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Sex By Deception

Berit Brogaard
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Sonja is sipping ice water at Sushi Samba while waiting for Bjørn to arrive. They met at a party a few weeks ago, and he invited her out. She doesn't know much about him. But he told her that he is 23 and about to graduate with a major in psychology from Florida International University. She is 21 and a junior at University of Miami, double-majoring in philosophy and psychology. She immediately recognizes him, as he enters the outdoor seating area. He is even cuter than she remembered. They are both shy at first, but before long the conversation flows effortlessly. At the end of the night, they agree to have sex. A few weeks later Sonja discovers that Bjørn lied to her. He is not 23 and about to complete his major in psychology but 33 and about to finish his Ph.D. as a clinical psychologist. How should we think about Bjørn's sexual conduct? Does the fact that Bjørn lied to Sonya make her assent to sex less than fully consensual? Did she indeed have sex with the one she consented to have sex with? Did he rape her?

In this chapter I will use sex by deception as a case study for highlighting some of the most tricky concepts around sexuality and moral psychology, including rape, consensual sex, sexual rights, sexual autonomy, sexual individuality, and disrespectful sex.

I begin with a discussion of morally wrong sex as rooted in the breach of five sexual liberty rights that are derived from our fundamental human liberty rights. They include sexual self-possession, sexual autonomy, sexual individuality, sexual dignity and sexual privacy. I then argue (against the standard interpretation) that experimental findings in moral psychology show that the principle of respect for persons—a principle that grounds our human liberty rights—drives our intuitive moral judgments. In light of this discussion, I then examine a puzzle about sex by deception—a puzzle which at first may seem to compel us to define 'rape' strictly in terms of 'force' rather than 'sexual autonomy'.

I proceed by presenting an argument against the view that, as a rule, sex by deception undermines consent—a position held by prominent thinkers such as Philippe Patry (2001), Onora O'Neill (2003), Rubenfeld (2012), Tom Dougherty (2013a, 2013b), Joyce M. Short (2013), and Danielle Bromwich and Joseph Millum (2013, 2018).¹ As we will see, sex following deception to increase your chances does not always constitute rape. Lying about your age, education, job, family background, marital status, or interest in a relationship, for example, does not make your sex partner incapable of consenting, which is to say that sex by deception need not be rape. I even go so far as to say that sex with another person that is facilitated by withholding information about having a venereal disease shouldn't be classified as rape.

¹ For a critical review of Tom Dougherty (2013a), see Neil C. Manson (2017).

I conclude by arguing that even though sex by deception doesn't compromise consent, it nonetheless violates the principle of respect for persons, not by vitiating sexual autonomy and compromising consent, but by failing to respect other sexual rights, such as our rights to sexual dignity, individuality, and privacy.

Keywords: doctrine of double effect; human rights; informed consent; moral psychology; principle of respect for persons; rape by deception; rape by fraud; sex by deception; sexual assault; sexual autonomy; sexual individuality; trolley problem

1. Sexual Rights

In recent years, there has been an excessive focus in academic circles and popular media on consent to sex (Mappes 1987; Wertheimer 2003).² Consent is often treated as the key factor for determining whether a sex crime has been committed, suggesting that wrongful sex equals rape (or sexual assault).

These almost obsessive attempts to tie the moral status of sex to consent is in my opinion based on a mistake. An extreme case that proves this point is that of the 43-year-old Berlin engineer Bernd Brandes, who consented to have sex with and then be eaten alive by the 42-year-old Berlin computer expert Armin Meiwes.³ Because cannibalism wasn't wrong in Germany back in 2001 when the events unfolded, and Brandes consented to the act, Meiwes was tried for murder for the purposes of sexual pleasure. In 2004 Meiwes was convicted of manslaughter and was imprisoned for eight years. The act of eating another person for the sake of sexual pleasure is an extreme case of using a person and utterly disregarding their humanity.

Sex can clearly be morally problematic, even when it isn't rape. It is morally problematic, I will argue, when it cannot be reconciled with our common sentiment that we ought to respect the worthiness of the humanity that all persons have in common, irrespective of their specific virtues, talents, attitudes, and choices. This is also known as the principle of respect for persons. This principle—which is commonly associated with Immanuel Kant and the ethics of *The Metaphysics of Morals*—renders it morally wrong to treat people merely as a means to an end. The humanity that all persons share in common morally demands respecting their self-governing, autonomous, unique, private, dignified and vulnerable personhood (Korsgaard, 1986; 2008). By respecting others, we grant that they have rights in virtue of the intrinsic worth of personhood and not merely in virtue of their utility, for example, rights to engage in self-directed behavior and to adopt and pursue their own ends.

² Lisa Rose, "Sexual consent is a worldwide conversation," CNN April 5, 2018, <https://www.cnn.com/2018/04/04/world/consent-christiane-amanpour-sex-love-around-world/index.html>, retrieved May 28, 2018.

³ Luke Hardin, "Victim of cannibal agreed to be eaten," *The Guardian*, December 3, 2003, <https://www.theguardian.com/world/2003/dec/04/germany.lukeharding>, retrieved March 7, 2009.

The principle of respect for persons, on its modern conception, is commonly taken to accommodate the following five related ideals (among others) (Maclagan, 1960a, b; Rawls, 1971, 1980, 1989; Nickel, 1987): respect for self-government, respect for personal autonomy, respect for individuality, respect for privacy, and respect for dignity and a minimally decent life.⁴ These correspond to five fundamental human liberty rights: The right to self-possession, the right to personal autonomy, the right to individuality, the right to privacy, and the right to dignity and a minimally decent life (*UN Universal Declaration of Human Rights*). Each fundamental human liberty right encompasses a corresponding sexual right.⁵

The right to self-possession (or self-government) is a fundamental right to govern oneself and hence not to be owned by another person and not to be subject to another's person's will, including another person's will to kill. Because self-dispossession rules out choosing one's own path, self-possession is a precondition for autonomy and individuality. But, as the case of sex by deception will make apparent, one can flout autonomy and individuality without flouting self-possession. The right to sexual self-possession can be glossed as follows.

Sexual Self-Possession

Any person has a right to be their own sexual governor and hence not to be sexually controlled, mastered or possessed by another person.

Historically, U.S. rape law has been based on the thought that rape violated the right to sexual self-possession (or self-government) (West, 1996; Whisnant, 2017). This characterization of rape, however, limits rape to forced sex or sex with a person who is incapacitated and therefore is unable to govern themselves sexually. Severe disability, alcohol intoxication and drug use, for example, can preclude knowledge of what's happening, which rules out the possibility of consent. As we will see below, however, at least some sexual acts that occur without force or incapacitation ought to count as rape, despite not hindering sexual self-possession.

The right to personal autonomy is the fundamental right to freely reflect on what one ought to do, to make free decisions about one's own actions and expressions in physical space and to act freely on those moral principles and decisions (Nickel, 1987; McLeod, 2005; Korsgaard, 2008). To freely reflect on what one ought to do is to freely reflect on what one would do, if one were fully self-determining (Korsgaard, 2008: 12). One is fully self-determining if it's practically possible for one to act in accordance with one's thoughts. The analogous right

⁴ *The United Nations Universal Declaration of Human Rights*, http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf, retrieved May 28, 2018. Human rights are to be understood as normative principles the satisfaction of which enables us to nourish our capacity for self-directed behavior and to adopt and pursue our own ends. The question of which fundamental human rights we have qua persons has not surprisingly been the subject of ferocious debate. See e.g. James W. Nickel (1987, 2014), Christopher McCrudden (2008), Conor O'Mahony, (2012) and Johan Brännmark (2017). Human rights can be divided into liberty rights and claims rights (Nickel, 1987). A liberty right is a right everyone has that does not depend on someone else having a duty to fulfill it (of course, everyone has a prima facie duty not to violate liberty rights). A claims right, by contrast, is a right that needs to be fulfilled by a particular person or institution. Charlotte's right to choose between taking the metro and the car to work is a liberty right, whereas her right to receive the \$100 she is owed by Lucas is a claims right.

⁵ Other sexual rights may include the right to reproduce, the right to freedom of sexual thought and expression, the right to a sex education and the right to a fair trial when charged with a sex crime.

to sexual autonomy can be cashed out as follows (the clause 'so long as they don't infringe on the rights of others' has been omitted here and below):⁶

Sexual Autonomy

Any person has a right to freely reflect on what they *ought* to do and not do sexually, to make their own free decisions about who they have sex with and to act freely on those moral principles and decisions.

We look closer at the conflicting conceptions of consensual sex defined as sexual self-possession versus sexual autonomy in section 3.

Next, the right to individuality is the right of a person to rein over their own inner self. This includes the right to have, develop, and, be respected irrespective of, one's own personal interests, preferences, personality and identity. Implied is our right to sexual individuality:

Sexual Individuality

Any person has a right to have, develop and, be respected irrespective of, their unique sexual interests, preferences, personality, identity, and orientation.

Sexual individuality differs from sexual autonomy in that the latter protects the individual's right to choice of action and expression in physical space, whereas individuality protects the individual's right to embrace and make decisions about aspects of her own mind. It is individuality that gives people the right to differentiate themselves from others *as persons*. Although our sexual interests, preferences, personality, identity and orientation can form the basis for our decision to engage in some types of sex but not others, an individual can have a strong interest in a particular type of sex, and yet not act on it, for example, by choosing not to act on it, because she believes another course of action is more beneficial to her.

