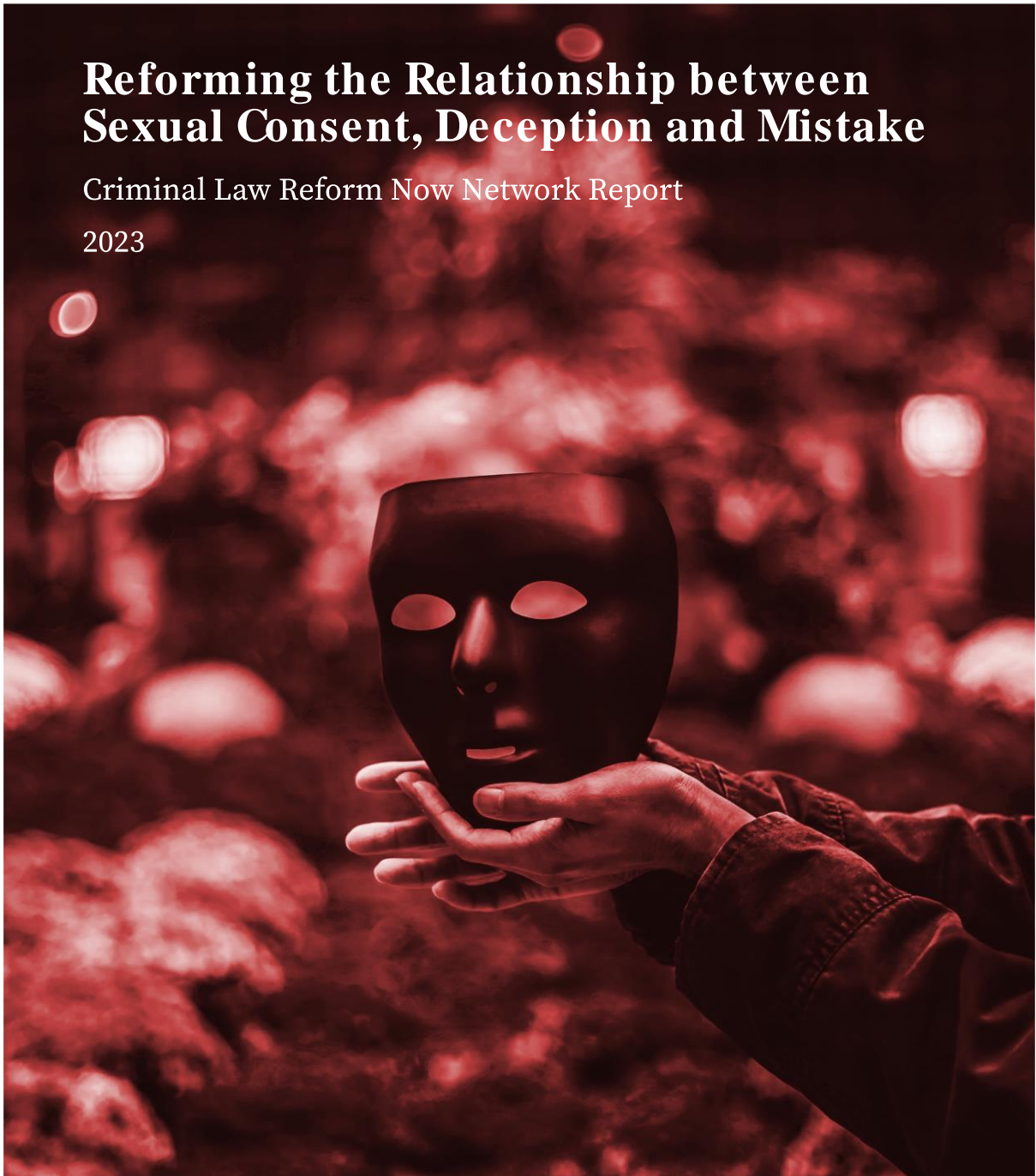


# Reforming the Relationship between Sexual Consent, Deception and Mistake

Criminal Law Reform Now Network Report

2023



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## CRIMINAL LAW REFORM NOW NETWORK

# Reforming the Relationship between Sexual Consent, Deception and Mistake

Launched in 2017, the mission of the Criminal Law Reform Now Network (CLRNN) is to facilitate collaboration between academics and other legal experts to gather and disseminate comprehensible proposals for criminal law reform to the wider community. We include members of the public and mainstream media as well as legal professionals, police, policymakers and politicians. Our proposals might require legislation but we do not restrict ourselves to such projects. We are also interested in reforms which public bodies such as the Home Office, Police or CPS can bring about by internal policies, as well as reforms which require the support of some of the judiciary, bearing in mind the proper judicial constraints on law making. We are ready to consult with and make recommendations to anyone who has the power to bring about reform.

More information about the CLRNN, including our other reform projects, can be found at our [website](#), and by following us on Twitter @CLRNNetwork and via our [YouTube Channel](#). We published an edited volume exploring reform proposals in 2019,<sup>1</sup> with a further volume due to be published later in 2023.<sup>2</sup>

### CLRNN Committee

**Co-Directors:** Professor John Child, Birmingham Law School; and Dr Jonathan Rogers, University of Cambridge.

**Committee:** Mr Paul Jarvis, Barrister (**Project Lead**); Dr Melissa Bone, University of Leicester; Mr Stephen Wooler CB, Barrister; and Dr Laura Noszlopy, University of Birmingham.

### Process leading to this Report

Our approach within [previous projects](#) has been to build an expert team to co-author a Network Report, presenting a single reform position. Recognising the diversity of views on the topic of deception, mistake and sexual consent, however, we have taken a quite different approach for this project. We began with a [Consultation Paper](#), published in December 2021.<sup>3</sup> following an introduction of legal issues from Project Lead, Paul Jarvis, we set out 10

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<sup>1</sup> JJ Child and RA Duff (eds), *Criminal Law Reform Now: Proposals and Critique* (Hart, 2019).

<sup>2</sup> M Bone, JJ Child and J Rogers (eds), *Criminal Law Reform Now: Proposals and Critique* (Vol. 2, Hart, 2023).

<sup>3</sup> Criminal Law Reform Now Network, *Reforming the Relationship between Sexual Consent, Deception and Mistake* (CLRNN 3, Consultation, 2021).

alternative reform proposals provided by a set of named expert writers, and we asked for consultees views on which (if any) should be preferred. The deadline for responses to the Consultation Paper was 1 April 2022, later extended to May 2022.

Following consultation, and drawing on the feedback provided, we drafted a Policy Outline document setting out the provisional position taken by the CLRNN Committee. The purpose of the Policy Outline was to seek targeted feedback on the favoured approach of the Committee so as to begin building the broad consensus necessary for achieving substantive legal change. We published an article drawing on the Policy Outline in the December 2022 Issue of *Archbold Review*.<sup>4</sup> The final position taken by the CLRNN Committee has been influenced by the additional responses received to the Policy Outline.

The contents of this Report replicate much of the Consultation Paper, with a general introduction of issues from the Project Lead, Paul Jarvis, followed by the ten proposals for reform provided by our expert authors. The last chapter contains the CLRNN Committee's final recommendation for reform along with worked examples of how the significant authorities in this area may have been decided differently if the scheme proposed by the Committee had been in force at the relevant time.

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<sup>4</sup> P Jarvis, 'Deception, Mistake, and Sexual Consent: Criminal Law Reform Now Network' (2022) 10 *Arch Rev* 8.

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# INTRODUCTION: THE HISTORICAL DEVELOPMENT OF CONSENT TO SEXUAL ACTIVITY

[Paul Jarvis](#)

It is common nowadays to regard the [Offences against the Person Act 1861](#) as a statute concerned only with what could be called non-sexual offences against the person. In fact, when the 1861 Act was first enacted it contained a number of provisions that created new sexual offences, or which placed common law offences onto a statutory footing. [Section 50](#) of the 1861 Act, for example, created the offence of carnally knowing a girl under ten years of age, which had not previously existed at common law. [Section 48](#) referred to the punishment available to those 'convicted of the Crime of Rape' but it did not seek to define what the elements of rape were and so that task fell to the common law, inspired by the work of the institutional writers.<sup>5</sup> The more serious non-sexual offences against the person remain those contained within the 1861 Act, but so far as the sexual offences against the person are concerned, Parliament brought most of them together in the [Sexual Offences Act 1956](#).

## Sexual Offences Act 1956

Under the heading '*Intercourse by force, intimidation, etc.*' Parliament enacted four offences, the first being rape in [section 1](#) and then procurement of a woman by threats in [section 2](#), procurement of a woman by false pretences in [section 3](#), and administering drugs to obtain or facilitate intercourse in [section 4](#).

Section 1 (rape) contained no definition of the offence. Section 1(1) simply stated that 'It is a felony for a man to rape a woman'. Section 1(2) provided that a man who induces a married woman to have sexual intercourse with him by impersonating her husband commits rape. Sections 2 and 3, read together, made it an offence for a person to procure a woman by threats or intimidation or false pretences or false representations, to have unlawful sexual intercourse in any part of the world, although they both came with the caveat that no person could be convicted of such an offence on the evidence of a single witness unless there was some further evidence 'implicating the accused'. [Section 5](#) made it an offence for a person to have sexual intercourse with a girl under thirteen and [section 6](#) similarly made it an offence for a person to have sexual intercourse with a girl aged between thirteen and sixteen subject to two defences, one of which became known as the controversial 'young man's defence'.<sup>6</sup>

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<sup>5</sup> 1 Hawk, c.41, s.2; 1 Hale 627, 628; Co.Litt, 123 b; 2 Co.Inst 180; 3 Co.Inst 60; 4 Bl.Com. 210; 1 East P.C. 434.

<sup>6</sup> 'A man is not guilty of an offence under this section because he has unlawful sexual intercourse with a girl under the age of sixteen, if he is under the age of twenty-four and has not previously been charged with a like offence, and he believed her to be of the age of sixteen and has reasonable cause for that belief': section 6(3) as enacted.

Sections [14](#) and [15](#) made it an offence to indecently assault a woman or a man. Importantly, both sections referred expressly to consent. Each section provided that a girl or boy under the age of sixteen could not 'in law give any consent which would prevent an act being an assault for the purposes of this section' and, moreover, that a woman or man 'who is a defective cannot in law give any consent which would prevent an act being an assault for the purposes of this section, but a person is only to be treated as guilty of an indecent assault on a defective by reason of that incapacity to consent, if that person knew or had reason to suspect [him/her] to be a defective.'

## The Next Two Decades

Although the 1956 Act marked the first real attempt by Parliament to place the sexual offences against the person on a statutory basis there were a number of occasions between then and the introduction of the [Sexual Offences Act 2003](#) where dissatisfaction with the law in that area prompted a review, either by a formal law reform body or by a committee established by Government to consider some particular area of concern that had arisen.

In July 1975, the Home Secretary assembled the Advisory Group on the Law of Rape under the chairmanship of Mrs Justice Heilbron. This followed the decision of the House of Lords in [DPP v Morgan](#).<sup>7</sup> The Advisory Group was asked to consider whether any changes to the law of rape should be made in the wake of that decision so as to avoid the possibility of juries being directed that the reasonableness of the belief of the accused was irrelevant to the issue of *mens rea*. Also, in July 1975, the Home Secretary asked the Criminal Law Revision Commission to review the law relating to, and penalties for, sexual offences.

On 14 November 1975, the Advisory Group reported to the Home Secretary (the Heilbron Report<sup>8</sup>). The Advisory Group noted that there was no statutory definition of rape and they quoted<sup>9</sup> with approval from a passage in *Smith & Hogan*,<sup>10</sup> which referred to lack of consent 'being the crux of the matter...' The test is not 'was the act against her will?' but 'was it without her consent?' The Group concluded that the House of Lords had been correct in *Morgan* to define the mental element of the offence in the terms in which they did, but nevertheless that legislation was needed to clarify the *mens rea* in rape so as to avoid confusion in the future. The Advisory Group went on to recommend that 'as rape is a crime which is still without a statutory definition, that lack of which has caused certain difficulties, we think that this legislation should contain a comprehensive definition of the offence which would emphasise that lack of consent (and not violence) is the crux of the matter'.<sup>11</sup> In its summary of recommendations, the Group stressed this need for a definition of rape and suggested that the statutory definition of the mental element should come in two parts; the

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<sup>7</sup> (1975) 61 Cr App R 136. To the effect that an honest belief in consent was a defence to rape and the more reasonable that belief the more likely it was to be honestly held.

<sup>8</sup> Cmnd 6362. Available in Parliamentary Papers, 1975 – 1976, Vol.20.

<sup>9</sup> At para.19.

<sup>10</sup> Smith and Hogan, *Criminal Law* (3<sup>rd</sup> edition, Butterworth, 1973) 326.

<sup>11</sup> At para.84.

first part declaring that in cases where the question of belief is raised, the issue is whether at the time that sexual intercourse took place the accused believed that the woman was consenting, and the second part stating that whilst there is no requirement of law that such a belief must be based on reasonable grounds, the presence or absence of such grounds is a relevant consideration in deciding whether the accused genuinely had such a belief.

## **Sexual Offences (Amendment) Act 1976**

In consequence of the recommendations in the Heilbron Report, a number of important changes were made to the offence of rape by the [Sexual Offences \(Amendment\) Act 1976](#). The new definition of rape was set out in the 1976 Act in these terms: a man commits rape if 'he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it' and 'at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it'. The new [section 1\(2\)](#) of the 1976 Act provided that 'if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed'. The 1976 Act did not set out to define what consent was, but it did at least serve to make it clear that lack of consent was part of the definition of the offence of rape. The *mens rea* of the offence remained belief (and not reasonable belief, as it was later to become), but the genuineness of a stated belief now fell to be checked against the yardstick of whether reasonable grounds for that belief in fact existed.

## **The Work of the Criminal Law Revision Committee**

In October 1980, the Criminal Law Revision Committee published its [Working Paper on Sexual Offences](#). The Working Paper set out the Commission's provisional conclusions and sought to identify some of the problems in this area of the law. The Committee recited the new definition of rape and noted that 'the 1976 [Amendment] Act does not purport to cover the whole of the law of rape'.<sup>12</sup> As to the problems still outstanding in this area, the Committee identified the first one to be confusion as to the meaning of consent. The Committee expressed itself in this way:

(1) What amounts to consent? If a woman consents to sexual intercourse with X, thinking that he is Y, and X knows that she thinks he is Y, has she consented to that intercourse? If a woman is told by a man purporting to treat her for a medical condition that the insertion of his penis into her vagina is part of the treatment, has she consented to sexual intercourse? Unlikely as those two sets of

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<sup>12</sup> At page 7.

circumstances may be, the reported cases do show that they have occurred. If a woman is induced by threats not involving the use of violence (for example, by a threat of dismissal from a job) to allow sexual intercourse has she consented to it? If she is induced to consent by a promise fraudulently made, for example, a promise of employment, has she consented?

The Committee considered that it had not been until the second half of the nineteenth century when the courts encountered difficulties with the meaning of consent in rape cases. If a woman was made to have sexual intercourse by force, or by the fear of force, then that was rape. In the view of the Commission, that proposition still represented the law. In cases where the woman's agreement to sexual intercourse was procured by some fraud on the part of the accused, the position was less clear. Where the accused tricked the woman into believing he was her husband, the older cases tended to the view that there would be no consent in such a situation<sup>13</sup> and that understanding came to be reflected in section 4 of the Criminal Law Amendment Act 1885, which was re-enacted in the original version of Section 1(2) of the Sexual Offences Act 1956. Therefore, only that quite specific deception would uncontroversially serve to turn an act of sexual intercourse into rape. The authors of *Smith & Hogan* criticised the distinction between a deception as to the identity of the man as the woman's husband and any other type of fraud that induced the woman to have sexual intercourse.<sup>14</sup> The Committee recognised the difficulties with this approach,<sup>15</sup> and went on to consider the related problems of threats and intimidation that relate to something other than the use of force, such as a threat to terminate employment. Under the 1956 Act, sexual intercourse that occurred under those conditions would constitute an offence under sections 2 and 3 but it would not amount to rape.

A majority of the Committee in the Working Paper was of the opinion that 'the offence of rape should not apply when a woman has knowingly consented to the defendant putting his penis into her vagina. Mistake as to his identity, whether as a husband or otherwise, or as to the purpose for which the penetration has been made should be irrelevant. Nor should the use of threats or other intimidation short of threats of force amount to rape.'<sup>16</sup> Where sexual intercourse is induced by fraud or threats falling short of threats of force then that conduct should be criminal but it should not amount to rape. The Committee invited comments. The provisional conclusion expressed in the Working Paper was that the offence of rape 'should remain substantially in its present form...but sexual intercourse induced by threats (other than threats of force) or other intimidation or by fraud should not be rape.'

It was not until April 1984 when the Committee presented its [Fifteenth Report on Sexual Offences](#) to the Home Secretary,<sup>17</sup> in conjunction with the Policy Advisory Committee

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<sup>13</sup> *R v Flattery* (1877) 2 QBD 410; *R v Dee* (1884) 15 Cox CC 579.

<sup>14</sup> Smith and Hogan, *Criminal Law* (4<sup>th</sup> edition, Butterworths, 1978) 406.

<sup>15</sup> At para.22.

<sup>16</sup> At para.23.

<sup>17</sup> Cmnd 9213.



on Sexual Offences,<sup>18</sup> which had been appointed in 1975 to advise the Committee as to its review and to the terms of reference. The Committee acknowledged that the portion of the Working Paper concerned with rape had attracted more comments than any other. The Committee held to the view that so far as the offence of rape is concerned ‘absence of consent is what counts.’<sup>19</sup> The Committee recommended that absence of consent ‘should remain of the essence in rape’<sup>20</sup> but all members of the Committee agreed ‘that it would be impracticable to define what is meant by absence of consent in rape.’

As to fraud, the Committee repeated its earlier view, and that of the Policy Advisory Committee, that sexual intercourse obtained by fraud should not be treated as rape. That proposition had the support of a majority of commentators on the Working Paper but a significant minority was against it. On reflection, the Committee now felt that there was no good reason to exclude cases of fraud from rape because where fraud vitiates consent the offender deserves to be labelled and punished accordingly. However, the Committee ‘was concerned about the precision of the distinction that can be drawn between fraud which is sufficient to vitiate consent and other types of fraud.’<sup>21</sup> The Committee recognised that fraud as to the nature of the act is accepted as rape but certain lies or half-truths told to persuade a woman to have sexual intercourse might not vitiate her agreement. The decision in *Olugboja*<sup>22</sup> (which had removed the distinction between the use of force or threat of force and other forms of pressure to agree to sexual intercourse) had increased the Committee’s concern about the lack of clear guidance on consent. The Committee expressed its conclusions in this way:

It is, however, in our opinion, inherently unsatisfactory to leave what constitutes an offence to be determined on the facts of each case. We recommend, therefore, that it should be expressly stated in the legislation which cases of consent obtained by fraud amount to rape. Somewhere a line must be drawn. We would include within rape those cases that before 1976 clearly were rape, namely fraud as to the nature of the act and impersonation of a husband. We see no reason to distinguish between consent obtained by impersonating a husband and consent obtained by impersonating another man, so that latter case should also constitute rape. All other cases of fraud should be dealt with under section 3 of the 1956 act and should not amount to rape.

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<sup>18</sup> As to the membership of which, see Annex A to the Fifteenth Report.

<sup>19</sup> At para.2.17.

<sup>20</sup> At para.2.18.

<sup>21</sup> At para.2.25.

<sup>22</sup> *Olugboja* [1981] 3 All ER 443. Dunn LJ, delivering the judgment of the court, said that consent should not be left to the jury without some further explanation from the trial judge. The content of that explanation would depend on the facts of the case but the jury should be told that there is a difference between consent and submission because ‘every consent involves a submission, but it by no means follows that a mere submission involves a consent’. The distinction between consent and submission was subsequently criticised as being vague and unhelpful. See also S Gardner, ‘Appreciating *Olugboja*’ (1996) 16 LS 275.

As to threats, most of the Committee agreed with the Policy Advisory Committee that there should be an express legislative provision in place to make it clear that where a woman submits to sexual intercourse through fear that does not amount to consent. The Committee said that ‘the offence of rape should arise where consent to sexual intercourse is obtained by threats of force, explicit or implicit, against the woman or another person, for example, her child; but it should not be rape if, taking a reasonable view, the threats were not capable of being carried out immediately.’<sup>23</sup> All other cases of sexual intercourse obtained by threats not amounting to rape will fall under [section 2](#) of the 1956 Act. Turning to *mens rea*, the Committee said that ‘if...the suspect was mistaken in his belief that the woman was consenting, he should not be liable to conviction for rape, even if he had no reasonable grounds for his belief. None of us would wish to extend the offence of rape to such a case. That would in effect turn rape into a crime of negligence.’<sup>24</sup>

### **The Work of the Law Commission**

While the Committee was hard at work reviewing the offences against the person, both sexual and non-sexual, the Law Commission was in the throes of attempting to fulfil an objective set down in its 1968 Second Programme of Law Reform to undertake a comprehensive review of the criminal law with a view to its codification.<sup>25</sup> On 28 March 1985, just under a year after the Committee published its Fifteenth Report, a group of distinguished academics chaired by Professor J.C. Smith QC submitted a report to the Law Commission as a step towards codification.<sup>26</sup> That report contained a [Draft Criminal Code Bill](#). In drafting the clauses of the Bill that concerned sexual offences, the Law Commission acknowledged the work of the Criminal Law Revision Committee in its Fifteenth Report, and the Policy Advisory Committee. Clause 89 defined rape as sexual intercourse between a man and a woman without her consent and in circumstances where the man knows she does not consent or is aware that she may not be, or does not believe that she is, consenting. Clause 89(2) provided that for the purposes of the offence of rape, a woman shall be treated as not consenting to sexual intercourse if she consents to it ‘because a threat, express or implied, has been made to use force against her or another if she does not consent and she believes that, if she does not consent, the threat will be carried out immediately or before she can free herself from it’ or ‘because she has been deceived as to the nature of the act or the identity of the man.’ The Commission proposed to preserve the effect of sections 2 and 3 of the 1956 Act by retaining those offences in clauses 90 and 91. Thus, the effect of this reform would have been to stress that only certain types of threats and only certain types of deceptions serve to render sexual intercourse non-consensual. Where sexual intercourse takes place against a background of

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<sup>23</sup> At para.2.29

<sup>24</sup> At para.2.40.

<sup>25</sup> Law Commission, *Second Programme of Law Reform* (Law Com. No.14, 1968) Item XVIII.

<sup>26</sup> Law Com. No.143.

other forms of fraud or threat consent would be present, although the conduct could still amount to an offence.

By drafting clause 89 in those terms, the Commission expressly endorsed the Committee's view that rape would only be negated where the threat was of *immediate* force. Nevertheless, some members of the Commission felt strongly that this was the wrong approach and that threats falling short of the immediate use of force should still have the effect of vitiating the victim's consent.<sup>27</sup> The proposed provisions on the relationship between deception and consent were also taken from the Committee's Fifteenth Report. Any forms of deception not specifically referenced in clause 89 could nevertheless result in conviction under the other clauses of the Bill.

For a number of reasons, the Draft Criminal Code never found its way onto the statute books, although calls for a criminal code still echo from time to time. Nevertheless, the reports into the codification attempt undertaken during the 1980s point strongly towards the position that in the realms of the non-sexual offences against the person consent could be left to the common law whereas for the sexual offences more had to be done to make it clear what the role of consent and belief in consent was. The concern was not so much defining what consent was, but rather looking to see in what circumstances consent would not exist, for example where there were threats or deceptions surrounding the act of intercourse, and whether those matters had any bearing on consent or should be left for other, less serious offences, to be concerned with.

As part of its efforts to secure the enactment of the Criminal Code, the Law Commission published a Consultation Paper in 1992 entitled '*Legislating the Criminal Code: Offences against the Person and General Principles*'.<sup>28</sup> Appended to the Consultation Paper was a [Draft Criminal Law Bill](#) in three parts which set out to codify the non-sexual offences against the person. As with the Commission's previous reports, no definition of consent was contained in the Bill and most of the heavy lifting was left to the common law. The Report of the same name was published in November 1993,<sup>29</sup> with the stated purpose of providing a basis for 'comprehensive reform of non-fatal offences against the person.'<sup>30</sup> The Commission indicated in the report that it had embarked on a quite separate project to review the law around consent in this area. The details of that separate project emerged in February 1994, when the Law Commission published a Consultation Paper entitled '[Criminal Law: Consent and Offences against the Person](#)'.<sup>31</sup> There is no doubt that this Consultation Paper represented the first occasion on which any law reform body had shed its reluctance to look in detail at the relationship between consent and violence, but it is interesting to note that the discussion undertaken by the Commission focused very much on what a person consented

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<sup>27</sup> Volume II, para.15.14.

<sup>28</sup> Law Com. No.122.

<sup>29</sup> Law Com. No.218.

<sup>30</sup> At para.2.1.

<sup>31</sup> Law Com. No.134.

to rather than the circumstances in which they gave their consent, which up to this time had been - and still is - the major focus when considering consent and sex.

The Commission reviewed the case law and concluded that the authorities lacked 'any very clear general theme.'<sup>32</sup> Under the heading '*Reality of "consent"*',<sup>33</sup> the Commission considered the difficulties that had arisen around the meaning of consent in rape cases and offered the view that certain specific offences (notably sections [2](#) and [3](#) of the 1956 Act) had been created to circumvent those difficulties. The Commission eschewed any intention of following the example from the law of rape 'in producing a single formula to cover the many diverse cases which we are here concerned.'<sup>34</sup> The Commission went on to consider what impact youth, fraud, mistake duress and other, lesser, threats could have on consent to physical force before summarizing its provisional proposals.<sup>35</sup>

### **Criminal Justice and Public Order Act 1994**

On 3 November 1994, sections [142](#) and [172\(4\)](#) of the [Criminal Justice and Public Order Act 1994](#) brought into force amendments to the [Sexual Offences Act 1956](#) that expanded the definition of rape so that a man commits rape if he has sexual intercourse (whether vaginal or anal) with a person (whether a woman or a man) who at the time of the intercourse does not consent to it, and at the time he knows that the person does not consent to it or is reckless as to whether that person consents to it. Again, Parliament expressly declined the opportunity to define consent in the newly amended [section 1](#) of the 1956 Act or elsewhere in that statute.

Meanwhile, the Law Commission continued the process of sifting through the responses to its 1994 Consultation Paper. That led to the publication of a fresh Consultation Paper in 1995 entitled [Consent in the Criminal Law](#).<sup>36</sup> The responses to the earlier paper had convinced the Commission that any review of the law of consent should encompass the role of consent in both sexual and non-sexual offences against the person for the simple reason that 'it would make things extremely difficult for those who have to enforce the law if two quite separate regimes for consent operated in relation to these two types of offence which, although obviously different in their distinctive subject matter, are often very closely linked in practice.'<sup>37</sup> The Commission provided as an illustration of the way in which the sexual and non-sexual offences against the person could overlap in the scenario of a man who beats his partner and then has sexual intercourse with her. If the man was charged with rape and assault, should not the definition of consent be the same in respect of both charges? In the new Consultation Paper the Commission was keen to stress that it would not be undertaking 'a very radical review of the present structure on sexual offences'<sup>38</sup> for a number of reasons.

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<sup>32</sup> At para.12.1.

<sup>33</sup> At page 49.

<sup>34</sup> At para.24.3.

<sup>35</sup> At para.31.1. and 48.1.

<sup>36</sup> Law Com No.139.

<sup>37</sup> At para.1.7.

<sup>38</sup> At para.1.8.

Importantly, the Commission recognised that aside from the offences against the person (sexual and non-sexual) there are a number of other offences in which the victim's consent, or the accused's belief in the existence of the victim's consent, can provide a defence to liability. With that in mind, the Commission stated that its provisional conclusions in Part V ('Capacity to consent') and Part VI ('Fraud, mistake, force, threats, abuse of power and other pressures') 'should in general be the same in respect of all the criminal offences to which the defence applies' but the provisional proposals in Part VII in relation to *mens rea* should be limited to the law of sexual offences and offences against the person.

Over the course of 306 pages, the Commission set out its proposals in respect of the general principles of consent and the role of consent in specific situations, including medical and surgical treatment and lawful correction, areas in which previously the Commission had feared to tread. The Consultation Paper also contained a useful summary of the law of consent in a number of other jurisdictions and a commentary by Professor Paul Roberts on the philosophical foundations of consent in the criminal law.<sup>39</sup> Part XVI of the Paper contained the Commission's provisional proposals and the issues for consultation. The first point in the Commission's list was that most of its proposals (numbers 12 – 30) should apply to all offences where the consent of someone other than the accused is or may be a defence. Other proposals were specific to non-sexual offences against the person and sexual offences against the person, and specific types of medical treatment and cosmetic alteration. This Consultation Paper offered the most detailed treatment to date of consent in the criminal law and it generated, along with the previous Consultation Paper, a great deal of academic commentary<sup>40</sup> but, alas, it led to no Report from the Law Commission and no draft legislation.

The law on consent in sexual offences against the person did not stand still, however, and in the years following the 1995 Consultation Paper it went through something of a radical transformation. On 25 January 1999, the Home Secretary, Jack Straw, commissioned a review of sexual offences to recommend how they should be structured to deliver protection and help achieve a safe, just and tolerant society. The review, under Chairwoman Betty Moxon, produced its report in July 2000, entitled [\*Setting the Boundaries: Reforming the Law on Sex Offences\*](#).<sup>41</sup> The review recommended a wholesale re-writing of the law on sexual offences and its embodiment in a single statute. The authors recommended that consent should be defined as 'free agreement'<sup>42</sup> and the law should set out a non-exhaustive list of circumstances where consent was not present.<sup>43</sup> The defence of honest belief in consent should not be available where there was self-induced intoxication or if the accused did not

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<sup>39</sup> P Roberts, 'The Philosophical Foundations of Consent in the Criminal Law' (1997) 17 *Oxford Journal of Legal Studies* 389.

<sup>40</sup> D Ormerod, 'Consent and Offences Against the Person: LCCP No 134' (1994) 57 *MLR* 928; S Shute, 'Something Old, Something New, Something Borrowed – Three Aspects of the Consent Project' [1996] *Crim LR* 684; D Ormerod & M Gunn, 'Consent – A Second Bash' [1996] *Crim LR* 694.

<sup>41</sup> N Lacey, 'Beset by Boundaries: the Home Office Review of Sex Offences' [2001] *Crim LR* 3; P Rumney, 'The Review of Sex Offences and Rape Law' (2001) 64 *MLR* 890.

<sup>42</sup> At para.2.10.5.

<sup>43</sup> At para.2.10.6 and 2.10.9.

take all reasonable steps to ascertain whether the victim was consenting.<sup>44</sup> Further, indecent assault should be replaced with an offence of sexual assault to cover sexual touching carried out in the absence of the victim's consent.<sup>45</sup> The authors of the review were assisted by a policy paper produced by the Law Commission, which built on the work undertaken on the previous Consultation Papers.<sup>46</sup> As to the meaning of consent, the authors of the Review wrote this:

In this context the core element is that there is an agreement between two people to engage in sex. People have devised a complex set of messages to convey agreement and lack of it – agreement is not necessarily verbal, but it must be understood by both parties. Each must respect the right of the other to say 'no' – and mean it.<sup>47</sup>

The Law Commission in its policy paper had suggested a definition of consent in these terms – 'subsisting free and genuine agreement' – but the review rejected that definition as being 'too complex' and introducing 'an unnecessary semi-contractual complication into consent.'<sup>48</sup> Instead, the Review preferred the definition 'free agreement'. To complement the new definition, the authors felt that a non-exhaustive list of circumstances where consent was not present was needed. Examples given by the review included cases where the victim submitted because of force or where the victim was asleep, or where the victim lacked the capacity to understand what they were doing, or where the victim was deceived as to the purpose of the act. The Law Commission's policy paper made a number of suggestions about the role of capacity, deception, mistake and force in the law of consent but the Review had little to say about the Commission's recommendations in that regard. The Commission also suggested that the offence in [section 3](#) of the 1956 Act should be retained and extended whereas the offence in [section 2](#) should be repealed because in its view threats that procure sexual activity but which fall short of threats of force should not attract criminal liability of any kind.<sup>49</sup> The authors of the Review preferred to create a new offence of obtaining sexual penetration by threats or deception in any part of the world, and thus retain the essence of the sections 2 and 3 offences in their original, unaltered form.<sup>50</sup>

In its White Paper of 2002, [Protecting the Public](#),<sup>51</sup> the Government accepted most of the recommendations put forward by the 2000 review. The Government stated its intention 'to make statutory provision that is clear and unambiguous'<sup>52</sup> on the issue of consent, and this would be achieved by setting out a definition of consent followed by a list of

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<sup>44</sup> At para.2.13.14.

<sup>45</sup> At para.2.14.4.

<sup>46</sup> Law Commission, *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (2000).

<sup>47</sup> At para.2.10.4.

<sup>48</sup> At para.2.10.5.

<sup>49</sup> At para.6.29.

<sup>50</sup> At para.2.18.7.

<sup>51</sup> Cm 5668, 2002.

<sup>52</sup> At para.30.

circumstances where, if the prosecution proved those circumstances applied, absence of consent would be presumed unless the defence could prove on the balance of probabilities that there had been consent. Thereafter, the House of Commons Home Affairs Committee<sup>53</sup> considered the Government's proposed Sexual Offences Bill. During the debates in Parliament a number of changes were made to the legislation before it became the [Sexual Offences Act 2003](#).<sup>54</sup> The offence of rape in [section 1](#) was defined as the intentional penetration of the vagina, anus or mouth of another with the accused's penis in circumstances where the victim does not consent to the penetration and the accused does not reasonably believe that the victim consents. Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps taken by the accused to ascertain whether the victim consents. A new offence of assault by penetration was created in [section 2](#) and indecent assault was replaced with sexual assault in [section 3](#). But at the same time, sections 2 and 3 of the 1956 Act were repealed in their entirety<sup>55</sup> and not replaced. No clear explanation was offered for this, though it seems likely that the government simply thought that a separate offence of procuring sexual intercourse by deception was unnecessary. Unfortunately, but quite predictably, the courts would continue to hold that not every deception removes consent, and thus the removal of a back-up offence left a gap in the law; and as we shall see, it is this gap with which this present Report is principally concerned.

Consent was defined in [section 74](#) as follows: '...a person consents if he agrees by choice, and has the freedom and capacity to make that choice.' [Section 76](#) contained two conclusive presumptions, namely that where the accused 'intentionally deceived the complainant as to the nature or purpose of the relevant act' or the accused 'intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant' there could be neither consent nor reasonable belief in consent. [Section 75](#) contained evidential presumptions such that if one of six scenarios existed at the time then the victim is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented and the accused is to be taken not to have reasonably believed that the victim consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed. The six circumstances include where violence is used or threatened against the victim, where the victim was in fear of violence being used, where the victim was unlawfully detained, where the victim was asleep or unconscious, where the victim was unable through his or disability to communicate with the accused and where the victim had consumed, without his or her consent, a stupefying substance. The provisions of sections 74, 75 and 76 apply to a number of offences under the 2003 Act, including rape, assault by penetration and sexual assault. The

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<sup>53</sup> Home Affairs Committee, *Sexual Offences Bill* (Fifth Report of Session 2002 – 03, HC 639, 2003). The Government responded to that Report in 'The Government Reply to the Fifth Report from the Home Affairs Committee Session 2002 – 2003 HC 639' (Cm 5986, 2003).

<sup>54</sup> The Bill received Royal Assent on 20 November 2003.

<sup>55</sup> See para.10 of Schedule 6 to the 2003 Act.

2003 Act made no changes to the law of consent in respect of any offences other than those contained within the Act itself.

For the first time anywhere in the criminal law of England and Wales, Parliament had introduced a definition of consent and that definition contained three key components – capacity, freedom and choice. Although Parliament laid out situations in which consent was presumed not to exist (either conclusively or evidentially), it did not seek to explain the relationship between those presumptions and the definition of consent. Nor did Parliament seek to expand upon the relationship between consent, as it was understood in the 1956 Act, and consent, as defined in section 74 of the 2003 Act. Did the 2003 Act merely codify the common law meaning of consent under the 1956 Act or was something more going on under the hood of the new legislation?

In [\*R \(oao 'Monica'\) v Director of Public Prosecutions\*](#),<sup>56</sup> the Divisional Court (Lord Burnett of Maldon LCJ and Jay J) refused a claim from 'Monica' for judicial review of the decision of the DPP not to institute criminal proceedings against Andrew James Boyling, who was an interested party to the claim. 'Monica' is a pseudonym for a woman who entered into a sexual relationship with Mr Boyling before the 2003 Act came into force and at a time when he was a police officer masquerading as an environmental protestor. (The activities of Mr Boyling, and other police officers like him, are presently being considered by Sir John Mitting as part of the Undercover Policing Inquiry). Monica claimed that she would not have agreed to have a sexual relationship with Mr Boyling had she known the truth and, her agreement having been procured by his deception, her consent to the sexual activity that had taken place between them had been vitiated. The DPP refused to prosecute Mr Boyling for raping Monica, and she sought to challenge that decision before the Divisional Court.

