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Rape by Fraud and Rape by Coercion

Patricia J. Falk

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RAPE BY FRAUD AND RAPE BY COERCION*

Patricia J. Falk[†]

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INTRODUCTION

Without proof of force, actual or constructive, evidenced by words or conduct of the defendant . . . , sexual intercourse is not rape. This is so even though the intercourse may have occurred without the actual consent and against the actual will of the alleged victim.¹

The outrage upon the woman, and the injury to society, is just as great in these cases as if actual force had been employed; and we have been unable to satisfy ourselves that the act can be said to be any less against the will of the woman when her consent is obtained by fraud, than when it is extorted by threats or force.²

For more than a century, courts,³ legislatures,⁴ and legal commentators⁵ have struggled with the controversial and highly charged question of whether accomplishing sexual intercourse by means of fraud or coercion is blameworthy and appropriately condemnable as rape.⁶ In 1986 Professor Susan Estrich's suggested that

¹ *Goldberg v. State*, 395 A.2d 1213, 1219-20 (Md. Ct. Spec. App. 1979). *But see* Janet E. Findlater, *Reexamining the Law of Rape*, 86 MICH. L. REV. 1356, 1360 (1988) (commenting on *Goldberg*: "What sense can one make of this paradox: The victim was not forced to have sexual intercourse, but she had sexual intercourse against her will and without her consent?").

² *People v. Crosswell*, 13 Mich. 427, 437 (1865) (involving sexual intercourse with insane woman); *see also* *Pomeroy v. State*, 94 Ind. 96, 102 (1883) (quoting this passage from *Crosswell*).

³ *See, e.g.,* *Lewis v. State*, 30 Ala. 54 (1857) (husband impersonation); *People v. Cavanaugh*, 158 P. 1053 (Cal. Dist. Ct. App. 2d 1916) (police impersonation); *Don Moran v. People*, 25 Mich. 356 (1872) (fraudulent medical treatment); *Bloodworth v. State*, 65 Tenn. 614 (1872) (sham marriage); *Limbaugh v. Commonwealth*, 140 S.E. 133 (Va. 1927) (criminal seduction); *Regina v. Clarence*, (1888) 22 Q.B.D. 23 (concealment of venereal disease).

⁴ *See, e.g.,* MICH. COMP. LAWS § 750.90 (1996) (fraudulent medical treatment statute passed in 1883); TENN. CODE ANN. § 39-13-503 (1997) (update of 1870 husband impersonation provision); *see also* Jane E. Larson, "Even a Worm Will Turn at Last": Rape Reform in Late Nineteenth-Century America, 9 YALE J.L. & HUMAN. 1, 20-21 (1997) [hereinafter *Even a Worm*] (discussing age-of-consent campaign as first rape reform and noting "[w]ith strengthened statutory rape laws, convictions could be achieved in the kinds of factual patterns that otherwise did not meet unreformed definitions of forcible rape, so long as the victim was young.").

⁵ *See, e.g.,* J.H. Beale, Jr., *Consent in the Criminal Law*, 8 HARV. L. REV. 317 (1895) (discussing rape by fraud); H.W. Humble, *Seduction as a Crime*, 21 COLUM. L. REV. 144 (1921) (same); Ernst Wilfred Puttkammer, *Consent in Rape*, 19 U. ILL. L. REV. 410 (1925) (same).

⁶ The question is not unique to this time period or the Anglo-American legal tradition. Socrates is quoted as saying: "Then again, the very fact that he uses not force but persuasion makes him more detestable, because a lover who uses force proves himself a villain, but one who uses persuasion ruins the character of the one who consents."

rape law should "prohibit fraud to secure sex to the same extent we prohibit fraud to secure money, and prohibit extortion to secure sex to the same extent we prohibit extortion to secure money."⁷ Such suggestion spawned the latest cycle of discussion about this age-old conundrum in the American legal academic community.⁸ As the cases proliferate and the intellectual debate in response to Estrich's suggestion rages on, state legislatures, riding the successive waves of rape reform of the 1950s and 1970s,⁹ have been quietly enacting a comprehensive array of criminal statutes outlawing multiple forms of sexual offenses committed by fraudulent or coercive means.

The potential criminalization of rape by fraud and rape by coercion is, however, a difficult and troublesome legal development for a myriad of reasons.¹⁰ First, cases involving such acts pose significant definitional challenges for the crime of rape, inevitably implicating the debate over whether it is a crime of violence or a sexual offense¹¹ and the concomitant issue of the proper function of rape law as either protecting citizens' physical security or, more broadly, sexual autonomy.¹² Second, because these cases generally

XENOPHON, CONVERSATIONS OF SOCRATES 260 (1990) (footnote indicates penalties for rape were less severe than those for adultery under Athenian law).

⁷ Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1120 (1986); see also SUSAN ESTRICH, *REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO* (1987).

⁸ See, e.g., Vivian Berger, *Not So Simple Rape*, 6 CRIM. JUST. ETHICS 69 (Winter-Spring 1988) (reviewing SUSAN ESTRICH, *REAL RAPE* (1987)); Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780 (1992) [hereinafter *Beyond Rape*]; Findlater, *supra* note 1; Lynne N. Henderson, *What Makes Rape a Crime?*, 3 BERKELEY WOMEN'S L.J. 193 (1987-88) (reviewing SUSAN ESTRICH, *REAL RAPE*); Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI-KENT L. REV. 359 (1993); Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151 (1995) [hereinafter *Feminist Challenge*].

⁹ See Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35, 36-40 (1992) [hereinafter *Sexual Autonomy*].

¹⁰ See, e.g., Dripps, *Beyond Rape*, *supra* note 8, at 1802 ("One vexatious problem . . . involves misrepresentations that cause sexual cooperation."); Stephen J. Schulhofer, *The Gender Question in Criminal Law*, 7 SOC. PHIL. & POL'Y 105, 135 (1990) [hereinafter *Gender Question*] ("Perhaps the hardest set of problems in this area concerns the question of when fraud or misrepresentation should invalidate consent.").

¹¹ See *infra* Part III.A.

¹² See also *infra* Part III.A.; Lucy Reed Harris, Comment, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613, 644 (1976) ("Although the force element has traditionally furthered the policy of physical protection, as well as serving an evidentiary function, the role of fraud in rape law demonstrates that freedom of sexual choice rather than physical protection is the primary value served by criminalization of rape.").

involve factual scenarios in which physical force is absent and consent, in some form, is present, they strike at the doctrinal heart of rape law,¹³ raising issues like: the appropriate relationship between the elements of force and nonconsent,¹⁴ the necessity of physical force,¹⁵ and the parameters of legally effective consent.¹⁶ Third, discussion of these offenses often "trigger[s] common prejudices about the behavior of men and women in sexual encounters"¹⁷ and reinvigorates colloquy about rape victims' culpability¹⁸ and trustworthiness,¹⁹ deflecting attention from what should be the real question—the criminality of defendants' conduct. In short, consideration of these offenses pushes the envelope of rape law's function in regulating the outermost limits of sexual encounters in our society.

Part I of this Article collects and analyzes the surprisingly large body of criminal cases in which courts have struggled with the difficult question of whether to criminally punish defendants' use of

¹³ Rape had four basic elements: (1) sexual intercourse, (2) with a woman not the defendant's wife, (3) by force or threat of force, and (4) without her consent or against her will. Harris, *supra* note 12, at 613.

¹⁴ See *infra* Part III.A.

¹⁵ See *infra* Part III.A.

¹⁶ See *infra* Part III.B.

¹⁷ Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 CAL. L. REV. 777, 832 (1988).

¹⁸ Author Joel Feinberg comments:

Of course, if an occasional nonneurotic but uneducated, trusting woman faithfully obeys the instructions of her deceitful gynecologist, . . . she would find few persons in these enlightened days to give her sympathy. Again the old attitudes of caveat emptor would surface. "If she is that stupid, she deserves what she gets" are words that come easily to many lips. . . . But negligent or not, stupid or not, she could have been severely harmed by her experience and subject to the pains of depression, shame, loss of self-esteem, and tortured conscience, if not pregnancy and more obvious harms. . . . After all, people do not forfeit their rights simply by being ignorant or naively trusting, and even stupid people—especially stupid people—can be taken advantage of and harmed.

Joel Feinberg, *Victims' Excuses: The Case of Fraudulently Procured Consent*, 96 ETHICS 330, 337 (1986); see also James A. Durham, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 63 (1952) ("The rarity of these cases today may be partly explained by the difficulty of presenting a convincing picture of such grossly impeded comprehension to skeptical jurors; the scene depicted may resemble more an artful seduction than forcible intercourse."); Chamallas, *supra* note 17, at 832 (noting victims of sexual fraud may be less sympathetic).

¹⁹ Harris, *supra* note 12, at 628 ("Scholarly discussion on consent in rape gelled in an era when legal thinkers were emotionally distrustful of rape complaints in general, but were fascinated by cases where consent was allegedly induced by subterfuge.").

fraud or coercion in accomplishing sexual penetration or contact. Commonly, rape by fraud cases encompass instances of fraud in medical and other treatment contexts, false impersonation, sexual scams, and sexual theft; rape by coercion cases involve the abuse of authority and sexual extortion. Many of the courts in these cases have held that the defendants' behavior, although reprehensible, failed to satisfy either the force or nonconsent elements of rape. Frustrated by the lack of coverage of existing rape statutes, however, several of these courts have asked their respective legislatures to enact new criminal provisions to subsume this conduct.

Part II of this Article surveys current legislation and reveals a comprehensive battery of state criminal statutes prohibiting various forms of rape by fraud or rape by coercion. These statutes fall into five categories, those that: (1) punish criminal actors who abuse positions of trust or (2) positions of authority to secure sexual compliance, (3) specifically outlaw the use of fraud or deception, (4) substitute coercion and other types of nonphysical pressures for the force requirement, and (5) prohibit nonconsensual intercourse without reference to force, fraud, or coercion. The unitary concept of forcible rape has given birth to a host of offspring differing in substantive content and corresponding more closely to the varied behavior of sex offenders.

Part III of this Article explores the two doctrinal elements of traditional rape law—force and nonconsent—in the context of sexual offenses accomplished by fraud or coercion. First, this part addresses three major sets of objections to the expansion of the force requirement in rape law or its substitution by fraud or coercion and concludes that criminal law should punish both violent and nonviolent forms of rape. Second, because the nonconsent issue in rape law is a vast topic upon which countless courts and commentators have written, this Part considers the narrower question of how to distinguish effective and ineffective consent in rape cases involving fraud or coercion. This Article concludes that the critical question is no longer *if* rape law should prohibit sexual conduct secured by fraud or coercion, but rather *when* (or under what circumstances) such behavior merits criminal sanction.

A few definitional points are in order before proceeding. First, I retain the term "rape" largely for rhetorical reasons. Although its use may be inconsistent with dictionary definitions,²⁰ potentially

²⁰ See Schulhofer, *Sexual Autonomy*, *supra* note 9, at 59-60.

trivialize forcible rape,²¹ and inaccurately reflect current statutory enactments that employ designations such as criminal sexual penetration and sexual assault,²² I believe it conveys the appropriate level of blameworthiness and criminality for this conduct.²³ "Sexual predation" might be preferable except for its conflicting usage in contemporary sexual predator laws.²⁴ Second, I use the term "rape by fraud" as a shorthand expression for all criminal cases in which the defendant has accomplished sexual intercourse by any type of fraud, deception, misrepresentation, impersonation, or other stratagem. Finally, I employ "rape by coercion" as a catch-all term for any cases in which the criminal actor deployed nonphysical pressures, such as a position of authority, extortion, or other threats, to secure sexual compliance.

I. CASES OF RAPE BY FRAUD OR RAPE BY COERCION: "DR. FEELGOOD," "THE FANTASY MAN," AND "THE ABOMINABLE SNOWMAN"

The use or threat of physical violence is just one way men force women they know to have sex with them. Men also use other kinds of threats, such as to leave women stranded, to publicly humiliate them, and to fire them from their jobs. And men obtain sex by fraud; they lie to women, intentionally creating situations that frighten women into submitting to sex without a fight.²⁵

²¹ See *infra* Part III.A.

²² See *infra* Part II.

²³ See also Estrich, *Rape*, *supra* note 7, at 1183 (arguing that sex obtained by fraud or extortion should still be called rape because of "the injury to personal integrity involved in forced sex.").

²⁴ See Lea VanderVelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817, 818 n.2 (1996) ("By 'sexual predation,' I mean acts of sex which exploited women, including rape, coerced sex, sex based on deceptive representations, or sex that opportunistically took advantage of a woman's reproductive vulnerability. . . ."); see also *People v. Evans*, 85 Misc.2d 1088, 1098, 379 N.Y.S.2d 912, 921 (Sup. Ct. N.Y. County 1975) (describing defendant as predator); Jane E. Larson, *Women Understand so Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 453 (1993) [hereinafter *Women Understand*] ("[T]here is neither a principled nor a pragmatic basis for regulating the sexual sphere so as to permit more predatory conduct than is tolerated in the marketplace."). In the final analysis, disagreements about terminology should not take precedence over consideration of whether to punish the underlying conduct.

²⁵ Findlater, *supra* note 1, at 1363-64 (footnotes omitted).

There exists a remarkably large and diverse body of criminal²⁶ cases involving defendants' use of fraud or coercion in accomplishing sexual intercourse, with many sharply disagreeing about the propriety of punishing such conduct as rape or sexual assault.²⁷ The case law is a logical and appropriate starting point because courts are the first battleground upon which disputes are waged about whether to criminalize rape by fraud or coercion. The legal analysis and reasoning in the following legal opinions provide the fodder for subsequent legislative innovation²⁸ and doctrinal commentary.²⁹

Although arising in multiple jurisdictions (some even in foreign countries) with different rape or sexual assault statutes, three common themes emerge from the following case law review. First, courts in rape by fraud or coercion cases have generally adopted an approach characterized by judicial conservatism and strict statutory construction. Hanging their doctrinal hats on either the force or nonconsent prongs of traditional rape law, courts have often been reluctant to move beyond the literal wording of a jurisdiction's rape statute and explore alternative doctrinal avenues. For example, with respect to the force element, courts could have considered the applicability of the doctrine of constructive force, developed in burglary law, to subsume instances of fraudulent, nonforcible breaking to rape law.³⁰ Similarly, in the consent context, courts perpetuated the problematic distinction between fraud in the factum (mistake as to the act itself) and fraud in the inducement (mistake about the reason for doing the act)³¹ in lieu of more critically examining the types of fraudulent inducements that impugn the voluntariness

²⁶ For the most part, I omit civil cases. For discussions of some of these cases, see Larson, *Women Understand*, *supra* note 24; VanderVelde, *supra* note 24; Michael R. Flaherty, Annotation, *Improper or Immoral Sexually-Related Conduct Towards Patient as Ground for Disciplinary Action Against Physician, Dentist, or Other Licensed Healer*, 59 A.L.R. 4TH 1104 (1988 & Supp. 1997); Brendan de R. O'Byrne, Annotation, *Civil Liability of Doctor or Psychologist for Having Sexual Relationship with Patient*, 33 A.L.R. 3D 1393 (1970 & Supp. 1997).

²⁷ W. R. Habeeb, Annotation, *Intercourse Accomplished Under Pretext of Medical Treatment as Rape*, 70 A.L.R. 2D 824, 826-27 (1960) (superseded) comments: "The cases are not in harmony on the question whether this constitutes rape, the conviction being in some cases sustained on the theory that a consent obtained by fraud was not a real consent."

²⁸ See *infra* Part II.

²⁹ See *infra* Part III.

³⁰ See *infra* notes 475-479 and accompanying text.

³¹ See *infra* notes 566-589 and accompanying text.

of consent.³² Counterbalancing their judicial conservatism, many courts exhorted their respective legislatures to alter the statutory complexion of rape law to cope with these troublesome cases.

A second theme emerging from the case law is that criminal defendants' use of fraud or coercion to secure sexual compliance is not a recent or rare phenomenon³³ as several cases date to the 1800s.³⁴ Moreover, repetitive patterns or similar stratagems emerge from these defendants' conduct; the times and places may change but many of the stratagems remain the same. For example, in both *Don Moran v. People* (1872)³⁵ and *Boro v. Superior Court* (1985),³⁶ the defendants told their respective victims that sexual intercourse was essential for effective medical treatment instead of a painful surgical alternative. In fact, cases involving sexual intercourse accomplished by two different stratagems—fraudulent medical treatment or husband impersonation—have become so common as to be recognized as archetypes of rape by fraud,³⁷ and the current trend is toward expansion. The fraudulent medical treatment paradigm now encompasses cases of psychological counseling and religious guidance.³⁸ Likewise, courts have had to consider whether the husband impersonation model applies to cases of feigned fiancés, boyfriends, or lovers.³⁹ Moreover, new genres of sexual offenses continue to emerge, i.e., commercial-like fraud (i.e., sexual scams),⁴⁰ property-like offenses (i.e., sexual theft and extortion),⁴¹ and coercive pressures (i.e., abuse of authority)⁴² which have supplemented the traditional categories.

The third theme emerging from the case law is the portrait of defendants as a distinct specie of sexual predator; they were often repeat offenders with multiple victims.⁴³ Offenders were not simply

³² Feinberg, *supra* note 18, at 335; Schulhofer, *Gender Question*, *supra* note 10, at 135-36.

³³ See Feinberg, *supra* note 18, at 337; Durham, *supra* note 18, at 63.

³⁴ See *supra* note 3.

³⁵ 25 Mich. 356 (1872).

³⁶ 210 Cal. Rptr. 122 (Cal. Ct. App. 1985).

³⁷ See, e.g., *Don Moran*, 25 Mich. at 364-65 (1872 opinion discussing these two fact patterns).

³⁸ See *infra* Part I.A.

³⁹ See *infra* Part I.B.

⁴⁰ See *infra* Part I.C.

⁴¹ See *infra* Parts I.D and I.F.

⁴² See *infra* Part I.E.

⁴³ See, e.g., *Boro v. Superior Court*, 210 Cal. Rptr. 123 (Cal. Ct. App. 1985) (referring to "another potential victim of the same scheme") and cases discussed *infra*

persons who lied to others in the context of personal relationships, seducing prospective lovers with protestations of undying affection.⁴⁴ Rather, they abused positions of trust and authority over their victims, such trust having been established through professional, business, or employment settings. Others preyed on victims outside of these contexts, often taking considerable pains to locate the most gullible and unsophisticated citizens.⁴⁵ Many calculated their strategies, exploiting fully the power inherent in fraud or coercion but stopping short of physical violence.⁴⁶ Some devised elaborate schemes to defraud their unwary targets, scams that would have resulted (and sometimes ingeniously did)⁴⁷ in liability for other criminal acts, i.e., property crimes.⁴⁸ These criminal defendants often earned the moral condemnation of the courts hearing their cases, even as these courts regretfully relieved them of criminal responsibility.⁴⁹ In short, case law illustrates that these offenders are sexual predators, distinct from forcible rapists, but morally blameworthy in their own right.⁵⁰

notes 135-140, 149-153 and accompanying text.

⁴⁴ This Part does not include cases involving purely social or romantic relationships between defendants and victims, which raise even more difficult issues. While I favor the expansion of rape law to include instances of deception in the context of purely personal relationships, see, e.g., *Neal v. Neal*, 179 B.R. 234 (D. Idaho 1995), a battery action based on husband's failure to disclose to wife that he was having an affair, the resolution of rape law's treatment of fraud in professional or arms-length transactions should be the first step in doing so.

⁴⁵ The defendants in *Boro*, 210 Cal. Rptr. 122 and the Mitchell case, *infra* notes 135-140 and accompanying text, are reputed to have called multiple potential victims in order to find those gullible enough to believe their misrepresentations.

⁴⁶ See, e.g., *People v. Evans*, 85 Misc.2d 1088, 379 N.Y.S.2d 912 (Sup. Ct. N.Y. County 1975).

⁴⁷ See, e.g., *United States v. Condolon*, 600 F.2d 7 (4th Cir. 1979) (defendant convicted of federal wire fraud); LINDA A. FAIRSTEIN, *SEXUAL VIOLENCE: OUR WAR AGAINST RAPE* 195-97 (1993) (discussing case of Steve Davidson who was convicted of theft).

⁴⁸ Estrich points out that the defendants in *People v. Evans*, 85 Misc.2d at 1088, 379 N.Y.S.2d at 912, and *Goldberg v. State*, 395 A.2d 1213 (Md. Ct. Spec. App. 1979), would have been guilty of property offenses if they had been attempting to obtain money rather than sex. Estrich, *Rape*, *supra* note 7, at 1119; see also Larson, *Women Understand*, *supra* note 24, at 412 (arguing law allows men to use tactics to secure sex that would not be tolerated to secure money, what she calls the "sex exception to fraud").

⁴⁹ See, e.g., *Don Moran v. People*, 25 Mich. 356, 364-65 (1872); *State v. Thompson*, 792 P.2d 1103, 1107 (Mont. 1990); *Evans*, 85 Misc.2d at 1098-99, 379 N.Y.S.2d at 921-22.

⁵⁰ See also SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 43 (1978) (Bok quotes from Dante: "Of every malice that gains hatred in Heaven the end is injustice; and every such end, either by force or by fraud, afflicts another. But because fraud

The cases fall roughly into six major categories, although these are somewhat artificial because of inevitable overlap between fraudulent and coercive pressures. Cases of rape by fraud include: (1) fraudulent treatment, (2) fraud as to the defendant's identity (i.e., impersonation), (3) sexual scams, and (4) sexual theft; the rape by coercion cases encompass (5) abuse of authority and (6) sexual extortion. Due to the large number of extant cases, the following examples were selected because they were representative, involved intriguing factual issues, or provided an impetus for legal change (e.g., California and Kansas passed legislation in response to cases falling outside the boundaries of their existing rape statutes).⁵¹

A. *Fraudulent Treatment*

This section begins with the oldest set of cases, involving fraudulent medical treatment per se, and then considers three newer variations: defendants' use of fraudulent inducements under the guise of providing psychological therapy, religious guidance, and, in one unusual case, musical education.

1. *Fraudulent Medical Treatment*

A considerable number of cases exist in which defendants had sexual intercourse with patients under the guise of medical treatment, some dating back to the 1800s.⁵² These cases may be usefully divided into three subsidiary groups.⁵³ One group involves de-

is an evil peculiar to man, it more displeases God, and therefore the fraudulent are the lower, and more pain assails them."); FAIRSTEIN, *supra* note 47, at 197 ("While these men do not exhibit the life-threatening physical violence of forcible rapists, they practice a form of abuse and violation that should subject them to criminal liability in a court of law.").

⁵¹ See *infra* notes 339-342 and accompanying text.

⁵² See generally Jay M. Zitter, Annotation, *Conviction of Rape or Related Sexual Offenses on Basis of Intercourse Accomplished Under the Pretext of, or in the Course of, Medical Treatment*, 65 A.L.R. 4TH 1064 (1994); see also Habeeb, *supra* note 27 and accompanying text.

⁵³ Two other common fact patterns emerge. First, many defendants pretended to be doctors to gain access to victims. See, e.g., *United States v. Reed*, 9 C.M.R. 396 (1953) (captain represented himself as doctor in order to make physical examinations of three women); *Man Injects Women with Vitamin B-12*, UPI, Mar. 7, 1990, available in LEXIS, News Library, UPI File; *Phony Doctor Pushes B-12*, UPI, Mar. 8, 1990, available in LEXIS, News Library, UPI File; Chuck Shepard, *Juice Bar Show Aimed at Men Between the Ages of 18 and 21*, STAR TRIB. (Minneapolis, MN), Oct. 9, 1992, at 7E, available in LEXIS News Library, Busdlt File; Mike Thomas, *Stinky Bandits, Check-Kiting Congress-*

ception as to the nature of the act, e.g., a woman believes that she is having a routine vaginal examination and the defendant is actually having sexual intercourse with her. A second group concerns defendants who induce women to have sexual intercourse by fraudulently maintaining that it is necessary for their medical treatment; the patients were aware of the nature of the act. A third group encompasses types of "ambiguously sexual" touching(s) that the patient believes are necessary for medical purposes, but which are only for a defendant's sexual gratification.

a. *Deception as to the Act*

The first group of cases involves deception on the part of the defendant concerning the nature of his conduct. In these cases, the defendant professes to give the patient a routine vaginal examination but instead has sexual intercourse with her. Most courts have held that a rape conviction can be founded upon this fact pattern because the woman does not consent to sexual intercourse, not knowing that it is taking place.⁵⁴ As the authors of one criminal

men, Burglars at Bat, The Happy-Hooker Schoolteacher and, Of Course, That Silly Suncoast Dome, ORLANDO SENTINEL TRIB., Jan. 3, 1993, at 7, available in LEXIS, News library, Orsent file ("Dr. Giggles" defendant arrested for practicing medicine without license, for posing as doctor and giving injections).

Second, doctors and dentists administered substances to patients rendering them unable to prevent sexual intercourse. These cases are usually brought under rape statutes prohibiting sexual intercourse with an unconscious or physically helpless person. See, e.g., *State v. Oshiro*, 696 P.2d 846 (Haw. Ct. App. 1985) (dentist administered nitrous oxide); *Commonwealth v. Helfant*, 496 N.E.2d 433 (Mass. 1986) (doctor administered drug); *State v. Sladek*, 835 S.W.2d 308 (Mo. 1992) (dentist administered nitrous oxide); *State v. Lung*, 28 P. 235 (Nev. 1891) (no attempted rape because administered drug could not destroy power to resist); *People v. Teicher*, 52 N.Y.2d 638, 422 N.E.2d 506, 439 N.Y.S.2d 846 (1981) (dentist sexually abused patients under sedation); Flaherty, *supra* note 26, at 1104; see also *People v. Royal*, 53 Cal. 62 (1878) (defendant doctor practiced some sort of manipulation on victim and then had carnal connection with her). Finally, a few cases involved dentists who inappropriately touched patients without drugs. See *Hublin v. Shira*, 563 P.2d 1079 (Kan. Ct. App. 1977); *State v. Styskal*, 493 N.W.2d 313 (Neb. 1992).

⁵⁴ See, e.g., *People v. Ogunmola*, 238 Cal. Rptr. 300 (Cal. Ct. App. 1987) (rape upheld); *People v. Minkowski*, 23 Cal. Rptr. 92 (Cal. Ct. App. 1962) (rape upheld); *People v. Borak*, 301 N.E.2d 1 (Ill. App. Ct. 1973) (deviate sexual assault upheld and rape overturned); *Pomeroy v. State*, 94 Ind. 96 (1883) (rape upheld); *State v. Atkins*, 292 S.W. 422 (Mo. 1926) (rape upheld); *McNair v. State*, 825 P.2d 571 (Nev. 1992) (sexual assault upheld); *Commonwealth v. Morgan*, 56 A.2d 275 (Pa. Super. Ct. 1948) (rape upheld), *rev'd*, 58 A.2d 330 (Pa. 1948); *State v. Ely*, 194 P. 988 (Wash. 1921) (rape upheld); *Story v. State*, 721 P.2d 1020 (Wyo. 1986) (majority of rape convictions upheld); *Regina v. Flattery*, (1877) 2 Q.B.D. 410 (guilty of rape). *But see* *Walter v. People*,

law treatise assert: "It is well settled that if unlawful sexual intercourse was had with such a girl who thought she was being treated with medical or surgical instruments and had consented to nothing else, the man is guilty of rape."⁵⁵ Moreover, courts generally have held that the force requirement is satisfied by the mere use of the force required for the physical act of intercourse.⁵⁶

A recent case illustrating this type of fraudulent medical treatment is *McNair v. State* in which the defendant was convicted of six counts of sexual assault on his patients.⁵⁷ McNair appealed claiming insufficient evidence of nonconsent; the Nevada appellate court disagreed, noting: "When a physician succeeds in the penile penetration of a patient under the guise of performing a medical examination, a sexual assault is committed by fraud and deceit and without the victim's consent."⁵⁸ The court further declined McNair's invitation to consider his behavior as simply a matter of medical ethics, emphasizing the importance of treating such behavior as a crime.⁵⁹ The court, in fact, adopted a term coined by one author to describe similar types of cases—"confidence style assaults."⁶⁰ Lack of force was not an obstacle to the defendant's conviction because Nevada's sexual assault statute did not require force but only that the sexual penetration occur against the person's will.

50 Barb. 144 (N.Y. App. Div. 1867) (no rape). See also *Ebhart v. State*, 34 N.E. 637 (Ind. 1893) (defendant quack persuaded gullible parents to allow him to sleep in same room as daughter, where he took advantage of her). For recent cases see Kirk Loggins, *Nurse Testifies of Rape*, TENNESSEAN, Nov. 1, 1995, at 1B, available in LEXIS, News Library, Tennes File; John Commins, *Alleged Rape During Exam Brings Charges Against Physician*, NASHVILLE BANNER, Sept. 12, 1995, at B1; John Commins, *Doctor's Attorney Denies Rape Charges*, NASHVILLE BANNER, Sept. 13, 1995, at A2.

⁵⁵ ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 215 (3d ed. 1982) (footnote omitted).

⁵⁶ In *Borak*, the court employed the concept of statutory force and stated: "Force is thus implied when the rape or deviate sexual acts proscribed by statute are accomplished under the pretext of medical treatment when the victim is surprised, and unaware of the intention involved." 301 N.E.2d at 5; see also *Pomeroy v. State*, 94 Ind. 96, 100 (1883) (force element satisfied when no consent exists).

⁵⁷ 825 P.2d 571 (Nev. 1992).

⁵⁸ *Id.* at 574.

⁵⁹ *McNair*, 825 P.2d at 576.

⁶⁰ *Id.* at 576; see also Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 ST. JOHN'S L. REV. 979, 1018-20 (1993) (discussing blitz and confidence rapes).

b. *Sexual Intercourse as Necessary Medical Treatment*⁶¹

In contrast to opinions involving deception as to the sexual act, courts considering cases in which defendants lied about the purported benefits of sexual intercourse as a therapeutic treatment generally have found that no rape occurred. Courts have adopted two different approaches in rejecting a rape charge: the force requirement was not satisfied or consent deprived the conduct of its criminality.⁶² One of the oldest examples of this genre is the 1872 opinion in *Don Moran v. People*,⁶³ in which a doctor induced a fifteen-year-old girl to have sexual intercourse with him. The defendant persuaded the young woman to acquiesce using a panoply of deceptive statements: the girl's father had authorized the sexual connection, the doctor used the same technique on all women whom he treated, and the alternative was a painful medical procedure that would probably kill her.⁶⁴ The Michigan Supreme Court overturned the conviction because the trial court erred in instructing the jury by omitting the requirement of force. Although the supreme court held that fraud cannot substitute for force in rape,⁶⁵ the court

⁶¹ See, e.g., *Boro v. Superior Court*, 210 Cal. Rptr. 122 (Cal. Ct. App. 1985); *Commonwealth v. Goldenberg*, 155 N.E.2d 187 (Mass. 1959); *People v. Williams*, 175 N.W. 187 (Mich. 1919); *Don Moran v. People*, 25 Mich. 356 (1872); *Regina v. Hams*, 81 C.C.C. 4 (1943), 2 D.L.R. 61 (1944) (Sask. C.A.); *R. v. K., Rhod. L. R.* 571 (1965) (highest court in Rhodesia held no rape); see also *Commonwealth v. Robinson*, 462 A.2d 840 (Pa. Super. Ct. 1983) (mother's live-in boyfriend told victim she had venereal disease and persuaded her to allow him to treat it by sexual intercourse; convictions for statutory rape and corruption of minor upheld but forcible rape count dismissed); *Limbaugh v. Commonwealth*, 140 S.E. 133 (Va. 1927) (seduction when chiropractor told patient that he could not help her unless they had sexual intercourse).

Another similar case is a civil action against Dr. Julio Soto reported in the media: "A 21-year-old Syracuse, N.Y., woman has settled for an undisclosed amount of money her lawsuit against a former doctor, who she claimed tricked her into having sex by saying it was the best way to administer a secret vaccine." James Steinberg, *Noted Briefly*, SAN DIEGO UNION, Apr. 11, 1991, at D-2; see also Paul Leavitt, *Also Wednesday . . .*, USA TODAY, Apr. 11, 1991, at 3A, available in LEXIS, News Library, Usatdy File; *Vaccine-By-Sex Suit Settled*, NEWSDAY (N.Y.), Apr. 11, 1991, at 35. The judge ruled that Soto had committed medical malpractice; his license was also revoked but no criminal charges were filed.

⁶² Compare *Boro*, 210 Cal. Rptr. at 122 (consent deprived act of criminality) with *Don Moran*, 25 Mich. at 356 (force element not satisfied).

⁶³ 25 Mich. 356 (1872).

⁶⁴ *Id.* at 357.

⁶⁵ See also *State v. Lung*, 28 P. 235, 236 (Nev. 1891) (citing *Don Moran* and stating fraud does not supply the place of force: "Anything which merely excites the woman's passions, leaving her at the same time in the full possession of her mental and physical powers, capable of comprehending the nature of the act, and of exercising her

also noted that obtaining sexual intercourse by fraud may be as criminal as forcible rape but the legislature must outlaw it.⁶⁶ It further noted that the defendant could be convicted on retrial if the jury found that the requirement of force was satisfied by his threat to subject the patient to a life-endangering operation.⁶⁷

A more recent case, *Commonwealth v. Goldenberg*,⁶⁸ reached the same result. In *Goldenberg*, a young woman sought out a physiotherapist for an abortion. During the course of treatment, Goldenberg told the patient that he would have to have sexual intercourse with her and that this might help the procedure.⁶⁹ The Massachusetts Supreme Court, directly confronting the question of whether rape can be committed when the woman's consent is procured by fraud, held that it could not: "The essence of the crime is not the fact of intercourse but the injury and outrage to the feelings of the woman by the forceful penetration of her person. . . . Fraud cannot be allowed to supply the place of the force which the statute makes mandatory."⁷⁰ A concurring judge in a later case, *Commonwealth v. Keegan*,⁷¹ questioned the continued vitality of *Goldenberg* in light of recent scholarship.⁷²

In an even more recent case, *Boro v. Superior Court*,⁷³ the is-

own volition in the matter, is classed rather among the arts of the seducer than the weapons of him who would destroy female virtue by force."); *Walter v. People*, 50 Barb. 144 (N.Y. App. Div. 1867) (fraud insufficient for rape).

⁶⁶ *Don Moran*, 25 Mich. at 364-65. Other courts have made similar overtures to their respective legislative bodies. See, e.g., *Mathews v. Superior Court*, 173 Cal. Rptr. 820, 822 (Cal. Ct. App. 1981); *Bloodworth v. State*, 65 Tenn. 614, 619-21 (1872).

⁶⁷ *Don Moran*, 25 Mich. at 366.

⁶⁸ 155 N.E.2d 187 (Mass. 1959).

⁶⁹ *Id.* at 190.

⁷⁰ *Id.* at 191-92 (citation omitted).

⁷¹ 511 N.E.2d 534 (Mass. 1987).

⁷² *Id.* at 543 (Abrams, J., concurring).

⁷³ 210 Cal. Rptr. 122 (Cal. Ct. App. 1985); see also Lauren Blau, *Police Seek More Victims in "Cure" Fraud; Man Charged with Getting Women to Have Sex as Treatment*, L.A. TIMES, Mar. 31, 1987, at 12, available in LEXIS, News Library, LAT File; Ken Chavez, *Woman Says Ruse Tricked Her into Sex; "Wanted to Save Myself A Lot of Pain," Witness Testifies*, L.A. TIMES, Apr. 22, 1987, at 4, available in LEXIS, News Library, LAT File; *"Dr. Feelgood" to Plead Guilty to Sex by Fraud*, REUTER LIBR. REP., Aug. 5, 1987; *"Feelgood" Accused of Duping Women*, ST. PETERSBURG TIMES, Mar. 29, 1987, available in LEXIS, News Library, Stpete File; *Orange County Digest: Fullerton; Man Accused of Sex By Fraud to Stand Trial*, L.A. TIMES, Apr. 23, 1987, at 2, available in LEXIS, News Library, LAT File; UPI, Aug. 6, 1987, available in LEXIS, News Library, UPSTAT File (court's decision in *Boro* prompted legislature to pass law in 1986 making it a felony to obtain sex through fear or fraud); UPI, Mar. 28, 1987, available in LEXIS, News Library, UPSTAT File; UPI, Apr. 2, 1984, available in LEXIS, News Library, UPST-

sue was not one of force, but of lack of consent. Boro, whom the press nicknamed "Dr. Feelgood," posed as a doctor and tricked women into sexual intercourse by telling them that such act was necessary to cure their fatal blood disease. The defendant explained that the choice was either to undergo a painful and expensive surgery or have sexual intercourse with a donor (Boro) who had been injected with a special serum. The state prosecuted Boro for rape after he persuaded at least four women to engage in sexual intercourse, claiming that his actions fell under a statute prohibiting sexual intercourse with a victim who is unconscious of the nature of the act.⁷⁴ Boro appealed arguing that the rape statute did not cover his case; the appellate court agreed and prohibited his prosecution. Drawing a distinction between fraud in the factum and fraud in the inducement, the court held that only the former vitiates consent.⁷⁵ In discussing a previous case raising a similar issue, it wrote:

It is not difficult to conceive of reasons why the Legislature may have consciously wished to leave the matter where it lies. Thus, as a matter of degree, where consent to intercourse is obtained by promises of travel, fame, celebrity and the like—ought the liar and seducer to be chargeable as a rapist? Where is the line to be drawn?⁷⁶

The dissent pointed to a separate portion of California's statute defining consent, arguing that while not expressly repealing the factum-inducement distinction, it restricted consent to "cases of true, good faith consent, obtained without substantial fraud or deceit."⁷⁷ The California legislature, in response to *Boro*, passed a new statute specifically criminalizing this conduct.⁷⁸ Boro was apprehended again in 1987 for the same scam and prosecuted under the new statute specially designed for him.

AT File. Boro faced similar charges in other jurisdictions.

⁷⁴ CAL. PENAL CODE § 261 (West 1997).

⁷⁵ *Boro*, 210 Cal. Rptr. at 122; see also *People v. Ogunmola*, 238 Cal. Rptr. 300 (Cal. Ct. App. 1987) (physician obtaining sexual intercourse under pretext of medical exam constitutes fraud in the factum); *People v. Harris*, 155 Cal. Rptr. 472 (Cal. Ct. App. 1979) (fraud in the inducement does not vitiate consent); *infra* Part III.B.

⁷⁶ *Boro*, 210 Cal. Rptr. at 1230 n.5.

⁷⁷ *Id.* at 1232 (Holmdahl, J., dissenting).

⁷⁸ CAL. PENAL CODE § 266c (West 1997 & Supp. 1998). See *infra* notes 339-340 and accompanying text.

c. *Intermediate Cases*

Three recent cases involve a factual pattern that lies between the two traditional categories of fraudulent medical treatment cases.⁷⁹ Here, the patients agreed to various forms of intimate touching, falling short of sexual intercourse, in the mistaken belief that such touching constituted medical treatment. These cases differ from the first category—deception as to the act—because the patients were aware of the nature of the contact and not caught by surprise. They diverge from the second group—sexual intercourse as necessary medical treatment—because none of the patients consented to engage in sexual conduct; the ambiguous nature of the sexual contact reinforces this uncertainty. These cases also illustrate alternative answers to the question of whether the defendant's behavior constitutes rape or sexual assault.

In *State v. Quinlan*,⁸⁰ the defendant, working as a respiratory therapist, convinced a twenty-six-year-old patient to allow him to digitally penetrate her under the guise of performing a cardio-neurological-respiratory exam.⁸¹ The patient believed that Quinlan's con-

⁷⁹ Linda Fairstein's book *SEXUAL VIOLENCE: OUR WAR AGAINST RAPE* provides another example of a doctor using his position to induce women to allow him to examine them. See *supra* note 47, at 193. Hugh Richards described himself as a therapist who specialized in holistic healing. Under the guise of therapy, Richards made breast and vaginal examinations of his patients. Each of the women said that the sole reason that they had allowed "the intimate touching was because Richards had maintained that it was an essential part of the therapy or 'medical' treatment." *Id.*

Two assault cases raise a similar issue. In *Commonwealth v. Gregory*, 1 A.2d 501 (Pa. Super. Ct. 1938), the defendant, pretending to be a doctor, persuaded a woman to allow him to examine her artificial leg and stub. He convinced her to take off her dress and to pull down her underwear. He was convicted of indecent assault and assault and battery. The court opined:

[A]ny consent claimed to have been given was obtained by the perpetuation of a fraud, was vitiated by such fraud and is not a defense The deceit practiced was a fraud on the will of Mrs. Harkins equivalent to force. The legal reasoning involved is the same as that followed in the consideration of larceny by trick.

Id. at 505 (citations omitted). In *Bozett v. State*, 159 So. 2d 628 (Ala. Ct. App. 1964), the defendant impersonated a doctor and took indecent liberties with patient; he was convicted of assault and battery. See also *RESTATEMENT (SECOND) OF TORTS* § 55 cmt. a, illus. 4 (1965 & appendix 1977); *RESTATEMENT (SECOND) OF TORTS* § 892B cmt. e, illus. 7 (1977) ("A, believing B to be a physician, removes her clothing and permits B to lay hands on her person for the purpose of a medical examination. B is not a physician and knows that A believes him to be one. B is subject to liability to A for battery.").

⁸⁰ 596 N.E.2d 28 (Ill. App. Ct. 1992).

⁸¹ David Heckelman, *High Court to Rule on Sexual Assault by Therapist*, CHI. DAILY L. BULL., Aug. 26, 1992, at 3, available in LEXIS, News Library, ChidlB File.

duct was a legitimate medical procedure for diagnosing her respiratory problems.⁸² Quinlan appealed arguing that his conduct did not constitute criminal sexual assault because the victim consented.⁸³ The appellate court affirmed Quinlan's conviction noting that Illinois's statute criminalized sexual penetration when the accused knew the victim was unable to understand the nature of the act or was unable to give knowing consent.⁸⁴ The court reasoned that the patient had consented to a medical procedure, not to sexual penetration and that her consent was vitiated because it was obtained by deceit.⁸⁵ The court also noted that Illinois's statute exempted legitimate medical treatment and, therefore, illegitimate medical examinations fell within the statute's reach.⁸⁶

In a similar case reaching the opposite result, David J. Broderson, a phlebotomist, induced three women to allow him to intimately examine them with his fingers and cotton swabs.⁸⁷ When prosecutors charged Broderson with rape, a reviewing court dismissed the case asserting that Kansas's rape law required force or fear. The district attorney did argue, however, that the legislature should enact a new statute covering similar situations because "'Technically, it's just as much rape as someone attacking a stranger on a jogging trail,' . . . 'It's just as serious, it's only accomplished in a different manner.'"⁸⁸ Two years later, Kansas amended its rape statute to include instances in which the victim's consent was obtained through a knowing misrepresentation that intercourse was a medically or therapeutically necessary procedure or a legally required procedure within the scope of offender's authority.⁸⁹

Similarly, *State v. Tizard*⁹⁰ involved a seventeen-year-old male who visited a doctor to inquire about taking steroids. During some

⁸² 596 N.E.2d at 30.

⁸³ *Id.* at 30.

⁸⁴ *Id.* at 31.

⁸⁵ *Quinlan*, 596 N.E.2d at 31. Later, the court stated: "It was only after defendant used deceit to convince [plaintiff] D.S. that the test would get to the root of her medical problems that she consented." *Id.*

⁸⁶ *Id.*

⁸⁷ Tony Rizzo, *Case Shows Need for Rape Law Change, Prosecutors Say; Judge Drops Felony Charges in Incident that Didn't Involve Force*, KANSAS CITY STAR, July 29, 1995, at C2.

⁸⁸ *Id.*

⁸⁹ KAN. STAT. ANN. § 21-3502(a)(3)-(4) (1996 & Supp. 1997); see also Jim Sullinger, *Legislature Expands Rape Law to Include Deception*, KANSAS CITY STAR, Apr. 30, 1996, at B4, available in LEXIS, News Library, Kcstar File.

⁹⁰ 897 S.W.2d 732 (Tenn. Crim. App. 1994).

of these visits, the doctor rubbed the patient's genitals and, on one occasion, masturbated him to climax.⁹¹ The state prosecuted Tizard under its sexual battery statute that includes an explicit fraud provision. The defendant citing *Boro* argued that the statute reached only fraud in the factum, not fraud in the inducement, but the court rejected the distinction as being irrelevant to Tennessee law.⁹² The court further noted that the legislature had explicitly included fraud as an alternative to force in the context of its rape and sexual battery laws.⁹³ The court convicted Tizard, concluding that he had accomplished the touching by fraud since he did it under the guise of providing medical treatment.⁹⁴

⁹¹ *Id.* at 737.

⁹² *Id.* at 741.

⁹³ *Id.* at 742.

⁹⁴ *Id.* at 742-43. An appellate court later overturned the conviction based on the admission of improper evidence. *Id.* at 735.

