

Solving the Myth of Rape-by-Deception: Based on the Restatement of Sexual Autonomy

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How to cite this paper: Zhuang, J., & Liu, X. (2022). Solving the Myth of Rape-by-Deception: Based on the Restatement of Sexual Autonomy. *Beijing Law Review*, 13, 673-696.

<https://doi.org/10.4236/blr.2022.133044>

Received: August 24, 2022

Accepted: September 27, 2022

Published: September 30, 2022

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Abstract

When the defendant induces a woman to have sex with him by deception, whether he constitutes the crime of rape is a difficult problem that plagues the theory and practice of criminal law. In this regard, common law theories put forward the factum/inducement dichotomy, the theory of right to self-possession and the theory of sexual autonomy in a broad sense, but none of them can reasonably solve this problem. The purpose of this paper is to demonstrate which kind of deception constitutes a criminal offence of rape. We believe that, the crux of the matter lies in the lack of a clear definition of the concept of sexual autonomy. In legal theory, sexual autonomy should be defined as the woman's self-determination of the intimacy of sexual activity with a particular person. The intimacy of sexual activity includes three dimensions: the degree of sexual intimacy, intimacy privacy and intimacy taboo. Only when the defendant deceives the victim about the relevant facts of one of these three dimensions does he constitute the crime of rape. In conclusion, when the deception in a rape-by-deception case is about the degree of sexual intimacy, intimacy privacy or intimacy taboo, the defendant constitutes rape.

Keywords

Rape-by-Deception, Sexual Autonomy, Intimacy of Sexual Activity

1. Introduction

The problem of rape-by-deception is that, if a defendant intentionally fabricates facts or conceals the truth in order to obtain a woman's consent to sexual activity, and the woman would not give consent if she knew the truth, what kind of deception will make him guilty of rape? This problem is not only a vague issue in Chinese criminal law, but also controversial in the criminal law of the common law system (Chen, 2022; He, 2012; Rubinfeld, 2013; Chiesa, 2017). As is gener-

ally accepted, impersonating a woman's husband to obtain her consent to sex intercourse would constitute the crime of rape, while impersonating a Yale graduate would not. The essential difference between these two situations is not clear, because in both cases the victim would not consent to the sexual activity as long as she knew the truth. This theoretical ambiguity has further created controversy in other rape-by-deception cases. For example, it is highly controversial whether the defendant is guilty of rape in the following situations: Arab men pretending to be Jewish to have sex with Jewish women, concealing sexually transmitted diseases to have sex with others, secretly taking off condoms when having consensual sex (Katsampes, 2017; Gross, 2015). This ambiguity and controversy can not be resolved through the provisions themselves, because no matter in Chinese criminal law or in the criminal law of the common law system, there is no clear definition of what kind of deception constitutes rape. Obviously, not all deceptions lead to rape. This problem requires a theoretical discussion: what kind of deception would make the defendant guilty of rape?

This article is mainly based on Chinese criminal legislation and judicial practice to explore the boundary of rape-by-deception, but in terms of theoretical origins and case materials, it will also take into account the history and recent development of the common law system.

In the second part, we will first review the ambiguity of rape-by-deception problem in Chinese doctrine and examine the resulting inconsistencies in judicial practice. We will point out that there is no consistent and systematic approach to the definition of rape-by-deception in judicial theory and practice in China.

In the third part, we will try to analyze the common law theory's solution to this problem. There are three relatively influential theoretical schemes here, one is the factum/inducement dichotomy derived from traditional case law, the second is the theory of right to self-possession proposed by Professor Rubinfeld from Yale Law School, and the third is the theory of sexual autonomy in a broad sense, proposed from a feminist perspective. We will point out that these theories are either logically unjustifiable or seriously unreasonable in their conclusions.

The fourth part is the argumentation part of this paper. The ambiguity of rape-by-deception in academic and judicial practice stems from the ambiguity of people's understanding of sexual autonomy. Sexual autonomy should not simply be understood as a woman's freedom to decide to have sex, but should be understood as a woman's freedom to decide on the degree of intimacy of sexual activity. Sexual intimacy is measured by the risk of sexual activities, which includes natural and normative risk. Intimacy of sexual activity includes three dimensions: the degree of sexual intimacy, intimacy privacy and intimacy taboo. Rape can only be constituted if the victim is deceived in these three dimensions.

In the fifth part, we will classify various cases of rape-by-deception according to the new concept of sexual autonomy. In particular, it analyzes the conviction of the deception of the degree of sexual intimacy, the deception of intimacy pri-

vacy and the deception of intimacy taboo.

2. Theoretical and Practical Dilemmas of Rape-by-Deception Problem in China

2.1. The Theoretical Status of Rape-by-Deception Problem in China

In the Criminal Law of the People's Republic of China, the crime of rape is defined as the rape of a woman by violence, coercion or other means. Whether deception belongs to "other means" is not clear in the legislation. In this regard, the judicial interpretation of the Supreme Court has made relevant supplements. In 1984, the Supreme People's Court and the Supreme People's Procuratorate issued *The Answer to Several Questions Regarding the Specific Application of Law in the Current Handling of Rape Cases* (abolished in 2013), which stipulated that disguising sexual activity as medical treatment constitutes the crime of rape. In 1999, the Supreme People's Court and the Supreme People's Procuratorate issued *The Interpretation on Several Issues Concerning the Concrete Application of Law in Handling Criminal Cases of Organizing and Utilizing Cult Organizations* (abolished in 2017), which stipulated that organizing cult organizations and using superstitious heresies to lure, coerce, deceive or use other means to rape women constitutes the crime of rape. Although the above judicial interpretations have been abolished, since there are no other relevant laws and regulations to guide judicial practice, they still have important guiding significance for the judicial practice of rape-by-deception in China.

General legislation has given great space for theoretical interpretation. In general, Chinese scholars have accepted the concept of sexual autonomy in rape law theory, pointing out that the legal interest violated by rape is "women's sexual autonomy" (Li, 2016), "women's right to self-determination in sexual behavior" (Chen, 2016). The connotation of sexual autonomy is embodied in the idea that sexual wishes can only be considered and expressed voluntarily by women themselves, and cannot be violated or forced. On this basis, scholars define rape as the act of using violence, coercion or other means to forcibly having sexual activity with women against their will, or having sexual activity with young girls under the age of 14 (Li, 2016; Chen, 2016; Liu & Ma, 2018).

Legislatively, rape has only three modes of conduct: "violence, coercion, and other means". Rape-by deception can obviously only be included in the "other means" discussion. So, what is the specific meaning of "other means" that constitutes rape? Theories often take the method of enumeration. The currently accepted view is that "other means" refers to means other than violence and coercion that make women unaware of resisting or unable to resist (Chen, 2016).