The notion of sexual interest and preferences makes reference to a person's weighted preferences for particular types of sex and attributes of sex partners as well as their sexual values. For example, a person might sexually value only having sex with homosexual women, not exposing herself to sexually transmitted diseases, and not having sex with a person who is in a monogamous relationship with someone else.

The concept of sexual personality refers to a person's preferred sexual style or signature, for instance, a preference for wearing sexually provocative or non-provocative clothing, being sexually adventurous or conservative, being sexually dominant or submissive, being sexually monogamous or polygamous, or having a small, moderate or large amount of sex.

⁶ As every person has the same human rights, every person is required to protect and promote the human rights of everyone else. The principle of respect is thus constitutive of agency and rationality (Korsgaard, 2008: 12). Christine Korsgaard explains: 'To believe on the basis of a rational consideration is to believe on the basis of a consideration that could govern the beliefs of any rational believer, and still be a belief about the public, shared world' (2008: 12). Emotional receptivity to the demands of reason across many different situations and using prudence in balancing one's personal interests arguably are also constitutive of agency (Korsgaard, 2008: 15-18).

The notion of sexual identity refers to the sex or gender a person identifies with (if any) or their lack of identification with any sex or gender. The sex or gender that a person identifies with (if any) may or may not be the same as the one assigned to them at birth (Serano, 2007).

Finally, the notion of sexual orientation refers to a person's standing sexual preference for not having sex at all (asexual), or for having sex with people who were assigned a particular sex or gender at birth or who identify as male, female, non-binary or gender fluent.

Next, the right to dignity and a minimally decent life is the right to be honored and respected for the inherent worth every human being possesses—merely by being human. This encompasses the right to decent human treatment, and hence the right not to be treated with indecency, understood as all forms of degrading, humiliation, discrimination, stigmatization, harassment and bullying (McCrudden, 2008; Brännmark, 2017). This right arguably extends beyond life itself (Lindner, 2001). For example, you currently have a right not to have swastikas drawn on your future dead corpse.⁷ Analogously, the right to sexual dignity is:

Sexual Dignity

Any person has a right to not be subjected to torture, degrading or inhuman treatment, humiliation, ridicule, stigmatization, or exploitation, whether during sex or as a means to bully or harass the person because of their sexual appearance, preferences, personality, identity, or orientation.

Consider the case of Karl—a misogynist who regards women as inferior to men (Morgan, 2003). Karl wants to seduce Sophie but what he really desires is to feel empowered by thinking about Sophie in degrading ways while having sex with her. Using superficial charm, Karl manages to seduce the girl, and true to his nature, he thinks of their encounter as one in which he is degrading her. Sophie doesn't know this. Even so, his attitude towards her during sex vitiates her sexual dignity.

Finally, the right to privacy is the right of a person to be left alone and undisturbed (e.g., by light, smoke, noise, odor, or touch) and the right to hide aspects of their life from publicity, which includes the right not to be recorded without consent. The right to privacy encompasses the right to sexual privacy (Fried, 1968; Mayo, 1997).

Sexual Privacy

Any person has the right to have undisturbed and unobserved sex in private and to hide aspects of their sex life from the public.

The right to sexual privacy enables people to develop their sexual individuality without worrying about how they look in the eyes of others and the possible repercussions of their sexual idiosyncrasies.

One of the many toxic ways that bullies deprive people of their dignity as human beings is by disrespecting their right to sexual privacy. Such was the bullying incident involving Rutgers

⁷ If your future corpse is treated disrespectfully, we can say that this constitutes a posthumous violation of your current rights to dignity.

student Tyler Clementi. In 2010 Clementi asked his roommate Dharun Ravi to use their room on the evenings of September 19 and September 21 for a private visit. On September 19 Ravi left the computer webcam on and joined his friend Molly Wei in her room, where the two of them secretly viewed Clementi and his boyfriend in a sexual encounter. Shortly after the spying, Ravi posted a tweet about the incident: 'Roommate asked for the room till midnight. I went into molly's room and turned on my webcam. I saw him making out with a dude. Yay'. In anticipation of Clementi's second private evening, Ravi invited his friends via social media to join him in spying on Clementi but Clementi averted the attempt by disabling the webcam, and later that evening he reported the incidents to school officials. On September 22, only three days following the viewings, Clementi jumped from George Washington Bridge and was found dead in the Hudson River. Ravi was tried and convicted in 2012 on multiple charges related to the spying but he appealed and his sentence was reduced to 'attempted violation of privacy'.

Like human rights more generally, sexual rights can come into conflict with and supersede the normative force of other rights (Dworkin, 1978; Griffin, 2008). As we will see in the next section, it can be morally permissible to knowingly violate a right for the sake of a greater good, if the rights violation is unintended despite being foreseen. Sexual rights can also be restricted in scope or be nullified due to other weightier normative considerations. For example, having a right to sexual autonomy does not entail having a right to sex with children, corpses or non-human animals or a right to sex while incarcerated for a crime.

All unjustifiable infringements on rights, including sexual rights, betray a violation of the principle of respect for persons and hence involve a failure to recognize the humanity that sinners and saints have in common, despite their individual differences.

Some thinkers, including Kant himself, argue that sexual desire that is not based on love, relationship or marriage objectifies the other and therefore implies disrespect (Nussbaum, 1995; Soble, 2001). This is because sexual desire by nature involves a kind of all-consuming attention to the body or body parts that leaves no room for attitudes of recognition of the intrinsic worthiness of the person (Soble, 2001; Halwani, 2018).

In reply to this, it may be argued that recognizing the humanity in the other as an end is not about appreciating what is good, admirable or sexually arousing in any particular person but about recognizing the goodness of persons in any form (MacLagan, 1960b). Prizing the goodness of a person *qua person* does not require that all of one's attention is allocated to this activity. So, one can prize the goodness of a person and at the same time appreciate, admire or be sexually aroused by a person's unique advantages.

Furthermore, non-exploitative sexual desire doesn't ordinarily compromise any sexual rights, which is just another way of saying that it is compatible with the recognition of the goodness of the humanity of persons. So, desiring a person sexually—even a complete stranger—doesn't imply instrumentalizing them.

2. Respect for Persons, Trolleyology and Foreseen But Unintended Side Effects

So far I have spoken rather uncritically about immoral sex as disrespectful of a person's sexual rights. The rights of persons go hand in hand with our common sentiment that we ought to respect people because of their intrinsic worth and not merely because of their usefulness.

But why think the principle of respect should be guiding our behavior in the first place? Kant is often read as regarding the principle as an absolute and unconditional directive for how to treat all persons. (Simpson, 1979; Korsgaard, 1986; Langton, 2007; Merritt, 2017).⁸ I will argue for the somewhat related view that we should treat the principle of respect as behavior-guiding, because it is so deeply ingrained in us. Respect for others appears to be distinctly human and intrinsically communal (Darwall, 2016). In fact, we have a fundamental drive toward community, mutuality and inclusiveness (at least before being corrupted by society's appraisal mechanisms). As we will see, experimental results in moral psychology turn out to demonstrate this very vividly.

We humans are on average quite sensitive to the plight of others and often adjust our ways accordingly—though more so in Eastern than Western cultures (Gold, et al. 2014). Admittedly, few of us are inclined to treat all human beings as equally deserving of respect (Maclagan, 1960a, b). Although not condoned by Kant, we are fond of drawing razor-sharp distinctions between good and evil. Unlike such saintly personas as The Dalai Lama, Gandhi, Martin Luther King and Mother Teresa, inherently evil existences like Genghis Khan, Vlad III (Dracula), Adolf Hitler and Heinrich Himmler are not easily seen as deserving of our respect, owing to their ostensible vices and almost complete lack of virtues. Still, our default practical attitude is to regard all persons as inherently worthy of recognition respect, even those who are utterly unworthy of appraisal respect (Darwall, 1977).⁹ Unfathomably wicked humanoid existences, like Genghis Khan or Heinrich Himmler, may simply fail to be persons in any sense other than the most trivial.

Despite our allegiance to the principle of respect in many scenarios, empirical data may appear to suggest that we are inclined to deviate behaviorally when we can do a lot of good without directly causing harm. The widely discussed trolley problem is one of the best illustrations of this behavioral tendency (Foot, 1967; Thomson, 1976; Kamm, 1989; Greene, et al. 2001; Gold, et al. 2014). The first of the standard pair of trolley cases runs as follows:

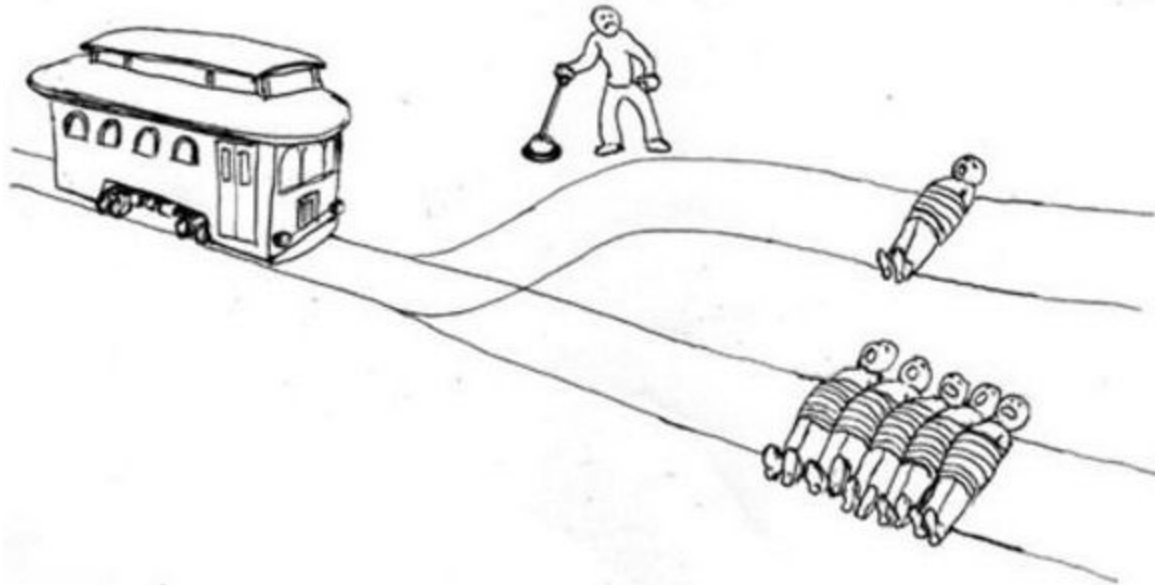
A runaway trolley is hurtling down the railway tracks. Five people are tied up and unable to move on the tracks ahead. The trolley is headed straight for them. You are standing in the train yard, next to a lever. If you pull the lever, the trolley will switch to a side track. However, you notice that one person is tied up on the side track.

