

COMMONSENSE CONSENT

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INTRODUCTION

When Bill Cosby stood trial for sexually assaulting his former mentee Andrea Constand, the jury was tasked with deciding whether Constand had given consent.¹ The first jury deadlocked on this question, resulting in a mistrial.² The second jury, also flummoxed by this question, submitted an inquiry to the judge asking for the legal definition of consent. The judge replied that the jury had already been given the legal definition of the crime—penetration “without the complainant’s consent”³—and that he could supply no further guidance.⁴ “The jury will decide what consent means to them,” he instructed.⁵

This Article asks how ordinary people understand the concept of consent. Consent is a pivotal concept in many areas of law, from police searches, to contracts, to medical malpractice, to rape. “[C]onsent turns a trespass into a dinner party; a battery into a handshake; a theft into a gift; an invasion of privacy into an intimate moment; a commercial appropriation of name and likeness into a biography,” observes the legal theorist Heidi Hurd.⁶ Despite the prominent role consent plays in our moral and legal lives, little is known

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¹ See Jeannie Suk Gersen, *The Legal Meaning of the Cosby Mistrial*, *NEW YORKER* (June 18, 2017), <https://www.newyorker.com/news/news-desk/legal-meaning-of-the-cosby-trial>.

² Maria Puente, Gene Sloan, & Jayme Deerwester, *Bill Cosby Retrial, Day 13: Jury Adjourns for Night After Seeking Definition of Consent*, *USA Today* (Apr. 25, 2018), <https://www.usatoday.com/story/life/2018/04/25/bill-cosby-retrial-day-13-jury-begins-deliberations/548593002>.

³ Pennsylvania defines “aggravated indecent assault” as penetration “without the complainant’s consent.” 18 Pa. Stat. § 3125(a)(1).

⁴ Puente et al., *supra* note 2.

⁵ *Id.*

⁶ Heidi M. Hurd, *The Moral Magic of Consent*, 2 *LEGAL THEORY* 121, 123 (1996).

about what the public thinks consent *is*. This Article thus undertakes an empirical investigation of people’s commonsense understanding of when consent has been granted. It reports four years’ worth of original data.

Under the standard philosophical account, consent is morally important because it expresses an agent’s autonomous will.⁷ Because consent is “intimately related to the capacity for autonomous action,”⁸ it must be given knowingly, competently, and freely. Consent is defective—it is mere *assent*⁹—if it is marred by factors that compromise autonomous decision-making, such as coercion (undermining freedom), incapacity (undermining competence), or fraud (undermining knowledge).¹⁰ When such factors are present, the agent has not executed a valid waiver of her rights, and any intrusion into her person or property is forbidden. This is why, in most cases, sex agreed to at gunpoint is rape¹¹; a will signed by a person with apparent dementia is voidable¹²; and a competitor who gains entry to a rival firm’s property by posing as a customer has trespassed.¹³

This Article asks whether folk intuition accords with this canonical view of consent. The startling answer, it uncovers, is no—not by a long shot. While most laypersons agree that coercion and incapacitation invalidate consent, they believe deception does not. Indeed, this Article reveals that large majorities of American survey respondents believe that victims of intentional fraud who are tricked into agreeing to an offer they would otherwise refuse, nonetheless grant valid, morally transformative consent.¹⁴

⁷ See, e.g., *id.*, at 124 (“[C]onsent is normatively significant precisely because it constitutes an expression of autonomy.”); Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1, 42 (2015) (“To consent to sex is indeed to assert agency—especially for those who sexuality has, over time, been variously denigrated, co-opted, denied, stigmatized, mythologized, and punished.”).

⁸ Larry Alexander, *The Moral Magic of Consent (II)*, 2 LEGAL THEORY 165, 165 (1996).

⁹ This Article uses the terms *assent*, *agreement*, and *acquiescence* interchangeably to refer to what the theorist Peter Westen calls “factual consent”: simple empirical acquiescence. See *infra* notes 169–170 and PETER WESTEN, *THE LOGIC OF CONSENT* (2003) for a detailed discussion.

¹⁰ See, e.g., ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* 127 (2003).

¹¹ See, e.g., Kimberly Kessler Ferzan & Peter Westen, *How to Think (Like a Lawyer) About Rape*, 11 CRIM. L. & PHIL. 769, 769–70 (2017).

¹² See, e.g., *Renchard v. Prince William Marine Sales, Inc.*, 87 F. Supp. 3d 271, 281 (D.D.C. 2015) (“[A] contract with person who ‘by reason of mental illness or defect . . . is unable to understand in a reasonable manner the nature and consequences of the transactions’ is ‘voidable’ if ‘disaffirmed or avoided by the incapacitated party.’”) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 15 (1981)).

¹³ See *Desnick v. Am. Broad. Companies, Inc.*, 44 F.3d 1345, 1352 (7th Cir. 1995).

¹⁴ Consent is “morally transformative” in that it renders normally wrongful conduct morally permissible. Legally, it transforms otherwise illicit conduct into lawful conduct. See,

This finding holds true across over two dozen scenarios spanning numerous contexts, including sex, surgery, participation in medical research, warrantless searches by police, contracts, and tattooing.

This Article offers the first comprehensive account of *commonsense consent*—the layperson’s intuitive mental representation of consent. It argues that we have a distinct folk theory of consent, which can be differentiated from other folk theories about harm and general moral wrongness. It advances the core claim that because this folk theory of consent accommodates significant forms of fraud, it contradicts prevailing normative theories, which see consent’s purpose as honoring autonomy.

The psychological phenomenon laid out in this Article carries several implications for the law. First, it introduces a new explanation for a longstanding legal puzzle about why the law refuses to treat fraudulently procured consent to sex as rape, or even as a crime at all. This Article details how in the vast literature on this topic, the puzzle is nearly always conceptualized too narrowly as a problem of rape exceptionalism.¹⁵ It instead suggests that judges are not (just) influenced by patriarchal sexual moralism or sexist attitudes toward women; they may *also* be influenced by the commonsense understanding of consent, which conceives of deception as compatible with autonomous decision-making in all sorts of domains, including and beyond sexual consent. Armed with this novel account of our moral psychology, we can see how reformers who seek to bring the law in line with the canonical view that deception invalidates consent are up against more than just patriarchal attitudes. They are up against our general mental representation of consent.

However, the puzzle of why the law tolerates fraudulently procured sex is now the least of our worries. The findings reported here show that the problem is much deeper and more pervasive than previously realized. People think patients give valid consent to surgery when their doctors lie to them; they think contracts signed as a result of fraud are binding; they think victims of deception act autonomously and voluntarily in numerous ways. These findings suggest that there is a large—and largely unrecognized—disconnect between commonsense intuition and the canonical conception of consent that appears in myriad areas of law.

This disconnect matters. Laypeople sit on juries and on campus sexual misconduct panels. They are frequently entrusted to make decisions in cases

e.g., Hurd, *supra* note 6, at 121.

¹⁵ See *infra* notes 71–83.

involving consent, with little guidance from the law. Laypeople are also defendants in criminal cases; they must be given notice that their conduct is unlawful, in “language that the common world will understand.”¹⁶ This Article argues that one cannot craft an effective jury instruction or a transparent criminal statute without taking into consideration the commonsense understanding of consent.

Finally, the findings suggest that laypeople who are on the receiving end of deceptive practices may fail to complain or otherwise assert their rights. This is because they mistakenly believe they have waived their rights by granting valid consent. Their moral community, moreover, may fail to protect their autonomy-based rights, because it subscribes to a theory of consent that departs from the canonical conception.

The Article proceeds as follows. Part I introduces the longstanding puzzle of why the law sometimes departs from the canonical rule that fraud defeats consent. It shows that previous commentary has primarily understood these deviations under the rubric of rape exceptionalism and thus has understated the depth of the rift. Part II presents data showing that among laypeople, most kinds of deception are seen as compatible with consent. Part III uses techniques from moral psychology and experimental philosophy to demonstrate that this attitude represents a deep moral belief—not a superficial disagreement about the term “consent.” Laypeople genuinely believe that a meaningful waiver has been executed when an offeree accepts a proposal as a result of deception. Furthermore, they react differently when an offeror uses coercion, as opposed to deception, to induce an offeree to acquiesce, suggesting that there is something special about deception that makes it seem uncorrupting of consent. Part IV investigates various hypotheses of why people think consent is compatible with deception. It uncovers a remarkable parallel between commonsense consent and the legal distinction between *fraud in the factum*—in which the lie pertains to the nature of the activity itself—and *fraud in the inducement*—in which the lie pertains to a mere tangential matter. Although this common-law doctrine has been roundly criticized by judges, legal scholars, consent theorists, and reformers, it appears to comport with commonsense morality. But, as Part V recognizes, surveying the public tells us what people think; it does not necessarily tell us what is morally right or what the law should be. The remainder of the Article thus grapples with the relationship between normative theory, folk morality, and law.

¹⁶ *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

I. DECEPTION AND CONSENT IN LAW: A PUZZLE

Under the canonical view, material deception vitiates consent.¹⁷ Thus a doctor who secures a patient's willingness to undergo surgery by lying about the procedure's potential side effects has not obtained valid authorization to operate.¹⁸ A research subject who agrees to take part in a study thanks to misrepresentations made by the investigator has not consented to her participation in research.¹⁹ A busybody who gains entry to a homeowner's property by posing as a meter-reader has trespassed.²⁰

The notion that deception thwarts autonomy dates back at least to Aristotle²¹ and is often associated with the work of Immanuel Kant.²² In law, the canonical principle that "consent procured by fraud is no consent at all"²³ has been operative for well over a hundred years.²⁴ As early as 1881, courts recognized that feeding a person chocolates sprinkled with poison was no less

¹⁷ *E.g.*, *Kreag v. Authes*, 28 N.E. 773, 774 (Ind. App. 1891) ("Consent obtained by fraud is, in law, equivalent to no consent"); *McClellan v. Allstate*, 247 A.2d 58, 61 (D.C. 1968) ("Consent implies knowledge on the part of the person giving consent, and consent obtained on the basis of deception is no consent at all.").

¹⁸ *See, e.g.*, *Duncan v. Scottsdale Med. Imaging, Ltd.*, 70 P.3d 435, 440 (2003) ("[I]f a patient's consent is obtained by a health care provider's fraud or misrepresentation, a cause of action for battery is appropriate.").

¹⁹ *See infra* note 147. This is why researchers planning to deceive participants must apply for a "waiver of consent" under the federal regulations governing human subjects research. *See* 45 C.F.R. § 46.116 (1991).

²⁰ *See, e.g.*, *Desnick*, 44 F.3d at 1352.

²¹ "It is commonplace, going back at least to Aristotle, to think consent (or 'voluntariness,' a sister concept) as a function of some combination of understanding and freedom from coercion." Brian H. Bix, *Contracts*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* (2009) (citing Aristotle, *Nicomachean Ethics*, Book III, in 2 *THE COMPLETE WORKS OF ARISTOTLE* 1729, 1752–55 (Jonathan Barnes ed., 1984)).

²² *See, e.g.*, CHRISTINE M. KORSGAARD, *CREATING THE KINGDOM OF ENDS* 295 (1996) ("According to Kant, you treat someone as a mere means whenever you treat him in a way to which he could not possibly consent. Kant's criterion most obviously rules out actions which depend upon force, coercion, or deception for their nature, for it is of the essence of such actions that they make it impossible for their victims to consent."); WERTHEIMER, *supra* note 10, at 127 ("We can also understand the value of consent and autonomy in terms of Kant's formula of humanity."); Dan W. Brock, *Philosophical Justifications of Informed Consent in Research*, in *THE OXFORD TEXTBOOK OF CLINICAL RESEARCH ETHICS* 606, 606 (Ezekiel J. Emanuel et al. eds. 2008) ("Philosophical conceptions of autonomy derive largely from the work of Immanuel Kant.").

²³ *Chatman v. Giddens*, 91 So. 56, 57 (La. 1921); *accord* Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 *YALE L.J.* 1372, 1376–77 n.11 (2013).

²⁴ Rubenfeld, *supra* note 23, at 1372 ("[A]s courts have held for a hundred years in virtually every area of law outside rape, a consent procured through deception is no consent at all.").

a battery than shoving the toxic powder down her throat,²⁵ and that allowing a faux doctor onto your property for a house call did not preclude a claim in trespass.²⁶ In 1888, a New Yorker named John DeLeon was guilty of kidnapping when he tricked a young woman into boarding a steamship to Panama on the promise that a job as a governess to a Panamanian family awaited. In fact, the defendant intended to employ her as a sex worker in a brothel.²⁷ The court reasoned that the young woman's consent to board the ship was negated by DeLeon's deceit.²⁸ "[T]he law has long considered fraud and violence to be the same,"²⁹ the court explained in holding that the defendant had violated New York's abduction statute.³⁰

These consent-by-deception cases are based on sound reasoning. A person who is deceived about a fact that is the basis for her decision-making is not able to exercise her autonomy.³¹ She cannot determine whether the proposed activity aligns with her preferences, because she is misinformed about what the proposed activity entails.³² As the legal theorist Joel Feinberg once explained, "One's 'choice' is completely involuntary . . . when through ignorance one chooses something other than what one means to choose, for instance, thinking arsenic is table salt, and choosing to sprinkle it on one's scrambled eggs."³³

Beyond autonomy, there are other reasons for law to treat deception as consent-defeating. One is that doing so is efficient: as Richard Posner argues, fraud is best deterred by placing the burden of prevention on the *deceivers*, not on the *deceivees*. He writes, "It is cheaper for the potential injurer not to commit fraud than for the victim to take measures of self-protection against

²⁵ *Com. v. Stratton*, 114 Mass. 303, 305 (1873) (stating that the deception "was a fraud upon her will, equivalent to force in overpowering it" and that this case is an example of "assault and battery without actual violence"); *see also* *State v. Monroe* 28 S.E. 547, 548 (1897) (affirming a conviction of assault and battery against a druggist who dropped diarrhea-inducing croton oil into a piece of candy as a prank against a customer).

²⁶ *De May v. Roberts*, 46 Mich. 160, 9 N.W. 146 (1861). *See generally* *Desnick*, 44 F.3d at 1352 (listing "numerous modern counterparts" to *De May*).

²⁷ David A. Fischer, *Fraudulently Induced Consent to Intentional Torts*, 46 U. CIN. L. REV. 71, 93 (1977) (citing *People v. DeLeon*, 109 N.Y. 226 (1888)).

²⁸ *De Leon*, 109 N.Y. at 230 ("The consent of the prosecutrix, having been procured by fraud, was as if no consent had been given . . .").

²⁹ *Id.* at 229 (quoting the 1842 case *Regina v Hopkins*, at 258 (Car. & M. 254)).

³⁰ Penal Code § 282 subd. 2.

³¹ KORSGAARD, *supra* note 22, at 295 ("If I am deceived I don't know what I am consenting to.").

³² *Id.*

³³ Joel Feinberg, *Legal Paternalism*, in *PATERNALISM* 1, 7 (Rolf E. Sartorius, ed. 1983).

it.”³⁴ Another reason to treat deception as undermining consent is the principle that the law must “shield only those whose armor embraces good faith.”³⁵ Treating consent as vitiated by deception prevents fraudsters from benefitting from their wrongful conduct.³⁶

Whatever the justification, scholars from diverse theoretical backgrounds—from libertarian thinkers such as Robert Nozick³⁷ and Ayn Rand³⁸ to feminist scholars such as Susan Estrich³⁹ and Robin West⁴⁰—agree that fraud cases should be treated as absence-of-consent cases. Indeed, scholars who write about the relationship between deception and consent tend to focus on harder questions, such as whether consent is undermined by failures to disclose or negligent misrepresentations.⁴¹ The intentional fraud cases are a yawn—“clear and obvious,” in the words of Onora O’Neill.⁴²

But there is a wrinkle. Even as the “principle is often stated, in broad and

³⁴ RICHARD A. POSNER, *SEX AND REASON* 393 (1992). While it may be efficient for the law to deter overly trusting behavior, there are limits to what self-protection can accomplish. As David Bryden explains, “[s]elf-protection is less feasible today than it was in pre-industrial times, when one’s business and social transactions were more likely to be with people who had a well-established reputation in the village.” David P. Bryden, *Redefining Rape*, 3 *BUFF. CRIM. L. REV.* 317, 461 (2000). Thus, many believe that the law must deter fraudulent behavior so that people can be able to trust one another in commercial transactions and beyond.

³⁵ *Ganley Bros. v. Butler Bros. Bldg. Co.*, 212 N.W. 602, 603 (1927) (holding that parol evidence is admissible to show that a contract was induced by fraudulent representations notwithstanding the inclusion of a clause stating no reliance).

³⁶ See, e.g., Gregory Klass, *The Law of Deception: A Research Agenda*, 88 *COLO. L. REV.* 101, 125 (2018); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 *J.L. & ECON.* 293, 298 (1975) (“The case against fraudulent misrepresentation is easy to make out. As a moral matter, a person should not profit by his own deceit at the expense of his victim; and as a general matter, no social good can derive from the systematic production of misinformation.”).

³⁷ ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

³⁸ Rand believed that deception involves an “indirect use of force: it consists of obtaining material values without their owner’s consent, under false pretenses or false promises.” AYN RAND, *THE NATURE OF GOVERNMENT*. See also Rubinfeld, *supra* note 23, at 1404 (noting that “libertarians object foundationally to both force and fraud”).

³⁹ SUSAN ESTRICH, *REAL RAPE* (1987).

⁴⁰ Robin L. West, *A Comment on Consent, Sex, and Rape*, 2 *LEGAL THEORY* 233 (1996). See also Joan McGregor, *A Critical Reconstruction of Consent, Sex, and the Law*, 2 *LEGAL THEORY* 198–99 (1996) (“Consent must be voluntary to have the moral force of changing relationships in the world. It is not enough to get another person to utter the words. Deception or fraud, similar to coercion, affects the voluntariness of the agent’s action.”).

⁴¹ See, e.g., Hugh Lazenby & Iason Gabriel, *Permissible Secrets*, 68 *PHIL. Q.* 265, 277–80 (2018).

⁴² Onora O’Neill, *Between Consenting Adults*, 14 *PHIL. & PUB. AFFAIRS* 252, 269 (1985).

sweeping language, that fraud destroys the validity of everything into which it enters, and that it vitiates the most solemn contracts, documents and judgments,”⁴³ the reality is more complicated. In fact, the law occasionally deviates from the canonical rule and treats deception cases as consensual.

For example, it is not rape when sexual consent is procured by deception.⁴⁴ It is not even a crime or tort in most jurisdictions,⁴⁵ as Mischele Lewis discovered in 2014. Lewis, a 35-year-old nurse from New Jersey, had been in a relationship with a man who, unbeknownst to her, was lying about everything: his name, his profession, his backstory, and his reasons for needing to borrow money.⁴⁶ It was not until the pair was engaged and Lewis was pregnant that she happened upon her fiancé’s wallet and discovered his true identity.⁴⁷ A quick web search revealed that he was a scam artist who had fathered thirteen children by six different women, and that one of his former fiancées had written a book about his exploits, including time served in prison for bigamy. Stunned, Lewis got an abortion and called the police. She hoped her ex-fiancé would be prosecuted for a sex crime, she later told news media, because she wanted society to be “safe from predators like him.”⁴⁸ But in New Jersey, as in the vast majority of states, it is not sexual assault to scam someone into having sex.⁴⁹

Another example of a doctrine that deviates from the canonical legal rule that deception vitiates consent can be seen in the Fifth Amendment’s treatment of involuntary confessions. Whereas other countries have outlawed deceptive interrogation tactics such as the “false evidence ploy,” most jurisdictions within the United States permit police to lie to suspects about the evidence that exists against them.⁵⁰ Confessions obtained via deception

⁴³ 23 AM. JUR. 770, Fraud and Deceit, § 19. 23; *accord* Van Der Stok v. Van Voorhees, 866 A.2d 972, 976 (2005) (“[P]ositive fraud vitiates every thing—contracts, obligations, deeds of conveyance, and even the records and judgments of courts, incontrovertible as they are on every other ground.”).

⁴⁴ See, e.g., John F. Decker & Peter G. Baroni, “No” Still Means “Yes”: The Failure of the “Non-Consent” Reform Movement in American Rape and Sexual Assault Law, 101 J. CRIM. L. & CRIMINOL. 1081, 1133 (2011) (stating that the use of deception to procure sex “is not proscribed in most states”).

⁴⁵ Bryden, *supra* note 34, at 465 (“In most jurisdictions, sexual deception is not even a tort.”).

⁴⁶ “I wanted Justice”: Con Victim Turns Focus to Changing Rape Law, CBS NEWS (Jan. 24, 2015), available at <https://www.nbcnews.com/news/us-news/i-wanted-justice-con-victim-turns-focus-changing-rape-law-n291661>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See Decker & Baroni, *supra* note 44.

⁵⁰ See Katie Wynbrandt, Comment, *From False Evidence Ploy to False Guilty Plea: An*

are often unreliable: false evidence ploys have been shown to increase the risk of eliciting a false confession from an innocent suspect.⁵¹ Yet the use of deception persists in American interrogation rooms, suggesting that deception is not viewed as undermining suspects' autonomous will.⁵²

Similarly, when it comes to warrantless consent searches, the Fourth Amendment prohibits police coercion but equivocates with respect to police deception. In 2017, a divided Eleventh Circuit panel held that “[t]he Fourth Amendment allows some police deception so long as the suspect’s will was not overborne. Not all deception prevents an individual from making an essentially free and unconstrained choice.”⁵³ The Ninth Circuit distinguishes between “ruse entries”—where officers whose identities as government agents are plainly disclosed misrepresent their “purpose in seeking entry”—and “undercover entries”—where officers pose as civilians.⁵⁴ Ruse entries violate the Fourth Amendment while undercover entries do not.⁵⁵ These doctrines represent a departure from the canonical rule, which governs in some other circuits. In the Fifth Circuit, for instance, the “well established rule” is that a warrantless search is “unreasonable under the Fourth Amendment if the consent was induced by the deceit, trickery or misrepresentation” of the government agent.⁵⁶

Trespass, too, is another example⁵⁷—even though trespass is often taken as a paradigmatic legal arena in which fraud vitiates consent.⁵⁸ It was not

Unjustified Path to Securing Convictions, 126 YALE L.J. 545 (2016).

⁵¹ See, e.g., Miriam S. Gohara, *A Lie for a Life: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791 (2006).

⁵² See, e.g., *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (police fabrication of a co-conspirator’s confession is “relevant” but “insufficient . . . to make [an] otherwise voluntary confession inadmissible.”).

⁵³ *United States v. Spivey*, 861 F.3d 1207, 1214 (11th Cir. 2017) (finding consent voluntary where officers entered the residence of a person suspected of credit card fraud under the pretense of following up on a burglary the suspect had reported earlier).

⁵⁴ *Whalen v. McMullen*, 907 F.3d 1139, 1147 (9th Cir. 2018).

⁵⁵ *Id.* at 1147 (9th Cir. 2018) (a suspect’s consent was “vitiating by . . . deception” where an officer “identified himself as a law enforcement officer and requested [the suspect’s] assistance in a fictitious investigation, gaining entry into her home using this ruse”).

⁵⁶ *United States v. Tweel*, 550 F.2d 297, 299 (5th Cir. 1977); accord *United States v. Cavitt*, 550 F.3d 430, 439 (5th Cir. 2008) (“‘Consent’ induced by an officer’s misrepresentation is ineffective.”).

⁵⁷ As the Fourth Circuit noted in *Food Lion v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), the trespass cases on deceptive entries are “as a class are inconsistent.”

⁵⁸ E.g., Rubinfeld, *supra* note 23; see, e.g., Laurent Sacharoff, *Trespass and Deception*, 2015 B.Y.U. L. REV. 359, 387 (2015) (describing the Restatement (Second) of Torts as “providing an easy rule” that most deceptive entries are trespass).

trespass, the Seventh Circuit held in *Desnick v. American Broadcasting Company*, when undercover reporters donning hidden cameras gained entry to a medical clinic by posing as patients.⁵⁹ Nor was it trespass when, in *Food Lion v. Capital Cities/ABC*,⁶⁰ investigative journalists infiltrated a grocery store to report on unsanitary food handling practices. Even though the reporters submitted fake resumes and were hired under false pretenses, the Fourth Circuit dismissed the notion that “consent based on a resume misrepresentation turns a successful job applicant into a trespasser the moment she enters the employer’s premises to begin work.”⁶¹

Examples abound. Just two years after John DeLeon was convicted of kidnapping the would-be Panamanian governess, a remarkably similar case arising in the same jurisdiction was greeted with the opposite result. In *People v. Fitzpatrick*, a young man was tricked into boarding a ship to Mexico on the understanding that he would be employed as a railroad worker at a rate of \$35 per month in U.S. currency; in fact, the job would pay only \$1 per month in Mexican currency.⁶² This scheme did not amount to a kidnapping, the district court determined, because the false promise was akin to “a shabby trick, but not a crime.”⁶³

So there is a puzzle. Scholars, judges, and treatises tend to parrot the canonical line that “fraud destroys all consent,”⁶⁴ but the case law paints a muddier picture.⁶⁵

Few commentators have grappled with this puzzle in full.⁶⁶ Those who have recognized deviations from the canonical view have tended to proceed as if the exceptions are confined to the domain of sexual consent.⁶⁷ “[I]n virtually every legal arena outside of rape law,” writes Jed Rubenfeld, “a ‘yes’ obtained through deception is routinely (and correctly) rejected as an

⁵⁹ *Desnick*, 44 F.3d.