2. Psychiatric and Psychological Treatment⁹⁵

Several cases implicate defendants' use of fraud in the context of psychological treatment. In one example,⁹⁶ *State v. Leiding*,⁹⁷ a male psychologist persuaded his male patient to have sexual relations with him.⁹⁸ The state prosecuted Leiding under a relatively new, gender-neutral statute that punished various forms of criminal sexual penetration accomplished through the use of force or coercion.⁹⁹ The state theorized that Leiding had used force or coercion under the definition that "the perpetrator knows or has reason to know that the victim . . . suffers from a mental condition which renders the victim incapable of understanding the nature or consequences of the act."¹⁰⁰ It argued that the patient had a condition

⁹⁵ See SUSAN BAUR, *THE INTIMATE HOUR: LOVE AND SEX IN PSYCHOTHERAPY* (1997) (discussing legal aspects of psychotherapist-patient sex); Gregory G. Sarno, Annotation, *Criminal Responsibility for Physical Measures Undertaken in Connection with Treatment of Mentally Disordered Patient*, 99 A.L.R. 3d 854 (1980) (collecting a few cases involving sex). Feinberg suggests psychiatric treatment is a new frontier in rape by fraud cases:

It is almost impossible to imagine similar frauds occurring today, except—and here is the late twentieth-century analogue—in the offices of psychiatrists. Few persons are so ignorant these days as to believe, even on the immense authority of a doctor, that sexual intercourse (with him) will cure or prevent cancer, but even the sophisticated (especially when desperately neurotic) will accept a similar opinion on the authority of their psychoanalyst. And the desperately neurotic are especially vulnerable to pain and injury.

Feinberg, *supra* note 18, at 336-37.

⁹⁶ See also *Ferguson v. People*, 824 P.2d 803 (Colo. 1992) (sexual penetration by psychotherapist); *Shapiro v. State*, 696 So. 2d 1321 (Fla. Dist. Ct. App. 1997) (sexual misconduct by psychotherapist); *State v. Nierras*, 1980 Ohio App. LEXIS 10118 (5th App. Dist. 1980) (attempted sexual intercourse with psychiatrist's client); *Regina v. Fiqia*, 87 C.C.C. 3d 377 (1993); Diana Coulter, *Duped into Sex, Woman Testifies; Fiqia's Therapy Issue in Trial*, EDMONTON J., Feb. 21, 1992; Diana Coulter, *Self-Styled Therapist Guilty of Sex Assault on Teen*, EDMONTON J., Mar. 5, 1992 (One victim of sexual abuse by a therapist said "We have to change the laws regarding consent in power-based relationships"); *Sicko Therapist Denied New Trial*, TORONTO SUN, June 3, 1994, at 45, available in LEXIS, News Library, Torsun File (Defendant told fifteen-year-old client that she had fictitious disease that would drive her insane or kill her and that to cure her he must administer aversion therapy that included sexual intercourse).

⁹⁷ 812 P.2d 797 (N.M. Ct. App. 1991).

⁹⁸ See also *State v. vonKlock*, 433 A.2d 1299 (N.H. 1981), *overruled by State v. Smith*, 503 A.2d 774 (N.H. 1985) (involving male therapist and young male patient); *Commonwealth v. Frank*, 577 A.2d 609 (Pa. Super. Ct. 1990), *postconviction relief denied*, 640 A.2d 904 (Pa. Super. Ct. 1994) (involving male therapist and young male patient).

⁹⁹ *Id.* at 797-98.

¹⁰⁰ *Leiding*, 812 P.2d at 798 (citation omitted).

known as transference that prohibited him from fully consenting to the sexual relationship.¹⁰¹ The court, however, concluded that transference did not render the patient incapable of consenting to the sexual act. Noting that Minnesota had enacted a criminal statute addressing sexual relations between a psychotherapist and patient,¹⁰² the opinion stated: "[I]f the legislature desires to make psychologist/patient sex a crime, it can certainly do so, subject only to constitutional limitations. But doing so requires legislative therapy, not judicial surgery."¹⁰³ In 1993, New Mexico amended its statutes by expanding force or coercion to include penetration or contact "by a psychotherapist on his patient, with or without the patient's consent, during the course of psychotherapy or within a period of one year following the termination of psychotherapy;"¹⁰⁴

3. Religious Guidance

A number of defendants have used a clerical office or spiritual authority to persuade persons to consent to sexual relations. In *State v. Dutton*,¹⁰⁵ the defendant, a church pastor, began counselling a woman, eventually enticing her into a sexual relationship by suggesting that it would be good for her.¹⁰⁶ Dutton was convicted of four counts of criminal sexual conduct under a Minnesota statute that, while not directly addressing clergy members, criminalized psychotherapist-patient contact.¹⁰⁷ Dutton was presumably aware of Minnesota's law as he asserted that while sexual intercourse between a counselor and counselee was a felony, his behavior did not qualify.¹⁰⁸ The court, however, found sufficient evidence of both emotional dependency on the victim's part and therapeutic deception by Dutton to satisfy the statutory requirements of the offense.¹⁰⁹ It wrote: "These statutes are meant to protect vulnerable

¹⁰¹ *Id.* at 798.

¹⁰² MINN. STAT. § 609.345(1)(j) (1996 & Supp. 1997).

¹⁰³ *Leiding*, 812 P.2d at 800.

¹⁰⁴ N.M. STAT. ANN. § 30-9-10(A)(5) (Law. Co-op. 1994).

¹⁰⁵ 450 N.W.2d 189 (Minn. Ct. App. 1990).

¹⁰⁶ *Id.* at 191-92.

¹⁰⁷ MINN. STAT. §§ 609.344(1)(h)-(j), 609.345(1)(h)-(j) (1996 & Supp. 1997); see also MINN. STAT. §§ 609.344(l), 609.345(l) (1996 & Supp. 1997) (punishing criminal sexual conduct with clergy members).

¹⁰⁸ 450 N.W.2d at 191-92.

¹⁰⁹ *Id.* at 192-93.

persons and allow them to reposit trust in those who can help them. The legislature has recognized the emotional devastation that can result when a psychotherapist takes advantage of a patient."¹¹⁰ Following *Dutton* and a similar case,¹¹¹ the Minnesota legislature amended its sexual conduct statutes to include specific provisions regarding the clergy.¹¹²

Similarly, in *People v. Cardenas*,¹¹³ the defendant held himself out as a faith healer in the Curanderismo religion. Cardenas used a combination of abuse of trust, religious authority, psychological coercion, physical deprivation, and a small amount of actual physical force to coerce two women, one a minor, into multiple sexual acts.¹¹⁴ After his conviction of seventy counts of sexual misconduct, Cardenas appealed arguing that he did not satisfy the statutory element of "force, violence, duress, menace, of fear of immediate and unlawful bodily injury" and that the women had consented to his conduct as part of a cure.¹¹⁵ The court rejected Cardenas's arguments and upheld his conviction, noting that the women had only consented to treatment, which did not necessarily translate into consent for defendant's sexual acts. Moreover, the court found that Cardenas's behavior amounted to duress, which it defined broadly to include threats of force as well as hardship or retribution sufficient to coerce a reasonable person of ordinary sus-

¹¹⁰ *Id.* at 194.

¹¹¹ James Hoogenboom, described as "a manipulative minister who persuaded vulnerable women in the congregation that having sex with him was the right thing to do," was tried under the same statute. Pat Doyle, *Church Brochure Says Sex-Assault Defendant Indeed was Counselor*, STAR TRIB. (Minneapolis, MN), Dec. 31, 1992, at 5B, available in LEXIS, News Library, Busdtl File; see also Pat Doyle, *A State of Mind: Minister Used Guile to Seduce True Believers, Elk River Jury Told*, STAR TRIB. (Minneapolis, MN), Dec. 26, 1992, at 1B, available in LEXIS, News Library, Busdtl File; Pat Doyle, *Ex-Minister is Acquitted of Sex Assault; Hoogenboom Still Faces Charges in 2 Other Cases*, STAR TRIB. (Minneapolis, MN), Jan. 9, 1993, at 1B, available in LEXIS, News Library, Busdtl File; Pat Doyle, *Ex-Pastor Testifies that Parishioner Initiated Sex Affair*, STAR TRIB. (Minneapolis, MN), Dec. 30, 1992, at 2B, available in LEXIS, News Library, Busdtl File. Two juries acquitted Hoogenboom of criminal charges and a civil jury found him not guilty. *Jury Clears Elk River Pastor, Church in Sex Case*, STAR TRIB. (Minneapolis, MN), Dec. 3, 1993, at 4B, available in LEXIS, News Library, Busdtl File; *2 Women Sue Minister, Charge that He Sexually Exploited Them*, STAR TRIB. (Minneapolis, MN), Nov. 17, 1991, at 3B, available in LEXIS, News Library, Busdtl File.

¹¹² MINN. STAT. §§ 609.344(l), 609.345(l) (1996).

¹¹³ 21 Cal. App. 4th 927 (Cal. Ct. App. 1994).

¹¹⁴ *Id.* at 932-36.

¹¹⁵ *Id.* at 930.

ceptibilities.¹¹⁶ The court was unpersuaded by defendant's final argument that the women's compliance was unreasonable because "Even unreasonable fear of immediate bodily injury may suffice if the accused knowingly takes advantage of that fear in order to accomplish a sexual offense."¹¹⁷

Other cases implicating similar fact patterns include a Florida minister who abused his position of authority by having sex with three parishioners under the guise of confirming their virginity.¹¹⁸ Another instance occurred in Israel, where a man posing as a rabbi was convicted of nine counts of sexual assault and fraud.¹¹⁹ The defendant sexually assaulted a sixteen-year-old woman telling her that it was necessary to take a sample of her vaginal secretion.¹²⁰ The defendant had multiple victims and was dismissed from the army after involvement in a sexual assault.¹²¹

4. Musical Education

Finally, to complete the list of instances in which defendants persuaded persons that sexual acts were necessary for their medical, psychiatric, or spiritual treatment, one case involved a choirmaster who duped two young women into sexual acts by telling them it was necessary to improve their singing.¹²² In *Rex v. Williams*, the defendant told one sixteen-year-old girl that her breathing was not right, inducing her into a position to engage in sexual intercourse.¹²³ When she asked what he was doing, he responded:

"It is quite right; do not worry. . . . This is my method of training. Your breathing is not quite right and I have to make an air passage to make it

¹¹⁶ *Id.* at 939.

¹¹⁷ *Id.* at 940 (citation omitted).

¹¹⁸ Nicole Sterghos & Sarah Lundy, *Portrait of a Pastor: 2 Claim Sex, Betrayal; Minister Says He's Victim of Church Politics*, SUN-SENTINEL (Fort Lauderdale, FL), Sept. 18, 1997, at 1A, available in LEXIS, News Library, Sunsen File.

¹¹⁹ Raine Marcus, *Fake Rabbi Guilty of Raping Woman He Promised to Cure*, JERUSALEM POST, Jan. 27, 1993, available in LEXIS, News Library, JPost File.

¹²⁰ *Id.*

¹²¹ *Id.*; see also *DeStefano v. Grabrian*, 763 P.2d 275 (Colo. 1988) (husband brought civil case against priest and diocese for enticing wife into sex during marital counseling).

¹²² *Rex v. Williams*, 27 Cox C.C. 350 (1922), excerpted in JOHN M. MACDONALD, RAPE: OFFENDERS AND THEIR VICTIMS 235-36 (1971).

¹²³ *Id.*

right. Your parents know all about it, it has all been arranged; before God, Vera, it is quite right. I will not do you any harm."¹²⁴

Williams was convicted of rape for this conduct and of indecent assault for digitally penetrating another female student.¹²⁵

5. Conclusion

Fraudulent medical treatment decisions, perhaps due to their greater longevity or sheer number, offer an encapsulated view of the fundamental problems inherent in rape by fraud cases. First, courts confronting factually similar behavior seem to arrive at different conclusions regarding the importance of the force and nonconsent elements of traditional rape law. The absence of force was critical for some, while consent deprived the act of criminality for others. Courts' characterization of the pivotal issue as one of force or nonconsent subsequently affected the jurisdiction's statutory enactments. Michigan, where *Don Moran* arose, altered its statute by enlarging the force requirement, while California, the site of *Boro*, passed new legislation altering the consent requirement.¹²⁶ Second, the fraudulent medical treatment cases, perhaps more than any other category, illustrate the dialectic relationship between courts and legislatures in criminalizing rape by fraud. *Boro* and *Broderson* prompted statutory innovation in medical contexts, *Leiding* preceded its state's psychotherapist legislation, and *Dutton* antedated specific clergy provisions. Thus, at least in some states, judicial invitations were answered by the legislature.

B. Fraud as to the Defendant's Identity

The second major case law category involves defendants who impersonate others in order to accomplish sexual intercourse. The archetypical fact pattern for such category is a defendant impersonating a woman's husband by getting into bed with her and engaging in sexual intercourse before the woman becomes aware of his real identity. Husband impersonation cases have reached differing outcomes, largely as a result of disagreement about whether such con-

¹²⁴ MACDONALD, *supra* note 122, at 236.

¹²⁵ Jocelyne A. Scutt, *Fraud and Consent in Rape: Comprehension of the Nature and Character of the Act and Its Moral Implications*, 18 CRIM. L.Q. 312, 315 (1976).

¹²⁶ See *infra* notes 280, 339-340 and accompanying text.

duct constitutes fraud in the factum or fraud in the inducement.¹²⁷ Newer cases provide even more twists by introducing interesting variations on the husband impersonation theme, i.e., men who pretend to be women's fiancées, boyfriends, or lovers. In one case, the defendant impersonated a famous person to maneuver women into vulnerable positions.

1. Husband Impersonation

The classic husband impersonation case with a twist is *Lewis v. State*.¹²⁸ Lewis, a slave, climbed into bed and had sexual intercourse with a white woman who believed Lewis was her husband.¹²⁹ The court reluctantly held that force, actual or constructive, is a necessary ingredient of rape.¹³⁰ If the woman consents, the court reasoned, no rape occurred even though consent was obtained by fraudulent impersonation.¹³¹ It added:

We depart from our usual course, for the purpose of inviting the attention of the legislature to this subject. Under our penal laws, one who obtains the goods of another under false and fraudulent pretenses, is held guilty in the same degree as if he has feloniously stolen them. He who contaminates female purity under like fraudulent pretenses, goes unwhipped of justice.¹³²

Other courts have upheld rape charges in husband impersonation cases finding fraud in the factum vitiating consent.¹³³ One court, for example, reasoned that husband impersonation cases really involve fraud in the factum because the woman has consented to

¹²⁷ See generally B.K. Carpenter, Annotation, *Rape by Fraud or Impersonation*, 91 A.L.R. 2D 591 (1963).

¹²⁸ 30 Ala. 54 (1857). But see *Boyett v. State*, 159 So. 2d 628 (Ala. Ct. App. 1964) (distinguishing *Lewis* and holding consent obtained by fraud did not prevent conviction for assault and battery). Other husband impersonation cases include *State v. Navarro*, 367 P.2d 227 (Ariz. 1961) (rape by deception conviction affirmed), and *Pinson v. State*, 518 So. 2d 1220 (Miss. 1988) (rape conviction affirmed).

A few cases involve sexual relations accomplished by sham marriages. See, e.g., *Bloodworth v. State*, 65 Tenn. 614 (1872) (rape conviction reversed); *Lee v. State*, 72 S.W. 1005 (Tex. Crim. App. 1902) (same); see also *Cop Couple in Sex Battle*, SCOTTS DAILY REC., Aug. 13, 1994, at 21 (male cop tricked female cop into marriage and sex before confessing he was not divorced).

¹²⁹ *Lewis*, 30 Ala. at 54-55.

¹³⁰ *Id.* at 56.

¹³¹ *Id.*

¹³² *Id.* at 57.

¹³³ See *supra* note 127.

marital intercourse not adultery and, therefore, the impersonator's fraud vitiates her consent.¹³⁴

2. Fiancé/Boyfriend/Lover Impersonation

One of the most notorious recorded sexual scams is the case of Raymond Mitchell, dubbed the "Fantasy Man" by the press.¹³⁵ Mitchell telephoned women, pretended to be their fiancés or boyfriends, explained that he had had a fantasy about having sex with a blindfolded woman, and persuaded them to leave their doors unlocked and to wait in bed blindfolded.¹³⁶ He also instructed his victims not to touch him during sex.¹³⁷ Mitchell was convicted under a Tennessee statute specifically criminalizing rape by fraud—the only one of its kind in the United States.¹³⁸ Although arguing that the women consented to the sexual intercourse, the court held that consent is ineffective if obtained by deception.¹³⁹ Presently, Mitchell is arguing on appeal that the statute is too vague as it does not specifically set forth the types of fraud which would lead to conviction.¹⁴⁰

¹³⁴ Regina v. Dee, 15 Cox 579 (1884); see also Jocelyne A. Scutt, *Fraudulent Impersonation and Consent in Rape*, 9 U. QUEENS. L.J. 59, 63-65 (1975) [hereinafter *Fraudulent Impersonation*] (discussing this case).

¹³⁵ Susan Ager, "Fantasy Man" Fooled so Many Women Because . . . ?, HOUSTON CHRON., Jan. 30, 1996, at 2, available in LEXIS, News Library, Hchm File; Mark Ippolito, *Fraud-Sex Link Deep in History*, TENNESSEAN, Jan. 16, 1996, at 1A, available in LEXIS, News Library, Tennes File; Kirk Loggins, *Lawyers: Dismiss Rape Case*, TENNESSEAN, Jan. 9, 1996, at 1A, available in LEXIS, News Library, Tennes File; "Fantasy Man" Guilty of Rape in Blindfolded Encounters, MILWAUKEE J. SENTINEL, Jan. 19, 1996, at 9, available in LEXIS, News Library, Miljnl File; "Fantasy Man" is Guilty of Rape, KNOXVILLE NEWS-SENTINEL, Jan. 19, 1996, at A6, available in LEXIS, News Library, Knews File; *Prosecutors Face Tough Question: Was it Rape or Fantasy Fulfillment*, FORT WORTH STAR-TELEGRAM, Feb. 3, 1995, at 7; *Women Who Waited for Fantasy Man Now Accuse Him of Rape*, STAR TRIB. (Minneapolis, MN), Feb. 3, 1995, at 5A [hereinafter *Women Who Waited*].

¹³⁶ See Ager, *supra* note 135, at 2.

¹³⁷ See Ager, *supra* note 135, at 2.

¹³⁸ The statute provides that rape occurs if, inter alia, "The sexual penetration is accomplished by fraud." TENN. CODE ANN. § 39-13-503 (1997). News accounts suggest that the statute was an update of an 1870 criminal provision on husband impersonation. *Women Who Waited*, *supra* note 120, at 5A; Ippolito, *supra* note 135, at 1A.

¹³⁹ Loggins, *supra* note 135, at 1A.

¹⁴⁰ "Fantasy Man" Pleads Guilty to Sexual Battery in 4th Case, NASHVILLE BANNER, Oct. 1, 1996, at B2.

Similarly, in *People v. Hough*,¹⁴¹ the defendant impersonated his twin brother in order to have sexual intercourse with the brother's girlfriend. The court phrased the question in the case as "whether a female actually consents to sexual intercourse with a male who procures the female's consent by impersonating the female's boyfriend."¹⁴² The court found New York's nonconsent statute required either forcible compulsion or incapacity to consent and did not include fraud:

In general, in the absence of a statute, where a woman is capable of consenting and does consent to sexual intercourse, a man is not guilty of rape even though he obtained the consent through fraud or surprise. . . . The reason is that in the traditional definition of the crime of rape, the sexual intercourse must have been achieved "by force", or "forcibly".¹⁴³

The court also pointed out that New York's statute, unlike other jurisdictions', did not contain a husband impersonation provision. It concluded that the legislature had intentionally excluded cases of fraud or impersonation and dismissed the information.¹⁴⁴

The case of *United States v. Booker*¹⁴⁵ provides a third variation on the impersonation theme. Booker had sexual intercourse with a sleeping or unconscious woman shortly after she had consensual intercourse with another man, arguably impersonating the woman's voluntary lover. He was tried for rape under military law.¹⁴⁶ The court struggled with whether his action constituted rape by fraud and whether such fraud was in the factum or in the inducement.¹⁴⁷ The court ultimately held that fraud as to the identity of a sexual partner constitutes fraud in the factum which vitiates consent because: "The better view is that the 'factum' involves both

¹⁴¹ 124 Misc.2d 997, 607 N.Y.S.2d 884 (1994); see also *Mathews v. Superior Court*, 173 Cal. Rptr. 820 (Cal. Ct. App. 1981) (boyfriend impersonation case in which attempted rape charges were dismissed); Maureen Fan, *Twin Cleared for Now*, *NEWSDAY* (N.Y.), Jan. 14, 1994, at 40 (A member of the district attorney's office said "It creates a glaring hole in the protection afforded to victims of sexual offenses."). The concurring judge in *Mathews* pointed out the different treatment of married and unmarried persons because California criminally punished husband impersonation. 173 Cal. Rptr. at 822.

¹⁴² *Hough*, 159 Misc.2d at 999, 607 N.Y.S.2d at 885.

¹⁴³ *Id.* at 1000, 607 N.Y.S.2d at 886.

¹⁴⁴ *Id.* at 1001-02, 607 N.Y.S.2d at 887.

¹⁴⁵ 25 M.J. 114 (CMA 1987); see also *Two Men Charged in Rape Case*, *IDAHO FALLS POST REG.*, Feb. 28, 1993, at C1, available in LEXIS, News Library, Idfall File (two friends tricked woman into having sex with both of them).

¹⁴⁶ *Booker*, 25 M.J. at 114.

¹⁴⁷ *Id.* at 116.

the nature of the act and some knowledge of the identity of the participant."¹⁴⁸ Thus, Booker was convicted of rape.

3. Impersonating a Famous Person

Oscar E. Kendall impersonated fashion photographer Richard Avedon in a pervasive ruse to persuade women to sleep with him and give him money.¹⁴⁹ Although news coverage of this unpublished case is scant, Kendall apparently used fraud to induce women into vulnerable locations, such as their hotel rooms, and then forcibly assaulted them.¹⁵⁰ His conduct was calculated and deliberate: "Kendall told a police detective in California that he knew 'it is difficult to prosecute a rapist who, by fraud, gains the confidence and companionship (sic) of a woman'"¹⁵¹ Once apprehended, Kendall admitted guilt to four crimes in four cities in exchange for the police dropping seventeen other charges.¹⁵² He had been convicted of the same charge in Florida in 1968.¹⁵³

4. Conclusion

The traditional husband impersonation cases provide a telling illustration of the problematic elasticity of the factum-inducement

¹⁴⁸ *Id.*; see also Scutt, *Fraudulent Impersonation*, *supra* note 134, at 63-65 (making similar argument).

¹⁴⁹ Laura A. Kieman, *Avedon Impostor Admits Guilt in 4 Crimes in 4 Cities; Man Admits Guilt in Crime in Avedon Impostor Case*, WASH. POST, Apr. 6, 1978, at C1 [hereinafter *Avedon Impostor Admits*]; Laura A. Kieman, *Avedon Impostor Draws 7 Years*, WASH. POST, May 6, 1978, at C2 [hereinafter *Avedon Impostor Draws*]; Bill Roeder, *Prose and Con*, NEWSWEEK, Dec. 5, 1977, at 23; Ron Shaffer & Alfred E. Lewis, *Avedon Suspect Held on \$1 Million Bail; Avedon Impostor Suspect is Held on \$1 Million Bail*, WASH. POST, Sept. 17, 1977, at A1; *Overexposed*, NEWSWEEK, Sept. 26, 1977, at 39. Kendall's criminal activity was the basis of the movie *Love Crimes*. Robert S. Cauthorn, *"Love Crimes" as Moving as Molasses*, ARIZONA DAILY STAR, Jan. 29, 1992, at 1C; see also Feinberg, *supra* note 18, at 344 (discussing example of man impersonating rock star to induce woman into sex).

¹⁵⁰ Kieman, *Avedon Impostor Admits*, *supra* note 149, at C1; see also Commonwealth v. King, 434 A.2d 1294 (Pa. Super. Ct. 1981) (defendant lured women with an advertisement about having their pictures taken, then physically attacked them); Donna Wares, *Man With 30 Aliases to Go on Trial for Rape/Investigators Say Jailhouse Lawyer Used his Camera to Lure Young Girls*, ORANGE COUNTY REG., Feb. 28, 1988, at B01 (defendant pretended to be a photographer).

¹⁵¹ Kieman, *Avedon Impostor Draws*, *supra* note 149, at C2.

¹⁵² Kendall had dealt with 33 women in 25 cities. He pleaded guilty to assault with intent to commit rape. Kieman, *Avedon Impostor Admits*, *supra* note 149, at C1.

¹⁵³ Kieman, *Avedon Impostor Admits*, *supra* note 149, at C1.

distinction in the context of assessing a victim's consent. One court's recharacterization of the consented-to act, as one of marital intercourse not adultery, allowed it to subsume the defendant's conduct under rape law. However, such legal sleight of hand is inadequate to address the newer variations involving sexual partners other than spouses.¹⁵⁴ In addition, Kendall's case poses a more difficult challenge because it involves a different type of impersonation. Instead of relying on the factum-inducement dichotomy, a superior approach may be simply to outlaw fraud as to identity in securing sexual compliance—the standard used in England.¹⁵⁵

C. *Sexual Scams: Talent Agents, Psychologists, and Psychics*

Recently, courts have been confronted with a third major category, a new genre of cases involving a different kind of fraud—con men who prey on women by perpetrating some form of sexual scam, many predictably involving the entertainment industry. These cases are difficult because they lack the historical development and, more importantly, the intuitive appeal of the traditional fraudulent treatment and impersonation cases. They typically involve business settings, not professional-treatment contexts, in which the defendants deceive the victims into sexual intimacy by false promises of benefit. Because these fact patterns more closely resemble fraudulent commercial transactions and trigger discussion of sexual bargains,¹⁵⁶ they demand careful consideration as to the potential limits of rape by fraud. To date, attempts to prosecute these defendants for sexual crimes, based on exploitation of victims under the guise of the casting couch or similar stratagems, have been largely unsuccessful. Most of these sexual con men have escaped criminal sanction or, more rarely, have been convicted of fraud or property crimes rather than the underlying sexual offense.

¹⁵⁴ In *Regina v. Elbekkay*, [1995] Crim LR 163 (C.A. 1994), available in LEXIS, UK Library, ALLCAS File, a British court eschewed the distinction between married and unmarried persons: "How could we conscientiously hold that it is rape to impersonate a husband in the act of sexual intercourse, but not if the person impersonated is merely, say the long-term, live-in lover, or in the even more modern idiom, the 'partner' of the woman concerned?"; see also Scutt, *Fraudulent Impersonation*, *supra* note 134, at 64 (arguing marriage irrelevant).

¹⁵⁵ See, e.g., *Regina v. Linekar*, [1995] Crim LR 320 (C.A. 1994), available in LEXIS, UK Library, ALLCAS File; see also *infra* notes 590-592 and accompanying text.

¹⁵⁶ See Berger, *supra* note 8, at 76; see also MODEL PENAL CODE § 213 commentary (Proposed Official Draft 1962) (discussing distinction between coercion and bargain).

1. Talent Agents, Acting Coaches, and Movie Producers¹⁵⁷

In *United States v. Condolon*,¹⁵⁸ the defendant engaged in an elaborate scheme designed "solely . . . to gratify his sexual desires."¹⁵⁹ He rented an apartment, obtained a business license, and placed newspaper ads offering to find women acting and modeling jobs.¹⁶⁰ Condolon propositioned many of the women who contacted him and a number submitted to his advances. In reality, Condolon had neither the means nor the intention of assisting his clients in obtaining work.¹⁶¹ He was convicted of wire fraud: "The federal statute was not used to punish Condolon for his sexual activities. Condolon was prosecuted for establishing a bogus commercial enterprise and then using the telephone to accomplish his fraudulent intentions."¹⁶² Without resort to the wire fraud statute, Condolon would likely have gone unpunished.

In *Goldberg v. State*, the defendant held himself out to be a free-lance agent, telling his victim that she would make a good model.¹⁶³ He brought her to a condo and smooth-talked her into removing her clothing (the victim stated that she was frightened of the defendant at this point) and eventually engaged in sexual intercourse. Goldberg appealed his conviction of second-degree rape. The appellate court reversed, finding insufficient evidence of force and holding that in the absence of force, the victim's lack of consent is irrelevant.¹⁶⁴ The court also considered whether the victim resisted or had been prevented from resisting because of fear; however, it concluded "unreasonable subjective fear of resisting cannot convert the conduct of the defendant from that which is non-crimi-

¹⁵⁷ See Schulhofer, *Feminist Challenge*, *supra* note 8, at 2185 (analyzing casting couch ploy).

¹⁵⁸ 600 F.2d 7 (4th Cir. 1979).

¹⁵⁹ *Id.* at 8.

¹⁶⁰ *Id.*; see also *United States v. Altman*, 901 F.2d 1161 (2d Cir. 1990) (defendant convicted of sexual exploitation of minor, interstate transportation of minor with intent to engage in illegal sexual activity, and wire fraud). "Altman posed as an owner of a modeling agency and induced women to pay him money to become his models. He then plied the women with the amphetamine Didrex diet pills, had intercourse with them, and took sexually explicit photographs of them." *Id.* at 1162.

¹⁶¹ *Condolon*, 600 F.2d at 8.

¹⁶² *Id.* at 9. Florida is the only state to have a statute, a civil one, regulating sexual misconduct in the operation of a talent agency. FLA. STAT. ch. 468.415 (1996).

¹⁶³ 395 A.2d 1213 (Md. Ct. Spec. App. 1979).

¹⁶⁴ See *supra* note 1 and accompanying text.

nal to that which is criminal."¹⁶⁵ Because the jury had been instructed not to return a verdict on any lesser-included offense, Goldberg escaped all criminal liability.¹⁶⁶

Similarly, in the civil case of *Micari v. Mann*,¹⁶⁷ an elderly acting teacher persuaded his young female students to have sexual intercourse with him and each other by saying that it would improve their acting. After the jury was instructed that "consent . . . would be a complete defense 'unless i) the defendant falsely represented to the plaintiffs that their performance of such acts was related to their training as actresses, and ii) plaintiffs relied upon such misrepresentation,'"¹⁶⁸ it found Mann liable and awarded the plaintiffs compensatory damages. The reviewing court determined punitive damages were appropriate, ordering a new trial on that issue:

Here the testimony indicated that defendant, playing upon the emotional needs of his insecure students, actively sought to be ensconced as their trusted father figure—indeed, one of the plaintiffs described defendant's behavior after a sexual experience as "fatherly". It is this studied effort at domination under the guise of acting in loco parentis, coupled with both his actual and apparent ability to affect plaintiffs' dearest aspirations, that renders defendant's actions so heinous. This gross violation was not merely of their bodies but of their trust as well, an invasion so reprehensible as to cry out for the imposition of a sanction expressing the moral outrage of society. Under these circumstances one would be hard pressed to find a situation where punitive damages were more warranted.¹⁶⁹

Author Linda A. Fairstein devotes an entire chapter of her book *SEXUAL VIOLENCE* to sexual scams.¹⁷⁰ One case she describes pertains to acting coach Paul Hannon who singled out women from his large classes for special acting lessons, during which he persuaded several of them to perform fellatio on him.¹⁷¹ The pattern is almost

¹⁶⁵ *Goldberg*, 395 A.2d at 1220.

¹⁶⁶ John MacDonald's book *RAPE: OFFENDERS AND THEIR VICTIMS*, *supra* note 122, provides the example of a Denver personnel manager who claimed to be searching for models for his store. The manager told one young woman that she would make a great model and induced her to allow him to measure her for a diaphragm, which he claimed was needed because so many models were becoming pregnant. The perpetrator digitally penetrated the young woman and proposed inserting himself, but she declined. The man succeeded in persuading a second, more gullible, woman to have intercourse with him to enlarge her to a size sufficient for the job. He told a third woman that she had a vaginal disease and that he had some pills.

¹⁶⁷ 126 Misc.2d 422, 481 N.Y.S.2d 967 (Sup. Ct. N.Y. County 1984).

¹⁶⁸ *Id.* at 423, 481 N.Y.S.2d at 969.

¹⁶⁹ *Id.* at 429, 481 N.Y.S.2d at 972.

¹⁷⁰ FAIRSTEIN, *supra* note 47, at 185-197.

¹⁷¹ FAIRSTEIN, *supra* note 47, at 185-191.

identical to *Micari*: "Each conceded that she had not been 'forced' to submit to him with a weapon or verbal threats, but that his presence was itself overpowering. He was in a position of responsibility and authority, and obviously aware that he was, at least psychologically, coercing his students into this behavior."¹⁷² The women's testimony was presented to a grand jury, but it declined to indict.¹⁷³

A sensational case from Hong Kong completes this Article's overview of entertainment industry sex scam cases. In one of the most notorious cases of sexual con men, defendant Chin Chi-Ming, pretended to be influential in the film industry, using promises of movie stardom, apartments, and cars to lure at least five women, some well-known starlets, into bed.¹⁷⁴ Afterwards, Chin blackmailed them with pictures taken at the sexual encounters. He was convicted of three counts of blackmail, one of procurement, one of

¹⁷² FAIRSTEIN, *supra* note 47, at 190.

¹⁷³ Steve Davidson is a third example of a man who used an acting ploy to secure sexual relations with women. Davidson, who was actually an agent for the Internal Revenue Service, pretended to audition women for a movie role and got them to spank him purely for his sexual gratification. The state cleverly prosecuted Davidson for a scheme to defraud, a property crime, rather than a sexual offense. The property was the women's videotaped performances. Davidson pleaded guilty and was sentenced to five years of probation; he was also fired. FAIRSTEIN, *supra* note 47, at 195-97. Similarly, news accounts describe the case of Dale Normand who tricked young women, some minors, into having sex with him by telling them that he would give them parts in a movie he was producing. He also pleaded guilty to two counts of securities violations in Ohio. H.G. Reza, *Sex Offender Pleads Guilty to Stock Swindle*, L.A. TIMES, Sept. 7, 1990, at B8, available in LEXIS, News Library, LAT File.

¹⁷⁴ Norma Connolly, *Police Hold ABC' Man After Woman Makes Rape Claim*, H.K. STANDARD, Sept. 23, 1997; Hugo Gurdon, *Sex and the Stars Draw Crowds in Colony Court*, DAILY TELEGRAPH, July 27, 1991, at 11; Kevin Hamlin, *Tales from the Casting Couch Pack HK Court*, INDEPENDENT (London), Aug. 17, 1991, at 1, available in LEXIS, News Library, Indpnt File; Kevin Hamlin, *'Terrible Sex' Brings Four Years' Jail*, INDEPENDENT (London), Oct. 29, 1991, at 14, available in LEXIS, News Library, Indpnt File; Andrew Higgins, *The World of Mr. Chin*, INDEPENDENT (London), Oct. 13, 1991, at 14, available in LEXIS, News Library, Indpnt File; Carol Scott & Bonny Tam, *Hong Kong: Jailed Chin to Appeal on Blackmail Verdict*, S. CHINA MORNING POST, Oct. 29, 1991, at P1, 8; Hedley Thomas, *Sex Conman Free to Cash in on Memoirs*, S. CHINA MORNING POST, Feb. 3, 1994, at 5, available in LEXIS, News Library, Schina File; *Chin Loses Appeal on Sex Trial Delay*, S. CHINA MORNING POST, Mar. 12, 1993, at 8, available in LEXIS, News Library, Schina File; *Hong Kong: Businessman on Sex Charges*, S. CHINA MORNING POST, Sept. 19, 1990, at P2; *No Kiss and Tell From Hong Kong Sex Conman . . . Yet*, REUTER WORLD SERV., Feb. 4, 1994.

attempted procurement, and four counts of theft; he served almost four years in prison.¹⁷⁵ Recently, Chin was arrested on new rape charges.¹⁷⁶

2. "The Abominable Snowman"

The entertainment industry is not the only environment fostering sexual scams. The defendant in *People v. Evans*¹⁷⁷ met his victim, Peterson, at the local airport where he struck up a conversation with her by claiming to be a psychologist writing a magazine article involving sociological experimentation.¹⁷⁸ Defendant Evans and another woman took Peterson to a singles bar to allegedly conduct such an sociological experiment. Evans then enticed Peterson to accompany him to an apartment, saying it was one of his offices, where he continued his psychological-interviewing ploy.¹⁷⁹ After several hours, Evans grabbed Peterson and tried to disrobe her. When she resisted, defendant's tactics changed, he told that she had failed the test and he was disappointed.¹⁸⁰ Evans then told Peterson to consider her situation, saying among other things: "'I could kill you. I could rape you. I could hurt you physically.'" ¹⁸¹ The defendant ultimately had sexual intercourse with Peterson several times.¹⁸² Later, Evans claimed that the acts were consensual and told the police that "the whole psychology bit was a 'game that he played with girls' heads.'" ¹⁸³ The court overturned Evans' conviction, finding an absence of forcible compulsion or threat.¹⁸⁴ The

¹⁷⁵ *Chin Loses Appeal on Sex Trial Delay*, *supra* note 175, at 8.

¹⁷⁶ Connolly, *supra* note 174.

¹⁷⁷ 85 Misc.2d 1088, 379 N.Y.S.2d 912 (Sup. Ct. N.Y. County 1975).

¹⁷⁸ I include *Evans* in the sexual scam section because defendant Evans's behavior more closely resembles the other defendants in this section than those in the fraudulent treatment cases.

¹⁷⁹ 85 Misc.2d at 1092, 379 N.Y.S.2d at 916.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 1093, 379 N.Y.S.2d at 917.

¹⁸² *Id.*

¹⁸³ *Id.* at 1094, 379 N.Y.S.2d at 918.

¹⁸⁴ The court stressed the defendant had not resorted to physical force; it drew a line between seduction and rape:

As we have become more civilized, we have come to condemn the more overt, aggressive and outrageous behavior of some men towards women and we have labeled it "rape". We have attempted to control or deter it by providing for extremely heavy sentences, . . .

At the same time we have recognized that there are some patterns of aggression or aggressive male sexual behavior toward females which do not

prevailing view, according to the court, was that no rape occurs when sexual intercourse is achieved by fraud, trick, or stratagem: "Provided there is actual consent, the nature of the act being understood, it is not rape, absent a statute, no matter how despicable the fraud," ¹⁸⁵ Although the court reasoned that larceny by trick did not apply because a woman's right to her body was not a thing of value within the meaning of theft law, the court did voice its strong disapproval of Evans's conduct in the final portion of its opinion, calling him "The Abominable Snowman." ¹⁸⁶

3. A Psychic

In an English case involving a bizarre sex scam, James Finningham posed as a wealthy psychic and pretended to be inhabited by a dead American Indian chief. ¹⁸⁷ He persuaded a gullible victim to sleep with him by telling her during a seance that she should physically give herself to him. ¹⁸⁸ Following both sexual

deserve such extreme penalties, in which the male objective may be achieved through charm or guile or protestations of love, promises or deceit.

Where force is not employed to overcome reluctance, and where consent, however reluctant initially, can be spelled out, this we label "seduction," which society may condone, even as it disapproves.

85 Misc.2d at 1090, 379 N.Y.S.2d at 914.

¹⁸⁵ *Id.* at 1095, 379 N.Y.S.2d at 919.

¹⁸⁶ The Evans court wrote:

The testimony in the case reveals that the defendant was a predator, and that naive and gullible girls . . . were his natural prey. He posed. He lied. He pretended and he deceived. He used confidences which were innocently bestowed as leverage to effect his will. He used psychological techniques to achieve vulnerability and sympathy, and the erosion of resistance. A young and inexperienced girl like Beth Peterson was then unable to withstand the practiced onslaught of the defendant. The defendant apparently got his kicks through the exercise of these techniques. He apparently spurned the readily available women, the acquiescent women, like Bridget, who was living in the same apartment. To him, the game was worth more than the prize. He boasted to the police that this was a game he played with girls' heads. The Court finds his conduct, if not criminal, to be reprehensible. It was conquest by con job. Truly, therefore, this defendant may be called "The Abominable Snowman."

Id. at 1099, 379 N.Y.S.2d at 921-22.

¹⁸⁷ Pat Clarke, "Rasputin" Conman Held Woman Prisoner, PRESS ASS'N NEWSFILE, Oct. 25, 1993, available in LEXIS, News Library, Panews File; Conman Termed Modern-Day Rasputin Gets Seven Years, REUTER LIBR. REP., Oct. 25, 1993.

¹⁸⁸ Clarke, *supra* note 187.

and financial exploitation of the woman, Finningham was convicted of fraud and false imprisonment, "but cleared of obtaining property by deception and causing her actual bodily harm."¹⁸⁹

4. Conclusion

The sexual-scam cases push the frontiers of rape by fraud by exceeding the boundaries set by traditional fraudulent treatment and husband impersonation cases. Their judicial reception has been mixed. Most defendants in these cases escape criminal sanction because courts, hampered by the poverty of statutory enactments, are reluctant to extend the coverage of sexual offenses to them. However, because many of these con men also stole money or property from their victims, a few courts have managed to punish such defendants for fraud or property offenses, leaving the sexual aspects of their crimes untouched. While notable, this result is troubling because it fails to protect citizens' rights to be free of fraudulent pressures in the sexual context,¹⁹⁰ exalting the protection of property rights over sexual integrity.¹⁹¹ Further, such result fails to vindicate the unique and qualitatively more serious harm of sexual offenses.¹⁹²

D. Sexual Theft: Prostitutes¹⁹³

A fourth category of potential rape by fraud cases, closely related to sexual scams, involves perhaps the most controversial of victims, persons who sell their sexual services. In some senses, these cases are easier than those involving sexual scams because the terms of exchange between defendants and victims are less ambiguous. However, given that prostitution remains illegal in most states, the victims of sexual theft may appear unworthy of sympathy because they engage in societally opprobrious behavior and may lack

¹⁸⁹ Clarke, *supra* note 162.

¹⁹⁰ Larson calls this the sex exception to fraud. Larson, *Women Understand*, *supra* note 24, at 412.

¹⁹¹ Estrich points out that if Goldberg and Evans had been stealing property, they would have been punished. ESTRICH, *supra* note 7, at 70.

¹⁹² Estrich emphasizes that the loss of bodily integrity is greater than the loss of money. Estrich, *Rape*, *supra* note 7, at 1121.

¹⁹³ I use the term "theft" narrowly here to include only cases in which the victim offered to sell sexual services.

legally enforceable rights to complain about the perpetration of fraud in their profession.¹⁹⁴

In a recent case from England, *Regina v. Linekar*,¹⁹⁵ the defendant approached a part-time prostitute and negotiated a price of twenty-five pounds for sexual intercourse. Afterwards, the defendant refused to pay and the woman alleged rape.¹⁹⁶ According to one author, the court conceptualized the question as: "whether the complainant's consent to sexual intercourse was vitiated by the defendant's decision not to pay her, namely by fraud."¹⁹⁷ The trial court instructed the jury that consent obtained by fraud is invalid, and it returned a guilty verdict. The appellate court quashed the conviction because the prostitute had consented to the intercourse and the fraud went to a collateral matter: "The reality of that consent is not destroyed by being induced by the appellant's false pretence that his intention was to pay the agreed price of £25 for her services."¹⁹⁸ The court held that the only forms of fraud negating consent are those that go to the nature of the act itself or the identity of the person.¹⁹⁹ The court also emphasized that it is the absence of consent, not the presence of fraud, that turns sexual intercourse into rape.²⁰⁰ The court opined that Linekar should have been prosecuted under a different English statute, making it a crime to procure a woman by false pretenses or representations to have sexual intercourse.²⁰¹

In a similar case from Canada, *Regina v. Petrozzi*,²⁰² the defendant solicited a prostitute and told her that he would pay her \$100 for sexual services, although he had no intention of doing so.

¹⁹⁴ See Panel Discussion, *Men, Women, and Rape*, 63 *FORDHAM L. REV.* 1, 125 [hereinafter *Men, Women, and Rape*] (1994) (remarks by Dripps) (Professor Dripps argues that sexual fraud will not be criminally punished until civil law enforces contracts for sexual services). He writes: "What seems to be at the heart of the problem of sexual fraud is that a pristine contract for prostitution is itself a crime under the criminal law, and unenforceable under the law of contracts because contrary to public policy." *Id.* at 144-45.

¹⁹⁵ [1995] *Crim LR* 320 (C.A. 1994), available in *LEXIS*, UK Library, ALLCAS File; see also *Fraud Affecting Consent in Rape*; *Law Report*, *TIMES* (London), Oct. 26, 1994.

¹⁹⁶ [1995] *Crim LR* at 320.

¹⁹⁷ Alan Reed, *Contra Bonos Mores: Fraud Affecting Consent in Rape*, 145 *NEW L.J.* 174, 174 (1995).

¹⁹⁸ *Linekar*, [1995] *Crim LR* 320.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*; see also Reed, *supra* note 197, at 176 (agreeing with Court's suggestion).

²⁰² 35 C.C.C. 3d 528, 2 W.C.B. 2d 109 (1987).

After Petrozzi had isolated the woman, he physically attacked her.²⁰³ The trial judge instructed the jury that if it found there was a causal connection between the fraud and the victim's submission, then no consent existed, and the defendant was guilty of rape.²⁰⁴ The jury convicted Petrozzi, but the case was overturned on appeal. The reviewing court held that the only types of fraud vitiating consent were those that went to the nature or quality of the act or the identity of the person,²⁰⁵ the same standard as *Linekar*. In a familiar refrain, the court said that if the legislature wanted to expand the range of fraud vitiating consent, it must do so explicitly.²⁰⁶ It also worried about the outer limits of a broader rule, asking whether it would be sexual assault if one adult simply lied to another.²⁰⁷

The *Second Restatement of Torts* adopts a similar example to illustrate the difference between fraud as to an essential matter and fraud affecting only a collateral issue in the context of the tort of battery:

1. A, to induce B to submit to intimate familiarities, offers her a paper which A represents to be a twenty dollar bill but which he knows to be counterfeit. B, believing the paper to be a genuine bill, submits. A is not liable to B for battery.
2. The same facts as in Illustration 1, except that the paper is offered if B will submit to a blood transfusion. A is subject to liability to B for the harm done by the operation to which A has fraudulently induced him to submit.²⁰⁸

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ The Legislature had already changed the language of the statute when Canada replaced rape with sexual assault, but the court did not find this change sufficient. *Id.*

²⁰⁷ See also *Regina v. Clarence*, (1888) 22 Q.B.D. 23, a case involving a man infected with a venereal disease who had sexual intercourse with his wife without disclosing his condition. In dicta, the majority wrote:

That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent.