When it comes to rape-by-deception, most criminal law textbooks list several types of it that constitute rape, including: impersonating a woman's husband or lover, using superstition to deceive, and disguising sexual activity as medical treatment (Li, 2016; Chen, 2016; Liu & Ma, 2018). The essence of these types of

rape-by-deception is described as follows: the defendant makes the woman fall into a state of ignorance of resistance to sexual activity through deception, which goes against the will of her to the extent that constitutes the crime of rape. Except for these circumstances, there are no other types of deception that constitutes rape. It shows that China's theoretical research only characterizes different types of rape-by-deception in an enumerating way (following the relevant judicial interpretations that have been abolished), but does not conduct a general scientific and systematic theoretical analysis and form a universal standard.

However, whether it is pretending to be a husband or lover, or using superstition or fake medical treatment to induce a woman to have sexual relations, the victim has a clear understanding of the sexual activity and agrees to it, why is it still considered to be a violation of woman's sexual autonomy? This question has never been clearly answered by theory. In conclusion, the conviction of rape-by-deception in China has not been exhaustively studied and formed a consensus conclusion in the academic community. The vacancy of the law and the confusion in theory make it difficult to characterize rape-by-deception cases in practice, and the boundaries between guilty and not guilty are blurred, resulting in a situation in which theories lag behind practical needs.

2.2. The Status of Judicial Practice of Rape-by-Deception Problem in China

An analysis of relevant judicial cases in China provides a glimpse into the general practice of the courts in handling rape-by-deception cases. Common rape-by-deception cases in Chinese judicial practice can be divided into the following categories:

2.2.1. Disguising Sexual Activity as Medical Treatment

This is the most common situation in which the defendant is considered guilty of rape in judicial practice. In the case of *Jiangxi Taihe County Procuratorate v. Chen Genhua* (2019), the defendant pretended to be a female doctor and other identities, deceived the victims through online chat that they had "vaginal cancer" and other diseases, falsely claimed that the above-mentioned diseases could be cured through sexual activity. The defendant deceived seven victims and had sex with them multiple times. In *Hebei Baoding Procuratorate v. Liu Zengbao* (2019), the defendant pretended to be a medical university teacher and claimed that sexual activity could repair hymens, treat acne, and make people slimmer. The defendant deceived three minors into having sex with him.

In the above-mentioned cases, the courts both held that the defendant's disguising sexual activity as a means of treatment was against the victim's will to forcibly have sex with her, and thus the defendant constituted the crime of rape.

2.2.2. Identity Deception

According to China's criminal law, impersonating another person to have sex with a woman may constitute three different crimes depending on the identity

impersonated: rape, crime of cheating and bluffing and crime of pretending to be a soldier to cheat and bluff.

When the perpetrator impersonates the victim's husband or lover, he commits the crime of rape. In *Xinjiang Hamiken District Procuratorate v. Sun Hongxi (1997)* (*Institute of Applied Law of the Supreme People's Court, 2000*), the defendant entered the victim's dormitory late at night and raped her by taking advantage of the victim's misunderstanding that he was the victim's boyfriend. When the victim found out that the defendant was not her boyfriend, she shouted for help, and the defendant fled. In *Anhui Anqing Procuratorate v. Li (2015)*, the defendant pretended to be the victim's husband, molested and intended to rape the sleeping victim, the victim woke up and found that he was not her husband and resisted, and the defendant fled. The court held that impersonating a woman's husband or boyfriend to have sex was "against the will of the woman" but the woman was not aware of resisting, and the defendant constituted rape.

When the perpetrator pretends to be a public official to have sex with a woman, he may constitute the crime of rape or the crime of cheating and bluffing. In *Yunnan Kunming Procuratorate v. Lu Chunhong (2019)*, the defendant negotiated with a prostitute online to conduct sex transactions for 100 yuan each time. After the defendant drove the victim to the vicinity of a reservoir, he pretended to be a plainclothes policeman and handcuffed the victim's hands with police handcuffs, threatening the victim to be detained and fined. The victim transferred 3300 yuan to the defendant for fear and agreed to have sex with him. The court held that the defendant pretended to be a police to threaten and coerce the victim, so that the victim was mentally coerced. She was in a mental state where she could not resist and did not dare to resist, and was forced to have sex with the defendant. The defendant constituted rape.

In *Anhui Hefei Procuratorate v. Liang Qizhen (2001)*, the defendant forged documents, honorary certificates, registration forms, criminal police enforcement materials and other materials from the Anhui Provincial Public Security Department, stole several police uniforms, police caps, gun license and related materials, and bought imitation toy pistols. He claimed to be the head of the criminal police team of the Anhui Provincial Public Security Department, the deputy director of the Chizhou Municipal Public Security Bureau and other identities, deceived many victims to have sexual activity with him, and defraud the victims and their relatives of more than 40,000 yuan. The court held that the defendant pretended to be a policeman to swindle, defrauded multiple victims of money and other illegal interests, seriously hindered the normal management activities of state organs, violated the legitimate rights and interests of citizens. Therefore, the defendant constituted the crime of cheating and bluffing.

In *Xinjiang Urumqi Procuratorate v. Zhang Guodong (2018)*, the defendant purchased forged military IDs, uniforms, etc. on the Internet, pretended to be a military officer of the Xinjiang Military Region to have sex with the victim, making the victim pregnant. In the name of borrowing, he defrauded the victim

26,049 yuan. The court held that the defendant pretended to be a military officer to have sex with the victim, and defrauded her money, which constituted the crime of pretending to be a soldier to cheat and bluff.

To sum up, in the case of impersonating a public official or soldier, it is necessary to distinguish whether the perpetrator used the false identity to coerce the victim and suppress her will. If so, he constitutes rape by coercion. If not, it is only possible for the perpetrator to constitute the crime of cheating and bluffing.

2.2.3. Using Superstition to Deceive

In *Qingyang Procuratorate v. Feng* (2014), the defendant used the online virtual identity “Fang Chong” to chat with the victim online and develop a romantic relationship with her. The defendant made use of the victim’s superstition to pretend to be possessed by “Fang Chong” to have sex with her. After that, he claimed that “Fang Chong” was ill, and forced the victim to have sex with him more than 20 times to treat “Fang Chong”, causing the victim to become pregnant once. The court held that the defendant used superstition and coercion to have sex with the victim for many times, which was contrary to the will of her. He therefore constitutes rape. In *Chongqing Wuxi Procuratorate v. Shi Yuefu* (2006) (Liu, 2014), the defendant deceived the victim that he could teach the magic of “turning empty paper into money” and during the teaching period, the victim could only have sex with the defendant, otherwise the magic would fail. The victim believed him and had sex with him. The court held that the defendant used superstition and other deceptive means to rape women, which constituted the crime of rape.