⁶⁰ *Food Lion*, 194 F.3d.)

⁶¹ *Id.* at 518.

⁶² *People v. Fitzpatrick*, 10 N.Y.S. 629 (Gen. Term 1890).

⁶³ *Id.*

⁶⁴ *Ganley Bros.*, 212 N.W. at 603.

⁶⁵ As one commentator observed, we have “complete doctrinal inconsistency, in which some deceptions vitiate consent and others do not, according to no rhyme or reason.” Sacharoff, *supra* note 58, at 391.

⁶⁶ “Fraud is the easy case,” writes Richard Epstein. Epstein, *supra* note 36, at 298 n.14; see also O’Neill, *supra* note 42.

⁶⁷ *But see* Klass, *supra* note 36 (suggesting that deception cases “turn . . . on the social value of the deception”); Saul Levmore, *Judging Deception*, 74 U. CHI. L. REV. 1779 (2007) (positing that deception is tolerated “when social benefits exceed private costs”).

expression of true consent.”⁶⁸ Bioethicists Danielle Bromwich and Joseph Millum acknowledge that the canonical view is “a minority position” when it comes to sexual relations, but claim that “in other domains in which consent operates it constitutes a majority view.”⁶⁹

Accordingly, the puzzle is nearly always conceptualized as a problem of rape exceptionalism.⁷⁰ Rape law is marked by “a peculiar history,” posits Laurent Sacharoff, “including protection of women’s virtue,” and this may explain why “courts seem to depart from the general rule that deception vitiates consent.”⁷¹ The refusal to treat sex-by-deception as rape is understood as a holdover from a time when the criminal law cared not about protecting individual sexual autonomy but rather about protecting chaste, innocent women from defilement.⁷² Under the patriarchal values of the common law, a victim of sex-by-deception like Michele Lewis could not claim to have been raped, because as someone who was willing to have *sex*, she was not the kind of virtuous victim entitled the law’s protection.⁷³ It matters not that she was deceived about facts that were material to her willingness to consent; under the “defilement logic of traditional rape law,” she became instantly unrapable when she sullied herself by willingly sleeping with a man to whom she was not married.⁷⁴ With this history in mind, critics such as Robin West have argued that the “state’s refusal to criminalize nonviolent fraudulent . . . sex evidences a refusal to grant women full possessory, sovereign rights over their bodies”⁷⁵ It denies women “the status of equal personhood”⁷⁶ and demonstrates fealty to the antiquated, patriarchal logic of traditional rape law.

Indeed, feminist writers have observed that the law on sex-by-deception

⁶⁸ Jed Rubenfeld, *Rape-by-Deception—A Response*, 123 YALE L.J. ONLINE 389, 395 (2013), <http://yalelawjournal.org/2013/12/1/rubenfeld.html>.

⁶⁹ Danielle Bromwich & Joseph Millum, *Lies, Control, and Consent: A Response to Dougherty and Manson*, 128 ETHICS 446, 447 (2018).

⁷⁰ E.g., Rubenfeld, *supra* note 23, at 1404 n.150 (“The problem was and is that everywhere else in the law, consent obtained by fraud is no consent at all.”).

⁷¹ Sacharoff, *supra* note 58, at 389.

⁷² Namely, virginal white women. See, e.g., Corey Rayburn Yung, *Rape Law Fundamentals*, 27 YALE J.L. FEMINISM 1, 24 (2015) (“Before the civil war, Black women, even those who had been ‘freed,’ were sexually victimized with little concern by prosecutors for their defilement.”).

⁷³ See ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 216 (3d ed. 1982) (arguing that a case should be considered nonconsensual where “a woman who consents to what would be entirely proper and chaste if the facts were as she believes them to be”); Rubenfeld, *supra* note 23, at 1401–02.

⁷⁴ *Id.* at 1382, 1401.

⁷⁵ West, *supra* note 40, at 242.

⁷⁶ *Id.* at 242.

seems “invested in male sexual supremacy”⁷⁷—consistently prioritizing men’s “right to seduce—the right of male sexual access” over women’s interests.⁷⁸ Joan McGregor argues that the special treatment of sexual fraud is best explained by judges’ uniquely contemptuous attitudes toward women who are duped into sex: “It is worth speculating on the reasons for the law’s unsympathetic reaction to victims of sexual fraud. Often, what is at work is the suggestion that if these women are so gullible, so naive, and so stupid, then they get what they deserve”⁷⁹ Martha Chamallas has conjectured that courts tolerate sex-by-deception because they trivialize the experience of victims and normalize deceit as part of ordinary male sexual aggression.⁸⁰

Other commentators, meanwhile, believe that even if sex-by-deception were considered seriously morally wrong, there are “genuine evidentiary and administrative concerns” that weigh against making it illegal.⁸¹ Some claim, for instance, that adjudicating fraud claims is simply too difficult when the lies pertain to matters of the heart, and this explains why sexual fraud is treated differently from other kinds of fraud.⁸²

What these commentators miss, however, is that the law departs from the canonical view of consent in many domains—not just rape. It is hard to see how sexist attitudes, or the difficulty of proving deception, can explain why drug suspects are seen as voluntarily consenting to undercover police searches of their residences⁸³ or why Food Lion was seen as consenting to the infiltration of its store by undercover journalists.⁸⁴

⁷⁷ Alexandra Brodsky, “Rape-Adjacent”: *Imagining Legal Responses to Nonconsensual Condom Removal*, 32 COLUM. J. GENDER & L. 183, 194 (2017).

⁷⁸ ESTRICH, *supra* note 39.

⁷⁹ McGregor, *supra* note 40, at 202. *See also* Vivan Berger, *Review Essay: Not So Simple Rape*, 7 CRIM. JUSTICE ETHICS 69, 76 (1988) (“I must confess to minimal sympathy for the idea that the law should protect, via criminal sanctions, the cheated expectations of women who sought to sleep their way to the top but discovered, too late, that they were dealing with swindlers.”).

⁸⁰ Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 832 (1988).

⁸¹ WERTHEIMER, *supra* note 10, at 25. Another concern is biased enforcement against transgender individuals who conceal their biological sex, or other perils of overcriminalization. *See, e.g.*, Brodsky, *supra* note 77, at 194–95.

⁸² *E.g.*, Bryden, *supra* note 34, at 461–63. For rebuttals of this position, *see* West, *supra* note 40, at 242 (“[I]t is only when *sex* is the subject of the fraud . . . that the state suddenly become squeamish about overreaching into personal affairs.”) and Rubinfeld, *supra* note 23, at 1400.

⁸³ *See, e.g.*, *Lewis v. United States*, 385 U.S. 206 (1966).

⁸⁴ *Food Lion*, 194 F.3d.

This Article advances an alternative account, one that is based not in rape exceptionalism but in cognitive science. Through a series of psychological experiments, it demonstrates that the problem runs deeper than patriarchal attitudes toward female victims of male sexual deception. People think that consent is compatible with deception in many areas *beyond sexual consent*, including contracts, medical interventions, human subjects research, and police searches.

While the Article does not claim that lay intuition aligns with the law in every instance, commonsense consent can shed new light on the puzzle of why various consent doctrines take inconsistent stances toward deception. The law seems to be of two minds about fraud cases, and our moral intuitions are, too. As we will see, deception cases feel intuitively compatible with autonomous choice—for reasons that go beyond traditional morality or gendered conceptions of sexual virtue.

This Article’s alternative account is notably different from a legal realist account. A legal realist would posit that judgments of consent are wholly determined by policy judgments or judges’ preferred outcomes. The data presented here tell a different story. It is not the case that people see consent where the deception is socially beneficial and see no consent where the deception is malign.⁸⁵ Intuitions about consent are separate from general moral outrage, and reflect something beyond outcome-driven reasoning. There is a discrete folk theory of consent, this Article argues. The catch is that it looks nothing like the consent that legal theorists imagine.

II. DECEPTION CASES ARE VIEWED AS CONSENSUAL

How do ordinary people understand the concept of consent? This Article uses techniques from moral psychology and experimental philosophy to elicit people’s “prereflective judgments” through a series of carefully designed cases.⁸⁶ This Part presents data showing that people believe consent is compatible with deception. Parts III and IV will present experimental evidence comparing their intuitions about deception to their intuitions about other similar concepts.

A. Methodological Background

⁸⁵ Thus, this Article’s theory is distinct from those put forth by Klass and Levmore, which posit that the law tolerates deception where it is efficient to do so. *See supra* note 67.

⁸⁶ For an overview of such techniques, see Joshua Knobe et al., *Experimental Philosophy*, 63 ANN. REV. PSYCHOL. 81, 82 (2012).

In this research, survey respondents were given short fact patterns and asked to judge whether the parties in the vignettes gave consent. All studies were programmed on Qualtrics survey software and administered online to U.S.-based adults recruited through Amazon Mechanical Turk (MTurk) or Lucid Fulcrum Exchange. MTurk allows researchers to perform low-cost experiments online, whereas Lucid supplies nationally representative samples that mirror the demographic makeup of the United States.⁸⁷ Participants' demographic characteristics did not consistently predict consent judgments; Appendices A and B report the demographic characteristics of each study sample as well as whether demographic covariates predicted consent judgments.

Deception comes in many shades, not all of which are morally offensive. This research uses scenarios designed to portray clear-cut cases of fraud.⁸⁸ In all scenarios, the offeree has a "deal-breaker": a condition that must be satisfied in order for her⁸⁹ to agree to the offeror's proposed activity. In each case, the offeror affirmatively misrepresents a fact he knows to be material to the offeree's decision-making. There are no omissions, equivocations, or mistakes: the offeror always intentionally tells a bald-faced lie about a matter of fact. In each case, the offeree agrees to the proposal in reliance on the offeror's misrepresentation. Thus, in each case, the offeror knows that he is violating the offeree's wishes. This is because he knows the offeree's preferences, he knows he is lying, and he knows the offeree would refuse if she knew the truth.

These scenarios sidestep the much-debated question of whether consent is properly considered a subjective state of mind, versus a performative act

⁸⁷ The sample recruited from Lucid was nationally representative. The sample from MTurk was not; however, no significant differences were observed between the two platforms when the same measures were administered on each. Moreover, participant samples drawn from MTurk tend to be more representative than convenience samples researchers often use, such as college students. *See, e.g.,* Adam J. Berinsky, Gregory A. Huber, & Gabriel S. Lenz, *Evaluating Online Labor Markets for Experimental Research: Amazon.com's Mechanical Turk*, POLITICAL ANALYSIS ("[T]he demographic characteristics of domestic MTurk users are more representative and diverse than the corresponding student and convenience samples typically used in experimental political science studies.").

⁸⁸ While there is considerable variation from state to state, common-law fraud often requires five elements: (1) false representation of a material fact; (2) the defendant's knowledge of falsity; (3) an intent to induce the plaintiff to rely on the misrepresentation; (4) justifiable or reasonable reliance by the plaintiff; and (5) damages proximately resulting from the reliance on the misrepresentation. *E.g.,* *Engalla v. Permanente Med. Grp., Inc.*, 938 P.2d 903, 917 (1997).

⁸⁹ In many of the cases, the offeree is female and the offeror is male, but character genders and names are also randomly varied in many vignettes.

expressing a state of mind.⁹⁰ In each vignette, the offeree unambiguously manifests an outward expression of consent by “agreeing” or “saying yes” to the activity proposed by the offeror. There is no miscommunication between parties; these vignettes are designed to portray one party successfully using deceit to manipulate the other party into acceptance.

The deceptions portrayed in the vignettes are designed to be incompatible with consent as defined by normative theory. For some consent theorists, it will be because the offeror’s conduct falls outside the scope of possibilities that the offeree intends to allow.⁹¹ For others, it will be because consent-seekers have duties of disclosure that are violated in cases of deception.⁹² For Kantians, it will be because “an act of consent makes a moral difference only if it is autonomous,”⁹³ and deceived individuals are insufficiently autonomous.⁹⁴ Whatever the theory of consent, there is little dispute among scholars that these kinds of intentional fraud invalidate it. So, while commentators disagree mightily about the necessary and sufficient features of morally valid consent, and they disagree about whether criminal punishment ought to attach to certain kinds of lies, few would argue that the cases described here portray morally transformative consent.

B. Study 1

Study 1 reports the findings from twenty consent-by-deception scenarios, summarized in Table 1.⁹⁵

1. Sexual Relations

As described earlier, the law deviates from the canonical rule when it comes to sexual consent.⁹⁶ This puzzling fact has drawn the attention of

⁹⁰ For an overview of the debate, see Alan Wertheimer, *What is Consent? And Is It Important?* 3 BUFF. CRIM. L. REV. 447, 566-75 (2000) (arguing for a performative account of consent and against a subjective or hybrid account).

⁹¹ E.g., Tom Dougherty, *Sex Lies, and Consent*, 123 ETHICS 717 (2013).

⁹² E.g., Franklin G. Miller & Alan Wertheimer, *Preface to a Theory of Consent Transactions: Beyond Valid Consent*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE 8 (2009).

⁹³ Andreas Müller & Peter Schaber, *The Ethics of Consent: An Introduction*, in ROUTLEDGE HANDBOOK OF THE ETHICS OF CONSENT 4 (Andreas Müller & Peter Schaber, eds. 2018).

⁹⁴ E.g., Bromwich & Millum, *supra* note 69, at 456.

⁹⁵ This series of survey findings is collectively referred to as “Study 1.”

⁹⁶ *Supra* notes 44–49 and accompanying text.

academics,⁹⁷ reformers,⁹⁸ and the reporters of the Model Penal Code.⁹⁹ “For more than a century,” Patricia Falk wrote in 1998, “[c]ourts, legislatures, and legal commentators have struggled with the controversial and highly charged question of whether accomplishing sexual intercourse by means of fraud . . . is blameworthy and appropriately condemnable as rape.”¹⁰⁰ Today, the debate over sex-by-deception rages on, “inevitably implicating”¹⁰¹ the controversy over whether rape is “a crime of violence”¹⁰²—requiring physical force—or whether it is instead “an offense against personal autonomy,”¹⁰³ in which case a lack of consent is by itself sufficient to establish liability.¹⁰⁴

Only seven states treat consent to sexual relations as unequivocally vitiated by fraud. Several others criminalize sex-by-deception only when the lies are particularly egregious, as when a doctor pretends to be conducting a medical procedure on a patient.¹⁰⁵ This leaves people like Mischele Lewis without recourse; her plight ultimately inspired a New Jersey state lawmaker to introduce a bill that would have criminalized “sexual assault by fraud.”¹⁰⁶

What do members of the public think of sex-by-deception? In the first survey, respondents were presented with a vignette, *Single*, which was drawn from Franklin Miller and Alan Wertheimer’s *The Ethics of Consent*.¹⁰⁷

Single (n = 100)

Ellen and Frank meet in a night class and have several dates. Ellen makes it clear that she refuses to sleep with married men. When asked, Frank lies and says that he is not married. Ellen agrees to sleep with

⁹⁷ See *infra* note 119.

⁹⁸ See, e.g., Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 90 (1998) for an overview of the rape-reform movements of the 1950s and 1970s that were inspired by feminist scholarship.

⁹⁹ The current Model Penal Code holds that consent is “ineffective” if it is “induced by force, duress, or deception”—but it also notes the difficulty in distinguishing rape “from many instances of ordinary seduction,” which may involve deception. AMERICAN LAW INSTITUTE, PROPOSED MODEL PENAL CODE, DISCUSSION DRAFT NO. 2, S. 213.0.

¹⁰⁰ Falk, *supra* note 98, at 44.

¹⁰¹ *Id.* at 45.

¹⁰² *Id.*

¹⁰³ Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, J. L. & PHIL. 35, 41 (1992).

¹⁰⁴ See, e.g., Rubinfeld, *supra* note 23, at 1401.

¹⁰⁵ Russell L. Christopher & Kathryn H. Christopher, *Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape*, 101 NW. U. L. REV. 75, 102, 122 (2007) (listing Alabama, Hawaii, Michigan, Rhode Island, Tennessee, Utah, and Virginia).

¹⁰⁶ *Supra* notes 46-48.

¹⁰⁷ Miller & Wertheimer, *supra* note 92, at 8.

Frank.

Respondents were asked, “Did Ellen give consent to sleep with Frank?” and were given an unmarked sliding scale that ranged from 0 (Not at all) to 100 (Very much) and was initialized at 50. They also rated Frank’s likeability on a scale from 0 (Not at all likeable) to 100 (Very likeable), as well as how wrong Frank’s behavior was (0 = Not at all wrong; 100 = Very wrong).

Single describes a paradigmatic case of sex-by-deception.¹⁰⁸ Bromwich and Millum, for instance, contemplate an equivalent case involving a sexual encounter in which Riya asks Owen if he is single and “ma[kes] it quite clear that cheating is unacceptable to her.”¹⁰⁹ Owen falsely states he is unmarried, and the two go to bed. According to Bromwich and Millum, Riya has not given valid consent to sex, because she “waives her bodily rights against sex with Owen {person not in a relationship}. She does not—and would not—waive her bodily rights against sex with Owen {person in a relationship}. Hence, the act in which she engaged is not the act for which she waived rights.”¹¹⁰ These authors, like many consent theorists,¹¹¹ would give *Single* a rating of 0.

Figure 1 shows how lay respondents reacted to *Single*.¹¹² It displays each individual participant’s response arranged from the lowest rating (0) to the highest rating (100), with the x-axis set at the midpoint of 50.

¹⁰⁸ See, e.g., Lazenby & Gabriel, *supra* note 41, at 282 (“Relationship” vignette) (“[W]e all know some things, including whether you are in a relationship or have an STD, are the kinds of things one is expected to disclose”); Bromwich & Millum, *supra* note 69, at 453 (Riya and Owen vignette).

¹⁰⁹ Bromwich & Millum, *supra* note 69, at 453.

¹¹⁰ *Id.* at, 453.

¹¹¹ See, e.g., Dougherty, *supra* note 91; Rubinfeld, *supra* note 23; Hallie Liberto, *Intention and Sexual Consent*, 20 PHIL. EXPLORATIONS 127 (2017); Lazenby & Gabriel, *supra* note 41.

¹¹² The demographics of the sample were as follows: 44% female, ages 19–67 years, median age = 29 years. Participants’ education levels ranged from high school to post-college degrees, with 82% having completed some college or more. Participants were left-leaning overall ($M = 3.59$, $SD = 1.61$) on a 1–7 Likert scale (1 = Extremely liberal; 7 = Extremely conservative). Approximately 33% reported an annual income of less than \$30,000, 20% report earning over \$75,000. For all other studies, demographic information is reported in Appendix B.

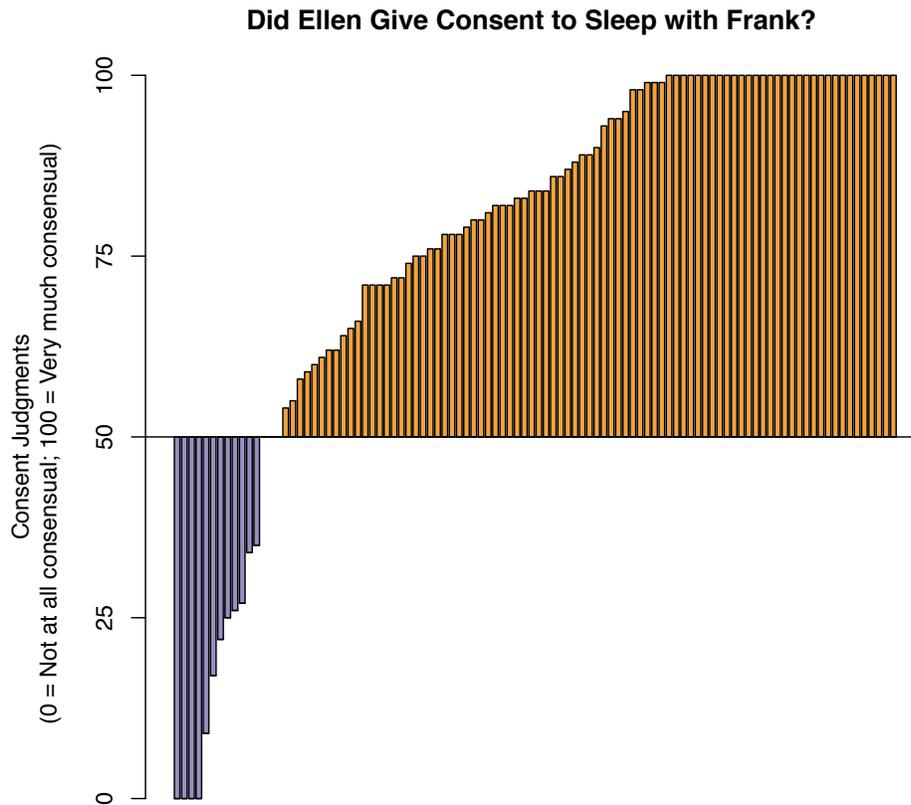


Figure 1. Participants' responses to the classic sex-by-deception vignette *Single*. The majority of respondents believe Ellen consented to sex with Frank, who deceived her about his marital status, knowing it was material to her willingness to proceed.

Participants' reactions to *Single* indicate that participants perceived the sex between Ellen and Frank as highly consensual. The most common response, reported by 32% of participants, was to give the maximum score of 100, indicating that respondents saw the scenario as *unambiguously* consensual. Only 12% of participants rated the scenario below the 50-mark, and only a handful ($n = 4$) viewed the scenario as unambiguously nonconsensual. The average rating was 77.17 ($SD = 27.25$).

At the same time, participants reported strongly disliking Frank ($M_{\text{likeability}} = 13.38$; $SD = 15.85$) and judged his behavior to be highly immoral ($M_{\text{wrongness}} = 85.04$; $SD = 22.34$). The same finding held true when the genders were reversed, such that it was Ellen who deceived Frank about her marital status.¹¹³

¹¹³ In this study, 152 participants were randomly assigned to read either about Ellen who deceives Frank or about Frank who deceives Ellen. No significant differences emerged

The finding that sex-by-deception is typically viewed as consensual was reproduced in eight different scenarios reported in Table 1 and Appendix A. The eight replications encompass a wide variety of deal-breakers: refusing to sleep with someone who has a criminal record, who immigrated to the country illegally, who has served in the military, who is bisexual, and who opposes same-sex marriage. The finding holds true whether one asks about “consent” or related concepts such as whether the act was “freely chosen” or done “voluntarily.”¹¹⁴ The pattern is clear: sex obtained by deception is seen as consensual sex.

In an effort to establish a lower bound on consent judgments, participants ($n = 52$) were given an extreme case in which an HIV-positive individual lies to a prospective sexual partner about his HIV status *and ultimately infects her with HIV*. Legally, in many jurisdictions, “the failure to disclose a communicable disease prior to intercourse vitiates consent.”¹¹⁵ Because a lack of disclosure in these cases “transforms ‘consensual’ intercourse into a battery,”¹¹⁶ it stands to reason that laypeople might regard *affirmative misrepresentation* regarding STI status as defeating consent.

Even in this extreme case, however, only half of participants saw the encounter as nonconsensual, as Figure 2 shows.¹¹⁷ In response to the question, “Did Allison consent to sleep with Rafael?”, the average rating was 49.42 ($SD = 41.66$).

between the two conditions, indicating that the gender of the party did not make a difference to judgments of consent, liking, or wrongness.

¹¹⁴ See Appendix C for six alternate phrasings.

¹¹⁵ *In re Louie*, 213 B.R. 754, 764 (Bankr. N.D. Cal. 1997); accord Brodsky, *supra* note 77, at 192 n.34 (collecting cases).

¹¹⁶ *Desnick*, at 1352 (citing *Crowell v. Crowell*, 180 N.C. 516, 105 S.E. 206 (1920)).

¹¹⁷ The average consent rating was 49.42 ($SD = 41.66$).

