Deception, Mistake, Privacy and Consent:

A Conceptual Framework for Resolving the 'Line-drawing' Problem in Sex-by-Deception and Mistaken Sex

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ABSTRACT

DECEPTION, MISTAKE, PRIVACY AND CONSENT: A CONCEPTUAL FRAMEWORK FOR RESOLVING THE 'LINE-DRAWING' PROBLEM IN SEX-BY DECEPTION AND MISTAKEN SEX.

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What is the appropriate legal response to sexual activity induced by deception or mistake? My thesis is built on three foundational moves. First, I challenge orthodox legal approaches to identifying deception and develop a tripartite taxonomy of active and passive deception, and uninduced mistake. Second, I identify the violation of the right to sexual integrity as the conceptual core of rape and sexual assault. Third, I recast the right to sexual integrity as comprising three component rights: the right to token ostensible consent, the right to be free from illegitimate interference with the decision to do so, and the right to know information relevant to that decision. Deception and uninduced mistake implicate different component rights, and so affect consent-validity in different ways. Only in restricted circumstances will consent given on the basis of an uninduced mistake (rather than deception) constitute a violation of sexual integrity. In most cases, mistaken consent is valid.

When consent is given on the basis of deception or 'relevant' uninduced mistakes D infringes C's right to sexual integrity. However, the right to sexual integrity it is not absolute, and must be balanced against D's rights, chiefly (but by no means exclusively) the right to privacy. This balancing exercise functions to exclude from the reach of both moral censure and criminal law certain deceptions and relevant mistakes that induce consent. Even when D's privacy right is not at stake, and C's moral consent is invalid, issues of legal and public policy may militate against imposing criminal liability.

This thesis does not offer a comprehensive account of all circumstances in which deceptively induced or mistaken consent will be morally or legally (in)valid. However, it provides a much needed, robust theoretical framework for resolving long-standing difficulties in this controversial and highly contested area of the law.

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TABLE OF ABBREVIATIONS

FA 2006…… Fraud Act 2006

GRC…..……..……..……..……..……Gender Recognition Certificate

HAART……...……..……..……..…. Highly Active Antiretroviral Therapy

HIV……..……..……..……..……. Human Immunodeficiency Virus

HSV……..…… Herpes Simplex Virus

MA 1967……..…… Misrepresentation Act 1967

PLWH……..……...……..……..……..…… People/Person living with HIV

Rape/SA……..…… Rape and/or Sexual Assault

SCC…..…..…..……..……..……..……..……..…. Supreme Court of Canada

SOA 2003……..……...…… Sexual Offences Act 2003

TA 1968……..……..……..……...……..……..…… Theft Act 1968

TA 1978……..……..……..……..……..……..…… Theft Act 1978

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CHAPTER ONE: INTRODUCTION

When is consent to sexual activity given on the basis of a mistake, or which is induced by deception, valid as a matter of criminal law? This question has bedevilled jurists and commentators alike for generations. To say that the absence of consent transforms sexual activity from a positive, beneficial act to one of our most serious criminal offences puts the normative power of consent too strongly. More than consent is required to make sexual intercourse a morally valuable, enjoyable activity.[1] However, consent certainly makes the difference between rape and a permissible sexual act. The stakes are high for getting the law of sexual consent right. Historically, consent has been understood too narrowly, in ways which have left women and girls in particular vulnerable at the hands of sexual abusers, with little to no legal protection. Legal developments which recognise consent as a richer concept than simply the absence of physical resistance have been vital in the process of taking rape and sexual assault (rape/SA) seriously in both criminal law and wider society.

But cases involving an 'information gap', where C consents on the basis of a mistake or as a result of deception, pose unique difficulties in evaluating questions of consent-validity in the criminal law. People lie and fail to disclose information regularly, in a wide range of sexual and romantic contexts. How many relationships are formed when parties, presenting themselves in the most flattering light, conceal the worst of their characters and appearances, and massage and inflate their positive qualities? How many fracturing relationships are characterised by an increasing lack of candour between the parties? What might we expect casual sexual partners to disclose to each other in order to be sure they are obtaining legally valid consent? What information might a person legitimately wish to keep private? Would it be appropriate for the criminal law to require everyone

[1] See Ch 2.4.

(on pain of potential liability for a sexual offence) to disclose sensitive personal information before even kissing someone? The recipient of that information is under no legal requirement to keep it secret, and the information might well have been irrelevant to their decision to consent to the kiss in any event.

If deception and mistake invalidate consent to sexual activity, then the actus reus of a serious criminal offence has been committed, and liability will turn on the issue of mens rea. If we hold that *any and all* deceptions and mistakes are capable of invalidating consent,[2] then we risk vast swathes of the sexually-active population becoming potential sex offenders on the basis of less-than-honest conduct that many people would regard as, at most, a sign of moral failure, and inapt for consideration within the criminal law. It is too easy to assume that deceptive and mistaken sex is perpetrated by a powerful and manipulative individual to exploit C's vulnerability. This is far from the case. What if a woman lies to her husband, who wants a child, about ceasing to take hormonal birth control? Had he known she was still taking birth control and did not want a child, he would have left the relationship. Is this a sexual offence? What if the woman, C, was afraid of telling her husband, D, about her preference for childlessness? Perhaps she was reluctant to bring a child into an abusive relationship, but was too scared to leave or to be honest about her reproductive decision-making. Persons who may have very good reason for keeping certain information private (e.g., highly stigmatised but harmless health conditions, reproductive history or capacity, previous sexual activity, gender history, having been the victim of child sexual abuse) would find their rights to privacy, security and sexual autonomy swept away by an absolutist emphasis on the right to sexual integrity, to the exclusion of their claims to any other right, interest or value.

[2] By 'capable of' invalidating consent, I mean that if a but-for causal link between the deception/mistake and the consent can be established, then consent will be invalidated.

Simplistic accounts that hold all deceptions and mistakes to be consent-invalidating may come with legal certainty[3] but at the expense of justice in these harder cases. A line must be drawn somewhere. The question is, where? Cast the net too widely, and too many persons without malign intent, and with good reason to fail to disclose information to, or even deceive, their sexual partner, will be captured and cast as serious sexual offenders. Cast the net too narrowly, as the English common law once did, and defendants who perpetrate egregious deception in order to control and manipulate (often vulnerable) individuals into engaging in sexual activity would be immune from criminal sanction.

We must find a way to distinguish those deceptions which ought to invalidate consent in criminal law from those which ought not. The current judicial approach to deceptive[4] and mistaken sex in the English law is ill-principled, uncertain and woefully under-theorised. The current legislation, the Sexual Offences Act 2003 (SOA 2003) is manifestly unfit for the purpose of regulating conduct of this kind.

Such a distinction must be drawn with a sufficient degree of legal certainty that individuals are able to conduct their sexual relationships without committing criminal offences. This thesis aims to provide a conceptually robust account of the appropriate resolution of the line-drawing problem. I do not offer a draft statute or policy paper, providing a resolution for every factual circumstance in which a question of consent-validity might arise due to deception or mistake. Rather, my objective is to erect a coherent, principled and analytically robust framework for working through difficult cases, and a conceptual structure upon which to build further academic work and judicial and legislative development. In the shorter term, this thesis also aims to assist

[3] And even this is in doubt, once one begins to question how the mens rea analysis would operate in practice. See Ch 5.

[4] I avoid use of the phrase 'rape-by-fraud', given the specific meaning of fraud in the commercial/criminal context. I prefer 'deceptive sex' to 'rape-by-deception' primarily for convenience of reference, particularly when discussing 'deceptive' and 'mistaken' sex at the same time.

practitioners and judges to identify weaknesses and missteps in the current legal framework, and to develop workable interim solutions within the current, inadequate, legal authorities, unless and until much-needed statutory intervention in this area is delivered.

1.1 THREE KEY THEMES

Whilst this thesis is primarily concerned with developing a normative framework for understanding consent in cases involving deception and non-disclosure, rather than an evaluation of current English legal law, it is helpful to understand the doctrinal position. The case law on deceptive sex and mistaken sex provides insight into just a few of the situations in which these cases might arise, and some of the issues that must be addressed by an effective legal framework. English law points to three key themes that run through this thesis:

1) the role of sexual autonomy as the underlying value at stake in the non-consensual sexual offences;
2) the contestable relationship between deception and mistake in the context of consent-(in)validity; and
3) the difficult line-drawing questions that need to be addressed, unless one holds that all deceptions/mistakes have no effect on consent-validity or are, in every case, capable of invalidating consent.

What is the wrong and harm that lies at the heart of the non-consensual sexual offences? How should deception (both active and passive) be distinguished from non-disclosure, and why is this distinction relevant at the consent stage of the rape/SA analysis? How should consent-invalidating deceptions and non-disclosures be identified, and distinguished from those which are not capable of invalidating consent? Whilst the English law recognises most of the relevant questions (with the notable exception of the need to balance the right to sexual integrity against competing, and complementary, rights), it will be clear from this introductory chapter, and this

thesis as a whole, that the answers it offers are far from satisfactory. The blame does not lie entirely with the courts. Although there is much to be criticised in the leading judgment in this area,[5] the statutory framework is not fit for the purpose of dealing with deception and mistake cases in the sexual consent context.

The current casuistic approach is marked by conceptual ambiguities and ill-principled distinctions. This is attributable to a fundamental lack of cogency in the rough working understanding of deception and non-disclosure developed by the courts, and the consequent failure to adopt an internally consistent and clear taxonomy of deception. It is also a result of the failure to get to grips with the line-drawing issue, probably due to the flaws in the SOA 2003. *McNally*[6] illustrates the coming together of the incoherent distinctions between deception and non-disclosure, and between consent-validating deception and non-invalidating deception. This case is also representative of a troubling factual context in which the law is being applied with some regularity: where young transgender or gender-non-conforming people are prosecuted for sexual offences on the basis that they deceived the complainants as to their gender. Here a finding of consent-invalidity starkly implicates the right to privacy of transgender persons; *McNally* demonstrates the inappropriate outcomes that follow from the failure to properly balance D's competing, coextensive claims to sexual integrity and privacy against C's the right to sexual integrity (or autonomy).[7] It presents a paradigm case with which any theory of the law in this area must grapple, showing that a coherent approach to deceptive and mistaken sex first requires a coherent approach to defining and distinguishing between deception and non-disclosure.

[5] *R v McNally* [2013] EWCA Crim 1051, [2014] QB 593.

[6] ibid.

[7] In this thesis I use D and C to denote defendant and complainant, deceiver and deceived, and defendant and claimant.

1.2 DECEPTIVE AND MISTAKEN SEX IN ENGLISH LAW

THE COMMON LAW

Prior to the SOA 2003, there was no general statutory definition of consent. It was left to the jury to determine whether consent had been given as a question of fact on the evidence. Consent was to be understood by its ordinary meaning, and the jury could be directed that 'mere submission' did not amount to consent.[8] However, in certain cases, 'consent' was regarded as invalid if the prosecution could show that it had been obtained through one of two specific types of deception: deception as the nature of the act or the impersonation of C's spouse or sexual partner. Deception as to the attributes of the defendant or other factors inducing the complainant to participate did not vitiate consent.[9]

The best-known examples of deception as to the nature of the act are *Williams*[10] and *Flattery*.[11] In *Williams,* D was a singing teacher who persuaded a 16-year-old girl that he needed to perform a procedure upon her to create an air passage so as to improve her singing voice. In *Flattery*, the victim and her mother approached the defendant for medical advice in relation to the victim's ill-health. The defendant told the mother and the victim that a medical procedure was necessary, to which V consented. D had sex with V. The second category of legally relevant

[8] *R v Olugboja (Stephen)* [1982] QB 320 (CA).

