

# IS FEMINIST THEORY INCAPABLE OF CONDEMNING RAPE BY DECEPTION?

*Mirko Daniel Garasic*<sup>1</sup>  
*Shay Keinan*<sup>2</sup>

**Abstract:** Rape by deception is a unique and controversial form of crime. It is based on the assumption that withholding some information from a person –usually a woman- prior to having sex with her can be said to nullify her consent to the act. One can assume that a feminist approach would strongly condemn this type of crime. However, in this paper we want to underline how rape by deception puts in question some variants of feminist theory. We will argue that in order to convincingly condemn acts of rape by deception, we need to accept that some forms of feminist ethics, such as relational autonomy and ethics of care, are inappropriate or incapable of convincingly condemning this type of rape. In order to support this claim, we will consider recent cases in Israel and in the United Kingdom that give relevance to this global issue. Assuming that procuring sexual interaction by deception about one’s own identity amounts to rape, we will highlight that such a position is consistent with a strict Kantian version of ethics. However, we will explain how this position paradoxically collides with the directives of some feminist theories.

**Keywords:** Rape by Deception. Autonomy. Consent. Kantian Ethics. Ethics of Care. Feminist Theories.

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## 1. Premises

Before turning to examine the case studies, some clarifications should be made. It is not the intention of this paper to establish the culpability or innocence of the agents involved in the specific cases discussed below. The cases involve multi-layered issues that cannot possibly be dealt with here. The cases are brought as illustrations and real life examples to the point we are trying to make. We will paint a picture that will aim to represent as accurately as possible the known facts regarding these cases. We will proceed on the basis that these facts are correct, and that facts establish the accusation of ‘rape by deception’. We will not consider defence arguments such as that rape did not occur in the first place and that the offense of ‘rape by deception’ should be abolished

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<sup>1</sup> Postdoctoral Fellow at The Edmond J. Safra Center for Ethics, Tel Aviv University, Israel. E-mail: mdgarasic@fulbrightmail.org

<sup>2</sup> PhD Candidate at College of Law, Australian National University, Canberra, Australia

altogether<sup>3</sup>. However, we will expand on and develop some of the arguments raised by the defence in these cases in order to demonstrate the limits of some feminist approaches in cases of rape by deception.

## **2. Defining Rape by Deception**

Rape by deception, or rape by fraud as defined in North American contexts<sup>4</sup>, gives relevance to the fact that in addition to force and coercion, withholding vital information about oneself from the sexual partner is an immoral act. This is so because such information would ultimately and decisively influence the victim's consent to the intercourse. Thus, as Larry Alexander and Heidi Hurd noted in two different studies: "there may be consent to *an* act, but there is no consent to *the* act"<sup>5</sup>. Traditionally, rape by deception tends to be divided into two main categories: medical treatment fraud and marital relations. In the first case, the victim agrees to undergo a medical procedure and the doctor pretends that the sexual contact is an integral part of the treatment. The latter case involves situations where a semi-conscious (perhaps half-asleep or in the dark) spouse agrees to sexual intercourse on the assumption that it was with her spouse, when in fact the partner was a different person withholding that relevant information. In the course of the years, many different scenarios joined these two categories, and we shall now turn to examine some cases from recent years where rape by deception was said to have occurred.

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<sup>3</sup> In some jurisdictions, this offence does not exist, and instead an accusation of 'procuring sexual penetration by fraud' can be made. See Patricia J. Falk, Rape by Fraud and Rape by Coercion, *Brooklyn Law Review*, Volume 64, Issue 1 (1998) p. 39.

<sup>4</sup> In relation to these terms and definitions, see a very accurate description in: Russell Christopher & Kathryn Christopher, Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape, *Northwestern Law Review*, Volume 101, Number 1 (2007) p.75-124; See also Jed Rubenfeld, The riddle of rape-by-deception and the myth of sexual autonomy, *Yale Law Journal*, Volume 122, Issue 6, 1413 (2013); Patricia J. Falk, Rape by Fraud and Rape by Coercion.