Table 1.
Summary of Means and Standard Deviations for Study 1

Vignette	Victim Is Deceived About	N	Did Victim Consent to X?	
			M	(SD)
Consent to Sexual Relations				
<i>Single (Female Victim)</i>	Prospective sexual partner's marital status	100	77.17	(27.25)
<i>Single (Male Victim)</i>	Prospective sexual partner's marital status	50	76.46	(26.31)
<i>Criminal Record</i>	Prospective sexual partner's criminal record	54	61.96	(36.73)
<i>College</i>	Prospective sexual partner's alma mater	57	73.12	(32.15)
<i>Bisexual</i>	Prospective sexual partner's sexual orientation	50	89.62	(18.70)
<i>Immigrant</i>	Prospective sexual partner's immigration status	51	86.88	(21.65)
<i>Veteran</i>	Prospective sexual partner's military service	47	82.00	(25.29)
<i>Views on Same-Sex Marriage</i>	Prospective sexual partner's political views	47	82.87	(25.24)
<i>HIV With Transmission</i>	Prospective sexual partner's HIV status	52	49.42	(41.66)
<i>HIV With No Transmission</i>	Prospective sexual partner's HIV status	48	53.54	(42.42)
Consent to Medical Treatment				
<i>Elective Ankle Surgery</i>	Surgeon lies about insurance coverage	97	66.60	(39.83)
<i>Elective Bunion Surgery</i>	Surgeon lies about insurance coverage	48	65.52	(38.21)
<i>Surgery Results Unspecified</i>	Surgeon lies about insurance coverage	54	67.04	(38.58)
<i>Surgery Results in No Infection</i>	Surgeon lies about insurance coverage	37	68.08	(37.39)
<i>Surgery Results in Infection</i>	Surgeon lies about insurance coverage	48	71.08	(35.77)
Consent to Search by Police				
<i>Warrantless Search</i>	Police lie about what they are searching for	58	82.47	(24.83)
<i>Warrantless Search (Find Child Pornography)</i>	Police lie about what they are searching for	51	71.63	(31.02)
<i>Warrantless Search (Find Bootleg Recording)</i>	Police lie about what they are searching for	53	77.51	(25.66)
Consent to Participation in Research				
<i>Research Purpose</i>	Investigator lies about the purpose of the research	51	72.55	(33.96)
Consent to Contract				
<i>Termites</i>	Seller lies to homebuyers about the presence of termites	48	73.31	(30.86)

Note. Appendix A reports the text of each vignette.

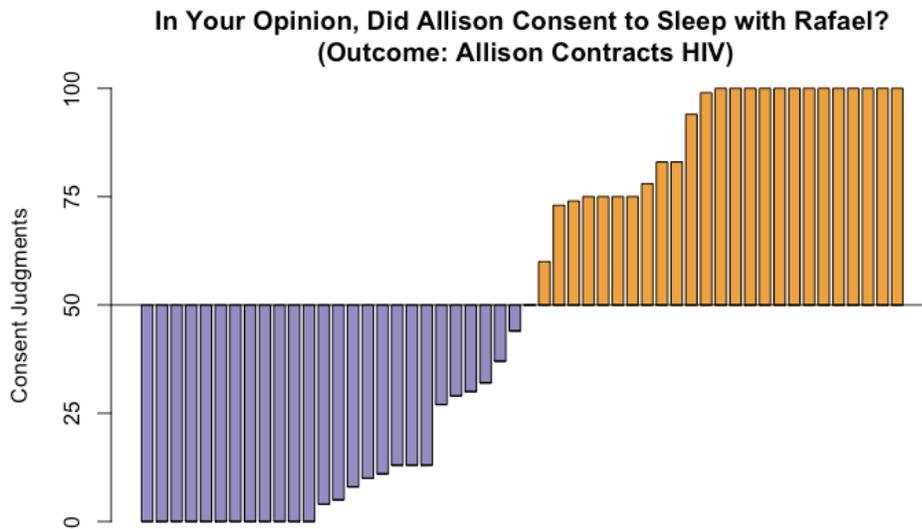


Figure 2. Participants’ responses to *HIV With Transmission*. About half of participants thought Allison consented to sleep with Rafael when he deceived her about his HIV status and Allison contracted HIV as a result.

Moreover, when asked whether the encounter was rape, 60% of participants responded no. Participants saw the deception as problematic, but did not think it undermined the consensual nature of the encounter. Many viewed the HIV issue as separable from the consent issue:

- *It wasn't rape as Allison consented to have sex with Rafael. But I do think it was Attempted Murder [or] some kind of assault. Rape is to forcibly have sex with someone against their will. Allison willingly had sex. The HIV aspect is another scenario entirely.*
- *He did not rape her because it was consensual sex to which she agreed. He did however, lie to her about HIV, which could or should result in some punishment, but is a separate charge than rape.*

The finding that a majority of respondents viewed deceived sex as consensual carries implications for the debate over the moral and legal status of sex-by-deception. As described earlier, sexual fraud cases are seen as “inevitably implicating” the controversy over whether rape is a crime of violence requiring physical force.¹¹⁸ Scholars who write about fraudulently procured sex—and there are a lot of them¹¹⁹—come to divergent conclusions

¹¹⁸ *Supra* note 101.

¹¹⁹ *E.g.*, ESTRICH, *supra* note 39; Christopher & Christopher, *supra* note 105; STEPHEN J. SCHULHOFER, UNWANTED SEX 19 (1998); ROLLIN M. PERKINS, PERKINS ON CRIMINAL

about whether sex-by-deception ought to be criminalized, and, indeed, whether it is even seriously morally wrong.¹²⁰ But many interlocutors who are on opposite sides of the debate nonetheless *agree* that deceived sex is nonconsensual sex. They merely draw different conclusions from this premise.

Some—like Susan Estrich,¹²¹ Jonathan Herring,¹²² and at least one justice of the Canadian Supreme Court¹²³—conclude that sex-by-deception ought to be illegal, because sex without consent ought to be a crime.¹²⁴ Others, like Jed Rubenfeld, conclude that consent must not be as morally important as it seems, because it would be absurd for the law to criminalize sex-by-deception.¹²⁵ He concludes, on the basis of the intuition that sex-by-deception cannot be rape, that rape must require *force*.¹²⁶

The results presented here offer an alternative explanation for why sex-by-deception cases do not intuitively strike us as rape. Perhaps it is not that these cases lack the *force* element, but because they lack the *nonconsent* element. That is, deception cases seem like they *are* consensual. Thus, we need not conclude, as Rubenfeld does,¹²⁷ that the intuition that sex-by-

LAW, (3d ed.1969); Jonathan Herring, *Does Yes Mean Yes? The Criminal Law and Mistaken Consent to Sexual Activity*, 22 SING. L. REV. 192 (2002); McGregor, *supra* note 40; Dougherty, *supra* note 91; Rubenfeld, *supra* note 23 (collecting sources); Bryden, *supra* note 34; WERTHEIMER, *supra* note 10; WESTEN, *supra* note 9; Hurd, *supra* note 6; Alexander, *supra* note 8; Neil C. Manson, *How Not to Think about the Ethics of Deceiving into Sex*, 127 ETHICS 415 (2017). Patricia Falk notes the “surprisingly large body of criminal cases” involving sex obtained by fraud. Falk, *supra* note 98, at 46, 49. Some commentators believe that sex-by-deception has received too much attention. *See e.g.*, Yung, *supra* note 72, at 39 (“The rape-by-deception puzzle is an unnecessary tangent, a minor quibble in a sea of contradictions. There are far more important issues in rape law.”).

¹²⁰ Compare Rubenfeld, *supra* note 23, with Dougherty, *supra* note 91.

¹²¹ ESTRICH, *supra* note 39.

¹²² Herring, *supra* note 119.

¹²³ WESTEN, *supra* note 9, at 199 (citing an argument by Justice l’Heureux-Dub in *Regina v. Cuerrier*, [1998] 2 S.C.R. 371 (Canadian Supreme Court), that any material deception, even one not about a life-threatening condition, can vitiate consent to sex).

¹²⁴ Or a tort. *See* Jane E. Larson, “Women Understand So Little, They Call My Good Nature ‘Deceit’”; *A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374 (1993).

¹²⁵ Rubenfeld, *supra* note 23; Rubenfeld, *supra* note 68, at 392, 402 (expressing the strong intuition that sex-by-deception cases cannot be rape, and stating to critics that these examples “speak for [themselves]”); *id.* at 391 (“I don’t believe my article offers a single conclusive argument” to someone prepared to ignore the intuition that lies are not rape).

¹²⁶ Rubenfeld, *supra* note 68, at 1417. (“All the major components of sex law today have seemingly converged on a single, unifying principle: sexual autonomy. Sex-by-deception calls that principle into question.”).

¹²⁷ Rubenfeld, *supra* note 68, at 391 (“Most of my article takes the form, ‘Unless you’re prepared to accept that people can be guilty of rape for lying about their college (or marital

deception is not rape implies that rape must require force.

But why, one might wonder, do people say there is autonomous, voluntary consent in sex-by-deception cases? Could it be because they are confident these cases are not rape, and they reason backwards to the conclusion that they must be consensual? To answer this question, the remainder of this Part will examine consent-by-deception cases in several nonsexual domains. It will demonstrate that deception is seen as compatible with consent even when questions of rape are not on the table.

2. Surgery

When it comes to consent to medical treatment, the law endorses the principle of patient autonomy. “Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient’s consent commits an assault for which he is liable,” announced the New York Court of Appeals in the landmark case *Schloendorff v. Society of New York Hospital*.¹²⁸ Consistent with the principle of bodily autonomy, the tort of battery prohibits invasion of the person by a wrongful touching regardless of whether an injury results.¹²⁹ “The inviolability of the person is the core idea. Thus, if consent is to negate battery, it must be because the autonomy-based right not to be touched has genuinely been waived.”¹³⁰

Tort law has come to embrace the idea that in order for consent to negate liability for battery, it “cannot have been induced by trickery on the part of the defendant.”¹³¹ This means that surgery, like any other touching of a person, is actionable if undertaken without consent, and fraud vitiates consent.¹³² This holds true even if the medical practitioner acts with

status, age, feelings, and so on), you’re going to have a problem defining rape as sex without consent.”); Rubinfeld, *supra* note 23, at 1411 (arguing that the deception cases “drive[] a wedge into rape law, requiring us to choose between force and autonomy”).

¹²⁸ *Schloendorff v. Society of N.Y. Hospital*, 105 N.E. 92, 93 (N.Y. 1914).

¹²⁹ See, e.g., *Zoterell v. Repp*, 153 N.W. 692, 694 (Mich. 1915) (“[I]n any case of an operation, the consent of the person operated upon is essential to justify the party operating in the performance of such operation, and regardless of how successful the operation may have been, how successfully performed, or how much such operation may have been needed, unless consent was given, it is an unlawful operation, and the party operating is liable for whatever damages may have resulted therefrom.”).

¹³⁰ JOHN C. GOLDBERG & BENJAMIN C. ZIPURSKY, *TORTS* 208 (2010).

¹³¹ *Id.* at 207–08.

¹³² The law since the eighteenth century has been that “absent an emergency, surgery [is] battery if performed on a competent adult without consent, and consent [is] invalid if obtained through misinformation.” Alexander M. Capron, *Legal and Regulatory Standards*

benevolent intentions and the patient suffers no harm from the surgery.¹³³

In *Elective Surgery*, participants judged a doctor who deceives a cost-conscious patient into agreeing to an elective, non-emergency surgery that is not covered by insurance:

Elective Surgery (n = 97)

Marvin has been in physical therapy for ankle pain and is contemplating undergoing elective surgery to repair the tendon. He cares deeply about whether the surgery is covered by his insurance; he would refuse to have the surgery if he would have to pay out of pocket. Marvin's doctor lies to him and says his insurance will cover the procedure, when really the doctor knows that Marvin will need to pay out of pocket. Marvin says yes to the surgery.

Participants rated the extent to which they believed Marvin had consented to the surgery. As Figure 3 shows, most participants (66%) gave a rating above the midpoint at 50, and the most common response, given by 35% of participants, was the maximum score of 100. The average rating was 66.60 ($SD = 39.83$).

of Informed Consent in Research, in THE OXFORD TEXTBOOK OF CLINICAL RESEARCH ETHICS 613, 614 (Ezekiel J. Emanuel et al. eds., 2008). See also *State v. Housekeeper*, 16 A. 382 (Md. 1889) (“Consent of [a] person submitting to surgical operation is presumed, unless he was the victim of a false and fraudulent misrepresentation.”).

¹³³ As long as the practitioner intends to deviate from the consent, it is a battery, even if the practitioner's reasons for doing so are benevolent. See, e.g., *Perin v. Hayne*, 210 N.W.2d 609, 618 (Iowa 1973) (“We agree with the majority trend. The battery theory should be reserved for those circumstances when a doctor performs an operation to which the patient has not consented. When the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present.”) (quoting *Cobbs v. Grant*, 502 P.2d 1, 7–8 (1972)).

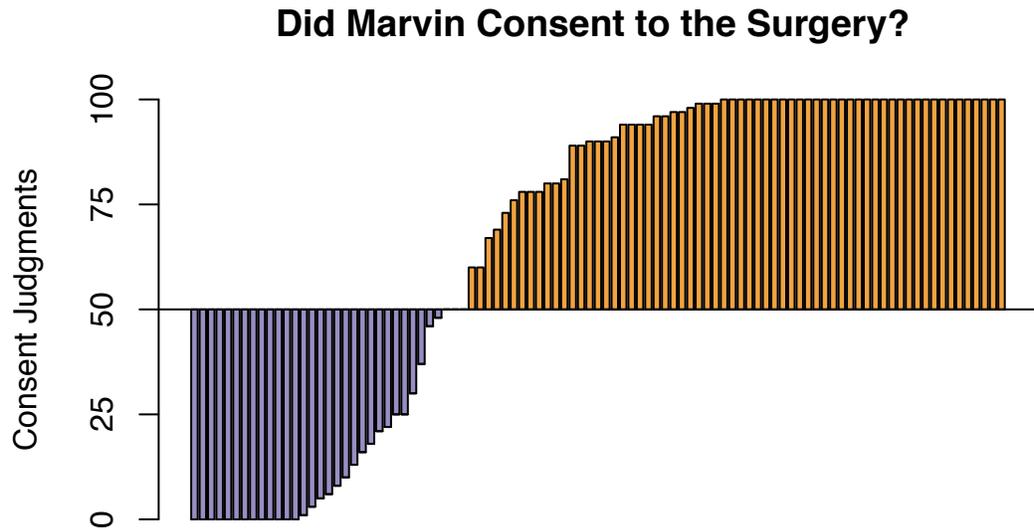


Figure 3. Participants’ reactions to the surgery-by-deception scenario *Elective Surgery*. Most respondents believe that the patient consented to the surgery when his doctor deceived him about the out-of-pocket cost.

In summary, a substantial number of laypeople reject the “settled”¹³⁴ and “well established”¹³⁵ legal view that when it comes to medical decision-making, “true consent to what happens to one’s self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available.”¹³⁶

3. Warrantless Searches by Police

Under the Fourth Amendment, officials may conduct warrantless searches if they obtain the citizen’s free and voluntary consent.¹³⁷ Courts diverge on whether deception by police renders consent involuntary, as described earlier. One thing, however, is clear: officers “may not obtain consent to search on the representation that they intend to look only for certain specified items and subsequently use that consent as a license to conduct a general exploratory search.”¹³⁸ For example, in *United States v.*

¹³⁴ *Canterbury v. Spence*, 464 F.2d 772, 782-83 (D.C. Cir. 1972) cert. denied, 409 U.S. 1064 (1972).

¹³⁵ *Id.*

¹³⁶ *Id.* at 780.

¹³⁷ *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

¹³⁸ An influential treatise describes this rule as “clear.” WAYNE R. LAFAVE, 4 SEARCH & SEIZURE; A TREATISE ON THE FOURTH AMENDMENT § 8.2(n) (5th ed.) (quoting *United States v. Dichiarinte*, 445 F.2d 126 (7th Cir.1971)).

Montes-Reyes, DEA agents gained entry to the hotel room of a suspected narcotics dealer by mispresenting that they were looking for a kidnapped child.¹³⁹ The search was deemed involuntary as a result of their ruse.

In *Warrantless Search*, uniformed police officers misrepresent the purpose of their search. As the court noted in *Montes-Reyes*, consent is rarely deemed valid in such cases.¹⁴⁰ Various rationales apply: some courts emphasize that police officers are “figures of authority in the community” and citizens feel a civic duty to aid them when asked.¹⁴¹ Others emphasize that the government’s search has exceeded the scope of consent, because the citizen agrees to a search for one thing but the officers look for another.¹⁴² A third rationale is the canonical view that fraud interferes with self-determination, thus vitiating consent. This third rationale was at work in *U.S. v. Harrison*,¹⁴³ a Tenth Circuit case on which *Warrantless Search* is based. “Not all trickery is improper,” the Tenth Circuit stated, “but when the police misrepresentation of purpose is so extreme that it deprives the individual of the ability to make a fair assessment of the need to surrender his privacy, the consent should not be considered valid.”¹⁴⁴

Warrantless Search (n = 58)

Johnny is at home in his apartment when he hears a knock on the door. Two men are standing outside. They say, “Police here. Can we come in and look around?” Johnny asks through the door, “What are you looking for?”

One of the police officers says, “We are just looking for drugs and drug paraphernalia. We got an anonymous call reporting drug dealing in this apartment.”

This statement is a lie. In truth, the police officers are looking for illegal firearms. They had received an anonymous tip about illegal weapons in the apartment.

Johnny knows that he has no drugs or drug paraphernalia in the apartment. He does, however, have two guns under his bed that he bought illegally. The reason he wants to know what the police are searching for is that he would say no to a search if he thought they were looking for firearms.

Under these conditions, Johnny lets the police in to search his apartment.

¹³⁹ 547 F. Supp. 2d 281 (SDNY 2008).

¹⁴⁰ *Id.* at 290 (collecting cases and noting that such outcome is not impossible, just “quite rare”).

¹⁴¹ *Id.* at 287. *See also* Whalen v. McMullen, 907 F.3d 1139, 1147 (9th Cir. 2018).

¹⁴² *E.g.*, State v. Bailey, 989 A.2d 716 (Me.2010) (holding that the search of the defendant’s computer exceeded the scope of his consent where the officer misrepresented that he would be looking for whether the computer had been hacked).

¹⁴³ 639 F.3d 1273 (10th Cir. 2011) (holding that the search was involuntary where officers searching for firearms falsely stated they were searching only for drugs and bombs).

¹⁴⁴ *Id.* (citing 2 Wayne R. LaFave et al., CRIMINAL PROCEDURE §3.10(c) (3d ed. 2007)).

Participants rated whether they thought Johnny had consented to the search. As Figure 4 shows, most participants saw the search as consensual.¹⁴⁵

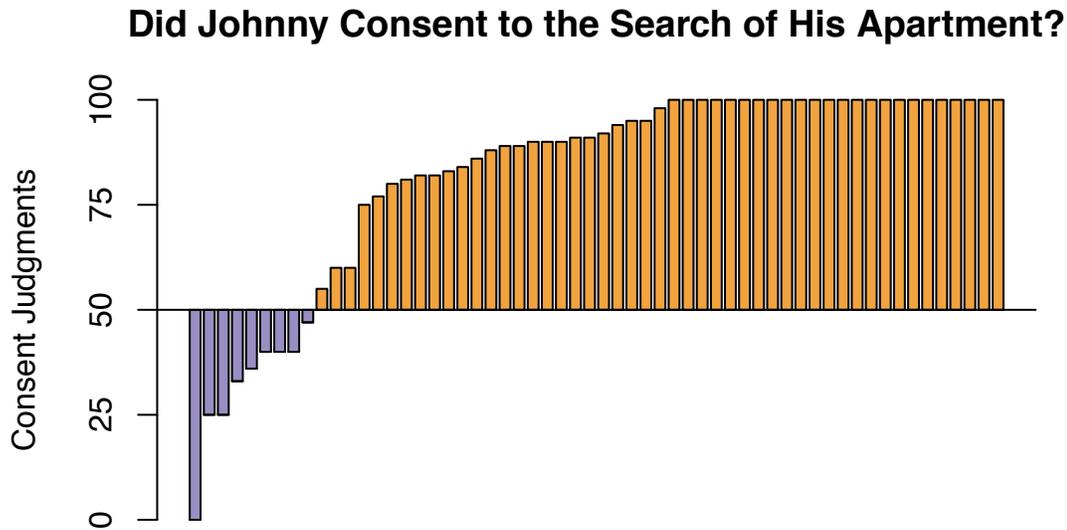


Figure 4. Participants' reactions to the search-by-deception scenario *Warrantless Search*. Most participants thought the citizen consented to the police search when the police lied about the purpose of their search.

4. Participation in Research

The same phenomenon was observed when participants were asked to evaluate consent to participate in research. In *Research Purpose*, an investigator deceives a potential research participant about the purpose of the study. Most respondents thought that the prospective research participant consented to the research procedure,¹⁴⁶ even though researchers are ethically and legally obligated to disclose to participants the purpose and nature of the research.¹⁴⁷ The full materials and results are reported in Appendix A.

5. Contract

Consent is not a homogenous concept across various areas of law. Turning to contract law, it is useful to observe that the kind of consent at issue

¹⁴⁵ The average consent rating for *Warrantless Search* ($n = 58$) was 82.47 ($SD = 24.83$).

¹⁴⁶ The average rating for *Research Purpose* ($n = 51$) was 72.55 ($SD = 33.96$).

¹⁴⁷ See, e.g., David Wendler & Franklin G. Miller, *Deception in Clinical Research*, in THE OXFORD TEXTBOOK OF CLINICAL RESEARCH ETHICS 315, 323 (Ezekiel J. Emanuel et al. eds., 2008) (“[A]ccurate disclosure about a study’s purpose is a basic element of informed consent.”).

in sex, surgery, searches by police, and scientific research involves a negative right against interference. These domains implicate our right not to have our bodies or our properties invaded by others without our permission. But with contract law, the interest at stake is our positive right to enter into arrangements on the terms we choose.¹⁴⁸ This “freedom of contract” ideal allows us to undertake obligations that we otherwise would not have.¹⁴⁹ Contract law is “predicated on something that has no counterpart elsewhere, namely, promise-making,”¹⁵⁰ and thus is often regarded as *sui generis*.¹⁵¹

Still, in contract law, as in other areas, material deception is understood to invalidate consent.¹⁵² It is black-letter law that an agreement is voidable if one party’s assent was given in justified reliance on another’s fraudulent misrepresentation.¹⁵³ In other words, if one party deliberately asserts something false, knowing that this falsehood is likely to induce the other party to enter the agreement, the deceived party can cancel the contract as long as reliance on the misrepresentation was reasonable.

Participants evaluated *Termites*, a scenario involving fraudulent misrepresentation in the sale of real estate. The seller stated falsely that the house had no problem with termites after specifically being asked whether the house had a termite problem. Most participants thought that the buyers had consented to the purchase, despite the fact that their assent had been induced by the seller’s fraudulent misrepresentation.¹⁵⁴ The full materials and results are reported in Appendix A.

C. Summary and Discussion of Study 1

To check for robustness, all five scenarios—*Single, Elective Surgery, Warrantless Search, Research Purpose*, and *Termites*—were administered to a nationally representative sample ($n = 252$).¹⁵⁵ As Figure 5 shows, no

¹⁴⁸ Bix, *supra* note 21, at 263 (2009); ALAN WERTHEIMER, COERCION 54 (1988).

¹⁴⁹ *Id.*

¹⁵⁰ WESTEN, *supra* note 9, at 10 (2003).

¹⁵¹ Müller & Schaber, *supra* note 93, at 1. (“[T]he notion of consent that is at the core of modern contract law differs from the consent that is involved in many other transactions.”).

¹⁵² Rubinfeld, *supra* note 23, at 1399 n. 136.

¹⁵³ See, e.g., 23 AM. JUR. 770, Fraud and Deceit, § 2; Willen v. Hewson, 622 S.E.2d 187 (N.C. App. 2005) (finding a contract voidable due to fraud).

¹⁵⁴ The average consent rating for *Termites* ($n = 48$) was 73.31 ($SD = 30.836$).

¹⁵⁵ Participants were 54% female, ages 18–89 years, median age = 47 years, with 67% having completed some college or more. 72% White, 8% Black, 7% Asian, 5% Hispanic, Latino, or Spanish origin, 1% American Indian or Alaska Native, 6% Other, 1% prefer not to answer. Approximately 33% reported an annual income of less than \$30,000, and 28% report earning over \$75,000. 35% are Democrats (19% strong Democrats) and 29% are

significant variation across the five domains emerged.¹⁵⁶ In addition, the main result—that most respondents saw deception cases as consensual—held true.