⁸ 'Respect' is short for 'respect in the practical sense' (MM, 6:449) as opposed to respect as a will-defying feeling or attitude, which Kant denied could be assigned a proper normative value.

⁹ Stephen Darwall's (1977) recognition respect is the respect we have for every human being who is not so evil *and* incapable of changing as to be undeserving of the status of personhood and moral agency. Appraisal respect is the respect we have for another human being because of their virtuous deeds and omission of vicious acts. The notion of respect should also be kept apart from that of care. If we care about a friend whose unhealthy lifestyle is nearly killing her, we may be inclined to recommend lifestyle changes. However, upon further reflection, we might refrain from offering lifestyle advice out of respect for our friend as self-governing (Darwall, 2006: 162-166).

You have two options: (i) Do nothing and the trolley kills the five people on the main track. (ii) Pull the lever, diverting the trolley onto the side track, which kills one person but saves five.

How will you proceed?

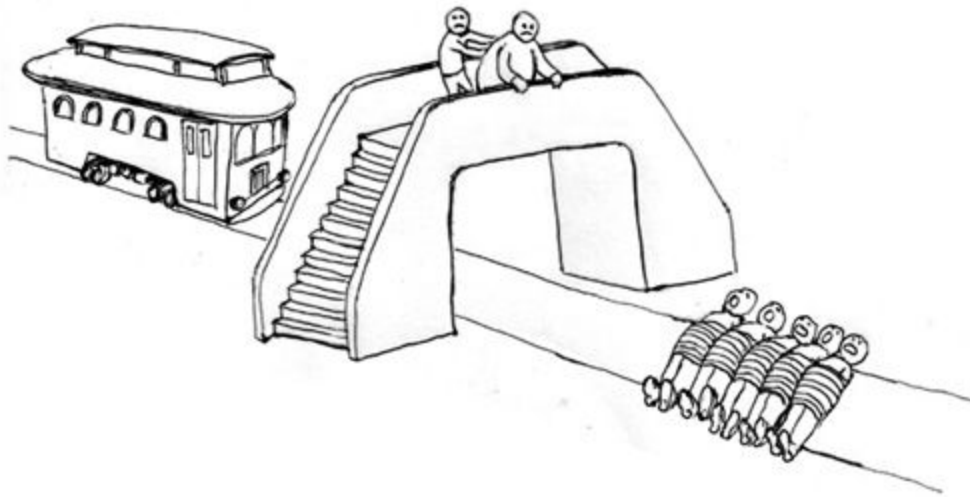


In studies of these cases, most research participants subjected to this dilemma say that they would pull the lever, which would kill one but save five (Greene, et al., 2001, 2004, 2008). Their moral choice satisfies the utilitarian principle that you should aim at maximizing well-being and minimizing suffering. Pulling the lever kills one person and saves five, whereas not pulling it kills five and lets one live. So, you are more likely to minimize suffering if you pull the lever than if you do not. People's inclination to pull the lever in this case may thus seem to be a result of thinking in accordance with the utilitarian principle (Greene, et al, 2001).

The second of the standard pair of trolley cases runs as follows:

As before, a runaway trolley is about to hit five people tied up and unable to move on the tracks ahead. You are on a bridge overlooking the track. You know that you can stop the trolley and save the five people by putting something very heavy in front of it. As it happens, a very fat man is standing next to you. You have two options: (i) Do nothing and the trolley kills the five people on the track. (ii) Push the fat man over the bridge and onto the track, which kills him, but saves five.

How will you proceed?



Despite the analogy between the two scenarios, most people do not respond in the same way to the second problem. Even people who happily switch the lever in the first scenario typically allege that they would not push the fat man in order to save the five.

This finding suggests that we give more weight to the principle of respect for persons when it is salient to us that we must harm a person by active force of our own in order for us to prevent the death of others (Greene, et al., 2001, 2004, 2008; Cushman & Young, 2009; Cushman, et al. 2010). So, while we are generally sympathetic to utilitarian principles, our attraction to the principle of respect overrides our utilitarian inclinations once it is made salient to us that saving lives requires intentional killing, or murder. But this infringes on the principle of respect. So, our unwillingness to push the man onto the tracks indicates that we only believe in maximizing utility when this is compatible with respect for persons.

This would appear to be a reasonable conclusion if it could be established that people's sentiments in the trolley cases are rational. However, Joshua Greene (2004, 2008)—a devout utilitarian—argues that we are not acting (or judging) rationally when judging differently in the trolley cases. If we are willing to pull the lever in order to save the lives of five people in the first case, we should be equally willing to push the fat man down on the tracks in order to save the lives of five people in the second case. Our irrational responses in fat-man trolley cases, Greene argues, are the result of fast, sub-personal and allegedly unreliable cognitive processes (type-1 processes) that turn us into moral fossils.

There is plenty of reason to think fast cognitive processing can be fairly reliable when we have limited information (see e.g. Gigerenzer, 2007; Brogaard, 2018; see also Mallon & Nichols, 2010; Prinz & Nichols, 2010). This, however, will not be my concern here. Instead I will defend an alternative analysis of the collected responses in trolley cases and present some of my own data as well. I will argue that ordinary folks are not inconsistently relying on utilitarian principles in some cases and the principle of respect for persons in others. Prevalent folk responses to trolleyesque thought experiments appear to be based on the principle of respect as well as the doctrine of double effect (Aquinas, *Summa Theologica*, II-II, Qu. 64, Art.7; Mangan, 1949; Foot, 1967, 1985; Quinn, 1989; McMahan, 1994; Mikhail, 2011), which I will argue suggests that

people's judgments about the trolley cases are indeed rational (despite being a conscious product of unconscious cognition).

The principle of respect tells us that no person should ever be treated merely as a means by which we achieve our desired end. Implicit in this formulation is the presumption that the degrading of another person to the level of mere instrument is an intended outcome of our doings. If you intend to kill a person and act on your intention for no excusable reason, this reflects a deep disregard for the intrinsic value of personhood and a failure on your part of practical reason, conscience and good will.

When a harmful effect is both unintended and unforeseen, it can be considered an accident. However, there are also cases where a harmful effect is an unintended but foreseen consequence of bringing about a highly desirable end. In such cases, the doctrine of double effect implies that in spite of the fact that you intend to cause harm, you have not displayed disrespect for persons. Here is a classical example of a morally acceptable side effect (cf. Cushman & Young, 2009; McIntyre, 2014).

Good Doctor

After trying all FDA-approved cancer drugs to no avail, a doctor considers giving a cancer patient an experimental drug that until now has cured 25 percent of people with the same type of cancer within six months of starting treatment. The doctor knows that the drug causes osteoporosis, a harmful effect. Yet he thinks that the one-in-four chance of being cancer-free within six months overrides the harm of osteoporosis (a treatable condition). So, he gives the drug to the patient.

The doctor intends to cure, not harm, his patient, and he believes that osteoporosis is a fair (or more than fair) price to pay for a one-in-four chance of being cancer-free. We typically take this to be sufficient for the doctor's action to be morally justified.

But ends do not always justify the means. Consider the following variation on *Good Doctor*:

Bad Doctor

After trying all FDA-approved cancer drugs to no avail, a doctor considers giving a wealthy cancer patient an experimental drug that until now has cured 25 percent of people with the same type of cancer within six months of starting treatment. The only obstacle is that he has run out of the drug. For it to work, it must be produced from bone marrow from organ donors, yet there is not enough time to wait for a new organ donor. To be able to produce the drug for the other patient, the doctor searches the hospital for a suitable donor. When he locates a homeless alcoholic who is unlikely to make it through the night, he gives the homeless an overdose of morphine. His bone marrow is sent to the local pharmacy that delivers the experimental drug. The doctor gives the drug to his wealthy patient, and within six months the wealthy patient is cancer-free.

In *Bad Doctor*, the doctor intends to cure, not harm, and he believes that the one-in-four chance of his wealthy patient being cancer-free within six months overrides the harm of taking the life of a homeless alcoholic. Yet most people judge that the doctor's action is not morally justified.

