

# The Right to Sexual Autonomy Reconsidered: Justifying the Criminalization of Sex by Deception

---

Beatriz Corrêa Camargo\*

The criminalization of sexual fraud has been the subject of significant controversy among criminal law theorists. Despite sharing the common goal of finding the appropriate scope for criminalization, scholars have offered numerous and divergent responses concerning how and why to criminalize sex by deception.

In this article, I propose a solution based on a discussion of the right to sexual autonomy in its positive and negative dimension. Specifically, I argue that rape law's protection of the non-coercive dimension of autonomy takes normative precedence over protection of the informational dimension of autonomy. This argument not only explains the traditional distinction between fraud in the factum and fraud in the inducement but also enables a redefinition of these concepts in accordance with the right to sexual autonomy.

As a result, deceptions involving an invasion of the victim's sexual boundaries violate negative sexual autonomy and are *prima facie* punishable as rape. Conversely, deceptions that induce sexual consent interfere only with positive sexual autonomy. Their criminalization requires additional justification, considering both the nature of the interference and conflicts with other rights, particularly the deceiver's informational privacy.

## I. Why Not Simply Criminalize All Cases of Sex by Deception?

In philosophy, the moral status of lying is a central concern. For Kant, while lying may not always represent a legal transgression, it invariably remains morally wrong, as it undermines humanity by weakening the foundations of trust we place in one another.<sup>1</sup>

From the perspective of autonomy, one could argue that lying is a form of objectification, particularly when the deceived person is treated merely as a means to the liar's ends.<sup>2</sup> Furthermore, since Aristotle, ignorance has been recognized as negating liability, alongside coercion.<sup>3</sup>

---

\* Professor of Criminal Law, Federal University of Uberlândia.

<sup>1</sup> Immanuel Kant, *Über ein vermeintes Recht, aus Menschenliebe zu lügen*, in Immanuel Kant's *kleine anthropologisch-praktische Schriften* 295 (Friedrich W. Schubert ed., 1838); Joel T. Klein, *Kant versus Constant: Sobre um suposto direito de mentir*, 16 *Studia Kantiana* 95, 110 (2018).

<sup>2</sup> 1 Derek Parfit, *On What Matters* 177-79 (2011); Franz von Kutschera, *Grundlagen der Ethik* 333, 337 (1982); Ronald Dworkin, *Justice for Hedgehogs* 118-20 (2011).

<sup>3</sup> Aristoteles, *Nikomachische Ethik* bk. III, 1110a, 1113b (Franz Dirlmeier trans., 10th ed. 1999).

Accordingly, part of the literature advocates for comprehensive criminalization of sex by deception. The argument holds that violating conditions imposed for sexual consent infringes upon the right to sexual autonomy.<sup>4</sup> This position assumes that sexual offenses should adopt a philosophical conception of autonomy and that any interference with sexual autonomy warrants criminalization, regardless of whether other public policies could adequately protect this right.

This comprehensive approach, however, faces significant limitations. Primary among these is that no legal system recognizes an absolute right to autonomy. If it did, we could bring legal action against self-interested friends or malicious colleagues whose deceptive conduct manipulates us into decisions that serve their purposes. No such vague cause of action exists.

In criminal law, autonomy matters not as a protected right itself, but as a condition for exercising other rights. Deception, similarly, lacks inherent criminality; it achieves legal relevance only when it undermines the conditions necessary for rights enjoyment. Consider property fraud: deception becomes criminal when it impairs an owner's capacity to allocate resources effectively, thereby affecting property rights.<sup>5</sup>

In addition, it remains unclear why sex crimes should adopt the same conception of autonomous choice employed in moral philosophy or medical ethics, particularly given that each domain addresses distinct dimensions of social life.

Unsurprisingly, the liberalization discourse that emerged in the 1950s invoked not "sexual autonomy" but "freedom of sexual self-determination"—the right to live one's sexuality free from subjugation or punishment based on moralistic views.<sup>6</sup> Over time, many scholars have lost sight of the freedom aspect of this right, treating the concept of autonomy in isolation.<sup>7</sup>

Moreover, in a liberal society, criminal law serves as the *ultima ratio* of state intervention—conduct should be criminalized only when other forms of state intervention prove insufficient to prevent socially undesirable behavior. Criminal law is therefore fragmentary: it criminalizes not all harms to individual interests, but only those that are

---

<sup>4</sup> See, e.g., Tom Dougherty, *Sex, Lies, and Consent*, 123 *Ethics* 717, 723 (2013); Jonathan Herring, *Mistaken Sex*, *Crim. L. Rev.* 511, 517 (2005); Rita Vavra, *Täuschungen als strafbare Eingriffe in die sexuelle Selbstbestimmung?*, 12 *Zeitschrift für Internationale Strafrechtsdogmatik* 611, 615 (2018).

<sup>5</sup> 2 Urs Kindhäuser & Martin Böse, *Strafrecht Besonderer Teil* 220-23 (10th ed. 2019).