[9] *Papadimitropoulos v* R (1957) 98 CLR 249 (HCA) in which D deceived C into believing that they were legally married (cited with approval in *R v Elbekkay* [1995] Crim LR 163 (CA); *R v Linekar* [1995] QB 250 (CA) in which D fraudulently promised to pay C for sexual services).

[10] *R v Williams* [1923] 1 KB 340 (CA).

[11] *R v Flattery* (1877) 2 QBD 410 (QBD).

deception was initially limited to situations where 'a man… induces a married woman to have sexual intercourse with him by impersonating her husband',[12] but was later extended to the 'impersonation' of sexual partners in *Elbekkay*.[13] The distinction between deception as to the nature of the act and deception in relation to features of the act and attributes of the actor is sometimes characterised as the fraud-in-factum/fraud-in-inducement distinction, particularly in the US context.[14]

There is little in the pre-2003 act case law that addresses the mistake/deception distinction. However, the decision in *Elbekkay* seems to recognise that uninduced mistakes as to the nominal identity of the defendant (at least when C mistakes D for her sexual partner) will invalidate consent. In *Elbekkay*, the complainant 'consented' to sexual intercourse with D on the (false) understanding that D was her boyfriend. Whilst the language of the judgment refers to this as the impersonation of the boyfriend, D argued at trial that he thought that C knew of his identity and wanted to have sex with him, and only later claimed that she had thought him to be her boyfriend. Whilst this account was clearly rejected by the jury, the prosecution's case would be consistent with C being mistaken about D's identity, without any deception on D's part.

THE SEXUAL OFFENCES ACT, 2003

In 2003, the law on rape and sexual assault underwent significant statutory development, through the enactment of the SOA 2003. In terms of consent, three key provisions were enacted

[12] See Criminal Law Amendment Act 1885, s4, replaced by Sexual Offences Act 1956, s1(2).

[13] *Elbekkay* (n9).

[14] See, for example, Patricia J Falk, 'Rape by Fraud and Rape by Coercion' (1998) 64 Brook L Rev 39, 157-61. See discussion in Ch 6.

in the SOA 2003, ss74-76, two of which, ss76 and 74, are relevant to the way that the current law deals with mistaken and deceptive sex. Section 76 provides that:

> (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, and
> >
> > (b) that the defendant did not believe that the complainant consented to the relevant act.
>
> (2) The circumstances are that—
>
> > (a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;
> >
> > (b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

Section 74 provides that 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice.'

In some ways, section 76 of the SOA 2003 looks like a codification of the common law position on deceptive sex. However, the scope and effect of s76 are a little more complex. Section 76 introduces irrebuttable 'presumptions' against C's consent and D's reasonable belief in C's consent in circumstances which broadly map on to the common law categories of legally relevant deception. This harsh effect has resulted in the courts emphasising on more than one occasion

that it is to be given a narrow interpretation.[15] In terms of the 'identity' criterion in s76(2)(b), the provision is both wider and narrower than the common law. The category now includes the impersonation of anyone 'known personally' to the complainant, but it is restricted to instances of intentional impersonation which induce consent. In other words, deception is necessary – C's mistake as to D's identity will not suffice.[16] Section s76(2)(a), 'nature and purpose', also seems to involve an extension of its cognate common law category, 'deception as to nature', as it now encompasses deception as to the 'purpose' of the act. However, despite some confusion in the authorities,[17] *Tabassum*[18] and *Green*[19] suggest that even before 2003, consent was invalid when the complainant was deceived into believing that the act was carried out for a medical or clinical purpose if the purpose of the defendant was sexual.[20] In any event, whilst 'deception as to medical purpose' cases undoubtedly fall within s76(2)(a), the precise scope of deception as to purpose is

[15] *R v Jheeta (Harvinder Singh)* [2007] EWCA Crim 1699, [2008] 1 WLR 2582; *R v Bingham* [2013] EWCA Crim 823, [2003] 2 Cr App R 29.

[16] Though if C mistook D for another person known to her, then consent would not be valid under s74. This point has not been addressed by the courts but given that the impetus behind the SOA 2003 was to increase protection for sexual autonomy, it would be inconsistent with the overall scheme of the legislation for conduct that was recognised as non-consensual prior to 2003 to be regarded as consensual under the new legislation. Note also that on the face of the statute, it would seem that this section would apply to a case where D's an impersonation of T did not fool C, but nevertheless induced consent, because C was attracted to T, and so decided to consent to D because the accuracy of the impression would help C to fantasise that they were having sex with T. This, however, cannot be correct. The better reading of the provision is that the impersonation must actually deceive C into thinking that D is the impersonated individual. See Jonathan Herring, *Criminal law: Text, Cases, and Materials* (7th edn, OUP 2016) 417.

[17] see Andrew Ashworth, 'Rape: Consent - Nature or Purpose of Act - Deception - Conclusive Presumptions' [2008] Crim LR 144.

[18] *R v Tabassum* [2000] 2 Cr App R 328 (CA). Defendant deceived women into consenting to breast examinations on the basis that he was medically qualified. Conviction for indecent assault upheld.

[19] *R v Green (Peter Donovan)* [2002] EWCA Crim 1501. Defendant deceived male patients into believing that sexual touching (either performed by the doctor, or performed by the patients themselves, in front of the doctor) was necessary in order to collect semen samples. The doctor's motives were in fact sexual. Convicted of indecent assault. Conviction upheld after unsuccessful appeal on issues of similar fact evidence.

[20] See Rebecca Williams, 'R v Flattery (1877)' in Philip Handler, Henry Mares and Ian Williams (eds), *Landmark Cases in Criminal Law* (Hart 2017).

often said to be unclear.[21] The difficulties are caused by the relationship between three Court of Appeal authorities, *Jheeta*,[22] *Devonald*,[23] and *Bingham.*[24] In *Jheeta,* D spun an elaborate web of deception which led his partner, C to believe, amongst other things, that a police officer (actually D himself) was instructing her to engage in sexual activity with her boyfriend, D, in order to prevent him from committing suicide and avoid incurring a fine. The Court of Appeal held that D's actions did not amount to deception as to the purpose (or nature) of the relevant sexual acts.[25] In *Devonald,*[26] D, a middle-aged man, deceived C, his daughter's ex-boyfriend, into performing sexual acts on webcam, by pretending to be a young woman. The Court of Appeal took the view that D's actions constituted deception as to purpose: D deceived C into thinking that the purpose of the act was sexual gratification when D's purpose was to humiliate C. In *Bingham*, D contacted his girlfriend, C, online by creating a fake profile. C performed various sexual acts over webcam for D (in the guise of this fake profile). D then created a second fake profile and blackmailed C into performing further sexual acts over webcam. The court rejected the argument that this constituted deception as to purpose, on the basis that D's motivation was probably sexual gratification and, additionally, some kind of power trip. C knew that D's motivation, at least in part, was to obtain sexual gratification. The court noted that the general definition of consent found in SOA 2003, s74 provides that 'a person consents if he agrees by choice, and has the

[21] See ibid 154-57.

[22] *Jheeta* (n15).

[23] *R v Devonald (Stephen)* [2008] EWCA Crim 527.

[24] *Bingham* (n15).

[25] The conviction was upheld on the basis that there was no doubt that on some occasions no consent had been given under s74 SOA 2003, the general consent provision. See discussion below.

[26] *Devonald* (n23).

freedom and capacity to make that choice', and that the prosecution should have brought their case on the basis that C did not consent in accordance with s74, as D had blackmailed her into performing sexual acts. In both *Jheeta* and *Bingham*, the Court of Appeal noted that s76 operates harshly against the defendant, removing the main lines of defence (consent and reasonable belief in consent). Accordingly, they should be construed restrictively, and deceptions which fall outside of the scope of s76 may nevertheless be relevant to the assessment of the validity of any ostensible consent under s74 SOA 2003. Within this context, it has been suggested that *Devonald* is a somewhat difficult case. Williams has posed the following question:

> if *Devonald* contained a deception as to purpose because the sex was actually for the purposes of humiliation rather than sexual gratification, why should *Jheeta* not also contain a deception as to purpose on the basis that the sex was for Jheeta's gratification rather than for the purpose of preventing his suicide, as the victim believed?[27]

However, the cases can be reconciled. A helpful starting point is to recognise that a case will not fall under s76 just because C and D have different purposes for engaging in the act, or because some deception on D's part undermines *C's* purpose. If D falsely promises to pay C for sexual activity, D's deception might frustrate C's (economic) purpose in consenting, but this does not constitute deception as to purpose under s76.[28] It seems that the provision refers to deception as to *D's* purpose for engaging in the sexual act. Hence, no deception as to purpose takes place in *Jheeta* (where D's deception provides C with a purpose for engaging in sexual activity that she would not have had otherwise). Usually, D has a sexual purpose and deceives C into thinking that his purpose is non-sexual. In *Devonald*, we see the reverse: D has a non-sexual purpose but deceives C into thinking that his purpose is sexual, in order to induce the sexual acts. The facts of *Bingham* are distinct from those of both *Jheeta* and *Devonald*. *Bingham* involves mixed-purposes. When sexual

[27] Williams (n20) 156. Note also that the Court of Appeal has twice expressed some hesitation about how these three cases are to be reconciled in *Bingham* (n15) [20] and *McNally* (n5) [18].

[28] The Court of Appeal in *Jheeta* (n15) [27] confirmed that the facts of *Linekar* (n9) would not amount to deception as to purpose under s76.

gratification is D's primary purpose (and C knows this, deception as to D's secondary purposes will not bring the case within the scope of s76. Left unclear, following *Bingham*, is whether s76 might apply if C knows of D's secondary purpose, but D deceives C as to his primary purpose, or how courts would, in practice, determine whether a case is a mixed or single purpose case, and distinguish primary from secondary purposes if necessary to do so.

Only section 76 of the SOA 2003 deals explicitly with deception. The Sexual Offences Act 1956, s3 made deception inducing a woman to consent to intercourse a specific offence. The 2003 Act omits any equivalent provision.[29] Nevertheless, deception that does not relate to the nature or purpose of the act might, depending on the circumstances, result in the invalidity of ostensible consent under s74 of the Act.[30] Deception falling outside of s76 could preclude free choice for the purposes of s74.[31] Whilst *Jheeta* is often referred to as a case involving deception as grounds for 'vitiating' consent, the facts of *Jheeta* involve more than mere deception. The defendant had sent the complainant, with whom he was in a sexual relationship, anonymous threatening text messages, and later sent her further text messages purporting to be from several police officers supposedly investigating those threats. The defendant used these messages to instruct her to have sex with the defendant or be liable for a fine. Consequently, the complainant had sex with the defendant on occasions on which he accepted, in a police interview, that she would not have done so, but for the text messages.[32] Whilst *Jheeta* is often described as a case involving deception, it is better

[29] Despite the recommendation of the Law Commission and the Sexual Offences Review: see Law Commission, *Consent In Sex Offences: A Report to the Home Office Sex Offences Review* (2000) para 5.45, published in Appendix C of Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences, vol 2*, (2000). See also Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences, vol 1* (2000) paras 2.1, 8.5. For historical developments see Karl Laird, 'Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003" (2014) Crim LR 492.