The pervasiveness of a 'guilty' verdict in *Bad Doctor* suggests that a harmful effect is justifiable only when the harm is not a main facilitator of the good. In *Bad Doctor*, killing the homeless alcoholic is the only feasible way for the doctor to get his hands on more of the cancer drug. So, the homeless person serves merely as a means to an end, viz., as the main supply of the experimental drug for the wealthy patient.

For a harmful double effect to be justifiable, then, several conditions need to be satisfied. My tentative suggestion is that we cash out the doctrine as follows. Where *S* brings about a harmful effect *B* (for 'bad') in the process of attempting to bring about the desired outcome *G* (for 'good'), *S*'s action is morally justified just in case:

Doctrine of Double Effect

1. *S* intends to bring about *G*
2. *S* believes bringing about *G* is likely to bring about *B*.
3. *S* does not intend to bring about *B*
4. *S* wishes *B* would not happen.
5. *S* believes that *B* is proportional to *G*.
6. *S* believes *B* is not merely a means to *G*.

How is the last condition to be understood? I would like to suggest that we take (6) to signify that the agent believes his action would have had the same good effect, even if the unintended but foreseen harmful consequence had not occurred. In terms of possible worlds, we can put this as follows:

Bad Effect B is Not Merely a Means to Good Effect G

S believes that if *S* had behaved as he did but *B* had not occurred, *G* might still have occurred.

Let it be granted for simplicity's sake that ordinary folks are reasonably rational agents who (below the level of conscious awareness) evaluate counterfactuals in roughly the way David Lewis (1979) proposed that we evaluate counterfactuals. On this proposal, we determine the truth-value of counterfactuals by envisaging a realm of alternative possible worlds that are ordered by magnitude of similarity to our actual world. The more similar, the closer. Lewis proposes the following default similarity measure for determining the world closest to the actual. The default similarity measure is an ordered list of how much or how little weight should be given to particular deviations from the actual world when determining which worlds in which the antecedent is true are closest to the actual.

1. It is of the first importance to avoid big, widespread, diverse violations of law.
2. It is of the second importance to maximize the spatio-temporal region throughout which perfect match of particular fact prevails.

3. It is of the third importance to avoid even small, localized, simple violations of law.
4. It is of little or no importance to secure approximate similarity of particular fact, even in matters that concern us greatly. (Lewis 1979: 47–8)

More colloquially put: possible worlds that do not comply with the laws of nature—for instance, worlds where we use means of transportation that go faster than light or where genuine miracles occur—are to be regarded as very distant from the actual world, and they are to be regarded as more distant than worlds where everything that occurs is compatible with our laws of nature but where long stretches of past or future occurrences diverge in radical ways from actual occurrences. Still closer are worlds involving minor violations of the laws of nature, say, worlds where a particle travels faster than light on a single occasion but where every other occurrence is near-indistinguishable from events in the actual world. Possible worlds that differ from the actual world merely in terms of small localized facts or events are to be treated as closest to the actual.

Applying Lewis' similarity measure to the first trolley case, we must adjudicate between two sets of worlds. In one set of worlds you pull the lever and divert the trolley to a track where a man is tied up but where the trolley miraculously stops before hitting the man or where the man miraculously survives the impact. In the other set of worlds you pull the lever, but the man is able to free himself and jump to safety before the impact occurs or he was never tied up in the first place. The first kind of scenario is more likely to involve either big violations of law or a significant mismatch of particular facts than the second. So, in the lever-trolley case the same good effect (five saved) would still have occurred, even if the harmful effect (one dead) had not occurred.

This is not so in the fat man trolley case. By Lewis' default similarity metric, worlds in which you make the train stop by pushing the man but the man miraculously lives are less similar to the actual world than worlds where you push the man but he does not land on the tracks and therefore fails to stop the trolley. That's because it is very improbable that the man stops the trolley with his body and yet survives the impact. But to say that it is very improbable just is to say that the worlds where that miraculous event happens are significantly different from—or far removed from—the actual. It either involves big, widespread, diverse violation of laws of nature or large regions of mismatches between particular facts.

So, the closest possible worlds where you push but don't kill the fat man aren't worlds where you push him and he miraculously survives but rather worlds in which he doesn't land on the tracks and therefore doesn't stop the trolley with his body. Thus, in the second case, unlike in the first, were you to decide to push the fat man and thereby save five, using the fat man to stop the trolley would be equivalent to treating him merely as a means to a greater good—a treatment which we ordinarily condemn.¹⁰

¹⁰ My proposal may seem superficially similar to the suggestion made by Warren Quinn that in order for a harm to be an unintended side-effect of an intended end, the harm must not be the result of direct agency. Direct agency, Quinn argues, is 'agency in which harm comes to some victims, at least in part, from the agent's deliberately involving them in something in order to further his purpose precisely by way of their being so involved' (1989, p. 343). However, my suggestion is different, as it does not imply that double effects cannot be a result of direct agency.

The upshot is this. When reinterpreted, the doctrine of double effect can account for why most of us are willing to kill a man to save five when all we need to do is pull a lever but are unwilling to kill a man to save five when we need to push him.

It may perhaps seem that the proposed reading of condition (6) deprives the doctrine of double effect of its ability to explain the apparent acceptability of killing in self-defense or sacrificing one's own life to save the lives of others (McIntyre, 2001, 2014). This is not so. Although I will not be able to go into the details here, the doctrine as formulated can explain the widely recognized acceptability of self-defense killings, when the killing is an unwanted side effect of an intention to harm without killing.¹¹

The above considerations cast doubt on Greene's (2013) claim that we are not acting rationally when judging differently in the trolley cases. The fact that we are judging differently can be explained on the view that we are inclined to abide by the principle of respect for persons but that this principle permits harming a person when the harm can truly be considered a double effect.

Even if we can explain the differential judgments in the trolley cases by appealing to the doctrine of double effect, one might wonder whether our folk decisions in critical choice situations are indeed guided by the doctrine (i.e., guided on an unconscious level, likely by recruitment of subcortical emotional brain regions; see Prinz & Nichols, 2010). Experimental studies of our intuitions about intentional action may seem to cast doubt on this claim (McIntyre, 2014). In one study conducted by Joshua Knobe (2003, 2006), two groups of research participants were assigned one of the following vignettes:

(1A)

The vice-president of a company goes to the chairman of the board and say, 'We are thinking of starting a new program. It will increase our profits, but it will harm the environment'. The chairman of the board answers, 'I don't care at all about the environment. I just want us to increase our profits. Let's start the new program'. They start the new program, and sure enough, the environment is harmed.

Did the chairman intentionally harm the environment?

(1B)

[...] and it will help the environment'. [...] The chairman of the board answered, 'I don't care at all about the environment. I just want us to increase our profits. Let's start the new program'. They start the new program, and sure enough, the environment is helped.

Did the chairman intentionally help the environment?

¹¹ I don't think it is straightforwardly morally permissible to sacrifice one's own life for the sake of others. There is a cultural tendency to celebrate 'supererogatory' acts, that is, acts that go above and beyond our call of duty, even when the acts are grounded in irrational feelings (Brogaard, 2015). For example, you are considered a 'hero' if you knowingly jump to your own death in order to save a child.

Knobe found that when the chairman knows that a side effect of his decision is harmful yet doesn't care whether it occurs (1A), most people judge that he intentionally brought about the harm. When the chairman knows that the side effect of his decisions is good yet still doesn't care whether it happens (1B), most people judge that he didn't intentionally bring about the good side effect. Knobe (2003, 2006, 2010) takes these data to show that we are inclined to regard a harmful result as a foreseen but unintended side effect when we believe that it is brought about by the right kinds of considerations yet take the side effect to be intentionally brought about when we judge it to be a result of morally despicable considerations (see also Harman, 1976; Knobe & Doris, 2010). This is also referred to as the 'The side-effect effect'.

Alison McIntyre (2014) argues that these findings threaten to undermine the explanatory power of double effect. The doctrine presupposes that a principled distinction can be drawn between a foreseen but unintended effect and an effect brought about intentionally. Yet experimental results indicate that we tend to treat the effects of action as intended whenever they are based on morally despicable considerations. When the same morally despicable considerations precede a morally good side effect, on the other hand, we tend to treat the side effect as foreseen but unintended. This may seem to suggest that we cannot draw an objective distinction between intentional outcomes and outcomes that are merely foreseen,¹² which is required by the doctrine of double effect.

However, I think this objection rests on a misreading of the doctrine of double effect. The latter regards it as permissible to allow a bad side effect to happen when but only when one hopes (perhaps against all odds) that it will not happen and hence only if one cares about whether it will happen. Since Knobe's envisaged chairman doesn't care whether the environment is harmed, the doctrine implies that he intentionally allows the harm to occur, which is one of the meanings of 'intentionally harming'.

Empirical studies confirm that our folk intuitions about side effects could be an effect of the doctrine of double effect operating on an unconscious level of cognition. In studies reported in Brogaard (2010) and Brogaard (forthcoming), research participants were randomly assigned one of the following vignettes.

(2A)

The vice-president of a company went to the chairman of the board and said, 'We are thinking of starting a new program. It will likely increase our profits, and help the environment'. The chairman of the board answered, 'I don't care at all about profits. I just want us to help the environment. Let's start the new program'. They started the new program, and sure enough, profits increased and the environment was helped.

Did the chairman intentionally help the environment? [yes]

Did the chairman intentionally help the company? [no]

¹² However, see Richard Holton (2010) for a reply.

(2B)

[...] 'It will likely help the environment but decrease our profits' [...] The chairman of the board answered, 'I don't care at all about profits. I just want us to help the environment. Let's start the new program'. They started the new program, and sure enough, profits declined but the environment was helped.