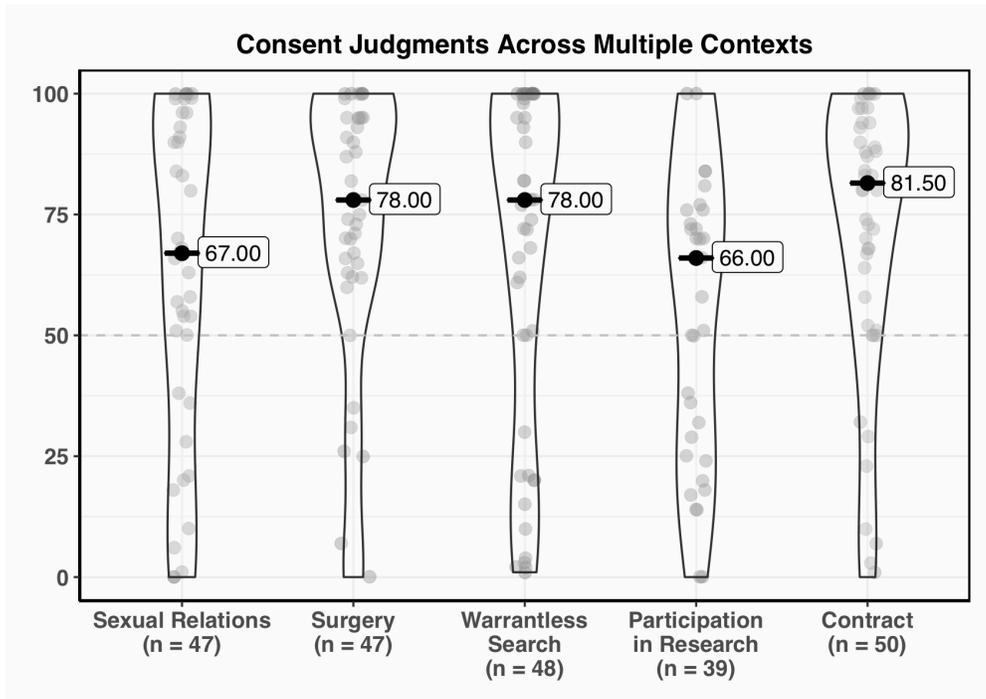


Figure 5. Consent across multiple contexts as judged by a nationally representative sample. Horizontal bars represent sample medians. In all cases, a majority of respondents judge the offeree to have consented.

In summary, across numerous domains, most American respondents report that consent can be granted despite the presence of material deception. Laypeople thus appear to reject the canonical view that fraud vitiates consent.

These findings are not easily explained by traditional sexual morality. While it is possible that patriarchal attitudes play a role in intuitive judgments of consent, the findings show that the core phenomenon—that deception is compatible with consent—is not unique to the sexual context.

Nor are these findings consistent with a legal realist account positing that people twist their consent judgments to serve their preferred outcomes. For instance, judgments of consent in the HIV case are unaffected by whether or

Republicans (6% strong Republicans).

¹⁵⁶ $F(4, 226) = 1.58, p = .18, \eta^2 = .03$. All post-hoc comparisons' Holm-adjusted p -values $\geq .04$.

not the offeree contracted HIV.¹⁵⁷ In addition, participants judge lying to be morally wrong, and they report disliking the deceiver. Nonetheless, they judge the encounters to be consensual.

Study 1 raises a key question that will guide the analysis in the next Part: Do people who say there is “consent” *also* believe that a moral transformation has taken place? Respondents may attest that a deceived individual has given “consent,” but do they believe that this “consent” renders the deceiver’s conduct morally permissible?

Part III will provide two pieces of evidence that yes, many respondents who say there is “consent” mean it in a morally deep way. First, Study 2 will demonstrate that people believe an offeror deserves less punishment for proceeding with a bodily violation (e.g., sex, surgery) if he tricks the offeree into agreeing to it first. They thus believe that a meaningful waiver has been executed when an offeree accepts a proposal as a result of deception. Next, Study 3 will demonstrate that respondents react differently when the offeror uses threats or intoxicants, as opposed to lies, to induce the offeree to acquiesce. Taken together, these studies establish that deceived assent—but not coerced assent or incapacitated assent—is viewed as morally transformative consent.

III. WHEN THEY SAY DECEPTION CASES ARE CONSENSUAL, DO THEY REALLY MEAN IT?

This Part provides evidence that consent granted as a result of deception is viewed as “real consent”—unlike the assent granted via force. It does this through two studies, each of which uses an experimental design to compare deception cases to similar non-deception cases.

¹⁵⁷ Consent ratings averaged 53.54 ($SD = 42.42$) for *HIV With No Transmission* and 49.42 ($SD = 41.66$) for *HIV With Transmission*, $t(98) = .49$, $p = .63$. The same held true for a police search vignette that was devised such that the police found contraband that was either child pornography or a bootleg recording of a Broadway musical (see Appendix A). Although participants felt more strongly that the citizen was a “bad person” when he possessed child pornography than when he possessed the bootleg recording (Child Pornography condition: $M_{\text{badness}} = 86.33$, $SD = 21.41$; Bootleg condition: $M_{\text{badness}} = 43.91$, $SD = 29.45$; $t(102) = 8.38$, $p < .001$), their consent judgments did not differ between conditions (Child Pornography condition: $M_{\text{consent}} = 71.63$, $SD = 31.02$; Bootleg condition: $M_{\text{consent}} = 77.51$, $SD = 25.66$; $t(102) = 1.06$, $p = .29$). See also Appendix C (reporting that judgments of how wrong the offeror’s behavior was do not significantly predict judgments of whether the offeree consented.).

A. Study 2: Deceived Agreement vs. No Agreement

Study 2 examines how laypeople evaluate *deceived agreement* versus *no agreement*. Do they say, as judges and legal theorists often do, that agreement obtained via deception is morally meaningless—that deceived consent is no consent at all?¹⁵⁸ Or do they attach some normative importance to deceived agreement, treating it as more consensual than no agreement? Study 2a examines this question in the context of sexual consent; Study 2b examines medical consent.

1. Sexual Consent Scenario

Study 2a compares a case in which a person refuses sex to a case in which a person is deceived into agreeing to sex. Participants ($n = 101$) were asked to judge a scenario in which the offeree, Emily, does not want to sleep with her boyfriend, John, unless he has been tested for Zika, a sexually transmissible virus that can be contracted from mosquitos in certain geographic regions. John has recently traveled to Miami, a moderately Zika-prone area.

In the scenario, *Zika*, the couple discusses plans to have sexual relations at a later time. The purpose of including this time delay was to provide a plausible manner in which one person might perform an unconsented-to act on an unwilling partner *without* adding the confounding factor of violence, force, or physical overpowering. To accomplish this, *Zika* describes the couple as having an established practice of one party initiating sex while the other is asleep.

The scenario reads, in pertinent part:

Shortly after John returned from his business trip, he spent the evening at Emily's place. That night, Emily was too tired to make love. John asked her if she would instead like a "surprise in the morning." For the couple, a "surprise in the morning" is what they call it when John wakes Emily up by making love to her.

Emily thought about whether she wanted John to wake her up by making love to her. She replied, "No surprise in the morning if you haven't gotten tested yet. But yes if you got tested and are clean."

¹⁵⁸ *E.g.*, Johnson v. State, 921 So.2d 490, 508 (Fla. 2005) ("Consent obtained by trick or fraud is actually no consent at all."); Feinberg, *supra* note 33, at 287 ("[T]aking another's property with his fraudulently induced 'consent' is no different in principle from taking it when there is no expression of consent.").

No Agreement condition: John said, “I still haven’t gotten tested yet.” In reality, he had not gotten tested. He was telling the truth. Emily said, “OK, then no. Don’t give me a surprise in the morning.”

Deceived Agreement condition: John said, “I’ve been tested and I am clean.” In reality, he still hadn’t gotten tested. He was lying. Emily said, “OK, then yes. Give me a surprise in the morning.”

Shortly after this conversation, they both fell asleep. The next morning, John woke Emily up with a “surprise in the morning”—that is, by having sex with her—even though he had not yet been tested for Zika.

Note that in both versions of the scenario, John knowingly subjects Emily to the risk of contracting Zika despite her insistence that she does not want to sleep with him if he has not been tested. The key difference is that in one case, John uses deception to surmount Emily’s objection, and in the other, he uses the fact that she is sleeping.

After reading *Zika*, participants rated their agreement with a series of statements, presented in random order, on a 1-7 Likert scale:

1. What happened between John and Emily was consensual.
2. John should be punished for sexually penetrating Emily against her wishes.
3. John raped Emily.
4. Though what John did might have been wrong, it would be a mistake for the law to punish him for it.

As Figure 6 shows, participants viewed the situation more positively overall when John deceived Emily into saying yes than when he violated her express refusal. They saw John’s behavior as more consensual¹⁵⁹ and as less deserving of punishment.¹⁶⁰ His conduct was judged to be rape in one case but not the other,¹⁶¹ and they found it more inappropriate to apply legal sanctions when he obtained deceived agreement than when he obtained no agreement.¹⁶²

¹⁵⁹ In the Deceived Agreement condition, the average level of agreement with “What happened between John and Emily was consensual” was 4.80 ($SD = 1.87$), whereas it was 2.63 ($SD = 1.46$) in the No Agreement condition, $t(99) = 6.52, p < .001, d = 1.30$.

¹⁶⁰ Compare 4.88 ($SD = 1.68$) with 3.54 ($SD = 2.04$), $t(99) = 3.61, p < .001, d = .72$.

¹⁶¹ Compare 4.47 ($SD = 1.85$) with 2.22 ($SD = 1.45$), $t(99) = 6.81, p < .001, d = 1.35$.

¹⁶² Compare 3.75 ($SD = 1.70$) with 4.48 ($SD = 1.71$), $t(99) = 2.17, p = .032, d = .43$.

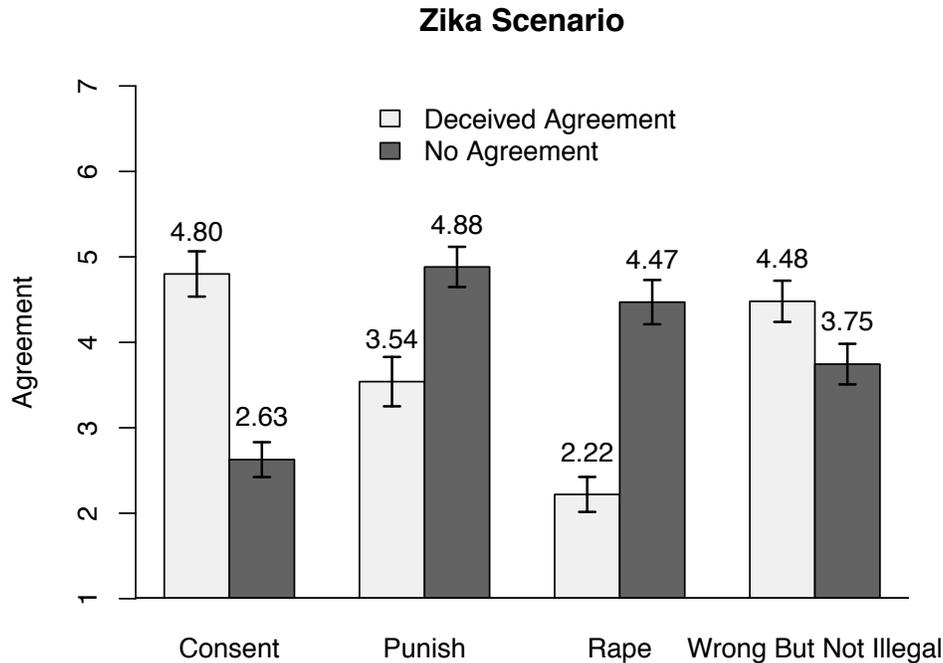


Figure 6. Participants' reactions to the sexual consent scenario *Zika*, in which the offeree was either deceived into agreeing to sex or did not agree. On all four measures, participants rated the Deceived Agreement version of the scenario to be less problematic than the No Agreement version.

One might wonder whether participants assumed that John used more force, or that Emily resisted more, in the No Agreement case. If so, this difference could explain why they saw the No Agreement case as less consensual than the Deceived Agreement case.

This concern is addressed in Study 2b. Here, the offeree is under general anesthesia in both cases. There is no possibility that participants will assume that the offeree fought back harder in one case than the other.

2. Medical Consent Scenario

Study 2b participants ($n = 101$) were randomly assigned to read one of two versions of a surgery-by-deception scenario, *Bunion Surgery*. The two conditions differed in whether the offeree *declined to undergo* an elective surgical procedure (No Agreement) or *would have declined* the same procedure for the same reasons were it not for the doctor's deception (Deceived Agreement).

Sophia has a bunion on her right foot and has been wearing splints to correct the problem. She is contemplating undergoing elective surgery to realign the joint.

Sophia will already be having surgery to address a torn ligament in her left ankle—an unrelated problem on the other leg. Her surgeon mentions that since she is already having the ankle surgery, it would be easy for him to also fix her bunion during the same operation.

Sophia wants to have her bunion fixed, but she also cares deeply about whether the bunion surgery is covered by her insurance. She explains to her surgeon that she wants to have the bunion surgery if it is covered by her insurance, but she would refuse to have it if she would have to pay for it out of pocket.

No Agreement condition: Sophia’s surgeon informs her that her insurance will not cover the bunion procedure. He knows that she will need to pay out of pocket. Sophia says no to the bunion procedure. She says the doctor may not fix her bunion while she is already under anesthesia for her ankle.

Deceived Agreement condition: Sophia’s surgeon lies to her and says her insurance will cover the bunion procedure, when really he knows that she will need to pay out of pocket. Sophia says yes to the bunion procedure. She says the doctor may fix her bunion while she is already under anesthesia for her ankle.

Imagine that during Sophia’s ankle surgery, the doctor also performs the bunion procedure, knowing that it will cost her out of pocket.

Thus, in the No Agreement condition, the doctor performs the procedure in violation of the patient’s express refusal. In the Deceived Agreement condition, the doctor equally knowingly violates the patient’s wishes, but he deceives her into giving assent before he performs the procedure.

After reading *Bunion Surgery*, participants were asked, “Did Sophia consent to the bunion procedure?” They also rated their level of agreement with four statements, presented in random order:

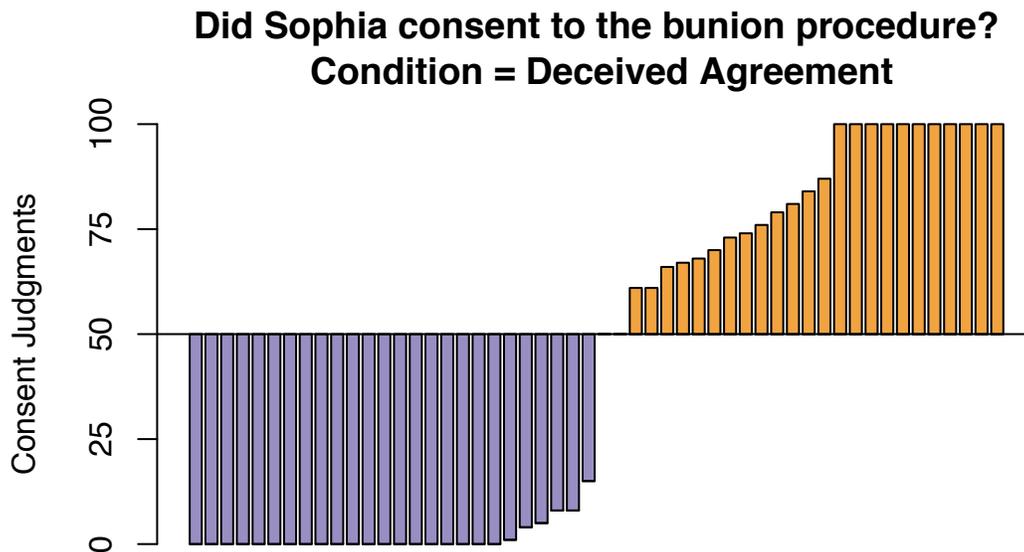
1. The doctor should be punished
2. The doctor should be punished for lying to Sophia
3. The doctor should be punished for performing an operation on Sophia against her wishes
4. To the extent that the doctor did something wrong, it was that he lied to Sophia, not that he performed surgery on her bunion.

The purpose of these four questions was to help participants focus on the specific question of whether the doctor is blameworthy *for performing the*

surgery (Question 3). Asking only whether the doctor “deserves punishment” could be ambiguous, because the doctor has potentially committed two misdeeds: lying to Sophia and performing a medical procedure on her without proper authorization. This Article is primarily interested in the latter misdeed, as this research study aims to capture lay attitudes toward *consent*.

Finally, participants were asked to make a legal determination of whether the doctor had battered the patient by touching her nonconsensually. They were instructed, “Imagine that Sophia sues the doctor for battery. You are called for jury duty and assigned to be a juror in the case. Battery consists of touching someone intentionally without their authorization.” They were then asked, “By performing the bunion procedure, did the doctor commit battery?” and given unmarked sliding scale (0 = Not at all; 100 = Very much). They were also asked to render a dichotomous judgment: “If you had to vote as a juror, would you say that the doctor committed battery?” (Yes/No).

As Figure 7 shows, participants viewed the bunion surgery as more consensual when the doctor deceived Sophia into agreeing to the procedure than when he performed the operation in violation of her express refusal.¹⁶³



¹⁶³ Average consent judgments were 42.08 ($SD = 42.74$) when the doctor obtained deceived agreement and 7.71 ($SD = 21.93$) when he obtained no agreement, $t(77.08) = 5.13$, $p < .001$, $d = 1.00$.

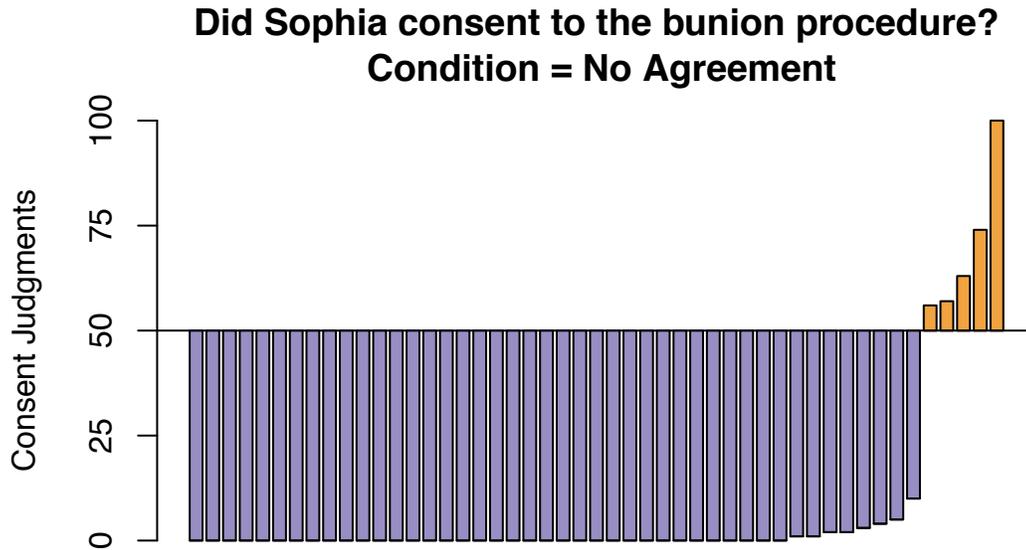


Figure 7. Participants' reaction to the surgery-by-deception scenario *Bunion Surgery*, in which the patient was either deceived into agreeing to an elective medical procedure or did not agree. Participants rated the Deceived Agreement surgery as more consensual than the No Agreement surgery.

On the key question—*Should the doctor be punished for performing an operation on Sophia against her wishes?*—participants saw the doctor as less deserving of punishment in the Deceived Agreement condition.¹⁶⁴ This suggests that participants view the operation as less problematic when the doctor lied to obtain “consent” than when he simply proceeded with the unwanted surgery.¹⁶⁵

¹⁶⁴ Punishment judgments in the Deceived Agreement condition averaged 5.04 ($SD = 2.11$) while they averaged 6.18 ($SD = 1.30$) in the No Agreement condition. This difference was significant, $t(99) = 3.25, p = .002, d = .68$. In addition, participants more strongly agreed with the statement “To the extent that the doctor did something wrong, it was that he lied to Sophia, not that he performed surgery on her bunion” in the Deceived Agreement condition ($M = 5.48, SD = 1.89$) than in the No Agreement condition ($M = 3.84, SD = 1.87$), $t(99) = 4.38, p < .001$. This finding is consistent with the interpretation that participants in the No Agreement condition thought the doctor’s main fault was performing an unauthorized surgery, whereas those in the Deceived Agreement condition thought the doctor’s main fault was lying about the insurance coverage.

¹⁶⁵ When it came to punishment for lying, participants in the Deceived Agreement condition thought the doctor deserved more punishment ($M = 6.46, SD = .96$) than did participants in the No Agreement condition ($M = 5.98, SD = 1.36$), $t(85.75) = 2.05, p = .04, d = .41$. This was unsurprising, as the doctor in the No Agreement condition did not lie. There was no difference in whether participants thought the doctor should be punished more generally, $t(99) = 1.15, p = .25$.

When it came to judging legal consequences, participants were less inclined to say that the doctor had committed battery in the Deceived Agreement condition.¹⁶⁶ When pushed to make a yes/no decision, as a juror would be, judgments of the two situations did not differ significantly.¹⁶⁷ In the Deceived Agreement case, 60% of jurors thought it was battery, and in the No Agreement case, 69% thought it was battery.

B. Discussion of Study 2 Findings

Study 2 showed that laypeople's attitudes toward consent and deception have moral depth. When they say that a deceived person consents, they follow through on this judgment by assigning less culpability for the putatively consented-to bodily invasion.

Study 2 also allows us to rule out a few explanations for why participants generally view deception cases as consensual. It is not that participants are paternalistic, insisting that doctors are justified in performing any surgery in the patients' best interest. Nor is it that participants refuse to respect a patient's decision to decline a medical procedure for cost reasons. Nor is it that participants think the patient benefitted by having her bunion removed. These features were equally present in the No Agreement scenario, and participants balked. Instead, it appears that there is something about deceived agreement that makes it seem like real consent.

One might wonder whether the results of Study 2 can be explained by the difference in expressive "tokens"¹⁶⁸ across the two conditions: the victim in the No Agreement condition says "no," whereas the victim in the Deceived Agreement condition says "yes." This hypothesis would not explain why participants thought the offeror acted more permissibly and deserved less punishment in the deception conditions, but it would explain why they said there was "consent."

Study 3 will rule out this explanation. It will show that the same outward expression is understood differently when it is achieved through coercion rather than through deception.

¹⁶⁶ Battery judgments in the Deceived Agreement condition averaged 51.71 ($SD = 37.75$), whereas they averaged 59.33 ($SD = 31.28$) in the No Agreement condition, $t(99) = 2.54$, $p = .012$, $d = .51$.

¹⁶⁷ $\chi^2(1) = .67$, $p = .41$.

¹⁶⁸ See WERTHEIMER, *supra* note 10.

C. *Study 3: Deceived Agreement vs. Coerced Agreement*

The legal theorist Peter Westen draws a helpful distinction between “legal consent” and “factual consent.”¹⁶⁹ Legal consent has normative significance: it carries the moral force to transform illicit conduct into legally permissible conduct. By contrast, factual consent (which this Article has variously called both “assent” and “agreement”), simply denotes “[a] state of mind of acquiescence . . . a felt willingness to agree with—or choose—what another person seeks or proposes.”¹⁷⁰ Factual consent is not sufficient for morally valid consent. As Westen explains, a woman held at gunpoint who agrees to submit to intercourse with her attacker has factually consented, but she has not legally consented.¹⁷¹ By contrast, a woman who fights back against her attacker and never relents gives neither factual nor legal consent.¹⁷²

Westen analyzes an infamous 1992 case from Texas in which a woman was attacked at knifepoint by a bedroom intruder, who ordered her to take off her clothes. The woman, fearing that she would be stabbed or infected with HIV, agreed to submit to sexual intercourse with her attacker if he put on a condom. The attacker wore a condom and proceeded to have intercourse with the woman, until she fled naked from her apartment to seek help from a neighbor.¹⁷³ The grand jury, in a decision that drew widespread condemnation, voted not to indict the attacker for rape, apparently because “several grand jurors believed that [the woman’s] willingness to submit to sexual intercourse in return for [the attacker’s] wearing a condom constituted ‘consent’ on her part.”¹⁷⁴

Westen’s reading of this troubling case is that the grand jury—rather than being morally perverse—may have been *confused* about the definition of consent they were being asked to apply. That is, the jurors may have made a *category mistake*—“taking the term consent, which the Texas judge intended

¹⁶⁹ WESTEN, *supra* note 9.