<sup>6</sup> See, e.g., Heribert Jäger, *Strafgesetzbuch und Rechtsgüterschutz bei Sittlichkeitsdelikten: Eine kriminalsoziologische Untersuchung* 42 (1957). In recent literature, there are examples of authors who refer to the idea of "freedom to sexual self-determination" or use the term "sexual freedom" as synonymous with "sexual autonomy." See, e.g., Brigitte Sick, *Zweierlei Recht für zweierlei Geschlecht*, 103 *Zeitschrift für die gesamte Strafrechtswissenschaft* 43, 51 (1991); Renato de Mello Jorge Silveira, *Crimes Sexuais—bases críticas para a reforma do direito penal sexual* 171 (2008); Tatjana Hörnle, in 10 *Strafgesetzbuch: Leipziger Kommentar* § 177 para. 132 (Gabriele Cirener et al. eds., 13th ed. 2023); Nina Nestler, in 10 *Strafgesetzbuch: Leipziger Kommentar* § 183a para. 1 (Gabriele Cirener et al. eds., 13th ed. 2023); Gloria Berghäuser, in 10 *Strafgesetzbuch: Leipziger Kommentar* § 184k para. 1 (Gabriele Cirener et al. eds., 13th ed. 2023).

<sup>7</sup> See, e.g., Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* 111 (1998).

indispensable for social coexistence.<sup>8</sup> Consequently, it remains doubtful whether all cases of sex by deception merit criminal law attention from the outset.<sup>9</sup> The answer depends on how deceptions affect sexual autonomy rights, what other rights conflict with sexual autonomy, and what harmful social consequences result from non-criminalization.

A purely moral conception of sexual autonomy may indicate how people ought to treat one another but does not explain why certain conduct should be legally required. One of the most significant advances of contemporary criminal law theory has been to clarify that criminalization serves to protect individuals against violations of their rights rather than upholding moral judgments about their sexual conduct.<sup>10</sup>

Most scholarship and legal systems adopt an intermediate approach, considering only *some forms* of sex by deception worthy of criminalization.<sup>11</sup> Doctrine has pursued two main approaches to draw this line. One offers criteria internal to the right of sexual autonomy. Another addresses external criteria to identify which cases of sex by deception merit criminalization.

The most consistent approach appears to be to define the possible meaning of the right to sexual autonomy protected by criminal law. When sexual autonomy is equated with a purely moral sense of autonomy, comprehensive criminalization of sex by deception seems inevitable: deception always attacks dignity when persons are instrumentalized for selfish ends.

Yet what legal justification exists for criminalizing some, but not all, instances of sex by deception? The subsequent section offers a definition of sexual autonomy through

---

<sup>8</sup> 1 Claus Roxin & Luis Greco, *Strafrecht: Allgemeiner Teil* § 2 paras. 7, 97 (5th ed. 2020).

<sup>9</sup> As Sick (*supra* note 6, at 52) notes, criminal law neither should nor can address every interference with sexual autonomy.

<sup>10</sup> Jäger, *supra* note 6; H.L.A. Hart, *Direito, liberdade, moralidade* (1987); Cristina de Maglie, *Il declino dell harm principle*, in *Politica criminale e cultura giuspenalistica: scritti in onore di Sergio Moccia* 433 (Antonio Cavaliere et al. eds., 2017); Joachim Renzikowski, *Primat des Einverständnisses? Unerwünschte konsensuelle Sexualitäten*, in *Regulierungen des Intimen—Sexualität und Recht im modernen Staat* 199 (Ulrich Lembke ed., 2017); Thomas Weigend, *Tatbestände zum Schutz der Sexualmoral*, 129 *Zeitschrift für die gesamte Strafrechtswissenschaft* 513 (2017).

<sup>11</sup> See, e.g., Tatiana Badaró, *A mentira que invalida o consentimento sexual: limites à criminalização do estupro mediante fraude*, 8 *Revista do Instituto de Ciências Penais* 390 (2023); David P. Bryden, *Redefining Rape*, 3 *Buff. Crim. L. Rev.* 317 (2000); Ivó Coca Vila, *Agresión sexual por engaño: Hacia una teoría diferenciadora del engaño excluyente del consentimiento sexual*, 2023 *InDret* 430 (<https://perma.cc/N9TW-C5LU>); Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 *Brook. L. Rev.* 39 (1998); 3 Joel Feinberg, *Harm to Self: The Moral Limits of the Criminal Law* (1986); Stuart P. Green, *Lies, Rape, and Statutory Rape*, in *Law and Lies: Deception and Truth-Telling in the American Legal System* 225 (Austin Sarat ed., 2015); Elisa Hoven & Thomas Weigend, *Zur Strafbarkeit von Täuschungen im Sexualstrafrecht*, 3 *Kriminalpolitische Zeitschrift* 156 (2018); Tatjana Hörnle, *Sexuelle Selbstbestimmung: Bedeutung, Voraussetzungen und kriminalpolitische Forderungen*, 127 *Zeitschrift für die gesamte Strafrechtswissenschaft* 851 (2015); Chloë Kennedy, *Criminalising Deceptive Sex: Sex, Identity and Recognition*, 41 *Leg. Stud.* 91 (2021); Nora Scheidegger, *Balancing Sexual Autonomy, Responsibility, and the Right to Privacy: Principles for Criminalizing Sex by Deception*, 22 *Ger. L.J.* 769 (2021); Alex Sharpe, *Sexual Intimacy and Gender Identity “Fraud”: Reframing the Legal and Ethical Debate* (2018).

the lens of sexual freedom. This framework aims both to clarify rape law's scope and to delineate principled boundaries for criminalizing deceptive sexual conduct.

