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ESSAY

THE LAW OF DECEPTION

*Amit Pundik**

INTRODUCTION

On July 19, 2010, the District Court of Jerusalem convicted Sabbar Kashur of rape.¹ According to the revised indictment, Kashur, a married Arab man, presented himself to the complainant, whom he met by chance for the first time in downtown Jerusalem, as a Jewish bachelor interested in a significant, romantic relationship. Following a short conversation, he proposed that she accompany him to a nearby building, on the roof of which they engaged in consensual intercourse. Consent, however, was obtained by deception with respect to the perpetrator's identity, and Kashur was convicted in accordance with a plea bargain.² The case was covered in

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¹ CrimC (Jer) 561/08 State of Israel v. Sabbar Kashur, PM 1996(123) (2010) (Isr.); *see also* Penal Law, 5737–1977, § 345(a)(2) (Isr.). After an appeal was submitted to the Supreme Court, Kashur's prison sentence was reduced from eighteen to nine months. The defense raised arguments against the application of the offense of rape by deception, but the Court refused to address them on the merits because the defense only appealed against the sentence and did not seek to withdraw from the plea bargain. CrimA 5734/10 Sabbar Kashur v. State of Israel 1474(1) PD para. 18 (2012) (Isr.) (Judge Meltzer's sentence).

² The facts above were those specified in the plea bargain and in the Court's verdict. However, the testimony given by the complainant, as well as the facts appearing in the original indictment, were different and included allegations of coercive intercourse. The discussion herein focuses on the alleged facts establishing the accused's conviction and ignores the problematic decision by the prosecution to submit a plea bargain that contains a significant modification of the complaint, as well as the Court's puzzling acceptance of this arrangement.

many newspaper columns by Israeli journalists and legal experts,³ and even received substantial exposure in the world press⁴ due to the allegedly racist aspect of the case.⁵

Kashur has brought to a climax a trend that has become increasingly prominent in Israeli law, namely that of broadening the offense of rape by deception and preferring conviction for this offense over other possible offenses. At first, such offenders were convicted of the nonsexual offense of obtainment by deception.⁶ In *Ben Avraham*, for example, the accused was convicted of obtainment by deception because he falsely presented himself as an ex-pilot, a successful doctor, and a rich proprietor from a posh village in Central Israel.⁷ Notably, this is the same offense that would have been charged had the accused deceived the victim to obtain financial benefit. However, five years after *Ben Avraham*, the defendant in a case of deception was convicted of the offense of rape itself. In *Alkoby*, the court convicted a transgender person born with female genitalia who presented himself as a man named Koby, of, among other offenses, indecent acts in circumstances of rape by deception and of several counts of attempted rape by deception.⁸ In a later case, the Court even ruled that conviction for obtainment by deception is unsuitable for cases of deceptive sexual relations, as it transforms sexual relations into an object, such

3 See, e.g., Orit Kamir, *Harsha' at Ha'Aravi Be'onos Mehayevet Ri'anun Hukati* [The Arab's Conviction of Rape Mandates Constitutional Reform], YNET OPINIONS (July 23, 2010), <http://www.ynet.co.il/articles/0,7340,L-3923816,00.html>; Ze'ev Segal, *The Degradation of Rape*, HAARETZ (July 21, 2010), <https://www.haaretz.co.il/misc/article-print-page/1.1213045>.

4 See, e.g., Jo Adetunji & Harriet Sherwood, *Arab Guilty of Rape After Consensual Sex with Jew*, GUARDIAN (July 20, 2010), <http://www.guardian.co.uk/world/2010/jul/21/arab-guilty-rape-consensual-sex-jew>; Dina Newman, *Unravelling the Israeli Arab 'Rape by Deception' Case*, BBC NEWS (Sept. 17, 2010), <http://www.bbc.co.uk/news/world-middle-east-11329429>.

5 The case's racial aspects, emphasized in the headlines, are in fact only mentioned once in the court's decision, in conjunction with other aspects of the accused's dishonest conduct towards the complainant (his marital status and his intentions for a serious relationship). Consequently, one may doubt the significance of the racial aspect of this case. At any rate, these aspects will not be discussed in this Essay.

6 Penal Law, 5737–1977, § 415 (Isr.).

7 CrimA 157/98 Eran Ben-Avraham v. State of Israel 456(6) PD (1998) (Isr.). This case was preceded by two cases in which the accused was convicted of obtainment by deception. In *Al-Shaabi*, a married Druze presented himself as a single Jewish man and promised to marry a minor, who became pregnant with his child. CrimA 499/72 Al-Shaabi v. State of Israel 27(1) PD 602 (1973) (Isr.). In *Danino*, the accused presented himself as a divorcee, despite his being married with children. CrimA 817/76 Michelle Danino v. State of Israel 31(3) PD 645 (1977) (Isr.). Gur-Arye criticizes the court's ruling in *Al-Shaabi*. In her view, while the offense of rape was not committed by the accused, he is guilty of impersonation (currently Penal Law, 5737–1977, § 441 (Isr.), then Criminal Law Ordinance, 1936, § 374 (Isr.)), rather than of obtainment by deception, which only pertains to the obtainment of financial benefit. See Miriam Gur-Arye, *Impersonation of a Non-Existing Person—Is It Personation or Fraud?*, 5 MISHPATIM 673, 673–74 (1974).