Did the chairman intentionally help the environment? [yes]

Did the chairman intentionally cause harm to the company? [no]

Did the chairman intentionally allow the profits to decline? [yes]

(2C)

[...] 'It will likely help the environment but decrease our profits' [...] The chairman of the board answered, 'It would be terrible if our profits decreased. But I really care about the environment. So, let's start the new program and hope for the best'. They started the new program, and sure enough, profits declined but the environment was helped.

Did the chairman intentionally help the environment? [yes]

Did the chairman intentionally cause harm to the company? [no]

Did the chairman intentionally allow the profits to decline? [no]

Participants assigned to (2A), (2B) and (2C) judged that the chairman intentionally helped the environment but didn't intentionally help the company. Participants in (2B) additionally judged that the chairman intentionally allowed the profits to decline, whereas participants in (2C) judged that he didn't intentionally allow the profits to decline. The results indicate that intentionally allowing a bad outcome to happen requires knowing that the outcome is likely to happen as the result of one's actions yet *not caring if it does happen*, which is what the doctrine of double effect predicts. There is thus good reason to think that our folk intuitions about morality are driven by the principle of respect. This does not rule out the centrality of emotions to moral judgments. Empathy is evidently required for us to be receptive to the demands of reason. But so are many other emotions, such as self-pride, anger, indignation and sympathy (Korsgaard, 2008: 19; Prinz & Nichols, 2010).

In the next section I bring the principle of respect and the corresponding human sexual rights to bear on a puzzle about sex by deception which at first may seem to compel us to accept an account of 'rape' strictly in terms of 'force' rather than 'sexual autonomy'. In the subsequent section I will argue that puzzle doesn't in fact compel us to accept this definition and that the notion of consensual sex can be understood in terms of the notion of sexual autonomy.

3. Rape and the Riddle of Sex by Deception

In colloquial speech, ‘rape’ (and ‘sexual assault’) has connotations of sex by force.¹³ This is even more transparent in other languages, for instance, Italian: stupro (sex by force). German: Vergewaltigung (assault). Danish: voldtægt (taking by violence). The vernacular interpretation coheres with the definition upheld by the U.S. judicial system until January 2013.¹⁴ The U.S. Department of Justice now defines ‘rape’ as ‘penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim’. While this is a vast improvement on the definition that included a requirement of force, the new rendition is elusive insofar as it depends on how ‘consent’ is glossed. Currently, there is little consensus on what counts as consent.

The problem of how to cash out ‘consent’ primarily arises when considering sexual activity that would not previously have qualified as rape because both (or all) parties voluntarily agreed to every aspect of the act. Sex by deception falls into this category. To a first approximation, we can say that sex by deception is sex that involves duplicity that is intended to increase the probability that the person subjected to the duplicity will agree to sex.¹⁵ A gripping example of sex by deception is sex following non-disclosure of a known positive HIV status. HIV criminalization laws have led to some rather severe sentences—sometimes 30 years in prison—for reckless endangerment, aggravated assault, and attempted murder in the U.S. and for sexual assault in Canada and The United Kingdom (Buchanan, 2015).¹⁶

In the U.S., explicit rape status has been given only to a limited variety of sex by deception, chiefly cases where the perpetrator impersonates someone else’s significant other in order to obtain consent (faking identity) and cases where the perpetrator convinces someone else that the impending sexual act is a necessary medical intervention or other non-sexual act (faking the nature of the act). Here are a few representative examples:

¹³ Stephanie Auteri, “Was It Rape? The Problems with Varying Definitions for Sexual Assault,” *Pacific Standard*, Jan 27, 2016, <https://psmag.com/news/was-it-rape>, retrieved May 28, 2018.

¹⁴ In many jurisdictions, rape is sexual violence that involves nonconsensual sexual penetration (a special case of sexual assault). Sexual violence that involves non-penetrative nonconsensual sexual activity, such as nonconsensual kissing, touching or sucking, is often considered sexual assault but not rape. This assumption has, unsurprisingly, been challenged, and for a horde of good reason (for discussion, see Whisnant, 2017). Here is one—rhetorically put: Why think a woman raping another woman needs to involve penetration? In what follows I will continue to use the word ‘rape’ but I don’t personally take it to be referentially restricted to penetrative nonconsensual sex.

¹⁵ When understood in this way, we can define ‘sex by deception (A on B)’ as follows:

(i) A actively engages in deception (lying or withholding of information) that causes B to believe that A is F,

(ii) A believes that B is significantly more likely to assent to sex with A, if B believes A is F than if B believes A is not-F.

(iii) A engages in the deception to improve the chance that B will assent to sex with A (as a way to promote A’s interests rather than a way to promote a greater good or B’s sexual rights; see note 24).

(iv) B is significantly more likely to consent to sex with A, if B believes A is F than if B believes A is not-F.

¹⁶ Zach Stafford, “Failure to disclose HIV-positive status is a felony that leads to a much worse crime,” *The Guardian*, July 17, 2015,

<https://www.theguardian.com/commentisfree/2015/jul/17/hiv-aids-disclosure-felony-std-tests-law>, retrieved May 28, 2018.

In 2009, California-resident Julio Morales was convicted for rape by fraud for sneaking into the dark bedroom of an 18-year old woman and having sex with her under the false pretense of being the woman's boyfriend, who had just left. The conviction was eventually overturned because the law of 1872 only criminalizes rape by fraud when someone impersonates a woman's legal husband in order to get her consent. This loophole was closed when Assembly Bill 65 and Senate Bill 59 were signed into law in 2013.

In 2016 Mario Ambrose Antoine was charged in federal court in Kansas City with multiple counts of rape by fraud after having had sex with more than 25 women who were told they would be performing as paid adult actresses.¹⁷ Antoine used fake documents to convince them to have sex with him in exchange for large sums of money as well as a 'shot at' making even larger sums of money if chosen for the films. They never received any money, and Antoine had none of his claimed rank and status in the adult film industry. To stop the women from filing formal complaints, Antoine used scare-tactics, threatening to send compromising pictures to family members or publicizing sex recordings. Although Kansas does not explicitly recognize rape by fraud, the federal prosecutors on the case cite Missouri rape legislation, which has ratified rape by fraud, in support of their case against Antoine.

In 2018 Larry Nassar, former Michigan State and USA Gymnastics doctor, was tried and convicted for raping and sexually assaulting female athletes as young as 12 in his clinics from 1994 to 2016. Nassar had also sexually abused a friend's daughter from the age of six until she was 12. Over the years Nassar's victims had been telling parents, coaches, counselors, MSU athletic trainers that the physician had digitally penetrated them both vaginally and anally without gloves or lubricant and without a third party in the room, claiming to be performing 'intravaginal adjustments'. However, the sufferers were met with skepticism and were discouraged from filing formal complaints, and Nassar continued to practice sports medicine at Michigan State University and serve as chief medical coordinator and team doctor for USA Gymnastics for decades before finally being charged with rape and assault.

These cases exemplify the increasing public and judicial awareness of the insidiousness of rape by deception. These horror stories, however, are exceptions that prove the rule. Except when it's the result of impersonation or a cover-up of the act, sex by deception is not rape, in the eyes of the law. Lying about your age, marital status, or emotional involvement to increase the likelihood of sex is not rape, legally speaking.

Jed Rubinfeld, Professor of Law at Yale Law School, has drawn attention to current rape law's differential treatment of sex by deception (Rubinfeld, 2012). He blames the discrepancy on the widely held belief that rape should be criminalized because it infringes on a person's right to sexual autonomy (McGregor, 1994; Schulhofer, 2000: 16-17; Falk, 2002).¹⁸ Recall that the right to sexual autonomy implies that we have a right to decide who we have sex with and what types of sex we engage in.

¹⁷ Tony Rizzo, "Raymore man's arrest puts rape by fraud issue in the spotlight," *The Kansas City Star*, October 27, 2016. <http://www.kansascity.com/news/local/crime/article110787327.html>. Retrieved May 28, 2018.

¹⁸ Tom Dougherty (2013) likewise defends the view that a wide range of sex by deception vitiates consent and therefore is a serious offence. I argue against this stance below.

Current rape law criminalizes rape because it vitiates consent. On a common interpretation of the notion of consensual sex, consensual sex requires respecting sexual autonomy. Rubenfeld argues against this interpretation of the notion of consensual sex in legal contexts on the basis of current rape law's differential treatment of sex by deception. Sex by deception, he argues, vitiates sexual autonomy. So, if current rape law is taken to criminalize non-autonomous sex, then all sex by deception is rape and should be criminalized. The fact that current rape law does not criminalize most cases of sex by deception as rape thus betrays an inconsistency in the law.

Legal theory provides a foundation for drawing a distinction between different types of sex by deception. Fraud is said to be either 'in the factum' or 'in the inducement'. Judicially, sex by fraud in the factum vitiates consent and therefore is rape, while fraud in the inducement does not vitiate consent and therefore does not affect the consensual status of the act. In the case of fraud in the factum, the very nature of the act consented to is misrepresented as being something other than it is. In the case of fraud in the inducement, there is no misrepresentation of the identity of the conniving person or the nature of the sexual act but merely a misrepresentation of contingent features of the conniving person, such as job status, marital status or religious affiliation, or contingent features of the sex act, such as being an expression of love, being special or being one's first time. In other words, the person who is deceived has been given false information about some contingent aspects of the sexual act but is nonetheless still in position to know that it is sex that she consented to as opposed to, say, a medical procedure.