## II. The Right to Sexual Autonomy in Its Positive and Negative Dimensions

### A. Freedom Against Sexual Acts vs. Freedom to Sexual Acts

According to a significant view in the literature, the right to sexual autonomy consists of a person's freedom to decide whether, how, and with whom to engage in sexual activity.<sup>12</sup>

This right to sexual autonomy encompasses two dimensions. The negative dimension of sexual autonomy comprises freedom *against* unwanted sexual acts—a right against others' access to one's sexual sphere. The positive dimension, by contrast, refers to the individual's freedom *to perform* sexual acts as they desire. Positive sexual autonomy grants people the freedom to shape their sexual lives according to their own conceptions of how it should be.<sup>13</sup>

Some scholars argue that criminal law should criminalize only violations of negative sexual autonomy—the right of defense against others' sexual advances. Under this view, harms to positive sexual freedom—the freedom to engage in sex—should not be criminalized.<sup>14</sup> Accordingly, coercing someone into unwanted sexual acts should constitute a sexual offense, but preventing someone through coercion from obtaining desired consensual sex should not be considered a sexual offense.

This differential treatment of positive sexual autonomy is justified by Tatjana Hörnle with the argument that the state should not guarantee ideal exercise of each person's sexual life.<sup>15</sup> By contrast, Stuart P. Green does not rule out that law can play a minor role in promoting positive sexual autonomy.<sup>16</sup>

While agreeing that sexual crimes should primarily address negative sexual autonomy, I contend that criminal law may legitimately protect positive sexual autonomy in certain cases of sex by deception. The crucial distinction, however, is that such cases require additional justification for criminal intervention.

---

<sup>12</sup> Chloë Kennedy, *Inducing Intimacy: Deception, Consent and the Law 2* (2024); Thomas Fischer, *Strafgesetzbuch vor § 174 para. 5* (70th ed. 2023); Schulhofer, *supra* note 7, at 99; Rita Vavra, *Die Strafbarkeit nicht-einvernehmlicher sexueller Handlungen zwischen erwachsenen Personen* 161 (2020); Brigitte Sick & Joachim Renzikowski, *Der Schutz der sexuellen Selbstbestimmung*, in *Festschrift für Friedrich-Christian Schroeder* 651, 652 (Andreas Hoyer et al. eds., 2006); Stuart P. Green, *Criminalizing Sex: A Unified Liberal Theory* 22 (2020).

<sup>13</sup> Green, *supra* note 12, at 21; Hörnle, *supra* note 11, at 859; Sick, *supra* note 6, at 51; Alan Wertheimer, *Consent to Sexual Relations* 125 (2003); Nora Scheidegger, *Balancing Sexual Autonomy, Responsibility, and the Right to Privacy: Principles for Criminalizing Sex by Deception*, 22 *Ger. L.J.* 769, 771 (2021).

<sup>14</sup> See Jörg Eisele, in *Kommentar zum Strafgesetzbuch vor § 174 para. 1b* (Adolf Schönke et al. eds., 30th ed. 2019); Hörnle, *supra* note 6, § 174 para. 28; 3 Joachim Renzikowski, in *Münchener Kommentar zum StGB vor § 174 para. 8* (Jürgen Schäfer et al. eds., 4th ed. 2021).

<sup>15</sup> Hörnle, *supra* note 11, at 127.

<sup>16</sup> Green, *supra* note 12, at 24.

### *B. The Difficulty of Distinguishing Between the Positive and Negative Dimensions of Sexual Autonomy*

This conceptualization of sexual autonomy rights raises questions about how criminal law should address sex by deception. Most immediately, it remains unclear whether deceit should be considered a violation of positive sexual autonomy (freedom to obtain desired sex) or negative autonomy (freedom from unwanted sexual acts).

Consider Mary, who agrees to have sex with her boyfriend John only because John falsely promised marriage. One could argue that John violates Mary's positive autonomy, since she intended to have sex with her future husband but instead engaged sexually with someone who planned to end their relationship. With this lie, John prevented Mary from obtaining the sex she desired, thereby affecting her right to self-realization through sex. Alternatively, if negative sexual autonomy encompasses Mary's right not to have sex with someone who is not her future husband, then her negative sexual autonomy is also compromised.

To identify criminalizable cases of sex by deception, Stuart P. Green suggests finding the right balance between negative and positive autonomy.<sup>17</sup> Nevertheless, the author does not elucidate how these two dimensions specifically relate to each other. Without clarification about how sexual offenses protect sexual autonomy, establishing objective material criteria for delimiting punishable sexual deceptions becomes impossible. If sexual offenses should protect a vague and broad right of choice in sexual relations, then any deception affecting conditions imposed by someone ought to be criminalized.