The case provoked considerable debate about the approach of the courts to deception and consent, but it also touched on the connection between the old and new statutory regimes for criminalizing non-consensual sexual misconduct. [\*The Sexual Offences \(Amendment\) Act 1976\*](#) did not define what 'consent' meant but in *Monica*, the Divisional Court saw no reason to suppose that it meant anything other than what the common law said it meant at the time the amendment to the 1956 Act was made.<sup>57</sup> The claimant submitted that in [\*Olugboja\*](#),<sup>58</sup> the Court of Appeal had unshackled consent in section 1 of the 1956 Act from its common law moorings and allowed it to drift over areas previously reserved for section 2 and 3. In other words, the claimant suggested that certain threats, intimidations, false pretences or false representations that would not previously have been relevant to the issue of consent under the common law now had to be considered under [section 1](#) of the 2003 Act whereupon it would be a matter for a jury to decide whether the apparent consent of the woman had been vitiated by those threats etc.

The claimant further submitted that the definition of consent in [section 74](#) of the 2003 Act did no more than reflect the more sophisticated understanding of consent that followed

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<sup>56</sup> [2018] EWHC 3469 (QB).

<sup>57</sup> At para.27.

<sup>58</sup> [1982] QB 320.



on from the amendment to the 1956 Act that had been made by the 1976 Act. In contrast, Mr Boyling argued that the introduction of section 74 fundamentally changed the law on consent and so it would be a mistake to assume that in 2003 Parliament had intended to do no more than codify the common law on consent as it existed at that time.

Of importance here, the Divisional Court found that there is ‘no decided case that holds in terms that the 2003 Act has made no difference to the notion of “consent”’.<sup>59</sup> It followed that there was ‘at least room for argument’ that the abolition of the offences in section 2 and 3 of the 1956 Act ‘may have widened the scope of the offence of rape.’ Although the Divisional Court was clearly not inclined to decide the point it did leave the door open to a submission in a future case that consent under the 2003 Act is different from consent under the 1956 and that is because (i) Parliament chose not to define consent under the earlier Act (and so it cannot be presumed that the definition in the 2003 Act reflects what Parliament understood consent in the 1956 Act to mean), and (ii) Parliament chose to retain sections 2 and 3 in the 1956 Act and so Parliament presumably intended certain types of conduct to be caught by those offences and not by section 1, whereas under the 2003 Act there is no equivalent of the section 2 and 3 offences and so ‘consent’ in section 1 is left to do all the work.

### **Where We Are Now**

Although the stated aim of the Government in bringing forward what became the [Sexual Offences Act 2003](#) was to make the law clear and unambiguous, that lofty aim has not been entirely met, and its failure is most apparent when considering the relationship between consent, deception and mistake. In [Monica](#) itself, the Divisional Court held that certain deceptions are capable of vitiating consent to sexual activity, but they are limited to deceptions as to the identity of the defendant or as to the nature or purpose of the sexual activity (i.e. those deceptions which are specially provided for in section 76 of the 2003 Act). Analysed in this way, deception is a concept that operates outside of the section 74 definition of consent in the 2003 Act; it is only a factor that pushes against a person’s consent and could overturn it depending on whether the person who consented was deceived in either of those two ways.

Such a narrow view of deception however – only vitiating consent when section 76 is engaged – does not reflect the current law. Rather, alongside cases unpacking what is meant by deception as to the nature and purpose of sexual activity (relevant for section 76), the courts have created a wider canon of case law concerning the potential for deception to prevent consent arising under the section 74 general definition (i.e. undermining a victim’s ‘freedom’ of choice). Thus, a man who deceives a woman into believing that he is wearing a condom, as she has insisted upon, does not deceive her as to the ‘nature’ of the activity, but does deceive her in some other way which removes consent under section 74 ([Assange v](#)

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<sup>59</sup> At para.48.

[Swedish Prosecution Authority](#)<sup>60</sup>). In [McNally](#), deception as to the defendant's biological sex was said not to engage section 76, but the Court held that consent was again absent under section 74 and gave the confusing explanation that it changed the 'nature' of the activity.<sup>61</sup>

The courts have struggled, however, to provide a coherent and defensible explanation for the potential of deception to vitiate consent under section 74. In the (current) leading case of [Lawrance](#),<sup>62</sup> for example, it was held that a man who tricks a woman into believing he is infertile with the result that she agrees to have unprotected vaginal intercourse with him can rely fully upon her consent. For the Court of Appeal, Lawrance's lie did not vitiate consent because it only concerned the quality of his ejaculate and not the nature of the sexual activity itself. That is an incredibly fine distinction, not least on the facts of *Lawrance* itself, and leaves the law in a situation where some egregious lies that strike at the very heart of a person's exercise of their sexual autonomy cannot vitiate their consent. More generally, no one has sought to argue that the decisions in *Assange*, *McNally*, *Monica* and *Lawrance* are all reconcilable.

Despite the reviews into consent and the sexual offences against the person that have been carried out intermittently over the decades by august bodies, none of them have grappled comprehensively or successfully with the interplay between consent, deception and mistake in order to create a legislative framework that is as clear and unambiguous as the Government wants it to be. Part of the reason for that stems from the failure of the courts to properly analyse the relationship between those concepts that bear on the issue of consent and in particular whether certain factors are essential components of consent or whether they operate in such a way as to vitiate consent. The Supreme Court of Canada recently addressed that question in the context of whether the victim's incapacity was a precondition to the giving of consent or whether it vitiated the consent she had already given,<sup>63</sup> but much the same distinction could be drawn in any discussion of the roles that deception and mistake play in the law of consent to sexual activity. Intertwined with this issue is a broader one of whether consent operates as a defence to render non-criminal certain conduct that would otherwise be criminal, or whether a lack of consent is an element of certain offences. Of course, these issues are not exclusive to the sexual offences. As this introductory chapter has sought to explain, the struggle to delimit the scope of consensual and non-consensual behaviour has played out in the realm of non-sexual offences against the person as well, with equally inconclusive results. This means that any serious attempt to reform the law of consent with respect to sexual activity can draw little succour from developments elsewhere in the criminal law.

That is why the CLRNN has approached this project in the way we have: This is a difficult area which needs to be navigated with regard to principles as well as practicalities. With that in mind, we invited academics from different backgrounds, from different

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<sup>60</sup> [2011] EWHC 2849 (Admin). See also *R (F) v DPP* [2014] QB 581.

<sup>61</sup> [2013] EWCA Crim 1051.

<sup>62</sup> [2020] EWCA Crim 971.

<sup>63</sup> *GF*, 2021, SCC 20.

jurisdictions and with different experiences to offer their views on the ways in which the law of consent to sexual activity can be reformed. The responses to the Consultation Paper informed our Policy Outline, and feedback from the Policy Outline has in turn informed the recommendations we make in the last chapter of this Report. We hope that both the authors' contributions and our own conclusions will play a valuable part in reforming an area of the law which has clearly reached the stage where statutory intervention of some kind is necessary.

# P1. SUSTAINED IDENTITY DECEPTIONS

[Caroline Derry](#)

The current law includes one specific statutory provision on identity deception: [section 76\(2\)\(b\), Sexual Offences Act 2003](#) creates an irrebuttable presumption that there is no valid consent if the accused impersonated someone known *personally* to the complainant, leaving other identity deceptions to be considered under the general definition of consent. In practice, this has meant that the only other aspect of identity deemed relevant to consent is genital sex.<sup>64</sup> The current law has been subject to extensive criticism.<sup>65</sup> It over-criminalises ‘gender fraud’ (where the defendant is allegedly understood by the complainant to be male but has female genitalia, or vice versa) and under-criminalises other sustained deceptions (e.g. where police officers working undercover as ‘activists’ had relationships with fellow activists). A new approach – and a new offence, ‘obtaining sexual activity by sustained identity deception’ – is needed.

The existing caselaw seeks, through inconsistent and hair-splitting distinctions, to limit criminal liability to deception as to the physical or sexual nature of the immediate sexual act.<sup>66</sup> The High Court thus held in [Monica](#)<sup>67</sup> that an undercover officer’s sustained, wide-ranging and profound deception did not vitiate consent because the complainant understood the physical nature of the act itself. Yet that principle does not account for the absence of lawful consent in ‘gender fraud’ cases where, for example, digital penetration is agreed to and occurs. The Court of Appeal in [McNally](#) ultimately fell back upon the problematic claim that it is ‘common sense’ that deception as to gender vitiates consent while almost no other deception does.<sup>68</sup> There have been no other appellate decisions directly upon ‘gender fraud’, although *Monica* glossed *McNally* as a sort of ‘identity or impersonation case, given the centrality of an individual’s sexuality to her or his identity’,<sup>69</sup> and added to ‘common sense’ the requirement that it be ‘closely connected to the performance of the sexual act’.<sup>70</sup>

Three key and interrelated problems underlie the current law and are addressed in this proposal. The first is the law’s underlying discrimination around gender and sexuality. The second is the misidentification of harms caused by identity deception; the third problem is the inadequate time frame considered by the criminal courts. Specific sexual acts are divorced

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<sup>64</sup> By contrast, the *Oxford English Dictionary* definition includes *what* a person is, the impression they present to others, and the characteristics that distinguish them from others.

<sup>65</sup> For overviews see e.g. A Sharpe, *Sexual Intimacy and Gender Identity ‘Fraud’: Reframing the Legal & Ethical Debate* (Routledge 2018); C Derry, *Lesbianism and the Criminal Law: Three Centuries of Regulation in England and Wales* (Palgrave Macmillan 2020) ch 8; C McCartney and N Wortley, ‘Under the Covers: Covert Policing and Intimate Relationships’ [2018] *Criminal Law Review* 137.

<sup>66</sup> E.g. *Lawrance* [2020] EWCA Crim 971: see the editors’ introduction.

<sup>67</sup> *R (on the application of ‘Monica’) v Director of Public Prosecutions* [2018] EWHC 3508 (Admin): see editors’ introduction.

<sup>68</sup> *R v McNally* [2013] EWCA Crim 1051.

<sup>69</sup> Para 77.

<sup>70</sup> Para 80.

from their wider relationship context. The law therefore disregards both the actual duration of the deceptions and the harms identified by victims. Almost all prosecutions have related to prolonged relationships between the parties, with deceptions extending significantly beyond the details of specifically sexual intimacies.<sup>71</sup> These intimate sexual relationships founded in deception would be better addressed through abolition of the *McNally* principle that gender deception automatically vitiates consent, combined with creation of a new offence which criminalises the obtaining of sexual consent by sustained and intentional identity deception.

## Scope of the Proposal

This proposal does not directly address other types of deception discussed in the editors' [introduction](#). It does not, for example, explore the contraception cases,<sup>72</sup> which raise quite different issues around express conditions of consent. Nor does it explicitly consider the situation where the complainant consented to one type of penetration, such as penile penetration of the vagina, but another actually occurred (eg anal penetration or penetration with a dildo). In that situation, the current law is appropriate in holding that there is no valid consent to the act which actually took place (although the proposed new offence might be a more appropriate charge in some such cases).

Where the incident does not involve misrepresentation of the nature of the physical act, it should fall under the proposed new offence. This offence would therefore have applied to the undercover policing cases and the leading 'gender fraud' case of *McNally*, where the complainant had agreed to, and the accused had performed, acts of digital penetration. The new offence may lead to a different outcome in future cases, as liability would depend on the specific nature of the relationship and deception rather than upon blanket principles that gender deception negates consent and other deceptions do not. Brief consideration of *Xavier* provides a helpful illustration of the practical effects.<sup>73</sup> In 2018, Duarte Xavier was convicted of six offences of causing a person to engage in sexual activity without consent.<sup>74</sup> The male defendant had impersonated a young woman in online dating services and in some instances persuaded the male complainants to engage in one-off acts of 'vaginal' intercourse in circumstances where they could not see their partner; in fact, what took place was anal intercourse. Thus the physical act was not the one to which they had consented; liability for that behaviour would be unaffected by the new offence. Other complainants had agreed to be fellated while blindfolded or otherwise unable to see the defendant. The physical act was the one to which they had agreed but, following *McNally*, their consent was vitiated by the use of a male mouth instead of a female one. Under the proposed reform, that would no

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<sup>71</sup> A rare exception is *Duarte Xavier*, considered later.

<sup>72</sup> *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin); *R (F) v DPP* [2014] QB 581; *R v Lawrance* [2020] EWCA Crim 971. See the editors' introduction, 'Where we are now'.

<sup>73</sup> *Duarte Xavier* (unreported, Kingston Crown Court, 9 November 2018).

<sup>74</sup> Contrary to the Sexual Offences Act 2003, s4.

longer be an automatic assumption. Instead, the new offence would focus the court's attention upon the wider relationship between the parties. In particular, it would consider the prior interactions which formed the context for their encounters. Newspaper reports suggested that in some instances, there had been brief online discussions followed by a meeting in a public park with the complainant already blindfolded. The act had clearly been agreed in advance but it is far from evident that identity was of significant importance; or that if so, gender was the critical feature rather than, say, age or physical attractiveness. Of course, the details of the prior communications might well suggest a different interpretation of what had been agreed and communicated, something a court would well be able to decide. Depending upon those, an offence may or may not have been committed.

## Addressing Key Issues with the Current Law

### ***Discrimination***

On its face, the [Sexual Offences Act 2003](#) ended discrimination which had permeated the previous law. For example, it removed the gendered distinctions in many offences<sup>75</sup> and the continued criminalisation of some consensual male same-sex activity. However, the removal of formal statutory discrimination has not ended its influence upon the caselaw. The courts' approach continues, perhaps unconsciously, to draw upon homophobic and transphobic assumptions about the greater value of normative heterosexual relationships as well as sexist assumptions that a significant element of women's worth is tied to their relationships with men. [McNally](#), for example, is underpinned by the assumption that a same-sex relationship is fundamentally different from, and implicitly less desirable than, a heterosexual one. At the same time, the law fails to protect complainants subject to equally extensive and exploitative deceptions which happen not to include gender.

A rejection of that approach does not mean that complete decriminalisation is the only or best alternative. While the present law is influenced by transphobia, replacing it with a principle that 'gender fraud' by trans defendants can never be criminal would not make the law non-discriminatory. First, 'gender fraud' should not be straightforwardly equated with trans identities,<sup>76</sup> as many of the defendants in these cases did not identify as trans, did identify as lesbian, or did not express a clear identity.<sup>77</sup> An assumption that these are 'trans' cases risks judgments being made by prosecutors and courts about whether a particular defendant is 'trans enough' or, in a term used by Alex Sharpe and adopted and extended by

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<sup>75</sup> E.g. between indecent assault of a male or female; see the 'Sexual Offences Act 1956' section of the Introduction.

<sup>76</sup> This slippage has occurred in the academic literature: while trans theorist Alex Sharpe acknowledged the complexities and uncertainties in Sharpe (n 60), subsequent work has not always shown the same nuance.

<sup>77</sup> As well as *McNally*, post-2003 cases include *Gemma Barker* (unreported, 5 March 2012, Guildford Crown Court), *Gayle Newland* [2016] All ER (D) 85, *Kyran Lee (Mason)* (unreported, 16 December 2015, Lincoln Crown Court), *Jennifer Staines* (unreported, 24 March 2016, Bristol Crown Court) and *Gemma Watts* (unreported, 9 January 2020, Winchester Crown Court).

Matthew Gibson, 'authentic'.<sup>78</sup> Some of the most vulnerable young people would fail such a test. Many 'gender fraud' defendants were reported as being confused about their sexual and gender identities; such confusion is not uncommon and is in large part a consequence of systemic pressures towards gender and sexual conformity.

Second, a blanket rule that an 'authentic' gender presentation is always a barrier to criminal liability allows the criminal justice system to ignore the context in which apparent consent was given. Most cases which came before the courts involved deceptions going far beyond misrepresentations of gender identity or gender history. Some involve significant manipulation, exploitation and deception and cause substantial harm to their victims. For example, the defendant in [Barker](#) had adopted four identities in person and more online.<sup>79</sup> One alter ego would encourage or pressurise complainants into having or continuing a sexual relationship with another alter ego. [Newland](#) included allegations that the defendant had pressured the complainant into giving up a job, as well as securing a final sexual encounter by threats of suicide.<sup>80</sup> Trans man [Kyran Lee](#) used a different male name, photographs of someone else, and an invented family history including single parenthood. [Gemma Watts](#) became physically aggressive towards a much younger complainant to pressurise her into sexual activity. Simply abandoning the *McNally* principle would leave complainants without redress before the criminal courts.

Third, only overturning the *McNally* principle would continue to mean that some defendants are guilty on the basis of deception as to the nature of the act (e.g. using a dildo instead of a penis). Decisions about their prosecution, conviction and sentencing could continue to be informed by discriminatory presumptions, particularly where they do not appear to prosecutors to be 'authentically trans'. The current law's focus upon an immediate physical act leaves no space for a context which can include genuine struggles with sexuality or gender identity, and where 'assault by penetration' may not seem an appropriate label. The challenge for the criminal law is to find a way of appropriately identifying the wrongs in some 'gender fraud' cases and criminalising them, at the same time as preventing prosecution and conviction where it is not justified. Abolition of the *McNally* principle combined with the proposed new offence could achieve this.<sup>81</sup>

The undercover policing cases further illuminate the courts' failure to adequately consider the harms done to women in particular in cases of deceptive consent. That is consistent with their concern to preserve men's scope to lie and mislead in the course of 'seduction'. Thus *McNally* simply dismissed deceptions as to wealth as 'obviously' irrelevant, while [Monica](#) confirmed that wide-ranging deceptions as to almost every aspect of life

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<sup>78</sup> M Gibson, 'Deceptive Sexual Relations: A Theory of Criminal Liability' (2020) 40 *Oxford Journal of Legal Studies* 82, 90; A Sharpe, 'Expanding Liability for Sexual Fraud Through the Concept of 'Active Deception'' (2016) 80 *The Journal of Criminal Law* 28, 39.

<sup>79</sup> *Gemma Barker* (unreported, 5 March 2012, Guildford Crown Court),

<sup>80</sup> *Gayle Newland* [2016] All ER (D) 85.

<sup>81</sup> The other situation in which deception currently means there is no consent – impersonation – would be unlikely to overlap with the new offence as such impersonation of a known person is unlikely to be sustained (and was not in the few reported cases).

including politics, marital status, identity, and life history did not vitiate consent. However, the preservation of male sexual prerogatives is achieved at significant cost for women, as the following section explores.

### **Harms**

The Court of Appeal decision in [McNally](#) arguably owes less to legal principle than to the harms which the courts have identified in this and other 'gender fraud' cases. They focus on 'disgust' at engaging in same-sex activity and assume that questioning of one's sexuality is necessarily traumatic to an extent that other identity deceptions are not. These assumptions are rooted in protection of the young women's heterosexuality, not their sexual agency. Since the undercover police officers did not challenge their partners' heterosexuality, their victims could be left without the criminal courts' protection.

Complainants emphasise different harms, and describe many in similar terms for both 'gender fraud' and undercover policing cases. (In the latter, the additional element of state complicity is also significant.<sup>82</sup>) These harms are consequences of the sustained and intentional nature of the deceptions, rather than the specific physical acts. For example, the extent of the deception itself may be more important than the gender of the deceiver. The initial complaint in [Barker](#) was prompted by discovering that two friends' boyfriends were the same man under different identities; Barker's 'gender fraud' was only uncovered at the police station. Complainants frequently describe something akin to bereavement as they mourn a lover who never existed. One complainant felt 'like he had just died';<sup>83</sup> another said her lover 'died that day'.<sup>84</sup> Complainants have considered suicide and made suicide attempts.<sup>85</sup> They also feel that their trust has been violated, as they shared not only sexual activity and emotional engagement but also intimate details of their lives, hopes and dreams. In consequence, they are left doubting their own judgment and ability to trust others in future.<sup>86</sup> Many had welcomed the deceiver into their wider families. Several victims of undercover police officers were left to bring up the couples' children alone after their partners simply disappeared.<sup>87</sup>

Attention to these harms helps us to understand which identity features should engage criminal liability: those sufficiently important to the complainant's perception of who their lover is that the defendant realises the deception makes them a 'different person'. For example, the undercover officers were aware their political beliefs were fundamental for the women with whom they had relationships, while there is no suggestion that that was the case

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<sup>82</sup> C McCartney and N Wortley, 'Raped by the State' (2014) 78 *Journal of Criminal Law* 1.

<sup>83</sup> M Blake, '[They Were Completely Different People, Even When We Kissed](#)': Teen Duped into Dating Two Boys without Realising They Were Both the SAME GIRL' *Daily Mail* (London, 7 March 2012).

<sup>84</sup> 'Woman's Life 'Ruined' after Finding Boyfriend She Had Sex with Was a Woman Wearing a Prosthetic Penis' *Crosby Herald* (Liverpool, 8 September 2015).

<sup>85</sup> BBC News, '[Gemma Watts: Sex Attacks Woman Posed as Teenage Boy](#)' *BBC* (London, 10 January 2020).

<sup>86</sup> R Evans, '[Women Start Legal Action against Police Chiefs over Emotional Trauma - Their Statement](#)' *Guardian* (London, 16 December 2011).

<sup>87</sup> R Evans and P Lewis, '[Undercover Police Had Children with Activists](#)' *Guardian* (London, 20 January 2012).



in *McNally*. The court there assumed it was obvious that wealth could never be similarly important; but sustaining a false picture of one's income over a longer time period would involve a defendant in wide-ranging associated deceptions around home life, social life, income source, and so on.

As the following section explores, the mismatch between the harms identified by courts and complainants is in part due to incompatible temporal framings: the ongoing relationships experienced by complainants and the discrete incidents of sexual touching considered by the criminal courts. By considering complainants' experiences, one can see that sexual violation is one, but not the only, form of harm done in these cases. They therefore belong within sexual offences law, but the current sexual offences do not adequately capture their wrongs.

### ***Time frames***

The statutory definition of consent emphasises 'agreement by choice', a formulation which has scope to encompass a process of active agreement between two parties. However, the highly gendered formulation of consent as male request and female submission continues to underlie the caselaw. One consequence is that the timeframe of consent is narrowed to an immediate 'yes' or 'no', rather than the broader period during which consent is or is not co-created between the parties. In other words, the instant event is shorn of even immediate context. The result is one or several staccato snapshots of moments deemed relevant to the instant sexual act, which make certain aspects (previous consent, 'flirting', etc) overly visible while concealing those which are most relevant to the relational, emotional, nuanced and contextual process of consent to sexual activity. That issue is particularly acute when consent is given as part of an ongoing relationship, as in most of the identity deceptions that have been before the courts.

Merely attempting to find a consistent principle to guide these cases, extending the approach in gender fraud to undercover policing cases or vice versa, would not be adequate. Fundamentally, it would not address the misidentification of harms or problems of temporal framing discussed here. There are also more immediate, practical problems. Given the courts' resistance to criminalising undercover policing deceptions, and determination to criminalise 'gender fraud', they are likely to be hostile to treating them in the same way; in any event, formulating a principle in line with the current jurisprudence would be fraught with difficulties. A more comprehensive response is necessary.

It would be possible for a different view of consent to be taken under the current statutory framework. 'Agreement' could – and, I suggest, should – be understood as a process which occurs over time rather than a singular 'offer and acceptance'. (Even contract law recognises the significance of the parties' dealings before that singular moment.) However, that will require a shift in the understanding of this process in time which is unlikely to happen quickly or without prompting; until it does, the identity deception cases will continue to pose particular problems.

## Reform

The discussion above points to the need for a profound shift in the courts' perspective. The current law prioritises particular, privileged heterosexual male subjectivities about the meanings of sexual acts. Those acts are largely decontextualised, limited to the time frame of normative heterosexual intercourse (that is, to use a legally resonant phrase, from penetration to emission). The relevance and import of contextual information is assessed from that same perspective: a notorious example is sexual evidence history, whose admissibility had to be restricted through the use of a specific and detailed statutory provision but still remains problematic and controversial.<sup>88</sup> Ultimately, meaningful change will depend upon a more relational understanding, and temporal reframing, of consent. However, such cultural shifts are long-term projects, as demonstrated by the uneven results of the [Sexual Offences Act 2003](#)'s redefinition of consent.

A shorter-term solution is needed, then, even if the wider shift in understanding should be our longer-term goal. That solution might best take the form of a specific statutory offence which addresses these cases by shifting the emphasis from individual sexual acts and explicitly making the wider relationship context relevant. Such an offence would not only better address the particular harms in these cases, but would do so by adjusting their legal temporalities in a way which might prove a model for other sexual offences.

This proposal for a new offence, 'obtaining sexual consent by sustained identity deception', therefore offers a medium-term response to some of the shortcomings of the present law. By taking the issue of identity deception outside sections 1-3 of the 2003 Act, it could allow the full relationship context to be considered, including the range of different expectations of candour between a single, casual encounter and more intimate relationships, whatever their length. While such an offence would be new to sexual offences law, it would be consistent with other criminal law developments that have shifted the temporal framing of offences. In particular, controlling or coercive behaviour in an intimate or family relationship, contrary to [section 76 Serious Crime Act 2015](#), is based upon repeated or continuous behaviour. While that behaviour must be coercive or controlling, it need not be criminal in itself. In other words, the offence is based upon continuing conduct which has a cumulative impact rather than upon a single incident or event.

Implicit in this proposal is a rejection of simple decriminalisation by overruling the principle in [McNally](#) without more. While that would both simplify the law and protect some vulnerable defendants, particularly those who are struggling with lesbian or trans identities, it would do so at a price. First, the harms caused to complainants would be ignored, however egregious the deception. Most cases prosecuted in recent decades involve alleged deceptions going far beyond the non-disclosure of gender history; and by no means all involved defendants who claimed trans identities. Second, abandonment of the *McNally* principle alone would not protect the most vulnerable potential defendants. For example, young

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<sup>88</sup> Section 41, Youth Justice and Criminal Evidence Act 1999.

people whose partners are of similar age but below the age of consent would still be committing a criminal offence. That does not mean that they would inevitably be criminalised: most sexual activity involving minors is not brought to police attention and by no means all that is becomes the subject of prosecution. However, some are both reported and prosecuted, with potentially serious legal consequences. Such decisions could be informed by the unspoken homophobia and transphobia that critics have identified in the *McNally* decision.

Finally, the timeframe of the proposed offence must extend to online communications as well as in-person meetings. The former do not include physical sexual contact but can involve as much vulnerability, emotional investment, and co-creation of intimacy as the latter. The law has not been quick to take on that point, but experiences during the Covid-19 pandemic have brought greater familiarity with online communications, and their strengths and weaknesses, which it is hoped will inform future decision-making. Thus the offence might extend to situations like *Devonald*,<sup>89</sup> where the defendant impersonated a woman online to persuade his daughter's ex-boyfriend to commit sex acts on webcam, and *B*,<sup>90</sup> where the defendant impersonated other men to coerce his girlfriend into on-camera acts. In both cases, the complainant thought they were performing for the viewer's own sexual gratification but the defendant apparently intended to 'teach them a lesson'. *Devonald* was convicted on the basis that he had deceived the complainant about the purpose of the act being sexual. *B*, however, was acquitted since the court assumed that his purpose was partly sexual gratification. In each case, that appeared to owe as much to assumptions about heteronormative male desire as to actual evidence. The proposed offence would offer a more principled basis for deciding such cases.

### **Caveat**

There is an important caveat to the following recommendations. The proposed offence would not resolve all issues in this area. In particular, there are important questions about why 'gender fraud' cases have very high prosecution and conviction rates, in stark contrast to other sexual offences cases. That may be an issue better addressed by prosecution guidelines than the substantive criminal law, but carrying out that assessment in relation to a more appropriate offence should assist the process. Sentencing guidelines would also need to be carefully drafted following wide consultation.

### **Recommendations**

- An offence of obtaining sexual activity by sustained identity deception should be created.

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<sup>89</sup> [2008] EWCA Crim 527.

<sup>90</sup> [2013] EWCA Crim 823.

- 'Sexual activity' would not be limited to penetration (a limitation which would privilege male subjectivities and ignore many of the actual harms).
- A sexual act must have taken place; this would include those performed 'virtually', eg via webcam, as well as direct sexual touching of the complainant by the accused.
- Deception needs to be carefully defined. It must be as to material facts upon which consent is based, and which misrepresent the defendant's identity (in the wider sense of their characteristics, not name and gender alone). These would typically be broad in range, although a single factor might suffice if the defendant is aware that the complainant considers it crucial.
- The deception must be intentional; this encompasses both intentional misrepresentation and intentional non-disclosure of information the accused knows is relevant to the complainant's decision to consent.
- The deception must be sustained: this offence is aimed at the harms caused by intimate relationship deceptions (even where the intimate relationship is short in duration) rather than those during one-off casual encounters, where a narrower approach may be appropriate.
  - Any definition of 'sustained' must focus upon the continuity of the relationship, rather than a series of 'occasions' (as in harassment offences) which invoke exactly the staccato temporal framings this offence must avoid.
- There must be a causal connection between the deception and consent to the sexual act.
- In sentencing the offence, its severity would depend upon the nature and duration of the relationship, not (only) the type of sexual contact.
- The principle in *McNally* that deception as to gender means there is no consent under s74, would be abolished and such cases would fall under the new offence.

## P2. FALSE BELIEFS AND CONSENT TO SEX

### [Mark Dsouza](#)

In its 2000 policy paper, the Law Commission ('LC') rejected the Cardiff Crime Study Group's contention that there was no logical basis for distinguishing deceptions that vitiate consent from those that do not, in the rule that D rapes V despite her apparent consent if V's consent was obtained by D's deception as to the nature of the act or the identity of the person performing it. It explained that this contention derived from a misconception of the rationale for the rule:

...the [rule] does not involve saying that a consent procured by deception may or may not be valid, depending on the nature of the deception. Rather, it focuses solely on whether the complainant did in fact consent to the doing of the act by the person who in fact did it. If D does x to V, the question is whether V consented to D's doing of x. If V consented to D's doing of y, and thought that D was doing y when he was in fact doing x, then she did not in fact consent to his doing x. Similarly, if V consented to E's doing of x, and thought that the person doing it was E when in fact it was D, then she did not consent to D's doing it. The [rule] does not draw an irrational distinction between deceptions of different kinds, some of which are deemed to nullify consent although consent was in fact given. It simply recognises that in certain circumstances an apparent consent is not a true consent to what is in fact done.<sup>91</sup>

Unfortunately, since the enactment of the [Sexual Offences Act 2003](#) ('SOA'), the jurisprudence in this area has drifted back towards trying to draw distinctions between different types of deceptions. To some extent, this was necessitated by Parliament's unexplained<sup>92</sup> failure to enact a replacement for [section 3 of the Sexual Offences Act 1956](#) ('1956 Act'), which criminalised obtaining consent to sex by deception. It being unthinkable that parliament had intended to decriminalise deceiving people into granting sexual consent, the courts tried to fit such cases into the principal non-consensual sexual offences by treating more instances of deceptively obtained consent as non-consent.<sup>93</sup> This however ran contrary to the well-established<sup>94</sup> wisdom that cases in which V consented to the occurrent sexual activity but was deceived into granting consent, are relevantly different from cases in which

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<sup>91</sup> *Consent in Sex Offences* (Law Commission, 2000) para 5.19-20.

<sup>92</sup> K Laird, 'Rapist or rogue? Deception, consent and the Sexual Offences Act 2003' (2014) 7 *Crim LR* 492, 499-500

<sup>93</sup> For instance, in *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin); *McNally* [2014] QB 593. In fact, the Law Commission predicted this might happen if the s.3, 1956 Act offence was dropped. See *Consent in Sex Offences* (n91) para 5.41.

<sup>94</sup> See discussion in the [introduction](#) chapter above.

V simply did not consent to the occurrent sexual activity; while both are good candidates for criminal liability, the non-consensual sexual offences are best restricted to the latter cases. It was not entirely surprising therefore that recently, in [Lawrance](#),<sup>95</sup> the court tried to limit the deceptions that vitiate sexual consent, by attempting to draw the sort of distinction that the Cardiff Crime Study Group thought there was no logical basis to draw. The largely negative reception that the CA(CD)'s judgment has received<sup>96</sup> suggests that the Cardiff Crime Study Group were right after all.

Apart from the practical difficulties with line-drawing, the CA(CD)'s approach also suffers from a deeper problem of principle. A key focus of the SOA is protecting sexual autonomy.<sup>97</sup> The CA(CD)'s attempt to identify a standard set of matters, false beliefs as to which will obliterate consent, is fundamentally incompatible with that focus. By definition, an objective enumeration of matters important to consent overrides individuals' sexual autonomy in deciding what matters are important to them.

I suggest here that we should adopt the LC's above-mentioned reasoning, i.e. that non-consensual sexual offences should apply when 'apparent consent is not a true consent to what is in fact done', and examine fully its implications. Additionally, we should fill the gap left by repealing s.3, 1956 Act without replacement. These steps would align with the SOA's focus on protecting sexual autonomy. Sexual autonomy is set back both when V is subjected to a sexual act to which she does not factually consent, and when V does consent to the sexual act that occurs, but V's consent is 'tainted' by, for instance, deception. But these wrongs should be criminalised separately, since they are different in nature,<sup>98</sup> and arguably, seriousness.

## Tainted Consent

I start with tainted consent. When D deceives V and that deception causes her to consent to sexual activity, D seriously wrongs V despite her consent. Obtaining or even attempting to obtain property or services by deception would be an offence under the Fraud Act 2006 and/or the Theft Act 1968, and there is no reason to think that obtaining sexual access is a less serious matter. A similar claim can be made regarding exploiting another's unilateral mistake to obtain sexual access. While deception and exploitation of a unilateral mistake are different wrongs, their difference is not material for the present purposes. Indeed in [R v Kirk](#),<sup>99</sup> the court has, in a connected context, treated securing submission to sex by exploiting the

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<sup>95</sup> [2020] EWCA Crim 971.

<sup>96</sup> R Williams, 'A further case on obtaining sex by deception' [2021] 137 *LQR* 183; K Laird, 'Sexual consent: R v. Lawrance' [2021] 7 *Crim LR* 610; R Buxton, 'Consent in rape: fact, not law' [2020] 79(3) *CLJ* 391; M Dsouza, '[Deception, Consent to Sex and R v Lawrance \(Part 1\)](#)' (2020) *UCL Centre for Criminal Law Blog*.

<sup>97</sup> See *Setting the Boundaries: Reforming the Law on Sex Offences*, Vol. I (Home Office, 2000) para 2.7.2, 2.20.3, 4.5.7, *Consent in Sex Offences* (n86) para 4.8, 4.69-70. These papers contributed to the passing of the SOA. See also C [2009] 1 WLR 1786 [pg 1790].

<sup>98</sup> M Gibson, 'Deceptive Sexual Relations: A Theory of Criminal Liability' [2020] 40(1) *OJLS* 82.

<sup>99</sup> [2008] EWCA Crim 434.

pressures that V found herself under as being effectively equivalent to imposing pressure to secure submission to sex. There is no reason to think that this reasoning does not carry over. Both such wrongs should be criminalised by inserting a new offence into the SOA.

## **Giving Consent**

Consider now the question of when apparent consent is not true consent. A common worry about reform proposals that focus on protecting sexual autonomy is that recognising an individual's absolute autonomy to identify 'dealbreakers' (i.e. beliefs that, if V knew they were false, V would not have consented to sexual activity) means letting V make even trivial matters dealbreakers. It seems to follow that if at the time of the sexual activity, V was mistaken as to any 'dealbreaker' belief, then legally, V did not consent to the sexual activity. This might make the non-consensual sexual offences overbroad. But the law can protect sexual autonomy without becoming capacious, if it is attentive to how sexual consent is actually granted.

When people engage in consensual sex, they may have deliberated on how they will exercise their sexual autonomy on this occasion by evaluating the pros and cons, and – what is important here – reminding themselves of beliefs they hold that have led them to the point of consenting. Perhaps they consciously remind themselves (of their belief) that their prospective partner is single, owns that lovely house, is Muslim, does not have chlamydia, and genuinely loves them. But this considered analysis is not how it usually goes. More often, they make, at most, a very attenuated, almost subconscious calculation when engaging in consensual sex – it either 'just feels right', or not. Such decisions to engage in sex are deliberate mental acts, not purely physiological responses to stimulus. They generate valid consent to sex. The courts have described the decision-making process involved as 'largely visceral rather than cerebral... ow[ing] more to instinct and emotion rather than to analysis'.<sup>100</sup> Here, I use the terms 'unreflective' and 'considered' instead of 'visceral' and 'cerebral', to capture the same meaning. Most individual grants of consent are neither entirely unreflective, nor entirely considered – they are some combination of the two.