In cases of using superstition to deceive, it was immaterial whether the deception reached the level of mental coercion or misled women about the nature of the sexual activity. As long as the accused obtains a woman’s consent to sexual activity through superstitious means, the courts tend to consider him guilty of rape. In the Shi Yuefu case, the deceived women were neither coerced nor misunderstood about the nature of sexual activity, but hoped to gain financial benefits by having sex. This kind of deception is essentially the same as impersonating a public official and promising financial benefit to lure women into having sex. What’s more, for ordinary people, it is more credible to pretend to be a public official than to use superstition to defraud. However, in China’s judicial practice, as long as superstition is used to obtain sex, the perpetrator constitutes the crime of rape. On the contrary, pretending to be a public official to obtain sex will be convicted of the crime of cheating and bluffing with a much lighter sentence. This is indeed suspected of violating the principle of fitting punishment with crime.

2.2.4. Making False Promises

In *Beijing Procuratorate v. Han*, the defendant developed a romantic relationship with a woman on the basis of marriage commitment and had sex with her. The court decided that it was an emotional dispute, and the law would not in-

terfere. In *Zhejiang Ningbo Procuratorate v. Zhu* (Shao, 2020), the defendant falsely promised financial benefits to make the victim his mistress and have sex with him. The court held that the evidence showed that the victim had consented to sexual activity, and that there was insufficient evidence for the conviction of rape. To sum up, in the case of false promise, no matter the promise is emotional, marital or financial, it does not affect the woman's consent to sexual activity, and the perpetrator does not constitute the crime of rape.

Although the above conclusions can be drawn through the analysis of practical cases, it does not mean that the judicial characterization of rape-by-deception cases in China has been scientifically and uniformly resolved. On the one hand, the reasoning in the judgments of such cases is obviously insufficient. The judge usually only uses one or two sentences to point out that the sexual activity "goes against the will of women" and that the deception is "other means" of the crime of rape to come to the conclusion that the perpetrator constitutes the crime of rape; pointing out that there is "a certain degree of victim consent" leads to the conclusion that the perpetrator does not constitute rape. On the other hand, in cases of impersonating public officials, the line between rape and the crime of cheating and bluffing is blurred. Finally, some of the judgments are actually not in line with the academic theory. For example, in some cases of using superstition to deceive, the perpetrator's deception obviously did not reach the same level as violence or coercion that made women unaware of resisting or unable to resist, and the sexual behavior between the perpetrator and the woman was more like an exchange of benefits. However, such cases are also recognized as rape, which is suspected of excessive conviction and sentencing.

In fact, the ambiguity and contradiction in judicial practice stems from the lack of academic theory-criminal law theory still fails to clearly define what kind of deception constitutes "other means" in the crime of rape. Authoritative criminal law textbooks only list several forms of deception which constitutes rape without conducting scientific and systematic analysis, and the example listed are based on relevant criminal law provision (in the case of using superstition to deceive) or judicial inertia (in the case of impersonating a woman's husband or lover/disguising sexual activity as medical treatment). In conclusion, there is no consistent and systematic approach to determine the criminalization of rape-by-deception in judicial theory and practice in China. Whereas rape-by-deception problem has been deeply discussed in the common law studies, we will examine and criticize three paths offered by common law theories in the following part.

3. Criticisms of Three Influential Resolution Paths

On the premise of taking sexual autonomy as the legal interest protected by rape law, how to resolve the logical conflict between the theory of sexual autonomy and the fact that rape-by-deception is not widely criminalized? How to make a reasonable characterization of rape-by-deception cases? Scholars from the common

law system have put forward several theories to solve this problem. Next, this paper will introduce three influential theories and analyze their rationality and shortcomings one by one.

3.1. Factum/Inducement Dichotomy

The theory of factum/inducement dichotomy is the standard recognized and adopted by the judicial practice of the common law system for a long time. By distinguishing whether the deception is deception of the factum or deception of the inducement, the theory judges whether the consent to sexual activity of the victim is valid, and then determines whether the defendant constitutes the crime of rape (He, 2014). If the deception leads to a misunderstanding of the fact, there is no legally recognized consent, because what happened was not what consent was given, and the perpetrator constitutes rape. If deception leads to a false perception of the “inducement” of the sexual act, such deception-induced consent is as valid as any other consent in terms of immediate legal consequences, and the perpetrator does not constitute rape (McJunkin, 2014). The theory of factum/inducement dichotomy tends to limit the scope of the crime of rape. It believes that compared with violence and coercion, most deceptions do not reach the same level of legal interest violations. Therefore, it is necessary to classify and determine whether a certain kind of deception constitutes rape.

3.1.1. Fraud in the Factum

Fraud in the factum is deception as to the fact of the sexual act itself. Traditional theory believes that fraud in the factum includes the following two situations (He, 2012):

One is the deception of the nature of sexual behavior, that is, the defendant deceives the victim that what happened is not sexual act, but act of other nature, such as medical treatment. For example, in *People v. Minkowski*, the defendant was a doctor. When treating the victim for menstrual cramps, he made her wear a hospital gown with her back to him, penetrating her with a medical instrument, then removing the instrument and inserting his penis. The victim did not realize until later that she had been penetrated by the defendant’s penis. The court held that the doctor constituted rape because the victim only consented to penetration with a medical device. She was not aware of the nature of the act and did not give consent to sexual act.

The second is the deception of the identity of the defendant. In traditional criminal law theory, the identity here only refers to the husband (Chu & Jiang, 2012). Impersonating a husband undermines male power as well as the husband’s property interests and is therefore seen as more harmful than other impersonations (Mullen, 2018). With the development of feminist jurisprudence, the scope of criminalization of identity deception has gradually expanded. Many countries and regions have expanded the criminalization of identity deception from impersonating a husband to impersonating a “partner with a stable relationship”.

3.1.2. Fraud in the Inducement

Fraud in the inducement means that the victim has no misunderstanding of the relevant facts of the sexual behavior itself, but only misunderstands the incentives that caused her consent to sexual activity. Usually, the defendant promises certain benefits to the woman on the condition of having sex with him, but does not intend to fulfill the promise. The theory holds that the victim has no wrong understanding of the sexual activity itself, so her consent to the sexual activity is valid, and the perpetrator does not constitute the crime of rape. American scholar Richard Posner puts fraud in the inducement as: If women are not opposed to having sex with a particular man, then the problem (if any) is lying (we generally don't think of lying in social contexts is a crime), not a violation of her physical integrity (Posner, 1992).

3.1.3. Criticism of Factum/Inducement Dichotomy

First of all, the division of “factum” and “inducement” is unreasonable in terms of common sense. Fraud in the factum does not necessarily mean that the deception is more malignant and the victim's right is more seriously violated, and fraud in the inducement does not necessarily mean that the deception is less malignant and the victim's right is less violated (Schulhofer, 1990).