[30] *Jheeta* (n15) [21]-[23].

[31] ibid [28]-[29].

[32] ibid [5]-[8], [29].

understood as a case involving coercion. It was the defendant's coercive schemes, threatening to fine the complainant or creating in the complainant the fear that her boyfriend would commit suicide if she did not consent, which operated on the complainant's decision-making process to induce an ostensible consent that the court rightly held to be invalid under s74. The deception facilitated the coercive scheme. Structurally, the case resembles *Michael v Western Australia*, in which D impersonated a police officer and threatened negative consequences if the complainants, sex workers, refused to perform sexual services for a reduced fee, or for no fee at all.[33] In these cases, the deception is necessary in order to effect the threats that ultimately operate on C's decision to consent, and it is primarily the threats that restrict C's freedom to exercise choice.

In any event, the key point settled in *Jheeta* is that deception falling outside of s76 can be assessed under the general definition of consent in s74. Following *Jheeta*, three further cases dealt with the issue of deception or non-disclosure under s74: *EB,*[34] *Assange v Swedish Prosecution Authority,*[35] and *R(F) v DPP*.[36] In *EB,* the Court of Appeal held that non-disclosure of a sexually transmissible disease did not vitiate consent to sexual intercourse. Latham LJ, giving the judgment of the court, dismissed the possibility that 'an implied deception can be spelt out of the mere fact that a person does not disclose his HIV status, or his or her infection by some other sexually transmissible disease, [and] that such a deception should vitiate consent'.[37]

[33] *Michael v Western Australia* [2008] WASCA 66, 183 A Crim R 348.

[34] *R v EB* [2006] EWCA Crim 2945, [2007] 1 WLR 1567.

[35] *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin), (2011) 108(44) LSG 17.

[36] *R(F) v DPP* [2013] EWHC 945 (Admin), [2014] QB 581.

[37] *EB* (n34) [19]. Cited in *McNally* (n5) [20]. Note that the parentheses represent my interpretation of this quote which unfortunately makes little grammatical sense in its original form. It is clearly intended to (and indeed must) be read as above.

EB was followed by *Assange* and *R(F),* both of which were heard in the Divisional Court and involved structurally similar deceptive practices.[38] Assange and the respondent in *R(F)* allegedly actively deceived their partners in relation to a physical feature of the sex act, breaching an express condition stipulated by the complainants, to which they had initially agreed. These cases might plausibly be characterised differently to straightforward deception and non-disclosure cases, in that they could be said to involve 'explicitly conditional consent'. In *Assange* the condition was the wearing of a condom, the allegation being that Assange deliberately tore or removed the condom during intercourse. In *R(F)* the condition was that the respondent remove his penis from the complainant's vagina prior to ejaculation. It was alleged that he had deliberately delayed withdrawal until after ejaculation.

The courts viewed the deception by Assange and the respondent in *R(F)* as relevant to s 74 and held that it would be open to the prosecution to argue that such deceptions precluded the exercise of free choice for the purposes of valid consent.[39] The court in *Assange* held that *EB* did not support Assange's argument that deceptive conduct falling outside of s 76 could not be considered under s 74, noting that the case spoke to the non-disclosure of HIV status, not deception as to condom usage. However, the court did not clearly indicate whether it saw the key distinction between the two cases as structural (*Assange* being a case of deception or conditional consent, and *EB* a case of non-disclosure), or substantive (condom usage, as opposed to HIV status), or a combination of the two. Leveson LJ in *McNally,* however, clearly viewed the distinction as structural, emphasising that *EB* 'left open' the issue as to whether HIV status could vitiate consent in cases of express active deception, declaring that in *EB* 'there was no question of any

[38] The issue in *Assange* arose in relation to the dual criminality requirement in extradition proceedings. In order to grant a request to extradite an individual to face criminal charges, the substance of the allegations against that individual must constitute an offence in English law. The issue in *R(F)* arose in relation to a judicial review of the decision of the CPS not to bring a prosecution in relation to the appellant's allegation of rape.

[39] *Assange* (n35) [23]-[26].

deception. The defendant had not misled the complainant'. [40] The distinction between mistake/non-disclosure and deception is now a central feature of the approach to these cases under s74, following *McNally*, which emphasised this distinction as the starting point for 'information gap' cases under s74.

McNally is now the leading case on the effect of deception and non-disclosure on the validity of consent under s74 SOA 2003. The Court of Appeal considered the effect of 'deception' as to gender on the validity of consent in the context of a relationship between the sixteen-year-old complainant and the seventeen-year-old defendant who, evidence suggest, identified as male at the time of the relevant conduct. In holding both that McNally deceived the complainant, M, and that deception as to gender was capable of invaliding consent under s74 SOA 2003, the court effectively imposed an obligation of disclosure on transgender individuals to disclose their 'true' gender, i.e., the gender category to which they were assigned at birth. In so doing, the court evince fundamental misunderstandings of transgender identities, begin to develop an unstable approach to s74 based on a distinction between deception and non-disclosure which is poorly understood and misapplied in the context of *McNally,* and adopt a line-drawing approach to deception and consent that is devoid of principle and clearly undermines the rule of law.

MCNALLY, AND DECEPTION AS TO GENDER UNDER THE SOA 2003

Justine McNally met the complainant (M) online, where McNally adopted a male persona called 'Scott'. Their online relationship progressed over the course of 3 ½ years, eventually becoming an 'exclusive romantic relationship'.[41] After M had turned 16, McNally visited M in

[40] *McNally* (n5) [20].

[41] ibid [3]-[5].

London on four occasions over a period of months. McNally presented as male, and they engaged in various sexual activities, including kissing, oral and digital penetration, and rubbing of M's vagina by McNally.[42] During their first encounter, McNally declined M's offer to perform oral sex, McNally was clothed whilst M was largely unclothed, and it was dark in the room. McNally was legally female and she presented as such both at home and at school. After the eventual 'discovery' of McNally's sex by M's mother, the police became involved and McNally ultimately pleaded guilty to six counts of sexual assault by penetration contrary to s2 SOA 2003. The contact forming the basis of the pleas involved a physical mechanism (digital penetration and the performance of cunnilingus) of which the complainant was fully aware, and to which she ostensibly consented. However, the Court of Appeal held that C's ostensible consent was invalid on the basis that she had deceived M as to her 'true' gender.

There are three key steps in the reasoning adopted to reach this conclusion:

- McNally actively deceived M as to her gender. She pretended to be male when in fact she was female.[43]
- Active deception can invalidate consent under s74, whereas non-disclosure cannot.[44]
- Not all deceptions will invalidate consent under s74. A 'broad commonsense approach to the evidence' will identify whether any given deception does, or does not, invalidate consent. Deception as to gender can do so.[45]

[42] ibid [7]-[9].

[43] ibid [26].

[44] ibid [19]-[21], [24].

[45] ibid [25].

At each stage, the reasoning of the Court of Appeal is flawed. The designation of McNally's conduct as deceptive is a crucial first step in the reasoning of the court, due to the distinction drawn by Leveson LJ between active deception on the one hand and non-disclosure on the other. The Court of Appeal used this to distinction to situate *McNally* within the prior case law. Counsel for McNally had sought to argue that, following *EB,* deception as to attributes (i.e., HIV status and gender) could not vitiate consent, unlike deception as to features of the act itself (i.e., condom usage,[46] or intention to withdraw prior to ejaculation[47]).[48] The court rejected this argument and instead distinguished *EB* from *McNally,*[49] on the basis that *McNally* was a case of 'active deception' and *EB* was not.[50] Yet, in drawing this distinction, the Court of Appeal offered no guidance on what constitutes 'active deception', why, or if, that is to be distinguished from (presumably) 'passive deception', and how deception (active or passive) and non-disclosure are to be differentiated in general. It is not clear, however, why *EB* is a case of non-disclosure, yet *McNally* is a case of 'active deception'. As will be explained below, the facts of *McNally* are better understood as involving non-disclosure, like *EB*, rather than deception. The failure to engage with the meaning of deception and the resulting unstable formal taxonomy of deception and related conduct (i.e., non-disclosure) contribute towards the inappropriate designation of McNally's conduct as deceptive and supports the central criticism of the jurisprudence as conceptually confused and, at the very least, under defined.

[46] *Assange* (n35).

[47] *R(F)* (n36).

[48] *McNally* (n5) [23].

[49] Along with *Assange* (n35) and *R(F)* (n36).

[50] *McNally* (n5) [19]-[21], [24].

McNally's representations, as far as the Court was concerned, amounted to the use of a male name online; talking to M about 'getting married and having children'; talking to M about sex, and 'what he wanted to do to [M] with "it" and "putting it in" which the complainant took to mean "his" penis'; purchasing condoms; presenting 'as a boy wearing what the complainant thought was gothic clothing....' and '[u]nder her trousers... wearing a strap-on dildo which resembled a penis'.[28] The Court considered the proposition conveyed to be the claim: 'I am male'. Yet, as Sharpe has noted, there is good reason to assume that McNally most likely identified as male at the time of the offending, or may simply have been seeking to live and interact with others in the most authentic way possible in a time of confusion and uncertainty.[51] Declaring this representation false evinces little understanding of transgender identities. There is every indication that McNally adopted the Scott Hill persona, including the wearing of male clothing, to manifest an internally held male gender identity.[52] In addition, wearing a prosthetic and purchasing condoms can be understood as culturally significant acts of gender expression.[53] McNally was seeking to be more authentic and truthful, not less so. Recognising transgender male presentation as authentic, as opposed to deceptive, is necessary in order to respect those with trans identities. As Sharpe notes, 'transgender men present as the men they are'.[54] It should not be held against McNally that

[51] ibid [10]; Alex Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent' [2014] Crim LR 207, 209; Alex Sharpe, 'Expanding Liability for Sexual Fraud Through the Concept of 'Active Deception'' (2016) 80 JCL 28, 39-42. Although it seems that McNally no longer identifies as transgender, uses female pronouns and the Court of Appeal at [47] noted that a Criminal Justice Sentencing Report had been carried out which 'spoke of... a history of... confusion surrounding her gender identity and sexuality, which were resolving', it is the authenticity of McNally's conduct at the time of the sexual activity that matters.

[52] See *McNally* (n5) [10], [47], and discussion in Sharpe, 'Criminalising Sexual Intimacy' (n51) 216, and Alex Sharpe, *Sexual Intimacy and Gender Identity 'Fraud': Reframing the Legal and Ethical Debate* (Routledge 2018) 94-95.

[53] Sharpe, 'Criminalising Sexual Intimacy' (n51) 217.

[54] Sharpe, *Sexual Intimacy and Gender Identity 'Fraud'* (n52) 16, 128.

she did not present as male at home and at school – contexts in which young transgender people regularly feel unable to express their authentic selves.

