For many, sexual autonomy means sexual “self-determination” . . . .
But guaranteeing everyone a right to sexual “self-determination” is
quite impossible. . . . [O]ne person’s sexual self-determination will
inevitably conflict with others’: John’s will require that he sleep with
Jane, but Jane’s will require otherwise.125

That example is nonsense. No one except Rubenfeld defines an
individual’s sexual autonomy as giving a person license to rape another.
Stephen Schulhofer is perhaps the scholar who has offered the richest account
of sexual autonomy in regards to rape law and his work is discussed in
Rubenfeld’s article.126 Schulhofer defines sexual autonomy as the exercise of a
basic right to choose with whom we have sexual relations.127 He contrasts
autonomy with coercion and concludes that autonomy ends where coercion
begins.128 Rubenfeld simply offers his own view of autonomy, with no basis in
the rape law literature, and then knocks it down. He is arguing only with
himself.

Rubenfeld only superficially engages rape law scholars and judges who
have issued relevant opinions in defining sexual autonomy and assessing its
role in modern rape law theory. For example, among scholars that he discusses,
Rubenfeld does not appreciate or articulate the context of the work of scholars
such as Patricia Falk and Schulhofer who argue that autonomy is a fundamental
principle for defining sexual consent.129 In the portions of their work cited,
Schulhofer and Falk are normatively contending that the word “consent” in

124. Rubenfeld, supra note 27, at 392.
125. Rubenfeld, supra note 1, at 1418.
126. Id. at 1394.
127. SCHULHOFER, supra note 54, at 144-45.
128. Id.
129. Rubenfeld, supra note 1, at 1394.
modern rape statutes should be understood through the autonomy paradigm. Rubenfeld’s argument is operating on a different, more basic level. Schulhofer and Falk are not seeking to justify the codification of rape as a distinct crime solely via sexual autonomy (although they would likely contend that it is one of many justifications for distinct rape law). Rather, the focus of their scholarship is assuming such codification and arguing how the consent element should be understood by supporting a strong notion of sexual autonomy.

Similarly, Rubenfeld reads far too much into this single quote from the majority opinion in the Supreme Court’s decision in Coker v. Georgia. In the text cited by Rubenfeld, the Court writes that:

We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter’s privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the ultimate violation of self.

Nowhere does the Court contend that autonomy, to the exclusion of other principles, explains the severity of rape and why the crime is not treated as an assault. The Court is simply trying to address concerns that its holding—that the death penalty could not constitutionally be applied to the crime of rape—does not minimize rape. Further, the Coker opinion is simply too dated to be

130. The citation to Schulhofer is clear in this regard. SCHULHOFER, supra note 54, at 99-113. Within the text, Rubenfeld recognizes the limited nature of Schulhofer’s claim when Rubenfeld only notes that “Stephen Schulhofer has argued extensively in favor of ‘sexual autonomy’ and the ‘right to sexual self-determination.’” Rubenfeld, supra note 1, at 1394 (citing STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 19-20 (1998)). This claim is far different than Rubenfeld’s belief that autonomy is the underlying principle for the separate codification of rape. The quote Rubenfeld uses from Falk is more ambiguous and may have created some of the confusion. Falk contends that “[T]he central value protected by sexual offense provisions is sexual autonomy or sexual integrity, the violation of which represents a unique, not readily comparable, type of harm to the victim.” Patricia J. Falk, Rape by Drugs: A Statutory Overview and Proposals for Reform, 44 ARIZ. L. REV. 131, 187 (2002). Taken alone, this quotation would seem to give credence to Rubenfeld’s claim that sexual autonomy is the critical basis for rape law. However, the sentence appears in the context of Falk discussing the concept of consent in cases where the victims are subject to “force, threat, coercion, power, fraud, or drugs.” Id. The fairer reading of the text is that when Falk identified the “central value protected by sexual offense provisions” she means the consent element specifically and not the central value of sexual offense provisions generally. Regardless, Rubenfeld simply misses the alternative claims of rape’s special status in large swaths of scholarship previously discussed herein (and cited by Rubenfeld in many instances).

131. Coker v. Georgia, 433 U.S. 584, 597 (1977) (internal citations and quotations omitted). Indeed, it was only two years previous to the Court’s decision in Coker that Michigan became the first state to amend its rape laws to reflect some of the concerns of feminists. SCHULHOFER, supra note 54, at 29.
relevant because it was issued in 1977, well before almost all of modern rape law scholarship was published.132

Perhaps the oddest step in Rubenfeld’s analysis is his treatment of the Supreme Court’s 2003 opinion in Lawrence v. Texas, ruling the Texas anti-sodomy statute unconstitutional.133 To be fair, the majority opinion in Lawrence is not a model of clarity.134 The exact contours of the so-called Lawrence right are poorly elucidated and, as a result, difficult for other courts to apply in a consistent manner.135 Nonetheless, whatever Lawrence does mean, the decision conceives of autonomy as a shield protecting an individual’s sexual liberty from government prosecution.136 After Lawrence, adult Americans, in private, are thought to be free to engage in non-commercial sodomy.

In contrast, Rubenfeld, in portions of his article, views Lawrence as embodying the notion that sexual autonomy is a sword such that any violation of that autonomy is criminal. In particular, Rubenfeld claims that if rape law does not recognize rape-by-deception as rape, which it currently does not, then the Lawrence decision is “rebuke[d]” and the right to sexual autonomy described in the opinion is violated.137 He further contends that Lawrence would have to be “reconsidered” if the right to sexual autonomy is not the fundamental component of rape law.138

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132. Rubenfeld also cites the well-known New Jersey case of State ex rel. M.T.S., 609 A.2d 1266, 1278 (N.J. 1992). M.T.S. is even less relevant than the language used in Coker. Many at the time of the decision thought that M.T.S. represented a new direction in understanding consent such that a person would require affirmative consent before initiating a sex act. However, the decision has largely been ignored in the general rape cases because of the special circumstances in the matter. The case involved two juveniles in a controlled institutional setting. Later courts have so limited the holding in M.T.S. to analogous situations. SCHULHOFER, supra note 54, at 97-98. Further, the M.T.S. opinion is not addressing the fundamental question as to why rape is differentiated from ordinary assault. It is simply trying to untangle the law of consent, which was in flux at the time.