Clarence, 22 Q.B.D. at 23, quoted in Beale, *supra* note 5, at 319. The court also provided an example of a man who passed himself off as a person of good family and standing when in fact he was a jailbird. *Clarence*, 22 Q.B.D. at 23, quoted in Reed, *supra* note 197, at 175; see also *Regina v. Cuerrier*, 111 C.C.C. 3d 261 (1996) (involving man with HIV who lied about his status to two women to have sexual intercourse).

²⁰⁸ RESTATEMENT (SECOND) OF TORTS § 57 cmt. a, illus. 1 & 2 (1965); see also RESTATEMENT (SECOND) OF TORTS § 892B cmt. g, illus. 9 (1977) (describing virtually same fact pattern); Puttkammer, *supra* note 5, at 422 (using example of paying prostitute with

A cursory review of the above illustrates that the difference between the two examples is not entirely clear. Therein lies the problem. Commentators have suggested the real reason that the law does not recognize rape (or battery) under these circumstances is that society often views the prostitute's behavior as immoral and illegal.²⁰⁹

E. *The Abuse of Authority*

Turning to rape by coercion, a fifth category of cases embraces situations in which a defendant uses an authoritative position or manipulates a power relationship to achieve sexual compliance. In these cases, defendants coerce victims to consent by threats or pressure falling short of physical force, rather than deploying deceptive measures. Cases falling into this category cover a broad spectrum of contexts. In three cases, the defendant held a position of trust or authority over a minor. Two cases involved real or feigned police officers. In a final case, the defendant was the victim's employer.

1. Teachers, Principals, and Guardians of Minors

The issue of coerced sex is successfully raised in *Scadden v. State*.²¹⁰ Scadden, a high school teacher and girls' volleyball coach, "encouraged the victims to become dependent on him in an atmosphere of trust, and . . . then used this influence to impose his sexual will on those students."²¹¹ Wyoming's statute criminalized sexual conduct when a defendant used his position of authority to cause a victim to submit;²¹² submit was defined to mean that the

counterfeit money).

²⁰⁹ See, e.g., 1 STUDIES IN AMERICAN TORT LAW 133 (arguing Restatement's two illustrations, the gigolo and blood seller, unhelpful: "The distinction between these two situations—if it exists at all—is surely too elusive to provide useful guidance to the courts or the public. The drafters of the Restatement's illustration may have assumed, without making their premises clear, that selling sexual services is more objectionable than selling blood."); Reed, *supra* note 197, at 176; Men, Women, and Rape, *supra* note 194, at 144-45 (remarks by Dripps).

²¹⁰ 732 P.2d 1036 (Wyo. 1987).

²¹¹ *Id.* at 1039.

²¹² The statute punishes second-degree sexual assault if "The actor is in a position of authority over the victim and uses this position of authority to cause the victim to submit." WYO. STAT. ANN. § 6-2-303(a)(vi) (Michie 1997).

person "does not give free, full and reasoned consent."²¹³ On appeal, Scadden challenged the statute as being void for vagueness, arguing that the position-of-authority definition could include examples such as inducing someone to have sex by using emotional involvement. The Wyoming Supreme Court rejected this interpretation, stating it would use common sense in applying the statute and affirmed.²¹⁴

In a comparable case from a different jurisdiction without a similar statute, *State v. Thompson*,²¹⁵ the defendant was a high-school principal who threatened to prevent the graduation of a female student unless she complied with his sexual demands. Before trial, the defendant sought to have the charges dismissed as failing to allege a criminal offense under Montana law.²¹⁶ The district court agreed and the Montana Supreme Court affirmed noting that the element of force was lacking.²¹⁷ It opined that force could not be stretched "to include intimidation, fear, or apprehension," but rather must be given its ordinary meaning.²¹⁸ In the final paragraph of its opinion, the court opined:

This case is one of considerable difficulty for us, as indeed it must have been for the District Court judge. The alleged facts, if true, show disgusting acts of taking advantage of a young person by an adult who occupied a position of authority over the young person. If we could rewrite the statutes to define the alleged acts here as sexual intercourse without consent, we would willingly do so. The business of courts, however, is to interpret statutes, not to rewrite them, nor to insert words not put there by the legislature. With a good deal of reluctance, and with strong condemnation of the alleged acts, we affirm the District Court.²¹⁹

This opinion is remarkably similar to *Don Moran* and other cases discussing the limitations imposed on the courts by the language of their jurisdiction's rape statutes.

²¹³ *Scadden*, 732 P.2d at 1040.

²¹⁴ *Id.* at 1042-43; see also *State v. Carter*, 663 A.2d 101 (N.H. 1995) (defendant eighth-grade teacher convicted of sexual assault for using his position of authority to coerce student to submit).

²¹⁵ 792 P.2d 1103 (Mont. 1990).

²¹⁶ *Id.* at 1105.

²¹⁷ *Id.* at 1106.

²¹⁸ *Id.*

²¹⁹ *Id.* at 1107.

Finally, in *Commonwealth v. Mlinarich*,²²⁰ the defendant guardian threatened a fourteen-year-old girl in his care with return to a juvenile detention facility if she did not accede to his sexual demands. The question that the court had to address was whether such threat constituted "forcible compulsion" or the "threat of forcible compulsion that would prevent resistance by a person of reasonable resolution" within the meaning of Pennsylvania's rape law.²²¹ The court answered the question in the negative. It noted that forcible compulsion includes both physical force and psychological duress,²²² but the latter must be of sufficient intensity to overpower the will to resist and here it did not.²²³ The court stated: "Notwithstanding, she was left with a choice and therefore the submission was a result of a deliberate choice and was not an involuntary act."²²⁴ One dissenter characterized this fact pattern as clearly involving psychological coercion.²²⁵ Another dissenting judge wrote: "The question is not whether she could make a choice to yield or be confined, but whether the law should allow such a choice at all."²²⁶ In a subsequent Pennsylvania case involving sexual acts by a male therapist with his adolescent male patient,²²⁷ the court found the forcible element of rape was satisfied by the therapist's position of authority.²²⁸

²²⁰ 542 A.2d 1335 (Pa. 1988). But see *United States v. Palmer*, 33 M.J. 7 (1991) (agreeing with *State v. Etheridge* and discussing "compulsion of parental command"); *State v. Etheridge*, 352 S.E.2d 673 (N.C. 1987) (finding constructive force in parent-child relationship).

²²¹ *Mlinarich*, 542 A.2d at 1338.

²²² *Id.*

²²³ *Id.* at 1342.

²²⁴ *Id.* at 1341. The court elaborated:

The purpose of the term was to distinguish between assault upon the will and the forcing of the victim to make a choice regardless how repugnant. Certainly difficult choices have a coercive effect but the result is the product of the reason, albeit unpleasant and reluctantly made. The fact cannot be escaped that the victim has made the choice and the act is not involuntary.

Id. at 1342.

²²⁵ *Id.* at 1344.

²²⁶ *Mlinarich*, 542 A.2d at 1350 (McDermott, J., dissenting).

²²⁷ *Commonwealth v. Frank*, 577 A.2d 609 (Pa. 1990).

²²⁸ The *Frank* court wrote: "Appellant occupied a position of authority such that it may be reasonably inferred that the victim would feel coerced to submit to appellant's demands out of a sense of duty to obey not only the appellant, but also the wishes of his then adoptive mother." *Id.* at 619.

2. Real and Feigned Police Officers²²⁹

In *Commonwealth v. Caracciola*²³⁰, the defendant pretended to be a police officer and threatened to imprison a woman unless she submitted to his sexual advances. The defendant moved to dismiss the indictment, arguing that the force requirement of rape had not been satisfied. The Massachusetts Supreme Judicial Court held that the defendant's conduct fell within the purview of its rape statute. It sought, however, to distinguish the case from one involving fraud, although the defendant in this case was impersonating a police officer.²³¹ The court analogized to the state's robbery statute, stating that the force requirement for rape could be satisfied by constructive force because: "The defendant's argument that physical force is a required element in rape cases asks us to assume that the Legislature intended to give greater protection to property than to bodily integrity. We decline to make such an unwarranted assump-

²²⁹ See generally Diane C. Sheiring, Annotation, *Sexual Misconduct or Irregularity as Amounting to "Conduct Unbecoming an Officer," Justifying Officer's Demotion or Removal or Suspension from Duty*, 9 A.L.R. 4TH 614 (1981); *Hightower v. State*, 443 So. 2d 1270 (Ala. Crim. App. 1982), rev'd, 443 So. 2d 1272 (Ala. 1983) (officer prosecuted for sexual misconduct for threatening woman with jail if she did not submit to sexual intercourse); *Douglas v. Daniels*, 382 N.E.2d 90 (Ill. App. Ct. 1978) (police officer coerced woman into sexual relationship in exchange for not enforcing his duty); *State v. Beugli*, 868 P.2d 766 (Or. Ct. App. 1994) (officer charged with sexual abuse, official misconduct, and harassment for inappropriately touching four women suspects); Julie Irwin, *Man Charged with Posing as Police/Lincoln Heights Firefighter Arrested*, CINCINNATI ENQUIRER, June 25, 1995, at C6, available in LEXIS, News Library, Cinnqr File; Melissa Martinez, *Cop Accused of Fondling Women/Tucson Police Officer Charles Thomas Robb is Suspended after Being Indicted on Six Counts of Abuse While He was on Duty*, TUCSON CITIZEN, May 25, 1996, at 1C; Cheryl Martinis, *Case Against State Trooper's Searches Goes to Jury*, PORTLAND OREGONIAN, July 2, 1996, at B3; Cheryl Martinis, *Trial Under Way for State Trooper*, PORTLAND OREGONIAN, June 21, 1996, at C3; Steve Ryfle, *2 Women Accuse Officer of Harassment; Police: Suit Alleges Lewd Conduct by Glendale Patrolman During a Traffic Stop/Department Declines to Comment*, L.A. TIMES, Oct. 12, 1995, at B4; *Around the Tristate News Tips*, CINCINNATI ENQUIRER, June 22, 1995, at C2, available in LEXIS, News Library, Cinnqr File; *State Trooper Charged with Sex Abuse*, UPI, Feb. 14, 1991; *Trooper Acquitted of Touchy Searches*, BULL. (Bend, Or.), July 3, 1996, at B4; *Trooper Sidelined as Prosecutors, OSP Spar*, BULL. (Bend, Or.), Jan. 16, 1997, at B3; see also *People v. Cavanaugh*, 158 P. 1053 (Cal. Dist. Ct. App. 1916) (involving both physical threats and coercive impersonation of an officer). The court reversed the conviction because the woman may have acceded to the defendant's sexual demands not because of physical force but rather from his impersonation of a police officer, which would not be sufficient for rape. *Id.* at 1055-56.

²³⁰ 569 N.E.2d 774 (Mass. 1991).

²³¹ *Id.* at 777.

tion."²³² The dissent argued that rape requires either physical force or a threat of bodily injury, citing *Goldenberg* (a fraudulent medical treatment case).²³³

Likewise, in *State v. Felton*,²³⁴ the defendant, a Louisiana police officer, was convicted of extortion, not a sex crime, for forcing a woman to have sexual intercourse with him by threatening to arrest her.²³⁵ The defendant appealed, arguing that the state statute was unconstitutionally vague and overbroad. The appellate court rejected both arguments.²³⁶

3. Employers²³⁷

In *State v. Caprio*,²³⁸ the defendant manager of a time-share condominium company called an employee into his office, maneuvered her between his legs, and fondled her. The young woman repeatedly told the defendant to stop, but he continued his advances.²³⁹ A jury convicted Caprio of five counts of third-degree sexual assault based on strong compulsion, the physical force he used in

²³² *Id.*

²³³ *Id.* at 783 (citing *Commonwealth v. Goldenberg*, 155 N.E.2d 187 (1959)); see also *State v. Burke*, 522 A.2d 725, 736 (R.I. 1987) (interpreting Rhode Island's sexual assault statute as encompassing case of police officer using his position of authority to intimidate victim into sex: "[T]he defendant's position of authority, in and of itself, carried with it an implied threat, and this appearance of authority, combined with the fact that defendant was armed, and the peculiar vulnerability of the victim, are sufficient to support a jury verdict that defendant coerced submission by impliedly threatening the victim within the meaning of § 11-37-1(c).").

²³⁴ 339 So. 2d 797 (La. 1976); see also *State v. Robertson*, 649 P.2d 569 (Or. 1982) (embodying a similar fact pattern although the case turns on the constitutionality of the statute). The court wrote: "[D]efendants are accused of coercing the victim into sexual conduct by threatening to 'expose a secret and publicize an asserted fact [not further described in the indictment] which would tend to subject [her] to hatred, contempt, and ridicule.'" *Id.* at 589 (brackets in original).

²³⁵ *Id.* at 799.

²³⁶ *Id.* at 799-800.

²³⁷ See also *State v. Trevino*, 833 P.2d 1170 (N.M. Ct. App. 1991), *aff'd sub nom.* *State v. Orosco*, 833 P.2d 1146 (N.M. 1992) (position of employer does not automatically translate into using position to coerce, but jury could infer employer had used coercion); *Thoreson v. Penthouse Int'l, Ltd.*, 149 Misc.2d 150, 563 N.Y.S.2d 968 (Sup. Ct. N.Y. County 1990) (a civil case in which defendant allegedly caused plaintiff to engage in sexual acts as condition of employment); *Carrie N. Baker, Sexual Extortion: Criminalizing Quid Pro Quo Sexual Harassment*, 13 L. & INEQ. J. 213 (1994); *Regina v. Hon*, 2 HKC 599 (1995), 1995 LEXIS 660 (employer persuaded foreign employee to allow him to examine her breasts under pretext of medical exam).

²³⁸ 937 P.2d 933 (Haw. Ct. App. 1997).

²³⁹ *Id.* at 936.

securing the woman between his legs.²⁴⁰ Caprio challenged his conviction, claiming that the trial judge should have instructed the jury on the lesser offense of fourth-degree sexual assault, which only requires compulsion—"a threat . . . that places a person in fear of public humiliation, property damage, or financial loss."²⁴¹ The appellate court agreed with such assertion because the evidence supported the inference that Caprio had also threatened financial loss.²⁴²

4. Conclusion

The abuse-of-authority cases, like the fraudulent treatment decisions, illustrate that the availability of specific statutory enactments is frequently outcome-determinative. In the trio of opinions involving minors, defendant Scadden's behavior was no more blameworthy or outrageous than defendants' Thompson's or Mlinarich's. However, Scadden lived in a jurisdiction with an abuse-of-authority provision while his cohorts did not. The one exception to this trend was *Caracciola* where the court upheld the defendant's conviction by invoking the constructive force doctrine and analogizing to the state's robbery statute. Collectively, however, these cases clearly highlight the problem of selective coverage as a result of the diversity of extant statutory law.

F. Sexual Extortion

Closely related to the abuse-of-power cases, several opinions implicate the use of fraudulent or nonfraudulent extortion to obtain sexual intercourse, thereby blurring the line between rape by fraud and rape by coercion. These cases differ from abuse-of-power situations because they generally do not involve defendants in formalized positions of authority but rather individuals who exploit power derived from circumstantial contact with the victim.

In a 1948 case from California, *People v. Cassandras*,²⁴³ the defendant accosted a married woman outside an employment office,

²⁴⁰ *Id.* at 938.

²⁴¹ HAW. REV. STAT. § 707-700 (1996).

²⁴² *Caprio*, 937 P.2d at 938-39. This case is of interest because Hawaii's sexual assault statutes are rather unique in that they include nonphysical threats.

²⁴³ 188 P.2d 546 (Cal. Ct. App. 1948); see also Harris, *supra* note 12, at 644 (discussing case).

told her about a possible job, and persuaded her to get into a car with him. Cassandras then drove the woman to a hotel room where he used various threats—including advising the police that she was a prostitute so they would take her children away—to cause her to submit to sexual intercourse.²⁴⁴ Appealing his conviction, Cassandras alleged that he did not fall under California's rape statute which required either force or threat.²⁴⁵ The court rejected such assertion, finding that the defendant had used sufficient threats to secure the woman's compliance.²⁴⁶

In a more recent case, *State v. Lovely*,²⁴⁷ the defendant befriended the male victim, hired him as an employee, and paid his rent and restitution for a past theft committed by the victim. Lovely then coerced the male victim into various sexual acts by threatening to fire, evict, sue, and turn him over to the police.²⁴⁸ The jury convicted Lovely of twelve counts of aggravated felonious sexual assault and seven counts of sexual assault.²⁴⁹ He appealed arguing that threats of financial retribution are not covered by the state's sexual assault statutes, which are limited to threats of violence.²⁵⁰ The New Hampshire Supreme Court upheld the convictions relying on complex statutory interpretation. First, it noted that the sexual assault statutes prohibited coercion based on retaliation. Second, it found that retaliation was defined to include extortion.²⁵¹ Because extortion was not defined in the sexual assault context, the court looked to the state's theft by extortion statute, which defined extortion to include causing official action or harming someone in their financial condition.²⁵² The court concluded, therefore, that "[t]hreats of mental punishment, extortion (as defined . . . to include threats of economic reprisal) or public humiliation or disgrace clearly extend beyond threats of physical violence to reach acts that undermine consent through the use of non-violent coercion."²⁵³

²⁴⁴ *Cassandras*, 188 P.2d at 548.

²⁴⁵ *Id.* at 549.

²⁴⁶ *Id.* at 549-50. A second issue in the case was the admissibility of evidence of a similar act committed with another woman; the court upheld its admission. *Id.* at 550-52.

²⁴⁷ 480 A.2d 847 (N.H. 1984).

²⁴⁸ *Id.* at 849-50.

²⁴⁹ *Id.* at 848.

²⁵⁰ *Id.* at 849.

²⁵¹ *Id.* at 850.

²⁵² *Lovely*, 480 A.2d at 850.

²⁵³ *Id.* at 850.

Following denial of his motion for reconsideration, Lovely filed an unsuccessful petition for a writ of habeas corpus, arguing that the state supreme court's interpretation was unconstitutional; the First Circuit upheld the dismissal.²⁵⁴

A third illustration of sexual extortion involves newspaper accounts which describe a scheme by which a man fraudulently blackmailed two women into sexual intercourse.²⁵⁵ The man telephoned the women and offered not to testify against their husbands in traffic-accident cases if they would bring money to a hotel room. He told one wife to wear a low-cut blouse and a slit skirt. When the women arrived, the blackmailer took the money and also coerced the women into sex. Unfortunately, no additional information is available regarding this case.

Finally, several civil cases involve sexual extortion by attorneys who have used their professional relationship to pressure women into sexual acts.²⁵⁶ In *In re Piatt*, an attorney disciplinary case, a lawyer told one client that if she did not sexually cooperate, he could not represent her without more money. He informed a second client, who had declined his sexual advances, that she would have to accept an undesirable settlement agreement or it would cost her more money.²⁵⁷ Piatt was found guilty and "sentenced" to public censure. Similarly, *In re Rinella* involved a domestic relations

²⁵⁴ *Lovely v. Cunningham*, 796 F.2d 1 (1st Cir. 1986).

²⁵⁵ UPI, Sept. 16, 1982, available in LEXIS, News Library, UPSTAT File; UPI, Sept. 17, 1982, available in LEXIS, News Library, UPSTAT File. Newspaper articles reveal the existence of several cases alleging sex by extortion. See, e.g., Cheryl Devall & Patrick Reardon, *Sawyer Ends Advisory Panel at CHA*, CHI. TRIB., July 27, 1988, at C1, available in LEXIS, News Library, Chitrib File (Chicago Housing Authority administrators); Gary Rotstein, UPI, Jan. 13, 1982 (male students of female sixth-grade teacher); *Officers Resign in Face of Sex Scandal*, UPI, Oct. 8, 1992, available in LEXIS, News Library, UPI File (army officers); *Police Probe Computer Sex Net*, UPI, Dec. 23, 1985 (civilian with minors).

²⁵⁶ See, e.g., *In re Gilbert*, 194 A.2d 262, 606 N.Y.S.2d 478 (1993); see also *McDaniel v. Gile*, 230 Cal. App. 3d 363 (1991) (finding lawyer malpractice in threatening to withhold services unless client complies with sexual demands); *Barbara A. v. John G.*, 193 Cal. Rptr. 422 (Cal. Ct. App. 1983) (fraud action by woman against her attorney for misrepresenting his sterility in order to have sexual intercourse with her).

²⁵⁷ 951 P.2d 889 (Ariz. 1997).

attorney who coerced three clients into sexual relationships and lied about it later. The attorney was suspended for three years.²⁵⁸

The Board found that this conduct by respondent constituted overreaching because he used his position of influence over the clients to pressure them to engage in sexual relations. The Board noted that all of the women testified that they did not want to engage in sexual relations with respondent but felt that they had to in order to ensure that they were effectively represented and because they could not afford to hire another lawyer.²⁵⁹

Although these cases do not involve criminal charges, the conduct involved closely resembles that of others who extorted sexual intercourse.²⁶⁰

In summary, defendants in sexual extortion cases used coercive, sometimes fraudulent, threats to compel sexual submission. These cases emphasize the coercive nature of threats involving, for example, the police or legal system, even when the defendant does not hold an authoritative position such as a law enforcement officer. Moreover, by exploiting their clients' financial vulnerability to accomplish sexual conduct, the attorney disciplinary cases raise the specter of economic threats for the first time in this case review.²⁶¹

G. Conclusion

The foregoing review of cases involving criminal actors who used fraud or coercion to accomplish sexual penetration or contact documents some important trends. First, these cases collectively paint a disturbing picture of sexual exploitation in a variety of contexts through a panoply of means. Defendants (all male) misrepresented to their prey (mostly female) that sexual intercourse was essential to their victims' medical treatment, psychological well-

²⁵⁸ *In re Rinella*, 677 N.E.2d 909 (Ill. 1997), cert. denied sub nom. *Rinella v. Robinson*, 118 S. Ct. 371 (1997).

²⁵⁹ *Id.* at 913.

²⁶⁰ William D. Langford, Jr., Note, *Criminalizing Attorney-Client Sexual Relations: Toward Substantive Enforcement*, 73 TEX. L. REV. 1223 (1995); *Lawyer Liable for Coerced Sex: Jury Awards Ex-Client \$225,000 for Malpractice Despite Competent Representation*, A.B.A. J. Feb. 1993 at 24; see also *Barbara A.*, 193 Cal. Rptr. at 433 n.11 (quoting the Board of Governors of the Oregon State Bar: "The attorney-client relationship is a fiduciary relationship, one of trust. The nature of that fiduciary relationship tends to make the client intellectually and, in many cases, emotionally dependent upon the attorney. If the client becomes involved in a love affair with the attorney, that dependency would only be increased.").

²⁶¹ See also *State v. Caprio*, 937 P.2d 933 (Haw. Ct. App. 1997).

being, or spiritual salvation or beneficial to their professional careers; they lied about their identities and intentions of paying for sexual services; and some wielded naked power derived from authoritative positions, while others used extortionate threats. Rape by fraud and rape by coercion are not unitary phenomena but comprehend a broad spectrum of conduct. Thus, the criminalization of this behavior will not be susceptible of simple solution; the legal response will need to be as innovative as these actors' conduct.

Second, a portrait emerges of the criminal defendants in these cases as a distinct class of nonviolent sexual predator not simply individuals in poor romantic or sexual relationships. Many of these perpetrators were repeat offenders. Boro ("Dr. Feelgood"), Mitchell ("The Fantasy Man"), and Kendall (the Avedon impersonator) had large numbers of victims. Even the Florida minister, the New York acting coach, and the bogus-traffic-accident blackmailer had more than one. More importantly, a significant number of offenders employed fraudulent or coercive stratagems that would have resulted in criminal liability if their goal had been to obtain property instead of accomplish sexual intercourse²⁶²—prompting frequent judicial references to, if not adoption of, analogies to theft offenses.²⁶³ The fact that many of these criminal actors also stole money or property from their victims only serves to underscore this similarity.

Third, in terms of legal analysis, these cases turned on courts' interpretation of the force or nonconsent elements of the jurisdiction's rape or sexual assault statutes—the two traditional requirements of rape law. Courts' most common approach to this genre of cases was to hold that the force requirement was not satisfied by defendants' use of fraudulent or coercive pressures, declining to extrapolate beyond the literal wording of the statutory language or acknowledge the similar effects these mechanisms may have on consent. Alternatively, courts held that the nonconsent element was not satisfied because victims had ostensibly consented to the sexual act. In confronting the subsidiary question of whether fraud or coercion vitiates that consent, courts relied on the traditional factum-inducement distinction to hold that defendants' fraud went to a collateral matter and, therefore, victim consent was valid. Courts conspicuously failed to explore the parameters of legally effective consent in these sexual offenses beyond this paradigmatic

²⁶² ESTRICH, *supra* note 7, at 70.

²⁶³ See *infra* Part III.A.

approach and as interpreted in other legal contexts. In the final analysis, courts frequently side-stepped the difficult issues embedded in these cases by asking their respective legislatures to consider expanding statutory coverage. Several state legislatures have responded to such judicial invitations by altering their criminal codes to bring some of this conduct within the purview of rape or sexual assault statutes. Part II reviews the results of these legislative efforts.

II. CRIMINAL STATUTES PROHIBITING RAPE BY FRAUD OR RAPE BY COERCION

[L]egislatures should replace the independent crime of rape with a variety of statutory offenses that would more clearly and more justly define criminal liability for culpable conduct aimed at causing other individuals to engage in sexual acts.²⁶⁴

This Part provides a descriptive review of legislative state of the art with respect to what may be denominated rape by fraud or rape by coercion. The review reveals a surprisingly comprehensive array of state criminal statutes prohibiting various forms of nonforcible or nonconsensual sexual conduct, some more specifically focusing on fraud or coercion. Every state has at least one relevant criminal provision, and many have civil statutes and disciplinary rules covering similar behavior, although these are beyond the scope of the present analysis.²⁶⁵

²⁶⁴ Dripps, *Beyond Rape*, *supra* note 8, at 1780.

²⁶⁵ See, e.g., ALASKA STAT. § 08.64.326(a)(9) (Michie 1996) (discipline for medical practitioners); ALASKA STAT. § 08.86.204(8) (Michie 1996) (discipline for psychologists); CAL. CIV. CODE § 43.93 (Supp. 1998) (action against psychotherapist); CAL. BUS. & PROF. CODE § 2960 (Supp. 1998) (discipline for psychologists); CAL. BUS. & PROF. CODE § 4982 (1990 & Supp. 1998) (discipline for marriage, family, and child counselors); CAL. BUS. & PROF. CODE § 4992.3 (1990 & Supp. 1998) (discipline for social workers); CAL. BUS. & PROF. CODE § 6106.9 (Supp. 1998) (attorney discipline); COLO. REV. STAT. § 12-41-115 (1997) (discipline for physical therapists); COLO. REV. STAT. § 12-43-704 (1997) (prohibited activities for psychotherapists); FLA. STAT. ch. 401.411 (1998) (discipline for medical transportation services); FLA. STAT. ch. 458.329 (repealed for review 1996) (sexual misconduct in medicine); FLA. STAT. ch. 459.0141 (repealed for review 1996) (sexual misconduct in osteopathic medicine); FLA. STAT. ch. 460.412 (repealed for review 1996) (sexual misconduct in chiropractic); FLA. STAT. ch. 464.017 (repealed for review 1996) (sexual misconduct in nursing); FLA. STAT. ch. 466.027 (repealed for review 1996) (sexual misconduct in dentistry); FLA. STAT. ch. 468.415 (1991 & Supp. 1998) (repealed for review 1996) (sexual misconduct in operation of talent agency); FLA. STAT. ch. 468.715 (Supp. 1998) (repealed for review 1996) (sexual misconduct in athletic training); FLA. STAT. ch. 490.009 (1991 & Supp. 1998) (repealed for review 1996) (discipline for psychologists); FLA. STAT. ch. 490.0111 (1991 & Supp. 1998) (repealed for review 1996) (sexual misconduct by psychologists); 740 ILL. COMP. STAT. 140/1, 140/2 (West 1993 &

This panoply of statutes is the logical successor to the rape-reform movements of the 1950s and 1970s which changed the face of rape law in significant ways.²⁶⁶ Specifically, these earlier movements altered two of the traditional elements of rape: sexual intercourse (generally limited to vaginal penetration) and a female victim not married to the defendant. Currently, statutes subsume multiple forms of sexual penetration and contact, not only vaginal intercourse,²⁶⁷ and employ gender-neutral language to cover perpetrators and victims of both sexes;²⁶⁸ a growing trend also exists, moving toward the elimination of the marital exemption.²⁶⁹ In addition, these reform movements were instrumental in dismantling substantive obstacles to rape prosecutions that were statutorily engrafted onto rape laws,²⁷⁰—such as resistance and corroboration requirements.²⁷¹ They changed rape's evidentiary landscape by spawning the enactment of rape shield laws²⁷² and the reformation of suspicion-engendering jury instructions modeled after Hale's cynical maxim.²⁷³ Finally, these reforms precipitated changes in the terms used to describe sexual crimes. Many modern statutes have replaced "rape" with offense categories such as criminal sexual

Supp. 1998) (sexual exploitation in psychotherapy); ME. REV. STAT. ANN. tit. 25, § 2806 (West Supp. 1997) (sexual exploitation by law enforcement officer); MINN. STAT. § 148.261 (1998) (discipline for nurses); MINN. STAT. § 148A.01 (1998) (sexual exploitation by psychotherapist); MINN. STAT. § 148B.68 (1998) (discipline for mental health practitioners); MINN. STAT. § 148C.09 (1998) (discipline for alcohol and drug counselors); TENN. CODE ANN. § 29-26-203 (Supp. 1997) (therapist sexual misconduct victims' compensation); TEX. CIV. PRAC. & REM. CODE § 81.001 et seq. (1996) (sexual exploitation by mental health services provider); WIS. STAT. § 895.70 (1997) (sexual exploitation by psychotherapist).

²⁶⁶ Schulhofer, *Feminist Challenge*, *supra* note 8, at 2171 ("There have been two important waves of statutory reforms, the Model Penal Code revision in the 1950s and revisions inspired by feminist reformers in the 1970s.") (footnote omitted); see also Schulhofer, *Sexual Autonomy*, *supra* note 9, at 36-40 (discussing rape reforms).

²⁶⁷ ESTRICH, *supra* note 7, at 83.

²⁶⁸ ESTRICH, *supra* note 7, at 81.

²⁶⁹ ESTRICH, *supra* note 7, at 81.

²⁷⁰ ESTRICH, *supra* note 7, at 81 n.101; Dripps, *Beyond Rape*, *supra* note 8, at 1783.

²⁷¹ Chamallas, *supra* note 17, at 799.

²⁷² *Id.*

²⁷³ *Id.* at n.101. Hale wrote: "It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved; and harder to be defended by the party accused, though never so innocent." 1 M. HALE, PLEAS OF THE CROWN 633, 635 (1680); cf. Schafran, *supra* note 60, at 1013 ("Contrary to Lord Hale's allegation, rape is extremely difficult crime to charge and the easiest of all to defend."); see, e.g., COLO. REV. STAT. § 18-3-408 (1997) (outlawing Hale's maxim and requiring jury be instructed not to allow gender bias to affect its decision).

conduct, criminal sexual penetration, aggravated felonious sexual assault, sexual battery, and sexual misconduct.²⁷⁴

Despite these many important reforms, what had not changed much, until fairly recently, was the hegemony of force and nonconsent, in conjunction, as the essential requirements of rape law.²⁷⁵ The newest wave of legislation, however, begins to accomplish what its predecessors did not and what would have been essentially unthinkable without these earlier reform movements—changing the importance and meaning of these two elements. Many of the reviewed statutes explicitly alter either the force or the nonconsent requirements in innovative ways to embrace the behavior of sexual predators who use fraud or coercion to secure sexual compliance. In short, these new statutes finally tackle a problem that has been troubling courts, legislatures, and commentators for more than a century—the criminalization of fraudulent or coercive sexual practices.

These new statutory enactments cluster around five organizational themes, provisions that outlaw sexual penetration or contact accomplished by: (1) abuse of trust, (2) abuse of authority, (3) fraud, (4) coercion, and (5) nonconsent. The first category carves out for special treatment defined groups of potential offenders who abuse positions of trust and have access to vulnerable victims, e.g., medical personnel. The second prohibits sexual conduct when the criminal actor abuses a position of authority over a victim, e.g., a prison guard. The third group specifically outlaws the use of fraud or deception in securing sexual compliance. The fourth substitutes coercion or other types of nonphysical pressure for the traditional requirement of physical force. Finally, the fifth class simply punishes nonconsensual intercourse without reference to force, fraud, or coercion.

²⁷⁴ Schulhofer, *Sexual Autonomy*, *supra* note 9, at 39.

²⁷⁵ See, e.g., ESTRICH, *supra* note 7, at 84 (noting reforms less expansive on force and nonconsent issues); Dripps, *Beyond Rape*, *supra* note 8, at 1784 ("the gravamen of rape remains the conjunction of force and nonconsent."); Schulhofer, *Sexual Autonomy*, *supra* note 9, at 39-40 ("In one form or another, however, nearly all states still preserved as essential requirements both force and nonconsent." But, he adds: "Beneath the seemingly universal and long-standing consensus that rape means forcible nonconsensual intercourse, there remains profound disagreement about what rape is."); Schulhofer, *Feminist Challenge*, *supra* note 8, at 2171 (same).

A. *The Abuse of Positions of Trust: Doctors, Psychotherapists, and the Clergy*

In modern statutory enactments, state legislatures have sought to protect victims from sexual exploitation by defining classes of individuals who occupy positions of trust. The most common classes encompassed by these statutes—doctors, psychotherapists, and clergy members—roughly correspond to the categories of offenders discussed in Part I.A. In a broader sense, these categories demonstrate internal logical coherence because they represent potential offenders who have access to victims under circumstances where the victims might be either physically or mentally vulnerable.²⁷⁶ Many of these statutes articulate the basis of victim vulnerability and explicitly negate consent as a defense. Idaho's statute is instructive; it defines medical care provider as a "person who gains the trust and confidence of a patient or client for the examination and/or treatment of a medical or psychological condition, and thereby gains the ability to treat, examine and physically touch the patient or client."²⁷⁷ Although analyzed separately below, these potential offender categories overlap. Delaware, for instance, covers all three groups in one statute.²⁷⁸

²⁷⁶ Colorado articulates the basis of civil liability for psychotherapists, medical professionals, and member of the clergy in its evidence code: "In any civil action for damages by an alleged victim which alleges damages resulting from a sexual assault on a client by any person who enters into a professional-client relationship that permits professional physical access to the client's person or the opportunity to affect or influence the thought processes or emotions of such client," COLO. REV. STAT. § 13-25-131(1) (1997); see also *Ferguson v. People*, 824 P.2d 803 (Colo. 1992) (articulating notion of victim vulnerability); *Shapiro v. State*, 696 So. 2d 1321 (Fla. Dist. Ct. App. 1997) (covering particularly vulnerable members of society); *State v. Carter*, 663 A.2d 101, 103 (N.H. 1995) (noting victim vulnerability in teacher case).

²⁷⁷ IDAHO CODE § 18-919(a)(2) (1997); see also D.C. CODE ANN. §§ 22-4415, 4116 (1997) ("in a professional relationship of trust with the actor;"); ME. REV. STAT. ANN. tit. 17-A, § 253(2)(l) (West Supp. 1997) ("'[M]ental health therapy' means psychotherapy or other treatment modalities intended to change behavior, emotions or attitudes, which therapy is based upon an intimate relationship involving trust and dependency with a substantial potential for vulnerability and abuse; . . .").

²⁷⁸ DEL. CODE ANN. tit. 11, § 761(g)(4) (1995). No state criminally punishes lawyer-client sex, although some states prohibit it. Langford, *supra* note 260 (arguing for the criminal punishment of lawyer-client sexual intercourse).

1. Medical and Health Care Professionals

Perhaps due to the fact that sexual relations accomplished under the auspices of medical care is one of the most common instances of sexual exploitation, sixteen jurisdictions contain criminal provisions regarding sexual intercourse obtained through supposed medical treatment.²⁷⁹ While varying somewhat, these stat-

²⁷⁹ ALASKA STAT. §§ 11.41.410(a)(4)(A)-(B), 11.41.420(a)(4)(A)-(B) (Michie 1996); CAL. BUS. & PROF. CODE § 729 (West 1990 & Supp. 1998); COLO. REV. STAT. §§ 18-3-403(1)(h), 18-3-404(1)(g) (1997); CONN. GEN. STAT. §§ 53a-71(a)(7), 53a-73a(a)(5) (1995); DEL. CODE ANN. tit. 11, § 761(g)(4) (1995); D.C. CODE ANN. §§ 22-4115, 22-4116 (1997); IDAHO CODE § 18-919 (1997); KAN. STAT. ANN. § 21-3502(a)(3) (Supp. 1997); MICH. COMP. LAWS §§ 750.520b, 750.520c(1)(f), 750.520d(1)(b), 750.520e(1)(b)(iv) (1991 & Supp. 1998); MINN. STAT. §§ 609.344(k), 609.345(k) (1997); N.H. REV. STAT. ANN. § 632-A:2(g) (1996); R.I. GEN. LAWS §§ 11-37-2(4), 11-37-4(3) (1994 & Supp. 1997); TEX. PENAL CODE ANN. § 22.011 (West Supp. 1998); UTAH CODE ANN. § 76-5-406(12) (Supp. 1998); WASH. REV. CODE §§ 9A.44.050(1)(d), 9A.44.100(1)(d) (Supp. 1998); WYO. STAT. ANN. § 6-2-303(a)(vii) (Michie 1997); see also ALA. CODE § 13A-6-65(a)(1) (1996) (statute does not explicitly mention health-care providers, but commentary suggests that it might cover cases of fraud in medical treatment); MISS. CODE ANN. §§ 97-3-95(2), 97-5-23(2) (1994 & Supp. 1997) (includes physician, physical therapist, and chiropractor as those in position of trust or authority over minors for purposes of sexual battery and child touching statutes); TENN. CODE ANN. §§ 39-13-503, 39-13-505 (1997) (interpreted in *State v. Tizard*, 897 S.W.2d 732 (Tenn. Crim. App. 1994), as covering cases of supposed medical treatment). Tennessee had a statute specifically outlawing sexual penetration under the guise of medical treatment, but it was repealed. TENN. CODE ANN. § 39-3705(A)(4) (1978) ("Where the actor engages in sexual penetration on the pretext of performing a medical examination or treatment for the purpose of achieving sexual penetration."); *McNair v. State*, 825 P.2d 571, 575 (Nev. 1992) ("We hold that sufficient evidence of sexual penetration against the victim's will exists under Nevada's statute when the penetration is accomplished under a pretext of medical treatment and without the victim's foreknowledge or consent.") (citations omitted).

Cases have interpreted Illinois' sexual assault statute as covering instances of illegitimate medical treatment. In *People v. Quinlan*, 596 N.E.2d 28 (Ill. App. Ct. 1992), the court noted that Illinois has a medical treatment exception to its sexual assault statutes. 720 ILL. COMP. STAT. 5/12-18(b) (West Supp. 1998) provides: "Any medical examination or procedure which is conducted by a physician, nurse, medical or hospital personnel, parent, or caretaker for purposes and in a manner consistent with reasonable medical standards is not an offense under [sexual assault statutes]" The *Quinlan* court opined: "This section evidences a legislative intent that illegitimate medical examination are covered by the criminal sexual assault statutes." 596 N.E.2d at 31; see also 18 PA. CONS. STAT. § 3125 (Supp. 1998) ("a person who engages in penetration . . . for any purpose other than good faith medical, hygienic or law enforcement procedures commits aggravated indecent assault, . . .").

Although not outlawing sexual relations between doctors and patients, two states proscribe situations involving the administration of drugs which may include medical personnel. Ohio's gross sexual imposition law prohibits sexual contact if:

The offender knows that the judgment or control of the other person or of one of the other persons is substantially impaired as a result of the influence

utes fall into four general categories, i.e., those that: (1) expand the force requirement, (2) amplify the nonconsent requirement, (3) create a separate offense addressing sexual exploitation by medical personnel, or (4) include the conduct as one alternative in broader rape or sexual assault statutes.

Michigan, with the oldest statute, adopts the first approach. Michigan's statute includes sexual penetration accomplished by medical practitioners under the definition of force or coercion for purposes of sexual offenses. Criminal sexual conduct occurs if the actor uses force or coercion, which includes "When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable."²⁸⁰

Delaware's statutory law exemplifies the second approach by incorporating its provision on health-care professionals within the definition of lack of consent. According to its statute, "without consent" includes: "under the guise of providing professional diagnosis, counseling or treatment and where at the times of such acts the victim reasonably believed the acts were for medically or profes-

of any drug or intoxicant administered to the other person with his consent for the purpose of any kind of medical or dental examination, treatment, or surgery.

OHIO REV. CODE ANN. § 2907.05(A)(3) (Anderson Supp. 1997). Maine's gross sexual assault statute covers instances in which the actor administered drugs to the victim, but provides for a defense based on voluntary consumption except "it is no defense when the other person is a patient of the actor and has a reasonable belief that the actor is administering the substance for medical or dental examination or treatment.") ME. REV. STAT. ANN. tit. 17-A, § 253(3) (West Supp. 1997).

²⁸⁰ MICH. COMP. LAWS § 750.520b(iv) (1996) (emphasis added) (felony); see also MICH. COMP. LAWS § 750.520c(1)(f) (1996) (felony of second-degree criminal sexual conduct); MICH. COMP. LAWS § 750.520d(1)(b) (1996) (felony of third-degree criminal sexual conduct); MICH. COMP. LAWS § 750.520e(1)(b)(iv) (1996) (misdemeanor of fourth-degree criminal sexual conduct). Michigan grades the severity of the offense based on whether the actor engages in sexual penetration or contact or causes physical injury.

Michigan also has an older statute on its books, passed in 1883:

Any person who shall undertake to medically treat any female person, and while so treating her, shall represent to such female that it is, or will be, necessary or beneficial to her health that she have sexual intercourse with a man, and shall thereby induce her to have carnal sexual intercourse with any man, and any man, not being the husband of such female, who shall have sexual intercourse with her by reason of such representation, shall be guilty of a felony, punishable by imprisonment in the state prison not more than ten [10] years.

MICH. COMP. LAWS § 750.90 (1996); see also *People v. Williams*, 175 N.W. 187 (Mich. 1919) (involving this statutory provision). Query whether Michigan passed this statute in response to *Don Moran*?

sionally appropriate diagnosis, counseling or treatment, such that resistance by the victim could not reasonably have been manifested."²⁸¹ Texas and Utah also specify that certain forms of sex are without consent when they are accomplished by a health-care professional.²⁸² Although no other state alters the consent requirement for sexual offenses in the same fashion as Delaware, Texas, and Utah, several explicitly negate consent as a defense to medical exploitation.²⁸³

California, the District of Columbia, and Idaho adopt the third approach by creating separate crimes of sexual exploitation by a medical-care provider.²⁸⁴ Other states simply add language to existing sexual assault or rape statutes covering instances in which the offender is a health-care provider.²⁸⁵ Several of these statutes specifically mention some form of fraud or deceit,²⁸⁶ others empha-

²⁸¹ DEL. CODE ANN. tit. 11, § 761(g)(4) (1995).

²⁸² TEX. PENAL CODE ANN. § 22.011(b)(9) (West Supp. 1998) (recently amended to include health-care-services provider in addition to mental health services provider); UTAH CODE ANN. § 76-5-406(12) (Supp. 1998) (recently amended to include health professional and religious counselor).

²⁸³ D.C. CODE ANN. § 22-4117 (1997) (consent no defense); IDAHO CODE § 18-919(a) (Supp. 1997) (consent no defense); KAN. STAT. ANN. § 21-3502(a)(3) (Supp. 1997) (consent obtained through knowing misrepresentation that sexual intercourse is medically or therapeutically necessary); MINN. STAT. §§ 609.344(k), 609.345(k) (1996) (consent no defense). *But see* WASH. REV. CODE §§ 9A.44.050(1)(d), 9A.44.100(1)(d) (Supp. 1998) ("It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual intercourse with the knowledge that the sexual intercourse was not for the purpose of treatment; . . .").

²⁸⁴ CAL. BUS. & PROF. CODE § 729 (West 1990 & Supp. 1998) (sexual exploitation of patient or client by physician and surgeon, or psychotherapist); D.C. CODE ANN. §§ 22-4115, 22-4116 (1997) (sexual abuse of patient or client); IDAHO CODE § 18-919 (1997) (sexual exploitation by medical care provider).

