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My Body Is My Temple? Comparing Sexual Crimes and Property Crimes in a Human Rights Tradition*

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Abstract

Despite recent criminal law reforms to define rape through the lack of consent, practical questions remain about how to regulate different kinds of violations of sexual autonomy. Many common law scholars have found it eye-opening how much more extensive and easily accepted the protection of property rights is compared to the protection of sexual autonomy. But when the rationale of criminalization resides in human rights, such a comparison is alien; protecting human dignity appears separate from protecting instrumental property rights. Considering rape a subversion of our ownership rights to our bodies (the property model of rape) is rightly regarded as problematic. This article argues that comparing sexual crimes and property crimes is not predicated on the property model but rather on autonomy itself. Comparisons based on autonomy could help resolve practical dilemmas of consent-based rape laws while respecting human dignity and thus be fruitful research pursuits within a human rights tradition.

Keywords: autonomy; rape; sexual crimes; property crimes; dignity

The recent wave of law reform on sexual crimes,¹ amending the definition of rape to consent-based rather than coercion-based, constitutes an important development in criminal law and an advancement in human rights in Nordic countries, as elsewhere in Europe. Despite these legal changes, it is unlikely that the question of the necessary, just, or desired level of protection for sexual autonomy has been resolved at the national or international level, as human rights norms fail to specify exact requirements for the protection of sexual autonomy, leaving unanswered practical questions about how to treat different kinds and levels of violations of sexual autonomy in the criminal law. Where might one find such answers? Many common law scholars have found it eye-opening to consider how much more extensive and easily accepted the protection of property is in criminal law when compared with sexual autonomy. In human rights tradition, however, such a comparison can be seen as either inconsistent with the human rights framework or redundant.

The purpose of this article is to find a thought framework that allows us to compare sexual crimes and property crimes without reducing people to objects or forgetting about human dignity. Two points are crucial for attaining this goal. First, a comparison differs from modeling one thing on another and from analogical reasoning, which proceeds from a source domain and maps

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¹Some examples include consent-based laws coming into force in Germany in 2016, Iceland and Sweden in 2018, Greece in 2019, Denmark in 2021, Spain in 2022, and Finland in 2023. Norway rejected a proposal for a consent-based definition of rape in 2018.

the target domain onto it. In model building and analogy, one thing is primary, the other secondary. By contrast, a comparison does not imply an order; it is symmetrical. Second, property crimes should be conceived as crimes against autonomy rather than crimes against property or ownership. Thus, the essential point of comparison becomes autonomy itself: sexual autonomy and autonomy over property.

It is not the purpose of this article to draw a systematic comparison between sexual crimes and property crimes but, instead, to encourage the use of such a comparison in a human rights tradition by showing how it can be consistent with human dignity. The analysis is intended to be universal in the sense that it does not commit to any particular jurisdiction or its definitions of either property crimes or sexual crimes. Inevitably, some examples will not hold in a particular jurisdiction, but this should not detract from the overall argument. I begin by outlining two approaches to examining sexual crimes: through human rights and comparisons with other crimes. This article is an attempt to combine these two seemingly conflicting approaches. In order to further justify the comparative approach, I examine how property crimes and sexual crimes share a legal framework that makes sense of the comparison. The legal framework for physically violent crimes, another frequent point of comparison, is different. After that, I scope out the features of autonomy that make the comparison illuminating. Autonomy should be understood as an enabler of human interaction, not a barrier, and it is scalar, relational, and multidimensional. I then explore how autonomy relates to property rights and how property relates to the body. After that, I consider how the differences between sexual autonomy and autonomy over property might be taken into account. Finally, I draw conclusions about the kinds of questions the comparison could help answer.

A. The Search for Answers

Legal amendments towards consent-based rape laws in Europe have followed in the wake of the Istanbul Convention (2011),² high-profile rape cases, and social movements like #MeToo; although the obligation to criminalize non-consensual sexual acts already existed since the interpretation of the European Convention on Human Rights in *M.C. v. Bulgaria* (2004)³ and the interpretation of the Convention on the Elimination of All Forms of Discrimination against Women in *Vertido v the Philippines* (2010).⁴ While the wordings of the amendments differ—the laws in Iceland, Denmark, and Greece referring to the lack of consent, the laws in Sweden and Finland referring to non-voluntary participation, and the law in Germany referring to a sexual act against the victim's will, for example—they all aim to protect the same right: sexual autonomy. A doctrinal analysis or an evaluation of the relative merits of different legislative choices is beyond the scope of this article but should not distract from its argument.

However, human rights norms fail to specify exact requirements for the protection of sexual autonomy, leaving unanswered practical questions about how to treat different kinds and levels of violations of sexual autonomy in the criminal law. Does non-consent have degrees, or are there other types of violations of sexual autonomy besides that based on the lack of consent? Does fraud, enticement, the victim's vulnerability,⁵ or the abuse of a position of power⁶ vitiate consent?

²Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, CETS No. 210 art 36.

³*M.C. v. Bulgaria*, 2003 XII Eur. Ct. H.R. 1, paras 164–66.

⁴*Vertido v the Philippines*, CEDAW Communication 18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010), para. 8.9(b)(ii). See also COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, *General recommendation No. 35*, para. 33 (2017).

⁵Such as a state of intoxication, disability, mental or physical illness, poverty, or other hardship.

⁶Such as an employer-employee, guard-prisoner, carer-patient, coach-coachee relationship. Such relationships are tied up with vulnerability, but I use vulnerability as a more generalized and less relationship-specific condition in this article.

The treatment of such situations differs considerably between the Nordic countries' laws.⁷ The variation suggests that our understanding of sexual autonomy and its violations has not yet become consolidated. For example, in Sweden, abusing the victim's dependence on the perpetrator was incorporated within the definition of non-voluntariness. By contrast, in Finland, only the "severe abuse" of a "special position of power" due to which the victim cannot formulate or express their will constitutes non-voluntariness. Sexual abuse remains a separate crime with a detailed list of the kinds of situations in which the abuse of a position of power is criminalized. In Denmark and Iceland, the abuse of a position of power is criminalized in several different provisions covering sexual interaction with incarcerated people, with people residing in other institutions, or with a person who is dependent on the perpetrator for money, work, medical treatment, or other care. Thus, in Finland, Denmark, and Iceland, the abuse of power does not categorically preclude the possibility of consent or voluntariness but nevertheless constitutes a violation of sexual autonomy even when it does not amount to non-consent or involuntariness.

Such differentiation has attracted criticism. For example, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), in its baseline evaluation report on Finland, stressed that the "fact that the act is carried out without the consent of the victim is the point which punishment shall hinge upon, whether this is committed by someone who employs violence or abuses their position of power over the victim," and warned Finland "against the creation of a hierarchy of victims on the basis of their characteristics such as young age, helplessness, dependence, illness or other circumstances," because "rape is rape."⁸ The critique could be read to mean that the abuse of power or vulnerability always vitiates consent and that non-consent does not have degrees, but this approach has difficulties, which will be discussed later. A desire to find a contextualized way to analyze different legal approaches to such cases has motivated this article.

