

# Lying about God (and Love?) to Get Laid: The Case Study of Criminalizing Sex Under Religious False Pretense in Hong Kong

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Section 120 of the Hong Kong Crimes Ordinances—which traces its origin to the U.K. and which is replicated in several other English common law jurisdictions—criminalizes procurement of sexual acts through false representation. Recently, prosecutors used this provision to indict individuals who procured sexual acts on the pretext of performing luck-improving religious rituals. Beyond presenting the first-ever systematic examination of these intriguing fraudulent sex court cases, this Article makes two arguments. First, this Article explains how the strong skepticism, and at times, instinctive rejection by the judges of the purported religious proclamations not only confirm the scholarly concerns over the sincerity test in *U.S. v. Ballard*, but also demonstrates how the often-proposed solution of bench trials and other procedural safeguards is of limited efficacy to restrain religious bias. Second, by situating religious fraud with romantic fraud—both being frauds that raise serious conceptual difficulties in terms of objectively proving falsehood—this Article highlights that fraudulent sex criminalization is as much a regulation of fraud as it is a sexual offence. Thus, the inquiry should not only be sensitive to the different normative considerations that vary with the subject matter of the representations, but should also incorporate the economic literature regarding the impact of fraud on market dynamics in appreciating the unintended effects of the law and prosecutorial decisions.

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## Introduction

Rape and sexual offences can excite passionate legal discourse by their inevitable entanglement with deeply controversial topics such as social morality, sexual autonomy, and gender equality.<sup>1</sup> Throw in fraud and deception, and it somehow raises the emotional stakes even further. Perhaps unique to this issue, it is not uncommon to find academic commentators who consciously explain or defend the self-perceived passionate tone employed in their law journal articles.<sup>2</sup> The deep and emotive division on the issue is understandable. Procurement of sex through fraud pits the intrinsic moral objection (and the accompanying long-standing legal sanctions) of deception in the conduct of human affairs<sup>3</sup> against the common perception that lies are prevalent in sexual relationships.<sup>4</sup> Indeed, it is typical for academics to confront the classic scenario of the criminal getting sex through a dishonest proclamation of love—arguably the most common form of deception in sex—regardless of their stance on the issue.<sup>5</sup> Mean-

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1. See Catherine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431, 431-36 (2016) (framing rape law as an issue of sexual discrimination). See generally CASSIA SOPHN & JULIE HORNEY, *RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT* (1992) (a discussion of rape reform contemporaneous to the substantial shift in rape laws from its traditional restrictive stance to its more liberal modern approach); *RETHINKING RAPE LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* (Clare McGlynn & Vanessa E. Munro eds., 2010) (an edited collection on rape law reform across the globe and in international/regional law).

2. See e.g., Michael Bohlander, *Mistaken Consent to Sex, Political Correctness and Correct Policy*, 71 J. CRIM. L. 412, 412 (2007) (“The style and tone of my remarks will betray that the topic causes me more than mere academic engagement. I will confess from the start that I have no sympathy for Herring’s proposal, and I will make no bones either about the fact that I view it as an example of exaggerated political correctness . . .”); Corey Rayburn Yung, *Rape Law Fundamentals*, 27 YALE J.L. & FEMINISM 1, 2 n.1 (2015) (“A reader might think that my tone and rhetoric in the Introduction and throughout this Article are unduly harsh. Indeed, a reader might conclude that I have some personal animus toward Jed Rubenfeld. However, we have never met and have no personal connection of which I am aware. My choice to use strong language at times is, nonetheless, a conscious one.”). See also Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1805 (1992) (“Rape is a topic that engenders strong emotions. I would be disappointed if this essay were not deemed provocative; on the other hand, I have not deliberately ground any ideological axe.”).

3. See AARON LEVINE, *ECONOMIC MORALITY AND JEWISH LAW* 53 (2012); Barbara Biscotti, *Debtor’s Fraud in Roman Law: An Opportunity for Some Brief Remarks on the Concept of Fraud*, 17 FUNDAMINA: A JOURNAL OF LEGAL HISTORY 1, 2-10 (2011).

4. See Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1405 (2013); Hyman Gross, *Rape, Moralism and Human Rights*, 2007 CRIM. L. REV. 220, 224-25 (2007). For a collection of various ancient and contemporaneous accounts of deception in sex, see WENDY DONIGER, *THE BEDTRICK: TALES OF SEX AND MASQUERADE* (2000).

5. See e.g., David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 461-62 (2000) (observing that providing a specific exemption for emotional declarations like “I love you” will negate concerns based on the pervasive nature of deception in love); Gross, *supra* note 4, at 222-25 (questioning the harm—and thus the justification and desirability of criminalization—to woman who are deceived by an “artful seducer”); Jonathan Herring, *Mistaken Sex*, 2005 CRIM. L. REV. 511, 519-22 (2005) (arguing that false declaration of love should be punished as rape as part of his general advocacy for broad interpretation as to the fraud that will vitiate consent).

while, courts around the world continue to deal with many cases ranging from the relatively mundane (if no less reprehensible) to the more elaborate. Among these are fraudulent representations that sexual intercourse is a part of medical and other forms of therapeutic treatment,<sup>6</sup> elaborate deception schemes that co-opt the ease of constructing fake personas over the internet,<sup>7</sup> or the seemingly straightforward lies that raise broader public policy considerations (e.g., sexually transmitted diseases,<sup>8</sup> use of birth control,<sup>9</sup> gender,<sup>10</sup> and ethnicity<sup>11</sup>).

Then, there is sex through religious fraud.

In recent years, individuals who procured sexual acts on the pretext of performing luck-improving religious rituals have been prosecuted in Hong Kong, a former British colony that continues to operate an English common law legal system after handover of sovereignty to China in 1997.<sup>12</sup> The standard *modus operandi* involves the defendant telling the victim that he has supernatural power and can perform a religious ritual that can alleviate the victim's problems, be it secular (e.g., career prospect, health issues) or occult (e.g., haunting by evil spirits).<sup>13</sup> The defendant tells the victim that sexual intercourse is an integral component of the ritual.<sup>14</sup> The victim believes the defendant and proceeds to have sexual intercourse with the defendant as part of the purported ritual.<sup>15</sup>

These individuals are prosecuted under Section 120 of Hong Kong Crimes Ordinances (hereafter "Section 120").<sup>16</sup> Originating from the U.K., and with equivalence found in several other English common law jurisdic-

6. See e.g., *Boro v. Superior Court*, 210 Cal. Rptr. 122, 123 (Cal. Ct. App. 1985); *R. v. Mobilio*, [1991] 1 V.R. 339 (Austl.). See Jenny Morgan, *Rape in Medical Treatment: The Patient as Victim*, 18 MELBOURNE U. L. REV. 403, 404 (1991).

7. See e.g., *R. v. Bingham*, [2013] EWCA Crim 823 § 1 (Ct. App.) (Eng.); *R. v. Devonald*, [2008] EWCA Crim 527 § 2 (Ct. App.) (Eng.). See J.R. Spencer, *Sex by Deception*, 2013 ARCHBOLD R. 6, 7-8 (2013).

8. See e.g., *R. v. Cuerrier*, [1998] 2 S.C.R. 371 (Can.); *R. v. EB*, [2006] EWCA Crim 2945 § 8 (Ct. App.) (Eng.). See Martha Shaffer, *Sex, Lies, and HIV: Mabor and the Concept of Sexual Fraud*, 63 TORONTO L.J. 466, 466 (2013).

9. See e.g., *Assange v. Swedish Prosecution Authority*, [2011] EWHC 2849 § 2 (Admin) (Eng.). See Athena Katsampes, *A Rape by Other Name? The Problem of Defining Acts of Protection Deception and the University as a Solution*, 24 VA. J. SOC. POL'Y & L. 157, 170-72 (2017).

10. See e.g., *R. v. McNally* [2013] EWCA Crim 1051 (Ct. App.) (Eng.); See Karl Laird, *Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003*, 2014 CRIM. L. REV. 492, 500-05 (2014)

11. See e.g., Aeyal Gross, *Rape By Deception and the Policing of Gender and Nationality Borders*, 24 TUL. J.L. & SEXUALITY 1, 15-23 (2015) (discussing the *Kashur* case, where a Jewish woman consented to sex with an Arab man that misrepresented himself as Jewish).

12. See Johannes Chan, *From Colony to Special Administrative Region*, in *LAW OF THE HONG KONG CONSTITUTION* 4 (Johannes Chan & C.L. Lim eds., 2d ed. 2015).

13. See *Hong Kong v. Yeung Shing Sang* (楊勝生), [2015] H.K.C. 1203.

14. See *id.*

15. See *id.*

16. See Crimes Ordinance, (1997) Cap. 200, § 120 (H.K.).

tions,<sup>17</sup> Section 120 criminalizes the procurement of sexual acts through fraud as a distinct and lesser offence from rape.<sup>18</sup> In addition to a lesser penalty (5 years vs. life imprisonment), conviction under Section 120 simply requires the defendant to “procure [a sex act] . . . by false pretense or false representations” rather than by the victim’s lack of consent.<sup>19</sup> This represents a lower conceptual and evidential threshold that merely focuses the inquiry on whether the false representation made by the defendant was a material inducement for the victim’s sexual acts.<sup>20</sup> This enables the prosecution to secure a high proportion of convictions.<sup>21</sup>

More crucially, this in turn facilitates an unadulterated critical examination on the normative considerations of criminalizing fraudulent sex. There has always been extensive scholarly inquiry on fraudulent sex around the world, the most recent in the U.S. academic circle being the intense debate sparked by the purportedly controversial 2013 article by Jed Rubenfeld in the *Yale Law Journal*.<sup>22</sup> However, notwithstanding the copious amount of ink spilled on the subject, the discourse has thus far been largely subsumed by the vexing and highly controversial issue as to the extent to which deception vitiates consent and/or violates sexual autonomy,<sup>23</sup> or is otherwise distracted by other objections of treating fraudulent sex as rape, such as fear that the offence of rape may be diluted by incorporation of fraudulent sex.<sup>24</sup> The basic question as to what exactly are the

17. See Crimes Act 1958 (Vic) s 45 (Austl.); Sexual Offences Act 2010, ch. 99, § 7(a)(vi) (Bah.); Sexual Offences Act 1956, 4 & 5 Eliz. 2 c. 69, § 3 (Eng.); Sexual Offences Act 2011, § 19 (Jam.). See *infra* Part I.A.

18. See Official Reports of Proceedings (Legislative Council of Hong Kong), Dec. 21, 1977, at 334-39.

19. Crimes Ordinance, *supra* note 16, §§ 118, 120.

20. For a discussion as to how this Section 120 provision differs from the requirement of rape under U.K. and U.S. jurisprudence, see *infra* Part I.A.3.

21. Six convictions out of the seven cases surveyed over a ten-year period. See *infra* Part I.II.C.

22. See Rubenfeld, *supra* note 4, at 1327. See also Luis E. Chiesa, *Solving the Riddle of Rape-by-Deception*, 35 YALE L. & POL'Y REV. 407, 408-10 (2017); Ben A. McJunkin, *Deconstructing Rape by Fraud*, 28 COLUM. J. GENDER & L. 1, 3 (2014); Patricia J. Falk, *Not Logic, But Experience: Drawing on Lessons from the Real World in Thinking about the Riddle-by-Fraud*, 123 YALE L.J. ONLINE 353, 353 (2013); Gowri Ramachandran, *Delineating the Heinous: Rape, Sex, and Self-Possession*, 123 YALE L.J. ONLINE 371, 371 (2013); Tom Dougherty, *No Way Around Consent: A Reply to Rubenfeld on "Rape-by-Deception"*, 123 YALE L.J. ONLINE 321, 321 (2013); Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L.J. ONLINE 335, 335 (2013).

23. See e.g., Bethany Simpson, *Why has the Concept of Consent Proven so Difficult to Clarify?*, 80 J. CRIM. L. 97, 109-11 (2016); Rubenfeld, *supra* note 4, at 1395-1408. See Rebecca Williams, *Deception, Mistake and Vitiating of the Victim's Consent*, 124 L.Q. REV. 132, 147-58 (2008) (normatively discussing the possible spectrum mistakes—e.g., “but-for,” “physical difference,” “non est factum”—that may be adopted by the courts/legislators as sufficient to vitiate consent). See also Stuart P. Green, *Lies, Rape, and Statutory Rape*, in LAW AND LIES: DECEPTION AND TRUTH-TELLING IN THE AMERICAN LEGAL SYSTEM 194, 206-08 (Austin Sarat ed., 2015) (arguing that sexual autonomy should be conceived “as a bundle of rights organized around the idea of securing for its possessor various forms of self-determination” rather than a single right that is dichotomously either violated or not).

24. See e.g., Amit Pundik, *Coercion and Deception in Sexual Relations*, 28 CAN. J.L. & JURIS. 97, 123-25 (2015); Gross, *supra* note 4, at 224-25.

consequences and the corresponding normative considerations of punishing fraudulent sex as an ordinary criminal law offence, or as a species of fraud regulation has remained largely unexamined.

Beyond the criminal law implications, the fact that the fraud relates to religious purposes or practices also raises serious conceptual and constitutional questions relating to the core element of the offence. How do the courts conclude that the defendant's claims of supernatural power and that sex acts are part of a religious ritual are false? How does this fact-finding process gel with the limitation of the secular state in assessing the spiritual realm, a core legal principle of modern liberal democracies, whether under U.S. constitutional law,<sup>25</sup> English common law,<sup>26</sup> or the international human rights law as interpreted by the European Court of Human Rights ["ECtHR"].<sup>27</sup>

Drawing on this unique intersection among fraud, sexual offence, and religious liberty, this Article utilizes Hong Kong case law as a case study to make three contributions.

The first contribution is descriptive. This is the first-ever systematic and in-depth chronicle of a series of actual fraudulent sex cases dealing with the intriguing fact patterns of religious deception. This Article assembles a complete set of religious fraudulent sex cases over a ten-year period in Hong Kong that has thus far been unexamined in the legal literature, whether in Hong Kong or elsewhere. This lack of scholarly attention is due to a combination of factors that include language (most of the cases are in Chinese), accessibility (many of the cases are unreported decisions not available on any online public/legal database), and perhaps more importantly, the preoccupation with rape and consent to the neglect of an offence that is neither. This is unfortunate. This detailed formal account on religious fraudulent sex in a globalized, highly educated, wealthy, and modern English common law jurisdiction<sup>28</sup> represents a fascinating human story that challenges conventional wisdom, and adds to the various sociological studies about religion and modern society.<sup>29</sup> More impor-

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25. See e.g., Caleb E. Mason, *What is Truth? Setting the Bounds of Justifiability in Religiously-Inflected Fact Disputes*, 26 J.L. & RELIGION 91, 93-104 (2011); Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1835 (2009); Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 44-45 (2004). See also *infra* Part II.B.

26. This is under the common law doctrine of non-justiciability as to issues relating to the truth or falsity of religious doctrines. See Satvinder S. Juss, *The Justiciability of Religion*, 32 J.L. & RELIGION 285, 291-94 (2017); Peter Smith, *The Problem of the Non-Justiciability of Religious Defamations*, 18 ECC. L.J. 36, 40-42 (2016).

27. See EUR. CT. H.R., RESEARCH DIV., OVERVIEW OF THE COURT'S CASE-LAW ON FREEDOM OF RELIGION 19 (2013); see also Nicholas Gibson, *Faith in the Courts: Religious Dress and Human Rights*, 66 CAMBRIDGE L.J. 657, 686-87 (2007).

28. See generally INFO. SERV. DEP'T, HONG KONG IN BRIEF (2016); SELIM JAHAN, U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2016 198 (2016). For a concise and legal-oriented historical account of Hong Kong, see Chan, *supra* note 12.

29. For analysis and discussion about the continued flourishing of religion and superstitious beliefs in an increasingly modern and secular social environment, see Dong-Kyu Kim, *Reconfiguration of Korean Shamanship: Tradition and Modernity in the Construction of Korean Shamans' Self-Identity*, 15 ACTA KOREANA 369, 389-90 (2012); see

tantly, the cases serve as a cornerstone for this Article's second and third contributions that focus on the practical and normative considerations surrounding criminalizing religious fraud and fraudulent sex.

Indeed, the second contribution draws on a key feature of the Hong Kong cases to help resolve the academic debate regarding the purported sincerity test espoused by the majority opinion in *U.S. v. Ballard*.<sup>30</sup> *U.S. v. Ballard* is the landmark case on religious fraud that has recently received renewed scholarly attention due to both the controversy of granting religious exemption to corporations under *Burwell v. Hobby Lobby*,<sup>31</sup> and the media reports on perceived fraudulent practices by televangelists and other purported religious leaders.<sup>32</sup> As interpreted by subsequent courts and commentators, the majority in *Ballard* stood for the proposition that even though the constitutional safeguard of religious liberty (including the Establishment Clause consideration) prohibits the court from investigating whether a religious claim is objectively true or false, the court may examine whether the alleged fraudsters sincerely believe their religious claims.<sup>33</sup> The debate in the literature revolves around whether this sincerity test is sufficient. On one hand, Kent Greenawalt<sup>34</sup> and William Marshall<sup>35</sup> agreed with the Justice Jackson's dissenting opinion that the purported distinction between impermissible evaluation of the truth of religious belief and permissible determination of the sincerity of that belief are more illusory than real.<sup>36</sup> On the other hand, scholars such as Paul Horwitz<sup>37</sup>

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also Christopher Dole, *Mass Media and the Repulsive Allure of Religious Healing: the Cincinnati Hoca in Turkish Modernity*, 38 INT'L J. MIDDLE EAST STUD. 31, 50-51 (2006).

30. United States v. Ballard, 322 U.S. 78, 84-87 (1944).

31. 134 S. Ct. 2751 (2014). See also Frederick Mark Gedicks, "Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion under RFRA, 85 GEO. WASH. L. REV. 94 (2017); Sean Nadel, *Closely Held Conscience: Corporate Personhood in the Post-Hobby Lobby World*, 50 COLUM. J.L. & SOC. PROBS. 417 (2017); Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts after Hobby Lobby*, 67 STAN. L. REV. ONLINE 59 (2014).

32. See e.g., Nicholas Barborak, *Saving the World, One Cadillac at a Time: What Can be Done When A Religious or Charitable Organization Commits Solicitation Fraud?*, 33 AKRON L. REV. 577 (2000); Jacob M. Bass, *The Sermon on the Mountain of Cash: How to Curtail the Prosperity Scheme and Prevent Opportunists from "Preying" on Vulnerable Parishioners*, 37 B.C. J.L. & SOC. JUST. 147 (2017); Mark Davis, *Prosperity Gospel Fuels Jet Scandal: Pastor's Request for \$65M Plane Criticized by Many*, ATLANTA J.-CONST., July 8, 2015, at A1; Abby Ohlheiser, *Comedian John Oliver Takes on the Prosperity Gospel by Becoming a Televangelist*, WASH. POST (Aug. 17, 2015), [https://www.washingtonpost.com/news/acts-of-faith/wp/2015/08/17/comedian-john-oliver-takes-on-the-prosperity-gospel-by-becoming-a-televangelist/?utm\\_term=.0031713b8222](https://www.washingtonpost.com/news/acts-of-faith/wp/2015/08/17/comedian-john-oliver-takes-on-the-prosperity-gospel-by-becoming-a-televangelist/?utm_term=.0031713b8222) [<https://perma.cc/N38V-8432>].

33. Notwithstanding common perception and subsequent court citation to the contrary, the Supreme Court did not in fact directly hold that the sincerity test may be used for securing conviction of religious fraud, but merely that question of religious truth cannot be put to the jury. See *infra* Part II.B.1.

34. See KENT GREENAWALT, I THE RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 115-16 (2006).

35. See William P. Marshall, *Smith, Ballard, and the Religious Inquiry Exception to the Criminal Law*, 44 TEX. TECH. L. REV. 239, 255 (2011).