The fact that McNally identified as female at the time of the trial similarly cannot be taken as evidence that her male gender presentation at the time of the sexual activity was inauthentic. What matters for the purpose of assessing whether a defendant's gender presentation is authentic (or deceptive) for the purposes of consent validity is D's gender identity at the time of the relevant conduct, not the point of trial. It has been suggested that, for a defendant like McNally, the experience of being outed as transgender and the hostile response of the criminal justice system might have triggered a 'retreat into "normality"'.[55] Moreover, 'gender identity can be fluid for some people,'[56] and 'we must insist that the notion of 'authenticity' remains compatible with the assertion of different gender identities at different times. For gender identity can be fluid for some people. It can change over time'.[57] What matters, for the purposes of determining whether any belief held by the complainant in relation to the defendant's gender identity, is how D understood their gender identity at the relevant point in time, not some later point.

McNally and the other cases relating to so-called 'gender fraud' involving young transgender men[58] are difficult and unusual cases because the real dispute between defendant and

[55] ibid 94-95. Certainly, this shift in self-understanding was framed by the court as a 'history of confusion' that was 'resolving', *McNally* (n5) [47].

[56] Sharpe, *Sexual Intimacy and Gender Identity 'Fraud'* (n52) 95.

[57] For a compendious discussion of the research on atypical sex and gender development, see GIRES, 'Atypical Gender Development–A Review ' (2006) 9 Intl J of Transgenderism 1; GIRES, 'Response to critiques of Atypical Gender Development – A Review' (2006) 9 Intl J of Transgenderism 61. See also Sharpe, 'Criminalising Sexual Intimacy' (n51).

[58] See *R v Gemma Barker* (Southwark Crown Court, March 5 2012); *McNally* (n5); *R v Chris Wilson* (Edinburgh High Court, March 6 2013); *R v Kyran Lee (Mason)* (Lincoln Crown Court, 2015); *R v Jason Staines* (Bristol Crown Court, 2016) . See discussion in Sharpe, *Sexual Intimacy and Gender Identity 'Fraud'* (n52) 44-51. *R v Newland* (Manchester Crown Court, September 15 2017) is often grouped with these cases, however in Newland the defendant pleaded not guilty on the basis that both she and the complainant were women exploring their attraction to other women. Newland never claimed to have identified as male. Her defence was that the complainant knew all along that she was female and the 'Kye Fortune' male persona was intended to protect the complainant from any 'suspicion' that she might be

complainant lies in what constitutes the relevant truth. The complainants view the defendants as 'really female'. The defendants view themselves as male. The law must take a position on which view is authentic. The current law privileges the *complainant's* understanding of the defendant's gender over and above the defendant's own self-identification. This is both inappropriate, as it erases the reality of transgender lives and experiences, and it is inconsistent with legislative and social policy that recognises that reality in the form of protection from discrimination on the grounds of 'gender reassignment',[59] the ability change one's name, legal documentation, including passport and driver's licence (including gender markers), legal sex category, including for the purposes of marriage and civil partnerships,[60] and the provision of gender-affirming healthcare free on the NHS.

It may be argued that McNally can be distinguished from cases involving other transgender individuals. It might be argued that the court would be unlikely to take the same position in relation to a transgender man who had lived openly as a man in all aspects of his life for a considerable period of time, let's say twenty years; who receives hormone therapy; who has undergone surgery to alter his primary sexual characteristics, and who is legally male by virtue of a Gender Recognition Certificate (GRC). Certainly, it could be said that classifying his conduct as active deception would undermine the purpose of the section 9 of the Gender Recognition Act 2004, which provides that, when a full GRC is issued, 'the person's gender becomes for all purposes the acquired gender (so that… the person's sex becomes that of a man [or]… a woman)'.[61] That McNally had not made

gay. See Sophie Wilkinson, 'Consent, Dildos and Deception: Reexamining The Trial of Gayle Newland' (*Vice*, 2017) <https://www.vice.com/en_uk/article/43qvz9/consent-dildos-and-deception-reexamining-the-trial-of-gayle-newland> accessed 4 September 2018.

[59] Equality Act 2010, s7.

[60] The latter of which are restricted to couples of the same sex, under Civil Partnership Act 2004, ss 1 and 3 (but note *R (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32, [2018] 3 WLR 415).

[61] It may be noted that Sch 3 of the Gender Recognition Act 2004, which amends the Matrimonial Causes Act 1973 to grant a declaration of nullity if the petitioner, at the time of marriage or civil partnership, was unaware that their

use of these legal, administrative and medical transition processes cannot justify declaring his gender presentation as 'truthful' and McNally's as 'false'. This distinction ignores the heterogeneity of the lives of trans people and the wide spectrum of trans identities and narratives. The choice to take advantage of medical, legal and administrative transition facilities, or even to live consistently in accordance with one's gender identity can be influenced by a range of factors which have no bearing on the authenticity of that gender identity.[62] Distinguishing between authentic and 'deceptive' identities in this way would be arbitrary and unreasonable. Surgery is not a requirement to obtain a GRC, and a GRC does not effect a change in one's gender identity; it effects a change of legal sex categorisation to reflect one's *existing* gender identity.[63] An individual falls within the scope of anti-discrimination legislation and can change one's name both legally and on passports and drivers licences without needing surgery, a GRC or hormone treatment.[64] The distinction is also dangerous, compounding the stereotype of the deceptive trans individual which is often at the root of transphobia within society.[65]

spouse was in possession of a GRC runs counter to the complete legal reclassification of the applicant's gender. However, this provision imposes a policy-based duty of disclosure of transgender status/history specifically in the marital/civil partnership context. It does not indicate the falsity of a respondent's acquired gender identity. To conclude otherwise would run counter to the spirit of the legislation as a whole and would circuitously render Sch.3 redundant, as the deception as to gender identity would surely be caught by s12(c) of the Matrimonial Causes Act, which provides that 'A marriage celebrated after 31st July 1971… shall be voidable on the… grounds… that either party… did not validly consent to it… in consequence of… mistake'. Note also that the imposition of this duty has been rightly criticised as a violation of art 8 and 14 ECHR by Alex Sharpe, 'Transgender Marriage and the Legal Obligation to Disclose Gender History' (2012) 75 MLR 33.

[62] E.g., for financial, medical, social or familial reasons.

[63] Sharpe, *Sexual Intimacy and Gender Identity 'Fraud'* (n52) 77.

[64] Gender Recognition Act 2004; Equality Act 2010 s7; Deed Poll Office, 'Advice for Transgender People' <https://deedpolloffice.com/advice/transgender> accessed 4 Sept 2018.

[65] E.g., the transphobic murder of Gwen Araujo, discussed in Talia Mae Bettcher, 'Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion' 22 Hypatia 43.

In Part II, I will argue that in order to be deceived, C must believe a false proposition of fact. In order C's mistake or deception to affect the validity of any consent to sexual activity (and therefore be relevant to criminal law), that deception or mistake must be material to C's decision to engage in sexual activity. In most cases, the propositional content of the material false belief will not be in issue. But in a case like *McNally*, this is the first and most important issue to be addressed. The false belief held by M was not that McNally was male, but that McNally was a *cis*gender, rather than a transgender male. The deception/non-disclosure distinction must be determined with respect to *this* particular proposition. Did D deceive C into this belief, or did C make an uninduced mistake to this effect? The conduct described above, used by the Court of Appeal as evidence of 'active deception', is entirely consistent with authentic male gender presentation.[66] C made an assumption that, because McNally looked, sounded, acted and identified as a man, he must have been a *cisgender* man. On the basis of a proper understanding of the distinction between deception and uninduced mistake, C may have been mistaken as to this fact, but that was not as a result of any deception on McNally's part.

The failure of the court to properly categorise McNally's conduct stems from the lack of robust understanding of deception and related concepts. The Court of Appeal seemed to contrast 'active' deception to 'implied' deception.[67] If this indicates a formal taxonomy, it suffers from a logical inconsistency. 'Active' and 'implied' deceptions are not opposing categories: 'active' opposes 'passive', and 'implied' opposes 'express'. It is possible to *actively* deceive someone through an *implied* deception. An implication may amount to *active* conduct. On a more charitable interpretation, Leveson LJ may have had in mind a distinction between deception and non-disclosure. If this is the case, the ambiguous phrasing might also indicate, and result from, a failure

[66] *McNally* (n5) [4]-[8]. See Sharpe, 'Criminalising Sexual Intimacy' (n51) 217.

[67] *McNally* (n5) [20]-[21].

to articulate a definition of deception and the distinction between deception and non-disclosure. In Part II of my thesis, I will articulate a clear and robust definition of deception and explain the distinction between deception and non-disclosure/mistake. I will argue in Part III of this thesis that the distinction between deception and mistake is relevant at the consent-validity stage of the analysis and in Part IV of the thesis, I will argue that in any event deception *or* mistake relating to gender in these circumstances does not result in consent invalidation, when the defendant's right to privacy is accounted for and balanced against the right to sexual integrity. At this stage, however, it suffices to note that *McNally* should be understood as a case involving mistake, not deception, and that on the court's own understanding of the relevant legal doctrine, this should have left the ostensible consent of the complainant legally valid under s74.

However, once the court identified McNally's conduct as deceptive, the court did not hesitate to identify the 'deception' as the sort of deception that is capable of invaliding consent. Whilst the court acknowledged that 'some deceptions… will obviously not be sufficient to vitiate consent' and gave the example of wealth as one such sort of deception,[68] deception as to gender was held to be clearly capable of invalidating consent seemingly because the gender of the person performing any given sexual act changes the 'sexual nature' of that act.[69] It isn't immediately clear what Leveson LJ means by 'sexual nature' in this context. It is clear that this invocation of the nature of the act is not meant in the same sense as the 'nature' of the act referred to in s76 SOA 2003. It would appear that what concerns Leveson LJ here is what the gender of D says about the sexuality of C. If C and D are both female, then C has taken part in a lesbian sex act, rather than a heterosexual one. This makes two physically and aesthetically identical acts fundamentally different in sexual nature, such that it almost goes without saying that deception as to gender would

[68] ibid [25].

[69] ibid [26].

invalidate C's consent. Putting aside concerns about the normative basis for this particular argument, the Court of Appeal recognises that some principle is necessary in order to indicate how a line is to be drawn between deceptions that will be capable of invalidating consent, and those that will not. The 'solution' provided is that 'the evidence relating to 'choice' and the 'freedom' to make any particular choice must be approached in a broad commonsense way'.[70]

The significance of *McNally* is not confined to its status as the leading authority on the interaction between deception, non-disclosure and consent under s74. Despite the tendency in some quarters to regard the facts of McNally as unusual,[71] it is representative of a significant number of prosecutions for sexual offences on the basis of so-called 'gender fraud' and it is important to understand how these cases in particular should be treated in any principled approach to deceptive sex/mistaken sex. Since 2012 there have been six cases in the UK, including *McNally*, involving defendants prosecuted for sexual offences on the basis that they deceived their partner into thinking they were male, when they were female.[72] All of the defendants were legally female and had been assigned such at birth. In *Lee* and *Wilson*, the defendants were clearly transgender men and had identified as male for quite some time.[73] There is evidence to suggest that other defendants also identified, or may have identified, as transgender men, or as gender non-conforming, at the time of the relevant conduct. All of the defendants other than Gayle Newland pleaded guilty. In *Newland*, the defendant pleaded not guilty on the basis that both she and the

[70] ibid [25].

[71] Not least in the CA itself, ibid [3].

