A Quite Principled Conceit

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

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I. PRINCIPLES

In *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, Professor Jed Rubenfeld sets out to reinvent rape law. Instead of resting on ideals of sexual autonomy—as it currently stands—Professor Rubenfeld argues that rape law should take root in a principle of self-possession.[1] The analysis proceeds in four parts, all lucid, all deft.

First, Professor Rubenfeld argues that the ideal of sexual autonomy cannot be squared with our intuition that rape-by-deception—sexual consent procured by lie or pretense (for example about one's marital status)—should not be a crime.[2] Deception strips the deceived party of grounds on which to legally consent. Therefore, if rape is defined as "nonconsensual sex," rape-by-deception is as odious as rape-by-force.[3] Yet, in Professor Rubenfeld's words, "[m]any—perhaps most—of us don't think 'rape-by-deception' is rape at all."[4] This observation frames and animates the rest of the article. It is a trenchant one.

Second, Professor Rubenfeld counsels that the way out of the snare is to give up on sexual autonomy, not to criminalize

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1 Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 Yale L J 1372, 1425 (2013).

2 See id at 1381–1406.

3 See, for example, id at 1403 ("[A] rape law genuinely committed to sexual autonomy would reject the force requirement, defining rape solely in terms of consent. And if rape is sex without consent, sex-by-deception ought to be rape.") (citation omitted). This point is fortified by the existence of two exceptions to the rape law's general disregard for rape-by-deception: first, medical misrepresentation; second, false impersonation of the victim's husband. See id at 1395–98.

4 Id at 1376.

rape-by-deception.[5] Third, he suggests that sexual autonomy should give way to an ideal of self-possession,[6] and that rape should be correspondingly defined as an act of violence that "possess[es]" its victim in the same way as slavery and torture: by rendering the victim's body no longer his or her own.[7] This formulation would distinguish rape from other crimes involving unwanted physical intrusion, insofar as "[a] rape victim's body is taken over, invaded, occupied, taken control of—*taken possession of*—in a fashion and to a degree not present in ordinary acts of theft, robbery, [and] assault."[8] And it would provide a conceptual rationale for the "force requirement" in rape law—a requirement that has been "much-maligned" over the years, though unduly according to Professor Rubenfeld.[9]

With the core of his argument complete, Professor Rubenfeld concludes the article—in the last Part of the last Section[10]—by enumerating certain "uncomfortable results" to which the self-possession theory leads.[11] For example, the self-possession theory probably requires us to say that when "a high school principal [ ] threaten[s] to expel a seventeen-year-old student unless she [has] sex with him," the resultant sex act does not count as rape.[12] Likewise, many instances of intercourse that begin with one party's refusal would not qualify as rape under the self-possession theory, including the infamous *Berkowitz* case, in which a male coed had sex with one of his classmates despite her repeatedly saying "no" before and during intercourse.[13] Finally, the theory must accept as unproblematic cases in which the victim is unconscious, asleep, or, in certain instances, intoxicated,[14] cases that I suspect many readers consider prime examples of rape.[15]

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5 See Rubenfeld, 127 Yale L J at 1408–22 (cited in note 1).

6 See id at 1423–40.

7 Id at 1425–27.

8 Id at 1426.

9 Rubenfeld, 127 Yale L J at 1380 (cited in note 1).

10 See id at 1435–40.

11 Id at 1435.

12 Id (acknowledging that this result "will not [ ] conform with many readers' intuitions"). See also *State v Thompson*, 792 P2d 1103, 1107 (Mont 1990).

13 See Rubenfeld, 127 Yale L J at 1438–39 (cited in note 1). See also *Commonwealth v Berkowitz*, 641 A2d 1161, 1165 (Pa 1994).

14 See Rubenfeld, 127 Yale L J at 1440–42 (cited in note 1).

15 See, for example, Sharon Cowan, *The Trouble with Drink: Intoxication, (In)capacity, and the Evaporation of Consent to Sex*, 41 Akron L Rev 899, 904 (2008) (beginning from the premise that intoxication compromises consent, and therefore conditions sexual assault, and exploring how this premise applies to concrete doctrinal ques-

As rich and provocative as the first three movements of Professor Rubenfeld's argument are, it is this fourth movement, the final overture, that should give the careful reader pause. Once the self-possession theory incorporates Professor Rubenfeld's caveats, his jaunt through the labyrinth leads right back to its center: a principle of rape law that fails, in hard cases, to harmonize with intuition. The article begins by explaining why the autonomy theory cannot be squared with widely-shared intuitions about rape. And it concludes by acknowledging that the self-possession theory cannot be squared with widely-shared intuitions about rape. In short, *both* theories fail if success is defined, as Professor Rubenfeld seems to define it, as harmony between principles and preexisting intuitions.