I propose drawing this line instead through better delimitation of negative sexual autonomy. Specifically, I suggest abandoning the assumption that negative sexual autonomy represents the exclusive framework whenever a sexual act occurs with the victim's consent. Negative autonomy should be understood as a defensive right against nonconsensual sexual acts rather than as the absence of sexual acts that fail to meet autonomy ideals. Consequently, the scope of rape law can be properly defined. This approach demonstrates that some deceptions primarily violate negative sexual autonomy, while others primarily violate positive sexual autonomy.

In this analysis, I will consider the offense of rape broadly as a conduct rule prohibiting sexual acts with a person without their authorization. This rule may appear in single or multiple legal provisions, may reference force, or differentiate penalties based on the nature of the sexual acts involved. Some countries provide specific provisions for sexual fraud.<sup>18</sup> For analytical purposes, rules on sexual fraud can be considered a variation of the offense of rape, particularly when deception is used by the perpetrator to perform sexual acts without the victim's knowledge.

---

<sup>17</sup> Id. at 106.

<sup>18</sup> This is the case in Brazil, which criminalizes the practice of sexual acts through fraud or other means that prevent or hinder the victim's expression of will under Art. 215 of the Brazilian Penal Code.

### III. The Protection of Negative Sexual Autonomy by Rape Law

#### A. The Prerogative to Impose Limits on Sexual Invasions as Rape Law's Scope

Civil law theorists have long recognized rape as involving a violation of freedom.<sup>19</sup> In the late nineteenth century, Karl Binding maintained, for instance, that a wife coerced into sex by her husband could not be considered a rape victim, since sexual conduct within marriage did not contravene moral standards and established customs. Nevertheless, the author emphasized that the husband committed the offense of coercion, as he violated the wife's freedom of action by compelling her to engage in a sexual act against her will.<sup>20</sup>

Yet rape law has always been more restrictive than coercion, guaranteeing only freedom against nonconsensual sexual contact; unlike coercion, rape law does not protect general sexual freedom. Preventing someone from performing consensual sexual acts does not constitute rape. The wife who locks her husband in a room to prevent him from meeting his lover does not commit rape, nor does church leadership by imposing celibacy on clergy, even if this affronts positive sexual autonomy.

This discrepancy demonstrates that sexual autonomy itself is not the protected interest by rape law—if it were, preventing consensual sexual acts should also constitute rape.

In civil law systems, there is consensus that criminal law protects not fundamental rights in their entirety, but rather different legal interests related to fundamental rights—generally, characteristics of persons, things, or institutions serving free individual development.<sup>21</sup> Similarly, Stuart P. Green proposes understanding sexual autonomy not as “a single, monolithic right to choose one's own sexual path but rather a complex, multifarious collection of rights to engage in, or refrain from, various forms of sexual activity and sex-related conduct.”<sup>22</sup>

This logic helps clarify both which aspect of sexual autonomy rape law protects and how to identify deceptions punishable as rape. Still, what interest does rape law protect if not simply autonomous decision-making about when, with whom, and under what conditions to perform sexual acts?

---

<sup>19</sup> 1 Karl Binding, *Lehrbuch des gemeinen deutschen Strafrechts: Besonderer Teil* 200-01 (2d ed. 1902); Hugo Meyer, *Lehrbuch des Deutschen Strafrechts* 623-24 (1875).

<sup>20</sup> Binding, *supra* note 19, at 200.

<sup>21</sup> Urs Kindhäuser, *Gefährdung als Straftat: Rechtstheoretische Untersuchungen zur Dogmatik der abstrakten und konkreten Gefährdungsdelikte* 144 (1989). On the origins of the discussion regarding whether criminal norms protect rights or legal interests, see 1 Karl Binding, *Die Normen und ihre Übertretung* 353 (1922); Johann Michael Franz Birnbaum, *Über das Erfordernis einer Rechtsverletzung zum Begriffe des Verbrechen, mit besonderer Rücksicht auf den Begriff der Ehrenkränkung*, 14 *Archiv des Criminalrechts* 166 (1834) (English translation: Concerning the Need for a Right Violation in the Concept of a Crime, having particular regard to the Concept of an Affront to Honour, in *Foundational Texts in Modern Criminal Law* 389 (Markus D. Dubber ed., 2014) (<https://perma.cc/AY32-DZD4>)); Paul Johann Anselm von Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts* § 23 (1801) (English translation: *Textbook of the Common Penal Law in Force in Germany*, in *id.* at 373 (<https://perma.cc/RD6H-3KUC>)).

<sup>22</sup> Green, *supra* note 12, at 20.