Conaghan criticizes the tendency to approach the central questions of rape law, including attempts to draw the boundaries of rape by seeking a universal "essence" to the crime. She calls for our understanding of rape to be contextualized and for shifting the focus from "abstract speculation about what rape is" to "honest, creative, and constructive engagement with the role of law in regulating sexual misconduct."⁹ This article suggests that, as a contrast and addition to "abstract speculation," we might turn to a comparison with other crimes, especially property crimes.

Many common law scholars have found it eye-opening to consider how much more extensive and easily accepted the protection of property is in criminal law compared with sexual autonomy. For example, in 1986, in her essay "Rape," Estrich wrote, "Much that is striking about the crime of rape—and revealing of the sexism of the system—emerges only when rape is examined relative to other crimes."¹⁰ According to Estrich, the legal process operates on a presumption that men are entitled to access to women's bodies, while no equivalent access has been granted to women's houses or wallets. The law does not require the victim of a robbery to resist, unlike the victim of rape. "Passive submission" or even "contributory negligence" does not amount to consent in a

⁷The relevant provisions are in the Swedish Criminal Code [Brottsbalken] 1962:700, Chapter 6, s 1; Finnish Criminal Code [Rikoslaki] 39/1889, Chapter 20, s 1–5; Danish Penal Code [Straffeloven] 1930:126, s 216–221; Icelandic Penal Code [Almenn hegningarlög] s 194–98.

⁸GREVIO monitors the implementation of the Istanbul Convention. The first evaluation took place before the legislative reform. GROUP OF EXPERTS ON ACTION AGAINST VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE, *GREVIO Baseline Evaluation Report: Finland*, GREVIO/Inf(2019)9, para. 167.

⁹Joanne Conaghan, *The Essence of Rape*, 39 OXF. J. LEG. STUD. 151, 156–57 (2019). In a similar vein, Frances Olsen has argued that abstract rights analysis fails to provide answers to the practical questions of rape law and can even be harmful when the goal is to safeguard young women's sexual integrity. Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis [1984]*, in FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER, 305, 310–12 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

¹⁰Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1090 (1986).

robbery, theft, or trespass, but it does in rape.¹¹ About a decade later, in “Unwanted Sex,” Schulhofer remarked:

We live in a world in which the law vigorously protects all of us against force, stealth, abuse of authority, and deception that impair our control over our property. We live in a world that never for a moment entertains the idea that a victim’s gullibility or “contributory negligence” lessens the criminal responsibility of a person who takes advantage of the situation by intimidation, extortion, or abuse of trust. Yet when women seek comparable protection for their bodily security and sexual integrity, they are disparaged as pleading for special privileges or wallowing in victimhood.¹²

In 2013, Rubinfeld highlighted a central inconsistency in rape law by reference to other areas of law:

[I]f rape is sex without the victim’s consent—as many courts, state statutes, and scholars say it is—then sex-by-deception ought to be rape, because as courts have held for a hundred years in virtually every area of the law outside of rape, a consent procured through deception is no consent at all.¹³

Around the same time, Dsouza called for applying the framework of undue influence, developed in contract law and sometimes applied to property offenses in the context of sexual crimes.¹⁴

Thus, comparing sexual and property crimes is not unusual in the common law tradition, but it is alien in the civil law tradition where the bases for criminalization are sought in human rights and property rights are considered separate from human rights. Rape and other sexual crimes directly subvert human dignity and are criminalized due to this subversion. Property rights are seen to have only an instrumental connection to human dignity; they are necessary for attaining security, freedom, equality, and an adequate standard of living,¹⁵ but ordinary property crimes do not directly threaten human dignity. A comparison of sexual crimes and property crimes is, therefore, considered inconsistent with a human rights approach. Alternatively, it can be thought to be redundant because the essence of rape or what is “at stake” can better be captured by direct reference to human rights.

The potential critique against comparing sexual crimes and property crimes is similar to that levelled against the property model of rape. In the property model of rape, our bodies are equated with property and our autonomy with ownership, which is inappropriate for the protection of sexual autonomy.¹⁶ For example, Russell has argued that the 2003 Sexual Offences Act of England and Wales has failed to protect women because rape is conceived of as a wrong in “the property of the person.” This masks the essential harm of rape as a violation of personhood itself.¹⁷ The critique stresses the centrality of the things that make us human: our subjectivity, inviolable dignity, and intrinsic value.

¹¹*Id.* at 1125–26.

¹²STEPHEN J. SCHULHOFER, UNWANTED SEX 13 (1998).

¹³Jed Rubinfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1372 (2013). Schulhofer also wonders how “We take for granted that criminal law should punish those who obtain property by fraud, but the law places no restrictions—none at all—on the use of fraudulent tactics to obtain consent to sex . . . [G]ood reasons are seldom offered for the law’s refusal to protect sexual autonomy from even the most egregious deceptive inducements.” SCHULHOFER, *supra* note 12 at 112.

¹⁴Mark Dsouza, *Undermining Prima Facie Consent in the Criminal Law*, 33 LAW & PHIL. 489 (2014).

¹⁵For example, Benjamin Davy, *Human Dignity and Property in Land—A Human Rights Approach*, in LAND POLICIES IN INDIA: PROMISES, PRACTICES AND CHALLENGES 1 (Sony Pellissery, Benjamin Davy & Harvey M. Jacobs, eds., 2017).

¹⁶On property models of rape, see ANNE PHILLIPS, OUR BODIES, WHOSE PROPERTY? 43–64 (2013).

¹⁷Yvette Russell, *Thinking Sexual Difference Through the Law of Rape*, 24 LAW & CRITIQUE 255, 272 (2013).

B. Tolerated Until Proven Prohibited

Some might consider sexual crimes extraordinary, beyond comparison, but this seems misguided for several reasons. First, all crimes share the general rules and principles of criminal law, and there is thus no reason why there should not be parallels between sexual crimes and other crimes. Second, rejecting any comparisons can contribute to the damaging myth that rape is incomparably bad, sometimes even “worse than death.” The myth can frustrate attempts to analyze rape, exacerbate the harm of rape, and hamper the recovery of rape survivors.¹⁸

Property crimes present a better point of comparison to sexual crimes than physically violent crimes due to the structure of the criminal law in Nordic countries. Physical violence is considered prohibited *per se*: the prosecution must only prove the presence of physical violence. The exercise of autonomy (for example, the presence of consent) can form a defense, but the burden of proof rests with the accused; physical violence is prohibited until proven permissible. By contrast, a violation of autonomy (for example, lack of consent) is an element of the *actus reus* of sexual crimes and property crimes. In the latter, the violation of autonomy is implicit in words such as “steal” or “deceive.”¹⁹ Dsouza has convincingly argued that prior to evidence in a particular instance, “the act description ‘sexual penetration’ is neutral as to consent,” presumed neither consensual nor non-consensual.²⁰ Nevertheless, because the prosecution must prove the violation, the law in practice is not neutral; sexual interaction is, if not presumed permissible, at least tolerated until proven prohibited. Similarly, the prosecution must prove that a property transfer was not part of an autonomously chosen transaction or gift. Thus, there is a similarity in legislative technique regarding sexual violations and property violations, which does not exist for physically violent crimes.

