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# THE CRIMINALIZATION OF CONSENSUAL ADULT SEX AFTER *LAWRENCE*

J. RICHARD BROUGHTON\*

## INTRODUCTION

American criminal law punishes private consensual sex between adults. Someone unacquainted with American sex crime law, and in the habit of keenly protecting his or her sexual privacy and autonomy, might find that initial observation outrageous. The observation becomes less outrageous, however, when we qualify it by saying that the criminal law punishes *some forms* of private consensual sex between adults. Still, the observation bears scrutiny, for one might imagine that it must be a difficult proposition—given the nuance and complexity of sexual relationships generally—when the state must select which forms of private consensual sexual conduct between adults it will subject to moral condemnation and punishment.

The nuance and complexity of sexual matters notwithstanding, the criminal law has long sought to regulate them, even far beyond the obvious categories of criminalization, such as rape.<sup>1</sup> Criminal law regulates both the manner in which we obtain sex (for example, by force and without consent, or by payment of money) and also *with whom* we may have sex, or the *category of person* with whom we may have sex (for example, siblings, students, patients, or persons married to someone else). This remains true even where the sex is, in fact, consensual (even affirmatively desired) and entirely private between consenting adult parties.<sup>2</sup> Of course, one axiom guiding such criminalization is that the sexual appetite of human beings—like other human appetites—ought to be controlled and that the state can advance important interests through such controls. Yet in a free society devoted to some substantial measure of legal protection for sexual autonomy, the criminalization of

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1. See LAWRENCE M. FREIDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 215–22 (1993); Steven R. Morrison, *Creating Sex Offender Registries: The Religious Right and the Failure to Protect Society's Vulnerable*, 35 AM. J. CRIM. L. 23, 74 (2007). See also Jane E. Larsen, "Women Understand So Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374, 414 (1993) (stating "[r]egulating human relationships is among the most difficult of legal tasks.")

2. See *infra* Parts I & II.

private consensual sex between adults raises serious concerns, both as a matter of sound public policy and of constitutional law.

The constitutional dilemma here is one created chiefly by the Supreme Court's decision in *Lawrence v. Texas*,<sup>3</sup> which invalidated a Texas statute criminalizing homosexual sodomy. It is an exceedingly rich case but a challenge to interpret and apply. *Lawrence* appears to hold that private, consensual, non-prostitution sex between adults enjoys constitutional protection under the doctrine of substantive due process.<sup>4</sup> Yet the extent of that protection remains fuzzy. The Court speaks of the right broadly, in terms that make the right appear fundamental, and thus presumably subject to more searching judicial scrutiny: "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions";<sup>5</sup> "It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons";<sup>6</sup> "These references [to laws and traditions of the last fifty years] show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."<sup>7</sup>

But the Court ultimately disposed of the case by saying that Texas possessed no legitimate interest (i.e., no rational basis) for the law.<sup>8</sup> This has led many courts to find—without more direction from the Court—that whatever right that *Lawrence* vindicated was not fundamental. Thus, legislation implicating such a right is subjected only to rational basis review (note that the academic commentary subjects this conclusion to intense criticism),<sup>9</sup> though presumably the state's interest must be something other than a mere effort to recognize and enforce

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3. 539 U.S. 558 (2003). The Court's description of the facts that led to Lawrence's prosecution pursuant to the Texas homosexual sodomy prohibition, we now know, did not fully capture the story behind the case. Fortunately, Dale Carpenter's excellent recent book has helped us to better understand the story of *Lawrence*. See DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *Lawrence v. Texas* (2012).

4. *Lawrence*, 539 U.S. at 578 (citing *Bowers v. Hardwick*, 478 U.S. 186, 216 (Stevens, J., dissenting)).

5. *Id.* at 562.

6. *Id.* at 567.

7. *Id.* at 572.

8. *Id.* at 578.

9. See, e.g., *United States v. Marcum*, 60 M.J. 198, 205 (C.A.A.F. 2004); *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 745 n.32 (5th Cir. 2008); *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232, 1236 (11th Cir. 2004); *Seegmiller v. LaVerkin City*, 528 F.3d 762, 771 (10th Cir. 2008). But see Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, CATO SUP. CT. REV. 21, 35–36 (2d ed. 2003) (arguing that *Lawrence* essentially disposed of the "fundamental rights" nomenclature and instead holds that state interference with "liberty" is presumptively unconstitutional); Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (arguing that *Lawrence* recognized a right that should be treated as fundamental); Nancy C. Marcus, Note, *Beyond Romer and Lawrence: The Right to Privacy Comes Out of the Closet*, 15 COLUM. J. GENDER & L. 355, 387–89 (2006) (arguing that *Lawrence* implicates the need for heightened scrutiny). Cf. Calvin Massey, *The New Formalism*:

good morals among the citizenry.<sup>10</sup> The Court did not apply (indeed, did not mention) the substantive due process approach articulated most fully in *Washington v. Glucksberg*, which ordinarily requires, on substantive due process claims for rights not yet recognized, a careful description of the asserted right and that the right be vindicated by history and tradition.<sup>11</sup>

An additional and important consideration in understanding the scope of *Lawrence* is that Justice Kennedy's opinion for the Court concluded with what I will call the "Exclusions Paragraph," which lists the kinds of conduct that would be excluded from the *Lawrence* Court's protection and is thus presumably still subject to criminal prohibition.<sup>12</sup> Indeed, many courts have read the *Lawrence* Court's Exclusions Paragraph as absolute.<sup>13</sup> In it, Justice Kennedy explains that the case does not involve minors, so sex crimes involving minors are excluded from *Lawrence*'s protection.<sup>14</sup> It does not involve "public conduct or prostitution."<sup>15</sup> Homosexual marriage is not at issue.<sup>16</sup> And finally, and most importantly for present purposes, Justice Kennedy says the case does not involve "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused."<sup>17</sup> Again, the Court is vague as to the universe of actors that this phrase contemplates. It might refer to those who cannot easily refuse consent

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*Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 946 (2004) (suggesting that a reexamination of tiered scrutiny may be necessary in light of, among others, *Lawrence*).

10. This was the interest advanced by Texas, which the Court found insufficient. *Lawrence*, 539 U.S. at 577–78 (adopting Justice Stevens' statement dissenting in *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986), that the state's view of a sexual practice as immoral "is not a sufficient reason for upholding a law prohibiting the practice."). For analysis of this aspect of *Lawrence*, see Keith Burgess-Jackson, *Our Millian Constitution: The Supreme Court's Repudiation of Immorality as a Ground of Criminal Punishment*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 407 (2004).

11. 521 U.S. 702, 720–23 (1997). Dale Carpenter thinks it significant that the Court did not mention *Glucksberg*, but argues that *Lawrence* and *Glucksberg* are nonetheless compatible. Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140, 1163–65 (2004).

12. *Lawrence*, 539 U.S. at 578.

13. See, e.g., *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir. 2005) (holding *Lawrence* does not protect consensual adult incest); *United States v. Palfrey*, 499 F. Supp. 2d 34, 41 (D.D.C. 2007) (holding *Lawrence* categorically does not protect prostitution); *State v. Freitag*, 130 P.3d 544, 545–46 (Ariz. Ct. App. 2006) (same); *State v. Van*, 688 N.W.2d 600, 614 (Neb. 2004) (holding *Lawrence* does not protect consensual sexual conduct involving bondage and sadomasochism because such conduct involves injury to the person). But see, e.g., *State v. Limon*, 122 P.3d 22, 24, 28 (Kan. 2005) (invalidating Kansas "Romeo and Juliet statute" on equal protection grounds, even though the case involved sex between an adult and a minor); *Earle*, 517 F.3d at 740, 746–47 (invalidating state ban on sale of sexual devices, even though this arguably involves commercial sexual activity, like prostitution).

14. *Lawrence*, 539 U.S. at 578.

15. *Id.* While it might be argued that this portion of the Exclusions Paragraph can be read as not protecting any "commercial" sexual conduct, I am uncomfortable reading the language quite that broadly. See *Earle*, 517 F.3d at 740, 746–47 (invalidating state ban on sale of sexual devices, pursuant to *Lawrence*). I therefore use the admittedly unwieldy phrase "non—prostitution," to indicate that prostitution is not protected by *Lawrence*, even if other sexual conduct with a commercial element may be.

16. *Lawrence*, 539 U.S. at 578.

17. *Id.*

because they fear harmful consequences of nonconsent based on some objective fact. For example, a woman only has sex with her boyfriend because he has been sexually violent in the past and she fears he might become violent if she refuses; or a woman who receives a sexual proposition from her boss but has sex with him only because he tells her that she will be fired if she does not do so. Or it might refer to any relationship, regardless of consent given, involving some disparity in power or authority—even if that power or authority is not exerted and, indeed, even if the victim does not reasonably believe that such power or authority would be exerted—because the nature of the relationship creates at least some risk that the power disparity has induced the consent, which might not exist but for the power disparity.

Shortly after the Court decided *Lawrence*, a rich body of scholarship emerged debating the case's meaning. For instance, in an important early piece, Randy Barnett analyzed what he saw as a major departure by Justice Kennedy from settled due process doctrine.<sup>18</sup> Barnett sees Justice Kennedy's approach as a potentially revolutionary one, if Justice Kennedy is serious about a new approach—an expansion of *liberty*, rather than *privacy*—based on his repeated references to “liberty” in the case.<sup>19</sup> In response, Dale Carpenter rejected the notion of *Lawrence* as a libertarian opinion.<sup>20</sup> Carpenter emphasizes the many ways in which Justice Kennedy's opinion goes out of its way to limit the holding.<sup>21</sup> As such, Carpenter argues that the best reading of *Lawrence* actually undermines the claims of those like Justice Scalia—whose dissent worried that the *Lawrence* opinion would usher in a new era of constitutional law in which legal restraints on sexuality were broadly invalidated by an activist and undemocratic judiciary<sup>22</sup>—and those like Barnett, who actually hoped for a more libertarian approach than they actually received.<sup>23</sup>

The early scholarship, though, did not grapple primarily with *Lawrence* as a substantive criminal law limitation. More recently, Kelly Strader has done just that, articulating a vision of *Lawrence* as a distinctly criminal law decision.<sup>24</sup> In Strader's view, *Lawrence* embraces the criminal law's harm principle (drawn, as he views it, essentially from Millian doctrine) and requires that the criminal law of sex punish only conduct

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18. See Barnett, *supra* note 9, at 21; see also Randy E. Barnett, *Grading Justice Kennedy: A Reply to Professor Carpenter*, 89 MINN. L. REV. 1582, 1582–90 (2005) (responding to Carpenter's claims about libertarian aspects of *Lawrence*).

19. Barnett, *supra* note 9, at 21.

20. See Carpenter, *supra* note 11, at 1169.

21. *Id.* at 1148–69.

22. See *Lawrence*, 539 U.S. at 590–91 (Scalia, J., dissenting). Justice Scalia writes that: State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.

*Id.* at 590. As I will explain *infra*, this appears to be a gross overstatement.

23. Carpenter, *supra* note 11, at 1141.

24. See J. Kelly Strader, *Lawrence's Criminal Law*, 16 BERKELEY J. CRIM. L. 41 (2011).

that is actually harmful, not merely socially harmful in the abstract.<sup>25</sup> Strader also rejects the claim of lower courts that the Exclusions Paragraph is an absolute bar to relief on any claim involving conduct that implicates that paragraph.<sup>26</sup> Rather, he argues, that paragraph simply allowed the Court to reserve for another day those cases in which the conduct might involve some identifiable harm, a problem the Court did not have to confront in *Lawrence* because there clearly had been no showing of harm.<sup>27</sup> Accordingly, although most of the academic commentary sees *Lawrence* as protecting a right to private, non-prostitution, consensual adult sex, the literature has been widely divergent as to the nature of the right that *Lawrence* protects and the kind and degree of judicial scrutiny to which courts must subject sex crime legislation.

Quite apart from answering our questions about the constitutionally permissible scope of sex crime legislation in America, then, *Lawrence*—over ten years later, even—instead creates further dilemmas for the criminal law of consensual sex, where those crimes do not involve minors, commercial sex, public sex, force or coercion, or other exploitation contemplated in the Exclusions Paragraph. These dilemmas are reflected in the existing scholarship on *Lawrence*, including *Lawrence*'s significance as to criminal law matters ranging from the use of sexual devices<sup>28</sup> to incest<sup>29</sup> and fornication.<sup>30</sup> This reflects not mere academic interest but, perhaps more importantly, a continued frustra-

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25. *Id.* at 66–67. Strader's piece is partly a response to those who reject this reading of *Lawrence*. See Miranda Oshige McGowan, *From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312, 1313 (2004) (arguing that *Lawrence* did not hold "that the Constitution incorporates the harm principle"); Darryl K. Brown, *Can Criminal Law Be Controlled?*, 108 MICH. L. REV. 971 (2010) (discussing difficulties of judicial application of the harm principle).

26. Strader, *supra* note 24, at 58–60.

27. *Id.* at 59.

28. See Curtis Waldo, Note, *Toys Are Us: Sex Toys, Substantive Due Process, and the American Way*, 18 COLUM. J. GENDER & L. 807, 809 (2009); Kristin Fasullo, Note, *Beyond Lawrence v. Texas: Crafting a Fundamental Right to Sexual Privacy*, 77 FORDHAM L. REV. 2997, 2997 (2009); Nathan R. Curtis, Note, *Unraveling Lawrence's Concerns About Legislated Morality: The Constitutionality of Laws Criminalizing the Sale of Obscene Devices*, 2010 BYU L. REV. 1369, 1370 (2010); Marybeth Herald, *A Bedroom of One's Own: Morality and Sexual Privacy After Lawrence v. Texas*, 16 YALE J.L. & FEMINISM 1, 1 (2004).

29. See Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 N.W. U. L. REV. 1543, 1544 (2005); Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337, 337 (2004).

30. See Amanda Connor, Note, *Is Your Bedroom a Private Place? Fornication and Fundamental Rights*, 39 N.M. L. REV. 507, 507 (2009) (evaluating *Seegmiller v. LaVerkin City*, 528 F.3d 762 (10th Cir. 2008), which held that there is no fundamental federal constitutional right to engage in consensual sex).