I propose understanding the protected legal interest in rape law as not a pure right of sexual choice, but as the prerogative to impose limits on what others may do sexually with oneself.<sup>23</sup> This is the power to determine the extent of another's sexual interaction with oneself and, if sexual contact is permitted, to establish the limits of sexual intrusion. In my view, this definition captures the essence of concepts previously elaborated by other theorists who consider that rape law protects individuals against invasions of their physical integrity in sexual matters<sup>24</sup> or ensures individuals the right of control or dominion over their own bodies with respect to sex.<sup>25</sup>

In this regard, Luis E. Chiesa emphasized that rape law focuses on the non-coercive dimension of autonomy.<sup>26</sup> I concur with this view. What I wish to demonstrate here, rather, is that rape law does not merely protect victims against coercion; it safeguards their freedom from sexual invasions. As I will discuss in the following section, rape's invasive aspect is crucial for determining which forms of deception should or should not constitute rape. In rape, the right to impose barriers against sexual invasions derives from the consent requirement itself, which prohibits sexual interaction without permission.<sup>27</sup> Sexual consent requirements inhibit violations of physical boundaries imposed against sexual interaction—only the individual can determine whether and what kind of contact will occur. These boundaries are violated even without direct physical contact between aggressor and victim—for example, when bodily invasion is self-performed under coercion, as in forced masturbation.

This understanding explains both why absence of consent is central to defining rape and why nonconsensual sexual acts merit more severe punishment than cases where sexual consent is obtained through deception.

Criminalizing violations of sexual boundaries provides individuals security regarding the inviolability of their sexual sphere—the assurance that their bodies will not be invaded without permission. Security about established limits explains why absence of sexual consent is more serious than consent given for wrong reasons: For an individual to be

---

<sup>23</sup> Beatriz Corrêa Camargo, *Sexuelle Selbstbestimmung als Schutzgegenstand des Strafrechts: Ein Beitrag zur Diskussion über die Strafbarkeit sexueller Täuschung und zur Auslegung von § 177 StGB*, 134 *Zeitschrift für die gesamte Strafrechtswissenschaft* 351, 369 (2022).

<sup>24</sup> David Archard, *The Wrong of Rape*, 57 *Phil. Q.* 374, 379 (2007); Juan Pablo Mañalich, *La violación como delito contra la indemnidad sexual bajo el derecho penal chileno: Una reconstrucción desde la teoría de las normas*, 20 *Ius et Praxis* 21, 33, 43 (2014).

<sup>25</sup> This idea is present, for example, in Joan McGregor, *Force, Consent and the Reasonable Woman*, in *In Harm's Way: Essays in Honor of Joel Feinberg* 235, 245-46 (Jules Coleman & Alan Buchanan eds., 1994); John Gardner & Stephen Shute, *The Wrongness of Rape*, in *Oxford Essays in Jurisprudence* 193, 208 (Jeremy Horder ed., 2000). Essentially, this also reflects the idea of "possession of one's own body" developed by Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 *Yale L.J.* 1372, 1425-27 (2013).

<sup>26</sup> Luis E. Chiesa, *Solving the Riddle of Rape-by-Deception*, 35 *Yale L. & Pol'y Rev.* 407, 422 (2016).

<sup>27</sup> Vera Bergelson, *Sex and Sensibility: The Meaning of Sexual Consent*, in *Sexual Assault: Law Reform in a Comparative Perspective* 33, 34-35 (Tatjana Hörnle ed., 2023).

sexually free, they must be able to trust first and foremost that the boundaries they set will be respected by others, including sexual partners during sexual encounters.

Defining the scope of rape law in these terms can be justified both by negative sexual freedom and, indirectly, by positive sexual freedom. Since consent represents a condition for permitted sexual contact, it also ensures the possibility of trusting that one's sexual partner will not engage in any sexual acts beyond those previously authorized. Were this not the case, sexual interactions would be pervaded by generalized mistrust requiring constant vigilance. Without ensuring minimal trust in sexual partners through law, the positive exercise of sexual freedom would become impossible.

Protection from sexual coercion is therefore a precondition for making fully autonomous decisions about sexual engagement. Consequently, it should be valued as the most fundamental aspect of sexual freedom. Without the power to establish and enforce boundaries, no right to sexual autonomy can be meaningfully exercised. This means that protection of the non-coercive dimension of sexual autonomy takes precedence over the protection of informational autonomy.

### ***B. Reconceptualizing the Distinction Between Fraud in the Factum and Fraud in the Inducement: What Constitutes the Object of Sexual Consent?***

Thus far, I have argued that rape law protects a fundamental aspect of the right to sexual autonomy, namely the power to impose barriers against sexual advances from others. This understanding derives, first, from the fact that rape does not address every violation of the victim's autonomy, but rather only those coercions that subject the victim to a sexual act. Consequently, rape is characterized by an invasive component concerning the victim's sexual sphere. Second, this interpretation follows from the role that consent plays in rape law, which stipulates that sexual conduct may only occur with authorization from the other individual. Within rape law, consent operates as a binary concept: authorization is either given by the victim, or it is not.<sup>28</sup>

Under this perspective, only deception employed to perform sexual acts without the victim's authorization qualifies as rape. There are essentially three situations in which this may occur. First, when the victim does not realize that a sexual act is being performed with them. Second, when the agent performs a sexual act in a more invasive manner than authorized. And third, when the victim grants authorization to a person other than the agent who performs the sexual act.