To distinguish these portraits of failure, Professor Rubenfeld wants to persuade us that his self-possession theory is principled, if "unappealing[ ],"[16] while the autonomy principle, in light of the rape-by-deception riddle, is defunct. But there is nothing intrinsically more principled about the self-possession theory. It is principled insofar as we *choose to apply it in a principled way*. The autonomy theory, too, could be principled—if we were willing to apply it so. But we are not. That's the whole game. Professor Rubenfeld asks us to embrace the self-possession principle even when its implications are grossly out of sync with existing sensibilities.[17] But he offers no account of why we would do this, or even why we *should* do this. Two theories are on offer, both of which capture many instances of rape but, if adopted with stoic rationality, would also lead to perverse results. Why should we prefer one to the other? An independent rationale is required to answer this question, but Professor Rubenfeld, strangely enough, offers none. The article closes in equipoise.

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tions). See also generally Shlomit Wallerstein, *'A Drunken Consent Is Still Consent'—or Is It? A Critical Analysis of the Law on a Drunken Consent to Sex Following* Bree, 73 J Crim L 318 (August 2009) (exploring different understandings of consent under conditions of intoxication and arguing that intoxication should vitiate consent for the purposes of rape law).

16 Rubenfeld, 122 Yale L J at 1438 (cited in note 1).

17 Id (claiming that he "see[s] no way out" of the uncomfortable outcomes to which the self-possession theory leads).

II. CONCEITS

Irresolution, ultimately, is not so grave a sin. The deeper problem is that Professor Rubenfeld's argument assumes—but never establishes why—rape law must be attached to one imperfect theory or the other. We need not abide this assumption. By positing *as a premise* that a choice between flawed principles is required, Professor Rubenfeld imagines into existence the very problem he sets out to solve. Even if his argument successfully fashions a solution—which I don't think it does, but supposing it did—the enterprise was stillborn from the start.

Professor Rubenfeld's error has a clear, if subtle, genesis: he misconstrues the force of his initial observation that the autonomy theory, if applied in a principled fashion, reaches rape-by-deception. If this observation holds—and Professor Rubenfeld persuasively demonstrates that it does—the proper inference is that rape-by-deception *could* be criminalized, not that it *should* be. Whether rape-by-deception *should* be a crime is not a question that Professor Rubenfeld's observation, on its own, can resolve. It's precisely what his observation invites us to consider. And having considered it, some of us will answer in the affirmative, and others of us—perhaps more—in the negative.[18]

I have trouble seeing what about this is lamentable. Different polities are free to set the parameters of categories like "rape" as they see fit, and law is not so artless that it must disavow what its human stewards find obvious. When it comes to the formulation of criminal statutes, there is no maxim that conceptual purity must trump human experience. In fact, the covenant of democratic politics could be described as exactly the opposite.[19] If Professor Rubenfeld's point were that rape statutes should be redrafted to explicate more precisely which acts they reach, he might well be right.[20] But that is not his point. Even if

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[18] Indeed, Professor Rubenfeld opens the article with examples of jurisdictions that have decided to criminalize rape-by-deception (or at least reflect that commitment in their legislative drafting). See id at 1375–76.

[19] This may not be true in all legal fields. When law is judge created, rather than legislative, there may be a stronger case to be made in favor of conceptual purity. The most famous defense of this view is Ronald Dworkin's account of "integrity." See generally Ronald Dworkin, *Law's Empire* (Harvard 1986). This view is highly contested, of course. And it is Justice Holmes, perhaps, who best summarized the opposing view in his svelte observation that "[t]he life of the law has not been logic: it has been experience." O.W. Holmes Jr, *The Common Law* 1 (Little 1881).

[20] Ironically, Professor Rubenfeld himself offers an excellent blueprint—in the idea of "rape-by-coercion"—for the redrafting effort.

rape statutes *were* so rewritten—to clarify, where appropriate, that they exclude rape-by-deception—Professor Rubenfeld would still condemn that solution as "unprincipled."[21] Why? Because in his view, we face a hard choice from which there is "no way out,"[22] requiring rape law to "pick its poison."[23] Rape law can stake its claim with sexual autonomy, *or* it can refrain from criminalizing rape-by-deception, but not both at once—at least, not without "contradict[ing] [ ] its own internal logic."[24]

Law, however, is not philosophy.[25] We don't *need* to bear down and accept every entailment of our first principles, however strained they become. The "contradiction"[26] that Professor Rubenfeld aims to resolve—that principle X could justify proscribing behavior A and behavior B, but its legal codification proscribes only behavior A—is no contradiction at all. Nor is it aberrant: law often stops short in this sense. We criminalize the exchange of child pornography on the grounds that its production harms children.[27] Giving this principle its due, we might criminalize the exchange of soccer balls made in sweatshops. Many jurisdictions allow for infliction of emotional distress torts on the grounds that subjecting another person to mental suffering breaches a duty of care.[28] Taking this principle seriously, there could also be a legal cause of action for heartbreak.[29]

In other words, there is nothing wrong with a democratic polity's decision *not* to extend a principle across its full field of possible applications. In practice, compromises are possible and

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21 Rubenfeld, 122 Yale L J at 1380 (cited in note 1).