²⁸⁵ ALASKA STAT. §§ 11.41.410(a)(4)(A)-(B), 11.41.420(a)(4)(A)-(B) (Michie 1996) (sexual assault); COLO. REV. STAT. §§ 18-3-403(1)(h), 18-3-404(1)(g) (1997) (sexual assault); CONN. GEN. STAT. §§ 53a-71(a)(7), 53a-73a(a)(5) (1995 & Supp. 1998) (sexual assault); KAN. STAT. ANN. § 21-3502(a)(3) (Supp. 1997) (rape); MINN. STAT. §§ 609.344(k), 609.345(k) (Supp. 1997) (criminal sexual conduct); N.H. REV. STAT. ANN. § 632-A:2(g) (1996) (aggravated felonious sexual assault); R.I. GEN. LAWS §§ 11-37-2(4), 11-37-4(3) (1996) (sexual assault); WASH. REV. CODE §§ 9A.44.050(1)(d), 9A.44.100(1)(d) (1998) (rape and indecent liberties); WYO. STAT. ANN. § 6-2-303(a)(vii) (Michie 1997) (sexual assault).

²⁸⁶ CONN. GEN. STAT. §§ 53a-71(a)(7), 53a-73a(a)(5) (1995 & Supp. 1998) ("by means of false representation that the sexual intercourse [contact] is for a bona fide medical purpose"); KAN. STAT. ANN. § 21-3502(a)(3) (Supp. 1997) (consent obtained through knowing misrepresentation that sexual intercourse is medically or therapeutically necessary); MINN. STAT. §§ 609.344(k), 609.345(k) (Supp. 1997) ("by means of deception or false representation that the penetration [contact] is for a bona fide medical purpose."); *see also* DEL. CODE ANN. tit. 11, § 761(g)(4) (1995) (under guise of professional treatment).

size the unprofessional or unethical nature of the conduct.²⁸⁷ Washington and Alaska specify that the sexual conduct must occur in the course of professional treatment; Alaska also requires that the victim be unaware that it is occurring.²⁸⁸

2. Psychotherapists and Mental Health Professionals

Twenty-two jurisdictions have criminal statutes prohibiting various forms of sexual conduct by psychotherapists or mental health professionals with their patients.²⁸⁹ Minnesota's statute, one of the most expansive, punishes criminal sexual assault if

²⁸⁷ COLO. REV. STAT. §§ 18-3-403(1)(h), 18-3-404(1)(g) (1997) ("The actor engages in treatment or examination of a victim for other than bona fide medical purposes or in a manner substantially inconsistent with reasonable medical practices."); N.H. REV. STAT. ANN. § 632-A:2(g) (1996) ("When the actor provides therapy, medical treatment or examination of the victim in a manner or for purposes which are not professionally recognized as ethical or acceptable."); R.I. GEN. LAWS §§ 11-37-2(4), 11-37-4(3) (1996) ("The accused engages in the medical treatment or examination of the victim for the purpose of sexual arousal, gratification, or stimulation."); WYO. STAT. ANN. § 6-2-303(a)(vii) (Michie 1997 & Supp. 1998) ("The actor inflicts sexual intrusion in treatment or examination of a victim for purposes or in a manner substantially inconsistent with reasonable medical practices.").

²⁸⁸ ALASKA STAT. §§ 11.41.410(a)(4)(A)-(B), 11.41.420(a)(4)(A)-(B) (Michie 1996) (victim is unaware of sexual act and sexual penetration/contact by health-care worker in course of professional treatment); WASH. REV. CODE §§ 9A.44.050(1)(d), 9A.44.100(1)(d) (Supp. 1998) ("When the perpetrator is a health care provider, the victim is a client or patient, and the sexual contact occurs during a treatment session, consultation, interview, or examination.").

²⁸⁹ ALASKA STAT. §§ 11.41.410(a)(4)(A)-(B), 11.41.420(a)(4)(A)-(B), 11.41.470(1) (Michie 1996); ARIZ. REV. STAT. § 13-1418 (1996); CAL. BUS. & PROF. CODE § 729 (1996 & Supp. 1998); COLO. REV. STAT. §§ 18-3-405.5(1),(2) (1997); CONN. GEN. STAT. §§ 53a-71(a)(6), 53a-73a(a)(4), 53a-65(9)-(12) (1995 & Supp. 1998); DEL. CODE ANN. tit. 11, § 761 (1995); D.C. CODE ANN. §§ 22-4115, 4116 (1997); FLA. STAT. ch. 491.0112 (1996); GA. CODE ANN. § 16-6-5.1(c)(2) (1996); IDAHO CODE § 18-919(a) (1997); IOWA CODE § 709.15 (1996); KAN. STAT. ANN. § 21-3502(a)(3) (Supp. 1997); ME. REV. STAT. ANN. tit. 17-A, § 253(2)(l) (West Supp. 1997); MINN. STAT. ANN. §§ 609.344(1)(h)-(j), 609.345(1)(h)-(j) (Supp. 1997); N.H. REV. STAT. ANN. § 632-A:2(g) (1996); N.M. STAT. ANN. § 30-9-10(A)(5) (Michie 1996); N.D. CENT. CODE §§ 2.1-20-06.1 (1995); S.D. CODIFIED LAW §§ 22-22-28, 22-22-29 (Michie 1998); TEX. PENAL CODE ANN. § 22.011(b)(9) (West Supp. 1998); UTAH CODE ANN. § 76-5-406(12) (Supp. 1998); WASH. REV. CODE §§ 9A.44.050(1)(d), 9A.44.100(1)(d) (Supp. 1998); WIS. STAT. § 940.22 (1997); see also MISS. CODE ANN. §§ 97-3-95(2), 97-5-23(2) (1996) (counselor, psychiatrist, and psychologist included as those in position of trust or authority over minors for purposes of sexual battery and child touching statutes); *State v. Nierras*, 1980 Ohio App. LEXIS 10118 (psychiatrist convicted of attempted sexual conduct with patient using coercion sufficient to overcome will of ordinary person—cessation of treatment and referral to another therapist).

- (h) the actor is a psychotherapist and the complainant is a patient of the psychotherapist and the sexual penetration occurred during the psychotherapy session. Consent by the complainant is not a defense.
- (i) the actor is a psychotherapist and the complainant is a patient or former patient of the psychotherapist and the patient or former patient is emotionally dependent upon the psychotherapist; or
- (j) the actor is a psychotherapist and the complainant is a patient or former patient and the sexual penetration occurred by means of therapeutic deception. Consent by the complainant is not a defense;²⁹⁰

Two of Minnesota's three provisions explicitly negate consent as a defense. The third invalidates consent by referring to the patient as emotionally dependent which occurs when he or she is "unable to withhold consent to sexual contact or sexual penetration by the psychotherapist."²⁹¹ Minnesota's statute also emphasizes therapeutic deception, the therapist's representation that sexual contact is "consistent with or part of the patient's treatment."²⁹²

The other twenty-one states appear to follow the same pattern as the medical-treatment enactments. New Mexico's statute alters the force or coercion requirement.²⁹³ Delaware, Texas, and Utah include mental health professionals within their definitions of lack of consent for purposes of sexual offenses.²⁹⁴ Although not rewrit-

²⁹⁰ MINN. STAT. ANN. §§ 609.344(1)(h)-(j) (Supp. 1997); see also MINN. STAT. ANN. §§ 609.345(1)(h)-(j) (Supp. 1997) (fourth-degree criminal sexual conduct when the actor obtains sexual contact, rather than penetration).

²⁹¹ MINN. STAT. ANN. § 609.341(19) (Supp. 1997).

²⁹² MINN. STAT. ANN. § 609.341(20) (1996). Other states also rely on the notions of emotional dependence or therapeutic deception. COLO. REV. STAT. §§ 18-3-405.5(1),(2) (1997) (therapeutic deception); CONN. GEN. STAT. §§ 53a-65(9)-(12); 53a-71(a)(6), 53a-73a(a)(4) (1995) (during psychotherapy session, patient is emotionally dependent, or therapeutic deception); D.C. CODE ANN. §§ 22-4115, 4116 (1997) ("actor represents falsely that the sexual act is for a bona fide medical or therapeutic purpose" or "the patient or client is impaired from declining participation in the sexual act."); FLA. STAT. ch. 491.0112 (1991 & Supp. 1998) (use of therapeutic deception increases grade of crime); IOWA CODE § 709.15(1)(f)(2) (1993 & Supp. 1998) (emotionally dependent patient or client); KAN. STAT. ANN. § 21-3502(a)(3) (Supp. 1997) (knowing misrepresentation that sexual intercourse medically or therapeutically necessary); S.D. CODIFIED LAW §§ 22-22-27, 22-22-28, 22-22-29 (Michie 1998) (emotionally dependent patient); TEX. PENAL CODE ANN. § 22.011(b)(9) (West Supp. 1998) (causes other person to submit by exploiting emotional dependency); see also GA. CODE ANN. § 16-6-5.1(c)(2) (1996) (if treatment or counseling relationship is used to facilitate sexual contact).

²⁹³ N.M. STAT. ANN. § 30-9-10(A)(5) (Michie 1996) (force or coercion includes "the perpetration of criminal sexual penetration or criminal sexual contact by a psychotherapist on his patient, with or without the patient's consent, during the course of psychotherapy or within a period of one year following the termination of psychotherapy; . . ."). But see N.M. STAT. ANN. § 30-9-12(B) (1996) (specifying exceptions such as inadvertent or legitimate contacts).

²⁹⁴ DEL. CODE ANN. tit. 11, § 761 (1995); TEX. PENAL CODE ANN. § 22.011(b)(9)

ing the consent requirement itself, many other state statutes rule out consent as a defense.²⁹⁵ Seven states have statutes specifically addressing sexual exploitation by psychotherapists;²⁹⁶ another three include therapists within specialized statutes dealing with the broader category of medical-care providers.²⁹⁷ The remaining states include psychotherapist-patient sexual contact within general sexual

(West 1998) ("actor is a mental health services provider or a health care services provider who causes the other person, who is a patient or former patient of the actor, to submit or participate by exploiting the other person's emotional dependency on the actor; . . ."); UTAH CODE ANN. § 76-5-406(12) (1998).

Delaware punishes unlawful sexual intercourse in three degrees: "A person is guilty of unlawful sexual intercourse in the third degree when the person intentionally engages in sexual intercourse with another person and any of the following circumstances exist: (1) The intercourse occurs without the victim's consent; . . ." DEL. CODE ANN. tit. 11, § 773 (1995). "Without the victim's consent" includes exploitation by health professionals:

For purposes of this paragraph, "health professional" includes all individuals who are licensed or who hold themselves out to be licensed or who otherwise provide professional physical or mental health services, diagnosis, treatment or counseling and shall include, but not be limited to, doctors of medicine and osteopathy, dentists, nurses, physical therapists, chiropractors, psychologists, social workers, medical technicians, mental health counselors, substance abuse counselors, marriage and family counselors or therapists and hypnotherapists; . . .

DEL. CODE ANN. tit. 11, § 761 (1995).

²⁹⁵ CAL. BUS. & PROF. CODE § 729(b)(5) (West 1990 & Supp. 1998) (consent no defense); COLO. REV. STAT. § 18-3-405.5(3) (1997) (consent no defense); D.C. CODE ANN. § 22-4117(a) (1981 & Supp. 1998) (consent no defense); FLA. STAT. ch. 491.0112(3) (1996) (consent no defense); GA. CODE ANN. § 16-6-5.1(c)(3) (1996) (consent no defense); IDAHO CODE § 18-919(a) (1997) (consent no defense); KAN. STAT. ANN. § 21-3502(a)(3) (1995 & Supp. 1997) (consent obtained through knowing misrepresentation that sexual intercourse is medically or therapeutically necessary); MINN. STAT. ANN. §§ 609.344(1)(h)-(j), 609.345(1)(h)-(j) (West 1987 & Supp. 1997) (consent no defense); N.M. STAT. ANN. § 30-9-10(A)(5) (Michie 1996) ("with or without the patient's consent"); N.D. CENT. CODE §§ 2.1-20-06.1 (1995) (consent no defense); S.D. CODIFIED LAW §§ 22-22-28, 22-22-29 (Michie 1997) (consent no defense); WIS. STAT. § 940.22(2) (1995-1996) (consent not an issue). *But see* WASH. REV. CODE §§ 9A.44.050(1)(d), 9A.44.100(1)(d) (1996) (affirmative defense).

²⁹⁶ ARIZ. REV. STAT. § 13-1418 (1996) (sexual misconduct by behavioral health professionals); COLO. REV. STAT. §§ 18-3-405.5 (1997) (sexual assault by psychotherapist); FLA. STAT. ch. 491.0112 (1996) (sexual misconduct by psychotherapist); IOWA CODE § 709.15 (1996) (sexual exploitation by counselor or therapist); N.D. CENT. CODE §§ 12.1-20-06.1 (1997) (sexual exploitation by therapist); S.D. CODIFIED LAW §§ 22-22-28, 22-22-29 (Michie 1997) (sexual contact/penetration by psychotherapist); WIS. STAT. § 940.22 (1995-1996) (sexual exploitation by therapist).

²⁹⁷ CAL. BUS. & PROF. CODE § 729 (West 1990 & Supp. 1998) (sexual exploitation of patient or client by physician and surgeon or psychotherapist); D.C. CODE ANN. §§ 22-4115, 22-4116 (1981 & Supp. 1997) (sexual abuse of patient or client) (includes therapeutic or counseling services); IDAHO CODE § 18-919 (1997) (psychotherapist included in medical care provider statute).

assault or rape statutes.²⁹⁸ A number of these statutes overlap with those criminalizing sexual intercourse obtained under the guise of medical treatment.²⁹⁹ Finally, one unique characteristic of the psychotherapist-patient statutes is that several states place a time limit on liability for sexual conduct by mental health professionals.³⁰⁰

3. The Clergy

Twelve states explicitly outlaw sexual exploitation by clergy members in their statutory provisions;³⁰¹ one additional state has

²⁹⁸ ALASKA STAT. §§ 11.41.410(a)(4)(A)-(B), 11.41.420(a)(4)(A)-(B) (Michie 1996) (sexual assault); CONN. GEN. STAT. §§ 53a-71(a)(6), 53a-73a(a)(4); 53a-65(9)-(12) (1997) (sexual assault); GA. CODE ANN. § 16-6-5.1(c)(2) (1996) (statute also prohibits sexual assault against persons in custody or hospitals); KAN. STAT. ANN. § 21-3502(a)(3) (1995 & Supp. 1997) (rape); ME. REV. STAT. ANN. tit. 17-A, § 253(2)(I) (West 1983 & Supp. 1997) (gross sexual assault); MINN. STAT. ANN. §§ 609.344(1)(h)-(j), 609.345(1)(h)-(j) (1996) (criminal sexual conduct); N.H. REV. STAT. ANN. § 632-A:2(g) (1996 & Supp. 1997) (aggravated felonious sexual assault); N.M. STAT. ANN. § 30-9-10(A)(5) (Michie 1996) (criminal sexual penetration); WASH. REV. CODE §§ 9A.44.050(1)(d), 9A.44.100(1)(d) (1996) (rape and indecent liberties).

²⁹⁹ ALASKA STAT. §§ 11.41.470(1), 11.41.410(a)(4)(A)-(B), 11.41.420(a)(4)(A)-(B) (Michie 1996 & Supp. 1997) (definition of health care worker includes mental health counselor, psychiatrist, psychologist, and psychological associate); KAN. STAT. ANN. § 21-3502(a)(3) (1995 & Supp. 1997) (knowing misrepresentation that sexual intercourse is medically or therapeutically necessary); N.H. REV. STAT. ANN. § 632-A:2(g) (1996 & Supp. 1997) (actor provides therapy; see *State v. vonKlock*, 33 A.2d 1299 (N.H. 1981), *overruled by State v. Smith*, 503 A.2d 774 (N.H. 1985); WASH. REV. CODE §§ 9A.44.050(1)(d), 9A.44.100(1)(d) (1996) (definition of health care provider includes mental health professionals).

³⁰⁰ ARIZ. REV. STAT. § 13-1418(c) (1996) (does not apply after patient has completed course of treatment); CAL. BUS. & PROF. CODE § 729(a) (1990 & Supp. 1998) ("with former patient or client when the relationship was terminated primarily for the purpose of engaging in those acts, unless" patient referred); FLA. STAT. ch. 491.0112 (1996) (former client when relationship terminated primarily for purpose of engaging in sexual contact); IOWA CODE § 709.15 (1996) (former client presumed to be emotionally dependent for one year following therapy); N.M. STAT. ANN. § 30-9-10(A)(5) (Michie 1994) (within one year following termination of therapy).

³⁰¹ ALASKA STAT. §§ 11.41.410(a)(4)(B), 11.41.420(a)(4)(B), 11.41.434(a)(3)(B), 11.41.436(a)(5)(B), 11.41.470(1), 11.41.470(5) (Michie 1996 & Supp. 1997); DEL. CODE ANN. tit. 11, § 761(g)(4) (1995); D.C. CODE ANN. §§ 22-4115(a), 22-4116(a) (1996); IOWA CODE § 709.15(1)(a) (1996); MINN. STAT. §§ 609.344(e), 609.345(e) (1996); MISS. CODE ANN. §§ 97-3-95(2), 97-5-23(2) (1994 & Supp. 1997); N.M. STAT. ANN. §§ 30-9-10(A)(5), 30-9-10(F)(11) (Michie 1994); N.D. CENT. CODE § 12.1-20-06.1(2) (1997); S.D. CODIFIED LAWS §§ 22-22-28, 22-22-29 (Michie 1997); TEX. PENAL CODE ANN. § 22.011(b)(10) (West 1994 & Supp. 1998); UTAH CODE ANN. § 76-5-406(12) (Supp. 1998); WIS. STAT. § 940.22(1)(i) (1995-96); see also COLO. REV. STAT. § 13-25-131(1) (1997) (civil suits against clergy members).

done so through judicial interpretation.³⁰² Minnesota's statute, which has the most extensive coverage provides:

(l) the actor is or purports to be a member of the clergy, the complainant is not married to the actor, and:

(i) the sexual penetration occurred during the course of a meeting in which the complainant sought or received religious or spiritual advice, aid, or comfort from the actor in private; or

(ii) the sexual penetration occurred during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private.

Consent by the complainant is not a defense.³⁰³

Seven states define health care provider, psychotherapist, or therapist as encompassing clergy members for the purposes of their sexual assault statutes;³⁰⁴ other states incorporate clerics in laws prohibiting abuse of positions of authority over minors.³⁰⁵ Finally, Delaware, Texas, and Utah define lack of consent for sexual offenses to include exploitation by clergy members.³⁰⁶

³⁰² Florida's statute does not mention the clergy, but a court recently ruled that they are covered under the statute dealing with abuse of a position of "familial or custodial authority" over a minor. FLA. STAT. ch. 794.011(8) (1996); Sterghos & Lundy, *supra* note 118, at 1A.

³⁰³ MINN. STAT. § 609.344(l) (1966); see also MINN. STAT. § 609.345(1) (1996) (same provision for sexual contact).

³⁰⁴ ALASKA STAT. §§ 11.41.470(1), 11.41.410(a)(4), 11.41.420(a)(4) (Michie 1996 & Supp. 1997) (definition of health care worker includes "religious healing practitioner"); D.C. CODE ANN. §§ 22-4115(a), 22-4116(a) (1996) (sexual abuse of patient or client includes circumstances of spiritual counseling); IOWA CODE § 709.15(1)(a) (1996) (defines counselor or therapist to include clergy); N.M. STAT. ANN. §§ 30-910(A)(5), 30-910(F)(11) (Michie 1994) (includes "minister, priest, rabbi or other similar functionary of a religious organization acting in his role as a pastoral counselor" in definition of psychotherapist); N.D. CENT. CODE § 12.1-20-06.1(2) (1997) (defines therapist to include clergy); S.D. CODIFIED LAWS §§ 22-22-27, 22-22-28, 22-22-29 (Michie 1997) (defines psychotherapist to include clergy); WIS. STAT. § 940.22(1)(f) (1995-96) (defines therapist to include clergy).

³⁰⁵ ALASKA STAT. §§ 11.41.470(5), 11.41.434(a)(3)(B), 11.41.436(a)(5)(B) (Michie 1996 & Supp. 1997) (position of authority over minor includes religious leader for purposes of sexual abuse statutes); MISS. CODE ANN. §§ 97-3-95(2), 97-5-23(2) (1994 & Supp. 1997) (position of trust or authority over child includes minister and priest for sexual battery and child touching statutes); see also FLA. STAT. ch. 794.011(8) (1996) (interpreted to include clergy).

³⁰⁶ DEL. CODE ANN. tit. 11, § 761(g)(4) (1995) (without consent includes health professional or "minister, priest, rabbi or other member of a religious organization engaged in pastoral counseling"); TEX. PENAL CODE ANN. § 22.011(b)(10) (West 1994 & Supp. 1998) (defines without consent to include if "the actor is a clergyman who causes the other person to submit or participate by exploiting the other person's emotional dependency on the clergyman in the clergyman's professional character as spiritual adviser."); UTAH CODE ANN. § 76-5-406(12)(b) (Supp. 1998) (defines "religious counselor" as "minis-

4. Conclusion

These abuse-of-trust provisions are laudatory because they explicitly outlaw a type of criminal conduct, fraudulent medical treatment, that has been troubling the courts since the last century—*Don Moran's* 1872 call to legislative arms has been answered. The psychotherapist provisions beneficially expand statutory coverage to instances that may be even more common in the modern era;³⁰⁷ the clergy enactments signal an expansion based more on substantive similarity than health-care credentials. Collectively, these enactments embody legislative judgments that fraud and coercion are totally inappropriate in certain alliances between holders of positions of trust and their patients. Larson, in discussing a tort of sexual fraud notes:

It is perhaps understandable that courts [and legislatures] are more concerned about sexual fraud in confidential relationships. The behavior involved is often outrageous, and it is perpetrated by a person sanctioned by society as a trustworthy individual. Abuse of a confidential relationship thus not only offends the victim but also undermines the credibility of other professionals by transgressing fundamental social and ethical norms. Against this background of formalized obligations, the professional defendant is much less sympathetic and the victim more credible.³⁰⁸

Because legislatures enacted these statutes to subsume an identifiable class of offenders, however, their major shortcoming lie in their very specificity. Covering only fraudulent or coercive practices occurring in medical, psychiatric, and religious alliances, these laws leave potential victims unprotected from similar conduct occurring outside them.

B. *The Abuse of Positions of Authority*

The second major approach to criminalizing nontraditional sexual offenses is one that punishes offenders who abuse their positions of authority over the victim. These provisions avoid the major

ter, priest, rabbi, bishop, or other recognized member of the clergy.”).

³⁰⁷ See, e.g., *ESTRICH*, *supra* note 7, at 87; *Feinberg*, *supra* note 18, at 336.

³⁰⁸ *Larson*, *Women Understand*, *supra* note 24, at 411 (footnotes omitted); see also *FAIRSTEIN*, *supra* note 47, at 197 (arguing that legislation particularly needed when the defendant is serving professionally as the victim's caretaker or in a similar position of trust). But see *Jeffrey A. Barker*, Comment, *Professional-Client Sex: Is Criminal Liability an Appropriate Means of Enforcing Professional Responsibility?*, 40 *UCLA L. REV.* 1275 (1993).

drawback of the abuse-of-trust approach by covering a broader range of possible offenders. Forty jurisdictions have at least one criminal provision outlawing the abuse of a position of power to obtain sexual intercourse.³⁰⁹ The theme of victim vulnerability is

³⁰⁹ See ALASKA STAT. §§ 11.41.410(a)(3), 11.41.420(a)(2) (Michie 1996 & Supp. 1997) (sexual assault); ALASKA STAT. §§ 11.41.434(a)(3)(A)-(B), 11.41.436(a)(5)(A)-(B) (Michie 1996) (sexual abuse of minor); ARIZ. REV. STAT. § 13-1419 (1999) (unlawful sexual conduct); ARK. CODE ANN. § 5-14-103(a)(2) (Michie 1997) (rape); ARK. CODE ANN. § 5-14-108(a)(3) (Michie 1997) (sexual abuse); ARK. CODE ANN. §§ 5-14-120, 5-14-121 (Michie 1997) (violation of minor); CAL. PENAL CODE § 261(a)(7) (West 1988 & Supp. 1998) (public official with power to incarcerate, arrest, or deport); COLO. REV. STAT. §§ 18-3-403(1)(g), 18-3-404(1)(f) (1997) (sexual assault); COLO. REV. STAT. § 18-3-405.3 (1997) (sexual assault on child by one in position of trust); CONN. GEN. STAT. §§ 53a-71(a)(4)(5), 53a-73a(a)(1)(E) (1995) (sexual assault); DEL. CODE ANN. tit. 11, § 763 (1997) (sexual harassment); D.C. CODE ANN. §§ 22-4113, 22-4114 (1996) (sexual abuse of ward); FLA. STAT. ch. 794.011(4)(g), 794.011(8), 794.011(9) (1996) (sexual battery); FLA. STAT. ch. 944.35(3)(b) (1996) (sexual misconduct with inmate); GA. CODE ANN. § 16-6-5.1(b)-(c) (1996) (sexual assault); HAW. REV. STAT. §§ 707-731, 707-732 (1993 & Supp. 1997) (sexual assault); IDAHO CODE § 18-6110 (1997) (sexual contact with inmate); 720 ILL. COMP. STAT. 5/11-9.2 (West 1997) (custodial sexual misconduct); 720 ILL. COMP. STAT. 5/12-13(a)(4) (West 1997) (criminal sexual assault); 720 ILL. COMP. STAT. 5/12-16(f) (West 1997) (aggravated criminal sexual abuse); IND. CODE § 35-44-1-5 (1997) (sexual relations between service provider and detainee); IOWA CODE § 709.4(2)(c)(3) (1996) (sexual abuse); IOWA CODE § 709.16 (1996) (sexual misconduct with offenders); KAN. STAT. ANN. § 21-3502(a)(4) (1995 & Supp. 1997) (rape); KAN. STAT. ANN. § 21-3520 (1996) (unlawful sexual relations); ME. REV. STAT. ANN. tit. 17-A, § 253(2)(E)-(G) (West 1983 & Supp. 1997) (gross sexual assault); ME. REV. STAT. ANN. tit. 17-A, § 254(1)(C) (West 1983 & Supp. 1997) (sexual abuse of minors); ME. REV. STAT. ANN. tit. 17-A, § 55(1)(E),(F),(I),(J) (West 1993 & Supp. 1997) (unlawful sexual contact); MICH. COMP. LAWS §§ 750.520b(1)(b)(iii), (1)(h)(ii), 750.520c(1)(b)(iii), (1)(h)(ii); 750.520e(1)(d)-(f) (1996) (criminal sexual conduct); MINN. STAT. §§ 609.343(1)(b), 609.344(1)(e), 609.345(1)(b),(e) (1996) (criminal sexual conduct); MISS. CODE ANN. § 97-3-95(2) (1994 & Supp. 1997) (sexual battery); MISS. CODE ANN. § 97-5-23(2) (1994 & Supp. 1997) (child touching); NEV. REV. STAT. §§ 201.540, 201.550 (1997) (sexual contact with pupils and students); NEV. REV. STAT. § 212.187 (1997) (sexual conduct with prisoner); N.H. REV. STAT. ANN. §§ 632-A:2, I(k), (n), 632-A:3, IV (1996 & Supp. 1997) (felonious sexual assault); N.J. STAT. ANN. §§ 2C:14-2.a(2)(b), 2C:14-2.c(3),(4)(e) (West 1995) (sexual assault); N.J. STAT. ANN. § 2C:14-3 (West 1995) (criminal sexual contact); N.M. STAT. ANN. §§ 30-9-11(D)(1)-(2) (Michie 1994) (criminal sexual penetration); N.M. STAT. ANN. § 30-9-13 (Michie 1994) (criminal sexual contact of minor); N.Y. PENAL LAW § 130.05(3)(e)-(f) (Consol. 1997) (lack of consent); N.C. GEN. STAT. § 14-27.7 (1993) (sexual offense); N.C. GEN. STAT. § 14-395.1 (1997) (sexual harassment); N.D. CENT. CODE § 12.1-20-07(1)(d) (1997) (sexual assault); N.D. CENT. CODE § 12.1-20-06 (1997) (sexual abuse of wards); OHIO REV. CODE ANN. § 2907.03(A)(6)-(9) (Anderson 1997) (sexual battery); OKLA. STAT. tit. 21, § 1111(A)(7) (1996) (rape); R.I. GEN. LAWS § 11-25-24 (1997) (sexual relations with inmates); S.C. CODE ANN. § 16-3-655(3) (Law Co-op. 1996) (criminal sexual conduct with minors); S.C. CODE ANN. § 44-23-1150 (Law Co-op. 1996) (sexual intercourse with patient); S.D. CODIFIED LAWS § 24-1-26.1 (Michie 1998) (sexual acts between prison employees and prisoners); TENN. CODE ANN. § 41-21-241 (1997) (sexual contact with prisoners); TEX. PENAL CODE ANN. § 22.011(b)(8) (West 1994 & Supp. 1998) (sexual assault);

evident in the wording of provisions that rely on language such as "position of authority" or "supervisory or disciplinary authority," while others describe custodial settings in which abuse of authority is implicit.³¹⁰ In addition, some of these statutes specifically require that the actor use their position of authority to cause the victim to submit,³¹¹ thus emphasizing the coercive, if not forcible, nature of these offenses.³¹² With respect to nonconsent, one of the traditional requirements for rape, many of these enactments explicitly negate consent as a defense³¹³ or alter the definition of consent

TEX. PENAL CODE ANN. § 39.03 (West 1997) (official oppression); UTAH CODE ANN. § 76-5-406(10) (1953 & Supp. 1997) (sexual offenses without consent of victim); V.I. CODE ANN. tit. 14, § 1700 (1997) (aggravated rape); V.I. CODE ANN. tit. 14, § 1708 (1997) (unlawful sexual contact); WASH. REV. CODE § 9A.44.050(1)(c),(e) (1996) (rape); WASH. REV. CODE § 9A.44.100(1)(c),(e) (1996) (indecent liberties); WIS. STAT. § 940.225(2)(g) (1995-96) (sexual assault); WIS. STAT. § 948.095(2)(e) (1995-96) (sexual assault of student); WYO. STAT. ANN. § 6-2-303(a)(vi) (Michie 1997) (sexual assault); see also *Commonwealth v. Frank*, 577 A.2d 609 (Pa. Super. Ct. 1990) (male therapist held position of authority with respect to adolescent male patient); *State v. Burke*, 522 A.2d 725 (R.I. 1987) (interpreting Rhode Island's sexual assault statute as encompassing case of police officer using his position of authority to intimidate victim into sex).

³¹⁰ California and Texas have provisions that simply outlaw the use of power by a public servant or official. CAL. PENAL CODE § 261(a)(7) (West 1988 & Supp. 1998) (threaten to use authority of public official to incarcerate, arrest, or deport); TEX. PENAL CODE ANN. § 22.011(b)(8) (West 1994 & Supp. 1998) (public servant coerces); see also MACDONALD, *supra* note 122, at 230 (in Yugoslavia "whoever through misuse of his position procures a female person subordinated or dependent upon him to have carnal knowledge shall be punished by detention for no more than three years.").

³¹¹ COLO. REV. STAT. §§ 18-3-403(1)(g), 18-3-404(1)(f) (1997) (uses position of authority to coerce victim to submit); IOWA CODE § 709.4(2)(c)(3) (1996) (uses authority to coerce other participant to submit); MICH. COMP. LAWS §§ 750.520b(1)(b)(iii), (1)(h)(ii), 750.520c(1)(b)(iii), (1)(h)(ii) (1996) (uses authority to coerce victim to submit); MINN. STAT. §§ 609.343(1)(b), 609.344(1)(e), 609.345(1)(b),(e) (1996) (uses authority to cause or induce complainant to submit); N.H. REV. STAT. ANN. §§ 632-A:2, I(k), (n), 632-A:3, IV (1996 & Supp. 1997) (uses authority to coerce victim to submit); N.M. STAT. ANN. §§ 30-9-11(D)(1), 30-9-13(2)(a) (Michie 1994) (uses authority to coerce child to submit); S.C. CODE ANN. § 16-3-655(3) (Law Co-op. 1997) (position of familial, custodial, or official authority to coerce victim to submit); TEX. PENAL CODE ANN. § 22.011(b)(8) (West 1994 & Supp. 1998) (without consent includes when actor is public servant and coerces other person to submit); V.I. CODE ANN. tit. 14, §§ 1700, 1708 (1997) (position of authority used to accomplish); WYO. STAT. ANN. § 6-2-303(a)(vi) (Michie 1996) (uses position of authority to cause victim to submit).

³¹² In *Scadden v. State*, 732 P.2d 1036, 1040 (Wyo. 1987), the court instructed the jury: "Submit" as used in this case means that the person subjected to sexual intrusion by an actor, who is in a position of authority over that person, does not give free, full and reasoned consent." New Mexico's jury instructions provide: "The defendant was a person who by reason of his relationship to [name of victim] was able to exercise undue influence over [name of victim] and used his position of authority to coerce her to submit" to sexual penetration or contact. N.M. UNIFORM JURY INSTRUCTIONS-CRIMINAL 14-945, 14-926 (1997).

³¹³ D.C. CODE ANN. § 22-4117(a) (1996) (consent no defense); FLA. STAT. ch.

to exclude certain protected classes.³¹⁴ While a rich diversity of statutory language and coverage exists in this context, the statutes may be organized into three major categories, those involving: (1) custodial settings, (2) minors or mentally handicapped persons, and (3) criminal sexual harassment.

1. Custodial Settings: Prisons, Hospitals, and Other Institutions

A number of state statutes protect those in custodial settings such as hospitals or prisons.³¹⁵ A typical provision, this one from Maine, reads:

2. A person is guilty of gross sexual assault if that person engages in a sexual act with another person and:

...

794.011(4)(g), 794.011(9) (1996) ("acquiescence . . . does not constitute consent"); FLA. STAT. ch. 794.011(8) (1996) ("without regard to the willingness or consent of the victim, which is not a defense"); FLA. STAT. ch. 944.35(3)(b)(3) (1996) (consent no defense); GA. CODE ANN. § 16-6-5.1(c)(3) (1996) (consent no defense); IND. CODE § 35-44-1-5(c) (1997) (not a defense that act consensual); KAN. STAT. ANN. § 21-3502(a)(4) (1995 & Supp. 1997) (consent obtained by knowing misrepresentation); MINN. STAT. §§ 609.343(1)(b), 609.344(1)(e), 609.345(1)(b),(e) (1996) (consent no defense); MISS. CODE ANN. § 97-5-23(2) (1994 & Supp. 1997) (with or without consent); N.H. REV. STAT. ANN. §§ 632-A:2,(n) (1996 & Supp. 1998) (consent no defense); N.C. GEN. STAT. § 14-27.7 (1993) (consent no defense); WIS. STAT. §§ 940.225(2)(g), 940.225(4) (1995-96) (consent not an issue). *But see* 720 ILL. COMP. STAT. 5/12-17(a) (West 1997) (consent as defense).

³¹⁴ 720 ILL. COMP. STAT. 5/11-9.2 (West 1997) (consent not a defense because "[a] person is deemed incapable of consent . . . when he or she is a probationer, parolee, releasee, or inmate in custody of a penal system."); N.Y. PENAL LAW § 130.05(3)(e)-(f) (Consol. 1997) (persons incapable of consent include those in correctional facilities and hospitals); TEX. PENAL CODE ANN. § 22.011(b)(8) (West 1994 & Supp. 1998) (without consent includes when actor is public servant and coerces other person to submit); UTAH CODE ANN. § 76-5-406(10) (1953 & Supp. 1997) (sexual act is without consent if actor was parent, guardian, or occupied position of special trust in relation to minor).

³¹⁵ COLO. REV. STAT. §§ 18-3-403(1)(g), 18-3-404(1)(f) (1997) ("The victim is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over the victim and uses this position of authority . . . to coerce the victim to submit"); CONN. GEN. STAT. §§ 53a-71(a)(5); 53a-73a(a)(1)(E) (1997) (supervisory or disciplinary authority); D.C. CODE ANN. §§ 22-4113, 22-4114 (1996) (supervisory or disciplinary authority); FLA. STAT. ch. 944.35 (1996) (prohibiting sexual misconduct with prisoners, consent no defense); GA. CODE ANN. § 16-6-5.1(c) (1996) (supervisory or disciplinary authority—consent no defense); N.J. STAT. ANN. § 2C:14-2(3) (West 1996) (supervisory or disciplinary authority); N.C. GEN. STAT. § 14-27.7 (1993) (parent or person with custody in private, charitable, or governmental institution, consent no defense); N.D. CENT. CODE §§ 12.1-20-06 (1997), 12.1-20-07(1)(d) (1997) (supervisory or disciplinary authority); OHIO REV. CODE ANN. § 2907.03(A)(6) (Anderson 1997) (supervisory or disciplinary authority); S.C. CODE ANN. § 44-23-1150 (Law Co-op. 1997) (mental health facility or correctional facility).

E. The other person, not the actor's spouse, is in official custody as a probationer or a parolee, or is detained in a hospital, prison or other institution, and the actor has supervisory or disciplinary authority over the other person;³¹⁶

Many of these statutes specifically employ abuse-of-authority language, but some merely describe custodial situations in which sex is prohibited. Illinois, for instance, recently passed new legislation punishing sexual contact in custodial settings: "A person commits the offense of custodial sexual misconduct when he or she is an employee of a penal system and engages in sexual contact or penetration with a person who is in the custody of that penal system."³¹⁷ Several additional states have recently enacted legislation covering prisoners.³¹⁸ Moreover, Hawaii has gone even further. It recently amended its sexual assault statute on prisons and other custodial settings to include police and law enforcement officers.³¹⁹

³¹⁶ ME. REV. STAT. ANN. tit. 17-A, § 253(2)(E) (West 1983 & Supp. 1997); see also ME. REV. STAT. ANN. tit. 17-A, § 255(1)(E) (West 1983 & Supp. 1997) (unlawful sexual contact) (same).

³¹⁷ 720 ILL. COMP. STAT. 5/11-9.2(a) (West 1997).

³¹⁸ ARIZ. REV. STAT. § 13-1419 (1996) (unlawful sexual conduct); FLA. STAT. ch. 944.35(3)(b) (1996) (sexual misconduct with inmate or offender); HAW. REV. STAT. §§ 707-731, 707-732 (1993 & Supp. 1997) (sexual assault while person employed by state correctional facility or police or law enforcement officer); 720 ILL. COMP. STAT. 5/11-9.2 (West 1997) (custodial sexual misconduct); IDAHO CODE § 18-6110 (1997) (sexual contact with inmate); IND. CODE § 35-44-1-5 (1997) (sexual relations between service provider and detainee); IOWA CODE § 709.16 (1996) (sexual misconduct with offenders); KAN. STAT. ANN. § 21-3520 (1995) (corrections or parole officer); MICH. COMP. LAWS §§ 750.520e(1)(d)-(f) (1996) (actor is employee of and victim is under corrections department, prisoner or probationer, or juvenile detainee); NEV. REV. STAT. § 212.187 (1997) (recently amended to include penalties); N.H. REV. STAT. ANN. §§ 632-A:2(n), 632-A:3(n) (1996 & Supp. 1997) (recently amended to include prisoners, juvenile detainees, parolees, and probationers); N.M. STAT. ANN. § 30-9-11(D)(2) (Michie 1994) (inmate confined in correctional facility or jail); N.Y. PENAL LAW § 130.05(3)(e)-(f) (Consol. 1997) (persons incapable of consent include those in correctional facilities and hospitals); R.I. GEN. LAWS § 11-25-24 (1997) (correctional employees); S.C. CODE ANN. § 44-23-1150 (Law Co-op. 1997) (amended to include inmates of state or local correctional facility); S.D. CODIFIED LAWS § 24-1-26.1 (Michie 1997) (person employed in state prison or detention facility); TENN. CODE ANN. § 41-21-241 (1997) (law enforcement and correctional officers). Many of these provisions do not appear in the sexual offense portions of codes but in sections dealing with inmates.

³¹⁹ HAW. REV. STAT. §§ 707-731, 707-732 (1993 & Supp. 1997); see also FLA. STAT. ch. 794.011(4)(g) (1996) (law enforcement, correctional, or correctional probation officers).

2. Minors and Mentally Handicapped Persons

A large number of the abuse-of-authority provisions are designed to protect minors in various settings, including foster care, detention facilities, schools, or hospitals.³²⁰ A few states also have abuse-of-authority or in-custody provisions for mentally handicapped persons.³²¹ These statutes further underline the theme of victim vulnerability.

³²⁰ ALASKA STAT. §§ 11.41.434, 11.41.436 (Michie 1996 & Supp. 1997) (minors); ARK. CODE ANN. §§ 5-14-120, 5-14-121 (Michie 1997) (minors); COLO. REV. STAT. § 18-3-405.3 (1997) (child); CONN. GEN. STAT. §§ 53a-71(a)(8); 53a-73a(a)(6) (1997) (school students); FLA. STAT. ch. 794.011(8) (1996) (minors); 720 ILL. COMP. STAT. 5/12-13(a)(4) (West 1997) (minors); 720 ILL. COMP. STAT. 5/12-16(f) (West 1997) (minors); IOWA CODE § 709.4(2)(c) (1993) (minors); ME. REV. STAT. ANN. 17-A §§ 253(2)(F)-(H), 254(1)(C), 255(1)(F),(G),(I) (West 1983 & Supp. 1997) (minors); MICH. COMP. LAWS §§ 750.520b(1)(b)(iii), 750.520c(1)(b)(iii) (1996) (minors); MINN. STAT. §§ 609.343(1)(b), 609.344(1)(e), 609.345(1)(b),(e) (1996) (minors); MISS. CODE ANN. §§ 97-3-95(2), 97-5-23(2) (1994 & Supp. 1997) (child); NEV. REV. STAT. §§ 201.540, 201.550 (1997) (pupils and students); N.H. REV. STAT. ANN. §§ 632-A:2, I(k) (1996 & Supp. 1997) (minors); N.J. STAT. ANN. § 2C:14-2.a(2)(b), 2C:14-2.c(4) (West 1996) (minor); N.M. STAT. ANN. §§ 30-9-11(D)(1) (Michie 1994) (child); N.M. STAT. ANN. § 30-9-13 (Michie 1997) (minor); OHIO REV. CODE ANN. § 2907.03(A)(7)-(9) (Anderson 1997) (student or minor); S.C. CODE ANN. § 16-3-655(3) (Law Co-op. 1996) (minors); UTAH CODE ANN. § 76-5-406(10) (1953 & Supp. 1997) (minors); V.I. CODE ANN. tit. 14, §§ 1700, 1708 (1997) (minors in same household as offender); WIS. STAT. ANN. § 948.095 (West 1996 & Supp. 1997) (sexual assault of student by school instructional staff).

³²¹ ALASKA STAT. §§ 11.41.410(a)(3), 11.41.420(a)(2) (Michie 1996 & Supp. 1997) (mentally incapable in offender's care by authority of law or in facility or program licensed by state); ARK. CODE ANN. §§ 5-4-103(a)(2), 5-4-108(a)(3) (Michie 1997) (rape and sexual abuse statutes amended to include residents of hospitals etc. who are incapable of consent because they are mentally incapacitated); ME. REV. STAT. ANN. 17-A §§ 253(2)(I), 255(1)(I) (West 1983 & Supp. 1997) (mentally retarded in state facility); see also ME. REV. STAT. ANN. 34-B §§ 3008, 5004 (West 1983 & Supp. 1997) (sexual activity with recipient of mental health or mental retardation services prohibited); MICH. COMP. LAWS §§ 750.520b(1)(h), 750.520c(1)(h) (1996) (mentally incapacitated); OHIO REV. CODE ANN. § 2907.03(A)(6) (Anderson 1997) (in custody or patient in hospital or other institution); WASH. REV. CODE §§ 9A.44.050(1)(c), 9A.44.100(1)(c) (1996) (developmentally disabled), §§ 9A.44.050(1)(e), 9A.44.100(1)(e) (1996) (resident of facility for mentally disordered or chemically dependent); WIS. STAT. § 940.225(2)(g) (1995-96) (patient or resident of adult family home, community-based residential facility, inpatient health care facility, or state treatment facility). Many other rape or sexual assault statutes cover cases in which a the victim is a mentally incapacitated person.

3. Criminal Sexual Harassment

Three states criminally punish sexual harassment.³²² Delaware criminalizes a broad range of such behavior by defining sexual harassment as "threaten[ing] to engage in conduct likely to result in the commission of a sexual offense against any person;" ³²³ North Carolina limits its offense to property lessors and defines sexual harassment as "unsolicited overt requests or demands for sexual acts when (i) submission to such conduct is made a term of the execution or continuation of the lease agreement, or (ii) submission to or rejection of such conduct by an individual is used to determine whether rights under the lease are accorded."³²⁴ Texas limits the reach of its statute to public servants, defining sexual harassment as: "unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, submission to which is made a term or condition of a person's exercise or enjoyment of any right, privilege, power, or immunity, either explicitly or implicitly."³²⁵ Georgia rejected a recent bill making it a felony to solicit sex from a worker or job applicant as a condition of employment.³²⁶

4. Conclusion

The abuse-of-authority enactments, more than their abuse-of-trust counterparts, emphasize the legislative judgment that it is the misuse of naked power in securing sexual compliance that is blameworthy, rather than the abuse of a professional trust or a confidential, fiduciary relationship. In some senses, these enactments are similar to statutory rape provisions that protect victims thought to be too young and vulnerable to make informed choices about sexual conduct from overreaching by those in superior positions.³²⁷ Mor-

³²² See also MACDONALD, *supra* note 122, at 230 ("Unlike American jurisdictions, some other countries—U.S.S.R., Switzerland and Yugoslavia—regard sexual intercourse induced by economic coercion as a form of rape."); Baker, *supra* note 237, at 247 (proposing model statute); Chamallas, *supra* note 17, at 821 (noting Swiss and Soviet criminal codes prohibit employers from sexually exploiting employees); Harris, *supra* note 12, at 644 (noting that several foreign jurisdictions prohibit economic coercion in obtaining effective consent to sexual intercourse).