Bestiality, too, is a subject of some debate but I, for one, am less concerned with bestiality laws as a constitutional matter. Even on a more libertarian reading of *Lawrence*, I am confident that the Court would find the state interests in public health and protection of animals from abuse to be sufficient for upholding such criminal prohibitions. On this score, as on others, I think Justice Scalia's *Lawrence* dissent, see *Lawrence v. Texas*, 539 U.S. 558, 586–605 (2003) (Scalia, J., dissenting), overstated his objections to the majority opinion—bestiality laws, among others, can be justified on grounds beyond mere moral disapproval.

tion about the Court's vagueness and ambivalence concerning a right that seems so socially vital, if not unlimited.

To wit, the constitutionality of criminal sanctions concerning both manner-of-sex and category-of-victim range from the fairly easy cases to the far more difficult. Crimes punishing the manner of having sex range from traditional and reformed rape laws, to those that punish rape obtained by fraud or seduction. Some variation of the latter problem is familiar: one person deceives another person in order to have sex with them. Those who teach criminal law materials on rape by fraud may well introduce it with a classic deception/seduction scenario:<sup>31</sup> a man, D, looks very much like a famous actor, X. V, a woman, sees D and approaches him for conversation, believing that D is the famous actor X. She indicates this belief to him, and D perpetuates the falsehood, pretending to be X. He asks her if she wants to go to his hotel room, which she does willingly, and they have sex that is, in all apparent respects, consensual. Afterward, V realizes that D is not X and claims that her consent was limited to having sex with X, not D. Is this rape, or some other sex crime? Or, to put it in post-*Lawrence* terms, can the state constitutionally criminalize sex obtained by deception, where the victim was not deceived as to the nature of the act and therefore knowingly and voluntarily consented to the sex?

Crimes involving consensual sex between categories of persons—what we might think of as prohibited sexual partners—are equally perplexing. Again, there are the easy and comparatively uncontroversial examples: a forty-year-old may not legally have sex with a ten-year-old, for example. Yet harder problems exist, such as barring a psychotherapist from engaging in consensual sexual relations with a patient, even if the therapeutic relationship between the two has ended.<sup>32</sup> Or such as barring a twenty-three-year-old from having consensual sex with a nineteen-year-old, if the former is a teacher and the latter is a student at the teacher's high school, or a thirty-year-old college professor from having private consensual sex with a twenty-five-year-old graduate student. Perhaps it is a preposterous notion that the Constitution might be thought to protect sex between a high school teacher and adult student, or between a psychotherapist and patient, without regard to the fact that the parties in these situations are consenting adults. But if viewed at a somewhat broader level of abstraction—that the Constitution protects *some* right of consenting adults to engage in private, non-prostitution sexual conduct, the level of abstraction arguably (if imprecisely) adopted in *Lawrence*—the proposition seems far less preposterous. It is therefore reasonable to ask whether these are among the kinds of consensual sexual relationships that *Lawrence* might protect.<sup>33</sup>

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31. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 582 (6th ed. 2012).

32. See generally *State v. Hollenbeck*, 53 A.3d 591 (N.H. 2012) (holding *Lawrence* did not prevent enforcement of felonious sexual assault statute where a psychotherapist had consensual sex with former patient within one year of termination of therapeutic relationship).

33. There is an excellent body of academic literature on the enforcement of college and university policies forbidding sexual relationships between faculty and students. See,

Again, much has been said about *Lawrence*, fundamental rights, and the standard of review, and I do not wish in this Article to repeat the excellent dialogue on the case that appears in the existing literature. Nor is it necessary to do so here. Rather, this Article accounts for *Lawrence* in the following ways: (1) although *Lawrence* is a masterful judicial work of mystery, it is fair to conclude that *Lawrence* is (though it need not be) a relatively conservative opinion as to the criminal law of sex generally;<sup>34</sup> (2) nevertheless, to have meaning or importance as a matter of constitutional law, *Lawrence* must protect *something*, and that is a right of *some kind* for adults to engage in private, consensual, non-prostitution sex that does not harm others or an institution that the state may protect;<sup>35</sup> and (3) consequently, *Lawrence* is perhaps less conservative, but still deeply ambiguous and ambivalent, as to the criminal law of private, consensual, non-prostitution adult sex.

With this understanding of *Lawrence*, this Article therefore explores this ambiguity as it relates to, and the extent to which *Lawrence* governs, the criminalization of sexual conduct that cannot plainly be proscribed pursuant to *Lawrence*'s Exclusions Paragraph: private, non-prostitution, consensual sex between adults. In doing so, this Article focuses upon two distinct areas of sex crimes which demonstrate the potential effects of *Lawrence*'s looseness and ambiguity.<sup>36</sup> The first involves sex obtained by fraud or seduction, where the adult parties both consented to engaging in sexual activity, implicating the traditional criminal law distinction between fraud in the factum and fraud in the inducement. The second involves criminal laws governing forbidden sexual partners, with special attention given to the highly public matter of secondary school teacher-student sexual relationships between consenting adults. This Article argues that the loose and ambiguous language in *Lawrence* could have real implications for the criminal law of sex in America in these areas and others, and that the Court should rectify this shortcoming by clari-

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e.g., Paul M. Secunda, *Lawrence's Quintessential Millian Moment and Its Impact on the Doctrine of Unconstitutional Conditions*, 50 VILL. L. REV. 117 (2005). I will refer to this body of literature more fully in Part III.

34. On this, I concur substantially with the reading of *Lawrence* that Carpenter expressed in his early article. See Carpenter, *supra* note 11, at 1167.

35. It is possible to add an additional limit on the definition of the right, protecting it only when the sex occurs as part of an intimate relationship. See *Lawrence*, 539 U.S. at 567. Calvin Massey has described it this way. See Massey, *supra* note 9, at 960–61. But more on this aspect of *Lawrence*, *infra* Part III.D.

36. To be clear, this Article does not oppose legislation criminalizing sex by fraud or sex between teachers and adult students, and certainly does not advocate such conduct. The point of this Article is to argue that, as it is written, *Lawrence* creates the potential for constitutional challenges to a wide range of sex crimes (though lower courts have read *Lawrence* perhaps far more conservatively than it is written). These two particular areas—sex by fraud and sex between teachers and adult students—appropriately highlight the problems created by *Lawrence*'s holding and have not been the subject of much literature in the wake of *Lawrence*, despite the fact that these areas of sex crimes are often highly-publicized and often the subject of reported cases, making them worthy topics for scholarly discussion. Moreover, this Article is focused upon the *criminal* law of consensual sex after *Lawrence*, and does not fully engage the issues of administrative or civil sanctions for consensual sexual conduct, though this Article acknowledges the possibility of (and perhaps, in some cases, preference for) such sanctions, even without criminal ones.

fying the scope of the *Lawrence* right and its application in the world of crimes involving private, consensual, and non-prostitution adult sex. But even if *Lawrence* provides little additional constitutional protection for consensual adult sex, *Lawrence's* real virtue actually lies in the narrative that it stimulates beyond constitutional rights—a political conversation about the over-criminalization and over-prosecution of sex in America.

## I. THE CRIMINALIZATION OF SEX OBTAINED BY FRAUD OR SEDUCTION

The stories and lies that one will perpetuate to persuade another into sex, range from the ridiculous to the bizarre and the truly detestable.<sup>37</sup> But the criminal law must decide when such lies or misrepresentations produce such significant social harms that they warrant moral condemnation by the community. As a California court phrased one such problem when it reviewed a recent case, “[a] man enters the dark bedroom of an unmarried woman after seeing her boyfriend leave late at night and has sexual intercourse with the woman while pretending to be the boyfriend. Has the man committed rape?”<sup>38</sup> No, the court said—or, yes, but only if she is married, because California makes it crime to have sex with a person where the actor deceives the victim into

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37. See Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39 (1998) [hereinafter Falk, *Rape by Fraud*] (compiling cases from several categories of rape by fraud). Falk’s piece is extraordinarily comprehensive. This Article does not seek to taxonomize rape by fraud in such a comprehensive way. Rather, it merely offers a synopsis of this category of sex crimes, where there is an issue as to the validity of consent, in order to frame the *Lawrence*-related constitutional problem. Accordingly, although Falk’s article covers both rape by fraud and rape by coercion, this Article excludes criminal prohibitions involving coercion, because those are clearly subject to the Exclusions Paragraph of *Lawrence*. See *Lawrence*, 539 U.S. at 578. For a truly comprehensive, if somewhat dated, account of these sex crimes, I highly recommend Falk’s piece.

Jed Rubinfeld has penned a more recent, and provocative, account of the problem created by deceptive sex, and its relation to *Lawrence*. See Jed Rubinfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372 (2013). Rubinfeld argues that rape law ought to be based on a right of self-possession. His piece has been subjected to strong criticism. See generally Tom Dougherty, *No Way Around Consent: A Reply to Rubinfeld on “Rape-by-Deception,”* 123 YALE L.J. ONLINE 321 (2013); Deborah Turkheimer, *Sex Without Consent*, 123 YALE L.J. ONLINE 335 (2013); Patricia J. Falk, *Not Logic, But Experience: Drawing on Lessons from the Real World in Thinking About the Riddle of Rape-by-Fraud*, 123 YALE L.J. ONLINE 353 (2013).

38. *People v. Morales*, 150 Cal. Rptr. 3d 920, 921–22 (Cal. Ct. App. 2013). Julio Morales was accused of entering Jane Doe’s bedroom after her boyfriend left and having sex with her while she was asleep. *Id.* at 923. He was convicted of rape of an unconscious person. See CAL. PENAL CODE § 261(a)(4) (West 2008).

A somewhat similar factual scenario arose in Connecticut in 2009. Police officer Jared Rohrig allegedly pretended to be his identical twin brother, Joe, in order to have sex with Joe’s girlfriend. During their sexual encounter, the girlfriend realized that Jared was not Joe because Jared did not have the tattoo that Joe had on his backside. See Ryan Smith, *Twin Trouble: Ex-Cop Jared Rohrig Pleads Not Guilty to Posing as Brother for Sex*, CBS NEWS (Oct. 12, 2009, 8:18 AM), [http://www.cbsnews.com/8301-504083\\_162-5372039-504083.html](http://www.cbsnews.com/8301-504083_162-5372039-504083.html). He pleaded no contest to unlawful restraint and criminal impersonation; the State dropped the sexual assault charges. See Brian McCreedy, *Ex-Orange cop avoids jail in Milford twin sex Switch case*, NEW HAVEN REGISTER (March 9, 2012, 12:00 AM), <http://www.nhregister.com/general-news/20120309/ex-orange-cop-avoids-jail-in-milford-twin-sex-switch-case-document-3>.

believing that the actor is her spouse.<sup>39</sup> In 2010 in Israel, an Arab man, who worked in Jerusalem, had a sexual encounter with an Israeli woman who subsequently learned that he was not Jewish.<sup>40</sup> He had given her a name, “Dudu,” that is a common Israeli name, and the woman never asked whether he was Jewish, nor did he tell her that he was Arab.<sup>41</sup> By all objective indications, according to one of the Israeli judges, the sex itself was consensual, but the woman complained afterward, saying she would never have had sex with him had she known he was not Jewish.<sup>42</sup> As part of a plea bargain, he was convicted under local law of rape by deception.<sup>43</sup> May American criminal law punish this conduct?

### A. *Traditional and Contemporary Approaches*

The traditional rule in the law of rape was, as Joshua Dressler appropriately describes it, that a seducer is not a rapist.<sup>44</sup> The rule was predicated upon the distinction between fraud in the factum and fraud in the inducement.<sup>45</sup> Pursuant to one popular description of the doctrine, if the victim was deceived as to the nature of the sex act itself—that is, if the deception precluded her from knowing that she was consenting to sex—then the defendant could not escape liability by claiming consent.<sup>46</sup> This is fraud in the factum. On the other hand, if the victim knew that she was consenting to sex, and was deceived only as to some fact ancillary to the nature of the act of having sex, then the defendant could fairly claim that the victim consented and he could not be guilty of rape.<sup>47</sup> Fraud in the inducement, then, was akin to what

39. *Morales*, 150 Cal. Rptr. 3d at 921–22, 929. The court’s conclusion was based on the fact that it was unclear whether the jury convicted Morales based on the theory that she was asleep (which would have been a valid theory) or on the theory that she was unconscious as to the nature of the act (which was not valid on these facts). Had the victim been married, Morales could have been convicted under the section of the Penal Code described above. See CAL. PENAL CODE § 261(a)(5) (West 2008).

40. See Joe Adetunji & Harriet Sherwood, *Arab guilty of rape after consensual sex with Jew*, THE GUARDIAN (July 20, 2010), <http://www.guardian.co.uk/world/2010/jul/21/arab-guilty-rape-consensual-sex-jew>.

41. See Harriet Sherwood, *Saber Kashour: “My conviction for ‘rape by deception’ has ruined my life,”* THE GUARDIAN (July 24, 2010), <http://www.guardian.co.uk/world/2010/jul/25/saber-kushour-rape-deception-charge>.

42. See Adetunji & Sherwood, *supra* note 40.

43. *Id.* Subsequently, media reports described a more complicated case in which the victim had complained of a forcible rape that was plea bargained to a reduced charge. See Rachel Shabi, *Arab rape-by-deception charge ‘was result of a plea bargain,’* THE GUARDIAN (Sept. 8, 2010, 1:09 PM), <http://www.guardian.co.uk/world/2010/sep/08/rape-by-deception-plea-israel>.

44. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 594 (5th ed. 2009).

45. *Id.* See also WAYNE R. LAFAYE, CRIMINAL LAW § 17.3(c) at 908 (5th ed. 2010) (explaining the distinction in the rape law context); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 215 (3d ed. 1982) (stating “consent induced by fraud is as effective as any other consent . . . if the deception related not to the thing done but merely to some collateral matter”); Joel Feinberg, *Victims’ Excuses: The Case of Fraudulently Procured Consent*, 96 ETHICS 330, 331 (1986). Rubenfeld is highly critical of the reasoning underlying the distinction. See Rubenfeld, *supra* note 37, at 1398–1400.