135. James Allon Garland, Sexual Expression: Sex as a Form of Gender and Expression after Lawrence v. Texas, 15 COLUM. J. GENDER & L. 297, 307 (2006) (“As the scholarly debate over its meaning attests, Lawrence’s lack of clarity about the nature of the right it recognized may already be promoting its narrowing.”).


137. Rubenfeld, supra note 1, at 1409 (“If Lawrence really holds that every individual has a right to sexual autonomy, rape law’s permission of sex-by-deception—permitting private actors to deceive people into sex—would be analogous to a statute permitting private actors to deceive women into childbirth. It would be a rebuke to Lawrence. It would allow private actors to deny or obstruct a freedom that constitutional law had deemed fundamental.”).

138. Id. at 1413 (“One of them has to give. Perhaps sex-by-deception should be rape—or at any rate a crime—in which case our criminal sex law could and should embrace sexual autonomy without cavil. Or perhaps instead the supposed right to sexual autonomy is wrong, in which case rejecting rape-by-deception is much less problematic, but Lawrence v. Texas, to the extent that it stands for such a right, would have to be reconsidered.”).
Rubenfeld’s view of Lawrence is unsupportable. The right to sexual autonomy, as conceived of in Lawrence, is only a protection from government punishment of consensual sexual activity. Private actors who violate other people’s sexual autonomy do not abridge that right under current law. If Rubenfeld wants to argue for a stronger view of autonomy (which would be antithetical to his claim that the right to sexual autonomy is useless in rape law), then he is free to do so. However, to argue that the Lawrence right under current doctrine is “obstruct[ed] or den[ied]” when a rape occurs is beyond any reasonable reading of the Court’s opinion.139

Indeed, the difficulty with Rubenfeld’s Lawrence discussion perhaps highlights that his discussion of “rights” (the right to sexual autonomy versus the right to self-possession) is inappropriate in the context of substantive criminal law. The criminal code is filled with hundreds of crimes that do not reflect fundamental rights violations such as drug possession, loitering, or prostitution. Indeed, it is often fundamental rights that curb the scope of criminal laws as in the cases of sedition laws (limited by the First Amendment), retroactive punishment (limited by the Ex Post Facto Clause), and weapon possession statutes (limited by the Second Amendment). Rape law might protect sexual autonomy, but there is simply nothing gained by characterizing the discussion as involving the constitutional right articulated in Lawrence.

2. Smoking and Sex

As a result of his odd conception of sexual autonomy, Rubenfeld concludes that autonomy should be discarded from rape law as it is “irrelevant.” To make that strong claim, he relies on a single, bizarre hypothetical example. Rather than summarize Rubenfeld’s argument, and have you, the reader, think that I have potentially misstated it, I include it here in its entirety:

In fact, sexual autonomy is a red herring when it comes to rape. Seeing why will point the way to an alternative principle. Imagine two friends debating whether individuals have a fundamental right of “smoking autonomy” (meaning something like a right to smoke if and as one chooses). John, a cigar smoker, claims there is such a right. Jane, a nonsmoker, denies it. John says smoking is central to and expressive of his identity; Jane says no one has a right to inflict on others unpleasant and perhaps harmful smoke. In a subtle parry of Jane’s nuanced logic, John physically forces her to smoke the cigar against her will.

139. Id. at 1409.
140. Id. at 1424-25.
Now: are we obliged to say that Jane was wrong—that there is a right of “smoking autonomy”—in order to conclude that she had a right not to have a cigar stuffed into her mouth? I don’t think so. What makes John’s act wrongful has nothing to do with whether it violated Jane’s supposed right of “smoking autonomy”—a concept we might want to reject altogether. In other words, “smoking autonomy” is wholly irrelevant to the wrongness of John’s act.

So too with “sexual autonomy” and rape. No one needs to believe in “sexual autonomy” to be against rape. Sexual autonomy is irrelevant to rape law.141

The analogy between smoking and sexual autonomy is not just strained; it is simply wrong. There are significant ways that the activities of smoking and consensual sex are radically different.

The problems with Rubenfeld’s analogy can be boiled down to, at a minimum, three objections. First, smoking has deleterious effects on persons not partaking in the activity through second-hand smoke. When Jane in Rubenfeld’s example asserts her right not to have her air polluted, she is not just arguing against forcible smoking—she is saying that John does not have a right to contaminate her air through second-hand smoke without her consent. Jane has a competing right in preserving her health and second-hand smoke violates that right. This is the nature of rights and autonomy in a modern liberal society wherein conflicts between rights and autonomy inevitably lead to constraints without abandoning the conflicting rights or autonomy entirely. In contrast, private consensual sex represents neither danger to other parties nor a rights conflict.

Second, Rubenfeld conflates necessary and sufficient conditions. He is quite right to assert that “[n]o one needs to believe in ‘sexual autonomy’ to be against rape.” As discussed in Part II.A, there are other bases for someone to object to rape: harm caused, gendered impacts, and terrorization. Autonomy, however, is a potentially strong sufficient condition to argue that rape is wrong. Simply arguing, as Rubenfeld does, that autonomy is not a necessary condition does nothing to establish it is “irrelevant” to rape law.

Third, the nature and numbers of persons involved in smoking and sex differ. Smoking is a solitary activity. As discussed earlier in this Part, sex, at least the type of sex that can turn into rape if there is no consent, involves more than one person. Protecting so-called “smoking autonomy” merely means allowing a single person to smoke (limited only by method or location so that other persons are not negatively impacted). In contrast, sexual autonomy involves protecting the autonomy of all persons involved in a sexual encounter.

141. Id.
Rape Law Fundamentals

It means giving each person a right to say “yes” and “no.” The right is necessarily different because it involves protecting an interaction between at least two persons instead of one person and an inanimate object.