In practice, the presumption of tolerability can sometimes be turned on its head by the context. For example, medically necessary surgery is generally presumed to be permitted, and the burden of proof lies with the patient to prove it was carried out against their wishes. Little proof is usually needed about the lack of consent when a stranger takes another person’s money without giving anything in return or about the presence of consent in an ordinary martial arts training session. Comparisons between sexual crimes and property crimes often highlight inconsistencies in how such presumptions arise in the criminal process; the threshold for inferring a lack of consent from the circumstances can be excessively high for sexual crimes. Estrich’s assertion that the legal process presumes men’s access to women’s bodies but not to their houses or wallets concerns such contextualized presumptions.

Some have suggested that all penetrative intercourse be criminalized, with consent forming a defense against penalty.²¹ There are good reasons not to accept such a suggestion. First, this approach would criminalize acts that we do not consider wrong. There is an important difference between considering consensual sex to be criminal but defensible and thus not punishable and considering it to be non-criminal. Second, the approach would jeopardize the defendant’s rights. If sexual intercourse were criminalized *per se*, guilt could be inferred from intentional sexual intercourse alone, and the burden of proof for consent would rest with the defense. There may be

¹⁸Phillips asks whether this is the “kernel of truth” in the “otherwise implausible assimilations of rape with assault or theft.” PHILLIPS, *supra* note 16 at 59.

¹⁹In Iceland, there was a proposal to criminalize rape in a similar fashion. According to the proposal, “theft” did not require a definition because its meaning was generally known, and neither did “rape.” The proposal was rejected. Bragadóttir points out the likelihood that “rape” would revert to the older and traditional understanding of coercion-based rape. Ragnheiður Bragadóttir, *Legislation on the Offence of Rape in Icelandic Criminal Law*, 8 BERGEN J. CRIM. LAW & CRIM. JUSTICE 24, 70–71 (2021).

²⁰Dsouza, *supra* note 14 at 495–96.

²¹For example, Jesse Wall, *Sexual Offences and General Reasons Not to Have Sex*, 35 OXF. J. LEG. STUD 4, 777–798 (2015). Brownmiller and Dworkin have argued that all sexual intercourse is a form of abuse of women, although it is not clear whether they think that all sexual intercourse should therefore be criminalized as rape; see SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1976); ANDREA DWORKIN, *INTERCOURSE* (1988).

situations that clearly call for an explanation from a defendant, and judicial decision-making inevitably relies on some presumptions and inferences. Still, these must be proportionate and maintain the rights of the defense.²² Rape is a serious crime and is often difficult to prove, and there is no reason to think that proving one's innocence would be easier. Reversing the burden of proof would thus seriously violate the rights of the defendant.

The difference in the legal approach between sexual interactions and property transfers, on the one hand, and physical violence, on the other, stems from a difference in the underlying values being protected. The primary harmfulness of sexual crimes and property crimes results from the violation of autonomy. By contrast, even when the requirements of autonomy are satisfied, physical violence *primarily* engages other values, especially the protection of health. Thus, autonomy is not an overriding value justifying the endangerment of others, even in the realm of human rights.²³ For example, in *Laskey v the United Kingdom*, the European Court of Human Rights maintained that physical violence can be prohibited even when consensual, on the grounds of protection of health, when the violence involves or risks a significant degree of injury or wounding, even if no permanent harm is sustained or medical attention required.²⁴ Consider the phrases "B sexually penetrated me," "B has my wallet," and "B hit me." The first two raise questions about context (consent), but the third feels immediately wrong. This intuition tracks the logic of the underlying wrong.

Nevertheless, there is an apparent contradiction in the law's approach to autonomy. Autonomy is thought to protect against interference; it requires that no one may touch our property or our bodies before obtaining permission. Yet the law treats sexual interaction and property transfers as tolerable until proven otherwise. The contradiction is partly due to the two assumptions operating in different relations: the first structures the relationship between people, and the second the relation of a person to the law. Fully dismantling the contradiction, however, requires us to consider the nature and purpose of autonomy in our lives.

C. Enabler-Autonomy

Autonomy means, roughly speaking, the opportunity to make decisions and carry them out according to one's own preferences without interference from others.²⁵ The conditions of autonomy, or "self-governance," have been much debated in philosophy and criminal law. The purpose here is not to examine these conditions, as the proposal is that at least some such conditions can be practically discovered through a comparison of sexual crimes and property crimes. It is, however, necessary to examine some central features of autonomy. Because sexual crimes and property crimes ultimately concern human interactions, I approach autonomy from the premise that what happens within a person's mind—whether an actor can formulate second-order preferences, whether the reasoning is rational, deliberative, or responsive to values or second-order preferences²⁶—is not as important to autonomy as how a person and their mental

²²As maintained in, e.g., *John Murray v. the United Kingdom*, 1996 I Eur. Ct. H.R. 30, paras 47, 51; *Salabiaku v. France*, 141 Eur. Ct. H.R. 3, para. 28 (1988).

²³Human rights do not guarantee total autonomy over, e.g., the decision to die. See *Pretty v. the United Kingdom*, 2002 III Eur. Ct. H.R. 155; Violeta Beširevic, *The Discourses of Autonomy in the International Human Rights Law: Has the Age of a Right to Die Arrived?*, 62–63 CUADERNOS CONSTITUCIONALES DE LA CÁTEDRA FADRIQUE FURIÓ CERIOL 19 (2008).

²⁴Interestingly, the *Laskey* case concerned sadomasochistic sex, thus straddling the divide between initial permissibility and impermissibility. The Court considered the sexual aspect of the activity secondary to the violence aspect, prioritizing the right to health over the right to privacy. *Laskey, Jaggard and Brown v. the United Kingdom*, 1997 I Eur. Ct. H.R. 4, paras 45–46.

²⁵See, e.g., John Christman, *Autonomy in Moral and Political Philosophy*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta, ed., Fall 2020).

²⁶See Joseph J. Fischel & Hilary R. O'Connell, *Disabling Consent, or Reconstructing Sexual Autonomy*, 30 COLUMBIA J. GENDER & LAW 428, 447–455 (2015); Sarah Buss & Andrea Westlund, *Personal Autonomy*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta, ed., Spring 2018 ed. 2018).

processes relate to the external world. Thus, autonomy also requires freedom and the possibility to act.²⁷ A person's mental processes may remain autonomous, but if they are unable to act accordingly, their autonomy is incomplete. For example, the rape victim who continually rejects the actions of the perpetrator and never submits, but is physically overpowered, has had their autonomy violated just as surely as a victim who is beaten into submission. The lack of respect for their decision-making provides the bridge from freedom to autonomy.