46. DRESSLER, *supra* note 44, at 594.

47. *Id.*

has been described by Susan Estrich as simply “old fashioned seduction.”<sup>48</sup>

One of the most well-known cases on the factum-inducement distinction was the famed California case of *Boro v. Superior Court*.<sup>49</sup> The defendant Boro telephoned the victim, Ms. R., claiming to have blood test results that suggested she suffered from a deadly disease that resulted from the use of public toilets.<sup>50</sup> Claiming to be “Dr. Stevens,” he told her that there were only two ways to treat the disease: one was a painful and expensive surgery, the other was to have sex with a man who could serve as a donor of a serum that would cure the disease.<sup>51</sup> The latter option would cost her only \$4,500, but when he was informed that she could not afford that option either, “Dr. Stevens” told her that \$1,000 would be a sufficient down payment.<sup>52</sup> Ms. R. could not afford the surgery, so she agreed to the sexual encounter, and it was carried out in a hotel room with the anonymous donor (Boro).<sup>53</sup> Ms. R. said she believed she would die if she did not get the “treatment.”<sup>54</sup> Boro was charged with rape under California law but the California Supreme Court ruled that this was fraud in the inducement—and therefore not rape—because Ms. R. fully and willingly consented to have sex with the unknown person, even though her reasons for doing so were predicated upon a fraud.<sup>55</sup>

Particularly in light of the rape reform movement that desired focus on the issue of consent, the factum-inducement distinction seemed troubling. After all, is all fraud in the inducement the same? Should there be a legally cognizable difference between a perpetrator claiming that he is a famous actor, on the one hand, and the perpetrator assuring a woman that he does not have a sexually transmitted disease, where the woman says she will sleep with him but only if he does not have an STD?<sup>56</sup> Or, as Dressler and others have asked, would that lead to some absurd results (for example, a man would be guilty of rape if he told his girlfriend that he loved her, thus inducing her to have sex with him, even though he later admits that he never loved her)?<sup>57</sup> In a

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48. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1120 (1986).

49. 163 Cal. App. 3d 1224 (Cal. Ct. App. 1985).

50. *Id.* at 1226.

51. *Id.*

52. *Id.*

53. *Id.* at 1227.

54. *Id.*

55. *Id.* at 1230–31. *Boro* is discussed in *Morales*. See *People v. Morales*, 150 Cal. Rptr. 3d 920, 927 (Cal. Ct. App. 2013). Distinguish the cases in which consent was said to exist based on the factum-inducement dichotomy from those in which there is, for example, therapeutic deception as in *Boro*. A conviction in the latter is improper because the state cannot prove the force required for rape. See *Don Moran v. People*, 25 Mich. 356, 357–58 (1872) (doctor induced fifteen-year-old girl to have sex with him by falsely telling her that her father consented, that he treated all women with sex, and that the alternative was a painful procedure that would probably result in her death).

56. See Vivian Berger, *Not So Simple Rape*, 7 CRIM. JUST. ETHICS 69, 76–77 (1988).

57. See DRESSLER, *supra* note 44, at 584; see also Berger, *supra* note 56, at 76–77 (asking whether a false “I love you” constitutes a material misrepresentation warranting liability for rape by fraud).

comprehensive study of rape by deception and coercion, Patricia Falk described the factum-inducement dichotomy as “problematic” because it relies upon a formal legal distinction that fails to “critically examin[e] the types of fraudulent inducements that impugn the voluntariness of consent.”<sup>58</sup> Perhaps the criminal law’s task, then, is to articulate some meaningful distinctions among the types of fraud in the inducement, imposing criminal sanctions upon frauds that work particular kinds of personal and social harms.

Some scholars like Susan Estrich began asking for a criminal law that sought to punish all sex obtained by deception.<sup>59</sup> As Estrich popularly framed the question, why is it that we make it a crime to obtain someone’s property through fraud or deception, but we do not do the same when the fraud or deception is used to obtain sex?<sup>60</sup> She compares the then-extant rape law to the law of false pretenses and theft by deception, and ultimately concludes that loss of bodily integrity is a “different and greater injury than loss of money.”<sup>61</sup> Estrich does not claim that sex by fraud or deception ought to be treated and punished the same as traditional forcible rape, but she plainly wishes it to be criminalized.<sup>62</sup> The factum-inducement distinction is inadequate.

Others, though, questioned criminalizing this kind of fraud broadly. Vivian Berger responded to Estrich’s paper, suggesting that many men who engage in such deceptions are despicable characters, but ought not to be called rapists.<sup>63</sup> Unlike Estrich, who considers fraudulent sex and extortionate sex together, Berger separates the two and considers sex by extortion far more culpable.<sup>64</sup> Berger says she has “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.”<sup>65</sup> Similarly, Donald Dripps—advancing the idea of a sexual expropriation offense that would capture certain conduct less serious than rape in which pressure short of violence or violent threats is exerted to obtain sex<sup>66</sup>—conceded the strength of Estrich’s argument, but was also careful to distinguish extortionate sex from fraudulently obtained sex.<sup>67</sup> Moreover, he wrote, in light of the complexity of sexual relationships and the difficulty of determining the causal relationship between sex and a particular deceit, proposals to criminally punish fraudulently obtained sex could result in the “sweeping criminalization of sex.”<sup>68</sup> Dripps preferred instead to focus the sexual expropriation

58. See Falk, *Rape by Fraud*, *supra* note 37, at 49–50.

59. See Estrich, *supra* note 48, at 1115–21.

60. *Id.* at 1119–21.

61. *Id.* at 1121.

62. *Id.* at 1120–21.

63. See Berger, *supra* note 56, at 76–77.

64. *Id.* at 77.

65. *Id.* at 76.

66. See Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1799–1800 (1992).

67. *Id.* at 1802.

68. *Id.* at 1802–03.

offense on the issue of consent and the disregard of words in intimate affairs, concluding that such conduct implicates interests in sexual autonomy though not in freedom from violence.<sup>69</sup>

In modern criminal law, many states have taken seriously this scholarly debate and have adopted the notion that not all fraud in the inducement is the same and that at least some forms of deception should vitiate consent, even if the victim knew she was consenting to sex.

Shortly after *Boro*, for example, California changed its rape law and added a new provision, which now makes it a crime to induce a person to engage in certain sex acts where the victim's consent is procured by false or fraudulent representation that "the sexual penetration served a professional purpose when it served no professional purpose."<sup>70</sup> Other states have also adopted sex-by-deception prohibitions that appear to abolish the factum-inducement distinction, some more punitive than others. In Tennessee, for example, sexual battery is a Class E felony and includes sexual penetration where the penetration is "accomplished by fraud."<sup>71</sup> This is perhaps the broadest of all state criminal proscriptions of sex by deception. In *State v. Tizard*, the Tennessee Court of Criminal Appeals expressly rejected the argument that fraud only in the inducement would bar conviction under the statute.<sup>72</sup> That court held that Tennessee law gave "fraud" its broadest meaning and that consent induced by deception is ineffective.<sup>73</sup> Alabama also makes it the crime of sexual misconduct for a male to engage in sexual conduct with a female where consent "was obtained by the use of any fraud or artifice."<sup>74</sup> And Montana, for purposes of its sex crime provisions, provides that a victim is incapable of consent due to "deception, coercion, or surprise."<sup>75</sup> Beyond this broader category, many states have made sex by deception a crime in specific instances, making it a crime to deceive a person into believing that the perpetrator is the victim's spouse, or into believing that the person is a physician or other person authorized to perform a medical procedure or any other professional service.<sup>76</sup>

69. *Id.* at 1803. Dripps writes that, "[t]he gist of the new offense, then, would be to punish any one who purposely or knowingly engages in a sexual act with another person, knowing that the other person has expressed a refusal to engage in that act." *Id.* at 1804.

70. See CAL. PENAL CODE § 261(a)(4)(D) (West 2013).

71. See TENN. CODE ANN. § 39-13-503(a)(3) (2010).

72. 897 S.W.2d 732 (Tenn. Crim. App. 1994). There, a physician who had been treating a seventeen-year-old boy masturbated the boy, claiming that he was obtaining a semen sample to test white blood cells. *Id.* at 735–37. The physician argued that the victim was at all times aware that he was being masturbated and that he never objected; in fact, the victim continued receiving treatment and steroid injections from the physician, even after the initial masturbation. *Id.* at 740–41.

73. *Id.* at 741.

74. See ALA. CODE § 13A-6-65(a)(1) (1975).

75. MONT. CODE ANN. § 45-5-501(1)(a)(ii)(C) (2011).

76. See, e.g., CAL. PENAL CODE § 261(a)(D) (West 1872); COLO. REV. STAT. ANN. §§ 18-3-402(1)(c) (West 2001), (g); COLO. REV. STAT. ANN. §§ 18-3-405.5 (1)(a)(II), 2(a)(II) (West 2001); CONN. GEN. STAT. §§ 53a-71(a)(6), (7) (West 2012 & Supp. 2012); KAN. STAT. ANN. 21-5503(a)(4) (West 2010 & Supp. 2011). For a fuller discussion, see

### B. *Special Problems: Misrepresented Identity and Seduction*

Not all states have gone so far as to make all fraudulently obtained sex a crime, continuing instead to recognize the traditional factum-inducement distinction. But that distinction is especially confounding in the mistaken identity cases. Does misrepresentation about being a famous actor or athlete work the same harms as misrepresentation about being a husband or fiancé?

In this sense, consider a different formulation of the factum-inducement distinction. As one court has stated it, in the case of a man convicted of rape under military law after having intercourse with a sleeping woman who had recently had intercourse with another man,

Clearly, fraud in the inducement includes such general knavery as: “No, I’m not married”; “Of course I’ll respect you in the morning”; “we’ll get married as soon as . . .”; “I’ll pay you \_\_\_\_ dollars”; and so on. Whatever else such tactics amount to, they are not rape.

The question is—what is fraud in the *factum* in the context of consensual intercourse? The better view is that the “*factum*” involves both the nature of the act and some knowledge of the identity of the participant. Thus in the “doctor” cases, consent would not be present unless the patient realized that the “procedure” being employed was not medical, but sexual . . . [W]e take it that even the most uninhibited people ordinarily make some assessment of a potential sex partner . . . before consenting to sexual intercourse. Thus, consent to the act is based on the identity of the prospective partner.<sup>77</sup>

Notice how this formulation may well differ from the one described previously. Using the previous formulation, the person who pretends to be a famous actor, athlete, or musician, or who feigns employment as a talent scout<sup>78</sup> or casting agent or famed fashion photographer,<sup>79</sup> would be committing only fraud in the inducement, so long as the person from whom he obtained sex knew that she was consenting to sex. But using this latter formulation—if “*factum*” is predicated upon either a belief that the act is something other than sex *or* a belief that the actor is not who he says he is—the same person would arguably be committing fraud in the *factum*, because he is deceiving the victim as to his identity. Consent, on this view, would be ineffective even if the victim knew she was consenting to sex because her consent

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Russell L. Christopher & Kathryn H. Christopher, *Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape*, 101 Nw. U. L. Rev. 75 (2007).

77. United States v. Booker, 25 M.J. 114, 116 (C.M.A. 1987). The court found that Booker’s conduct was fraud in the *factum*. *Id.*

78. See, e.g., United States v. Condolon, 600 F.2d 7 (4th Cir. 1979) (defendant convicted of wire fraud after creating scheme to have sex with women whom he said he would assist in finding acting and modeling work).

79. See Falk, *Rape by Fraud*, *supra* note 37, at 69 (describing unpublished case of Oscar Kendall, who impersonated a famous fashion photographer in order to induce women into locations where he could have sex with them).

would be based on the man's assumed identity and, we can say, she would not have consented but for that assumption.

The Massachusetts Supreme Judicial Court in *Suliveres v. Commonwealth* continued to recognize the traditional factum-inducement distinction where the defendant had sex with a woman by impersonating his brother, the woman's boyfriend.<sup>80</sup> The room was dark and the woman assumed that the man was her boyfriend.<sup>81</sup> The two then had sex.<sup>82</sup> The court said this was fraud in the inducement and prohibited defendant's prosecution for rape, recognizing that "[f]raudulently obtaining consent to sexual intercourse does not constitute rape as defined in our statute."<sup>83</sup> Contrast this with the same court's decision in *Commonwealth v. Caracciola*.<sup>84</sup> There, the victim entered Caracciola's car after he instructed her to get off of the street where she was walking.<sup>85</sup> She noticed that he was wearing a firearm.<sup>86</sup> He made statements implying that he was a police officer, such as when he said that if the victim did not stop crying, he would "lock [her] up for more things than [he] was planning on."<sup>87</sup> After stopping in a nearby school parking lot, the defendant began touching the victim's legs.<sup>88</sup> When she said that she was afraid and that the police frequented the area, the defendant assured her that he was a police officer.<sup>89</sup> She had sexual intercourse with him, fearing that she would be arrested if she did not.<sup>90</sup> Caracciola claimed this was not rape in Massachusetts because the sex was merely induced by fraud, his lie that he was a police officer, which presumably simply made the woman feel more comfortable about having sex with him.<sup>91</sup> The court disagreed. Caracciola's conduct and threats about incarcerating the victim, combined with his misrepresentations about being a police officer, were sufficient to constitute constructive force, which was sufficient to satisfy the Commonwealth's rape statute.<sup>92</sup> These cases illustrate the more traditional approach in which fraud will not substitute for force, but where force is actually or constructively present, a rape conviction would be appropriate.

Even more problematic are the mistaken identity cases that result in *adulterous* sex—where the perpetrator fraudulently leads the victim to believe that he is the victim's spouse. Courts have substantially disagreed as to whether this is rape.<sup>93</sup> One approach suggests that, regard-

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80. 865 N.E.2d 1086 (Mass. 2007).

81. *Id.* at 1088.

82. *Id.* The victim said she was "not fully awake" at the time of the penetration. *Id.*

83. *Id.* at 1091.

84. 569 N.E.2d 774 (Mass. 1991).

85. *Id.* at 775.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 777.

92. *Id.* at 778.

93. See Falk, *Rape by Fraud*, *supra* note 37, at 66.

less of the nature of the misrepresentation and the nature of the resulting sex, the sex is nonetheless consensual, and thus fraudulently pretending to be the victim's spouse is merely fraud in the inducement.<sup>94</sup> Other courts, however, suggest that this amounts to rape—as fraud in the factum—because the consent given is to the act of marital sex, not to adulterous sex, and the resulting adulterous sex is more harmful.<sup>95</sup> This latter view is consistent with the latter formulation of the factum-inducement distinction mentioned above: even though the victim knew she was consenting to sex, the perpetrator is still guilty of rape because he worked a deception as to the nature of the act, but *that* deception is based upon her mistake as to his identity. Consequently, the mistaken identity cases depend not simply upon whether the jurisdiction recognizes the factum-inducement distinction, but also upon which variation or understanding of that distinction applies.