8 CrimC (Hi) 389/02 State of Israel v. Chen Alkoby, Dinim Mehozi, PM 2003(32) 663 (2003) (Isr.). For an extended discussion of this case, see Aeyal Gross, *Impersonating Another: Gender-Related Impersonation and Defiance in Chen Alkoby's Trial*, in TRIALS ABOUT LOVE 365 (Orna Ben-Naftali & Chana Nave eds., 2005). Similarly to Gross, this Essay also refers to Alkoby in the masculine, so as to respect the manner in which Alkoby sees his sexual identity. *Id.* at 366.

that only the offense of rape by deception and its derivatives must be used in such cases.⁹

The Israeli approach to rape by deception is interesting and of relevance to other jurisdictions that grapple with the issue of rape by deception. The Israeli approach is more extensive than that taken by many other jurisdictions. Some European jurisdictions tend to avoid criminalizing deceptive sexual relations altogether. In particular, using deception to obtain consent for sexual relations between mentally sound adults is not generally criminalized in Germany¹⁰ or Spain.¹¹ Other jurisdictions acknowledge that consent can be vitiated by at least some types of deception, but limit the offense of rape by deception to specific types of deception, such as spousal impersonation or sexual intercourse under the guise of medical treatment.¹² Explicit reference to spousal impersonation exists in sixteen U.S. jurisdictions,¹³ and such references also appear in the Model Penal Code.¹⁴ In England, the category of spousal impersonation was augmented over the years to include impersonating a partner who is not the woman's legal husband,¹⁵ and then extended to "impersonating a person known personally to the complainant."¹⁶ Italy too criminalizes deceptive sexual relations only when they involve impersonation.¹⁷

By contrast, there are some jurisdictions in which the approach is much closer to that of Israel. In Canada, the Supreme Court interpreted Parliament's removal of

9 CrimA 2411/06 A v. State of Israel, Dinim Elyon 2008(59) PD 318, 318 (2008) (Isr.). It has been a matter of controversy whether the determination in *A*, which was held to be a case of deception with respect to the perpetrator's identity, is also applicable to deception with respect to the nature of the act. See CrimA 5097/07 Meir Fahima v. State of Israel, Tak-Al 2009(4) PD 2328 (2009) (Isr.); CrimA 9274/08 A v. State of Israel, Tak-Al 2009(4) PD 3866 (2009) (Isr.).

10 STRAFGESETZBUCH [STGB] [PENAL CODE], ch. 13, § 177 (Ger.), which criminalizes rape, is limited to coercion; abuse of persons who are incapable of resistance, *id.* at § 179, is limited to mental or physical incompetence; and in other sexual offenses, deception appears only in the offense of human trafficking for the purpose of sexual exploitation, *id.* at § 181; see also THOMAS FISCHER, STRAFGESETZBUCH UND NEBENGESETZE 1158 (2008). Interestingly, Germany used to have a sexual offense that criminalized deceiving a woman into believing that the intercourse was within marriage. STGB, ch. 13, § 179. However, it seems that only one person was ever convicted of this offense, Oberlandesgericht Koblenz, NEUE JURISTISCHE WOCHENSCHRIFT, 1966, at 1524–25, and it was abolished in 1969 due to practical irrelevance. 8 GERMANY (WEST). GROSSE STRAFRECHTSKOMMISSION, NIEDERSCHRIFTEN ÜBER DIE SITZUNGEN DER GROBEN STRAFRECHTSKOMMISSION: 76. BIS 90. SITZUNG. BESONDERER TEIL 184–85 (BAD FEILNBACH: SCHMIDT PERIODICALS 1991).

11 Deception is criminalized only when used in the context of trafficking, CÓDIGO PENAL [C.P.], art. 177(1) bis (Spain), prostitution, *id.* art. 188, or when the victim is between the ages of thirteen and sixteen, *id.* art. 182.

12 For cases in which impersonators under the guise of medical treatment were convicted of rape, see *People v. Minkowski*, 23 Cal. Rptr. 92 (Dist. Ct. App. 1962); *Pomeroy v. State*, 94 Ind. 96 (1884); *Story v. State*, 721 P.2d 1020 (Wyo. 1986).

13 Russell L. Christopher & Kathryn H. Christopher, *Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape*, 101 NW. U. L. REV. 75, 99–100, 122 n.270 (2007).

14 MODEL PENAL CODE § 213.1(2)(c) (AM. LAW INST. 1985). For an Australian case, see *Papadimitropoulos v. The Queen* (1957) 98 CLR 249, 257–59 (Austl.).

15 See *R. v. Elbekkay* [1994] AC 163 (Eng.).

16 Sexual Offences Act 2003, c. 42, § 76(2)(b) (UK).

17 CODICE PENALE [C.p.], art. 519(4) (It.).

the words “false and fraudulent representations as to the nature and quality of the act” as an “intention to move away from the unreasonably strict common law approach to the vitiation of consent by fraud.”¹⁸ Tennessee applies the offense of rape to cases of deception without mentioning any specific form of deception.¹⁹ Massachusetts considered a new bill that would impose life imprisonment for “rape by fraud,” which the bill defined as sexual intercourse to which consent was obtained “by the use of fraud, concealment or artifice.”²⁰

The Israeli experience sheds light on why some jurisdictions are reluctant to broaden the offense of rape by deception, offers a point of reference for jurisdictions that consider such a move, and is particularly relevant to the jurisdictions in which the offense is already broad. This is because in Israel the offense of rape by deception has been broadened in a gradual and casuistic process, thereby producing detailed jurisprudence on the question of which characteristics can constitute deception.