3. Sexual Theft and Autonomy

One of the interrelated reasons that Rubenfeld misreads the literature on sexual autonomy is because of his focus on the crime of battery. The general project of comparing the legal definition of rape to other criminal statutes, such as battery, is valuable. In particular, such comparisons help to clarify what is similar and dissimilar about rape law. However, Rubenfeld’s exclusive focus on battery misses the far more helpful analogy used to analyze rape—the crime of theft. It is through the discussion of theft law that a richer picture of sexual autonomy emerges.

Despite the linguistic similarity between “assault” and “sexual assault,” scholars find greater connections between the law of theft and rape than assault and rape. Scholars as diverse as Richard Posner, Robin West, Susan Estrich, and Donald Dripps recognize that, from a statutory perspective, rape is essentially the theft of sex.142 Richard Posner is clear about his support for analyzing rape law via theft prosecutions when he labels rapists as “sex thie[v]es.”143 Consistent with his choice of terminology, Posner argues that sex should be treated as a commodity and rape should be viewed as theft of that commodity.144 Donald Dripps offers a similar, yet distinct, commodity theory of rape and sexual assault recognizing the linkages between rape and theft law.145 Robin West, while not fully embracing Dripps’s statutory and theoretical proposal, does ultimately find the theft analogy helpful in studying and explaining rape law.146 Susan Estrich, in arguing that consent can be negated by extortionate threats and misrepresentations of material fact, can also be read as proposing a similar commodity analysis to address the very concerns that Rubenfeld is focused on: rape-by-deception.147 The focus on battery (instead of theft) law ultimately leads Rubenfeld astray as he sees force and the

143. Posner, supra note 112, at 182.
144. Id. at 182-83.
145. Dripps, supra note 142, at 1805-06.
147. Estrich, supra note 113, at 102-03. Unlike Posner and Dripps, Estrich seeks to criminalize coercive sex situations through using the theft analogy. Id. Unfortunately, unlike Dripps, Estrich does not detail how the analogy would be put into effect to criminalize coercive sex in the manner that she desires. Schulhofer, supra note 54, at 84.
physical invasion of the body as the quintessence of rape in crafting his theory of self-possession.

This is, of course, not to say that rape is theft. Equivocating the two crimes would repeat the mistake of Rubenfeld contending that rape is merely a type of battery. Robin West, in particular, in reviewing Posner's work on the subject, identifies several concerns with the theft-rape analogy. West argues that Posner's commodity theory of rape fell prey to the problem of legitimation. Because Posner takes a strong view of autonomy, he is unwilling to support any attempt to criminalize rape by fraud or coercion. West is concerned that the failure to criminalize coercive sex means that those acts became legitimated by their legality. The end result of Posner's silence concerning other crimes is that society would remain blind to coercive sex acts even when there were "grossly unequal distributions of sexual power." Nonetheless, in her debate with Dripps about his commodity theory, she ultimately finds value in the use of the theft analogy for unpacking the patriarchal assumptions of the application of modern rape law.

Despite its shortcomings, comparing rape to theft offers insights into why rape law reform has not been a long-term success because prosecutors, jurors, judges, and legislators treat rape as a radically different crime justifying special defendant-friendly rules. In contrast, treating rape as a subset of another crime, such as a battery, is indefensible because of the unique issues involved with sexual violence described in Part II.A.

The theft analogy offers numerous benefits for the feminist and rape law reformer perspective when compared to the traditional definitions adopted by courts and legislatures. It explains the inappropriateness of the "utmost resistance standard" and its watered-down variants as no resistance is required for theft victims. Similarly, evidence of past consensual sexual history of the victim is irrelevant under the theft analogy just as evidence of charitable giving by the victim is inadmissible in a theft trial. The commodity theory underlying the theft analogy puts emphasis on choice, a value fundamental to feminist theories of rape law.

149. Id.
150. Id. at 2431-32.
151. Id. at 2431 (emphasis added).
152. West, supra note 142, at 1447.
153. West, supra note 146, at 2431.
154. See, e.g., id. at 2431. As with any analogy, there are differences between rape and theft that are important to note. For example, although Dripps is careful not to adopt a commodity theory that would "smuggle in a normative term," it is impossible to avoid the inclusion of inherent assumptions about the nature of commodities. Dripps, supra note 1422, at 1787. In many theft cases, restitution is possible and a victim can be made whole. Stolen goods can be returned. Even when the stolen objects have high sentimental value, there is still some measure of fungibility. Dripps recognizes the difficulty with this portion of the analogy and, accordingly, shifts his discussion from theft of goods to theft of personal services. Id. at 1801-03. Under this perspective, however, the analogy is still difficult to apply.
The comparison to theft effectively explains how autonomy should be used to separate a consensual event (charity or gifting) from a non-consensual one (theft). Gifting, like sex, is a mutual activity such that there must be a giver and a receiver. If either party chooses not to join in the endeavor then no gifting occurs. In such cases, the autonomy of each individual does not require the other party to comply against his will. Someone who wishes to be a receiver from a giver who does not want to gift stops being a receiver and becomes a thief. Rubenfeld, in his smoking autonomy analogy, omits the discussion of how differently autonomy operates when the activity involved requires mutual consent.

III. SELF-POSSESSION THEORY IS MISGUIDED

Rubenfeld concludes his article by contending that conceiving of rape as a violation of self-possession akin to torture or slavery offers a better basis for modern rape law than autonomy theory. He ultimately argues that the right to self-possession is superior to autonomy theory because it solves the riddle of rape-by-deception. As I noted earlier, I do not dispute that a right to self-possession solves the riddle. Rather, I contend that the means by which it addresses the puzzle is troublesome.