<sup>5</sup> Larry Alexander, The Moral Magic of Consent, *Legal Theory*, Volume 2, Issue 3, 165 (1996) p. 167; See also Heidi Hurd, The Moral Magic of Consent, *Legal Theory*, Volume 2, Issue 2, 121 (1996) p. 127 - "there may be consent to *an* act, but there may be no consent to *the* act". In a recent case, the High Court of England and Wales ruled that even if there was consensual penetration, rape may have occurred if the man behaved aggressively and ignored the woman's demand not to ejaculate inside her. See "Sex consent could still lead to rape charge, judges say" BBC News, 24 April 2013 <http://www.bbc.co.uk/news/uk-22281457> [accessed 13/02/15].

### **3. The cases**

The first case to consider is that of Sabbar Kashur, a Palestinian Muslim man charged with rape by deception after having lied to an Israeli Jewish woman with whom he had casual sex<sup>6</sup>. In July 2010, Kashur was arrested by the Israeli police and was accused of committing rape by force. The charge was subsequently changed to rape by deception. The nature of Kashur's lie raises a particularly sensitive issue in that part of the world: Kashur pretended to be Jewish when the victim enquired about his identity prior to the sexual intercourse. For her, his religion, or ethnicity, was a decisive factor in considering whether to take their interaction further. The victim argued that if she had known this relevant (in her eyes at least) information concerning her soon-to-be sexual partner, she would have refused to engage in sexual activity with Kashur.

The second case involves several undercover British agents. An investigation carried out by the Guardian in recent years helped to shed light on the controversial stories of Mark Kennedy, Andrew James Boyling, Mark Jenner and Bob Lambert. These men were all undercover police officers, who had sex with women who were members of environmental, anarchist and left-wing groups that were listed by the Special Demonstration Squad (SDS)<sup>7</sup> as potentially dangerous<sup>8</sup>. When discussing the nature of his promiscuous lifestyle among these dissident groups, Boyling claimed that it was impossible not to expect officers to engage in such activity in these contexts, and that having sex with group members was "a necessary tool in maintaining cover"<sup>9</sup>.

In terms of the emotional attachment to the victims, Kennedy's scenario does not seem to differ much from Kashur's case, but what is really unique in Boyling, Jenner and Lambert's cases is that they had developed a long-term relationship with the very activists they were sent to spy on. Jenner had moved in with his partner and lived with

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<sup>6</sup> See Joanna Paraszczuk, "Court Cuts Arab-Israeli Rape-by-Deception Sentence" Jerusalem Post, 27 January 2012, <http://www.jpost.com/NationalNews/Article.aspx?id=255363.314319> [accessed 28/5/15]; For the full-text verdict in the appeal see CrimA 5734/10 Kashour v. State of Israel) available at <http://elyon1.court.gov.il/files/10/340/057/k05/10057340.k05.htm> (Hebrew) (given on 2<sup>nd</sup> of May, 2011).

<sup>7</sup> A secret unit formed to prevent violent disorder on the streets of London.

<sup>8</sup> Paul Lewis, Rob Evans and Rowenna Davis, "Ex-wife of police spy tells how she fell in love and had children with him" The Guardian, 23 January 2011 <http://www.theguardian.com/environment/2011/jan/19/wife-fourth-police-spy-children>. [accessed 25/5/15]; Paul Lewis and Rob Evans "Police spies: in bed with a fictional character" The Guardian, 1 March 2013, <http://www.theguardian.com/uk/2013/mar/01/police-spy-fictional-character> [accessed 25/6/15].

<sup>9</sup> Mark Townsend and Tony Thompson "Undercover police cleared 'to have sex with activists'" The Guardian, 23 January 2011 <http://www.guardian.co.uk/uk/2011/jan/22/undercover-police-cleared-sex-activists> [accessed 25/5/15].

her for five years, and Lambert had a child with his partner before disappearing. In this paper, we will focus on Boyling's case since it is the most extreme one - he ended up marrying the activist and having two children with her.