In the traditional approach, sexual interaction is seen as a boundary crossing, an interference with another person's body that is permissible if it is autonomously chosen. Nedelsky has criticized the conception of people as bounded selves and of our rights, such as the right to autonomy, as boundaries. The metaphor of a boundary does not capture the role of autonomy in a modern society characterized by interdependence. Maximizing autonomy requires relations with other people. The person with the widest sexual autonomy is the one who has an opportunity to choose to share their sexuality with others—not the person who is “the most isolated.”²⁸ Thus, autonomy is not a condition that separates us from others but one that enables meaningful, benign, and mutually beneficial interaction. Thus, autonomy is relational.²⁹

The human rights framework also has two conceptions of autonomy. Traditionally, autonomy has been constructed as a protector of our negative rights, our rights to be free from interferences and violations.³⁰ This conception has been operationalized in, for example, the requirement to criminalize non-consensual sexual acts. By contrast, the enabling qualities of autonomy are tools of empowerment in the paradigms concerning children, people with disabilities, and women's rights, for example.³¹ The enabler-autonomy is evident in the right to sexual health: while no one can have an absolute right to sexual interaction with others, maximizing sexual health requires “a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence.”³² Reconciling the two conceptions of autonomy is difficult, as one stresses insulating or protecting us from others, and the other requires maximizing our possibilities to interact with others. That project is beyond the scope of this article.

Besides relationality, two other qualities of the enabler-autonomy are important in comparing sexual and property crimes. First, autonomy is scalar. It is not “absolute independence” or “complete control,” a fragile and misanthropic construct that is violated whenever something or someone outside ourselves influences our decisions or actions. Such a conception of autonomy would be practically impossible because dependence and hierarchy are inevitable.³³ Nor is autonomy a robust creature capable of surviving except in the direst, threatening circumstances so that a person can be expected to resist interferences “to the utmost.” Rather, autonomy is a scale and can thus be affected to a lesser or greater extent, depending on the circumstances. We are all subject to the influences of social norms and the people around us, but depending on the strength

²⁷On the distinction, see Christman, *supra* note 25.

²⁸JENNIFER NEDELSKY, *LAW'S RELATIONS* 97–110 (2011), quote on p. 97. The range of choice is a measure, not a definition, of autonomy.

²⁹CATRIONA MACKENZIE & NATALIE STOLJAR, *RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF* (2000); NEDELSKY, *supra* note 28; Fischel and O'Connell, *supra* note 26; Victoria Brooks & Jack Clayton Thompson, *Dude Looks Like a Lady: Gender Deception, Consent and Ethics*, 83 J. CRIM. LAW 258 (2019).

³⁰E.g., Jaunius Gumbis, Vytaute Bacińskaite & Jurgita Randakevičiute, *Do Human Rights Guarantee Autonomy?*, CUADERNOS CONSTITUCIONALES DE LA CÁTEDRA FADRIQUE FURIÓ CERIOL 77 (2008).

³¹The UN Convention on the Rights of Persons with Disabilities, Art 3(a), explicitly mentions “individual autonomy including the freedom to make one's own choices” as a general principle of the Convention. See, e.g., Laura Lundy, *A Lexicon for Research on International Children's Rights in Troubled Times*, 27 INT. J. CHILDREN'S RIGHTS 4, 595–601 (2019); Jacqui Browne & Emma R. Dorris, *What Can We Learn From a Human-Rights Based Approach to Disability for Public and Patient Involvement in Research?*, 3 FRONTIERS IN REHABILITATION SCIENCES, 878231 (2022); UNITED NATIONS, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, (1995). See also, e.g., Beširevic, *supra* note 23.

³²WORLD HEALTH ORGANIZATION, *Sexual Health, Human Rights and the Law*, 5 (2015).

³³NEDELSKY, *supra* note 28 at 41, 64–65, 124.

of the influence, the circumstances, the resources available to us, and our personal capabilities, these influences affect our actions and experiences to different degrees. This makes autonomy fundamentally different from consent: consent either exists (is valid) or does not (is not valid). Suppose one is concerned with criminalizing non-consensual sexual acts. In that case, a differentiation of sexual offenses based on the mode of commission, such as that adopted in Finland, Denmark, and Iceland, appears illogical.³⁴ Yet autonomy is a broader concept than consent.³⁵ In the context of scalar autonomy, it would be illogical to group all violations of it under the same heading.

Second, autonomy is multidimensional. Its dimensions can be structured and termed in various ways.³⁶ The approach adopted here is guided by the typical comparison of sexual crimes with property crimes by their mode of commission, which encroach upon different dimensions of autonomy and is not intended as a comprehensive description of autonomy. Rape law and human rights norms on rape have traditionally focused on non-coerciveness and capability. The former refers to our freedom from harmful and threatening influences, while the latter refers to our physical, psychological, and, lately, social capabilities for decision-making and action. Thus, capability has traditionally encompassed questions such as the legal age of consent and total incapacity, such as a sleep state. Today, it also includes the broader idea of vulnerability, recognizing dependency, and making special provisions for vulnerable groups or persons.³⁷ Coerciveness in human rights law has expanded to include “coercive circumstances”, not only coercive behavior.³⁸

Autonomous decision-making suffers from inaccurate or outright false information, so autonomy includes an informational dimension. Informational autonomy is at stake in cases of deception. What is difficult to pinpoint is the relevance of freedom from affirmative influences like enticement.³⁹ Affirmative influences are an essential part of regular human interaction, but they affect decision-making and could be problematic for autonomy. Psychological research has demonstrated the effect of subtle influences on decision-making.⁴⁰ The impact on autonomy has

³⁴Radačić makes the same claim in relation to Croatia: “there is no need for three different, hierarchically ordered offences based on different forms of non-consent . . . as consent does not have degrees.” Ivana Radačić, *Rape Myths and Gender Stereotypes in Croatian Rape Laws and Judicial Practice*, 22 FEM. LEG. STUD. 67, 81 (2014).

³⁵Often, definitions of consent either do not capture the entirety of autonomy (e.g., the “hybrid account of consent” of Chadha) or require so much explanation that one might as well explain autonomy (e.g., the affirmative consent standard described by Torenz), or outright rely on autonomy for content (e.g., Valentiner lists as a requirement for consent that the actors “reach an agreement on sexual action through negotiation while maintaining each person’s autonomy.”) Karamvir Chadha, *Sexual Consent and Having Sex Together*, 40 OXF. J. LEG. STUD. 619 (2020); Rona Torenz, *The Politics of Affirmative Consent: Considerations from a Gender and Sexuality Studies Perspective*, 22 GERMAN L.J. 718 (2021); Dana-Sophia Valentiner, *The Human Right to Sexual Autonomy*, 22 GERMAN L.J. 703, 706 (2021).