Finally, a small group of states today have statutes that separately criminalize seduction. At one point, gender-specific seduction crimes were pervasive in the United States.<sup>96</sup> At common law, seduction was merely a tort.<sup>97</sup> Yet by the early twentieth century (prior to the admission of Alaska and Hawaii) thirty-seven states had enacted criminal seduction statutes.<sup>98</sup> One of the early seduction laws was actually a forerunner of the current teacher-student sex bans: Ohio in 1886 enacted a law that prevented a man over age twenty-one who was a superintendent, tutor, or teacher from having sexual intercourse with any female under his instruction, even where the sex was consensual.<sup>99</sup> The law “conclusively presumed that the tutor was a vile seducer, the pupil an innocent victim.”<sup>100</sup> By the early twentieth century, in most seduction jurisdictions the law had evolved and seduction required a false or pretended promise of marriage.<sup>101</sup> In other states, seduction typically barred the seduction and debauchery of a woman of chaste or virtuous character.<sup>102</sup> Notably, though, these statutes were “broad enough to

94. See, e.g., *Lewis v. State*, 30 Ala. 54 (1857) (holding no rape occurred where slave entered bed of a white woman and had sex with her, as she thought Lewis was her husband). See also LAFAYETTE, *supra* note 45, at 908 (explaining various approaches).

95. See *Regina v. Dee*, 15 Cox C.C. 579 (1884). See also Ann Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1 (1998) (arguing that fraud should negate consent where victim believed she was having sex with husband). Cf. Feinberg, *supra* note 45, at 345 (explaining that misrepresentation that induces adulterous sex results in more serious harm than other types of misrepresentations of identity, the difference between “suffering an evil and missing a good”). See also Rubinfeld, *supra* note 37, at 1397 (describing impersonation of a woman's husband as one of only two generally-recognized exceptions to the general rule that deception is not rape).

96. See H.W. Humble, *Seduction As a Crime*, 21 COLUM. L. REV. 144 (1921).

97. *Id.* at 154. See also Brian Donovan, *Gender Inequality and Criminal Seduction: Prosecuting Sexual Coercion in the Early-Twentieth Century*, 30 LAW & SOC. INQUIRY 61, 65–66 (2005) (stating that seduction existed as a tort since the colonial era); Lea Vandervelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817, 867 (1996) (discussion of seduction in tort); Larsen, *supra* note 1, at 379 (discussion of history of seduction in tort).

98. Humble, *supra* note 96, at 144.

99. See FRIEDMAN, *supra* note 1, at 219.

100. *Id.*

101. Humble, *supra* note 96, at 145–50.

102. *Id.* at 146–47.

cover practically every case of intercourse with consent,<sup>103</sup> as seduction was understood to encompass “the use of arts, persuasions, or wiles to overcome the resistance of the female who is not disposed, of her volition, to step aside from the path of virtue. . . . Any seductive arts or promises, where the female involuntarily or reluctantly yields thereto, are sufficient.”<sup>104</sup>

Interestingly, then, conduct that might well exculpate a man from the crime of rape because it is merely fraud in the inducement could actually subject him to criminal liability pursuant to a seduction statute, if the woman fit the statutory character requirement. This may seem inconsistent with the idea that a person should be free of criminal responsibility where the woman knowingly consents to sexual intercourse, which is the defining element of fraud in the inducement doctrine. But seduction laws were predicated upon a different concern: that a chaste or virtuous woman would not have consented to the sex, but for the enticements of the seducer.<sup>105</sup> Not unlike rape law, as well as criminal prohibitions on adultery, the preservation of female virtue, it turns out, has been identified as the core concern of seduction legislation.<sup>106</sup> The ruination of a female was taken so seriously that not only was it the object of criminal legislation, it also gave rise to what Lawrence Friedman has described as the “unwritten law” that justified the use of force or violence (often deadly) by a man in defense of his wife’s, daughter’s, mother’s, or sister’s personal honor.<sup>107</sup> Still, others have suggested that, despite the modern view of criminal seduction as a product of a paternalistic and sexually repressive bygone era, those laws were actually important tools for combating sexual violence and coercion and “acted as an instrument of social justice for vulnerable working-class and immigrant women.”<sup>108</sup>

Later in the twentieth century, many states abandoned their seduction laws as part of a growing trend of “anti-heart-balm” statutes designed to account for more active female sexuality.<sup>109</sup> Still, today, a few seduction statutes remain notable. In Mississippi, it is seduction (punishable by up to five years) to obtain carnal knowledge of any woman of previous chaste character by virtue of a feigned or pretended marriage or a false promise to marry.<sup>110</sup> Oklahoma has a similar seduction statute that makes it a crime to have sex with a woman under false promise to marry.<sup>111</sup> Michigan has the broadest seduction prohibition that does not require a false promise of marriage: it is a felony punishable by up to five years for a man simply to seduce and debauch an unmarried woman.<sup>112</sup>

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103. *Id.* at 146.

104. *Id.* (quoting *State v. O’Hare*, 36 Wash. 516, 518 (1904)).

105. *See* FRIEDMAN, *supra* note 1, at 218–20.

106. *Id.*

107. *Id.* at 221–22.

108. Donovan, *supra* note 97, at 83.

109. *See id.* at 82; Larsen, *supra* note 1, at 393–97.

110. MISS. CODE § 97-29-55.

111. 21 OKLA. STAT. ANN. tit. 21, § 1120 (West 2002).

112. MICH. COMP. LAWS § 750.532.

Most states, then, punish some form of fraudulent sex or sex by inducement or enticement. The traditional factum-inducement distinction has broken down, both in the law of rape and in the law of other sex crimes. What we see in modern criminal law, then, is a realization of Falk's observation that the question is not whether to criminalize sex by deception, but rather what *kinds* of deception will suffice for criminal liability.<sup>113</sup> And yet in some jurisdictions, most any deception will suffice. This trend is evidence of an American criminal law in which the pendulum has swung toward making non-consent the essential defining element of modern rape, where some categories of fraud that do not deceive as to the nature of the act may be said to vitiate what would otherwise be consent in fact to sex.

### C. *Lawrence and the Sex by Fraud or Seduction Crimes*

If *Lawrence* protects a right to engage in private, consensual, adult sexual activity, then, the argument might run, *Lawrence* could possibly provide a *very* narrow avenue of protection for a defendant accused of a seduction or sexual deception crime where the sex was *in fact* consensual. Although the case law does not appear to address any situations post-*Lawrence* in which a defendant has been accused of a seduction or sex-by-deception crime and has made such an argument relying on *Lawrence*, there remains a tiny category of prosecutions in which such an argument would at least be plausible, but it would almost certainly have to involve a seduction statute like the one in Michigan—a rare statute that is seldom enforced. Rape by fraud likely contains a sufficient element of exploitation (and in some cases, much more than this) to at least justify state regulation in the abstract and would fall outside of *Lawrence's* protection.

The problem, for a criminal defendant, is this: if the state defines consent as being vitiated by fraud (even where fraud was in the inducement), then the sex is by definition nonconsensual and is thus outside the zone of *Lawrence's* protection. If the state retains a factum-inducement distinction and the fraud is merely in the inducement, then state criminal law cannot reach the defendant in the first place and the protection of *Lawrence* is unnecessary. Consequently, in the former situation, the defendant would have to argue that *Lawrence* constitutionalizes the factum-inducement distinction and forbids state law from defining something as nonconsensual where the common law would not have vitiated consent. This is likely asking far too much of the Court and of *Lawrence*. Of the crimes implicated in this Part, then, the best candidates for attack pursuant to *Lawrence* are the seduction crimes, where applied to seductive sex between adults.

Of course, rape obviously falls outside of any constitutional protection. But for a challenger, the relevant question is which understanding of rape we mean when we say this. Is it possible, one might ask, that

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113. See Falk, *Rape by Fraud*, *supra* note 37, at 167. See also Falk, *Not Logic, But Experience*, *supra* note 37, at 368–69 (observing that criminal laws applicable to fraudulent sex have been evolving as more real world examples shed light on the harms done).

Justice Kennedy was sufficiently aware of the factum-inducement distinction in rape law that his opinion sought to ensure constitutional protection for that distinction, or that he did so unwittingly? The predicate to the right recognized in *Lawrence*, as Cass Sunstein has observed, is consent.<sup>114</sup> If *Lawrence* functions only pursuant to the traditional factum-inducement distinction, then situations where fraud in the factum exists would be unprotected by *Lawrence* because fraud in the factum vitiates the consent given. But because fraud in the inducement does not vitiate consent, then it could be argued that sex obtained by fraud in the inducement is at least presumptively protected under the umbrella of *Lawrence*, even if state law does not follow that legal distinction. That would need to be a very large umbrella, however, because it assumes that the Court meant to constitutionalize the factum-inducement distinction—and there is virtually no evidence from *Lawrence* that this is the case. Indeed, *Lawrence* says “coerc[ion]” and “injur[y]” explicitly, though it does not mention fraud or deception.<sup>115</sup> Perhaps this was meant to be Justice Kennedy’s way of simply reinforcing the obvious point that rape would not be included in any constitutional protections, and that “coercion” only means sex obtained by force or threat. But if coercion is understood to mean sex obtained by fraud or deception—a fair understanding<sup>116</sup>—then it is fair to conclude that *all* fraudulent sex falls outside of *Lawrence*’s small universe of protection. Sexual deception as coercion makes sense, especially if we adopt a deeper, and broader, understanding of harm. Coercion involving a threat places the victim in a position where she cannot reasonably will a choice to refuse consent. With sexual deception, she can still choose not to have sex, but the decision to do so is not made on the basis of accurate information, and the deceiver is culpable for the misinformation. Consequently, the consent given may fairly be said to be unknowing, even unintelligent. In this sense, the victim of the fraud is deprived of her autonomy and bodily integrity, just as a person who engaged in sex via force or threat. As Jane Larsen has written, “deception into sex is not as physically injurious as rape by force; yet like a rape, sexual fraud falls on the wrong side of the consent line.”<sup>117</sup>

So if (as is likely) *Lawrence* does not constitutionalize the factum-inducement distinction, political actors therefore retain the latitude to define what conduct vitiates consent. In Tennessee criminal law, for example, all fraud negates consent.<sup>118</sup> Tennessee could not enforce such a rule if *Lawrence* constitutionalized the factum-inducement dichotomy. And of course, it seems on its face difficult to suggest that the Constitution would forbid the states from defining sex crimes in a

114. See Cass R. Sunstein, *Liberty After Lawrence*, 65 OHIO ST. L.J. 1059, 1064 (2004).

115. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

116. See LAFAVE, *supra* note 45, at 909 (placing rape-by-fraud cases in category of “coercion”).

117. See Larsen, *supra* note 1, at 414. Larsen is speaking in the context of tort actions, but her conclusions about the harm done and the relationship of fraud and consent seem to apply equally in the area of criminalization.

118. See TENN. CODE ANN. § 39-13-503(a)(4) (West 2005).

way that ensures protection from certain harms the state can reasonably identify. Of course, complicated questions arise if we merely defer to the state's judgment that certain sexual situations cannot, by definition, be consensual.

Merely saying that states should be able to define consent, while likely true, is not unproblematic. One could plausibly argue that such a rule would allow states to dictate the scope of a federal constitutional right, and it could undermine some truly consensual sexual relationships that the constitutional law might otherwise wish to foster or at least grudgingly protect. Consent, on this reading, has no independent constitutional meaning. It is solely a creature of state law, and thus the scope of the *Lawrence* right is dependent upon the content of state law. Furthermore, to say that consent ought to have some constitutional dimension when it is part of a standard for determining the scope of a constitutional right is not inconsistent with the Court's work in other areas of criminal case adjudication. In the constitutional criminal procedure context, for example, the Court has been willing to define consent for purposes of determining the scope of Fourth Amendment protection.<sup>119</sup> But of course, *Lawrence* did not do this, and it is fair to assume that when *Lawrence* speaks of "consensual" sex, it means "consensual" as defined by the relevant state criminal law. Moreover, in other contexts the Court has recognized a constitutional right and allowed the states the latitude to determine whether the right is implicated based on definitions the state creates.<sup>120</sup> In short, had the Court meant to give constitutional dimension to "consent" in *Lawrence* it could have explicitly done so, even going so far as to say that the right to private, non-prostitution, consensual adult sex is informed by the legal tradition of the factum-inducement dichotomy. But *Lawrence* did no such thing.

None of this is to say that all sex by fraud or deception ought to be criminalized, but rather that the state would have a rational basis, beyond mere moral disapproval, for concluding that the conduct is worthy of condemnation, thus leaving the conduct outside the scope of constitutional (as opposed to legislative) protection. Here, then, Justice Kennedy may have been a bit sloppy. *Lawrence* could, and should, have more explicitly identified the kinds of harmful conduct in relation to sex that remain unprotected. Even if we can say that the sex was "consensual" as that term is understood in the context of the factum-inducement distinction, sex obtained by deception still has the ring of, if not the actual taint of, exploitation. For this reason, the more con-

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119. See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (holding that consent to search is valid when it is voluntary under the totality of the circumstances).

120. See, e.g., *Atkins v. Virginia*, 536 U.S. 304 (2002) (allowing states to define mental retardation for purposes of determining who can be executed). *Atkins* held that the Eighth Amendment bars the execution of a person who is mentally retarded. The Court, however, explicitly left to the states the task of determining who falls into the category of persons for whom there was a national consensus against execution. *Id.* at 317.

servative reading of *Lawrence* would likely forbid constitutional protection.

*Lawrence* might be fatal, however, to seduction as a crime, at least as it is enforced in the Michigan statute, which makes it a felony punishable by five years in prison for a man to “seduce and debauch” an unmarried woman.<sup>121</sup> Because seduction can include “arts, persuasions, or wiles,”<sup>122</sup> and not necessarily deception as it is practiced in the fraud cases or even in the breach of promise to marry statutes, some acts of seduction—understood broadly—may not implicate an interest against sexual violence nor involve the same kind of autonomy interest or interest against exploitation that exists with respect to the sexual fraud crimes. Rather, one commonly accepted reading of the history of seduction suggests that it was primarily designed to promote a purely moral interest: preserving womanly virtue (and in the case of the Michigan statute, the virtue of an unmarried woman in particular).<sup>123</sup> Even on the more judicially conservative reading of *Lawrence* described here, *Lawrence* might arguably view this as precisely the kind of moral interest that does not deserve vindication. Consequently, if sex between adults is obtained by seduction, is otherwise consensual in fact, is private and not prostitution, and did not involve deception of a kind that would implicate the state’s interest in protecting the victim against exploitation or coercion, a defendant accused of seduction could plausibly claim the protection of *Lawrence* and at least force the state to defend the application of the statute on grounds other than preserving female virtue (and the more recent literature on seduction suggests the state may have such additional justifications, given appropriate facts).<sup>124</sup> This is hardly enough to make *Lawrence* meaningfully more libertarian in practice, however, because of the rarity of such statutes and the even greater rarity of seduction prosecutions involving the factual situation described here. Nevertheless, to the extent that statutes like the one in Michigan are used by prosecutors as the basis for either a criminal trial or for negotiating a plea,<sup>125</sup> prosecutors should be aware at least of the vulnerability of seduction crimes after *Lawrence*.