A. Self-Possession and Force

By using a very narrow definition of rape based upon a theory of self-possession, there would be a drastic decrease in the number of rapes that could be prosecuted. As conceived by Rubenfeld, the right to self-possession translates into statutory language requiring the prosecution to prove beyond a reasonable doubt that the defendant must commit a sex act, "through the kind of force that turns labor into slavery: roughly speaking, physical incapacitation, whether through restraint or imprisonment, or serious physical assault (or the threat of either)."

\[155.\] Rubenfeld, supra note 1, at 1432-34.  
\[156.\] One of the oddities of the way Rubenfeld structures his article is that he states quite openly that the portion of the piece regarding self-possession is bound to be controversial and problematic. *Id.* at 1380. He even claims, in his introductory road map, that that portion of the article should not have been written. *Id.* ("Parts IV and V of this Article—well, Parts IV and V should probably never have been written."). Nonetheless, he continues.  
\[157.\] *Id.* at 1436.
The choice of language by Rubenfeld likely indicates that the force requirement used in many jurisdictions would be far narrower if Rubenfeld's theory were implemented into law. Consider, for example, how a California court explained the role of its state's force requirement: "Because the fundamental wrong is the violation of a woman's will and sexuality, the law of rape does not require that 'force' cause physical harm. . . . 'Force' plays merely a supporting evidentiary role, as necessary only to insure an act of intercourse has been undertaken against a victim's will." 158 Even the Pennsylvania Supreme Court's opinion in Commonwealth v. Berkowitz, the most famous case defining a state's force requirement, merely required proof of "forcible compulsion" to satisfy the requirement. 159

Rubenfeld's force requirement, in contrast, requires far more violence or threatened violence on behalf of the defendant. He proposes not just ordinary force, such as a push or slap (or threat of either), be sufficient, but instead says that the force or threat of force must be of the type and severity used to compel someone into slavery. It is difficult to imagine that someone would submit to human bondage without actual or threatened grievous bodily harm. In that way, Rubenfeld's force requirement is much closer to the outdated "utmost resistance requirement" than modern force elements. If Rubenfeld's proposed language is indeed that narrow, then only a handful of rape cases could be prosecuted in any jurisdiction.

The most charitable interpretation of Rubenfeld's proposed statutory change (ignoring the connections he makes to torture and slavery) is that he would have modern rape statutes eliminate the non-consent element and use a typical force requirement as the means of differentiating sex from rape. If that is the case, it is unclear what contribution Rubenfeld's article makes to the relevant literature. The theory underlying the right to self-possession assumes force of a level to compel torture or slavery. If Rubenfeld is merely contending that the modern force requirement is sufficient then his novel theory is a superfluous tangent. 160 Further, even assuming that Rubenfeld's statute would

160. Despite the tension between this modest proposal and his retheorizing of rape law, Rubenfeld contends, in response to critics, that he does not support a "rollback" of rape law. He writes: "It's simply a confusion to think that my account of rape would somehow preclude punishment of these offenses. No 'rollback' of these or other sex offenses is implied by my article." Rubenfeld, supra note 27, at 399. Given that his original article was a radical criticism of existing rape laws, it is strange now to say that he does not support any retrenchment of such statutes. Perhaps realizing the serious problems in his article, Rubenfeld is attempting to rewrite his scholarly history. Ultimately, it is for the reader to decide if Rubenfeld's attempt to blame others for misreading his work is a sound argument. See supra note 27. In particular, it seems impossible to reconcile the above statement with this quote from his original article: "Accordingly, absent physical restraint, overpowering, violence, or the threat of violence, rape as a violation of self-possession would fail to give 'no' the categorical rape-creating effect a consent-based conception might give it." Rubenfeld, supra note 1, at 1440. That prescription undoubtedly represents a very significant "rollback" of rape law reforms in jurisdictions that do not presently have a force requirement.
be identical to modern force requirements, it would still have disastrous effects
through imposition of that element in jurisdictions that had removed it.

In his article, Rubenfeld fails to consider the paradigmatic rape scenario
under modern rape law: non-stranger rape.\(^{161}\) Since the rape law reform
movement, cultural changes have steadily allowed prosecutors to win
convictions in non-stranger rape cases. In such situations, force is rarely used.
Studies and the best available data indicate that such cases now constitute
approximately ninety percent of rapes in the United States.\(^{162}\) Rubenfeld
ignores such instances and his silence is telling in his failure to engage the vast
majority of fact patterns in rape cases.

It is also worth noting that Rubenfeld includes one last wrinkle regarding
consent in his proposal that undoes any of his suggested gains (while doing
nothing to mitigate the downside). He notes that consent would not be entirely
removed from his proposal. Instead, he states that "[r]ape as a violation of self-
possession would ask whether the violence was consented to."\(^{163}\) He contends
that this consent question would not be subject to the problems he associates
with modern consent elements because "[w]hether a person wanted sex may be
easily put in question; whether a person affirmatively gave her permission to be
bound, cut, whipped, threatened, and so on, is more difficult to make an issue
of."\(^{164}\)

Rubenfeld omits one basic fact of criminal rape cases, particularly non-
stranger rape prosecutions, which practitioners in the area know well: people
lie. Rape cases, whether prosecuted or not, usually amount to competing
narratives about events for which there is no documentary evidence.\(^{165}\) If there
were actually consistent stories or objective video recording, rape law would be

\(^{161}\) Anderson, supra note 4, at 645-46.

\(^{162}\) See NAT'L VICTIM CTR., supra note 6, at 4 (discussing data showing the rarity of serious
physical injury or threatened serious physical injury in reported rapes).

\(^{163}\) Rubenfeld, supra note 1, at 1437. See also id. at 1436 ("Only sex coerced through bodily
violence wrests from the victim her fundamental bodily self-possession—and is therefore rape.").

\(^{164}\) Id. at 1438.