Despite the ubiquity of (relatively) unreflective agreements to sex, both commentators and courts almost always implicitly refer to the paradigm of considered agreements to sex when considering whether the falseness of a belief undermines consent and apply insights drawn from this sort of analysis to all agreements to sex. I explain below that correcting this mistake prevents the non-consensual offences from becoming overbroad.

## **When Apparent Consent is Not True Consent**

Broadly, there are two types of cases in which apparent consent is not true consent. Firstly, as the LC noted, if V consents to 'x' and D instead does 'y', then V does not consent to the

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<sup>100</sup> Per the CA in *IM v LM, AB, and Liverpool City Council* [2014] EWCA Civ 37 [para 80], the CA(CD) in *A(G)* [2014] EWCA Crim 299 [para 28], the HL in *C* [2009] UKHL 42 [para 15], and *Consent in Sex Offences* (n91) para 4.59.

thing that happened, i.e. 'y'. If 'y' is a sexual act, we should charge D with a non-consensual sexual offence. Secondly, if V indicates that her consent to 'y' is conditional upon 'x' occurring prior to or simultaneously with 'y', and that condition is not met, then V does not consent to 'y'. Again, if 'y' is a sexual act, we should charge D, the perpetrator of 'y', with a non-consensual sexual offence.

I discuss these cases separately.

### **A. Consent's object**

One does not consent in the abstract; one can only consent to something. To successfully exercise her sexual autonomy to consent to sexual activity, V must decide the object of her consent i.e., what she consents to. She does this by reference to various parameters that describe the bounds of her consent. For instance, she may consent to 'vaginal sex without ejaculation, with my husband'. Here, V specifies some affirmative parameters like 'vaginal sex', and 'with my husband', and some negative parameters like 'without ejaculation', each of which describing the object of her consent. These parameters often point to beliefs that V holds when consenting – here they suggest that V has a belief that D is her husband, and will not ejaculate inside her.

V can, in principle, frame the precise boundaries of the object of her consent by exhaustively listing each parameter thereof. Then, reference to V's list of parameters would resolve any dispute about whether V's consent extended to some 'y'. But such cases are vanishingly rare. More often, even when consenting consideredly, V frames the object of her consent by reference to a non-exhaustive list of key parameters. This list may leave the issue of whether V's consent extended to 'y' underdetermined – there is a 'correct' position on the issue, but just reading V's list will not reveal it. Now recall that sexual consent is often granted unreflectively. Since consent needs an object, it follows that it must also be possible to frame the object of one's sexual consent unreflectively. In such cases, even more such boundary disputes will be left underdetermined by V's list (such as it is) of parameters.

To decide whether V consented to 'y' when the answer is underdetermined by V's list of parameters, we should ask what V was actually (mentally) picturing as the object of her consent, when consenting (whether this be a consideredly defined image, or an unreflective sketch, or a bit of both). Only parameters actually in (considered or unreflective) contemplation when framing the object of consent will shape it. Since sexual consent is often given largely unreflectively, the object of consent will rarely be framed in enough detail to factor in all, or even most, dealbreakers. So, an HIV negative V may not factor in something as important as D's HIV status when unreflectively consenting;<sup>101</sup> V's consent may simply be to 'sex with D'. This limits the breadth of the resulting offence, and means that the outcomes of many cases in which V's consent was held not to have been obliterated, are defensible.

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<sup>101</sup> M Dsouza, 'Undermining Prima Facie Consent in the Criminal Law' (2014) 33 *Law and Philosophy* 489, 506.



That said, we should reject claims that false beliefs as to any particular matter, be it wealth, or the validity of a marriage, can never, as a matter of law, vitiate putative consent. An individual's sexual autonomy makes them the ultimate authority on what matters are important enough to them to either incorporate into the object of, or (as I will argue below) make a precondition for, their consent. We should also reject the outcomes of cases which hold that V consented despite having a false belief as to something she (consideredly or unreflectively) made part of the object of,<sup>102</sup> or a precondition to,<sup>103</sup> her consent.

Similarly, an individual's sexual autonomy makes them the ultimate authority on what matters are not important to their consent. So, if V does not really care what D's purpose is – say she is interested only in her own sexual gratification – then the fact that she is mistaken about D's purpose (even if D misled her) should make no difference to the validity of V's consent. There is no normative basis for the reading of [section 76\(2\)\(a\)](#) SOA that suggests otherwise.<sup>104</sup> This argument does not extend to the nature of the act since, if V does not realise that she is consenting to D's performance of a sexual act, then whatever else she does, she does not exercise her *sexual* autonomy to grant sexual consent. Elsewhere, I have argued that the terms 'nature' and 'purpose' in that provision were not meant to cover different ground despite the disjunctive 'or' between them and that in trying to avoid attributing nominal redundancy in drafting to Parliament, some courts have wrongly overextended the scope of s.76(2)(a).<sup>105</sup> The words 'or purpose' in s.76(2)(a) should be dropped to avoid confusion.

Now consider the improbable case that V agrees to sex with 'that blonde millionaire, D'. Here, V has consideredly deployed her belief that 'D is a millionaire' when framing the object of her consent. Therefore, she does not consent to sex with a pauper. A law that respects V's sexual autonomy must accept that the sex with pauper D was non-consensual. It also seems likely that V unreflectively deployed her belief that D's hair was real in framing the object of her consent. If so, then V did not consent to sex with a bald man wearing a hairpiece (even if she would still have consented had she known about the hairpiece – though in that case, prosecution would probably not be in the public interest since even V did not care about D's baldness; and if prosecuted, D would almost certainly have a mens rea based answer to liability). On the other hand, since V did not even unreflectively frame the object of her consent by reference to any belief that all of D's limbs were intact, the fact that D has an artificial foot will not mean that she did not consent to sex with D (even if she would not have consented, had she known).

One might think that the fact that D is poor, or bewigged, should not expose him to conviction for a non-consensual offence. But first, such cases will be rare – more often, even if V's background beliefs about D were essential for D even being eligible for V's sexual

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<sup>102</sup> E.g. *Lawrance* [2020] EWCA Crim 971.

<sup>103</sup> E.g. *Papadimitropoulos v The Queen* (1957) 98 CLR 249 (HCA).

<sup>104</sup> See *Devonald* [2008] EWCA Crim 527, *Matt* [2015] EWCA Crim 162. This proposition is doubted in *Bingham* [2013] EWCA Crim 823 [paras 14,19,20].

<sup>105</sup> M Dsouza, '[Deception, Consent to Sex and R v Lawrance \(Part 2\)](#)' (2020) *UCL Centre for Criminal Law Blog*.

consideration, when V exercises her sexual autonomy, her consent is just to 'sex with D'. Background beliefs that V does not deploy, consideredly or unreflectively, at the time she exercises her sexual autonomy to consent to sex, do not shape the object of her sexual consent. In such cases, V does factually consent to sex with the bewigged pauper, D, so D commits no non-consensual sexual offence. However, depending on other facts, D may deserve liability for a 'tainted consent' offence. Second, even in the rare cases in which V's framing of the object of her consent makes D's wealth and hairline relevant, D will have a mens rea based answer to liability if D reasonably did not realise that V had so framed her consent.

#### *(a) Fact-finding*

Fact-finders would assess the plausibility of an assertion that V had selected a given parameter of the object of her consent, whether consideredly or unreflectively, as they always do – by referring to the evidence available and drawing appropriate inferences based their experience of ordinary behaviour in society. Admittedly, this will not be easy, but fact-finders regularly make such findings,<sup>106</sup> not just about subjective consent, but about all manner of subjective mental states, including intention, suspicion, foresight, and recklessness. Concerns about matters of evidence should ordinarily not shape substantive law.<sup>107</sup>

#### *(b) Two potential problems*

One problem for this analysis is 'future-facing' parameters – where V defines the object of her consent by reference to events subsequent to the sexual act, e.g. 'sex that makes me pregnant', or 'sex with D, who will marry me'. Allowing V to make subsequent events dictate the precedent validity of her sexual consent seems counter-intuitive.

Doctrine precludes this statutorily, by focusing on whether V consented to the actions involved in the concerned sexual act. So, to perform the actus reus of assault by penetration, D must penetrate V's vagina or anus with a part of his body or with something else. Therefore, for V's consent to insulate D against this charge, it must also relate to the penetration of V's vagina or anus with a part of D's body or with something else.<sup>108</sup> The same is true for the other non-consensual sexual offences. But this solution excessively limits the law's ability to protect V's exercises of her sexual autonomy.

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<sup>106</sup> For instance, in *McNally*, they inferred from the facts that V had consented to 'sexual encounters with a boy'; in *R(F) v DPP*, they inferred that V had consented on the basis that D 'would not ejaculate within her vagina'. In *Linekar*, the jury inferred that V 'had consented to sexual intercourse believing she would be paid but the defendant had never intended to pay'. There is no reason to believe that they cannot make similar findings in other cases, especially if the law prompts them to do so.

<sup>107</sup> This is also important for practical reasons. For instance, in the extradition case of *Assange* (n93), the court had to decide by reference to the complainant's allegations, since it could not itself act as a fact-finder. Substantive rules shaped by the difficulties in identifying facts are especially ill-suited for such purposes.

<sup>108</sup> SOA, s2.

Consider [McNally](#).<sup>109</sup> D was born with female genitalia and identified as male. D (who used a male avatar) befriended V online, and they started a long-distance relationship which lasted several years, throughout which V believed D was a cisgender male. When they finally met, with V's enthusiastic approval (and with the lights off), D digitally and orally penetrated V's vagina. When V (eventually) learned that D had female genitalia, D was charged with assault by penetration under [section 2 of the SOA](#). The CA ruled that V's putative consent to the sexual activity was vitiated because V 'chose to have sexual encounters with a boy and her preference... was removed by [D's] deception'. But even assuming for argument's sake that D deceived V into believing that D was a cisgender male, the conclusion that V's consent was vitiated does not, in law, follow. Section 2 is not concerned with V's full description of the object of her consent ('sexual encounters with a boy') – it is concerned only with whether she consented to the penetration of her vagina with D's fingers and tongue. That, she undoubtedly did. In principle, D ought to have been acquitted on this ground alone. Regardless of whether we think D deserved to be convicted in *McNally*, it seems uncontroversial that D ought not to be acquitted on this technical ground.

### *(c) A better solution*

A better solution is to recognise that V can frame the object of her consent as she wishes, but caveat that for the purpose of identifying non-consensual sexual wrongs against V, references in V's description to events subsequent to the sexual activity are irrelevant. This makes sense since the SOA focuses on wrongs constituted by sexual acts. Where V's act description includes a sexual act and a subsequent event, and the subsequent event does not occur, V is really wronged by *that* fact, and not the sexual act.<sup>110</sup>

## **B. Preconditions for consent**

V can also exercise her sexual autonomy by setting preconditions that must be satisfied before her consent to sex arises,<sup>111</sup> e.g. 'I consent to sex, provided you wear a condom', or 'I consent to sex, provided you wash the dishes first'. To do this, V must consideredly identify a proposition and mentally link its truthfulness to the consent's validity while giving consent – preconditions are not set unreflectively. It follows that the concerned grant of consent must also have been considered. Accordingly, only where consent was given consideredly is it possible (though not guaranteed) that consent was granted subject to the satisfaction of a precondition.

## **C. Deception and other mistakes**

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<sup>109</sup> [2013] EWCA Crim 1051.

<sup>110</sup> This is consistent with the ruling in *Linekar* [1995] QB 250.

<sup>111</sup> Dsouza, 'Undermining' (n101) 504-5.

Nothing in this analysis supports making a categorical distinction between deceptions and other mistakes, including self-induced ones, in analysing the actus reus of the non-consensual sexual offences. Where D deceives V as to a material fact, this will be strong evidence for the claim that D had the mens rea for an offence. But even in the absence of a deception, D will have the mens rea if, for instance, he knows that V mistakenly thinks what is happening matches the object of her consent, or that a precondition for her consent had been met.

#### ***D. The emerging rule***

We can now synthesise the following RULE:

Where V putatively consents to sexual activity with D, the falseness of a belief that V holds renders the sexual activity non-consensual when it means either

- (a) that what happened to V fell outside the (consideredly or unreflectively selected) boundaries of the object of V's consent, or
- (b) that a precondition that V consideredly set for her consent, had not been met.

#### ***E. On mens rea***

While not being overbroad, the proposed RULE does widen the scope of the non-consensual sexual offences. It is therefore imperative that the mens rea requirements for these offences provide an adequately robust safeguard against undeserved convictions. A particular concern here is the mens rea in relation to a complainant's identity. The only case on point so far is *Whitta*,<sup>112</sup> in which the trial judge held that the SOA enacts strict liability as to the complainant's identity. It is not clear that this was intended by parliament. In keeping with the overall mens rea rule in these offences, it should be clarified that D should not be convicted unless he had no reasonable belief as to the consent of the person he reasonably took the complainant to be.

### **Proposals for reform**

The Appendix to this paper sets out a suggestion for statutory text that will implement the reforms that I have suggested here, which include:

1. Inserting a new offence into the 2003 SOA to criminalise obtaining sexual access through tainted consent. [Appendix, section 4A]
2. Making such amendments as are necessary to enact a rule to the effect that misperceptions (whether caused by deceit or not) render a putatively consensual act non-consensual when V mistakenly believes that

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<sup>112</sup> [2006] EWCA Crim 2626.

- a. a precondition she set for her consent to sexual activity to arise has been satisfied; or
  - b. the sexual act performed falls within the boundaries of the sexual act that she has permitted. [Appendix, section 79(11) r/w section 77; sections 1(1)(b), 2(1)(c), and 3(1)(c); sections 75, 76]
3. Specifying that the mens rea for non-consensual sexual offences is an absence of reasonable belief as to the consent of the person D reasonably took the complainant to be. [Appendix, sections 1(1)(c), 2(1)(d), 3(1)(d), and 4(1)(d)]

## APPENDIX

The following is a suggestion for statutory text that can be deployed to implement the proposals made in the Proposal Paper on False Beliefs and Consent to Sex. Only sections to which changes are suggested are reproduced below, and the proposed changes appear in red lettering.

### **Rape**

1

#### **Rape**

(1) A person (A) commits an offence if—

- (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
- (b) B does not consent to the **activity involving the** penetration, and
- (c) A does not reasonably believe that B **(or the person he reasonably believes to be B)** consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

(3) Sections 75 and 76 apply to an offence under this section.

(4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

### **Assault**

2

#### **Assault by penetration**

(1) A person (A) commits an offence if—

- (a) he intentionally penetrates the vagina or anus of another person (B) with a part of his body or anything else,
- (b) the penetration is sexual,
- (c) B does not consent to the **activity involving the** penetration, and
- (d) A does not reasonably believe that B **(or the person he reasonably believes to be B)** consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

(3) Sections 75 and 76 apply to an offence under this section.

(4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

3

#### **Sexual assault**

(1) A person (A) commits an offence if—

- (a) he intentionally touches another person (B),
- (b) the touching is sexual,

- (c) B does not consent to the **activity involving the touching**, and
  - (d) A does not reasonably believe that B **(or the person he reasonably believes to be B)** consents.
- (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.
- (3) Sections 75 and 76 apply to an offence under this section.
- (4) A person guilty of an offence under this section is liable—
- (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years.

***Causing sexual activity without consent***

**4 Causing a person to engage in sexual activity without consent**

- (1) A person (A) commits an offence if—
- (a) he intentionally causes another person (B) to engage in an activity,
  - (b) the activity is sexual,
  - (c) B does not consent to engaging in the activity, and
  - (d) A does not reasonably believe that B **(or the person he reasonably believes to be B)** consents.
- (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.
- (3) Sections 75 and 76 apply to an offence under this section.
- (4) A person guilty of an offence under this section, if the activity caused involved—
- (a) penetration of B’s anus or vagina,
  - (b) penetration of B’s mouth with a person’s penis,
  - (c) penetration of a person’s anus or vagina with a part of B’s body or by B with anything else, or
  - (d) penetration of a person’s mouth with B’s penis,
- is liable, on conviction on indictment, to imprisonment for life.
- (5) Unless subsection (4) applies, a person guilty of an offence under this section is liable—
- (a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years.

***Procurement***

**4A Procurement of sexual activity**

- (1) A person (A) commits an offence if—
- (a) by knowingly making a false representation or exploiting a false belief held by another person (B), he procures B to engage in an activity, and
  - (b) the activity is sexual
- (2) A person guilty of an offence under this section, if the activity caused involved—
- (a) penetration of B’s anus or vagina,
  - (b) penetration of B’s mouth with a person’s penis,
  - (c) penetration of a person’s anus or vagina with a part of B’s body or by B with anything else, or
  - (d) penetration of a person’s mouth with B’s penis,
- is liable, on conviction on indictment, to imprisonment for a term not exceeding 10 years.
- (3) Unless subsection (2) applies, a person guilty of an offence under this section is liable—

- (a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years.
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75 **Evidential presumptions about consent**

(1) If in proceedings for an offence to which this section applies it is proved—

- (a) that the defendant did the relevant act,
- (b) that any of the circumstances specified in subsection (2) existed, and
- (c) that the defendant knew that those circumstances existed,

the complainant is to be taken not to have consented to the ~~relevant act~~ activity unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.

(2) The circumstances are that—

- (a) any person was, at the time of the ~~relevant act~~ activity or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;
- (b) any person was, at the time of the ~~relevant act~~ activity or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;
- (c) the complainant was, and the defendant was not, unlawfully detained at the time of the ~~relevant act~~ activity;
- (d) the complainant was asleep or otherwise unconscious at the time of the ~~relevant act~~ activity;
- (e) because of the complainant's physical disability, the complainant would not have been able at the time of the ~~relevant act~~ activity to communicate to the defendant whether the complainant consented;
- (f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the ~~relevant act~~ activity.

(3) In subsection (2)(a) and (b), the reference to the time immediately before the ~~relevant act~~ activity began is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began.

76 **Conclusive presumptions about consent**

(1) If in proceedings for an offence to which this section applies it is proved that the defendant did the relevant act and that any of the circumstances specified in subsection (2) existed, it is to be conclusively presumed—

- (a) that the complainant did not consent to the ~~relevant act~~ activity, and
- (b) that the defendant did not believe that the complainant consented to the ~~relevant act~~ activity.

(2) The circumstances are that—

- (a) the defendant intentionally deceived the complainant as to the nature ~~or purpose~~ of the ~~relevant act~~ activity;

(b) the defendant intentionally induced the complainant to consent to the ~~relevant act~~ activity by impersonating a person known personally to the complainant.

77 **Sections 75 and 76: relevant act**

In relation to an offence to which sections 75 and 76 apply, references in those sections, and in section 79, to the relevant act and to the complainant are to be read as follows—

<b>Offence</b>	<b>Relevant Act</b>
An offence under section 1 (rape).	The defendant intentionally penetrating, with his penis, the vagina, anus or mouth of another person ('the complainant').
An offence under section 2 (assault by penetration).	The defendant intentionally penetrating, with a part of his body or anything else, the vagina or anus of another person ('the complainant'), where the penetration is sexual.
An offence under section 3 (sexual assault).	The defendant intentionally touching another person ('the complainant'), where the touching is sexual.
An offence under section 4 (causing a person to engage in sexual activity without consent).	The defendant intentionally causing another person ('the complainant') to engage in an activity, where the activity is sexual.

79 **Part 1: general interpretation**

- (1) The following apply for the purposes of this Part.
- (2) Penetration is a continuing act from entry to withdrawal.
- (3) References to a part of the body include references to a part surgically constructed (in particular, through gender reassignment surgery).
- (4) 'Image' means a moving or still image and includes an image produced by any means and, where the context permits, a three-dimensional image.
- (5) References to an image of a person include references to an image of an imaginary person.
- (6) 'Mental disorder' has the meaning given by section 1 of the Mental Health Act 1983 (c. 20).
- (7) References to observation (however expressed) are to observation whether direct or by looking at an image.
- (8) Touching includes touching—
  - (a) with any part of the body,
  - (b) with anything else,
  - (c) through anything,and in particular includes touching amounting to penetration.
- (9) 'Vagina' includes vulva.
- (10) In relation to an animal, references to the vagina or anus include references to any similar part.
- (11) In relation to an offence under sections 1, 2, 3, or 4, any issue as to whether the complainant consented to the activity is to be determined having regard to any preconditions that the complainant set for his consent to arise, and how the complainant framed of the object of his consent, excluding any reference therein to events subsequent to the relevant act.



## P3. REDEFINING SEXUAL CONDITIONS

[Matthew Dyson](#)

The sexual offences have significant problems of substantive law, evidence, investigation and sentencing. Many are longstanding problems, both of practice and of conflicting values and norms. This proposal focuses on two within the group of problems relating to consent: on what counts as consent and how we decide what must be consented to.

Subjective conditions, and subjective and objective definitions of offences are problems throughout the law, and the sexual offence and should be a place where even better solutions are crystalised. This can be done within the existing format of the [2003 Act](#), by amending, [section 74](#) on the definition of consent, and appropriately applying [section 76](#) on 'nature and purpose'. This is a draft reform proposal, subject to further refinement and development.

### Conditions and Consent

Conditions are difficult to square with English law's simplistic view of mens rea. Despite some recent greater awareness of the difficulties particularly in conditional *intention*,<sup>113</sup> it is still ensnared in the wider failure of English law to define mens rea states. It is obvious, but often forgotten, that essentially all purposes, and many other mental states, have conditions. Some are known, some are unrealised. Many are so obvious as not to be mentioned, such as that the sun rises tomorrow. For the sexual offences, it is conditions about consent where reform is needed most urgently. It is common for persons to have some conditions on the choice to agree to sexual conduct. Some are express, some are implied. They also often relate to risks, like the chance of contracting a sexual transmitted disease, or of an undesired pregnancy.

While English criminal law does not have a fully developed approach to conditions at present, the sexual offences do not even engage with the mainstream tools in other areas, like the offences against the person. The sexual offences provide an opportunity to sharpen existing doctrinal approaches, while also supporting coherence across legal rules and factually similar situations.

The proposal is to enhance the definition of consent in section 74:

'...a person consents when a free, informed and deliberate agreement is made.'

Rather than:

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<sup>113</sup> E.g. *Jogee* [2016] UKSC 8.

‘a person consents if he agrees by choice, and has the freedom and capacity to make that choice’ in the current law.

The proposed definition avoids referring to both ‘agreement’ and ‘choice’ without explaining how they are different.

The definition also avoids referring to capacity, since that is a necessary component of any mental state described in the criminal law. Inserting it each time a mental state is discussed is not necessary, and doing so risks its exclusion if on any occasion it is omitted. Its inclusion also, in a legal system where it is not normally added to every definition, might be taken to imply there are special rules for capacity within consent in the sexual offences, which there are not and should not be. If it was felt necessary to include it, the provision could instead be ‘a person with capacity consents by making a free, informed and deliberate choice to agree.’

The main addition is the language of ‘free, informed and deliberate’,<sup>114</sup> which is used in causation generally, and in many other areas of the English legal system. While known to the common law, it appears able also to provide as clear a legal definition as a statute can, avoiding the difficulties of additional deception offences.

The concept of freedom is already in the present legislation. Some of the work courts have hitherto made it do would be moved elsewhere in the new definition.

The requirement of ‘informed’ consent is well known across the law, though it has different applications in different contexts. It would neither be necessary nor possible to provide in legislation about what it should mean in every context. Each factual situation has to be assessed on its own merits. However, two points could be made clear. First, that case law can build up some elaborations on what level of information is required. It will extend beyond questions of ‘nature and purpose’ which have until now been part of [section 76. McNally](#)<sup>115</sup> provides one example, perhaps flawed, but certainly arguable, of such accretions of law. Second, that a deception about a matter which would have changed the complainant’s decision to consent will mean that consent was not informed. Subject to the discussion in the next section, that the condition was relevant to the sexual offence, that would mean there was no consent.

Deceptions fit imperfectly with the choice/freedom/capacity definition in the current [section 74 SOA 2003](#). Indeed, the Court of Appeal in [Lawrance](#) might have been trying to avoid facing the need for ‘informed’ by purporting to use ‘nature or purpose’ under section 74 even though that formulation only appears in the statute in section 76. A deception might affect *choice* by cutting down a complainant’s apparent options. Leveson LJ in *McNally* fitted deception into ‘freedom’, holding that the complainant’s preference, ‘her freedom to choose whether or not to have a sexual encounter with a girl was removed by the defendant’s

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<sup>114</sup> E.g., HLA Hart and T Honoré, *Causation in the Law*, 2nd ed. (Oxford: Clarendon, 1985), 326, adopted in *Latif* [1996] 1 WLR 104, 115; endorsed again famously in *Kennedy (No 2)* [2008] 1 AC 269, [14].

<sup>115</sup> [2013] 2 Cr App R 28.

deception'.<sup>116</sup> It is surprising that the Court in *Lawrance* felt able to hold that deceptions have no greater value than mistakes, given that they were either overruling or departing from *McNally*, *Dica* and other cases. Deceptions erode the complainant's decision-making in a way that should have remained highly salient to liability. While mistakes, assumptions, failures to disclose and deceptions might blur in some situations, that does not mean the law should stop putting effort into identifying them and recognising their impact. Doing so is particularly important as otherwise we might also accentuate difficult divisions the law already has.

More generally, a condition specified by the complainant will be more likely to be part of any calculation of whether the complainant had been 'informed' even when the defendant did not actually deceive the complainant in response.

The final element is that the decision to agree is 'deliberate'. Again, this is a well-established term elsewhere in the law. It does not require that the person concerned understood all aspects of the information required, but that the person considered and decided to agree. In the context of conditions, 'deliberateness' highlights that the person consenting has to do more than simply consider the possibility of a condition, but must make an actual choice about the relevance of the condition. In the same way as conditional intention about a risk can too easily (and erroneously) be assumed merely because a person foresaw a risk and carried on with the risk-causing conduct, so should conditional consents be considered on all the evidence. At least one other commentator has already focused 'deliberate', although it is not clear it is the best placed to do all the work of conditional consents.<sup>117</sup>

## What Comes Within the Scope of 'Sex'

The second problem is what we define as sex and how we decide what conditions are relevant to it. Most generally, one might ask how much the object of a criminal offence exists independently of the decisions and feelings of a person the offence relates to.

The precise meaning of 'sex' is difficult. In *Clarence* in 1888, the Court of Crown Cases reserved decided six to four that a woman consented to the risk of a sexually transmitted disease when she consented to sex with her husband.<sup>118</sup> The judgment has a number of problems. For the modern world, it was grounded in a number of doctrines rejected firmly since. Most obviously, the court held that a wife gave almost irrevocable consent to sex upon marriage, finally removed in *R v R* in 1991.<sup>119</sup> The court also held that there was no offence on those facts under section 20 or section 47 of the [Offences Against the Person Act \(OAPA\) 1861](#), since overruled in *Dica* in 2004.<sup>120</sup> However, there is a deeper question of whether sexually transmitted diseases are inherently a risk of sex.

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<sup>116</sup> [2014] QB 593, [26]. Cf the obfuscation in *Monica*, [2019] QB 1019, [81].

<sup>117</sup> M Dsouza, '[Deception, Consent to Sex and R v Lawrance \(Part 2\)](#)' (2020) UCL Centre for Criminal Law Blog.

<sup>118</sup> [1888] 22 QBD 23.

<sup>119</sup> [1992] 1 AC 599.

<sup>120</sup> [2004] QB 1257. See also *Konzani* [2005] 2 Cr. App. R. 14.

In [Dica](#), the Court of Appeal was willing to assume unprotected sex with someone carries a risk of HIV, and that is a risk you accept for the purposes of sex but not for the purposes of the OAPA. It simply said ‘These victims consented to sexual intercourse.’<sup>121</sup> The court did not engage with what ‘sexual intercourse’ means, and what risks are part of it. Why should the law protect your autonomy to reject the risk of physical harm (through section 18 or section 20 OAPA) more than your sexual autonomy (such as through rape)? The risks are vastly different. The chance of transmission would be the same, at 0.08%. Then, given how low the prevalence of HIV is (0.17%),<sup>122</sup> and how many with HIV are diagnosed and receiving treatment which effectively prevents transmission<sup>123</sup> (90%<sup>124</sup>), the conduct in [Dica](#), if carried out today, is over 5880 times more risky than what the complainant was agreeing to. Other diseases can be modelled similarly.

This evidence-based analysis of risk in sex has not been engaged in by the courts. In [EB](#) in 2007,<sup>125</sup> undisclosed HIV transmitted through unprotected sex was held not to be rape. The only authority cited was the above line in [Dica](#). Reform could and should set a standard of how significant the particular risk is to sex. The standard formulation on such decisions is a multiple of the severity of the risk and the likelihood of it happening without the mistake or deception. For example, the risk of catching a cold might normally not be relevant, but the risk of HIV would be.

The current test, seen in [Lawrance](#) is that the condition (there, relating to the absence of fertility) had to be ‘so closely connected to the nature or purpose of sexual intercourse...closely connected to the performance of the sexual act.’<sup>126</sup> Reasoning like this might also be seen around the edges of cases relating to deception about a disease in cases like [Dica](#), and definitely in cases about identity and purpose of the relationship like [Monica](#).<sup>127</sup> By contrast, a conviction for a deception about wearing a condom was obtained without expressly using it, but with [Monica](#) arguing the test explains the decision.<sup>128</sup> It is not just that this test has been applied unevenly, creating the untenable claim that ejaculate containing fertile sperm is not physically different than ejaculate without it. It also focuses only on physical elements of the conduct, ignoring all other things which a reasonable person might say were related to sex.

The answer is to look more closely at what the SOA considers to be related to sex. This offers a way out of the Court of Appeal’s additional narrow understanding of the object of consent. In the context of rape, consent to the penetration by a penis of a vagina, anus or mouth is all that [section 1](#) explicitly refers to. Conditions for that penetration, and attitudes

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<sup>121</sup> Ibid, [39].

<sup>122</sup> Stats from [Aidsmap](#) and [Avert](#).

<sup>123</sup> The best estimate is currently 0.8%; see generally Barré-Sinoussi F et al., ‘Expert Consensus Statement on the Science of HIV in the Context of Criminal Law’ (2018) 21 J of the Intl AIDS Society 1.

<sup>124</sup> According to [National Aids Trust data](#), 93% of people who have HIV and are diagnosed, and the 97% of them who are on treatment.

<sup>125</sup> [2007] 1 WLR 1567.

<sup>126</sup> [2020] EWCA Crim 971, [35].

<sup>127</sup> [2018] EWHC 3469 (QB).

<sup>128</sup> *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin); see also *R (F) v DPP* [2014] QB 581.

to risks associated with that penetration, are only relevant to the extent other provisions of the SOA 2003 make them so. [Section 76](#) does so for impersonation of someone known personally, and for deceptions about the nature and purpose of the act. The nature of the act has been narrowly interpreted, but covers simple tricks about whether the conduct is sexual, rather than medical or otherwise innocuous. Similarly, four of [section 75's](#) circumstances address the freedom to consent, and two address consciousness and willpower. This would mean, on its face, that section 1 did not cover deceptions about condom usage, while case law has held that it does. The problem is in a narrow reading of section 1, but it goes wider than that.

However, rape is not the only relevant offence. A related early error the law has fallen into is to treat [section 1](#) and [2](#) differently from [section 3](#) and [4](#) of the SOA. Section 1 and 2 concern 'penetration' and that has been the issue triggering discussions of consent. However, in 'sexual touching' under section 3, and certainly for section 4's 'sexual activity', there is no less a need to know what consent, including in particular what conditions, relate to sex, and which do not. The narrow mechanical description in section 1 does not help us define why wearing a condom is a valid condition, but requiring the oven be cleaned first is not. In section 4, 'sexual activity' does not have an external meaning like the one asserted in [Lawrance](#). To decide what the sexual activity was in a given case, you would have to look at what the parties agreed. Reformulated into a s. 4 offence, in *Lawrance*, that would sensibly be described as activity where there was no significant risk of pregnancy, and the defendant caused the complainant to perform sexual activity outside this.

To a lay person (and probably most lawyers), the decision that pregnancy was not 'closely connected to the nature or purpose of sexual intercourse', but was one of the 'risks or consequences associated with it' is probably hard to follow. Pregnancy could surely be the very purpose of the act. For a non-trivial number of people who have sex, the very reason of the sexual intercourse is to reproduce. Indeed, why should a purpose not to get pregnant, using surgical or barrier interventions, meet the 'closely connected' test, but the purpose to get pregnant does not? To consider pregnancies as only ever 'risks or consequences associated with [the sexual act]' seems only to restate the issue by chronology, focusing on the hours between ejaculation and fertilisation. Even if a pregnancy is undesired, is it that once a person wants to have sex for fun or pleasure, no other purposes or conditions are permitted? Beyond just those problems, the sperm were a clear physical difference in the nature of the fluids involved. The sperm created a factually relevant risk and one the parties agreed to exclude. Sperm constitute one of the two significant risks to unprotected penile-vaginal sex, something children from age 11 are taught in schools.

This leads us to consider how the SOA currently addresses what does relate to sex. That can be found in [section 78](#) of the Act:

For the purposes of this Part (except sections 15A and 71), penetration, touching or any other activity is sexual if a reasonable person would consider that—

(a)... it is because of its nature sexual, or

(b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.

There is no definition of what is ‘because of its nature sexual’. The most logical interpretation is that only the penile penetration of the vagina, anus or mouth is by its nature sexual. That tracks ordinary usage for “sex” and that conduct described in [section 1](#) is the only offence to which section 78 applies which does not also employ the word ‘sexual’; for example, [sections 2-4](#) all do. ‘Sexual’ is not needed for s. 1, because it could only ever be sexual. In addition, the provision focuses on the conduct to be characterised, not on how consent to that conduct should be addressed. To apply the provision to consent, the ‘by its nature sexual’ should be similarly narrow, only very few consents could only be sexual. The vast majority are ones which we should ask what a reasonable person would say was a condition related to sex, and if it can be sexual, turn to consider the circumstances or purpose of a person in relation to it. The provision is already a clear sign that the SOA 2003 does not conceive of sex in purely subjective terms, applying an objective filter in the ‘reasonable person’ test first.

Something similar already happens in respect of consent in the offences against the person. Battery, in part through a concept of an ‘unlawful’ application of force. Even an unconsented to touching is not a battery where it is within some societally accepted touching, such as on public transport.<sup>129</sup> However, deliberately taking advantage of those limits is a difficult area with little decided law in England and Wales, and probably results in a battery. The underlying point is that an individual cannot always determine that a touching on her is unlawful, each touching is also mediated through objective considerations based on societal standards. There are some difficulties in adapting a process of physical inviolability into sexual offences, but in principle the same logic applies.

Some have argued that that more mistakes or deceptions should negate consent than English law currently recognises. The most famous academic arguments in this direction focus on the ability of the individual to set parameters on what is consented to, effectively allowing the individual to define what would be sex and what would be rape. For example, in 1995 Simon Gardner considered that a complainant/victim centred assessment of a mistake could be blended with a jury’s assessment of the significance of that mistake: ‘consent is negated by mistake if the matter as to which the victim was mistaken was of sufficiently (in the view of the jury) major moment in her own decision to have intercourse with the accused’.<sup>130</sup> In 2005, Jonathan Herring went further, arguing that when a claimant would not have consented but-for an issue about which (s)he is mistaken, there is no consent.<sup>131</sup> This would be an apparently simple and attractive bright line. Consent would be predictable from the position of complainants, and from the position of defendants who deceive; mistakes would not

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<sup>129</sup> E.g., *Collins v Willcock* [1984] 1 WLR 1172, 1177-1178 per Goff LJ. Note, subjective perception might elevate a level of harm, e.g., into ABH: *DPP v Smith* [2006] EWHC 94.

<sup>130</sup> S Gardner, ‘Appreciating Olugboja’ (1996) 16 *Legal Stud* 275, 288.

<sup>131</sup> J Herring, ‘Mistaken Sex’ (2005) *Crim LR* 511. Cf. H Gross, ‘Rape, moralism, and human rights’ [2007] *Crim LR* 220; A Sharpe, ‘Criminalising sexual intimacy: transgender defendants and the legal construction of non-consent’ [2014] *Crim LR* 207.

necessarily be. Importantly, it would dramatically expand the situations where there was no legally valid consent.