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121. MICH. COMP. LAWS § 750.532 (1970).

122. See Humble, *supra* note 96, at 146 (quoting *State v. O’Hare*, 36 Wash. 516, 518 (1904)).

123. See FRIEDMAN, *supra* note 1, at 217–20.

124. See, e.g., DONOVAN, *supra* note 97, at 71–82 (discussing nineteenth century seduction cases and comparing them to modern “date rape” scenarios); LARSEN, *supra* note 1, at 403 (arguing that sexual fraud should be an actionable tort). In light of the justifications given by those like Larsen, it is at least conceivable that some of those same justifications—beyond sexual morality—could validate criminal statutes on seduction. This is also true if we view seduction as a form of sexual exploitation (such as with rape-by-fraud generally), which I view as outside of any due process protections. See Falk, *Not Logic, but Experience*, *supra* note 37, at 357–59.

125. For an interesting comment on this, see Eugene Volokh, *Recent Michigan Prosecutions for “Seducing an Unmarried Woman,”* THE VOLOKH CONSPIRACY (June 8, 2010, 8:15 PM), <http://www.volokh.com/2010/06/08/recent-michigan-prosecutions-for-seducing-an-unmarried-woman>.

## II. THE CRIMINALIZATION OF CONSENSUAL SEX BETWEEN SPECIFIC CATEGORIES OF ADULTS

*Lawrence* makes clear that sex between people of the same gender is not subject to criminal proscription, at least where it is private, consensual, and non-prostitution, and where the proscription is justified only on grounds of preserving public morals.<sup>126</sup> But other categories of sexual partners potentially implicate concerns beyond simply public morality, even when the sex is private, (apparently) consensual, and between adults. Criminal law forbids sexual conduct between, for example, persons whose sexual contact would be incestuous;<sup>127</sup> between psychotherapists and their patients (even former patients);<sup>128</sup> and between members of the clergy and persons who are seeking spiritual aid, comfort, or therapy from them.<sup>129</sup> But perhaps the most publicly prominent category of forbidden sexual partners is that of teacher and student. Instances of teacher-student sex are now regularly covered by the mass media, most often where the student is in secondary school.<sup>130</sup> And—not unlike many other things in life that drive political action—as more and more instances of teacher-student sex invade the public’s consciousness, the more likely politicians are to respond with legislation, including criminal legislation. But even the desirable notion of protecting young people from sexual exploitation by those with supervisory or other authority over them could have constitutional limits. This Part explores some cases in which those limits have been, or could be, tested, in light of *Lawrence*.

### A. *Representative Post-Lawrence Cases of Sex Between Teachers and Adult Students*

Brittni Colleps was recently sentenced by a Texas court to five years in prison for engaging in consensual sex with other adults in the privacy of her home. The legal problem for Colleps: she was a public school teacher, and the adults with whom she had sex were students enrolled at her school. Colleps was an English teacher at Kennedale High

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126. See *Lawrence v. Texas*, 539 U.S. 558, 572, 578 (2003).

127. See *Muth v. Frank*, 412 F.3d 808 (7th Cir. 2005).

128. See *State v. Hollenbeck*, 53 A.3d 591 (N.H. 2012). Admittedly, this area of sex crimes is worthy of additional academic and judicial attention, in light of *Lawrence*.

129. See *State v. Dutton*, 450 N.W.2d 189 (Minn. Ct. App. 1990).

130. For an interesting and useful gallery and synopsis of highly-publicized student-teacher sex scandals, see *Notorious teacher sex scandals*, CBSNEWS.COM, <http://www.cbsnews.com/pictures/notorious-teacher-sex-scandals/> (last visited Feb. 23, 2014). These include, as just a few examples, the cases of Mary Kay Latourneau, a Seattle teacher who began a sexual relationship with a male student when he was twelve years old and whom she eventually married and had children with; Debra LaFave, a Florida teacher who had sex with a 14-year-old student; Pamela Rogers Turner, a Tennessee teacher who was convicted after having sex with a 13-year-old student; Amber Jennings, a Massachusetts teacher who was accused of having sex with, and sending nude photos to, a 16-year-old student, and who eventually pleaded guilty on the nude photo charges; and most recently, Sarah Jones, a former Kentucky teacher and Cincinnati Bengals cheerleader who had a sexual relationship with a 17-year-old student. See *id.*

School in north Texas.<sup>131</sup> Over the course of two months at her private home, Colleps had sex with five Kennedale High students, including group sex with as many as four students.<sup>132</sup> One student received oral sex from Colleps but did not have intercourse with her.<sup>133</sup> One encounter was captured on a cell phone video recorded by one of the students, though it did not show Colleps's face.<sup>134</sup> All of the students were at least eighteen years old and thus fully capable of consenting to sex under Texas law.<sup>135</sup> Yet Colleps was charged under a Texas criminal statute that forbids improper relationships between an educator and student, a second degree felony.<sup>136</sup> In August 2012, a jury convicted Colleps on all sixteen counts of the crime.<sup>137</sup>

Of course, Colleps's case differs in significant respects from many of the teacher-student sex cases that have become so red hot in media coverage. First, several facts distinguish Colleps in ways that make her unsympathetic: she engaged in group sex, which might suggest that the sex was not related to an expression of love or in furtherance of a committed relationship; the sex was captured on video; and she exchanged sexually explicit text messages with the students. On the other hand, rather than having sex with students properly characterized as "children" or "minors," Colleps had sex only with students who were adults. Indeed, prosecutors could not charge Colleps with statutory rape, leaving them with the "improper relationship" statute as their criminal law refuge against her. While a broader reading of *Lawrence* might appear to supply Colleps with some basis for challenging the application of the improper relationship statute here, the relevant cases have not read *Lawrence* so liberally.

First, consider how Texas courts have treated their own statute. In *Ex Parte Morales*, a male "Student Activities/Recreation Assistant" at a private Baptist school was convicted, pursuant to the improper sexual relationship statute, for having sex with a male student at the school, who was over the legal age of consent.<sup>138</sup> Morales claimed a fundamental right to "adult consensual sexual activity" and lodged a facial attack on the statute's constitutionality, citing *Lawrence*.<sup>139</sup> The Texas Court

131. See Deanna Boyd, *More Students Tell of Sexual Escapades With Former Kennedale High Teacher*, FORT WORTH STAR-TELEGRAM (Aug. 16, 2012), <http://www.star-telegram.com/2012/08/16/4185438/more-students-tell-of-sexual-escapades.html>.

132. *Id.*

133. *Id.*

134. *Id.* Colleps was recently the subject of a feature on ABC's news program *20/20*. In the interview, Colleps suggests that she was victimized because she never gave her consent for the students to shoot the video. See Jim Dubreuil, *Teacher Who Had Group Sex With Students Says She's the Victim*, ABC NEWS (Sept. 28, 2012), <http://abcnews.go.com/US/brittini-colleps-texas-teacher-group-sex-students-shes/story?id=17338821#.UOcyI6zTzoM>.

135. See TEX. PENAL CODE ANN. § 21.11(c)(1) (West 2009).

136. See TEX. PENAL CODE ANN. § 21.12(a) (West 2011 & Supp. 2012).

137. See Deanna Boyd, *Ex-Kennedale Teacher Guilty of Sex With Students; Mom Asks Jury For "Mercy"*, FORT WORTH STAR-TELEGRAM (Aug. 18, 2012), <http://www.star-telegram.com/2012/08/17/4189321/ex-kennedale-teacher-guilty-of.html?storylink=digger-topic>.

138. 212 S.W.3d 483, 486–87 (Tex. Ct. App. 2006).

139. *Id.* at 489–91.

of Appeals upheld the statute. According to the court, *Lawrence* did not establish a fundamental right and thus only rational basis review applied.<sup>140</sup>

The court had little difficulty concluding that the state had multiple rational bases for the law, despite Morales's contention that the law was so broad as to be not rationally related to a legitimate state interest in punishing predatory or coercive sex.<sup>141</sup> First, the state has a rational interest in preventing the exploitation of "schoolchildren" and in concluding that students might not easily be able to refuse consent where the sexual partner is an educator, taking the conduct outside of *Lawrence's* protection.<sup>142</sup> The court emphasized that Morales's challenge was a facial one, not an as-applied one, and thus the statute would unquestionably be constitutional in situations involving minor students.<sup>143</sup> In any event, it did not matter that the student in this case was legally an adult because the legislature could have rationally concluded that those "clothed with the imprimatur of school employment . . . will possess the sort of power disparities enabling them to coerce or unduly influence students to engage in sexual conduct."<sup>144</sup> The statute also advances the rational goal of preserving trust and confidence in the school system by prohibiting sex between a student and those whose employment gives them access to students "as a conduit for sex."<sup>145</sup> And finally, the State has a rational basis, consistent with the tenets of the Texas Constitution regarding public education, in having an educational environment conducive to learning.<sup>146</sup> That goal could be undermined if school employees could have sex with students.<sup>147</sup> In short, teachers are not similarly situated to the kinds of private actors who were prosecuted in *Lawrence*.<sup>148</sup> They occupy positions of public trust in an educational setting populated by young people and, as a result, it is reasonable for the State to constrain their sexual activities when the object of their sexual desires is a student, someone they teach or supervise.<sup>149</sup>

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140. *Id.* at 491–93.

141. *Id.* at 495.

142. *Id.* at 495–96. I emphasize in quotations that court's reference (which appears repeatedly in the opinion) to protecting Texas "schoolchildren." The reference suggests that the court was primarily concerned about the law's legitimate application to minors; otherwise, because the victim in this case was an adult, the description would seem both inappropriate and misplaced as a way of describing this victim.

143. *Id.*

144. *Id.* at 496.

145. *Id.*

146. *Id.* at 496–97 (citing TEX. CONST. art. VII, § 1, which provides that "a general diffusion of knowledge being essential to the preservation of the liberties and rights of the people," and that the state legislature has a duty "to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.").

147. *Id.* at 497–98.

148. *Id.* at 497.

149. *Id.* The court of appeals was asked to reconsider the soundness of *Morales* in *Berkovsky v. State*, 209 S.W.3d 252 (Tex. Ct. App. 2006), and rejected the defendant's facial challenge to the statute. *Id.* at 253.

*State v. Clinkenbeard*<sup>150</sup> involved a similar improper relationship statute in Washington. There, Clinkenbeard, a bus driver who was sixty-two years old at the time of his conviction, formed a relationship with a twelve-year-old girl who rode Clinkenbeard's bus.<sup>151</sup> The relationship continued to develop as the girl aged, but does not appear to have been sexual.<sup>152</sup> She took music lessons from him when she was in the ninth grade and they had frequent phone conversations.<sup>153</sup> When the girl turned eighteen, Clinkenbeard divorced his wife, moved his trailer next to the girl's home, and then had sex on multiple occasions with the girl.<sup>154</sup> Although she had already turned eighteen when they first had sex, she was still enrolled in the school district.<sup>155</sup> The jury acquitted Clinkenbeard on multiple counts of child molestation but convicted him under a statute that makes it a felony for a school employee to have sexual intercourse with a student where the student is at least sixteen but not more than twenty-one, and where there is more than a five-year age difference between the student and employee.<sup>156</sup> The statute does not require authority over or supervision of the student.<sup>157</sup> The Washington Court of Appeals upheld the statute against Clinkenbeard's *Lawrence* claim. The court found—applying only rational basis review, based on its conclusion that *Lawrence* “[did] not employ a fundamental rights analysis”<sup>158</sup>—that the State had a legitimate interest in protecting children from sexual exploitation, particularly in the educational environment.<sup>159</sup> Here, although there was no evidence that Clinkenbeard and the girl ever had sex prior to her turning eighteen, their personal relationship began when she was twelve, thus raising the concern that Clinkenbeard's school employment-based access to the girl offered him an opportunity to “groom or coerce” her into having sex.<sup>160</sup> It was therefore reasonable for the State here to apply this statute, the purpose of which is to protect children from those who would use their access to sexually exploit them.<sup>161</sup>

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150. 123 P.3d 872 (Wash. Ct. App. 2005).

151. *Id.* at 875–76.

152. *Id.* at 876. There was evidence that he had touched her buttocks and kissed her. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* Curiously, the statute defines the crime as sexual misconduct *with a minor*. See WASH. REV. CODE ANN. § 9A.44.093(1)(b) (West 2009) (defining sexual misconduct with a minor in the first degree as a class C felony). Yet the statute applies to actors who have sex with students who are legally adults, as in this case.

157. *Clinkenbeard*, 123 P.3d at 876.

158. *Id.* at 878. Interestingly, when considering Clinkenbeard's equal protection challenge, the court recognized that *Lawrence* “did make clear that this area of autonomy is of great importance,” and “cautions strongly against the states interfering in private relationships.” *Id.* at 880. The court was suggesting that perhaps an argument for intermediate scrutiny could be successfully made.

159. *Id.* at 879.