³²³ DEL. CODE ANN. tit. 11, § 763(1) (1995).

³²⁴ N.C. GEN. STAT. § 14-395.1(b)(1) (1997).

³²⁵ TEX. PENAL CODE ANN. § 39.03(c) (West 1994).

³²⁶ Baker, *supra* note 237, at 213.

³²⁷ "The cases left out are handled by development of a status concept, one which

ever, because these provisions disaggregate power from physical force, they delegitimize conduct that has previously escaped criminal punishment, like that of the defendants in *Thompson* (the high-school principal) and *Mlinarich* (the guardian). In addition, the focus in many of these provisions on particularly vulnerable persons such as minors or prisoners underscores the power differential between defendants and victims—roughly corresponding with the abuse-of-authority cases discussed in Part I.E. Finally, the widespread adoption of these statutes, the broadest of any category, renders less meaningful the selective-coverage problem discussed in connection with those cases.

C. Sexual Penetration or Contact by Fraud or Deception

In addition to the plethora of state statutes that criminally punish individuals who abuse a position of trust or authority, some states have enacted specific statutes dealing with sexual contact obtained by fraud or deceit.³²⁸ First, two states punish defendants' use of unspecified forms of fraud to obtain sexual intercourse: Tennessee for the felonies of rape and sexual battery and Alabama for the misdemeanor of sexual misconduct. Second, in response to egregious acts by putative rapists and the lack of available statutory remedies, California and Kansas recently enacted provisions carving out certain circumstances in which a specific type of fraud will render a defendant criminally responsible for rape. Additionally, several states retain older criminal provisions relating to specific forms of fraud in obtaining sexual relations such as husband impersonation, fraud as to the nature of the act, or fraudulent administration of drugs. Third, ten states have global consent provisions men-

takes the prohibitions on sexual activities involving children (and certain others) as manifesting a distinct set of concerns—partly paternalistic, partly prohibitions on seriously exploitive conduct." J.H. Bogart, *On The Nature of Rape*, 5 PUB. AFF. Q. 117, 131 (1991).

³²⁸ Some foreign countries also have statutes punishing species of rape by fraud. In England, Parliament passed the Sexual Offenses Act of 1956 making it a misdemeanor to procure a woman by false pretenses or false representation in order to have sexual intercourse. K. L. Koh, *Consent and Responsibility in Sexual Offenses*, 1968 CRIM. L. REV. (ENG.) 81. New Guinea's Criminal Code provides: "Any person who has carnal knowledge of a woman, or girl, not his wife, without her consent, or with her consent, if the consent is obtained by . . . means of false or fraudulent representations as to the nature of the act, or in the case of a married woman, by impersonating her husband, is guilty of a crime which is called rape." Quoted in Scutt, *Fraudulent Impersonation*, *supra* note 134, at 64.

tioning deception that may arguably affect their jurisdiction's sexual offense statutes, although they are not explicitly part of these codes. This Part also considers remnants of the past, statutes punishing various forms of fraud in the context of separate crimes such as seduction and pandering. The common thread uniting all these statutes is their reference to fraud, artifice, or deceit; many of these enactments also explicitly alter the nonconsent requirement.³²⁹

1. General Types of Fraud

Two states provide for global treatment of fraud in relation to rape or other sexual offenses—Tennessee and Alabama. The distinguishing characteristic of both states' statutes is that they do not specifically set forth the exact types of fraud at issue. In contrast to the statutes in the next part which explicitly articulate the precise types of fraud needed to commit the offense, the following statutes can encompass a variety of deceptive behavior on the part of perpetrators.

a. *Tennessee: Rape and Sexual Battery by Fraud*

Under Tennessee's rather sophisticated grading structure, four categories of sexual offenses exist: aggravated rape, rape, aggravated sexual battery, and sexual battery.³³⁰ Aggravated rape and aggravated sexual battery statutes punish defendants' use of force or coercion when they are armed with a weapon, cause bodily injury, or have accomplices.³³¹ On the other hand, Tennessee's rape statute covers cases in which "The sexual penetration is accomplished by fraud."³³² Its sexual battery statute covers instances in which the

³²⁹ The one exception is the U.S. Military's treatment of fraud. 10 U.S.C. § 920 (1997). The Manual for Courts-Martial provides in pertinent part: "If there is actual consent, although obtained by fraud, the act is not rape, but if to the accused's knowledge the victim is of unsound mind or unconscious to an extent rendering him or her incapable of giving consent, the act is rape." MANUAL FOR COURTS-MARTIAL UNITED STATES § 45(c)(1)(e), at iv-65 1995. However, in *United States v. Booker*, 25 M.J. 114 (CMA 1987), the United States Court of Military Appeals interpreted this language as pertaining to fraud in the inducement but not fraud in the factum.

³³⁰ TENN. CODE ANN. §§ 39-13-502, 39-13-503(a)(4), 39-13-504, 39-13-505(a)(2), (a)(4) (1997).

³³¹ TENN. CODE ANN. § 39-13-502 (1997) (aggravated rape); TENN. CODE ANN. § 39-13-504 (1997) (aggravated sexual battery).

³³² TENN. CODE ANN. § 39-13-503(a)(4) (1997).

defendant achieves sexual contact, rather than penetration, and also includes a provision on fraud.³³³ Such fraud is defined as "used in normal parlance and includes, but is not limited to, deceit, trickery, misrepresentation and subterfuge, and shall be broadly construed to accomplish the purposes of this title;"³³⁴ Finally, Tennessee provides that consent is not effective when it is induced by deception.³³⁵

b. *Alabama: Sexual Misconduct*

Unlike Tennessee's incorporation of fraud into its rape and sexual battery provisions, Alabama criminally punishes certain lesser forms of sexual misconduct as misdemeanors. One section of Alabama's statute punishes sexual misconduct if: "Being a male, he engages in sexual intercourse with a female . . . with her consent *where consent was obtained by the use of any fraud or artifice*;"³³⁶ The commentary to this statute provides:

Section 13A-6-65 is not concerned with aggravated cases of rape, . . . rather it is directed toward the more unusual situations where a person has acquiesced to sexual intercourse . . . as a result of some fraud, artifice or stratagem.

Section 13A-6-65(a) offers an offense in instances where the line between criminal and noncriminal sexual conduct has been transgressed to an extent which requires punishment of the actor and vindication of the victim. It comprehends specific instances presently criminal (see below), but it is broad enough to include other situations where the naivete of the victim or guile of the actor is sufficient to allow the actor to gain sexual access to the person of another through some artifice or fraud, e.g., "necessary medical treatment." . . . Section 13A-6-65(a)(1) also includes the offense of seduction³³⁷

Alabama's sexual misconduct statute operates when the victim has consented, thus the defendant cannot claim consent as a defense.³³⁸

³³³ TENN. CODE ANN. § 39-13-505(a)(2), (a)(4) (1997).

³³⁴ TENN. CODE ANN. § 39-11-106(a)(13) (1997).

³³⁵ TENN. CODE ANN. § 39-11-106(a)(9)(A) (1997).

³³⁶ ALA. CODE § 13A-6-65(a)(1) (1994) (emphasis added); see also *Hightower v. State*, 443 So. 2d 1272 (1983) (dismissing case because of fatal variance in indictment under this statute).

³³⁷ ALA. CODE § 13A-6-65 Commentary (1994).

³³⁸ ALA. CODE § 13A-6-65(a)(1) (1995).

2. Specific Types of Fraud

a. Recent Enactments

i. California: Inducing Consent by Fear Based on Fraud

The California legislature in response to *Boro v. Superior Court*,³³⁹ discussed in Part I.A., amended its rape laws by including a new category of offense called "Inducing consent to sexual act by fraud or fear" which provides:

Every person who induces any other person to engage in sexual intercourse . . . *when his or her consent is procured by false or fraudulent representation or pretense that is made with the intent to create fear, and which does induce fear, and that would cause a reasonable person in like circumstances to act contrary to the person's free will, and does cause the victim to so act, is punishable by imprisonment . . .*³⁴⁰

The statutory title is slightly inaccurate because fraud must induce fear and is insufficient alone. However, in this section, California has explicitly described one set of circumstances in which consent will be ineffective.

ii. Kansas: Consent Obtained Through Knowing Misrepresentation

Kansas recently amended its rape statute to include two distinct categories of rape by fraud:

(3) sexual intercourse with a victim *when the victim's consent was obtained through a knowing misrepresentation made by the offender that the sexual intercourse was a medically or therapeutically necessary procedure; or*

(4) sexual intercourse with a victim *when the victim's consent was obtained through a knowing misrepresentation made by the offender that the sexual intercourse was a legally required procedure within the scope of the offender's authority.*³⁴¹

Like the California statute, Kansas's enactment renders consent based on certain types of fraud ineffective in the context of rape. Kansas's provisions closely resemble the abuse-of-trust and abuse-of-

³³⁹ 210 Cal. Rptr. 122 (Cal. Ct. App. 1985).

³⁴⁰ CAL. PENAL CODE § 266c (West Supp. 1998) (emphasis added).

³⁴¹ KAN. STAT. ANN. § 21-3502(a) (Supp. 1997) (emphasis added).

authority statutes in Parts II.A. and II.B., but employ the unique standard of "knowing misrepresentation." Kansas, like California, enacted the above-referenced legislation to close a loophole that allowed a defendant who allegedly raped three women, under the guise of performing a medical examination, to escape punishment because his behavior fell outside the extant statute.³⁴²

b. *Traditional Provisions*

i. Husband Impersonation

One traditional category of rape by fraud is provisions in rape and sexual assault statutes covering cases of husband impersonation. Eleven jurisdictions have statutes explicitly punishing this form of fraud in order to obtain sexual intercourse.³⁴³

³⁴² Rizzo, *supra* note 87, at C2.

³⁴³ ARIZ. REV. STAT. §§ 13-1401(5)(d) (Supp. 1997) (without consent includes if "victim is intentionally deceived to erroneously believe that the person is the victim's spouse"); CAL. PENAL CODE § 261(a)(5) (West Supp. 1998) (victim submits under belief actor is victim's spouse, and "this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief"); COLO. REV. STAT. § 18-3-403(1)(d) (1997) (actor knows victim submits "erroneously, believing the actor to be the victim's spouse"); IDAHO CODE § 18-6101(6) (1997) (victim submits under belief that actor is her husband, and "the belief is induced by artifice, pretense or concealment practiced by the accused, with intent to induce such belief."); LA. REV. STAT. ANN. § 14:43(A)(3) (West 1997 & Supp. 1998) (female victim submits under belief intentionally induced by any artifice, pretense, or concealment practiced by offender); NEB. REV. STAT. § 28-318(8)(a)(iv) (1995) (without consent includes "consent, if any was actually given, was the result of the actor's deception as to the identity of the actor"); OHIO REV. CODE ANN. § 2907.03(A)(4) (Anderson Supp. 1997) ("offender knows that the other person submits because the other person mistakenly identifies the offender as the other person's spouse."); OKLA. STAT. tit. 21, § 1111(A)(6) (Supp. 1998) (belief induced by artifice, pretense or concealment practiced by accused or by accused in collusion with spouse with intent to induce such belief); P.R. LAWS ANN. tit. 33, § 4061(e) (1992) (belief induced by artifice, pretense or concealment practiced by accused); UTAH CODE ANN. §§ 76-5-406(7) (1996) (without consent includes actor knowing victim submits or participates because victim erroneously believes actor is victim's spouse); WYO. STAT. ANN. § 6-2-303(a)(iv) (Michie 1997) (actor knows or should reasonably know that victim submits erroneously believing actor is spouse); see also ALA. CODE § 13A-6-65(a)(1) (1994) (commentary asserts that sexual misconduct also includes husband impersonation).

Texas had a statute that punished as rape sexual intercourse obtained by means of force, threats, or fraud. Fraud was defined as using some stratagem to induce the woman to believe that the defendant was her husband. Carpenter, *supra* note 127, at 606.

ii. Fraud as to the Nature of the Sexual Act

A number of rape and sexual assault statutes have miscellaneous provisions referring to fraud or deceit. Three states prohibit fraud or deception as to the *nature* of the act. Arizona defines "without consent" for purposes of its sexual offenses to include instances in which: "The victim is intentionally deceived as to the nature of the act."³⁴⁴ Similarly, Nebraska defines "without consent" for purposes of its sexual assault statute to include deception as to the identity of the actor, a variation of a husband impersonation provision, as well as deception as to the "nature or purpose of act on the part of the actor."³⁴⁵ California's rape statute prohibits sexual intercourse when the victim is "unconscious of the nature of the act," which it defines to include "[w]as not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact."³⁴⁶

iii. Fraud in Administering Drugs

Ohio's rape statute outlaws sexual intercourse if "[f]or the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception."³⁴⁷ Ohio's provision is unique in that states with similar drug provisions in their rape or sexual assault statutes do not incorporate the notion of fraud.³⁴⁸

³⁴⁴ ARIZ. REV. STAT. § 13-1401(5)(c) (Supp. 1997).

³⁴⁵ NEB. REV. STAT. § 28-318(8)(a)(iv) (1995).

³⁴⁶ CAL. PENAL CODE § 261(a)(4)(C) (West Supp. 1998); see also CAL. PENAL CODE § 261.6 (West Supp. 1998) (consent defined as "positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."); *Boro v. Superior Court*, 210 Cal. Rptr. 122 (Cal. Ct. App. 1985) (a discussion of the two sections in a rape case).

³⁴⁷ OHIO REV. CODE ANN. § 2907.02(A)(1)(a) (Anderson Supp. 1997); see also OHIO REV. CODE ANN. § 2907.05(A)(2) (Anderson Supp. 1997) (gross sexual imposition statute has same provision).

³⁴⁸ These statutes contain a provision regarding the administration of a drug, anesthetic, or alcohol to obtain the victim's compliance: ALA. CODE §§ 13A-6-60(6) (1994); ARIZ. REV. STAT. § 13-1401(5)(b) (Supp. 1997); ARK. CODE ANN. §§ 5-14-101(4) (Michie 1997); COLO. REV. STAT. §§ 18-3-402(1)(d), 18-3-404(1)(d) (1997); CONN. GEN. STAT. § 53a-73a(a)(1)(B), 53a-65(5) (1996 & Supp. 1998); DEL. CODE ANN. tit. 11, §§ 761(g)(5) (1996); D.C. CODE ANN. § 22-4102(4) (1996); FLA. STAT. ch. 794.011(1)(c), (4)(d) (1996); HAW. REV. STAT. § 707-700 (1993); IDAHO CODE § 18-6101(4) (1997); IOWA CODE

3. Global Consent Provisions: Consent is Ineffective if Induced by Force, Duress, or Deception

Some states have generic consent provisions applying to all types of criminal offenses not just sexual crimes. These provisions track Model Penal Code ("MPC") § 2.11 which describes when consent is ineffective in relieving a criminal actor of liability for conduct.³⁴⁹ One enumerated circumstance, for example, is when consent is induced by force, duress, or deception. Ten states' provisions incorporate the MPC language with respect to deception.³⁵⁰ These generic consent statutes commonly take two slightly different forms. One form specifies that assent does not constitute consent if: "It is induced by force, duress or deception."³⁵¹ Two states further qual-

§§ 709.1(1), 709.4(3) (1993); KY. REV. STAT. ANN. § 510.010(5) (Michie 1990 & Supp. 1996); LA. REV. STAT. ANN. §§ 14:43(A)(1) (West Supp. 1998); ME. REV. STAT. ANN. tit. 17-A, § 253(2)(A) (West Supp. 1997); MASS. GEN. LAWS ch. 272, § 3 (1996); MICH. COMP. LAWS § 750.520a(g) (1994); MINN. STAT. § 609.341(7)m (1996); MISS. CODE ANN. § 97-3-97(c) (1994); N.H. REV. STAT. ANN. § 632-A:2(I)(f) (1996); N.D. CENT. CODE §§ 12.1-20-03(1)(b), 12.1-20-07(1)(c) (Supp. 1997); OKLA. STAT. tit. 21, § 1111(A)(4) (1996); 18 PA. CONS. STAT. ANN. § 3121(4) (West Supp. 1998); TEX. PENAL CODE ANN. § 22.011(b)(6) (West Supp. 1998); UTAH CODE ANN. § 76-5-406(8) (Supp. 1998); VT. STAT. ANN. tit. 13, § 3252(a)(2) (Supp. 1997); W.VA. CODE § 61-8B-1(4) (1997); WYO. STAT. ANN. § 6-2-303(a)(iii) (Michie 1997).

³⁴⁹ It provides: "Ineffective Consent. Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if: . . . it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense." MODEL PENAL CODE § 2.11(3)(d) (Proposed Official Draft 1962). The commentary to this section states: "Many thefts are the result of transactions to which there is assent by the victim; the fraudulent method of inducing the assent, however, deprives it of controlling force." MODEL PENAL CODE § 2.11 commentary at 399 (Proposed Official Draft 1962).

³⁵⁰ ALA. CODE § 13A-2-7(c)(4) (1994); COLO. REV. STAT. § 18-1-505(3)(d) (1997); DEL. CODE ANN. tit. 11, § 453(4) (1995); HAW. REV. STAT. § 702-235(4) (1993); ME. REV. STAT. ANN. tit. 17-A, § 109(3)(C) (1996); MO. REV. STAT. § 556.061(5)(c) (1996); MONT. CODE ANN. § 45-2-211(2)(c) (1997); N.J. STAT. ANN. § 2C:2-10(c)(3) (West 1995); N.D. CENT. CODE § 12.1-17-08(2)(c) (1997); 18 PA. CONS. STAT. § 311(C)(4) (1998). *But see* N.H. REV. STAT. ANN. § 626:6 (1996) (omitting the "force, duress or deception" language from its provision). *See also* TENN. CODE ANN. § 39-11-106(a)(9)(A) (1997) ("Consent is not effective when: (A) Induced by deception or coercion; . . ."); TEX. PENAL CODE ANN. § 1.07(a)(19) (West 1994) ("Consent is not effective if: . . . induced by force, threat, or fraud.") This section appears to be limited to property offenses; Texas defines "without consent" differently in its sexual assault statutes. *But see* *Smith v. State*, 873 S.W.2d 66 (1993) (court cites both section 1.07 and sexual-assault consent provision in sexual assault case).

³⁵¹ ALA. CODE § 13A-2-7(c)(4) (1994); COLO. REV. STAT. § 18-1-505(3)(d) (1997); MO. REV. STAT. § 556.061(5)(c) (1996); N.D. CENT. CODE § 12.1-17-08(2)(c) (1997). In *Ferguson v. People*, 824 P.2d 803 (Colo. 1992), the court cited Colorado's global con-

ify this language by retaining the MPC language "of a kind sought to be prevented by the law defining the offense."³⁵² The other form provides that consent does not constitute a defense under the same circumstances.³⁵³ Therefore, in rape cases where consent is procured by deception, such consent could be vitiated in states with global consent provisions fashioned after the MPC.³⁵⁴

One question arises, however, when determining the applicability of these consent provisions—whether a conflicting definition appears in the sexual offenses section of the criminal code.³⁵⁵ Eight states do not separately define consent in their sexual offense codes;³⁵⁶ Delaware and Montana do.³⁵⁷ Delaware's definition of "without consent" is critical because it incorporates abuse-of-trust provisions for doctors, psychologists, and clergy members and appears more controlling than its generic provision.³⁵⁸ In Montana, the annotator's notes to the generic consent provision make clear that it applies to sexual crimes.³⁵⁹ However, Montana defines "without

sent provision in the context of a case involving sexual imposition by a psychotherapist. It noted that in 1989, when Colorado amended its statute to negate consent as a defense, it merely clarified the application of this provision.

³⁵² N.J. STAT. ANN. § 2C:2-10(c)(3) (West 1995); 18 PA. CONS. STAT. § 311(C)(4) (1998).

³⁵³ DEL. CODE ANN. tit. 11, § 453(4) (1995); HAW. REV. STAT. § 702-235(4) (1993); ME. REV. STAT. ANN. tit. 17-A, § 109(3)(C) (West 1996); MONT. CODE ANN. § 45-2-211(2)(c) (1997).

³⁵⁴ Hawaii has, in fact, held that its statute renders the factum-inducement distinction irrelevant. See *State v. Oshiro*, 696 P.2d 846, 850 n.2 (Haw. Ct. App. 1985).

³⁵⁵ The MPC and seven state provisions contain language such as: "unless otherwise provided by the Code or by the law defining the offense" MODEL PENAL CODE § 2.11(3) (Proposed Official Draft 1962); ALA. CODE § 13A-2-7(c) (1996); COLO. REV. STAT. § 18-1-505(3) (1997); DEL. CODE ANN. tit. 11, § 453 (1995); HAW. REV. STAT. § 702-235 (1993); MO. REV. STAT. § 556.061 (1996); N.J. STAT. ANN. § 2C:2-10(c) (West 1995); 18 PA. CONS. STAT. § 311(C) (1998). Maine and North Dakota simply provide "within the meaning of this section." ME. REV. STAT. ANN. tit. 17-A, § 109(3) (West 1996); N.D. CENT. CODE § 12.1-17-08(2) (1997). Montana is silent on this issue. MONT. CODE ANN. § 45-2-211 (1997).

³⁵⁶ ALA. CODE § 13A-6-60 (1994); COLO. REV. STAT. § 18-3-401 (1997); HAW. REV. STAT. § 707-700 (1993); ME. REV. STAT. ANN. tit. 17-A, § 251 (West Supp. 1997); MO. REV. STAT. § 566.010 (1996); N.J. STAT. ANN. § 2C:14-1 (West 1995); N.D. CENT. CODE § 12.1-20-02 (Supp. 1997); 18 PA. CONS. STAT. § 3101 (Supp. 1998).

³⁵⁷ DEL. CODE ANN. tit. 11, § 761(g) (1995) (definition of "without consent" applicable to sexual offense); MONT. CODE ANN. §§ 45-5-501(1); 45-5-503(1) (1997) (definition of "without consent" for sexual intercourse without consent).

³⁵⁸ See *supra* note 281 and accompanying text.

³⁵⁹ It provides: "It is an element of the sexual offenses of Sexual Assault and Sexual Intercourse Without Consent (citations omitted) that the sexual act was committed without the consent of the victim. Thus, consent is a defense which may eliminate criminal responsibility." Annotator's Note accompanying MONT. CODE ANN. § 45-2-211 (1997)

consent" for the purposes of the offense of "sexual intercourse without consent" more narrowly.³⁶⁰ Thus, the generic consent definition arguably applies to Montana's sexual assault statute³⁶¹ while the narrower consent definition applies to the offense of sexual intercourse without consent.

4. Remnants of the Past: The Other Crimes of Seduction, Abduction, Marrying Under False Personation, and Pandering

Finally, in addition to rape or sexual assault statutes, several states retain criminal seduction statutes which implicate deception. Criminal seduction statutes are one of the oldest types of statutory law prohibiting the commission of sexual intercourse based upon some form of fraud.³⁶² Seduction required a chaste woman who was induced to have sexual intercourse under the false promise of marriage.³⁶³ Six jurisdictions presently retain seduction statutes in their criminal codes.³⁶⁴ Two states statutes explicitly mention some form of fraud;³⁶⁵ three others mention the promise of marriage.³⁶⁶ Moreover, several jurisdictions recognized in the past a

³⁶⁰ The statute defines "without consent" to include physical force and a victim incapable of consent because mentally defective, physically helpless, or less than sixteen years old. MONT. CODE ANN. § 45-5-501(1)(b)(i)-(iii) (1997).

³⁶¹ MONT. CODE ANN. § 45-5-502(1) (1997) provides: "A person who knowingly subjects another person to any sexual contact without consent commits the offense of sexual assault."

³⁶² See generally 70 AM. JUR. 2D *Seduction* 97 (1987); Humble, *supra* note 5.

³⁶³ 70 AM. JUR. 2D at 104.

³⁶⁴ MICH. COMP. LAWS § 750.532 (1991) (seduction); MISS. CODE ANN. § 97-29-55 (1994) (seduction of female over 18 by promised or pretended marriage); MISS. CODE ANN. § 97-5-21 (1994) (seduction of child under 18); OKLA. STAT. tit. 21, § 1120 (1996) (seduction under promise of marriage); OKLA. STAT. tit. 21, § 1121-1122 (1996) (marriage as defense and penalty for abandonment of marriage after seduction); P.R. LAWS ANN. tit. 33, § 4063 (1992) (seduction); S.C. CODE ANN. § 16-15-50 (Law. Co-op. Supp. 1995) (seduction under promise of marriage); V.I. CODE ANN. tit. 14, § 1981 (1997); see also ALA. CODE § 13A-6-65(a)(1) (1994) (commentary to sexual misconduct statute indicates that it includes the offense of seduction); MASS. GEN. LAWS ch. 272, § 4 (1997) ("Whoever induces any person under eighteen of chaste life to have unlawful sexual intercourse . . ."); NEV. REV. STAT. §§ 200.364; 200.368 (1997) (punishing statutory sexual seduction which more closely resembles statutory rape than seduction).

³⁶⁵ MISS. CODE ANN. § 97-29-55 (1996) (obtaining carnal knowledge by feigned or pretended marriage or false or feigned promise of marriage); S.C. CODE ANN. § 16-15-50 (Law Co-op. 1996) (by means of deception and promise of marriage). South Carolina's provision is quite restrictive, prohibiting conviction if the woman's testimony is uncorroborated or she is lewd and unchaste and staying action if defendant marries woman.

³⁶⁶ OKLA. STAT. tit. 21, § 1120 (1996); P.R. LAWS ANN. tit. 33, § 4063 (1992); V.I.

tort of seduction. Since such time, most legislatures have abolished both criminal and civil seduction statutes as part of the anti-heartbalm legislation.³⁶⁷ In repealing its civil seduction statute, Illinois's legislature stated that it would leave "punishments of wrongdoers guilty of seduction to proceedings under the criminal laws of the state"³⁶⁸

In addition to the above, five states criminalize abduction for the purposes of marriage, sexual intercourse, or prostitution;³⁶⁹ two provisions mention fraud.³⁷⁰ Seven states prohibit falsely impersonating someone for the purpose of marriage, closely resembling the husband impersonation provisions discussed earlier.³⁷¹ California's statute, for example, provides: "Every person who falsely personates another, and in such assumed character marries or pretends to marry, or to sustain the marriage relation towards another

CODE ANN. tit. 14, § 1981 (1997).

³⁶⁷ See Larson, *Women Understand*, *supra* note 24. The commentary to New Jersey's statutory repeal provides: "Primary aim of Heart Balm Act barring suit based upon breach of promise to marry was to do away with excessive claims, coercive by their very nature and, frequently, fraudulent in nature." N.J. STAT. ANN. § 2A:23-1 et seq. (West 1996) (Notes of Decisions) (citations omitted). Minnesota issued a similar policy declaration:

Actions based upon alleged alienation of affections, criminal conversation, seduction and breach of contract to marry, have been subject to grave abuses, have caused intimidation and harassment, to innocent persons and have resulted in the perpetration of frauds. It is declared as the public policy of this state that the best interests of the people of this state will be served by the abolition of these causes of action.

MINN. STAT. § 553.01 (1996).

³⁶⁸ 740 ILL. COMP. STAT. 15/1 (West 1996) (legislative declaration).

³⁶⁹ MASS. GEN. LAWS ch. 272, § 1 (1996) (abduction of unmarried person under sixteen for purpose of marriage); MASS. GEN. LAWS ch. 272, § 2 (1996) (abduction for prostitution or unlawful sexual intercourse); MICH. COMP. LAWS § 750.13 (1991) (enticing away female under sixteen for prostitution, concubinage, sexual intercourse, or marriage); MISS. CODE ANN. § 97-3-1 (1994) (abduction for purposes of marriage); MISS. CODE ANN. § 97-5-5 (1994) (enticing child for prostitution, concubinage, or marriage); OKLA. STAT. tit. 21, § 1119 (Supp. 1998) (abduction of person under fifteen for marriage, concubinage, or any crime involving moral turpitude); VA. CODE ANN. § 18.2-48 (Michie Supp. 1997) (abduction with intent to defile or for child under sixteen for the purpose of concubinage or prostitution); see also N.M. STAT. ANN. § 30-9-4(l) (Michie 1994) ("under pretense of marriage, knowingly detaining a person or taking a person into the state or causing a person to leave the state for the purpose of prostitution").

³⁷⁰ MASS. GEN. LAWS ch. 272, § 2 (1996) ("Whoever fraudulently and deceitfully entices or takes away a person"); MISS. CODE ANN. § 97-3-1 (1996) ("by force, menace, fraud, deceit, stratagem or duress,").

³⁷¹ CAL. PENAL CODE § 528 (West 1996); COLO. REV. STAT. § 18-5-113 (1997); IDAHO CODE § 18-3003 (1997); MINN. STAT. § 609.83 (1996); MISS. CODE ANN. § 97-19-33 (1994); NEV. REV. STAT. § 205.450 (1997); OKLA. STAT. tit. 21, § 1531 (Supp. 1998).

er, with or without the connivance of such other, is guilty of a felony.³⁷²

Further, thirteen states have pandering statutes, a unique blend of fraud and sex,³⁷³ some pertaining only to the offender's spouse.³⁷⁴ Michigan's statute provides in relevant part:

[A]ny person who by promises, threats, violence, by any device or scheme, by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, or having legal charge, shall take, place, harbor, inveigle, entice, persuade, encourage or procure any female person to enter any place within this state in which prostitution is practiced, encouraged or allowed, for the purpose of prostitution;³⁷⁵

The language of this enactment is striking. In warding off the evil of prostitution, Michigan crafted a comprehensive provision protecting women from a broad range of pressures including force, fraud, coercion, and other means strongly resembling more modern abuse-of-trust and abuse-of-authority provisions. Perhaps more than any other set of statutes reviewed in this Part, these laws demonstrate legislative know-how in writing all-inclusive provisions. Unfortunately, that knowledge has not been put to good use in drafting rape or sexual assault statutes.

5. Conclusion

The legislative prohibition of sexual penetration or contact accomplished by fraud that occurs outside of professional treatment contexts continues to be a difficult problem. No doubt way of

³⁷² CAL. PENAL CODE § 528 (West 1996).

³⁷³ CAL. PENAL CODE § 266a (West 1996) (procurement by fraud); CAL. PENAL CODE § 266i (West Supp. 1998) (pandering); D.C. CODE ANN. § 22-2708 (Supp. 1998) (causing spouse to live in prostitution); MD. ANN. CODE OF 1957, CRIMES & PUN. § 429 (1997) (placing spouse in house of prostitution); MICH. COMP. LAWS § 750.455 (1991) (pandering); MISS. CODE ANN. § 97-29-51 (1994) (procuring); NEV. REV. STAT. § 201.300 (Supp. 1997) (pandering); NEV. REV. STAT. § 201.310 (1997) (placing spouse in brothel); N.M. STAT. ANN. § 30-9-4 (Michie 1994) (promoting prostitution); OKLA. STAT. tit. 21, § 1081 (Supp. 1998) (pandering); R.I. GEN. LAWS § 11-34-1 (1994) (pandering); S.C. CODE ANN. § 16-15-100 (Law. Co-op. 1995) (prostitution); VA. CODE ANN. § 18.2-368 (Michie 1996) (placing or leaving wife for prostitution); V.I. CODE ANN. tit. 14, § 1625 (1997) (pandering); W. VA. CODE § 61-8-7 (1997) (procuring for house of prostitution).

³⁷⁴ D.C. CODE ANN. § 22-2708 (Supp. 1998); MD. CODE ANN. OF 1957, CRIMES & PUN. § 429 (1996); NEV. REV. STAT. § 201.310 (1997); VA. CODE ANN. § 18.2-368 (Michie 1996).

³⁷⁵ MICH. COMP. LAWS § 750.455 (1996).

casting their nets too wide, state legislatures have been quite conservative, tending to enact very specific provisions to cover a few factual scenarios rather than passing more global fraud statutes. The importance of the two archetypical rape by fraud cases, fraudulent medical treatment and husband impersonation, is evident in many of these modern enactments; California's and Kansas's specific fraud provisions flowed from fraudulent medical cases in those jurisdictions and Tennessee's rape by fraud law, although written broadly, is an update of an older husband impersonation statute. In addition, although some have global consent provisions, states seldom apply them in the context of sexual offenses, underlining the point that rape continues to be treated differently from other crimes.³⁷⁶ The few remaining seduction, abduction, and pandering statutes are counterexamples of a broader retrenchment in protection afforded persons from some types of sexual fraud.³⁷⁷ Finally, none of the reviewed provisions, with the exception of Tennessee's,³⁷⁸ even approaches the problem of rape by fraud in the business or commercial setting. Thus, while legislatures have made considerable progress, this area remains one of the least developed.

D. *Sexual Intercourse by Coercion, Compulsion, Extortion, or Duress*

A fourth major category of statutes, appearing in approximately twenty jurisdictions, deviate from rape laws by substituting non-physical forms of coercion for the traditional requirement of physical force or threat of physical force. Many of these statutes provide for a lesser degree of sexual crime than cases involving physical force. Moreover, they differ from abuse-of-trust statutes because they do not specify individuals by whom or circumstances in which victims may be assailed; they also do not rely on an imbalance of power as in abuse-of-authority provisions. Finally, these statutes address coercive, not fraudulent, pressures, distinguishing them from the previous category.

³⁷⁶ See *infra* Part III.

³⁷⁷ See also Schulhofer, *Gender Question*, *supra* note 10, at 136 (noting since abolition of seduction, criminal law has immunized all misrepresentations no matter how egregious).

³⁷⁸ See *supra* note 332.

1. Nonphysical Threats or Means of Causing Submission

A number of states retain criminal provisions that outlaw the use of various threats or means to coerce a victim to submit to sexual intercourse. One group punishes defendants' use of threats to retaliate to secure sexual compliance, with some states defining "threat to retaliate" narrowly to encompass only measures involving physical force or kidnapping,³⁷⁹ but six others cover at least one nonphysical means, most commonly extortion.³⁸⁰ For example, New Hampshire's statute, the broadest in scope, defines retaliate to include: "[p]hysical or mental torment or abuse[;] kidnapping, false imprisonment, or extortion[; or] public humiliation or disgrace."³⁸¹ While not employing the threat-to-retaliate formulation of these other states, Tennessee punishes rape and sexual battery accomplished by coercion,³⁸² which includes extortion and the use of "parental, custodial, or official authority" on a child under fifteen.³⁸³ Similarly, Vermont prohibits "threatening or coercing the other person" to submit to sexual intercourse.³⁸⁴

³⁷⁹ CAL. PENAL CODE § 261(a)(6) (West Supp. 1998) (against victim's will by threat to retaliate, i.e., threat to kidnap, falsely imprison, inflict extreme pain, serious bodily injury, or death); COLO. REV. STAT. § 18-3-402(1)(c) (1997) (causes submission by threat to retaliate, i.e., threat of kidnapping, death, serious bodily injury, or extreme pain); WYO. STAT. ANN. § 6-2-303(a)(i) (Michie 1996) (same); see also R.I. GEN. LAWS § 11-37-1(2)(D) (Supp. 1997) (defining force or coercion to include threatening to murder, inflict bodily injury, or kidnap).

³⁸⁰ FLA. STAT. ch. 794.011(1)(f), (4)(c) (Supp. 1998) (coerces victim to submit by threatening to retaliate, i.e., threats of future physical punishment, kidnapping, false imprisonment, forcible confinement, or extortion); MICH. COMP. LAWS § 750.520b(1)(f)(iii), 750.520e(1)(b)(iii) (Supp. 1998) (coerces victim to submit by threatening to retaliate, i.e., threats of physical punishment, kidnapping, or extortion); N.H. REV. STAT. ANN. § 632-A:1 II, 632-A:2 I(d) (1996) (coerces victim to submit by threatening to retaliate, i.e., physical or mental torment or abuse; kidnapping, false imprisonment, or extortion; or public humiliation or disgrace); N.M. STAT. ANN. § 30-9-10(A)(3) (Michie 1994) (force or coercion includes threats of physical punishment, kidnapping, extortion, or retaliation); S.C. CODE ANN. § 16-3-655(3) (Law. Co-op. 1996) (aggravated coercion includes threatening to retaliate by infliction of physical harm, kidnapping, or extortion); UTAH CODE ANN. § 76-5-406(4) (Supp. 1998) (coerces victim to submit by threatening to retaliate, i.e., threats of physical force, kidnapping, or extortion).

³⁸¹ N.H. REV. STAT. ANN. § 632-A:1 II (1996).

³⁸² TENN. CODE ANN. §§ 39-13-502, 39-13-503, 39-13-504, 39-13-505 (1997).

³⁸³ TENN. CODE ANN. § 39-13-501(1) (1997). In *State v. McKnight*, 900 S.W.2d 36 (Tenn. Crim. App. 1994), the court interpreted coercion to include the defendant's threat to expose the victim's homosexuality.

³⁸⁴ VT. STAT. ANN. tit. 13, § 3252(a)(1) (Supp. 1997).

Six states adopt a second approach based to some degree upon MPC § 213.1(2)(a) which prohibits sexual intercourse when the female is compelled to submit "by any threat that would prevent resistance by a woman of ordinary resolution."³⁸⁵ North Dakota's sexual imposition statute tracks the MPC language most closely; it prohibits a sexual act or contact "if the actor compels the other person to submit by any threat that would render a person of reasonable firmness incapable of resisting."³⁸⁶ Similarly, Pennsylvania prohibits indecent assault "by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; . . . "³⁸⁷ The statute defines forcible compulsion broadly: "Compulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied."³⁸⁸ California's rape

³⁸⁵ MODEL PENAL CODE § 213.1(2) (Proposed Official Draft 1962). The commentary provides in pertinent part:

Examples might include threat to cause her to lose her job or to deprive her of a valued possession. This provision extends liability for coercion by threat far beyond anything contemplated by prior law. It rests on the judgment that using one's ability to cause harm in order to override the will of a reluctant female is wrongful and should be punished.

Stated abstractly, the rationale . . . seems self-evident. Yet there are obvious dangers in extending the prospect of criminal sanctions into the shadow area between coercion and bargain. To take an extreme example, the man who "threatens" to withhold an expensive present unless his girlfriend permits his advances is plainly not a fit subject for punishment under the law of rape.

MODEL PENAL CODE § 213.1 commentary at 314 (Proposed Official Draft 1962). Coercion is overwhelming the will of the victim, while bargain is offering "an unattractive choice to avoid some unwanted alternative." *Id.*; cf. Durham, *supra* note 18, at 57 ("Many threats other than direct bodily harm, such as loss of a job or suitor, may coerce a girl into submission; and though she may consider herself opposed to the act, the law does not treat these situations as rape.") (footnote omitted).

³⁸⁶ N.D. CENT. CODE § 12.1-20-04(1) (1997). Compare this language to North Dakota's duress statute which provides: "Compulsion within the meaning of this section exists only if the force, threat, or circumstances are such as would render a person of reasonable firmness incapable of resisting the pressure." N.D. CENT. CODE § 12.1-05-10(1) (1997). The sexual imposition statute appears to require less by way of compulsion because it does not specify force or threat of force, and may cover other types of "duress" such as exposing a secret or causing financial hardship.

³⁸⁷ 18 PA. CONS. STAT. §§ 3125(3), 3126(a)(3) (Supp. 1998).

³⁸⁸ 18 PA. CONS. STAT. § 3101 (Supp. 1998). But see *Commonwealth v. Mlinarich*, 542 A.2d 1335 (Pa. 1988) (interpreting this provision quite narrowly in a rape-by-coercion context).

statute contains a separate duress provision with³⁸⁹ duress defined as:

a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress.³⁹⁰

Three states adapt the MPC language by substituting the term "means" for "threat." Ohio and Wyoming criminalize coercing or causing another person to submit "by any means that would prevent resistance by a person of ordinary resolution."³⁹¹ Colorado's second-degree sexual assault provision outlaws if: "The actor causes submission of the victim to sexual penetration [sexual intrusion] by any means other than those set forth in section 18-3-402 [first-degree sexual assault],³⁹² but of sufficient consequence reasonably calculated to cause submission against the victim's will;"³⁹³ Finally, Washington retains a unique provision—third-degree rape occurs: "Where there is threat of substantial unlawful harm to property rights of the victim."³⁹⁴

2. Compulsion, Coercion, or Extortion

Three states have criminal enactments providing for broader coverage of coercion in the rape context, although they use three different terms to address such coercion, i.e., compulsion, coercion, and extortion. Hawaii's sexual assault statute differentiates between strong compulsion (e.g., threats, dangerous instrument, or physical force)³⁹⁵ and compulsion ("absence of consent, or a threat, express or implied, that places a person in fear of public humiliation, prop-

³⁸⁹ CAL. PENAL CODE § 261(a)(2) (West Supp. 1998).

³⁹⁰ CAL. PENAL CODE § 261(b) (West Supp. 1998).

³⁹¹ OHIO REV. CODE ANN. § 2907.03(A)(1) (Anderson Supp. 1997) ("knowingly coerces the other person to submit"); WYO. STAT. ANN. § 6-2-303(a)(i) (Michie 1996) ("causes submission of the victim").

³⁹² First-degree sexual assault requires physical force, threats of force or physical retaliation, or a drugged or physically helpless victim. COLO. REV. STAT. § 18-3-402(1) (1997).

³⁹³ COLO. REV. STAT. § 18-3-403(1)(a) (1997).

³⁹⁴ WASH. REV. CODE § 9A.44.060 (1988 & Supp. 1998).

³⁹⁵ HAW. REV. STAT. § 707-700 (1993 & Supp. 1996).

erty damage, or financial loss.")³⁹⁶ Hawaii's first-degree sexual assault statute outlaws sexual penetration accomplished by strong compulsion;³⁹⁷ lesser degrees of sexual assault require compulsion which vary based upon the actor's mental state and whether penetration or contact occurred.³⁹⁸

New Jersey's sexual assault statute prohibits penetration when the actor uses physical force or coercion, grading the offense depending upon whether the victim sustains severe personal injury.³⁹⁹ New Jersey defines coercion for purposes of sexual assault by reference to its criminal coercion statute.⁴⁰⁰ This latter statute covers a broad range of conduct including: inflicting bodily injury, accusing someone of a crime, exposing a secret, or "perform[ing] any other act which would not in itself substantially benefit the actor but which is calculated to substantially harm another person with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships."⁴⁰¹ New Jersey's statute punishes coercive means falling far short of the traditional requirement of physical force or threat.⁴⁰²

Delaware's sexual extortion statute, the only one in existence, is quite similar in scope to New Jersey's sexual assault statute addressing coercion. It provides in pertinent part

A person is guilty of sexual extortion when the person intentionally compels or induces another person to engage in any sexual act involving

³⁹⁶ *Id.*; see also *State v. Caprio*, 937 P.2d 933 (Haw. Ct. App. 1997) (discussing difference between two provisions).

³⁹⁷ HAW. REV. STAT. § 707-730(1)(a) (1993).

³⁹⁸ HAW. REV. STAT. §§ 707-731(1)(a) (Supp. 1997) (2nd degree: knowingly subjects to sexual penetration), 707-732(1)(a) (1993) (3rd degree: recklessly subjects to sexual penetration), 707-733(1)(a) (1993) (4th degree: knowingly subjects to sexual contact).

³⁹⁹ N.J. STAT. ANN. §§ 2C:14-2(a)(6) (aggravated sexual assault), 2C:14-2(c)(1) (sexual assault) (West 1997); see also N.J. STAT. ANN. § 2C:14-3 (West 1997) (aggravated and non-aggravated criminal sexual contact).

⁴⁰⁰ N.J. STAT. ANN. § 2C:13-5 (West 1997); see also N.Y. PENAL LAW § 135.60 (Consol. 1998) (coercion in the second degree); MODEL PENAL CODE § 212.5(1) (punishing the separate offense of criminal coercion). Courts have interpreted New York's coercion statute, which is quite similar to New Jersey's, as covering various types of sexual activity. See, e.g., *People v. Williams*, 508 N.Y.S.2d 797 (N.Y. App. Div. 1986).

⁴⁰¹ N.J. STAT. ANN. § 2C:13-5 (West 1997).

⁴⁰² Two states include coercion as a factor negating consent in their general definitional sections. NEB. REV. STAT. § 28-318(8)(a)(i) (1995) (without consent includes if victim compelled to submit by coercion); TENN. CODE ANN. § 39-11-106(a)(9)(A) (1997) (consent ineffective if induced by coercion). North Carolina caselaw has interpreted "force" for purposes of its rape statutes to include "fear, fright, or coercion." See, e.g., *State v. Martin*, 485 S.E.2d 352, 354 (N.C. Ct. App. 1997).

contact, penetration or intercourse with the person or another or others by means of instilling in the victim a fear that, if such sexual act is not performed, the defendant or another will.⁴⁰³

inflict physical injury, cause damage to property, or expose a secret. Delaware's final alternative in its sexual extortion statute is almost identical to New Jersey's formulation outlawing extortionate threats with respect to business, financial condition, or personal relationships.⁴⁰⁴ Finally, New Hampshire retains a provision mentioning extortion but fails to utilize the "threat" or "means" language of other statutes described above.⁴⁰⁵

3. Coercion or Duress Negate Consent

Four jurisdictions provide that coercion negates consent.⁴⁰⁶ Tennessee, for instance, provides: "Consent is not effective when: (A) Induced by deception or coercion; . . ."⁴⁰⁷ In addition, ten states have global consent provisions that negate consent when "it is induced by force, duress, or deception."⁴⁰⁸ However, duress is usually confined to a "threat of imminent death or serious physical injury."⁴⁰⁹

⁴⁰³ DEL. CODE ANN. tit. 11, § 776 (1996).