These proposals accept that there might not be consent, and refines the definition of consent to strengthen the role of autonomy in the meaning of consent. However, that does not require that the law accept that that all such decisions are automatically about 'sex'. It rejects an individual's ability to make sex include anything, from well-known examples like that the sex be paid for, as in [Linekar](#),<sup>132</sup> to that both parties love each other, that the sex last a certain amount of time, being a certain level of pleasure, or that the parties will get married afterwards. A complainant could require a guarantee that there would be no negative elements, from soreness to pregnancy: if sex takes place, even with all possible precautions, and the complainant experiences such a negative, on a purely subjective test the consent would be vitiated. If there are risks of unwanted elements or consequences to sex, a party can shift those risks to the other party by not consenting to them. The other party can decline sex, and those risks, but cannot share either. Indeed, impossible past, present or perhaps even future conditions could be imposed and consent would be absent if the condition is not met. That cannot be right. Inherent or inherently shared risks should not entirely be allocated to one party.

A key related issue is that English law is right to require that the defendant have a mens rea about the absence of consent. However, because of that purely subjective definitions of sex become less predictable, and there are reasons to doubt that they can do all the work themselves. In the non-consensual sexual offences, the defendant must lack a reasonable belief in consent, an objective standard different to subjective consent. A reasonable belief might be incorrect or correct, but it must be a belief in fact held, and it must have been reasonable to hold it. It is practically similar but not the same to say the defendant must have been negligent about consent.<sup>133</sup> A belief might be reasonable based on objective evidence about consent, and no grounds to suspect a mistake by the complainant, or ignorance that the deception was something the complainant connected to sex.<sup>134</sup> Included in a reasonable belief in consent is an approximation of the amount the person consenting does not want the entire truth at any one moment. To convict for a non-consensual sexual offence, a jury would have to decide that the defendant did not have reasonable belief in the success of his or her efforts to stay within the bounds of how much truth the complainant wanted at that time. That will be easy in the three cases that Herring particularly criticises: [Linekar](#); [Bolduc and Bird](#),<sup>135</sup> where a doctor's friend pretends to be a medical student to witness a genital examination; and [Papadimitropoulos](#),<sup>136</sup> where a woman consents because she believes she married the defendant, a man who knew the marriage had been invalid. Other cases are harder, involving what sex might reasonably be thought to be, rather than

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<sup>132</sup> [1995] QB 250.

<sup>133</sup> For example, it might be possible to have a reasonable belief without taking reasonable care, or vice versa.

<sup>134</sup> E.g., a deception about being a computer programmer in order to fix the complainant's laptop, happening to be a fantasy of the complainant's; see also J Herring, 'Mistaken Sex' (2005) *Crim LR* 511, 517.

<sup>135</sup> (1967) 63 D.L.R. (2d) 82.

<sup>136</sup> (1957) 98 C.L.R. 249

just what sex is. [McNally](#) represents just such a difficult case. Even where there is no consent in fact, it might reasonably be believed that the complainant is not entitled to assume the defendant has particular sexual organs or is a particular gender identity, one that matches the complainant's views of sex and gender; it might also be reasonable to believe that some parts of a person's history are private. Similarly, a party who knows that pregnancy can result from ejaculation inside the vagina, even taking precautions, might reasonably believe that that is a risk of sex, not a risk that can be transferred to him or her. The better framing of this question is about whether a reasonable person decides this even concerns sex at all.

### Reform Proposal Summary

- Amend [section 74](#): 'In this Part, a person consents when a free, informed and deliberate agreement is made.'
- Apply [section 78](#) to decide whether a condition relates to sex. At the moment, [Lawrance](#) refers to the physical performance of an act to try to borrow some of the authority of [section 76](#)'s 'nature and purpose' to decide whether conduct was non-consensual. Instead, combined with the redrafted section 74, the question should be whether there was free, informed and deliberate consent with respect to a matter that was sexual. Whether conduct was sexual should be decided by whether a reasonable person would say it was because it inherently is (very rare) or whether a reasonable person would say it could be sexual, and then, based on the circumstances and purposes relevant to it, that it was. This could also be used to overturn the decision in [Clarence](#).



# P4. DECEPTION, CONSENT AND THE RIGHT TO SEXUAL AUTONOMY

[Matthew Gibson](#)

This paper outlines several proposals for the Criminal Law Reform Now Network's project, *Reforming the Relationship Between Sexual Consent, Deception and Mistake*.<sup>137</sup> Notably, it recommends the introduction of four deceptive sexual relations offences to mirror the four principal sexual offences of: rape; assault by penetration; sexual assault; and causing someone to engage in sexual activity without consent – as contained, respectively, in [sections 1-4 of the Sexual Offences Act 2003](#) (SOA).

Part 2 of the paper evaluates how the principal sexual offences currently criminalise deceptive sexual relations. Next, Part 3 defines deception and contrasts this with mere mistake. Then, Part 4 discusses how deceptive sexual relations implicate two key concepts: consent and sexual autonomy. Subsequently, Part 5 explains how deception, consent and sexual autonomy justify separate criminalisation of those relations. Finally, Part 6 sets out the relevant proposals.

## 2. Deceptive Sexual Relations and the Principal Sexual Offences

English criminal law will readily convict an individual (D) for deceiving another (V) into sexual activity; and that conviction will always be for a principal sexual offence – one designed to capture specific wrongdoing.

Many deceptions concern penile penetration, thereby amounting to rape. In the most extreme scenarios, V is unaware that intercourse is taking place – as where a doctor misrepresents sex as a surgical operation to cure fits;<sup>138</sup> or a voice coach disguises sex as a procedure to aid his pupil's singing voice.<sup>139</sup> Other deceptions take place where V is aware that intercourse is taking place. These include impersonation.<sup>140</sup> They also comprise cases where D and V share the same purpose – sexual gratification – yet D deceives V about: a physical aspect of the encounter, for instance his intention not to ejaculate during penetration,<sup>141</sup> or use of a condom;<sup>142</sup> or an attribute of D, such as his mental state.<sup>143</sup>

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<sup>137</sup> The underpinning research was originally published in: M Gibson, 'Deceptive Sexual Relations: A Theory of Criminal Liability' (2020) 40 *OJLS* 82.

<sup>138</sup> *Flattery* (1877) 2 QBD 410.

<sup>139</sup> *Williams* [1923] 1 KB 340.

<sup>140</sup> *Elbakkay* [1995] Crim LR 163.

<sup>141</sup> *R (F) v DPP* [2013] EWHC 946 (Admin).

<sup>142</sup> *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin).

<sup>143</sup> *Jheeta* [2007] EWCA Crim 1699.

Meanwhile, some deceptions occur *outside* the penile-penetrative context, therefore constituting other sexual offences. Again, D may deceive V as to the purpose for engaging in the activity – as where D touches V for bogus non-sexual reasons which conceals D’s real purpose: sexual gratification. In certain of these instances, V is aware that the touching is sexual; for instance, D may masturbate V as part of a pretend medical experiment (indecent assault – now repealed).<sup>144</sup> Alternatively, V may be unaware that the touching is sexual; for example, V may believe that D is measuring V for a modelling agency (sexual assault).<sup>145</sup> Occasionally, D may deceive V into engaging in *solo* sexual activity for a sham purpose which obscures D’s true purpose – like persuading V to masturbate online via a webcam, supposedly for D and V’s mutual sexual gratification, but really so that D can use the footage to humiliate V (causing someone to engage in sexual activity without consent).<sup>146</sup> Aside from purpose, so-called ‘gender fraud’ may arise where D identifies and presents as transgender, and V later discovers D’s transgender status. Many of these cases involve transgender men: here non-penile penetration of V is assault by penetration.<sup>147</sup>

Following these developments, the courts now draw a strict line between deceptions concerning physical aspects of sexual activity (like ejaculation, or condom use) which *will* undermine consent; and those concerning circumstances surrounding that activity (like HIV status, or fertility) which will *not* undermine consent.<sup>148</sup> That line is morally contestable and, thus, fraught with difficulty.<sup>149</sup>

### 3. Defining Deception and Distinguishing Mistake

What does ‘deception’ mean? What is a mistake and how does it differ from deception? And why distinguish between deception and mistake at all? Confronting these questions is critical to understanding the nature of deceptive sexual relations.

Deception occurs where D intentionally – or recklessly – causes V to believe something false (X), and D knows or believes that X is false, or at the least does not believe that X is true.<sup>150</sup> This definition is roughly reflected in criminal law where deception raises a *further* causal issue, as seen in deception-based property offences. Liability for these crimes is usually

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<sup>144</sup> *Green* [2002] EWCA Crim 1501.

<sup>145</sup> *Piper* [2007] EWCA Crim 2151. Similarly, see *Tabassum* [2000] 2 Cr App R 328 (indecent assault).

<sup>146</sup> *Devonald* [2008] EWCA Crim 527. Here, D had just *one* purpose (humiliation) of which V was ignorant. Contrast with *R v B* [2013] EWCA Crim 823 where deception as to purpose was rejected. Seemingly, this was because D appeared to have a *range* of purposes, some of which V was aware.

<sup>147</sup> *McNally* [2013] EWCA Crim 1051.

<sup>148</sup> *Lawrance* [2020] EWCA Crim 971. See also *R (Monica) v DPP* [2018] EWHC 3508 (Admin).

<sup>149</sup> Indeed, there should be no such line: see section 4.

<sup>150</sup> T Carson, ‘Lying, Deception and Related Concepts’, in C Martin (ed), *The Philosophy of Deception* (OUP 2009) 177 – 78. Similarly, see T Dougherty, ‘Deception and Consent’, in A Müller and P Schaber (eds), *The Routledge Handbook of the Ethics of Consent* (Routledge 2018) 165.

result-orientated: the deception must be *material* to V's decision to transfer money or property to D, or provide services to D etc.<sup>151</sup>

Moreover, deception can be active or passive. The former demands a representation from D by words or actions, whilst the latter requires that D fails to disclose a fact where D is under an obligation to do so. Sexual relations should surely surmount the disclosure threshold given their fundamentally intimate character, grounded in whatever meanings (religious, transactional, procreative, loving, gratification-seeking etc.) they have for the participants. Consequently, D's obligation to disclose information relevant to V's decision to engage in sexual relations is *just* as serious as the obligation (in active deception) not to lie about that information.<sup>152</sup> This logic finds favour in the domestic courts where active and passive deceptions are both capable of undermining consent.<sup>153</sup>

On these analyses, the problem with deception is its manipulation of V's beliefs. In turn, this impacts V's *decision making*, usually resulting in a gain for D, or loss to V, or both. Such manipulation and exploitation not only obliterate professional or personal trust; they also disrespect V's autonomy, constraining it in the process. This is a vision of autonomy in the traditional, liberal sense: one which prizes individual freedom and the conditions for its realisation. Deception interferes with a number of those conditions, notably the ability to self-determine and thus make authentic choices.

However, deception is not the same as mistake. The difference concerns the source of V's false belief and D's associated blameworthiness. An active or passive deception by D as to something (X) must engender in V a false belief about X, with D intending to cause (or recklessly causing) that belief through words/actions (active deception) or non-disclosure (passive deception). In deception, D is thereby culpably involved in bringing about V's false belief; a belief which D then exploits – producing a gain for D, a loss to V, or both – via its materiality to V's decision making. In contrast, whilst mistake identically requires that V holds a false belief, that belief is not caused by D: V forms it unilaterally.<sup>154</sup> Nonetheless, in criminal law, assuming V's mistake is linked to V's subsequent conduct, D is not necessarily without blame. The issue is whether D knows, or perhaps ought to know, of V's mistake. Where D has such knowledge and – under a duty to disclose – withholds it from V, this similarly amounts to exploitation of V's false belief where that belief is material to V's decision making (generating a gain for D, a loss to V, or both).

Deception and mistake duly feature conflicting dynamics between D and V at the point when V forms a false belief. That conflict flows from the *power* D exercises over the creation of V's beliefs in deception and the absence of this in mistake. In deception, D not only exploits

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<sup>151</sup> For instance, see the old deception offences in England and Wales under the Theft Acts 1968, 1978 and the Theft (Amendment) Act 1996. Controversially, this jurisdiction has not only dispensed with this second causal element; it also no longer requires that the deception causes V's initial false belief: Fraud Act 2006 ss 2-4. This unorthodox approach to deception is not advocated in this paper.

<sup>152</sup> D's obligation to disclose information is discussed in Part 5.

<sup>153</sup> *Lawrance* (n148) at [41].

<sup>154</sup> Where V's belief is formed via a third party, it may not always be uninduced – as where the third party's conduct itself constitutes deception.

V's false belief, but also illegitimately procures it in the first place – thereby culpably creating the conditions for that exploitation. Whereas in mistake, D's conduct carries no blame at the start: V's false belief has nothing to do with D. Instead, D's conduct only becomes blameworthy *if* D holds information which D realises that, were it revealed to V, would correct V's false belief – and D, under a duty to disclose, retains this information to exploit that belief.

Accordingly, even if deception and mistake undermine V's autonomy to the same degree, then, all else being equal, D's conduct in the former demonstrates *greater* blameworthiness than that in the latter. Deception is thus a more *egregious* basis for criminal liability than mistake. This is not to rule out alternative liability for 'mistaken sexual relations'. It is just that deceptive sexual relations represent a separate wrong which should be isolated from, and not conflated with, its mistake-based equivalents in the criminalisation debate.

#### 4. Consent to Sexual Relations and the Right to Sexual Autonomy

Many legal systems organise their sexual offences around the absence of V's consent. If V does not consent to sexual relations, then – subject to D's mental state regarding V's consent – that turns legal sexual relations into ones which are criminal.

The need for consent recognises V's autonomy as the centre of decision-making. This reflects the fact that in certain domains – sexual or otherwise – consent is an exercise of autonomy. Indeed, Schulhofer identifies *sexual* autonomy as a major personal right. He suggests that it comprises two mental elements – namely, an internal capacity to make reasonably mature and rational choices, and an external freedom from impermissible pressures and constraints (like coercion or deception) on those choices; along with a physical element – notably, the separateness of the corporeal person from sexual interference.<sup>155</sup> The right to sexual autonomy is thereby *different* from other personal rights (including that of bodily autonomy). As Childs observes, '[t]he *centrality* of sexuality to personhood, and its complex involvement in both physical and affective relations, suggests that there are good reasons for retaining a category of sexual wrongs legally and conceptually distinct from other violations of autonomy'.<sup>156</sup>

The right to sexual autonomy comprises a negative dimension – i.e. the ability to refuse to have sexual relations with anyone at any time and place, for any reason or for no reason at all; along with a *positive* dimensions – i.e. the ability to choose the sexual activity one wishes to pursue, with any consenting person(s) at any time and place, for any reason.<sup>157</sup> Accordingly, one person's sexual self-determination will inevitably conflict with another's: e.g. D's will require that he sleep with V, but V's will require otherwise. Here, D's right to sexual autonomy is legitimately frustrated. As Herring clarifies, '[a]utonomy provides us with a reason for leaving a person alone to fulfil their desires. It does not require us to fulfil other

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<sup>155</sup> S Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (HUP 1998) 111.

<sup>156</sup> M Childs, 'Sexual Autonomy and Law' (2001) 64 *MLR* 309, 311 (emphasis added).

<sup>157</sup> Schulhofer (n155) 99.

people's desires. That would be an impossible burden ... [T]here is nothing unjustifiable in refusing to have sex with another and such a refusal does not unjustifiably harm another'.<sup>158</sup>

In the relations proscribed by the principal sexual offences – i.e., those concerning incapacity (usually voluntary or involuntary intoxication) or coercion (physical force, threatened force, blackmail, emotional pressure, improper offers etc.) – V is trying to exercise *negative* sexual autonomy. Here, V is, at the very least, unwilling to engage in sexual relations.<sup>159</sup> D's conduct compromises V's attempt at sexual abstention – thereby undermining V's consent. Even if V factually 'consented' to the relations, that should not – morally or legally – amount to prescriptive consent where incapacity or coercion is present.

Contrastingly, in deceptive sexual relations V is trying to exercise positive sexual autonomy: willing, at the very least, to have sexual relations with D, although V requires that those relations have (a) condition(s) attached and respected as part of V's sexual self-determination. By implication, V is *also* attempting to deploy negative sexual autonomy: the avoidance of sexual relations which do not satisfy V's condition(s).<sup>160</sup> In these cases, D's deception as to V's condition(s) undermines V's consent. As seen above,<sup>161</sup> criminal law generally requires that D's active or passive deception be *material* to V's engagement in conduct: in this instance, sexual activity. A counterfactual test underscores that connection. In the sexual realm, the question is whether, but for D's deception as to V's condition(s), would V have consented to the sexual relations? The materiality of any condition(s) means the answer is 'no': the sexual encounter contained (a) feature(s) to which V is *opposed* – V did not consent. This is true whether V is only 'just' unwilling to have sexual relations, but the deception tips V into consenting; or 'never in a million years' would V consent to such relations, yet the deception induces consent. In both circumstances, there is no consent because the deception creates *counterfactual* non-consent.<sup>162</sup>

Subjectively, though, should V be able to invoke *any* condition? Or only those which, objectively, seem *plausible* or *reasonable*?<sup>163</sup> Attempts to take an objective stance – often based on mere moral intuition – have led to awkward line-drawing.<sup>164</sup> Indeed, there is something capricious about dictating the presence (or otherwise) of V's consent according to fluctuating intuitions about the legitimacy of conditions. If a condition made a material – i.e., 'but for' – difference to V's engagement in sexual relations, it is irrelevant that it appears ridiculous to external observers. Such a claim permits V to pursue a personal conception of

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<sup>158</sup> J Herring, 'Rape and the Definition of Consent' (2014) 26 *National Law School of India Review* 62, 66 – 67.

<sup>159</sup> This is true even where V commences consensual sexual relations, thereby asserting positive sexual autonomy, but *revokes* consent during those relations, thus asserting negative sexual autonomy instead.

<sup>160</sup> In some deceptive sexual relations, V will default to a state of *negative* sexual autonomy deployment: see Part 5.

<sup>161</sup> Part 2.

<sup>162</sup> Counterfactual non-consent may also be termed 'counterfactual refusal' or 'invalid actual consent': see A Pundik, 'Coercion and Deception in Sexual Relations' (2015) 28 *Canadian Journal of Law and Jurisprudence* 97, 108.

<sup>163</sup> An objective view of conditions currently prevails in English sexual offences: *Monica* (n148), per Lord Burnett CJ and Jay J at [81] – [86].

<sup>164</sup> See *Lawrance* (n148).

positive sexual autonomy. It also means accepting that V's condition(s) may be based on prejudice: for instance, V may only want sexual relations with people who are cisgender, or of V's race. Whilst these prejudices may not be condonable, they are permissible as part of the right to sexual autonomy.<sup>165</sup> So Dougherty is correct that, '[w]hen it comes to consent, we must respect other people's wills as they actually are, not as they ought to be'.<sup>166</sup> This also enables Herring to say that '[V] is under no duty to supply sexual service to others on a non-discriminatory basis'.<sup>167</sup>

## 5. Criminalising Non-Consensual Sexual Relations

Inevitably, with the validity of Vs condition(s) assessed subjectively, this would revise up criminal law's penalisation of deceptive sexual relations. Nonetheless, criminalisation would *still* be reliant on several factors.

It would require V to identify the relevant condition(s) and show that D intentionally or recklessly caused V to believe falsely that D satisfied the condition(s), with D knowing or believing this, or at the least not believing it was true. Furthermore, establishing the 'but for' role the condition(s) played in inducing counterfactual non-consent would be important: does the jury believe V's claims about materiality? Or are those claims suspect because they seem distorted by regret and hindsight? What if D's deception placed *emotional pressure* on V to consent? Here, D's conduct might fall under a principal sexual offence because, at the time, that pressure meant that V no longer desired sexual relations (pursuing negative sexual autonomy; no consent), notwithstanding any initial condition(s). Where a provable causal link *did* exist between the deception and V's counterfactual non-consent, D would need to know about the materiality of V's condition(s) – although it might be sufficient that D *ought* to have known about that materiality to prevent claims of ignorance by D regarding (a) condition(s) which – on the facts – should have been obvious. However, it might not always be easy for a jury to decide whether D knew, or ought to have known, that V had (a) condition(s) – particularly where there was a lack of obviousness to the condition(s). D's state of mind regarding V's condition(s) would also be relevant to gauging D's belief – reasonable or otherwise – in V's consent.

Yet how do consent and sexual autonomy justify the *separate* criminalisation of deceptive sexual relations from the relations proscribed by the principal sexual offences? The answer lies in the *wrongfulness* of the former as compared to the latter. That contrast is important given that both sets of relations harm V's right to sexual autonomy in effectively the same way. In the relations prohibited by the principal sexual offences, V is attempting to deploy negative sexual autonomy; unwilling to engage in sexual activity at all (the baseline).<sup>168</sup>

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<sup>165</sup> This creates a clash between V's right to positive sexual autonomy and D's right to privacy: see Part 5.

<sup>166</sup> T Dougherty, 'Sex, Lies, and Consent' (2013) 123 *Ethics* 717, 730.

<sup>167</sup> Herring (n158), 71.

<sup>168</sup> Where V revokes consent during sexual relations, thus asserting negative sexual autonomy (having, till then, been asserting positive sexual autonomy), and D proceeds without V's consent, that baseline is similarly reversed.

However, D then has non-consensual sexual relations with V, *reversing* that baseline. This harms V's right to sexual autonomy by setting it back: putting it in a worse condition to that which it was in prior to D's conduct.

In deceptive sexual relations, V is trying to secure positive sexual autonomy: a vision of sexual liberty according to V's condition(s) (the baseline).<sup>169</sup> But D's deception *frustrates* this vision, thwarting the advancement of that baseline. Simultaneously, V is also trying to secure negative sexual autonomy: the avoidance of sexual relations which go against that vision (the same baseline). Accordingly, the deception harms V's right to sexual autonomy by not only impeding the progress of V's baseline, but also, ultimately, reversing it.<sup>170</sup> Consequently, whilst V will be dissatisfied at not securing positive sexual autonomy, the proper basis of V's complaint will be that D violated V's negative sexual autonomy – by subjecting V to counterfactually non-consensual sexual activity. Given that V's baseline finishes in an identical position – set back from where it started – in deceptive sexual relations and the relations prohibited by the principal sexual offences, both types of relations therefore harm V's right to sexual autonomy to an *equivalent degree*.

Nevertheless, for criminalisation purposes, it is significant that V attempts to deploy positive sexual autonomy in deceptive sexual relations. Here, D's attack on that autonomy signals a difference in wrongfulness between those relations and the relations caught by the principal sexual offences. In the former, D's wrongdoing is *internal* to the sexual context into which V willingly enters with a deal breaker – absent D's deception, the relations would have proceeded along the lines V sought, leading to positive sexual autonomy fulfilment. Whereas in the latter, D's wrongdoing is *external* to that context – V is unwilling to be a part of it.<sup>171</sup> That unwillingness means that, for V, the relations can never come to any good. In each case, the relationship between D and V is qualitatively *different*: D's wrongdoing has a separate moral foundation. Deceptive sexual relations thus represent an *independent* wrong from the relations prohibited by the principal sexual offences, therefore requiring separate criminalisation – and individuated according to the type of the sexual activity (penetrative or non-penetrative). This is an issue of fair labelling of offences; something which impacts D on conviction. The criminal record should give an accurate sense of wrongdoing so that the condemnation attached to the conviction is appropriate and informs any resulting social stigma.

One implication of this proposal is that it subordinates D's right to non-disclosure to V's right to sexual autonomy. In some scenarios – especially those concerning D's gender or

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<sup>169</sup> The exceptions are deceptions where V is unaware that the activity – regarding either its nature (like intercourse) or purpose (like touching) – is sexual; or those where D's representation is the catalyst for V's initial interest in sexual activity, e.g., where V masturbates for D as part of a pretend medical procedure set up by D – see *Green* (n144). In all these circumstances, V did *not* seek positive sexual autonomy; V defaulted to a state of negative sexual autonomy deployment. These deceptions are thus concerned with attacks solely on V's negative sexual autonomy. Consequently, such deceptions should be criminalised under the principal sexual offences.

<sup>170</sup> This is true even where D deceives V about V's conditions(s) *during* sexual relations. Here, V secures positive and negative sexual autonomy up until D's deception; at which point, V stops securing both these forms of sexual autonomy.

<sup>171</sup> V may be unwilling either from the very start of the relations, or after they have begun.

HIV-positive status – it may be that D’s motive for deceiving V is that this information is acutely personal. This will undoubtedly be true. Moreover, D may fear adverse reactions from V or others if D reveals the information. However, the harm which D’s deception does to V’s right to sexual autonomy justifies prioritising that right over D’s right of non-disclosure.<sup>172</sup> Legally, if not morally, D’s motive cannot negate D’s culpability in committing a wrong – in this case, deception (assuming deception can be proved).<sup>173</sup> Ultimately, if D wishes to keep information private, the only way to avoid criminalisation is to refrain from sexual relations with V where that information is material to V’s decision to consent. This may be frustrating for D if D really wishes to have such relations with V. But it does not stop D having sexual relations with others for whom this sort of information is not material in that way.

## 6. Law-Reform Proposals

- A series of deceptive sexual relations offences mirroring the principal sexual offences in [section 1-4 of the SOA](#) (and the individuated forms of sexual activity contained therein).
- Broadly, that individuating process tracks the longstanding social and cultural meanings ascribed to these activities.
  - For fair-labelling reasons, and to avoid the particular condemnation and stigma associated with the principal sexual offences, the deceptive sexual relations offences should be labelled as follows:
    - ‘Procuring sexual intercourse by deception’ (mirroring ‘rape’ in the SOA, [section 1\(1\)](#)).
    - ‘Procuring penetration by deception’ (mirroring ‘assault by penetration’ in the SOA, [section 2\(1\)](#)).
    - ‘Procuring sexual touching by deception’ (mirroring ‘sexual assault’ in the SOA, [section 3\(1\)](#)).
    - ‘Procuring non-consensual sexual activity with a person by deception’ (mirroring ‘causing a person to engage in sexual activity without consent’ in the SOA, [section 4\(1\)](#)).

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<sup>172</sup> J Herring, ‘Mistaken Sex’ [2005] *Crim LR* 511. 523.

<sup>173</sup> If these fears induce D’s deception, then – depending on V’s threat – a possible defence for D may include duress, or one specially constructed as part of a series of deceptive sexual relations offences.



## P5. CONSENT MISTAKEN

### Jonathan Herring

Over fifteen years ago I wrote an article entitled 'Mistaken Sex'<sup>174</sup> in which I argued:

If at the time of the sexual activity a person (B):

(i) is mistaken as to a fact; and

(ii) had they known the truth about that fact would not have consented to it then B did not consent to the sexual activity.

I went on to argue that if A (the person engaging in the activity) knew or ought to have known there was no consent, so understood, that could be rape or some other sexual offence.

That view has many critics, but I still believe it to be true and will offer a defence of it here, although I will rely on rather different arguments than I did back in the original article. For ease of presentation I will focus on rape, but many of the arguments will apply equally to cases of sexual assault. I will use the term 'key fact' to indicate a fact which if B had known they would not have consented. So, for example, if A has sex with B and, unknown to B, A is married, but B would not have agreed to sex had they known that fact, then B is mistaken about a 'key fact' (A's marital status). If A knew or ought to have known about that fact then A will be guilty of a criminal offence.

My arguments will be based on two premises:

1. When A sexually penetrates<sup>175</sup> B that is a *prima facie* wrong which requires a justification.
2. Consent can provide that justification if the consent provides A with good reason to believe that B has determined the sexual penetration is in B's best interests.

From these premises the following points emerge all of which are arguments for saying there is no consent when B is mistaken as to a 'key fact':

1. If A knows B is mistaken as to a 'key fact' then A cannot rely on that consent as justifying their act. That is because it does not give A a good reason for believing the act is in B's best interests.
2. If A is sexually penetrating B then A has a responsibility to ensure that they have effective consent for their act. Where A knows that B is mistaken as to a key fact it is a failure of their responsibility not to correct that fact.

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<sup>174</sup> J Herring, 'Mistaken Sex' [2005] *Crim LR* 511.

<sup>175</sup> As indicated earlier I am focussing on rape. There are plenty of other sexual touchings will also be a *prima facie* wrong. Indeed, we might imagine in many sexual encounters A and B will be both engaging in *prima facie* wrongful behaviour.

3. Cases involving 'key facts' are examples of conditional consent. The consent is given based on a particular belief. It is irrelevant whether B expressly states the consent, the consent only arises if the condition is met.
4. There are many different views as to what the sexual penetration means. The law must not impose a particular view of what sex is and allow each person to define for themselves what the nature of the act is. If B has a particular understanding of the nature of the act between A and B and that is based on a mistake as to A's character or behaviour, then the act engaged in is not the act A has consented to.

## **The Two Premises**

I will start by justifying my two premises.

### **1) A sexual penetration is a *prima facie* wrong**

Michelle Madden Dempsey and I have argued that a sexual penetration is a *prima facie* wrong.<sup>176</sup> Only a brief summary of that claim will be offered here. We highlight two wrong which are nearly always present in a penetration and one which always is in the case of male penetration of a woman. The two that are typically present are the application of physical force against another's body which is involve in penetration; and the non-trivial risks of harms that are associated with penetrative sex (e.g. sexually transmitted diseases, abrasions and bruising). Jesse Wall<sup>177</sup> reaches a similar conclusion arguing 'penetration of the vagina or anus, forceful or otherwise, is the use and control by the other, rather than the use and control by the self' and hence a *prima facie* wrong. The wrong that is always present in male penetration of women is the negative social meaning that act communicates in our patriarchal society. That is the 'the devaluation of women qua women and a disrespecting of women's humanity', with which heterosexual sexual penetration is unfortunately always associated in a society marked in rape culture and sexism.

That conclusion, that a sexual penetration is a *prima facie* wrong, must be correct, if, as is widely agreed, sexual penetration requires consent to be justified. Consent is only needed when an act is a *prima facie* wrong. Where the act is not wrongful then A does not need reasons to do the act. Hence, consent is not needed to look at the clouds floating by or walking down the street as those acts are not wronging anyone. We would not require or expect consent if the act of a sexual penetration was not itself a *prima facie* wrong.

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<sup>176</sup> M Madden Dempsey and J Herring, 'Why Sexual Penetration Requires Justification' [2007] 27 *OJLS* 467.

<sup>177</sup> J Wall, 'Sexual Offences and General Reasons Not to Have Sex' (2015) 35 *OJLS* 777. For a contrary view see K Greasley, 'Sex, Reasons, Pro Tanto Wronging, and the Structure of Rape Liability (2012) 15 *Crim L & Philos* (2021) 159.

## 2) How consent can justify a penetration

The second premise is that consent provides that justification (or at least goes a long way to justifying the act<sup>178</sup>). Consent has been called ‘moral magic’,<sup>179</sup> because it transforms an otherwise illegal act into a lawful one. It is through consent that trespasser becomes a guest, and a thief becomes the recipient of a gift. But we need to understand why that is so. The model of consent I will adopt here is that propounded by Michelle Madden Dempsey in an important article.<sup>180</sup>

In relation to a sexual penetration, consent is relevant because it provides A with a potential justificatory reason for the penetration. Consent gives A an option to decide to set aside the reasons against acting in a particular way which rest in B’s well-being. Consent does that by allowing A to assume that the act is not, all things considered, contrary to the wellbeing of the victim B. That assumption is appropriate because A is permitted to rely on B’s assessment that the act is overall in B’s best interests. In effect where consent is effective Madden Dempsey claims that A is entitled to say:

This is [B]’s decision. He’s an adult and can decide for himself whether he thinks the risk is worth it. In considering what to do, I will assume that his decision is the right one for him. After all, he is in a better position than I to judge his own well-being. And so, I will not take it upon myself to reconsider those reasons. Instead, I will base my decision of whether to [harm] him on the other relevant reasons.<sup>45</sup>

So, in the situation of rape, B’s consent gives A a reason for assessing that the sex will promote B’s best interests. Clearly an ambiguous answer; one made in the face of a threat; or an ambivalent or reluctant ‘consent’ will not enable A to reach that conclusion.<sup>181</sup> An enthusiastic agreement will.<sup>182</sup>

The rest of this essay will expand on why a consent based on a key fact cannot do this work.

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<sup>178</sup> I will leave to one side whether consent is sufficient to justify the act. For the purposes of this article I will assume it does. It seems plausible to argue it is not sufficient to set aside reasons for engaging in a penetration which are not related to wrong to B. See the discussion in S Brison, ‘What’s Consent Got to Do with It?’ *Social Philosophy Today* for some of the wrong that might not be mitigated by consent.

<sup>179</sup> H Hurd, ‘The Moral Magic of Consent’ (1996) 2 *Legal Theory* 121.

<sup>180</sup> M Madden Dempsey, ‘Victimless Conduct and the Volenti Maxim: How Consent Works’ [2013] 7 *Crim L & Philos* 11.

<sup>181</sup> J Wall, ‘Justifying and Excusing Sex’ (2019) 13 *Crim L & Philos* 283.

<sup>182</sup> R West, ‘Consent, Legitimation, and Dysphoria’ (2020) 83 *MLR* 1.

## Why Mistakes Negate Consent

### **1) Mistaken consent does not work**

An error which has befuddled much thinking and analysis of consent is that consent is a binary concept: there was either a yes or a no. It fails to appreciate that consent is a scalar concept. In broad terms we might distinguish consent in a strong or a weak sense:

- Consent in a strong sense would require us to be strict about what will count as consent. The person must know all of the relevant facts and be able to weigh them in the balance and reach a decision for themselves. They must be free from illegitimate pressure and feel they have a range of options open to them. Finally, their consent must be a positive enthusiasm to go ahead.
- Consent in the weak sense would mean we would not be strict about what would count as consent. The person need only know the essential facts. They need to be able to come to a decision, but we will not have requirements about the quality of their decision-making. Unless they are facing overwhelming pressures we will accept their consent as valid.

Of course, there are a host of consents which are in-between these. The law recognizes that 'consent' is not a binary concept by having requirements about consent (stronger or weaker) depending on the nature of the act in question. I suspect most people would require consent in the strong sense for it to be legally valid consent for heart surgery, but consent in the weak sense would suffice for a handshake. A key question is then what kind of consent should be required for sex.

I suggest we need strong consent. While in other contexts A may have other reasons to believe that the act will promote B's best interests (for example, A is a doctor offering B a treatment which makes them better) in relation to sex A has no reason to think the sex will benefit B, save B's own assessment of B's best interests. Where B is acting under a 'key fact' mistake A cannot rely on that consent because they are not relying on B's assessment of what is B's interests. Indeed, quite the opposite. A knows if that if B knew the 'key fact' B would not want to have sex. They may think B is foolish, petty or bigoted to place so much weight on the 'key fact', but that is to impose their own determination of what is best for B onto B. Whereas they should only rely on B's own assessment and they know B does not believe the act to be in their best interests.

### **2) Consent and responsibility**

If A is about to do an act which they know is a *prima facie* wrong and which if they have got the consent question wrong will cause serious harm to B then A has a responsibility to ensure that B's consent is indeed an effective determination by her of her best interests. A is about to do something dangerous, which could put B at risk of serious harm. This puts positive obligations on A to ensure that they are able to rely on B's assessment that the act will be in

B's best interests. The focus should not be on 'did B consent?' but 'did A have sufficient reason to engage in a *prima facie* wrongful act?' This requires more than simply considering if there is a 'yes or no'. If A is to do an act which is a potentially serious harm to B then A can be expected to do a little more than that. Listening to what B is saying about the proposed act is likely to require appreciating how V understands the act within its wider relational and social meaning. Only thereby can they be sure the risk of serious harm from their act will not materialize.

This involves not just looking at the moment of sex but the context of the relationship and the broader social environment. Does the interaction indicate that A was seeking to let or enable B to make a free, informed decision about what was in her best interests or was A lying, threatening, pressurizing B? The use of deceptions, pressures, manipulations and the like indicate that A was not seeking to use consent as an assessment by B of their wellbeing. Was B given time and space to make the decision? Ensuring they were not labouring under any mistake? Deceptions are clearly inconsistent with this as is proceeding with sex knowing B is mistaken. As Tom Dougherty puts it 'Deception that is materially relevant to someone's decision-making is a paradigm of manipulating someone or treating her 'merely as a means'.<sup>183</sup> The very opposite of the kind of responsibilities A owes to B.

### **3) Consent and conditions**

It is generally agreed that if B agrees to sex subject to conditions and A goes ahead without those conditions being met B will not have consented. For example, in [R \(on the application of F\) v DPP](#)<sup>184</sup> the victim agreed to sex on condition the defendant did not ejaculate inside her. The defendant had sex and deliberately ejaculated inside her. It was held she had not consented to the act the defendant did. Similarly in [Assange v Swedish Prosecution Authority](#)<sup>185</sup> it was held that if a woman agrees to sex, but only if the man wears a condom, she will not be held to have consented if the man does not wear a condom.