\(^{165}\) There are different theories as to how narrative competition occurs in the context of modern
rape trials. Andrew Taslitz, for example, uses "storytelling theory" to better understand rape trials.
TASLITZ, supra note 61, at 15. Under Taslitz's theory, "the story of a case must be told in a way as to
satisfy a jury's needs for narrative coherence and fidelity." Id. Coherence is the internal consistency of a
story. Id. Fidelity is the degree to which a story appeals to a juror's sense of reality. Id. Taslitz identifies
at least four common rape story narratives that dominate trials: silenced voices, bullying, black beasts,
and a little more persuading. Id. at 19-36. Susan Ehrlich's scholarship focuses on understanding of
Ehrlich argues that "language is the primary vehicle through which cultural and institutional ideologies
are transmitted in legal settings." Id. The "talk" of witnesses is mediated and filtered through the legal,
cultural, and institutional values present in a courtroom. Id. Because those values are heavily gendered,
the "talk" of the courtroom reinforces and replicates the more systemic dialogue of patriarchy. Id.
Kimberlé Crenshaw contends that accusers inevitably become pigeonholed into one of several
categorical stereotypes including "the whore, the tease, the vengeful liar, the mentally or emotionally
unstable, or, in a few instances, the madonna." Kimberlé Crenshaw, Whose Story is it Anyway?, in
much simpler. Instead, the stories that victims and rapists tell are quite different. In a world where Rubenfeld's statute were adopted, rapists could merely assert that consent, verbal or nonverbal, was given to the violence involved. Or in the case of constructive force, a defendant will claim no threat was made. If there were bruises or other physical injuries, defendants would still be able to argue successfully, if the past record is any indicator, that the victim asked for the "rough sex." Shifting consent to the force element instead of the sex act element does not escape the difficulties with the concept of sexual autonomy—it simply changes how defendants and their lawyers characterize the alleged consent given by the victim.

B. Real Rape Problems

The motivation for Rubenfeld's project is that he believes the rape-by-deception riddle is a critical problem in rape law today. He is not arguing that incidents of rape-by-deception are the significant harm (his solution does not criminalize or otherwise address such cases), but rather that the doctrinal incoherence created by his identified riddle are worrisome. His concern is entirely misdirected. As previously discussed, rape law specifically and sex-crime law generally are replete with inconsistencies. The rape-by-deception puzzle is an unnecessary tangent, a minor quibble in a sea of contradictions. There are far more important issues in rape law that Rubenfeld's proposal does not address and actually makes worse. In particular, rape is occurring at an increasing rate, law enforcement is exhibiting greater indifference to rape victims, and politicians are endorsing policies based upon their skepticism of rape victims. If rape law were premised on a right to self-possession, each of those harms would likely increase in quantity and degree.

1. Rape Prevalence

The most significant issue in rape law today is the failure to abate the high rate of sexual violence in the United States. The conventional story about the rates of violent crime generally, and rape specifically, is that they have been declining at unprecedented levels since the early 1990s. Even so, the rate of

166. Corey Rayburn [Yung], To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials, 15 COLUM. J. GENDER & L. 437, 459 (2006) ("That is, the defense strategy in most rape cases is to argue that the rape was simulated. Defense attorneys do not use the term 'simulated,' but when they say 'it was just rough sex' or 'bruises are normal,' they are saying the rape was only an illusion, a facsimile, a copy, a simulation.").

167. See, e.g., MARY LOUIS FRAMPTON ET AL., AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION 1 (2008) (noting that low crime rates have led to declarations of victory in order to move the focus to other issues confronting America).
Rape here remains the highest of any nation in the West.\footnote{168} A closer look at the rape statistics shows that even the progress in decreasing American sexual violence is likely illusory.

Rape statistics are compiled annually by the FBI through the Uniform Crime Reports (UCR) program.\footnote{169} The UCR data indicates that the rate of rape has been steadily declining since the early 1990s.\footnote{170} Unfortunately, several

\begin{quotation}
168. DEBORAH L. RHODE, SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY 119 (1997) (noting that even low estimates of crime rates indicate that “the United States has the highest rate of reported rape in the Western industrial world.”).

169. Although participation in the UCR program has been voluntary, over 95% of police departments nationwide presently supply crime data to the FBI. See NATHAN JAMES & LOGAN RISHARD COUNCIL, Cong. Research Serv., RL34309, HOW CRIME IN THE UNITED STATES IS MEASURED 3 (2008), https://www.fas.org/sgp/crs/misc/RL34309.pdf. Those participating departments cover approximately 97% of the population of the United States. See FRANK E. HAGAN, INTRODUCTION TO CRIMINOLOGY: THEORIES, METHODS, AND CRIMINAL BEHAVIOR 26 (2010). The UCR system is not without its flaws. The UCR relies exclusively on reports to police, which has meant that, by the very nature of the system, unreported crimes have not been included. JAMES & COUNCIL, supra, at 18. For the crime of rape, this is a particular concern because up to an estimated 84% of incidents have, in recent years, not been reported to police. See Dean Kilpatrick & Jenna McCauley, Understanding National Rape Statistics, NAT’L RES. CTR. ON DOMESTIC VIOLENCE 2, 3 (Sept. 2009), http://www.wawnet.org/research/print-document.php?doc_id=2103&find_type=web_dese_AR. Further, the system has relied on police officers to make UCR classifications with neither proper training nor guidance which may affect the data. JAMES & COUNCIL, supra at 18-19; Kimberly A. Lonsway & Joanne Archambault, The “Justice Gap” for Sexual Assault Cases: Future Directions for Research and Reform, 18 VIOLENCE AGAINST WOMEN 145, 149 (2012).

Despite the shortcomings of the system, the UCR has remained the dominant source of information about crime levels and rates in the United States. The media has uncritically reported the statistics from the program without noting the limitations of the data. See generally HAGAN, supra; JAMES & COUNCIL, supra. Police departments wishing to show progress in fighting crime have focused on decreasing their UCR statistics. The UCR data has often served as the basis for crime and social policy in America. Congress has allocated funds to police departments based upon their successes reported in the UCR statistics. The UCR data has also regularly been used by policymakers to evaluate the efficacy of criminal justice programs. See JAMES & COUNCIL, supra, at 2 ("UCR data are now used extensively by academics and government officials for research, policy, and planning purposes, and the data are widely cited in the media. The UCR also provides some of the most commonly cited crime statistics in the United States."); LARRY J. SIEGEL, CRIMINOLOGY 30 (2011) ("The UCR is the best known and most widely cited source of official criminal statistics."); Lonsway & Archambault, supra, at 149 ("[Widespread citation to the UCR] is . . . likely attributable to the credibility afforded by the FBI’s prominent support of the [UCR], which may understandably lead public officials, members of the media, and the public to conclude that the UCR is the authoritative source for information on crime reporting.").