⁴⁰⁴ Delaware's statute continues to find guilt where one extorts a sexual act by means of instilling fear in the victim that another will: "Perform any other act which is calculated to harm another person materially with respect to the other person's health, safety, business, calling, career, financial condition, reputation or personal relationships." DEL. CODE ANN. tit. 11, § 776(7) (1996).

⁴⁰⁵ N.H. REV. STAT. ANN. § 632-A:2 I(e) (1996) (victim submits because of false imprisonment, kidnapping, or extortion).

⁴⁰⁶ D.C. CODE ANN. § 22-4101(4) (1996) (lack of resistance resulting from force, threat, or coercion does not constitute consent); FLA. STAT. ch. 794.011(1)(a) (Supp. 1998) ("Consent" means intelligent, knowing, and voluntary consent and shall not be construed to include coerced submission."); NEB. REV. STAT. § 28-318(8)(a)(i) (1995) (defining without consent to include "victim was compelled to submit due to the use of force or threat of force or coercion"); TENN. CODE ANN. § 39-11-106(a)(9)(A) (1997).

⁴⁰⁷ TENN. CODE ANN. § 39-11-106(a)(9)(A) (1997).

⁴⁰⁸ ALA. CODE § 13A-2-7(c)(4) (1994); COLO. REV. STAT. § 18-1-505(3)(d) (1997); DEL. CODE ANN. tit. 11, § 453(4) (1996); HAW. REV. STAT. § 702-235(4) (1993); ME. REV. STAT. ANN. tit. 17-A, § 109(3)(C) (West 1996); MO. REV. STAT. § 556.061(5)(c) (Supp. 1998); MONT. CODE ANN. § 45-2-211(2)(c) (1997); N.J. STAT. ANN. § 2C:2-10(c)(3) (West 1995 & Supp. 1998); N.D. CENT. CODE § 12.1-17-08(2)(c) (1997); 18 PA. CONS. STAT. § 311(c)(4) (1998).

⁴⁰⁹ See, e.g., ALA. CODE § 13A-3-30(a) (1994).

4. Conclusion

A significant number of states have statutes covering situations in which the defendant secured the victim's sexual acquiescence by threatening various types of nonphysical harm or utilizing other means not involving physical force. These coercion provisions are helpful in capturing another segment of previously unpunished criminal behavior, threats falling outside of abuse-of-authority situations. For the most part, such statutory provisions are written broadly enough to encompass the sexual extortion cases discussed in Part I.F. The statutes in Hawaii, New Jersey, and Delaware are superior to the MPC variations, however, because they more clearly embody a legislative judgment that extortionate practices are illegal in securing sex. As a result, they are also more likely to be invoked because they are more specifically tailored to the problem of coercive sex.

E. *Nonconsensual Sexual Relations Without Force, Fraud, or Coercion*

Finally, to complete this review of innovative rape and sexual assault statutes, eighteen states have at least one statute that dispenses with force, fraud, or coercion and punishes a specie of sexual offense that simply requires sexual penetration or contact to occur without the victim's consent.⁴¹⁰ Many of these provisions, like the coercion statutes, are designed as less serious alternatives to forcible rape or sexual assault laws.⁴¹¹

1. Eliminating Force Entirely

Nevada's sexual assault statute is the simplest; it does not require force at all, but only that the act be against the will of the victim.⁴¹² Nevada grades the offenses depending upon whether

⁴¹⁰ See also *State ex. rel. M.T.S.*, 609 A.2d 1266 (N.J. 1992) (interpreting New Jersey's sexual assault statute's requirement of "physical force" as being satisfied with force necessary for sexual act if victim did not consent).

⁴¹¹ While treated separately *supra*, several states also explicitly alter consent requirements in abuse-of-trust or abuse-of-authority statutes. See *supra* Part II.A-B.

⁴¹² NEV. REV. STAT. § 200.366 (1997); see also *McNair v. State*, 825 P.2d 571, 574 (Nev. 1992). In *State ex rel. M.T.S.*, 609 A.2d 1266 (N.J. 1992), the New Jersey Supreme court held its sexual assault statute's force requirement is satisfied by the force necessary for intercourse when the act is nonconsensual.

the perpetrator causes substantial bodily injury or the assault is against a child under the age of sixteen.⁴¹³

2. Requiring Affirmative Consent

Two states require the defendant actor to obtain affirmative consent from the victim prior to sexual contact in order to avoid criminal liability. Wisconsin punishes four degrees of sexual assault; the first two degrees require lack of consent as well as aggravating circumstances such as force, bodily harm, or multiple offenders.⁴¹⁴ Third-degree sexual assault covers nonconsensual sexual intercourse and fourth-degree sexual assault involves nonconsensual sexual contact without aggravation.⁴¹⁵ Wisconsin defines consent as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact."⁴¹⁶ Similarly, Vermont punishes as sexual assault any act which compels another to participate in a sexual act, *inter alia*, without the other's consent,⁴¹⁷ defining consent as "words or actions by a person indicating a voluntary agreement to engage in a sexual act."⁴¹⁸

3. Lack of Consent Expressed Through Words or Conduct

Three states provide for sexual offenses if the victim expresses nonconsent through words or conduct.⁴¹⁹ Nebraska defines first-degree sexual assault as sexual penetration, *inter alia*, without the

⁴¹³ NEV. REV. STAT. § 200.366 (1997).

⁴¹⁴ WIS. STAT. § 940.225(1)-(2) (1995-1996).

⁴¹⁵ WIS. STAT. §§ 940.225(3), 940.225(3m) (1995-1996).

⁴¹⁶ WIS. STAT. § 940.225(4) (1995-1996); see also D.C. CODE ANN. § 22-4101 (1996) (defining consent similarly for sexual abuse provisions); 720 ILL. COMP. STAT. 5/12-17 (West 1993) (defining consent similarly as a defense); MINN. STAT. ANN. § 609.341(4) (West 1996) (inserting "present" agreement); WASH. REV. CODE § 9A.44.010 (1998) (defining consent similarly for sexual offenses); cf. CAL. PENAL CODE § 261.6 (West 1998) (consent means "positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."); COLO. REV. STAT. § 18-3-401(1.5) (1997) ("Consent" means cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act.).

⁴¹⁷ VT. STAT. ANN. tit. 13, § 3252(a)(1) (1997).

⁴¹⁸ VT. STAT. ANN. tit. 13, § 3251(3) (1996).

⁴¹⁹ NEB. REV. STAT. § 28-318(8)(a)(ii)-(iii) (1995); N.H. REV. STAT. ANN. § 632-A:2 I(m) (1996); UTAH CODE ANN. § 76-5-406(1) (1998).

victim's consent⁴²⁰ and second- and third-degree sexual assault as sexual contact without the victim's consent (graded based upon whether the actor causes serious personal injury).⁴²¹ "Without consent" includes instances in which the victim was compelled to submit because of force or coercion or the victim expressed a lack of consent through words and conduct.⁴²² Similarly, Utah defines "without consent" for all sexual offenses in one statute that provides multiple alternatives including force, coercion, unconsciousness, or mental disability as well as when "the victim expresses lack of consent through words or conduct; . . ."⁴²³ Specific offenses are, in turn, defined in their own individual statutes; Utah's rape statute, for instance, provides: "A person commits rape when the actor has sexual intercourse with another person without the victim's consent."⁴²⁴ Finally, New Hampshire simply outlaws sexual assault when "the victim indicates by speech or conduct that there is not freely given consent to performance of the sexual act."⁴²⁵

4. Requiring Knowledge of Victim's Nonconsent

Six jurisdictions require both a nonconsensual sexual act and that the defendant know that the victim is not consenting. For example, in 1995, Tennessee amended its rape and sexual battery statutes to include instances in which "The sexual penetration [contact] is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the penetration that the victim did not consent; . . ."⁴²⁶ Similarly, Montana's ver-

⁴²⁰ NEB. REV. STAT. § 28-319(1)(a) (1996). An older version of this statute provided: "Any person who subjects another to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception . . . is guilty of sexual assault in the first degree." NEB. REV. STAT. § 28-319(1) (1993).

⁴²¹ NEB. REV. STAT. § 28-320(1)(a) (1996).

⁴²² NEB. REV. STAT. § 28-318(8)(a) (1996); see also NEB. REV. STAT. § 28-318(8)(b) (1996) ("The victim need only resist, either verbally or physically, so as to make the victim's refusal to consent genuine and real and so as to reasonably make known to the actor the victim's refusal to consent; . . .").

⁴²³ UTAH CODE ANN. § 76-5-406(1) (1997).

⁴²⁴ UTAH CODE ANN. § 76-5-402(1) (1997).

⁴²⁵ N.H. REV. STAT. ANN. § 632-A:2 I(m) (1996).

⁴²⁶ TENN. CODE ANN. §§ 39-13-503(2), 39-13-505(2) (1997); see also COLO. REV. STAT. § 18-3-404(1)(a) (1996) (prohibiting third-degree sexual assault if defendant knows victim does not consent); 720 ILL. COMP. STAT. 5/12-13(a)(2) (West 1997) (punishing criminal sexual assault when the criminal actor engages in sexual penetration and "knew that the victim was unable to understand the nature of the act or was unable to give knowing consent"); D.C. CODE ANN. § 22-4106 (1997) (outlawing as misdemeanor sexual abuse

sion defines sexual assault as "A person who knowingly subjects another person to any sexual contact without consent" ⁴²⁷ Montana also retains a statute entitled "Sexual intercourse without consent." ⁴²⁸ The without-consent definition for this latter statute, however, addresses only force or coercion and victims incapable of consent because they are mentally incapacitated, physically helpless, or less than sixteen years old. ⁴²⁹ Thus, such statute is limited in its applicability.

5. Miscellaneous Provisions

Pennsylvania's statutory framework contains, in addition to its traditional rape and sodomy statutes, three crimes based on nonconsent: sexual assault, aggravated indecent assault, and indecent assault. ⁴³⁰ The sexual assault statute provides that except as provided in the crimes of rape and sodomy, it is an offense if a "person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent." ⁴³¹ The aggravated indecent assault and indecent assault statutes prohibit penetration or indecent contact, respectively, if "the person does so without the complainant's consent;" ⁴³² The language in both of these statutes is followed by traditional alternatives such as forcible compulsion, unconsciousness, or mental disability—which also appear in the rape and sodomy statutes. Thus, the assault crimes statutes recognize simple nonconsent alternatives while the rape and sodomy statutes do not.

instances in which the actor "should have knowledge or reason to know that the act was committed without that other person's permission,"; MO. REV. STAT. § 566.040(1) (1996) ("A person commits the crime of sexual assault if he has sexual intercourse with another person knowing that he does so without that person's consent."); see also Rizzo, *supra* note 87, at C2 (discussing Missouri's new statute). To cover a much broader scope of conduct, the Missouri legislature rewrote an old statute that punished sexual assault "if he has sexual intercourse with another person to whom he is not married and who is incapacitated or who is fourteen or fifteen years old." MO. REV. STAT. § 566.040(1) (1993) (superseded).

⁴²⁷ MONT. CODE ANN. § 45-5-502(1) (1995).

⁴²⁸ MONT. CODE ANN. § 45-5-503 (1997).

⁴²⁹ MONT. CODE ANN. § 45-5-501(1) (1997).

⁴³⁰ 18 PA. CONS. STAT. ANN. §§ 3124.1, 3125, 3126 (West 1998).

⁴³¹ 18 PA. CONS. STAT. ANN. § 3124.1 (West 1998).

⁴³² 18 PA. CONS. STAT. ANN. §§ 3125(1), 3126(1) (West 1998); see also *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1166 (Pa. 1994) (indecent assault does not require forcible compulsion like rape).

Georgia limits its nonconsensual sexual offenses to those that involve physical contact or penetration with a foreign object. Its sexual battery statute prohibits instances in which the actor "intentionally makes physical contact with the intimate parts of the body of another person without the consent of that person."⁴³³ Aggravated sexual battery occurs when the actor "intentionally penetrates with a foreign object the sexual organ or anus of another person without the consent of that person."⁴³⁴ Although Georgia does not define "without consent" for purposes of its sexual offense statutes, its global definition for all crimes includes: "a person whose concurrence is required has not, with knowledge of the essential facts, voluntarily yielded to the proposal of the accused or of another."⁴³⁵

Finally, Oregon criminalizes two degrees of sexual abuse involving lack of consent on the part of the victim. Second-degree sexual abuse addresses penetration or intercourse without consent,⁴³⁶ and third-degree sexual abuse includes sexual contact without consent as well as instances in which the victim is under 18.⁴³⁷ Oregon does not explicitly define "consent" for its sexual offense statutes except for a definition of "incapacity to consent,"⁴³⁸ nor does it provide a global consent provision for all its criminal statutes.

6. Blurring the Line Between Rape and Statutory Rape

Finally, the provisions in several states blur the line between nonconsensual sexual contact and statutory rape by grouping the two offenses together or using the same statute to encompass both. Mississippi and South Dakota, for example, group sexual penetration or contact without the victim's consent with instances in which the victim is mentally handicapped or a minor. Mississippi's sexual battery provision outlaws sexual penetration with another person "without his or her consent," a mentally handicapped person, or a child under fourteen.⁴³⁹ South Dakota's trilogy of statutes prohibit

⁴³³ GA. CODE ANN. § 16-6-22.1(b) (1996).

⁴³⁴ GA. CODE ANN. § 16-6-22.2(b) (1996).

⁴³⁵ GA. CODE ANN. § 16-1-3(19) (1996).

⁴³⁶ OR. REV. STAT. § 163.425(1) (1997).

⁴³⁷ OR. REV. STAT. § 163.415(1)(a) and (b) (1997).

⁴³⁸ OR. REV. STAT. § 163.315 (1997).

⁴³⁹ MISS. CODE ANN. § 97-3-95(1)(a) (1994).

sexual contact with: (1) a person "who, although capable of consenting, has not consented . . ." ⁴⁴⁰ (2) a person incapable of consent (i.e., physical or mental incapacity), ⁴⁴¹ and (3) a child under the age of sixteen. ⁴⁴²

New York ⁴⁴³ and Kentucky have lesser forms of sexual offenses denominated "sexual misconduct," which are defined as engaging in sexual intercourse without consent. ⁴⁴⁴ The commentary accompanying New York's statute indicates that it is intended to include the higher offenses of rape and sodomy as well as statutory rape and statutory sodomy, when the victim is below the legal age of consent, which are not included in the higher offenses. ⁴⁴⁵ By contrast, the legislative commentary to Kentucky's statute limits its applicability to statutory rape and statutory sodomy although case law has questioned this limit. ⁴⁴⁶

7. Conclusion

Nonconsensual sexual provisions address a genre of blameworthy conduct that would normally escape criminal sanction due to failure to satisfy rape law's traditional force requirement. These statutes break the hegemony of force as an indispensable element of sexual offense and, thereby, disconnect the conjunction of force

⁴⁴⁰ S.D. CODIFIED LAWS § 22-22-7.4 (Michie 1998) (a misdemeanor).

⁴⁴¹ S.D. CODIFIED LAWS § 22-22-7.2 (Michie 1998 Revision) (a felony).

⁴⁴² S.D. CODIFIED LAWS § 22-22-7.3 (Michie 1998 Revision) (a misdemeanor).

⁴⁴³ See also N.Y. PENAL LAW § 130.55 (Consol. 1997) (criminalizing sexual abuse without consent).

⁴⁴⁴ N.Y. PENAL LAW § 130.20(1) (Consol. 1997) ("A person is guilty of sexual misconduct when: 1. Being a male, he engages in sexual intercourse with a female without her consent; . . ."); KY. REV. STAT. ANN. § 510.140 (Michie 1996) ("A person is guilty of sexual misconduct when he engages in sexual intercourse or deviate sexual intercourse with another person without the latter's consent.").

⁴⁴⁵ The Commission Staff Notes to section 130.20 of the New York Penal Law, N.Y. PENAL LAW § 130.20 (Consol. 1997), provide that it is intended to include the higher degrees of rape and sodomy, as well as statutory rape and statutory sodomy.

⁴⁴⁶ The commentary to Kentucky statute section 510.140, KY. REV. STAT. ANN. § 510.140 (Michie 1996), provides that its basic purpose is "to preserve the concept of statutory rape and statutory sodomy. . . . In this context the ages of the defendant and the victim are critical. Force is not an element of this offense. The victim is statutorily incapable of consent." *Id.* (quoted in *Cooper v. Commonwealth*, 550 S.W.2d 478, 479 (Ky. 1977)). But see *Yarnell v. Commonwealth*, 833 S.W.2d 834 (Ky. 1992), in which the dissenting judge argues: "The statute . . . states no age limitations. . . . The obvious difference between this offense, as stated, and Sodomy I or Rape I is that it does not require physical force or threats accompanying the acts sufficient to overcome earnest resistance, only a lack of consent." *Id.* at 838-39 (Leibson, J., dissenting).

and nonconsent. However, because these statutes continue to rely on the notion of nonconsent, they continue to beg the question of what constitutes legally effective consent—a question of particular importance in cases of rape by fraud or rape by coercion.

F. *Conclusion*

In legislative hands, the unitary concept of violent rape has given birth to a host of offspring differing in substantive make-up and degrees of severity and corresponding more closely to the varieties of sex offenders' real-world behavior. Several conclusions may be drawn from the foregoing statutory review.

First, state legislatures have not criminalized rape by fraud or rape by coercion wholesale, they have been conservative in their work. The vast majority of legislatures have begun with the most noncontroversial and unassailable factual patterns, outlawing the use of fraudulent or coercive pressures deployed against vulnerable victims in the context of professional, trust-based alliances or relationships involving authoritative positions or power imbalances. A few states have been more aggressive, making inroads into the criminalization of rape by fraud, by describing circumstances in which fraud renders the criminal actor responsible for sexual offenses. Other states have attacked the problem of rape by coercion by more expansively outlawing defendants' use of nonphysical pressures in securing sexual compliance falling outside the professional, authoritative, or institutional contexts. Finally, a minority of states prohibit a category of nonconsensual sexual crimes which fails to also require force, fraud, or coercion.

Second, this new wave of statutory enactments outlawing fraudulent, coercive, or simply nonconsensual sexual offenses has not come at the cost of eliminating protection of citizens from forcible rape. Rather, states adopting these new statutes have retained their violent rape provisions, declining to treat the criminalization of nonviolent sexual offenses as an either-or proposition. For example, while Tennessee provides an explicit fraud alternative in its rape statute, it continues to punish forcible sexual penetration as aggravated rape and forcible sexual contact as aggravated sexual battery. Similarly, Hawaii distinguishes between defendants' use of strong compulsion and compulsion, the former including violent rape and the latter covering nonviolent variations. These statutes retain the legislative judgment that sexual penetration or contact obtained by

force may be a more serious harm than the same acts accomplished by nonviolent pressures. Criminal provisions outlawing rape by fraud or coercion supplement rather than replace violent sexual crimes.

The final conclusion to be drawn from this Article's statutory review is that the diversity inherent in this grouping of new statutes is necessary to capture the broad range of defendants' conduct undertaken to accomplish sexual intercourse by fraudulent or coercive means. Because rape by fraud or rape by coercion is not an unitary phenomenon, as discussed *supra* in Part I, their legislative prohibition must be wide-ranging and multi-faceted. Individually, the five categories of sexual offenses reviewed above fail to cover all possible instances of using fraud or coercion to obtain sexual intimacy. Collectively, however, they provide an excellent starting point to address the criminalization of this problematic behavior. In the best traditions of statutory experimentation in a multi-state system, diversity among some states in their statutory approaches provides a fertile field of innovation inviting emulation by other states.

III. THE DOCTRINAL ELEMENTS OF FORCE AND NONCONSENT IN THE CONTEXT OF CRIMINALIZING RAPE BY FRAUD AND RAPE BY COERCION

Deceit and violence—these are the two forms of deliberate assault on human beings. Both can coerce people into acting against their will. Most harm that can befall victims through violence can come to them also through deceit. But deceit controls more subtly, for it works on belief as well as action. Even Othello, whom few would have dared to try to subdue by force, could be brought to destroy himself and Desdemona through falsehood.⁴⁴⁷

The continuing proliferation of cases involving criminal defendants who accomplish sexual intercourse by means of fraud or coercion⁴⁴⁸ and, to a lesser extent, the widespread promulgation of legislative enactments outlawing some types of this behavior,⁴⁴⁹ have fueled the heated debate over the propriety of criminalizing

⁴⁴⁷ BOK, *supra* note 50, at 18 (footnote omitted); cf. Beale, *supra* note 5, at 321 ("A seeming consent extorted by force or terror differs from consent obtained by fraud. In the latter case the mind is deceived into agreement; in the former, the body is forced to act without a real agreement of the mind.").

⁴⁴⁸ See *supra* Part I.

⁴⁴⁹ See *supra* Part II.

rape by fraud and rape by coercion. In addition, Estrich's suggestion⁴⁵⁰ that rape law should prohibit sexual intercourse secured by fraud or extortion to the same extent that criminal law outlaws taking money by these means has spawned increased controversy and contributed to a substantial body of theoretical commentary.⁴⁵¹ The breadth and depth of this debate are virtually limitless.⁴⁵² Cases of rape by fraud or rape by coercion inevitably serve as lightning rods, triggering a host of fundamental disagreements about the crime of rape, many revolving around the doctrinal elements of force and nonconsent. For instance, courts, legislatures, and commentators cannot agree about: (1) rape's historical make-up, i.e., whether it always required both force and nonconsent;⁴⁵³ (2) the nature of its defining harm, i.e., a crime of violence or a sexual offense;⁴⁵⁴ (3) the function of rape law, i.e., to protect bodily security or sexual integrity too;⁴⁵⁵ (4) the meaning of force, i.e., physical force only or also constructive force;⁴⁵⁶ (5) the relationship between force and nonconsent, i.e., whether force merely corroborates nonconsent or has independent significance;⁴⁵⁷ and (6) the meaning of consent, i.e., tacit assent or affirmative, freely given approval indicated by words or conduct.⁴⁵⁸ Moreover, feminist and radical critiques of criminal law, in general, and rape law, in particular, overlay these multiple disagreements, adding levels of complexity to an already complex rape analysis.⁴⁵⁹

⁴⁵⁰ ESTRICH, *supra* note 7, at 103.

⁴⁵¹ Estrich, *Rape*, *supra* note 7, at 1120. Estrich reiterates the above suggestion in a subsequent 1987 publication.

⁴⁵² See, e.g., Dripps, *Beyond Rape*, *supra* note 8, at 1796 (calling rape law "a mess"); Schulhofer, *Sexual Autonomy*, *supra* note 9, at 40 (noting profound disagreement about "what rape is").

⁴⁵³ See, e.g., Schulhofer, *Sexual Autonomy*, *supra* note 9, at 60 (arguing that common-law definition of rape was nonconsensual sexual intercourse).

⁴⁵⁴ See *infra* notes 487-534 and accompanying text.

⁴⁵⁵ See, e.g., Harris, *supra* note 12, at 644 (positing rape by fraud cases demonstrate that central question of rape law is sexual integrity not just bodily security); see also KEITH BURGESS-JACKSON, *RAPE: A PHILOSOPHICAL INVESTIGATION* 43 (1996) (discussing conservative (rape as trespass), liberal (rape as battery), and radical (rape as degradation) views on rape; Chamallas, *supra* note 17, at 780-813 (discussing the traditional, liberal, and egalitarian views of sexual conduct).

⁴⁵⁶ See, e.g., *State v. Etheridge*, 352 S.E.2d 673 (N.C. 1987).

⁴⁵⁷ See *infra* notes 535-558 and accompanying text.

⁴⁵⁸ See *infra* Part B.

⁴⁵⁹ BURGESS-JACKSON, *supra* note 455, at 103, comments:

The liberal, to put it pithily, makes consent the touchstone of rape and believes that most women, most of the time, consent to sexual intercourse.

This Part explores the two separate, but interrelated requirements of traditional rape law—force and nonconsent.⁴⁶⁰ Cases of rape by fraud and rape by coercion implicate both these doctrinal mainstays of rape because physical force or threat of such force may generally be absent and consent, in some form, is usually present. Although related, the force and nonconsent elements present two different challenges. First, the critical question with respect to force is whether rape law should expand beyond physical force to subsume nonforcible, alternative methods of accomplishment, such as fraud or coercion. This Article examines three arguments against expanding rape law in this fashion but concludes that the force requirement does not present an insurmountable obstacle to the criminalization of rape by fraud or coercion. The challenge posed, however, by these fraud and coercion cases to the nonconsent element of rape law is how to determine the parameters of legally effective consent when that consent is induced by either fraudulent or coercive pressures. This Article examines alternative formulations for drawing the line between valid and invalid consent in both the fraud and coercion contexts and concludes that considerable scholarly and legislative progress has been made in solving these difficult line-drawing problems. The question is no longer if rape by fraud or rape by coercion should be punished but rather under what circumstances.

A final caveat is necessary. Although the two doctrinal issues of force and consent merit serious attention and certainly have received it from various scholarly quarters, the existing statutory law summarized in Part II already criminalizes various forms of rape by

Therefore, rape, conceived as nonconsensual intercourse, is rare. The radical makes coercion the touchstone of rape and believes that most women, most of the time, are coerced into having sexual intercourse. Therefore, rape is pervasive. . . . Each theorist rejects the other's conclusion. Indeed, each finds the other's view incomprehensible and takes the other's conclusion to be a *reductio ad absurdum* on the theory that generates it. The liberal finds it preposterous that rape is pervasive; the radical finds it absurd that it is rare.

(footnote omitted).

⁴⁶⁰ Common law rape had four basic elements: (1) sexual intercourse, (2) with a woman not the defendant's wife, (3) by force or threat of force, and (4) without her consent or against her will. Harris, *supra* note 12, at 613. Some dispute exists regarding whether "without her consent" and "against her will" are synonymous. *Id.* According to Harris, force focuses on the defendant, while lack of consent focuses on the victim. *Id.*

fraud and rape by coercion, in some senses eclipsing theory. This Part, therefore, highlights this tension between scholarly debate and practical reform.

A. *The Force Requirement*

The first issue addressing the criminalization of rape by fraud or coercion center around the notion that rape law has traditionally required the element of physical force or threat of such force. In considering whether to outlaw certain forms of sexual contact not involving physical force, courts and commentators have asserted three different arguments against doing so: (1) many rape statutes are explicitly written with the element of physical force and should be strictly construed; (2) rape is a crime of violence and rape law is designed to protect citizens' physical security; and (3) force provides an external, verifiable indication of nonconsent, elimination of which will cause confusion and instability in determining victim consent.

1. The Statutory Requirement of Force

At the most rudimentary level of analysis, the deceptively simple question of whether rape by fraud or coercion can be accommodated under statutes explicitly requiring force becomes more difficult upon closer inspection. The statutory-construction problem is actually two separate questions: what constitutes force for the purposes of rape law and what role do courts play in making these judgments?

a. *Strict Construction of Criminal Statutes*

Questions surrounding the element of force are certainly not new; courts and commentators have struggled with them since the 1800s.⁴⁶¹ One excellent example discussed *supra* is *Don Moran v. People*⁴⁶² wherein the court overturned the defendant's conviction because the trial court had failed to properly instruct the jury on the

⁴⁶¹ See, e.g., Beale, *supra* note 5; Harris, *supra* note 12, at 628; Puttkammer, *supra* note 5.

⁴⁶² 25 Mich. 355 (1872) (fraudulent medical treatment case).

force element. The *Moran* court cogently summarized many of the key issues of debate regarding the statutory force requirement:

If the statute, or the definition of rape, did not contain the words "by force," or "forcibly," doubtless a consent procured by such fraud as that referred to, might be treated as no consent; but the idea of force can not thus be left out and ignored, nor can such fraud be allowed to supply its place, though it would doubtless supply, and satisfy, all the other terms of the definition; and, so far as the intimation in question is to be understood as going further and dispensing with all idea of force, it must be understood as an intimation of the court of what, in their opinion, the law ought to be, rather than what it is. And, upon abstract principles of right and wrong, a sexual connection obtained by falsely and fraudulently personating the husband of a woman, or by a physician fraudulently inducing a female patient to believe such connection essential to a course of medical treatment, must be considered nearly, if not quite, as criminal and prejudicial to society as when obtained by force or any apprehension of violence, and it might, and in my opinion would, be judicious for the legislature to make some provision for punishment in cases of this kind. But it is not for the judiciary to legislate, by straining the existing criminal law to bring such cases within it.⁴⁶³

The Michigan Supreme Court's analysis in *Don Moran* is appealing in its simplicity. If the statute explicitly requires force or threat, then anything falling short is not rape. Other courts have similarly concluded that fraud may not replace the force requirement of rape.⁴⁶⁴ Despite adoption of a strict-construction approach, however, several courts have invited their respective legislatures to alter existing statutes to punish sexual offenses secured by fraud or coercion.⁴⁶⁵

⁴⁶³ *Id.* at 364-65.

⁴⁶⁴ See, e.g., *Lewis v. State*, 30 Ala. 54, 56 (1857) (constructive or actual force necessary ingredient of rape; no rape if victim consents although obtained by husband impersonation); *Commonwealth v. Goldenberg*, 155 N.E.2d 187, 192 (Mass. 1959) ("Fraud cannot be allowed to supply the place of force which the statute makes mandatory."); *State v. Lung*, 28 P. 235 (Nev. 1891) (citing *Don Moran* and stating that fraud does not supply place of force); *Walter v. People*, 6 Am. L. Reg. NS 746 (N.Y. 1867) (fraud insufficient for rape); *Bloodworth v. State*, 65 Tenn. 614, 618-20 (1872) (no rape in sham marriage case because force absent).

⁴⁶⁵ For example, in *Bloodworth*, 65 Tenn. at 614, the court first quoted from a previous case, *Wyatt v. State*, 2 Swan 396:

"We agree with the Attorney General, that the moral turpitude of the crime is as great when perpetrated by fraud and deception, as by force," and that the act richly deserves to be severely punished; but the question is, not what it deserves, nor what our feelings and individual opinions would dictate, but "what sayeth the law."

The *Bloodworth* court thereupon added its own language to the same effect:

The question of whether nonphysical coercion satisfies the statutory force requirement seems easier to resolve than in fraud cases because of the greater similarity between physical force and coercion. Both physical force and nonphysical coercion involve the imposition of another's will on the victim without the further complication of resorting to deceptive stratagems to achieve that result. However, some courts have read force quite narrowly to exclude coercion. In *State v. Thompson*,⁴⁶⁶ discussed *supra*, the court dismissed the action because physical force was absent, reasoning that the force requirement could not be stretched to include coercion.⁴⁶⁷ Similarly, in *Commonwealth v. Mlinarich*,⁴⁶⁸ the court found the defendant had not used forcible compulsion when he caused his step-daughter's sexual submission by threatening her return to a juvenile detention facility.⁴⁶⁹

To the extent that these cases stand for the proposition that courts are not free to simply eliminate the statutory force language, they are unremarkable. The argument that neither fraud nor coercion is sufficient to satisfy statutes requiring force or threat is supported by the canon of statutory interpretation that criminal statutes must be strictly construed and implicates notions of fair notice and due process for defendant actors.

We therefore feel constrained to hold, that the element of force being entirely excluded by the proof in the case, and the fact of some degree of assent shown, and certainly no dissent, that the act could not have been both forcible and against her will, and these elements are, by our statute, made essentials in this crime.

The Legislature, with their attention called to this case, can, and no doubt will, easily enact a law that will meet the precise case. We have no power to do it, and can only administer the law as we find it.

65 Tenn. at 620-21; see also *Lewis*, 30 Ala. at 57; *Mathews v. Superior Court*, 173 Cal. Rptr. 820, 822 (Cal. Ct. App. 1981); *State v. Leiding*, 812 P.2d 797, 800 (N.M. Ct. App. 1991); *State v. Thompson*, 792 P.2d 1103, 1107 (Mont. 1990); *Regina v. Petrozzi*, 35 C.C.C. 3d 528, 2 W.C.B. 2d 109 (1987).

⁴⁶⁶ 792 P.2d 1103 (Mont. 1990).

⁴⁶⁷ *Id.* at 1107.

⁴⁶⁸ 542 A.2d 1335 (Pa. 1988) (high school principal coerced pupil to sexually submit or not graduate).

⁴⁶⁹ *Id.*

b. What Constitutes Force in Rape Law?

i. The Elasticity of the Force Requirement

The power of the strict-construction argument is lessened, however, by the recognition that not all forms of rape involve physical force or threat: "Whatever the limits of rape by fraud, there can be no question that rape, as a legal category, has long included many forms of nonviolent misconduct."⁴⁷⁰ Most conspicuously, force is absent in cases of unconscious, mentally ill, or physically helpless victims; in such cases, the law presumes nonconsent and dispenses with the force requirement. For this reason, Puttkammer criticizes *Don Moran* as being decided on the wrong issue: "It would have been far simpler to go on the consent ground, and so to avoid conflict with cases holding that rape can be committed on an unconscious or terrified woman, where likewise force is not used."⁴⁷¹

Courts have further held that in husband impersonation and medical treatment cases involving fraud as to the act, the only force required is that necessary for sexual intercourse. In *Pomeroy v. State*,⁴⁷² for example, a case almost contemporaneous with *Don Moran*, the court quoted: "Whenever there is a carnal connection and no consent in fact, fraudulently obtained or otherwise, there is evidently, in the wrongful act itself, all the force which the law demands as an element of the crime."⁴⁷³ In fact, Roberts suggests that rape law is policy driven, stating: "How much force should we allow this type of man to use against this type of woman?"⁴⁷⁴ Thus, while the strict-construction argument has superficial appeal and relative validity, upon closer analysis the force requirement is considerably more elastic than courts like to admit.

⁴⁷⁰ Schulhofer, *Sexual Autonomy*, *supra* note 9, at 63.

⁴⁷¹ Puttkammer, *supra* note 5, at 420.

⁴⁷² 94 Ind. 96 (1883) (defendant represented that he was physician and had carnal connection with victim without consent).

⁴⁷³ *Id.* at 100. For similar reasons, not all courts have been reluctant to exclude fraud from rape. See, e.g., *Eberhart v. State*, 34 N.E. 637 (Ind. 1893) (defendant pretended to be traveling doctor).

⁴⁷⁴ Roberts, *supra* note 8, at 363.

ii. The Doctrine of Constructive Force

A second problem with viewing the force requirement under the narrow strict-construction approach is that courts have expanded force to include fraud in other criminal offenses in the guise of the doctrine of constructive force. For example, in burglary law,⁴⁷⁵ courts have enlarged the usual requirement of a physical breaking (actual force) to include instances in which the burglar obtained entry by "means of artifice or fraud or . . . pretense of business or social intercourse"⁴⁷⁶—defining such conduct as constructive force. Even *Goldberg*, quoted *supra*, includes constructive force as satisfying the force requirement of rape.⁴⁷⁷ In fact, the similarity between fraud in burglary and fraud in rape has not escaped scholarly notice:

There is no ground on which a legal distinction between such fraud in relation to the entry and fraud in relation to sexual activity can be drawn, and similarly . . . there hardly seems to be support for a policy grounding which would extend greater protection in terms of crimes against property than in terms of crimes against the person.⁴⁷⁸

In the development of burglary law, then, courts have looked beyond the mere exertion of force to protect habitation rights.⁴⁷⁹

The doctrine of constructive force has arisen in the context of rape by coercion. Several courts have interpreted the force requirement broadly, relying on constructive force to permit rape prosecutions based on coercion. For example, in *Commonwealth v. Caracciola*⁴⁸⁰ discussed *supra*, the court analogized to the state's robbery (not burglary) statute holding that the state's statutory force requirement could be satisfied by constructive force. The court de-

⁴⁷⁵ See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* 477-80 (1986).

⁴⁷⁶ *Nichols v. State*, 32 N.W. 543, 546 (Wis. 1887); cf. *Whittaker v. State*, 7 N.W. 431, 431 (Wis. 1880) ("The element of force forms a material ingredient of the offence of rape, by which the resistance of the woman violated is overcome, or her consent induced by threats of personal violence, duress, or fraud; . . .").

⁴⁷⁷ *Goldberg v. State*, 395 A.2d 1213, 1219-20 (Md. Ct. Spec. App. 1979).

⁴⁷⁸ *Scutt, Fraudulent Impersonation*, *supra* note 134, at 62-63; see also *Sanders v. State*, 1995 Del. LEXIS 161 (defendant committed burglary, kidnapping, and sexual extortion); *Feinberg*, *supra* note 18, at 339-40 (analogizing between robbery and burglary, and violent and nonviolent rape).

⁴⁷⁹ But see *Beale*, *supra* note 5, at 324 (arguing constructive breaking doctrine in burglary erroneous and therefore unhelpful in rape).

⁴⁸⁰ 569 N.E.2d 774 (Mass. 1991) (defendant feigned policeman to coerce woman into sexual intercourse by threatening jail).

clined to assume legislative intent meant to provide "greater protection to property than to bodily integrity."⁴⁸¹ Similarly, *State v. Etheridge*⁴⁸² adopted a broad view in the parental rape context.

The phrase "by force and against the will of the other person" means the same as it did at common law when it was used to describe an element of rape. The requisite force may be established either by actual, physical force or by constructive force in the form of fear, fright, or coercion. Constructive force is demonstrated by proof of threats or other actions by the defendant which compel the victim's submission to sexual acts.⁴⁸³

The court held: "the parent wields authority as another assailant might wield a weapon. The authority itself intimidates; the implicit threat to exercise it coerces. Coercion . . . is a form of constructive force."⁴⁸⁴ Thus, the constructive force doctrine offers a viable basis for expansively interpreting rape's statutory force requirement.

c. Conclusion

Although it is certainly preferable to alter the statutory definitions of offenses rather than relying on judicial interpretation of ambiguous provisions,⁴⁸⁵ rape law has sufficient doctrinal space to accommodate broader conceptions of force than many courts acknowledge because of the elasticity of the force requirement and the availability of the doctrine of constructive force. In addition, several state legislatures have responded to judicial invitations to change by enacting innovative legislation to deal with these difficult fraud and coercion cases.⁴⁸⁶ The strict-construction problem is rendered moot, at least to some extent, by enactment of these new sexual offense statutes.

⁴⁸¹ *Id.* at 777. The dissent held that rape requires either physical force or threat of bodily injury. *Id.* at 783.

⁴⁸² 352 S.E.2d 673 (N.C. 1987).

⁴⁸³ *Id.* at 682.

⁴⁸⁴ *Id.* at 680 (citations omitted).

⁴⁸⁵ See also Dripps, *Beyond Rape*, *supra* note 8, at 1793 n.41 ("I have serious reservations about the legitimacy of courts, as opposed to legislatures, reading the force element out of the statute books."); Schulhofer, *Feminist Challenge*, *supra* note 8, at 2184 ("The way to fill the gap is not to try expanding what we mean by force but to have statutes punishing, as an offense distinct from forcible rape, any sexual imposition without valid consent.").

⁴⁸⁶ See discussion *supra* Part II.

2. Rape as a Crime of Violence or a Sexual Offense

A second objection to criminalizing rape by fraud or coercion originates from competing conceptions of rape (i.e., the debate over whether rape is a crime of violence or a sexual offense),⁴⁸⁷ and of rape law (i.e., as protecting physical security or sexual autonomy).⁴⁸⁸ Resolution of these fundamental, definitional questions has clear implications for whether to expand rape law to include cases involving fraud or coercion. On one hand, if rape is a form of violence, it may be inadvisable to dilute rape law by including cases accomplished by nonviolent fraud or coercion. Expansion of rape law may also trivialize forcible rape by comparison and undercut progress made by the rape reform movements, which relied heavily upon the rape-as-violence argument.⁴⁸⁹ Moreover, expansion may cause juries to refuse to convict because rape by fraud or coercion cases may not meet jurors' expectations of rape as a violent crime. On the other hand, if rape is a sexual offense and rape law is designed to protect victims' sexual integrity as well as physical security, it may be preferable to expand rape law to include a broader range of methods by which sexual predation is accomplished; the sole reliance on force may actually privilege other blameworthy conduct. In addition, including fraud and coercion in rape law may be more consonant with the legal system's treatment of other criminal offenses, such as theft, which encompass both violent and nonviolent methods.

⁴⁸⁷ See, e.g., SUSAN BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* (1975) (rape is crime of power and violence, not lust); ESTRICH, *supra* note 7, at 103-04 (rape is about sex and sexual violation); RICHARD A. POSNER, *SEX AND REASON* 384 (1992) (rape is "substitute for consensual sexual intercourse"); Bogart, *supra* note 327, at 117 (rape is attack on person as sexual being); Estrich, *Rape*, *supra* note 7, at 1183 (rape is about sex and sexual violation); Findlater, *supra* note 1, at 1363 ("Rape—whether seen as a crime of sex or a crime of violence—is about the abuse of power . . .") (discussing page 83 of Estrich's book).

⁴⁸⁸ Schulhofer in *Sexual Autonomy*, *supra* note 9, at 41, comments:

[T]he main difficulty stems not from clashing conceptions of 'force' (though these are important) but more from unresolved tension (in both law and culture) between the conception of rape as a crime of violence requiring 'force' and the conception of rape as an offense against personal autonomy, centering on 'meaningful consent.'

Id.

⁴⁸⁹ See Lynne Henderson, *Rape and Responsibility*, 11 *LAW & PHIL.* 127 (1992).

a. *Costs of Expanding Rape Law to Include
Fraud and Coercion*

i. Undercutting Rape Reform

One potential cost of expanding rape law to include fraud and coercion is the possibility of undercutting rape reform. Perhaps the most significant advantage of thinking about rape as a violent act is the impact that such conceptualization has had on rape law reform. Feminists and others, arguing that rape is not simply bad sexual intercourse but a completely different phenomenon,⁴⁹⁰ have drawn attention to the seriousness of rape as an individual offense and as a crime against women as a group.⁴⁹¹ "This rape-as-violence argument did succeed in disentangling rape from sex, and therefore harm from pleasure, in the minds of many. Until men and women understood that rape was not sexual passion as they understood it, it was difficult to obtain any rape law reform."⁴⁹² The violence argument has succeeded, and significant rape reform has resulted.⁴⁹³ At this stage of legal development, therefore, it seems unlikely that expansion of rape law to include fraud or coercion will harken a return to earlier formulations. To the contrary, the success of earlier rape reform has paved the way for serious discussion of these other variations of rape. For example, one author comments: "Perhaps the most significant aspect of the new sexual liability law is that it is only in the last few years that women have been bold enough to assert that they have a legal right to expect honesty from men in sexual relationships."⁴⁹⁴ The newly burgeoning array of statutes punishing multiple types of rape by fraud or coercion attest to the fact that rape law is currently expanding, not constricting.

⁴⁹⁰ See Berger, *supra* note 8, at 69 ("By contrast, with respect to rape, a crime almost universally perpetrated by men, ordinarily against women, questions of 'whose meaning wins' are crucial in drawing the line between offensive sex and sexual offense.").

⁴⁹¹ See, e.g., BROWN MILLER, *supra* note 487.

⁴⁹² Henderson, *Rape and Responsibility*, *supra* note 489, at 156. But she adds: "The rape-as-violence argument leaves unchallenged most male interpretations of heterosexual relations." *Id.* at 157.

⁴⁹³ See *supra* notes 266-274 and accompanying text.

⁴⁹⁴ Chamallas, *supra* note 17, at 813.

ii. Trivializing Violent Rape

A second potential cost of expanding rape law to encompass fraud and coercion cases is the trivialization of violent rape by comparison. Many commentators argue that an experiential or qualitative difference exists between violent and nonviolent rape, one that may be invalidated or obscured by expansion of rape law to include both forms.⁴⁹⁵ For instance, Berger criticizes Estrich's suggestion to criminalize sexual intercourse procured by fraud or extortionate threat because doing so would depreciate the seriousness of rape:⁴⁹⁶

A fortiori, the notion that rape, one of the gravest possible infringements of human integrity, should be expanded to include situations where the woman attempts to sell her body and fails to receive the bargained-for price simply makes a mockery of women's long efforts to achieve autonomy, respect, and equality.⁴⁹⁷

Other commentators agree, describing the experience of violent rape as a complete negation of existence,⁴⁹⁸ a form of "spiritual murder,"⁴⁹⁹ or "[s]hort of homicide, . . . 'the ultimate violation of self.'"⁵⁰⁰ For some, the difference is not experiential but the degree of harm suffered by the victims: "[T]he force or threat of violence is itself an integral part of the total harm produced. Compulsion is not necessarily more destructive of voluntariness than deception is, but it is normally more harmful in itself."⁵⁰¹ The rape vic-

⁴⁹⁵ The horrific description of one violent rape should suffice. See Nancy S. Erickson, *Final Report: "Sex Bias in the Teaching of Criminal Law,"* 42 RUTGERS L. REV. 309, 342 (1990).

⁴⁹⁶ See Berger, *supra* note 8, at 76-77.