The purpose of this Essay is both descriptive and normative. On the descriptive level, this Essay details the Israeli jurisprudence and scholarly opinions on the issue of rape by deception in a way accessible to non-Hebrew readers, and briefly compares it with approaches taken elsewhere. On the normative level, the Essay seeks to show that the various attempts to answer the question of which characteristics can constitute deception all fail. In particular, it seeks to show that the Israeli approach is the least attractive, a conclusion that, it is hoped, may serve as a warning to reformers in other jurisdictions who consider going in a similar direction to that taken by Israeli criminal law.

It should be noted that the scope of the offense of rape by deception has at least two dimensions. This Essay only discusses the *content* of the deception: deception as to which characteristics should be criminalized. The other dimension, not addressed in this Essay, is the *form* of deception: what conduct amounts to deception. In particular, this Essay does not discuss whether omitting information regarding relevant characteristics amounts to criminal deception, what presumptions should be made about the parties’ mental states, what duties to disclose or inquire each party should comply with, or whether these questions should be assessed against subjective or objective standards.

I. THE ISRAELI APPROACH TO RAPE BY DECEPTION

The offense of rape by deception with respect to the perpetrator’s identity is defined in the first part of section 345(a)(2) of the Israeli Penal Law, where the element of consent obtained by deception consists of two components.²¹

18 R. v. Cuierrier, [1998] S.C.R. 371, 380–81 (Can.). For a similar statement, see *id.* at 424 (Cory, J., dissenting) (discussing whether the failure to disclose HIV infection vitiates consent). In Canada, offenses such as rape and sexual assault were removed from the Sexual Offenses chapter and integrated in a general graded offense of sexual assault under the Assaults section of the Criminal Code. See Canada Criminal Code, R.S.C. 1985, c C-46, §§ 271–73.

19 TENN. CODE ANN. § 39-13-503(a)(4) (West 2017).

20 H.B. 3154, 187th Gen. Court (Mass. 2011).

21 See Penal Law, 5737–1977, § 345(a)(2) (Isr.). Consent obtained by deception is part of the circumstance defined as “with the woman’s consent, which was obtained by deceit in respect

The first component is the presence of actual consent to the course of action proposed by the perpetrator, consent which was specific rather than general and, crucially, matched the misrepresentations made by the perpetrator. If these representations were real, the case would be neither a deception nor an offense. In *Kashur*, for example, the complainant agreed to have intercourse with a person who was similar to Kashur in all other respects, to the exclusion of his being Jewish, single, and interested in a significant, romantic relationship. In *Ben Avraham*, there was actual consent to sexual relations with a person similar to Ben Avraham in most respects other than his being an ex-pilot, a practicing physician, and a wealthy village proprietor. The second component is the hypothetical refusal to the course of action proposed by the perpetrator. Had the victim known the truth, she would have refused to engage in that activity. Following the event, both the complainants in *Kashur* and *Ben Avraham* claimed that they would not have consented to sexual relations with the accused had they known his identity.

An important question, which is not settled by the Israeli legislation, relates to the characteristics that can constitute deception with respect to the perpetrator's identity: Is every characteristic considered by the complainant critical in arriving at her decision, or is it only a characteristic that the court accepts as a reasonable basis for making such a decision? In other words, is the proper standard for viewing this question objective or subjective? Are the characteristics most important to the complainant herself to be considered, or should the court address only the characteristics considered critical by "a reasonable person" (or the characteristics that "a reasonable person" would consider important for the specific complainant)? Under the first, subjective approach, the characteristics considered by the complainant to decide what she considers critical to deception are entirely subject to her discretion, irrespective of the court, society, or anyone else deeming them marginal or whimsical. Under the second, objective approach, deception as to some characteristics will be ignored even if the complainant reliably testifies that she would not have consented to the sexual relations had she known the truth about them.

Under current Israeli caselaw, the standard for evaluating the importance of the deceptive characteristics is objective. The most salient representative of the objective approach is Justice Rubinstein, who made this approach a binding precedent in *Saliman v. State of Israel*, and formulated the standard for deception: "[A] man not telling the truth in regard to characteristics *critical* in the eyes of a reasonable woman, and, as a result of this false representation, the woman had engaged in sexual intercourse with him."²² Rubinstein does not specify the

of the identity of the person or the nature of the act." *Id.* The prosecution must also prove beyond a reasonable doubt that the accused was aware of this circumstance. The proof of mens rea is discussed in Part IV. A detailed analysis of the concept of consent obtained by deception can be found in Amit Pundik, *Coercion and Deception in Sexual Relations*, 28 CAN. J.L. JURIS. 97, 101–08 (2015).