[72] Some of these cases involved charges involving the use of a prosthetic instead of a penis and one of these cases involved a charge relating to sex with an underage child, however all but *Newland* and *Lee* involved at least one count where the sole basis of liability was 'deception' as to gender that invalidated consent to sexual acts that were fully understood by the complainant, in a physical sense. See (n58).

[73] Sharpe, *Sexual Intimacy and Gender Identity 'Fraud'* (n52) 46-47, 49-50.

complainant were women exploring their attraction to other women. Newland never claimed to have identified as male. Her defence was that the complainant knew all along that she was female and the male 'Kye Fortune' persona she adopted in online interactions with C, and in the over 140 hours they spent together, often engaging in sexual activity, during which C was blindfolded, was a mutually understood and agreed upon performance. It was, according to Newland, intended to protect the complainant from any 'suspicion' that she might be gay and perhaps intended to allow the women to explore their sexuality in a way that insulated them from reckoning with their lesbian sexualities. The prosecution's case was that Newland deliberately pretended to be a man in order to pursue a sexual and romantic relationship with the complainant, a woman with whom Newland (as Gayle Newland) was friends, and to whom she was attracted, because she knew that C was not interested in pursuing a relationship with a woman. *Newland* differs from *McNally* in that the prosecution's case was premised on Newland's gender presentation being inauthentic and, in any event, all of the convictions involved the use of a prosthesis, which C believed to be a fleshy penis.[74] *Newland* is a deception case. In Part IV, I will address how privacy and sexual integrity are to be balanced against each other in these sorts of cases involving deception as to gender when there is no defence claim that the defendant is either transgender, genderqueer or non-conforming.

[74] See Ch 7.2.

1.3 RETURNING TO THE THREE KEY THEMES

My thesis begins at the conceptual foundations of the law of sex offences and builds upwards. Any analysis of the appropriate scope of non-consensual sex offences in this context is dependent upon a robust understanding of the functional role of consent in those sexual offences, and the harm, wrong, and core conceptual content of rape and sexual assault. I will explore these questions in Part I, ultimately arguing that the boundaries of rape and sexual assault encompass any sexual activity that amounts to a violation of an individual's right to sexual integrity and that this right-violation is the ('dignitary') harm of rape/SA. No *experiential* harm is required for conduct to amount to rape/SA and warrant criminalisation.

The question then becomes to what extent do deception and mistake violate an individual's right to sexual integrity? This question, of course, assumes that deception and mistake can be robustly distinguished at the conceptual level. In Part II, I argue that this is indeed the case. However, in Chapter 3, I reject orthodox legal approaches to 'translating' deception into a legal framework, eschewing a 'misrepresentation' requirement in favour of an analysis of deception and related concepts that identifies a causal link between D's conduct and C's false belief as the hallmark of deception, which is set out in Chapter 4. This leads me to develop a tripartite taxonomy of active and passive deception and uninduced mistake. This distinction can then be considered in the context of sexual consent-validity.

In Part III, I argue that whilst deception prima-facie infringes the right to sexual integrity, not every mistake but-for-which C would not have ostensibly consented similarly results in consent-invalidity. Instead, we can identify a much narrower class of 'relevant mistakes' that infringe C's right to know information relevant to the decision to give a token of ostensible consent. This 'differentiated' account of deceptive and mistaken sex, offered in Chapter 5, explains why deception and uninduced mistake can and should be treated differently at the consent-stage

of the analysis. In Chapter 6, I show that the traditional approach to identifying a narrow range of consent-invalidating deception in the common law (those which go to the nature of the act or the identity of the actor) is normatively relevant to consent but not as a way of identifying instances of *invalid* ostensible consent but by distinguishing between two 'tracks' of analysis through which cases may be analysed. In the 'information gap' cases, a token of ostensible consent is given and the central question for determination is whether that token of ostensible consent was valid. In the 'token cases', the issue is whether a token of ostensible consent was given at all. If C was mistaken as to the nature of the act or the identity of the actor, C did not give a token of consent to D to perform the relevant act in the first place; questions of consent *validity* never arise.

Parts I-III of this thesis, therefore, provide a much needed, conceptually robust framework for addressing the difficult line-drawing questions which arise in relation to deception (both active and passive) and relevant uninduced mistakes. In Part IV, I argue that the appropriate way to draw principled distinctions between those deceptions and relevant uninduced mistakes which invalidate consent and those which do not rests on the crucial recognition that the right to sexual integrity is not absolute. It can and must be balanced against competing rights and interests. By focusing on two case studies, involving transgender identity/gender history and HIV status, I demonstrate not only instances where D's right to privacy does outweigh C's right to sexual integrity but I also set the standard for the kind of nuanced, careful discussion that this balancing exercise demands. Finally, in the last section of Chapter 7, I extrapolate from these case studies to argue that not only will the infringement of sexual integrity sometimes be justified but that there may also be instances where legal and public policy require us to accept a gap between morally and legally valid consent, in light of the institutional limitations of the criminal law.

PART I

CHAPTER TWO:
THE HARM AND WRONG OF RAPE AND SEXUAL ASSAULT

This thesis is primarily concerned with establishing whether sexual consent obtained by deception, or given on the basis of a mistake, is valid. If not, the actus reus of a serious criminal offence has been committed, and liability turns on the issue of mens rea. Before I am able to assess whether such activity should constitute rape or sexual assault,[75] I must consider what kind of conduct these offences exist to prohibit and briefly explain the role and function of consent.

This project does not seek in the first instance to identify the meaning of consent. Peter Westen has revealed the 'plasticity' of consent as a term, and offers a range of competing conceptions of 'consent', used linguistically and practically for different purposes. It may be used in a 'factual' sense, which includes submission to D's sexual advances under coercive conditions but which does not, however, render D's actions morally or legally permissible;[76] only 'prescriptive' (i.e., valid) consent can perform this 'moral magic'.[77] It might be thought unhelpful, then, that the term 'consent' is often used to describe some kind of normatively deficient acquiescence or agreement. I will generally use the terms 'assent' or 'ostensible consent' to refer to this kind of normatively deficient communication of something that looks like, but is not, consent. Save for providing a basic set of internal requirements, Westen's analysis of the meaning of consent cannot

[75] Hereafter I will use 'rape/SA' to refer to these offences. Whether an offence of rape is distinguished from sexual assault and, if so, how, varies between jurisdictions. Any argument as to how the behavioral element of the actus reus of rape is determined (whether it should extend beyond penile-vaginal penetration and, if so, how far), lies beyond the scope of this thesis. Rival accounts of the harm and wrong of rape might draw a sharper normative distinction between rape and sexual assault, but my argument that sexual integrity lies at the heart of rape also applies to sexual assault.

[76] Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct* (Ashgate 2004) Ch 1-2.

[77] Heidi Hurd, 'The Moral Magic of Consent' (1996) 2 LEG 121.

fully explain when conduct *should* be criminalised; he is often forced to relegate any conclusive normative analysis of permissibility to decisions made by policy makers and legislators in individual jurisdictions.[78]

This indicates the fundamental limitations of assuming that consent is the concept that determines the permissibility of sexual conduct. It is not. Consent is instead a vehicle, or a mechanism, by which the underlying right in question is both exercised and protected. The violation of the right to sexual integrity is the 'gist', or 'conceptual core', of rape/SA. The violation of C's sexual integrity is the threshold issue in the assessment of whether certain conduct does or should fall within rape/SA.

The wrong of rape/SA is often said to be the violation of sexual autonomy and the harms of rape described in experiential terms. In section 2.1, I will argue that the harm of rape lies in the violation of the right to sexual integrity alone; no experiential or 'prospective' harm is necessary.[79] In section 2.2, I will defend the view that the right at stake is best viewed in terms of integrity, rather than autonomy. A rejection of an experiential account of harm is not to dismiss or downplay the gravity of the harm and trauma rape/SA often cause. However, to define the (legal) harm of rape/SA as rooted in experience, is actually to exclude behaviour that warrants labelling as nothing less or other than rape/sexual assault.

In section 2.3, I will articulate the functional role consent plays in the exercise of the right to sexual integrity. Once this is understood, it becomes clear that many criticisms of consent derive from a failure to understand this relationship and consequently underestimate the normative power of consent. Some criticism consent derives from an *over*estimation of both consent and the

[78] See, for example, Westen (n76) 50, 52, 232-33, 224.

[79] If, for example, C was unconscious at the time and never learned of the rape/SA.

criminal law in general. In response, in section 2.4, I will explore the dangers of conflating lawful sex with morally good or unproblematic sex. I will explore some accounts of what constitutes morally good, or ethical sex, and argue that lawful sex may be morally problematic. This insight is crucial to ensure the appropriate use of the criminal law and to encourage and motivate creative and multi-faceted solutions to preventing unethical and unlawful sexual conduct. It is also important to recognise that not all unethical sexual conduct (including, but not limited to instances involving deception and mistake) will amount to rape/SA.

In identifying the 'gist' of rape/SA as the violation of sexual integrity, explaining and defending the role of consent, and finally in sounding a note of caution against any tendency to assume that consensual (lawful) sex must be morally good sex, this chapter sets the stage for an analysis of whether consent given on the basis of a mistake or induced by deception is invalid – i.e., whether the sexual activity amounts to a violation of C's sexual integrity.

2.1 THE HARM OF RAPE AND SEXUAL ASSAULT

This project is concerned with identifying the outer boundaries of rape/SA, specifically in the context of deception and mistake. When ostensibly-valid consent is induced by deception, or premised upon an uninduced mistake, is that consent valid? If not, the sexual activity in question is a candidate for criminalisation; the actus reus of the offence is made out, and D may be guilty, subject to a finding of mens rea. Any analysis of the proper boundaries of the non-consensual sexual offences ought to begin with consideration of the harm and wrong of the offence(s).

2.1.1 WHAT IS HARM?

Feinberg defines harm as the wrongful 'thwarting, setting back, or defeating of an interest'.[80] This involves two criteria: the 'set-back of interests' criterion and the 'wrongfulness' criterion. The former defines harm, whilst the latter 'is meant to screen out those harms that the harm principle would not want to prohibit'.[81] There is a difference between that which is harmful, and that which is legally recognised *as* harm. Counted within one's interests are all those things in which one has a stake. Our ulterior interests relate to our overall aims and ambitions in life,[82] and our welfare interests relate to wellbeing in a more direct way, reflecting our general interest in achieving and maintaining the health, liberty and access to resources necessary to pursue ulterior goals.[83] A set-back to either kind of interest can amount to harm.

Interests are set back when they are 'invaded' and left in a 'worse condition' for that invasion.[84] Feinberg's account of harm seems to be forward-looking: a set-back to interests involves 'the impairment of a person's opportunities,'[85] or 'a diminution of our… capacities'.[86] The notion of an invasion in Feinberg's description of harm dovetails with his wrongness criterion: to say that D has harmed C requires that D has also wronged C, in that 'his indefensible… conduct

[80] Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (OUP 1984) 33, 31-36.

[81] Alan Wertheimer, *Consent to Sexual Relations* (CUP 2003) 93.

[82] Feinberg (n80) 45.

[83] ibid 57.

[84] ibid 34.

[85] A P Simester and Andrew Von Hirsch, *Crimes, Harms, and Wrongs: On The Principles of Criminalisation* (Hart 2011) 38.