The partners of these agents initiated a legal action against the Metropolitan Police Service for the trauma caused by long-term relationships with undercover police<sup>10</sup>. As one of the agent's partners stated: "we are psychologically damaged; it is like being raped by the state. We feel that we were sexually abused because none of us gave consent"<sup>11</sup>.

How should we judge the situations described above? Should we accuse the agents of committing rape by deception? Although it took Boyling a long time to tell his wife the truth about himself and despite their subsequent divorce, it seems like at least in this case – love was present in their relationship. Can we say that a government agent who falls in love with a person while undercover would not be committing rape by deception due to the very emotion that he experienced? Perhaps the agent's feelings are irrelevant and what matters is that he made the victim believe X when X is false? In order to answer these questions, we need to invoke a moral theory that can explain what is actually wrong with the conduct of the perpetrators in these scenarios. The moral theory needs to explain why such conduct should be considered as 'rape by deception' thus falling under the sever category of rape, rather than under other categories of deceit. We will begin by highlighting the specific issues raised by the cases considered. Next, we will apply a Kantian approach and see how Kantian ethics adequately deals with such cases and condemn them on all levels. We will then turn to feminist theories of relational autonomy and ethics of care and see that applying these conceptions on such cases makes it not only hard to categorise them as 'rape', but even to condemn them altogether.

#### **4. Issues to consider**

These cases raise a number of issues, each of which deserves a thorough discussion. For example, what is the role of the State in both situations? In the Israeli case, the State can be seen as controversially sustaining or reinforcing a form of racist

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<sup>10</sup> See [policespiesoutoflives.org.uk](http://policespiesoutoflives.org.uk) -a support group for women's legal action against undercover policing.

<sup>11</sup> Paul Lewis, Rob Evans and Sorcha Pollak "Trauma of spy's girlfriend: 'like being raped by the state' "The Guardian, 25 June 2013 <http://www.theguardian.com/uk/2013/jun/24/undercover-police-spy-girlfriend-child> [accessed 29/5/15]

discrimination by reaffirming that an act of withholding a person's ethnicity or religion from a partner amounts to rape. In the UK scenario, the State appears to be even more directly involved in initiating the events that brought up the rape act itself, with all the contentious consequences resulting from such a stand.

Surely the sensitivity of the topic calls for further investigation on the status of all actors involved in the situation, but this is beyond the scope of this paper. The focus of our current investigation is instead on the parties to the sexual act and the interactions that took place between them. What seems to be the core problem in these interactions is that the three men involved in these cases have lied (directly or indirectly), being aware that the women they were lying to might not have had sex with them were they to tell the truth.

This scenario, many argue, is not very uncommon in "normal" relationships. For example, people will lie about the nature of their job, their financial and marital status, and so forth. Is there any difference then between such "simpler" cases and the cases considered here? In absolute terms perhaps not, but trying to find a specific dimension for the latter, we could define the guilt in our two case studies as follows.

In the Israeli case, Kashur was specifically asked by the victim if he was Jewish. Kashur knew that withholding this information was going to directly affect the development of their interaction.

However, in the case of the undercover agents, the lie was continuous, extending over a long period of time. Obviously in this case, the situation never evolved to the point where the victims explicitly asked the agents to clarify their status, for the simple fact that the women involved did not suspect that their fellow group members were in fact undercover police agents. It is reasonable to assume that if the victims knew or had doubts regarding the identity of these men, they would have immediately stopped spending time, let alone sleeping with them. That is why the women complained thereafter that they were not able to give informed sexual consent. Given that in these instances the relationships extended over time (and included more than just casual sex), it could be inferred that their autonomous choice was incapacitated even more than in the Israeli case. Having a better understanding of the acts committed by the men in these cases, let us turn now to consider in detail how Kantian ethics deals with such acts.