At one level these cases should come as no surprise. Lawyers are very familiar with conditional contracts or conditional gifts, where the legally effective transaction only comes into existence if the condition is met. So if there is consent providing condition X is met, straight forwardly there will be consent if X exists and there will not be if X is not met.

Unfortunately, the courts have not been as clear as they should have been on these cases and there are two areas of uncertainty. The first is whether the condition must relate to a 'significant matter'. This has arisen following the decision in [Lawrance](#)<sup>186</sup> where the conditional consent cases were considered alongside cases about deception, and *F* and *Assange* explained on the basis the conditions related to the physical nature of the act. That appears misguided. If a condition is put on consent then the consent is only effective if that

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<sup>183</sup> Tom Dougherty, 'Deception and Consent' in Peter Schaber and Andreas Muller, *Routledge Handbook of the Ethics of Consent* (Routledge, 2021).

<sup>184</sup> [2013] EWHC 945 (Admin)

<sup>185</sup> [2011] EWHC 2849 (Admin).

<sup>186</sup> [2020] EWCA Crim 971.

condition is met, regardless of the triviality of the condition. The most that might be said is that the more trivial the less likely it is to be a true condition of the consent. If X leaves Y a gift in a will subject to condition X, it is banal to point out that the gift is only effective if the condition is satisfied. It matters not whether the condition is regarded as trivial or absurd. The sole question for the court is whether the condition is met, without which the gift will have no effect. Exactly the same approach should be taken to conditional consent.

The second is that it may be that conditional consent is only recognised if it is explicitly stated by the victim. In [Lawrence](#) although the victim had repeatedly asked the defendant if he was fertile, which he assured her he was not, she had not explicitly stated she would only consent if he was fertile. The court agreed that it was true she would not have agreed if she had known the truth. Chloë Kennedy<sup>187</sup> in her important article appears to agree with this approach stating that only if the victim explicitly states that consent is condition will it (if unimportant to the average person) be a conditional consent. These points, I suggest, are incorrect. Consent is a state of mind and so the articulation of the consent should be irrelevant, just as it is irrelevant whether the victim voices opposition. Of course, in the case of unarticulated conditional consent the defendant may well be unaware of the condition and so lack *mens rea*, but that should not preclude its use in cases where the defendant is aware of the condition.

#### **4) Consent and Equality**

For many commentators it is necessary to draw a line between different forms of mistake (or deception). We need to distinguish between important mistakes which might negate consent and unimportant mistakes which do not. That view must be firmly rejected. First, sexual matters are of fundamental significance. Other do not have a right to touch us sexually. It is only if we decide others may touch us that the prohibition is removed. But it is our choice, our right to decide to waive. And, crucially, we do not need to give good reasons.<sup>188</sup> If A were to say 'B must give me good reasons why I should not have sex with her' that would demonstrate an utter lack of respect for B's sexual integrity. B does not need to justify not giving A access to her body. The bizarre thing is that we recognize this when it comes to fraud. If X lies about something and as a result acquires Y's property that will amount to the offence of fraud. It is no defence for X to say that Y should not have been taken in by such an obvious lie or that the lie related to simply a trivial issue. Why is it that we should take a clear line to those who use lies to get property, but not to those who lie to get sex?

Michael Bohlander<sup>189</sup> has attempted to answer this question. He explains:

[T]ransactions in the property context take place in a *highly* ordered system of a mechanical exchange of goods and services based on public and more or less inflexible rules established to safeguard smooth commerce between participants

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<sup>187</sup> C Kennedy, 'Criminalising deceptive sex: sex, identity and recognition' (2020) *Legal Studies* 1.

<sup>188</sup> T Dougherty, 'Sex, Lies, and Consent' (2013) 123 *Ethics* 717.

<sup>189</sup> M Bohlander, 'Mistaken Consent to Sex, Political Correctness and Correct Policy' (2007) 71 *J Crim L* 412.

in the system who may have had no prior contact. Being able to trust in the mere representations of the other side-with attendant severe sanctions for breach of that trust-is crucial for this commerce or the system will break down. None of this applies to sexual offences in our context.

But that is precisely my point: the current law fails to deal with breach of trust and deception in the sexual context, when it should. He offers no reasons why being able to trust in a would-be sexual partner's statements are 'crucial' for the protection of sexual autonomy. Enormous suffering has and is caused because men believe the 'seduction game' has no rules: that any amount of lying or pressurising is legitimate to get the consent.

Second, we need to recognize as a society that there is a wide diversity of views about the nature and values around sex. These reflect cultural, religious and personal values. It is not for the law to state that one set of reasons not to have sex are sufficient but another set of reasons are trivial. This distinction is one the courts and commentators have attempted, some with considerable imagination.<sup>190</sup> However, to do this is to impose a particular moral perspective on the world. In particular, at least in so far as the decisions of the English courts, a particular secular western perspective of sex. It shows an utter lack of respect for cultural and religious diversity that the issues that concern people around sex which do not relate to the physical act are dismissed as being trivial.

## Conclusion

I have argued in this essay that if A sexually penetrates B then A is engaging in a *prima facie* wrong. A requires a justification (a good reason) to do it. B's consent can provide that justification, or at least a part of it. B's consent can do this when it reflects B's assessment that the sexual penetration is in their best interest. It should not lie in the mouth of A to complain about what facts B counted as important. It is for B and B alone to determine who, when and why they are sexually used. Otherwise, B becomes an object to be used at the whim of others. Nor is it for the court to determine that the issue about which B was mistaken was trivial. That is an attempt to impose the views of a majority on a profoundly personal matter. Where A is having sex with B and is saying to themselves 'it's a good thing that B does not know fact X because otherwise they would not be agreeing' then A is showing a profound lack of respect for B's sexual autonomy. They should be convicted of rape.

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<sup>190</sup> C Kennedy, 'Criminalising deceptive sex: sex, identity and recognition' (2020) *Legal Studies* 1.

## P6. SEX, SELFHOOD AND DECEPTION

[Chloë Kennedy](#)<sup>191</sup>

In a number of jurisdictions, including England and Wales, the concept of consent is important to sexual offence laws; the absence of consent is one of the things that makes sexual activity a crime. Identifying when sexual consent is absent is therefore crucial. At present, however, **it is not clear when deception precludes sexual consent**<sup>192</sup> and it is therefore not clear when sex that involves deception (deceptive sex) is a crime.

In response to this problem, this paper provides a **new framework for deciding when deceptive sex should be criminal**. This framework satisfies the two criteria that the law on deception and sexual consent should meet: it is grounded in a clear account of **why deception matters for sexual consent**, provided in Part 2, and it maximises the **prospective clarity** of the law, as discussed in Part 3.

The new framework, which is based on **an understanding of how sex is connected to selfhood**, is set out in Part 4. Following this, Part 5 shows how this framework can be used to **determine the scope and structure of the law concerning deceptive sex**. More specifically, the framework is used to determine which deceptions should be capable of grounding criminal liability – i.e., those that relate either to **an issue that was explicitly central to the complainant’s decision to have sex** or to the way that **sex bears on identity-formation** – and what culpability the law should require. Finally, Parts 6 and 7 briefly summarise proposals for reform and recommendations for further work.

### 2. Deception and Sexual Consent

To provide a clear account of why deception matters for sexual consent it is necessary to explain what sexual consent is and when it exists. Though sexual consent can be defined in different ways, two concepts are often used: **agreement and choice**. As a starting point, therefore, we might say that sexual consent exists when two (or more) people agree to have sex. Put slightly differently, we might say that a person consents to sex when they choose to have sex.

This is not the full story, though, because it is important to pay attention to *how* that choice has been made. If the choice to have sex was made in the face of pressure we regard as inappropriate – threats, for example – we would not want to say that sexual consent exists. This is because sexual consent is supposed to protect **sexual autonomy** and sexual autonomy

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<sup>191</sup> Prepared with assistance from Kate Harvey, independent policy advisor. This research was supported by the AHRC Early Career Research Leader grant AH/S013180/1.

<sup>192</sup> This paper speaks of consent being precluded rather than vitiated to make clear that consent is absent (see New South Wales Law Reform Commission, *Consent in relation to sexual offences* (report 148, 2020) paras 6.19-6.20).



can be interpreted to mean **choosing freely** whether to engage in sexual activity, including where, when, with whom and under what conditions.<sup>193</sup>

With this explanation of sexual consent in mind, it becomes clear why deception might sometimes preclude sexual consent. If someone is deceived about any of the issues listed above i.e., where, when, with whom and under what conditions the sexual activity takes place, we might conclude that they did not choose freely to engage in the sexual activity. This is because **their choice was constrained by not knowing the true state of affairs**.

This line of thinking can be taken in two different directions. The first is to focus on the complainant's state of mind and ask: when does a complainant's mistaken (or false) belief preclude sexual consent? The second, which is the direction taken in this paper, is to focus on the information available prior to the sexual activity and ask: **when does not having certain information preclude sexual consent?**<sup>194</sup>

There are two reasons for taking this direction. The first, which is discussed in the next part, is that it maximises the prospective clarity of the law. The second is that it reduces the focus on the complainant. Though the main focus of the criminal trial ought to be the defendant and their alleged behaviour, in sexual offence trials there has been, and continues to be, a tendency to focus unduly on the complainant and their conduct. As a consequence, some reformists are keen to **reduce the extent to which sexual offence trials focus on complainants**.<sup>195</sup> While some focus on the complainant is unavoidable, the complainant and their conduct should not be the main focus of the trial as standard. The recommendations of this paper encourage an appropriate focus on the defendant's conduct.

### 3. Prospective Clarity

The criminal law ought to be **as prospectively clear – as clear in advance – as possible**. This is important so that potential defendants have **fair warning before breaking the law** and so that potential complainants **know when they have experienced a crime**. Everyone who has to use and apply the law has an interest in it being prospectively clear, too.

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<sup>193</sup> This interpretation combines the conception of sexual autonomy discussed in M Gibson, 'Deceptive Sex: A Theory of Criminal Liability' (2020) 40(1) *OJLS* 82-109 (at 94) with the definition of consent adopted in various jurisdictions, including England and Wales (freedom and capacity to choose (Sexual Offences Act 2003 section 74)) and Scotland (free agreement (Sexual Offences (Scotland) Act 2009 section 12)).

<sup>194</sup> Focusing on the absence of information means that neither misrepresentation nor mistake is *necessary*, though they might be present in individual cases. Recent case law has confirmed that the distinction between misrepresentation and non-disclosure is not significant in the context of sexual consent (*Lawrance* [2020] EWCA Crim 971 (para 41)) and earlier academic work pointed out that the distinction is difficult to sustain (A Sharpe, 'Expanding Liability for Sexual Fraud through the Concept of Active Deception: A Flawed Approach' (2016) 80(1) *The Journal of Criminal Law* 28-44). Despite the fact that neither misrepresentation nor mistake is necessary, I use the terms 'deception' and 'deceptive sex' throughout this paper because laws regulating the flow of information are part of the 'law of deception' (G Klass, 'The Law of Deception: A Research Agenda' (2018) 89 *University of Colorado Law Review* 707-740).

<sup>195</sup> E Finch & V Munro, 'Breaking Boundaries – Sexual Consent in the Jury Room' (2006) 26 *Legal Studies* 303-320 at 306; V Tadros, 'Rape Without Consent' (2006) 26(3) *OJLS* 515 at 516.

As the introduction to this report makes clear, the law criminalising deceptive sex currently falls short in this regard.

One way to solve this problem would be to allow juries to decide the matter on a case-by-case basis. Another solution would be to ask the jury to make determinations based on the complainant's mistaken (or false) beliefs. For example, the jury could be asked to decide what the complainant believed when they had sex and what impact any false belief(s) had on their decision to have sex. Alternatively, the jury might be asked whether the complainant would have decided *not* to have sex if they had known the true state of affairs.

There are problems with these suggestions, though. First, asking juries to make determinations based on either the complainant's beliefs or their hypothetical decision-making inverts the focus of the trial in the way described as problematic in section 2. Second, giving juries wide discretion or asking them to make determinations about a complainant's subjective experience decreases legal certainty.<sup>196</sup> Giving juries wide discretion or asking them to make determinations based on the complainant's subjective (or hypothetical) experience also increases the risk that undesirable (and gendered) assumptions about 'ordinary seduction' will shape trial outcomes.<sup>197</sup>

Asking **what information should be available before choosing to have sex** can avoid these problems. In addition to avoiding undue focus on the complainant, treating this as the material question serves **clarity in advance of both sexual encounters and sexual offence trials**.

The key to achieving these objectives is **identifying, in advance, which information is significant for sexual decision-making**.

## 4. Sex and Selfhood

This part sets out a framework for identifying which information is significant for sexual decision-making, which is based on the way that **sex and its direct consequences are important to how people form their identities**. The framework and its underpinnings are more fully set out [here](#).<sup>198</sup>

### ***What is identity and why does it matter?***

Identity is another word for selfhood – a person's sense of who they are. According to philosophical and psychological literature, in many contemporary societies individuals are largely responsible for developing their sense of self, albeit in relation with others. They do this by integrating their life experiences and the roles, statuses and group memberships they acquire into a narrative about who they are and what they value. **For most people, this**

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<sup>196</sup> On jury discretion, see E Finch & V Munro, 'Breaking Boundaries'; on complainants' subjective experiences, see A Eisenberg, 'Criminal Infliction of Emotional Distress' (2015) 113 *Michigan Law Review* 607-662.

<sup>197</sup> On some of these assumptions, see B McJunkin, 'Deconstructing Rape by Fraud' (2014) 28(1) *Columbia Journal of Gender and Law* 1-47.

<sup>198</sup> This section and the next draw on the linked article, C Kennedy, 'Criminalising Deceptive Sex: Sex, Identity and Recognition' (2021) 41(1) *Legal Studies* 91-110.

**narrative – their sense of self – is important and deciding in accordance with it matters to them.**

Preventing a person from deciding in accordance with their sense of self fails to respect the importance this process holds. On top of this, preventing a person from deciding in accordance with their sense of self can have negative effects on that person’s self-worth and self-esteem. Finally, preventing a person from deciding in accordance with their sense of self is particularly harmful when the consequences of the decision force a shift in that person’s life narrative – when they alter that person’s sense of who they are.

Drawing these insights together, we can conclude that people have **an interest in making decisions that accord with, and contribute towards, their sense of self** and that failing to respect this interest is both **wrongful and likely to be harmful**.

### ***How does this account of identity help?***

This account of identity and why it matters offers a way of working out, in advance, which information is significant for sexual decision-making and therefore which deceptions should be capable of grounding criminal liability (referred to as ‘qualifying deceptions’ in the rest of this paper). There are two categories of such deceptions.

The first category is deceptions that **relate to an issue that was explicitly central to the complainant’s decision to have sex**. To maximise prospective clarity, ‘explicit’ here means expressly articulated by the complainant to the defendant<sup>199</sup> before the sexual activity takes place (and not retracted before that time). Since each person constructs their own sense of self, it seems appropriate that when they expressly articulate this, e.g. by **setting conditions on their decision** to have sex, their stipulation(s) should be respected. Since people do not often explicitly set conditions on their decision to have sex, instances of this category of deceptions are likely to be rare.

The second category is a subset of deceptions that **generally relate to people’s identity-formation**. Although each person’s sense of self is personal, it is typically constructed from **‘components’ that are culture-dependent**. In other words, there are certain statuses, roles, group memberships and values that typically contribute towards a person’s sense of self at any particular place and time. This means that it is possible **to use research on these ‘components’ to develop a list of deceptions that generally relate to identity-formation** and then work out which of these has **a close link to sex and its direct consequences**. These deceptions constitute the second category of qualifying deceptions.<sup>200</sup>

This required link to sex and its direct consequences means that some deceptions that might arise in the context of sexual decision-making will be excluded. This is because these deceptions, which are identified in the next section, **are more closely linked to intimate**

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<sup>199</sup> This reflects the importance of consent being expressed by the complainer (see Sexual Offences (Scotland) Act 2009 section 13(2)(f)).

<sup>200</sup> It is possible that these deceptions will not matter to every potential complainant. Nevertheless, the fact that they are likely to matter to potential complainants in the ways outlined in the previous subsection makes them justifiable candidates for criminalisation. For a similar example of criminalisation based on the likely negative effects of the proscribed conduct, see the Domestic Abuse (Scotland) Act 2018 ss 2 and 4.

**relationships and their likelihood or quality** than they are to sex and its direct consequences. Although intimate relationships are central to identity-formation, the **principle of fair labelling** – that crimes ought to reflect the wrong they entail – suggests that these deceptions might require **alternative forms of legal redress**. This is an important issue but falls outside the scope of this paper.<sup>201</sup>

## 5. Applying the Framework

This section shows how the **framework outlined in part 4 can be used to determine which deceptions should fall into the second category of qualifying deceptions**. In other words, it shows how the framework can be used to draw up a list of deceptions that qualify in the absence of an explicit statement by the complainant that an issue was central to their decision to have sex (referred to as ‘the list’ throughout the rest of this paper). The list is outlined below and is followed by a discussion of culpability. This section concludes with an image depicting **the two routes to potential criminal liability envisaged** through applying the framework outlined in part 4.

### *The list*

Starting with a range of issues about which people seeking sexual or romantic intimacy are likely to be deceptive, we can assess which of these should be included on the list by using research about components of identity-formation. This selection process is more fully outlined [here](#).

#### **The following deceptions should be included on the list:**

**Nature or purpose of the act:** defining the boundaries of an ‘act’ is difficult and has proved so in case law. This paper recommends including deceptions about the act’s nature or purpose on the list but only **where these concern the fact that the act is sexual as opposed to, e.g., medicinal or therapeutic** or **where they concern the physicality of the act, e.g., what body parts and/or objects are involved**. This baseline information seems necessary for sexual autonomy meaningfully to be engaged.

**Identity:** the term identity can refer to attributes of a person or the person as a whole. Attributes are discussed below so here the term ‘identity’ refers to the person as a whole. The only type of identity deception that definitely qualifies according to the law as it stands is impersonating someone known personally by the complainant. It could be argued that all instances of identity deception, from impersonating any real person to adopting a false persona, should qualify because the identity of one’s sexual partner is also ‘baseline’ information. Given the importance of personal relationships to identity-formation,

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<sup>201</sup> See the author’s [research project](#).

however, this paper recommends that **identity deceptions concerning someone known personally by the complainant (pretending to be them or pretending *not* to be them) should be considered worse than other identity deceptions**. If all identity deceptions qualify – a position this paper supports – then these should constitute aggravated instances of identity deception.

**The following deceptions are the right kind of deception but their inclusion on the list depends on further work, as discussed in section 6:**

**Contraceptive practices and fertility:** Parenthood is widely acknowledged to entail a fundamental shift in identity and abortion is also known to be connected to identity-formation. As such, in principle this paper recommends including deceptions about contraceptive practices and fertility on the list but only in relation to sexual acts that are generally capable of leading to pregnancy.

**Chronic sexually-communicable diseases:** Contracting diseases of this kind has been shown to entail a significant shift in identity. As such, in principle this paper recommends including deceptions that bear on the transmission of these diseases on the list but only in relation to sexual acts that have the potential to lead to such transmission.

**Gender:** For most people, the gender of their sexual partner has a significant relationship to their own sexual identity (and perhaps their gender identity). In principle, this paper therefore recommends including gender deception on the list.

**The following deceptions should not be included on the list because they are the wrong kind of deception:**

**Marital/relationship status:** while a prior existing marriage (or other exclusive intimate relationship) is **likely to affect the likelihood or quality of any other intimate relationship** it is not clear that deceptions about marital or relationship status relate to identity-formation via sex, per se. For this reason, this paper does not recommend including deceptions of this kind on the list. Similarly, deceptions about the status of any relationship between two parties who have sex – e.g., that they are married – are arguably distinctive wrongs that are worthy of separate consideration. When a person’s beliefs forbid pre-marital sex, this is a condition that should be made explicit if the deception is to preclude sexual consent.

**Sexual orientation:** Like deceptions about existing intimate relationships, deceptions about sexual orientation appear most relevant to identity-formation insofar as **they affect the likelihood or quality of any intimate relationship** between the two parties. As such, this paper does not recommend including deception about sexual orientation on the list.

**Wealth and occupation:** Some research suggests that at least up until the 1990s women constructed their identity around their husband's occupation and income. Even if this remains the case, however, this would be another example where the **relationship, rather than sex per se, provides the link with identity-formation**. As such, this paper does not recommend including deceptions about wealth and occupation on the list.

**Religious and political views:** These attributes appear most **significant to the likelihood or quality of any intimate relationship** between the parties, so this paper does not recommend including deceptions about religious or political views on the list. If a religious or political belief involves **the prohibition of sex with those from outside the relevant group** the case for inclusion is stronger. As with pre-marital sex, however, this is a condition that should be made explicit if the deception is to preclude sexual consent.

**Infidelity:** The emergence of 'relational orientation' – a phrase that refers to the kind of intimate relationships in which one participates – suggests that the 'fidelity terms' of one's intimate relationships can be significant for identity-formation. Again, however, **the relationship, rather than sex per se, provides the link with identity-formation** and so this paper does not recommend including infidelity on the list. Privacy concerns add weight to this conclusion.

**Relationship or reproductive intentions, pre-existing children, and biological parenthood:** These first two issues are linked to identity-formation in a **more remote sense** than the other issues discussed in this paper – they refer to potential developments whose realisation depends on numerous factors. Furthermore, in respect of all of these issues the **link to identity-formation primarily rests on the existence of an intimate relationship**, rather than sex per se. This paper therefore does not recommend including these deceptions on the list.

**Race, nationality or ethnicity:** It is not clear that these attributes of a sexual partner bear on identity-formation so this paper does not recommend including deceptions about race, nationality or ethnicity on the list.

**Appearance and educational achievements:** These attributes of a sexual partner do not appear relevant to identity-formation and so this paper does not recommend including deceptions about appearance or educational achievements on the list.

**Age:** The age of a sexual partner does not appear relevant to identity-formation except when there is an identity-changing consequence to having sex with a someone of the deceiver's true age (such as being convicted of a sex offence). This paper therefore does not recommend including deception about age on the list.

**Criminal record:** The criminal record of a sexual partner does not appear relevant to identity-formation so this paper does not recommend including deceptions about criminal record on the list.

**Health:** Other than chronic sexually-communicable diseases, the health of sexual partners does not appear relevant to identity-formation so this paper does not recommend including deceptions about health on the list.

### ***Culpability requirement***

To reflect the direction taken in this paper, the culpability required to ground criminal liability for deceptive sex should relate to the subject matter of the deception. To align with the culpability generally required for sexual offences, a **defendant should not be liable to criminal punishment when they reasonably believed either that the relevant information was available to the complainant or that it would be unimportant to them.**<sup>202</sup> The beliefs of the defendant could be something that the prosecution has to prove (i.e., the absence of reasonable belief) or something the defendant has to prove (i.e., the existence of reasonable belief). The latter would reflect the asymmetry of potential harm that arises when mistakes about willingness to have sex arise<sup>203</sup> but would raise concerns about the presumption of innocence, especially if the burden on the defendant were legal, as opposed to evidentiary.<sup>204</sup>

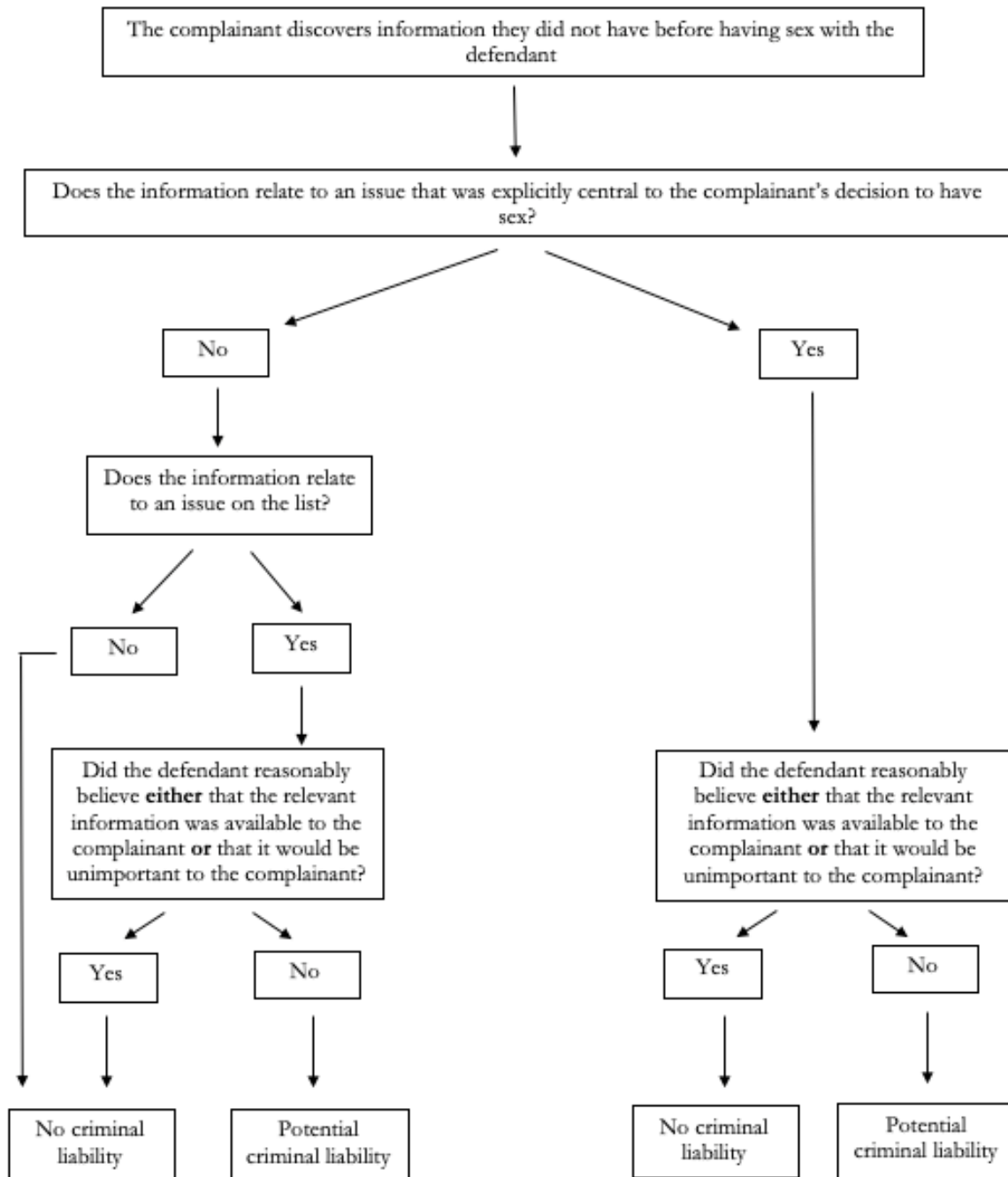
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<sup>202</sup> The Sexual Offences (Scotland) Act 2009 appears to require the prosecution to prove a lack of reasonable belief in consent when either of the two deceptions that preclude sexual consent has been carried out. In contrast, under the Sexual Offences Act (2003) where either of the two deceptions that preclude sexual consent occurs (both of which require intention on the part of the defendant) it is conclusively presumed that the defendant did not believe that the complainant consented.

<sup>203</sup> N Lacey, 'Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law' (1998) 11(1) *Canadian Journal of Law and Jurisprudence* 47-68 at 66.

<sup>204</sup> In Canada a similar defence imposes an evidentiary burden on the defendant. K Barranco, 'Canadian Sexual Assault Laws: A Model for Affirmative Consent on College Campuses' (2016) 24(3) *Michigan State International Law Review* 801 at 816.

**Overview of routes to potential criminal liability**





## 6. Reform

The legislation governing deceptive sex needs to be reformed so that both the deceptions that can ground criminal liability and the law's culpability requirements are prospectively clear and reflect a clear account of why deception matters for sexual consent. Based on the framework offered in this paper, this should be accomplished by:

- stipulating that the deceptions that can ground criminal liability include those that relate either to (i) an issue that was explicitly central to the complainant's decision to have sex or (ii) an issue that appears on the list (which, like all aspects of legislation, could be revised in future);
- stipulating that culpability should be determined with reference to whether the defendant reasonably believed either that i) the relevant information was available to the complainant or ii) the relevant information would be unimportant to them.

This reform could be accomplished by repealing [section 76 of the Sexual Offences Act 2003](#) and inserting a new section which sets out the law regarding deception and sexual consent, making clear that deception cannot affect sexual consent in any other way.

## 7. Recommendations for Further Work

### ***The prosecution of transgender people***

Including gender deception on the list of qualifying deceptions means that transgender people might be prosecuted, as has occurred in practice. The current Crown Prosecution Service guidance explains that a suspect's perception of their gender, the steps they have taken to live in their 'chosen identity' and acquire a 'new gender status' will be relevant in deciding whether they have been deceptive about their gender.<sup>205</sup> This suggests that some transgender defendants will not risk prosecution for deceptive sex if they fail to disclose that they are transgender. Although the research on which this paper is based broadly supports this position,<sup>206</sup> not all trans\* people fit within this framework, particularly if they do not adhere to the gender binary.<sup>207</sup> Further consultation with experts and affected parties is therefore desirable. Additionally, if the relevant information in cases involving transgender people concerns 'gender history' or 'biological sex', rather than 'gender', the law needs to make clear whether this deception qualifies, taking account of privacy concerns and the effects of criminalisation on already-marginalised groups.

### ***The criminalisation of sex work clients***

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<sup>205</sup> [Rape and Sexual Offences - Chapter 6: Consent.](#)

<sup>206</sup> Kennedy (n198).

<sup>207</sup> C Nirta, 'A Critique of the Model of Gender Recognition and the Limits of Self-Declaration for Non-Binary Trans Individuals' (2021) 32 *Law and Critique* 217-233.

This paper has not discussed sex workers, but their sexual consent is sometimes conditional on payment for services, so it is important to consult experts and affected parties about the potential consequences of criminalising deceptions that relate to this condition.<sup>208</sup>

### ***The public health consequences of criminalisation***

The potential public health consequences of criminalising deceptions relating to fertility and the transmission of chronic sexually-communicable disease require consideration in dialogue with relevant experts and affected parties.<sup>209</sup>

### ***Type of legal response***

This paper has proceeded on the basis that sexual offences are organised around the concept of consent and that deception is considered capable of precluding sexual consent. Both of these assumptions could be critiqued, along with the assumption that criminal, as opposed to civil, liability is the appropriate response to deceptive sex. Consideration of these issues is outside the scope of this paper.<sup>210</sup>

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<sup>208</sup> Case law suggests that this form of deception would not currently preclude sexual consent (*Linekar* [1995] 2 Cr App R 49).

<sup>209</sup> Academic research suggests that HIV criminal laws have a negative effect on public health goals. See, e.g., P Byrne et al, 'HIV Criminal Prosecutions and Public Health: An Examination of the Empirical Research' (2013) 39(3) *Medical Humanities* 85.

<sup>210</sup> See the author's research project (n201).

## P7. FREEDOM TO NEGOTIATE

[Tanya Palmer](#)

The question of how to respond to cases of so-called ‘rape-by-deception’ is an intractable problem for criminal law. The [section 76 of the Sexual Offences Act 2003](#) provides that impersonating someone known personally to the complainant will vitiate consent to a sexual act, as will an intentional deception as to the nature and purpose of the act. Courts have grappled both with the interpretation of these provisions, and with a number of scenarios falling outside their scope in which the defendant has deceived the complainant and/or the complainant has been mistaken about some fact which influenced their decision to consent to sex. These judgments have produced a range of different approaches including the practically and normatively problematic distinction between active deception and non-disclosure.<sup>211</sup> Running parallel to these doctrinal developments, an even broader range of proposals for reform has proliferated in the academic literature raising questions about whether the types of deception/mistake that should vitiate consent should be decided by objective criteria or depend on what mattered to the specific complainant,<sup>212</sup> whether the repealed offence of procuring sex by deception should be reinstated,<sup>213</sup> or whether deception should be rendered irrelevant through a return to a force-based definition of rape.<sup>214</sup> Indeed, it seems that the only point of consensus is that the status quo is deeply unsatisfactory: criticised for its lack of certainty and consistency, and the unfairness flowing from this, as well as the punitive and stigmatising approach adopted in cases involving deception and/or mistakes about the defendant’s gender.<sup>215</sup>

Rather than try to solve the question of the relationship between deception and consent, I propose in this paper to decentre consent in order to move the debate forward. Concepts of ‘freedom to negotiate’ and ‘chronic sexual violation’, developed in the author’s previous work, are used to reframe the case law in this area, providing new insights into how to respond to the wide variety of experiences that have been brought under the umbrella of ‘rape-by-deception’. As such, the paper argues for a more contextualised enquiry into the interaction between the parties and the conditions under which sex took place beyond a blunt enquiry as to whether this deception ‘counts’ to vitiate consent.

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<sup>211</sup> A Sharpe, ‘Expanding Liability for Sexual Fraud Through the Concept of ‘Active Deception’: A Flawed Approach’ (2016) 80(1) *Journal of Criminal Law* 28.

<sup>212</sup> J Herring, ‘Mistaken Sex’ [2005] *Crim LR* 511.

<sup>213</sup> K Laird, ‘Rapist or rogue? Deception, consent and the Sexual Offences Act 2003’ [2014] *Crim LR* 492.

<sup>214</sup> J Rubinfeld, ‘The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy’ (2013) 122(6) *The Yale Law Journal* 1372.

<sup>215</sup> A Sharpe, ‘Criminalising sexual intimacy: transgender defendants and the legal construction of non-consent’ [2014] *Crim LR* 207.

## Freedom to Negotiate

My overarching proposal is that the framework of consent within the [Sexual Offences Act 2003](#) should be replaced with a framework of 'freedom to negotiate'. Such that each of sections 1-4 would read as follows:

- (1) A person (A) commits an offence if—
  - (a) he intentionally [penetrates/touches etc. depending on the offence] another person (B)
  - (b) B does not have the freedom to negotiate his participation in the [penetration/touching etc.], and
  - (c) Either:
    - (i) A has intentionally or recklessly constrained B's freedom to negotiate, or
    - (ii) A acts with the knowledge that B's freedom to negotiate is constrained.

I developed the concept of 'freedom to negotiate' as part of a broader critique of consent in sexual offences law.<sup>216</sup> The existing legal construction of consent is enmeshed with a liberal understanding of subjecthood that downplays the embodied reality of sexual encounters.<sup>217</sup> It presumes an asymmetric interaction between initiator and consenter – even in legitimate sexual encounters – and it falsely constructs consent as a rigid binary which is given or withheld at specific moments in time. By contrast, a 'freedom to negotiate' framework emphasises the potential mutuality and fluidity of sexual encounters, and the need for a more contextualised inquiry into ostensible 'agreements' to engage in sexual activity. This alternative framework draws attention to the context in which a given sexual encounter played out and the power relations between the parties. It recognises that at a minimum each party to a sexual encounter should have the space to negotiate more than just the bare fact of their participation in sex but also the nature or quality of a sexual encounter.

The existing consent framework mandates a high degree of scrutiny of the complainant's actions to ascertain whether she<sup>218</sup> was consenting, and whether she did anything that could provide the defendant with grounds for a reasonable belief in consent. This is particularly apparent in debates about the deception and mistake cases, which

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<sup>216</sup> Tanya Palmer, 'Distinguishing sex from sexual violation: consent, negotiation and freedom to negotiate' in Alan Reed, Michael Bohlander, Nicola Wake and Emma Smith (eds.) *Consent: domestic and comparative perspectives* (Routledge 2016).

<sup>217</sup> Throughout this paper I use the terms 'sexual encounter', 'sexual activity' and 'sex' interchangeably as umbrella terms to refer to all forms of sexual activity covered by ss1-4 of the Sexual Offences Act 2003, as the concepts discussed apply to all four offences.

<sup>218</sup> Whilst recognising that perpetrators and victims of sexual violence can be any gender, I use 'she' to refer to victims/complainants and 'he' to refer to perpetrators/defendants throughout the paper for the sake of simplicity and clarity.

regularly focus on issues such as: What beliefs did the victim (V) hold about the sexual encounter she was engaged in, and the identity and attributes of her partner? What facts did, could or should V have contemplated? Did V have any 'dealbreakers' to consenting to sex, and if so, how clearly must she have contemplated these and/or expressed them to her partner? Should V's 'dealbreakers' be taken seriously or are they trivial? The freedom to negotiate framework that I propose addresses this issue by focusing on the defendant (D)'s actions and intentions i.e. did he do anything to constrain the victim's freedom? Did he take advantage of any pre-existing any lack of freedom on the victim's part?