[86] ibid 36-37.

violates the other's right'.[87] An invasion of an interest that C has 'no right to have respected' would not constitute a harm. Moreover, C is not harmed if he voluntarily inflicted the setback upon himself, freely assumed the risk of such a setback, or freely consented to such a setback.[88]

One need not *experience* harm in order to suffer a setback to welfare or ulterior interests. One might have an asymptomatic disease; an individual's ulterior goals may be stymied without their knowledge.[89] Yet many accounts of the harm of rape/SA are rooted in an experiential understanding of harm.[90] The harm of rape/SA cannot be located in victim experience for three reasons. Firstly, the lack of any *unifying* type of experiential harm poses a significant challenge to exponents of an experiential account. Secondly, undoubtedly lawful instances of sexual activity can cause experiential harms and so such an account would be insufficient to distinguish between rape/SA and lawful sex. Thirdly, undoubtedly *unlawful* instances of sexual intercourse and activity can be entirely harmless in an experiential sense.

The inadequacies of the experiential account results in a choice between two conceptual positions: either the harm of rape is of no use in identifying the 'gist' of the offence in order to

[87] Feinberg (n80) 34.

[88] ibid 35.

[89] Wertheimer (n81) 94.

[90] Susan Estrich, *Real Rape* (Harvard University Press 1987) 25; Lynne Henderson, 'What Makes Rape a Crime' (1987) 3 Berkeley Women's LJ 193, 225-27; Martha Chamallas, 'Consent, Equality, and the Legal Control of Sexual Conduct' (1988) 61 S Cal L Rev 777, 817; Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) 172, 186; Lynne Henderson, 'Rape and Responsibility' (1992) 11 Law & Phil 127, 156; Robin West, 'Legitimating the Illegitimate: A Comment on "Beyond Rape"' (1993) 93 Colum Law Rev 1442, 1448; Donald A Dripps and others, 'Panel Discussion, "Men, Women and Rape"' (1994) 63 Fordham L Rev 125, 131, 136 (Deborah W Denno) 150-51 (Robin West) 158 (Linda Fairstein); Robin West, 'A Comment on Consent, Sex, and Rape' (1996) 2 LEG 233, 242, 244; Michelle Anderson, 'Negotiating Sex' (2005) 41 S Cal L Rev 101, 102; Robin West, 'Sex, Law and Consent' in Franklin G Miller and Alan Wertheimer (eds), *The Ethics of Consent: Theory and Practice* (OUP 2010) 227; Jed Rubenfeld, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2013) 122 Yale LJ 1372, 1441; Patricia J Falk, 'Not Logic, but Experience: Drawing on Lessons from the Real World in Thinking About the Riddle of Rape-by-Fraud' (2013) 123 Yale LJ Online 353; Scott Anderson, 'Conceptualizing Rape as Coerced Sex' (2016) 127 Ethics 50; Corey Rayburn Yung, 'Rape Law Fundamentals' (2016) 27 Yale J L & Feminism 1.

allow us to identify conduct which is a candidate for criminalisation, and we should be focusing instead on the wrong of rape, or, alternatively, the wrong of rape and the harm of rape are opposite sides of the same coin, and the harm of rape is best understood as the violation of the right to sexual integrity.[91] The *harm* of rape/SA should be understood in terms of a rights-violation, and therefore *experientially* 'harmless' rapes/SA are not 'harmless' at all. The violation of the right to sexual integrity demarcates lawful from unlawful sexual activity –distinguishes sex from rape.

2.1.2 REJECTING AN EXPERIENTIAL ACCOUNT OF THE HARM OF RAPE

As the experiential harms of rape/SA are enormously variable,[92] any experiential account of harm must be defined either as a cluster of qualifying experiential harms, or by some broad, flexible language. Either option poses its own difficulties: what kinds of harm should qualify for inclusion within the cluster; what kinds of harm (should) fall within the broad and flexible definition adopted? If C is aware that sexual activity is occurring and is also aware of her own non-consent, she will certainly experience some contemporaneous experiential harm. However, any experiential account of the harm of rape/SA must include both contemporaneous and *ex post* harms, given that an unconscious, sleeping or deceived victim will only become aware of their non-consent, and experience harm, after the act. This further complicates the 'experiential harm' account.[93]

Any account of the harm of rape/SA must also *exclude* harm attendant on consensual sex. Both physical and emotional/psychological harm can arise during and after consensual sexual

[91] See 2.2.2.

[92] See David Archard, 'The Wrong of Rape' (2007) 57 The Philosophical Q 374, 377.

[93] Further references to 'experiential harm', unless stated, should be taken to refer to both contemporaneous and *ex post* harm.

activity. For example, tears to the vaginal wall or frenulum may cause injury, pain and bleeding, even in consensual sex. One might consent to sex which later results in an unwanted pregnancy or sexually transmitted disease. One might validly consent to sex but later come to regret engaging in sex with that person, or that kind of sex. This might lead to psychological harm. Consider, for example, **Amy,** who represses her feelings of same-sex attraction and engages in casual sex with a male acquaintance, or **Steve** and **Pauline,** who succumb to mutual attraction and have sex, despite the fact that Steve is married to Pauline's sister. They may experience depression as a result of the sex, but these harmful experiences must be distinguished from the experience of who suffer the *ex post* harms outlined above. It is not clear how focusing purely on C's experience or diminution of future prospects can assist us in drawing this distinction.

According to Feinberg, a set-back to interests (defined, on the experiential account, as some kind of pain, injury, psychological injury or fear), must also be wrongful if it is to constitute a *legal* harm. If C freely consents to the setting-back of her interests, according to the principle of *volenti non fit inuria*, she is not wronged and no *legal* harm can be identified.[94] However this cannot save the experiential account of harm, because what matters here is the consent *to the setting-back of the interests* – i.e., the consent to the experiential harm, not the sex. Parties to consensual sexual activity do not consent to subsequent psychological or physical harm. They may consent to *running the risk of* X, but that is not the same as consent *to* X.[95]

[94] Feinberg acknowledges that the *volenti* principle can alternatively be satisfied by an assumption of responsibility, Feinberg (n80) 35-36, 116.

[95] Hurd (n77) 125-26; Heidi Hurd, 'The Normative Force of Consent' in Peter Schaber and Andreas Muller (eds), *The Routledge Handbook of the Ethics of Consent* (Routledge 2018) 46-47.

We might say that, in consenting to sex, the parties have assumed the risk of these unwanted injuries or consequences.[96] However using an 'assumption of responsibility' to distinguish between harms that might fall within the category of *harms of rape/SA* and harms that do not fall within that category is a difficult and dangerous move. The difficulty arises in determining what C needs to know about the risk of X in order to assume it. If **Sarah** has no idea at all that sex carries the risk of causing tears in her vaginal wall, and **John** does not even know what the frenulum is, do either assume responsibility for their injuries sustained during consensual sex? If knowledge of the risk is necessary, it is difficult to see how this can be practically translated into the identification of the harms of rape/SA, in order to provide a clear, prospective indication of the scope of rape/SA. If knowledge of the risk is not necessary, it is not clear what we should require of the relationship between the risk and the activity.

Recourse to this analysis is also dangerous. If we are prepared to hold that knowingly assuming the risk of harm attendant upon sexual activity renders that harm *not* a 'legal' harm of rape/SA, then how can we also (coherently) claim that when C knowingly places herself in a situation that significantly increases her risk of being subjected to non-consensual sexual activity, the harm attendant on that non-consensual activity (physical, emotional, psychological) *is* a harm of rape/SA?[97] The answer, obviously, is that consent makes all the difference here. Not consent to the *harm*, but consent to the *sexual activity* that led to the harm. **Amy**, **Steve**, **Pauline**, **Sarah** and **John** all validly consent to the sexual activity, and for that reason the harms they suffer are not the harms of rape/SA. If the most we can say is that the harm of rape/SA is defined as any experiential harm occasioned through non-consensual sexual activity, the idea of experiential harm adds little to our understanding of the scope of rape/SA. Only consent provides substantive assistance in

[96] Feinberg (n80) 35.

[97] Hurd, 'The Normative Force of Consent' (n95) 46-47.

differentiating between the harms of rape/SA and harms that may be attendant upon permissible sexual activity.

More challenging still for proponents of an experiential account is the reality that non-consensual sexual activity or intercourse can be entirely harmless in the experiential sense, and need not diminish C's future prospects or make her life go worse. Such activity should constitute rape/SA. If the victim neither experiences non-consensual penile penetration contemporaneously nor subsequently, and suffers no physical injury, disease or pregnancy, then no *experiential* harm is caused, and there can be no detrimental impact on the victim's future life. Gardner and Shute call this 'pure rape' and argue that it is harmless.[98] They envisage a somatic victim, perhaps intoxicated to the point of unconsciousness. Such a victim may instead be in a permanent coma and so never *could* wake up to discover the offence. These examples are sometimes thought to be 'extraordinarily unusual' and 'statistically rare (to say the least)'.[99] Whilst it is obviously impossible to identify cases that remain undiscovered by third parties, coma patients, severe dementia sufferers, and unconscious individuals have been subjected to rape/SA and only discovered due to pregnancy,[100]

[98] See John Gardner and Stephen Shute, 'The Wrongness of Rape' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence, Fourth Series* (OUP 2000), reprinted in John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (OUP 2007). All subsequent citations refer to the reprinted version. Though Gardner and Shute do not offer a full definition of harm, their account is clearly both prospective and experiential, see 3-4, 8-9.

[99] Douglas Husak, 'Gardner on the Philosophy of Criminal Law' (2009) 29 OJLS 169, 184.

[100] Staff, 'Nurse's Aide Sentenced in Coma-rape Case' *The Buffalo News* (27th March 1997) <http://buffalonews.com/1997/03/26/nurses-aide-sentenced-in-coma-rape-case/> ; 'A Woman in Argentina Became Pregnant in a Coma After Being Raped' *Vice* (1st May 2015) <https://www.vice.com/en_us/article/vdxga9/a-woman-became-pregnant-after-being-in-a-coma-for-over-a-year-430> .

subsequent disclosure by D,[101] or the discovery of documentary evidence.[102] It is not unreasonable to assume that there are more victims of rape/SA who are still unaware of their abuse.

Such cases, involving no experiential or prospective harm, are undoubtedly instances of rape/SA. I am not alone in taking this as axiomatic.[103] Instead of requiring the repudiation of the harm principle, or an understanding of the that principle which would allow the criminalisation of harmless rape/SA,[104] an *experiential* account of the harm of rape/SA should be rejected. The harm of rape is the violation of the right to sexual integrity. Whilst some rapes may be 'hurtless', the violation of the right to sexual integrity is a harm per se, even if the victim never discovers this to be the case, and her life is not made worse as a result. On this account, whilst rape/SA may – and indeed often does – cause 'aggravating harms',[105] the essential harm of rape is a right-violation, or a 'dignitary harm'.[106]

It might be thought that if the violation of a right is a harm per se, and harm is understood as a set-back to interests, then, on the basis that all rights are grounded in an individuals' interests and all violations therefore involve a set-back to interests, the harm-wrong distinction will collapse.

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[101] 'Hospital worker 'sexually assaulted female patient as she lay in a coma" *Daily Mail* (15th November 2008) <http://www.dailymail.co.uk/news/article-1085703/Hospital-worker-sexually-assaulted-female-patient-lay-coma.html> .