170. The summary statistics in the annual UCR are available directly from the FBI. See Uniform Crime Reports, FEDERAL BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/ucr (last visited May 19, 2015). The raw data, released well after the annual UCR, is available from the National Archive of Criminal Justice Data (NACJD). See Uniform Crime Reports Data, NAT’L ARCHIVE OF CRIMINAL JUSTICE DATA, http://www.icpsr.umich.edu/icpsrweb/content/NACJD/guides/ucr.html, (last visited May 19, 2015). The Bureau of Justice Statistics (BJS) has also created a data analysis tool that allows for quick analysis of certain variables in the UCR data. See Bureau of Justice Statistics, Uniform Crime Reports Data Analysis Tool, http://bjs.ojp.usdoj.gov/ucrdata/ (last updated Mar. 29, 2010). The data used in my study can be derived from all three sources, as the data used in this study is consistent between each. Because of the ease of accessing data over time (as opposed to within a single calendar year), much of the data was from the BJS, which allows for the production of custom time-series data. However, because of the limited variables available from that the BJS, data from the FBI and NACJD were utilized as well.
police departments have been caught intentionally suppressing their official rape statistics to create paper reductions in crime.171

In 2010, the Baltimore Sun exposed the Baltimore Police Department’s practice of substantially undercounting reported rapes in the UCR data it submitted to the FBI.172 From 1995 until 2010, the Baltimore Police Department provided UCR numbers that indicated that the rate of rape had declined by a remarkable eighty percent in the city. The investigation by the Baltimore Sun ultimately demonstrated that the incredible reported reduction in rape was the product of police concocting crime statistics to create the illusion of success in fighting crime.173 The Baltimore Police Department is not alone in improperly manipulating UCR rape statistics during the past two decades. Media investigations caught police “red-handed” in New Orleans, Philadelphia, and St. Louis, having submitted crime statistics that substantially undercounted the number of rapes in their respective jurisdictions.174 The cheating police departments were able to lower their official counts for rape through difficult-to-detect techniques.175 As a result of using those methods, the police

171. See Justin Fenton, City Rape Statistics Questioned—Baltimore Police Label Many Cases ‘Unfounded’ Officers Defend Tactics, but Mayor Orders Review, BALTIMORE SUN, June 27, 2010, at A1 (detailing the suspiciously low number of reported rapes in Baltimore are like other metropolitan cites like “Washington D.C., San Diego, San Francisco, and Atlanta are among cities with rates comparable to Baltimore’s,” which suggests underreporting there as well).

172. Justin Fenton, Chief Says Shooting Focus Affected Rape Probes, BALTIMORE SUN, July 20, 2010, at 4A; see also Justin Fenton, City Out of Top 5 for Murder Rate; Drop Is 1st in Years; Rape Numbers Up Sharply in Wake Of Police Reporting Reforms, BALTIMORE SUN, June 12, 2012, at 2A (detailing the role of the Baltimore Sun in uncovering police underreporting of rape to the FBI as part of the UCR program) [hereinafter Fenton, City out of Top 5], Fenton, supra note 171 at A1.


174. See Mark Fazlollah, Michael Matza & Craig R. McCoy, How to Cut City’s Crime Rate: Don’t Report It, PHILA. INQUIRER, Nov. 1, 1998, at A01 (describing the process the Philadelphia police used to avoid reporting rapes to the FBI as part of the UCR program); Jeremy Kohler, Waivers Wipe Out Reports of Rape, ST. LOUIS POST-DISPATCH, Aug. 29, 2005, at A1 ("Sex crimes detectives used [rape complaint] waivers several dozen times in the previous two years, a Post-Dispatch review has found. Many of the cases went uncounted in crime statistics, although they should have been included under uniform crime reporting guidelines."); Laura Maggi, NOPD Downgrading of Rape Reports Raises Questions, TIMES-PICAYUNE (New Orleans) (July 11, 2009), http://www.nola.com/news/index.ssf/2009/07/nopd_downgrading_of_rape_repor.html ("More than half the time New Orleans police receive reports of rape or other sexual assaults against women, officers classify the matter as a noncriminal ‘complaint.’"); Michael Matza, Victims’ Testimony at Congressional Hearing Show “Chronic Failure” in Rape Investigations, PHILA. INQUIRER, Sept. 15, 2010, at B1 ("Philadelphia police had severely underreported rapes for decades through the 1990s, a problem brought to light by Inquirer investigative reporting . . . .").

175. Because the FBI provides little to no oversight regarding the numbers reported by police departments, absent the rare investigative journalism, police have been free to “cook the books” without fear of discovery. See Michael D. Maltz, Missing UCR Data and Divergence of the NCVS and UCR Trends, in UNDERSTANDING CRIME STATISTICS 269, 270 (James P. Lynch & Lynn A. Addington eds., 2007). First, police departments exploited the UCR rule that they did not have to count rapes if “an agency determine[d] that complaints of [rape were] unfounded or false.” See Fenton, City out of Top 5, supra note 172, at 2A; Kohler, supra note 174, at A1 (describing the rape complaint “waivers” process wherein alleged rape victims who did not want to pursue prosecution, for whatever reason, were told they had to sign the waiver classifying their rape complaint as “unfounded”); Maggi, supra note 174; Bureau of Justice Statistics, Uniform Crime Reports: Crime in the United States, 2011, DEP’T OF JUSTICE 2 (2011), http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-
departments in Baltimore, New Orleans, Philadelphia, and St. Louis were able to create fictional drops in violent crime rates and claim victory in their battles against sexual violence.  