¹⁷⁰ *Id.* at 4.

¹⁷¹ *Id.* at 9, 53.

¹⁷² Under traditional rape law, a showing of “utmost resistance” was required. *See, e.g., Connors v. State*, 2 N.W. 1143, 1147 (1879) (“[V]oluntary submission by the woman, while she has power to resist, no matter how reluctantly yielded, removes from the act an essential element of the crime of rape. . . . [I]f the carnal knowledge was with the voluntary consent of the woman, no matter how tardily given, or how much force had been theretofore employed, it no rape.”).

¹⁷³ WESTEN, *supra* note 9, at 1; *see also* Ross E. Milloy, *Furor Over a Decision Not to Indict in a Rape Case*, N.Y. TIMES, Oct. 25, 1992, at A30; Carla M. da Luz & Pamela C. Weckerly, *The Texas ‘Condom-Rape’ Case: Caution Construed as Consent*, 3 UCLA WOMEN’S L.J. 95 (1993).

¹⁷⁴ WESTEN, *supra* note 9, at 2.

them to understand legally, and interpreting it factually.”¹⁷⁵ Under a factual definition of consent, Westen notes, the complainant in this case did consent.¹⁷⁶

Setting aside the specifics of the Texas case, we can appreciate Westen’s point about the potential for category mistakes: perhaps study participants interpreted their charge as deciding whether the offeree factually acquiesced. Instead, what we mean to ask is whether the offeree gave morally valid authorization.

If this is the mistake participants are making, it would explain why Study 2 respondents regarded the surgery as consensual when Sophia was deceived into saying yes and as nonconsensual when she flatly refused.¹⁷⁷ In addition, it would explain why Study 1 participants reported such high levels of perceived consent in deception cases across the board. Deceived individuals *do* factually consent, because they have a state of mind of acquiescence. They say (or think) *yes*.¹⁷⁸

Study 3 largely rules out the category mistake hypothesis. Study 3a randomly assigns survey respondents to evaluate an offeree who factually acquiesces to sexual relations either because she has been *deceived* or because she has been *threatened*. If participants view deception cases as consensual because they take “consent” to mean simple factual acquiescence, we should expect respondents to find similarly high levels of consent in a scenario in which an offeree is *coerced* into saying “yes.” But, as we will see, participants report strikingly low levels of consent when an offeree is coerced. Study 3b replicates and extends this finding.

Study 3a participants ($n = 111$) read either *Married* or *Secret* and rated whether the offeree consented to sex with the offeror. The vignette

¹⁷⁵ *Id.* at 9 (emphasis omitted).

¹⁷⁶ *Id.* at 9 (“[The complainant] did factually consent to sexual intercourse with [the defendant]. She consciously chose to engage in sexual intercourse with [him] in the sense that she preferred sexual intercourse to the risks of death, injury, and disease she feared she would otherwise face.”).

¹⁷⁷ It would not, however, explain why they thought the surgeon had acted more permissibly and deserved less “punish[ment] for performing an operation on Sophia against her wishes.” See *supra* note 164 and accompanying text.

¹⁷⁸ Some jurisdictions take the position that consent consists of certain mental states of acquiescence (e.g., thinking yes) while other jurisdictions take the position that consent consists of a certain expression of subjective acquiescence (e.g., saying yes, nodding, etc.). WESTEN, *supra* note 9, at 87. Here, the distinction between subjective and expressive consent is not crucial. The key point is that deceived individuals do acquiesce, in their minds and in their conduct.

characters' names were randomly chosen from a list of common names; for simplicity, here the offeror is named Kevin and the offeree is named Ann.

Married (Deception)

Kevin wants to sleep with Ann. Ann has said that she does not want to date or sleep with any man who is married. When she asks Kevin whether he is married, he lies and says no, even though he is married. Under these circumstances, Ann sleeps with Kevin.

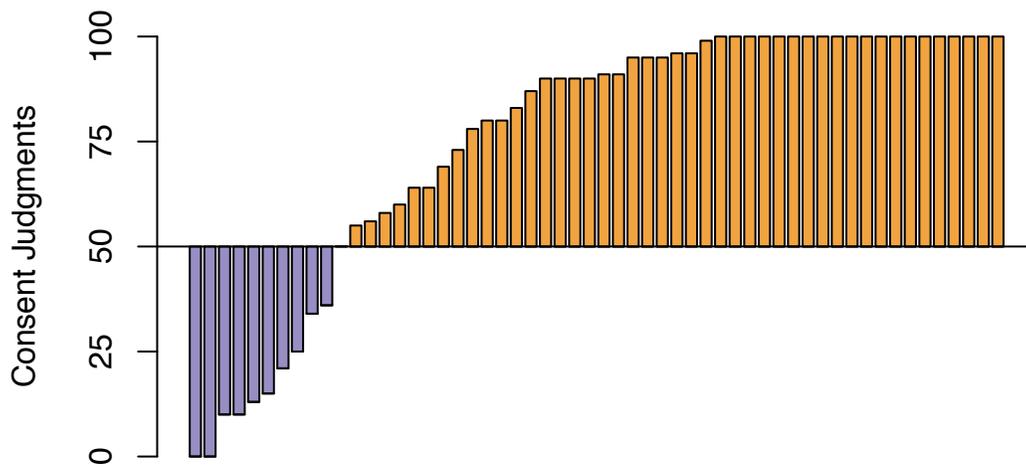
Secret (Coercion)

Kevin wants to sleep with Ann. Ann had previously shared an embarrassing secret with Kevin. Kevin now says he will spread Ann's secret unless she will sleep with him. Under these circumstances, Ann sleeps with Kevin.

This pair of vignettes was chosen based on a pilot test in which participants ($n = 100$) rated lying about being married as equal in moral wrongness to threatening to spread someone's secrets. In fact, they rated lying about being married as slightly more wrongful.¹⁷⁹

As Figure 8 shows, most participants who read the deception scenario *Married* thought Ann had consented to sex with Kevin, whereas most participants who read the coercion scenario *Secret* thought that Ann had not.¹⁸⁰

Deception: Did Ann Consent to Sex with Kevin?



¹⁷⁹ See Appendix C (showing that lying about being married garnered a wrongness rating of 92.44 ($SD = 12.96$), while threatening to spread a secret garnered a rating of 90.53 ($SD = 16.97$), a difference that is not significant, $t_{\text{Welch}}(185.13) = .89, p = .37$).

¹⁸⁰ The average consent rating for *Married* was 75.70 ($SD = 31.55$), whereas the average the consent rating for *Secret* was 31.35 ($SD = 31.43$). This difference was significant, $t(109) = 7.42, p < .001, d = 1.41$.

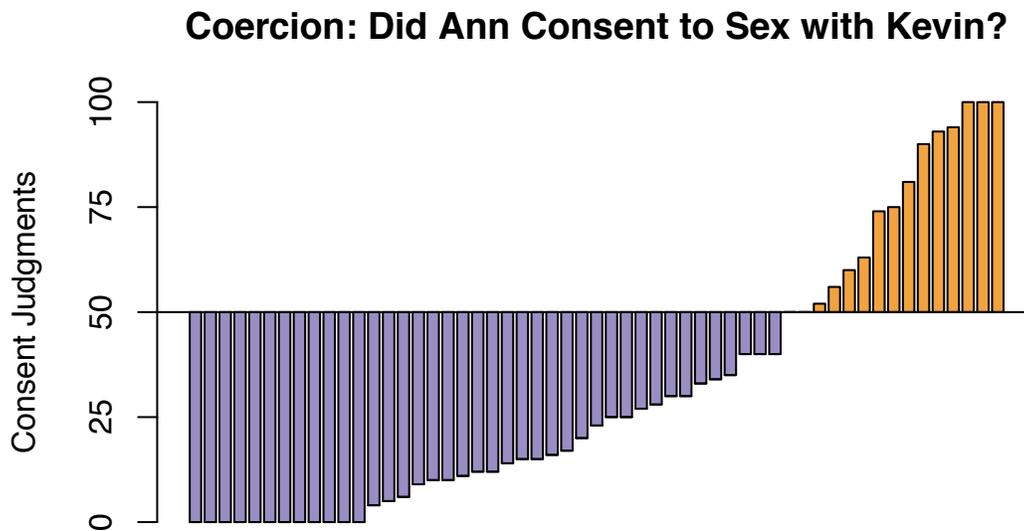


Figure 8. Participants' responses to the sexual consent scenarios *Married* and *Secret*. In *Married*, the offeree was deceived into agreeing to sex; in *Secret*, she was coerced into agreeing to sex. Participants saw more consent in the deception case than in the coercion case. An earlier group of participants had rated the two antecedent acts—lying about being married and threatening to spread someone's secret—as being equally morally wrong.

Participants' written responses further underscore that they viewed Ann as acting more autonomously when she was deceived than when she was coerced:

- *Just because Ann had false information, she still had a choice, which she made. While it is true she would have chosen differently if she knew the truth, that doesn't remove Ann's freedom of choice. (Deception scenario)*
- *The sex was consensual. She was told by Kevin that he was not married. She believed him and made up her own mind to sleep with him. No one forced or coerced her to do this. She made up her own mind based on the information she was given. (Deception scenario)*
- *It was not consensual because one person was forced into sex because the other person was threatening her. (Coercion scenario)*
- *She is being forced into it due to blackmail. This is in no way consenting. (Coercion scenario)*

As these qualitative responses demonstrate, participants were not simply answering the factual question of whether Ann acquiesced. In both conditions, participants seemed to grapple with the normative question of whether Ann's acquiescence expressed her autonomous will. They were reasoning morally—and largely concluding that consent was vitiated in the coercion case but not the deception case.

A strong recurring theme in participants' responses is that deceived individuals are not "forced." They *could* have chosen to decline the proposal. Therefore, they gave meaningful consent.

- *She made the choice to have sex with him. He may have lied to her but he did not force her to do anything. (Deception scenario)*
- *Although I think it was wrong of [Kevin] to deceive [Ann] about the circumstances of his and [Ann's] sexual encounter, in the end she did give consent to have sex. Even though she was wrongly informed, [Kevin] didn't rape her or force her to have sex, she made that decision. [Kevin] should not have lied about his situation but [Ann] decided to move forward. (Deception scenario)*

Some participants who invoked force seemed to be speaking of *physical force*, of the kind contemplated by the traditional definition of rape, which requires the use or threat of physical force.¹⁸¹

- *If he didn't physically force her to sleep with him, then she consented. (Deception scenario)*
- *Because he did not physically force her to have sex, she willingly went along with it because she thought he was not married. He lied to her, but didn't physically force her. He manipulated her. (Deception scenario)*

But it seems that most respondents who mention "force" are not referring exclusively to physical force. Those who judged the coercion scenario *Secret* often said the offeree was "forced" to have sex, even though the threat she faced was having her secret exposed—a nonphysical threat. Recall that Ann was threatened with her embarrassing secret getting out.

- *No. It was blackmail. She might have agreed to it, but it was because she felt threatened. In my opinion, it doesn't matter if you feel threatened physically or emotionally, a threat is still a threat. (Coercion scenario)*

¹⁸¹ Today, most jurisdictions define rape as requiring force, or else define rape as nonconsensual sex and include force as a necessary component of nonconsent. *See, e.g.,* Tuerkheimer, *supra* note 7, at 15 (listing statutes).

It seems important to participants that the deceived offeree had a meaningful opportunity to say no.¹⁸² She was not forced, in the sense that she had reasonably available options, and could have declined the proposal:

- *She could have chosen not to consent, or chosen to find out more about him before in engaging in sex with him. (Deception scenario)*

The coerced person, by contrast, is seen as not having had reasonably available options, because such options were foreclosed by the threat. In participants' eyes, she could not have said no:¹⁸³

- *Because Kevin was blackmailing her; what choice did she have? (Coercion scenario)*

We might wonder why it should matter, normatively speaking, that a deceived person has options available to her when her rational capacity to choose among these options is impaired by another's manipulative deceit. The options may be available, but she has been misled about the value of pursuing them. "Both coercion and deception infringe upon the voluntary character of [an] agent's actions," explains the philosopher Gerald Dworkin.¹⁸⁴ "In both cases . . . [a person's] actions, although in one sense hers because she did them, are in another sense attributable to another."¹⁸⁵ Yet that is not how laypeople see things. In deception cases, they say her actions are hers because she did them; in coercion cases, they say her actions are attributable to another.

- *She made her own choice and decided to sleep with him even though it was based on a lie. (Deception scenario)*
- *His lie doesn't change her free will. (Deception scenario)*

Study 3b extends these findings with a third condition in which Kevin gets Ann drunk. Study 3b asks participants to evaluate not only consent, but

¹⁸² For a discussion of how problematic this determination is, see Ferzan & Westen, *supra* note 11, at 776 n.57 (noting that "reasonable people may disagree" about the kinds of coercion that render sexual intercourse nonconsensual" and comparing approaches taken by different states.).

¹⁸³ Maybe they favor something like O'Neill's argument that "a better test of whether someone was able to consent is whether the person had an authentic opportunity to say no." KORSGAARD, *supra* note 22, at 309 (citing Onora O'Neill, *Justice, Gender, and International Boundaries*, in *THE QUALITY OF LIFE* (Martha Nussbaum & Amartya Sen eds., 1992)).

¹⁸⁴ GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 14 (1988).

¹⁸⁵ *Id.*

also whether Kevin's conduct was rape, deserving of punishment, or otherwise illegal.

Participants ($n = 151$) were randomly assigned to read a Deception scenario (*Married*), a Coercion scenario (*Secret*), or an Incapacitation scenario (*Drunk*).¹⁸⁶

Drunk (n = 49)

Kevin wants to sleep with Ann. Kevin sees Ann at a college party and buys her several drinks throughout the night. By the end of the night, she is extremely drunk and can hardly stand up on her own. When she speaks, her words are slurred. Kevin asks her back to Kevin's dorm room. Under these conditions, Ann agrees to sleep with Kevin.

Participants rated their level of agreement with a series of four statements (1 = Strongly disagree; 100 = Strongly agree), which were presented in random order:

1. The sex between Kevin and Ann was consensual.
2. Kevin should be punished for sexually penetrating Ann.
3. Kevin raped Ann.
4. Though what Kevin did might have been wrong, it would be a mistake for the criminal justice system to punish him for it.

¹⁸⁶ This intoxication scenario was chosen because pre-test participants rated it as equally morally wrong ($M = 87.59$, $SD = 23.13$, on a scale from 0 to 100) as lying about being married ($M = 89.75$, $SD = 18.02$).

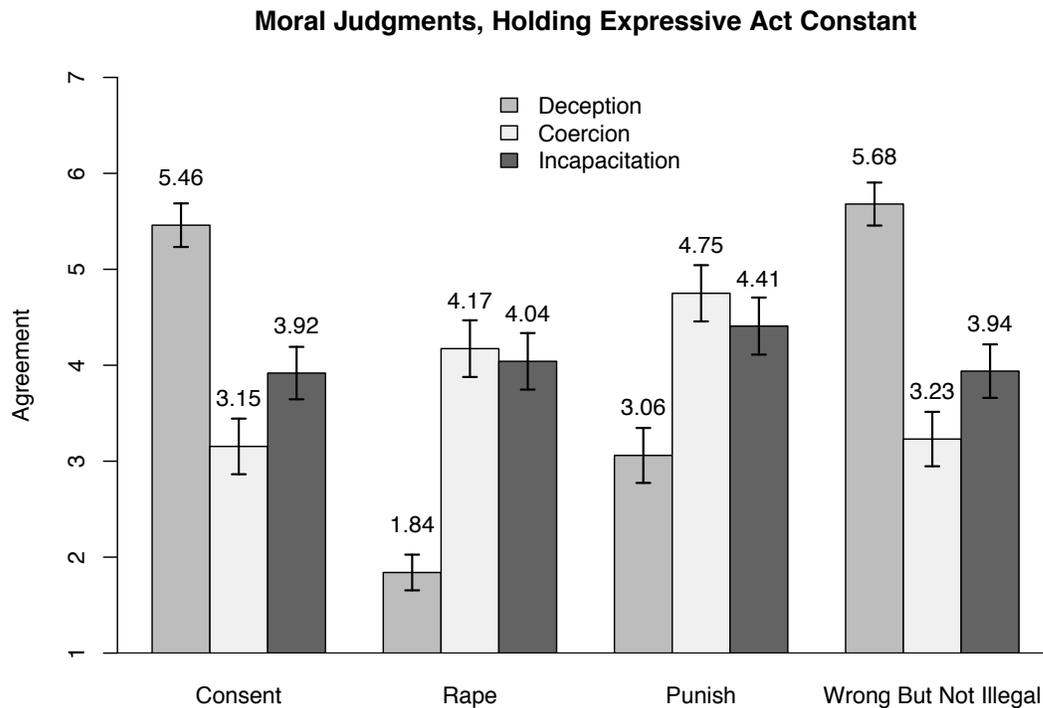


Figure 9. Participants' responses to the sexual consent scenarios *Married*, *Secret*, and *Drunk*. Across all four measures, participants saw the sex-by-deception as less problematic than the sex-by-coercion or sex-by-incapacitation.

As Figure 9 shows, participants had a qualitatively different reaction to deception than to coercion or incapacitation. Unlike sex-by-coercion or sex-by-intoxication, sex-by-deception was seen as highly consensual. It was seen as not worth punishing, and certainly not as rape (indeed, rape judgments were near the floor of 1 on a 1-7 scale ($M = 1.84$, $SD = 1.31$)). In addition, participants more strongly agreed that sex-by-deception was wrong, but felt it was not something the criminal justice system should punish.

Taken together, Studies 2a, 2b, 3a, and 3b demonstrate that most people think there is consent when the unwanted act is achieved via deception, but not when it is achieved via stealth (while the person is under general anesthesia), via coercion (while the person is placed in fear of embarrassment), or via incapacitation (while the person is inebriated). These results contravene the “category mistake” hypothesis.

Participants appear to be thinking normatively, but their intuitions trace a bizarre pattern that no existing theory of consent can explain. Commonsense

consent is not Westen's simple *factual acquiescence*: that would require respondents to say that all three cases are consensual. Nor is commonsense consent *canonical consent*: that would mean all three cases—including the deception case—are nonconsensual. But participants aren't following *legal consent*, either. In most jurisdictions, it is not rape if sex is obtained through nonphysical forms of extortion.¹⁸⁷ Participants judged the coercion case *Secret* to be nonconsensual, even though the threat was to share an embarrassing secret.

In summary, participants appear to understand the term “consent” in a way that comports with neither factual, prescriptive, nor legal accounts. Commonsense consent, it seems, is its own special breed.

IV. WHY DO PEOPLE THINK DECEPTION IS COMPATIBLE WITH CONSENT?

Thus far, we have seen that laypeople largely regard deceived individuals as granting “consent” (Study 1) and that this “consent” is morally meaningful, in that it exculpates conduct that would otherwise be tortious (Study 2a) or criminal (Study 2b). This finding appears to be specific to deception; it does not extend to other interferences to autonomy such as coercion (Study 3a) and incapacitation (Study 3b).

This Part searches for an explanation. Why are deception cases viewed as consensual when coercion and incapacitation cases are not? We can already rule out several hypotheses:

1. Respondents are applying a thin account or literalistic understanding of consent¹⁸⁸
2. The offeree factually acquiesces or says “yes”¹⁸⁹

¹⁸⁷ See RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 5-34 (1996) for an overview of rape statutes. For instance, New York defines forcible compulsion as “compel[ling] by either the use of physical force or a threat, express or implied, that places a person in fear of immediate death or physical injury to himself, herself, or another person, or in fear that any person will be kidnapped.” *Id.* at 23-24. See also Bryden, *supra* note 34, at 461 (2000) (“[L]aws prohibiting sexual extortion” are “so far rare.”). For a counterexample, see DEL. CODE § 774 (defining sexual extortion to include “expos[ing] a secret . . . intending to subject anyone to hatred, contempt or ridicule”).

¹⁸⁸ Commonsense consent does not seem to be a thin concept, because people give moral weight to deceived assent, exculpating the offeror from punishment (Study 2). Furthermore, when it comes to cases involving coercion or intoxication, respondents do not apply a thin or literalistic understanding of consent, so this cannot explain why deception cases are uniquely seen as consensual (Study 3).

¹⁸⁹ See Study 3. When the “yes” is induced by coercion or intoxication, factual acquiescence is insufficient for consent; it is only when the “yes” is induced by deception

3. The offeree ultimately benefits from or is not harmed by the offeror's conduct¹⁹⁰
4. The offeree's deal-breaker is unsympathetic¹⁹¹
5. In the absence of a written agreement, deception would be difficult to substantiate¹⁹²
6. The deception at issue is normal, expected, or something that we see occurring in everyday life¹⁹³

What explanations remain? This Part explores three hypotheses. The first is based in a classic psychological phenomenon: participants' responses are consistent with victim-blaming, a self-protective coping mechanism. But the results also allow us to go beyond well-known psychological processes and venture into territory that is genuinely new.

Moral psychologists have developed theories for various folk intuitions: why we view harms caused by omission as less wrong than identical harms caused by action; why our judgments of how intentional an act is are influenced by our moral evaluations of the act; why we sometimes (but not always) think it's morally justified to kill one person to save five others, to name a few.¹⁹⁴ The phenomenon explored here, however, is new. Psychologists do not have a ready explanation for why people think deception is compatible with morally transformative consent.¹⁹⁵

that people think it is sufficient for consent.

¹⁹⁰ See Study 2. The patient benefits equally from the bunion procedure, yet only when she is deceived do participants judge the procedure to be consensual.

¹⁹¹ See Study 2. In both cases, the patient's reason for declining the procedure is the out-of-pocket cost. Yet it is only when she is deceived that participants judge the procedure to be consensual. In addition, many of the cases deemed consensual depict offerees with highly sympathetic deal-breakers, such as not wanting to sleep with a married person or undergo an elective medical procedure that has a high out-of-pocket cost.

¹⁹² See Study 2. In both cases, the patient would have an equally difficult time proving that she had instructed the doctor not to perform the operation if the procedure was not covered by insurance. In neither case did she memorialize her wishes in writing. Yet only when she was deceived was she judged to have consented.

¹⁹³ See Study 3. When the offeror used alcohol to get the offeree to assent to sex, the sex was deemed nonconsensual even though plying a prospective partner with alcohol is relatively commonplace occurrence, descriptively.

¹⁹⁴ See, e.g., Fiery Cushman, Liane Young, & Marc Hauser, *The Role of Conscious Reasoning and Intuition in Moral Judgment*, 17 PSYCHOL. SCI. 1082 (2006); Joshua Knobe, *Intentional Action in Folk Psychology: An Empirical Investigation*, 16 PHIL. PSYCHOL. 309 (2003).

¹⁹⁵ I myself did not predict this finding when I first began conducting empirical research on consent. I simply happened to notice that participants were consistently giving remarkably high consent ratings to deception cases.

The first novel hypothesis this Part will explore is that deception cases are viewed as consensual because they, unlike coercion or intoxication cases, involve the phenomenological experience of choice. A deceived person, at least in the moment, *thinks* she wants to participate in the proposed activity. If the folk conception of consent is something like *wholehearted wanting*, it is easy to see why deceived individuals are considered autonomous, consenting agents.

This explanation is tempting, but it cannot ultimately explain the data uncovered in Study 4. The better explanation, this Part will conclude, is that commonsense consent tracks judgments of *essentiality*. Roughly speaking, lies that pertain to the essence of the activity in question vitiate consent, whereas lies that pertain to mere tangential matters do not (Study 5). As we will see, this murky intuition loosely mirrors the famously slippery legal distinction between “fraud in the factum” and “fraud in the inducement.”¹⁹⁶

This Part assesses each of these three hypotheses—victim-blaming, wholeheartedness, and essentiality—in turn.

A. Victim-Blaming

In participants’ qualitative responses, one theme unmistakably emerges. Participants frequently blamed the victims of deception for being overly naïve, arguing that consent was present because the offeree could have “sniffed out”¹⁹⁷ the deception rather than credulously relying on the word of another:

- *She did consent, even though she was lied to. She’s not helpless, after all. For example, she could have done her “homework” and found out about [Kevin’s] true marital status. She could have asked around, talked to others who know him, and then she could have found out the truth. It is incumbent upon all of us to make our decision as informed as possible. On the one hand, she was deceived, but on the other, she could have taken some time to make sure [Kevin] met her criteria to be single. It is up to her to make sure she knows what she is doing.*
- *I believe [Marvin] should have asked his insurance company himself whether the procedure was covered or not. The doctor has every reason to have ulterior motives for saying what he did about the insurance. [Marvin’s] a big boy. He should’ve taken it upon himself to find out.*

¹⁹⁶ See *infra* notes 224–228.