36. See *Ballard*, 322 U.S. at 92-93.

and Stephen Senn<sup>38</sup> argued that the sincerity test is desirable and permissible, especially when coupled with proposed procedural and substantive safeguards.<sup>39</sup> Nathan Chapman goes further saying that even the jury would be able to properly apply the sincerity test with only limited changes to existing procedural rules.<sup>40</sup> Underlying this debate are the differing assumptions as to how factfinders would actually go about the fact-finding process—assumptions that had not been even anecdotally examined given the paucity of actual religious fraud prosecutions in the United States and the prevalence of jury trials where there is no provision of the reasoning process.<sup>41</sup>

Against this backdrop, the fact that the majority of these Hong Kong cases are bench trials in which the judges are required to articulate the reasons for their findings of facts provides a rare and valuable glimpse as to the actual reasoning processes in dealing with the veracity of religious statements. The law in Hong Kong, especially as articulated by the appellate court, is similar to that in the United States. The falsity of the religious claim is supposed to be established via the sincerity of the defendant (i.e., whether the defendant sincerely believed in the claims and/or sincerely intended to perform religious rituals).<sup>42</sup> However, reading the trial judges' judgments closely reveals the judges' strong skepticism, and at times instinctive rejection of the veracity of any representations that sexual intercourse is an integral part of religious rituals.<sup>43</sup> The fact that professional English common law judges—in a jurisdiction that purportedly has a high regard for international human rights in general and religious freedom in particular<sup>44</sup> and which is consistently ranked highly in international ranking of rule of law<sup>45</sup>—succumb so readily to the common instinct of bias and discrimination against perceived incredulous religious claims is telling. With the appropriate caveat, as to the cultural and jurisprudential differences of Hong Kong, this case study suggests that the often-proposed solution of bench trials and other procedural safeguards that is premised on entrusting judges with an elevated gatekeeper role is likely of limited efficacy to restrain unconstitutional religious bias.

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37. See Paul Horwitz, *Scientology in Court: A Comparative Analysis and Some Thoughts on Selected Issues in Law and Religion*, 47 DEPAUL L. REV. 85, 147-50 (1997).

38. See Stephen Senn, *The Prosecution of Religious Fraud*, 17 FLA. ST. U. L. REV. 325, 336-41 (1990).

39. See *infra* Part II.B.3.

40. See Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1189-91 (2017).

41. See *infra* Part II.B.3.

42. See *Hong Kong v. Au Yeung Kwok Fu*, [2012] H.K.C. 223, ¶ 33 (C.A.); *infra* Part I.C.2.

43. See *infra* Part I.C.

44. The Hong Kong courts regularly refer to decisions from the U.S., Canada and ECtHR to reach purportedly robust interpretations on civil liberties. See Johannes Chan & C.L. Lim, *Interpreting Constitutional Rights and Permissible Restrictions*, in *LAW OF THE HONG KONG CONSTITUTION* 565, 576-77 (Johannes Chan & C.L. Lim eds., 2d ed. 2015); Daniel R. Fung, *Constitutional Reform in China: The Case of Hong Kong*, 39 TEX. INT'L L.J. 467, 472-73 (2004).

45. See WORLD JUST. PROJECT, *RULE OF LAW INDEX 2016* 5 (2016).

Moving from the religious liberty literature to the criminal law literature, the third contribution engages with the existing discourse over fraudulent sex criminalization to introduce a new perspective: criminalization of fraudulent sex is as much a regulation of fraud as it is a sexual offence.

Given the emphasis on rape and the corresponding focus on consent and sexual autonomy, existing academic discourse over the criminalization of fraudulent sex primarily focuses on the extent to which such criminalization shapes and redefines the sexual relationship.<sup>46</sup> However, a salient feature of the preceding argument regarding religious liberty is that the argument only applies to procurement of sex involving false religious claims. This salience is best highlighted with reference to sex by false romantic pretense. Romantic fraudulent sex and religious fraudulent sex both raise serious conceptual difficulties in terms of objectively proving falsehood. Falsifying the defendant's claim that one is a deity and/or has supernatural power is as fraught with difficulties as attempting to define and verify the "love" in "I love you."<sup>47</sup> However, as evidenced by this case study, such falsehood could be established by combining an inquiry of the defendant's sincerity with certain assumptions as to what would inherently constitute false claims. Although there have been no prosecutions of romantic fraudulent sex, there are—ironically—more justifications to prosecute romantic fraudulent sex than religious fraudulent sex. The fact that modern, secular courts are less constitutionally precluded in defining love when compared to religion renders the almost inevitable practice by judges (and juries) to determine what constitutes legitimate religion/love when applying the sincerity test. Moreover, the state is supposedly indifferent to engagement in sexual intercourse for self-interest (for example, improving one's luck), especially in contrast with sex in pursuit of love.

To be clear, this Article is not advocating for the prosecution of romantic fraudulent sex or, for that matter, religious fraudulent sex. Rather, by unpacking the different legal and normative implications inherent in criminalizing romantic and religious fraudulent sex, this Article underscores that criminalizing fraudulent sex does not just redefine sexual relationships, it also regulates the subject matter of the falsehood, be it about religion, love, or other forms of false manipulations.

This new perspective brings forth two implications. First, it supports selective criminalization of fraudulent sex that targets representations involving certain subject matter (e.g., medical treatment, marital status, and sexually transmitted disease). Such criminalization, often enacted by the legislature in response to public outcry over a not-guilty rape verdict

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46. See Herring, *supra* note 5, at 523–24. See ESTELLE B. FREEDMAN, REDEFINING RAPE 33–51 (2013) (discussing the historical evolution of the penalizing seduction in the context of the underlying social attitudes towards sex). Cf., McJunkin, *supra* note 22, at 21–34 (arguing that the law's reluctance to criminalize fraudulent sex reflects an underlying notion of seduction based on normative masculinity where men derive power and social status through sexual conquest). See *infra* Part III.D.

47. See Bryden, *supra* note 5, at 468–70; STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 155–58 (1998). See also *infra* Part III.B.

premised on the distinction between fraud in the factum versus fraud in the inducement,<sup>48</sup> has been criticized for its ad hoc nature and failure to systematically address the underlying deficiency of sexual offences law.<sup>49</sup> Nonetheless, from the perspective of fraud regulation, the varied normative considerations of criminalization among different subject matter of representation may justify such an approach.

Second, in line with recent attempts to move the discourse on general rape law beyond the confines of criminal law,<sup>50</sup> this Article's conceptualization of fraudulent sex criminalization as a form of fraud regulation incorporates the economic literature on fraud's impact on market dynamics. In particular, the concept of credence goods points to the normative ambiguity of using Section 120 and other deceptive sex offences to prosecute fraudulent sex involving hard-to-verify falsehoods, including religious fraud. Credence goods is an economic term for goods and services whose quality cannot be judged before or after purchase or consumption, thus elevating the supplier's credibility as a particularly salient consideration in the consumers' calculus.<sup>51</sup> Given the severe information asymmetry for consumers, a whole host of government interventions ranging from licensing and certification to expanding sellers' liability have been advocated to protect consumers and ensure proper functioning of the market.<sup>52</sup> However, where the state is in no better position than the consumer to evaluate the product—as with the case of religion, given its allusion to divinity, spiritual realms, and other unverifiable concerns—can such state interventions unduly enhance the credibility of the supplier without any corresponding increase in quality. In the context of this case study, this Article argues that by unintentionally imbuing large swaths of unprosecuted, but otherwise dubious, practices with a perceived aura of legality, the prosecution of

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48. See *infra* Part III.D.

49. See Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 101 (1998); Simon H. Bronitt, *Rape and Lack of Consent*, 16 CRIM. L.J. 289, 296-98 (1992).

50. See e.g., Katharine K. Baker, *Why Rape Should Not (Always) be a Crime*, 100 MINN. L. REV. 221, 223-25 (2015) (arguing for the use of Title IX enforcements by the Department of Education to reduce the amount of nonconsensual sex on campus); Margo Kaplan, *Rape Beyond Crime*, 66 DUKE L.J. 1045, 1048-51 (2017) (arguing for an alternative public health framework to more holistically tackle the multifarious causes of sexual violence and coercion); see also Galia Schneebaum, *What is Wrong with Sex in Authority Relations? A Study in Law and Social Theory*, 105 J. CRIM. L. & CRIMINOLOGY 345, 379-85 (2015) (arguing that sex within authority relations should not be punished as a sex offence, but as a lesser offence of abuse of office as part of anticorruption regulation).

51. See Uwe Dulleck, Rudolf Kerschbamer & Matthias Sutter, *The Economics of Credence Goods: An Experiment on the Role of Liability, Verifiability, Reputation, and Competition*, 101 AM. ECON. REV. 526, 526-27 (2011); Uwe Dulleck & Rudolf Kerschbamer, *On Doctors, Mechanics, and Computer Specialists: The Economics of Credence Goods*, 44 J. ECON. LITERATURE 5, 6-9 (2006); Winand Emons, *Credence Goods and Fraudulent Experts*, 28 RAND J. ECON. 107, 107 (1997).

52. See Camille Chaserant & Sophie Harnay, *The Regulation of Quality in the Market for Legal Services: Taking the Heterogeneity of Legal Services Seriously*, 10 EURO. J. COMPARATIVE ECON. 267, 284-85 (2013); Hayne E. Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards*, 87 J. POL. ECON. 1328, 1329, 1342 (1979).

religious fraudulent sex in Hong Kong is at risk of encouraging activities and transactions that the courts and prosecutors wish to discourage.

This Article is organized into four parts. Part I lays out the case study of Hong Kong by discussing the background and context of Section 120, the facts and proceedings of the prosecution, and how the courts approach the issue of falsity. Part II engages with the literature on prosecuting religious fraud under the sincerity test and explains how the inherent judicial bias revealed in this case study confirms the harm of such prosecution and indicates the limited efficacy of the proposed procedural safeguards that rely on judges to restrain discriminatory impulses. Part III situates the case study with romantic fraudulent sex to highlight how fraudulent sex criminalization is as much a regulation of fraud as it is a sexual offence and how such a conception can justify selective criminalization of fraudulent sex on the basis of the subject matter or context of the employed deception. Part IV draws from economic literature to demonstrate the counterproductive nature of Hong Kong's prosecution of religious fraudulent sex.

## I. Law in Context

### A. Background

#### 1. *Legal and Social Backdrop*

Hong Kong is an autonomous jurisdiction under the sovereignty of China since its handover from the British in 1997 after slightly over 150 years of colonial rule.<sup>53</sup> It retains its English common law judicial system,<sup>54</sup> and the bulk of its legislation (including its criminal law) remains based on corresponding English statutes.<sup>55</sup> Hong Kong's 7.3 million population is predominantly Chinese (95%).<sup>56</sup> According to the Pew Research Center's 2012 global survey of religious groups, the religious composition of Hong Kong population is, in order of proportion, unaffiliated (56.1%), Christian (14.3%), Buddhist (13.2%), affiliated with Chinese folk religions (12.8%), Islamic (1.8%), affiliated with other religions (1.4%) and Hindu (0.4%).<sup>57</sup> Notably, ritualistic practices associated with Chinese folk religions and/or superstition are practiced by many in the population, including those who claim no religious affiliation.<sup>58</sup>

53. See Chan, *supra* note 12.

54. See Johannes Chan, *The Judiciary*, in *LAW OF THE HONG KONG CONSTITUTION* 361, 361 (Johannes Chan & C.L. Lim eds., 2d ed. 2015); Kwai Hang Ng, *Is There a Chinese Common Law? An Empirical Study of the Bilingual Common-Law System of Hong Kong*, 8 *J. EMPIRICAL LEGAL STUD.* 118, 119-20 (2011).

55. See MICHAEL JACKSON, *CRIMINAL LAW IN HONG KONG* 25-30 (2003).

56. See INFO. SERV. DEP'T, *supra* note 28, at 44-45.

57. See PEW RESEARCH CENTER, *THE GLOBAL RELIGIOUS LANDSCAPE* 47 (2012).

58. See Joseph Bosco, *Chinese Popular Religion and Hong Kong Identity*, 14 *ASIAN ANTHROPOLOGY* 8, 9-13 (2015); Joel Thoraval, *The Western Misconception of Chinese Religion: a Hong Kong Example*, 3 *CHINA PERSPECTIVES* 58, 63-64 (1996).

## 2. The Provision in Question

The focal point of this case study, Section 120, currently stipulates<sup>59</sup> under the heading “Procurement by false pretences”:

- (1) A person who procures another person, by false pretences or false representations, to do an unlawful sexual act in Hong Kong or elsewhere shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 5 years.
- (2) For the purposes of subsection (1), pretence or representation includes a pretence or representation relating to the past, the present or the future and any pretence or representation as to the intention of the person using the pretence or representation or any other person.<sup>60</sup>

This offence is distinct from rape, defined as having “unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it” and punishable by “imprisonment for life.”<sup>61</sup> Section 120 was added into Hong Kong law in 1978 together with a whole host of other offences relating to prostitution,<sup>62</sup> all of which reflect the underlying legislative objective of tackling the exploitation of women and girls for the purposes of prostitution.<sup>63</sup> The provision was based on the near identically worded Section 3 of the U.K. Sexual Offences Act 1956, which in turn could be traced back to a provision enacted in 1885 to protect women from being lured into prostitution.<sup>64</sup> This provision has been replicated in other English common law jurisdictions, such as Australia,<sup>65</sup> Jamaica,<sup>66</sup> and the Bahamas.<sup>67</sup>

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59. The provision has been amended twice since the provision was enacted in 1978. The first amendment was made in 1991, when the originally worded “sexual intercourse” was amended to the current “sexual act” as part of the extension of provisions “designed to offer women and girls protection from sexual exploitation” to men and boys. See Official Reports of Proceedings (Legislative Council of Hong Kong), Apr. 17, 1991. The second amendment was made in 2000, when section 120(3) was removed in its entirety. Section 120(3) previously provided the requirement of collaboration for conviction of section 120. The abolishment was again a relatively straightforward amendment given how the requirement of collaboration has been abolished in other contexts a few years prior. See Legislative Council Secretariat, *Report of the Bills Committee on Evidence (Amendment) Bill 1999*, June 7, 2000, LegCo Paper No: CB(2)2215/99-00, at 6-8.

60. Crimes Ordinance, *supra* note 16, § 120.

61. *Id.* § 118.

62. For example, the offence of “trafficking [for the purpose of prostitution]” (§ 130), “causing prostitution” (§ 131), “living on earnings of prostitutions of others” (§ 137), “letting of premise for use as vice establishment” (§ 143).

63. See Official Reports of Proceedings (Legislative Council of Hong Kong), Dec. 21, 1977, at 334-39.

64. See Spencer, *supra* note 7, at 6. The provision was abolished in the U.K. during 2003 reforms, though academics have opined that this is due to a legislative oversight rather than a deliberate decision. Simpson, *supra* note 23, at 107; Laird, *supra* note 10, at 499.

65. See Crimes Act, *supra* note 17, § 45. The state of New South Wales previously had a similar provision but repealed it in 2003. See Crimes Act 1900 (NSW) s 66 (Austl.).

66. See Sexual Offences Act, *supra* note 17, § 19.

67. See Sexual Offences Act, *supra* note 17, § 7(a)(vi). The Caribbean Community, a regional intergovernmental organization of Caribbean nations, issued model legislation

Before continuing to discuss the concept of consent under English common law, it is apt to clarify here that the “unlawful” in “unlawful sexual act/intercourse” has been interpreted by the U.K.<sup>68</sup> and Hong Kong courts<sup>69</sup> as being essentially “surplusage”<sup>70</sup> because it covers all sexual acts and intercourse, whether within or outside of the context of marriage.

### 3. *Relationship with Rape*

On the issue of what sort of deception will vitiate consent, the English common law position is that deception must relate to the “nature of the act” to vitiate consent for the purpose of rape and indecent assault.<sup>71</sup> This is similar to the U.S. position in which the fraud has to be in the *factum* as opposed to fraud in the *inducement*.<sup>72</sup> Thus, the otherwise much cited and criticized U.S. case *Boro v. Superior Court* would likely be decided the same way in Hong Kong.<sup>73</sup> Whereas the U.K. and Hong Kong courts have held that penetration as part of medical treatment goes to the “nature of the act” element and thus could constitute rape, the facts in those cases are such that the penetration was not described by the defendant as sexual intercourse.<sup>74</sup> Thus, if the defendant had fraudulently stated that *sexual* intercourse was part of the medical procedure as in *Boro*, the fraud is to the “purpose of the act.”<sup>75</sup> This would not sustain a conviction of rape,<sup>76</sup> at least prior to the 2003 legislative reform in U.K. that has expanded the category of fraud to expressly encompass “purpose of the act.”<sup>77</sup> A similar reform is proposed in Hong Kong.<sup>78</sup>

Notably, Section 120 dispenses even with this more relaxed test of consent post legislative reform.<sup>79</sup> There is no restriction as to the type and/or category of fraud that will constitute the offence. Indeed, the

for sexual offences that includes this distinct lesser offence. See CARIBBEAN COMMUNITY (CARICOM) SECRETARIAT, MODEL LEGISLATION ON SEXUAL OFFENCES § 6 (1991).

68. See *Regina v. R*, [1992] 1 A.C. 599, 610–11 (H.L.) (appeal taken from Eng.).

69. See *Au Yeung Kwok Fu*, H.K.C. 223 ¶¶ 25–30.

70. See *Regina*, 1 A.C. at 610–11.

71. See Laird, *supra* note 10, at 495–98; Williams, *supra* note 23, at 133–36. For an academic discussion right before the 2003 law reform in the U.K., see DAVID SELFE & VINCENT BURKE, PERSPECTIVES ON SEX, CRIME AND SOCIETY 79–86 (2d ed. 2001).

72. See McJunkin, *supra* note 22, at 9–12; Falk, *supra* note 49, at 157–61. For criticisms that this distinction is unsatisfactorily contingent to how specific the act is described, see ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 206 (2003).

73. 210 Cal. Rptr. at 122. See McJunkin, *supra* note 22, at 10 (describing the case as “probably the most cited rape by fraud case in American history”).

74. See *R v. Williams*, [1923] 1 K.B. 340 (C.A.) (Eng.); *R v. Flattery*, [1877] 2 Q.B.D. 410 (C.A.) (Eng.). See *Chan Wai Hung v. Hong Kong*, [2000] H.K.C.U. 611, at 3–6 (C.F.A.) (surveying and approving a line of relevant U.K. and Hong Kong cases).

75. See *Boro*, 210 Cal. Rptr. at 122.

76. In 2000, the highest court in Hong Kong emphasized that “the law is concerned with the nature of the act and not its purpose.” *Chan Wai Hung*, H.K.C. at 2.

77. Sexual Offences Act 2003, c. 42, § 76 (U.K.). For an overview of the reform, see generally Jennifer Temkin & Andrew Ashworth, *The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent*, 2004 CRIM. L. REV. 328, 328–46 (2004).

78. See LAW REFORM COMMISSION OF HONG KONG, CONSULTATION PAPER: RAPE AND OTHER NON-CONSENSUAL SEXUAL OFFENCES 43–44 (2012).

79. See Crimes Ordinance, *supra* note 16, § 120.

breadth of the provision can be best observed in relation to the scenario in which the defendant had sex with a prostitute on the promise of payment, but the defendant had no intention of fulfilling the promise. Even the broader “nature or purpose of the act” test could not encompass this scenario.<sup>80</sup> However, Section 120 can be and indeed has been employed on several occasions in Hong Kong to convict such individuals.<sup>81</sup>

## B. Cases on Sex by Religious False Pretenses

Despite the media’s prominent reporting of such cases,<sup>82</sup> there has not been any systematic inquiry, whether in the academic legal literature or otherwise. This case study assembles all the court decisions involving the use of Section 120 to prosecute sex by religious false pretenses within the ten-year period from March 2007 to March 2017. This was achieved by first searching for all prosecutions of Section 120 via the relevant search term<sup>83</sup> in the electronic legal database, Lexis HK,<sup>84</sup> and the official judiciary website for judgments.<sup>85</sup> In addition, requests were made to the judiciary for court judgments that were discussed or mentioned in the searchable judgments, but which were otherwise not found on the electronic databases. In total, there are eleven cases.<sup>86</sup> Among these, seven cases concerned religious fraud and form this case study’s subject matter. The conviction rate is high, with only one acquittal among these seven cases.<sup>87</sup>

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80. See *R v. Linekar*, [1995] Q.B. 251 (C.A.) (Eng.). See also RICHARD CARD, ALISDAIR GILLESPIE & MICHAEL HIRST, *SEXUAL OFFENCES* 56-57 (2d ed. 2008) (arguing that “purpose” does not include the “wider purpose,” such that a therapist fraudulently inducing a client to have a “threesome” on the pretext of a cure for depression, when instead it is for the therapist’s own sexual gratification, does not contravene the provision since such scenario is akin to the *Linekar* case).

81. See e.g., *Hong Kong v. Guan Zhonghong*, DCCC599/2015 (D.C. Aug. 20, 2015) (Legal Reference System) (H.K.); *Hong Kong v. Feng Guohao*, DCCC712/2015 (D.C. Oct. 20, 2015) (Law Reference System) (H.K.); *Hong Kong v. Nyamdoo Zoljargal*, HCMA 157/2014 (C.F.I. May 13, 2014) (Legal Reference System) (H.K.). One Hong Kong judge has correctly recognized the economic (and not sexual) nature of the crime. See *Nyamdoo Zoljargal*, *supra* note 81, ¶ 6. Commentators have made similar critiques. See Bryden, *supra* note 5, at 466-67.