Nevertheless, the proposed framework is not simply an expansion of liability for rape but rather a reorientation. While replacing consent with 'lack of freedom to negotiate' arguably widens the *actus reus* of the relevant offences, the framework institutes a higher subjective *mens rea* threshold. If D himself has constrained V's freedom to negotiate, he must have done so intentionally or (subjectively) recklessly in order to attract liability. Or, if he merely takes advantage of some existing constraint on V's freedom, he must have done so knowingly.<sup>219</sup> In the remainder of the paper I outline how the freedom to negotiate model would apply to various different types of scenarios that have come under the umbrella of deception-based or mistaken consent.

### **Cases where Freedom to Negotiate is Constrained by Coercion**

For some of the cases usually discussed in relation to 'rape-by-deception', deception is not in fact the central issue. If D forces V to perform a sexual act at gunpoint, it makes no difference if unbeknownst to V the gun was fake. V in this scenario did not have the freedom to negotiate even the bare fact of their participation in sexual activity, let alone the quality of that encounter, but has submitted due to fear. The case of [Jheeta](#)<sup>220</sup> can be understood as a more elaborate version of this scenario. Jheeta, sensing his girlfriend was losing interest in him, sent anonymous text messages to her from a number of false personas in order to first put her in a state of fear, and then to persuade her that she would be liable to criminal prosecution if she did not continue a sexual relationship with him. The fact that Jheeta's scheme was considerably more elaborate than placing a fake gun to someone's head does not change the basic underlying premise: In both cases, the victim submits to sex due to threats which limit their freedom to negotiate their participation in sexual activity.<sup>221</sup> Moreover, if V were to mistakenly think she must have sex with D under threat of criminal penalty, and D was aware of V's mistake, D would remain liable as there would still be a lack of freedom to negotiate (due to V's own misconception), which D would be knowingly exploiting. By contrast, if D were neither the source of, nor aware of, V's misconception, he would be an innocent man.

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<sup>219</sup> I continue to research the broader implications of this alteration to the *mens rea* of ss1-4 of the Sexual Offences Act 2003, but for the purposes of the current proposal, this is the *mens rea* threshold I have set.

<sup>220</sup> *Jheeta* [2007] EWCA Crim 1699.

<sup>221</sup> This approach appears to have been – correctly – adopted by the Court of Appeal in this case.

A somewhat different case involving coercion and deception is that of [F v DPP](#).<sup>222</sup> Here, D had abused his wife over a number of years, using threats of violence and emotional blackmail to coerce her into sexual activity on occasions when she did not wish to have sex, and into types of sexual activity that she found degrading and physically painful. Having reviewed her case, the DPP concluded that none of the specific incidents she had described amounted to rape and declined to prosecute. The Court of Appeal, reviewing this decision not to prosecute, acknowledged the broader coercive context of the relationship, but ultimately identified only one incident as a potential basis for rape liability. On this occasion, D had initiated sexual activity and V had reluctantly agreed only if he wear a condom or withdraw before ejaculation. D then, whilst penetrating V, told her that he would ejaculate inside her 'because you are my wife and I'll do it if I want.'<sup>223</sup> In both *Jheeta* and *F* the victims experienced the sexual activity *at the time* as something they were being coerced into, as opposed to as something they chose to do on the basis of facts they later discovered to be untrue. Thus coercion – rather than deception – should be understood as the central issue in these cases.

### **Cases where V has No Freedom to Negotiate Participation in a *Sexual Act***

Where D initiates an activity with V but conceals from her that the activity is *sexual* in nature, V has no freedom to negotiate her participation in a *sexual* act. The *actus reus* of an offence under one of [sections 1-4 of the Sexual Offences Act 2003](#) would therefore be established (which offence will simply depend on the particular type of sexual activity involved). This scenario has arisen in a number of cases both before and after the 2003 Act, in which V has given their consent to D performing a medical examination or procedure upon them, and D has instead gone on to perform a sexual act.<sup>224</sup> It matters not that in these cases the physical movements of D's body are broadly the same as those that V agreed to, consent to a non-sexual act simply is not consent to a sexual act, no matter how similar the physical movements involved may be.

The existing consent framework has been applied relatively unproblematically to these cases, via the application of [section 76\(2\)\(a\) of the Sexual Offences Act 2003](#). There is however one problem, which is that this provision conflates the *actus reus* element of consent and the *mens rea* element of reasonable belief in consent. S76(2)(a) only applies if D *intentionally deceives* V as to the nature or purpose of the sexual activity. If this is proven, it is conclusively presumed both that V did not consent and that D did not reasonably believe V consented. However, this overlooks situations where D has not *intentionally deceived* V, but is nevertheless aware that V mistakenly thinks they are agreeing to a non-sexual act. Reframed under a freedom to negotiate model, D would be guilty of a sexual offence if he

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<sup>222</sup> *Director of Public Prosecutions* [2013] EWHC 945 (Admin).

<sup>223</sup> *Ibid.* [14].

<sup>224</sup> See *Flattery* [1877] 2 QBD 410; *Williams* [1923] 1 KB 340; *Tabassum* [2000] 2 Cr. App. R. 328; *Green* [2002] EWCA Crim 1501.

intentionally or recklessly misled V as to the sexual nature of the act *or* if he took advantage of V's mistake. V has no freedom to negotiate her participation in a sexual act if she does not know the activity is sexual, and under the proposed model D is liable whether D is responsible for constraining V's freedom to negotiate or knowingly takes advantage of that constraint.

### **Freedom to Negotiate the Nature and Quality of a Sexual Encounter**

A key principle of the freedom to negotiate model is that a person should have the freedom to negotiate not just the bare fact of participation in sexual activity, but the more granular details of that sexual experience. One doesn't generally agree to 'one unit of sex' and then hand themselves over to their partner to do as they wish (though for those that prefer this kind of passive participation that is also accommodated under a freedom to negotiate model). The model does not require the participants to explicitly negotiate every detail of a sexual encounter, rather it requires that they have the freedom to do so. It is designed to recognise and make space for the ways that people legitimately negotiate their sexual activity – they should have the freedom to lean in or pull away, to go faster or slower, to change position, to ask for something different or more of the same. In essence, freedom to negotiate means that all parties to a sexual encounter feel that they can safely express their wishes (verbally or otherwise) and that their partner won't simply ignore or override them and keep going exactly as they wish. As proposed here, it is a requirement that the defendant does not take steps to constrain that freedom or knowingly exploit an existing constraint.

Thus, if D surreptitiously removes a condom – the scenario considered in [Assange](#)<sup>225</sup> – D shuts down V's freedom to negotiate this aspect of the sexual encounter. Similarly, in a case like [E](#) (leaving aside for the moment the broader context of ongoing coercion), where D deliberately ejaculates inside V having previously agreed not to, he intentionally overrides her freedom to negotiate. D in this scenario proceeds with the sexual activity entirely on his own terms with no regard to V's autonomy or her equal worth as a participant in the encounter, and should be liable for rape.

I would place in that same category cases such as [Lawrance](#), in which D lied to V claiming that he had had a vasectomy in order to persuade her to have intercourse with him without a condom.<sup>226</sup> Here, D has intentionally constrained V's freedom to make choices about the sexual encounter – such as whether to use a condom – by providing her with false information. Burnett LCJ's reasoning that the first two cases involve deceptions as to the performance of the physical act (i.e. whether ejaculate would enter V's body), while *Lawrance* itself involves a deception about the potential consequences of the sexual activity, holds some appeal in the abstract. However, it is absurd in practice to distinguish three cases which all involve defendants deliberately removing the complainant's ability to make an informed choice about her use of contraception. I submit however, that there is scope for further

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<sup>225</sup> *Assange v Sweden* [2011] EWCH 2849 (admin).

<sup>226</sup> *Lawrance* [2020] EWCA Crim 971.

research as to whether causing an involuntary pregnancy should be conceptualised as a distinct criminal wrong and applied to any such case where V does become pregnant as a result and, if so, whether that would mitigate the need to include all of these scenarios within the offence of rape.

In [Lawrance](#) itself it was argued that lies about fertility should be treated as analogous to both lies and non-disclosures about being HIV+ or carrying any sexually transmissible infection (STI).<sup>227</sup> There are, however, a number of important distinctions between these scenarios. First, if D simply does not disclose his HIV/STI status, V's freedom to negotiate has not been restricted. In this situation there is nothing to stop V asking questions, negotiating the use of protection etc. and this remains so even if D is aware that V has mistakenly assumed he is HIV and STI free. Second, if D is HIV+ but has an undetectable viral load, D does not constrain V's freedom to negotiate even if he actively lies and claims to be HIV negative. This is because, with an undetectable viral load the virus cannot be transmitted to V. D's status as a person with HIV therefore makes absolutely no difference to the sexual act and is not an aspect of the act that needs to be negotiated. Third, where D has detectable HIV or any STI, and intentionally conceals this from V, this arguably would curtail V's freedom to negotiate. Nevertheless, there are good reasons not to include this within the scope of the sexual offences. Specifically, the fact that where an STI is transmitted this can be addressed through the non-sexual offences against the person,<sup>228</sup> and the legitimate concern further criminalisation may increase the stigma attached to HIV and discourage people from seeking treatment and testing.<sup>229</sup>

I would, however, extend the scope of liability for [sections 1-4 of the Sexual Offences Act 2003](#) to cover situations like that considered in [Linekar](#), in which D masqueraded as a client and agreed a price for sexual intercourse, which then took place.<sup>230</sup> He did not pay V, and never intended to do so. Here, D has intentionally violated V's freedom to negotiate by unilaterally overriding the terms of their agreement. Particularly significant here is the unequal power dynamic between sex worker and client. Moreover there are good policy reasons for protecting sex workers who are already marginalised and vulnerable to exploitation and harm, including rape, in part because of the way the legal regulation of sex work is structured.

## Freedom to Negotiate a Sexual Encounter *with D*

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<sup>227</sup> Ibid. [11].

<sup>228</sup> *Dica* [2004] EWCA Crim 1103.

<sup>229</sup> See, for example, M Wait, 'Limit Cases: How and Why We Can and Should Decriminalise HIV Transmission, Exposure, And Non-Disclosure' (2019) 27(4) *Medical Law Review* 576.

<sup>230</sup> *Linekar* [1995] QB 250. Rather bizarrely, the complainant's actual evidence in that case was that she was raped via a violent physical assault. The account of a false promise of payment appears to have been merely a speculation concocted by the judge, but was nevertheless the basis on which both the first instance decision and the appeal were decided.



If one consents to sex with Ashley, one has not consented to sex with Alex, Mo or Sam. This is covered under the present law by the presumption in [section 76\(2\)\(b\) of the Sexual Offences Act 2003](#) that V does not consent and D does not reasonably believe in consent where D intentionally impersonates someone known to V. Under a freedom to negotiate framework, where D intentionally impersonates another person known to V, D has intentionally removed from V the option to consider whether to have sex *with D*. By this logic, I would also include ‘false persona’ cases within the scope of the [section 1-4 offences](#). Where D pretends to be someone else – known to V or not, real or fictitious – where D pretends to be Not-D, D blocks V from the opportunity to negotiate a sexual encounter *with D*.

The most egregious example of this to be found in the case law is the events considered in [Monica v DPP](#).<sup>231</sup> This case concerned a sexual relationship between Andrew Boyling, then an undercover police officer, and ‘Monica’ an environmental activist and part of the movement that Boyling’s undercover placement was set up to spy upon. In declining to prosecute, the DPP framed Boyling’s deception as amounting only to lies about his name and profession, which merely provided the circumstances for them to meet, after which they developed a relationship based on ‘mutual attraction’.<sup>232</sup> I argue that the claimant’s description of the deception, that it ‘went to every aspect of his identity apart from his body’ is more accurate.<sup>233</sup> Monica was deprived of the freedom to negotiate whether and on what terms she wished to have sex with *Andrew Boyling*, because she believed herself to be interacting with an entirely different person. This holds, notwithstanding the fact that neither Boyling nor his alter-ego was previously known to Monica, and that the latter was an entirely fictitious persona.<sup>234</sup>

Further examples of false persona cases include [Newland](#) in which D created a false persona through which she began an online relationship and later an in-person sexual relationship with V, whilst also becoming a close friend of V as herself.<sup>235</sup> And [Devonald](#) in which D, representing himself as a 20-year-old woman, initiated an online relationship with his daughter’s ex-boyfriend, and persuaded him to masturbate in front of a webcam in order to ‘teach him a lesson’.<sup>236</sup> Here, Newland removed V’s freedom to negotiate a series of sexual encounters *with Gayle Newland*, and Devonald deliberately removed V’s freedom to negotiate a sexual interaction *with Mr Devonald*. In both cases, the fact that D impersonated someone of a different gender is irrelevant, had Newland’s fake persona been female it would not change the fact that she denied her friend the freedom to choose whether to have sex with Gayle Newland. I.e. she denied her the freedom to negotiate a fundamental aspect of the sexual activity – who she was having sex with. In *Devonald*, discussion of ‘deception as to

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<sup>231</sup> *R (Monica) v Director of Public Prosecutions* [2018] EWHC 3508 (Admin).

<sup>232</sup> *Ibid.* at 1028, 1039, 1060.

<sup>233</sup> *Ibid.* at 1023.

<sup>234</sup> There is of course an additional layer to this case which is the state’s role in the deception. This has been recognised as a human rights violation in a similar undercover police officer case: *Wilson v (1) Commissioner of the Police of the Metropolis (2) National Police Chiefs’ Council* [2021] UKIPTrib IPT\_11\_167\_H.

<sup>235</sup> *Gayle Newland* [2017] Manchester Crown Court, unrep.

<sup>236</sup> *Devonald* [2008] EWCA Crim 527, [3].

purposes' is also something of a red herring. He simply did not give V the option to decide whether he wanted his sexual activity to be viewed by Mr Devonald. By the same logic I would extend the relevant offences to cover scenarios where D deliberately impersonates a real person who is not known to V, e.g. a celebrity, or knowingly takes advantage of the fact that V has mistaken him for a celebrity.

By contrast, [McNally](#) is not a false persona case.<sup>237</sup> The defendant, Justine, and the person whom V believed she was having sex with, Scott, are one and the same person. A person who used a name different to the one that they had been given by their parents, and dressed in a style they felt comfortable with – these behaviours are not deceptions. While the judgment focuses on D 'deceiving' V by 'purporting to be a boy', it is not at all clear that D is/was not a boy – notwithstanding that D was assigned female at birth.<sup>238</sup> There was no additional fictitious backstory, D did not disguise their voice or face and openly met with V and her friends and family. While I do not wish to downplay or invalidate the sense of violation and betrayal that V experienced, V's freedom to negotiate a sexual encounter with Scott, the person standing in front of her whom she had been getting to know for several years, was not constrained.

I am conscious that moving to a freedom to negotiate model does not mandate this reading of [McNally](#). Indeed, the court that upheld D's conviction emphasised the notion of 'freedom to choose' throughout and ruled that this had been removed.<sup>239</sup> Specifically the court framed this as the freedom to choose whether to have sex with a girl, which was viewed as fundamentally changing the nature of the act.<sup>240</sup> However, if D is understood to be a trans boy, V did not have sex with a girl. On the other hand, if D is in fact a girl, V chose to have sex with this specific girl even if she did not desire sex with girls in general. As a broader point, sexual offences law should not oblige trans and/or non-binary people to disclose the history of their bodies (eg whether they previously had a penis, breasts etc.) when it does not oblige anyone else to disclose details of any previous changes to their body. Nor should they be required to announce the history or current status of their gender identity any more than we would expect a cis person to.

As a general rule, it is proposed that a failure to disclose some individual fact about yourself – such as race, religion, political beliefs, wealth – will not sufficiently constrain freedom to negotiate to justify criminalisation, even if it is something that would be a dealbreaker for V. Even telling an outright lie about some aspect of your body/personality/values/behaviour will not generally amount to constraining someone's freedom to negotiate whether to have sex *with you*. Drawing this line between false personas and deceptions as to individual attributes will often be difficult, as the case of [Monica](#) demonstrates. Attention to the power dynamics involved is important in finding a way through these cases. There is, after all, a significant difference between a young trans, non-

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<sup>237</sup> [McNally](#) [2013] EWCA Crim 1051.

<sup>238</sup> A Sharpe, 'Criminalising Sexual Intimacy' (n206).

<sup>239</sup> [McNally](#) (n.237) [26].

<sup>240</sup> *Ibid.*

binary or questioning person figuring out how to express their gender in a relationship with someone of a similar age and level of experience, compared to say, a cis man in his thirties masquerading as a woman in order to have sex with a lesbian.<sup>241</sup> There is also a world of difference between the power wielded by an adult man over the teenage ex-boyfriend of his daughter or a police officer over a civilian, than by a young possibly trans person trying to get to grips with their gender identity in a cisheteronormative society.

## Chronic Sexual Violation

One final issue I want to raise is the possibility of chronic sexual violation. In the false persona cases – most notably [Monica](#) – identifying individual sexual encounters as rape doesn't really capture the full extent of what happened here. In this case D did not only remove V's freedom to negotiate in the context of discreet sexual encounters, but fundamentally undermined her freedom to negotiate every aspect of the relationship.

I have previously articulated a concept of chronic sexual violation to capture ongoing, cumulative erosions of sexual autonomy, which can be contrasted with 'acute' isolated incidents in which a person's sexual autonomy is overridden.<sup>242</sup> I developed this concept in the context of intimate relationships characterised by a constellation of long-term coercive controlling behaviours such as:

- frequent 'low level' sexual assaults;
- acts falling outside the scope of sexual assault such as depriving V of privacy (e.g. by insisting on watching her showering or using the toilet), disclosing private sexual photographs, insisting on watching pornography together;
- sexual encounters where the bare fact of sex is consensual but the manner of the sex is not (e.g. it is physically rough, involves name-calling or an aggressive demeanour, or specific acts/positions which V finds degrading – and these are not aspects which V freely agrees to);
- insistence and pressure to have sex which would not necessarily rise to the level of non-consent when looked at in isolation, but which becomes more salient in the context of ongoing coercion and control.

In such relationships, picking out the individual instances that do cross the legal threshold into sexual assault does not reflect the gravity of the violation as a whole. I have previously argued that this framework could be applied in [Jheeta](#) and [F](#).<sup>243</sup> It is submitted here that this construct could also be used to reframe cases like [Monica](#) and [Newland](#), to highlight the fact that the

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<sup>241</sup> Something the character Barney claims to have done in the popular sitcom, *How I Met Your Mother*.

<sup>242</sup> T Palmer, 'Failing to See the Wood for the Trees: Chronic Sexual Violation and Criminal Law' (2020) 84 (6) *The Journal of Criminal Law* 573.

<sup>243</sup> *Ibid.*

violation is continuous and continues to accumulate in the gaps between specific sexual encounters. That it is a distinct but equally serious wrong to rape.

These cases raise issues about the type and degree of coercion that vitiates consent – particularly in the context of ongoing relationships and particularly where there is no threat of immediate physical force. That is perhaps why the court in [E](#) focused on one particular instance of deception as a basis for liability. They also raise questions about the potential application of the offence of controlling or coercive behaviour<sup>244</sup> – not available at the time these cases were decided – to ongoing patterns of sexual coercion in intimate relationships. But these issues need to be addressed in their own right, and are not solved by focusing in on one incident of deception or conditional consent within a broader pattern of chronic sexual violation.

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<sup>244</sup> Serious Crime Act 2015, s76.

## P8. DECEPTION ABOUT *WHAT*? SUBJECTIFYING THE CRIMINALISATION OF DECEPTIVE SEX

[Amit Pundik](#)<sup>245</sup>

What kinds of deceptions vitiate consent to sexual relations? In [McNally](#), the court stated that ‘some deceptions (such as, for example, in relation to wealth) will obviously not be sufficient to vitiate consent.’<sup>246</sup> By contrast, my proposal here is that the criminalisation of deceptive sex should be extended to include deception regarding *any* characteristic of the deceiver or the relationship on which the deceived’s consent was conditional, *where the deceiver was aware of this conditionality*. More concretely, I would suggest abolishing the existing presumption about consent defined in [Section 76 of the Sexual Offences Act](#), which is limited to either impersonation or deception about the nature or purpose of the act.<sup>247</sup> Instead, a new presumption should be created to apply to deception relating to *any* characteristic on which the deceived’s consent was conditional, where the deceiver was aware of this conditionality.

To limit the risk of over-criminalisation that is inherent in my proposal, I would further suggest that the presumption should be evidential rather than conclusive, to apply only to deceivers who knew that the deceived would not have consented to the sex, had they known the truth about this characteristic. In addition, as I have argued elsewhere,<sup>248</sup> I believe that deceptive sex should be criminalised by a different and lighter offence than rape. I also tend to support limiting the criminalisation of deceptive sex to cases of active deception rather than failure to disclose.<sup>249</sup> However, I do not pursue these points here: my discussion focuses exclusively on the *content* of the deception—that is, which characteristics of the perpetrator (e.g. their identity, wealth, or marital status), their relations with the victim (e.g. marriage, long-term intentions), or the sex itself (e.g. protected) should vitiate consent when deception is involved? My proposal to extend deception to any characteristic on which the deceived’s consent was conditional is independent of my other views; hence, I hope that those who disagree with my stance on other issues or are less concerned about the risk of over-criminalisation may still find my proposal here useful.

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<sup>245</sup> I am grateful to John Child and Paul Jarvis for their helpful comments. I am also indebted to the Max Planck Institute for Foreign and International Criminal Law in Freiburg i. Br., Germany, and, in particular, to its Director, Prof. Dr. Dr. h.c.mult. Ulrich Sieber, for the remarkable assistance and hospitality I received during my academic stay. I also benefited from research assistance from the Institute for Criminology at the University of Tübingen and from the dedicated and thorough research assistance of Dana Alpar, Iddo Ayali, Widad Elias, and Maya Oren.

<sup>246</sup> [McNally](#) [2013] EWCA Crim 1051 [25].

<sup>247</sup> Sexual Offences Act 2003, s76(2)(b) and s76(2)(a) respectively.

<sup>248</sup> A Pundik, ‘Coercion and Deception in Sexual Relations’ 28 *CJLJ* 97, 101–8. See also J Spencer, ‘Three New Cases on Consent’ (2007) 66 *CLJ* 490; M Gibson, ‘Deceptive Sexual Relations: A Theory of Criminal Liability’ (2020) 40 *OJLS* 82; D Ormerod and K Laird, *Smith, Hogan, and Ormerod’s Criminal Law* (16<sup>th</sup> ed, OUP 2021), 769.

<sup>249</sup> [McNally](#) [2013] EWCA Crim 1051 [20].

To support my proposal, I now turn to examine the different definitions of ‘deceptive sex’ and diverse legal approaches taken to its criminalisation in the England and Wales, Germany, and Israel. Surprisingly, different jurisdictions hold strikingly different views on these matters. This diversity ranges from the narrow definition of traditional English law (and its slightly more flexible contemporary version) to the minimalist approach of the German system and Israel’s objectivist stance. By discussing their respective merits and shortcomings, I seek to establish that the most defensible approach is the removal of any limitation on the type of characteristic at the heart of the deception that may vitiate consent.

### **The Arbitrary Definition of Traditional English Law**

Traditionally, English law has acknowledged that sexual consent can be vitiated by deception, but it limits the offence of rape to specific types of content—namely, where agreement to engage in sexual intercourse is obtained under the guise of medical treatment or impersonation.<sup>250</sup> The category of impersonation was augmented over the years to include impersonating a partner who is not the woman’s legal husband,<sup>251</sup> and then extended to ‘impersonating a person known personally to the complainant’.<sup>252</sup> Italy, too, criminalises deceptive sexual relations only when they involve impersonation.<sup>253</sup> In the United States (US), explicit reference to spousal impersonation appears in sixteen jurisdictions,<sup>254</sup> and such references also appear in the Model Penal Code.<sup>255</sup>

While this narrow definition of deceptive sex avoids the problems plaguing other definitions that I describe further ahead in this paper, it is nevertheless difficult to justify. This becomes clear when this definition of deceptive sex is compared with English law’s justifiably expansive definition of coercive sex. Consider *A* who wishes to avoid having sex with anyone over the age of 40, perhaps, say, due to a personal preference or an unfounded superstition. Assume that *A* meets *B* and makes some sexual advances but then finds out that *B* celebrated their 40<sup>th</sup> birthday yesterday. Assume further that, but for this extra day, *A* would consent to have sex with *B*. Now, imagine that *A* expresses doubts about proceeding. If *B* were to coerce *A* to have sex with them at this point, this would undoubtedly amount to rape. But, if *B* is aware of *A*’s preference and knowingly lies about their age to overcome *A*’s reservations about proceeding to have sex, then, according to English law, no offence has been committed because *A*’s consent is valid even though it was obtained by deception.

This state of affairs raises a tricky question. Since English law takes the person’s actual refusal on grounds other than impersonation very seriously in cases of *coercive* sexual relations, why should it turn a blind eye to their hypothetical refusal on the same grounds

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<sup>250</sup> Sexual Offences Act 2003, s76(2)(a) and s76(2)(b) respectively.

<sup>251</sup> *Elbekkay* [1995] AC 163.

<sup>252</sup> Sexual Offences Act 2003, s76(2)(b).

<sup>253</sup> Codice Penale, article 519(4).

<sup>254</sup> R Christopher & K Christopher, ‘Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape’ (2007) 101 *Nw U L Rev* 75, 99–100, 122, fn 270.

<sup>255</sup> Model Penal Code, s213.1(2)(c) (American Law Institute 1985).

(that is, had they known the truth about these grounds)? And, if hypothetical refusal were not enough to justify criminalisation, why would it suffice in cases of impersonation?<sup>256</sup> English law's answer to the question of content is, hence, arbitrary, in my view: it is unclear why a person should be protected from engaging in sexual relations with a person who is impersonating someone they think they know (since this deception falls within English law's narrow definition of deceptive sex) but not with a person who pretends to possess a particular characteristic they do not possess (since this deception falls outside of that definition).

### The Flexible Definition of Contemporary English Law

Contemporary English law has extended the pre-set categories of 'impersonation' and 'nature of the act'. In *Assange*, the court determined that the traditional categories, set out in [section 76\(2\)](#), do not exhaust the range of possible characteristics contained in such a deception that vitiates consent.<sup>257</sup> It also accepted that a deceiver could be convicted of rape if the deception relates to the use of a condom,<sup>258</sup> while the offence of rape was later extended to deception about the deceiver's biological sex in *McNally*.<sup>259</sup> However, as mentioned above, the Court in *McNally* also insisted that consent would not be vitiated by deception about *any* characteristic.<sup>260</sup> The matter of *which* characteristics would vitiate consent, and which would not, was left to 'commonsense'.<sup>261</sup> *Lawrance* further demonstrates how flexible the definition of deceptive sex in contemporary English law can be: while lying about the use of a condom (*Assange*) or an intention to withdraw before ejaculation (*R(F)*)<sup>262</sup> can vitiate consent, lying about having had a vasectomy does not, for the latter was deemed to be *not* 'closely connected to the performance of the sexual act'.<sup>263</sup>

A similarly flexible definition of deceptive sex is adopted in Canada, where the Supreme Court interpreted Parliament's removal of the words 'false and fraudulent representations as to the nature and quality of the act' as an 'intention to move away from the unreasonably strict common law approach to the vitiation of consent by fraud'.<sup>264</sup> In the US, Tennessee applies the offence of rape to cases of deception without mentioning any specific content.<sup>265</sup> And Massachusetts once considered a new bill that would impose life

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<sup>256</sup> For further criticism of the US and English approaches, see J Rubinfeld, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2013) 122 *Yale LJ* 1372, 1395–98.

<sup>257</sup> *Assange v Sweden* [2011] EWHC 2849 (Admin).

<sup>258</sup> *Ibid.*

<sup>259</sup> *McNally* [2013] EWCA Crim 1051.

<sup>260</sup> *Ibid.*, [25].

<sup>261</sup> *Ibid.*, citing *R(F) v DPP* [2013] EWHC 945 (Admin) in agreement.

<sup>262</sup> *R(F) v DPP* 2 [2013] EWHC 945 (Admin).

<sup>263</sup> *Lawrance* [2020] EWCA Crim 971, [35–37].

<sup>264</sup> *Cuerrier* [1998] S.C.R. 371, [3] (Can.). For a similar statement, see *ibid.*, [105] (Cory, J., dissenting) (Judge Cory discussing whether failure to disclose HIV infection vitiates consent).

<sup>265</sup> Tenn. Code Ann s39-13-503(a)(4) (West 2017).

imprisonment for ‘rape by fraud,’ which the bill defined as sexual intercourse to which consent was obtained ‘by the use of fraud, concealment or artifice.’<sup>266</sup>

But perhaps the most flexible definition of all vis-à-vis the content of the deception is that employed by Israel, where the offence of rape includes sex ‘with the woman’s consent, which was obtained by deceit in respect of the identity of the person or the nature of the act’.<sup>267</sup> In [Kashur](#),<sup>268</sup> a married Arab man was convicted of rape after he presented himself to the complainant, whom he had met by chance in downtown Jerusalem, as a Jewish bachelor interested in a long-term romantic relationship.<sup>269</sup> The case received substantial exposure in the world press<sup>270</sup> due to the allegedly racist aspect of the case,<sup>271</sup> but it also illustrates how far the Israeli definition of deceptive sex goes.

While, in cases where the victim is deliberately misled, the Israeli legislation does not exclude any characteristic from the definition of deceptive sex, the Israeli Supreme Court has added in *Suliman* a test of ‘reasonableness’: ‘a man not telling the truth with regard to characteristics critical in the eyes of a *reasonable* woman, and, as a result of this false representation, the woman had engaged in sexual intercourse with him’.<sup>272</sup> The Supreme Court did not specify the characteristics that a ‘reasonable woman’ would consider critical to her decision regarding whether to engage in sexual relations but, instead, left this as an open question to be decided on a case-by-case basis.<sup>273</sup>

One problem with such a flexible definition is the interference with the person’s liberty to determine what characteristics they consider important in their sexual partner. Indeed, it does not protect *any* choice a person makes with regard to the identity of their partner, but rather only those choices considered by the court ‘reasonable’ or ‘commonsensical’. This is true even when, before consenting, the person makes it clear that they will not consent to sex if the other does not possess a certain characteristic that they deem crucial (but the court later deems unreasonable). By contrast, if a person who initially

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<sup>266</sup> H.B. 3154, 187th Gen. Court (Mass. 2011).

<sup>267</sup> [Israel Penal Law, 5737–1977, s345\(a\)\(2\)](#). Notably, the Israeli offence of rape applies only to female victims (male victims are protected by another offence with a similar sanction entitled ‘Indecent Act’, see *ibid.* s348).

<sup>268</sup> CrimC (Jer.) 561/08 State of Israel v. Sabbar Kashur, District Court Rulings 1996(123) (2010).

<sup>269</sup> These were the facts as specified in the plea bargain and in the court’s verdict, yet the testimony given by the complainant, as well as the facts appearing in the original indictment, were different and included allegations of coercive sex. I do not discuss here either the problematic decision by the prosecution to submit a plea bargain containing a significant modification of the complaint or the court’s puzzling acceptance of this arrangement.

<sup>270</sup> See, e.g., Dina Newman, ‘[Unravelling the Israeli Arab ‘Rape by Deception’ Case](#)’, *BBC NEWS* (Sept. 17, 2010).

<sup>271</sup> The case’s racial aspects, emphasised in these headlines, are, in fact, only mentioned once in the court’s decision, in conjunction with other aspects of the accused’s dishonest conduct towards the complainant (his marital status and his intention of starting a serious relationship).

<sup>272</sup> CrimA 2411/06 Saliman v. State of Israel, Dinim Elyon 2008(59) 318, [105] (2008) (Isr.) (Rubinstein, J.) (my translation and emphasis). Interestingly, in the same paragraph, Justice Rubinstein deploys another test using a different notion of reasonableness: ‘would a reasonable person believe that *this* woman would engage in intercourse with this man, were he not to present the ‘identity’ he had fabricated?’ *Ibid.* §106 (emphasis added). However, the latter formulation is reducible to the subjectivist definition, by focusing on the woman’s subjective preferences while introducing ‘reasonableness’ merely as a standard of proof (what would a reasonable external observer, perhaps more accurately referred-to as ‘the fact-finder’, infer from her conduct about her subjective preferences?).

<sup>273</sup> *Ibid.*, [107].



refuses, based on the absence of a certain characteristic that they deem crucial, is then *coerced* into having sex nevertheless, the perpetrator would not be acquitted of rape just because the particular characteristic that led the victim to refuse in the first place was ‘unreasonable’. I reiterate, then, that it remains unclear why the court should interfere with the person’s right to choose what characteristics they consider important only when the case involves deception.

In addition to this recurring difficulty, the flexible definition of deceptive sex aggravates two familiar problems associated with the use of open-ended standards in Criminal Law. It is not difficult to guess why courts opted to leave the question open, as compiling a comprehensive list of characteristics protected under the rape-by-deception offence would arguably constitute an insurmountable task, given the complexity and variety of the situations concerned. However, despite the practical benefits engrained in this flexible definition, it is unclear how it could be reconciled with the principle of legality. To illustrate, the accused might discover that specific characteristics falsely presented by them would result in their being guilty of rape only *after* the incident had occurred—and after a judicial resolution had been given concerning their case. But the principle of legality necessitates, *inter alia*, that the individual be warned prior to their being punished, and firmly objects to retroactive punishment due to violation of a norm not clearly designated as prohibited at the time of the individual’s choosing to act as they did. The flexible definition might thus bring about unjust punishment, since it is sullied with retroactivity and not preceded by adequate warning.<sup>274</sup>

The flexible definition might also adversely affect the efficacy of Criminal Law in guiding conduct. When it is unclear which characteristics ought to be disclosed and which can be withheld without any legal ramifications, some men might fail to disclose crucial information based on their mistaken belief that that particular characteristic is not something a reasonable woman would consider crucial to her decision,<sup>275</sup> thereby undermining the deterrence created by the criminal offence. As the list of reasonable characteristics (as perceived by the court) becomes increasingly vague and more subject to the discretion of each judge, so grows the risk of generating insufficient deterrence and exacerbating the violation of the principle of legality. These, of course, are general problems that pertain to any use by Criminal Law of open-ended standards. But leaving this list completely open

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<sup>274</sup> I tend to think that a similar criticism could be levelled against the Common Law test of dishonesty, ‘whether according to the ordinary standards of reasonable and honest people what was done was dishonest’, see *Gosh* [1982] EWCA Crim 2. Originally, and unlike the flexible approach to deceptive sex, the Ghose test included a second stage, where the jury ‘should ... then ask whether D realized it was dishonest in this sense’, see N Padfield, *Criminal Law* (8th ed, OUP 2012), 30. However, this second subjectivist stage was later dropped in *Ivey v Genting Casinos* [2017] UKSC 67, a move recently confirmed in *Booth & Anor* [2020] EWCA Crim 575. For a criticism of the dishonesty test that is similar to my criticism of the flexible approach to deceptive sex, see D Ormerod and C Laird’s examination of the *Ivey* test, and in particular the uncertainty it creates and its potential violation of Article 7 of the ECHR (no punishment without law), *Smith, Hogan, and Ormerod’s Criminal Law* (15<sup>th</sup> ed, OUP 2018), 881.

<sup>275</sup> For the difficulty of making this assessment and proving it in court, see the text accompanying n272.

without providing any guidelines only elevates the threat posed by the flexible definition to both the principle of legality and the efficacy of Criminal Law.

### The Minimalist Approach of German Law

Another possible approach to deceptive sex is to avoid its criminalisation altogether, as some European jurisdictions already do. In particular, using deception to obtain consent to sexual relations between mentally-sound adults is not generally criminalised in Germany<sup>276</sup> (even after the extensive reform of sexual offences in 2016)<sup>277</sup> or Spain.<sup>278</sup> Such a minimalist approach avoids the arbitrariness of the definition followed by English law, but I still find its extreme distinction between coercion and deception difficult to justify. Consider again A's preference for sexual partners younger than 40. Why should A's freedom to choose with whom they would like to have sex be protected by the law when they find out B's age *before* they consent to sex, but not protected at all when they find out the truth *after* the sex? The discrepancy is further intensified in the German approach when it comes to justifying the distinction between obtaining sexual vs. non-sexual benefits using deception.<sup>279</sup> It is hard to see why deceiving a person into giving away money should be a criminal offence but deceiving them into giving consent to sexual relations should not. Consequently, the German minimalist approach does not seem to offer an attractive answer to the question of content.