[102] Mary Fogarty, "I will ruin her': Man jailed for sexually assaulting 'comatose' woman' *The Irish Times* <https://www.irishtimes.com/news/ireland/irish-news/i-will-ruin-her-man-jailed-for-sexually-assaulting-comatose-woman-1.3045497> ; Nick Irving, 'Depraved carer who filmed herself committing shocking acts of abuse on elderly residents is jailed' *The Mirror* (13th August 2015) <http://www.mirror.co.uk/news/uk-news/depraved-carer-who-filmed-herself-6247866> .

[103] See Husak (n99) 184: 'no one doubts that [Gardner and Shute's example] qualifies as a genuine rape'.

[104] Gardner and Shute argue that the criminalisation of harmless rape is consistent with the harm principle, see Gardner (n98) 29. Their approach to the harm principle is not without its critics: see Husak (n99) and John Stanton-Ife, 'Horrific Crime' in Antony Duff (ed), *The Boundaries of the Criminal Law* (OUP 2010).

[105] Archard (n92) 381.

[106] Stanton-Ife (n104) 159, citing Westen (n76) 149.

However, we can accept that the violation of the right *to sexual integrity* is a 'dignitary harm', without rejecting an interest-based theory of rights in its entirety, and without the wrongs/harms distinction collapsing.

Feinberg argues that trespass can constitute a harm, even if the action of trespass benefits C in the long run in a way which threatens the harm/wrong distinction. He considers the mere right-violation as a harm seemingly on the basis that the violation alone amounts to a set-back of C's '*interest* to exclusive enjoyment and possession' of his land, even if the act of violation ultimately benefits C.[107] This indicates that the interest grounding the right is 'set back' simply through violation, even if no further 'set-back' obtains. It is not clear why all wrongs would not therefore constitute harms, collapsing the distinction between the two.[108] It might seem that, in order to maintain a distinction between harming and wronging, one must choose between dignitary harms and an interest-based theory of rights. Unless one rejects the latter, the former is conceptually unsustainable. I cannot develop an overarching theory of rights in this thesis. However, by recognising that the right to sexual integrity, at least, is not grounded in interests, even if other rights are so grounded, we can recognise the violation of the right to sexual integrity as a harm per se, without the harms/wrongs distinction collapsing altogether.[109]

Simester and Von Hirsch point us in a helpful direction. They note that 'it does not suffice to point to the violation of the property right per se as the wrongful harm that warrants state intervention… because, in most modern societies, property rights are not pre-legal'.[110] However,

[107] Feinberg (n80) 107 (emphasis added), 35.

[108] A distinction that Feinberg accepts elsewhere, ibid 35.

[109] Central to this analysis is that sexual integrity constitutes the right at stake in rape/SA. I will set out an argument in support of this position in Ch 2.2.

[110] Simester and Von Hirsch (n85) 40.

Simester and Von Hirsch accept that freedom from attack or the violation of 'physical integrity' *is* a pre-legal right: *I do need the law to know that this is my table, or that that house is yours, but I don't need the law to know that this arm is mine*.[111] We might reimagine this legal/pre-legal distinction as tracking a distinction between those rights which are grounded in the importance of C's *interests* and those rights which are grounded in a more fundamental way.

As Herring and Wall argue, writing in the medical law context, the right to bodily integrity is distinct from the right to sexual autonomy, because the body is the 'point of integration between a person's subjectivity and the remainder of the objective world'.[112] It is the interface between the self, and the other, a fundamental conceptual distinction that is central to our sense of who we are. And we cannot have goals or values without first understanding that we are a person. In this sense the right to sexual integrity is a vital precondition for the existence of the achievement of positive sexual autonomy but it is not 'reducible' to autonomy, as it has a different 'moral basis' to the right to sexual autonomy.[113] Sexual integrity is not grounded in recognition of the importance of an individual's interest in making certain sexual decisions or pursuing sexual certain goals, (though the interest to pursue one's own sexual goals and values certainly *is* important and may ground a right to *positive* sexual autonomy, which would be infringed, for example, by the prohibition of homosexual sexual activity[114]). An infringement of the right to sexual integrity amounts, as Herring and Wall note, 'to a disrespect that is broader than disrespect for the person's capacity to live life

[111] This is a direct quote from ibid 41, but the order of the observations are reversed, in order to emphasise the pre-legal nature of the right against physical attack, rather than the 'quintessentially legal' nature of property rights.

[112] Jonathan Herring and Jesse Wall, 'The Nature and Significance of the Right to Bodily Integrity' [CUP] 76 CLJ 566, 576. I will say more about the relationship between sexual integrity and sexual autonomy in Ch 2.2.2.

[113] ibid.

[114] See Ch 2.2.2.

according to reasons and motivations that one takes as one's own (their autonomy)'.[115] The violation of sexual integrity, I contend, denies the conceptual boundary between the C and the rest of the world. It speaks to the perception, by the wrongdoer, of the inexistence of that boundary; in other words, the wrongdoer does not recognise C as a distinct individual, as a person. When understood that the right to sexual integrity is not grounded in interests, even if other rights are so grounded, we can recognise the violation of this right as a *harm per se*, without threatening the general distinction between wrongs and harms.

A rights-based account of the harm of rape/SA is the only account that unites all instances of rape/SA. Harm need not be understood in the narrow and necessarily prospective sense envisaged by Shute and Gardner, but as simply the violation of the right to choose when one's body is sexually touched or engaged. Not every right-violation will constitute harm in this way. However, a violation of the rights guarding the personal, physical boundaries of the body constitutes a dignitary harm, whether or not it is experienced contemporaneously or ever discovered subsequently.

[115] Herring and Wall 577.

2.2 THE WRONG OF RAPE AND SEXUAL ASSAULT

The dominant account of the wrong of rape identifies the violation of sexual autonomy as the relevant wrong. This view is widely held across the academic literature,[116] and underpins the law governing England and Wales,[117] Scotland,[118] the Republic of Ireland,[119] and Commonwealth systems including Australia,[120] and New Zealand.[121] Space precludes attention to every rival to an autonomy-based account; in this section I will reject arguments that rape is better understood by reference to violence or forcible sex, coerced sex, or the violation of something akin to a property right. Nicola Lacey's critique of autonomy, however, offers a persuasive rival account. In order to avoid artificially casting the wrong of rape in purely cognitive terms, obscuring the embodied and affective aspect of the violation that occurs when an individual is raped, it is appropriate to

[116] Stephen J Schulhofer, 'Taking Sexual Autonomy Seriously: Rape Law and Beyond' (1992) 11 Law & Phil 35; John H Bogart, 'Commodification and Phenomenology: Evading Consent in Theory Regarding Rape' (1996) 2 LEG 253; Simon Gardner, 'Appreciating Olugboja' (1996) 16 LS 275; David Archard, *Sexual Consent* (Westview 1998); Stephen J Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press 1998); David P Bryden, 'Redefining Rape' (2000) 3 Buff Crim LR 317; Jennifer Temkin, *Rape and the Legal Process* (2nd edn, OUP 2002); Wertheimer (n81); Joan McGregor, *Is It Rape? On Acquaintance Rape and Taking Women's Consent Seriously* (Ashgate 2005); Victor Tadros, 'Rape Without Consent' (2006) 26 OJLS 515.

[117] Home Office, *Setting the Boundaries, vol 1* (n29); Law Commission, *Consent in Sex Offences,* published in Appendix C of Home Office, *Setting the Boundaries, vol 2* (n29); Home Office, *Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences* (White Paper, Cm 5668, 2002); Jennifer Temkin and Andrew Ashworth, 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent' [2004] Crim LR 328; *R v C (Gary Anthony)* [2009] UKHL 42, [2009] 1 WLR 1786.

[118] Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences* (Scot Law Com DP No 131, 2006).

[119] See Irish Law Reform Commission, *Sexual Offences and Capacity to Consent* (Irish LRC, No 109, 2013); John Stannard, 'Consent in Irish Law' in Alan Reed and others (eds), *Consent: Domestic and Comparative Perspectives* (Routledge 2017) 217-18.

[120] See Mirko Bagaric, 'Australia' in Alan Reed and others (eds), *Consent: Domestic and Comparative Perspectives* (Routledge 2017).

[121] Julia Tolmie, 'New Zealand' in Alan Reed and others (eds), *Consent: Domestic and Comparative Perspectives* (Routledge 2017).

reconsider the right in question as one of sexual integrity. An integrity account is also necessary if we are to recognise the dignitary harm of rape, identified in Chapter 2.1.2.

2.2.1 VIOLENCE, COERCION AND PROPERTY

RAPE AS VIOLENCE

Rape is sometimes described as a crime of, and about, violence, and not sex.[122] Understood in terms of perpetrator-motivation,[123] this risks oversimplification: perpetrators often (though not always) have sexual motives,[124] and the claim that such a rape is *only* about violence and *not* about sex obscures the complicated relationship between power, violence and sexuality at play.[125]

The claim makes more sense as a characterisation of victim-experience. Despite some ambiguous contributions to the literature,[126] the claim that rape is a crime of violence seeks to expand and re-imagine the definition of violence to encompass all non-consensual touching, and to encourage law-makers and the public to take rape/SA seriously.[127] This definition of violence holds that any unlawful touching is violent; rape/SA is an *assault*, violating human dignity and

[122] Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (Secker & Warburg 1975); Estrich (n90) 82-83; Henderson, 'What Makes Rape a Crime' (n90) 225-27; David P Bryden and Sonja Lengnick, 'Rape in the Criminal Justice System' (1997) 87 J Crim L & Criminology 1194, 1329-33; Bryden (n116) 375.

[123] Wertheimer (n81) 72.

[124] ibid 74-78. See also Vanessa E Munro, 'Concerning Consent: Standards of Permissibility in Sexual Relations' (2005) 25 OJLS 335 and Temkin (n116) 154.

[125] Ann J Cahill, *Rethinking Rape* (Cornell University Press 2001) 27.

[126] '[F]rom the victim's perspective, unwanted sexual penetration involves unwanted force, and unwanted force is violent – *it is physically painful, sometimes resulting in internal tearing and often leaving scars'*, West, 'Legitimating the Illegitimate' (n90) 1148 (emphasis added).

[127] See, for example, Estrich (n90) 82-83.

integrity and, on that basis, falls within a broader conception of 'violence'. Whilst this analysis captures something significant about the nature of the victim's experience *and* encourages the offences to be taken seriously in the public imagination, it is of limited assistance in isolating and describing the *specific* wrong at the heart of rape/SA. There are many ways of acting violently, and of committing assault. Non-sexual offending is also violent.[128] It remains vital to distinguish between sexual and non-sexual assaults, as the 'peculiarly sexual' nature of the offence is of equal import to characterising the victim's experience, as well as D's wrong.[129] Even if we maintain that rape is *not sex*, usefully viewing rape and sex as mutually exclusive categories, rape/SA is certainly *sexual*, and if we are attempting to isolate the wrong involved, this argument doesn't get us far enough.

NARROW ACCOUNTS OF RAPE AS VIOLENCE (OR COERCION)

The argument that rape is a crime of violence can also be found in accounts of rape that construe violence (and rape) in much narrower terms. It is important to consider whether these accounts are plausible, at least briefly, as, if so, they provide a simple solution to the question at the heart of this thesis, excluding mistaken and deceptive sex from the ambit of rape/SA by definition.