82. See e.g., HK01, <https://www.hk01.com/tag/14108> [<https://perma.cc/5LQM-HLSE>] (last visited Feb 1, 2018). For an example of the extensive and sordid reporting of an earlier case, see Laurence Zuckerman, *Hong Kong’s Seductive Trial*, N.Y. TIMES (Aug. 17, 1991).

83. The search starts with judgments mentioning/citing the provision, followed by searching judgments that include key phrases of the provision, such as “procurement by false pretences” to ensure completeness.

84. See LEXIS HK, <https://www.lexisnexis.com/hk/legal/>.

85. See LEGAL REFERENCE SYSTEM, <http://legalref.judiciary.hk/lrs/common/ju/judgment.jsp> (last visited Feb. 1, 2018). Both databases have substantial but incomplete overlaps at the time of the search, i.e., some cases can only be searched in one of the databases despite the supposed comprehensive nature of both databases.

86. This number is broadly similar to the total of sixteen cases during the eleven-year period from 2001 to 2011, as revealed by the Law Reform Commission in a 2012 Consultation Paper. LAW REFORM COMMISSION OF HONG KONG, *supra* note 78, at 68.

87. See *Hong Kong v. Luo Weiluo*, DCCC1105/2015 (D.C. Feb. 20, 2015) (Legal Reference System) (H.K.).

To better appreciate how the courts deal with the issue of falsity, the key facts of the seven cases are set forth as follows, with particular focus on (1) the age of the victim and defendant at time of first offence; (2) how the victim and defendant met; (3) the specifics of the false pretense; (4) the number of times of sexual intercourse and duration between first and last intercourse; (5) how the case reached the police; and (6) the defendant's defense. The facts are based on the court verdicts save for the last case (as arranged in chronological order), in which the defendant was acquitted. For that last case (*Law Wai Leuk*),<sup>88</sup> the victim's testimony is presented.

### 1. *Hong Kong v. Au Yeung Kwok Fu*<sup>89</sup>

The victim was eighteen, and the defendant was fifty-two. The victim was a model and was introduced to the defendant by the victim's modeling agent. Notably, it was the victim's modeling agent who told the victim that the defendant could improve her career-related luck and that the ritual would involve sexual intercourse. The defendant performed the ritual nine times over a period of eight months. The victim went to the police after she discovered she was pregnant, despite purported assurance by the defendant that the unprotected sex during the ritual would not make her pregnant.<sup>90</sup>

The defendant admitted to the sexual intercourse and testified that he performed the luck-improving rituals.

### 2. *Hong Kong v. Wong Mei Yin & Lo Fun Yi*<sup>91</sup>

The victim was nineteen, and the defendant was sixty-three. The victim's "godmother" told the victim that the victim's room was haunted. The victim's "godmother" then told the victim that she (the "godmother") knew of a priest who could perform an exorcism ritual, but the ritual would involve sexual intercourse. The defendant performed the ritual twice over a period of three days. The victim's "godmother" was present and naked during the second ritual and fondled the victim's breast while the defendant had sexual intercourse with the victim.<sup>92</sup> The victim made a police report after reading about the aforementioned *Au Yeung Kwok Fu* case in the newspaper about a month after the rituals.<sup>93</sup>

88. See *infra* Part I.B.7.

89. DCCC 569/2009 (D.C. Dec. 12, 2009) (Legal Reference System) (H.K.).

90. The victim underwent an abortion. DNA testing confirmed that the victim was impregnated by the defendant.

91. DCCC70/2010 (D.C. Aug. 4, 2010) (Legal Reference System) (H.K.).

92. The "godmother" was actually charged together with the defendant. Her charges were "aiding and abetting" the defendant in procuring sex by false pretenses. She was acquitted since the judge found that she believed the defendant's lies, and thus had no intention of deceiving the victim. By way of background context, the defendant (who was married) had been having an affair with the "godmother."

93. The victim did mention the rituals (including the sexual intercourse) to her older sister (who was pursuing graduate education at that time) about ten days after the rituals. The victim's older sister—who gave testimony at trial—felt that it was a little strange but did not pursue the matter. The victim decided to report to the police after discuss-

The defendant admitted to sexual intercourse and testified that it was consensual and was desperately initiated by the victim.

3. Hong Kong v. Chow Kam-Wah<sup>94</sup>

The victim was nineteen, and the defendant was fifty-one. The victim and the defendant lived in the same public-housing estate. The victim was introduced to the defendant by a mutual acquaintance who learned that the victim believed a ghost was following her. The defendant told the victim that he could perform an exorcism ritual but that sexual intercourse was part of the ritual. The defendant performed the ritual three times over a period of three months. Four months after the last ritual, the defendant drove the victim to a deserted spot (after driving her to collect her wages) and forcibly had sexual intercourse with the victim. The victim made a police report thereafter.

The defendant admitted to all the sexual intercourse and testified that it was consensual, with no talk of ghosts or exorcism, and the sexual intercourse was based on monetary considerations.

The defendant was convicted of rape in addition to the three charges under Section 120.

4. Hong Kong v. Ho Ka Po Tony<sup>95</sup>

The victim was twenty-seven. The defendant's age was not mentioned in the judgment. The victim was a domestic helper from Indonesia and had back pains that did not respond to a family doctor's medical treatment. The victim's agent suggested this might be due to the victim being under a "Tame Head" spell<sup>96</sup> and brought the victim to the defendant's office. The defendant said that he would cure her and proceeded to engage in sexual acts with the victim while alluding to purported religious rituals (e.g., prayer to a Buddhist figurine). This was repeated four days later, although the charge for that instance was procurement by threat in light of how the defendant told the victim that she would be in trouble if she did not submit. The victim later told the incidents to her employer, who accompanied her to make a police report.

The defendant elected to remain silent during the trial.

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ing the matter with her friend in light of the newspaper report of the *Au Yeung Kwok Fu* case.

94. Hong Kong v. Chow Kam-wah, HCCC 80/2010 (C.F.I. Nov. 30, 2010) (Legal Reference System) (H.K.).

95. Hong Kong v. Ho Ka Po Tony, DCCC 1169/2012 (D.C. Apr. 29, 2013) (Legal Reference System) (H.K.).

96. "Tame Head," also known as "gong tao," is a form of black magic practiced in South East Asia. For a case study account, see generally Bertha Mo, *Black Magic and Illness in a Malaysian Chinese Community*, 18 SOC. SCI. & MED. 147 (1984).

5. *Hong Kong v. Yuen Yuk Kin*<sup>97</sup>

The victim was fifteen. The defendant's age was thirty-three. The defendant was the boyfriend of the victim's older sister. The victim had frequent fevers, and the defendant told the victim that this was because the victim's boyfriend's spirit was left in the victim's body after the victim and her boyfriend had sex.<sup>98</sup> The defendant told the victim that to exorcise the ghost and to improve her luck, he could perform a ritual that involved sexual intercourse. Over a period of six years, they had regular sexual intercourse, allegedly on this pretense. The victim went to the police after the victim's request to end the rituals prior to entering university was met with angry resistance by the defendant.

The defendant admitted to sexual intercourse and testified that it was consensual, without the alleged pretenses, and that the exorcism and luck improvement ritual he actually performed did not involve sexual intercourse. The defendant agreed with the prosecution that sexual intercourse had no exorcism or luck improvement effect.

6. *Hong Kong v. Yeung Shing Sang*<sup>99</sup>

The victim was thirty-eight, and the defendant was thirty-nine. The victim was introduced to the defendant by the victim's twin sister, who told the victim that the defendant "was a God with magical powers" and could help the victim's intellectually-disabled son. The defendant was at the time the lover of the victim's twin sister. The ritual, purported to help the victim's son and to help the victim's romantic relationship, involved the defendant first inserting a sausage and his fist with the accompanied instruction that the victim would "expel [it] by simulating the movements of child-birth." The defendant then inserted his penis, of which the victim protested, and the defendant withdrew. The ritual was done in the presence of the victim's twin sister. The victim and the victim's twin sister went to the police the next day. Forensic evidence later revealed that a drink offered by the defendant to the victim was laced with methamphetamine ("ice").

The defendant did not give evidence at trial and relied on police statements that claimed the sex with the victim was with consent, that the withdrawal was due to him being disconcerted by the presence of the victim's twin sister, and denied the insertion of sausage and fist.

Notably, the defendant was also charged and convicted of rape because the defendant never told the victim that sexual intercourse (as opposed to insertion of sausage and fist) was part of the religious ritual.

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97. CACC 454/2011 (C.A. Jan. 15, 2013) (Legal Reference System) (H.K.).

98. See *id.* Victim admitted that she had three sexually active boyfriend-girlfriend relationships prior to the age 16.

99. *Hong Kong v. Yeung Shing Sang*, CACC 374/2013 (C.A. May 20, 2014) (Legal Reference System) (H.K.).

### 7. Hong Kong v. Law Wai Leuk<sup>100</sup>

This was the only case where the defendant was acquitted. The following account is based on the victim's testimony.

The victim was twenty-four, and the defendant was forty-two. The victim was introduced to the defendant by the victim's colleague. The defendant used cards to tell the victim's fortune and predicted she would have a boyfriend who would be twelve years older than her. A year later, the victim had a boyfriend who was indeed twelve years older but whose luck had not been good. The defendant said he could help change said boyfriend's luck with a ritual that involved sexual intercourse. The rituals were performed four times over the period of a year. The victim made a police report six months after the last ritual, which followed an alleged molestation (which the defendant was also acquitted of) that purportedly took place five months after the last ritual.

The defendant admitted to sexual intercourse and testified that it was consensual and based on sexual fulfillment without the pretext of performing rituals.

### 8. Summary: Patterns in the Facts

Although the facts of the seven cases have significant variations in terms of their specifics, such as the age difference between the defendant and victim and the frequency and duration of the interactions before the conduct stopped, certain broad similarities can be garnered from these seven cases.

First, when the defendant initially makes the representation regarding the religious rituals, there is no prior religious and/or fiduciary relationship between the victim and defendant. There is also no power disparity between the victim and the defendant, with perhaps the exception of the *Ho Ka Po Tony* case, where the victim is a foreign domestic helper and may have felt somewhat beholden to the defendant even if the defendant had no employment relationship with the victim. Indeed, the victim is often introduced to the defendant by the victim's acquaintances, friends, or even family members who thought that the defendant possessed supernatural means and could help the victim.

Second, none of the cases involved organized and/or established world religions. The religious premise of all the defendants' representations was Chinese folk religions. "Chinese folk religions" is a label that broadly encompasses worship of a diverse multiplicity of deities and other rituals/practices imbued with veneration and/or supernatural dimensions (e.g., ancestor worship, fortune-telling, and geomancy).<sup>101</sup> Ritualistic practices

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100. Hong Kong v. Law Wai Leuk, DCCC 1105/2015 (D.C. Feb. 3, 2017) (Legal Reference System) (H.K.).

101. See Wai Yip Wong, *Defining Chinese Folk Religion: A Methodological Interpretation*, 21 *ASIAN PHIL.* 153, 158-65 (2011). See Fenggang Yang & Anning Hu, *Mapping Chinese Folk Religion in Mainland China and Taiwan*, 51 *J. SCI. STUD. RELIGION* 505, 508-11 (2012) (discussing the evolution and controversies in the definition of Chinese folk religion and arguing Chinese folk religion can be further categorized into three

associated with Chinese folk religions are commonly practiced in Hong Kong, even if many who practice report no religious affiliation.<sup>102</sup>

Third, the purported rituals were transactional in nature, whereby the victim was hoping for divine intervention for specific problems, be it secular (e.g., improving a modeling career, son's mental capacities) or supernatural (e.g., exorcism, removal of a curse). This reflects the religious premise of the defendants' representations. Unlike monotheistic religions, which are often based on faith in the designated supreme and the goal of eternal salvation,<sup>103</sup> Chinese folk religions are more oriented as an exchange relationship between the deity and the adherent, whereby religious rites are performed with the expectation of favorable divine intervention into daily affairs.<sup>104</sup> It is also significant that the victim's underlying demand for the transaction was not created or induced by the defendant—no defendant actively sought out his victims (at least not directly)<sup>105</sup> or tell the victim that she was suffering from a curse or followed by a ghost. If the defendant created the “reason” for the transaction, especially where the “reason” is severe (e.g., curse and other grave supernatural consequences), then arguably the defendant can be prosecuted for procuring sex by threats or intimidation.<sup>106</sup> One key advantage of prosecuting with the procurement by threats offence is that the objective truthfulness of the threat is irrelevant for conviction.<sup>107</sup>

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types—namely communal folk religion, sectarian folk religion and individual folk religion—based on their differing level of belief and organization, and different social functions).

102. See Tik-sang Liu, *A Nameless but Active Religion: An Anthropologist's View of Local Religion in Hong Kong and Macau*, 174 CHINA Q. 373, 373 (2003).

103. See Sarah Claerhout & Jakob De Roover, *Conversion of the World: Proselytization in India and the Universalization of Christianity*, in PROSELYTIZATION REVISITED: RIGHTS TALK, FREE MARKETS AND CULTURE WARS 53, 65 (Rosalind I.J. Hackett ed., 2008); David Tracy, *The Christian Understanding of Salvation-Liberation*, 7 BUDDHIST-CHRISTIAN STUD. 129, 130–32 (1987).

104. See C. HARRY HUI, EDDIE C. W. NG, & M. HANNAH TAI, 1 ENCYCLOPEDIA OF PSYCHOLOGY AND RELIGION 145 (David A. Leeming, Kathryn Madden & Stanton Marlan eds., 2010); Liu, *supra* note 102, at 389.

105. The acquaintance who introduced the defendant to the victim could also be charged under Section 120 if the acquaintance knowingly made the false representation/pretext. Indeed, the original understanding of the U.K. equivalent was that the clause was meant to prosecute the third parties that facilitate the sexual intercourse, rather than the individual who actually engaged in the intercourse, and it took an early court case to establish otherwise. Spencer, *supra* note 7, at 6–7. This was indeed what happened in *Wong Mei Yin & Lo Fun Yi*, though curiously as an “assisting and abiding” offence rather than the offence itself. See *supra* Part I.B.2.

106. See Crimes Ordinance, *supra* note 16, § 119 (“A person who procures another person, by threats or intimidation, to do an unlawful sexual act in Hong Kong or elsewhere shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 14 years.”).

107. See *Hong Kong v. Chan Wing Hung*, CACC000430/1996 (C.A. July 15, 1997) (Legal Reference System) (H.K.) (upholding a conviction under § 119 of an ex-boyfriend who threatened to release sex tapes if the victim did not have sex with him, even though there were no such sex tapes); see also PETER WESTEN, *THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT* 188–89 (2004) (arguing that the *Boro* case should be analyzed via the perspective of

Whereas the first and third themes do not directly implicate the legal elements of Section 120, they do indicate the priorities and considerations underpinning each prosecutor's decision<sup>108</sup> to pursue the case and will be discussed further in Part III's examination of the impact of such enforcement on individuals' behaviors. The second theme, as will be discussed in the next section, implicates the manner in which falsehood is established.

### C. Evaluating Falsity

Falsehood is the integral element of Section 120. However, where the pretense is religious or supernatural in nature,<sup>109</sup> difficult conceptual and evidential issues arise. Whereas courts and states in the past have had little problem making determinations as to what constitutes false religion and/or heresy,<sup>110</sup> contemporaneous discourse of religious liberty—whether with or without an accompanying anti-establishment consideration—has duly recognized the limitations on the desirability and capabilities of the modern secular courts to assess religious and spiritual matters.<sup>111</sup> Given the allusion to supernatural forces and divine intervention, there is no ready source of evidence that can provide straightforward verification of the truthfulness of such claims.

This is particularly so, as in this Hong Kong case study, where the religious premises of such claims are not those of either organized or established world religions.<sup>112</sup> Insofar as the defendant purports to practice a religion with clearly articulated and defined doctrines, it is possible—although still extremely complicated and highly controversial—for secular

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'force' and 'threat' rather than fraud given how the defendant "conditionally placed [the victim] in fear of her life.").

108. The Department of Justice has an Attorney General whose prosecutorial discretion and independence is enshrined in the Basic Law (Hong Kong's de facto constitution). See *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, adopted by the National People's Congress on April 4, 1990, 29 I.L.M. 1551 (1990), at art. 63. See Wong Yan Lung, *The Secretary of Justice as the Protector of the Public Interest: Continuity and Development*, 37 HONG KONG L.J. 319, 334-48 (2007) (discussing the judicial respect of prosecutorial discretion in Hong Kong and issues of accountability).

109. A distinction should be made from a claim that relates to religion, but is based on secular factual claim—for example, claiming that one was a head monk/priest in a particular famous temple. These sorts of claims are capable of ready verification and do not pose particular problems distinct from conventional fraud claims. See Senn, *supra* note 38, at 328-29.

110. See WILLIAM SALKELD, REPORTS OF CASES ADJUDGED IN THE COURT OF KING'S BENCH WITH SOME SPECIAL CASES IN THE COURTS OF CHANCERY, COMMON PLEAS AND EXCHEQUER 162 (1795) (highlighting a 16th century English case, *Dominus Rex versus Lady Portington*, which held that under the monarch's power and obligation to "see that nothing be done to . . . "Propagation of a false Religion," the monarch may order a trust for "a superstitious use" to be applied to a "proper use"). For a discussion of the Medieval Inquisition, arguably the most systematic attempt at policing religious truth in history, see Carole A. Myscofski, *The Magic of Brazil: Practice and Prohibition in the Early Colonial Period, 1590-1620*, 40 HIST. RELIGION 153, 157-58 (2000); see also Margaret Mott, *The Rule of Faith over Reason: The Role of the Inquisition in Iberia and New Spain*, 40 J. CHURCH & ST. 57, 66-67 (1998).

111. See Koppelman, *supra* note 25, at 1835; See Shiffrin, *supra* note 25, at 44-45.

112. See *supra* Part I.B.1.

courts to determine the correct religious doctrine for that religion and whether the defendant had misrepresented the doctrine.<sup>113</sup> However, such avenues are closed in the Hong Kong cases. Indeed, in the two cases where the defendant did testify and gave evidence as to his religious practices (*Au Yeung Kwok Fu*<sup>114</sup> and *Luo Wei Lue*<sup>115</sup>), both defendants stressed that their religious practices were not related to Daoism. Although objectively that is likely to be the case, notwithstanding the fluidity and breadth of the concept of Daoism as a religion,<sup>116</sup> it is also notable that the prosecution presented at trial a Daoist religious expert who testified that Daoist rituals would never include non-spousal sexual intercourse, even though the relevancy of the expert's testimony is undercut by the defendant's position.<sup>117</sup>

As we shall see, how the Hong Kong court actually approached the factual issue of falsehood in each of the seven cases was closely connected to how the defendant chose to mount his defense.

### 1. *Defendant's Concession as to Falsity*

The easiest case is arguably *Yuen Yuk Kin*, in which the defendant agreed that sexual intercourse had no exorcism or luck improvement effect.<sup>118</sup> This admission meant that in order to establish the key *actus reus* element of procuring sex under false pretenses, the court just needed to believe the victim's testimony that the defendant did actually tell the victim that sexual intercourse was an integral part of the religious ritual.<sup>119</sup>

### 2. *Defendant's Insincerity*

Compared to the defendant in the *Yuen Yuk Kin* case, the defendant in the *Au Yeung Kwok Fu* case directly asserted that sexual intercourse was part of the religious ritual. Indeed, the defendant proffered three witnesses with whom the defendant had performed religious rituals, involving sexual intercourse, to the individuals' satisfaction (i.e., the individuals testified that they felt the rituals were effective in improving luck or providing miraculous health benefits).<sup>120</sup> This placed the veracity of the religious claims at the forefront of the trial.

In finding the defendant guilty, the trial judge expended a large portion of the judgment on detailing the many inconsistencies in the defendant's testimony. For example, the trial judge noted that whereas the defendant claimed that during the sexual intercourse, his body was pos-

113. See Smith, *supra* note 26, at 37-38 & 51-52; Mason, *supra* note 25, at 93-104; Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 550-56 (2013).

114. See *Au Yeung Kwok Fu*, H.K.C. 223, ¶¶ 46-48.

115. See *Hong Kong v. Luo Wei Lue*, DCCC 1105/2015 (D.C. Feb. 3, 2017) (Legal Reference System) (H.K.).

116. See Jiexia Elisa Zhai, *Contrasting Trends of Religious Markets in Contemporary Mainland China and in Taiwan*, 52 J. CHURCH & ST. 94, 100-01 (2010).