22 CrimA 2411/06 *Saliman v. State of Israel*, Dinim Elyon 2008(59) PD 318, § 105 (2008) (Isr.) (quotations from this case were translated to English by the author of this Essay). The nature of the objective element in Rubinstein's test is unclear because in the same paragraph he deploys another test using a *different* objective element: "[W]ould a reasonable person believe that *this* woman would engage in intercourse with this man were he not to present the 'identity' he had fabricated?" *Id.* § 106 (emphasis added). This test is considered in Justice Rubinstein's judgment

characteristics that a reasonable woman would consider critical to her decision whether to engage in sexual relations, but rather leaves this as an open question that should be decided on a case-by-case basis.²³

The immediate problem with Rubinstein's approach, as with the objective approach in general, is the interference with the woman's liberty to determine what characteristics she considers important in her partner. This approach does not protect any choice a woman makes with regard to the identity of her partner, but rather only those choices considered by the court to be reasonable. This is true even when, before consenting, the woman makes it absolutely clear that she will not consent to sleep with the deceiver if he does not possess a certain characteristic she deems crucial (but the court deems unreasonable). It becomes clear that such an approach is unacceptable once it is compared with the approach to cases of coercive sexual relations. When a woman's refusal is followed by coercive sexual relations, the court would never acquit the coercer of rape on the basis that the characteristics that led the woman to refuse in the first place are unreasonable. Why, then, should the court interfere with the woman's right to choose what characteristics she considers critical when dealing with deception cases?

In addition to this general difficulty, Rubinstein's approach aggravates two familiar problems with the use of open-ended standards in criminal law. It is not difficult to guess why Justice Rubinstein opted to leave the question open, as compiling a comprehensive list of characteristics protected under the rape by deception offense would be a difficult, possibly insurmountable, task, given the complexity of the situations concerned. However, in spite of the practical benefits engrained in Justice Rubinstein's flexible approach, it is difficult to see how this approach might be reconciled with the principle of legality. An accused might discover whether specific characteristics falsely presented by him resulted in his guilt only after the incident had occurred, and after a judicial resolution had been given concerning his case. The principle of legality necessitates, *inter alia*, that the individual be warned prior to their punishment and firmly objects to retroactive punishment due to the violation of a behavioral norm not clearly designated as prohibited at the time of the individual's behavior. Rubinstein's objective method might, then, bring about unjust punishment, sullied with retroactivity and not preceded by adequate warning. This, of course, is a general problem that pertains to any use by criminal law of open-ended standards, but leaving this list completely open without determining any guidelines only elevates the threat that Rubinstein's objective approach poses to the principle of legality.

In addition to the principle of legality, Rubinstein's flexible method may also adversely affect the efficacy of the criminal law in guiding behavior. When it is unclear which characteristics ought to be disclosed, some men might fail to disclose crucial information based on their mistaken belief that that characteristic is not something a reasonable woman would consider crucial to her decision, undermining

to be identical with the previous one, although these two differ substantially: while the first examines what a "reasonable party" would consider to be characteristics critical to *her own* decision, the second takes the viewpoint of a "reasonable bystander" and asks what characteristics such a bystander would believe to be critical in the eyes of the *actual* woman.

²³ *Id.* § 107.

the deterrence created by the criminal offense. Other men might be chilled and become overcautious, disclosing too much information in a mistaken belief that a reasonable woman would want to know. This could present problems in finding potential partners and could prevent what would otherwise be mutually desired sexual relations. As the list of reasonable characteristics (as perceived by the court) becomes increasingly vague and subject to the discretion of each judge, the risk of insufficiently or excessively deterring men and exacerbating the violation of the principle of legality grows.

Of all the objective approaches, Rubinstein's approach most acutely intensifies these problems. His acknowledging the futility of trying to compose a list of reasonable characteristics not only leaves the list entirely open, it also directs the lower courts to determine what characteristics are reasonable casuistically and in accordance with the circumstances of each case. While guiding behavior with open-ended standards is challenging, such standards can sometimes be made more effective by setting some concrete precedents as to how the open-ended standard should work in practice. However, in acknowledging that cases of deception are too complex and subtle to be analyzed with a predetermined list of reasonable characteristics, Rubinstein's approach means that each case ought to be determined on its own merits, making the setting of guiding precedents all but impossible.

Another objective approach might be found in English law and some U.S. jurisdictions,²⁴ according to which rape by deception is restricted only to cases in which a man pretends to be a person with whom the complainant is personally acquainted. This approach preserves the significance ascribed to paradigmatic cases of a man's inveigling his way into a woman's bed while pretending to be her husband, cases of key importance for the offense of rape from a historical perspective. The historical purpose of this construction was to protect women from being found guilty of adultery according to religious law, which explains why the category was narrowly construed.²⁵ However, while this approach avoids the problems of uncertainty plaguing Justice Rubinstein's flexible approach, it is nevertheless not any easier to justify. It is unclear why a woman should be free to decide to refrain from engaging in sexual relations with a man who pretends to be someone she knows but not with a man who pretends to be something he is not. Since the common law takes women's actual refusal on grounds other than impersonation very seriously in cases of coercive sexual relations, why should it turn a blind eye to women's hypothetical refusal on the same grounds? And if the

24 In English law, for example, the test is defined by the Sexual Offences Act 2003, c. 42 § 76(2)(b) (Eng.): "[T]he defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant." For the U.S. jurisdictions, see Christopher & Christopher, *supra* note 13, at 76–77.