Second, there is no unified standard for the classification of facts and inducements, and the logic of the classification is questionable. The theory of factum/inducement dichotomy ignores the deception of other facts that will also seriously affect the victim's consent to sexual behavior, and unreasonably limits the situation of fraud in the factum to deception of the nature of the sexual behavior and the identity of the defendant. At the same time, in the case of deceiving the defendant's identity, only the deception of certain identities is considered to be fraud in the factum, while the deception of other identities is considered to be fraud in the inducement. The logic of facts and inducement's classification is questionable.

To sum up, factum/inducement dichotomy has no solid nomological basis. It does not develop a systematic theory of how and why to distinguish between facts and inducements.

3.2. Theory of Right to Self-Possession

Theory of right to self-possession was proposed by Jed Rubenfeld, a law professor at Yale Law School, in *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy* (Rubenfeld, 2013). Professor Rubenfeld believes that rape-by-deception necessarily violates women's sexual autonomy. Rape laws therefore either criminalize all rape-by-deception cases or renounce sexual autonomy as the legal interest protected by rape law, which is the only way to avoid rape law's internal logical conflicts. He advocated giving up sexual autonomy as the protected legal interest of rape law, and put forward the theory of right to self-possession, that is, the crime of rape violates the victim's possession of her own body.

Professor Rubinfeld believes that the theory of right to self-possession has the following advantages. First, it basically solves the problem of whether obtaining women's consent to sexual activity by deception constitutes the crime of rape. In such cases, although the victim is manipulated, she does not lose possession of her own body. Therefore, the defendant does not violate the victim's self-possession and does not constitute the crime of rape. Second, it shows why rape is a more serious crime than most other crimes against body right without invoking the notion of "chastity". A rape victim's body is taken over, invaded, occupied, taken control of—taken possession of—in a fashion and to a degree not present in ordinary acts of theft, robbery, assault, and so on, and the victim loses the possession of her own body. Finally, in judicial practice, because traditionally the rape law of the United States interprets consent to sexual activity as a mental state, that is, the true will of the victim, which is difficult to provide evidence for. And judging whether a woman consents to losing possession of her body is much simpler than judging whether she consents to sexual activity.

Despite the above advantages, Professor Rubinfeld's theory has also been criticized by many scholars. Professor Tom Dougherty pointed out that the theory of right to self-possession cannot completely resolve the logical conflict of rape law embodied in rape-by-deception problem as Professor Rubinfeld expects (Dougherty, 2013-2014). The reason is that "consent" still occupies a central place in the theory, except that it is converted from consent to sexual activity to consent to physical possession. All deception that can invalidate consent to sexual activity can also invalidate consent to physical possession, in which case rape law returns to the same question it originally faced: does obtaining consent through deception leads to rape?

Other scholars have made harsher criticisms. Since the theory of right to self-possession regards the violation of the physical possession of another as the fundamental feature of rape, it excludes rape-by-deception, coercive rape, and rape of an unconscious, mentally or physically incapacitated person (unless the condition is caused and controlled by the defendant) and many other serious violations of women's sexual autonomy, which has brought rape law back to the "force requirement" period. This is a total undermining of the progress the feminist movement has made over the years to make rape laws fairer, less sexist and more protective (Falk, 2013-2014).

In addition, some scholars pointed out that identifying the nature of sexual crimes as violations of body possession and interpreting the legal interests of sexual crimes as the broad concept of physical freedom will obliterate the unique characteristics of sexual crimes and make them confused with other crimes that violate personal freedom (such as the crime of false imprisonment in China), and cannot reflect the essence of the legal interests of sexual crimes (Jia, 2018).

3.3. Theory of Sexual Autonomy in a Broad Sense

Theory of sexual autonomy in a broad sense was originally proposed by feminist scholars. It advocates comprehensive punishment for rape-by-deception and

maximum protection of the victim's sexual autonomy (Estrich, 1987; Herring, 2005). Scholars of this school believe that the current legislation and judicial practice have not adequately protected women's sexual autonomy. Since the act of obtaining property by deception constitutes the crime of fraud, why can't the act of obtaining sexual interests by deception constitute the crime of rape (Estrich, 1987)? Does the law protect women's sexual autonomy less strongly than property rights? This theory is based on the victim's point of view, asserting that "when the alleged sexual act occurs, if the defendant deceives the victim or hides certain facts from her, and the defendant knows or should know that if the truth is told to the victim, she will not consent to have sex with him, then the defendant constitutes rape" (Herring, 2005). It can be seen that the standard adopted by this theory to judge whether "consent" is valid is individualized and fully respects the personal wishes of the victim, rather than adopting a general standard fabricated by law.

Scholars advocating this theory also believe that the actual harm of rape-by-deception is no less than that of rape carried out by means of violence or coercion. American scholar Alan Wertheimer pointed out that deception may cause more suffering to victims than force. Force simply overpowers or evades the victim's will, while deception makes use of the victim's own will against herself, making her an unwitting agent of violating her own rights (Wertheimer, 2003). They point out that victims of rape-by-deception not only lose time, energy (and in some cases money, employment, etc.), but may also experience multiple physical, psychological and emotional harm, including unwanted pregnancy, sexually transmitted diseases, serious emotional and psychological distress and loss of trust, etc.

This paper argues that the theory of sexual autonomy in a broad sense has the following defects. First of all, it damages the predictability of law. According to this theory, the illegality of deceptive behaviors is judged based on the victim's individual subjective standards, which vary widely from person to person. This makes it difficult for ordinary people to have certain expectations about the legal consequences of their actions. Secondly, it leads to difficulties in presenting evidence. As mentioned above, this theory adopts the victim's personal standard to judge the validity of consent, and the true will of the victim is difficult to prove. Thirdly, it excessively expands the scope of rape and leads to improper penalty. Most rape-by-deception cases have a low degree of violation of sexual autonomy, and are far less vicious than rapes carried out by force or coercion. Finally, it leads to conflicts with other legal rights or values advocated by law. Over-protection of sexual autonomy may conflict with the privacy rights of others. After all, even in the face of sexual partners, individuals should have the right to keep the privacy that they do not want to be known by others, such as marriage history, sexual experience, family background, etc. In addition, the protection of some sexual autonomy is not only not appreciated by the mainstream social values, but even considered to be contrary to public order and good customs. For example, some women hope to obtain illegitimate benefits through sexual bribery, while the

sexual autonomy of others reflects discrimination against race, occupation, region, etc. (Gross, 2015).