In line with current rape laws, frauds that mislead the victim as to the sexual nature of the act can be punished without difficulty. The classic case involves physicians sexually penetrating patients under the pretense of a routine exam. Here, patients did not authorize sexual penetration; they are rape victims because they did not consent.<sup>29</sup>

---

<sup>28</sup> Chiesa, *supra* note 26, at 424; Thomas Gutmann, *Freiwilligkeit als Rechtsbegriff* 147 (2001).

<sup>29</sup> Hörnle, *supra* note 6, vor § 174 paras. 23, 39.

Note that there is a fundamental difference between deception and coercion regarding consent. Coercion is inherently incompatible with authorization: we cannot claim that a person whose purse was suddenly taken or who was threatened by a robber *authorized* someone to take their purse—there is no “invalid” or “vitiating” consent; there is no consent at all. This is not invariably the case with deception.

From this understanding, deceptions concerning the *motive* for sexual consent are not covered by rape law. The criminalization of rape guarantees victims the prerogative to authorize which sexual invasions they will submit to, not accuracy of information that grounds their motives for giving such authorization. For this reason, physicians deceiving patients about the curative potential of falsely claimed sexual techniques do not commit rape. Accordingly, the distinction between fraud in the factum and fraud in the inducement can be reframed: In fraud in the factum, no authorization exists for sexual acts; the victim’s body is sexually invaded without consent. The physically coercive dimension of fraud in the factum refers to negative sexual autonomy and qualifies such deception as rape. In fraud in the inducement, permission for sexual contact exists; the deceived person’s body remains under their control. Informational autonomy affected by fraud in the inducement relates to the exercise of positive sexual autonomy—it does not qualify as rape.

By excluding fraud in the inducement from rape, I am not arguing that such deception should be irrelevant to criminal law, only that reasons for criminalization differ. I will return to this point below.

For now, I would like to clarify how the prerogative to impose limits on sexual invasions allows for precise delimitation of the object of consent in rape offenses. This question is important because current criticism of the distinction between fraud in the factum and fraud in the inducement holds that the distinction is artificial and fails to describe what should count as the object of sexual consent.<sup>30</sup> Moreover, this criticism is exacerbated by the elastic nature of action descriptions, as Feinberg has demonstrated: depending on what is included in the description, an act can be characterized as wanted or unwanted.<sup>31</sup> Mary may have agreed to have sex with John, but not with John described as a “married man.” Due to this elasticity effect, many scholars encounter difficulty in determining whether stealthing and lying about birth control should constitute rape.<sup>32</sup>

---

<sup>30</sup> Badaró, *supra* note 11, at 397; Falk, *supra* note 11, at 162; Kennedy, *supra* note 11, at 4; Scheidegger, *supra* note 13, at 776; Alan Wertheimer, *Consent to Sexual Relations* 197 (2003).

<sup>31</sup> Feinberg, *supra* note 11, at 283.

<sup>32</sup> Felix Herzog, “Stealthing”: Wenn Männer beim Geschlechtsverkehr heimlich das Kondom entfernen. Eine Sexualstraftat?, in *Festschrift für Fischer* 354 (Stephan Barton et al. eds., 2018); Thomas Michael Hoffmann, Zum Problemkreis der differenzierten Einwilligung (Einverständnis) des Opfers im Bereich des § 177 StGB nach dem Strafrechtsänderungsgesetz 2016: Ein Kurzbeitrag zur strafrechtlichen Einordnung des sogenannten “Stealthing.” 39 *Neue Zeitschrift für Strafrecht* 16 (2019); Kay H. Schumann & Lukas Schefer, Das sog. Stealthing als Prüfstein des § 177 StGB nF, in *Festschrift zum 70. Geburtstag von Professor Dr. Dr. h.c. mult. Urs Kindhäuser* 824 (Friedrich Toepel et al. eds., 2019); José Antonio Ramos Vázquez, El engaño como medio comisivo de la agresión sexual: la esterilidad de Naim Darrechi y la nueva cultura del consentimiento, in *Comentarios a la ley del “solo sí es sí”: Luces y sombras ante la reforma de los delitos sexuales introducida en la LO 10/2022, de 6 de septiembre* 167 (José R. Agustina ed., 2023).

Nonetheless, the definition of the object of sexual consent is by no means arbitrary. Once the scope of rape is established, it becomes clear not only why stealthing ought to be punished as rape, but also why deception about fertility should not be considered rape. Given that the consent requirement ensures the victim's prerogative to oppose sexual invasions, only those acts that transgress the sexual boundaries established by the victim should qualify as the relevant object of consent in rape law. In cases of stealthing, the victim does not authorize direct contact of the penis or ejaculation inside their body. This represents an unconsented sexual invasion—that is, rape. In cases involving deception about fertility, such as when a woman lies to a man about taking birth control pills, the man consents to penetration and ejaculation in its full extent. In this instance, he has been deceived about facts pertinent to his motivations for sexual consent. As such, deception about fertility does not constitute rape.

It follows that the only conditions imposed by victims that are relevant to rape offenses are those that limit the extent of sexual invasion.<sup>33</sup> For this reason, performing acts that are less invasive than those agreed upon does not amount to rape—as in the example of a man who secretly uses a condom contrary to his partner's wishes because he fears contracting sexually transmitted diseases.