I recently completed a study that used the data from Baltimore, New Orleans, Philadelphia, and St. Louis to create a profile for jurisdictions undercounting incidents of rape. I identified forty-two additional police departments covering populations of at least 100,000 people that likely substantially undercounted the number of rapes reported using a fraudulent data statistical test derived from the practices in the four jurisdictions that were caught cheating. Jurisdictions manipulating their rape numbers have significantly altered the historical statistics regarding the prevalence of rape in America and, as a result, our society’s understanding of the magnitude of sexual violence in this country.

In total, I found that approximately 796,213 to 1,145,309 rapes were not included in the UCR due to police undercounting during that time. Further, the corrected data indicated that the years from 1995 to 2012, even using the low estimate, have had the fifteen highest rates of rape since the UCR began reporting rape data in 1930. In contrast to the widely held conventional wisdom, the rate of rape in America has not decreased over the last twenty years as has been the case for other violent crimes. Instead, America is in a crisis of sexual violence that has gone undetected because of systemic underreporting of rape by police departments across the country.

By removing consent from rape statutes and utilizing a narrow force requirement, Rubenfeld ensures that the largest percentage of reported rapes, where the victim knows her rapist and little or no force is used, cannot possibly be prosecuted. Under Rubenfeld’s statute, “no” will not mean “no” and victims will be forced to engage in substantial resistance to trigger the force (or threat of force) necessary for there to be a subsequent rape prosecution. In a time of rape crisis in America, Rubenfeld’s proposal, which decriminalizes much of rape, is particularly dangerous. And trying to achieve doctrinal coherence is an insignificant concern in the face of widespread increasing rape.

2011/methodology_final.pdf ("When, through investigation, an agency determines that complaints of crimes are unfounded or false, the agency eliminates that offense from its crime tally through an entry on the monthly report."). Second, the police departments suppressed their reported numbers by regularly classifying rape complaints as lesser offenses that were not part of the core UCR statistics sent to the FBI. See Fenton, City out of Top 5, supra note 172, at 2A; Matza, supra note 174, at B1. Third, police officers in those jurisdictions often failed to create any written record that a rape complaint was ever made in order to eliminate the incident from the UCR data. One scholar estimated that no written record was made in 40% of rape complaints in Baltimore from 2003 to 2010. See Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing Before the S. Comm. on the Judiciary, 111th Cong. (2010) (testimony of Carol Tracy, Exec. Dir., Women’s Law Project). See also Fenton, supra note 171, at 1A; Kohler, supra note 174, at A1; Matza, supra note 174, at B1.

176. Fenton, supra note 171, at 1A; Kohler, supra note 174, at A1; Matza, supra note 174, at B1.
2. Law Enforcement Failure

Related to the increasing prevalence of rape, the enforcement of rape statutes is actually declining. When looking at the relevant numbers, it is a wonder that any rapists are actually imprisoned. We live in a world where rape is incredibly underreported, reported rapes are not regularly investigated, arrests in rape cases are rare, prosecutors are loath to take rape cases that might jeopardize their high conviction rates, and convictions at trial are less likely than in other crimes. A typical rape case can fall apart at any stage through the criminal justice system even when the rape victim is firmly committed to potentially years of participating in the arduous process.

Even in the rare cases of conviction, appellate courts continue to apply antiquated ideas about what constitutes rape to reverse guilty verdicts. For example, in 2011, a state appellate court in Louisiana overturned a jury conviction for rape when, as the appellate court described, the defendant "struck the victim with his fists, forced her to remove her clothing at knife point, and had sexual intercourse with the victim against her will." In wielding the knife, the defendant ordered the victim to disrobe while stating: "[I]f you want to act like a whore, I’m going to treat you like a whore." Nonetheless, the court reversed the jury verdict of guilty on the rape charge because "the victim stated that she resisted the Defendant verbally, but did not get up and leave the room because she was scared."

Internalizing the norms of the criminal justice system, police have increasingly acted as gatekeepers to inhibit rape victims from pushing their cases forward. Police are arresting rapists at a lower rate and mistreatment of rape victims continues. During the 1970s, one out of two rape reports led to an arrest. Since 2005 that rate has dropped to one out of every four reported rapes. The rate of clearance of rape cases by police has declined from approximately fifty percent to about forty percent of reported rapes from 1999 to 2010. Police have often aggressively interrogated and harassed rape victims to recant their allegations in order to achieve departmental goals for decreased crime. In many cases, police have assured victims that they were

179. Id. at 903.
180. Id.
181. See Lonsway & Archambault, supra note 169, at 150.
182. Id.
183. Id. at 149-50.
184. See Justin Fenton, Downgrading Rape Cases Not A New Problem—Crime Beat Issues Go Back Decades, With Pressure For Good Numbers, BALT. SUN, June 30, 2010, at 6A (detailing how the investigation of the Baltimore Police investigation and reporting procedures "have discouraged women from reporting sexual attacks in order to achieve a statistical drop in the city's number of rapes. Baltimore police deem nearly one-third of rape reports 'unfounded,' meaning they believe that they are false or baseless—more than in any other city in the country, according to an investigation by the Baltimore Sun. . . . Police in Baltimore are continually accused of fudging the numbers. Police leaders
busy working on their cases while no actual investigation was being done because the complaint had already been labeled "unfounded." When police have failed to fully investigate rape complaints, the result has been that serial rapists, who constitute an estimated ninety-one to ninety-five percent of all rapists, are free to rape, and sometimes murder, more victims. Rubenfeld's proposal also plays into the hands of indifferent police officers who are increasingly blocking rape cases. With such a high threshold for force, police can ignore any rape victim who isn't on the verge of death. Indeed, if rape is limited to such cases, police departments will have little incentive to keep officers assigned to rape cases. The growing use of specialized rape crime units, well known because of the television show *Law & Order: Special Victims Unit*, would surely be reversed as tight budgets cannot warrant dedicated units for narrow crimes. In an era marked by high rates of sexual violence and police suppression of rape cases, Rubenfeld's proposal is among the worst imaginable among all conceivable possibilities.

3. Rape in the Modern Political Landscape

Rubenfeld writes his article questioning the scope of rape law at a time when the political landscape has increasingly welcomed such ideas. He is not just innocently pontificating about theoretical nuances isolated from a larger social context. Rubenfeld is giving intellectual cover to those who would rollback modern rape law for a variety of different purposes.