³⁶E.g. Wittrock includes four dimensions: “liberty (freedom from coercion), opportunity (the options we may choose from), capacity (what we are capable of doing, in the abstract), and authenticity (the extent to which [our] choices are genuinely our own, i.e., based on the capacity for reasoning and available information).” Jon Wittrock, *A Human Right to Friendship? Dignity, Autonomy, and Social Deprivation*, 29 INT. J. HUMAN RIGHTS 1590, 1599 (2022). The criminal law of England and Wales covers some of these dimensions; “For the purposes of this Part [of the Sexual Offences Act], a person consents if he agrees by choice, and has the freedom and capacity to make that choice.” Sexual Offences Act 2003, s 74. Emphasis added.

³⁷See, e.g., COUNCIL OF EUROPE, *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence*, para. 87 (2011) for a non-exhaustive list of persons made vulnerable by particular circumstances for the purposes of the Istanbul Convention. “Vulnerability” can be understood in various ways and has also raised criticism for its association with weakness. See, e.g., Erinn Cunniff Gilson, *Vulnerability and Victimization: Rethinking Key Concepts in Feminist Discourses on Sexual Violence*, 42 SIGNS 71 (2016); Mikaela Heikkilä, Hisayo Katsui & Maija Mustaniemi-Laakso, *Disability and Vulnerability: a Human Rights Reading of the Responsive State*, 24 INT. J. HUMAN RIGHTS 1180 (2020).

³⁸*MC v Bulgaria* 2003-XII Eur. Ct. H.R. at para. 163; *Vertido v The Philippines* *supra* note 5 at para. 8.9(b)(ii)b; COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, *supra* note 5 at para. 33.

³⁹Schulhofer terms these noncoercive offers or inducements. SCHULHOFER, *supra* note 12 at 159–66.

⁴⁰Birte Englich, Thomas Mussweiler & Fritz Strack, *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts’ Judicial Decision Making*, 32 PERS SOC PSYCHOL BULL 188 (2006); Kelly Burns & Antoine Bechara, *Decision making and free will: A neuroscience perspective*, 25 BEHAV. SCI. LAW 263 (2007).

been recognized in the rules of impartiality and the prohibition of bribery. Some sexual crime laws prohibit enticement in circumstances where the victim's capacity for decision-making is reduced; for example, due to young age or disability.⁴¹ How broadly affirmative influences in the sexual sphere should be criminalized remains an open question.

Non-coerciveness, capability, information, and freedom from affirmative influences describe prerequisites for autonomous decision-making. Autonomy can also be violated when the victim's choice is not respected; for example, when a person has declined to participate or has not chosen at all. Typical examples would include proceeding with sexual activity or a property exchange, even though the other person says "no," or using stealth to steal property or rape a sleeping person. In these situations, the victim's decision-making may be autonomous, but their behavior is not. This dimension has gained strength in human rights norms on rape through the requirement that states criminalize non-consensual sexual acts.

The framework of relational, scalar, and multidimensional autonomy allows a contextualized comparison of sexual crimes and property crimes. Of interest is whether the standards of autonomy differ based on what we are trying to protect and, if so, on what grounds. First, it is necessary to consider the implications of the autonomy framework for property crimes.

D. My Body is Not My Temple

The relationship between sexual crimes and property crimes has been especially examined under the "property model of rape," and the critique against this model is also relevant for comparing sexual crimes with property crimes without modeling one on the other.⁴² The property model of rape treats the body as property, and by analogy, sexual autonomy must be self-ownership and sexual interaction a transaction. The most serious challenges to body-as-property, autonomy-as-ownership, and sex-as-transaction are ethical. A propertyed notion of the self violates the Kantian categorical imperative of treating persons as ends in themselves.⁴³ Lacey, Russell, and Phillips criticize how the autonomy-as-ownership standard obscures the embodied and affective experience of rape and belittles the harm to the victim's personhood.⁴⁴ The notion of sex as a transaction could be used to justify why a husband cannot rape his wife⁴⁵ or to prevent sex workers from withdrawing their consent.⁴⁶ It is not my purpose to argue against these problems; objectifying the body is problematic. Rather, my task is to show that the comparison does not rely

⁴¹Sexual enticement of a child is usually criminalized, but this usually owes more to the act's harmfulness for the child's development than to the protection of autonomy. Even absent any enticement, the sexual act would often be criminal. If the child is over the legal age of consent, protection against enticement reflects a concern for autonomy.

⁴²See PHILLIPS, *supra* note 16 at 43–64.

⁴³Interestingly, some authors have suggested that the reduction of people to objects, of which the denial of autonomy may or may not be a part, is the central wrongness of rape. Whether they consider this to make sexual crimes and property crimes more or less comparable is unclear. See Martha C. Nussbaum, *Objectification*, 24 PHIL. & PUBLIC AFFAIRS 249 (1995); John Gardner, *The Wrongness of Rape*, in OFFENCES AND DEFENCES, 17–18, 29 (2007); Michael Plaxton, *Nussbaum on Sexual Instrumentalization*, 10 CRIM. LAW & PHIL. 1 (2016); MARTHA C. NUSSBAUM, *CITADELS OF PRIDE: SEXUAL ASSAULT, ACCOUNTABILITY, AND RECONCILIATION* 3–5 (2021).

⁴⁴Nicola Lacey, *Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law*, 11 CAN. J.L. & JURIS. 47, 57–62 (1998); Russell, *supra* note 17 at 263–64; PHILLIPS, *supra* note 16 at 42–64.

⁴⁵E.g., according to Dripps, "nonviolent sexual imposition deserves punishment because the actor expropriates a valuable asset from the victim," but this does not extend to a married woman because "it is not clear that the "victim's" rights and interests are violated," even though "she has not expressed approval." This is because Dripps thinks that "the husband has not sought to evade the terms of the relationship," which apparently includes sex whenever he likes, even if she is unconscious. Donald A. Dripps, *Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent*, 92 COLUMBIA L. REV. 1780, 1801 (1992).

⁴⁶Carnegy-Arbuthnott documents problems associated with treating sex work as just another occupation. Hannah Carnegy-Arbuthnott, *On a Promise or on the Game: What's Wrong with Selling Consent?*, 37 J. APPL. PHIL. 408, 418–419 (2020).

on the body-as-property, autonomy-as-ownership, or sex-as-transaction. For that, we must turn our attention to the nature of property rights.

A comparison of sexual and property crimes should not rely on a property model of rape but on an autonomy model of property crimes. Employed for the purpose of comparing sexual crimes and property crimes, this “model” will not be a comprehensive characterization of property, property relations, or property crimes but, rather, a collection of characteristics that can shape the comparison. These characteristics should be compatible with the principles of criminal law but are not tied to established theories of property in civil law. The characteristics examined here concern the notion of property itself, the kinds of property relations that are considered emblematic, and the value of autonomy over property.