To sum up, although scholars from the common law system have made respectable efforts to solve the problem of rape-by-deception, the solutions they put forward are either logically unjustifiable or have unreasonable conclusions, so they failed to form a scientific and complete theoretical scheme. The essence of the rape-by-deception problem lies in the understanding and interpretation of sexual autonomy. Next, this paper will redefine the sexual autonomy protected by rape law and put forward its core concept—intimacy of sexual activity.

4. Intimacy of Sexual Activity and Sexual Autonomy

The reason for the vagueness of rape-by-deception problem in theory and practice lies in the lack of a clear definition of the victim's sexual autonomy in criminal law. We must answer what kind of deception would be considered a criminal violation of sexual autonomy. This requires an in-depth analysis of what exactly is the victim's sexual autonomy in criminal law. Therefore, this paper proposes the concept of "intimacy of sexual activity".

4.1. Intimacy of Sexual Activity

If a broad understanding of sexual autonomy is adopted, that is, a person's consent to sexual activity, it is easy to draw the conclusion that any sexual activity obtained by deception is an infringement of the other party's sexual autonomy, because if the other party knew the truth, they would not agree to the sexual activity, and the defendant's deception curbs the victim's expression of "disagreement". Obviously, this conclusion is not satisfactory.

The reason why traditional rape law has the logical conflict of protecting sexual autonomy and refusing to widely criminalize rape-by-deception is that its interpretation of sexual autonomy is too general. In fact it directly applies the concept of autonomy in the philosophical sense to the field of criminal law, which leads to the excessive expansion of the boundaries of legal interests protected by rape law. Therefore, in order to make a scientific and systematic characterization of rape-by-deception cases, we must first redefine the sexual autonomy worthy of criminal law protection, and clarify the specific connotation of the victim's consent to sexual activity in criminal law.

This paper argues for the introduction of the concept of "intimacy of sexual activity" to better understand sexual autonomy protected by criminal law. The nature or characteristics of different sexual activities are different, and the sexual intimacy it reflects is also different. For example, sexual activities can be divided into four categories of different degree of sexual intimacy according to their nature. The first is sexual intercourse in the narrow sense, that is, the entry of the genitals of both sexes. The second is sexual intercourse in a broad sense, that is, the contact and entry of the genitals and the opening of the body cavity between people, such as oral sex, anal sex and so on. The third is other sexual behaviors

other than sexual intercourse, that is, stimulating behaviors aimed at various sexual organs and various sexually sensitive parts, such as masturbation, caressing, and using sex toys. The fourth is other sexual activities other than the above-mentioned behaviors, which refers to any activities that people engage in for sexual purposes and sexual desire requirements, such as pornographic performances. Generally, this type of activity does not allow participants to achieve a full orgasm.

There is a decreasing degree of intimacy in the above-mentioned four kinds of sexual activities. Therefore, the criminal law provides for different crimes to protect women's sexual autonomy over sexual activities with a certain level of sexual intimacy. This means that women's sexual autonomy is protected by criminal law according to the degree of intimacy of the sexual activities they consent to. For example, if a woman only agrees to conduct pornographic performance, and the defendant tries to engage in sexual behaviors (not sexual intercourse) with her without her consent, the defendant constitutes a crime of indecent assault. If the woman only consents to sexual intercourse in the broad sense, and the defendant has sexual intercourse in the narrow sense with her without her consent, the defendant constitutes the crime of rape.

To sum up, sexual autonomy in criminal law can be redefined through the introduction of the concept of "intimacy of sexual activity". In this way, sexual autonomy in criminal law shows characteristics of degree and dimension, thus can guide conviction and sentencing more accurately.

4.2. Sexual Autonomy Defined by Intimacy

The essence of sexual autonomy in criminal law is the right to choose the intimacy of sexual activity. Consent to a certain degree of intimacy is at the heart of "consent" in rape law. The characteristics of sexual activities are different, and the degree of intimacy they reflected are also different. Specifically, we can determine how intimate a sexual activity is by measuring how risky it is. The higher the risk of a woman's consensual sex, the higher the intimacy it showed. The limits of rape law's protection of women's sexual autonomy are determined by the degree of intimacy of the sexual activity they consent to. The risk of sexual activity can be measured at two levels: natural risk and normative risk.

4.2.1. Natural Risk

Natural risk refers to the risk that sexual activity directly damages the life and health of women. Specifically, it includes the risk of contracting venereal diseases, the risk of pregnancy, and the risk of other bodily harm.

1) Risk of contracting venereal diseases. The scope of venereal diseases here can refer to the crime of spreading venereal diseases stipulated in Article 360 of the Chinese Criminal Law, which includes serious venereal diseases such as syphilis and gonorrhea. According to judicial interpretation, AIDS is also a serious venereal disease. Infection of venereal diseases is one of the major dangers brought by sexual behavior, which will not only seriously affect people's physical

health, shorten or even suspend their lives, but also deprive them of the rights to develop intimate relationships, live a normal sexual life, and even have children. They are discriminated against, excluded from society and unable to carry out a normal social life. Contracting venereal diseases unknowingly can also destroy the victims' sense of control over their own bodies, leading to feelings of shame, unease and helplessness, and causing serious mental damage. Therefore, sexual intercourse with risk of contracting venereal diseases is much more risky than normal sexual activity, reflecting stronger intimacy.

2) Risk of pregnancy. Whether a woman accepts the risk of pregnancy is also an important criterion for judging the degree of sexual intimacy. Pregnancy will bring a great burden or even damage to a woman's body, and having children will profoundly affect a woman's identity and life trajectory for a longer period of time. Consequently, women will generally only consent to unprotected sex as an expression of emotion in extremely limited circumstances. This consent reflects a woman's voluntary choice for a higher level of intimacy.

3) Risk of other bodily harm. This refers to whether the woman consents to other bodily harm during sex, such as minor intentional harm, use of drugs that cause bodily harm, etc.

4.2.2. Normative Risk

Normative risk means that although sexual activity does not cause direct physical harm to women, because it violates the ethical norms of universal value in human society, it will cause lower social evaluation and serious mental damage to women. Normative risk includes intimacy privacy and intimacy taboo.

1) Intimacy privacy. Privacy is an important feature of sexual activity and an important part of the basic content of women's sexual autonomy. Professor Zhang Mingkai pointed out that the basic content of sexual autonomy includes not only the right to decide whether to have sex, but also the right to decide when and where to have sex. If a woman agrees to have sex with a man in a closed bedroom, but the man forcibly has sex with her in a public place, the man is guilty of rape. Therefore, sexual acts that violate women's intimacy privacy pose a normative risk to women and seriously violate women's sexual autonomy and personal dignity.