¹⁹⁷ “She consented based on a lie, she had to be careful and sniff things out. Fault’s partially on her,” one participant wrote.

Victim-blaming is a well-documented psychological phenomenon.¹⁹⁸ In general, we are motivated to maintain a comforting belief that the world is fair and controllable. When an innocent person is victimized, our dearly held “belief in a just world”¹⁹⁹ is threatened. We thus cast about for reasons why the victim deserved what she got.²⁰⁰ This tendency is especially pronounced when it comes to blaming victims of sexual assault.²⁰¹

One problem with the victim-blaming hypothesis, however, is that it does not explain why participants blame deceived victims more than coerced or intoxicated victims. One could easily blame the blackmail victim for unwisely sharing her embarrassing secret with Kevin, or for having a shameful secret in the first place. Similarly, with the *Drunk* scenario, participants could easily blame the victim for voluntarily intoxicating herself.²⁰² Yet they judge the coercion and intoxication scenarios to be nonconsensual.

B. “*At that Moment, Given What She Knew*”: Consent as Wholehearted Wanting

Perhaps, when laypeople think of consent, they think of something like “wholehearted wanting.” People who are deceived, unlike people who are coerced, have the phenomenological experience of choice. In their minds, they *want* to accept the offeror’s proposal. Indeed, they may give something that resembles the “enthusiastic consent” now recommended by many university codes of conduct.²⁰³

¹⁹⁸ See, e.g., Melvin Lerner & Carolyn Simmons, *Observers’ Reaction to the “Innocent Victim”*: Compassion or Rejection? 4 J. PERSONALITY & SOC. PSYCHOL. 203 (1966); Melvin Lerner & Dale T. Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, 85 PSYCHOL. BULL. 103 (1978); MELVIN LERNER, THE BELIEF IN A JUST WORLD (1980).

¹⁹⁹ Adrian Furnham & Barrie Gunter, *Just World Beliefs and Attitudes Toward the Poor*, 23 BRIT. J. SOC. PSYCHOL. 265 (1984); Carolyn L. Hafer, *Do Innocent Victims Threaten the Belief in a Just World? Evidence from a Modified Stroop Task*, 79 J. PERSONALITY & SOC. PSYCHOL. 165 (2000).

²⁰⁰ Jaime L. Napier et al., *System Justification in Responding to the Poor and Displaced in the Aftermath of Hurricane Katrina*, 6 ANALYSES SOC. ISSUES & PUB. POL’Y 57 (2006) (“Blaming victims for their own misfortune serves the psychological purpose of maintaining a belief in a just world.”).

²⁰¹ See, e.g., Laura Niemi & Liane Young, *Blaming the Victim in the Case of Rape*, 25 PSYCHOL. INQUIRY 230 (2014) (summarizing several studies showing that people judge victims of rape more harshly relative to victims of nonsexual crimes such as robbery).

²⁰² Recall that Kevin “buys her several drinks throughout the night.”

²⁰³ Yale University, for instance, instructs students to “[h]old out for enthusiasm.” Jacob

- *What [Kevin] did was horribly wrong, but it doesn't change the fact that, at that moment, given what she knew, [Ann] wanted to have sex with him, and chose to have sex with him.*

Perhaps when laypeople think about consent, they think about the offeree's subjective experience of choice, rather than focusing on the more abstract concept of the offeree's autonomous will. Note that this would suggest that the folk conception of consent is about how the offeree *feels*, rather than about her ability to control access to her body on her own terms.

This explanation for participants' consent judgments is attractive, because it echoes a familiar position in the debate over the legal wrong of rape. Broadly speaking, the "experiential view" is that "rape is wrong because of the bad experience of being raped."²⁰⁴ This position has been rejected by many modern commentators, who insist that rape is wrong because it violates the victim's sexual autonomy—and not because it is violent or upsetting in the moment.²⁰⁵ For instance, the legal philosopher John Gardner argues that sex without consent is wrong "even when unaccompanied by further affronts" because "the sheer use of a person, and in that sense the objectification of a person, is a denial of their personhood. It is literally dehumanizing."²⁰⁶ Deborah Tuerkheimer similarly asserts that the gravamen of rape is "the negation of women as sexual subjects"²⁰⁷ and argues that "whether the victim experiences the violation . . . is beside the point."²⁰⁸

The wholeheartedness hypothesis is also attractive because it explains why sex-by-deception is seen as consensual while sex-by-coercion is not. As Wertheimer observes, "Women abhor coerced sex, but the synchronic experience of sex is typically not affected by deception Indeed that is precisely why some commentators argue that the wrong of rape cannot be based on experience."²⁰⁹

Gersen & Jeannie Suk Gersen, *The Sex Bureaucracy*, 104 CAL. L. REV. 881, 925 (2016). The authors observe that "enthusiasm" is a term that "we increasingly see schools recite in the mode of didactic training on how to have sex." *Id.* at 929.

²⁰⁴ JOHN GARDNER, *OFFENCES AND DEFENCES* (2007).

²⁰⁵ See, e.g., Müller & Schaber, *supra* note 93, at 1.

²⁰⁶ GARDNER, *supra* note 203.

²⁰⁷ Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L.J. FORUM 355 (2013) at 352.

²⁰⁸ *Id.* at 351.

²⁰⁹ WERTHEIMER, *supra* note 10, at 194; accord Bryden, *supra* note 34, at 469 ("While it is true that deception impairs autonomous choice . . . , the victim in a deceptive romantic relationship may not be as severely hurt as one who has been forced by a threat to have sex.") (citing SCHULHOFER, *supra* note 119, at 156).

The wholeheartedness hypothesis would suggest that the folk theory aligns with the experiential view that scholars like Gardner, Tuerkheimer, and Wertheimer reject. But, as we will see, this hypothesis is belied by Study 4's findings. Study 4 tests whether some lies are considered more consent-defeating than others, and it unearths a salient counterexample in which deception is *not* viewed as compatible with consent—even though the offeree wholeheartedly chooses to accept the proposal “at the moment, given what she knew.”

C. Study 4: Different Lies Are Treated Differently

In Study 4, participants ($n = 152$) evaluated one of three sex-by-deception vignettes. In *Twin Brother*, the offeree is deceived about the identity of the person propositioning her: she believes she is speaking with her boyfriend, but really it is her boyfriend's twin brother. In *HIV Status*, the offeree is deceived about the offeror's HIV status. In *Married*, the offeree is deceived about his marital status. Appendix A presents the full text of the vignettes.

Participants rated the extent to which they believed the offeree had consented to “sex with the person who got into her bed in the morning.” They also rated the degree to which they thought the offeror had raped the offeree (0 = Not at all, 100 = very much).

As Figure 10 shows, most participants viewed *Twin Brother* as nonconsensual,²¹⁰ *HIV Status* as middling,²¹¹ and *Married* as highly consensual.²¹² Most people considered *Twin Brother* to be rape,²¹³ while few thought *HIV Status*²¹⁴ or *Married* constituted rape.²¹⁵ These differences were statistically significant.²¹⁶

²¹⁰ $M = 25.92$, $SD = 38.60$.

²¹¹ $M = 45.61$, $SD = 38.64$.

²¹² $M = 78.60$, $SD = 28.96$.

²¹³ $M = 72.76$, $SD = 33.12$.

²¹⁴ $M = 33.53$, $SD = 34.33$.

²¹⁵ $M = 5.42$, $SD = 11.29$.

²¹⁶ The main effect of condition on consent judgments was significant, $F(2, 149) = 27.98$, $p < .001$, $\eta_p^2 = .27$. So was the effect of condition on rape judgments, $F(2, 149) = 71.80$, $p < .001$, $\eta_p^2 = .49$.

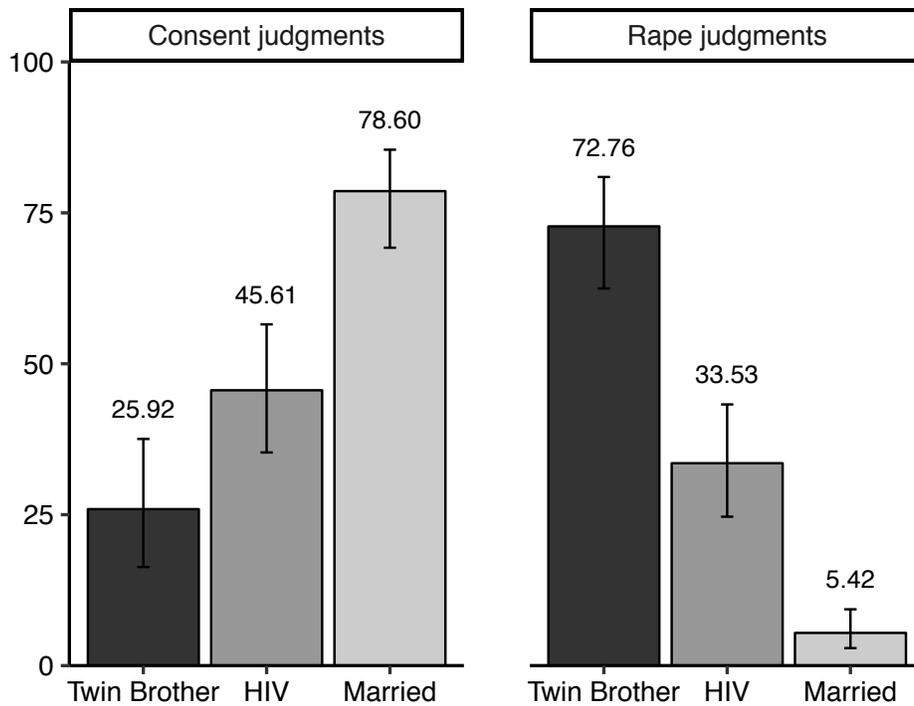


Figure 10. Participants' responses to the sex-by-deception scenarios *Twin Brother*, *HIV Status*, and *Married*. Participants viewed *Twin Brother* as more problematic than *HIV Status*, which was more problematic than *Married*.

The findings demonstrate that some types of deception are perceived as consent-defeating while others are not. Most saliently, respondents were willing to call *Twin Brother* rape, even though the offeree wholeheartedly wanted to sleep with the offeror in the moment.

Why is the twin deception different from the others? Undoubtedly, it is a disturbing case. The offeree would be horrified and disgusted to learn that she had slept with the wrong person. But it is not clear that being lied to about your partner's identity is worse, or more horrifying, than being lied to about your partner's HIV status.

Perhaps the twin brother case is different because it involves *impersonation*. The law has long treated impersonation as a particularly serious form of sexual fraud. In Idaho, for instance, it is rape if a victim "submits under the belief that the person committing the act is someone other

than the accused.”²¹⁷ Nebraska, too, treats sexual contact induced by “deception as to the identity of the actor” as a crime.²¹⁸ England and Canada also recognize impersonation cases as rape,²¹⁹ as does the Model Penal Code.²²⁰

In the literature on sex-by-deception, there are two main theories about impersonation cases: the *materiality* theory and the *essentiality* theory.

The materiality theory posits that what matters is the subjective importance the offeree places on the factor in question. Impersonation cases are distinguishable from run-of-the-mill deceptions about factors like marital status and occupation because the two differ in how material they are to the offeree’s willingness to partake in the activity. To commentators like Neil Manson, this distinction justifies treating impersonation cases and other “never-in-a-million years” deal-breaker cases as nonconsensual, while treating “weak deal breaker” deceptions as consensual.²²¹

The essentiality theory, meanwhile, says that “if the identity of the person doing the act is part of the essence [of the act], then a mistake regarding his identity is an essential mistake,”²²² which will vitiate consent.²²³ Thus, the essentiality theory posits that what matters is whether the deception pertains to a *core* aspect of the act in question, as opposed to a fact that is merely *peripheral*.

This fuzzy distinction roughly corresponds to the common law doctrine differentiating “fraud in the factum” from “fraud in the inducement.” As Perkins and Boyce explain:

if deception causes a misunderstanding as to the fact itself (fraud in the factum)
there is no legally-recognized consent because what happened is not that for

²¹⁷ Ferzan & Westen, *supra* note 11, at 783 (2017).

²¹⁸ *Id.* (“Nebraska makes it a crime to induce sexual intercourse by deception regarding the actor’s ‘identity’ or the ‘nature or purpose of his act.’”).

²¹⁹ See Rubinfeld, *supra* note 23, at 1397 (listing examples).

²²⁰ Under the proposed revisions to the Model Penal Code, an impersonator is guilty of a felony if he “knowingly leads” the victim to believe that he “is someone with whom [the victim] has been sexually intimate.” See AMERICAN LAW INSTITUTE, PROPOSED MODEL PENAL CODE, DISCUSSION DRAFT NO. 2, S. 213.0.

²²¹ Manson, *supra* note 120, at 419.

²²² Christopher & Christopher, *supra* note 105, at 86 (citing Ernst Wilfred Puttkamer, *Consent in Rape*, 19 U. ILL. L. REV. 410 (1925)).

²²³ If one’s partner’s identity is “part of the act,” then the victim in *Twin Brother* “was defrauded as to the act itself, which is fraud in the factum, and, therefore rape.” *Id.* at 86 n.60.

which consent was given; whereas consent induced by fraud is as effective as any other consent . . . if the deception relates not to the thing done but merely to some collateral matter (fraud in the inducement).²²⁴

Unfortunately, as critics have noted, there is no principled way to determine what counts as “the fact itself” and what is merely “collateral.”²²⁵ Still, the essentiality theory is the primary legal explanation offered by courts for why impersonation cases are nonconsensual.²²⁶ Thus, it is worth studying, even though the distinction “has plagued theorists”²²⁷ with its “essential arbitrariness”²²⁸ and “problematic elasticity.”²²⁹

Study 5 pits the two theories against one another. It asks: which is seen as more undermining of consent—a lie that is essential but immaterial, or a lie that is material but nonessential?

D. Study 5: Essentiality or Materiality?

Are impersonation cases seen as nonconsensual because one’s partner’s identity is highly *material* to one’s willingness to have sex, or because one’s partner’s identity is a highly *essential* feature of a sexual encounter? Study 5 deployed three nonsexual vignettes specifically devised to disentangle the two explanations.

Participants ($n = 605$) were randomly assigned to read either the Material Lie version or the Essential Lie version of one scenario, which was either about a medical exam (below), a contract for sale, or a tattooing. Appendix A contains the full text of all three scenarios.

Table 2. Study 5 Medical Exam Scenario

Material Lie	Essential Lie
<p>Imagine Brett is volunteering to help medical students learn how to practice medicine. Brett chooses to volunteer because he feels strongly about making a difference. Whenever he thinks about how he should spend his time, he prioritizes activities that will have the most impact.</p>	

²²⁴ PERKINS & BOYCE, *supra* note 73.

²²⁵ Feinberg, *supra* note 33; Fischer, *supra* note 27; WERTHEIMER, *supra* note 10, at 206 (“Everything turns on the way in which a case is described.”).

²²⁶ Christopher & Christopher, *supra* note 105, at 84–85 (collecting cases).

²²⁷ Kimberly Kessler Ferzan, *Clarifying Consent: Peter Westen’s The Logic of Consent*, 25 L. & PHIL. 193, 199 (2006) (reviewing WESTEN, *supra* note 9).

²²⁸ Feinberg, *supra* note 33, at 333 n.7.

²²⁹ Falk, *supra* note 98, at 159–160.

<p>As a volunteer, Brett's job is to sit still while an experienced professor of medicine performs an exam on him in front of a class of medical students.</p>	
<p>Imagine that the professor who will perform the exam tells Brett beforehand that the exam <u>will teach the students new material that will help them learn how to be doctors.</u></p> <p>But when Brett gets on stage in front of the class of medical students, <u>it turns out that the students have already learned about the content being covered.</u></p> <p>As he gets examined, Brett realizes that the professor lied about <u>whether the students will learn anything from watching him be examined.</u></p>	<p>Imagine that the professor who will perform the exam tells Brett beforehand that the exam <u>will be of his abdomen.</u></p> <p>But when Brett gets on stage in front of the class of medical students, <u>the professor examines Brett's ears.</u></p> <p>As he gets examined, Brett realizes that the professor lied about <u>what part of the body the exam will be of.</u></p>
<p>"There was consent in this situation." (7-point Likert scale Agree/ Disagree)</p>	
<p>If you had to guess, how much do you think it mattered to Brett <u>whether the exam done on him involved new material that helped the medical students learn, versus was old material that taught them nothing?</u></p> <p>(7-point Likert scale: Matters not at all /Matters a great deal)</p>	<p>If you had to guess, how much do you think it mattered to Brett <u>whether the exam done on him was of his abdomen, as opposed to his ears?</u></p> <p>(7-point Likert scale: Matters not at all /Matters a great deal)</p>

This scenario was written such that the essential lie (what body part) was less material to Brett than the nonessential lie (whether the exam would be edifying to the medical students). *Tattoo* and *Contract* had the same design. For example, in *Contract*, a man sought to make a purchase in order to earn reward points that would enable him to redeem a trip to Europe. He did not care much about what he bought; he planned to donate the item to a charity. The store clerk deceived him either about *what item* he was ordering (a more essential, less material lie) or about *whether the purchase would qualify for reward points* (a less essential, more material lie).

Results indicate that participants perceived more consent in the Material Lie condition than in the Essential Lie condition.²³⁰ For instance, Brett's consent was seen as more undermined when he was lied to about what body part would be examined, even though he cared much more about whether the exam was edifying to the students (Figure 11).²³¹ Thus, a lie that was *more* important was viewed as *less* defeating of consent.

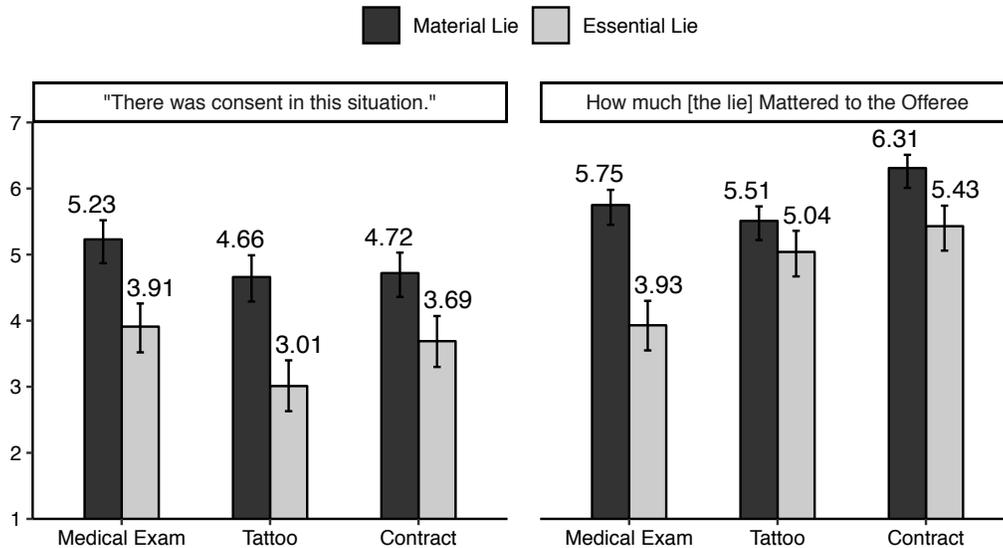


Figure 11. Participants' responses to essential lies vs. material lies for three scenarios: *Medical Exam*, *Tattoo*, and *Contract*. Lies about facts that were seen as more material to the offeree were determined to be less vitiating of consent.

Study 5 establishes that consent judgments track the essentiality of the lie, not the materiality. It seems that folk intuition roughly tracks the factum/inducement distinction—as imprecise and question-begging as the distinction may be.

²³⁰ A significant main effect of condition was observed, $F(1, 599) = 80.02, p < .001, \eta^2 = .12$. There was no significant interaction between condition and domain/scenario, $F(2, 599) = 1.44, p = .23$, indicating the difference between the material lie and the essential lie was the same for all three scenarios.

²³¹ As expected, there was a significant main effect of condition on judgments of materiality, $F(1, 599) = 66.29, p < .001$. This indicates that the materiality manipulation was successful: participants judged that that fact in question mattered more to offerees in the Material Lie conditions than in the Essential Lie conditions. This manipulation made a significant difference in each of the three scenarios.

V. PUTTING IT ALL TOGETHER: WHAT IS THE FOLK THEORY OF CONSENT?

To summarize, laypeople have a distinct conception of consent that differs from both canonical and legal understandings. This distinct conception, which this Article has called “commonsense consent,” is a moralized construct: it tracks judgments of punishment and moral permissibility,²³² and participants’ open-ended responses show them to be thinking normatively about concepts like voluntary choice and autonomous will.²³³ Crucially, however, intuitions about consent can be differentiated from intuitions about other moral concepts, such as harm or general moral badness.²³⁴ Indeed, respondents report disliking the deceptive offerors, and they judge the intentional lying to be morally wrong.²³⁵ They just do not think that deception invalidates consent.

This discrete psychological construct—the folk theory of consent—needs to be articulated. This Part summarizes its features. First, laypeople see assent procured by fraud—but not assent procured by coercion or intoxication—as “consent.”²³⁶ Assent procured by deception, moreover, is understood as morally transformative: it converts behavior that is normally verboten (e.g., penetrating, inking, cutting with a scalpel) into something less wrong.²³⁷ Deceived individuals are seen as “making up their own minds” and exercising meaningful choice.²³⁸ They are autonomous, in other words. In these ways, assent procured by deception is understood as “real consent.”

But not always: some lies *do* vitiate consent. The lies that vitiate consent, however, are not the ones that are the most harmful²³⁹ or the most material to the offeree.²⁴⁰ Rather, the lies that vitiate consent are those that seem to transform the proposed activity into something else entirely: the wrong body part is touched; the wrong product is purchased; the wrong person is taken to bed. In this way, commonsense consent tracks the oft-criticized legal

²³² See Part III.A.

²³³ See Part III.B.

²³⁴ See, e.g., *supra* note 157 (consent judgments do not track judgments of wrongness); Appendix C (same).

²³⁵ See Part II.B.1 (deceptive offerors garnered low likeability ratings).

²³⁶ See Part III.C.

²³⁷ See generally Part III.

²³⁸ See Part III.C.

²³⁹ E.g., Part IV.D (showing that consent was seen as *less* vitiated when Brett was deceived about the worthwhileness of his volunteer efforts and seen as *more* vitiated when his ears were examined instead of his abdomen—even though it is difficult to see how Brett was harmed by the latter substitution).

²⁴⁰ *Id.*

distinction between fraud in the factum and fraud in the inducement.

Most important, the folk moral theory of consent is not subjectivized to the idiosyncratic preferences of the individual. Rather, commonsense consent embeds an *objective* judgment about the kinds of information a decision-maker must know in order to make a sufficiently autonomous decision. It seems that so long as one knows the truth about certain primary features—which body part will be touched, say—one gives “consent.” Even if one cares deeply about some other feature of the touching—such as its purpose or likely effects, as in the case of Brett the medical volunteer—those features are of secondary status.²⁴¹ Brett can be deceived about those secondary features and still be deemed to have given consent. It does not seem to matter that by Brett’s lights, the secondary features are more important than the ostensibly primary ones.

For this reason, commonsense consent is basically unrecognizable as “consent.” The whole point of consent—why it is normatively and legally significant in the first place—is that it expresses our autonomous will.²⁴² Theorists may disagree about the sorts of lies that defeat consent, but they generally accept the premise that the purpose of consent is to allow people to choose for themselves the activities that are, by their own lights, worth pursuing. That is why we may not force a Jehovah’s Witness to accept a blood transfusion against his wishes, even to save his life; it is why a person can refuse to have sex with anyone based on any reason she pleases.²⁴³ As Dougherty explains:

One of the key achievements of waves of sexual liberation has been the promotion of a sexual pluralism that allows each individual to pursue his or her own conception of the sexual good, so to speak. Appropriately valued, sexual autonomy permits individuals to act freely on their own unconstrained conception of what their bodies and their sexual capacities are for. As such, it is up to each individual to determine which features of a sexual encounter are particularly important to her.²⁴⁴

Commonsense consent imposes an objective standard regarding the features of an activity that are important enough to defeat consent. Thus, it fails to do the work that normative consent needs to do. Because commonsense consent ignores subjective materiality, it fails to vindicate individual autonomy.