## **5. Kantian approach: Autonomy and Trust**

As one of the most respected contemporary Kantian scholars, Onora O’Neill appears as a valuable reference for the present investigation. Her interpretation of Kant stresses the importance of combining the widely accepted notion of autonomy with the equally important (but often overlooked) notion of trust<sup>12</sup>. Trust -even more than autonomy- requires the moral agent not to lie. This very aspect of truth telling is what enables trust to live and flourish in society. It follows then that in *any* case of rape by deception, a Kantian approach based on O’Neill’s interpretation would have no hesitation in condemning the act on three grounds.

The first ground -and perhaps the best known- condemns the act on the basis of not respecting the victim’s autonomy. By lying, the liar is contravening the formulation of the categorical imperative that O’Neill and others define as ‘the formula of the end in itself’: “act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means”<sup>13</sup>.

When A lies to B about his identity in order to achieve sexual pleasure, he treats B as a means to satisfy his own desires, instead of a person (an end) in herself.

The second ground simply stresses the well-known (and heavily criticised) Kantian maxim that we should *never* lie, whatever the consequences. Once we establish that deception took place, and that according to the Kantian maxim, the act of lying was inexcusable, it follows that the woman’s consent was absent and therefore rape was committed.

The third ground focuses more on the trust dimension, underlining the societal damage of such a deceptive behaviour. O’Neill points out that the correct way to understand Kant is to fuse the latter two concepts in practice. Therefore, the second and third points may serve as a good example of how to combine the theoretical and extreme position of not lying at all, with a more practical approach. To sum up then, we can see how a Kantian approach easily rejects rape by deception at every level, combining all three grounds. However, this does not seem to be the case for some feminist theories, and we shall now explain why this is the case.

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<sup>12</sup> Onora O’Neill, *Autonomy and Trust in Bioethics*, CUP (2002).

<sup>13</sup> Immanuel Kant, *Grounding for the Metaphysics of Morals*, translated by Ellington, J., Hackett (1993) p.36.

## **6. Feminist approach: Relational Autonomy and Ethics of Care**

Relational autonomy constructs the notion of autonomy in a new way. Instead of constructing autonomy according to the hyper-individualistic approach common to Western theorists, relational autonomy conceptualise our freedom and moral agency as directly entrenched in the interactions between each individual and the human beings surrounding her<sup>14</sup>. Our autonomy is not developed individually; rather, every person we interact with contributes to the process of shaping our own autonomy. Interestingly, this vision of autonomy is strongly in agreement with the principled autonomy advanced by Kantian theorists such as O'Neill. So what makes relational autonomy different?

Feminist theory argues that autonomy is fundamentally relational in several senses: causally, substantively, and conceptually<sup>15</sup>. The core distinction between Kantian autonomy and relational autonomy relies in the last category: the conceptual sense. Kantian and feminist conceptions of autonomy differ on the relevance they give to the principle of rationality in the assessment of moral behaviour. Kantian ethics relies heavily on the importance of reason as an objective practical standard that ought to be applied by any rational agent. Reason in this sense applies universally to any individual, no matter what his or her subjective circumstances or particular emotions may be<sup>16</sup>. Some feminist theorists reject what they call as 'male driven ethical theories', arguing that they do not consider sufficiently the role of emotions in the moral evaluation of an action<sup>17</sup>. This leads us to another approach typical of the feminist tradition - the ethics of care and justice. Even if arising in the context of psychology, the so called Kohlberg-

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<sup>14</sup> Among other sources aimed at describing this vast notion that has different layers and description, see the valuable volume put together by Mackenzie and Stojar: Catriona Mackenzie & Natalie Stoljar (eds.), *Relational Autonomy*, OUP (2000). See also Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law*, OUP (2011); John Christman, *Autonomy in Moral and Political Philosophy*, *The Stanford Encyclopedia of Philosophy* (Spring 2011 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/spr2011/entries/autonomy-moral/> at 3.3.