2) Intimacy taboo. Intimacy taboo refers to sexual activity that is generally regarded as taboo by human society, and thus may seriously affect some women's consent to sexual activity, such as incest, same-sex intercourse, and interracial sexual activity. Since ancient times, incest has been regarded as a behavior that seriously violates social ethics and disrupts family order. Up to now, the crime of incest is still stipulated in the criminal laws of some countries and regions. Same-sex intercourse and interracial sexual activity are taboo sexual activity that is not accepted by social ethics in many countries or regions in the history or at present. Due to the different sexual orientations and preferences of different people, gender and race are the key factors for sexual consent for many people.

The sexual autonomy protected by rape law is also a concept of degree and

dimension. Specifically, it is woman's right to choose the "intimacy of sexual activity". Natural risk and normative risk are two criteria for measuring sexual intimacy in its three dimensions: degree of sexual intimacy, intimacy privacy, and intimacy taboo. Therefore, deceiving or concealing the degree of intimacy, intimacy privacy, or intimacy taboo makes a woman unwittingly engages in a more intimate sexual activity than she originally consents to and brings her unwanted risk. In conclusion, such deception seriously violates the woman's sexual autonomy, and the defendant constitutes rape.

5. Three Dimensions of Sexual Autonomy and Rape-by-Deception

As discussed in the previous section, sexual autonomy refers to women's right to choose the intimacy of sexual activity, which includes three dimensions: the degree of intimacy, intimacy privacy and intimacy taboo. Accordingly, deception in rape-by-deception cases can be redefined as: deception by the defendant regarding the intimacy of sexual activity. Therefore, only three kinds of deception constitute rape: degree of intimacy deception, intimacy privacy deception and intimacy taboo deception. Next, this chapter will analyze and characterize rape-by-deception cases in practice according to these three dimensions.

5.1. Degree of Intimacy Deception

5.1.1. Deception about the Nature of Sexual Activity

Deception about the nature of sexual activity means that the deception causes the victim to have a misunderstanding of the nature of the sexual activity. Rape law protects women's sexual autonomy. If a woman has a wrong understanding of the nature of sexual activity due to the defendant's deception, the consent given by her is not consent to sexual activity, and she has no awareness of exercising sexual autonomy at all. This type of deception fundamentally excludes women from exercising their sexual autonomy, and the defendants constitute rape. There are two types of deception about the nature of the sexual activity.

1) Disguising sexual activity as medical practice, which means that the defendant makes the victim mistakenly believe that there is no sexual activity or that the sexual activity has a medical nature. The defendant may make use of the victim's lack of sexual experience and knowledge to deceive them that what happened was not sexual activity. Another situation is that although the victim has a complete and accurate understanding of the concept of sexual activity, but because of the defendant's deceit or concealment, she is unaware that a sexual activity is taking place. As in *People v. Minkowski*, the victim thought she was undergoing vaginal treatment, unaware that it was not a medical device but the doctor's genitalia inserted. In another case, the defendant deceived the victim that he was a medical expert and is conducting a medical research. Therefore, the victim allowed him to examine her breasts. In fact the defendant was not a medical expert, and the examination was only to satisfy his own sexual desire.

Another controversial situation is that doctors deceive patients that having sex

is a medical treatment. In *Boro v. Superior Court* (1985), the defendant, a hospital worker, deceived a female patient that she had a highly infectious and potentially fatal disease, the only surgical treatment available is very painful and expensive. Another treatment option was for the victim to have sex with an anonymous donor (the defendant himself) who had been injected with a serum that could cure the disease. The victim agreed to the defendant's advice in the belief that she would die if she did not receive treatment. The California Court of Appeals overturned the defendant's conviction, finding that "the victim's testimony made it clear that she accurately understood the 'essence of the conduct', but out of fear of illness and death, she succumbed to the defendant's deceptive rhetoric. "The victim had consented to sex, so the deception was about inducement, not factum, and the defendant was not guilty of rape.

This paper argues that the traditional view has overly narrowed the scope of deception about the nature of the sexual activity, resulting in acts that seriously undermine the sexual autonomy of the victim cannot get due sanctions. Victims only agree to sexual activity because they mistakenly believe that sexual activity has a medical nature. The content of their consent is essentially consent to medical behavior. The occurrence of sexual activity is actually a forced choice and goes against their true will. If one unilaterally believes that women's sexual autonomy will not be violated as long as they consent to sexual activity, regardless of whether they have a wrong understanding of the nature of sexual activity itself, the protection of sexual autonomy will be completely ineffective. This can lead to defendants using their authoritative status and the victim's trust to trample on women's sexual autonomy without paying any price.

In fact, in recent years, the legislation and precedents of common law countries have gradually expanded the criminalization of rape-by-deception, and further strengthened the protection of citizens' sexual autonomy. Many states in the United States have separate legislation regulating rape-by-deception in the doctor-patient relationship. Delaware's statutory law incorporates its provision on health-care professionals within the definition of lack of consent. According to its statute, "without consent" includes: "under the guise of providing professional diagnosis, counseling or treatment and where at the times of such acts the victim reasonably believed the acts were for medically or professionally appropriate diagnosis, counseling or treatment, such that resistance by the victim could not reasonably have been manifested." Similar provisions are not only used to regulate the group of doctors, but also extend to the professions such as psychological counselors and clergy. This legislation rejects the unreasonableness of traditional views, shows the strict prohibition of the legislation on possible deception and coercion between practitioners in "positions of trust" and their patients, which demonstrates the legislature's practical concern and tight protection for the rights and interests of vulnerable groups.

2) Using superstition to deceive. Deception of the nature of sexual activity also exists in deceptive rape by superstition. For example, the defendant pretends to be an immortal and uses superstition to make the victim mistakenly believe that

what happened was not sexual activity. In *Guangxi Liuzhou Procuratorate v. Chen* (1997), the defendant Chen claimed to be the leader of the “Chinese non-governmental organization” and the lord and commander-in-chief of the “Three Spheres” (Earth, Sun, Moon). Chen and two other accomplices claimed to be the masters of Dharma teaching and spread that “whoever join the ‘Chinese non-governmental organization’ do not need to farm, they will naturally have food and clothing”, and that “there will soon be a catastrophe in the world, only by participating in the ‘Chinese non-governmental organization’, men through ‘consecration’ (that is, taking off their shirts and clicking on acupuncture points), and women through ‘Tubian’ (that is, having sex with the three defendants), can disasters be avoided and eternal protection be assured”. The three defendants used feudal superstition to confuse, deceive and intimidate women, and raped dozens of women separately. In this case, the defendants took advantage of women’s superstition to disguise the sexual intercourse as a so-called “Tubian”, that is, to deceive the nature of the sexual activity. At the same time, there are other cases in which the defendants committed superstitious deception but did not deceive the nature of sexual activity, such as the case *Chongqing Wuxi Procuratorate v. Shi Yuefu* mentioned above. The deceived woman clearly recognized that what happened was sexual activity, but she consented to it, believing that she could learn magic to obtain financial benefits by having sex. This kind of deception is not about the intimacy of sexual activity and does not fall under the protection of the rape law.