25 Dana Pugach, *Criminalization of Conventional Courtship Practices? Deception, Victim Error and Consent in Respect to Sexual Offenses*, in *TRENDS IN CRIMINAL LAW* 168 (Eli Lederman et al. eds., 2000). Pugach also criticizes this approach by highlighting the conservative worldview on which it is based. *Id.* at 168–76.

hypothetical refusal was not enough to justify a conviction of rape, why would it suffice in cases of impersonation?²⁶

Lastly, Aeyal Gross, who predicted *Kashur* long before it occurred,²⁷ proposes another approach, which is mainly subjective but incorporates objective elements. Gross concedes that the criteria must be subjective, and that women should be free to select which characteristics are important to them, but insists on excluding (1) racist preferences and (2) cases like *Alkoby*, where the accused did not perceive himself as an imposter at all but rather presented himself to the complainant in accordance with his sexual identity as viewed by himself. In such cases, Gross suggests an objective standard: since such characteristics are unreasonable, a hypothetical refusal based on them should not be vindicated by the law. However, the criticism made above also applies to his approach: Given that a woman could refuse to have sexual relations with someone on the basis that he is Arab, and that coercion in such a case would be nothing less than rape, why should her preferences be discarded when considering whether the case amounts to rape by deception? Either a woman should be allowed to refuse sexual relations based on these grounds (actually or hypothetically) or not.

II. THE SUBJECTIVE APPROACH

The most notable advocate of the subjective approach in Israeli scholarship is Dana Pugach, who claimed in her criticism of *Ben Avraham* that the question of which characteristics vitiate consent should be left to the woman herself rather than to the court. In her view, one must address each characteristic deemed relevant by the woman, even if such a characteristic is considered whimsical or improper by society.²⁸ The subjective approach avoids the problems faced by the objective approaches: it does not violate the woman's autonomy by ignoring characteristics that are crucial to her and would have not have been ignored in cases of coercion; it respects the principle of legality, for men are able to know what is required of them *during the event* (disclosing every characteristic that that specific woman deems crucial); and it preserves the efficacy of the criminal prohibition because the guidance given to men is relatively clear. The subjective approach thus calls for a stricter protection of women's autonomy, as it enables women freely to select those factors they deem most significant and relevant to their choices without subjecting them to any external criteria. As such, the subjective approach combines liberal principles of nonintervention in individual choices, and certain feminist principles, namely those of promoting women's autonomy and preventing its subjection to institutional criteria, which are often determined by men. The subjective approach is hence principled and well established, and perhaps the most attractive position for anyone who holds that deceptive sexual relations should be criminalized.

While the subjective approach avoids the problems faced by the objective approach, it comes at a notable price: applying the offense of rape even to cases in

26 For further criticism of the American and English approaches, see Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1395–98 (2013).

27 Gross, *supra* note 8, at 389.

28 Pugach, *supra* note 25, at 183.

which the preference in question is morally problematic or whimsical. Under the subjective approach, it would be possible to convict a man of rape by deception who concealed his ethnicity from a woman interested in a relationship only with a man of a different ethnicity,²⁹ as well as a man who is five feet, eleven inches tall who misled a woman to believe that he was one inch taller and she, due to a personal quirk, would have refused to have sex with anyone shorter than six feet. The subjective approach leads to the state implicitly endorsing the first woman's prejudicial preference and allows the second woman to harness the criminal system to protect her whimsical preferences. However, these consequences of the subjective approach are not as groundbreaking as some might think. This is because in an equivalent case of coercion, if a woman had refused to have sex on morally problematic or whimsical grounds and was then coerced to do so against her will, it would still be a case of rape, her grounds for refusal notwithstanding.

III. THE PROBLEMATIC IMPLICATIONS OF THE LOGIC OF RAPE BY DECEPTION

The purpose of this Part is to show that, when taken to its full extension, the logic underlying the offense of rape by deception yields an extensive and intrusive interference with the intimate lives of many members of society. According to this concern, both the subjective and objective approaches have the potential to significantly broaden the offense of rape and other sexual offenses to many types of case which should not be criminalized at all. Since some feminists might suspect that this liberal concern masks the neglect of protecting women's interests in the name of protecting individuals from societal interference, this Part also shows that criminalizing deceptive sexual relations might have problematic implications not only with respect to men but also women. Instead of enhancing the protection of rights or autonomy of women as a disenfranchised group, it has the potential to subject women's sexual behavior to societal scrutiny and severe penal punishments.

Assume, for example, a woman discovers that her partner was once unfaithful a few years before, and she would not have consented to have sex with him had she known him to have been unfaithful. Should each instance of sexual intercourse between the two since the event of betrayal be regarded as a case of rape by deception? Arguably, each time they had sex during that period an offense of rape was committed, contrary to Section 345(a)(2), since these instances involved the woman's consent deceptively obtained with respect to the perpetrator's identity: he was not the faithful partner she took him to be. Even if consent to sexual intercourse was given at the time of the event, this consent was given to a man with a characteristic critically different from his: namely, to a faithful partner. Since it seems plausible that a reasonable woman would consider the fidelity of her partner critical to her decision whether to engage in sexual relations with him, both the objective and subjective approaches would deem such a partner a rapist.