Defining the object of consent as a sexually invasive act also explains why identity fraud generally does not negate consent. What is typically at stake in deception about identity is not which act is being performed or even with whom, but rather information such as the person's real name and background. The only instance that should be punished as rape is the less frequent case of bedroom invasion, as exemplified by a man who enters a couple's bedroom and impersonates the woman's husband while she sleeps. In this scenario, the woman consents to her husband—not to the person beside her. She consents to an individual she mistakenly believes to be present.

In all other cases of identity fraud, if the perpetrator is precisely the individual to whom authorization was given, the sexual acts he performs are not rape. Information about a partner's past, gender, social status, ethnic background, intentions, and similar characteristics does not constitute the object of sexual consent; therefore, deception involving these aspects of a person's life does not constitute rape.

#### **IV. Fraud in the Inducement as Interference with Positive Sexual Autonomy**

##### ***A. Reframing the Criminalization of Fraud in the Inducement***

As I have argued, a hierarchy exists between the non-coercive and informational dimensions of autonomy. The coercive element in rape law takes precedence over other forms of interference with autonomy, as the assurance that one's sexual boundaries will not

---

<sup>33</sup> Camargo, *supra* note 23, at 375. Similarly, regarding the relevance of the degree of bodily invasion in rape, see Coca Vila, *supra* note 11, at 456; Carlos Castellví Monserrat, ¿Violaciones por engaño? Sobre el concepto de consentimiento y el objeto del consentimiento sexual, 2023 *InDret* 171, 195 (<https://perma.cc/6MHX-EQ9A>).

be violated constitutes a precondition for individuals to make informed sexual decisions according to their own values. The object of sexual consent is a sexually invasive act that transgresses boundaries established by the victim. Accordingly, only fraud in the factum, where the perpetrator invades the victim's sexual sphere without authorization, qualifies as rape.

That fraud in the inducement should not be considered rape does not mean it merits no legal attention. Indeed, several jurisdictions criminalize deception regarding at least some circumstances relevant to victims' motives for sexual consent. Nevertheless, the conceptual distinction I have presented highlights that deception which induces consent affects positive rather than negative sexual autonomy. This perspective matters because it alters the rationale for criminalization. Criminalizing interferences with positive autonomy requires additional justification. Moreover, punishment in such cases should be less severe than that for rape. Why is this so? I identify several reasons.

In fraud in the inducement, the problem lies not in the sexual act itself but in what deceived individuals fail to obtain or lose through sexual engagement—they may confront unwanted infection risks, forgo potential treatments, abandon life plans due to unintended pregnancy, waste their time on people who do not merit their affection or suffer economic losses. Personal goals and life narratives are undermined so that others may obtain sexual gratification or pursue self-serving interests. Yet what is disregarded are individuals' values, not their bodies.

Sexual assaults without consent strike at the core of sexual autonomy and merit *prima facie* criminalization. Preventing personal fulfillment through sexual activity causes damages that may be compensable under tort law. Where negative sexual autonomy is violated, criminal intervention proves indispensable for preserving sexual freedom. Where positive sexual autonomy is violated, the demand for criminal sanction seeks to eliminate impediments to achieving personal objectives through sexual freedom.

In this regard, criminalizing interference with positive sexual autonomy also raises the question of how extensively states may require citizens to cooperate with others' life objectives by providing them accurate information. Generally, the state's legitimacy in imposing cooperation obligations among citizens is far more constrained than when called upon to prevent citizens from transgressing one another's rights.<sup>34</sup>

Furthermore, as will be discussed below, positive sexual autonomy protection may conflict with other privacy rights. Hence, it must be determined to what extent the deceived person's sexual autonomy can override the deceiver's informational privacy regarding intimate facts.<sup>35</sup>

---

<sup>34</sup> von Kutschera, *supra* note 2, at 320; Joachim Renzikowski, *Solidarität in Notsituationen: Ein historischer Überblick von Thomas v. Aquin bis Hegel*, in *Solidarität im Strafrecht: Zur Funktion und Legitimation strafrechtlicher Solidaritätspflichten* 13 (Andrew von Hirsch et al. eds., 2013).

<sup>35</sup> On this discussion, see Camargo, *supra* note 23, at 383; Herring, *supra* note 4, at 523; Hörnle, *supra* note 6, *vor* § 174 para. 39; Alex Sharpe, *Deceptive Sex: Rethinking Consent from the Gender Margins*, 88 *Mod. L. Rev.* 689, 705 (2025); Scheidegger, *supra* note 13, at 780.

### *B. Balancing Positive Sexual Autonomy and Informational Privacy*

Fraud in the inducement often involves clear conflicts between privacy rights. This occurs because the fundamental right to privacy encompasses not only the right to sexual autonomy but also the right to shape one's self-image and influence how others perceive oneself.<sup>36</sup> While individuals falsely induced to provide sexual consent have legitimate claims to truthful information, those who lie or omit information may likewise possess rights to preserve intimate data.