160. *Id.*

161. *Id.*

Most recently, the Kansas Court of Appeals rejected a *Lawrence*-based challenge to that state's unlawful sexual relations statute in *State v. Edwards*.<sup>162</sup> There, a thirty-year-old choir instructor at a Wichita area high school had consensual sex with an eighteen-year-old student of his.<sup>163</sup> The Kansas statute made it a crime for "a teacher or a person in a position of authority" to engage in consensual sex, lewd fondling or touching, or sodomy with a student enrolled at the offender's school.<sup>164</sup> "Teacher" is defined broadly to include any professional employee at the school (kindergarten through the twelfth grade) and the statute makes no distinctions based on age.<sup>165</sup> In a somewhat confusing opinion that applied two distinct standards of review (rational basis *and* strict scrutiny), the court held that *Lawrence* did not make it explicit whether it viewed this as a fundamental right and that the State's interests in this law were sufficient to protect it from constitutional challenge.<sup>166</sup>

Repeatedly emphasizing the power disparity between teachers and students, the court said that teachers "have constant access to students, often in an unsupervised context."<sup>167</sup> Thus, teachers are in a unique position to groom or coerce students into "exploitive or abusive conduct."<sup>168</sup> Also, a "sexually charged learning environment would confuse, disturb, and distract students, thus undermining the quality of education in Kansas."<sup>169</sup> The court further explained that *Lawrence* does not protect this sexual activity because this is a relationship where consent might not easily be refused: students are required by law to attend the school, are a captive audience, and "very well may not have the necessary level of maturity to remove themselves from a sexually charged situation."<sup>170</sup> The court shifted its discussion of the standard of review, holding that the statute is narrowly tailored to serve a compel-

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162. 288 P.3d 494 (Kan. Ct. App. 2012).

163. *Id.* at 496–97. It was undisputed that the student transported herself to Edwards's home and gave him a condom to use, and that the student was a mother (a fact that the State argued had no relevance). *Id.*

164. See KAN. STAT. ANN. § 21-3520(a)(8) (2007) (repealed 2011).

165. *Id.* § 3520(b)(9). The statute was actually amended to eliminate age distinctions. *Edwards*, 288 P.3d at 503.

166. *Edwards*, 288 P.3d at 502.

167. *Id.*

168. *Id.* See also *State v. McKenzie-Adams*, 915 A.2d 822 (Conn. 2007), *overruled in part on other grounds* by *State v. Payne*, 34 A.3d 370 (Conn. 2012). In *McKenzie-Adams*, the Connecticut Supreme Court upheld that state's statute prohibiting sex between a school employee and student. *Id.* There, the court held that even if a fundamental right of consensual sex existed it did not encompass sex in the context of an inherently coercive relationship, like teacher and student. *Id.* at 836. Beyond this, the facts of *McKenzie-Adams* differ in significant respects from other cases—there, the defendant-teacher had sexual relationships with two students who were not friendly with one another and then deliberately created further dissension between them. *Id.* at 830–31. Once the two girls learned that each was having sex with the same teacher, they voluntarily reported the teacher's conduct. *Id.* at 831. There was also evidence that the defendant attempted to pressure the students into certain sex acts, although in other respects the sexual relationships appear to have been consensual. *Id.* at 829–30.

169. *Edwards*, 288 P.3d at 502.

170. *Id.*

ling interest because it does not infringe upon “any sexual activity unrelated to the job of teachers and does not prevent teachers from having sexual relationships with adults who are not students.”<sup>171</sup> Finally, the court rejected Edwards’s arguments that the statute fails strict scrutiny: it did not matter if the statute was enacted only to appease a single parent who was upset over a teacher-student relationship; it did not matter that the same sexual relationship would have been lawful if Edwards was a college professor; it did not matter that courts in Iowa and Idaho had rejected civil liability for teacher-student sex.<sup>172</sup>

The *Morales* and *Edwards* opinions delve more thoroughly than does *Clinkenbeard* into the legitimate interests of the state. Yet in each case the court focuses on the state’s effort to protect “children” and substantially ignores the relevance of the fact that the sex occurred between consenting adults, which would seem to matter on an as-applied challenge. Had the applicable standard of review been one involving heightened scrutiny, these courts would likely have been forced to more meaningfully confront the argument that the state’s interests in protecting children from exploitation seem reduced (though not eliminated) in significance when the student becomes an adult and where there is no evidence of actual coercion or exploitation in the case. *Edwards*, for example, identifies the risk of exploitation but does not address whether the absence of actual exploitation ought to matter to the application of the statute in a given case, preferring instead to characterize the teacher-student relationship as inherently coercive and as preventing meaningful opportunity to refuse consent. The court there assumed in one paragraph that students generally may fail to possess the necessary maturity to refuse consent, but in the next paragraphs, the court occupied itself with the distinctions between the maturity levels of sixteen-, seventeen-, and eighteen-year-olds, admitting that eighteen-year-olds possess greater levels of maturity.<sup>173</sup> The court then failed to specifically grapple with the fact that the student in this case was eighteen and thus presumably possessed the heightened maturity that the court acknowledged. If it is true that the maturity level of an eighteen-year-old is generally adequate for voluntary sexual decision-making as to its consent or its refusal—and even the Supreme Court has decided a series of cases in recent years recognizing the distinctions between eighteen-year-olds and those below age eighteen for purposes of enforcing criminal laws<sup>174</sup>—then a challenger may well ask

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171. *Id.* at 503.

172. *Id.* at 503–04.

173. *Id.* at 502–03.

174. *See, e.g.,* *Roper v. Simmons*, 543 U.S. 551, 570–71 (2005) (holding that Eighth Amendment bars capital punishment upon offender who was younger than eighteen at the time of the offense); *Graham v. Florida*, 560 U.S. 48 (2010) (holding same as to imposition of life without parole for non-homicide offense); *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (holding that Eighth Amendment bars mandatory life without parole for homicide offenders under age eighteen); *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2402–03 (2011) (holding that fact that criminal suspect is under age eighteen is relevant to determination of whether the suspect was in custody for *Miranda* purposes).

whether the statute is rationally related to the state's interest in preventing exploitation when the student is at least eighteen.

Another problem for the *Edwards* court is this: if Kansas public policy had meant for the sexual maturity of sixteen and seventeen-year-olds to be so easily distinguishable from that of eighteen-year-olds, and to matter when applying the unlawful sexual relations statute, then Kansas law could have accounted for this fact. But it did not, as Kansas makes sixteen the age of consent for voluntary sex, reflecting a legislative determination that sixteen and seventeen-year-olds possess—as a matter of law, rather than fact—sufficient capacity for voluntary and intelligent sexual decision-making (including, presumably, the capacity to give or refuse consent).<sup>175</sup> Yet the court goes on to say that the age of the student is less important than the mere fact of the teacher-student relationship,<sup>176</sup> meaning, presumably, that the relationship is one involving an inherently coercive power disparity. It is therefore *that* fact, and not the maturity level of student, that *Edwards* appears to deem most critical in preserving the statute.

Moreover, particularly in the context of the Washington statute challenged in *Clinkenbeard*, a defendant may plausibly argue that the State's asserted interest in protecting students from exploitation by those with access to them in an educational environment seems difficult to reconcile with the language of the Washington legislation. If it is the mere fact of the student's status *as a student* (rather than as a minor) and the employee's status *as a school employee* (rather than as an intentional coercer or exploiter) that implicates the relevant interest, then that same interest would be implicated if a twenty-three-year-old school employee had consensual sex with a nineteen-year-old student. Yet the State does not punish the employee in that situation.<sup>177</sup> At a minimum, *Clinkenbeard* could have raised this problem in asserting his equal protection challenge to the statute by claiming that the age provisions were not rationally related to the state's asserted interest.<sup>178</sup>

The recent case of *Paschal v. State*,<sup>179</sup> however, demonstrates these concerns about the significance of the fact of private consensual adult sex, and casts a shadow over the cases that have refused to recognize a *Lawrence* violation. *Paschal* was a high school teacher in Arkansas who had been dating an eighteen-year-old student for several months.<sup>180</sup> The relationship included sex.<sup>181</sup> *Paschal's* actions (and he knew this, because he expressed concern to the school principal that his career and relationship with his children might be in jeopardy)<sup>182</sup> constituted

175. KAN. STAT. ANN. 21-3522(a) (2007).

176. *Edwards*, 288 P.3d at 503.

177. See WASH. REV. CODE 9A.44.093(1)(b) (2009 & Supp. 2012).

178. Note that a subsequent equal protection challenge to the statute was rejected by the Washington Supreme Court, where the defendant claimed that the statute impermissibly discriminated between certain school employees. See *State v. Hirschfelder*, 242 P.3d 876 (Wash. 2010).

179. 388 S.W.3d 429 (Ark. 2012).

180. *Id.* at 432.

181. *Id.*

182. *Id.*

second-degree sexual assault, which occurs when a teacher at a public school engages in sexual contact with a student who is enrolled at the teacher's school and is under the age of twenty-one.<sup>183</sup> The Arkansas Supreme Court held the statute unconstitutional as applied to Paschal.<sup>184</sup> The State improperly framed the issue as one asking whether a teacher has a fundamental right to have sex with a student enrolled at his school.<sup>185</sup> Instead, framing the issue at a broader level of generality, the court said the relevant question was whether the statute invaded the personal and *fundamental* right of an adult to engage in consensual, non-prostitution, and private sexual conduct with another adult.<sup>186</sup>

In holding that such a right existed in Arkansas, the court explained that this was not a case in which the teacher had intentionally exploited the teacher-student relationship so as to create a mere conduit for sexual gratification of the teacher.<sup>187</sup> By all indications, Paschal and the student were in a committed relationship that involved more than simply casual sex. The court was careful to distinguish its earlier decision in *Talbert v. State*, in which the court upheld the State's statute making it third-degree sexual assault for a clergyman to have sex with a penitent.<sup>188</sup> That statute requires that the member of the clergy be in a position of trust or authority over the victim *and use the position* to engage in the sexual activity.<sup>189</sup> Because *Talbert* involved coercive conduct and *Paschal* did not, the court found that *Talbert* did not control.<sup>190</sup> Moreover, applying strict scrutiny, the court concluded that even if the state has an interest in protecting school students from the sexual advances of teachers (which it does, the court said),<sup>191</sup> the statute did not apply the least restrictive means for advancing that interest.<sup>192</sup> Rather, if a teacher (like the clergyman in *Talbert*) used his position of trust or authority over a student in order to create a conduit for sexual gratification, the teacher was punishable under the state law forbidding mandated reporters in positions of trust or authority from using the position to engage in sex.<sup>193</sup>

Still, it is unclear how much the court relied upon *Lawrence*. The better reading of *Paschal* is that the statute was unconstitutional because Arkansas law recognizes such a fundamental right. Although the court cited *Lawrence*, its statement that “[T]he fundamental right to privacy implicit in *our law* protects all private, consensual, noncommercial acts of sexual intimacy between adults,”<sup>194</sup> was drawn from language used

183. ARK. CODE ANN. § 5-14-125(a)(6) (2006 & Supp. 2011).

184. *Paschal*, 388 S.W.3d at 434-35.

185. *Id.* at 435.

186. *Id.*

187. *Id.* at 434.

188. See *Talbert v. State*, 239 S.W.3d 504, 510-11 (Ark. 2006).

189. See ARK. CODE ANN. § 5-14-126(a)(1)(B) (2006 & Supp. 2011).

190. *Paschal*, 388 S.W.3d at 435.

191. *Id.* at 436-37.

192. *Id.* at 437.

193. *Id.* (citing ARK. CODE ANN. § 5-14-126(a)(1)(C)(2006 & Supp. 2011)).

194. *Id.* at 435 (quoting *Jegley v. Picado*, 80 S.W.3d 332, 350 (Ark. 2002)) (emphasis added). Note that *Edwards* was decided after *Paschal*, and refuses to follow *Paschal*'s

in *Jegley v. Picado*, an Arkansas case decided a year before *Lawrence*.<sup>195</sup> That case appears to rest on state constitutional law grounds, rather than a federal one.<sup>196</sup> Still, Paschal explicitly relied on *Lawrence* and federal substantive due process doctrine to support his claim,<sup>197</sup> and the dissenting justices seemed to acknowledge that the majority agreed with Paschal's *Lawrence* claim.<sup>198</sup> But the majority opinion nevertheless criticized one of the dissents in a footnote, wondering why that dissent relied upon cases from other jurisdictions "to determine whether [the Arkansas statute at issue] violates the fundamental right to privacy found in the Arkansas Constitution."<sup>199</sup>

Perhaps what *Paschal* best represents, then, is the reality that some judges are prepared to recognize that a *Lawrence*-type right extends far enough to permit consensual sexual encounters between a teacher or other school employee and an adult student, at least where the encounter does not involve coercion or any intent to exploit a position of authority over the student. Thus if *Paschal's* reasoning is correct, we cannot simply assume exploitation from the mere fact of the teacher-student relationship. The state would bear the burden of proving beyond a reasonable doubt not simply that a teacher and adult student had sex, but that the teacher sought to use the position of authority as a way of merely obtaining sex. In the typical case, and in the absence of objective evidence showing threats, coercion, or an intent to exploit the power disparity in the relationship, this will be a difficult burden to meet. Still, though, the dominant approach has been to read *Lawrence* in a judicially conservative manner and to offer wide deference to legislatures in asserting potential harms and risks that would affect not just the student, but the system of public education more generally.

### B. Lawrence and Teacher-Student Sex Crimes

As with the sex by fraud crimes, there are natural reasons to think that *Lawrence's* Exclusions Paragraph would cover the teacher-student sex cases and validate the existing criminal sanctions. After all, *Lawrence* states that the right would not apply where the sexual conduct would do damage to an institution that the state may protect or where the sex occurs under circumstances in which consent might not easily be refused.<sup>200</sup> And the cases that have denied protection to the teacher pursuant to *Lawrence*—and even *Paschal*, where the teacher was constitutionally protected—have amply explained the relevant state interests: protecting students from sexual exploitation, protecting the integrity of

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holding. See *State v. Edwards*, 288 P.3d 494, 503 (Kan. Ct. App. 2012). Among the reasons, the *Edwards* court said, was that *Paschal* found a fundamental right in the Arkansas Constitution, and that Kansas had not recognized a corresponding state constitutional right. *Id.*

195. See *Jegley*, 80 S.W.3d at 332.

196. *Id.* at 350.

197. *Paschal*, 388 S.W.3d at 435.

198. *Id.* at 442–43 (Baker, J., dissenting).

199. *Id.* at 436 n.7 (emphasis added).

200. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

the academic environment, and preserving a school system free of the complications created by sexual relationships between employees and students.<sup>201</sup> If a *Lawrence* claim mandates only rationality, these interests would almost surely be adequate to survive review. But even if protecting students from sexual exploitation *demand*s the coercive force of the criminal law, other interests, while worthy of protection, could be served by administrative or civil remedies short of criminalization—license revocation, for example; or termination, reprimand, or suspension from the school.