Rubenfeld, however, does not think a principled distinction can be drawn between sex by deception in the factum, which vitiates consent, and sex by deception in the inducement, which does not. One problem, he argues, is that in many other areas of the law, fraud in the inducement is taken to vitiate consent. For example, in cases of trespassing and contract law, misrepresentations of one's occupation or other personal characteristics that are not essential to one's identity are regarded as vitiating consent to enter or consent to access. Rubenfeld finds it puzzling that pretending to be the cable guy in order to get green light to enter private property vitiates consent, when pretending to be a bachelor in order to enter a woman's body does not, in the eyes of the law. I assess this point in the paper's final section.

The second problem with in-the-factum/in-the-inducement distinction, according to Rubenfeld, is that the distinction fails to explain why sex by deception only occasionally is treated as rape. Masquerading as someone's spouse to obtain consent to sex with them misrepresents the nature of the act. But, Rubenfeld argues, so does pretending to have a characteristic you do not have, for instance, pretending to be a bachelorette or a pilot. Justifying the criminal nature of rape on the grounds that it vitiates sexual autonomy doesn't improve matters, Rubenfeld argues, because if sexual autonomy has any significance, then 'it surely includes the right not to have sex with a married man if you don't want to'. (2012: p. 25) Rubenfeld presents a similar case against a differential treatment of sex disguised as something it is not. If disguising a sexual act as a medical procedure to obtain consent is rape, so is disguising sex as an act of love. In both cases, the conniving person disguises a sexual act as something it is not: a medical procedure or an act of love.

If we insist on preserving the principle of sexual autonomy as a foundation for rape law, then we have two options, Rubenfeld argues: we can either count all sex by deception as rape or none at all (for the former view, see Falk, 1998; Short, 2013).

Rubenfeld—rightly in my view—thinks the first option is absurd. As he points out, it has the grotesque consequence that if a seventeen-year old woman tells a twenty-year old man that she is eighteen to avoid rejection and they have sex, not only would the man have committed statutory rape, the teen would also be guilty of raping the adult man. Or in another scenario envisaged by Rubenfeld, a ‘man who only rapes models could claim to have been raped by his victim if she falsely told him she was a model’ (2012, p. 1415).

Arguing for a similar point in reply to Tom Dougherty, Hallie Liberto (2017) envisages a case in which a couple are having sex and that the man (who wants the sex to continue) lies to the woman about his slight discomfort in order to prevent the woman from discontinuing the sexual act. Like Rubenfeld, Liberto argues that it would be preposterous to think that the couple’s lovemaking is nonconsensual and that the slightly discomforted person is raping his partner by not revealing the discomfort.

This would then seem to leave us with the second alternative: count all sex by deception between people of legal age as consensual, even when consent is obtained by impersonating a partner or disguising the act as a medical procedure. But sex by deception is an infringement on our right to sexual autonomy, in Rubenfeld’s opinion. So, given that we must settle for the second option, sexual autonomy should not serve as the foundation of rape law.

Rubenfeld ponders whether we could opt for a compromise by treating not just sex by force but also sex by coercion as rape (for a defense of this position, see Falk, 1998; Chiesa, 2017). However, he doesn’t think this expansion of the force requirement is sustainable or warranted. A definition of ‘rape’ as ‘sex by force or coercion’ fails to resolve the conundrum, because deception, however manipulative, isn’t coercion, legally speaking. Furthermore, Rubenfeld argues, sex by coercion, like sex by deception, conflicts with our right to sexual autonomy. So, if ‘consent’ is glossed in terms of sexual autonomy, and a coerced ‘yes’ doesn’t count as consent, then neither should a deceived ‘yes’. But this brings us back to the first horn of the dilemma: regard all sex by deception as rape.

Rubenfeld concludes by reiterating that the riddle of sex by deception arises because ‘rape’ is legally glossed in terms of ‘sexual autonomy’. Not only is sexual autonomy unable to serve as a foundation of rape law, it should not figure anywhere in the law, Rubenfeld argues, as the very concept of sexual autonomy is incoherent.

To back up this claim, he makes a case for the view that sex can be a matter of one person allowing the other to have complete control over what happens. This is the essential component of bondage/discipline/sadomasochism (BDSM) whose practitioners do not play by the ‘no means no’ rulebook. The person in control is allowed to degrade, humiliate, restrain, discipline or physically hurt the other. Rubenfeld grants that it is commonplace to use safe words (e.g., ‘banana’, ‘yellow’ or ‘red’) as a way to tell the other to slow down, decrease, or

completely cease an action. But not saying ‘no’ does not equal consent. BDSM thus vitiates sexual autonomy.¹⁹

BDSM is at the extreme end of the spectrum. Sex by deception, Rubenfeld argues, is an integral part of almost all sex preceded by seduction. In common scenarios of seduction, you disguise the way you normally look, sound and behave, for example, by wearing a corset, a push-up bra, fake eyelashes or slimming yoga pants or by putting a sock in your pants, talking with a deeper voice and nonchalantly buying multiple rounds of drinks. If the fake nipples you used to up your chances of spending the night with the school’s hottest guy were successful, you would be guilty of sex by deception. But Rubenfeld certainly makes a good point when drawing attention to the absurdity residing in classifying sex by seduction as rape.

In the end, Rubenfeld chooses to advocate for a legal definition of ‘rape’ as a sexual act that contravenes a person’s right not to be forced into sexual service,²⁰ which he takes to be a special case of the right to sexual self-possession. The grisly harm of rape, he argues, lies in the violation of bodily self-possession where ‘the victim’s body is utterly wrested from her control, mastered, possessed by another’ (2012: 1427). This utter loss of one’s possession of one’s own body is akin to the violations of self-possession that occur in slavery, captivity and torture. Rubenfeld’s proposal thus suggests an account of consensual sex as sex that all parties assent to and that doesn’t violate any party’s right to sexual self-possession. This is essentially the old legal definition of ‘rape’ in terms of ‘force’. I will now argue that the puzzle about sex by deception is a false dilemma.

4. Consensual Sex as Autonomous Sex

The riddle of sex by deception, I will now argue, is a false dilemma. Sex by deception does not compel us to reject an account of consensual sex in terms of sexual autonomy.

The riddle of sex by deception rests on an argument from analogy, which lumps together all sex by deception ranging from sex by impersonation to sex by seduction. On the face of it, this analogy may seem sound. Upon further scrutiny, however, the parallel breaks down.

There are key differences between pretending to be a particular woman’s husband to obtain consent to sex—say Karla’s husband Kai—and pretending to be *a husband* to obtain consent to sex with commitment-phobic Boline (*or pretending not to be a husband to obtain consent to sex with desperate Dorte*). In fact, the phrase ‘pretend to be someone’s husband’ is ambiguous between a reading where ‘someone’s husband’ takes narrow scope relative to the verb ‘pretend’ and a reading where it takes wide scope:

¹⁹ The premise that the legality of BDSM makes sexual autonomy unusable in a legal context is questionable, as temporarily giving up self-possession and not just sexual autonomy is integral to the practice. A similar point is made by Tom Dougherty (2013b).

²⁰ Katharine K. Baker (2015) argues for a similar view but on purely pragmatic grounds: the law should cover only cases of rape that occur as a result of force, because it is virtually impossible to prove that sex where no force was used is rape. Jay Bernstein (2015) argues that rape law should include a conception of rape that is best suited as a way of preventing self-dispossession, which he thinks is best accomplished by understanding rape as an infringement on sexual autonomy.

Narrow Scope:

Bachelor Børge pretends to be someone's husband (i.e., Børge pretends to be married to someone or other).

Wide Scope:

There is some person (Kai), such that husband impersonator Hans pretends to be that person (i.e., Hans pretends to be Kai).

To pretend to be married to someone or other without pretending to be any person other than oneself (narrow scope) is clearly different from pretending to be identical to someone else (wide scope). If husband impersonator Hans sneaks into Karla's bedroom, pretending to be her hubby Kai, this is to be understood on the wide-scope reading: Hans the husband impersonator is pretending to be Kai. But Karla cannot consent to an activity that has not even been proposed to her. So, husband impersonator Hans does not give Karla the option of consenting to sex with him. If, on the other hand, bachelor Børge pretends to be someone's spouse to obtain consent from commitment-phobic Boline consents (or alternatively: bluff-bachelor Børge pretends not to be anyone's spouse to obtain consent from desperate Dorte), where 'someone's spouse' takes narrow scope, Boline is given the option of consenting (or not consenting) to sex with Børge.

Why does pretending to be *someone other than you* vitiate consent when pretending to be *something you are not* does not? To answer this question, let's have a closer look at the meaning of 'consent'. 'Consent' is shorthand for 'voluntary informed consent'. Voluntary consent is consent a person has not been physically forced to give, for example, by being tortured until they say 'yes'. To say that the consent is informed is to say that it is based on true information about the nature of the act and the identity of the person requesting consent.

Consent is not informed when a person who assents to the activity doesn't understand what they assent to and is unaware of the generally known consequences of partaking in the activity (Wertheimer, 1996). Children, for example, are unable to consent to sex. This is not because minors are unable to consent to anything. Certainly, if a parent asks an average six-year old whether she would like the parent to brush her hair, and the six-year old responds that she does, her agreement counts as consent. Six-year olds are normally old enough to understand what it means for someone to brush their hair, and hair brushing rarely has any harmful consequences. So, not only is the child voluntarily assenting to the act, she also understands its nature and consequences. A six-year old cannot consent to sex, however, as she is not in a position to know what to expect during or after the encounter. Severely disabled or incapacitated individuals are unable to consent to sex for the same reason.