In this respect, sex by deception differs fundamentally from deception in property offenses such as fraud. Buyers' claims to truthful information concern objective facts about merchandise or consideration.<sup>37</sup> Additionally, the expectation of disclosure regarding contractually pertinent facts is established in advance by private law provisions.<sup>38</sup> In sexual relationships, by contrast, most circumstances relevant to consent are intimate<sup>39</sup>—such as whether the partner maintains other sexual relationships, intends marriage, loves someone else, belongs to a certain religion or holds particular social status, is healthy, possesses a specific biological sex or sexual orientation, is of a certain age, or has a particular life history. All these facts pertain to the sexual partner's private life, and generally no preestablished obligation exists to provide truthful disclosure concerning them.

Unlike cases involving violations of negative sexual autonomy, there are no reasons to consider that promotion of positive sexual autonomy should always prevail over the deceiver's right to privacy. Thus, protecting positive sexual autonomy through criminal law requires balancing these two dimensions of privacy: deceived individuals' decisional privacy (the right to decide important life matters without external intervention) and deceivers' informational privacy (the right to determine what others know about them).<sup>40</sup>

In various contexts, the right to withhold intimate information takes precedence over the right to make well-informed decisions, such that lying to preserve intimacy is not

---

<sup>36</sup> Gabriele Britz, *Freie Entfaltung durch Selbstdarstellung: eine Rekonstruktion des allgemeinen Persönlichkeitsrechts aus Art. 2 I GG* 39, 53 (2007); Friedhelm Hufen, *Staatsrecht II, Grundrechte* § 10 para. 14 (7th ed. 2018); Niels Petersen, *Deutsches und Europäisches Verfassungsrecht II: Grundrechte und Grundfreiheiten* § 3 para. 158, 170 (2d ed. 2019).

<sup>37</sup> Fraud law does not protect mere affective interests or arbitrary purposes of the disposing party. See 3 Urs Kindhäuser, in *Nomos Kommentar zum Strafgesetzbuch: Besonderer Teil* § 263 para. 294 (Urs Kindhäuser et al. eds., 5th ed. 2017).

<sup>38</sup> Urs Kindhäuser, *Täuschung und Wahrheitsanspruch beim Betrug*, 103 *Zeitschrift für die gesamte Strafrechtswissenschaft* 398, 411 (1991).

<sup>39</sup> See Schulhofer, *supra* note 7, at 155.

<sup>40</sup> On both dimensions of privacy, see Bert-Jaap Koops et al., *A Typology of Privacy*, 38 *U. Pa. J. Int'l L.* 483, 500 (2017); Beate Rössler, *Privacy as a Human Right*, 117 *Proc. Aristotelian Soc'y* 187, 191 (2017).

regarded as unlawful conduct.<sup>41</sup> In my view, this pattern should also apply as a criterion for criminalizing fraud in the inducement.

In this vein, Nora Scheidegger suggests that “taboo” topics in job interviews—such as race, gender, religion, and health—might serve as guidelines for criminalizing sex by deception.<sup>42</sup> I agree that deception about these topics should not be criminalized. Nonetheless, I do not consider workplace relationships to provide an adequate parameter in this context.

The balancing necessary to criminalize fraud in the inducement concerns, first, whether the required information belongs to partners’ intimate spheres and, second, whether additional reasons substantiate expectations of truthful cooperation. Only cases where deception concerns facts about which individuals have special truth-telling obligations may legitimately be criminalized as fraud in the inducement.

Generally, truth-telling obligations arise in professional service contexts involving trust relationships, such as doctor-patient relationships. This explains relative consensus on punishing physicians who falsely attest to the curative efficacy of their sexual practices. Patients depend on physicians’ medical expertise. This equally applies to religious figures lying about sexual practices’ spiritual character.

Finally, the proposed criterion permits criminalizing situations where public security agents lie about their identity to obtain sexual intimacy with investigated individuals for evidentiary or espionage purposes. Under these circumstances, no conflict arises between deceived individuals’ rights to truthful information and agents’ privacy rights, as the agents are operating in their professional capacity. The conflict involves abstract state investigative interests, which should not override citizens’ sexual privacy.

Fraud in the inducement should not be generally criminalized in sexual contexts. Instead, deception that induces sexual consent should be criminalized in a targeted manner for specific situations, with penalties lower than those for rape. Except where truth-telling obligations exist, fraud in the inducement should not constitute a criminal offense, even if morally objectionable.

---

<sup>41</sup> Regarding a “right to lie” as the negative dimension of personality rights, see Kirsten Schmalenbach, *Wahrheit und Lüge unter der Herrschaft der Grundrechte*, 10 *Juristische Arbeitsblätter* 749, 750 (2005). The right to lie is particularly debated within the context of employer-employee relationships: Christian Armbrüster, § 123 BGB, in 1 *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Allgemeiner Teil* § 123 para. 46 (Franz Jürgen Säcker et al. eds., 9th ed. 2021); Martina Benecke, in 1 *Münchener Handbuch zum Arbeitsrecht: Individualarbeitsrecht I* § 33 para. 158 (Heinrich Kiel et al. eds., 4th ed. 2018).

<sup>42</sup> Scheidegger, *supra* note 13, at 782.