### The Subjectivist Definition

In response to Israel's flexible definition of deceptive sex, some Israeli scholars defend a fully-subjectivist definition. Dana Pugach, for example, held that the decision regarding which characteristics vitiate consent should be left to the subject themselves rather than to the

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<sup>276</sup> STRAFGESETZBUCH [STGB] [PENAL CODE], ch. 13, § 177 (Ger.), which criminalises rape, is limited to coercion; abuse of persons who are incapable of resistance (*ibid.* at s179) is limited to mental or physical incompetence; and, in other sexual offences, deception appears only in relation to human trafficking for the purpose of sexual exploitation (*ibid.* at s181). *See also* T Fisher, STRAFGESETZBUCH UND NEBENGESETZE 1158 (2008). Curiously, Germany used to have a sexual offence criminalising deceiving a woman into believing that the intercourse was within marriage. STGB, ch 13, s179. However, it seems that only one person was ever convicted of this offence (*see* O Koblenz, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1966, 1524–25), and it was abolished in 1969 due to practical irrelevance, Germany (West). G Strafrechtskommission, Niederschriften über die Sitzungen der Großen Strafrechtskommission: 76. bis 90. S Besonderer Teil, Volume 8 (Bad Feilnbach: Schmidt Periodicals, 1991), 184–85.

<sup>277</sup> The 50th Act to Amend the Criminal Code – Improvement of the Protection of Sexual Self Determination, Federal Law Gazette, Part I, p. 2460 et sec.

<sup>278</sup> In Spain, deception is criminalised only when used in the context of trafficking (CÓDIGO PENAL [C.P.], art. 177(1)-bis), prostitution (*id.* art. 188), or when the victim is between the ages of thirteen and sixteen (*id.* art. 182).

<sup>279</sup> *See, mainly,* the offence of fraud as defined in §263 StGB (Germany): '(1) Whosoever with the intent of obtaining for himself or a third person an unlawful material benefit damages the property of another by causing or maintaining an error by pretending false facts or by distorting or suppressing true facts shall be liable to imprisonment of not more than five years or a fine', M Bohlander, *The German Criminal Code: A Modern English Translation* (Hart 2008), 168. The German Criminal Code also includes an array of more specific forms of fraud: §264 (Subsidy Fraud); §264a (Capital Investment Fraud); §265 (Insurance Fraud); and §265a (Obtaining Benefits by Deception).

court. In her view, one must address each characteristic deemed relevant by the individual, even if such a characteristic is considered whimsical or improper by society.<sup>280</sup> In the case of England and Wales, a few years later, Jonathan Herring made a similar argument for a fully-subjectivist definition of deceptive sex.<sup>281</sup>

A fully-subjectivist definition avoids the problems faced by the aforementioned alternatives:<sup>282</sup> it does not violate the woman's autonomy by ignoring characteristics that are crucial to her and would not have been ignored in cases of coercion; it respects the principle of legality, for men are able to know what is required from them *during the event* (disclosing every characteristic that their potential partner communicates to be crucial); and it preserves the efficacy of the criminal prohibition because the guidance given is relatively clear. The subjectivist approach thus calls for stricter protection of people's autonomy, as it enables people to freely select those factors they deem most significant and relevant to their choices without subjecting them to any external criteria. As such, the subjective approach combines liberal principles of non-intervention in individual choices with certain feminist principles, namely those of promoting women's autonomy and preventing its subjection to institutional criteria, which are often determined by men. Hence, the subjectivist approach is principled and well established, and is perhaps the most attractive position for anyone who holds that deceptive sexual relations should be criminalised.

Notably, however, if taken to its fullest extent, the subjectivist definition might yield an overwhelming intrusion into the intimate lives of many members of society. Consider, for example, a couple in which one person was unfaithful for a time, and their partner would not have consented to have sex with them on some or all of the occasions on which they had sex since the affair started, had that partner known about the infidelity. According to the English Law approach, particularly as it was set in [Lawrance](#), such a deception is arguably neither about the identity of the perpetrator nor about the nature of the act. By contrast, according to the subjectivist definition, which is not limited to these categories, each time they had sex during that period, a sexual offence was committed, since the partner's consent was obtained deceptively in those instances.<sup>283</sup>

Applying the offence of rape-by-deception to such a couple enforces a very conservative worldview of the boundaries of Criminal Law and of its authority over situations

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<sup>280</sup> D Pugach, 'Criminalization of Conventional Courtship Practices?: Deception, Victim Error and Consent in Respect of Sexual Offenses' in *Trends in Criminal Law* (Eli Lederman *et al.* eds, 2000), 183 [in Hebrew].

<sup>281</sup> J Herring, 'Mistaken Sex' [2005] *Crim LR*, 511–24. Herring further argued that '[n]or is there a need for the defendant to have caused the victim's mistake by a deception', *ibid.*, 517. While I tend to disagree, I do not discuss this issue here.

<sup>282</sup> Aeyal Gross proposes another definition that is mainly subjective but incorporates elements of reasonableness, by excluding certain preferences (e.g., racism). See A Gross, 'Impersonating Another: Gender-Related Impersonation and Defiance in C Alkoby's Trial' in *Trials about Love* (O Ben-Naftali and C Nave eds, 2005) [in Hebrew]. I do not discuss this partly-subjectivist definition in detail because it suffers from the same flaws as the previously-mentioned offence: were a person to refuse a potential partner on the basis of race and then be coerced into having sex by that person nevertheless, there is no doubt that such a case may still amount to rape, irrespective of the individual's racist basis for refusing sex to begin with.

<sup>283</sup> Interestingly, the flexible definition is likely to reach a similar conclusion, since a reasonable person would probably consider the fidelity of their partner crucial to their decision of whether to have sex.

that are at the very heart of citizens' private lives. While some feminist views might be suspicious of this liberal concern, worrying, for example, that it masks the neglect of protecting women's interests in the name of protecting individuals from societal interference, reversing the gender roles in this example is straightforward: a betrayed man could resort to the same logic and accuse his partner of numerous sexual offences. The subjectivist definition might lead to the criminalisation of a vast number of people: while the incidence of spousal infidelity is difficult to estimate, some statistical data indicate that it is more than 20 per cent.<sup>284</sup> Consequently, if left unrestricted, the subjectivist definition might surreptitiously introduce an offence similar in nature to that of *adultery*, since such an offence would allow any individual who had experienced infidelity to enlist society to impose severe penal sanctions on their unfaithful partners.<sup>285</sup> In particular, if, contrary to my own view,<sup>286</sup> deceptive sex is continued to be criminalised under the offence of rape, adulterers (both men or women) could potentially be convicted of multiple counts of rape, each punishable by a lengthy prison sentence.

### **Proof of *Mens Rea***

While the risks of overextending the criminalisation of deceptive sex that we have considered here were related to substantive Criminal Law, it is important to highlight an additional risk of overextension that arises from difficulties of proof. As part of the *actus reus*, it is necessary to establish the hypothetical (or counterfactual) claim that the complainant *would not* have consented to sex, had they known the truth. This hypothetical claim consists of two separate material facts: (1) that the complainant attributed to the perpetrator or to the sexual act characteristics that they believed to be true but were not, and (2) that these characteristics were sufficiently important to the victim that they would have revoked their actual (invalid) consent, had they known the truth about the perpetrator. No less important, the prosecution also needs to prove beyond reasonable doubt the corresponding mental element: that the accused was aware of the false characteristics that the complainant attributed to them or to the sexual act, and of the crucial importance that the victim ascribed to these.

Proving that the accused was aware that the complainant would have refused to have sex with them, had they known the truth, involves difficulties of proof that are qualitatively and quantitatively different from those involved in proving coercive sex. In the latter, the prosecution has to prove the accused's awareness of the complainant's *actual* lack of consent to engage in sexual relations. Whether consent is a mental state, a conduct, or some combination of both is subject to deep controversy.<sup>287</sup> Be that as it may, even if consent is a

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<sup>284</sup> M Wiederman, 'Extramarital Sex: Prevalence and Correlates in a National Survey' (1997) 34 J Sex Res 167, 171 (finding that 22.7% of men had engaged in extramarital sex).

<sup>285</sup> Such an offence would not be identical to that of adultery. It would be narrower because adultery would also be invoked when both partners validly consent to an open relationship. It would be broader because adultery only applies to married couples.

<sup>286</sup> Pundik (n248).

<sup>287</sup> See A Wertheimer, *Consent to Sexual Relations* (CUP 2003), 144–52.

mental state (as I tend to accept),<sup>288</sup> it is likely to be accompanied by some outward expressions that indicate the complainant's state of mind to an external observer (this is true even when the lack of consent is not accompanied by attempts at resistance or explicit verbal statements).<sup>289</sup> In the case of someone accused of rape by coercion, while proving their awareness of the complainant's refusal could be immensely difficult in some cases, at least there are some outward expressions to refer to.

By contrast, proving deceptive sex requires proving the accused's awareness of a *hypothetical state of mind*. Hypothetical lack of consent is unlikely to consist of, or be accompanied by, clear expression. True, there could be cases in which the complainant verbalises clearly and explicitly her hypothetical refusal (e.g., 'I would not agree to have sex with you if you were an Arab'). However, such statements are uncommon since they involve discussing hypothetical scenarios of refusal during the communication of *consent*. This is particularly relevant to the intimate context of sexual relations, in which both partners might use subtle signals rather than clear verbal messages. The complainant's hypothetical refusal might not be expressed at all, rendering the accused's awareness that she would not have consented, had she known the truth, much harder to prove than his awareness of her actual lack of consent in cases of rape by coercion. If these difficulties of proof are not given their full weight, courts might convict even in cases where it cannot be proven beyond reasonable doubt that the accused was aware of the complainant's hypothetical lack of consent.

### **Conclusion: Cautious Extension**

This proposal has focused on the following question: deception concerning *which* particular characteristics of the perpetrator (e.g. their identity, wealth, or marital status), their relations with the victim (e.g. marriage, long-term intentions), or the sex itself (e.g. protected) should vitiate consent? None of the strikingly different answers given to this question in various jurisdictions is appealing. I would thus propose to extend the criminalisation of deceptive sex to deception about *any* characteristics—of the deceiver or the relationship—upon which the consent of the deceived was conditional *where the deceiver was aware of this conditionality*.

However, to avoid potential overextensions, I would suggest giving full weight to the difficulties of proof that are involved in deceptive sex. In particular, deceptive sex should be criminalised only when the accused had *mens rea* as to the facts that (1) the deceived held false beliefs about the deceiver or the relationship and (2) the deceived would not have consented, had they known the truth. How to adequately address these difficulties of proof is beyond the scope of this proposal, but at least one measure that seems appropriate is to

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<sup>288</sup> See, generally, L Alexander, 'The Ontology of Consent', (2014) 55 *Analytical Philosophy* 102.

<sup>289</sup> As I have argued elsewhere, refusal may consist of (or be accompanied by) signals such as freezing, visible distress, or some negative attitude toward the accused, all of which are overt and accessible to an external observer. See Pundik (n248), 112–3.

continue limiting the criminalisation of deceptive sex to active deception rather than failure to disclose.<sup>290</sup>

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<sup>290</sup> *McNally* [2013] EWCA Crim 1051 [20].

## P9. DECEPTION, MISTAKE AND DIFFICULT DECISIONS

[Rachel Clement Tolley](#)

That the law of deception and consent to sex requires reform is widely accepted. I take it as my starting point that in criminalising ‘sex-by-deception’,<sup>291</sup> and possibly even simply mistaken sex,<sup>292</sup> we should seek to protect the right to sexual autonomy. Accordingly, any approach which recognises only limited categories of deceptions as relevant to consent validity should be rejected. A more expansive vision can be embraced if we distinguish deceptions from mere mistakes and confine liability almost exclusively to cases involving deception. Whilst this distinction minimises rule of law concerns and strikes a better balance between sexual autonomy and other valuable rights and interests, we should still *exclude* certain deceptions from the scope of the criminal law. This will require extensive consultation and careful legislative drafting. However, despite the challenges associated with identifying such a list of deceptions, this shift in approach is certainly more principled than the futile search for a list of those which are in some way ‘sufficiently serious’ to warrant inclusion within the scope of liability.<sup>293</sup>

### A Broader Approach

The right to sexual autonomy is necessarily individualistic. Consent, therefore, should be an expression of autonomous decision-making about whether to engage in sexual activity with a particular individual, when and where to do so, and in what circumstances. Any attempt to identify a set of deceptions capable of ‘vitiating’ consent based on some objective criterion, rather than the fact that the information in question was so important to C that ostensible consent would not have been provided, were it not for the deception, cannot readily be justified, without rejecting sexual autonomy as the underlying right at stake in the non-consensual sexual offences.<sup>294</sup> ‘Objective line drawing approaches’, under which only certain deceptions are recognised as ‘sufficiently serious’ or otherwise worthy of potential criminalisation, are inescapably moralised, reflecting matters that *most people* regard as important, or that some decision-maker thinks *should be important*, when making decisions about sex, rather than what *was* important to the individual whose consent is in question.

An objective approach which might be thought to escape this criticism is one under which liability can be imposed only when the deception in question exposes C to the risk of

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<sup>291</sup> I.e., C would not have agreed to engage in sexual activity but for D’s deception.

<sup>292</sup> I.e., C would not have agreed to engage in sexual activity but for a mistake of fact, which may or may not have been induced by deception.

<sup>293</sup> I defend this approach in far more detail in R Tolley, *Deception, Mistake and Sexual Activity: Reconceiving Consent in the Criminal Law* (OUP, forthcoming).

<sup>294</sup> See J Rubenfeld, ‘The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy’ (2013) 122 *Yale LJ* 1372.

physical harm. Given the exogenous and quite proper concern of the criminal law to protect individuals from such a risk, this might be thought to offer a more principled solution and is at least located in protecting C's right against sustaining injury, rather than identifying a chimerical list of 'sufficiently serious' deceptions. Such an approach would certainly avoid the arbitrary distinction between [Lawrance](#)<sup>295</sup> and [Assange](#).<sup>296</sup> However, on a harm-based approach, deception about the use or effectiveness<sup>297</sup> of a condom would only result in liability where D's deceptive conduct and the subsequent sexual activity exposes C to a risk of pregnancy or disease transmission. Whilst these risks might well lie behind the insistence on the condom in most cases, we cannot rule out the possibility that someone might have additional reasons for requiring the use of a condom and be left entirely without protection. In any event, C's autonomous *decision-making* is no less restricted in circumstances where (perhaps even unbeknownst to D) those risks were not present. Whilst one arbitrary distinction (*Lawrance vs Assange*) is removed on this approach, another is introduced in its place: condom-use deceptions where harm is possible vs condom-use deceptions where no harm is possible.

To avoid this outcome, one might supplement a 'harm-based' approach with an *additional* category of relevant deceptions – those which are 'closely related to the performance of the act'.<sup>298</sup> But where is the outer boundary of this category? What does 'close' mean, especially where the physical aspect of the act is of central importance to C? Would this category cover the integrity of the condom,<sup>299</sup> or the *material* out of which it is made?<sup>300</sup> It is unclear how such cases might be excluded from the 'close connection' test, but it seems hard to explain why deception as to the brand of condom should be sufficient to vitiate consent but not, for example, deception as to whether D and C were validly married.<sup>301</sup> We could add a further category of 'marital status' deceptions, but then why not deceptions going to profession,<sup>302</sup> or the intention and ability to pay for sexual services?<sup>303</sup> Ultimately, we are left with an ad hoc list of vitiating deceptions which some decision-maker regards as 'sufficiently important' to sexual decision making.

Such a list decouples the law from its underlying rationale; those with idiosyncratic preferences are left with no opportunity to ensure that their sexual decision-making is respected. Even if C were to set out her 'dealbreakers', and seek assurances about certain

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<sup>295</sup> *Lawrance* [2020] EWCA Crim 971.

<sup>296</sup> *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin), (2011) 108(44) LSG 17.

<sup>297</sup> In the Canadian case of *Hutchinson* 2014 SCC 19, [2014] 1 SCR 346, D surreptitiously poked holes in the condom. Because this conduct gave rise to a significant risk of serious bodily harm (pregnancy), D's dishonesty amounted to 'fraud', within the meaning of the relevant statutory provision and was thus capable of vitiating consent.

<sup>298</sup> I.e., the category adopted in *Lawrance*.

<sup>299</sup> As in *Hutchinson*, though this category would only be required in those cases where neither pregnancy nor disease transmission were possible consequences of the sexual act.

<sup>300</sup> C may insist upon the use of a vegan condom, rather than a cheaper, non-vegan brand.

<sup>301</sup> *Papadimitropoulos* (1957) 98 CLR 249 HCA.

<sup>302</sup> *Monica v DPP* [2018] EWHC 3508 (Admin), [2019] QB 1019, though the deceptions in this case were more wide-ranging than simply deception as to 'profession'.

<sup>303</sup> *Linekar* [1995] QB 250 CA.



matters upon which her consent would be contingent, an objective materiality requirement gives D carte blanche to lie, in order to obtain sexual gratification, at least in those cases where the subject matter of the lie relates to material excluded from the list. Ultimately, this results in fundamentally unequal protection under the law: an individual's right to sexual autonomy is respected *only* to the extent that the matters upon which they seek to condition their consent are regarded by some third party (whether this be the judge, jury or legislature) as meeting some kind of objective threshold.

We must therefore recognise a far greater range of deceptions as relevant to consent. Putting aside, for the moment, why we might seek to *exclude* certain categories of deception from the scope of liability, something must be said about the potential implications of such a significant expansion in the criminal law. To hold that (almost) *all* deceptions and mistakes are capable of invalidating consent risks vast swathes of the sexually active population becoming potential sex offenders on the basis of conduct which might be widely viewed as a sign of moral failure at most. Whilst this is not itself a good argument for permitting widespread violations of sexual autonomy, it does indicate the risk of unpredictable liability arising from any reform proposal that goes beyond simply identifying a short list of relevant deceptions/matters which must be disclosed, and which are widely recognised as important to decision-making in this sphere. Individuals *must* be given reasonable notice as to what might constitute a sexual offence and a reasonable opportunity to avoid liability, yet the variation in what matters to an individual's sexual decision-making makes it difficult to consistently and reliably predict whether any instance of non-disclosure, or even deception, prior to sexual intercourse might later be seen as a basis for criminal liability.

The mens rea requirement cannot be relied upon to minimise this risk of unpredictability. Under the current law,<sup>304</sup> it suffices to prove that any belief on D's part that a) C was not mistaken about x, or b) x would not make a difference to C's decision to consent was unreasonable. If 'unreasonableness' here is contingent on whether the mistake/deception would have made a difference to *most* people then, in the inevitable absence of empirical evidence, the requirement is simply an invitation to the jury to speculate, based, no doubt, on what matters to *them*. If the jury are to assess the 'reasonableness' of D's belief on a normative basis, although the focus might sometimes be on whether D's belief was unreasonable based on statements made by C, or on specific characteristics of C which were known to D, in many cases the jury might simply determine whether one is generally entitled to rely on a belief in consent, in the absence of disclosure of, or following deception about, some particular fact. Essentially, the mens rea requirement simply abdicates responsibility to the jury to determine what individuals should have to disclose prior to sexual intimacy; in so doing the risk of inconsistency, unpredictability and bias is heightened, rather than mitigated.

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<sup>304</sup> See discussion in the [Introduction chapter](#).

## A Focus on Deception

There is a better way to meet these concerns than by simply limiting relevant deceptions and mistakes to an ad-hoc, ill-principled list of 'objectively serious' matters. We can make headway by drawing a distinction between deception and mere non-disclosure. This also allows us to strike a balance between sexual autonomy and other valuable rights and interests.

The desirability of this approach is best understood when we keep firmly in mind that D must determine whether or not valid consent has been given in an informational vacuum. If all (or even many) *mere mistakes* were potentially consent-vitiating, we would have to decide whether to disclose a whole host of information to our sexual partners *ex ante*, without necessarily having any indication as to whether the other party is mistaken in the first place, and then whether that mistake might make a difference to their decision making. In other words, the criminal law would impose an obligation to disclose 'relevant' information but without any means of knowing what constitutes relevant information in advance. Given the uncertainty created by the mens rea requirement, such an approach undermines the rule of law and cannot simply be justified because it secures C's sexual autonomy; C's sexual autonomy is only at risk if the information is relevant. This will not always be the case.

Additionally, we all have information that we would not wish to disclose unless *absolutely necessary*. This information might relate to, for example: sexual history; gender history or identity; reproductive health matters; sexual abuse; previous criminal convictions; HIV status or other health information. C is under no legal obligation to maintain D's confidence, once this information is disclosed. Disclosure may carry serious risk of distress, social exclusion, discrimination, and perhaps even physical abuse. If, in the final analysis, the information would have made no difference to C's decision after all, these costs come with no benefit. And it is not just D who may bear the costs. If, instead of disclosing, D simply refrains from engaging in sexual activity (with C, or perhaps more widely), in circumstances where the information would not have made a difference to C, then *both* C and D have lost out on the prospect of a fully consensual, mutually desired encounter.

In sum, if all mistakes could potentially vitiate consent, we would all face an invidious choice between a) unnecessarily disclosing sensitive information (which turns out to be irrelevant); b) foregoing consensual sexual activity in order to maintain our privacy (because the information we wish to keep private would have been irrelevant to C's decision-making); or withholding information, at the risk of criminal liability. It should also be noted again that the mens rea provides no solution, here. Even on a subjective approach to mens rea, an 'honest belief in consent' is inconsistent with any suspicion that C may be mistaken about information which may matter to their decision to consent. Perversely, the more marginalised (or, perhaps just self-conscious) an individual might be, the more invidious their position becomes. If D fears that some people might not consent to sexual activity if they were aware of D's characteristic x, (due to widespread discrimination of individuals on the basis of x) but is unable to predict whether a specific person would withhold consent on that basis without

raising the matter of *x*, it may be *impossible* for D to engage in sexual activity without either disclosing or risking liability. We can avoid placing individuals in this invidious position, and reduce unpredictability, if we limit liability to cases involving deception. D is far less likely to be required to disclose ultimately unnecessary information and C's sexual autonomy remains protected, even if C's deal-breakers are idiosyncratic, as C can ask questions about those dealbreakers and deception on D's part will likely lead to liability.

The feasibility of this central recommendation is naturally dependent on our ability to reliably draw this distinction in practice. Space precludes a full defence of the point here, but we should be slow to conclude that the distinction is 'inherently prone to analytical collapse'.<sup>305</sup> The distinction is, after all, deployed elsewhere in the criminal and civil law. The focus here should be on whether C's mistake was induced by D (through words or conduct), or arose from a unilateral false assumption by C. Of course, it may be argued that, in some circumstances, non-disclosures may themselves induce false beliefs, and thereby deceive. This may be so but, where criminal liability for sexual offences beckons, rule of law values demand that obligations of disclosure are placed on statutory footing, by way of a provision which makes it clear that certain mistakes will negate valid consent.

The list of 'deceptive non-disclosures' should be small, confined to those matters which are safely regarded as (almost) universally relevant, in order to ensure that the law does not frequently demand unnecessary disclosures. It can safely include mistakes as to the nominal identity of the individual,<sup>306</sup> and mistakes as to the nature of the sexual act, in the narrow sense captured by *Williams*<sup>307</sup> and *Flattery*.<sup>308</sup> It *could* be argued that disclosure of a significant risk of STI transmission might be included within the list, not least because, for as long as there exists an exogenous legal duty to disclose HIV status prior to any sexual activity which carries such a risk,<sup>309</sup> the failure to do so is arguably deceptive. Ideally, however, reform in this area of the law might also provide an occasion to revisit the imposition of liability under the Offences Against the Person Act for the reckless transmission of HIV; It would certainly be

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<sup>305</sup> A Sharpe, 'Expanding Liability for Sexual Fraud Through the Concept of 'Active Deception'' (2016) 80 *JCL* 28. Sharpe is right to criticise the application of this distinction in *McNally* [2013] EWCA Crim 1051, [2014] QB 593. In order to be deceived, or indeed to be mistaken, C must believe a false proposition of fact. For that mistake or deception to affect the validity of any consent to sexual activity, that deception or mistake must matter to C's decision to engage in sexual activity. In most cases, the propositional content of the false belief will not be in issue. But the failure to identify the propositional content of the relevant false belief in *McNally* led directly to the mis-categorisation of the case: C's relevant false belief in *McNally* was not that McNally was a man, but that McNally was a *cisgender* man. This mistake arose from an assumption on C's part, rather than any deception on D's part. Any acceptable reform to this area must depart wholesale from the offensive suggestion that there is anything inherently deceptive about transgender (or intersex) individuals, or any conduct or presentation which merely doesn't conform to gender stereotypes.

<sup>306</sup> Because consent given to T cannot affect D's duty to not sexually touch C. It also imposes no onerous obligation on D to ensure that C has not mistaken D for another person known to C.

<sup>307</sup> [1923] 1 KB 340.

<sup>308</sup> (1877) 2 QBD 410.

<sup>309</sup> *Konzani* [2005] EWCA Crim 706.

no improvement of the law to impose an obligation of disclosure on individuals capable of transmitting HIV or other STIs.<sup>310</sup>

One further category of mistake which should also be included is that in which D *knows* that C is mistaken about *x*, *and* that *x* would make a difference to C's consent. There seems to be little reason to exclude non-disclosure of *x* from the scope of liability in such a scenario. D is not in the invidious position resulting from a lack of *ex ante* guidance as to what might matter to C. Jury decision-making, when faced with a knowledge-based requirement, will necessarily focus on the interpersonal aspects of the relationship between D and C, and the source of D's alleged knowledge, rather than an assessment of what individuals might generally be expected to disclose to sexual partners. The knowing exploitation of mistake is certainly dishonest, if not, strictly speaking, deceptive, and warrants inclusion within the scope of liability. That the list of relevant mistakes is limited to these categories does not undermine sexual autonomy, provided deception is more widely recognised as vitiating consent.

### **Identifying Deceptions Worthy of *Exclusion***

Once the notion that some deceptions are 'too trivial' to vitiate consent, and powerful rule of law and privacy concerns are largely neutralised by the distinction between deception and non-disclosure, few arguments remain against recognising *any* kind of deception as potentially relevant to consent-validity. Some may claim that certain deceptions are *so widespread and socially acceptable* (i.e., the sort of 'sales talk', exaggeration or flattery which might be common in flirtatious interaction and which individuals might expect to be mutually practiced) that the imposition of liability may be unpredictable and unfair. However, we should not assume that *all* deceptions would lead inexorably to liability; *mens rea* will have a role to play and it is unlikely a jury will convict in this scenario. A return to the [Morgan](#) principle might be warranted in the deception context. We may worry about an acquittal, following a jury determination that the deception *should not have mattered* to C, rather than whether D *should have been expected to anticipate* that it mattered to C. This risk is hard to avoid on an inadvertent *mens rea* requirement. Equally, where D *appreciates* a risk that their deception might be relevant to C's consent, liability seems neither unpredictable nor unfair. If there is concern that a subjective standard may be unjustifiably defendant-friendly, a suitable counter-measure may be found in a statutory provision to the effect that, where C clearly expresses their consent to be conditional on certain factual matters, deception by D in relation to those matters is to be regarded as inconsistent with any belief on D's part in C's consent.

Nevertheless, one serious concern remains: there is a tendency to regard sex-by-deception and mistaken sex through the paradigm of the unscrupulous individual, setting out

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<sup>310</sup> See M Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (Routledge 2007) and I Grant, 'The Over-Criminalization of Persons with HIV' (2013) 63 *U Toronto LJ* 475.

to obtain sexual gratification by lying, scheming, and manipulation. Yet denial and deception are often relied upon by the vulnerable, marginalised and disempowered, as a form of protection. We ought to recognise that, in some cases, the right to sexual autonomy is in direct conflict with the right to privacy and physical security. We must take seriously the idea that individuals may have compelling reasons for deceiving their sexual partners, even when they know or suspect that deception might induce consent. The imposition of criminal liability might be inappropriate, despite the wrong done to C in such cases. Space precludes anything like a full defence of this position here;<sup>311</sup> but lawmakers should take into account, inter alia, the risks of severe psychological distress; physical harm; discrimination and harassment, and physical abuse, in addition to further public policy factors which might support the argument against liability in particular contexts. I do not propose a comprehensive list of the sorts of deceptions which might warrant exclusion from liability, not least because the development of such a list should involve consultation and collaboration with a range of stakeholders, particularly those who may be affected personally by the decisions made in this regard. However, I as a starting point, I'd suggest that we have good reason to exclude from the scope of potential liability those women (or perhaps any person) who lies to their partner about their continued use of contraception, for fear of sexual and physical abuse. Further, given the high rates of discrimination and abuse to which transgender individuals are subjected in society, deception as to gender history or identity ought to be excluded from the scope of liability.<sup>312</sup> For similar reasons, so should deception as to HIV status, certainly in those cases where D has an undetectable viral load and so is unable to transmit HIV even through unprotected sex. Even where D is capable of transmitting HIV, there is a strong argument to be made that deception as to HIV status should also fall outside the scope of the criminal law, given the public health ramifications of imposing criminal liability.<sup>313</sup>

Further categories of deception might well be identified as suitable for exclusion. We should not rely on prosecutorial discretion to strike the balance here: the law does not simply punish wrongdoing but defines our legal obligations to one another. When constructing those obligations, we cannot avoid grappling with the reality that multiple rights, all worthy of protection, may conflict, and that criminalisation itself might cause disproportionate harm to some. Our efforts in reforming this area of the law should focus on confronting these challenges at the legislative level, rather than deferring difficult decisions to judges, juries and prosecutors. It is to that end, I think, that we should direct our future collective efforts.

## Summary of Recommendations

- C's consent to sexual activity should be regarded as invalid where:

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<sup>311</sup> For more detail, see *Deception, Mistake and Sexual Activity* (n293).

<sup>312</sup> For excellent discussion, see A Sharpe, *Sexual Intimacy and Gender Identity 'Fraud': Reframing the Legal and Ethical Debate* (Routledge 2018). Where D intentionally engaged in *inauthentic* gender performance for the purposes of obtaining sexual gratification liability would be appropriate.

<sup>313</sup> The public health policy arguments made by Weait (n310) apply in the sexual offences context, too.

- C mistakenly understood D to be another person known to C;
- C misunderstood the nature of the act for which consent was required;
- D knew that C was mistaken as to any fact and was aware that C would not have 'consented', were it not for that mistake.
- C's consent should be regarded as invalid where it is induced by deception of any kind, subject to certain exclusions, justified by compelling reasons relating to public policy concerns and/or the protection of conflicting rights, for example, the right to privacy or physical safety. These should include deception as to the continued use of contraception;<sup>314</sup> HIV status; deception as to transgender identity/gender history.
- The mens rea requirement should return to the [Morgan](#) principle (in the deception context, alone). However D is not to be regarded as having a belief in C's consent in circumstances where the jury is satisfied that C has clearly expressed their consent as being conditional on certain information, about which D deceived C.

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<sup>314</sup> But not deception as to the lack of (effective) contraception.

## P10. ECONOMIC AND SEXUAL AUTONOMY

[Rebecca Williams](#)

As Jarvis points out in the [introductory chapter](#) of this Report, the current law regarding consent, deception and mistake is in urgent need of reform. First, even to label the conceptual line between the cases of [Assange](#)<sup>315</sup> and [Lawrance](#)<sup>316</sup> ‘incredibly fine’ is arguably generous, given that it could be described as non-existent. I have argued elsewhere that the women in the cases of *Assange*, *Lawrance*, *R(F)*<sup>317</sup> and *B*<sup>318</sup> had all refused consent in relation to the presence of a particular physical entity (semen in the cases of *Assange* and *R(F)*, the HIV virus in the case of *B* and sperm in the case of *Lawrance*). By contrast, although the court in *Lawrance* appears to confirm the decision in [McNally](#),<sup>319</sup> in that case there was in fact no physical difference between what the victim had consented to and what actually took place (digital penetration, the only difference being the gender identity at birth of the owner of the fingers).

Second, the result of this lack of a rational distinction between the existing cases makes the future application of the ‘sufficiently close connection’ rule in [Lawrance](#) unpredictable. But this unpredictability and lack of clarity has in fact been prevalent throughout the area since the [2003 Act](#). I have noted elsewhere the impact that this has on the ability of defendants to know whether or not to plead guilty,<sup>320</sup> and the double uncertainty brought about first by the change of approach in *Lawrance* and second the unpredictability of the application of that test itself seem unlikely to improve the situation.

Third, a potentially even more worrying aspect of the decision in [Lawrance](#) is that the test of ‘sufficiently close connection’ begs the immediate question ‘according to whom?’ To which the answer must be the court in the particular case. But there is no guarantee that the view of the court will match either that of the participants in the situation or of society more widely. This too has long been an unfortunate and pervasive feature of this area of law which applies not just to the case law but also to [section 76 of the 2003 Act](#). For example, knowledge of the identity of one’s sexual partner is often not a necessary condition of sex at all, and yet when it is, deception concerning it is automatically sufficient to provide both actus reus and mens rea. By contrast, even those who are not particularly concerned with the precise identity of their partner may well be very concerned by matters such as the likelihood of pregnancy or disease transmission and yet these apply, if at all (and not in the case of *Lawrance*) only through the application of [section 74](#). A further related problem is that not only does this

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<sup>315</sup> *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin).

<sup>316</sup> *Lawrance* [2020] EWCA Crim 971.

<sup>317</sup> *R(F) v DPP* [2013] EWHC 945.

<sup>318</sup> *B* [2006] EWCA Crim 2945.

<sup>319</sup> *McNally* [2013] EWCA Crim 1051.

<sup>320</sup> R Williams, ‘*R v Flattery*’ in P Handler, H Mares and I Williams (eds) *Landmark Cases in Criminal Law* (Oxford, Hart Publishing, 2017) at fn 80.

situation cause the uncertainty outlined above, it also increases the chance that the law will be applied in a potentially discriminatory manner, as evidenced by the assumption that [McNally](#) would automatically pass the test, despite there being no *physical* difference between the act anticipated and that which took place.<sup>321</sup>

Within the common law the situation could be improved if courts were to move away from general principles such as ‘sufficiently close connection’ and instead outline clear, predictable and defensible categories of deception which would vitiate consent. I have in the past suggested ‘non est factum’ cases, physical difference and legal qualification as three such potential categories.<sup>322</sup> But ideally reform would be legislative and more wide-ranging than this, as the rest of this piece will outline.

### The Purpose of Sexual Offences

It is perhaps unsurprising that the law relating to sex obtained through deception or misapprehension on the part of the victim should have such a tangled and difficult history, given that the law relating to sexual offences more generally has evolved considerably over time in the manner demonstrated by the introductory chapter. As Farmer<sup>323</sup> notes, the perceived purpose of sexual offences has varied over time from a concern to prohibit offences regarded as being contrary to religion, morality, public economy and public health to a more recent understanding that they are in fact offences against the person. Indeed, even though the [1956 Sexual Offences Act](#) reflected the transformation in social and scientific understandings of sex which had taken place over the early part of the 20<sup>th</sup> Century, he notes that these reforms still contained a distinction between ‘normal’ and ‘pathological’ forms of sexual conduct, leading to an increased interest in what was perceived as sexual deviancy. It has only been the [2003 Sexual Offences Act](#) in England and Wales and the [2009 Sexual Offences \(S\) Act](#) in Scotland, argues Farmer, which organise the main offences around the concept of consent.<sup>324</sup> As he puts it, in these more recent Acts, ‘Consent is framed in positive terms, as not merely submission or acquiescence to the desires of another, but a negotiated interaction or agreement in which the needs and desires of both parties are expressed and respected... Sex, it is argued, is a valued human activity such that the criminal law ought to protect our interest or right to pursue that end as we choose.’ ‘From this perspective’ he concludes, ‘the wrong of rape has come to be seen as the interference with sexual autonomy understood as, on the one hand, the protection of a sphere of intimacy and, on the other, the right to choose with whom and when to have sexual intercourse’.<sup>325</sup>

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<sup>321</sup> See further A Sharpe, ‘Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent’ [2014] *Crim LR* 207.

<sup>322</sup> R Williams, ‘Deception, Mistake, and Vitiating of the Victim’s Consent’ (2008) 124 *Law Quarterly Review* 132.

<sup>323</sup> L Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order*, (Oxford, OUP, 2016) Ch 9, ‘Sex’.

<sup>324</sup> *Ibid* at 287.

<sup>325</sup> *Ibid* at 288.



Once we understand sexual offences in these modern terms it becomes much clearer that their role is quite different from that of the offences of homicide or non-sexual, non-fatal offences against the person, for example. Whereas the desired level of activity in the latter two categories is essentially zero,<sup>326</sup> the same cannot be said for sexual activity. Here the role of the law is to draw a line on a spectrum which ranges from activity which is not only desirable, but integral to the future of the human race at one end, through to activity which is so damaging it can lead to suicide at the other.<sup>327</sup> In this sense, while it is not surprising that, as the authors of the introductory chapter point out, there is 'little succour' to be drawn from developments elsewhere in the criminal law relating to rules aimed at total prohibition, help can perhaps be drawn from another area where the law also draws a line between permissible and impermissible transactions, namely that of property offences.