117. See *Luo Wei Lue*, DCCC 1105/2015; *Au Yeung Kwok Fu*, H.K.C. 223.

118. *Hong Kong v. Yuen Yuk Kin*, CACC 454/2011 (C.A. Jan. 1, 2013) (Legal Reference System) (H.K.).

119. See *id.*

120. See *Au Yeung Kwok-Fu*, H.K.C. 223.

sessed by divine spirit and he had no recollection or control of his actions, he was still able to provide details of the sexual intercourse in his testimony. Other examples of inconsistency involved the conditions he stipulated regarding the performance of the rituals, where his claim as to the specific location and timing requirements for ritual were not always followed in all the rituals.<sup>121</sup> Although this suggests that the trial judge purported to use these inconsistencies to challenge the sincerity of the defendant's belief that sexual intercourse was an integral part of the religious rituals, the trial judge went on to opine that,

I neither accept nor believe that any religion or belief which has helping others and advocating kindness as its fundamental value will coopt mortal sexual lust as a component of religious worship/rituals. If there are really such teachings, I consider them as only belonging to heretics and evil cults which sought to use these teachings and twisted logics to satisfy one's desire. These people are packaging sexual intercourse as a religious or mystical product.<sup>122</sup>

If only to complicate matters, the trial judge then referred to paragraphs 21–33 of HK Archbold 2010 (an authoritative commentary on criminal law in English common law jurisdictions) and “opined that prosecution need not conclusively prove that the representation/pretense [that the defendant has the power to improve the victim's luck] is false.”<sup>123</sup>

Unsurprisingly, this case was appealed. The key legal issue was whether the falsity of the “pretense” must be established for conviction.<sup>124</sup> The Court of Appeals found the trial judge mistakenly relied on HK Archbold 2010 and then held that the correct legal principle is that the prosecution is not required to specify the falsity of the representation/pretense in the indictment.<sup>125</sup> The Court of Appeal went on to find that despite the trial judge's mistake, the prosecution established the pretense's falsity.<sup>126</sup> The various and major inconsistencies in the defendant's testimony demonstrated that the defendant was not “sincere in improving the luck of the victim” when he had sexual intercourse with the victim.<sup>127</sup>

It is somewhat fortunate that the Court of Appeals was on hand to clarify the otherwise muddled approach by the trial judge in *Au Yeung Kwok Fu*. The Court of Appeals in *Au Yeung Kwok Fu* did not explicitly explain why it held that evidence demonstrating the defendant's insincerity in improving the victim's luck through sexual intercourse was sufficient to satisfy the element of falsity of the representation. However, given how the material representation directly concerned the defendant's purported divine ability to improve the victim's luck, the Court of Appeals was likely driven to its conclusion due to religious freedom considerations. Indeed,

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121. See *id.* ¶¶ 130–33.

122. *Id.* ¶ 141.

123. *Id.*

124. See *id.*

125. See *id.* ¶ 32.

126. See *id.*

127. *Id.* ¶ 33.

this is also probably why the trial judge in *Au Yeung Kwok Fu* was keen to rely on HK Archbold, so as to avoid the need of expressly finding the falsity of the purported religious claim, even if the judge was not at all shy to express his intense skeptical opinion of the claim.

In Hong Kong, the right to religious freedom is secured through the verbatim adoption of the International Covenant on Civil and Political Rights [“ICCPR”] via the Hong Kong Bill of Rights Ordinance.<sup>128</sup> Hong Kong courts have not directly addressed this clause *vis-à-vis* religious fraud. In the few cases that involved constitutional claims for violations of religious freedom and/or religious exemptions to generally applicable laws, the Hong Kong courts have typically found that the claims were religious and focused the inquiry on whether there were sufficient justifications for the restrictions.<sup>129</sup> In the absence of direct precedence, jurisprudence from ECtHR will be instructive. When interpreting the Hong Kong Bill of Rights Ordinance, Hong Kong courts have regularly cited ECtHR decisions as persuasive authority, unsurprisingly given how the European Convention on Human Rights closely resembles the ICCPR.<sup>130</sup> The ECtHR, in turn, has consistently held that the state is not permitted to assess the legitimacy of religious beliefs, given the duty of neutrality and impartiality under the religious freedom clause of the European Convention on Human Rights.<sup>131</sup> Moreover, even without this constitutional protection, English common law courts have frequently invoked the doctrine of non-justiciability to hold that “issues of the truth or falsity of religious doctrines were non-justiciable” and dismissed litigation in which such issues are an essential legal component.<sup>132</sup>

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128. As a general matter, either the Basic Law or the Hong Kong Bill of Rights Ordinance will suffice in providing grounds for a constitutional challenge, whereas the ICCPR may serve as a constraint against repeal or amendment of the Hong Kong Bill of Rights Ordinance without providing an independent source of enforceable rights itself. See Dinusha Panditaratne, *Basic Law, Hong Kong Bill of Rights and the ICCPR*, in *LAW OF THE HONG KONG CONSTITUTION* 521, 538-59 (Johannes Chan & C.L. Lim eds., 2d ed. 2015); Simon N. M. Young, *Restricting Basic Law Rights in Hong Kong*, 34 *HONG KONG L.J.* 109, 115-17 (2004).

129. See e.g., *Chu Woan Chyi v. Secretary for Justice*, CACV 119/2007 (C.A. Sept. 4, 2009) (Legal Reference System) (H.K.) (finding that Falun Gong is a religion under constitutional law); *Brian Alfred Hall v. Secretary for Justice*, [2005] H.K.C. 1324 (C.F.I) (H.K.) (recognizing listening of reggae music as integral to Rastafarian faith). Cf., *R v. Yuen Chong*, [1996] 3 H.K.C. 205 (C.A.) (H.K.) (in the context assessing the common law doctrine of “religious mortification” as a potential defense from the infliction of harm, finding that corporal punishment is not an accepted form of punishment in the Taoist religion given the lack of evidence, such as testimony to the effect).

130. See Chan & Lim, *supra* note 44, at 576-77; Roda Mushkat, *International Law in HKSAR Courts*, 28 *CAL. W. INT’L L.J.* 353, 371-75 (1998).

131. See *EUR. CT. H.R., RESEARCH DIV.*, *supra* note 27, at 19. See also Anna Su, *Judging Religious Sincerity*, 5 *OXFORD J.L. & RELIGION* 28, 36-37 (2016) (discussing the recent emergence of the sincerity test to replace the belief-conduct distinction that was previously used to manage religious accommodation challenges under ECtHR jurisprudence).

132. See Frank Crammer, Editorial, *Thomas Phillips v. Thomas Monson*, 16 *ECC. L.J.* 393, 393 (2014) (noting how a private prosecution against a Mormon church leader for soliciting religious contributions “while at the same time knowingly promoting theological doctrines which ‘might be untrue or misleading’” was summarily dismissed for,

Under such jurisprudential constraints, it is apt that the Hong Kong Court of Appeals in *Au Yeung Kwok Fu* relied on the defendant's insincerity as the basis of establishing falsehood. This allows the court to uphold the conviction without having to directly confront the vexing issue of how to falsify a religious claim. As Anna Su observed in her recent analysis of how the Canadian courts and the ECtHR have adopted a sincerity test in assessing whether a practice falls under the scope of the respective constitutional provisions as a religious exemption, "[i]n confining themselves to a familiar comfort zone of assessing witness credibility, judges avoid choosing dogma and from implicating themselves in possible religious controversies."<sup>133</sup>

At this juncture, it is worth noting that the sincerity of the defendant's belief (as opposed to insincerity) may also come into play in negating criminal liability. One key reason for the acquittal in *Law Wai Leuk* is that the judge found the defendant to be as superstitious as the victim, and thus, the prosecution could not establish that the defendant himself did not believe in the religious rituals involving sexual intercourse.<sup>134</sup> This is the standard *mens rea* requirement, in which the defendant has to be aware of the falsity of his representations to be convicted of fraud crimes.<sup>135</sup>

### 3. Assumption of Falsehood?

However, the sincerity test poses a particular problem when the defendant elects to remain silent and does not provide any evidence, as in *Ho Ka Po Tony*. Whereas the court can evaluate the credibility of the victim and find that the defendant did make claims relating to the supernatural purposes of sexual intercourse, there are no testimonial inconsistencies on the part of the defendant to readily establish the defendant's insincerity. This latter issue was, in fact, completely side-stepped in *Ho Ka Po Tony*. After finding that the victim was a credible witness and that her factual account was accurate, the trial judge simply concluded that "I was sure that on 26 July she was deceived into believing that what the defendant was performing was some form of religious ritual intended to remove problems caused by her having been cast as a 'Tame Head.'"<sup>136</sup> There was no discussion as to why the pretense of the "Tame Head" curse removal was a deception. It is possible that the judge was inferring the defendant's lack of sincerity from the fact that after the first occasion of sexual intercourse, the defen-

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among other things, "issues of the truth or falsity of religious doctrines were non-justiciable."). For a discussion of the doctrine of non-justiciability of religious issues in the English courts, see Juss, *supra* note 26, at 291-95.

133. Su, *supra* note 131, at 39.

134. See *Luo Wei Lue*, DCCC 1105/2015 (H.K.). The other reason for the acquittal is that the judge did not find that the victim was a credible witness, and the circumstances of the sexual intercourse (e.g., taking place on Boxing Day which was the date commonly associated in Hong Kong with lover's sexual activity) suggested that the sex was really for mutual sexual gratification. *Id.* ¶¶ 97-119.

135. See GUYORA BINDER, *CRIMINAL LAW* 251-54 (2016); JACKSON, *supra* note 55, at 731-32.

136. *Ho Ka Po Tony*, DCCC 1169/2012 (H.K.) ¶¶ 38-46.

dant threatened the victim that “she would have trouble” after she was hesitant to engage in sexual intercourse on the pretext of the “Tame Head” curse removal.<sup>137</sup> Nonetheless, given how the trial judge in *Au Yeung Kwok Fu* instinctively veered into opining that sexual intercourse cannot, as a matter of fact, be part of a legitimate religious ritual, it is likely that the judge in *Ho Ka Po Tony* operated under similar skepticism.

The sincerity test also does not operate well when the defendant testifies that the sex was voluntary without any reference to the religious pretenses, as in *Wong Mei Yin & Lo Fun Yi*. There, the trial judge—having found the victim as a credible victim—determined that the defendant did make the representation that sexual intercourse was a necessary part of the exorcism ritual. However, the falsity of the representation was established through the trial judge determining—in a sentence without any discussion—that the representation “was false, without any basis, and that ordinary reasonable and honest people will deem such representation as false.”<sup>138</sup> Notably, no expert witnesses were called regarding the religious practices nor any admission elicited from the defendant as to the falsity of the representation. Thereafter, the trial judge found that the defendant did not believe the representation was true.<sup>139</sup>

Similarly, whereas the nature of a jury trial for *Chow Kam-wah*<sup>140</sup> prevented a more detailed analysis as to how the falsehood was established, the way the judge summarized the facts during sentencing echoed a presumptive approach. The judge simply noted that “[t]he defendant told the victim that the sexual intercourse was part of the exorcism ritual. The defendant thus procured sexual intercourse with the victim by falsely representing that by having sexual intercourse with him the ghost following the victim would be exorcised.”<sup>141</sup> This can be contrasted with the conviction for rape, where the judge noted that the defendant “raped the victim” because the “evidence disclosed that . . . the defendant forcibly removed her shorts and underpants and had sexual intercourse with her against her will.”<sup>142</sup> For the later rape conviction, all the elements of the crime—in particular the most critical “against her will” element—are set out in the fact summary. Nonetheless, it appears that the judge thought that the falsity of the representation that sexual intercourse would exorcise a ghost was either self-evident or could otherwise be presumed.

137. See *id.* ¶ 19.

138. *Wong Mei Yin & Lo Fun Yi*, DCCC70/2010 (H.K.) ¶ 103.

139. See *id.* ¶ 104.

140. Given the concurrent rape charges, the case was tried at the court of first instance (a higher-level court than the district court where trials involving Section 120 are conducted) where jury trial is the default. See High Court Ordinance, (1997) Cap. 4, §§ 12, 33A (H.K.); Criminal Procedure Ordinance, (1997) Cap. 221, § 41 (H.K.).

141. *Chow Kam Wah*, HCCC80/2010 (C.F.I. Nov. 30, 2010) (Legal Reference System) (H.K.), at 2.

142. *Id.*

#### 4. Summary: Crude Sincerity Test

In summary, the approach applied by the Hong Kong courts can be described as a crude sincerity test. When pressed, especially on appeal, the court will acknowledge that the proper and straightforward way of finding falsehood is through questioning the sincerity of the defendant's belief in the religious pretense.<sup>143</sup> However, it is also common to detect a judge's inherent skepticism of any claims relating to how religious rituals involve sexual intercourse. The judge in *Wong Mei Yin & Lo Fun Yi* was quick to find that the representation was false on the grounds that "ordinary reasonable and honest people" will deem it as false.<sup>144</sup> Tellingly, the bold (if honest) rejection by the trial judge in *Au Yeung Kwok Fu*, of religion as part of a legitimate religious ritual was not clarified or challenged on appeal. Thus, the purported focus on the defendant's sincerity is in practice underpinned by an objective assessment of what constitutes genuine religious practices.

## II. Falsity in Religious Fraud

The formal adoption of the sincerity test to adjudicate the falsity of religious claims, and the actual reliance on judges' intuition to determine what constitutes true religion should come as no surprise to U.S. readers, given the copious amount of literature surrounding the Supreme Court case of *U.S. v. Ballard*.<sup>145</sup> This part of the Article presents the case and the corresponding academic debate regarding the constitutionality and desirability of the purported sincerity test espoused in the *Ballard* decision. This Part then demonstrates how the Hong Kong experience suggests that the proposed solutions of bench trials and other procedural safeguards would remain insufficient to restrain religious bias.

### A. *U.S. v. Ballard*<sup>146</sup>

Given the case's prominence and regular featuring in the literature, a brief summary of the facts and legal holdings will suffice here. The two defendants, being mother and son, were charged and convicted of using and conspiring to use mail to defraud. The defendants led the religious "I Am Movement."<sup>147</sup> According to the indictments, they claimed (together

143. See *id.* at 2-3.

144. *Wong Mei Yin & Lo Fun Yi*, DCCC70/2010 (H.K.) ¶ 103.

145. 322 U.S. 78.

146. *Id.*

147. From the perspective of religious studies, the "I Am Movement" is categorized as New Age spirituality that originates from the metaphysical movement. A key feature of such movements is the recognition of subtle energies that may be transformed by individuals to serve the objectives of the individuals (in particular healing), and the corresponding commodification and commercialization of such spiritual services. See Catherine L. Albanese, *The Subtle Energies of Spirit: Explorations in Metaphysical and New Age Spirituality*, 67 J. AM. ACAD. RELIGION 305, 316-21 (1999); see also Leo Preffer, *The Legitimation of Marginal Religions in the United States*, in RELIGIOUS MOVEMENTS IN CONTEMPORARY AMERICA 9, 23-24 (Irving I. Zaretsky & Mark P. Leone eds., 1974) (arguing that the de facto legitimation of new religious movements like the "I Am Movement" was

with their deceased husband/father) to be divine messengers of the divine entity Saint Germain and thereby had supernatural powers to cure diseases that are medically incurable. They utilized such claims to solicit funds from the public.<sup>148</sup> During trial in the district court, the government and the defendants agreed that the jury would only decide whether the defendants honestly and in good faith believed their claims, but would not decide whether those claims were actually true.<sup>149</sup> The defendants were convicted by the jury, and later appealed, arguing that the question put to the jury was different from the indictment.<sup>150</sup> The court of appeals agreed and ordered a new trial. Then, the government appealed.<sup>151</sup>

The U.S. Supreme Court decision was split three ways. The majority, delivered by Justice Douglas, allowed the appeal and remanded the case to the court of appeals on the basis that it erred in implying that the question of religious truth should be put to the jury.<sup>152</sup> The majority held that the religious freedom guaranteed under the First Amendment precluded the state from pronouncing whether a religious claim is true or false.<sup>153</sup>

Justice Jackson dissented. He agreed that the basic tenet of religious freedom is the right to maintain and practice beliefs that are otherwise deemed heresy and implausible by orthodox or majority faiths. However, he thought that the conviction should be quashed outright because religious freedom remained unconstitutionally violated, even under the purported inquiry into the defendants' sincerity of their belief. He observed that it is not possible in practice or theory to "separate an issue as to what is believed from considerations as to what is believable," given how such separation is contrary to common experience in evaluating falsity.<sup>154</sup>

There was another separate dissent by Chief Justice Stone (joined by Justice Roberts and Justice Frankfurter), which reached the opposite conclusion from Justice Jackson. Chief Justice Stone thought that the conviction in the district court should be upheld. For him, the withdrawal of the factual issue of the truth of the religious statement did not amount to an amendment to the indictment.<sup>155</sup> In addition, he considered it constitutionally permissible for the defendants to be convicted for fraudulent misrepresentation of their state of mind. Further, he was also open to the

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due to how the "felt need to protect the gullible from fraud" is ultimately outweighed by the American constitutional tradition's aversion to be involved in theological disputes, even if not always observed in practice, such as in the case of upholding convictions under statutes prohibiting fortune telling).

148. See *Ballard*, 322 U.S. at 79-80.

149. See *id.* at 81-82.

150. See *id.* at 82-83.

151. See *id.* at 83.

152. See *id.* at 86-88. The court of appeals did state that "whether such representations were false or true was a question which should have been submitted to the jury," however, that statement was made vis-à-vis the issue as to whether the question put to the jury is consistent with the indictment. *Ballard v. U.S.*, 138 F.2d 540, 545 (9th Cir. 1943).

153. See *Ballard*, 322 U.S. at 86-88.

154. *Id.* at 92-93.

155. See *id.* at 90-91.

notion that falsity of religious experiences that include an objectively verifiable component (e.g., physical presence at a location on a particular day) could be established by evidence refuting that particular component (e.g., the defendant was physically present in some other place on that particular day).<sup>156</sup>

## B. Religious Freedom and Sincerity Test

*U.S. v. Ballard* has subsequently, and frequently, been cited by courts<sup>157</sup> and academics<sup>158</sup> as standing for the proposition that courts may inquire into only the sincerity of the defendant's belief and not the veracity of that belief. This is technically incorrect, as pointed out by Stephen Senn and others, because the holding of the majority was framed in the negative—the jury could not be faced with a question as to the veracity of the belief, with nothing explicitly said on whether a sincerity test could be used to convict the defendants.<sup>159</sup> In a way, the common understanding of the case is the fusion of the reasoning of the majority with the prescribed outcome under Chief Justice Stone's dissent that expressly endorsed the existing conviction premised on the defendants' sincerity.<sup>160</sup> Regardless, this doctrinal quibble is largely immaterial. The judicial evaluation of the claimants' sincerity in their belief regarding a purported religious claim has been firmly established as an acceptable practice,<sup>161</sup> whereas the academic literature has focused on pitting the (perceived) majority endorsement of the sincerity test against Justice Jackson's dissent that sought to rule out the sincerity test.

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156. See *id.* at 89–91. The other example provided is about claims of curing diseases and evidence that no such cures are affected. John Noonan identified the ambiguities about these seemingly straight forward examples. The reporter of the religious experience may simply get his geography wrong, and the claimed cures might be “permanent or temporary, physical or psychological, organic or psychosomatic.” John T. Noonan, Jr., *How Sincere Do You Have to be to be Religious?*, 1988 U. ILL. L. REV. 713, 717–18 (1988).

157. See e.g., *U.S. v. Seeger*, 380 U.S. 163, 184 (1965); *Molko v. Holy Spirit Assn.*, 46 Cal. 3d 1092, 1112, 1134–35 (1988).

158. See e.g., John Richard Burkholder, “*The Law Knows No Heresy: Marginal Religious Movements and the Courts*,” in RELIGIOUS MOVEMENTS IN CONTEMPORARY AMERICA 27, 32 (Irving I. Zaretsky & Mark P. Leone eds., 1974); Jorge O. Elorza, *Secularism and the Constitution: Can Government be Too Secular?*, 72 U. PITT L. REV. 53, 110–11 (2010); Bernadette Meyler, *Commerce in Religion*, 84 NOTRE DAME L. REV. 887, 892–93 (2009).