⁴⁹⁷ Berger, *supra* note 8, at 76-77. Berger is especially critical of the notion of rape by fraud and finds the suggestion regarding extortionate threats more plausible. *Id.* at 77.

⁴⁹⁸ See Henderson, *What Makes Rape a Crime?*, *supra* note 8, at 226 (it is rape when a woman's existence does not matter). But see Bogart, *supra* note 327 (criticizing defining crime in terms of victim's experience).

⁴⁹⁹ Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1448 (1993); see also Henderson, *Rape and Responsibility*, *supra* note 489, at 164 (calling it "soul-murder").

⁵⁰⁰ *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion) (citation omitted).

⁵⁰¹ Feinberg, *supra* note 18, at 339; see also ALA. CODE § 13A-6-65 Commentary (1995) ("In the situation here discussed, since neither force nor imposition upon disability is the *causa causans*, there is no danger of physical injury to those unable to protect themselves."); Dripps, *Beyond Rape*, *supra* note 8, at 1800 (arguing physical violence "expresses a more complete indifference, or a more intense hostility, to the victim's humanity."); Harris, *supra* note 12, at 633 (noting chance of physical harm less in fraud cases).

tim suffers not only the fundamental harm to her sexual integrity but also the effect of violence.

Some authors, however, while not disputing the severity of violent rape, point out that nonviolent sexual offenses also cause serious harm

[A] woman's decision to submit to physical force may be less agonizing than her decision to have sexual intercourse with a person who holds economic or emotional power over her and her family. Although one can argue that a man who obtains intercourse through threats of nonphysical harm should be punished less severely than a violent rapist, the growing legal appreciation of the reality of mental injury and the power of economic duress suggests that he nonetheless should be punished.⁵⁰²

In addition to the fundamental assault on sexual integrity embodied in rape by fraud or coercion,⁵⁰³ victims suffer the harms that befall persons who are lied to, betrayed, or manipulated. Schafran notes that victim trauma in acquaintance rape cases can be as great, if not greater, than in stranger cases because of self-blame and the loss of the ability to trust others.⁵⁰⁴ Larson asserts that sex induced by fraud may cause "grave physical and emotional injury";⁵⁰⁵ while Bok points out that persons who have been lied to are disappointed, resentful, and suspicious.⁵⁰⁶ Although the harm is not of the same experiential quality as violent rape, victims of nonviolent sexual assault also suffer significantly; recognition of nonviolent rape would validate these victims' experiences.

Finally, perhaps the single best response is provided by Roberts. In discussing whether grouping together all unwanted sexual intercourse and violent rape will trivialize violence against women, she comments: "I fear as much that disconnecting all seemingly nonviolent sexual coercion from sex accompanied by physical violence will obscure the common nature of both."⁵⁰⁷ Estrich

⁵⁰² Harris, *supra* note 12, at 644-45 (footnotes omitted).

⁵⁰³ See, e.g., Bogart, *supra* note 327.

⁵⁰⁴ See Schafran, *supra* note 60, at 1018; see also Feinberg, *supra* note 18, at 340 ("Fraud in the inducement is a form of manipulation in which some traits of the victim are used—turned against her—by the deceiver. It is not misleading to say that even her will is to some extent involved, as well as her general desires (with new mistaken beliefs subsumed under them) and such traits as credulity, naivete, cupidity, or trustfulness.").

Feinberg also notes that a deceived woman may suffer "depression, shame, loss of self-esteem, and tortured conscience, if not pregnancy and more obvious harms." *Id.* at 337.

⁵⁰⁵ Larson, *Women Understand*, *supra* note 24, at 380, 453.

⁵⁰⁶ See Bok, *supra* note 50, at 20.

⁵⁰⁷ Roberts, *supra* note 8, at 381.

agrees: "The 'rape as violence' approach may strengthen the case for punishing violent sex, but it may do so at the cost of obscuring the case for punishing forced sex in the absence of conventional violence, the usual pattern in the simple rape."⁵⁰⁸

iii. The Effect on Juries

Some theorists worry that juries will not convict defendants if the evidence fails to disclose the use of force because this does not correspond to jurors' intuitive notions of rape:

But even if we by-pass the obvious vagueness problems entailed in deploying such a standard against economic inducements, emotional pressure, and the like, this approach will not necessarily work well for the women we want to protect, because there is no guarantee that prosecutors and juries will accept a feminist perspective on when such pressures are improper.⁵⁰⁹

Recent cases, however, suggest that it is not at all clear juries would not convict. In some of the most difficult cases, involving prostitutes who were deceived, juries returned guilty verdicts, although appellate courts eventually overturned them.⁵¹⁰ Moreover, opinion polls indicate strong public sentiment against these types of nonviolent sex crimes.⁵¹¹

b. *Benefits of Expanding Rape Law to Include Fraud and Coercion*

i. Broader Coverage of Blameworthy Conduct

Abandoning the unitary concept of rape-as-violence has several potential benefits. First, expansion will plug a hole in rape law that has been troubling courts for more than a century: "These cases make clear that one thing missing in the law of rape is some way to

⁵⁰⁸ ESTRICH, *supra* note 7, at 83.

⁵⁰⁹ Schulhofer, *Feminist Challenge*, *supra* note 8, at 2177.

⁵¹⁰ See *supra* notes 193-209 and accompanying text.

⁵¹¹ In a student opinion poll conducted by Samuel Horowitz, while a visitor at the Cleveland-Marshall College of Law, students identified fraud in securing sexual intimacy as high on their list of reprehensible conduct. (Sept. 10, 1996) (on file with author); see also Dan Subotnik, "Sue Me, Sue Me, What Can You Do Me? I Love You": A Disquisition on Law, Sex, and Talk, 47 FLA. L. REV. 311, 393-401 (1995) (discussing various public opinion polls arriving at different conclusions).

punish sexual misconduct that is not physically violent. It is as if we had a law against armed robbery but no law against theft."⁵¹² The exclusive reliance on force or violence as the indispensable element of rape has the undesirable effect of insulating a broad range of blameworthy conduct from criminal condemnation. As Roberts notes:

If rape is violence as the law defines it (weapons, bruises, blood), then what most men do when they disregard women's sexual autonomy is not rape. If rape is committed only by violent men, then very few men are rapists. By defining most male sexual conduct as nonviolent, even when it is coercive, it has been possible to exempt a multitude of attacks on women's autonomy from criminal punishment, or even critical scrutiny. The category of violence, far from punishing all sexual assaults, actually privileges most of them.⁵¹³

Roberts's observation is buttressed by the fact that many defendants in rape by fraud or coercion cases are habitual offenders with multiple victims.⁵¹⁴ They were not simply persons who lied to victims in the context of private relationships but intentionally set about satisfying their sexual desires by preying on the most vulnerable victims using methods falling just short of physical force. Including fraud and coercion under rape law means that a wider range of such defendants' blameworthy conduct will be criminalized.

ii. The Analogy to Theft Crimes

One of the strongest arguments for expanding rape law to include fraud and coercion cases is the aptness of the analogy many courts and commentators have made between rape and theft offenses,⁵¹⁵ although troubling problems inhere in equating sexual au-

⁵¹² Schulhofer, *Feminist Challenge*, *supra* note 8, at 2184.

⁵¹³ Roberts, *supra* note 8, at 362-63 (footnotes omitted); see also Rosemary J. Coombe, *Room for Manoeuvre: Toward a Theory of Practice in Critical Legal Studies*, 14 L. & SOC. INQUIRY 69, 80 (1989) ("Economic dependence or cultural degradation are contexts socially defined as consistent with free sexual consent and a woman's actual agreement is constituted within this context—she is very likely to conceive of her sexual relations as consensual so long as there is no physical coercion"); Estrich, *Rape*, *supra* note 7, at 1118 ("the force standard guarantees men freedom to intimidate women and exploit their weaknesses, as long as they don't 'fight' with them."); *Men, Women*, *supra* note 194, at 153 (remarks by Prof. West) ("the focus on the effectiveness or ineffectiveness of rape law . . . tends almost inevitably to legitimate, as praiseworthy, just or morally non-problematic, the vast bulk of our non-criminal consensual heterosexual encounters.").

⁵¹⁴ See *supra* Part I.G.

⁵¹⁵ See, e.g., *Lewis v. State*, 30 Ala. 54, 57 (1857) (noting obtaining goods by fraudu-

tonomy with property.⁵¹⁶ Simply put, the criminal law punishes both theft of property accomplished by force or threat as robbery and theft of property without force as larceny, false pretenses, or extortion depending on the nonviolent method. Robbery is graded as the most serious offense because it entails the use of physical force. Estrich builds on the theft analogy by arguing that the law should punish the use of fraud or extortion to secure sexual intercourse to the same extent it outlaws their use to secure money.⁵¹⁷

lent pretenses treated same as forcible theft, but obtaining sexual relations by false pretenses not punished); *State v. Lovely*, 480 A.2d 847 (N.H. 1984) (defining extortion for sexual assault by reference to theft by extortion statute); *Commonwealth v. Caracciola*, 569 N.E.2d 774, 777 (Mass. 1991) (analogizing rape to robbery statute and declining "to assume that the Legislature intended to give greater protection to property than to bodily integrity."); *Commonwealth v. Gregory*, 1 A.2d 501, 505 (Pa. Super. Ct. 1938) (comparing fraud in sexual assault and battery case with fraud in larceny by trick); *Regina v. Petrozzi* 35 C.C.C. 3d 528, 2 W.C.B. 2d 109 (1987) (court's instructions to jury regarding fraud in prostitute case analogized to theft of goods); Estrich, *Rape*, *supra* note 7, at 1120 (arguing for criminalization of rape along lines of theft offenses); Feinberg, *supra* note 18, at 339 (discussing difference between violent robbery and nonviolent burglary); Harris, *supra* note 12, at 638-40 (analogizing rape to robbery and assault as nonconsensual, forcible versions of ordinary interactions and also comparing victim behavior in robbery and rape cases); Schulhofer, *Feminist Challenge*, *supra* note 8, at 2184; Scutt, *Fraudulent Impersonation*, *supra* note 134, at 61-62 (discussing one opinion in husband impersonation case concluding there must be "the same defence for female virtue against the thief in the dark as against the open methods of a highwayman."); *The Legal Bias Against Rape Victims*, 61 A.B.A. J. 464 (1975) [hereinafter *Legal Bias*] (quoted in *Pittsburgh Action Against Rape*, 428 A.2d 126, 142 (1981)) (importing rape cross-examination strategy to robbery case); see also Chamallas, *supra* note 17, at 815 n.167 (observing contracts compelled by physical force are void but also those compelled by economic duress or misrepresentations are avoidable); Larson, *Even a Worm*, *supra* note 4, at 9-10 (discussing age-of-consent reforms and quoting from speech of that era: "Why do they bear so heavily upon the weaker, making the punishment for stealing away a woman's honor no greater than that for stealing a silk gown; purloining her character at a smaller penalty than the picking of a pocket would incur?"). But see *People v. Evans*, 85 Misc.2d 1088, 1096, 379 N.Y.S.2d 912, 919 (Sup. Ct. N.Y. County 1975) (declining to analogize to larceny by trick because woman's right to body not properly within meaning of theft law); *People v. Harris*, 155 Cal. Rptr. 472 (Cal. Ct. App. 1979) (reversing rape conviction, but finding theft by fraud permissible on same facts); Beale, *supra* note 5, at 324 (distinguishing larceny by trick and constructive breaking in burglary and rape law).

⁵¹⁶ See, e.g., note 669.

⁵¹⁷ See Estrich, *Rape*, *supra* note 7, at 1120. Estrich also points out that Evans and Goldberg would have been guilty of property offenses if they had been attempting to obtain money, rather than sex. *Id.* at 1119; see also Findlater, *supra* note x, at 1364 ("Threats and deceptions that would be prohibited by laws against extortion, fraud, or false pretenses as a way to obtain money should be prohibited by rape law as a way to obtain sex." (footnote omitted)).

Not only does this argument have intuitive and logical appeal, it has two additional benefits. First, the theft analogy offers a viable model for reconciling the seriousness of violent rape with the criminalization of lesser forms of nonviolent rape. One would never argue that the prohibition against robbery precludes punishing larceny, false pretenses, or extortion. The theft paradigm makes clear that it is not an either-or proposition. Second, implementing the theft paradigm equalizes the law's treatment of force, fraud, and coercion across the crime spectrum.⁵¹⁸ Rape law, instead of making exceptions for fraud⁵¹⁹ or coercion, should treat these pressures with the same repugnancy as they are treated in theft offenses.⁵²⁰

The analogy between rape and theft law, however, has not been universally embraced. Ironically, Dripps and Posner, who emphasize an economic analysis of rape, would provide little support for the concepts of rape by fraud or coercion. Dripps discusses the theft analogy in the context of elaborating his commodity theory of sex, his own property analogy, in which he likens sexual cooperation to a service.⁵²¹ He proposes dividing sexual offenses into two categories: sexually motivated assault, essentially violent rape, and sexual expropriation, covering instances in which the victim expressed refusal or was incapable of consent.⁵²² Dripps believes the theft analogy works for the assault offense but does not work as well for sexual expropriation because "sex differs from other commodities in that no clear line separates the consumer from the supplier."⁵²³ Thus, Dripps likens sexual intercourse with an unconscious, helpless, or incompetent woman to larceny but balks at expanding the analogy to theft by false pretenses.⁵²⁴ Moreover, he

⁵¹⁸ Susan Estrich in *Teaching Rape Law*, 102 YALE L.J. 509, 512 (1992), argues rape should be treated more like other crimes: "What I have been fighting for, over these years, is not to give rape special treatment . . . but rather to stop treating it specially;"

⁵¹⁹ See Larson, *Women Understand*, *supra* note 24, at 412 (arguing law allows men to use tactics to secure sex that would not be tolerated to secure money, what she calls the sex exception to fraud).

⁵²⁰ See *supra* notes 515-531 and accompanying text (burglary analogy). But see Schulhofer, *Gender Question*, *supra* note 10, at 136 (arguing against using same standards of fraud in rape and property contexts and advocating looking at how fraud works in sexual arena).

⁵²¹ See Dripps, *Beyond Rape*, *supra* note 8. Dripps's proposal has been heavily critiqued. See, e.g., Roberts, *supra* note 8; West, *supra* note 454.

⁵²² Dripps, *Beyond Rape*, *supra* note 8, at 1807-08.

⁵²³ Dripps, *Beyond Rape*, *supra* note 8, at 1801.

⁵²⁴ Dripps, *Beyond Rape*, *supra* note 8, at 1802 ("Should sex be among the things it

remains skeptical about criminalizing rape by fraud, although he suggests it might be treated as theft of services.⁵²⁵

Posner has also equated sex with a good but, like Dripps, argues that sex by fraud should not be punished because fraud should not be recognized as a form of coercion.⁵²⁶ He comments:

The law usually treats force and fraud symmetrically in the sense of punishing both, though the latter more leniently. It is a crime to take money at gunpoint. It is also a crime, though normally a lesser one, to take it by false pretenses. But generally it is not a crime to use false pretenses to entice a person into a sexual relationship. Seduction, even when honey-combed with lies that would convict the man of fraud if he were merely trying to obtain money, is not rape. The thinking may be that if the woman is not averse to having sex with a particular man, the wrong if any is in the lies (and we usually do not think of lying in social settings as a crime) rather than in an invasion of her bodily integrity.⁵²⁷

Posner's analysis, however, fails to account for non-social situations in which victims are defrauded; most of the cases in Part I involved professional or business contexts.⁵²⁸

Some feminists have also criticized the theft analogy for completely different reasons. West argues that the analogy "wildly misdescribes the experience of rape," which is more akin to "spiritual murder than either robbery or larceny."⁵²⁹ She elaborates: "Rape is sui generis. It is not accurately captured by any analogy, no matter how clever or elaborate. . . . [R]ape itself cannot be reduced to other painful experiences. It certainly cannot be reduced to theft."⁵³⁰ Other feminists are troubled by the analogy, claiming it is reminiscent of earlier notions of women as men's property.⁵³¹ The point, however, is not that rape is similar to theft—they prohibit

is criminal to obtain by false pretenses?").

⁵²⁵ Dripps, *Beyond Rape*, *supra* note 8, at 1803. Dripps also argues that criminal penalties for sexual fraud cases are premature "until the civil law enforces contracts for sexual services," *Men, Women and Rape*, *supra* note 171, at 145 (remarks by Dripps).

⁵²⁶ See POSNER, *supra* note 487, at 392.

⁵²⁷ POSNER, *supra* note 487, at 392.

⁵²⁸ Posner distinguishes husband impersonation and fraudulent medical treatment cases because there the act is disgusting and humiliating. POSNER, *supra* note 487, at 392-93.

⁵²⁹ West, *supra* note 499, at 1448; see also *Men, Women, and Rape*, *supra* note 194, at 157 (comments of Fairstein; agreeing with West).

⁵³⁰ West, *supra* note 454, at 1449; see also Henderson, *What Makes Rape a Crime?*, *supra* note 8, at 219 n.97 (1987-88) (arguing nature of rape is not like theft).

⁵³¹ Henderson, *What Makes Rape a Crime?*, *supra* note 8, at 219 n.97. But see Dripps, *Beyond Rape*, *supra* note 8, at 1805 n.75 (suggesting women have property rights in their own bodies).

entirely different harms—but rather that the law's umbrella treatment of theft crimes, subsuming a broad range of conduct, is useful in crafting a comparable approach to the varieties of sexual offenses.

c. *Conclusion*

The benefits of expanding rape law to encompass fraudulent or coercive inducements outweigh those of retaining a unitary, rape-as-violence conceptualization. Rape law, like theft law, should subsume a broad range of blameworthy conduct, not simply forcible sexual penetration or contact. More importantly, several state legislatures have already transcended many of the theoretical issues inherent in this debate by prohibiting both violent rape and nonviolent sexual offenses accomplished by fraud or coercion⁵³² or without reference to force, fraud, or coercion.⁵³³ These legislative bodies have declined to assume that enactment of the latter forecloses retention of the former. The resulting statutes grade violent rape more harshly and punish it more severely, preserving the judgment that it is a qualitatively more serious offense and forestalling any possible hint of trivialization.⁵³⁴

3. The Relationship of Force and Nonconsent in Rape Law

A third set of objections to the expansion of rape law to include fraud or coercion implicates the confusing and murky relationship between force and nonconsent in rape law: are these two elements coequal or does force serve a corroborative function by providing an external, verifiable indication of nonconsent?⁵³⁵ If force is an independent element of rape, then its elimination or substitution by fraud or coercion may be problematic. However, if the real inquiry of rape law is consent, and force merely corroborates nonconsent, then factors other than force can be recognized as invalidating consent. Embedded within this inquiry lie two subsidiary concerns: (1) the need for verification of nonconsent based on

⁵³² See *supra* notes 328-409 and accompanying text.

⁵³³ See *supra* notes 410-446 and accompanying text.

⁵³⁴ See, e.g., TENN. CODE ANN. §§ 39-13-503 (1997).

⁵³⁵ The debate over whether rape law protects women from physical assault or protects their sexual integrity is also implicated in the question of whether force and nonconsent are equivalent prongs of rape law.

an assumed untrustworthiness of rape victims and (2) the effect of fraud or coercion on consent.

a. *Force Corroborates Nonconsent*

Competing views exist about the proper relationship between the force and nonconsent elements of rape law. *Goldberg*, for example, quoted at the beginning of this Article, argued that the issue of consent is simply irrelevant in the absence of force. The *Goldberg* court held that force and nonconsent are coequal elements of the crime; rape cannot occur in either's absence.⁵³⁶ Dripps concurs: "The conjunction also means that no matter how nonconsensual the sex may be, there is no crime without force."⁵³⁷ By contrast, *Crosswell* emphasized consent as being the central inquiry of rape law, and force, threat, or fraud may negate it.⁵³⁸

Historical support exists for the notion that the force requirement of rape is subservient to nonconsent. Specifically, Schulhofer notes that the common law definition of rape was "'unlawful sexual intercourse with a female person without her consent.'"⁵³⁹ One court observed that the better view is

... to require a showing of only such force as is necessary reasonably to demonstrate that an act of intercourse has been undertaken without the victim's consent⁵⁴⁰

...

⁵³⁶ See *Goldberg v. State*, 395 A.2d 1213 (Md. Ct. Spec. App. 1979).

⁵³⁷ Dripps, *Beyond Rape*, *supra* note 8, at 1794; see also *Commonwealth v. Childs*, quoted in Puttkammer, *supra* note 5, at 420 ("No amount of persuasion or solicitation however improper, no amount of deception or even fraud however villainous or outrageous, will make illicit intercourse constitute rape, where the woman, induced or persuaded consents to the act."). Dripps ultimately argues for abandoning the conjunction by eliminating consent and focusing exclusively on the defendant's actions. Dripps, *Beyond Rape*, *supra* note 8, at 1805-06 ("By defining the assault offenses exclusively by reference to the alternatives the defendant presents the victim with, consent to sex can be taken out of the law."); see also Cynthia Ann Wicktom, Note, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399 (1988) (making similar proposal).

⁵³⁸ See *People v. Crosswell*, 13 Mich. 427 (1865).

⁵³⁹ Schulhofer, *Sexual Autonomy*, *supra* note 9, at 60. He notes that American jurisdictions added the force element. *Id.*

⁵⁴⁰ *People v. Cicero*, 204 Cal. Rptr. 582, 590 (1984); see also *State ex rel. M.T.S.*, 609 A.2d 1266, 1270 (N.J. 1992) (quoting PERKINS & BOYCE, *supra* note 55, at 211, for a similar proposition); Schulhofer, *Sexual Autonomy*, *supra* note 9, at 63 (noting Perkins reads force element out of rape).

As these authorities make clear, the fundamental wrong at which the law of rape is aimed is not the application of physical force that causes physical harm. Rather, the law of rape primarily guards the integrity of a woman's will and the privacy of her sexuality from an act of intercourse undertaken without her consent. 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. Rather, in this scenario, "force" plays merely a supporting evidentiary role, as necessary only to insure an act of intercourse has been undertaken against a victim's will.⁵⁴¹

This interpretation of the force element is preferable to any other interpretation because it also helps to make sense of cases involving unconscious, mentally ill, or physically helpless victims: "[W]here the complainant clearly was incapable of effective consent, . . . it is settled that the force requirement is satisfied merely by the amount of force necessary to perform the sexual act."⁵⁴² Thus, with force correctly understood as corroborating nonconsent, it should not elide further inquiry into the question of consent.

b. *Women as Untrustworthy Rape Accusers*

Rape law's insistence on an external, verifiable criterion of nonconsent embodied in the force requirement must also be viewed in a larger historical and jurisprudential context. Many commentators have pointed to the gender bias inherent in criminal law,⁵⁴³ which "is—and has been for centuries—a system of rules conceived and enforced by men, for men, and against men."⁵⁴⁴ Rape law is peculiarly vulnerable to discriminatory biases against women because it is one of the only crimes that pits men directly against women, wherein issues of credibility are often outcome-determinative.⁵⁴⁵ Estrich adds: "Moreover, because the crime involves sex

⁵⁴¹ *Cicero*, 204 Cal. Rptr. at 590 (ruling force element of committing lewd and lascivious acts upon child suffices to show it was against child's will).

⁵⁴² *Harris*, *supra* note 12, at 619-20 (1976) (footnotes omitted) ("[I]t is evident that juries, courts and commentators consider assailant force and victim resistance primarily as indicators of nonconsent. Where the force used was extreme . . . , the trier of fact generally assumes that the victim did not consent to intercourse"); see also MONT. CODE ANN. § 45-5-511(5) (1997) (force or threat sufficient to show nonconsent); *M.T.S.*, 609 A.2d at 1270-71 (discussing force requirement as proving act against woman's will and significance of resistance as proxy for force illustrated by cases in which victims unable to resist); POSNER, *supra* note 487, at 388 (distinguishing rape from ordinary sex by nonconsent, which is difficult to prove without physical injury); WHARTON'S CRIMINAL LAW § 290 (1995) (no consent if defendant uses force or threat).

⁵⁴³ See, e.g., Schulhofer, *Feminist Challenge*, *supra* note 8.

⁵⁴⁴ Schulhofer, *Feminist Challenge*, *supra* note 8, at 2154.

⁵⁴⁵ Deborah W. Denno, *Why Rape is Different*, 63 FORDHAM L. REV. 125, 128 (1994)

itself, the law of rape inevitably treads on the explosive ground of sex roles, of male aggression and female passivity, of our understandings of sexuality—areas where differences between a male and female perspective may be most pronounced.⁵⁴⁶ Even more importantly, feminist and other writers have noted that rape jurisprudence, dating from Lord Hale's famous maxim,⁵⁴⁷ reveals a basic distrust of women and fear that they will make false accusations of rape.⁵⁴⁸

The fear of false rape charges is exacerbated in rape by fraud cases because "doubts as to the credibility of the complainant are magnified by the absence of such outward indicia of nonconsent as force and resistance."⁵⁴⁹ Puttkammer similarly argues that fraud cases are dangerous because "the central fact of prime importance is, not the woman's objective conduct, but her unmanifested thoughts and beliefs. To ascertain them with any degree of assurance is bound to be an excessively difficult task."⁵⁵⁰ Harris even maintains that rape law has developed into its current form because of inordinate attention to the rape by fraud cases: "Scholarly discussion in rape gelled in an era when legal thinkers were emotionally distrustful of rape complaints in general, but were fascinated by cases where consent was allegedly induced by subterfuge."⁵⁵¹ It may be asserted, therefore, that errors in decision-making will be minimized by retaining an external criterion such as force.

("Relative to other crimes, rape reveals the dark side of the social and biological differences and potential conflicts between men and women."); see also Findlater, *supra* note 1, at 1357 (rape law based on sexist notions).

⁵⁴⁶ ESTRICH, *supra* note 7, at 1091.

⁵⁴⁷ Hale wrote: "It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved; and harder to be defended by the party accused, though never so innocent." 1 M. HALE, PLEAS OF THE CROWN 633, 635 (1680); cf. Schafran, *supra* note 60, at 1013 ("Contrary to Lord Hale's allegation, rape is an extremely difficult crime to charge and the easiest of all to defend.").

⁵⁴⁸ See, e.g., *State ex rel. M.T.S.*, 609 A.2d 1266, 1273 (N.J. 1992) ("During the 1970s feminists and others criticized the stereotype that rape victims were inherently more untrustworthy than other victims of criminal attack."); *Legal Bias*, *supra* note 469.

⁵⁴⁹ Harris, *supra* note 12, at 631; see also *Barbara A. v. John G.*, 145 Cal. App.3d 369, 377 (1983) (opining that it would be awful if we admitted that the legal system could not sort out false from true claims).

⁵⁵⁰ Puttkammer, *supra* note 5, at 421. The author discloses his bias when he articulates why rape is different from automobile theft—we should be more suspicious of rape victims. *Id.*

⁵⁵¹ Harris, *supra* note 12, at 628; see also Chamallas, *supra* note 17, at 832.

Today, the widespread proliferation of rape law reform attests to a more egalitarian system, one not predominated by distrust of rape victims. Several states, for example, have eliminated Hale's cynical maxim from their jury instructions.⁵⁵² Furthermore, empirical support is notably absent in support of the notion that women fabricate rape claims.⁵⁵³ Harris recommends

If the law would formalize the unofficial practice of requiring force as an element of rape only where the expectation of the complainant's untruthfulness is not rebutted by extrinsic evidence, and then discard that expectation itself as unreasoned and unreasonable, then the law would very likely conclude that the freedom of sexual choice which is to be protected by rape law can be as effectively negated by nonphysical as by physical coercion.⁵⁵⁴

Banishing the basic distrust of rape victims means external indicia of nonconsent such as the use of force become less important.

c. *Fraud and Coercion Also Invalidate Consent*

If the real question in rape law is victim consent, then it seems logical to look at all factors that undermine consent, not simply physical force. The exclusive focus on physical force may deny the philosophical and empirical reality that other types of pressures erode or negate consent. Commentators approaching the consent question from varying perspectives conclude that persons may be compelled to do things against their wills or without true consent by means other than force, i.e., fraud, coercion, and economic pressure.⁵⁵⁵ Moreover, as noted earlier, criminal law takes cogni-

⁵⁵² See, e.g., COLO. REV. STAT. § 18-3-408 (1997) (outlawing Hale's maxim and requiring jury instruction against gender bias).

⁵⁵³ See Schafran, *supra* note 60, at 1012-13.

⁵⁵⁴ Harris, *supra* note 12, at 645.

⁵⁵⁵ See, e.g., BOK, *supra* note 50, at 18 (noting deceit and violence may coerce persons into acting against their wills); JOEL FEINBERG, HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW 269 (1986) ("Coercive force is by no means the only kind of factor that can reduce or vitiate the voluntariness of consent. Deficient or mistaken information is another."); Chamallas, *supra* note 17, at 814 (arguing consent ineffective if secured by physical force, economic pressure, or deception); Coombe, *supra* note 513, at 80 ("This move to contextualization, however, has no logical (that is to say non-arbitrary) limits; economic dependence, cultural degradation, and psychological pressure, for example, could be considered in this calculation of coercion and consent if an interpretive construct other than the prevailing mind/body dichotomy were utilized."); Harris, *supra* note 12, at 644 ("[T]he law should recognize that forms of coercion other than threats or infliction of bodily harm preclude effective consent to intercourse."); Larson, *Women Un-*

zance of these other factors in numerous contexts; fraud or coercion provide a sufficient explanatory mechanism in burglary and theft law.⁵⁵⁶ Finally, the impact of these factors on consent is recognized in many legal contexts, particularly commercial ones outside criminal law.⁵⁵⁷

d. Conclusion

Rape law, in some senses, has come full circle. Common law rape constituted nonconsensual sexual intercourse without reference to force. American jurisdictions added the force requirement to supply external evidence of nonconsent, probably because of rampant, sexist distrust of rape victims. Exclusive reliance on force as the indicator of nonconsent has prevented more careful consideration of other types of pressures that also invalidate consent. Today, many state legislatures have solved this problem by enacting statutes making certain forms of fraud or coercion illegal in the context of accomplishing sexual intercourse. Others have disconnected the substantive link between force and nonconsent by explicitly altering one or another of these requirements. Finally, a substantial minority outlaw at least one form of nonconsensual sexual offense without force, returning to rape's common law formulation.⁵⁵⁸

4. Conclusion

In summary, the doctrinal element of force in traditional rape law does not present an insurmountable obstacle to the criminalization of rape by fraud or rape by coercion. First, rape law has sufficient doctrinal space to accommodate a conception of force broader

derstand, *supra* note 24, at 414 ("Free choice may be thwarted by compulsion of the body through physical violence, or more subtly by the creation of false belief through deception."); Schulhofer, *Sexual Autonomy*, *supra* note 9, at 45 ("Many of the ways to defeat a person's will are not usually thought to involve force: trickery, stealth, (possibly) economic leverage.").

⁵⁵⁶ Global criminal consent provisions often include trilogy of force, duress, or deception. See *supra* notes 349-354 and accompanying text.

⁵⁵⁷ See Larson, *Women Understand*, *supra* note 24, at 412 (noting greater protection against fraud in commercial than sexual spheres); Schulhofer, *Sexual Autonomy*, *supra* note 9, at 89 (observing that from "commercial transactions to medical procedures and surgery, material misrepresentations are widely acknowledged as sufficient to invalidate consent. Yet current law does not proscribe nondisclosure or even active, affirmative misrepresentations to induce sexual intimacy in most contexts.").

⁵⁵⁸ See *supra* Part II.E.

than physical harm. Moreover, state legislatures have already enacted a new genre of sexual offenses that explicitly alter, replace, or eliminate the force requirement of traditional rape law. Second, the costs of expanding rape law to include nonforcible fraud and coercion are relatively small and the benefits considerable when compared to retaining the unitary concept of violent rape. In addition, the theft analogy provides a valuable paradigm for punishing both forcible and nonforcible offenses. Third, the real focus in rape law should be consent. Force, although an important method of corroborating nonconsent, should not prevent examination of other factors that also undermine consent such as fraud and coercion.

B. *The Nonconsent Requirement*

The second major challenge inherent in cases of rape by fraud and rape by coercion concerns rape law's doctrinal requirement of nonconsent. The common denominator of cases involving physical force, fraud, and coercion is the effect of these pressures on consent.⁵⁵⁹ Simply put, the central question is whether a victim's fraudulently induced or nonphysically coerced consent is valid, depriving the defendant's conduct of criminality, or whether the offender's use of fraud or coercion vitiates the victim's seeming consent.⁵⁶⁰ Another way of posing this inquiry, one suggested by Schulhofer, is: does yes always mean yes?⁵⁶¹ Because modern rape law has recognized some forms of fraud or coercion as vitiating consent,⁵⁶² the narrower problem is where to draw the line be-

⁵⁵⁹ Larson, *Women Understand*, *supra* note 24, at 418-19, comments: "A victim's will may be bent to the coercer's ends by means other than physical force. Force, fear, and fraud work in much the same way: The wrongdoer arranges the victim's world so that the act he wants her to perform appears as her best choice. . . . For the duration of the threat or the deception, the coercer has captured the victim's will for his own ends."

⁵⁶⁰ Scutt, *Fraudulent Impersonation*, *supra* note 134, at 59, conceptualizes the question as follows: "Where 'consent' to the particular act has in fact been given by the woman concerned, is the charge of rape thereby ousted, or does the fraud vitiate the consent, thus validating a charge that the man has had carnal knowledge of the woman without her consent?"

⁵⁶¹ Schulhofer, *Gender Question*, *supra* note 10, at 135, comments: "Once a 'no' means 'no,' the next generation of issues will center on when or whether 'yes' is sufficient to mean 'yes.' What happens when the 'yes' is produced by intimidation, indirect pressure, or manipulation?"

⁵⁶² Some argue that these may be exceptions rather than the rule. See Chamallas, *supra* note 17, at 830 ("It might be claimed that the current legal prohibitions against deception in sexual relationships are exceptions to a more general rule that immunizes

tween effective and ineffective consent in cases of fraud and coercion.⁵⁶³ Schulhofer comments:

Despite the undoubted value of legal analysis or cultural criticism that points to commonalities between physical violence and social, economic, or psychological pressure, the job of legal scholarship is not finished until a workable boundary between permitted and regulated conduct has been identified. And in the case of rape, the boundary problem is acute.⁵⁶⁴

This section explores various formulations of how to draw the line in both the fraud and coercion contexts.⁵⁶⁵

1. Fraud

a. *Traditional Formulations*

i. Fraud in the Factum vs. Fraud in the Inducement

The traditional formula for distinguishing legally valid from invalid consent in fraud cases is the dichotomy between fraud in the factum and fraud in the inducement.⁵⁶⁶ Perkins and Boyce

sexual encounters from charges of fraud."); Schulhofer, *Gender Question*, *supra* note 10, at 136 (noting since abolition of seduction, criminal law has immunized all misrepresentations no matter how egregious).

⁵⁶³ See *Boro v. Superior Court*, 210 Cal. Rptr. 122, 126 n.5 (Cal. Ct. App. 1985) (asking where line should be drawn); *Regina v. Linekar*, 2 Crim. App. 49 (C.A. 1995) (discussing line-drawing); *Berger*, *supra* note 8, at 76 ("What would be the limits of liability for rape by fraud?"); *Estrich*, *Rape*, *supra* note 7, at 1180 (drawing line between criminal sex and seduction); *Anthony Hooper*, *Fraud in Assault and Rape*, 3 U.B.C. Rev. 117, 121 (1968) (need for line drawing acute); see also *Dripps*, *Beyond Rape*, *supra* note 8, at 1799 ("The second, and far more difficult, step toward a rational criminal law of sex would be to define and grade those pressures to cause sexual cooperation, short of violence, that deserve to be punished as crimes.").

⁵⁶⁴ Schulhofer, *Feminist Challenge*, *supra* note 8, at 2176.

⁵⁶⁵ *Harris*, *supra* note 12, at 620, comments: "Continuous juggling of the elements of the crime by the courts and commentators reflects an urge toward administrative simplicity, a search for an external standard by which to measure the subjective element of nonconsent."

⁵⁶⁶ See, e.g., *People v. Harris*, 155 Cal. Rptr. 472, 472 (Cal. Ct. App. 1979) (fraud in the inducement does not vitiate consent); *People v. Cicero*, 204 Cal. Rptr. 582, 597 (1984) (fraud in the factum does vitiate); *Boro*, 210 Cal. Rptr. at 125 (fraud in the inducement does not vitiate); *People v. Ogunmola*, 238 Cal. Rptr. 300 (Cal. Ct. App. 1987) (doctor obtaining sexual intercourse under pretext of medical exam is fraud in the factum); *United States v. Booker*, 25 M.J. 114, 114 (1987) (fraud in the factum includes identity); *Linekar*, 2 Crim. App. at 49 (fraud in inducement includes lies about payment of prostitute).

In *Don Moran*, notably, which held that fraud was insufficient to supply the place

describe such concepts as follows:

The general rule is that if deception causes a misunderstanding as to the fact itself (fraud in the *factum*) there is no legally-recognized consent because what happened is not that for which consent was given; whereas consent induced by fraud is as effective as any other consent, so far as direct and immediate legal consequences are concerned, if the deception relates not to the thing done but merely to some collateral matter (fraud in the inducement).⁵⁶⁷

The authors maintain that the most striking illustration of this dichotomy occurs in rape law,⁵⁶⁸ supporting their thesis with the following example. If a doctor falsely tells a woman that sexual intercourse is necessary for her treatment and she agrees, no rape occurred because the doctor's misrepresentation constitutes fraud in the inducement and the resulting consent is effective. On the other hand, if the doctor pretends to perform a routine pelvic exam and instead has sexual intercourse with the woman, then it is rape because this is fraud in the *factum* which vitiates her consent. The woman never consented to sexual intercourse because she was deceived about the act itself.⁵⁶⁹ In fact, the court in *Boro v. Superior*⁵⁷⁰ relied on this classic distinction. As discussed *supra* in Part I.A.1, *Boro* involved a feigned doctor who told his victims that sexual intercourse was a necessary treatment to cure their fatal blood disorder. The *Boro* court held that the defendant's lies constituted fraud in the inducement, the victims' consent was effective, and, therefore, defendant was not found guilty of rape.⁵⁷¹

Likewise, the *Restatement of Torts* recognizes the factum-inducement dichotomy. Consent is ineffective if induced by a substan-

of force, the court seemed willing to acknowledge lack of consent based on fraud: "If the statute, or the definition of rape, did not contain the words 'by force,' or 'forcibly,' doubtless a consent procured by such fraud as that referred to, might be treated as no consent" *Don Moran v. People*, 25 Mich. 356, 364 (1872).

⁵⁶⁷ PERKINS & BOYCE, *supra* note 475, at 1079; see also LAFAYE & SCOTT, *supra* note 418, at 477-80; Feinberg, *supra* note 18, at 332 (describing distinction as between nonconsent and less than voluntary consent because of defective belief induced by fraud).

⁵⁶⁸ PERKINS & BOYCE, *supra* note 475, at 1079.

⁵⁶⁹ PERKINS & BOYCE, *supra* note 475, at 1079; see also WHARTON'S CRIMINAL LAW § 290 (1995).

⁵⁷⁰ 163 Cal. App. 3d 1224 (1985).

⁵⁷¹ The dissent pointed out California had a separate statute defining consent for sexual intercourse that implicitly repealed the factum-inducement distinction. *Id.* at 1232 (Holmdahl, J., dissenting); see also Feinberg, *supra* note 18, at 342-43 (discussing similar fact pattern).

tial mistake as to the nature of the invasion or the extent of harm and it is induced by another or known to him.⁵⁷² However,

If the consent is induced by mistake concerning other matters, the rule does not apply. . . . Sometimes this is expressed by saying that the consent is "voidable," but not "void" sometimes by saying that the mistake goes merely to the "inducement" of the consent, rather than to the essence of what is consented to; sometimes by saying that it goes merely to a "collateral matter."⁵⁷³

Moreover, even contract law recognizes the void-voidable dichotomy depending upon whether the fraud occurred in the execution or in the inducement.⁵⁷⁴

Despite widespread adoption, the factum-inducement distinction is objectionable on several grounds. First, some commentators argue it is of dubious origin and question its emergence, at least in the torts context.⁵⁷⁵ Second, and more importantly, scholars suggest that the distinction makes no sense and provides little real assistance in differentiating between legally effective and ineffective consent.⁵⁷⁶

Although superficially appealing, the traditional dichotomy between essential and collateral matters breaks down in application and has little predictive value. . . . Recent scholarship has rejected the traditional factum/inducement dichotomy and has held that if the mistake *materially* affects the plaintiff's decision-making process, the consent is invalid—but, again, only if the mistake is known to the defendant.⁵⁷⁷

In particular, the predictive utility of the distinction has been seriously undermined by its elastic application in rape cases.⁵⁷⁸ Re-

⁵⁷² RESTATEMENT (SECOND) OF TORTS § 892B(2) (1977).

⁵⁷³ *Id.* § 892B cmt. g (1965). The illustration accompanying this provision concerns giving a prostitute or gigolo a counterfeit bill. *Id.* at § 892B cmt. g, illus. 9 (1977).

⁵⁷⁴ The contract distinction seems to have spilled over into the marriage area. For instance, section 106.030 of Oregon statutes, ORE. REV. STAT. § 106.030 (1996), provides for voidable marriages when "the consent of either party is obtained by force or fraud,"

⁵⁷⁵ The distinction appeared in the *First Restatement of Torts*; before the *Restatement*, scholars either did not discuss this issue or concluded that all forms of fraud vitiated consent. David A. Fischer, *Fraudulently Induced Consent to Intentional Torts*, 46 CINCINNATI L. REV. 71, 71 (1977).

⁵⁷⁶ See *id.* at 71 ("[T]here is no basis for the distinction. Fraud always invalidates consent, whether the fraud relates to the tortious nature of the act or to matters of inducement."); see also FOWLER V. HARPER ET AL., 1 THE LAW OF TORTS 303 (2d ed. 1986) (citing Fischer and concluding case law on the distinction thin); STUART M. SPEISER ET AL., 1 THE AMERICAN LAW OF TORTS § 5:7, 800 (1983) (citing Fischer).

⁵⁷⁷ VINCENT R. JOHNSON, *MASTERING TORTS* 42 (1995) (emphasis added).

⁵⁷⁸ See also Puttkammer, *supra* note 5, at 423 ("But in fact there is little profit in any

call, for instance, the legal sleight of hand used by the court in *Regina v. Dee*, a husband impersonation case, to bring the defendant's conduct within the purview of rape law.⁵⁷⁹ Although impersonation cases were commonly thought to involve fraudulent inducement, the court held that the woman had consented to marital intercourse not adultery, which constituted fraud in the factum; therefore, the impersonator's fraud vitiated her consent.⁵⁸⁰ While some authors defend this example, arguing that the courts are not disagreeing about the underlying principle but only its application, Feinberg comments: "there is a danger in packing too much into the description of what was consented to, since it could undermine altogether the distinction between fraud in the *factum* and fraud in the inducement."⁵⁸¹ Ambiguity in the description of the consented-to act similarly arises in fraudulent treatment cases⁵⁸² and in the sexual theft context.⁵⁸³

Third, the factum-inducement dichotomy fails to accurately distinguish degrees of voluntariness. Feinberg maintains that the real distinction should not be between fraud in the factum and fraud in the inducement but "between those cases of fraud in the inducement that reduce the voluntariness of consent substantially and

event in speaking of 'fundamental differences' as contrasted with 'merely collateral circumstances'; the dividing line may too easily be drawn where the speaker wishes and the arbitrary nature of his choice be covered by such terms of mere camouflage.") (footnote omitted).

⁵⁷⁹ *Regina v. Dee*, 15 Cox 579 (1884); see also Scutt, *Fraudulent Impersonation*, *supra* note 134, at 63-65 (discussing case).

⁵⁸⁰ *Dee*, 15 Cox at 579; see also Scutt, *supra* note 134, at 63-65 (discussing this case).

⁵⁸¹ Feinberg, *supra* note 18, at 335; see also *id.* at 344-45 (discussing difference between husband impersonators and medical misrepresentation).

⁵⁸² Feinberg, *supra* note 18, at 335, comments:

The consent to intercourse with a physician when fraudulently induced by medical misrepresentations, for example, could be reclassified as fraud in the *factum* and therefore rape after all, since the woman could always argue that though she consented to sexual intercourse, she was not consenting to what in fact was done, but rather to an act of therapy that was not in fact administered.

Later, he adds "But there is no reason in principle why sex by fraudulent inducement in cases where it is plausibly harmful (as in our example) ought not to be a crime." *Id.* at 341; see also *State v. Quinlan*, 596 N.E.2d 28 (1992) (victim consented to medical procedure, not acts of sexual penetration; thus, consent vitiated because obtained by deceit).

⁵⁸³ See JOHNSON, *supra* note 577, at 42 ("Surely, the gigolo's mistake . . . relates to those facts which determine whether the liaison was offensive to him or whether he suffered mental aggravation.").

those that do not."⁵⁸⁴ Schulhofer similarly comments: "[A]t least some frauds in the inducement are sufficiently serious to invalidate consent and justify criminal punishment."⁵⁸⁵ Courts' adherence to the formulaic factum-inducement distinction thwarts serious inquiry into these more significant and finer-grained differences.