<sup>15</sup> See Susan H Williams, *Truth, Autonomy, and Speech: Feminist Theory and the First Amendment*, NYU Press (2004) p 75.

<sup>16</sup> This is obviously a very brief (and superficial) presentation of the role of reason in Kantian ethics, but we are unable to delve here too deeply into this issue, for more on this see Jennifer K. Uleman, *An Introduction to Kant's Moral Philosophy*, Cambridge University Press (2010), 51.

<sup>17</sup> See Superson, Anita, "Feminist Moral Psychology", *The Stanford Encyclopedia of Philosophy* (Winter 2014 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/win2014/entries/feminism-moralpsych/>. There are of course feminist theorists that adopt a Kantian approach and conceptualize it in accordance with feminist principles (see for example Carol Hay, *Kantianism, Liberalism, and Feminism: Resisting Oppression*, Palgrave Macmillan, (2013). We direct our criticism to those feminist theorists who criticize Kantian ethics because of its emphasis on reason and objective standards as opposed to emotions and subjective circumstances.

Gilligan debate over the structural incapacity of females to follow expected legal standards is closely connected to our discussion. Kohlberg's conclusions have sparked an intense debate over the contested results and their interpretation<sup>18</sup>. Kohlberg's theory of moral development fuelled feminist theorists to underline the fact that the tests used by Kohlberg were gender-directed and therefore implicitly in agreement with 'male values' and 'male understanding of morality' (i.e. in accordance to reason). As Annette Baier puts it: "Piaget's finding that girls were deficient in the 'legal sense' was confirmed"<sup>19</sup>. The feminist reaction affirmed that other values *in addition* to justice had to be taken into account; values that are more closely related to undervalued qualities arguably typical of females, such as care.

According to Virginia Held<sup>20</sup>, the main assumptions of the current moral and legal systems should not be left unchallenged. Of particular relevance for the present work, ethics of care puts into question two major assumptions that are central to the Kantian tradition:

- 1) Privileging reason over emotions: In line with Western tradition, emotions are seen as interfering with the task of reaching a proper standard of moral conduct. We are expected to detach ourselves from our emotions in order to understand what is right and be able to act accordingly.
- 2) All actions are either selfish or altruistic; morality is the result of consciously suppressing our natural bias and tendency to act in favour of our own selfish

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<sup>18</sup> Using Piaget's storytelling technique, Kohlberg studied the answers given by children of different ages to the questions he posed. The group of children was composed of 72 boys from Chicago between the ages of 10 and 16. 58 of these children were followed up at three-yearly intervals for 20 years. Through the reading of the answers to several dilemmas, he defined three distinct levels of moral reasoning, each with two sub stages: Pre-Conventional Morality, Conventional Morality and Post-Conventional Morality. One can only pass through these levels in this order. Each new stage replaces the reasoning typical of the earlier stage. Not everyone achieves all the stages. Among other critiques, Carol Gilligan underlined the androcentric nature of Kohlberg experiment –as his theory took into account only males. Gilligan argued that while male morality might favor abstract principles such as justice and law, female morality is based instead on principles of care and justice. See Lawrence Kohlberg, *The philosophy of moral development: moral stages and the idea of justice*, San Francisco: Harper & Row (1981); Carol Gilligan, *In a Different Voice*, Harvard University Press (1982). See also Owen Flanagan and Kathryn Jackson, *Justice, Care, and Gender: The Kohlberg-Gilligan Debate Revisited*, *Ethics*, Vol. 97, No. 3 (1987), pp. 622-637; Jean Piaget, *The Moral Judgment of the Child*, London: Kegan Paul, Trench, Trubner and Co (1932).