159. See Bass, *supra* note 32, at 162; see also Senn, *supra* note 38, at 333–35.

160. Some commentators who recognized that the majority did not explicitly cordon the sincerity test have argued that this reading is “implied.” See Chapman, *supra* note 40, at 1205 (arguing that while the “Court did not squarely hold that the government may adjudicate religious sincerity and punish insincere statements that amount to fraud, [ ] its disposition of the case strongly implied that result. It declined to agree—twice—with Jackson's powerful arguments that the First Amendment prohibits prosecutions for insincerity.”); see also GREENAWALT, *supra* note 34, at 115 (“What is confusing is that, without explicitly saying so, the opinion implies, as the district court had held, that a fraud conviction may be based on insincerity . . .”).

161. See Chapman, *supra* note 40, at 1188–89; Su, *supra* note 131, at 31–34. See Nadel, *supra* note 31, at 442–44 (examining the different legal contexts in which the party's sincerity is examined as a pertinent element in litigation).

### 1. *Delineating the Debate*

Before delving into the specific debate regarding sincerity tests in the prosecution of religious fraud, it is important to extricate the inquiry from two related contexts. First, the debate should be distinguished from the controversy of using of a sincerity test as a precondition for the grant of religious exemptions from generally applicable statutes. The familiar tension between religious liberty and fraud prevention permeates the issue of whether claimants of such religious exemptions have to demonstrate that they are sincere in their religious beliefs. On the one hand, there are concerns over how a sincerity test conflates veracity with sincerity and may discriminate against minority or unpopular religions.<sup>162</sup> On the other hand, there are the costs of not weeding out insincere religious claims. As explained by Nathan Chapman, the costs are threefold: (1) the increased costs on the state or public arising from the undeserved legislative accommodation and benefits, (2) the danger of “suspicion creep,” in which the court utilizes or develops other doctrines to deny the suspected claim, thereby potentially harming legitimate claims, and (3) the erosion or dilution of value of religious liberty in the eyes of public.<sup>163</sup>

However, there is an important distinction between the religious fraud and fraudulent claims of religious exemptions that parcel out the latter for the purpose of this Article’s examination of the sincerity test. Targets of religious fraud are free to assess the veracity of the purported religious claims and thereupon reject those claims (and be relieved from fraud) if they find the claims unusual, implausible, or objectionable on any other grounds, however whimsical. The state, on the other hand, is constitutionally prohibited from making such an assessment. Thus, regardless of whether a sincerity test is ultimately unconstitutional and/or undesirable, there is a greater justification for its use in fraudulent claims of religious exemptions, given its greater prevalence in the absence of a sincerity test or other forms of state intervention.<sup>164</sup>

The second context that should be distinguished are objectively verifiable frauds that don’t invoke religion. Commentators such as Kent Greena-

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162. See Su, *supra* note 131, at 41–43; Michael Kagan, *Refugee Credibility Assessment and the “Religious Imposter” Problem: A Case Study of Eritrean Pentecostal Claims in Egypt*, 43 VAND. J. TRANSNAT’L L. 1179, 1218–20 (2010) (arguing that the sincerity test is a trap of circular logic that ultimately returns to the original conundrum of religious credibility).

163. See Chapman, *supra* note 40, at 1212–22. For similar arguments, see Peter J. Riga, *Religion, Sincerity, and Free Exercise*, 25 CATH. L. 246, 258–61 (1980); see also John O. Hayward, *Religious Pretenders in the Courts: Unmasking the Imposters*, 20 TRINITY L. REV. 24, 41–64 (2014) (arguing that the judges should be more vigilant against “religious pretenders” seeking to unjustly claim religious exemption through adopting an objective test, in addition to sincerity, of what constitutes religion).

164. See also Noonan, *supra* note 156, at 718–24 (distinguishing between fraud against the government, such as religious exemptions and tax exemption claims—and fraud against another citizen, stating that there is more justification for state intervention in the former, though preferably through the question of is it religious rather than sincerity).

walt,<sup>165</sup> David Austin,<sup>166</sup> and Jorge Elorza<sup>167</sup> have adopted Chief Justice Stone's argument that prosecuting such secular facts is constitutionally uncontroversial and normatively desirable. On the other hand, Marjorie Heins, relying on Justice Jackson's dissent, argued that there should not only be a prohibition of litigation involving fraudulent claims that are religious, but also when claims are made in a religious context.<sup>168</sup> Similarly, Caleb Mason opined that it is not prudent to criminally prosecute religious fraud (even those with empirically testable claims) on account of danger of heresy trials,<sup>169</sup> even if she disagreed with Justice Jackson's view on immunity for religiously-inflected fraudulent activity and argued that judges may adjudicate any matters that may be empirically tested.<sup>170</sup> This Article is sympathetic to the latter position. Even if the prosecutor, judge, and jury are able to make the appropriate delineation between the religious claims and secular claims, it is likely that members of the general public would fail to pick up on this nuanced distinction and simply perceive the trial as targeting false religions or fraudulent religious practices.<sup>171</sup> Nonetheless, this is a broader issue as to how fraudulent schemes that draw on the trust of religious associations or affiliations should be tackled by the state.<sup>172</sup> This is conceptually and normatively distinct from the issue as to the use of a sincerity test to falsify objectively unverifiable religious claims and that will not be examined further in this Article.

## 2. Arguments from Both Sides

Having distinguished these two disparate contexts, the terrain of the discourse on the use of a sincerity test in prosecuting religious fraud can be more clearly mapped out. In essence, the core debate revolves around whether the fact finders (i.e., judge and/or jury) are, in actual practice, able to properly execute a sincerity test without surreptitiously adjudicating the veracity of the religious claims or discriminating against minority and unpopular religions.

The seemingly simple and principled nature of Justice Jackson's exclusion of even the sincerity test in religious fraud prosecution has attracted

165. See GREENAWALT, *supra* note 34, at 115-17.

166. See David E. Austin, "In God we Trust": *The Cultural and Social Impact of Affinity Fraud in the African American Church*, 4 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 365, 405 (2004).

167. See Elorza, *supra* note 158, at 110-11.

168. See Marjorie Heins, "Other People's Faiths": *The Scientology Litigation and the Justiciability of Religious Fraud*, 9 HASTINGS CONST. L.Q. 153, 157-58 (1981).

169. See Mason, *supra* note 25, at 101-02.

170. See *id.* at 138-39.

171. Cf. LAW REFORM COMMISSION OF HONG KONG, REPORT: CHARITIES 20, 104 (2013) (observing how the public commonly perceived the list of organizations that have been granted charitable tax exemption status as a formal and supervised register of charitable organizations even if the producer of the list—the tax authority—had no legal authority, and did not in fact, engage in any active monitoring of the activities of the organizations).

172. See e.g., Bass, *supra* note 32; Austin, *supra* note 166.

much support among scholars.<sup>173</sup> These scholars reaffirmed Justice Jackson's rationale that the sincerity of a belief could not be independently evaluated from the veracity of the belief. Michael Kagan observed that "[t]he sincerity test will be, in most cases, a trap of circular logic that ultimately returns to the original conundrum of religious credibility. . . . The sincerity test can work only by making assumptions about how a religious person would talk or act."<sup>174</sup> William Marshall noted that the process of investigation would inevitably and problematically require asking the believer to explain or justify his/her belief.<sup>175</sup> Relatedly, John Noonan worried that the sincerity test could be problematic for conventional religious professionals who have lost their faith but continue to perform the rituals of their religions.<sup>176</sup> Justice Jackson's point about indeterminate harm of religious fraud also resonates. Bernadette Meyler categorized the conflict between the majority and Justice Jackson as the dispute as to whether religious value should be "embodied . . . in the sincerity of the founders of the religions" or "assess[ed] . . . through the eyes of the receiver."<sup>177</sup> Stephen Rosenthal argued forcefully for the constitutionality of regulations targeting kosher fraud. Nonetheless, he made the distinction between situations in which the alleged harm of the fraud is purely spiritual (e.g., fortune telling or palm reading) and situations such as kosher fraud in which there is "a set of objectively verifiable characteristics as well as a clear market value"<sup>178</sup> and acknowledged that Justice Jackson's rationale remains persuasive of the former.

Opponents of Justice Jackson's blanket prohibition typically acknowledge such concerns as legitimate and alive. Nonetheless, they opine that appropriate procedural and/or substantive safeguards will be sufficient to mitigate those concerns to a tolerable level. Stephen Senn argued in favor of prosecuting religious fraud because victims are particularly susceptible, given the relationship imbalance between religious leaders and adherents and that religion would be corrupted in the eyes of the public if religions are frequently exploited by charlatans.<sup>179</sup> Recognizing constitutional concerns, he argued for procedural safeguards such as (1) inadmissibility of improper evidence (e.g., attempts by prosecutors to ridicule the religion); (2) the right to bench trial and more latitude in jury dismissal; (3) more specific jury instructions; (4) the judge requiring a heightened evidentiary standard before passing on the question to the jury; and (5) a more robust review at appeal (although not necessarily a *de novo* review).<sup>180</sup>

Paul Horwitz is worried about how courts will try to get to fraudulent religions via other means that might collaterally harm legitimate religions

173. See e.g., Kagan, *supra* note 162, at 1218–20; Marshall, *supra* note 35, at 255.

174. Kagan, *supra* note 162, at 1218–20.

175. See Marshall, *supra* note 35, at 255.

176. See Noonan, *supra* note 156, at 718–24.

177. Meyler, *supra* note 158, at 893–94.

178. Stephen F. Rosenthal, *Food for Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment*, 65 *GEO. WASH. L. REV.* 951, 985–88 (1997).

179. See Senn, *supra* note 38, at 328–32.

180. See *id.* at 336–41.

(e.g., decreasing the threshold or scope of constitutional protection for religious liberty for all religions) and thus argues in favor of prosecuting religious fraud.<sup>181</sup> To deal with concerns of religious liberty, he argues for substantial rules to regulate the scope of prosecution. These include (1) limiting the type of individuals who may be prosecuted to those “who, with a fraudulent and insincere motive, invent and benefit from a religion or a religious doctrine;”<sup>182</sup> (2) a broad conception of what constitutes religious speech (e.g., healing) in which only sincerity but not veracity may be assessed; and (3) restricting the evidence that may be admitted to prove insincerity to (i) testimony, statements, or reliable testimony concerning admissions against interest by the defendant, (ii) coexistence of relevant secular fraud, and (iii) evidence of concealment.<sup>183</sup>

Such proposals have softened the objections by those who would do away with sincerity tests altogether. Kent Greenawalt opined that the “wisest course is not to have prosecution for fraud about spiritual matters” but did not take it as constitutionally mandated and is open to Stephen Senn’s procedural safeguards as a “reasonable alternative” to pursue such prosecutions using a sincerity test.<sup>184</sup> Likewise, whereas Ira Lupu recognizes the inherent bias against unknown or unpopular religions in insincerity tests, he is sympathetic to how procedural safeguards in the form of specific jury instructions and a more robust appellate review (i.e., doctrine of constitutional fact) might mitigate the problems.<sup>185</sup>

At the other end of the spectrum is Nathan Chapman, who argues that courts can and should adjudicate religious sincerity under ordinary pleading and evidentiary standards.<sup>186</sup> For him, the constitutional and normative considerations of religious liberty require only one additional rule, namely, that the court should not admit evidence of religious inaccuracy or implausibility and should primarily limit evidence to (1) incentives for insincerity; (2) inconsistent behavior; and (3) consistency with beliefs of a claimant’s religious beliefs.<sup>187</sup> Thereafter, a specific jury instruction will suffice. He observed that jurors are routinely instructed “to not allow their biases or personal beliefs about this or that to interfere with their evaluation of the evidence. There is no reason to think that bias about the plausibility of a religious claim is especially hard to put aside when one evaluates the claimant’s sincerity.”<sup>188</sup> Indeed, citing a lack of direct evidence of a jury’s religious bias and other evidence indicating a lack of jury bias in general, he does not view bench trials as a superior alternative to his proposal.<sup>189</sup> Although writing primarily in response to *Hobby Lobby* and in

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181. See Horwitz, *supra* note 37, at 147.

182. See *id.* at 147.

183. See *id.* at 147-50.

184. GREENAWALT, *supra* note 34, at 115-16.

185. See Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 953-54 (1989).

186. See Chapman, *supra* note 40, at 1189-91.

187. See *id.* at 1231-39.

188. *Id.* at 1208-09.

189. See *id.* at 1230-31.

the context of religious accommodation, he is in favor of prosecuting religious fraud using a sincerity test on account of the cost of religious fraud, which he describes as “obvious,” with the “religious charlatan [using] something that many people place beyond value to bilk them of money, time, and energy.”<sup>190</sup>

### 3. *Summary: Judge vs Jury*

Underlying the debate as to the desirability of, and the appropriate safeguards for, the use of a sincerity test in religious fraud prosecution is the different assumptions as to how the factfinders actually go about the fact-finding process. For supporters of Justice Jackson’s perspective noted above, both judge and jury are so prone to religious bias that any adjudicating of religious fraud would be inflicted with their perceptions of what is or should be legitimate religious teachings or practices. Such perceptions are not static and may evolve to a broadly accommodating conceptualization in light of increased religious pluralism,<sup>191</sup> but remain hostile to new and unorthodox religious movements.

For scholars who advocate for deploying a sincerity test under additional procedural or substantive safeguards, a key assumption is the judge’s ability to manage the risks of religious liberty violations. The proffered proposals typically place the judge in an elevated position vis-à-vis the jury in the fact-finding process, either through the right of the defendant to a bench trial or greater scrutiny of the factual conclusions at the appellate level. At the very least, the judge is tasked with the gatekeeper role in ensuring the inquiry into a sincerity test is not distracted by the perceived veracity of the claims, whether through crafting the appropriate jury instructions or excluding prejudicial evidence.

Nathan Chapman’s optimism and confidence in the jury to faithfully apply the sincerity test is notable for its rarity in the literature. Nonetheless, his reasoning is instructive for the purpose of this Article. A key justification for his position is that “jury bias is unproven,” especially in the context of religious sincerity.<sup>192</sup> Conversely, he supported his proposition by alluding both to the empirical studies suggesting that juries are more likely to find against the government in litigation on unconstitutional conduct and to the argument that inherent diversity of juries will likely result in identification with a wide array of claimants.<sup>193</sup>

### C. Implications from the Hong Kong Case Study

The paucity of religious fraud prosecutions in the United States, especially when the alleged fraudulent claims are religious and mandate the

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190. *Id.* at 1211-12.

191. See EDWIN S. GAUSTAD, PROCLAIM LIBERTY THROUGHOUT ALL THE LAND 51 (2003). *Cf.*, Leo Pfeffer, *supra* note 147, at 25-26 (arguing that marginalization occurs due to tension with secular rather than theological concerns).

192. See Chapman, *supra* note 40, at 1230-31.

193. See *id.* at 1230-31.

head-on application of a sincerity test,<sup>194</sup> means that even anecdotal or qualitative examination of the factual issues of religious bias in a sincerity test have been precluded. This places this Hong Kong case study in a unique position to contribute to the debate. First, Hong Kong has experienced a series of recent and regular religious fraud prosecutions under the same criminal provision. This enables the close examination of how the courts repeatedly deal with the identical legal requirement of falsity over a set of similar fact patterns under comparable underlying socioeconomic conditions. Second, the intermediate severity of the criminal provision meant that the majority of the prosecutions took place as bench trials in the District Court under Hong Kong criminal procedural laws.<sup>195</sup> This provides a set of judgments in which the judge is compelled to set out the reasoning for the factual findings, which particularly sheds light on the process by which the falsity of the religious fraudulent claims are established.

As elaborated above in Part I.C, the actual approach adopted by the Hong Kong courts revealed a common intrinsic suspicion of any claims regarding luck-improving religious rituals that involve sexual acts. For many judges, such a claim is not only incredulous on its face but also contrary to what religion ought to be. Admittedly, the defendants are typically deemed by the judges as non-credible witnesses and may have committed other acts such as procuring sex with threats or through force, such that the defendants might have been convicted in any event under a properly applied sincerity test. Nonetheless, the ostensible reliance of objective assessment of religious veracity by the presiding professional judge (as opposed to a jury), who is supposedly constrained by religious liberty prescriptions under constitutional, international human rights and common law, does buttress the concerns expressed by Justice Jackson and his supporters. Trials of religious fraud would often be reduced to trials of religious heresy, both in substance and appearance. More pointedly, the Hong Kong experience suggests that the often-proposed solution of bench trials and other procedural safeguards that are premised on judges serving as gatekeepers is likely of limited efficacy to restrain religious bias.

As an objection to this preceding argument, the United States is not Hong Kong. Religious liberty is much more ingrained and respected by both the judges and the public in the United States, such that the bias witnessed in Hong Kong does not speak to the debate in the United States. This is a potent argument to which this Article is highly sympathetic. Indeed, the author has previously highlighted the glaring oblivion among the legislators and the public with regard to formal religious discrimination in the Hong Kong legal regime.<sup>196</sup> Nonetheless, although the United States

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194. Cf. *United States v. Jinwright*, 683 F.3d 471 (4th Cir. 2012); *United States v. Rasheed*, 663 F.2d 843 (9th Cir. 1981); *Tilton v. Marshall*, 925 S.W.2d 672 (Tex. 1996).

195. See District Court Ordinance (1997) Cap. 336, §§ 74–80, (H.K.).

196. See JIANLIN CHEN, *THE LAW AND RELIGIOUS MARKET THEORY: CHINA, TAIWAN AND HONG KONG* 127–34 (2017). Notably, there have been regular convictions of religious fraudulent sex and religious frauds in Taiwan, a nearby East Asian jurisdiction, where

as a whole may be much more vigilant in its considerations of religious liberty, it is undeniable that there remain significant pockets within both the general public and the legal professions that do not always appreciate the demands arising from the First Amendment.<sup>197</sup>

Moreover, it is worth remembering that Hong Kong is not some back-water exotic jurisdiction; rather Hong Kong is a wealthy jurisdiction with a per-capita annual GDP of around USD \$44,000.<sup>198</sup> Hong Kong is ranked just a place below the United States in the most recent United Nation's Human Development Index.<sup>199</sup> Its English common law legal system is also well regarded by the international community, ranking sixteenth worldwide in the 2016 Rule of Law index, above the United States, which is eighteenth.<sup>200</sup> At the very least, the experience of Hong Kong serves a cautionary reminder of the perils of assuming that religious liberty will be readily extended by the judiciary to unpopular minority religions.

Additionally, the Hong Kong experience raises an implication that is independent and immune on purported cultural differences. The U.S. discourse about the operation of a sincerity test in religious fraud prosecution assumes that defendants would testify in court asserting the truth of their religious claims. This would in turn generate what commentators regard as the best evidence (in light of the probative value and risk of impermissible religious prejudice) for challenging sincerity, namely, defendants' statements and testimonies.<sup>201</sup> This is a reasonable assumption when the alleged religious fraud in question is perpetuated by the leader of a purported religious organization—there, there would usually be copious amounts of written materials detailing the religious claims such that there might be a limited litigation advantage for the defendant to elect to remain

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the courts similarly—and problematically—assume the falsity of the religious claims. See Jianlin Chen, *Joyous Buddha, Holy Father, and Dragon God Desiring Sex: A Case Study of Rape by Religious Fraud in Taiwan*, 13 NAT'L TAIWAN L. REV. (2018) (forthcoming); Sheng-wei Tsai, 論強制性交罪違反意願之方法 [Forcible Means in the Crime of Forced Sexual Intercourse], 18 ACADEMIA SINICA L.J. 41, 61–64 (2016); Chun-Jin Tu & Po-Chiang Liu, 以宗教之名行騙性交是否構成強制性交罪 [Does Sexual Intercourse Obtained by Religious Deception Constitute Rape?], 58 MILITARY L.J. 50, 58–62 (2012).

197. A notable recent example would be the travel restrictions issued by the Trump Administration. While there is serious and important debate as to whether the actual executive orders that target nationality without explicit mention of religion is constitutional, the president's campaign rhetoric of banning Muslim immigrant does not adhere to the principles of religious freedom. See Abed Ayoub & Khaled Beydoun, *Executive Disorder: the Muslim Ban, Emergency Advocacy, and the Fires Next Time*, 22 MICH. J. RACE & L. 215, 215 (2017); Joe Palazzolo, *Travel Ban Ruling: Decision Raises Opposing Views*, WALL ST. J., June 27, 2017, at A4. Indeed, similar anti-Islam sentiment and corresponding discriminatory policy proposals have been frequently raised by Presidential candidates during the Republican primaries. See e.g., Marsha B. Freeman, *Holier than You and Me: "Religious Liberty" is the New Bully Pulpit and Its New Meaning is Endangering Our Way of Life*, 69 ARK. L. REV. 881, 892–95 (2017).