Finally, Perkins and Boyce assert that the distinction is only "controlling in the prosecution of offenses in which absence of consent is an element of the crime, but unimportant in the prosecution of other offenses."⁵⁸⁶ In battery and larceny cases, they argue, all types of fraud render consent invalid.⁵⁸⁷ Harris disagrees with this basic premise, asserting that other crimes, such as assault and robbery, also require nonconsent.⁵⁸⁸ Her argument reinforces the notion that the real difference is not doctrinal (i.e., whether the nonconsent element is explicit or implicit) but rather the differential treatment of fraud in the context of rape as compared to other crimes. Moreover, under Perkins and Boyce's analysis, the factum-inducement distinction may lose its significance in states with provisions explicitly altering the nonconsent element or with new statutory crimes such as sexual battery or sexual extortion, depending upon the elements required for conviction. Notably, courts in Hawaii, Tennessee, and Wisconsin have recently eschewed the distinction by holding that it was irrelevant under their respective sexual offense statutes.⁵⁸⁹

ii. Nature and Quality of Act and Identity

A second formulation, very similar to the factum-inducement dichotomy and appearing in British and Canadian cases, is fraud as to the nature or quality of the act or the identity of the defen-

⁵⁸⁴ Feinberg, *supra* note 18, at 335.

⁵⁸⁵ Schulhofer, *Gender Question*, *supra* note 10, at 135-36.

⁵⁸⁶ PERKINS & BOYCE, *supra* note 475, at 1084; see also LAFAYE & SCOTT, *supra* note x, at 479 ("However, as to other offenses where consent is only sometimes a defense, such as battery, both forms of deception may be considered unlawful and thus a bar to effective consent.").

⁵⁸⁷ In an old larceny case, the court held "fraud supplied the place of force." PERKINS & BOYCE, *supra* note 475, at 1083 (quoting *Pear's Case*, 2 East P.C. 685 (1779)).

⁵⁸⁸ Harris, *supra* note 12, at 638-40 (analogizing rape to robbery and assault as nonconsensual, forcible versions of ordinary interactions).

⁵⁸⁹ *State v. Oshiro*, 696 P.2d 846 (Haw. Ct. App. 1985); *State v. Tizard*, 897 S.W.2d 732, 740-42 (Tenn. Crim. App. 1994); *State v. Dantes*, 350 N.W.2d 740 n.1 (Wis. 1984).

dant.⁵⁹⁰ Commentators, however, have also criticized this formulation for its elasticity: "But once the courts admit that a consent to a touching or intercourse can be vitiated by the fraudulent concealment of the purposes of the accused, then the problem of where to draw the line becomes acute. The expression 'the nature and quality of the act' does not help the courts to solve this problem."⁵⁹¹ This formulation seems no more satisfactory than others because it still begs the question of what constitutes the act to which the victim consented.⁵⁹² Its explicit inclusion of identity fraud, however, does resolve the impersonation aspect of rape by fraud, a strategy not emulated in other formulations. Rather than debating whether deception as to identity constitutes fraud in the factum or fraud in the inducement, this formulation bypasses that classification and explicitly provides that identity fraud vitiates consent.

b. Commentators' Suggestions

Abandoning the traditional formulation of fraud in the factum versus fraud in the inducement, legal commentators have made some suggestions, varying in degrees of specificity, about how to draw the line between valid and invalid consent in cases of rape by fraud. These scholarly approaches fall into the following three overarching categories: (1) voluntariness or autonomy, (2) materiality, and (3) totality of the circumstances.

⁵⁹⁰ See also Puttkammer, *supra* note 5, at 424 (suggesting drawing the line between cases where victim knows she was consenting to sexual intercourse and those where she did not). Statutes in Arizona, Nebraska, and California use this language. See *supra* Part II.C.

⁵⁹¹ Hooper, *supra* note 563, at 121.

⁵⁹² Koh, *supra* note 328, at 92-94 (discussing medical treatment cases). In England, Parliament also passed the Sexual Offenses Act of 1956, making it a misdemeanor to procure a woman to have sexual intercourse by false pretenses or false representations. However, because the scope of this provision is unclear, Koh suggests construing it more broadly than nature of the act or identity.

It is hoped the courts would give it a liberal construction and consider the types of misrepresentation that are likely to induce a woman to have sexual intercourse, to which but for the representation, she would not so consent. For example, a misrepresentation as to a person's health such as in *Clarence's* case should be serious enough to merit punishment but not, it is submitted, if it involves a misrepresentation of a person's wealth or family connections.

Id. at 94 (referring to *Regina v. Clarence*, (1888) 22 Q.B.D. 23, 43-44.).

i. Voluntariness or Autonomy

In one of the most thorough treatments of fraudulently procured consent,⁵⁹³ Feinberg argues that the real question is what types of fraud reduce the voluntariness of consent to a level that should not be recognized as legally effective. He classifies fraudulent inducements as follows: (1) bluffing threats (extortionate fraud), (2) bluffing warnings, (3) false promises, and (4) other false pretenses. Bluffing threats are really a form of coercion and not fraud because the real harm comes from its extortionate aspect. Bluffing warnings combine fraud and coercion "in such a way that the coercive pressure that reduces the voluntariness of the victim's consent would not exist but for her fraudulently induced false belief."⁵⁹⁴ The worse the threatened harm, the less voluntary is the consent.⁵⁹⁵ Feinberg would outlaw *Boro*-like⁵⁹⁶ fraudulent treatment cases under this second category based on the coercive nature of the false warning. The third category, false promises, affects voluntariness because the victim does not assume the risk of default; these should be actionable as rape or gross sexual imposition if they are coercive enough (i.e., avoiding or eliminating an intolerable evil rather than offering an attractive prospect). For instance, Feinberg argues that criminal law should subsume the actions of a wealthy man who falsely promises to financially assist the mother of a sick child in return for her sexual favors but not the actions of the same rich man who merely offers a desirable, but not desperately needed, alternative to the woman. Finally, Feinberg discusses several types of fraudulent inducements in his fourth category, other false pretenses, positing the same coerciveness distinction.⁵⁹⁷ He excludes from criminal sanction, for example, a rock-star impersonator who exploits a fan's mistake as to his identity to accomplish sexual intercourse. In summary, Feinberg finds fraud objectionable when its effect on consent is too coercive.⁵⁹⁸ While his proposal is more

⁵⁹³ Feinberg, *supra* note 18.

⁵⁹⁴ Feinberg, *supra* note 18, at 343.

⁵⁹⁵ Feinberg, *supra* note 18, at 343, adds: "If we use objective standards of voluntariness and require also that the warning be at least minimally credible, then the voluntariness of the procured consent might also vary with degree of credibility."

⁵⁹⁶ *Boro v. Superior Court*, 210 Cal. Rptr. 122 (Cal. Ct. App. 1985).

⁵⁹⁷ Feinberg, *supra* note , at 344-45.

⁵⁹⁸ BOK, *supra* note 50, at 22, comments: "Deception, then, can be coercive. When it succeeds, it can give power to the deceiver—power that all who suffer the consequences of lies would not wish to abdicate."

expansive than the factum-inducement distinction, subsuming *Boro* for instance, it still may not be broad enough to cover many sexual scam cases because of its emphasis on coerciveness.

On the other hand, Schulhofer advocates focusing on sexual autonomy as the central precept of rape law and outlawing illegitimate pressures in causing someone to submit to sexual intercourse. In the fraud context, where he believes no clear consensus exists,⁵⁹⁹ he argues that the autonomy perspective helps identify some forms of deception that are "indefensible intrusions on freedom of choice."⁶⁰⁰ Schulhofer specifically mentions falsehoods about pecuniary interest, nondisclosure or misrepresentations involving significant health risks and adds that any deceptions "intended to create feelings of isolation, physical jeopardy, or economic insecurity should likewise be considered unprivileged and an unwarranted intrusion on autonomous choice."⁶⁰¹ He remains more wary of misstatements concerning emotions or commitment to a relationship.⁶⁰² Schulhofer's proposal, like Feinberg's, is more expansive than the traditional factum-inducement distinction because it includes falsehoods regarding pecuniary interests and health issues. Moreover, his comment regarding deceptions strongly resembles Feinberg's emphasis on coerciveness.

Finally, Bogart advocates defining rape simply as nonconsensual sexual intercourse.⁶⁰³ Judging, on standard philosophical grounds, the four possible conceptualizations of rape, i.e., as forcible, coerced, nonvoluntary, or nonconsensual, Bogart concludes that the superior definition is one based on nonconsent. He defines nonconsensual sex as existing "[w]here participation is not willing, not chosen freely, not chosen without the application or presence of external pressures,"⁶⁰⁴ Bogart posits a nonconsensual model of rape as the preferable choice because of its ability to cover a broad spectrum of scenarios, including those involving deception. He argues that fraud cases distinguish the nonconsent and nonvoluntary models:⁶⁰⁵ Specifically, "Because the beliefs un-

⁵⁹⁹ Schulhofer, *Sexual Autonomy*, *supra* note 9, at 92.

⁶⁰⁰ Schulhofer, *Sexual Autonomy*, *supra* note 9, at 93.

⁶⁰¹ Schulhofer, *Sexual Autonomy*, *supra* note 9, at 93.

⁶⁰² Schulhofer, *Sexual Autonomy*, *supra* note 9, at 93.

⁶⁰³ Bogart, *supra* note 327, at 118.

⁶⁰⁴ Bogart, *supra* note 327, at 118; see also Chamallas, *supra* note 17, at 814 (discussing refurbished model of consent which is not "freely given if secured through physical force, economic pressure, or deception.").

⁶⁰⁵ Bogart asserts that nonvoluntary sex includes forcible and coerced sex as well as

derlying the action are false, although the action itself is voluntary, there is no effective consent. Consequently, the cases may be termed instances of rape under the nonconsent model. Under the nonvoluntary model, these are cases of simple seduction."⁶⁰⁶ For Bogart, then, rape law should focus on the falsity of the victim's belief, rendering the resulting consent ineffective, rather than on the coerciveness of the fraudulent inducement. This more expansive approach is shared by Larson and Bok in their discussions of sexual fraud and lying.⁶⁰⁷ All three scholars opine that deception prevents the victim from having information necessary for an informed choice.

The major critique of the voluntariness or autonomy approach is two-fold. First, some feminists argue that autonomy is illusory in a culture in which women occupy a subordinate role and that all forms of sexual intercourse are coerced to some degree.⁶⁰⁸ Second, they argue that the liberal idea of rights embedded in the autonomy perspective is more male-oriented and does not take into account women's feelings.⁶⁰⁹ Chamallas, for example, proposes a notion of mutuality that goes beyond consensual sex.⁶¹⁰ While these critiques are valid, they fail to offer an alternative method of distinguishing valid and invalid consent. West is the most helpful by suggesting that rape law should not ask about consent but rather about the legitimacy of the pressures brought to bear on victims.⁶¹¹

cooperation due to "compelling circumstantial pressures." If lack of cooperation results in serious inconvenience or substantial harm, the sex is nonvoluntary; examples include unemployment and being abandoned in an unfamiliar place. Bogart, *supra* note 327, at 18. One example of a court adopting a nonvoluntary approach is *Commonwealth v. Mlinarich*, 542 A.2d 1335, 1335 (Pa. 1988).

⁶⁰⁶ Bogart, *supra* note 327, at 120.

⁶⁰⁷ Bok, *supra* note 50, at 20 ("They see that they were manipulated, that the deceit made them unable to make choices for themselves according to the most adequate information available, unable to act as they would have wanted to act had they known all along."); Larson, *Women Understand*, *supra* note 24, at 414, 422.

⁶⁰⁸ See, e.g., Chamallas, *supra* note 17, at 783 ("[F]eminists have contended that the liberal notion of rights is inadequate to protect women against the coercive power exercised by men in society."); Schulhofer, *Feminist Challenge*, *supra* note 8, at 2175-76 (discussing dominance approach of MacKinnon).

⁶⁰⁹ Chamallas, *supra* note 17, at 796.

⁶¹⁰ Chamallas, *supra* note 17, at 784.

⁶¹¹ West, *supra* note 499, at 1459.

ii. The Materiality Approach

Commentator's second approach to determining whether consent is legally effective, derived from criminal and civil fraud law, is to focus on the nature of the misrepresentation, particularly its materiality to the victim's decision-making process. Estrich, in her proposal to criminally punish actors using fraud to obtain sexual intercourse in the same manner as actors using fraud to obtain money, describes the relevant category of fraud as "deceptions of material fact."⁶¹² This approach would have three basic components: (1) the misrepresentation must be material, (2) the victim's reliance must be reasonable,⁶¹³ and (3) the actor must have intended to mislead when making the misrepresentation.⁶¹⁴

Larson advocates the adoption in the civil arena of a modern tort of sexual fraud, a modified version of an action for intentional misrepresentation applied to lies told to induce sexual consent.⁶¹⁵ Some of Larson's ideas supporting tort liability for achieving sexual intercourse by fraud may be adapted to criminal law, although the two systems obviously serve different functions. Larson's new tort of sexual fraud provides:

One who fraudulently makes a representation of fact, opinion, intention, or law, for the purpose of inducing another to consent to sexual relations in reliance upon it, is subject to liability to the other in deceit for serious physical, pecuniary, and emotional loss caused to the recipient by his or her justifiable reliance upon the misrepresentation.⁶¹⁶

This sexual fraud tort would require an intentional misrepresentation, (i.e., knowledge of falsity and calculated to mislead), mate-

⁶¹² Estrich, *Rape*, *supra* note 7, at 1182.

⁶¹³ See also Feinberg, *supra* note 18, at 343 (discussing requirement that bluffing warning be at least minimally credible).

⁶¹⁴ With respect to the intent, one way of narrowing the class of behavior that might fall within the purview of rape by fraud is to insert a heightened intent requirement, for example, the specific intent to cause the victim to submit through the use of fraud. Kansas's rape statute prohibits two types of knowing misrepresentations. See *supra* notes 297-298 and accompanying text. Bok defines a lie as "an intentionally deceptive message in the form of a statement." Bok, *supra* note 50, at 15. She distinguishes cases in which the person intends to deceive the other person from those in which the person is self-deceiving. *Id.*

⁶¹⁵ Larson, *Women Understand*, *supra* note 24, at 453.

⁶¹⁶ Larson, *Women Understand*, *supra* note 24, at 453.

reality (i.e., whether a reasonable person would act on it),⁶¹⁷ and justifiable reliance (i.e., was it justified under the circumstances).

Chamallas, who is skeptical about whether the law is at a stage of development where deception is generally regarded as an impermissible inducement to sex, comments: "Perhaps the principal impediment to criminalizing rape by fraud is the desire to avoid the difficult task of choosing which lies will be treated as material and which will be dismissed as insignificant."⁶¹⁸ Chamallas appears to favor a tort action like Larson's, although she worries such liability might interfere with "the universal interest in ending unwanted relationships."⁶¹⁹ However, she adds: "This concern could be met by limiting recovery to cases in which a plaintiff proves that the defendant consciously misrepresented a material fact with the purpose of inducing sex,"⁶²⁰ thereby adopting the major components of Larson's proposed tort.

Several other scholars discuss an approach to rape by fraud cases which strongly resembles the materiality approach. Dripps, in proposing to treat cases of sex secured by fraud as theft of services, emphasizes that most sexual relationships are complex and would limit criminal liability to a narrow class of deception:

No single representation causes sexual cooperation; a host of causes are in play. A prospective lover can be talented, beautiful, and rich, but still somehow unacceptable. By contrast, the theft-of-services statutes only punish representations made in bad faith when the representation is a necessary and sufficient condition for obtaining the service.⁶²¹

Dripps's approach requires a higher standard for the misrepresentation than Larson's but still focuses on the causal connection between the statement and sexual relations.⁶²² Feinberg also notes that

⁶¹⁷ One torts treatise states: "Material . . . means not . . . decisive, but . . . given [some] weight in the decision-making process." JOHNSON, *supra* note 528, at 42. The book asserts the gigolo may be able to maintain an action for battery under a materiality theory because "[s]urely, the gigolo's mistake . . . relates to those facts which determine whether the liaison was offensive to him or whether he suffered mental aggravation." *Id.*

⁶¹⁸ Chamallas, *supra* note 17, at 833 (footnote omitted).

⁶¹⁹ Chamallas, *supra* note 17, at 835.

⁶²⁰ Chamallas, *supra* note 17, at 835.

⁶²¹ Dripps, *Beyond Rape*, *supra* note 8, at 1803. Dripps is also concerned with the slippery slope argument; he worries that the criminalization of rape by fraud would lead inevitably to the "sweeping criminalization of sex, including, most prominently, recriminalizing adultery." *Id.* He adds that sexual fraud cases are premature until the civil law enforces contracts for sexual services. *Men, Women, and Rape*, *supra* note 194, at 145 (remarks by Dripps).

⁶²² Dripps' proposal seems only to make sense in the relatively rare cases in which

one possible way of grading fraudulently induced beliefs is according to their centrality to the victim's decision-making process.⁶²³ As discussed above, however, he prefers an alternate conceptual approach to ranking false beliefs.⁶²⁴

The major critique of the materiality approach concerns its feasibility. Subotnik, for instance, questions whether a sexual fraud tort is really workable.⁶²⁵ Similarly, Posner discusses the difficulty of litigating over false statements about feelings.⁶²⁶ He believes that women should take self-protective measures against fraud by potential sexual partners rather than punishing those who perpetrate the fraud.⁶²⁷

iii. Totality of the Circumstances⁶²⁸

In an article written more than twenty years ago, Harris argues that the criminal law "has not yet developed a principled standard of effective nonconsent in rape."⁶²⁹ To fill this void, she suggests: "Principles that should guide the current controversy over consent in rape can be derived from an examination of policies that govern the meaning of effective consent in other situations where one person violates another's safety and freedom of choice."⁶³⁰ More specifically, Harris proposes that courts look at the totality of the circumstances in deciding whether the victim validly consented to sexual intercourse.⁶³¹ She likens this inquiry to that conducted in search-and-seizure cases: "To best protect fourth amendment interests, courts require that effective consent be informed, specific to the scope of the search, and uncontaminated by any physical or

the victim was a prostitute and offered her sexual services for sale, but not in other noncommercial cases in which the woman's sexual integrity is impugned. See also Reed, *supra* note 197 (suggesting the use of the crime of obtaining services by deception in cases involving prostitutes in England).

⁶²³ Feinberg, *supra* note 18, at 341, asks whether mistaken belief is the whole reason, a sufficient condition or critical element thereof, a necessary but insufficient reason, or a mere consideration for consenting.

⁶²⁴ See *supra* notes 593-597 and accompanying text.

⁶²⁵ Subotnik, *supra* notes 433-438.

⁶²⁶ POSNER, *supra* note 487, at 393.

⁶²⁷ POSNER, *supra* note 487, at 393.

⁶²⁸ See also CAL. PENAL CODE § 261(b) (West 1998) (duress for rape tested by the totality of the circumstances).

⁶²⁹ Harris, *supra* note 12, at 613.

⁶³⁰ Harris, *supra* note 12, at 637.

⁶³¹ Harris, *supra* note 12, at 645.

mental coercion.⁶³² Harris's proposal is also similar to the paradigm of informed consent used in medical treatment cases.⁶³³

c. Legislative Enactments

State legislatures have approached the line-drawing problem in criminalizing rape by fraud cases from several different angles, providing a fertile field of alternative statutory solutions. First, some states simply outlaw fraud in the context of certain professional relationships. Several medical-treatment statutes, for instance, explicitly mention fraud or deceit, while others emphasize the unprofessional or unethical nature of the conduct, arguably including fraudulent practices.⁶³⁴ Similarly, a number of states rely on the notions of therapeutic deception or emotional dependence in psychotherapist-patient provisions.⁶³⁵ These enactments embody the legislative judgment that fraud is totally inappropriate in certain alliances between vulnerable patients and those holding positions of trust.⁶³⁶ Moreover, these statutes embody the corollary proposition that fraud is generally more coercive in these contexts than outside them, lending tacit support to Feinberg's and Schulhofer's emphasis on coerciveness.

Second, some states specify a limited set of conditions involving fraud under which victim consent, as traditionally understood, does not relieve the defendant of criminal sexual liability.⁶³⁷ In addition to older provisions outlawing husband impersonation, fraud as to the nature of the act, fraudulent administration of drugs, or seduction, three states punish a form of sexual offense when the victim concededly consented to the conduct. Alabama punishes

⁶³² Harris, *supra* note 12, at 642. She does not favor looking at consent in terms of duress.

⁶³³ See also RESTATEMENT (SECOND) OF TORTS § 57 cmt. 9, illus. 2 (1977) (discussing providing intercourse for counterfeit money); Schulhofer, *Feminist Challenge*, *supra* note 8, at 2181 (discussing consent in the context of medical procedure).

⁶³⁴ See *supra* notes 279-288 and accompanying text.

⁶³⁵ See *supra* notes 289-300 and accompanying text.

⁶³⁶ See also FAIRSTEIN, *supra* note 47, at 197 (arguing legislation particularly needed when defendant serves professionally as victim's caretaker or in similar position of trust); Larson, *Women Understand*, *supra* note 24, at 411 (concurring in her discussion of tort liability for sexual fraud). But see Jeffrey A. Barker, Comment, *Professional-Client Sex: Is Criminal Liability an Appropriate Means of Enforcing Professional Responsibility?*, 40 UCLA L. REV. 1275 (1993) (arguing against a broad application of criminal sanctions).

⁶³⁷ See *supra* notes 339-348 and accompanying text.

sexual activity if consent is obtained by any fraud or artifice,⁶³⁸ California requires consent be induced by fear based on fraud,⁶³⁹ and Kansas requires consent be secured by the defendant's knowing misrepresentations regarding necessity or authority.⁶⁴⁰

Each of these statutes represents a unique legislative judgment about the effects of certain types of fraud on consent. The provisions in California and Kansas, based largely on fraudulent coercion, are similar to suggestions made by Feinberg and Schulhofer. Kansas's knowing-misrepresentation standard also adopts the heightened intent requirement emphasized in the materiality approach. Alabama's treatment of fraud in the sexual context as a misdemeanor represents a more general judgment that fraud is a less serious inducement than force. While these statutes are useful because they describe the types of fraudulent misrepresentations that are so egregious as to render a defendant's conduct criminal in the face of consent, they also cover only a limited range of scenarios. They represent a strategy that has characterized rape by fraud—piecemeal solutions to a more global problem.

A third legislative approach is that adopted by Tennessee which simply rewrote its rape and sexual battery statutes to include instances in which sexual penetration or contact is accomplished by fraud.⁶⁴¹ The primary benefit of Tennessee's approach is that it defines the offense broadly, not triggering the limitations inherent in the other two approaches. However, the problem is ascertaining what types of fraud make consent invalid. Although Tennessee's courts have eschewed the factum-inducement distinction,⁶⁴² it remains unclear how the state distinguishes effective and ineffective consent in the fraud context. Further legislative guidance seems preferable, perhaps in the guise of a nonexclusive list of the types of misrepresentations that fall inside or outside (e.g., relating solely to emotional ties or the intimacies of a romantic relationship) the statute's purview.

Finally, some state legislatures have explicitly altered the consent standard by including global consent provisions in their crimi-

⁶³⁸ See *supra* notes 336-338 and accompanying text.

⁶³⁹ See *supra* notes 339-340 and accompanying text. But see Schulhofer, *Sexual Autonomy*, *supra* note 9, at 93 n.136 (suggesting California's statute does not add much to current rape doctrine).

⁶⁴⁰ See *supra* notes 341-342 and accompanying text.

⁶⁴¹ See *supra* notes 331-335 and accompanying text.

⁶⁴² *State v. Tizard*, 897 S.W.2d 732, 740-42 (Tenn. Crim. App. 1994).

nal codes which state that consent is ineffective if obtained by force, duress, or deception.⁶⁴³ These enactments are not tied to particular status relationships or specific types of misrepresentations but provide that deception is an illegitimate inducement across the board. Moreover, because these consent provisions arguably apply to all crimes, not simply sexual ones, they equalize the treatment of deception in rape law with its treatment in other criminal contexts. However, it remains unclear whether in practice states actually apply these global consent provisions to sexual offenses. If they do not apply them, then victims of sexual exploitation receive no protection. If they do, the problem is knowing what types of deception make consent ineffective—the line-drawing problem again. Will these statutes harken back, for instance, to the inducement-factum distinction? The first step in developing these statutes may be to insert language or commentary explicitly making them applicable to sexual offenses. Second, further definition similar to Tennessee's statute may be useful although case law may have already fleshed out the contours of deception in nonsexual contexts for application to rape cases.

d. Conclusion

Diversity of opinion continues to exist regarding the appropriate parameters of legally effective consent in cases of rape by fraud. In general, both commentators' suggestions and legislative enactments are more expansive than the traditional factum-inducement dichotomy and, thereby, offer greater protection to potential victims. The current stream of legal thought is decidedly pointing in the direction of a more thorough examination of the basis of victim consent and the effect of defendants' fraud on the voluntariness of that consent, rather than adherence to a formalistic distinction. What Larson terms the "sex exception to fraud" may be slowly eroding.⁶⁴⁴ This trend coincides with movements in the tort and contract realms, where the emphasis seems to be shifting toward a materiality standard. Within this larger intellectual movement lies a smaller trend focusing on the coerciveness of fraud. This smaller

⁶⁴³ See *supra* notes 349-361 and accompanying text.

⁶⁴⁴ Larson, *Women Understand*, *supra* note 24, at 412 ("I use the shorthand term 'sex exception to fraud' when referring to the law's failure to protect the decision to have sexual relations from coercion by fraud.").

trend represents a logical starting point for expansion of rape law's coverage because the emphasis on coerciveness resonates with the traditional force element and cases involving coercion per se. A greater challenge inheres in cases where the effect of fraud is not strictly coercive but the denial of information critical (or material) to the victim's decision-making process. The dividing line between valid and invalid consent in rape by fraud cases merits continued attention and development from judicial, legislative, and scholarly quarters.

2. Coercion

Courts, legislatures, and commentators agree to a far greater extent about the propriety of criminally punishing rape by coercion than its fraudulent counterpart. This more robust agreement is likely due to the greater similarity which exists between physical force or threat of force, extreme forms of coercion, and the pressures encompassed by nonphysical coercion. Berger comments: "In general, the notion of submission to threat not only finds a basis in current understandings of force but also invokes the types of concern for sexual autonomy that are wholly absent when a man fraudulently induces a woman to engage in sex."⁶⁴⁵ Moreover, coercion cases bypass many of the highly charged problems that have plagued the treatment of fraud in sexual contexts. Thus, Dripps, Schulhofer, and Chamallas, all skeptical to some degree about punishing rape by fraud,⁶⁴⁶ endorse outlawing some forms of coercive sexual conduct.

⁶⁴⁵ Berger, *supra* note 8, at 77 (also arguing that woman who yields to sex for advancement suffers the same diminution in integrity whether or not man has lied, while a victim of rape by coercion who yields because of intimidation has the right to feel "degraded, not merely duped.").

⁶⁴⁶ See Chamallas, *supra* note 17, at 830 ("It is debatable whether the law is at a point where deception is generally regarded as an impermissible inducement to sex. It might be claimed that the current legal prohibitions against deception in sexual relationships are exceptions to a more general rule that immunizes sexual encounters from charges of fraud."); Dripps, *Beyond Rape*, *supra* note 8, at 1803 ("Applying criminal fraud principles to representations made to initiate relationships more complex than one of simple prostitution invites the sweeping criminalization of sex, including, most prominently recriminalizing adultery. . . . I shall content myself with skepticism about the desirability of doing so."); Schulhofer, *Sexual Autonomy*, *supra* note 9, at 92 (noting that no clear social consensus exists about when misrepresentations in intimate sexual matters are improper).

This greater unanimity is further reflected in scholarly and legislative proposals for distinguishing between legal and illegal coercive pressures on consent in rape cases. The major line-drawing problem in these cases is the one identified by the MPC: "[T]here are obvious dangers in extending the prospect of criminal sanctions into the shadow area between coercion and bargain. To take an extreme example, the man who 'threatens' to withhold an expensive present unless his girlfriend permits his advances is plainly not a fit subject for punishment under the law of rape."⁶⁴⁷ According to the MPC, coercion is overwhelming the victim's will, while a bargain is merely offering "an unattractive choice to avoid some unwanted alternative."⁶⁴⁸ The same distinction arises in the case law. In *Commonwealth v. Mlinarich*,⁶⁴⁹ for instance, the court reasoned that the defendant's step-daughter could choose between returning to a juvenile detention facility or acceding to defendant's sexual demands; therefore, her assent was not involuntary.⁶⁵⁰ A second source of dispute is whether coerced sexual contact should be punished as a sexual offense or as nonsexual extortion or coercion.

a. Commentators' Suggestions

i. Extortionate Threats

Estrich, one of the foremost proponents of the criminalization of rape by coercion, argues that rape law should comprehend instances in which the criminal actor secures sexual contact through extortionate threats; more specifically, she proposes punishing sex secured by extortion in the same manner as the law prohibits extortion to obtain money—at least as a starting point.⁶⁵¹ Confronting

⁶⁴⁷ See MODEL PENAL CODE § 213.1 cmt. at 312 (Proposed Official Draft 1962); see also Berger, *supra* note 8, at 76 (opposing criminalizing situations in which victim does not get bargained-for exchange).

⁶⁴⁸ MODEL PENAL CODE § 213.1 commentary at 314 (Proposed Official Draft 1962); see also Feinberg, *supra* note 18, at 344 (using similar test); Chamallas, *supra* note 17, at 820 ("When the [economic] pressure is regarded as unlawful, it is labeled coercion; when it is lawful, it is likely to be called a bargain." (footnote omitted)).

⁶⁴⁹ 542 A.2d 1335 (Pa. 1988).

⁶⁵⁰ *Id.* at 1341. The court added: "Certainly difficult choices have a coercive effect but the result is the product of the reason, albeit unpleasant and reluctantly made." *Id.* at 1342.

⁶⁵¹ Estrich, *Rape*, *supra* note 7, at 1120 ("It is almost certainly impossible to expect

the line-drawing question of whether rape law can effectively regulate sexual bargains, Estrich argues that the task is not impossible because extortion law already prohibits a broad range of threats.⁶⁵² Estrich also believes that the inclusion of coerced sex under nonsexual criminal coercion statutes is a poor alternative to expanding rape law's coverage because such other statutes do not emphasize that the loss of bodily integrity is far more serious than monetary loss.⁶⁵³

Dripps, as noted earlier, proposes treating sexual autonomy as a commodity and its exploitation as analogous to theft.⁶⁵⁴ Although Dripps suggests that "sexual autonomy means freedom from illegitimate pressures" and that "[c]onsent is only the label we attach to causes of conduct deemed legitimate,"⁶⁵⁵ he appears to posit that the only illegitimate means worthy of criminal condemnation are force (i.e., his crime of sexually motivated assault) and disregarding an expressed refusal or exploiting a victim's incapacity to consent (i.e., his sexual expropriation offense).⁶⁵⁶ This conceptualization offers little by way of expanding the reach of traditional rape law.⁶⁵⁷ In response to Estrich's proposal to outlaw sexual intercourse secured through extortionate threats, Dripps argues: "Extortion can be covered simply by amending the extortion statutes to include sex among the things it is criminal to obtain by unlawful threat."⁶⁵⁸ Thus, Dripps, unlike Estrich, believes that nonsexual crimes would adequately redress instances in which the defendant coerced the victim's sexual submission; he makes no provision for the unique harm endemic to sexual offenses.⁶⁵⁹

that the law could address all of the techniques of power and coercion which men use against women in sexual relations.").

⁶⁵² Estrich, *Rape*, *supra* note 7, at 1120.

⁶⁵³ Estrich, *Rape*, *supra* note 7, at 1121.

⁶⁵⁴ Dripps, *Beyond Rape*, *supra* note 8; see also Donald A. Dripps, *More on Distinguishing Sex, Sexual Expropriation, and Sexual Assault: A Reply to Professor West*, 93 CAL. L. REV. 1460 (1993). For critiques of Dripps's analysis, see West, *supra* note 499; Men, *Women*, *supra* note 194, at 148-56 (remarks by West).

⁶⁵⁵ Dripps, *Beyond Rape*, *supra* note 8, at 1786-87; see also Coombe, *supra* note 513, at 80 ("Peller's point is that concepts of consent and coercion which are supposed to be the source of legal interpretation are actually effects of the structure of legal representation.").

⁶⁵⁶ Dripps, *Beyond Rape*, *supra* note 8, at 1807-08 (model statutes).

⁶⁵⁷ See also Schulhofer, *Feminist Challenge*, *supra* note 8, at 2178 (reaching same conclusion about Dripps's proposal).

⁶⁵⁸ Dripps, *Beyond Rape*, *supra* note 8, at 1802.

⁶⁵⁹ See also Feinberg, *supra* note 18, at 335 (discussing bluffing threats or extortionate fraud).

ii. Illegitimate Restraints on Sexual Autonomy

In contrast to Estrich's and Dripps's focus on extortionate threats, several other scholars approach the coercion problem from a more global perspective by suggesting that the appropriate dividing line is between legitimate and illegitimate inducements or restraints on sexual autonomy. For example, West comments: "We might very profitably ask not which sexual practices are consensual or not, but rather which of our sexual practices are legitimate means of obtaining sex and which are not."⁶⁶⁰ Even Dripps suggests: "In the rape context, we must grade the pressures to have sex according to their legitimacy—from those pressures to have sex that are perfectly moral, to those that are immoral but not criminal, to those that are criminal, to those that constitute crimes of the most serious sort."⁶⁶¹ While this formulation is promising, it begs the question of what are legitimate and illegitimate restraints?

Schulhofer and Chamallas have attempted to flesh out in greater detail what constitute illegitimate restraints. Schulhofer proposes that the law should focus on women's autonomy which he defines as "the right to protection from those interferences that our culture and our legal system already consider impermissible."⁶⁶² Schulhofer's first premise is that consent for sexual intimacy requires affirmative permission clearly signaled by words or conduct and that silence or ambivalence are insufficient to qualify as consent.⁶⁶³ Second, he seeks to identify the kinds of interferences that violate sexual autonomy in cases in which the victim agrees.⁶⁶⁴ Thus, he argues that an employer cannot legitimately trade a promotion for sexual favors, but a man living with a woman may condition continued financial support of her on sexual intimacy because he is validly entitled to pursue sexual fulfillment.⁶⁶⁵ In other words, Schulhofer would criminally punish some sexual bargains based on

⁶⁶⁰ West, *supra* note 499, at 1459.

⁶⁶¹ Dripps, *Beyond Rape*, *supra* note 8, at 1788.

⁶⁶² Schulhofer, *Feminist Challenge*, *supra* note 8, at 2180. He also asserts that the dominance approach articulated by Catharine A. MacKinnon and others does not solve the problems in determining what conduct to punish as rape.

⁶⁶³ Schulhofer, *Feminist Challenge*, *supra* note 8, at 2180-81.

⁶⁶⁴ *Id.* at 2182.

⁶⁶⁵ But see Roberts, *supra* note 8, at 381-386 (disagreeing with some of Schulhofer's conclusions and arguing that "relying on autonomy replicates the problems I noted earlier of defining rape according to male entitlements to sexual access to women." *Id.* at 384.).

the legitimacy or illegitimacy of the pressure, rather than measuring its effect on the victim. He adds: "This approach identifies a baseline of existing rights, and it leaves room for the evolution in the standards for valid consent."⁶⁶⁶

In another article, Schulhofer provides more detail about the "kinds of pressures and constraints that intrude on autonomous choice and render consent ineffective"⁶⁶⁷ by identifying four possible categories of illegitimate pressures. Three involve types of coercion: extortionate behavior, institutional or professional authority, and economic power; the fourth, deception, was discussed earlier.⁶⁶⁸ Agreeing with Estrich and Dripps, Schulhofer asserts: "[E]xtortionate behavior is already understood to be unprivileged and illegitimate."⁶⁶⁹ He also argues that institutional and professional relationships should be protected from sexual exploitation, a position consonant with the burgeoning group of abuse-of-trust and abuse-of-authority statutes reviewed *supra* in Part II. With respect to institutional authority and economic pressure, Schulhofer notes that "coercion results from altering the [person's] ordinary range of options in a legally impermissible way."⁶⁷⁰ In total, Schulhofer provides the broadest, most well-developed categorization of coercive pressures by exploring what it is that makes nonforcible conduct excessively intrusive or coercive, without resort to concepts that are hopelessly open-ended.⁶⁷¹

Chamallas argues that criminal law should refurbish the notion of consent in the context of sexual offenses.⁶⁷² Rape law, instead of simply relying on consent, should be based on a new, positive ideal of mutual sexual conduct—"mutuality"—which is also capable of separating moral from exploitative sex.⁶⁷³ She elaborates: "Under the refurbished version of consent, consent is not considered freely given if secured through physical force, economic pressure,

⁶⁶⁶ Schulhofer, *Feminist Challenge*, *supra* note 8, at 2184.

⁶⁶⁷ Schulhofer, *Sexual Autonomy*, *supra* note 9, at 77.

⁶⁶⁸ Schulhofer, *Sexual Autonomy*, *supra* note 9, at 77-93.

⁶⁶⁹ Schulhofer, *Sexual Autonomy*, *supra* note 9, at 79. Schulhofer argues that if one is not permitted to obtain property by such behavior, then one should not be allowed to obtain sexual acquiescence either.

⁶⁷⁰ Schulhofer, *Sexual Autonomy*, *supra* note 9, at 85.

⁶⁷¹ Schulhofer, *Sexual Autonomy*, *supra* note 9, at 77.

⁶⁷² Chamallas, *supra* note 17, at 814.

⁶⁷³ Chamallas defines mutuality as "whether the target would have initiated the encounter", but notes that this standard may be problematic in the criminal context. Chamallas, *supra* note 17, at 836-37.

or deception"—the "trio of unacceptable inducements."⁶⁷⁴ Chamallas's proposal resembles Schulhofer's because of its emphasis on the unacceptability or illegitimacy of pressures causing sexual compliance. It is also expansive because it conjoins force, economic pressure (one type of coercion), and fraud (discussed above) as factors invalidating consent. Chamallas notes that physical force is always considered an illegitimate inducement to sexual intercourse, an assertion that is clearly consistent with traditional rape doctrine.⁶⁷⁵ She argues that the case is less clear regarding economic pressure because of the blurry line between coercion and bargain,⁶⁷⁶ but adds, "I discern a trend here to regard economic pressure as an unacceptable inducement to sex and to create a range of legal sanctions to discourage economically coerced encounters, even if such sex is not subject to direct criminal sanctions."⁶⁷⁷ Although Chamallas's discussion of unacceptable inducements is not as well-developed as Schulhofer's, she agrees with his conclusion that economic pressure is illegitimate.

b. *Practical Reforms*

State legislatures have adopted three general approaches to the line-drawing problem in cases of rape by coercion. First, the most common tack is to criminalize sexual intercourse between victims and persons holding positions of trust or authority,⁶⁷⁸ mirroring Schulhofer's suggestion to the same effect. Coercion is implicit in the abuse-of-trust statutes based on the power inherent in professional authority; it is explicit in the abuse-of-authority provisions, especially those requiring that the criminal defendant use the position of authority to cause submission.⁶⁷⁹ Addressing rape law's nonconsent element, several enactments explicitly alter the definition of consent (although a few change the force requirement), while others eliminate consent as a defense, e.g., psychotherapists and prison guards provisions. Finally, some states specifically pro-

⁶⁷⁴ Chamallas, *supra* note 17, at 814. She adds: "This trio of unacceptable inducements may not seem exceptional to anyone with a passing acquaintance with twentieth century contract law." *Id.* at 815.

⁶⁷⁵ Chamallas, *supra* note 17, at 816.

⁶⁷⁶ Chamallas, *supra* note 17, at 820.

⁶⁷⁷ Chamallas, *supra* note 17, at 830.

⁶⁷⁸ See *supra* notes 276-327 and accompanying text.

⁶⁷⁹ See *supra* notes 311-312 and accompanying text.

hibit sexual extortion in employment. These statutes express a legislative conclusion that coercion, in the form of a position of trust or authority, is an illegitimate inducement to sexual relations regardless of consent.

A second major approach adopted by several states is to outlaw various forms of nonphysical coercion administered to accomplish sexual intercourse.⁶⁸⁰ A number of states prohibit threats to retaliate, including extortion. Several jurisdictions provide for other types of coercion, such as exposing the victim to public humiliation or disgrace. Others, modeled after the MPC, do not specify the precise nature of the threat, but employ a generalized standard such as rendering "a person of reasonable firmness incapable of resisting."⁶⁸¹ These provisions beneficially supplement the abuse enactments by transcending professional relationships and authoritative positions.

The third major approach involves a few jurisdictions that have crafted special provisions addressing instances of sexual extortion or sexual coercion.⁶⁸² Delaware, the only state with a sexual extortion statute, covers a broad range of extortionate measures such as exposing secrets or harming another in health, business, or reputation. Hawaii's definition of compulsion includes property damage and financial loss. New Jersey defines coercion for purposes of sexual assault by reference to its criminal coercion statute, which covers the same types of conduct as Delaware's statute. These three statutory approaches, especially the third, are noteworthy not only because they tacitly agree with Estrich's position but because they reflect a normative judgment that sexual intercourse accomplished by coercive pressure merits punishment as a sexual crime rather than as nonsexual extortion or criminal coercion.

c. Conclusion

A remarkably strong isomorphic relationship exists between scholarly suggestions and legislative enactments regarding the types of coercive pressures that are legally problematic in securing consent to sexual intercourse. This commonality of approach "rests on the judgment that using one's ability to cause harm in order to

⁶⁸⁰ See *supra* notes 277-394 and accompanying text.

⁶⁸¹ N.D. CENT. CODE § 12.1-20-04(1) (1997).

⁶⁸² See *supra* notes 395-405 and accompanying text; see also *State v. Lovely*, 480 A.2d 847 (N.H. 1984) (interpreting state's sexual assault statute by referring to theft by extortion statute).

override the will of a reluctant female is wrongful and should be punished."⁶⁸³ The best-developed area, especially in terms of statutory enactments, is the abuse of professional or authoritative positions. The widespread criminal condemnation of this behavior is further supported by civil statutes and disciplinary rules that prohibit sexual abuse occurring in these contexts. Extortion or extortionate threats are also well-represented in current enactments, either in statutory variations based on the MPC language or in more specific provisions like Delaware's sexual extortion law. The extortion statutes provide a viable model of thinking about a comprehensive array of nonphysical threats that would be illegal if used to obtain property or money.⁶⁸⁴ Finally, the least-developed area concerns economic pressures or inducements, probably because they come closest to the vexatious problem of sexual bargains or, even more broadly, prostitution;⁶⁸⁵ this facet of coercion and its effect on consent warrants increased attention from academic and legislative circles.

CONCLUSION

As we have become more civilized, we have come to condemn the more overt, aggressive and outrageous behavior of some men towards women and we have labelled it "rape".⁶⁸⁶

Amid the flux of scholarly debate and practical reform, one thing is clear: The law of rape has not ceased and in all likelihood will not cease to evolve. Nor, arguably, should it, for the law of rape, like any body of law—perhaps *more* than other bodies of law—reflects changing social attitudes and conditions, normative as well as material.⁶⁸⁷

After more than a century, modern rape law stands on the threshold of resolving the difficult conundrum posed by cases involving rape by fraud and rape by coercion. This legal evolution has awaited certain critical developments in judicial, legislative, and scholarly thought. First, it has taken the gradual proliferation of archetypical fraudulent treatment cases occurring in ever-broadening

⁶⁸³ MODEL PENAL CODE § 213.1 cmt. 312 (Proposed Official Draft 1962).

⁶⁸⁴ See *supra* notes 515-531 and accompanying text (discussing analogy between rape and theft offenses).

⁶⁸⁵ See Chamallas, *supra* note 17, at 826-30 (discussing feminist view of prostitution as extreme form of coerced sex).

⁶⁸⁶ *People v. Evans*, 379 N.Y.S.2d 912, 914 (N.Y. Sup. Ct. 1975).

⁶⁸⁷ BURGESS-JACKSON, *supra* note 455, at 82 (footnote omitted).

professional circles and husband impersonation scenarios spilling over into assorted nonmarital contexts, as well as the steady accumulation of new genres of fraudulent and coercive sex cases more closely resembling commercial-like fraud, property-like offenses, and authoritative abuse, to recognize the patterns of sexual predation inherent in these crimes. Second, state legislatures have had to undergo two successive waves of rape reform before most were willing to respond to repeated judicial invitations for reform and to seriously confront the specter of criminalizing this conduct. Altering the force and nonconsent elements of traditional rape law in innovative ways, these legislative bodies have enacted five different statutory solutions to the problems posed by cases of rape by fraud and rape by coercion. Finally, it has required countless scholarly articles and commentary addressing the historical, doctrinal, philosophical, and political aspects of rape law and, more specifically, the function of force and the meaning of consent in sexual offenses to augur change in this area. Today, as a result of these synergistic developments, it would not be an overstatement to assert that the crucial question is no longer *whether* to criminalize rape by fraud and rape by coercion but rather *when* (or under what circumstances) to do so. If, as one author argues,⁶⁸⁸ rape law developed into its traditional formula because of inordinate attention to rape by fraud cases, these cases (and those involving coercion) currently provide an opportunity to recalibrate the outer boundaries of acceptable sexual conduct between members of our society.⁶⁸⁹ 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.

⁶⁸⁸ Harris, *supra* note 12, at 628.

⁶⁸⁹ State ex rel. M.T.S., 609 A.2d 1266, 1278 (N.J. 1992) ("Today the law of sexual assault is indispensable to the system of legal rules that assures each of us the right to decide who may touch our bodies, when, and under what circumstances.").