I. An Extensive Notion of Property

As in human rights law on property, the autonomy model of property regards “property” as an extensive category relating to interests of monetary value or material objects, even when their monetary value is not at stake.⁴⁷ For example, theft and fraud provisions typically extend to funds in a bank account, a pecuniary interest that cannot really be characterized as “property,” and even less as “possessions,” and is not based on ownership but rather on the debt relation one has formed with the bank. Some crimes, such as trespass to property, do not engage monetary interests unless one considers it a lost opportunity to charge for access, but nevertheless engage an interest in autonomy over material objects. In some jurisdictions, such crimes would not be considered property crimes but crimes against privacy. Nonetheless, they fall within the remit of the autonomy model of property.

A system of ownership is an important way of regulating autonomy over property, but it is not the only one. Criminal law also includes provisions that govern monetary interests but would not typically be characterized as “property crimes,” such as bankruptcy crimes. These restrict a debtor’s autonomy over property they own to guarantee the “property” rights of creditors. Criminal law can also apply when the person whose autonomy is violated suffers no pecuniary loss; for example, when a fraudster convinces a person to leave them an inheritance. The central wrong is the interference with the autonomy of the person leaving the inheritance rather than the financial detriment to the person who would have been the deceased’s chosen recipient in the absence of fraud. The key concept of our property rights is thus not ownership but a decision-making right: autonomy.

II. Sharing as a Paragon of Property Relations

The transaction, the transfer of ownership, has become the paragon of property rights. The sale, or its criminal counterpart, the theft, is seen to characterize autonomy over property and its violations, and when these are considered the model for sexual crimes, sex becomes a transaction and rape becomes theft. There are many other ways to use our property, however, and a better paragon for property interactions would be the everyday action of sharing the use of one’s property.

Sharing property resembles autonomous sexual activity more than a transaction does for at least four reasons. First, the context of both sharing and sexual activity is usually a close relationship, and both, ideally, are manifestations of trust. Second, the motivation is more altruistic than the transaction, which is usually characterized by self-serving economic rationalism. Sharing does not rely on the expectation of a return. Thus, there is also a heightened

⁴⁷For example, Article 1 of Protocol I to the European Convention on Human Rights guarantees natural and legal persons the entitlement to “the peaceful enjoyment of his possessions.” According to the European Court of Human Rights case law, the definition of “possession” can extend to “a ‘legitimate expectation’ of obtaining an ‘asset’” and to an asset which may have no economic value. E.g. *Pintar and others v Slovenia*, App. Nos. 49969/14, 20530/16, 4713/17, 13244/18, and 16311/18, para. 91 (Sep. 14, 2021), <http://hudoc.echr.coe.int/>.

expectation of respect. Third, what is important in sharing the use of the property is not (necessarily) the benefit gained but the sharing itself: for example, sharing a table to have a meal together or sharing a car to take a trip together. Gardner has argued that sex is good when it amounts to team activity. In team activity, both parties act together to achieve something *together*, *with* each other; one person does not do something *to* the other.⁴⁸ In the same way, one might say that property relations are good when they are characterized by joint activity and a shared goal rather than self-centered wealth maximization.⁴⁹ Although Gardner considers that consent can be unnecessary for team activity,⁵⁰ autonomy cannot. Fourth, and most importantly, autonomy (let alone “ownership”) is not relinquished during sharing. Because use rather than ownership is shared, the other party does not accrue rights or entitlements in respect of the object of autonomy (although they may contribute something to the interaction that is the object of *their* autonomy).

Emphasizing sharing over the transaction changes some of the usual comparisons. For example, Schulhofer claims that fraud in property transactions typically goes to the heart of the transaction: the promised return does not take place at all, or the objective value of the return is vastly disproportionate to the victim’s payment. In sexual fraud, where sex is obtained using fraudulent professions of love, promises of marriage, or other such lies, the value of the transaction depends on the victim’s expectations and attitude—whether she viewed the sex as an interaction valued primarily for itself or as part of a web of larger and more lasting interests. For Schulhofer, this justifies the non-criminal nature of sexual fraud.⁵¹ However, when the notion of sex-as-transaction is rejected, the comparison with financial fraud no longer seems appropriate. Typically, the crime of fraud requires that the victim suffers economic detriment due to the fraud. A person who manages to sell a phone by pretending to be of the same religious denomination as the buyer will usually not be guilty of fraud if the phone matches the description, even though the seller’s religious background was material to the buyer. Thus, the autonomy of the decision is not protected separately from the value of the object of autonomy. In sharing, the outcome or “benefit” is not the most important, so the “value of the (trans)action” lies elsewhere. Sharing comes with a heightened expectation of trust and respect, which fraud vitiates. In such a context, what is the value of autonomy itself?

III. The Value of Autonomy Over Property

The value of sexual autonomy is usually seen as intrinsic. The value of autonomy over property is more contested. As a human right, the right to property is usually framed in terms of the right to decide about the use of one’s property for one’s essential needs and enjoyment.⁵² It is heavily qualified, with public or societal interests providing reasons for the deprivation of one’s property. Its importance is linked to the possibility of attaining other values like security, freedom, equality, and an adequate standard of living.⁵³ In criminal law, the right to property guarantees the functioning of the economic system, even when a fundamental value, such as an adequate standard of living, is not threatened by the crime. The most obvious value of a right to property is thus its use-value.

⁴⁸John Gardner, *The Opposite of Rape*, 38 OXF. J. LEG. STUD. 48, 53–56 (2018).

⁴⁹Even a transaction could have a shared goal—mutual benefit or “win-win”—but sharing property epitomizes these qualities the best.

⁵⁰Gardner, *supra* note 48 at 60. For a critique, see Chadha, *supra* note 35.

⁵¹SCHULHOFER, *supra* note 12 at 156. Schulhofer does not justify why sexual fraud would not be criminalized in those cases where the ‘value’ of the sex was affected in this way by the fraud, and the usual requirements of *mens rea* were fulfilled.

⁵²The American Convention on Human Rights recognizes a person’s “right to the use and enjoyment of his property” (Art. 21). The African Charter on Human and People’s Rights recognizes a vaguer “right to property” (Art. 14), as well as a “right of access to public property and services” (Art. 13), and the right of a people to freely dispose of their wealth and natural resources (Art. 21).

⁵³Davy, *supra* note 15; Ingrid Leijten, *The Right to Minimum Subsistence and Property Protection under the ECHR: Never the Twain Shall Meet?*, 21 EUR. J. SOC. SECURITY 307 (2019).

Nevertheless, respect for autonomy over property has also been linked to dignity. For example, Atuahene has characterized the confiscation of property from Blacks in apartheid South Africa and other instances of dispossession as “dignity takings.” Dignity takings are a special class of property appropriation because they are a form of dehumanization perpetrated by the state.⁵⁴ Alexander draws the value constitution of property from dignity, which he describes as a “potential for autonomy and a right to develop that potential.”⁵⁵ He cites the example of *Jacque v. Steenberg Homes, Inc.*, where a trespass incurred only nominal compensatory damages but high punitive damages. The company had trespassed against the vigorous protests of the Jacques, with the assistant manager displaying glee at the transgression in addition to intentional disrespect. Alexander considers the outcome correct because “Steenberg Homes had so flagrantly disrespected the Jacques’ dignity and undermined their flourishing.”⁵⁶ Thus, property violations engender an indignity that is separate from the value of the property.