198. See JAHAN, *supra* note 28, at 198.

199. *Id.*

200. See WORLD JUST. PROJECT, *supra* note 45, at 5.

201. See Horwitz, *supra* note 37, at 147–50; Senn, *supra* note 38, at 342–51.

silent.<sup>202</sup> In addition, defendants risk losing all their remaining adherents if they are not prepared to defend their religious claims in court. However, there remain scenarios in which defendants are under limited pressure to testify or otherwise admit to making those religious statements, such as when defendants are operating as individuals and/or primarily allude to verbal representations of religious claims.<sup>203</sup> Under such scenarios, as revealed by this Hong Kong case study, the sincerity test is essentially stone-walled and compels reliance on assumptions, whether implicit or explicit, about what constitutes plausible religious claims.<sup>204</sup>

### III. Prosecuting Romantic Fraudulent Sex: Fraudulent Sex Criminalization as Market Regulation

Part II engages with the religious fraud aspect of religious fraudulent sex prosecutions. This dimension has thus far been absent from the academic discourse on fraudulent sex, notwithstanding the frequent mention and discussion in U.S. law reviews on intriguing fraudulent sex cases in other jurisdictions.<sup>205</sup> The omission is understandable, given the lack of awareness of such cases in even the Hong Kong and U.K. literature until now. However, beyond adding to the already fascinating (or perverse?) myriad of sexual deceptions<sup>206</sup> and perhaps triggering a socio-legal inquiry on the intersection between sex and religious practices,<sup>207</sup> this actual employment of a lesser fraudulent sex criminal offence to convict arguably impossible-to-verify religious claims also allows a more concrete footing on which to examine a persistent issue in the discourse of fraudulent sex, namely, the problem of sex procured by a false proclamation of

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202. For example, the bulk of the alleged fraudulent representations in the *Ballard* case are contained in literature distributed by the defendants. See *Ballard*, 322 U.S. at 79-80.

203. See e.g., *Hong Kong v. Ho Ka Po Tony*, DCCC 1169/2012 (D.C. Apr. 29, 2013) (Legal Reference System) (H.K.).

204. Paul Horwitz opined that in addition to the defendant's testimony, evidence relating to coexistence of relevant secular fraud and evidence of concealment could and should be permitted in proving lack of sincerity. See Horwitz, *supra* note 37, at 147-50. However, the former would have established conventional fraud and thereby negated the necessity for a sincerity test altogether. The latter is an option that is not particularly common as per this Hong Kong case study. The only case in which there is arguably evidence of concealment is the *Ho Ka Po Tony* case involving the foreign domestic helper, which was also a relatively rare case where the victim was not made aware of involvement of sexual intercourse prior to meeting the defendant. See *supra* Part I.B.4.

205. Jed Rubenfeld begins his piece with the Israeli *Kashour* case. See Rubenfeld, *supra* note 4, at 1375. See Gross, *supra* note 11, at 4-15 (discussing gender impersonation cases from Israel and the U.K.). See generally Falk, *supra* note 49, at 48-89 (discussing a wide survey of deceptive cases in the United States and around the world). Notably, Patricia Falk mentioned an entertainment industry sex scam court case from Hong Kong as garnered from the Lexis newspaper database. She notes that the convictions involved the "procurement" offence. *Id.* at 73-74.

206. See e.g., DONIGER, *supra* note 4.

207. See e.g., Ludger H. Viehues-Bailey, *Holiness Sex: Conservative Christian Sex Practices as Acts of Sanctification*, 6 J. MEN, MASCULINITIES & SPIRITUALITY 4 (2012); Janine Anderson Sawada, *Sexual Relations as Religious Practice in the Late Tokugawa Period: Fujido*, 32 J. JAPANESE STUD. 341 (2006).

love. By demonstrating the legal possibility of successfully prosecuting such romantic fraudulent sex under Section 120 and the ironically greater justification for such prosecution, as compared to religious fraudulent sex, this Part III highlights how fraudulent sex criminalization is also a regulation on the subject matter of the falsehood, be it religion, love, or other forms of lies.

#### A. Academic Debate on the Merits of Punishing Romantic Fraudulent Sex

Romantic fraudulent sex is a staple in the academic literature on fraudulent sex criminalization. It is frequently used as a rhetoric device to highlight the logical conclusion posed by arguments in favor of broader criminalization of deceptive sex, such as when Jed Rubenfeld observed that “[i]f our criminal sex law were really designed to vindicate a right of sexual autonomy, sex plus lies should equal jail time, whether the lie was a false claim of bachelorhood, ‘I love you,’ or any other material misrepresentation reasonably calculated to induce another person to have sex.”<sup>208</sup> At the same time, this purportedly radical and unpopular outcome has been rapidly countered by excluding this species of fraudulent sex from the proposal for broader criminalization of deceptive sex, such as when Gowri Ramachandran argued that “we can also treat sexual partners as ‘on notice’ of certain common misrepresentations and exaggerations if we are worried about people who are too eager to say ‘I love you,’ for instance.”<sup>209</sup>

Nonetheless, there has been a concerted engagement with the issue. In a 2005 article published in the U.K., Jonathan Herring provocatively argued that a false proclamation of “I love you” to get sex should be punished.<sup>210</sup> He criticized the traditional reluctance to criminalize deception in sexual relationships as being premised on the wrong starting point, namely, that sexual intimacy is a good thing and criminalization is meant to target sexual activities that are harmful. Instead, he advocated that the law should determine what the acceptable forms of sexual intimacy are and then criminalize the rest as harmful, with the tentative suggestion that acceptable forms of sexual intimacy would involve elements of “reciprocity, integration, responsibility and mutuality.”<sup>211</sup> This triggered a forceful response from Hyman Gross, who observed that “words said to arouse feelings and to ‘put one in the mood’ are understood to be part of a game that lovers play in which the propriety of what is said does not depend on its truth”<sup>212</sup> and that the law should not criminalize what are perceived to be

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208. Rubenfeld, *supra* note 4, at 1410.

209. Ramachandran, *supra* note 22, at 387.

210. See Herring, *supra* note 5, at 511. See also Alisdair A. Gillespie, *The Electronic Spanish Prisoner: Romance Frauds on the Internet*, 81 J. CRIM. L. 217 (2017) (arguing that such fraudulent sex would not be perceived or treated as rape by the public, and suggesting that it might be punished as a lesser procurement by false pretense offence that is gender neutral).

211. Herring, *supra* note 5, at 515.

212. Gross, *supra* note 4, at 224.

private moral failings without demonstrable harm to others.<sup>213</sup> Michael Bohlander joined the critique by noting that the “real harm” of such fraudulent sex is “[b]eing deceived and therefore humiliated”<sup>214</sup> and bemoaned the perceived “exaggerated political correctness” that underpins Jonathan Herring’s proposal.<sup>215</sup>

Across the Atlantic in the United States, Stephen Schulhofer defended the reluctance to criminalize sexual fraud where it relates to emotional attraction and commitment (e.g., “I love you” and “I want to spend my life with you”) on several grounds, including how the “especially difficult and speculative” process to determine falsity, the indeterminate nature of the harm, the backdoor revival of outdated regulation on sexual morality, and “the elusive nature of ‘truth’ and the complex role of emotional imagination in sexual encounters.”<sup>216</sup> The last ground—a distinct problem from the evidential difficulty that Stephen Schulhofer acknowledges is not insurmountable—is that “erotic experience, like storytelling in literature, so often involves fantasy and the ‘willing suspension of disbelief.’”<sup>217</sup> Building on Stephen Schulhofer’s work, David P. Bryden is similarly against criminalizing lies about love (arguing for specific exemption for emotional declaration in any legislative or judicial attempt to expand criminal liability for fraudulent sex) because of the massive intrusion into the private life of an individual, the questionable and at least less severe harm of such fraud, and evidential difficulties, both in terms of determining what the facts are and the intrusive process of finding out the facts.<sup>218</sup>

## B. Prosecuting Romantic Fraudulent Sex through Section 120 and the Crude Sincerity Test

It does appear that the general consensus even among proponents of greater criminalization of fraudulent sex (e.g., Stephen Schulhofer argues that misrepresentation as to the absence of sexually transmitted disease should vitiate consent)<sup>219</sup> is that romantic fraudulent sex should not be penalized for two broad reasons: the evidential difficulties in determining falsehood and the excessive and moralistic intervention in individuals’ private affairs. The merit of the latter rationale is beyond the scope of this Article, but the former is particularly salient in light of this Article’s examination of how Section 120 has been used to prosecute religious fraud. The evidential concerns of romantic fraudulent sex are similarly pertinent for religious fraudulent sex. The truth of a representation as to the divine and religious is as elusive, if not more so, than the truth of a proclamation of love. Similarly, the indeterminate harm argument against criminalization

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213. See *id.* at 226–27.

214. Bohlander, *supra* note 2, at 416.

215. See *id.* at 412.

216. See SCHULHOFER, *supra* note 47, at 155–58.

217. *Id.* at 158.

218. See Bryden, *supra* note 5, at 468–70.

219. See SCHULHOFER, *supra* note 47, at 158–59. See also WERTHEIMER, *supra* note 72, at 198 (“Love, not just sex, may be deeply intertwined with false beliefs . . .”).

of romantic fraudulent sex (especially when compared to conventional fraud involving property)<sup>220</sup> is equally applicable to religious fraudulent sex. The loss of the promised favorable divination would be impossible to quantify or even be recognized.<sup>221</sup> In this regard, it is also germane to point out that discussion of romantic fraudulent sex criminalization often revolves around the issue of rape. Although scholars recognize the possibility of pursuing such criminalization via a lesser criminal offence (such as Section 120), the discussion of this possibility is only in passing, given how such non-rape fraudulent sex provisions are either extremely rare (United States)<sup>222</sup> or abolished (U.K.)<sup>223</sup> when the scholarly discussion takes place.

This, in turn, means that the crude sincerity test employed by the Hong Kong courts to overcome the evidential difficulty in establishing religious falsehood can be equally applied to determine the veracity of romantic representation, including the classic statement of “I love you.” Through the purported use of a sincerity test to resolve the issue of falsehood, the court is implicitly (and correctly) acknowledging that trying to determine what objectively constitutes “true” love is messy and unnecessary and that it is more effective and feasible to simply focus on assessing whether the defendant is sincere when he/she made the proclamation of love. This inquiry can be conducted by focusing on any inconsistencies between the defendant’s purported definition of love and the defendant’s actions and/or testimony. For example, if the defendant defines love as having special care and concern for the person,<sup>224</sup> his/her testimony revealing he/she did not consider the welfare of the “victim” when he/she made important decisions potentially affecting both parties could be used against him/her. Alternatively, and equally likely, where the defendant has elaborated to the victim the implications of his/her love (e.g., will marry

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220. See Bryden, *supra* note 5, at 463-64 (“we cannot presume causation [of harm arising from romantic fraudulent sex], as we can in most serious financial scams”). See also WERTHEIMER, *supra* note 72, at 202-04 (discussing, critically, what are the possible experiential and non-experiential harm arising from deceptive sex). Cf. DONIGER, *supra* note 4, at 76-87 (discussing via the literary perspective the grave humiliation and other psychological and emotional harm that may arise from fraudulent sex while also recognizing the possibility of genuine pleasure).

221. See *Ballard*, 322 U.S. at 94-95 (Jackson, J. dissenting) (“The chief wrong which false prophets do to their following is not financial . . . the real harm is on the mental and spiritual plane. . . . When they are deluded and then disillusioned, cynicism and confusion follow. The wrong of these things, as I see it, is not in the money the victims part with half so much as in the mental and spiritual poison they get.”).

222. For a survey of state statutes dealing with fraudulent sex, see Falk, *supra* note 49, at 107-19.

223. Jonathan Herring did mention a prior offense of procuring sex by false pretenses that was recently (at the time of his writing in 2005) abolished, but used the repeal to double down on his proposal of criminalizing romantic fraudulent sex as rape. See Herring, *supra* note 5, at 522.

224. For a discussion of how the concept of love may be analytically separated into the two dimensions of “attractive love” (which revolves around fulfillment of needs/desires of self) and “virtuous love” (which focuses on benefiting the other), see Vincent Jeffries, *The Structure and Dynamics of Love: Towards a Theory of Marital Quality and Stability*, 27 HUMBOLDT J. SOC. REL. 42, 44-47 (2002).

him/her or will be in an exclusive relationship with him/her), the examination of sincerity can either be shifted to whether the defendant intended to uphold those promises<sup>225</sup> or adopted those implications as the purported defendant's definition of love.

This attempt to find contradictions may not be applicable if the defendant elected not to give evidence. But as with the religious fraud case, the court can still apply certain assumptions to find that the proclamation of love in certain contexts is *prima facie* false. Examples include when the defendant has simultaneously engaged in multiple sexual or romantic relationships with other people or when the defendant is verbally or physically abusive to the victim.<sup>226</sup> Notably, for the later example, testimonial evidence by the victim on the verbal and physical abuses levied at him/her will suffice for the fact-finding process.

Admittedly, there is a significant difference between how the crude sincerity test is applied to romantic fraud. For religious fraudulent sex, the court is at times essentially treating certain representations on religious matters (here being that sex is part of religious ritual) as *per se* false. However, for romantic fraudulent sex, additional evidence of the defendant's conduct or words are necessary to establish falsity of the proclamation of love. The main reason for this departure is because love is a widely-accepted rationale for sexual activity, such that procuring sex on the pretext of love is itself an utterly plausible premise, and the question is whether the premise is factually true (i.e., whether the defendant actually did love the victim). On the other hand, performance of a luck-improving religious ritual is a much more unconventional reason to have sex (at least as perceived by the judges), so as to trigger a wholesale rejection of the premise (i.e., there is no such religious ritual as a matter of fact). As he will elaborate in the next section, this distinction is precisely one of the reasons that prosecuting romantic fraudulent sex is more justified than religious fraudulent sex.

### C. Romantic Fraudulent Sex versus Religious Fraudulent Sex

The previous section explains how Section 120, together with the crude sincerity test applied by the courts, could be employed to prosecute romantic fraudulent sex. There are no such prosecutions, as compared to numerous prosecutions of religious fraudulent sex, whether in terms of

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225. The provision explicitly stipulates that the relevant representation could include "representation as to the intention of the person." Crimes Ordinance, *supra* note 16, § 120(2).

226. In an ethnological survey of the concept of love in the U.S. and Russia, it was found that three characteristics of altruism, intrusive thinking (always thinking) and supreme happiness resonate strongly for both genders in both jurisdictions. See Victor de Munck, Andrey Korotayev & Darya Khaltourina, *A Comparative Study of the Structure of Love in U.S. and Russia: Finding a Common Core of Characteristics and National Gender Differences*, 48 *ETHNOLOGY* 337, 354 (2009). See also Harry T. Reis & Arthur Aron, *Love: What is it, Why Does it Matter, and How Does it Operate?*, 3 *PERSP. ON PSYCHOL. SCI.* 80, 82 (2008) (discussing psychological research that find trust and caring as "highly prototypical of love").

absolute number or in proportion to the overall use of Section 120. Although this Article is not suggesting that Section 120 should be used to prosecute romantic fraudulent sex, it is important to note that it is ironically more justified to prosecute romantic fraudulent sex when compared to religious fraudulent sex. The reasons are twofold.

First, as explained in Part II, the courts are constitutionally prohibited from making determinations as to what constitutes true religion. Even if the sincerity test may arguably pass constitutional muster, there remains normative concerns about how its application would likely introduce religious bias against an unpopular minority faith. The legal and normative considerations are substantially less salient for romance. It is often acknowledged that as a normative matter, the state should largely stay away from the private affairs of individuals, no less matters of the heart.<sup>227</sup> Courts in the United States have expansively interpreted (created?) the constitutional right of substantive due process to constraint state regulations on marriage, sex-related activities (e.g., contraception or abortion), and sexual activities (e.g., prohibition of sodomy).<sup>228</sup> Nonetheless, it is still common to find state intervention in the realm of sex, marriage, and family, even among purportedly liberal societies.<sup>229</sup> More importantly, there is no *per se* prohibition against the state defining and determining what love is. In this regard, it is interesting to observe that the Hong Kong courts have been quite comfortable in discussing love, from opining whether the defendant had any love or affection toward the victim<sup>230</sup> to direct engagement of what “genuine love” is.<sup>231</sup>

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227. See Gross, *supra* note 4, at 225–27; SCHULHOFER, *supra* note 47, at 155–58.

228. In the U.S., of particular relevance is the right of intimate association. See Nancy Catherine Marcus, *The Freedom of Intimate Association in the Twenty First Century*, 16 GEO. MASON U. CIV. RTS. L.J. 269, 317–28 (2006); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 626–29 (1980).

229. Such state intervention usually takes the forms of active advocacy, subsidy and/or legal support for the particular family arrangement consisting of marriage with children. See Bruce C. Hafen, *The Family as an Entity*, 22 U.C. DAVIS L. REV. 865, 878–89 (1989) (discussing how regulations on family have simultaneously been reduced for certain aspects, such as those relating to morality and reproduction, while increasing in others, such as those issues involving minors). See also Letter from Dayna K. Shah, Assoc. Gen. Counsel., U.S. Gen. Accounting Off., to Hon. Bill First, Majority Leader, U.S. Senate (Jan. 23, 2004) (observing that there are easily over 1000 “federal statutory provisions . . . in which marital status is a factor in determining or receiving benefits, rights, and privileges”), available at <https://www.gao.gov/new.items/d04353r.pdf> [<https://perma.cc/5WCX-C4TS>].

230. See e.g., *Hong Kong v. Tang Tin-yau*, DCCC388/2016, ¶ 30 (D.C. Nov. 28, 2016) (Legal Reference System) (H.K.) (rejecting the defendant’s claim that he loves the victim, and considering it as “one-sided invented feelings” on account of the age difference between the 63 year old defendant and 12 year old victim); *Hong Kong v. Tang Tak-cheung*, HCCC 208/2013 (C.F.I. Sept. 17, 2013) (Legal Reference System) (H.K.) (opining that “[i]t can hardly be said that the defendant had any love and affection towards any of the girls” in a plead guilty case involving defendant posing as a female doctor online to get nude photos of underage victims before using those photos to pressure sex on the victims).

231. See e.g., *Hong Kong v. Tong Yip-Chung*, DCCC 755/2013 (D.C. Oct. 9, 2013) (opining that “[L]ove can be blind, and love can become hate, but love does not equate to possessing the other party, or requiring to love you more. Real love is about how one

The second reason why prosecution of romantic fraudulent sex is more justified than religious fraudulent sex is that love is a much more widely accepted reason for sexual activities than is religion, whether perceived as such by the general public or in terms of state policy. Indeed, whereas prostitution has been decriminalized in many jurisdictions,<sup>232</sup> courts are still extremely reluctant to enforce contracts, agreements, and promises whereby the consideration is sexual on the grounds that use of sex as a commodity contravenes public policy.<sup>233</sup> Indeed, where such a contract/agreement/promise is enforced by the courts or recognized by statute, it is in the context of “seduction” in which the promise is restricted to the promise of marriage.<sup>234</sup> Thus, even if the legal doctrines surrounding seduction are arguably rightly abolished as being premised on outdated notions of gender and sexual norms<sup>235</sup> and that the state is slow to intervene on matters of pure sexual morality,<sup>236</sup> it will still be a stretch to argue that sex for love is on the same normative footing as the other forms of sex, especially when the sex is conducted as part of religious ritual to obtain advantageous divine intervention for the immediate problems of the participant.

Another way to appreciate the differences in normative positions between romantic sex and religious sex is vis-à-vis the common argument proffered when defending the limited criminalization of fraudulent sex: namely, the victim could have adopted an appropriate level of skepticism and engaged in the conduct at their own risk.<sup>237</sup> The consequence of such an approach is reduced activity, as it does when the prevalence of counterfeit goods negatively impacts commercial markets.<sup>238</sup> This consequence

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cares for the other, for the good of the other, and not hurt the other”). See Kevin Kwok-yin Cheng, *Moral Discourse in Hong Kong’s Chinese Criminal Proceedings*, 3 CHINESE J. COMP. L. 375, 383-88 (2015) (discussing how lower court judges in Hong Kong often employed moral discourse to lecture both the defendant and the public about the judges’ opinions of morality).

232. See Victoria Nagy & Anastasia Powell, *Legalising Sex Work: The Regulation of ‘Risk’ in Australian Prostitution Law Reform*, 28 CURRENT ISSUES CRIM. JUST. 1, 5-6 (2016) (discussing the regulation of sex work in Australia); see also Suzanne Bouclin, *Regulating Sex Work in Canada*, 2012 PUB. L. 387, 388-91 (2012) (discussing the legal and political landscape in Canada vis-à-vis sex work regulation).