So if evidence existed that the teacher actually employed his position of power or authority in order to obtain the sex, this would surely fall outside of *Lawrence*'s protection, even if the criminal statute at issue did not specifically make this an element of the crime. But the central question is whether the “power disparity” or the *mere status* as a teacher or other authority figure in a particular school *necessarily* implies undue influence over a student, or precludes the student from making sexual choices knowingly, intelligently, and voluntarily.<sup>202</sup>

On one level, this power disparity claim might seem difficult to limit. After all, many sexual relationships involving power disparities are not criminalized: a CEO who has consensual sex with her administrative assistant, an elected official who has consensual sex with her intern, a wealthy man who has consensual sex with a poor woman. Of course, the state may pick and choose the power disparities it wishes to target, but if the state is serious about power disparity as the reason why sex inside such a relationship is inherently coercive or exploitative, then the failure to criminalize sex occurring in other types of relationships with power disparities could at least weaken the state's claim. Another problem with the power-disparity-as-inherent-coercion claim is that it could fail to account for the realities of a given relationship. For example, the teacher who says to student X, “I will fail you and prevent your graduation from this school if you do not have sex with me,” would be situated no differently—for *Lawrence* purposes—than the teacher who says to student X, “If you sleep with me, I will give you an ‘A’ in my course.”<sup>203</sup> The latter scenario might be construed as an offer rather than a threat, but in each case, the teacher is using his or her position as a teacher to solicit sex from the student. And in each case, it can fairly be said that the student could not *easily* refuse consent. These are precisely the kinds of coercive tactics that would serve as evidence that a faculty member is exploiting a power disparity, or status as a teacher or school official, in order to obtain sex with the student.

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201. See *State v. Edwards*, 288 P.3d 494, 502–03 (Kan. Ct. App. 2012).

202. See Falk, *Not Logic, But Experience*, *supra* note 37, at 366 (arguing that sex within authority-based relationships fall within the domain of rape-by-coercion, because “the inherent power imbalance in these situations so gravely affects the victim’s ability to give meaningful consent that it violates sexual autonomy.”).

203. The Dressler text uses this hypothetical, and I use it when I teach the material. See JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 469 (5th ed. 2010). For an example of the latter scenario, see *State v. Thompson*, 792 P.2d 1103, 1104 (Mont. 1990) (principal not guilty of intercourse without consent under state law).

But a defendant raising a *Lawrence*-based challenge could argue that these scenarios seem far different from a scenario in which a teacher and an adult student develop genuinely close and romantic feelings for one another, get to know one another, and subsequently have sexual relations; this situation, the defendant could argue on the appropriate facts, is especially different if the teacher has no direct authority over the student. *Lawrence*'s Exclusions Paragraph, applied in the adult teacher-adult student sex context, certainly would validate a state interest in preventing sexual exploitation. But when we consider some cases, like *Paschal*, or even *Edwards*, we see that courts must confront the question of whether adult student-teacher relationships are inherently exploitative or whether a situation exists where the element of actual exploitation could, at least arguably, be lacking. So a defendant could ask: must the state prove exploitation, or is it enough to simply presume it?

For example, one might imagine a defendant (on specific facts, of course) claiming that the arguments about exploitation—protecting students from power disparities or, in *Lawrence*'s language, from situations where they might not easily be able to refuse consent—may not apply with the same force where the adult student (though this is likely very rare) seeks out the teacher for sex. Consider, again, the *Colleps* prosecution. There, at least one of the students involved with *Colleps* testified that once he found out that *Colleps* had sex with one of his friends, he urged the friend to “hook him up” with *Colleps*.<sup>204</sup> That the subsequent sex was exploitative on the part of *Colleps* seems a somewhat weaker claim, unless, again, we are prepared to say that the mere fact that she is a teacher transforms an otherwise consensual situation into an exploitative one. Moreover, none of the students in the *Colleps* case testified that they felt threatened, or harmed, or exploited, nor did any of the students have a desire to see *Colleps* punished.<sup>205</sup> Of course, even if a student independently desires and seeks out sex with a teacher, this does not necessarily negate the risk of exploitation. On the other hand, it is important to remember that once the student reaches the age of consent to have sex, the student enjoys important privacy rights related to his or her own sexuality.<sup>206</sup> The state is now implicitly granting the person sexual freedom that did not exist in the same ways before the person became an adult. So the adult student's own sexual autonomy—not simply the teacher's—is implicated by the teacher-student sex prohibitions. Is it possible that we over oversimplify (even misapprehend) the complicated nature of sexual and romantic

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204. See Deanna Boyd, *Jury sees video of former Kennedale teacher having sex with students*, FORT WORTH STAR-TELEGRAM (Aug. 15, 2012), <http://www.star-telegram.com/2012/08/14/4181766/jury-sees-video-of-former-kennedale.html>.

205. See Crimesider Staff, *Brittini Colleps Case: Students who were alleged sex partners of ex-Texas teacher say they do not feel like victims*, CBS NEWS (Aug. 16, 2012, 5:27 PM), [http://www.cbsnews.com/8301-504083\\_162-57494881-504083/brittini-colleps-case-students-who-were-alleged-sex-partners-of-ex-texas-teacher-say-they-do-not-feel-like-victims/](http://www.cbsnews.com/8301-504083_162-57494881-504083/brittini-colleps-case-students-who-were-alleged-sex-partners-of-ex-texas-teacher-say-they-do-not-feel-like-victims/).

206. Indeed, presumably, this is a corollary of *Lawrence*. See *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).

relationships generally, if we by law equate all sex involving relationships in which power disparities exist, or argue that all such situations are *equally* exploitative? Such an equation also, in some cases at least, could diminish the sexual autonomy of the adult who is *not* at the top of the power structure, whom the state has now otherwise empowered to make his or her own sexual choices (and, as a consequence, to live with the kinds of mistakes with which other adults must live when making sexual choices). Of course, it is once again worth noting that this argument would pertain only in situations where exploitation is presumed merely by the nature of the relationship, but is not otherwise actually present or intended on the part of the authoritative actor. In cases involving actual exploitation, or where the teacher acted with an intent to exploit or to otherwise take advantage of his or her position of authority in order to obtain sex from the student, the state's interests in criminalizing the conduct clearly become stronger, and *Lawrence* likely offers no protection in the first place.<sup>207</sup> Indeed, those may well be the overwhelming majority of cases.

The body of literature addressing sexual relationships between faculty and students at the college and university level is especially instructive. As one might imagine, much of that literature contends that policies (not criminal laws, however) forbidding such relationships are both necessary and desirable, in part because of the risks associated with the practice and in part because of many of the same reasons that we see articulated in the cases concerning such relationships at the secondary school level.<sup>208</sup> One of the chief arguments is that such relationships are inherently coercive, which would place them outside of *Lawrence's* narrow zone of protection.<sup>209</sup> But other scholars have argued against the validity of general bans on faculty-student sex,<sup>210</sup>

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207. *Lawrence*, of course, does not explicitly use this terminology, but I interpret *Lawrence's* reference to coercion and to injury. See *Lawrence*, 539 U.S. at 578 (categorically excluding sexual exploitation of this kind).

208. See, e.g., Neal Hutchens, Note, *The Legal Effect of College and University Policies Prohibiting Romantic Relationships Between Students and Professors*, 32 J.L. & EDUC. 411, 438 (2003); Richard R. Carlson, *Romantic Relationships Between Professors and Their Students: Morality, Ethics and Law*, 42 S. TEX. L. REV. 493, 505–06 (2001); Caroline Forell, *What's Wrong with Faculty-Student Sex? The Law School Context*, 47 J. LEGAL EDUC. 47, 61 (1997); Margaret H. Mack, *Regulating Sexual Relationships Between Faculty and Students*, 6 MICH. J. GENDER & L. 79, 94–97 (1999); Martha Chamallas, *Consent, Equality, and Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777 (1988). But cf. Sunstein, *supra* note 114, at 1064 (questioning whether such policies are constitutional after *Lawrence*, where the parties agree that the relationship is consensual).

209. See Mack, *supra* note 208, at 92–95.

210. See generally JANE GALLOP, *FEMINIST ACCUSED OF SEXUAL HARASSMENT* (1997); Gary E. Elliott, *Consensual Relationships and the Constitution: A Case of Liberty Denied*, 6 MICH. J. GENDER & L. 47 (1999); Sherry Young, *Getting to Yes: The Case Against Banning Consensual Relationships in Higher Education*, 4 AM. U. J. GENDER & L. 269 (1996); Secunda, *supra* note 33, at 156–62. See also Sunstein, *supra* note 114, at 1064 (arguing that, on an as-applied-challenge where the parties both claim the relationship is consensual, “these cases would be genuinely difficult after *Lawrence*”).

and Paul Secunda has offered a comprehensive, post-*Lawrence* response to the arguments in favor of prohibitive policies.<sup>211</sup>

Beginning with the premise that *Lawrence* advances a sexual autonomy rationale beyond one limited to sodomy between people of the same sex, Secunda (like others) sees a Millian devotion to autonomy that would protect faculty-student sexual relationships.<sup>212</sup> He responds to the “consent might not easily be refused” argument for such policies by concluding that faculty-student sexual relationships *can* be truly consensual, just as private same-sex sexual relations can be.<sup>213</sup> He further responds to the argument about power disparities by concluding that, although colleges and universities can look to individual instances to determine whether the faculty member exploited the power differential, a blanket prohibition assumes such exploitation and denies the parties an opportunity for “mutually satisfying” relationships—he is clearly opposed to the notion of faculty-student sex as *inherently* exploitative.<sup>214</sup> Secunda further argues that colleges and universities are not meant to come within the meaning of Justice Kennedy’s statement about preventing “abuse of an institution the law protects;”<sup>215</sup> rather, that phrase is likely referring to marriage.<sup>216</sup> Secunda ultimately prefers a sliding scale approach to college and university policies, in which the most weight would be given to policies that forbid sexual relationships where there is a supervisory role for the faculty member.<sup>217</sup> This would place the burden on the faculty member to show that her interests in the relationship outweigh the state’s interests.<sup>218</sup> At the same time, the Constitution would presumptively favor nonsupervisory relationships.<sup>219</sup>

Secunda is, of course, focused on internal college and university policies that ultimately provide civil or administrative sanctions, rather than criminal laws targeting secondary school teachers who could serve time in prison for engaging in consensual sexual relationships with students. The question is whether the arguments he makes apply with any of the same force in the latter context. Perhaps, as the *Edwards* court thoughtfully explained, secondary schools *are* different.<sup>220</sup> The state could reasonably argue, or rationally conclude, that good academic order and academic integrity have special meaning in the secondary school context, particularly where student assessment is typically not anonymous (as it is in some higher education environments, like law schools). Or perhaps the state could rationally conclude that because

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211. See Secunda, *supra* note 33, at 147–62. See also Paul M. Secunda, *Getting to the Nexus of the Matter: A Sliding Scale Approach to Faculty-Student Consensual Relationship Policies in Higher Education*, 55 SYRACUSE L. REV. 55 (2004) (discussing similar subject matter).

212. Secunda, *supra* note 33, at 118–19.

213. *Id.* at 147.

214. *Id.* at 147–48.

215. *Id.* at 148–50 (quoting *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

216. Secunda, *supra* note 33, at 148–49.

217. *Id.* at 156–57.

218. *Id.* at 157–60.

219. *Id.* at 160–62.

220. See *State v. Edwards*, 288 P.3d 494, 504 (Kan. Ct. App. 2012).

secondary school students are overwhelmingly below or have barely reached the age of majority, and most of whom are required by law to attend, they are more impressionable, more likely to be adversely affected by an environment in which teacher-student sex is permitted, and perhaps even more likely to be sexually exploited if a sexually permissive atmosphere is allowed to exist between teachers and students.<sup>221</sup> Or the state could argue that, although an atmosphere of sexual freedom and permissiveness is to be expected to some extent once one reaches college, such expectations do not apply (at least not to the same degree) among secondary schools.

The concern, then, is not merely with the possibility of exploitation, but with the dangers of sexualizing a learning environment, particularly one inhabited largely by minors. The point here is simply that if Secunda's thoughtful arguments are ultimately persuasive in the context in which he raises them—that is, if he is right about *Lawrence's* meaning and reach with respect to consensual sexual relationships in higher education—then the criminal laws described here would have to be predicated upon interests unique to the secondary school context. That is at least a plausible predicate, but one that requires articulation.

### C. *Lawrence and the Importance of an Intimate Relationship*

It is also important to note the language in *Lawrence*, which has not escaped thoughtful scholarly attention,<sup>222</sup> that the right is (or might be) predicated upon the existence of an intimate relationship or upon conduct designed to promote emotional intimacy between people. *Lawrence* specifically describes the sodomy at issue in that case as “but one element in a personal bond that is more enduring.”<sup>223</sup> As other scholars have noted, this language at least suggests that sexuality is worth preserving as a constitutional value only when it forms a part of the development and preservation of intimate relationships that the actors hope will endure.<sup>224</sup> In this sense, and in light of the Exclusions Paragraph, there is further evidence that while *Lawrence* may not look at first blush as traditionally conservative with respect to law and sexuality, neither is *Lawrence* particularly libertarian. As such, *Lawrence* would forbid even consensual sex obtained by deception or seduction, because in such cases the sexual intimacy is consummated not for the purpose of developing a deeper emotionally intimate relationship, but merely to serve the prurient interests of the seducer, who is engaging in fraud or misrepresentation solely to obtain sex rather than to promote intimacy within a committed relationship. But in the adult teacher-adult student cases, it would also require us to treat different teachers differently in the cases discussed here. It would, for example, treat David Paschal—who dated his student lover prior to their sexual activity and by all indi-

221. *Id.*

222. See generally Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809 (2010).

223. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

224. See Rosenbury & Rothman, *supra* note 222, at 810.

cations developed a serious relationship with her over time—differently from Brittni Colleps, who engaged only in casual sex, including group sex, with multiple student partners.