<sup>19</sup> Annette Baier, *The Need for More than Justice*, *Canadian Journal of Philosophy*, supplementary vol.13, Calgary: University of Calgary Press (1987) in *Ethics: Selections from Classic and Contemporary Writers*, Oliver Johnson and Andrews Reath (eds.), Wadsworth (2011) p.538.

<sup>20</sup> Virginia Held, *The Ethics of Care: Personal, Political and Global*, OUP (2006).



interests. Again, the presumption is that we need to guide our actions according to an impartial standard in order for our actions to be moral.

These assumptions are questioned by feminist theorists because they put too much emphasis on the need for morality to be external, a priori and independent from our contingent situation. More specifically, these assumptions, so it seems, try to detach us from the natural feelings we experience when conducting our everyday relationships. Therefore, according to the feminist theories of relational autonomy and ethics of care, emotions evoked by inter-personal relationships should be valued and appreciated more than 'cold' reason-based argumentation when evaluating legal situations<sup>21</sup>. In the cases considered however, such an approach adds another layer to the already complicated status of rape by deception. This layer, as we shall explain now, puts in question the culpability of the men involved in these situations.

## **7. Applying the Theories to the Cases**

Applying relational autonomy and ethics of care to our cases, we will find that the focus shifts from the act of lying to other relevant factors, and most importantly – to the emotions experienced by the parties. By taking into account the emotions experienced by all the actors involved in the creation of a certain situation we are reducing the degree of liability assigned to the perpetrator. In the case of the Israeli woman, one could say (as indeed Kashur did) that the issue of ethnicity was secondary. She was attracted to him, he was attracted to her, both of them followed their passion and engaged in sexual activity. It is only through the rational *post-factum* schematisation of ethnicity that the rape dimension will come into existence. In the UK cases, the key difference between the different agents seems to lie precisely in the emotional attachment each agent had developed to their victims: while Kennedy for example did not seem to care much about his partners and their feelings, Boyling fell in love with the woman he had sex with. True, for a long time during their relationship, Boyling was withholding significant information about his identity before, during and after making love to his wife. Put in that way, Boyling's conduct does not seem to be

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<sup>21</sup> See Superson, Anita, "Feminist Moral Psychology", The Stanford Encyclopedia of Philosophy (Winter 2014 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/win2014/entries/feminism-moralpsych/>.

less (or more) severe than Kennedy's behaviour with respect to his occasional partners. In fact, one could even argue that Boyling's attitude was more callous, as his wife had put more trust in him, and deserved a higher level of honesty from her partner than one could expect from an occasional sex-partner. Nonetheless, all the facts indicate that Boyling did love his wife and it seems reasonable to assume that a significant emotional dimension did exist between Boyling and his wife; a dimension that was completely absent in the cases of Kennedy and Kashur. Perhaps this is why Boyling's partner never referred to their intercourse in terms of rape, while other women labelled their partner's conduct as "rape by the State"<sup>22</sup>. This fact could invite us to think of Boyling's sexual engagements with his partner as somehow more genuine and "true" than those in the other cases. This would be true if emotions were a measurement unit of relationships, namely, if in order to assess the genuineness and quality of a (sexual) relationship the emotions experienced by the parties must be examined. This is indeed the position of some feminist theorists. However, applying such an approach would be very problematic.

Our main issue of concern here are the implications of 'relational autonomy' for rape cases in general, and rape by deception in particular. When taken to the extreme, the relational approach could end up pushing us to defend the view that the rape could be ascribed also to the victim. We do not refer here to arguments along the lines of "she should not have put on such a short skirt" that aim to reduce the individual dimension of the rapist's choice due to the victim's behaviour. In such cases, there is no prior engagement between the victim and the perpetrator and therefore no basis to construct an emotional relationship between the parties. However, in cases of rape by deception (and in other cases of rape, where the parties knew each other prior to the act), applying the relational approach would make the condemnation of the rapist very difficult. In cases of rape by deception, as we can witness in the cases discussed above, the victim actively engages with the perpetrator, and the perpetrator has some indication that the victim is interested in him and wishes to be involved with him sexually. The absence of physical violence puts the putative rapist in the position of saying: "she wanted it as much as I did". Under the relational autonomy framework, engaging romantically and voluntarily with a specific male can be considered as some kind of 'contributory negligence' from the side of the victim, so that the offender's liability is reduced,