233. For the U.K., see GUENTER TREITEL, *THE LAW OF CONTRACT* 443-44 (11th ed. 2003). For the U.S., see Andrew Gilden, *Sexual (Re)consideration: Adult Entertainment Contracts and the Problem of Enforceability*, 95 GEO. L.J. 541, 557-60 (2007).

234. See Falk, *supra* note 49, at 116-18. See FREEDMAN, *supra* note 46, at 33-51 (discussing the historical and social context of the crime of seduction in the U.S.). See also H.W. Humble, *Seduction as a Crime*, 21 COLUM. L. REV. 144 (1921) (an early twentieth century journal article discussing the then trend of criminalizing seduction and finding such a trend not objectionable).

235. Hong Kong previously recognized the right to bring a civil suit for breach of promise of marriage, but this cause of action was legislatively repealed in 1971. See Wang Xi v. Lee Pok Hok Andrew, [2011] 1 H.K.L.R.D. 1134, 1140 (C.A.) (H.K.).

236. See Hafen, *supra* note 229, at 878-81.

237. See McJunkin, *supra* note 22, at 21-25 (discussing the prevalence of this argument but critical thereof).

238. See Trang Huyen My Pham & Muhammad Ali Nasir, *Conspicuous Consumption, Luxury Products and Counterfeit Market in the UK*, 13 EUROPEAN J. APPLIED ECON. 72,

may well be accepted or tolerated as a matter of principle, as implicitly recognized by proponents of this argument. Yet, it will be rather peculiar if the state is less concerned about decreased engagement of sexual activities in pursuit of love compared to the decreased engagement of sexual activities for luck-improvement religious rituals.

#### D. Fraudulent Sex Criminalization as Fraud Regulation

To be clear, this Article is not arguing that romantic fraudulent sex should be prosecuted. Rather, the critical comparison in the previous section serves two purposes.

First is to argue that the religious fraudulent cases should not have been prosecuted in the first place. This Article does not take a position as to whether the broadly worded Section 120 should be retained beyond observing that the abolishment in the U.K. has been frequently criticized by English academics together with suggestions that it should be reenacted<sup>239</sup> and that the Hong Kong Law Reform Commission has similarly recommend retention of the provision.<sup>240</sup> However, notwithstanding the confidence of academics that prosecutorial discretion will prevent abusive and otherwise undesirable use of such a broadly worded provision,<sup>241</sup> the employment of the provision to tackle religious fraudulent sex in Hong Kong has proven to be normatively problematic. Not only does the prosecution compel courts to inadvertently step into the objective determination of what constitutes legitimate/true religious practices, but the prosecutions are also aimed at victims' activities (i.e., sex to obtain favorable divine intervention) to which the state is at best indifferent to. That none of the cases (save perhaps the case involving a foreign domestic helper) involve abuses of fiduciary relationship—religious or otherwise—by the defendant further diminishes the justification for such prosecutions.<sup>242</sup>

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73–76 (2016); Thorsten Staake et al., *Business Strategies in the Counterfeit Market*, 65 J. BUS. RES. 658, 658 (2012).

239. See Laird, *supra* note 10, at 509; Simpson, *supra* note 23, at 110; Spencer, *supra* note 7, at 8. See also Temkin & Ashworth, *supra* note 77, at 345–46 (arguing the value of the abolished provision as a sort of “middle way” between complete acquittal and severe sanctions).

240. See LAW REFORM COMMISSION OF HONG KONG, *supra* note 78, at 68.

241. See Spencer, *supra* note 7, at 8. See also Susan Leahy, “No Means No”, *But Where’s the Force? Addressing the Challenges of Formally Recognizing Non-violent Sexual Coercion as a Serious Criminal Offense*, 78 J. CRIM. L. 309, 323–24 (2014) (arguing for prosecutorial discretion to ensure the reintroduction of the offence of procuring sex by threat will not result in over-criminalization). Cf., Alexandra Brodsky, “Rape-Adjacent”: *Imagining Legal Responses to Nonconsensual Condom Removal*, 32 COLUM. J. GENDER & L. 183, 194–95 (2017) (referring to Israeli cases where fraudulent sex involving deception as to ethnicity and gender was successfully prosecuted and observing that “[l]oo often, courts use rape by deception to validate and operationalize bigotry”).

242. See Green, *supra* note 23, at 226–27 (arguing that in the context of sex under fraudulent pretense of medical treatment, the presence of a fiduciary relationship increases the wrongfulness of the act, though suggesting that the act could be punished under sexual offences involving abuse of position of trust). See also Zanita E. Fenton, *Faith in Justice: Fiduciaries, Malpractice & Sexual Abuse by Clergy*, 8 MICH. J. GENDER & L. 45, 58–68 (2001) (discussing the problems of sexual misconduct/abuse by clergy and arguing that the relationship of trust and confidence warrants imposition of breach of

Second, and more importantly for this Article, the critical comparison with romantic fraudulent sex highlights that criminalization of fraudulent sex is—beyond the traditional lens of sexual offences that have been the focus of existing literature—also a form of fraud regulation.

When discussing whether fraudulent sex should be criminalized, academics tend to focus on how the law impacts sexual relationships and sexual activity<sup>243</sup> or, relatedly, sexual autonomy.<sup>244</sup> Other scholars, given the intimate association between romance and sex,<sup>245</sup> have gone further and debate on the collateral consequences of romantic relationships. Jed Rubenfeld and others are worried about the stifling of romance and love under broad criminalization of deceptive sex,<sup>246</sup> whereas Ben A. McJunkin argues that arguments in favor of limiting the scope of criminalized fraudulent sex are underpinned by a conception of seduction as something of widespread practice (thus implicitly rather innocuous) or even a social good (as intrinsic to romance).<sup>247</sup> Indeed, Alan Wertheimer identified how “sexual relationships” could be conceived as one of the four possible relationship models of a competitive game, contractual interaction, friendship, or fiduciary, with the empirical determination and/or normative choice of the model having corresponding implications for how law should treat deceptive sex.<sup>248</sup>

Such an inquiry focus is without a doubt understandable, necessary, and desirable. Sexual activities have always been an intrinsically special aspect of human life, with deep and extensive implications on gender and social ordering.<sup>249</sup> Rape law reform has also been a prominent and con-

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fiduciary duty, especially since “sexual activity, and especially misconduct, are not products of religious beliefs [of traditional major religions in society today]”); Janice D. Villers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U. L. REV. 1, 37-48 (1996) (highlighting the power imbalance between clergy counselors and parishioners that is accentuated by divine salvation and arguing that the relationship is fiduciary in nature and thus gives rise to corresponding liability for sexual misconduct).

243. See FREEDMAN, *supra* note 46, at 33-51; Herring, *supra* note 5, at 523-24.

244. See Rubenfeld, *supra* note 4, at 1417-22; Yung, *supra* note 2, at 27-35.

245. Psychological research has suggested there is some correlation of attitudes towards love to certain forms of sexual styles. See Kurt Frey & Mahzad Hojjat, *Are Love Styles Related to Sexual Styles?*, 35 J. SEX RES. 265, 269-71 (1998). See also DONIGER, *supra* note 4, at 63-66 (observing that while a linguistic and conceptual distinction is typically drawn between “love” and “lust” in many cultures, there is much ambiguity between the perceived boundary and causal relationship between the two).

246. See Bryden, *supra* note 5, at 462 (“the argument that deception in love is pervasive and perhaps essential to romance”); Rubenfeld, *supra* note 4, at 1416 (“And love? A vast engine of deception. Even in a hook-up culture, love floats on the horizon, an obscure object of desire, and what is more common than love’s blinding one person to the most basic facts about another?”).

247. See McJunkin, *supra* note 22, at 21-25. See SUSAN ESTRICH, *REAL RAPE* 69-71 (1987) (observing how the broad conception of permissible “seduction” in rape law is without parallel when compared to other areas of criminal law).

248. For example, the competitive model will permit much more deception as compared to the other models. See WERTHEIMER, *supra* note 72, at 210-13.

249. See generally JAMES BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* (1987); see also JEFFREY WEEKS, *SEX, POLITICS & SOCIETY: THE REGULATIONS OF SEXUALITY SINCE 1800* 3-6, 11-12 (John Stevenson ed., 2d ed. 2014).

tentious focal point for scholars, lawmakers, and advocates in the broader feminist challenges to outdated and sexist sexual norms.<sup>250</sup> It is thus no surprise that much of the discourse on fraudulent sex has been examined through the twin lenses of *criminal* law intervention in a *sexual* relationship. Indeed, attempts to make distinctions within the vast array of possible fraudulent sex remain rooted in the vantage point of sex. There is recognition as to how fraudulent representations may differ as to its nature and effect on the harm and corresponding justification for criminalization.<sup>251</sup> For example, the false representation that one is a movie agent to procure sex on the promise of offering a movie role arguably results in pecuniary harm rather than a violation of sexual autonomy.<sup>252</sup> This, in turn, supports criminalization of some form of more objectionable fraud (e.g., sexually transmitted disease<sup>253</sup> or sexual protection<sup>254</sup>) while not intervening in others.<sup>255</sup>

Without diminishing the significance of this inquiry, the critical comparison between romantic and religious fraudulent sex in this Article revealed another important dimension that warrants consideration. The subject matter of the representations utilized by the fraudsters have distinct legal and normative implications beyond the impact on sexual autonomy and relationships. Prosecuting religious fraudulent sex is as much about policing sex as it is about regulating religion. The transactional nature of the religious claims employed in these Hong Kong cases means that the nature of the fraud (i.e., purpose or inducement) and the harm suffered by the victim (i.e., loss of the promised benefits) is akin to the scenario of the false promise by a purported movie agent (and arguably identical in the *Au Yeung Kwok Fu* case, in which the victim is looking for divine intervention

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250. See Susan Estrich, *Rape*, 95 *YALE L.J.* 1087, 1090, 1137-61 (1986); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 *WASH. L. REV.* 581, 586-603 (2009).

251. A point of debate between Michael Bohlander, Hyman Gross and Jonathan Herring is that what exactly is the harm of romantic fraudulent sex as compared to fraudulent sex where the fraud goes to the nature of the act. See Bohlander, *supra* note 2, at 416; Gross, *supra* note 4, at 224-25; see also Green, *supra* note 23, at 219-24 (arguing for a graduated approach towards sexual offences whereby not all nonconsensual sexual intercourse are morally or legally equivalent, and that criminalization and punishment of fraudulent sex should reflect the differing degree of harm posed by different forms of deceptions).

252. See Bryden, *supra* note 5, at 466-67. See also WERTHEIMER, *supra* note 72, at 207-09 (making a distinction between the victim treating sex “as a cost for which she expects to receive a greater benefit” and “as an activity in which she would like to engage or as part of a valued relationship”).

253. See Rubinfeld, *supra* note 4, at 1416-17; SCHULHOFER, *supra* note 47, at 158-59. See also Shaffer, *supra* note 8 (examining, critically, the Canadian Supreme Court jurisprudence whereby deception about sexually transmitted diseases may vitiate consent if it poses a significant risk of bodily harm).

254. See Katsampes, *supra* note 9, at 172-82. See Brodsky, *supra* note 241, at 208-10 (arguing for the creation of a tort for such deception).

255. See also Chiesa, *supra* note 22, at 452-58 (arguing that coercion should be the touchstone for determining whether deceptive sex should be criminalized as rape); Williams, *supra* note 23, at 157-58 (arguing that sexual fraud as to legal characteristics may be punished as a distinct category, and observing how “such a category would support the protection given to such institutions elsewhere in law”).

to improve her modeling career).<sup>256</sup> Nonetheless, the prosecutions in this case study can and should also be conceived as a general clamp down on perceived pseudo-religious and superstitious activities,<sup>257</sup> with all the consequential normative and legal complications.

The immediate significance from this new conceptualization of fraudulent sex criminalization is that it provides a justification for selective criminalization of fraudulent sex on the basis of the normative desirability in policing certain forms of representations. The fraud in the inducement and the fraud in the factum distinction under the traditional common law approach toward fraudulent sex<sup>258</sup> have resulted in hugely controversial acquittals of perceived morally repressible defendants, such as the notorious U.S. case *Boro v. Superior Court*.<sup>259</sup> The corresponding public outcry has in turn spurred legislative responses that specifically criminalize the representation employed in the respective cases. As observed by Patricia Falk, “*Boro* and *Broderson* prompted statutory innovation in medical contexts, *Leiding* preceded its state’s psychotherapist legislation, and *Dutton* antedated specific clergy provisions.”<sup>260</sup> The same pattern is repeated elsewhere. In Australia, the states of Victoria and New South Wales have enacted specific provisions to address rape fraud involving medical purposes and marital status (between the perpetuator and victim) in direct response to controversial acquittals by the courts.<sup>261</sup>

These selective criminalization on the basis of the subject matter of the fraudulent criminalization has attracted criticism. Simon H. Bronitt argued that “[m]erely devising piecemeal statutory modifications on an ad hoc basis . . . tackles the symptoms rather than the cause of the problem,” namely, the restrictive view under common law that focuses only on fraud relating to the physical mechanics of the acts.<sup>262</sup> Similarly, Patricia Falk contends that the “major shortcoming [of these legislative enactments] lie in their very specificity.”<sup>263</sup> By only covering conducts within the specific context stipulated in the provision, potential victims are unprotected from otherwise similar conduct that does not fall under the provision.<sup>264</sup>

However, from the perspective of fraud regulation, such selective criminalization is common and justified. Whereas fraud typically attracts moral condemnation, legal responses to fraud do vary in accordance with the representation employed in the deception. A good illustrative example would be fraudulent representations in the sale of food products. A whole

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256. See *supra* Part I.B.1.

257. This is arguably the case given the presence of other discriminatory laws and policies in Hong Kong that target Chinese folk religions. See *infra* nn.311-319 and accompanying text.

258. See *supra* Part I.B.3.

259. Cal. Rptr. at 122.

260. Falk, *supra* note 49, at 65.

261. See Bronitt, *supra* note 49, at 296-98; see also SIMON BRONITT & BERNADETTE MCSHERRY, PRINCIPLES OF CRIMINAL LAW 680-81 (4th ed. 2017).

262. Bronitt, *supra* note 49, at 296-98.

263. Falk, *supra* note 49, at 101.

264. See *id.*

variety of lies are possible. In addition to deceptive sales practices associated with any commercial transaction, there could be disinformation on any of the characteristics of the food product itself, ranging from brand, quantity, ingredient (including the use of artificial additives), nutritional value, geographical origin, farming practices, therapeutic properties, religious certification, and so on.<sup>265</sup> Although the legal prohibition on misinformation of all these different characteristics can and should be properly categorized and approached as a form of food regulation, it is also apparent that each characteristic may have unique normative considerations (e.g., intellectual property, unfair competition, public health, agricultural policy, or religious freedom)<sup>266</sup> and thus often have their own distinct legal regimes with differing levels of state supervision and punishments.<sup>267</sup>

The same is applicable to fraudulent sex. Given how the medical profession has been heavily regulated in the modern state,<sup>268</sup> the specific legislative provision on fraudulent sex in the medical context could—in addition to the usual criminal law concerns about abuse of power and protection of vulnerable victims<sup>269</sup>—be treated as an extension of the regulation of the medical profession.<sup>270</sup> In the same vein, the Australian statutory amendment that renders deception of marital status between the perpetrator and the victim (i.e., whether the perpetrator and the victim are in fact legally married) as capable of vitiating consent<sup>271</sup> is in line with long-standing state interventions of requiring and facilitating public disclosure of marital status in a bid to protect the institution of marriage.<sup>272</sup>

To be clear, the argument here is not that criminalization of fraudulent sex should *always* be conducted in a piecemeal fashion on the basis of the subject matter of the representation. This new conceptualization of fraud

265. See generally NEAL D. FORTIN, *FOOD REGULATION: LAW, SCIENCE, POLICY, AND PRACTICE* (2d ed. 2017).

266. See e.g., Abigail A. Carson, *Something's Fishy: Combatting Seafood Fraud and Mislabeling in South Carolina*, 68 S.C. L. REV. 973, 981–83 (2017) (identifying the economic, health and environmental harm associated with deceptive labelling of seafood); see also Justin Hughes, *Champagne, Feta, and Bourbon: the Spirited Debate about Geographical Indications*, 58 *Hastings L.J.* 299, 339, 343–51 (2006) (unpacking the considerations of trademark, monopoly rent and agricultural subsidies that underpins the debate over regulation/protection of geographical indications); Rosenthal, *supra* note 178, at 956–59 (1997) (discussing the Establishment Clause considerations in regulations so as to tackle Kosher fraud).

267. For an overview of the different types of possible food fraud and the corresponding regulatory regime, see FORTIN, *supra* note 265.

268. See Edward P. Richards, *The Police Power and the Regulation of Medical Practice*, 8 *ANNALS HEALTH L.* 201, 202–23 (1999); Leland, *supra* note 52, at 1329, 1342.

269. See Green, *supra* note 23, at 225–27.

270. See also Anne C. Dailey, *The Psychodynamics of Sexual Choice*, 57 *ARIZ. L. REV.* 343, 358–71 (2015) (discussing the justifications for restricting sexual relationships between therapist and patient from the psychoanalytical perspective).

271. *Crimes Act 1900 No 40* (NSW) § 61HA sub-div 5 (Austl.) (“A person who consents to sexual intercourse with another person: . . . under a mistaken belief that the other person is married to the person . . . does not consent to the sexual intercourse.”).

272. See Teri Dobbins Baxter, *Marriage on Our Own Terms*, 41 *N.Y.U. REV. L. & SOC. CHANGE* 1, 11–20 (2017) (discussing the various legal regulations of marriage prerequisites, roles, and obligations).

regulation is meant to add to, rather than substitute, the existing inquiry from the perspective of sexual offences. There are many legitimate countervailing reasons—such as to ensure adequate protection of potential victims<sup>273</sup> or to punish morally culpable conduct<sup>274</sup>—to approach legal reform of fraudulent sex criminalization in a holistic and comprehensive manner. Rather, the central thrust of this new conception is to highlight the necessity and desirability of being actively aware of the disparate legal and normative considerations associated with, in particular, the subject matter of the false representation, whether in any legal reform on fraudulent sex criminalization<sup>275</sup> or, as per this case study, the exercise of prosecutorial discretion in enforcing broadly-worded fraudulent sex provisions.

#### IV. Fraud and Market

This Article's recognition that prosecution of fraudulent sex is also a regulation of the premise or context used in the fraud is in line with recent attempts to move the discourse on general rape law beyond the confines of criminal law. For example, given the limited success of criminal law in light of the high burden of proof, conflicting notions of what constitutes a rapist, and complicated reluctance on the part of victim, Kathrine Baker proposes the use of Title IX enforcements by the Department of Education to reduce the amount of nonconsensual sex on campus and thereby change the norm of male entitlement.<sup>276</sup> Margo Kaplan argues for an alternative public health framework to more holistically tackle the multifarious causes of sexual violence and coercion.<sup>277</sup> In a similar vein, the conceptualization of fraudulent sex criminalization as fraud regulation will also introduce new normative considerations that are independent from existing inquiry into the sexual dimension. Such recognition will facilitate co-opting the rich literature that utilizes economic perspectives to examine the impact of fraud, and the corresponding legal responses, on people's behaviors.

This part of the Article discusses the relevant economic literature that has critically analyzed how the cost of state intervention may outweigh the benefit and highlights the unintended and counterproductive consequences that may arise from Hong Kong's prosecutions of religious fraudulent sex.

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273. See Falk, *supra* note 49, at 101.

274. See Dripps, *supra* note 2, at 1780 (While specifically skeptical about criminalizing fraudulent sex, Dripps argued that rape law should be replaced by a selection of statutory offences that specifically and differentially targets the relevant culpable conduct.).

275. Cf. Villers, *supra* note 242, at 32–37 (arguing that the problem of clergy's sexual misconduct should be primarily addressed by legislature through specific provisions that are narrowly tailored to the culpable conduct—here being the use of clergy's position and influence to take advantage of vulnerable women—while taking scrupulous care to address any religious liberty concerns).