The political campaigns leading to the 2012 elections provide salient examples of the growing chorus of voices seeking to circumscribe the definition and/or minimize the harm of rape. During the period before the elections, the following thoughts were vocalized by the politicians identified:

So the way [my father] said it was, "Just remember, Roger, some girls, they rape so easy. It may be rape the next morning." – Roger Rivard, Wisconsin State Representative

are only as good as their stats, and the pressure to get them lower, whether explicitly stated or implied, is intense. And it's a time-honored practice, law enforcement experts say, in a culture that relies on evaluating job performance through statistics and in which police officers harbor an inherent distrust for victims and suspects alike. . . . Rape and sexual assault cases are among the easiest to hide.

185. Lonsway & Archambault, supra note 169, at 161.
186. See Kimberly A. Lonsway, *Trying to Move the Elephant in the Living Room: Responding to the Challenge of False Rape Reports*, 16 VIOLENCE AGAINST WOMEN 1356, 1365 (2010).
And even when life begins in that horrible situation of rape, that it is something that God intended to happen. — Richard Mourdock, United States Senate candidate from Indiana

[In the emergency room they have] what’s called rape kits where a woman can get cleaned out [and not get pregnant]. — Jodie Laubenberg, Texas State Senator

It seems to be, first of all, from what I understand from doctors, [pregnancy from rape is] really rare. If it’s a legitimate rape, the female body has ways to try to shut the whole thing down. — Todd Akin, United States Senate candidate from Missouri

The horrific rape in Steubenville led one scholar to offer this strange thought experiment on his high-profile blog:

Let’s suppose that you, or I, or someone we love, or someone we care about from afar, is raped while unconscious in a way that causes no direct physical harm—no injury, no pregnancy, no disease transmission. (Note: The Steubenville rape victim, according to all the accounts I’ve read, was not even aware that she’d been sexually assaulted until she learned about it from the Internet some days later.) Despite the lack of physical damage, we are shocked, appalled and horrified at the thought of being treated in this way, and suffer deep trauma as a result. Ought the law discourage such acts of rape? Should they be illegal?

Such queries, like Rubenfeld’s, represent a dangerous sea change in public and political discourse about rape. The disastrous prosecution of members of the Duke Lacrosse Team for rape led many to believe that false accusations of rape are the norm. Chief among those attacking modern rape law as too expansive after the Duke case is Professor K.C. Johnson who concludes that: “Rape law needs modification. Until the 1970s, rape law was far too friendly to the defendant; now it is the reverse.”

The above comments add needed context to Rubenfeld’s article. Writing from a privileged position at Yale Law School and publishing in the Yale Law

Journal, Rubenfeld lends authoritative credence to those seeking a curtailment of substantive rape law. Notably, among all of the quoted positions, Rubenfeld’s may be the least defensible. Rubenfeld does not support non-forcible non-stranger rape decriminalization because he is concerned about innocent men being convicted. He is not driven by beliefs about abortion that intersect with discussions about rape. He is not writing out of a mistaken understanding of rape kits and pregnancy. Rubenfeld supports his regressive turn in rape law only in the name of doctrinal coherence. In the end, Rubenfeld empowers and enables the backlash against the limited progress that has been made to advance rape laws since the 1970s.

CONCLUSION

By exposing the missteps Rubenfeld makes, I hope to help prevent such mistakes from being repeated. Rape law is a thorny area that reflects a range of complex cultural, historical, and social issues. Because of that, writing about solutions to rape’s wicked problem is not easy. Rubenfeld has simply stumbled into a briar patch that he is unable to theorize his way out of.

I choose to highlight the problems of rape prevalence, political hostility to rape victims, and rape law underenforcement to illustrate how out-of-touch Rubenfeld’s theory really is. Rather than focusing on stemming the high rates of sexual violence in America, Rubenfeld believes the issue for us to focus upon is resolving minor perceived inconsistencies in doctrine. Further, Rubenfeld’s proposal aggravates the problems I describe by severely limiting the number of rapes that could be prosecuted.

Nonetheless, there is value to be found in following the direction that Rubenfeld points toward. Much can be gained by greater recognition of the fundamental values of rape law. The four animating principles that I discuss for the existence of the crime of rape offer a solid foundation that can offer substantive benefits. Simply put, rape is a gendered crime that causes greater harm than ordinary assaults and terrorizes potential targets of rape. Sexual autonomy is the means by which rape and consensual sex are separated. Each core concept has not been given full effect in the codification, enforcement, and punishment of rape. Rape law scholarship of the foundational type in which Rubenfeld engages can do much to explore the role of those lodestar principles in the substance of rape law.

The possibilities for inculcating rape law with its fundamental values offer a new avenue for addressing sexual violence. For example, although gender has been a prominent concern in rape law scholarship and in modern procedural and evidentiary rules such as rape-shield laws, there has been limited integration of the fundamental value of gender into the substantive offense of rape. A gender-conscious interpretation of rape statutes that has been strongly
resisted by courts is to recognize how physical size differentials between victims and rapists implicate both the force and consent elements. By giving the gender dynamics that provide part of the foundation of rape law greater effect, such interpretations are called into question.

Rather than focusing on procedural and substantive statutory tinkering, an approach that has had diminishing returns, we can explore how the values of rape law should shade the interpretations of existing rules and statutes. However, a full discussion of how fundamental values of rape law can and should be better interwoven into doctrine and statute will have to wait for another day and is beyond the scope of this Article. By better theorizing the foundations of substantive rape law, the fight against rape can shift its focus where it is most needed: in the minds of police, judges, jurors, prosecutors, rape victims, and potential rapists.

194. John F. Decker & Peter G. Baroni, “No” Still Means “Yes”: The Failure of the “Non-Consent” Reform Movement in American Rape and Sexual Assault Law, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1117 (2011) (“The court reasoned that the only force applied to the victim was the weight of the defendant’s body on top of her and that this was not enough force to establish forcible compulsion.”).