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<sup>22</sup> Paul Lewis, Rob Evans and Sorcha Pollak "Trauma of spy's girlfriend: 'like being raped by the state'", Op.Cit.

though not completely dissolved, due to the victim's active engagement with him<sup>23</sup>. Adopting the feminist criticism and allowing 'feelings' to play a relevant role in the assessment of moral conduct, can be dangerous. It may open the door for sex offenders to justify their actions on the basis of the feelings experienced by the parties. In the Kashur case, the justification put forward could be: "she clearly wanted to have sex with me. Being Jewish or not has nothing to do with the feelings we are experiencing, I don't have to over-rationalise the situation, nor seek an impartial analysis of the situation, I just follow what I feel is right to do and let her follow her feelings." This, in fact, is more or less the response given by Kashur in an interview given to the Guardian: Kashur tried to justify himself by saying that "any person in his shoes would have done the same"<sup>24</sup>, that is – any man, even if not lying directly, would at least not make any effort to clarify the situation and risk losing the opportunity for sex that was offered to him by the woman.

It seems as if accepting this point of view would leave far too much "freedom of action" for many potential rapists to self-assess their emotional status in order to justify a constant and perpetrated deception of their identity. One can think of many different scenarios, where a man can claim that he lied to a woman he had sexual relations with because he had developed true and genuine feelings for this woman and felt he was 'forced' to lie. This is a major problem with the implementation of feminist ethics in scenarios like the ones described here.

In Kashur's case, feminists may argue that relational autonomy cannot come to the rescue of the rapist: Kashur and the woman he met had sex after a few minutes of conversation. The whole episode took about an hour; there was no time to develop a relational attachment and therefore the concept of relational autonomy should not apply to this case. In the case of Boyling however, there is no reason why the concept of relational autonomy would not apply. There was an ongoing contact between the partners, and real emotional relations were able to develop over weeks, months and years.

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<sup>23</sup> In tort law, if a person was injured in part due to her own negligence (i.e. her negligence 'contributed' to the realisation of the harm), than the liability of the person who caused the harm would be reduced according to the victim's 'contributing' negligence. See Harold Luntz, David Hambly & Robert Hayes. *Torts: cases and commentary*, (7th edition) Lexis Nexis (2013).

<sup>24</sup> Harriet Sherwood, "Saber Kushour: 'My conviction for "rape by deception" has ruined my life'", *The Guardian*, 25 July 2010, <http://www.guardian.co.uk/world/2010/jul/25/saber-kushour-rape-deception-charge?intcmp=239> [accessed 29/5/15]

It seems clear thus, that the application of some feminist theories to cases of rape by deception is inappropriate, as it is incapable of adding any valuable inputs in the pursuit of justice. That is, unless we want to reduce the liability of men who commit such acts, or to abolish the offence of ‘rape by deception’ altogether. This would be ironic, given that feminist theories such as relational autonomy came into existence in order to strengthen women’s position in such conflicts, not to weaken them.

Does this mean that such conduct should not be considered as rape by deception, but rather as ‘procuring sexual penetration by fraud’? This again would not seem like a desirable outcome from a feminist perspective. Equating sexual penetration to other goods or services that may be acquired by fraud seems to deny the special status that should be assigned to women’s bodily integrity. It would conflict with feminist approaches regarding other practices that utilise the female body such as prostitution or the porn industry. In such instances, feminists argue against putting the female body on the same line as other goods and services that may be bought and sold on the free market<sup>25</sup>.