Notably, reversing the gender roles in this example is all too easy, even in jurisdictions in which the offense of rape applies only when the victim is a woman, because the betrayed man could resort to the same logic and accuse his partner of

29 Gross, *supra* note 8, at 388–89.

other sexual offenses, such as an indecent act.³⁰ Under both approaches it would be difficult to justify why deceptive infidelity vitiates consent in the offense of rape but not in other sexual offenses. While offenses such as an indecent act usually carry significantly lighter punishments than rape, the betrayed man could accuse his partner of committing a separate offense each time they had sexual relations to which he would not have consented had he known of her infidelity.

The example of infidelity illustrates how extensive the offense of rape by deception could be: it extends the offense of rape in such a way that a vast number of people might be convicted as rapists. While the incidence of spousal infidelity is difficult to estimate and depends on different variables (e.g., gender, age, location), some statistical data indicate that it is over twenty percent.³¹ The exact proportion of individuals to be regarded as guilty of rape by deception varies according to the type of deception required (e.g., omission or commission), but in any event it would amount to a substantial proportion of the population.

Moreover, the offense of rape by deception might surreptitiously introduce an offense similar in nature to that of *adultery*, since such an offense would allow individuals who had experienced infidelity to enlist society to impose severe penal sanctions on their unfaithful partners. True, such an offense would not be entirely identical with that of adultery, as it would be both narrower and broader than adultery. It would be narrower because adultery would also be invoked when both partners consent to an open relationship, whereas this offense would only apply if the betrayed partner was unaware of the infidelity and would not have consented to sexual intercourse were they aware of it. It would be broader because, while adultery only applies to married couples, the offense of rape by deception might apply also to unmarried couples, and even to individuals who are not involved in a long-term relationship (if their partner would have refused the sexual relations had they known of the infidelity). Nevertheless, applying the offense of rape by deception to unfaithful partners enforces a very conservative worldview of the boundaries of criminal law and of its authority over situations which are at the very heart of citizens' personal lives. The offense of rape by deception, with its potential for extensive and intrusive interference with the intimate lives of many members of society, is troubling from a liberal standpoint and might undermine the legitimacy of the criminal justice system.

Another example of the way the logic of rape by deception may jeopardize women as well is that it would allow criminalizing "sperm theft." If a woman

30 In Israel, for example, he could resort to section 348 of the Penal Law, which incorporates extensive portions of the offense of rape, including the circumstances of consent obtained by deception with respect to the perpetrator's identity. *See* Penal Law, 5737–1977, § 348 (Isr.). In the case of same-sex partners, it would also be possible to convict them of even more severe offenses. A female who is the unfaithful partner of another female could be convicted of rape by deception, as the victim of the offense is a woman. A male who is the unfaithful partner of another man could be convicted of sodomy, *see id.* at § 347, which also incorporates the circumstances of deception from the offense of rape, and can be punished as if he were convicted of rape, *see id.* at § 347(b).

31 Michael W. Wiederman, *Extramarital Sex: Prevalence and Correlates in a National Survey*, 34 J. SEX RES. 167, 171 (1997) (finding that 22.7% of men had engaged in extramarital sex).

deceives her male partner about the use of or need for contraceptives and her actual partner (per the subjective approach) or a reasonable man (per the objective approach) would not have consented to the sexual relations had he known the truth, that woman should be convicted of a sexual offense, such as an indecent act. Consider the analogical case of Julian Assange, the founder of Wikileaks, who was indicted for rape after deceiving his partner about his use of a condom.³² When ruling on the Swedish extradition request, the High Court of Justice in the United Kingdom decided that deception as to the use of protection can suffice to vitiate consent and transform Assange's alleged actions into rape.³³ Just as deception as to the use of contraceptives can vitiate the consent of a woman, it can also vitiate the consent of a man. The consent in cases of deception about contraceptives was given to a person with characteristics differing from those of the deceiver (for example, a person using contraceptives), or was given only for sexual relations of a specific kind (protected sex). While there is little doubt that the conduct of such a deceiver is impermissible, it is difficult to accept that she is a sex offender.

The last example of the far-reaching consequences of the logic of rape by deception is that of cases in which a person engages in sexual relations after being deceitful about their capacity to consent. This logic yields the conclusion that when a minor engages with an adult in sexual relations after being deceitful about their true age, *the minor* is a sex offender. Suppose that a man is accused of statutory rape after engaging in sexual relations with a female minor who is a day shy of being of the age of consent, and he claims in his defense that she lied to him about her age. If the court accepts his defense, it follows from the logic of rape by deception that it might be necessary to prosecute the minor herself for an indecent act. This is because his defense seems to imply that had he known that she was yet a minor and incapable of giving valid consent, he would not have engaged in sexual relations with her.³⁴ Furthermore, and even more counterintuitively, if a woman sleeps with a minor male after he deceives her about his real age, the logic of rape by deception requires that the minor be convicted of no less than rape. The evidence about the adult's hypothetical nonconsent might be measured against substantially different standards of proof, depending on whether it is the defense or prosecution that submits it, and this difference might prevent the minor's conviction in some cases. However, the important point is that accepting the adult's defense requires addressing the question of whether the minor, who is currently taken to be the victim in such a situation, is actually culpable of committing a sexual offense. This is troubling because the deceived party is not necessarily the more vulnerable party. As a result, while the logic of rape by deception purports to enhance the protection of individuals from sexual transgression, the example of minors shows that this logic might quickly backfire and turn into victim blaming.