²⁴¹ See Part IV.D.

²⁴² See, e.g., Tuerkheimer, *supra* note 7.

²⁴³ See, e.g., Dworkin, *supra* note 184.

²⁴⁴ Dougherty, *supra* note 91, at 730 (internal citations omitted).

VI. THE PUZZLE REVISITED

We started with a legal puzzle: the law sometimes deviates from the canonical principle that deception vitiates consent. As discussed earlier, previous scholarship on this puzzle has largely elided the fact that numerous counterexamples crop up in legal domains beyond sexual consent.

This Article offers a new diagnosis of the puzzle, one that suggests courts are not necessarily motivated by traditional sexual morality or patriarchal attitudes (although that may be part of it). Perhaps judges are *also* influenced by an intuitive conception of consent that sees deception as compatible with autonomous decision-making in all sorts of domains. This alternative account has the virtue of explaining why we see deviations from the canonical rule in legal arenas other than rape, such as policing and trespass.

To be clear, this Article does not claim that commonsense consent maps perfectly onto the erratic case law. As we have seen, folk intuition can treat deceivers more punitively than the law in some cases (e.g., nonphysical threat cases) and less punitively in others (e.g., in medical research). The key claim of this Article is that the law is pervasively ambivalent toward deception cases, and insights from moral psychology can suggest a reason why: it is because we do not really believe, deep down, that deception invalidates consent. Despite the claim by moral philosophers that “everyone agrees”²⁴⁵ on fraud cases, the canonical view is not intuitive. Thus, judges who deviate from the canonical rule may be responding to commonsense consent—either because their own moral intuitions are marked by the same patterns as laypeople’s, or because they are loath to stray too far from public morality.

This alternative account should be welcome news for feminists and progressive reformers who wish to see the law of rape turn on sexual consent, rather than on physical force. A chief liability of the prevailing academic account is that it lends itself to the conclusion that sex-by-deception is an anomaly in a sea of doctrines that all follow the canonical rule. Under this understanding, critics have been able to argue that the only way to harmonize rape doctrine with the rest of the law is to “choose [between] two paths”²⁴⁶: start treating sex-by-deception cases as rape, or give up on consent as the driving legal principle. Some conclude that the law must give up on

²⁴⁵ Collin O’Neil, *Consent in Clinical Research*, in *ROUTLEDGE HANDBOOK OF THE ETHICS OF CONSENT* 301 (Andreas Müller & Peter Schaber, eds. 2018); Bromwich & Millum, *supra* note 69, at 446 (“Most people agree that lies can invalidate consent.”).

²⁴⁶ Rubenfeld, *supra* note 23, at 1430.

consent²⁴⁷ and “stick[] with the force requirement in order to say no to rape-by-deception.”²⁴⁸ This Article’s alternative account makes clear that one can reject rape-by-deception without necessarily giving up on a consent-based regime. This is because one can now claim that sex-by-deception cases intuitively seem like they are not rape because deception, *in general*, feels compatible with consent. This Article has supplied a novel psychological explanation for the strong moral intuition that it is not rape to scam someone into sex—one that does not require the feminist legal movement to “pick its poison.”²⁴⁹

VII. BROADER IMPLICATIONS

So, we can make some progress on the puzzle of why we see such inconsistency in how the law treats deception cases. The cognitive science account does a better job than the rape exceptionalism account of explaining why deviations from the canonical rule surface in legal domains other than rape, and it gives progressives a way out of the dilemma that sex-by-deception cases seem to pose for the vision of centering rape law around the principle of consent.

But the puzzle now feels like the least of our worries. This Article has uncovered a novel empirical fact about our moral psychology: there is something fundamental about consent that makes it seem unperturbed by deception. This intuition is deeper and more pervasive than previously imagined; it extends to numerous domains where the law still follows the canonical view. Armed now with the discovery of commonsense consent, we can see that laypeople are likely to find these canonical doctrines unintuitive. We can also see that if reformers succeed in their efforts to bring the deviant doctrines in line with the canonical rule, large swaths of the American public are going to regard the new laws as unintuitive. This Part grapples with the normative implications and practical challenges of building a legal system at odds with popular morality.

A. Should law conform to popular morality?

Where the law deviates from the canonical view, it has been subject to criticism on normative grounds. Critics have objected that the use of deception in police interrogations prompts innocent people to confess and that it ought to be considered one of the factors that renders confessions

²⁴⁷ *Id.* at 1401 (“[I]f rape is sex without consent, sex-by-deception ought to be rape.”).

²⁴⁸ *Id.* at 1380.

²⁴⁹ *Id.*

involuntary.²⁵⁰ Similarly, judges have puzzled over how a consent search can be voluntary if police deceit is what caused the defendant to grant the officer entry.²⁵¹ The factum/inducement distinction? It “makes no sense”²⁵² and is “utterly pointless”²⁵³ to critics. And there is an entire cottage industry of scholarship attacking the law’s incoherent treatment of consent in cases of fraudulently procured sex.²⁵⁴

One might wonder whether the empirical findings reported here—which suggest that the deviant doctrines may comport with commonsense morality—caution against these critics’ efforts to bring the law in line with the canonical view. Indeed, a prominent jurisprudential position would advocate that the law ought to match commonsense morality. This is what Paul Robinson calls “democratizing criminal law”²⁵⁵—“shaping criminal law rules to track the justice judgments of ordinary people”²⁵⁶—and what Joshua Kleinfeld calls “democratic justice”²⁵⁷—structuring the law such that “lay citizens take part in it and see their sense of justice at work in it.”²⁵⁸ These legal theorists argue that a political community must see its norms reflected in the law if it is to enjoy collective self-determination.²⁵⁹ This is particularly true of the criminal law, they say, because the criminal law’s “distinctive social function” is expressing social solidarity around shared norms following a tear in the social fabric.²⁶⁰

Robinson and Kleinfeld also argue their case on utilitarian grounds. They posit that laypeople will refuse to follow laws that strike them as unfair or unreasonable.²⁶¹ Relying on empirical studies of citizen cooperation,

²⁵⁰ *E.g.*, Gohara, *supra* note 51.

²⁵¹ *Spivey*, 861 F.3d at 1220–23 (Martin, J., dissenting) (arguing that the suspect’s consent was not voluntary where “officers used deceit, trickery, and misrepresentation to hide the true nature and purpose of their investigation”).

²⁵² Falk, *supra* note 98, at 159.

²⁵³ Kenneth W. Simons, *The Conceptual Structure of Consent in Criminal Law*, 9 BUFFALO L. REV. 22 (2005) (reviewing WESTEN, *supra* note 9).

²⁵⁴ See sources cited *supra* note 119.

²⁵⁵ Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 NW. U. L. REV. 1565, 1566 (2017).

²⁵⁶ *Id.* at 1565.

²⁵⁷ Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1378 (2017) (advocating for “lay involvement and community values”).

²⁵⁸ Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 NW. U. L. REV. 1455, 1457 (2017).

²⁵⁹ *Id.* at 1456.

²⁶⁰ Kleinfeld elaborates this view in *Manifesto of Democratic Justice*, *supra* note 257, at 1400; Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485 (2016).

²⁶¹ Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1401 (2005) (providing

deference, and resistance to authorities, they argue that the “moral credibility” of the law depends on its tracking commonsense views.²⁶² While Robinson and his co-author John Darley do not believe that community views ought to be “determinative” of legal rules, they insist that public attitudes “ought to be an influential factor in the policy-making and code-drafting process.”²⁶³

But we need not embrace the “democratic justice” view that the law should “adopt liability and punishment rules that track community views.”²⁶⁴ This position would require that we treat many cases of fraudulently procured assent as having the moral force reserved for legally valid consent. The chief weakness of the democratic justice approach is that it would have the law embrace a conception of consent that is basically unrecognizable under any autonomy-based theory.

If one rejects the democratic justice approach, however, one would need to find an independent way of determining what the law should be. One would need, in other words, to work out a theory of consent, which may differ across various areas of law. For example, whether deceptive policing tactics should be taken to undermine the voluntariness of a consent search depends in part on the theory of consent contemplated by the Fourth Amendment. That answer might be quite different from the answer to whether deceptive advertising should be taken to vitiate consent in commercial transactions. The answer for medical research might differ from the answer for kidnapping. Ultimately, a substantive normative argument is needed about whether our consent intuitions get it right, and that substantive argument may differ for different offenses.²⁶⁵ Such questions cannot be resolved by survey data.

However, even if the findings reported here cannot tell us what the legal rules should be, they still matter for law. Data on lay attitudes can help us decide *how* to implement the laws once we decide what laws to have. Numerous translational problems arise when law misaligns with lay morality, as many consent doctrines currently do. Thus, the rest of this Part explores

empirical evidence of the “Flouting Thesis”).”

²⁶² Kleinfeld, *supra* note 257, at 1405; Robinson, *supra* note 255, at 1580.

²⁶³ PAUL ROBINSON & JOHN DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VALUES AND THE CRIMINAL LAW 4 (1995).

²⁶⁴ Robinson, *supra* note 255, at 1580.

²⁶⁵ For example, whether sex-by-deception ought to be criminalized as rape depends on a theory of what the crime of rape is. *See, e.g.*, WESTEN, *supra* note 9 (“[I]t is a fallacy to infer that valid acquiescence to sexual intercourse requires at least as much knowledge as valid acquiescence to transfers of property, unless one knows *why* jurisdictions regard rape as such a serious offense.”).

these translational problems in light of our new understanding of commonsense consent.

B. Laypeople as Deciders: Implications for Jury Instructions

“The question of consent is a question of fact for you to decide, approaching it in a commonsense way.”²⁶⁶

In some legal domains, laypeople are tasked with deciding consent. Recall that the jury in Bill Cosby’s criminal trial asked for the legal definition of consent, and their request was denied. In essence, the jurors were required to make a legal judgment based on their commonsense notion of consent, even as they tried to seek guidance from the law. Although Cosby’s case did not involve deception, it nonetheless illustrates the degree to which our legal system places trust in the layperson’s intuitive mental representation of consent—a construct that, this research suggests, is something of a wildcard.

Consent is not defined in the criminal codes of 21 states, including 8 states that punish sexual penetration “without consent.”²⁶⁷ With such little guidance, juries can be expected to apply their commonsense understanding, which may diverge from the legal understanding. One can expect the same problem to arise in other areas of law, such as fraudulently induced contracts, theft-by-deception, and medical battery cases. Unless instructed otherwise, lay decision-makers are likely to conclude that a defendant’s knowing falsehoods do not invalidate a plaintiff’s consent.

Thus, where the law seeks to embody the canonical rule yet empowers laypeople to decide consent, jurors should be instructed on the relationship between consent and deception. Jury instructions should alert them that the legal definition of consent may differ from how they might normally think about consent.

Future research should test model jury instructions to ensure that they have the intended effect. Suppose, for instance, that a legislature agreed with Model Penal Code reporter Steven Schulhofer that the fraudulent transmission of STIs should constitute assault, because the deception “not only affects the ‘inducement’ to have sex but also conceals *the nature of the*

²⁶⁶ Judge Leo Clark’s remarks to a jury in a Canadian rape trial. *See* R. v. Olugboja [1982] QB 320.

²⁶⁷ *See* AMERICAN LAW INSTITUTE, PROPOSED MODEL PENAL CODE, DISCUSSION DRAFT No. 2, S. 213.0.

physical contact” visited upon the victim.²⁶⁸ The legislature might be tempted to draft something like Arizona’s criminal statute, which defines sexual assault as engaging in sexual intercourse without consent, including cases where “the victim is intentionally deceived *as to the nature of the act*.”²⁶⁹

Using this language to criminalize the fraudulent transmission of STIs would be a mistake. Recall that nearly half of participants judged the *HIV With Transmission* case as consensual.²⁷⁰ Their written responses showed that they thought the victim had not been “intentionally deceived as to the nature of the act”—to them, the nature of the act was *sex*, and the victim knowingly agreed to have sex. She just did not agree to the HIV part. Thus, many laypeople would refuse to treat intentional transmission cases as assault, despite the legislature’s intention. Lawmakers would do well to take account of folk psychology, including how laypeople are inclined to delineate “acts” and their essential natures.

C. Laypeople as Subjects: Fair Notice

In general, if the law is to offer guidance for how people should behave, it must be made known to the people it may be applied to.²⁷¹ Take the example of Iowa’s kidnapping statute, which prohibits the “removal of a person without the consent of the person removed.”²⁷² A kidnapping-by-deception case that came before the Iowa Supreme Court illustrates the problem posed by commonsense consent.²⁷³

In *State v. Ramsey*, defendant Carl Ramsey approached a truck driver named James Clark, and asked for a ride to a party three miles away. Clark “willingly obliged” and accepted gas money in exchange for giving Ramsey a lift.²⁷⁴ Clark later testified that “at no time” during the drive “was he threatened with a weapon or made to feel in any danger.”²⁷⁵ Clark did not realize until they reached the “party” that the whole thing had been a ruse to lure him to a remote location where Ramsey planned to attack him and steal his car. Ramsey was charged with first-degree kidnapping in addition to attempted murder and robbery.

²⁶⁸ SCHULHOFER, *supra* note 119, at 159.

²⁶⁹ ARIZ. REV. STAT. ANN. § 13-1406A (2001).

²⁷⁰ See *supra* Part II.B.1.

²⁷¹ See, e.g., Bruce Celano, *Publicity and the Rule of Law*, in 2 OXFORD STUDIES IN PHILOSOPHY OF LAW (2013).

²⁷² IOWA CODE ANN. § 710.1.

²⁷³ *State v. Ramsey*, 444 N.W.2d 493 (Iowa 1989).

²⁷⁴ *Id.* at 493.

²⁷⁵ *Id.*

Clearly, Clark did not consent to being attacked and robbed, but the question raised by the first-degree kidnapping charge was whether Clark was “removed without consent” when he, under false pretenses, “willingly obliged” Ramsey’s request to be driven to a location three miles away in exchange for a few dollars in cash. Ramsey argued that Clark voluntarily drove to the scene, and that because the word “deception” does not appear in Iowa’s kidnapping statute, Clark consented to his removal. But the state high court disagreed. “Whether the removal was accomplished by force or artful deception, the end result remains the same,” it declared.²⁷⁶

Ramsey is not a sympathetic defendant. He knew he was doing something illegal when he lured Clark to the remote location. But a layperson would not see this kidnapping-by-deception as the same offense as kidnapping-by-force. The court, in arguing that the offense is the same whether accomplished by fraud or force, endorsed the canonical understanding of consent, not the lay understanding.

To avoid the confusion, legislatures that seek to treat deception cases as absence-of-consent cases should single out deception for special doctrinal treatment. For example, Iowa’s false imprisonment statute is admirably clear. It prohibits a person from “intentionally confin[ing] another against the other’s will” and specifies that confinement occurs “when the person’s freedom to move about is substantially restricted by force, threat, or deception.”²⁷⁷

D. Laypeople as Victims: Vulnerability to Deception

More broadly, the findings from these studies matter for citizens beyond their roles as jurors and would-be defendants. People make judgments about consent every day, in their ordinary capacities. These results suggest that they may fail to assert themselves when they are exploited, manipulated, or deceived. One participant spontaneously shared a story from his own experience, in which he recognized that he may have had legal recourse for being deceived, but did not feel entitled to it given that, in his view, he had only himself to blame:

- I’ve actually had a similar scenario happen to me where the doctor lied about the procedure being covered when it wasn’t. Though I may have been angry and might have grounds to contact an attorney and start a suit, I still

²⁷⁶ *Id.*

²⁷⁷ IOWA CODE ANN. § 710.7.

consented to the procedure of my own free will. I feel similarly about [Marvin's] situation. He really did make a decision to have the surgery despite being deceived. He should have contacted the insurance company to double-check if he was concerned he couldn't cover the costs.

Psychologists who study the processes of naming, blaming, and claiming an injury find that most victims who suffer legal injuries choose not to pursue claims to which they are entitled.²⁷⁸ This often occurs because they do not recognize themselves as victims (naming) or they fault themselves for their injury rather than the injurer (blaming).²⁷⁹ The findings reported here raise the prospect of a similar dynamic with respect to fraud: individuals who are deceived may fail to assert their legal rights if they believe—mistakenly in some cases—that have waived them by giving valid consent.²⁸⁰ They may fault themselves for their naiveté, rather than faulting those who exploited their trust. In such cases, their folk moral theory leads them to see themselves as in control and therefore to blame.

CONCLUSION

This Article has discovered a new fact about our moral psychology: many people—perhaps most—think that deceived individuals grant meaningful consent. Across five studies and over two dozen scenarios, it has demonstrated this phenomenon in several legally salient domains: sex, medicine, contracts, research, and warrantless searches by police.

It has largely ruled out the easiest explanations for this finding. Participants are not applying a technical or literal understanding of consent instead of a normative one. Indeed, participants' responses show that many of them are reasoning morally and are concluding that deceived individuals—unlike coerced or intoxicated individuals—exercise meaningful choice when they “consent” to the offer in front of them.

²⁷⁸ See, e.g., William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980–1981); David M. Engel, *Lumping as Default in Tort Cases: The Cultural Interpretation of Injury and Causation*, 44 Loy. L. A. L. Rev. 33 (2010); JENNIFER K. ROBBENOLT & VALERIE P. HANS, *THE PSYCHOLOGY OF TORT LAW* 17 (2016).

²⁷⁹ *Id.*

²⁸⁰ This argument is elaborated in a separate paper. Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine Print Fraud*, 72 STAN. L. REV. (forthcoming 2020) (presenting four original studies suggesting that victims of fraud are deterred from pursuing legally valid claims because they believe they have consented to, and are bound by, contracts that are signed as a result of deception).

Commentators who have reckoned with the law's uneven treatment of deception cases have generally assumed that the problem is one of sex exceptionalism. They think it is obvious, and uncontroversial, that deception invalidates consent in all other contexts besides sex.²⁸¹ This Article has shown, on the contrary, that there is something fundamental about consent that makes it seem unperturbed by deception—and this intuition extends beyond sexual consent. It thus offers a new explanation for the puzzle of why deception cases are given inconsistent doctrinal treatment. Its account is based not in rape exceptionalism or sexual moralism, but in broader folk morality.

Beyond the puzzle, these findings carry important implications for law, which still endorses the canonical rule in many areas. Where the law treats deception as negating consent, we can expect a stark mismatch between lay and legal views. This matters because lay decision-makers serve as fact-finders in cases involving consent, and may apply commonsense consent in situations where the law calls for canonical consent. Laypeople are also would-be defendants who may fail to realize that victims tricked into assenting will be understood to have acted “without consent.” Lawmakers would do well to take account of commonsense consent when crafting jury instructions and legal rules that are meant to put would-be defendants on notice.

The findings also suggest that victims of fraud may fail to seek recourse, mistakenly believing they have waived their rights. When they do pursue their legal claims, the law will sometimes fail to protect them, because the law occasionally deviates from the canonical view and embraces the commonsense understanding of consent.

Consent touches numerous areas of law and indeed many areas of life. This Article has taken a first step toward understanding how the public views this ubiquitous moral concept. We have learned that large swaths of the public reject the “settled” and “well established” understanding of consent.²⁸²

* * *

²⁸¹ *E.g.*, Jonathan Herring, *Mistaken Sex*, 2005 CRIM. L. REV. 511, 517 (“Few people would have difficulties in saying that a doctor who misled a patient into consenting to an operation is acting without her consent and had committed a criminal offence. We can take a similar approach to sexual relations.”).

²⁸² *Supra* note 134.

APPENDICES

A. Appendix A: Study Stimuli

1. Study 1

Single (Female Victim)²⁸³

Ellen and Frank meet in a night class and have several dates. Ellen makes it clear that she refuses to sleep with married men. When asked, Frank lies and says that he is not married. Ellen agrees to sleep with Frank.

Single (Male Victim)²⁸⁴

Frank and Ellen meet in a night class and have several dates. Frank makes it clear that he refuses to sleep with married women. When asked, Ellen lies and says that she is not married. Frank agrees to sleep with Ellen.

Criminal Record²⁸⁵

Kevin wants to sleep with Ann. Ann has said that she does not want to date or sleep with any man who has a criminal record. When she asks Kevin whether he has a criminal record, he lies and says no, even though he does have a criminal record. Under these circumstances, Ann sleeps with Kevin.

College²⁸⁶

Kevin wants to sleep with Ann. Ann has said that she does not want to date or sleep with any man who went to community college. When she asks Kevin whether he went to community college, he lies and says no, even though he did go to community college. Under these circumstances, Ann sleeps with Kevin.

²⁸³ The demographics of the sample ($n = 100$) were as follows: 44% female, ages 19–67 years, median age = 29 years. Participants' education levels ranged from high school to post-college degrees, with 82% having completed some college or more. Participants were left-leaning overall ($M = 3.59$, $SD = 1.61$) on a 1–7 Likert scale (1 = Extremely liberal; 7 = Extremely conservative), with 46% identifying as slightly to extremely left-of-center, 30% identifying as moderate, and 24% identifying as slightly to extremely right-of-center. Approximately 33% reported an annual income of less than \$30,000, 20% reported making over \$75,000, and the remaining 47% reported making between \$30,000 and \$75,000. There was no significant relationship between consent judgments and participant gender, age, race, income, education, or political views. For all other studies, the demographic information is reported in Appendix B.

²⁸⁴ 56% female, ages 19–82 years, median age = 34.5 years; 79% had some college or more education; political views were left-leaning ($M = 3.05$, $SD = 1.55$). Approximately 40% reported an annual income of less than \$30,000 and 6% reported making over \$75,000.

²⁸⁵ 46% female; ages 19–61 years, median age = 29.5 years; 85% had some college or more education. Approximately 32% reported an annual income of less than \$30,000 and 22% reported making over \$75,000.

²⁸⁶ 44% female; ages 19–55 years, median age = 31 years; 96% had some college or more education. Approximately 34% reported an annual income of less than \$30,000 and 17% reported making over \$75,000.

Bisexual²⁸⁷

Sean wants to sleep with Christina. Christina has made it clear that she would never date or sleep with a bisexual—that is, someone who is attracted to men as well as women. When she asks Sean about his sexuality, Sean lies. He says he is straight, even though he has had boyfriends in the past and is attracted to both men and women. Under these circumstances, Christina sleeps with Sean.

Immigrant²⁸⁸

Allison and Rafael meet at the bakery where Rafael works and go on several dates. Allison opposes illegal immigration and has said that people in the United States illegally “should get out of our country and go back to where they came from.” She has made it clear that she does not want to date or sleep with any man who is in the country illegally. When she asks Rafael about his immigration status, Rafael lies. He says he is here legally, even though he is in the country illegally. Under these circumstances, Allison sleeps with Rafael.

Veteran²⁸⁹

Sean wants to sleep with Christina. Christina has made it clear that she would never date or sleep with a veteran—that is, anyone who has served in the military or participated in warfare. When she asks Sean his background, Sean lies. He says he has never served in the military, even though he did two tours in Iraq as a marine. Under these circumstances, Christina sleeps with Sean.

Views on Same-Sex Marriage²⁹⁰

Allison and Rafael meet at the bakery where Rafael works and go on several dates. Allison strongly supports gay rights and has said that people who oppose same-sex marriage are “ignorant bigots.” She has made it clear that she does not want to date or sleep with any man who opposes same-sex marriage. When she asks Rafael about his views on gay marriage, Rafael lies. He says he supports gay marriage, even though he is firmly against it and refuses to bake wedding cakes for same-sex weddings. Under these circumstances, Allison sleeps with Rafael.

HIV With Transmission vs. HIV With No Transmission²⁹¹

Allison and Rafael meet at the bakery where Rafael works and go on several dates. Rafael proposes that they sleep together. Allison says she will not sleep with any man who has HIV. She asks Rafael whether he has HIV. Rafael lies

²⁸⁷ 41% female; ages 19–41 years, median age = 31 years; 84% had some college or more education. Approximately 29% reported an annual income of less than \$30,000 and 19% reported making over \$75,000.

²⁸⁸ No demographic data were collected.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ 63% female; ages 19–60 years, median age = 31 years; 82% had some college or more education. Approximately 29% reported an annual income of less than \$30,000 and 19% reported making over \$75,000.

and says he has been tested recently and is perfectly clean. In reality, Rafael knows he is HIV-positive. Under these circumstances, Allison agrees to sleep with Rafael.

HIV With Transmission condition: After they have sex, Allison contracts HIV from Rafael.

HIV With No Transmission condition: After they have sex, Allison does not contract HIV from Rafael.