276. See Baker, *supra* note 50, at 223–25.

277. See Kaplan, *supra* note 50, at 1048–51.

## A. Fraud, Market, and Regulation

Fraud is as old as civilization, attracting all forms of sanctions since ancient times<sup>278</sup> while remaining a persistent problem all over the globe.<sup>279</sup> The modern legal system typically contains a whole host of measures to tackle the bane of fraud, ranging from severe criminal sanctions against the perpetrator<sup>280</sup> to generous civil remedies for the victims.<sup>281</sup> This is often complemented with a variety of statutes and regulations designed to reduce the incidence of fraud in commercial context<sup>282</sup> and even personal matters such as marriage.<sup>283</sup>

This proliferation is unsurprising given how fraud is commonly regarded as immoral,<sup>284</sup> notwithstanding that scholars have increasingly argued that from a consequentialist perspective, there will be numerous circumstances in which the benefits of deception can be sufficiently large to render the fraud morally justified.<sup>285</sup> Examples include deceptions used to facilitate investigation by journalists and law enforcement officers,<sup>286</sup> to prevent improper use of information that is explicitly designated as under no obligation of disclosure (e.g., religion or race in job application),<sup>287</sup> and to help the oppressed (e.g., Nazis, slave-owners) overcome their

278. See LEVINE, *supra* note 3, at 53; Biscotti, *supra* note 3, at 2-10.

279. See Valentin-Stelian Badescu, *Fraud in Electronic Commerce*, 2 PERSP. BUS. L.J. 8, 9 (2013); Jeff Langenderfer & Terence A. Shimp, *Consumer Vulnerability to Scams, Swindles, and Fraud: A New Theory of Visceral Influences on Persuasion*, 18 PSYCHOLOGY & MARKETING 763, 763 (2001).

280. See Theft Ordinance, (1997) Cap. 210, §§ 17-19 (H.K.); Fraud Act, 2006, c. 35 (U.K.). See also Bryan H. Druzin & Jessica Li, *The Criminalization of Lying: Under What Circumstances, if any, Should Lies be Made Criminal*, 101 J. CRIM. L. & CRIMINOLOGY 529, 545-50 (2011) (discussing the various ways criminal law punishes lies).

281. Damages for fraudulent misrepresentation include all actual damage directly flowing from the fraudulent inducement without much limitation as to remoteness or foreseeability, unlike in the case for negligent misrepresentation where damages are so limited. See *Smith New Court Securities Ltd. v. Citibank N.A.*, [1997] AC 254 (HL) 266-67, 269 (U.K.). There may also be statutory provisions for exemplary damages for defendants who successfully resist fraudulent litigation claims. See Julian Fulbrook, *Tasneem v. Morley*, 2014 J. PERSONAL INJURY L. 91, 92-95 (2014).

282. See also Will Barnett, *Fraud Enforcement in the Financial Services Act 1986: an Analysis and Discussion of s.47*, 17 COMPANY LAWYER 203, 204 (1996) (discussing the historical backdrop of the enactment of the Financial Services Act in the U.K. and the underlying purpose of preventing financial fraud).

283. The institution of a public register of marriage and the requirement for a period of public notice prior to marriage. See Marriage Ordinance, (1997) Cap. 181, §§ 6-10, 23-26 (H.K.).

284. See Ariel Porat & Omri Yadlin, *A Welfarist Perspectives on Lies*, 91 IND. L.J. 617, 623-24 (2016) (observing the disparate legal treatment of non-disclosure and lies, and noting the deontological morality underpinning the distinction).

285. See Druzin & Li, *supra* note 280, at 532-38 (discussing the strict deontological critique of all lies as inherently wrong and the consequentialist more circumstantial objection to deceit).

286. See Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1471-80 (2015) (arguing that such deceptions promote First Amendment values of truth, individual autonomy, and democratic self-governance).

287. See Porat & Yadlin, *supra* note 284, at 634-38.

oppressors.<sup>288</sup>

Beyond its effects on morality, fraud also has disruptive effects on the proper conduct of human activities. This has been recognized and discussed in traditional legal literature. For example, a common argument for regulation of charities is that if the public perceives rampant fraudulent practices by purported charitable organizations, there would be a paralyzing distrust that would curtail charitable donations.<sup>289</sup> In the context of fraudulent sex, it is similarly recognized that one consequence of non-criminalization is that women would be more cautious and hesitant to engage in sexual activity.<sup>290</sup>

In this regard, scholarship informed by economic perspectives can further elaborate the nuances and flesh out the sometimes counterintuitive dynamics among fraud, law, and the market. For example, fraud not only poses direct harm to the deceived but can also dilute the ability of honest merchants or individuals from conveying truthful information.<sup>291</sup> Coupled with the difficulty in observing and verifying the relevant information, this can lead to the so-called lemons market, whereby the market will degenerate with fraudsters driving out legitimate operators due to the inability of consumers to differentiate between the two.<sup>292</sup> More pertinent are the insights as to appropriate legal responses. The basic starting point is that policing and regulation can be costly and outweigh the benefit of reduction in fraud, especially where the fraud is hard to detect.<sup>293</sup> Yet, there also could be complications in which increased policing or regulations to combat fraud can ironically increase the incidence of fraud. For example, increased regulations may dilute the trust relationship between parties in an existing relationship (e.g., insurer and insured in insurance claims fraud) such that it reduces moral or emotional inhibition to commit fraud.<sup>294</sup> Increased policing may also give potential victims a false sense of

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288. See R. George Wright, *Lying and Freedom of Speech*, 2011 UTAH L. REV. 1131, 1148-58 (2011) (arguing that lying may advance autonomy, truth, dignity, equality and other desired values in these contexts).

289. See Joseph Mead, *Confidence in the Nonprofit Sector Through Sarbanes-Oxley-Style Reforms*, 106 MICH. L. REV. 881, 884-86 (2008); Yolanda Demianczuk, *Charity Regulation in the Russian Federation*, 35 COLUM. J. TRANSNAT'L L. 477, 482-84 (1997).

290. See Herring, *supra* note 5, at 520-21; Bryden, *supra* note 5, at 461.

291. See Porat & Yadlin, *supra* note 284, at 631-34. See also Paul G. Mahoney, *Precaution Costs and the Law of Fraud in Impersonal Markets*, 78 VA. L. REV. 623, 630-31 (1992) (discussing the three type of social costs—increased victims' precaution costs, dead-weight investment in deception, and allocative costs—imposed by fraud).

292. See Brian Roe & Ian Sheldon, *Credence Good Labeling: The Efficiency and Distributional Implications of Several Policy Approaches*, 89 AM. J. OF AGRI. ECON. 1020, 1021 (2007); Anke S. Kessler, *Revisiting the Lemons Market*, 42 INT'L. ECON. REV. 25, 25-27 (2001).

293. See Diana Crumley, *Achieving Optimal Deterrence in Food Safety Regulation*, 31 REV. LITIG. 353, 366-68 (2012); David A. Hyman, *Health Care Fraud and Abuse: Market Change, Social Norms, and the Trust "Reposed in the Workman"*, 30 J. LEGAL STUD. 531, 539-40 (2001).

294. See Sharon Tennyson, *Moral, Social, and Economic Dimensions of Insurance Claims Fraud*, 75 SOC. RES. 1181, 1182 (2008).

security so that they do not undertake cost-effective precautions.<sup>295</sup>

## B. Credence Goods and State Intervention

For the purpose of this Article, a particularly interesting and relevant contribution of the economic literature relates to the market involving credence goods. Credence goods is an economic concept for goods and services whose quality cannot be judged whether before or after consumption, thus elevating the supplier's credibility as a particularly salient consideration in the calculus of consumers.<sup>296</sup> Typical examples include medical treatment, legal services, and automobile repairs. Given the severe information asymmetry for consumers, a whole host of government interventions ranging from licensing and certification to expanding sellers' liability have been advocated to protect consumers and ensure proper functioning of the market.<sup>297</sup>

Religion, given its allusion to divinity, the spiritual realm, the afterlife, and other effectively unverifiable concerns, is the ultimate credence good in which the inability of adherents to assess the true quality of the "product" is not simply due to lack of information or expertise, but also due to the fact that there is no objective way to verify the core claims of religious truth.<sup>298</sup> This challenges the key assumption of state intervention for more conventional credence goods, namely, that the state is in a better position to evaluate the otherwise elusive qualities of the product/service through employing economies of scale in information and expertise. In such circumstances, state intervention in religious matters can have unintended and even counterproductive effects. For example, state action intending to suppress a religion (ranging from persecution of leaders to milder discriminatory treatment) will generate pressures for adherents to leave the religion by increasing the cost of their religious activities. However, these negative incentives will often be counteracted by an increase in perceived credibility of the religion lent to it by the sacrifices of religious leaders and adherents. These sacrifices can be interpreted as mutually reinforcing signals to both adherents and outsiders of the value of the religion and of the strength of religious commitment.<sup>299</sup> Depending on the interplay between the two factors this phenomenon can, at times, result in a reduction of overall numbers but preservation of a highly-committed core that continues to operate underground.<sup>300</sup> At other times, especially when the adverse actions are

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295. See Amitai Aviram, *Allocating Regulatory Resources*, 37 J. CORP. L. 739, 743-44 (2011).

296. See Dulleck, Kerschbamer & Sutter, *supra* note 51, at 526-27.

297. See Chaserant & Harnay, *supra* note 52, at 284-85; Roe & Sheldon, *supra* note 292, at 1021.

298. See LARRY WITHAM, *MARKETPLACE OF THE GODS: HOW ECONOMICS EXPLAINS RELIGION* 61-62 (2010); ANTHONY GILL, *THE POLITICAL ORIGINS OF RELIGIOUS LIBERTY* 41-42 (2008).

299. See RODNEY STARK & ROGER FINKE, *ACTS OF FAITH: EXPLAINING THE HUMAN SIDE OF RELIGION* 106-13 (2000).

300. For example, the vigorously enforced criminalization of the Falungong sect by the Chinese government has largely eliminated their public presence in China without

milder and/or successfully infused with theological meaning, it promotes overall growth.<sup>301</sup>

This complication, arising from the credence goods nature of religion, directly implicates the attainment of the purported state objectives that underpin the prosecutions and convictions of religious fraudulent sex. Beyond the commonly touted protection of “naïve and vulnerable woman/girls,”<sup>302</sup> the courts also express hope that such convictions would serve as warnings and cautions to people who are otherwise very superstitious.<sup>303</sup> Putting aside the constitutional defects of the mechanisms in which these objectives are pursued and the questionable normative merits of those objectives,<sup>304</sup> the more instant issue is that such state actions may be counterproductive vis-à-vis the purported objectives.

The prosecutions and convictions of religious fraudulent sex undeniably has a deterring effect on potential fraudsters. The rather high rate of conviction and the typical substantial prison terms of at least a couple of years will dissuade at least some potential fraudsters on the margins from committing the offence, even if the absolute number of prosecutions is low.<sup>305</sup> However, the problem is that this positive impact (the objective of reducing such crime) may be outweighed by the enhancement of perceived credibility of such religious pretenses that resulted from state intervention.

This enhancement of credibility can manifest in three ways. First, state intervention in a particular market will generate a sense of security among market participants. This can sometimes lead to an inefficient reduction in victims’ precaution as is noted in general economic litera-

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eradicating the continued practice of its teachings in private/secret. See JAMES W. TONG, REVENGE OF THE FORBIDDEN CITY: THE SUPPRESSION OF THE FALUNGONG IN CHINA, 1999-2005 205 (2009); Anne S.Y. Cheung, *In Search of a Theory of Cult and Freedom of Religion in China: the Case of Falun Gong*, 13 PAC. RIM L. & POL’Y J. 1, 21-26 (2004).

301. To use another example from China, only state-sanctioned religious organizations are considered legal. Independent Protestant “churches” that refused to join the official Protestant church organization are thus technically in a state of legal ambiguity that involves general tolerance (but no official reorganization) punctuated with occasional and limited crackdowns. However, this has not impeded the continued growth of such “churches.” See Fenggang Yang, *The Red, Black, and Gray Markets of Religion in China*, 47 SOC. Q. 93, 97-98 (2006); Jacqueline E. Wenger, *Official vs. Underground Protestant Churches in China: Challenges for Reconciliation and Social Influence*, 46 REV. RELIGIOUS RES. 169, 170-71 (2004).

302. E.g., Yuen Yuk Kin, CACC454/2011, ¶ 96; Chow Kam Wah, [2012] HKCU 2447, ¶ 38; Au Yeung Kwok Fu, H.K.C. 223, ¶ 13.

303. See Au Yeung Kwok Fu, H.K.C. 223. See also Hong Kong v. Tang Tsin Cheung, CACC89/2010, [2011] (C.A.) (endorsing such objective in the context of a religious fraud case that involved sexual intercourse but the defendant was charged with the common law offences of conspiracy to defraud).

304. See *supra* Part II. It is also important to note that the former rationale of protecting “naïve and vulnerable women/girls” has a disturbing paternalistic and gendered undertone. Cf., McJunkin, *supra* note 22, at 21-34 (arguing that the law’s reluctance to criminalize fraudulent sex in the U.S. reflects an underlying notion of seduction based on normative masculinity where men derive power and social status through sexual conquest).

305. For a discussion of deterrence from the economic perspective, see RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 278-86 (8th ed. 2011).

ture.<sup>306</sup> However, for credence goods, there is also going to be an increase in perceived credibility among the suppliers by consumers. Consumers may feel that the supplier is credible (or more credible than if completely unregulated) on the basis that the supplier is willing to operate under risk of state sanctions for fraudulent behaviors. Insofar as the state intervention/prosecution is conspicuous, but is in fact rare and random (as in the case of religious fraudulent sex in Hong Kong),<sup>307</sup> there is a real likelihood that a large swath of otherwise suspect practices would be perceived as being legitimate and legal by consumers on the basis that the perpetrators have not been prosecuted.

Second, this enhancement of credibility is aggravated by the crude sincerity test employed to prosecute religious fraudulent sex. The allusion to “sincerity” is a judiciary concession that such religious practices may be genuine in other instances. This will dilute the intended warning or caution that the court hopes to signal to “naïve and vulnerable” persons. Indeed, this dilution is particularly pronounced in the instances where the defendant is acquitted.<sup>308</sup> In this regard, it would have been ironically better if the courts just went all out to explicitly and consistently proclaim that sex can never be part of religious ritual as a matter of fact.<sup>309</sup> That would at least have been more effective as a matter of public education rather than the current predicament of violating constitutional rights without attaining the purported policy objectives.

Third, is the ability for potential fraudsters to draw on the discriminatory nature of the legal system to negate any diminishment of credibility from state intervention. Here, it is important to note that whereas a more explicit judicial rejection of such practices would increase the level of skepticism of potential victims toward such practices,<sup>310</sup> the credibility of the perpetrator of such practices is not negated and may still receive an unintended boost. As noted above, the religious premise of all defendants’ representation/pretenses is Chinese folk religions.<sup>311</sup> This is significant

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306. See *supra* CONCLUSION. See also GREENAWALT, *supra* note 34, at 114-15 (“If people are aware that the state does not involve itself in prosecutions for spiritual fraud, they will be on notice they must rely on themselves for protection. . . . A clear legal rule against enforcement for fraud might reinforce most people’s reliance on their own judgment about essentially religious claims.”).

307. See also Aviram, *supra* note 295, at 745-48 (discussing the various types of “placebo effects” of law enforcement and the different impact of behaviors and efficiency considerations).

308. See *supra* Part I.B.7.

309. See *R v. William Case*, (1850) 1 Den. 580, 582-83 (1850) (Eng. C.A.) (“The notion that a medical man might lawfully adopt such a mode of treatment [that involves sexual intercourse] is not to be tolerated in a Court of justice. He would have committed a high ecclesiastical offence at all events”).

310. For a research study that examined how the impact of forewarning to at-risk fraud victims and found that such warnings provided an effective though somewhat temporary reduction of the susceptibility to fraud, see Susanne Scheibe et al., *Forewarning Reduces Fraud Susceptibility in Vulnerable Consumers*, 36 BASIC & APPLIED SOC. PSYCH. 272, 275-78 (2014).

311. See *supra* Part I.B.8.

beyond the implications of the determining religious truth.<sup>312</sup> Despite frequent, proud proclamations of perceived religious liberty in Hong Kong, in contrast with China,<sup>313</sup> British colonial rule has produced many instances of explicit discrimination and hostility toward Chinese religions,<sup>314</sup> some of which remain in force today. For example, religious specialists from Buddhism, Taoism, and Chinese folk religions remain conspicuously omitted from the exemption of jury service, in contrast to the equivalent from Christianity, Judaism (since 1948), or Hinduism and Islam (since 1997).<sup>315</sup> More blatant is the Chinese Temples Ordinance that—on the purported objectives of tackling “pseudo-religious establishments” exploiting ignorant masses<sup>316</sup>—subject only Chinese religions<sup>317</sup> to the requirement of mandatory registration, building restrictions, power of search and seizure without warrant, and most starkly, the “absolute control” by a government regulatory body over all the financial assets of all Chinese temples.<sup>318</sup> Under such circumstances, skepticism and sanctions by a legal system that is ostensibly hostile to a particular form of religious practices could be easily explained away by a potential fraudster as straightforward religious discrimination and accepted as such by the substantial segment of the population who have continued to believe and practice such “superstitious” beliefs despite more than a century of such state hostility.<sup>319</sup>

More sociological research is necessary to tease out the precise dynamics of how these prosecutions have actually affected the credibility of the purported practitioners of these religious practices and also the general operation of such a “market” for divine interventions. At this juncture, it suffices to note that despite the series of high-profile prosecutions that have received widespread media reports, especially among the tabloids,<sup>320</sup>

312. See *supra* Part I.C.

313. See e.g., Thomas In-sing Leung, *Crises and Transformation: the Implications of 1997 for Christian Organizations in Hong Kong*, in *POLITICS AND SOCIETY IN HONG KONG TOWARDS 1997* 62, 75–78 (Charles Burton ed., 1992). See also Michael Ng, *When Silence Speaks: Press Censorship and Rule of Law in British Hong Kong, 1850s–1940s*, 29 *LAW & LITERATURE*, 425, 436–38, 450 (2017) (a historical archival survey that reveals the colonial government’s “active and pre-emptive press censorship of Chinese newspapers” in Hong Kong and “demythologizes the much-congratulated rule of law in the former colony.”).

314. See CHEN, *supra* n.196 and accompanying text.

315. See Jury Ordinance, (1997) Caps. 3, 8, §§ 5(1)(h), (ha) & (hb) (H.K.).

316. See *Fok Ho Chiu v. The Chinese Temples Committee*, [2003] HCAL 13/2003 (H.K.).

317. “Chinese temples” are defined to cover “all Miu (廟 temples), Tsz (寺, Buddhist monasteries), Kun and To Yuen (觀及道院, Taoist monasteries) and Om (庵 nunneries)”. Chinese Temples Ordinance, (1928) Cap. 153, § 2 (H.K.).

318. See *id.* §§ 4, 5, 7 & 14. See Jianlin Chen, *Hong Kong’s Chinese Temples Ordinance: A Cautionary Case Study of Discriminatory and Misguided Regulation of Religious Fraud*, J.L. & RELIGION (forthcoming).

319. See *supra* I.A.1.

320. It is common—and totally unsurprising given the explosive combination of sex, fraud and the supernatural—that tabloids have devoted widespread and continuous coverage throughout the court proceedings. E.g., *Sexual Transfer*, HONG KONG NEWS, <https://www.hk01.com/tag/14108> [<https://perma.cc/UTK5-TKA3>] (last visited Feb. 1, 2018) (dedicating a specific tag for the *Law Wai Leuk* case).

such cases are still regularly available for prosecution without any noticeable increase in sophistication in deception methods. This suggests that these prosecutions have not achieved their intended effect.

### **Conclusion**

This Article's case study of the prosecutions and convictions of religious fraudulent sex in Hong Kong highlights the constitutional and normative deficiencies of such state actions. Such litigation compels the courts to engage with the issue of religious falsehood which—given the elusive and unverifiable nature of the divine—often results in instinctive rejection of perceived unorthodox religious doctrines/practices even among professional judges. Furthermore, sex for religious purposes—no less where the underlying concern is materialistic in nature (e.g., seeking supernatural assistance to advance career)—is not the type of activity which the state would wish to encourage especially when compared to sex for romantic purposes. This raises critical questions as to the merits of such prosecution in the context where romantic fraudulent sex is not similarly prosecuted despite falling under the scope of the relevant provision.

More broadly, this case study demonstrates the importance of approaching criminalizing fraudulent sex not simply as a matter of sexual offences, but as a matter of fraud regulation. Prosecuting religious fraudulent sex is an act of religious regulation, which will affect the conduct of affairs in the religious realm as much as the sexual sphere. Thus, this Article argues for greater appreciation and analysis of the different legal and normative considerations that would arise based on the types of fraudulent pretenses employed. In this regard, economic insights as the precise, if sometime counter-intuitive, dynamics between fraud, laws and individual's behaviors can expose the unintended consequences of fraudulent sex offences and their enforcement.