5.1.2. Venereal Disease Deception

As mentioned above, the risk of contracting venereal diseases is an important measure of sexual intimacy. Therefore, if the defendant deceives or conceals the fact that he has venereal diseases, or secretly undermines the measures that a woman takes to prevent the transmission of venereal diseases, such behavior violates a woman’s sexual autonomy to practice safe sex, and the defendant should be guilty of rape. In venereal disease deception, whether the victim is infected with the venereal disease does not affect the defendant’s serious violation of women’s sexual autonomy, so it does not affect the conviction of rape. In a case happened in New Zealand in 2012, a man infected with AIDS had sex with a woman without informing her of his disease. The Wellington Court of Appeal pointed out in its judgment that whether a man informs a woman of his AIDS status in advance will greatly affect the woman’s consent to sexual activity. Therefore, if a person with HIV conceals his condition from a sexual partner, and the other party voluntarily has sex with him, he can be charged with rape.

In the case of venereal disease deception, conviction and sentencing should be based on the consequences of the criminal act. As far as China’s criminal law is concerned, if no new charges are created, it should be punished as the crime of rape. If the victim is indeed infected with the venereal disease due to the sexual activity, the defendant should be evaluated as the aggravating circumstance of rape—rape causing serious injury. Such conviction not only takes into account

the violation of women's sexual autonomy by deceitful behavior, but also the threat to their life and health caused by venereal diseases, which is more in line with the principle of adapting guilt and punishment.

5.1.3. Drug Deception

Drug deception refers to the use of drugs that cause harm to a woman's health without her consent during consensual sex. In a case happened in Foshan, Guangdong in 2021, the defendant and the victim were colleagues. The two had supper together and went to karaoke to sing and drink, and then stayed in the same room in a hotel. After they had consensual sex and the woman fell asleep, the defendant poured sevoflurane onto a tissue and placed it under her nose, causing her to fall into a coma and had sex with her again. The victim died of acute respiratory failure and circulatory dysfunction caused by sevoflurane poisoning. In this case, it can be reasonably inferred that the victim agreed to have sex with the defendant, but she did not agree to use drugs during sex. The defendant's use of drug actually violated the victim's will and sexual autonomy. Coupled with the consequences of the victim's death due to the use of drug, the defendant should be guilty of rape causing death.

5.1.4. Protection Deception

Protection deception is when a woman only agrees to have sex with a specific contraceptive, and the defendant deceives the woman into having sex without that contraceptive. Specific behaviors include intentionally not taking contraceptive measures agreed with women in advance, deceiving women that contraceptive measures have been taken, and secretly destroying contraceptive measures taken by women. In *R (F) v. DPP & A (2013)*, the court ruled that a husband ejaculating inside his wife without her consent could sustain a conviction for rape under the 2003 Sex Offences Act. In this case, the woman became pregnant, but in analyzing consent, the court found a violation regardless of the physical harm she sustained. In *Jiangsu Suzhou Procuratorate v. Yuan (2019)*, the defendant Yuan solicited prostitutes on WeChat, and met the victim to have sex in a hotel. In the process of having sex, the defendant removed the condom and the victim refused to continue the sexual activity without a condom. The defendant covered the victim's head with a quilt to force her to continue. The court held that the defendant Yuan violated the true will of women and raped women by violence and coercion, which constituted the crime of rape.

In protection deception, a woman expresses her unwillingness to take the risk of pregnancy and consents only to sex with contraception. The defendant deliberately violates the will of the victim, destroys her control over her own body rights, and shows extreme disregard for women's individual will. In protection deception, the defendant imposes sexual activity of a higher degree of intimacy on the victim. In general women see consensual unprotected sex as a way to solidify emotional bond, but in protection deception, the defendant forces such an emotional connection upon the victim, which will directly causes the victim's

emotional harm. Protection deception can also make the victim feel anxious about sexual behavior and unable to have a normal, pleasurable sex life because she loses control over an important means of self-preservation (Katsampes, 2017). Consequences of protection deception, such as miscarriage or unwanted childbirth, will cause great damage and burden to a woman's body and spirit. Even if the victim is not pregnant, the violation of her rights and the resulting mental damage are inevitable. In the sense of gender harm, protective deception is a means by which men control women, who bear the burden of childbirth alone, which perpetuates gender inequality. To sum up, protection deception violates women's right to choose the degree of intimacy of sexual behavior, and should constitute the crime of rape.

5.1.5. Deception of Intimacy Identity

As human society became more civilized and the social pattern turned from communal marriage to monogamy, sex became exclusive for women. Especially in the conservative society in China, women usually only agree to have sex with specific people, such as spouses, lovers, admirers, etc. These identities related to the degree of sexual intimacy according to the general norms of social interaction are intimacy identities.

In recent years, the scope of criminalization of identity deception rape has expanded worldwide. In the United States, the laws of some states in history criminalized only one kind of identity deception, that is, impersonating the husband. Scholars point out that impersonation of the husband is seen as more harmful than other impersonations because it undermines male power and the husband's property interests. As social conventions put enormous pressure on women to provide sexual services to their husbands, it is nearly impossible for a woman to deny the perpetrator's sex request when he is impersonating her husband. In other words, the male-dominated law condemns husband impersonation not because of rape's gross violation of human dignity and women's sexual autonomy, but because of the devaluing effect of rape on a man's so-called property—his wife (Mullen, 2018). With the transformation of the society's attitudes toward sex and the evolution of rape law theory, in many countries and regions including China, the scope of criminalization of identity deception has gradually expanded from impersonating the husband to impersonating the fiancé, lover, and even all kinds of identities (Institute of Applied Law of the Supreme People's Court, 2000). However, in most laws, the criminalization of identity deception is limited to "impersonation of a spouse or a partner in a stable cohabitation relationship". The reason is that for people in a stable cohabitation relationship, one party is more likely to agree to the request for sexual behavior made by the other party, and because of the tacit understanding generated by the two parties living together, often the request and consent for sexual behavior can be expressed by tacit consent. This kind of tacit understanding is more likely to be exploited by the perpetrator, so the sexual autonomy of the victim is more vulnerable.

Whether a person has the intimacy identity such as spouse or lover is one of the most critical factors affecting a woman's sexual consent. Intimacy identity deception makes women lose the right to choose sexual partners, and greatly damages women's sexual autonomy. The perpetrator should be guilty of rape. When the perpetrator impersonates other identities, such as superior, public official, etc., because these identities have nothing to do with the degree of sexual intimacy, so this type of deception is not about the intimacy of sexual activities, and the perpetrator does not constitute the crime of rape.