Informed consent does not require knowing everything about the type of act that one is consenting to or everything about the person who is to perform, or partake in, the act. Consenting to surgery requires knowing in broad strokes what is likely to happen during the procedure as well as risks and benefits of surgery versus alternatives to the surgery (if any). In order to consent to surgery, however, you don't need to know even a fraction of what the surgeon knows about medicine. Furthermore, surgery doesn't require knowing anything about the person who ultimately carries out the operation. If Surgeon Feinstein falls ill mid-surgery, and Surgeon Shamon finishes the act, there is no breach of consent.

There is no sharp cutoff between when you have been sufficiently informed and when you have not. The reason for this is that the term ‘informed’ is vague much like ‘bald’, ‘cold’ and ‘sounding British’, which is to say, there are borderline cases in which the term neither *clearly* applies nor clearly fails to apply (e.g., someone with a bit of hair on the temples). But this is no cause for alarm, for there are also cases where the term clearly applies and cases where it clearly doesn’t apply. Bruce Willis is clearly bald; Robert Redford is clearly not. Karla is clearly sufficiently informed to consent to sex with her husband Kai and clearly isn’t sufficiently informed to consent to sex with husband impersonator Hans.

I will propose that in order for a person to consent to participation in an activity of kind κ , there must be a meaningful and officially recognized sorting of activities in the relevant domain into (social or natural) kinds or prototypes, and κ must clearly belong to one of those kinds or prototypes. In medicine, for example, heart surgery and brain surgery are officially recognized as being different kinds of surgery. Likewise, within the domain of heart surgery, heart transplant, coronary artery bypass grafting and heart valve replacement are distinct, officially recognized types of heart surgery. So, a patient can consent to heart valve replacement without thereby consenting to coronary artery bypass grafting or heart transplant.

We can make sense of the idea of consent to sex with a *particular person* only on the assumption that people have individual essences that are unchangeable and non-interchangeable and that make each person distinct from every other person. We are not destined by genes or otherwise to have all the attributes and relational features we in fact have. You could have had a different job, gone to a different university, lived in a different city, and had a different marital status and still have been the person you are. Things are different when it comes to our core self-identity—our individual essence. You could not have been the unique person you are and yet have had a different individual essence. On what we might call ‘the biological account’, a person’s identity is given by her origin—i.e., the zygote she came from (Kripke, 1980). For simplicity’s sake, we can take this to mean that a person’s origin is limited only by his or her genetic material. On this view, you could not have been a kangaroo, have been born with gills or have used your leg hair to detect the electromagnetic field of flowers.

Despite having been a staple of philosophy for decades, the biological account is unlikely to offer much insight into what makes you the unique person you are. It can explain why you could not have been a fish or a bumble bee, but not what makes you the unique human person you are as opposed to an entirely different person. What makes you you is likely going to involve a vast number of intentional behavioral tendencies and the mental states that ground them (Vargas, 2013; Brogaard, 2019).²¹ Even if a realistic account of a person’s self-identity is currently unfathomable, different theories of identity are bound to concur that features such as one’s education, profession, marital status, sex assignment at birth, love relationships and personal wealth are not part of what defines a person.²²

²¹ The view of identity defended in Brogaard (2019) presupposes the falsehood of ‘blunt’ situationism; see John Doris (2003) for a defense and Manuel Vargas (2013) and Doris (2015) for plausible compatibility accounts of agency and responsibility.

²² It may perhaps seem that the biological account implies that a person’s sex assigned at birth is fixed by her individual essence. However, this is not so, as the sex assigned at birth can, and often does, change (Serano, 2007).

Even an imprecise notion of a person's identity will thus suffice for explaining the legal outliers among sex-by-deception cases. It will suffice for explaining why pretending to be a doctor performing a medical procedure in order to obtain consent to sex ought to be treated differently from lying about being in love with a person in order to obtain consent. Medical procedures and sexual intercourse are officially recognized, distinct types of action. So, you can consent to one type of activity in a given typology without thereby (by default) having consented to other types—and this is so even if the types overlap.

Turning to the impersonation case: even an imprecise notion of person's identity will suffice for explaining why Karla's agreement to sex with husband impersonator Hans fails to constitute consent to *sex with Hans*, even though Boline's agreement to sex with pretend-bachelor Børge, who has lied to her about his marital status, *does* constitute consent to sex with Børge. Karla's consent to sex with her husband Kai doesn't constitute consent to sex with husband impersonator Hans disguised as Kai, because Kai and Hans have distinct personal identities (or individual essences). Even so, Boline's agreeing to sex with Børge, who has lied to her about his marital status to up his chances, constitutes consent. We are rarely (if ever) 100 percent honest with our sex partners—particularly not people we are about to have sex with for the first time (for fear that it may dampen their interest). Requiring 'full revelation' for consent to sex thus has the absurd implication that (nearly) all sex is rape. So, while sex by impersonation vitiates consent, sex by fake marital status does not.

Using legal terminology, we can say that fraud in the factum requires pretending to be a different person (with a different individual essence) or pretending that the act for which consent is sought is a different type of act. Fraud in the inducement, by contrast, merely requires pretending to have a non-essential feature without thereby masquerading as an entirely different person and without disguising the sexual act as an entirely different type of act in an officially recognized typology of acts.

Pace Rubenfeld, a principled distinction can thus be drawn between rape by deception recognized as such by current rape law in most states in the U.S. and consensual sex preceded by deception. Only sex by deception where the offender masquerades as someone else or convinces the victim that the sex act is a different type of act, say a medical procedure, vitiates sexual autonomy.²³

²³ In the terminology of dual process theory: the type-I heuristics (or 'short-cuts') we automatically rely on when making quick decisions on the basis of limited information can be more reliable than slow type-II reasoning on the basis of a lot of information (see Gigerenzer, 2007; Haidt, 2007). So concealing information or lying to make someone agree to sex need not vitiate sexual autonomy. Mark Alfano (2015) and Alan Strudler (2016) make a similar point. As Alfano puts it, 'additionally, we need a nuanced, empirically-informed conception of autonomy. More information doesn't always lead to better decision-making, and can even introduce bias. Promoting someone's autonomy can therefore involve concealing information or even providing misinformation' (2015: 2). Arguably, the same can be said about promoting someone's individuality and perhaps other rights as well. Being presented with too many options, for example, might prevent us from developing preferences in a particular domain. This suggests that only some kinds of 'deception' violate the principle of respect, viz. the kinds carried out with the intention of promoting one's own selfish ends (as opposed to a greater good or the ends of the deceived).

My thesis here, of course, should not be taken to imply that rape *only* violates the right to sexual autonomy. In many instances, rape vitiates sexual self-possession and the survivor's rights to sexual individuality and sexual dignity.

5. Sexual Rights and Sex by Deception

I have argued, on the basis of philosophical argument and data from moral psychology, that people's intuitive moral judgment are guided by the principle of respect for persons, which encompasses five related ideals: respect for self-government, respect for personal autonomy, respect for individuality, respect for privacy, and respect for dignity and a decent life. I have, furthermore, argued (pace Rubenfeld) that a legitimate distinction can be drawn between sex by deception that violates sexual autonomy and sex by deception that does not, and that the puzzle about sex by deception therefore does not compel us to rethink the current interdefinability of consensual sex and sexual autonomy, which is to say that, with rare exceptions, sex by deception is consensual sex.

Even when consensual, sex by deception is not morally kosher. This is because all sex by deception vitiates the principle of respect for persons. Different instances flout different facets of the principle. Consider our initial scenario. Bjørn tells Sonya that he is 23 and about to graduate from college to increase his chances of sleeping with her; he is in fact 33 and about to finish his Ph.D. Although Sonya's sexual preferences were not stated in the original story, let's assume for argument's sake that she would have been much less likely to have sex with Bjørn, if she had known his true age. On this assumption, Bjørn intentionally disrespects Sonya's sexual preferences, which is to say that his conduct violates her right to sexual individuality, viz. her right to have, develop, and be respected irrespective of, her own unique sexual preferences, personality, identity, and orientation.

Now, let's cancel the assumption regarding Sonya's preferences and assume instead that contrary to what Bjørn believes, Sonya actually prefers a considerable age difference, or alternatively that she couldn't care less either way. Under either assumption, Bjørn's conduct doesn't violate Sonya's right to sexual individuality. But his behavior reveals that he has no regard for her sexual rights. Why else would he lie? His lying is an overt attempt to disregard her rights. Bjørn is thus guilty of an *attempted* violation of Sonya's sexual individuality, which makes his sexual conduct disrespectful.

So far we have been concerned exclusively with lying or deceiving with the intent of increasing the likelihood of consent to sex. Suppose, however, that Bjørn lies about his age for entirely idiosyncratic reasons, and that it never occurs to him that doing so might make Sonya more likely to consent to sex. Suppose further that a 'reasonable person' would have no reason to think Sonya cared about his age. In this scenario, Bjørn's lying isn't an attempt to deceptively make Sonya agree to sex. So, his sexual conduct doesn't satisfy the *mens rea* ('guilty mind') requirements of criminal law.²⁴

²⁴ For discussion for *mens rea* in the context of rape, see Rebecca Whisnant (2017).