While Alexander linked the trespass to dignity, the example also raises the question of the value of autonomy. Autonomy has more than mere use-value.⁵⁷ The enabler-autonomy is constitutive of our experiences in this world; therefore, a violation of sexual autonomy produces the “psychic and subjective impact,” which Russell claims is lost with a propertied notion of autonomy.⁵⁸ A violation of autonomy is an attack on the person, even if the autonomy extends to something other than ourselves, such as property. In the example above, the buyer of the phone probably feels cheated, even though the law does not recognize the violation of their autonomy as important enough to be criminalized. This is not the case for all property crimes. Criminal trespass can be committed through pretense and does not require economic detriment. It is autonomy itself that is seen as valuable. On this premise, Pundik and colleagues advocate criminalizing sexual fraud where the perpetrator actively lied, the deception was material to the decision-making, and the perpetrator knew that the deception was material.⁵⁹ Such an approach would have a comparison in criminal trespass to property.

The value of autonomy does not diminish or vary over time or due to the circumstances. Likening the body to property has elicited critiques about the value of virginity or the lack of a prior sexual relationship because unused property is more valuable than second-hand property.⁶⁰ Thinking through the lens of sharing, rather than transaction, can again help to disentangle the falsity of the parallel. The value of the action lies in the value of the autonomy for the person exercising autonomy rather than the value of the object of autonomy for someone else. The value of autonomy is not affected by how often autonomy has already been exercised. Moreover, the idea that the best exercise of autonomy is to exclude others and maintain something as “untouched” is at odds with a conception of autonomy as an enabler of meaningful and benign interactions. A decision to engage and not engage are equally valid and valuable exercises of autonomy.

⁵⁴BERNADETTE ATUAHENE, WE WANT WHAT’S OURS: LEARNING FROM SOUTH AFRICA’S LAND RESTITUTION PROGRAM 26–34 (2014).

⁵⁵Gregory S. Alexander, *Property, Dignity, and Human Flourishing Essay*, 104 CORNELL L. REV. 991, 1005 (2018).

⁵⁶*Id.* at 1020.

⁵⁷The use-value of autonomy relates to the use-value of the object of autonomy and the value of autonomy for our well-being or attaining other values. On the impact of (experiences of) autonomy for our health, see, e.g., Reed Larson, *Is Feeling “in Control” Related to Happiness in Daily Life?*, 64 PSYCHOL. REP. 775 (1989); Patricia A. Frazier, *The Role of Attributions and Perceived Control in Recovery from Rape*, 5 J. PERS. & INTERPERS. LOSS 203 (2000); Patricia Frazier et al., *Perceived Past, Present, and Future Control and Adjustment to Stressful Life Events*, J. PERS. & SOC. PSYCHOL. 749 (2011); Louis Tay & Ed Diener, *Needs and Subjective Well-Being Around the World*, 101 J. PERS. & SOC. PSYCHOL. 354 (2011); Sarah E. Ullman & Liana Peter-Hagene, *Social Reactions to Sexual Assault Disclosure, Coping, Perceived Control, and PTSD Symptoms in Sexual Assault Victims*, 42 J.COMMUNITY PSYCHOL. 495 (2014).

⁵⁸Russell, *supra* note 17 at 263.

⁵⁹Amit Pundik, Shani Schnitzer & Binyamin Blum, *Sex, Lies, and Reasonableness: The Case for Subjectifying the Criminalisation of Deceptive Sex*, 41 CRIM. JUSTICE ETHICS 167, 2 (2022).

⁶⁰Russell, *supra* note 17 at 264.

Wertheimer claimed that “the distance between the (ugly) property model and the (attractive) autonomy model [of rape] is not very great.”⁶¹ This is because property rights are also based on autonomy. Nevertheless, the differences between the autonomy approach and the ownership-to-property approach are important: under the former, our property need not be propertied, our property rights need not be ownership rights, and our property interactions need not be transactions. The autonomy-centered approach to property rights and property crimes focuses on who decides and controls the property. In the framework of the enabler-autonomy, the object of autonomy can be anything; it is the interference with autonomy that damages a person’s subjectivity and dignity. However, this does not mean that there are no differences between property crimes and sexual crimes.

E. Useful Differences

All comparisons are imperfect. The comparison between property crimes and sexual crimes revolves around the argument that at least one shared value is violated. Nevertheless, our interest in autonomy over property and sexual autonomy need not be of equal “size” for the comparison to make sense. It is obvious that, on the whole, sexual autonomy entails a more precious interest than autonomy over property.⁶² The difference in our interest in maintaining our autonomy leads many to conclude that the comparison is inappropriate and devalues people. Gardner considers that a rape survivor who described her experience as “like being burgled” would be committing “a serious travesty” and showing “extraordinary moral insensitivity.”⁶³ One reason (albeit for Gardner, not the more important one) is that, according to Gardner, the analogy diminishes or trivializes the rape. Is that necessarily so? The rape victim who compared their experience to being burgled might well have meant, “It was like being burgled—only worse.” For someone who had not been raped but had been burgled, the comparison would indicate the interests at stake, even if the magnitude of the harm was different.⁶⁴ Evaluating the value of different types of autonomy can be an essential part of the comparison. A violation of sexual autonomy is a more intimate violation of autonomy, is more likely to be emotionally devastating, and entails violations of other important values; these differences are good reasons to protect sexual autonomy more stringently than autonomy over property.⁶⁵ The comparison can be used to show that such is not the case and to demand stricter rape laws.

Gardner’s second reason for the “extraordinary moral insensitivity” of the rape survivor’s comparison is that it ignores the primacy of the self over what one owns:

[P]roperty rights are necessarily the derivative or shadow case. One can analogize what happens to what one owns to what happens to oneself because what one owns can be an extension of oneself. But one cannot in the same way analogize what happens to oneself to what happens to what one owns, because oneself cannot be an addition to what one owns.⁶⁶

⁶¹ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 34 (2003).

⁶²As held by the European Court of Human Rights in, e.g., *Blumberga v. Latvia*, App. No. 70930/01, para. 67 (Oct. 14, 2008), <http://hudoc.echr.coe.int/>.

⁶³Gardner, *supra* note 43 at 14.

⁶⁴The subjective experience of rape is not the object of comparison; no one would say that having property stolen and being raped feels the same. Watt criticized the Gardner’s position on the wrongness of rape for making “a mere side-show” of emotions. I agree with Gardner’s reply to this critique: first, that the subjective trauma might well be the most important aspect of rape, but that we nevertheless maintain an interest in understanding when and how such trauma arises; second, that sweeping aside theoretical and critical considerations of value on the basis that the “horror” of rape is condescending to rape victims. Bob Watt, *The Story of Rape: Wrongdoing and the Emotional Imagination*, 26 DENNING L.J. 46, 49 (2014); John Gardner, *Reasonable Reactions to the Wrongness of Rape*, 29 DENNING L.J. 3, 5 (2017).