5.2. Intimacy Privacy Deception

Intimacy privacy deception includes a variety of behaviors, such as having sex with unsuspecting women when there are other people watching, secretly shooting sex videos, photos and other audio-visual products for dissemination and even live webcasting while having sex. In the Internet age, women's sexual privacy seems to be in a precarious state. In the notorious "9th Room" incident in 2020 (Jiang & Wu, 2020), the South Korean police investigated and closed down several secret chat rooms on the online social platform Telegram. In these online chat rooms, as many as 260,000 users shared illegally filmed sexual videos and photos, many of which were private videos or pictures secretly taken by unwitting women's boyfriends or husbands. However, in China, the personal rights and interests of victims in such serious violations of women's sexual privacy cannot be protected by criminal law at all. Dissemination of obscene materials without profit-seeking purpose only constitutes the crime of Disseminating Obscene Materials when the dissemination is considered "serious". This crime protects the legal interest of administration of public order and its maximum penalty is only two-year imprisonment. For small-scale dissemination that does not meet the "serious" standard, the only way to stop the infringement and obtain compensation is civil infringement lawsuit. Intimacy privacy deception violates women's right to choose sexual intimacy, and should be punished as the crime of rape. Through this way of interpreting the rape law, the loophole of law's criminal punishment for small-scale dissemination of sexual partner's intimacy privacy have been closed.

5.3. Intimacy Taboo Deception

5.3.1. Gender Deception

Gender deception is rare in China, but there have been many cases abroad. In *McNally v. R.* (2013), the defendant pretended to be a boy named Scott and wore a strap-on dildo to have sex with a 16-year-old girl. The Court of Appeal held that the complainant "chose to have sexual encounters with a boy and her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by the appellant's deception". In the court's analysis, the gender nature of the sexual activity was different when the defendant deliberately deceived the victim into believing that the former was male, and that such gender deception could invalidate consent. The defendant was convicted of sex-

ual assault. Similar cases have occurred in the United Kingdom, the United States, Israel and other countries (Gross, 2015). It is worth noting that all the defendants of such cases are female. They pretended to be men to have sex with other women, and were convicted of sexual assault because of gender deception. Aeyal Gross believes that the reason for this is that the defendant, whose biological sex is female, has acquired a privileged identity that does not belong to her by pretending to be a male. Such cross-border behavior disrupts the social order that assigns privileges based on rigid identity categories, and is therefore punished by social and legal systems. In short, the courts are protecting the privileged position of men and heterosexual normative order in the name of protecting women from deception.

5.3.2. Incest Deception

Incest deception means that the defendant obtains the victim's consent to sexual activity by deliberately concealing the natural or legal consanguinity between him and the victim and has sex with her. For example, a doctor at an artificial insemination clinic replaced donated sperm with his own without the patient's knowledge, causing the patient to give birth to his biological child. Then, he concealed his biological father's identity and had a voluntary sexual relationship with the child. Incest is no longer regarded as a crime in China, but only if it is consensual. In incest deception, the victim unwillingly engages in incest that is regarded as taboo by social ethics, which will undoubtedly cause confusion in family relations, lower social evaluation, and great mental pain for the victim.

5.3.3. Nation and Religion Deception

Nation and religion deception usually occurs in countries with strict nationality and religion order, reflecting the racist characteristics of these countries. In *Kashur v. State of Israel* (2012) (Gross, 2015), an Arab man, Kashur, falsely claimed to be a single Jew who intended to pursue a serious romantic relationship and obtained consent from the victim to have sex with him. The court held that the victim's consent was obtained through deception and false representation, and she would not cooperate with him if she knew the truth. The court convicted the accused of rape and indecent assault under the section of the Israel Penal Law that defines rape as consensual sexual activity with a woman if her consent was obtained by deception regarding the perpetrator's identity.

In the past, Israel's provisions on identity deception were similar to most common law systems, i.e., rape by deception would only be constituted if the perpetrator was impersonating a specific person known to the complainant. But in *Saliman v. State of Israel* (2008) (Gross, 2015), the court created new jurisprudence, ruling that "when a man or woman falsely represents himself or herself and, by deception, has intimate relations with someone who, had he known things to be as they were, would never have considered sexual activity with that person," there is room for a criminal conviction. Despite this, the Kashur case still caused a lot of controversy in Israel and even the international community,

and was criticized by many media as racial discrimination. Scholars believe that the idea embodied in this judgment is that when the defendant pretended to be Jewish, he deviated from his racial expression and acquired a privileged identity that did not belong to him. This judgement reflects the purpose of Israeli society seeking to protect specific nationality hierarchy (Jews/Arabs) and maintaining a stable nationality and religion social order through the enforcement of law.

To sum up, sexual autonomy in criminal law should be redefined as the right to choose the intimacy of sexual activity, which includes three dimensions: degree of sexual intimacy, intimacy privacy and intimacy taboo. Only when the perpetrator's deception is related to the intimacy of sexual activity does he violate the sexual autonomy protected by criminal law. Deceptions relevant to the degree of sexual intimacy include the following situations: deception about the nature of sexual activity, venereal disease deception, drug deception, protection deception and deception of intimacy identity. Deception of intimacy privacy means that the defendant spreads his sex partner's sexual intimacy without her knowledge during/after consensual sex. Intimacy taboo deception refers to gender deception, incest deception and nation & religion deception. Therefore, when deceiving the victim about the above-mentioned aspects, the perpetrator violates women's right to choose "intimacy of sexual activity" and constitutes the crime of rape.

6. Epilogue

Dilemmas exist in both academic theory and juridical practice of rape-by-deception in China. This paper studies and draws lessons from foreign theories, legislative and judicial practices, so as to provide Chinese legislation and judiciary a systematic approach to solving the rape-by-deception problem. The study of rape-by-deception problem is concerned with the core concept of the crime of rape—sexual autonomy. Sexual autonomy is a concept of degree and dimension, and not all acts that violate sexual autonomy are worthy of criminal law intervention. To solve the problem of rape-by-deception, it is necessary to clarify the specific connotation of sexual autonomy protected by criminal law. This paper proposes the concept of sexual intimacy, pointing out that the sexual autonomy protected by criminal refers to women's right to choose the "intimacy of sexual activity". Specifically, intimacy of sexual activity includes degree of sexual intimacy, intimacy privacy, and intimacy taboo. Therefore, only when deceiving the victim about the relevant facts of one of these three dimensions does the perpetrator violate women's right to choose "intimacy of sexual activity" and constitute the crime of rape. Other kinds of deceptions irrelevant to intimacy of sexual activity are less infringing on women's sexual autonomy and do not require criminal law intervention.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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