Lying prior to sex—even if not to increase your chances of sex—could turn your sexual conduct into a liability, however (see MacKinnon, 1989: 180-181).²⁵ In civil law, unlike in criminal law, a person can be held responsible for harm or damage he or she didn't foresee and didn't directly cause. Suppose you recently opened your own petting zoo. You own a mule, a donkey and a goat. One day your goat goes mad and starts running around the enclosure like a maniac. A little girl gets in the way of the runaway goat, which causes her to trip and break her arm. In the envisaged scenario, you didn't cause, or intend to cause, harm. Since you didn't carry out the action, you would not ordinarily be held criminally liable. But civil court may order you to pay for the medical costs incurred by your goat. If your behavior is also deemed subjectively reckless (see below), your penalty could be punitive as well—for example, civil court could order you to serve time or pay restitution.

Negligence is an omission or failure to act that unintentionally inflicts harm or damage that was neither intended nor foreseen by the agent (Brady, 1980), for instance, omitting to schedule the weekly veterinarian site visit because you got caught up watching Tour De France and paying no heed to the fact that visitors could get hurt as a result. Negligence that doesn't violate a legal claims right (e.g., your child's right to your care as a parent or caretaker) can be a civil liability, but not a criminal liability, as criminal liability requires a positive action rather than an omission, except when a claims right is violated.

Subjective recklessness is a positive action that inflicts harm or damage which the agent didn't intentionally bring about but had foreseen and yet didn't care to avoid (Sullivan, 1992). For example, it would be subjectively reckless for you to keep your goat outside with visitors, while being well aware of its random caprice yet failing to care about anything except increasing your profits. Being subjectively reckless thus also differs from causing a foreseen side effect that you care about but choose for the sake of a greater good. In fact, the effect-causing actions in Knobe's chairman cases are paradigmatic instances of subjective recklessness (see Knobe, 2010; Knobe & Doris, 2010). Unlike neglect, subjective recklessness can vary in legal kind, being either a civic liability or a criminal offense.

Consider yet another variation on our initial deception case. Bjørn lies to Sonya about his age and later they have consensual sex. Bjørn doesn't believe that Sonya cares about age, and, in fact, no reasonable person would believe that she cares either. Sadly, when Sonya learns about Bjørn's deception, she feels sexually violated and suffers significant psychological damage. After realizing that she needs mental health care that she cannot afford, she takes the matter to civil court. In this scenario, it seems to me that Bjørn should be held liable for the unintended damages inflicted on Sonya and hence that he should be required to pay for her mental health care.

Sex by deception sometimes compromises sexual dignity rather than sexual individuality. Consider again the case of Karl, a misogynist who has had his eyes set on Sophie for a long time. Karl's desire to degrade and humiliate women is so sickly strong that he happily

²⁵ Although I cannot argue for it here, I do not think that all sex by deception (let alone all instances of rape) should be considered merely a strict liability rather than a crime. On a related note: *Mens rea* is central to an account of attempted rights violations, including attempted rape (Sullivan, 1992). For a discussion of rape as a strict liability and potential issues with the 'reasonable person' standard that is standardly used to determine *mens rea*, see Whisnant (2017).

plays his part as ‘women’s best friend’, ‘sweet and caring lover’, and ‘home buddy looking for someone special’ in order to seduce and eventually devalue Sophie. At first Sophie gives Karl a hard time. But after a few weeks, she is hooked, and he knows it. When they finally have sex, which they both refer to an act of ‘love making’, Karl’s main thought is how good it is to finally ‘fuck that little disgraceful whore’. In this scenario, Karl evidently infringes on Sophie’s right to sexual dignity.

In other cases, sex by deception vitiates sexual privacy. In 2010, Colgate University student Michael Piznarski secretly recorded having sex with his girlfriend on several occasions²⁶ Piznarski informed her about the video recordings after their breakup, which made the girlfriend file a complaint with the police. The police obtained a search warrant and confiscated the recordings, one of which showed Piznarski having sex with a different woman. Piznarski was eventually convicted for breach of sexual privacy under New York’s unlawful surveillance statute, called ‘Stephanie’s Law’.

As argued in section 1, my thesis that our folk intuitions about morality are driven by the principle of respect doesn’t rule out the centrality of emotions to moral judgments (Korsgaard, 2008: 19; Prinz & Nichols, 2010). An infringement on our sexual rights can trigger intense negative emotions such as indignation, resentment and envy.

Emotions play a central role in moral judgments because of their ability to make us attuned to what is morally right in a way that incentivizes us to act (Korsgaard, 2008: 19). Simply knowing what is right and wrong doesn’t motivate action. The inability of a murderous psychopath to feel empathy together with his lack of fear of repercussion leaves him without any motivation for acting on his pre-existing knowledge of the wrongness of his ways (Schroeder, et al., 2010). The thrill, empowerment and sexual arousal that he experiences when he tortures and kills are his only motivators.

Consistent with this finding, studies in moral psychology have found that empathy can make the difference between whether a distressed bystander is responsive or unresponsive to a moral infraction. This is because empathy is inherently unpleasant, and the only way to eliminate the unpleasantness is by helping the person in need (Stocks, et al. 2009). Escaping the scene eliminates the unpleasant stimulus but the discomfort of genuine empathy is immediately replaced by an even more unpleasant feeling of guilt.

While empathy can motivate bystanders to take action, it hardly motivates crime victims. Although we sometimes feel a kind of empathy for our tortured past selves, we don’t ordinarily empathize with ourselves. This is because, as victims we experience emotional pain directly rather than by seeing or hearing someone suffer. However, directly perceived emotional pain, together with anger-like emotions, can motivate us to seek justice. The pursuit of justice, in turn, can alleviate the extreme unpleasantness of the emotional suffering caused by genuine empathy.

Although emotions can enhance our receptivity to what’s morally right and hence our inclination to do what is right, this is so only when the emotion is fitting (or appropriate), that is, only when the emotion matches its formal object—say, by being dangerous, hurtful, smelly or

²⁶ Danielle Citron, “Nonconsensual Taping of Sex Partners Is a Crime,” *Forbes*, May 15, 2014, <https://www.forbes.com/sites/daniellecitron/2014/05/15/nonconsensual-taping-of-sex-partners-is-a-crime/#439eec106ce0>, retrieved on May 28, 2018.

unexpected (Brogaard, 2015). For example, indignation is appropriate when it involves a negative appraisal of a person's infraction on human rights. So, the feeling of indignation is fitting only if human rights have indeed been violated.

How receptive we are to moral rights and wrongs depends on the extent to which we are disposed to have fitting emotions across many different circumstances. Sadly, sexual rights violations too often cause the victim to feel guilt or shame rather than indignation, thus compromising her ability to do what is right (Tangney & Dearing, 2002). When learning about how his sexual privacy and dignity had been compromised, Tyler Clementi felt shame when his sexual encounter with his boyfriend was recorded for the public to see. Shame prompted him to do the wrong thing: punish himself by ending his life.

Shame is far more insidious than guilt. While both involve a feeling of responsibility for an incident or a downfall, they have different intentional and attentional objects (Tangney & Dearing, 2002: ch. 2). Whereas guilt is directed at a harmful incident for which you know or suspect you are responsible, shame points its finger directly at you. Shame, unlike guilt, furthermore involves undue attention to what others think; hence the misleading reference in colloquial speech to the 'public nature' of shame.

5. Conclusion

In this chapter we looked at sex by deception as a case study in order to highlight some of the issues around sexuality and moral psychology, including sexual self-possession, sexual autonomy, sexual individuality, sexual interest, consensual sex and disrespectful sex.

After outlining five fundamental sexual rights, viz. sexual self-possession, sexual autonomy, sexual individuality, sexual dignity and sexual privacy, I argued against widely accepted experimentally-based conclusions in moral psychology that take people's intuitive judgments about morality to be driven by the principle of respect for persons. The principle of respect encompasses human liberty rights, including human sexual rights.

Next we looked at a puzzle about sex by deception—a puzzle that appears to lend credence to an account of rape in terms of force rather than autonomy. As it turns out, the puzzle rests on a mistake, viz. that of treating all cases of sex by deception alike. This is a mistake because even though some instances of sex by deception vitiates sexual autonomy and therefore ought to be considered rape, most instances aren't rape.

Sex by deception, however, is morally problematic because it infringes on fundamental human rights, such as the right to sexual individuality. Suppose Kirsten believes that her new neighbor Marianne—like most of her past sex partners—would be less likely to have sex with her if she knew she was married. To increase her chances with the new neighbor, Kirsten claims to be divorced. Kirsten and Marianne eventually have sex. As Marianne has freely chosen to have sex with Kirsten, Kirsten doesn't compromise her neighbor's sexual autonomy, so her sexual conduct isn't rape. However, Kirsten's concealment of her marital status as a strategy to seduce Marianne infringes (or attempts to infringe) on Marianne's right to regard for her preference for sex with unmarried women. So, Kirsten's sexual conduct hinders Marianne's

right to her own sexual individuality. Disrespectful sex is immoral sex. So, although Kirsten didn't rape Marianne, Kisten's sexual conduct is nonetheless morally wrong.

The moral severity of a person's violation of another person's sexual rights could well match or surpass that of rape, although the extent to which it does (if at all) would need to be determined on a case-by-case basis. Sex facilitated by failure to disclose a HIV-positive status, concealment of bizarre sexual inclinations with significant ramifications such as a desire to have sex with children, and not informing your sex partner that you are their bygone biological parent clearly fail on the moral scale.²⁷

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