Feminists may reply that they are still able to condemn the acts performed by Kashur and Boyling based on the fact that they lied or concealed the truth: the perpetrators knew (or should have known) that if the woman had known the truth about them she would feel differently and might not agree to have sex with them. Therefore, feminists may accuse the men involved in committing some form of ‘emotional manipulation’ on the victims that led the victims to agree to the sexual contact.

However, there are at least two problems with this reply. Firstly, this reply seems to contradict other important aspects of feminist theory regarding the concept of truth. Some feminist theorists do not accept the traditional definitions of truth and hold that: “truth is contextual and relational rather than objective. It can and must be pursued through means that recognize emotion and value as well as reason and that generate responsibility on the part of the knower whose values are implicated”<sup>26</sup>. When applying this approach to Kashur’s case for example, it would seem that feminist reading would be reluctant to condemn his behaviour just because he was not genuine regarding his religion or ethnicity. To recognise that he lied would mean accepting that ethnicity and religion are pertinent to the question of whether a person should engage sexually with a

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<sup>25</sup> See Rebecca Whisnant, Christine Stark, *Not for sale: Feminists resisting prostitution and pornography*, Spinifex Press (2004).

<sup>26</sup> Susan H. Williams, *Truth, Autonomy, and Speech: Feminist Theory and the First Amendment*, p. 73.

potential partner. Such a discriminatory result seems undesirable from a feminist perspective.

The second problem is that even if feminists do succeed in condemning the perpetrators' dishonesty on some grounds, it still does not help them to move to the next step and conclude that the crime committed amounts to rape. Rape requires that the consent from the victim be denied by compromising her autonomy. Kantian ethics fits well with this principle, as it maintains that each individual is fully autonomous on its own. But if the victim's autonomy is relational to the perpetrator and true emotions on both sides are present, the whole formulation upon which the concept of rape by deception is built collapses. The fact that the perpetrator was dishonest regarding a certain fact does not mean that the victim's autonomy was infringed to the extent of denying her the ability to consent to the sexual act. Since her autonomy is being constructed in relation to that of the perpetrator, and since both of them had a genuine interest in each other, one lie or a detail concealed cannot overshadow all other genuine and truthful interaction between the parties that formed the relationship between them. Again, a feminist theorist may be able to condemn the perpetrator in the situation, but less severely than a Kantian theorist would.

Moreover, even if we concede that Kashur had committed some form of 'emotional manipulation', Boyling's case remains problematic to tackle from a feminist perspective. Boyling was never asked by his partner whether he was a police agent, and his choice not to reveal his false identity to the woman in question could be related to the fact that he did not want to put their genuine relationship at risk. If we accept that his partner was actually in love with him, the intensity of the emotional attachment between them might lead us to see the act of withholding the truth in a different light.

Thus, the prioritisation of the emotional interaction, as well as the bond between the parties, might be seen in accordance with the central directives of the concept of relational autonomy. Yet, such acceptance would result in an inability to condemn this case as rape by deception, as in order to do so, we need to use an external source of judgement from that which is created within the relationship: reason.

## **8. Conclusion**

In conclusion, rape by deception is an extremely delicate and specific form of crime, as its labelling and definition suggest. It seems that the current legal system

already struggle to comprise all types and cases of rape in a satisfactory manner. We have argued that although feminist theory often claims it wishes to expand the protection given to victims of sexual acts, some feminist theories of autonomy and rationality are not supportive of this goal. Applying approaches that contest traditional concepts of autonomy and rationality can end up damaging rather than benefitting the victims of such acts. Addressing the question posed in the title, we have shown that some feminist theories are paradoxically incapable of condemning some cases of rape by deception. In contrast, a theory of autonomy that is based on Kantian principles would allow us to convict the perpetrators in such situations adequately. If we do believe that these acts should be categorised as ‘rape’, then applying a rational approach -rather than a feminist one- seems like the morally sound way of dealing with situations that are very complicated to begin with.