Yet if this reading of *Lawrence* is accurate (and it certainly is plausible), then fully, truly consensual “one-night stands” would not be protected under *Lawrence*’s privacy right. Casual sex of all kinds, including group sex (consider, again, Colleps’s case), would be unprotected even if consensual. This seems a strange result if *Lawrence* is otherwise serious about the way it describes the importance of sexual autonomy. More broadly, Laura Rosenbury and Jennifer Rothman have written an exceptionally thoughtful piece that acknowledges *Lawrence*’s conservative approach to sex and challenges this type of constraint on *Lawrence*’s privacy right, arguing that sex can have value even in non-intimate or enduring relationships.<sup>225</sup> The authors describe the existing “sex-negative landscape” as discouraging sex outside of emotionally intimate relationships and as deterring “openness about the potential diversity of sexual experiences.”<sup>226</sup> As a result, sexual expression is considered acceptable only in narrow circumstances, and any sex that falls outside of those narrow categories is stigmatized.<sup>227</sup> According to their formulation, sexual association and intimate association must not be conflated.<sup>228</sup> If the Rosenbury/Rothman formulation is the better reading of *Lawrence*, or if some subsequent case adopts this formulation, then clearly the possibility of a seducer claiming a constitutional bar to his prosecution becomes somewhat more palatable, but again, only to the extent that the seductive activity is not also fraudulent or otherwise exploitative. The same is true with the teacher who has consensual, casual, or group sex with adult students, outside the context of a committed relationship. And yet, if the *Lawrence* right really does depend upon the existence of an intimate relationship, then those persons situated in otherwise prohibited sexual relationships would arguably possess a stronger case for protection under *Lawrence* where the sex was a part of a deeper and more lasting relationship (which is to say, it involves more than merely casual sex). In the case of teacher-student sex, the argument for deliberate exploitation at least *seems* stronger if the sex is isolated and casual, unconnected to a deeper commitment between the two parties. By contrast, exploitation appears less likely as an explanation for the teacher’s conduct if objective evidence of such relational commitment exists.

Making these kinds of distinctions, of course, simply reinforces the argument that Rosenbury and Rothman advance: valuing consensual sexual intimacy between adults means recognizing its value outside of committed relationships, and this means moving to a vision of sexual intimacy that more fully considers sex in the context of freedom, self-

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225. *Id.* at 811.

226. *Id.*

227. *Id.* at 812.

228. *Id.* at 818–19.

fulfillment, and self-realization.<sup>229</sup> Yet it is those very distinctions that could indicate the difference between a teacher-student sexual relationship that actually implicates state concerns about sexual exploitation, and one that does not.

### III. RETHINKING SEX CRIMES AFTER *LAWRENCE*

The two areas of sex crimes discussed here may seem somewhat detached on the surface. The sex-by-fraud materials focus primarily on the issue of whether consent can be said to exist; that is, whether the deception or misrepresentation vitiates consent. In the teacher-student materials, the cases focus on the nature of such relationships—whether we presume non-consent because the relationships are inherently coercive and thus cannot be legally consensual—and upon the state's interests in forbidding sex based solely upon identities and roles of the sexual partners. Both areas raise the problem of actual or potential sexual exploitation. Moreover, both areas raise the same potential constitutional problem: whether, if the sex at issue is private, non-prostitution, truly consensual, and between adults, the state may choose to nonetheless make the sex a crime without violating due process. And yet, at a deeper level of criminal lawmaking, both areas compel us to confront the question of what types, and degrees, of harm are sufficient to implicate the interests and functions of the criminal sanction: whether the conduct at issue is sufficiently worthy of condemnation and punishment imposed by the political community. The politics of crime-definition and the exercise of prosecutorial discretion become especially valuable components of the criminal law narrative that *Lawrence* sets in motion.

Consequently, perhaps the better understanding of *Lawrence*, from the perspective of criminal law, is not one that focuses upon the fundamentality of the right, the standard of review, or even the nature of constitutional protection for sexuality, important as those considerations are. Rather, perhaps *Lawrence* is better understood as a case that compels us to consider more carefully which consensual sexual conduct we decide to punish. Strader's analysis of *Lawrence* rightly highlights not only *Lawrence's* significance as a criminal law precedent but also *Lawrence's* interest in harm.<sup>230</sup> As the state's justification is more closely scrutinized, naturally, the burden is greater on the state to identify the substantiality of the harm that it seeks to prevent and punish. But even at the level of rational basis review, the harm that the state identifies must be more than an abstract harm to public morality. Same-sex sodomy *simpliciter*, then, cannot be criminalized because it causes no harm to individuals and no social harm that the state is otherwise entitled to

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229. See *id.* at 819–21 (citing with approval, *inter alia*, J. Harvie Wilkinson III & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 611–13, 615 (1977) and David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 *passim* (1979)).

230. See Strader, *supra* note 24, at 51–61. On this aspect of *Lawrence*, then, Strader and I seem to agree.

address through the criminal sanction. Indeed, the categories of sexual conduct that fit within the Exclusions Paragraph all include sexual conduct that could be deemed sufficiently harmful to the political community, beyond harms that may be characterized as moral ones only. But those categories of conduct, and the ones discussed in this Article, challenge us to properly identify the scope of any harm principle announced in *Lawrence*—whether, as Strader argues, that harm must be proven to exist in each case, or whether the state is free to identify potential harms or risks of exploitation even if not actually present. Understood this way, then, *Lawrence* emerges as an instrument for propelling a larger narrative about the overcriminalization, or at least the overprosecution, of sex.

Maybe this is the real virtue of *Lawrence*. Even if *Lawrence* is read to apply only rational basis review, thus setting a low bar of justification for most sex crimes (and thus likely validating all, or at least the overwhelming majority of, sex-by-deception crimes and those involving prohibited sexual relationships beyond mere same-sex ones), and even if *Lawrence's* constitutional holding only reinforces many restraints on—rather than the increased liberation of—sex,<sup>231</sup> it nonetheless forces us to grapple politically with whether we simply make crimes out of, and prosecute, too many consensual sex acts. *Lawrence's* concerns, then, tend to merge with those of the criminal law.

The literature on overcriminalization in America is substantial,<sup>232</sup> but it is not clear that sex crimes have played a significant role in the debate (beyond the subject of prostitution).<sup>233</sup> Perhaps this is a product of our inability to achieve greater sexual liberation, leaving us mired in a kind of sexual conservatism that regards much sexual activity as socially unacceptable, unseemly, or morally questionable—even if private and consensual, particularly outside of marriage. Or perhaps it is because, like other areas of criminalization, legislators can afford to broaden criminal prohibitions without fear of a political downside and because no constituency for decriminalization exists that is politically worthy of defending.<sup>234</sup> In the context of private, non-prostitution, and consensual sex, however, this explanation for criminalization does not seem to apply—unlike other forms of criminal activity, private, consen-

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231. See Rosenbury & Rothman, *supra* note 222, at 810.

232. I have summarized this extensive literature elsewhere. See J. Richard Broughton, *Congressional Inquiry and the Federal Criminal Law*, 46 U. RICH. L. REV. 457, 466 (2012).

233. The literature of decriminalizing prostitution is sizeable. For just a few examples, see Belkys Garcia, Note, *Reimagining the Right to Commercial Sex: The Impact of Lawrence v. Texas on Prostitution Statutes*, 9 N.Y. CITY L. REV. 161 (2005); Michael Conant, *Federalism, the Mann Act, and the Imperative to Decriminalize Prostitution*, 5 CORNELL J.L. & PUB. POL'Y 99 (1996); Margaret A. Baldwin, *A Date with Justice: Prostitution and the Decriminalization Debate*, 1 CARDOZO WOMEN'S L.J. 125 (1994); David A.J. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195 (1979).

234. See Broughton, *supra* note 232, at 471. I am influenced by Bill Stuntz's work on the politics of criminalization, and he makes a similar point with great persuasiveness. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2002).

sual, non-prostitution sex outside of marriage is common enough that every American legislator has a relevant constituency engaging in this behavior.

Moreover, the “tough on crime” label that normally drives the politics of crime-definition seems difficult to apply when one is talking about consensual sex between adults. Still, perhaps those crimes actually involve an interest worth punishing through the criminal sanction. As Falk notes, for example, one of the emerging themes in the sex by fraud cases is that the perpetrators tend to commit their frauds upon multiple victims, thus raising legitimate state concerns about sexual predation as well as exploitation.<sup>235</sup> And as we see in the student-teacher cases, if the state must seek an external harm to justify what otherwise may be truly consensual sex, the externality is not simply the risk of sexual exploitation but also the educational institution or system itself and the learning environment and good order that it must promote to be effective at the critical but complicated task of educating young people. Sexualization of the learning environment thus raises legitimate public concerns beyond the risk of exploitation. The larger criminal law-making point here, then, is that criminal law could actually be drawn to reflect these legitimate state interests by including the relevant harm as an element of the crime, thus allowing us to meaningfully distinguish the most harmful sex from sex that, is unworthy of social condemnation and public punishment through *criminal* sanction.<sup>236</sup> The fact that we ought to criminalize *some* consensual sex does not mean that we should criminalize most of it. Nor does it preclude us from using other, civil or administrative mechanisms—rather than the force of criminal law—to protect legitimate public interests. But even as we seek to protect those interests, defining criminal law in this area requires recognizing that, very often, romantic and sexual relationships are complicated and cannot easily be placed into neat categories that presume them to be socially harmful.

Indeed, at a time when the substantive criminal law has grown by alarming proportions, and has invested prosecutors with enormous power,<sup>237</sup> the moment is ripe for more fully considering how the substantive criminal law of sex is contributing to the rightful scope and power of the state. In such massive—and massively powerful—criminal law and prosecutorial regimes, it is a mistake to unthinkingly perpetuate a regime of criminalized consensual, private, adult sex without adequately considering whether public resources ought to be devoted to prosecuting such cases and to subjecting offenders to public punish-

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235. See Falk, *Rape by Fraud*, *supra* note 37, at 50–51.

236. I understand Strader to make a similar, but slightly different, point in the context of judging the constitutionality of sex crime statutes. For Strader, if the text of the statute fails to clearly identify the relevant harm being targeted, then the government *must* affirmatively prove that the act caused specific harm to person or property (but not “harm to society”). See Strader, *supra* note 24, at 74–76. A mere assertion of an abstract harm will not do.

237. See generally Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009).

ment in the absence of actual harms, particularly where civil and administrative remedies might be available and more desirable. So even if the state can identify non-morality interests that would survive constitutional scrutiny, it is fair to ask whether those are interests that the state can protect without using the blunt force of the criminal law and criminal prosecution. To say that Paschal, Colleps, Edwards, or Morales have done something to compromise the educational environment—and that they should be disciplined—is one thing. To expend scarce public resources on their prosecutions and then to imprison them is quite another. To say that psychotherapists cannot have sex with their patients is one thing; to say they cannot do so even after termination of the professional relationship is quite another; to prosecute and put them in jail for it is still another.<sup>238</sup>

So regardless of whether *Lawrence* reaches as far as this Article has (rather skeptically) suggested that it might (or, to put it more precisely, that it *could be argued* to reach), American policymakers cannot simply rely on an ambivalent Supreme Court to determine the scope of permissible consensual adult sexuality. Consequently, we ought to understand *Lawrence* as a case that challenges existing political assumptions about the criminal law of sex. It compels us to bring crimes involving *truly* consensual, private adult sex to the table as we further the conversation about the proper scope of the American criminal sanction and exercise of prosecutorial power and discretion. Even if we assume that *Lawrence* is more conservative than libertarian,<sup>239</sup> and even if one wishes that *Lawrence* was clearer about the scope of its protection of consensual, non-prostitution, and private adult sex, a conservative grounding for a leaner and more sensible criminal law of sex remains possible. The result (though not the methodology) in *Lawrence* is not inconsistent with a thoughtful form of conservatism that embraces prudent limits on the criminal sanction and the power of the state. While conservatism embraces restraints on sexual practices that inflict identifiable social harms, it does not require *criminal* punishments for any and all conduct that may be socially undesirable. The criminal law is a vital, but not exclusive, instrument for achieving a tolerable social order.

For the thoughtful conservative—who may be skeptical of this assessment of *Lawrence's* virtue—Justice Thomas's two-paragraph dissent in *Lawrence* is worth careful consideration. When Justice Thomas channels Justice Stewart in *Griswold*,<sup>240</sup> calling this an “‘uncommonly silly law’” and saying that he would vote to repeal the Texas sodomy statute if he were a member of the Texas legislature,<sup>241</sup> Justice Thomas is demonstrating a substantive criminal law vision not so attenuated from that of the *Lawrence* majority, even if his constitutional analysis differs significantly.<sup>242</sup> “Punishing someone for expressing his sexual

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238. See *State v. Hollenbeck*, 53 A.3d 591, 598–99 (N.H. 2012).

239. Cf. Carpenter, *supra* note 11.

240. See *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).

241. See *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting) (quoting *Griswold*, 381 U.S. at 527 (Stewart, J. dissenting)).

242. See *Lawrence*, 539 U.S. at 605–06 (Thomas, J., dissenting).

preference through non-prostitution consensual conduct with another adult,” Thomas says, “does not appear to be a worthy way to expend valuable law enforcement resources.”<sup>243</sup>

The prudent political decisionmaker knows that she must pick her battles, wisely, with serious consideration given to the proper equilibrium between good social order and freedom, to reasonable limits on the power of the state, and to an appreciation of social custom and tradition as well as a recognition that those customs and traditions evolve. In this sense, the overcriminalization concern and the aims of conservatism are entirely compatible, even in the arena of sex crimes.

#### CONCLUSION

For ten years, the criminal law has endured the ambiguities of *Lawrence*. Those ambiguities create especially complicated constitutional questions about criminal sexual behavior in factually consensual sexual encounters. It is important to emphasize again that this Article does not condone, endorse, or justify any of the sexual activity or conduct at issue in the cases or hypotheticals discussed here. What this Article has attempted to do, however, is to identify a framework for considering the enticingly rich but deeply unclear holding in *Lawrence* and to discern whether *Lawrence* offers some admittedly narrow protection for truly factually consensual (that is, consensual as to the nature of the act), non-prostitution sexual encounters between adults that the state nevertheless forbids through the criminal law. The existing understanding of *Lawrence* among lower courts, if accurate, suggests that *Lawrence* is a comparatively conservative opinion that likely offers little in the way of restraints on the state’s ability to regulate sex. That may well be an accurate interpretation of *Lawrence*, but it is no substitute for clarity. In truth, the loose language in *Lawrence* has real implications for the criminal law of sex in America and for the sexual behavior of consenting adults. The Court should rectify this shortcoming. But even if it does not, *Lawrence* has provided American criminal justice policymakers and prosecutors with an opportunity to engage the broader problem of overcriminalization in the area of sexuality and to target only that sexual conduct which is sufficiently personally or socially harmful to justify the coercive power of the criminal sanction. When it comes to truly consensual sex between adults, there is a universe of conduct that should be criminalized and prosecuted, but it is likely a small one.

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243. *Id.* at 605. (Thomas, J., dissenting).