Elective Surgery²⁹²

Marvin has been in physical therapy for ankle pain and is contemplating undergoing elective surgery to repair the tendon. He cares deeply about whether the surgery is covered by his insurance; he would refuse to have the surgery if he would have to pay out of pocket. Marvin's doctor lies to him and says his insurance will cover the procedure, when really the doctor knows that Marvin will need to pay out of pocket. Marvin says yes to the surgery.

Surgery Results Unspecified vs. Surgery Results in No Infection vs. Surgery Results in Infection²⁹³

Nicholas has been in physical therapy for ankle pain and is contemplating undergoing elective surgery to repair the tendon. The ankle surgery carries the risk of causing an infection: 1 in 4,000 patients who receive the surgery will develop an infection due to the operation. Nicholas's doctor informs him that he has a 1 in 4,000 chance of developing an infection due to the surgery. Nicholas decides he is okay with that level of risk.

Nicholas next raises a separate concern. He cares deeply about whether the surgery is covered by his insurance; he would refuse to have the surgery if he would have to pay out of pocket. Nicholas's doctor lies to him and says his insurance will cover the procedure, when really the doctor knows that Nicholas will need to pay out of pocket. Nicholas says yes to the surgery.

Unspecified condition: [blank]

Results in No Infection condition: After the surgery, Nicholas's ankle pain completely disappears. It appears that the surgery went smoothly, and that Nicholas did not develop an infection.

Results in Infection condition: After the surgery, Nicholas's ankle pain gets worse. It appears that the sometime during the surgery, Nicholas developed an infection. He will need antibiotics and a month of rest before he can walk again.

Warrantless Search²⁹⁴

²⁹² 49% female; ages 19–73 years, median age = 33 years; 82% White, 7% Asian, 6% Black, 3% Hispanic, 1% Other; 85% had some college or more education. Approximately 24% reported an annual income of less than \$30,000 and 30% reported making over \$75,000.

²⁹³ 49% female; ages 18–77 years, median age = 33 years; 81% White, 6% Asian, 7% Black, 5% Hispanic, 1% Other. 81% had some college or more education. Approximately 29% reported an annual income of less than \$30,000 and 24% reported making over \$75,000.

²⁹⁴ 51% female; ages 18–50 years, median age = 29 years; 75% White, 8% Asian, 9% Black, 7% Hispanic, 2% Other. 85% had some college or more education. Approximately 30% reported an annual income of less than \$30,000 and 21% reported making over \$75,000.

Johnny is at home in his apartment when he hears a knock on the door. Two men are standing outside. They say, "Police here. Can we come in and look around?" Johnny asks through the door, "What are you looking for?"

One of the police officers says, "We are just looking for drugs and drug paraphernalia. We got an anonymous call reporting drug dealing in this apartment."

This statement a lie. In truth, the police officers are looking for illegal firearms. They had received an anonymous tip about illegal weapons in the apartment.

Johnny knows that he has no drugs or drug paraphernalia in the apartment. He does, however, have two guns under his bed that he bought illegally. The reason he wants to know what the police are searching for is that he would say no to a search if he thought they were looking for firearms.

Under these conditions, Johnny lets the police in to search his apartment.

Warrantless Search (Find Child Pornography vs. Find Bootleg Recording)²⁹⁵

William is sitting at home reading his mail when he hears a knock at the door. Two police officers are standing outside. They say, "Police here. Can we come in and look around?" William asks through the door, "What are you looking for?" One of the officers says, "We are looking for illegal firearms and other weapons. We got an anonymous call reporting firearm trafficking in this apartment." This statement is a lie. In reality, the police officers are looking evidence on William's laptop of drug trafficking and other illegal online activity. They had received an anonymous tip that William is an online drug dealer for a "dark web" drug marketplace. William does not have any firearms or other weapons in his apartment. He does, however, have some things on his computer he does not want the police to see. The reason he wants to know what the police are searching for is that he would say no to the search if he thought they were going to look through his computer. William says, "I don't have any weapons. Is that all you're looking for?" The police officer replies, "Yes, that's all. If we don't find any weapons after taking a look around, we'll leave." William decides to let the police in.

The police search William's apartment, find his computer, and open it up to look through his folders and web browsing history. They don't find any evidence of drug dealing or dark web activity, which is what they were searching for.

Find Child Pornography condition: The police do, however, find child pornography in William's trash folder. William apparently made nude films of his 8-year-old stepdaughter and two of her classmates, and sold the videos online.

Find Bootleg Recording condition: The police do, however, find an illegal recording of a Broadway musical in William's trash folder. William apparently snuck a video camera into a live performance, recorded the show, and sold the videos online.

"You are in serious trouble," the officers tell William, as they confiscate

²⁹⁵ No demographic data were collected.

his laptop.

Research Purpose²⁹⁶

Dr. Parker is conducting a scientific experiment designed to test whether men are innately better than women at mathematical reasoning.

Dr. Parker hopes Deborah will agree to be a participant in this research. Deborah asks about how long the study will take, how much it will pay, and whether she faces any risks. Dr. Parker answers all of these questions honestly. He describes to her that for the study, she will complete a math quiz while undergoing a brain scan.

Deborah asks what the data will be used for. She makes it clear that she only wants to do the study if she will be contributing to an important cause such as finding a cure for a serious illness.

Dr. Parker lies and says he is studying Alzheimer's disease and her participation could eventually help researchers find a cure for the disease. He hides the fact that the research is about gender differences in mathematical ability, because he knows that Deborah will refuse to participate if she knew what her data would be used for.

Deborah participates in the study.

Did Deborah consent to undergo the brain scan?

Termites²⁹⁷

Mr. and Mrs. Jones are looking to buy a house. After picking out a house they like, Mr. and Mrs. Jones ask the owner if the house has a termite problem. The house has a terrible termite problem, but the owner lies. He knows that Mr. and Mrs. Jones will not buy the house if they hear about the termite problem, so he tells the Joneses that there is no termite problem. The Joneses and the owner sign a contract for Mr. and Mrs. Jones to buy the house for \$300,000.

2. Study 2

Study 2a (n = 101)²⁹⁸

Emily and her boyfriend John have been dating for nearly a year. John often spends the night at Emily's apartment.

John's job frequently requires him to travel. Most recently, he spent several weeks in Miami, an area with the Zika virus.

Zika is a contagious virus that is transmitted by mosquitoes. Adults who have been infected with Zika often do not have symptoms and very rarely experience serious health complications. The real problem with Zika is that it causes severe birth defects in fetuses, including defects in the brain, eyes, and

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ The demographics of the sample were as follows: 47% female; 75% White, 6% Black, 8% Asian, 11% Hispanic; ages 20–77 years, median age = 34 years; 83% completed some college or more; 31% make less than \$30,000, 28% over \$75,000. Participants were left-leaning overall ($M = 3.64$, $SD = 1.72$).

ears. Because of this, pregnant women are advised not to travel to areas with Zika. In addition, medical experts now believe that Zika can be transmitted sexually. This is true even if the infected person does not have any symptoms.

Miami, where John traveled for business, used to be on the “Red List” of high alert Zika zones, but it was taken off several months before his trip. When he left for his trip, it had been many weeks since officials had identified any new cases of Zika transmission in Miami.

Emily was not planning to get pregnant any time soon, but she still wanted John to get tested for Zika. Before he left she asked him to get tested once he got back from his trip.

Shortly after John returned from his business trip, he spent the evening at Emily’s place. That night, Emily was too tired to make love. John asked her if she would instead like a “surprise in the morning.” For the couple, a “surprise in the morning” is what they call it when John wakes Emily up by making love to her.

Emily thought about whether she wanted John to wake her up by making love to her. She replied, “No surprise in the morning if you haven’t gotten tested yet. But yes if you got tested and are clean.”

No Agreement condition: John said, “I still haven’t gotten tested yet.” In reality, he had not gotten tested. He was telling the truth. Emily said, “OK, then no. Don’t give me a surprise in the morning.”

Deceived Agreement condition: John said, “I’ve been tested and I am clean.” In reality, he still hadn’t gotten tested. He was lying. Emily said, “OK, then yes. Give me a surprise in the morning.”

Shortly after this conversation, they both fell asleep. The next morning, John woke Emily up with a “surprise in the morning”—that is, by having sex with her—even though he had not yet been tested for Zika.

Study 2b (n = 101)²⁹⁹

Sophia has a bunion on her right foot and has been wearing splints to correct the problem. She is contemplating undergoing elective surgery to realign the joint.

Sophia will already be having surgery to address a torn ligament in her left ankle—an unrelated problem on the other leg. Her surgeon mentions that since she is already having the ankle surgery, it would be easy for him to also fix her bunion during the same operation.

Sophia wants to have her bunion fixed, but she also cares deeply about whether the bunion surgery is covered by her insurance. She explains to her surgeon that she wants to have the bunion surgery if it is covered by her insurance, but she would refuse to have it if she would have to pay for it out of pocket.

No Agreement condition: Sophia’s surgeon informs her that her insurance will not cover the bunion procedure. He knows that she will need to pay out of pocket. Sophia says no to the bunion procedure. She says the doctor may not fix her bunion while she is already under anesthesia for her ankle.

Deceived Agreement condition: Sophia’s surgeon lies to her and says her

²⁹⁹ No demographic data were collected for this study.

insurance will cover the bunion procedure, when really he knows that she will need to pay out of pocket. Sophia says yes to the bunion procedure. She says the doctor may fix her bunion while she is already under anesthesia for her ankle.

Imagine that during Sophia's ankle surgery, the doctor also performs the bunion procedure, knowing that it will cost her out of pocket.

3. Study 3

Study 3a ($n = 111$)³⁰⁰ randomly assigned participants to read either *Married* or *Secret*. Study 3b ($n = 151$)³⁰¹ added a third condition: *Drunk*.

Married

Kevin wants to sleep with Ann. Ann has said that she does not want to date or sleep with any man who is married. When she asks Kevin whether he is married, he lies and says no, even though he is married. Under these circumstances, Ann sleeps with Kevin.

Secret

Kevin wants to sleep with Ann. Ann had previously shared an embarrassing secret with Kevin. Kevin now says he will spread Ann's secret unless she will sleep with him. Under these circumstances, Ann sleeps with Kevin.

Drunk

Kevin wants to sleep with Ann. Kevin sees Ann at a college party and buys her several drinks throughout the night. By the end of the night, she is extremely drunk and can hardly stand up on her own. When she speaks, her words are slurred. Kevin asks her back to Kevin dorm room. Under these conditions, Ann agrees to sleep with Kevin.

4. Study 4

Study 4 ($n = 152$)³⁰² randomly assigned participants to one of three sex-by-deception scenarios: *Twin Brother*, *HIV Status*, or *Married*.

³⁰⁰ The demographics of the sample were as follows: 47% female; 73% White, 9% Black, 11% Asian, 5% Hispanic, 3% Other; ages 18–73 years, median age = 29 years; 87% completed some college or more; 31% make less than \$30,000, 22% over \$75,000. Participants were left-leaning overall ($M = 3.26$, $SD = 1.76$). There was no significant relationship between consent judgments and participant gender, age, race, income, education, or political views.

³⁰¹ The demographics of the sample were as follows: 40% female; 75% White, 7% Black, 7% Asian, 10% Hispanic, 1% Other; ages 18–73 years, median age = 33 years; 77% completed some college or more; 33% make less than \$30,000, 24% over \$75,000. Participants were left-leaning overall ($M = 3.61$, $SD = 1.76$).

³⁰² No demographic data were collected for this study.

Twin Brother

Mike and Alexandra meet in a night class and go on several dates. Mike proposes that they sleep together. Alexandra agrees. She comes over to Mike's apartment, where he lives with his identical twin brother Barry. She spends the night with Mike.

The next morning, while Alexandra is still sleeping, Mike leaves the house to get coffee. His brother Barry gets into bed with Alexandra, pretending to be Mike. When Alexandra wakes up, Barry asks her if she'd like to have sex. Thinking that Barry is actually Mike, she says yes.

HIV Status

Barry and Alexandra meet in a night class and go on several dates. Barry proposes that they sleep together. Alexandra says that she will not sleep with any man who has HIV. She asks Barry whether he has HIV. Barry lies and says he has been tested recently and is perfectly clean. In reality, Barry knows he is HIV-positive. Under these conditions, Alexandra agrees to spend the night with Barry.

The next morning, while Alexandra is still sleeping, Barry leaves the house to get coffee. When he gets back, he gets into bed with Alexandra. When Alexandra wakes up, Barry asks her if she'd like to have sex. Thinking Barry is not HIV-positive, she says yes.

Married

Barry and Alexandra meet in a night class and go on several dates. Barry proposes that they sleep together. Alexandra says that she will not sleep with any man who is married. She asks Barry whether he is married. Barry lies and says he is unmarried, even though in reality, he is married. Under these conditions, Alexandra agrees to spend the night with Barry.

The next morning, while Alexandra is still sleeping, Barry leaves the house to get coffee. When he gets back, he gets into bed with Alexandra. When Alexandra wakes up, Barry asks her if she'd like to have sex. Thinking Barry is unmarried, she says yes.

5. Study 5

Study 5 ($n = 605$)³⁰³ used a 2 (Material Lie vs. Essential Lie) x 3 (Medical Exam vs. Contract vs. Tattoo) factorial design. Participants were assigned to one of six conditions.

Medical Exam

³⁰³ The demographics of the sample were as follows: 51% female; 74% White, 10% Black, 8% Asian, 5% Hispanic, 2% Other; ages 18–87 years, median age = 35 years; 83% completed some college or more; 23% make less than \$30,000, 28% over \$75,000. Participants were left-leaning overall ($M = 3.68$, $SD = 1.74$).

Material Lie	Essential Lie
<p>Imagine Brett is volunteering to help medical students learn how to practice medicine. Brett chooses to volunteer because he feels strongly about making a difference. Whenever he thinks about how he should spend his time, he prioritizes activities that will have the most impact.</p> <p>As a volunteer, Brett's job is to sit still while an experienced professor of medicine performs an exam on him in front of a class of medical students.</p>	
<p>Imagine that the professor who will perform the exam tells Brett beforehand that the exam <u>will teach the students new material that will help them learn how to be doctors.</u></p> <p>But when Brett gets on stage in front of the class of medical students, <u>it turns out that the students have already learned about the content being covered.</u></p> <p>As he gets examined, Brett realizes that the professor lied about <u>whether the students will learn anything from watching him be examined.</u></p>	<p>Imagine that the professor who will perform the exam tells Brett beforehand that the exam <u>will be of his abdomen.</u></p> <p>But when Brett gets on stage in front of the class of medical students, <u>the professor examines Brett's ears.</u></p> <p>As he gets examined, Brett realizes that the professor lied about <u>what part of the body the exam will be of.</u></p>
<p>“There was consent in this situation.” (7-point Likert scale Agree/Disagree)</p>	
<p>If you had to guess, how much do you think it mattered to Brett <u>whether the exam done on him involved new material that helped the medical students learn, versus was old material that taught them nothing?</u></p> <p>(7-point Likert scale: Matters not at all /Matters a great deal)</p>	<p>If you had to guess, how much do you think it mattered to Brett <u>whether the exam done on him was of his abdomen, as opposed to his ears?</u></p> <p>(7-point Likert scale: Matters not at all /Matters a great deal)</p>

Material Lie	Essential Lie
<p>Imagine that Steve has a loyalty card at a store called Mickey's. He is trying to spend enough money to qualify for a travel reward points promotion, so that he can get a free trip to Europe. If Steve can spend \$1000 on certain kinds of purchases at Mickey's in the first three months of having the loyalty card, he will earn enough points for the trip to Europe. Steve is close to getting to \$1000, so he decides to go to Mickey's that weekend and order a \$50 toy to donate to a toy drive.</p>	
<p>The salesperson tells Steve that <u>the purchase qualifies for the travel reward points promotion.</u></p> <p>Later, after the package arrives, Steve realizes that <u>the purchase did not qualify, because weekend purchases do not qualify.</u></p> <p>Steve looks back at the contract he signed the previous weekend with Mickey's and realizes that the salesperson lied to him about whether the \$50 order <u>qualified for the travel reward points promotion.</u></p>	<p>The salesperson tells Steve that <u>he will be receiving a bicycle in the mail.</u></p> <p>Later, after the package arrives, Steve realizes that <u>the purchase was of a camera.</u></p> <p>Steve looks back at the contract he signed the previous weekend with Mickey's and realizes that the salesperson lied to him about whether the \$50 order <u>was for a bicycle or a camera.</u></p>
<p>“There was consent in this situation.” (7-point Likert scale Agree/Disagree)</p>	
<p>If you had to guess, how much do you think it mattered to Steve whether the toy he ordered for the toy drive that weekend <u>qualified for the travel reward points promotion?</u></p> <p>(7-point Likert scale: Matters not at all /Matters a great deal)</p>	<p>If you had to guess, how much do you think it mattered to Steve whether the toy he ordered for the toy drive that weekend <u>was a bicycle or a camera?</u></p> <p>(7-point Likert scale: Matters not at all /Matters a great deal)</p>

Tattoo

Material Lie	Essential Lie
<p>Imagine there is a religion called Oneia. In this religion, having a tattoo on your shoulder is considered offensive. Amber lives in a city with a large Oneian population. Amber is not herself Oneian, but many of her clients at work are.</p> <p>At the tattoo parlor, the tattoo artist tells Amber that Oneians are offended by lower back tattoos. Unbeknownst to Amber, the artist is lying: Oneians are offended by shoulder tattoos. He gives her a tattoo on her shoulder.</p> <p>When Oneians see Amber's shoulder, they are offended.</p>	<p>Imagine that Amber is seeking to get a tattoo. At the tattoo parlor, the tattoo artist tells Amber that he will give her a tattoo of the Japanese word for "wisdom."</p> <p>Unbeknownst to Amber, the artist is lying: he plans to give her a tattoo of the Chinese word for "wisdom."</p> <p>He gives her a tattoo of the Chinese word for "wisdom."</p>
<p>"There was consent in this situation." (7-point Likert scale Agree/Disagree)</p>	
<p>If you had to guess, how much do you think it mattered to Amber <u>whether the part of the body where Oneians find tattoos offensive is the shoulder (where she got a tattoo) versus some other part of the body?</u></p> <p>(7-point Likert scale: Matters not at all /Matters a great deal)</p>	<p>If you had to guess, how much do you think it mattered to Amber whether <u>the tattoo was the Chinese word for "wisdom" or the Japanese word for "wisdom"?</u></p> <p>(7-point Likert scale: Matters not at all /Matters a great deal)</p>

Appendix B: Demographic Differences in Perceptions of Consent

No consistent differences in judgments of consent based on participants' gender, age, race/ethnicity, education, household income, or political views were observed. This Appendix reports all demographic covariates that significantly predicted perceptions of consent, with the caveat that one must be cautious about over-interpreting these results. By random chance, approximately 1 in 20 tests will register as statistically significant at the $\alpha = .05$ level—even if there is no relationship whatsoever between the variables. Because over two dozen scenarios were administered and at least five demographic covariates were examined for each, we should expect to see false positives.

Gender differences were observed for *Criminal Record*, *HIV With Transmission*, and *HIV With No Transmission*. Male participants perceived more consent than female participants in *Criminal Record*, whereas the reverse was true in the other two vignettes.

Age differences were observed for *Single (Male Victim)*, *Surgery Results Unspecified*, *Surgery Results in No Infection*, and *Surgery Results in Infection*. Older adults perceived more consent than younger adults.

Lower-income participants perceived more consent in *Bisexual* than did higher-income participants. Participants with fewer years of education perceived less consent in *Immigrant* and *Research Purpose*.

Finally, no significant differences by race/ethnicity were observed when Black/African-American, Hispanic/Latino, Asian/Asian-American/Pacific Islander, and Other were analyzed as separate groups. If these groups are pooled together as a single “nonwhite” category, significant differences emerge for the HIV vignettes. White participants perceive less consent than nonwhite participants in these vignettes.

Appendix C: Pilot Tests and Supplemental Analyses

Participants ($n = 100$) rated ten items on a scale from 0 (*Not morally wrong at all*) to 100 (*Completely despicable*). All participants rated all items, presented in random order.

For each of the following questions, imagine that John wants to sleep with Ann. On a scale from 0 to 100, please rate how morally wrong it would be if John did the following things to Ann in an effort to try to get her to sleep with him.

Table 3.

Means and Standard Deviations of Moral Wrongness Pre-test Items

Pre-Test Items	<i>M</i>	<i>(SD)</i>
Pretend to have tragically lost a child, when in reality he has never been a father.	93.37	(12.33)
Say he will post nude pictures of Ann on the internet, unless she will sleep with him.	93.23	(15.52)
Lie about being married—that is, say he is unmarried even though he has a wife.	92.44	(12.96)
Say he will spread Ann’s embarrassing secret unless she will sleep with him.	90.53	(16.97)
Pretend not to have any children, even though he has a child from a previous relationship.	86.51	(17.89)
Lie about being transgender—that is, he was born female but he pretends to have been born male.	83.44	(22.14)
Say he will not drive Ann home from dinner, unless she will sleep with him.	81.31	(21.95)
Say he will break up with Ann unless she will sleep with him.	76.66	(27.50)
Say he will not drive Ann to the airport like he previously agreed to, unless she will sleep with him.	76.05	(25.07)
Lie about what his job is.	65.19	(27.06)

Note. Items in red are coercion pre-test items; items in black are deception pre-test items.

A *t*-test confirmed that two actions—lying about being married and threatening to spread Ann’s embarrassing secret—were rated as no different in their moral wrongness.³⁰⁴ The means differed by a mere 1.91 on a scale ranging from 0-100. The 95% confidence interval spans from -4.55 to 0.73.

In Study 3a participants evaluated deceived agreement vs. coerced agreement. In addition to rating whether Ann consented to sex with Kevin, they also rated several additional questions, presented in random order:

1. Did Ann voluntarily have sex with Kevin?
2. Did Ann have sex with Kevin of her own free will?

³⁰⁴ $t_{Welch}(185.13) = .89, p = .37.$

3. Did Ann willingly have sex with Kevin?
4. Did Ann freely choose to have sex with Kevin?
5. Did Ann let Kevin have sex with her?
6. Did Ann give Kevin permission to have sex with her?

Participants largely viewed coercion but not deception as infringing Ann's autonomy. This is consistent with their judgments of "consent." As Table 4 shows, perceptions of voluntariness, free will, willingness, and free choice diverged widely between the two scenarios ($ps < .001$). Perceptions of whether Ann "let" or "permitted" Kevin to have sex with her also showed significant differences, although the divergence is less stark for each of these two questions than the others.

Table 4.

Coercion vs. Deception

	Deception		Coercion	
	<i>M</i>	<i>SD</i>	<i>M</i>	<i>SD</i>
Did Ann have sex with Kevin of her own free will?	84.46	21.88	30.29	32.21
Did Ann freely choose to have sex with Kevin?	82.82	23.13	30.04	32.47
Did Ann willingly have sex with Kevin?	84.30	21.86	28.42	30.29
Did Ann voluntarily have sex with Kevin?	84.89	20.63	33.44	33.38
Did Ann give Kevin permission to have sex with her?	81.59	23.53	56.53	34.90
Did Ann let Kevin have sex with her?	82.62	24.41	56.55	35.06

Note. All scales ranged from 0 (not at all) to 100 (very much).

Finally, participants were also asked to rate how *wrong* Kevin's behavior was. In other words, participants assigned to read *Married* rated how wrong it was for Kevin to lie about his marital status, while participants assigned to read *Secret* rated how wrong it was for Kevin to threaten to spread Ann's secret.

This measure revealed that stark difference observed between the two scenarios in how participants rated "consent" cannot be explained by differences in how morally repugnant people found Kevin's behavior. A regression analysis indicates that participants' ratings of how wrongful Kevin's behavior was did not significantly predict their consent judgments.³⁰⁵

³⁰⁵ $b = -.37$, $SE = .23$, $p = .10$. In other words, the correlation between judgments of consent and judgments of wrongfulness of Kevin's behavior was only $-.16$ and was not

Moreover, when participants' wrongfulness judgments are included in the regression equation along with condition (deception vs. coercion), the resulting model demonstrates that condition is still just as strongly related to consent judgments even after adjusting for the perceived wrongfulness of Kevin's behavior.³⁰⁶ Thus, the moral wrongness of threatening (vs. lying) does not explain why participants saw less consent in the coercion case.

statistically significant ($p = .10$).

³⁰⁶ Without adjusting for wrongfulness, condition is a significant predictor of consent judgments, with deception being associated a 44-point increase over coercion, $b = 44.35$, $SE = 5.98$, $p < .001$. After adjusting for wrongfulness, the relationship between condition and consent judgments remained significant, with deception being associated with a 43-point increase in consent judgments, $b = 43.02$, $SE = 6.55$, $p < .001$.