32 See *Assange v. Swedish Prosecution Auth.* [2012] UKSC 22 (appeal taken from Eng.); *Assange v. Swedish Prosecution Auth.* [2011] EWHC 2849 (Admin).

33 *Assange*, [2011] EWHC 2849, [87]–[90] (Admin).

34 This is more straightforward under the objective approach, because it is hard to deny that a reasonable man would have refused to sleep with her had he known she was a minor.

IV. THE UNIQUE DIFFICULTY IN PROVING RAPE BY DECEPTION

While the risks of overextending the offense of rape by deception identified above were related to substantive criminal law, it is important to highlight an additional risk that arises from difficulties of proof. In addition to the factual element (nonconsensual penetration), the offense of rape also requires proving mens rea, manifested in the accused's awareness of the victim's nonconsent. This Part seeks to draw attention to difficulties of proof that are unique to the offense of rape by deception. There is a risk that these difficulties could be overlooked by courts, thereby further extending the far-reaching applications of rape by deception.

The discussion focuses on the difficulties of proving the subjective mens rea required for rape by deception because in many jurisdictions, including Israel,³⁵ the offense of rape is committed only when the accused had subjective mens rea; namely, he (rather than a reasonable man) was aware of the victim's nonconsent. In some jurisdictions, such as the United Kingdom,³⁶ the offense of rape includes "rape by negligence,"³⁷ manifested in cases in which the accused believed that the victim consented but his belief was *unreasonable*. However, cases of rape by deception do not seem to raise issues additional to those already raised by the notion of holding people culpable of rape by negligence.

As previously stated, an important characteristic of deception cases is the complainant's consent to the sexual relations during the event, though this consent is invalid due to the deception. As a result, the prosecution cannot be expected to prove the factual claim that the complainant *did not* consent, because actual nonconsent is not part of the factual element of the offense of rape by deception. Rather, the prosecution should prove the hypothetical (or counterfactual) claim that the complainant *would not* have consented had she known the truth. This hypothetical claim consists of two separate facts: (1) that the complainant ascribed to him or to the sexual act characteristics which were not true, and (2) that these characteristics were so important to her that she would have revoked her actual (invalid) consent had she known the truth about them. As with any component of the factual element, the prosecution also has to prove the corresponding mental element. More specifically, the prosecution must prove beyond a reasonable doubt that the accused was aware of the false characteristics that the complainant ascribed to him or to the sexual act, and of the crucial importance that she attached to them.

In *Kashur*, for example, the prosecution had to prove that the accused was aware that the complainant held false beliefs about him and ascribed to him false characteristics (namely, she believed him to be Jewish, single, and interested in a

35 Section 19 of the Israeli Penal Law clearly states that any offense which requires subjective mens rea is not constituted if the error was made in good faith, no matter how unreasonable it is. See Penal Law, 5737–1977, §§ 19–20 (Isr.).

36 For England and Wales, see Sexual Offences Act 2003, c. 42, §§ 1(1)(c), 75(1) (Eng.); for Scotland, see Sexual Offences (Scotland) Act 2009, (ASP 9) §§ 1(b), 16; for Northern Ireland, see The Sexual Offences (Northern Ireland) Order 2008, §§ 5(c), 9(1).

37 "Rape by negligence" was introduced in part to prevent defenses of flatly unreasonable, albeit allegedly honest beliefs in consent, such as in the English case of *DPP v. Morgan* [1975] UKHL 3, [1976] AC 182 and the American case of *People v. Mayberry*, 542 P.2d 1337 (Cal. 1975).

significant, romantic relationship).³⁸ The prosecution also needed to prove that the accused was aware that, had the complainant known that he was a married Arab person with no significant romantic intentions, she would have changed her mind and refused to have sexual relations.³⁹ In other words, the prosecution had to first prove the material fact of the hypothetical nonconsent (which is part of the factual element), according to which the complainant would indeed have refused, had she known the accused's true characteristics. In addition, the prosecution also needed to prove beyond a reasonable doubt the mental element, namely that the accused was aware *during the event itself* that the complainant would have changed her mind had she known the truth.⁴⁰ Since Kashur was convicted in a plea bargain, the prosecution did not have to prove these mental states and could instead rely on the accused's confession.⁴¹ However, had the case proceeded to trial, these mental states would have comprised a part of those material facts which the prosecution would have had to prove beyond a reasonable doubt. Kashur could have defended himself, for example, by arguing that even if the complainant formed her belief on the basis of something he said or did, he was unaware of the inference she drew from his conduct to his ethnicity.⁴² In particular, he could have insisted that while he gave her an alias (Dudu, in this case), he was unaware of the inference she had drawn from his alias to his being Jewish. Rather than intending to deceive her, he merely gave her his nickname. While the complainant believed that this name was Jewish, the inference she made was far from trivial, and at any rate he was unaware of it. Alternatively, if he was aware of the inference she drew, he could have claimed that he was nevertheless unaware of the crucial importance she attached to the outcome of the inference, namely his ethnicity. Given that they only had a single short conversation, he did not realize that his being Arab would change her mind about having sex with him. It could be argued that the very fact that he bothered to create the impression that he was Jewish shows that he was well aware that his ethnicity was crucial to her decision. However, his conduct could be explained by referring to the known phenomenon of "passing," according to which some minority group members in multicultural societies seek to pass as members of the majority for various reasons which have nothing to do with the complainant (e.g., fears of societal maltreatment or self-identity issues).⁴³