⁶⁵As demanded by Estrich, *supra* note 10 at 1182; SCHULHOFER, *supra* note 12 at 67, 117–18.

⁶⁶Gardner, *supra* note 43 at 14.

A comparison does not imply an order, unlike analogical reasoning. A comparison is symmetrical in that it does not make sense to say that “property crimes resemble sexual crimes more than sexual crimes resemble property crimes.” Property crimes and sexual crimes resemble each other equally. Asymmetry can arise when a third object, a point of comparison, is introduced. I argue that the point of comparison is autonomy. Property crimes epitomize ownership rights better than sexual crimes do, so ownership is not a useful or appropriate point of comparison. However, property and sexual relations epitomize autonomy to roughly the same extent. This makes autonomy an interesting point of comparison, even if property and sexual relations do not epitomize autonomy in exactly the same way. From this point of view, it makes sense to say that “rape is like burglary.”

Because the comparison does not demand that our interest in autonomy, or any other aspect of autonomy, is exactly the same in the two contexts, the comparison does not by itself involve a normative claim. Schulhofer calls the comparison of property crimes and sexual crimes “in equal parts suggestive and misleading”; the latter because we should not assume that the standards of impermissible interference with autonomy are the same in the two types of crimes.⁶⁷ But if we choose to protect sexual autonomy and autonomy over property in different ways and to different extents, we should provide reasoning for our choices. Such reasons could be ideological or practical. For example, Schulhofer considers that a weaker consensus on the rights and wrongs of sexual interaction, compared to those in property transactions, has resulted in an unwillingness to regulate the former. Although this by itself is not a sufficient reason for the weaker protection of sexual autonomy, such social disagreement is a relevant factor to consider in fixing the boundaries of criminalization in a democracy.⁶⁸ Property-related fraud often requires that the fraud be material to the value of the property. As has been argued above, such a requirement would not make sense in sexual relations. The autonomy itself is violated, rather than the “value of the transaction.” In defending their view that sexual fraud should be criminalized for the protection of autonomy, Pundik and colleagues nevertheless argue for practical restrictions on the criminalizations so as not to practically reintroduce the offense of adultery.⁶⁹ Recognition of the intrinsic value of autonomy could, however, also lead us to question our approach to property-related fraud.

Standards of autonomy can also differ due to the operation of other values. For example, repeated access to a piece of property may establish a claim on that property so that the owner’s right to autonomy is diminished. The same is not true of sexual autonomy. This is because claims to property on the basis of previous access, such as squatters’ rights, usually protect rights to essential goods in order to guarantee another aspect of human dignity. There is no alternative value that could justify a similar diminishing of sexual autonomy.

Reasons to adopt different standards of autonomy for sexual crimes and property crimes are particularly convincing if they result from differences in the nature of autonomy in the two contexts. For example, using sexual autonomy usually involves intimate use of our bodies, while we can use our autonomy over property without bodily action. Due to this more embodied nature of sexual autonomy, we cannot relinquish our autonomy over our bodies and sexuality, but we can and frequently do relinquish our autonomy over a particular piece of property. Another person cannot have a claim on or an entitlement to our body or sexual behavior but can have a claim on our property. Consequently, an expression of will regarding sexual interaction

⁶⁷SCHULHOFER, *supra* note 12 at 116. See also Luis E. Chiesa, *Solving the Riddle of Rape-by-Deception*, 35 YALE L. & POL’Y REV. 407, 444 (2017).

⁶⁸Schulhofer points out that, historically, when the protection of property was extended against non-violent forms of acquisition, there was also social disagreement on the correct scope of protection. SCHULHOFER, *supra* note 12 at 67. One might even say that the stronger consensus is a *result* of a longer history of criminalization, a self-fulfilling prophecy.

⁶⁹Pundik, Schnitzer & Blum, *supra* note 59 at 12.

cannot be binding; we should have the right to change our minds about sexual encounters at any time before or during the encounter. The binding nature of expressions of autonomy over property justifies providing specific safeguards that may not be necessary for expressions of sexual autonomy. At the same time, other considerations, like the aforementioned greater importance and intimacy of sexual autonomy, may pull in the other direction.

F. Conclusion

This article was motivated by a desire to find a way to analyze the Nordic approaches to sexual interactions whose criminal characterization is variable or contested. I have proposed seeking comparisons between property crimes and sexual crimes to understand the nature and value of autonomy better. Key to the proposal are a relational, scalar, and multidimensional understanding of autonomy and a recognition of human autonomy as the basis for property crimes. Nevertheless, my proposal does not involve a normative claim that the standards of autonomy should be the same in property crimes and sexual crimes. Rather, criminalization should be sensitive to the differences between sexual interactions and property interactions.

The comparison raises questions about the extent of criminalized behavior, the content of criminal law. Why are certain violations of autonomy, such as deception, criminalized in relation to property interactions but not with regard to sexual activity? Moreover, the penal latitudes of property crimes establish a hierarchy between stealthy misappropriation, breach of trust, deception, and the use of violence as culpable ways of abusing someone, and the existence of such a hierarchy is rarely questioned. Should such a hierarchy not exist also in the realm of sexual crimes?

The comparison can also inform questions of legislative technique, the form of criminal law. For example, property crime definitions tend to be detailed and differentiated by *modus operandi* and type of property (robbery, extortion, theft, motor vehicle theft, embezzlement, fraud, credit card fraud, usury, unauthorized use, trespass, vandalism, intellectual property crime, insurance fraud, bankruptcy crime, and so on), while calls to enlarge the remit of criminalized sexual misconduct often rely on the expansion of a few labels (rape, sexual assault), using just a few concepts (consent, coercion). Comparing sexual crimes with property crimes should push the debate away from the latter kind of enlargement and the search for an essential concept towards detailing, differentiating, and contextualizing. Such differentiation remains visible in the Nordic laws, either in the subsections of rape or in the separate sections criminalizing sexual abuse and other violations. At the same time, consent or voluntariness can be seen as a uniting or interpretative principle. Do the Nordic countries need more rather than less contextualization to ensure comprehensive protection for sexual autonomy?

The comparison might also highlight blind spots in the legal system more generally. Is the law and the legal process bad at recognizing and accepting as abuse the sexual abuse of a position of power or the victim's vulnerability—as many claim it is—because the abuse is sexual, or is it equally bad at recognizing abuses of property relations when they take place within a power imbalance, under conditions of vulnerability, or as part of a complex web of relations? I have sought to show that even within a human rights tradition, such questions can be meaningfully and appropriately approached through a comparison of sexual crimes with property crimes. Such engagement should be the topic of further research.

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