Of course, the history of the relationship between sex and property has been problematic, and the suggestion is not that we should return to the approach of the early modern law in which virtue and chastity of unmarried women were protected as property that could be damaged by rape but restored on marriage to the attacker.<sup>328</sup> Indeed, if anything the suggestion here is the reverse; the analogy arises precisely because sexual autonomy is now understood as having a positive as well as a negative dimension, the ability to choose to engage in sexual activity as well as the choice not to.<sup>329</sup> And it is this which, as Green points out, is 'loosely analogous to the concept of property... a 'bundle' of rights organized around the idea of securing, for the right of the holder, exclusive possession of, use of, access to, or control of a resource', in this case 'sexual self-determination and self-realization'.<sup>330</sup> In both areas, therefore, the law has the same role, not of eradicating transactions altogether, but of drawing a line between permissible and impermissible transactions, a line which essentially tracks the autonomous choices of those involved in the transactions.

Against this background it is perhaps therefore not surprising that both areas of law are concerned with the concept of deception, but the parallel extends even beyond that since, as Green points out, even in the property context 'legislatures were slow to condemn theft by deception in the same terms as other forms of theft.' He suggests various reasons for this; the idea of 'caveat emptor', i.e. the duty to take care of oneself rather than expecting the state to do it; a sense that, while dishonest, audacious fraudsters are in some way also admirable; the fact that 'as a matter of proof, thefts by deception are more likely to blur into

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<sup>326</sup> It is true that there is a list of limited exceptions to the rules prohibiting non-fatal offences against the person, but these might be regarded as operating generally on a no less restrictive means basis. For example, while it is possible to consent to surgery, it is unlikely that it would be possible to consent to a more extensive procedure for the sake of it if keyhole surgery were available and sufficient. The point is still to minimise the activity to the greatest extent possible.

<sup>327</sup> K Kim, B Ryou, J Choi and J Kim, 'Profile Analysis of Sexual Assault Experiences among Adult Women and Their Implications for Mental Health' (2021) *Psychiatry Investigation* 312.

<sup>328</sup> See, e.g. Farmer, above n323 at 267-8.

<sup>329</sup> See, e.g. V Bergelson, 'The Meaning of Consent', (2014) 12 *Ohio State Journal of Criminal Law* 172 and S Green, *Criminalizing Sex, a Unified Liberal Theory* (Oxford, Oxford University Press, 2020), Ch 2.

<sup>330</sup> Green, *ibid.*

legitimate, or at least non-criminal forms of behaviour’ and finally the difficulty of establishing ‘exactly which sorts of deception should count as legally culpable and worthy of criminal penalties and which should not’, including questions of positive deception versus omission to tell, lies as opposed to misleading conduct and false promises as opposed to false statements of fact.<sup>331</sup>

The last of these is evidently also a challenge which has led to fluctuating criminalisation in the context of sexual offences, as illustrated by the fact that the law prior to [Lawrance](#)<sup>332</sup> distinguished between deception ([McNally](#)),<sup>333</sup> positive caveat ([Assange](#))<sup>334</sup> and failure to tell, the latter not leading to criminal liability ([B](#)),<sup>335</sup> while the court in *Lawrance* removed this tripartite distinction. But it seems likely that Green’s other points may also have played a role in sexual offences’ struggle to deal properly with deception, including a (problematic) sense that the victim might be to blame for being too trusting, the sneaking admiration in popular culture (however misplaced) for the ‘lothario’, and the concern that the line between legitimate seduction and illegitimate deception may be difficult to establish. If both areas of law thus face similar concerns with deception and similar challenges in responding to it, examining the law of property offences as a source of inspiration for reform of sexual offences might at the very least prevent our reinventing the wheel and provide some consistency across the criminal law.

## The Structure of the Law of Sexual and Property Offences

At present, however, although they can be argued to fulfil similar roles, sexual offences and property offences are structured quite differently. While, as Farmer notes, sexual offences are largely organised around the concept of consent, this concept is essentially binary. Either V consented to the activity or V did not. The core offences contained in [sections 1-4 of the 2003 Act](#) are then differentiated on the basis of which part(s) of D touched which part(s) of V. By contrast, as Stuart Green’s *Thirteen Ways to Steal a Bicycle*<sup>336</sup> engagingly outlines, property offences are essentially structured according to the method by which consent is vitiated.

There are, of course, not thirteen ways to *steal* a bicycle, and the offences of blackmail, fraud, theft etc are quite distinct, in some instances arising from different statutes. They also have differences of mens rea<sup>337</sup>, focus on results in the case of the [Theft Act 1968](#) but conduct in the case of the [Fraud Act 2006](#) and sometimes also encompass non-economic wrongdoing

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<sup>331</sup> S Green, *Thirteen Ways to Steal a Bicycle, Theft Law in the Information Age* (Boston, Harvard University Press, 2012) at 130-131.

<sup>332</sup> [2020] EWCA Crim 971.

<sup>333</sup> [2013] EWCA Crim 1051.

<sup>334</sup> [2011] EWHC 2849 (Admin).

<sup>335</sup> [2006] EWCA Crim 2945.

<sup>336</sup> *Ibid.*

<sup>337</sup> For example there is no equivalent of Theft Act 1968 s2 with respect to the definition of dishonesty for the purposes of the Fraud Act 2006.

(as in the case of burglary contrary to [section 9 Theft Act 1968](#)). Nonetheless, there are, at the very least, various different ways in which one's autonomy to consent to an economic transaction can be infringed such that the law regards the resulting transaction as being criminal. And in some cases, the relationship between the other offences and theft is even more direct. [Section 8 of the Theft Act 1968](#), for example, states that the offence of robbery is committed when someone steals using force immediately before or at the time of doing so, meaning that robbery is essentially theft + force, or even theft by force. Similarly [section 9\(b\) of the 1968 Act](#) makes it an offence (inter alia) to commit theft + trespass. Even the relationship between theft and fraud could potentially be seen in this way, at least under the old law.<sup>338</sup>

Indeed, it may not be mere happenstance that the law of property offences has been divided up in this way. Simon Gardner has suggested that we can actually regard the harm of loss of property in as being aggravated by a further form of injury in these 'theft +' situations. 'In robbery this further injury is the feeling of physical powerlessness. In burglary it is the feeling of lost territorial security... Obtaining by deception<sup>339</sup> fits the same pattern. It too responds to the victim's suffering both a loss of property and an additional injury: in this case a feeling of intellectual vulnerability'.<sup>340</sup> He goes on to note that all three offences thus carry higher maximum sentences than simple theft and that it is therefore no surprise that these aggravated offences overlap with theft. This idea is also discussed by Green, with two slight variations, namely that he uses the terminology of primary and secondary wrongs as opposed to harms, and he adds the possibility that a secondary wrong might arise even in the context of stealing, given the element of stealth from which the offence derives its name.<sup>341</sup>

## Reforming the Law of Sexual Offences

If we turn to consider this approach in the context of sexual offences, it seems very likely that we could characterise the harms and wrongs involved in a very similar way. Whether one is discussing property or sexual offences, the core wrong/harm is the interference with one's autonomy to transact in a manner that enables self-determination and self-realization, while the presence of force, deception, pressure etc can act as an aggravating secondary wrong or harm. And this in turn points to a proposed structure that a reforming sexual offences statute might take.

There have been various suggestions in the past that we should enact a new version of the offence contained in the old [section 3 Sexual Offences Act 1956](#); procuring sex by false pretences.<sup>342</sup> It would not, however, to make sense to do this simply by adding an additional

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<sup>338</sup> See, e.g. P Glazebrook, 'Thief or Swindler: Who Cares?' (1991) *Cambridge Law Journal* 389.

<sup>339</sup> Which was the offence in place until the 2006 Fraud Act.

<sup>340</sup> S Gardner, 'Appropriation in theft: the last word?' (1993) 109 *Law Quarterly Review* 194 at 198.

<sup>341</sup> *Ibid* at 124.

<sup>342</sup> See, e.g. J Spencer, (2013) (9) *Archbold Review* 6 and K Laird, 'Rapist or rogue? Deception, Consent and the Sexual Offences Act 2003' [2014] 7 *Criminal Law Review* 492 at 509.

offence into the existing structure of the [2003 Act](#) because such an offence would in fact cut across that structure. At present, as noted above, consent within the 2003 Act is binary. If V does not consent to sexual activity there is an offence under sections 1-4 of the Act and a new version of section 3 of the 1956 Act is unnecessary. If V does consent, on the other hand, it is difficult within the structure of the 2003 Act to see why the activity would be rendered criminal. There is thus simply no space for the operation of a new 1956 section 3 offence within the existing structure of the law. However, if we consider deception not as an independent and anomalous addition to the existing law of sexual offences, but as part of the quite different structure of the law relating to property offences, this gives us a much better way forward.

There are clear parallels in the case law on sexual offences for each of the principal property offences, as the table below outlines. Where the secondary wrong or harm is that of stealth, the parallel with [section 1 of the Theft Act 1968](#) arises in cases such as [Elbekkay](#)<sup>343</sup> or [Ciccarelli](#),<sup>344</sup> and [section 75\(2\)\(d\) of the 2003 Sexual Offences Act](#), where V is asleep at the time of the contact. Where the secondary wrong is that of force, as in robbery contrary to [section 8 of the Theft Act 1968](#) the obvious parallels are cases such as [Olugboja](#)<sup>345</sup> and [Doyle](#)<sup>346</sup>. Cases where D puts pressure on V akin to that of blackmail under [section 21 of the Theft Act 1968](#) include those of [Wellard](#),<sup>347</sup> [Bingham](#)<sup>348</sup> and [Jheeta](#)<sup>349</sup>. Deception of the kind discussed here in cases such as [Bingham](#),<sup>350</sup> [Jheeta](#),<sup>351</sup> [McNally](#),<sup>352</sup> [Devonald](#),<sup>353</sup> [Lawrance](#),<sup>354</sup> [Monica](#),<sup>355</sup> [R\(F\)](#),<sup>356</sup> [B](#),<sup>357</sup> [Assange](#)<sup>358</sup> etc then has obvious parallels with [sections 1 and 2 of the Fraud Act 2006](#), while the separate offence in [section 4 of the Fraud Act 2006](#), abuse of a position of trust, has obvious parallels with cases such as [Kirk](#),<sup>359</sup> [C](#)<sup>360</sup> and [Ali](#).<sup>361</sup>

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<sup>343</sup> [1994] EWCA Crim 1.

<sup>344</sup> [2011] EWCA Crim 2665.

<sup>345</sup> [1982] QB 320

<sup>346</sup> [2010] EWCA Crim 119.

<sup>347</sup> [1978] 1 WLR 921.

<sup>348</sup> [2013] EWCA Crim 823.

<sup>349</sup> [2007] EWCA Crim 1699.

<sup>350</sup> [2013] EWCA Crim 3.

<sup>351</sup> [2007] EWCA Crim 1699.

<sup>352</sup> [2013] EWCA Crim 1051.

<sup>353</sup> [2008] EWCA Crim 527.

<sup>354</sup> [2020] EWCA Crim 971.

<sup>355</sup> [2018] EWC 3508.

<sup>356</sup> [2013] EWHC 945 (Admin).

<sup>357</sup> [2006] EWCA Crim 2945.

<sup>358</sup> [2011] EWHC 2849 (Admin).

<sup>359</sup> [2008] EWCA Crim 434.

<sup>360</sup> [2009] UKHL 42.

<sup>361</sup> [2015] EWCA Crim 1279.

Method of vitiating	Property Offence	Sexual counterpart
<b>Stealth</b>	Theft S 1 TA 68	<i>Elbekkay, Ciccarelli, s 75(2)(d)</i>
<b>Force</b>	Robbery S 8 TA 68	<i>Olugboja, Doyle</i>
<b>Pressure</b>	Blackmail s 21 TA 68	<i>Wellard, Bingham, Jheeta</i>
<b>Deception</b>	S 1 via s 2 Fraud Act 2006	<i>Bingham, Jheeta, Devonald, McNally, Lawrance, Monica, R(F), R(B), Assange etc</i>
<b>Abuse of a position of trust</b>	S 1 via s 4 Fraud Act 2006	<i>Kirk, C, Ali</i>

Once the parallels are laid out like this, rather than asking why we might want to treat sexual offences in a manner similar to property offences, it becomes more obvious to ask why we *don't* currently protect sexual autonomy in the comprehensive and nuanced way we protect economic autonomy. In my view, therefore, we need to move away from the sexual offences' current binary approach to consent and instead we should replace our existing single offences of rape and sexual assault with a series of offences of 'rape<sup>362</sup> by stealth', 'rape by force', 'rape by fraud' etc. Retention of 'rape' in the labelling of these offences will be important both to victims and almost certainly also to those legislating, who will not wish to be seen as being in any way 'softer' on criminal behaviour, but it is also consistent with the idea that the law should identify both the relevant wrongs/harms; the interference with sexual autonomy and self-realization, and the additional secondary wrong/harm arising from the stealth, pressure, force etc. And this approach not only presents a way to resolve the current difficulties surrounding deceptive sex in a manner which more accurately reflects and labels the relevant wrongs/harms, it also has two further advantages.

First, it enables us to achieve some degree of consistency across the criminal law, which the historical happenstance of developments in the two areas has so far prevented. It gives us a structure focused on the current role played by the two areas of criminal law, freed from existing path dependencies.

Second, it also, as noted above, prevents us from having to reinvent the wheel. Thus, one potential objection to the proposed structure might be the difficulties of overlap or choice between different offences as in cases such as *Jheeta* or *Bingham*, for example. But that is also true of property offences, as evidenced in cases such as *Hinks*,<sup>363</sup> *Barton*<sup>364</sup> and *Lawrence*.<sup>365</sup> It has not led to the downfall or unworkability of those offences and on the contrary, the solutions developed in the property context can on this basis be extended to the sexual context without a great deal of further work, including the concept of primary and secondary harms/wrongs already discussed. Similarly, if we are worried, as Green suggests,

<sup>362</sup> Or indeed sexual touching, sexual penetration etc as appropriate.

<sup>363</sup> [2000] 3 WLR 1590.

<sup>364</sup> [2020] EWCA Crim 575.

<sup>365</sup> *Lawrence v Metropolitan Police Commissioner* [1972] AC 626.

about the level of deception necessary, or the relationship between positive deceptions and failures to tell etc, the parallel with property offences means that we already have the more developed rules relating to fraud from which we can draw, taking us back to the benefit of consistency.

It might, of course, be argued that the proposed approach would not immediately reflect public opinion, particularly given that there is no limit on the subject matter of fraud for the purposes of property offences; any deception with intent to gain or cause loss will suffice. But it is important to remember that the law can lead as well as follow, as Robinson notes it has done in areas such as drink driving and domestic violence.<sup>366</sup> More specifically, the law is quite used to leading in the sexual offences context given the relatively recent enactments of [section 67A Sexual Offences Act 2003](#) to deal with 'upskirting' and [section 33 Criminal Justice and Courts Act 2015](#) targeting 'revenge porn'.

## Conclusion

In conclusion, then, the law is in urgent need of reform. And given what is at stake in terms both of the coherence, certainty and predictability of the law (and its resulting efficiency in terms of guilty pleas and appeals) and in terms of the protection of sexual and reproductive autonomy and general health, it is difficult to justify ignoring either the greater and more nuanced protection currently given to economic autonomy, or the presence of a ready-made area of criminal law from which we can derive the answers we need.

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<sup>366</sup> P Robinson, 'Criminalization Tensions: Empirical Desert, Changing Norms and Rape Reform' Ch 9 of Duff et al (eds) *The Structures of the Criminal Law* (Oxford, Oxford University Press, 2011).

# FINAL RECOMMENDATION: CLRNN REFORM PROPOSAL

Having reviewed the consultation proposals, the responses of consultees and the feedback from the Policy Outline,<sup>367</sup> the CLRNN Committee has decided not to endorse any single proposal in full. Rather, as was also common among several consultees, we have constructed an approach that borrows from and/or is influenced by many of the consultation proposals. In doing so, we hope to do appropriate justice to the exceptional work and insights provided by our consultation authors whilst recommending a scheme that we believe has the best chance (both in principle and in practice) to make a positive change to the law.

**We recommend the creation of a new offence – inducing a person to engage in sexual activity by deception – to be added as section 4A to the [Sexual Offences Act 2003](#).** We do not recommend any further changes to the Sexual Offences Act 2003, including to the provisions defining consent in sections 74-76. Below we set out the recommended new offence as it might appear in statute. Following this, we provide some explanation for the various aspects of the new offence. Finally, we illustrate how that new offence would apply to the facts of several controversial cases involving deception and sexual activity.

## **4A. Inducing a person to engage in sexual activity by deception**

- (1) A person (A) commits an offence if—
  - (a) A deceives another person (B);
  - (b) A intends by his deception to induce B to engage in sexual activity;
  - (c) B engages in sexual activity;
  - (d) B’s decision to engage in sexual activity is induced by A’s deception; and
  - (e) A has no reasonable excuse for deceiving B.
- (2) A will deceive B for the purposes of subsection (1) whenever:
  - (a) A knowingly makes a false representation to B about a matter that A knows is important to B’s decision whether to engage in the sexual activity;or
  - (b) A intentionally fails to disclose to B information about a matter that A knows is important, or that A believes would be important, to B’s decision whether to engage in the sexual activity.

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<sup>367</sup> With particular thanks to the COEUS Legal Research Group and Dr Kyle Murray for their extensive and penetrative commentaries.

- (3) Where evidence is provided of a reasonable excuse for A's deception of B, it will be for the prosecution to prove that A had no reasonable excuse for that deception.
- (4) In deciding whether A had no reasonable excuse for that deception, the court should have regard to the following factors so far as they might arise:
  - (a) The age and vulnerability of B;
  - (b) The risks of serious consequences for B if B were to engage in the sexual activity;
  - (c) The age and immaturity of A;
  - (d) Any purpose of A in deceiving B beyond the intention to induce B to engage in sexual activity; and
  - (e) The personal or private nature of the matter referred to in subsections (2)(a) and (b).
- (5) A person guilty of an offence under this section, where the sexual activity engaged in consists of, or includes, penetration of B's vagina, anus or mouth with A's or another's penis, is liable on conviction on indictment to imprisonment for life.
- (6) A person guilty of an offence under this section, where the sexual activity engaged in consists of, or includes, penetration of B's vagina or anus with a part of A's or another's body or anything else, is liable on conviction on indictment to imprisonment for life.
- (7) A person guilty of an offence under this section, where the sexual activity engaged in consists of, or includes, the touching of B by A or another (including B) is liable—
  - (a) on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or both; or
  - (b) on conviction on indictment to imprisonment for a term not exceeding 10 years.



## Explaining the Recommendation

In this section we anticipate and answer a series of questions in order to explain and justify the major policy choices underlying the CLRNN recommendation.

### *Why do we need a new deception-based sexual offence?*

The need for reform in this area is a point of consensus among our consultation authors and consultees. So too, the principled basis for that reform: focusing on the need for greater legal clarity (for courts, as well as prospectively for the public), greater protection of individual autonomy in choices to engage in sexual activity, and greater normative justification for the thresholds of criminalisation.

In line with a majority of our consultation authors, and consultees, however, we have opted to recommend a new offence of inducing engagement in sexual activity by deception – providing a new section 4A to the [Sexual Offences Act 2003](#). There are advantages to this in both principle and in terms of practicality. At the level of principle, we are convinced by consultation authors who present sex (and sexual touchings, etc) by deception as a separate and distinct wrong from that of sex without consent: whereas both represent an attack on B's sexual autonomy, those attacks are of a different kind (i.e. as we recognise in other areas of the criminal law, such as property offences). Having accepted this difference, a new offence allows that distinction to be marked in the labelling of the crime, and most importantly, allows us greater flexibility in defining the elements (physical and mental) that best capture the conduct we wish to criminalise. It will be noted, for example, that we have defined the new offence without reference to B's 'non-consent'.

Some of the feedback to the Policy Outline suggested that it would be preferable to create four separate offences rather than a single offence to capture deceptive conduct. The concern expressed by the COEUS Group, for example, was that the section 4A offence could be seen as being less serious than those offences in sections 1 – 4 of the Act and so to avoid that possibility there should be a number of separate offences of rape by deception, assault by penetration by deception, sexual assault by deception and inducing a person to engage in sexual activity by deception. The CLRNN Committee is not persuaded by that suggestion. We wonder what would be the position if person A intended to induce person B to engage in sexual activity falling short of penetration, but once engaged in, that activity progressed to the point where person A penetrated person B's vagina with his penis? Would person A be charged with sexual activity by deception or with rape by deception? Section 4A as presently drafted does not seek to draw distinctions between the sexual activity intended and the sexual activity engaged in for the purposes of liability. Where the sexual activity engaged in amounts to penile penetration of person B's vagina, anus or mouth, the maximum sentence

will be the same for the section 4A offence as it is for rape, contrary to section 1, and that should ensure that the section 4A offence is not treated less seriously than the offence in section 1.

***Does the new offence cover both active and passive forms of deception?***

Yes. Although we do not employ the language of active or passive deception in the draft Bill, such conduct is captured within our definition of ‘deception’ outlined in section 4A(2) – extending *both* to the making of false representations as well as failing to disclose information. We were convinced by consultation authors warning that distinguishing these between forms of deception can lead to practical difficulties, and that the separation provides little (if any) basis for distinctions in blame.

***Should certain types of deception be excluded from the ambit of the new offence?***

The proposed new offence does not seek to exclude from its ambit any particular types of deception. In other words, any deception that falls within subsection (2) is capable of founding liability on the part of person A if the other elements of the offence in subsection (1) are made out. The COEUS Group, in its response to the Policy Outline, has argued that certain types of deception ought not to be criminalised and so certain exceptions should be carved out of the new offence to ensure that those types of deceptive conduct do not attract liability under section 4A. The examples given are deceptions as to sex or gender identity, and deceptions as to age where person A is a child under the age of 18. The concern of the COEUS Group is that the reasonable excuse provision in subsection (1)(e) is an insufficient safeguard against the risk of juries convicting, in particular, trans, intersex and gender non-conforming defendants as well as child defendants.

The CLRNN Committee recognises the force of this argument but it prefers to maintain the position set out in the Policy Outline that there should be no express exceptions within section 4A to automatically exclude certain types of deceptions from the ambit of the new offence. There are several reasons for this. First, it seems to us that the victims of such deceptions may themselves be vulnerable, and we thus wonder whether any sympathy for the persons thus identified is more suitably considered in prosecuting decisions or in sentencing than in legislation which would apparently permit such deceptions. Moreover, our ‘reasonable excuse’ provision would potentially cover the situation where the defendant apprehends violence if they were to reveal their age or gender identity and if desisting from sexual activity might itself tend to reveal such facts. Secondly, we were impressed by the responses which warned against distinguishing between various types of deceptions, arguing that what matters is the effect on the victim's autonomy and not a third party appraisal of the

gravity of the deception. Thirdly, creating specific exceptions could create uncertainty around the application of any such exception, for example in a case where the defendant made two false representations, one of which arguably falls within an exception, and where it is unclear whether the combination of deceptions had induced the activity. Fourthly, reasonable excuse defences exist in a range of statutes and the experience of the CLRNN Committee is that juries have little difficulty deciding for themselves to the criminal standard whether the excuse put forward by a defendant to account for his or her actions was unreasonable. There is no reason to suppose that juries trying defendants for the new offence would be any less assiduous when carrying out that exercise. If there is a concern that juries, or certain jurors, could be hindered in their task by harbouring myths and stereotypes around transgender identity, for example, then that could be addressed through jury directions, but the CLRNN Committee is not convinced that specific exceptions within section 4A are necessary or desirable to address these concerns.

Although we are not convinced by the use of specific exceptions to the section 4A offence, we have included a list of factors that the court should have regard to when deciding whether A lacked a reasonable excuse (section 4A(4)). We discuss this further below, on the specific role of the 'reasonable excuse' provision. The inclusion of such factors – including issues of vulnerability and privacy – is intended to provide some additional guidance on the issues raised by the COEUS Group and by others,

### ***What impact must A's deception have on B?***

Section 4A(1)(d) requires that 'B's decision to engage in sexual activity is induced by A's deception'. In the Policy Outline we favoured the use of the word 'influence' but we are persuaded by the feedback from the COEUS Group that 'influence' is a weak test of causation that could lead to over-criminalisation, whereas 'induce' strikes a better balance between not imposing too strict a test and not creating an offence that is over broad in its scope. As long as the prosecution can prove that A's deception was one of the factors that persuaded B to engage in sexual activity then this element of the offence will be satisfied. This should be understood both in terms of active persuasion (subsection (2)(a)), as well the denial of information that A knows or believes would have made B significantly less likely to engage in the sexual activity (subsection (2)(b)).

### ***What if A deceives B as to sexual contact with a third party?***

Typical cases will involve person A deceiving person B in order to induce person B to engage in sexual activity with person A himself. However, the section 4A offence is not limited to that situation. It will also apply, for example, where person A deceives person B to engage in sexual

activity with a third party. In such a case, it should be noted, the third party is also likely to commit the section 4A offence (by failure to disclose) if they are aware of person A's deception. The offence also covers deception aimed at inducing solo sexual activity where, for example, person A deceives person B into sexual activity on a webcam.

### ***Why do we require subjective mental fault?***

There was a range of fault elements recommended by our consultation authors, but most who advocated for a new offence (i.e. taking the situation outside the terms of present non-consent offences) conditioned liability on person A's subjective willingness to deceive person B. We agree that for an offence focused on person A's deception, it should be necessary for person A to intend his manipulation (section 4A(1)(b)) and to know or believe that the subject-matter of that manipulation is, or would be, important to person B's decision to engage in the sexual activity (section 4A(2)). The result is that various false boasts from person A, including representations of wealth etc, will not be caught by the new offence where A does not believe that they will play a significant part in person B's decision to engage in sexual activity.

### ***What is the role of 'reasonable excuse'?***

The CLRNN Committee agree with the majority of our consultation authors, and consultees, that the unconditioned criminalisation of all forms of deception has the potential to result in inappropriate liability. To avoid this, our section 4A offence includes an exception where person A has a reasonable excuse for deceiving person B (section 4A(1)(e)). The reasonable excuse provision is intended to guard against inappropriate criminalisation whilst avoiding the problems associated with specific categorical exclusion of certain deceptions (discussed, and rejected, above). The new section 4A offence will apply to any form or topic of deception, as long as it induces person B to engage in sexual activity and person A knows or believes that it is important to person B's decision, and person A lacks a reasonable excuse for deceiving person B.

There are several examples, taken from our consultation exercise, where the court could find that person A acted with a reasonable excuse: these include, for example, circumstances where A is the victim of abuse and deceives person B (e.g. about the use of birth control) as a form of self-protection; and cases where person A is HIV positive, but has been assured that his viral load represents no danger to his sexual partner. There are also more difficult cases where the reasonable excuse exemption does not provide a certain answer, but, we believe, provides the appropriate focus for argument in court. Cases of deception regarding gender reassignment provide a prominent example here, although there

are several others.<sup>368</sup> Where person A engages in sexual activity with person B without informing person B of their gender transition, it should be open to person A to explain why this was the case – simply fearing that person B would not consent to the sexual activity should not be sufficient as reasonable excuse, but a greater understanding of the relationship with person B, and person A’s potential concerns about wider knowledge of their previous gender, should be taken into account.

In order to assist the court in its application of the ‘reasonable excuse’ provision, our final drafting of section 4A includes a list of factors that should be taken into account (subsection (4)(a)-(e)). The idea here is not to be overly prescriptive; we are conscious not to introduce specific categorical exceptions of the kind we considered and rejected above. Rather, the factors listed – including those relating to age, vulnerability, consequences to the complainant (including unwanted pregnancy), and protection of privacy – are intended to assist the court by highlighting issues that are likely to bear upon person A’s blameworthiness. It might be pointed out that there is no room to consider any of these matters under the present law, where deception must be argued to arise under s.76 of the Sexual Offences Act 2003 or to negate consent as defined under s.74; but for very many writers and complainants, these are especially salient factors to consider. It is another reason for preferring a separate offence, quite apart from those where proof of non-consent is required.

We acknowledge the great assistance provided by consultees in helping us to identify and articulate these factors.

### ***How was the decision made on sentencing?***

The new section 4A offence is intended to stand apart from [sections 1-4](#) as a distinct criminal wrong, but we do not believe that it is in all cases a less serious wrong than activity where non-consent is proven. On this basis, depending on the form of sexual activity (section 4A(5)-(7)), the maximum sentence tracks the same maximum sentence available for the non-consent offences. Tracking the maximum sentence also helps avoid the problem, highlighted by consultation authors and consultees, of any new deception offence creating a tiering of more and less serious forms of deception (i.e. forms of deception capable of vitiating consent being perceived as most serious).

### ***How will the new offence work alongside existing sexual offences?***

As stated in response to the previous question – on sentencing – the new section 4A offence is intended to work alongside existing offences within the [Sexual Offences Act 2003](#), more

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<sup>368</sup> See the final section ‘Applying the Recommendation’ below.

accurately capturing and criminalising the separate wrong of deception induced sexual activity. Unlike some of our consultation authors, we do not recommend changes to the existing offences alongside the new offence (e.g. to ensure that deception cases are *only* prosecuted under the new offence). Certain deception cases may still be prosecuted under the non-consent offences, where person A deceives person B as to the nature of the conduct consented to or their identity (i.e. those satisfying the [section 76](#) conclusive presumption of non-consent). However, for the majority of deception cases, those currently focused on the general [definition of consent](#), we believe that the more appropriate terms of the new offence will be sufficient to encourage prosecutors to employ section 4A. Our recommendation here is very much in line with the current structure of the Sexual Offences Act 2003, supplementing the non-consent offences (sections 1-4) with various other categories of distinct but overlapping forms of sexual offending.

### Applying the Recommendation

In order to illustrate the likely future application of our recommended scheme, here we briefly sketch how that scheme would apply to previous deception cases. Our aim is not to demonstrate that there is a simple answer to every case. Rather, our aim is to show how the greater clarity provided by our scheme can produce straightforward answers to several cases, whilst allowing any remaining ‘hard cases’ to be contested on a fairer legal basis than is currently available.

[Linekar \[1995\] 2 Cr App R 49](#) (pre-SOA 2003):

The case was put to the jury *inter alia* on the basis that they might convict of rape if A had sexual intercourse with B, a sex worker, having promised to pay her. A never intended to pay.

Crown Court: guilty of rape.

Court of Appeal: appeal allowed, consent was not undermined by A’s deception. B was not deceived as to the nature of the act (she knew he was going to penetrate her vagina with his penis) or the purpose of A doing so (for him to derive sexual gratification).

CLRNN Recommendation: A would not be guilty of a section 1 rape offence, for the reasons given by the Court of Appeal. However, A would have committed the new section 4A deception offence, if he had intentionally and falsely represented his intention to pay B with no (apparent) reasonable excuse.

**[Dica \[2004\] EWCA Crim 1103:](#)**

A, knowing he was HIV-positive, had unprotected sexual intercourse with two victims, infecting both with the disease. It was clear that neither of the victims would have consented to intercourse if they had known about A's infected status.

Crown Court: guilty of an offence against the person (not charged with rape).

Court of Appeal: appeal allowed against the non-fatal offence, and a retrial ordered. However, the position at trial that B was not deceived as to the 'nature' of the sexual act was confirmed; there was no rape.

CLRNN Recommendation: A would not be guilty of a section 1 rape offence, since s.76 of the 2003 Act would not apply, as accepted by both courts. However, A would have committed the new section 4A deception offence, having intentionally failed to disclose important information to B, which could reasonably be said to have induced the activity, since he was not receiving treatment.

**[Jheeta \[2007\] EWCA Crim 1699:](#)**

A sent B anonymous text messages over several years, purporting to be from the police, telling her to continue having a sexual relationship with him in order to avoid fines for causing distress. A was charged with rape.

Crown Court: guilty of rape—A's deception undermined B's apparent consent within the terms of section 76.

Court of Appeal: conviction upheld on appeal, but held that section 76 was not properly applicable. Instead, in the circumstances, V was not 'free' to make her own decision and thus did not consent within the terms of section 74 because of the threats and pressure that underscored A's lies.

CLRNN Recommendation: A's potential liability for the section 1 rape offence is formally unaffected. However, it is clear that A would also commit the new section 4A deception offence, intentionally deceiving B by false representation.

**[Assange \[2011\] EWHC 2849:](#)**

The Divisional Court was asked to assume that B agreed to sex with A on the basis that he would wear a condom throughout the encounter; and that A subsequently, and without B's knowledge, removed the condom before sex. The question – relevant to a European Arrest Warrant – was whether such conduct would amount to a criminal offence in England (i.e. would A's conduct satisfy the elements of a section 1 rape offence)?

Divisional Court: A's conduct would satisfy the elements of a section 1 rape offence if it had taken place in England, because the conversation preceding the activity made it clear that B was not agreeing to sex without a condom. But, again, section 76 was inapplicable. (NB. Assange later appealed, unsuccessfully, to the Supreme Court, but the grounds of that appeal were not concerned with this part of the Divisional Court's decision).

CLRNN Recommendation: A's potential liability for the section 1 rape offence is formally unaffected. However, it is clear that A would also commit the new section 4A deception offence, intentionally deceiving B by false representation, which may be the more appropriate charge on these facts.

**[F v DPP \[2013\] EWHC 945:](#)**

B agreed to have sex with A on the condition that he would not ejaculate inside her vagina. A subsequently and intentionally ejaculated inside B's vagina. In the case, B was applying for judicial review of the CPS decision not to prosecute A for a sexual offence, focusing on the realistic prospect of conviction on the facts.

Divisional Court: entertained a judicial review and quashed the decision not to prosecute. In light of the previous conversations between the parties, and the decision in *Assange*, A's conduct fell within the definition of section 1 rape.

CLRNN Recommendation: A's potential liability for the section 1 rape offence is formally unaffected. However, it is clear that A would also commit the new section 4A deception offence, intentionally deceiving B by false representation. It is also clear that the section 4A offence would be committed at the first point of sexual contact following A's deception.

**[McNally \[2013\] EWCA Crim 1051:](#)**

A was born a female, but identified and presented as a young man to B at the time of the offence. B, a young woman, engaged in sexual activity with A (including oral sex by A and digital penetration by A). B maintained that she would not have consented to the sexual activities with A had she known the 'truth', as the court put it, that A was female.

Crown Court: guilty of section 2 offences of assault by penetration.

Court of Appeal: conviction upheld on appeal. A's 'deception as to gender' vitiated B's consent.

CLRNN Recommendation: A's potential for section 2 liability is not formally impacted by our recommendations, though a Court might find such liability to be inconsistent with the later case of *Lawrance*. It is likely (and we believe appropriate) that in future prosecutors would focus on the new section 4A deception offence. Even here, cases like *McNally* remain difficult: A may contend not to have knowingly made a false statement (or to have concealed 'the truth') about their gender, and/or A may claim a reasonable excuse engaging with the factors set out in subsection (4).

**[R \(Monica\) v DPP \[2018\] EWHC 3508:](#)**

An undercover police officer (A) had, under his assumed identity, conducted a sexual relationship with a woman from a campaign group (B). B later discovered A's true identity, and complained of rape on the basis that she would not have consented to sexual activity with A if she had known he was a police officer. In the case, B was applying for judicial review of the CPS decision not to prosecute A for a sexual offence.



Divisional Court: held that the CPS was justified in its decision not to prosecute A, as A's deception was insufficiently connected to the nature or purpose of the sexual activity to render that activity non-consensual.

CLRNN Recommendation: The current law struggles to identify salient points of distinction between this case and *McNally*, exposed by regular appeals to 'common sense' in the judgment. As with *McNally*, we contend that the new section 4A deception offence is a better fit for the facts of a case of this kind. Since it would be clear that A has deceived B in a relevant manner for the section 4A offence, the question is whether A acted with a reasonable excuse: the focus here would be on A's professional role and the circumstances surrounding that role; as well as the impact on, and any vulnerability of, the complainant.

[Lawrance \[2020\] EWCA Crim 971](#):

A knowingly and falsely assured B that he had had a vasectomy, and that therefore no condom was required to prevent the risk of pregnancy. On this basis, and following reassurance from A, B consented to sex. A was charged with rape.

Crown Court: guilty of rape. B's consent was not free and informed, and was therefore invalid.

Court of Appeal: appeal allowed. B was not deceived as to the 'sexual intercourse itself' but only as to the 'broad circumstances' surrounding it. The latter category of deception does not undermine consent.

CLRNN Recommendation: A's non-liability for a section 1 rape offence is not directly impacted by our recommendations. However, given the problems associated with the test developed in *Lawrance*, including in its application to the facts of that case, we would anticipate and encourage cases of this kind to be charged using the new section 4A deception offence. There is clear evidence of deception on the facts of the case, and without an obvious reasonable excuse, the elements of the new offence are likely to be satisfied.