Proving that the accused was aware that the complainant would have refused to have sex with him had she known the truth about him involves difficulties of proof which are qualitatively and quantitatively different from those involved in proving rape by coercion. This is because rape by deception requires proving the accused's awareness of a *hypothetical state of mind*. In rape by coercion, the prosecution has to prove the accused's awareness of the complainant's *actual* refusal to engage in sexual relations. Whether consent and refusal are mental states, expressions, or

38 CrimC (Jer) 561/08 State of Israel v. Sabbar Kashur, PM 1996(123) (2010) (Isr.).

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 For an overview of this phenomenon among Israeli Arabs, see Leora Bilsky, 'Speaking Through the Mask': Israeli Arabs and the Changing Faces of Israeli Citizenship, 1 MIDDLE E. L. GOVERNANCE 166, 170 n.11 (2009).

some combination of both is subject to deep controversy.⁴⁴ If refusal is an expression, it means that the accused's awareness of the complainant's refusal could be proved or disproved by reference to this expression, rendering this proof similar to proof of awareness of other nonmental facts. And even if (more plausibly) refusal is a mental state,⁴⁵ it is likely to be accompanied by some external expressions which indicate the complainant's state of mind to an external observer, including the accused (this is true even when the refusal is not accompanied by attempts at resistance or explicit verbal statements).⁴⁶ Either way, while proving an accused person's awareness of the complainant's refusal could be immensely difficult in some cases, at least there are some external expressions to refer to.

By contrast, in cases of rape by deception, hypothetical refusal is unlikely to consist of or be accompanied by clear expression. True, there could be cases in which the complainant states clearly and explicitly her hypothetical refusal (e.g., "I would not have slept with you if you were Arab"). However, such statements are uncommon since they involve discussing hypothetical scenarios of refusal during the process of *consenting*. This is particularly relevant to the intimate context of sexual relations, in which both partners tend to use subtle signals rather than clear verbal messages. Normally the complainant's hypothetical refusal is not expressed at all, rendering the accused's awareness that she would have refused sex had she known the truth much harder to prove than his awareness of her actual refusal in cases of rape by coercion. Furthermore, in cases of rape by deception, the prosecution still needs to prove the accused's awareness of the complainant's *actual* mental state: her false beliefs about him. Rape by deception is thus subject to similar difficulties of proving awareness of actual mental state which are common in rape by coercion, in addition to the difficulties of proving one person's awareness of another's hypothetical mental state, which are unique to rape by deception. These difficulties exacerbate the fear that the logic of rape by deception might bring about an inflation in the number of sexual offenders. Not only might it dramatically overextend the scope of sexual offenses, these difficulties of proof might not be given their full weight, thereby allowing a conviction of rape by deception even when there is a reasonable doubt about the accused's awareness of the complainant's hypothetical refusal.

CONCLUSION

This Essay has scrutinized the various approaches to the criminalization of the use of deceptive means in order to obtain the consent of a competent adult to sexual relations. The least attractive approach seems to be that taken by the Israeli Supreme Court, according to which deception should be criminalized only when the characteristics are deemed important enough by the court, rather than by the complainant. In addition to the arbitrariness of the protection such an approach provides to victims of deception, it violates the principle of legality and undercuts

44 See ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* 144–52 (2003).

45 See generally Larry Alexander, *The Ontology of Consent*, 55 *ANALYTIC PHIL.* 102 (2014).

46 As I have argued elsewhere, refusal may consist of (or be accompanied by) freezing, suffering, or some negative attitude toward the accused, all of which are overt and accessible to an external observer. See Pundik, *supra* note 21, 112–13.

the efficacy of criminal law. The British approach fares slightly better because the types of criminalized deception are clearly defined (e.g., impersonation to someone personally known to the complainant). However, this approach is also arbitrary, since it is unclear why victims who were deceived about other characteristics which were crucial to their decision to engage in sexual relations should not receive similar protection. The subjective approach avoids the problems faced by the Israeli and British approaches, but it might so broaden the field of sex offenses as to adversely affect both men and women. Furthermore, rape by deception involves unique difficulties of proof, which might increase the risk of convicting the innocent. The most attractive alternative seems to be the German approach, according to which using deceptive means to obtain consent to sexual relations is not criminalized at all. However, while such a minimalist approach avoids all the problems discussed in this Essay, it calls into question the criminalization of other forms of fraud, since it is difficult to accept that deceiving a person into giving some money should be a criminal offense, but deceiving her into giving consent to sexual relations should not.