22 Id at 1438.

23 Id at 1380.

24 Id at 1412.

25 See Anthony T. Kronman, *Precedent and Tradition*, 99 Yale L J 1029, 1031 (1990).

26 Rubenfeld, 122 Yale L J at 1380 (cited in note 1).

27 See, for example, *New York v Ferber*, 458 US 747, 758 (1982) (describing "the use of children as subjects of pornographic materials" as "harmful to [their] physiological, emotional, and mental health"). See also id at 758 n 9 (enumerating scholarly findings to the same effect).

28 See, for example, *Snyder v Phelps*, 131 S Ct 1207, 1222–23 (2011) (Alito dissenting) (outlining the standards for and normative basis of intentional infliction of emotional distress claims).

29 In fact, some jurisdictions previously recognized this species of action: "amatory torts." See Fernanda G. Nicola, *Intimate Liability: Emotional Harm, Family Law, and Stereotyped Narratives in Interspousal Torts*, 19 Wm & Mary J Women & L 445, 467–74 (2013). The point is neither to laud nor to lament the disappearance of heartbreak suits from tort law. The point is that our decision to disallow heartbreak suits, despite the fact that tort law contemplates the possibility of such suits *in theory*, is not a contradiction. It is just a choice.

often wise, especially in a contentious setting like rape law. Ironically enough, Professor Rubenfeld actually spends a good deal of energy *outlining* a compromise position—one that strikes an intuitive balance between his more wooden options—only to dismiss it as "unprincipled" and "contradictory."[30] The compromise would be to proscribe "coercive" rape, but not "deceptive" rape,[31] thereby capturing our intuitions about the latter and, at once, vindicating the ideal of sexual autonomy. Professor Rubenfeld acknowledges that this solution would strike a "happy medium," and that many readers are likely to find its results "appealing."[32] Hollow vanities, those. In Professor Rubenfeld's view, no matter how "desir[able]" the coercive-rape solution might be,[33] it lacks the cool analytic purity that a legal regime apparently demands. In his words:

> Coercion is objectionable because a coerced "yes" does not reflect a valid or genuine consent. But the same is true of a deceived "yes." An anti-coercion principle is attractive because coerced sex is unconsented-to sex. But if unconsented-to sex is rape law's target, then *deceptive sex ought to be punished as well*.[34]

But why? Is there something inherently amiss about a legal world, shaped by the democratic process, in which sex-by-coercion is deemed rape, while sex-by-deception is not? Of course not. In the last sentence above, Professor Rubenfeld slyly inserts the word "ought," as though to underscore an everyday normative judgment. But Professor Rubenfeld is not using "ought" in the typical sense; his view is *not* that deceptive sex merits punishment due to its abhorrence. Rather, he is saying that if (1) sexual autonomy is our animating commitment, and (2) conceptual symmetry is our goal, then we "ought" to criminalize sex-by-deception alongside sex-by-coercion no matter how flagrantly that outcome grates against our felt sense of justice. Again, in his words:

> A coercion rule for rape law would claim its strength from the principle of sexual autonomy—the idea that people have a right not to engage in sex they don't consent to. But by ex-

30 Rubenfeld, 122 Yale L J at 1380 (cited in note 1).
31 Id at 1410–12.
32 Id at 1411.
33 Id.
34 Rubenfeld, 122 Yale L J at 1412 (cited in note 1).

> cluding sexual deception, the coercion compromise conflicts with sexual autonomy. It can exclude rape-by-deception only by contradicting its own logic.[35]

But if lawyers are not logicians, so much less are legislative bodies, and less still the American people. This aspect of our legal universe is a blessing, not a drawback. When it comes to rape, and undoubtedly many other legal categories, there is no necessary overlap between "principled" determinations in Professor Rubenfeld's sense—lush abstractions—and the actual values held by actual members of our polity.

Our *nomos* wends the latter way. It is a messy, interwoven world of values; it pulls in many directions at once. Can its complexity be pared down to specific commitments, whose logical outcomes are then offered up as inescapable in spite of their practical oblivion? The article answers resoundingly: Yes, we *can* do this. And in the hands of an artisan like Professor Rubenfeld, the results can be sharp and elegant, a source of delight for philosophers. The question is whether those results, originating as they do from an abstract puzzle, a parlor game, a—quite principled—conceit, can lay claim to something more.

Regrettably, I think not.

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[35] Id at 1412.