Rubenfeld defines rape as a violation of 'the right to self-possession', purportedly justifying the exclusion of rape-liability for deceptively obtained sex and the retention of a force requirement in US rape law.[130] On his account, provided that 'there is neither violence nor fear of violence,

[128] Or may also be violent, if one were to take the view that relatively minor assaults do not involve violence, but rather an infringement of privacy, see John Gardner, 'Rationality and the Rule of Law in Offences Against the Person' (1994) 53 CLJ 502, 508.

[129] Cahill (n125) 27. See also Estrich (n90) 81, and Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart 1998) 122.

[130] Rubenfeld (n90).

[and] the victim could have walked away at any moment', there is no rape. Rubenfeld's account wrongly identifies the harm of rape as necessarily experiential,[131] and wrongly assumes that complainants (usually women) are always capable of 'walking away' or resisting, even in the absence of force or threats of force.[132] Rubenfeld's account of the wrong of rape should be rejected on its own terms,[133] but, as the English law on rape has long-since rejected a formal force requirement[134] his account would involve a significant and unrealistic departure from the current conceptual approach to rape in this jurisdiction.

Scott Anderson understands rape as coerced sex, rather than non-consensual sex.[135] He gives examples of 'ethically problematic' non-consensual sex that are nevertheless excluded from his definition of rape, including: a scenario where a woman responds to her partner's overtures by telling him that she does not want to have sex and pushes him away but he persists and she, without saying 'no', stops pushing him away and relents; a scenario where a sleeping woman's partner performs sex acts upon her without prior discussion or agreement; sex procured by deception about age, marital status, STD status etc; and sex without a condom when consent was explicitly conditioned upon that basis. Anderson argues that these cases should not be understood

131 ibid 1441.

132 For discussion, see Anderson (n90) 114-17. Rubenfeld fails to adequately address this criticism. In a single footnote, he somewhat glibly dismisses this phenomenon as infantilising and assumes that this freeze response can only arise in response to an assault which would presumably qualify as force under his framework, see Rubenfeld (n90) 1439, n238.

133 For further criticism of Rubenfeld's account, see Tom Dougherty, 'No Way Around Consent: A Reply to Rubenfeld on "Rape-by-Deception"' (2013) 123 Yale LJ Online 321; Falk, 'Not Logic, but Experience' (n90); Gowri Ramachandran, 'Delineating the Heinous: Rape, Sex, and Self-Possession' (2013) 123 Yale LJ Online 371; Deborah Turkheimer, 'Sex Without Consent' (2013) 123 Yale LJ Online 335; Yung (n90).

134 *R v Camplin* (1845) 1 Cox CC 220. See discussion in Temkin (n116) 90-91; Peter F G Rook and Robert Ward, *Rook & Ward on Sexual Offences: Law and Practice* (5th edn, Sweet & Maxwell 2016) 1.16; *The Crown Court Compendium: Part 1 Jury and Trial Managagement and Summing Up* (Judicial College, February 2017) 20-4, paras 3 and 7. See also n117.

135 Anderson (n90). Note that Anderson's understanding of coercion departs from leading contemporary accounts of the concept; see discussion at 72-78.

as rape because they 'all seem likely to affect the non-consenting parties in ways that are qualitatively and morally different from cases typically regarded as rape or even non-penetrative sexual assault'.[136] Anderson's fundamental error is to assume that because the 'stereotypical cases' cases of rape result in a particular set of experiential harms, rape is itself *defined by* those harms.[137] Not only is Anderson's rejection of autonomy fundamentally misconceived as a result of his untenable assumption that the harm of rape is necessarily experiential, but he also circles back to consent in the final analysis, arguing that D's reasonable belief in consent will provide a defence even if D coerced C into sex. Putting aside any question of how a belief in consent could be honest, much less reasonable, if that 'consent' is coerced by D, Anderson's supposed rejection of a consent/autonomy-based conception of rape is undermined by his ultimate reliance on consent as a backstop.

A PROPERTY MODEL OF RAPE AND SEXUAL ASSAULT

Like Anderson's model, Donald Dripps' account of the wrong of rape is also unsuccessful in departing from a consent/autonomy approach.[138] Dripps argues that individuals have a proprietary right to their bodies, and that rape is an 'expropriation' of (bodily) property.[139] He wrongly assumes that only a 'commodity theory' can explain the wrongfulness of experientially harmless rapes,[140] and consent, like Anderson, ultimately circles back round to autonomy, as he

[136] ibid 66-67.

[137] ibid 53-54.

[138] Donald A Dripps, 'Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent' (1992) 92 Colum Law Rev 1780.

[139] ibid 1786.

[140] ibid 1789.

identifies various sexual interactions as illegitimate precisely because choice is absent and autonomy has been infringed.[141]

2.2.2 SEXUAL AUTONOMY AND SEXUAL INTEGRITY

The violation of sexual autonomy is often identified as the wrong of rape/SA. No alternative formulation outlined above provides a plausible challenge to this model. However, in the final analysis, the conceptual core of rape/SA is better understood as the violation of the right to sexual integrity.

The first step in understanding why the violation of 'sexual autonomy' is not an accurate description of the normative 'gist' of rape/SA is the recognition that sexual autonomy should not be seen as one monolithic right but as a concept or value that is both constituted by and realised through 'a bundle of rights organized around the idea of securing for its possessor various forms of sexual self-determination'.[142] Rather than seeing this bundle as primarily concerned merely with freedom to make choices in the sexual arena, we ought to recognise a richer and more demanding concept.[143] There are rights within the bundle that seek to secure the empowerment of people to develop and understand their sexual selves – their preferences, commitments and determination of the (sexual) 'good'– and to live in a society where adequate opportunities to pursue their own understanding of sexual goods are, within appropriate boundaries, afforded to them. The bundle includes a positive right to engage in sexual activity of one's choosing, with a partner of one's choosing, in a time and place of one's choosing (though this may all be subject to reasonable limitations, for example, the partner must be a consenting adult and sex in certain places may

[141] See Bogart (n116) 261.

[142] Stuart P Green, 'Lies, Rape and Statutory Rape' in Austin Sarat (ed), *Law and Lies: Deception and Truth-telling in the American Legal System* (CUP 2015) 207.

[143] ibid.

legitimately be prohibited). It also includes rights that we might not typically consider when imagining sexual autonomy through a paradigm of rape/SA. It includes the right to be free from discrimination on the grounds of sexual orientation, sex and gender identity. All such forms of discrimination can inhibit an individual's sexual self-realisation. It also includes a right to receive an adequate sexual education, without which the intellectual and emotional capacities to reflect upon and pursue one's own sexual good life are diminished. It also, as Green notes, includes the right to 'becom[e] pregnant, undergo[…] fertility treatments, hav[e] an abortion, us[e] contraception'.[144] This demanding extrapolation of sexual autonomy is consistent with a liberal approach. Despite criticism,[145] a liberal account of autonomy is 'thoroughly socialised'; relationships with others can 'nourish' individual's autonomy and for many, if not most people, their conception of the good life is framed through their relationships with others.[146] The liberal ideal of autonomy also recognises that the exercise of autonomy is dependent on the socio-economic and material availability of a range of meaningful options from which to exercise choice.[147] Similarly, what looks like an autonomous choice in a moment may not have been; it may be tainted by deception, coercion or abuse.

The rights contained within the bundle of sexual autonomy are concerned both with ensuring that an individual's sexual life is self-authored – that her choices are meaningful and respected – and also that her range of options allow for self-reflection, realisation and fulfillment.

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[144] ibid 208.

[145] Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 Yale L & Feminism 7; Lacey (n129); Jonathan Herring, 'Relational Autonomy and Consent' in Alan Reed and others (eds), *Consent: Domestic and Comparative Perspectives* (Routledge 2016).

[146] Paul Roberts, 'Privacy, Autonomy and Criminal Justice Rights: Philosophical Preliminaries' in Peter Alldridge and C H Brants (eds), *Personal Autonomy, the Private Sphere and Criminal Law: A Comparative Study* (Hart 2001) 60-62.

[147] ibid; Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986); Joel Feinberg, *The Moral Limits of the Criminal Law Volume 3: Harm to Self* (OUP 1989) Chs 18-19.

These wide-ranging rights impose a range of obligations on various actors, and are appropriately realised through a range of different legal mechanisms. It is vital to note that not all of these rights are the province of the criminal law.

Often, rape/SA is characterised as protecting the negative right to sexual autonomy, as opposed to the positive rights set out above. Green claims that 'the law of forcible rape epitomizes the protection of negative liberty in the sense that it protects people from being forced to have penetrative sex they do not wish to have, while having no separate effect on their freedom to engage in sex they do desire'.[148] However, rape/SA is not always perpetrated by force, and the right in question is not well-characterised as a right to sexual liberty. Nicola Lacey has argued that the language of autonomy risks suggesting that rape/SA is a wrong against the will alone, and further implies a distinction between the mind and the body that is artificial in general, but particularly so in the context of sexual decision-making and desire. By reframing the right to sexual 'autonomy' as the right to sexual integrity, the 'embodied and affective aspects of the offence' remain clearly in focus.[149] Green has noted that 'integrity' can be conceptualised in three ways, including as 'steadfastness' and 'intactness'.[150] The steadfastness conception involves a thoughtful, deliberative process whereby one has the facilities and space to consider one's values over time and is empowered to engage in activity only to the extent that it reflects those values. Green observes that consistency and commitment to values is a crucial component of integrity in this sense.[151] This sense of sexual integrity is something we may undermine for ourselves. We may act

[148] Green (n142) 207.

[149] Lacey (n129) 114.

[150] Stuart P Green, 'The Legal Enforcement of Integrity (October 11, 2017)' in Christian B Miller and Ryan West (eds), *Integrity, Honesty and Truth-Seeking* (Forthcoming. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3051335).

[151] ibid 2.

without integrity if we act against our consistent, long-held values. Alternatively, on this view, others may disrespect, undermine, or violate our integrity by impeding our ability to reflect on our own values or make decisions by them. Green claims that an alternative, 'intactness' conception of integrity is concerned with 'wholeness'.[152] Lacey uses integrity in this sense. We can further develop this understanding of integrity as intactness by returning to Herring and Wall's argument that bodily integrity and bodily autonomy are distinct, and that integrity is not reducible to an autonomy interest.[153] Integrity is concerned with the interference with the physical body; the interface between the self and the world. Autonomy is concerned with making choices, in light of one's own values.[154]

As argued in Ch 2.1.1, integrity as 'intactness', properly understood, explains the dignitary harm of rape/SA without leading to the collapse of the harm/wrong distinction. A 'steadfastness' conception of sexual integrity cannot do the same, so the conception of sexual integrity entails the existence of harmless rapes.

Autonomy – the notion of choice, control and self-authorship - is closely connected with sexual integrity, and consent still has an important role to play in securing and protecting this right. The right to sexual integrity is policed by consent.[155] D may not touch C sexually without it. The power to grant or withhold consent allows C to exercise her positive sexual autonomy and to maintain her sexual integrity. But not every assent amounts to consent. If a simple 'yes' were

[152] ibid 3.

[153] See Herring and Wall (n112) 567. See discussion in Ch 2.2.1.

[154] ibid 575.

[155] See *R v Ewanchuk* [1999] 1 SCR 330 [26], [36]; *R v Litchfield* [1993] 4 SCR 333 [13]-[16]; *R v Saint-Laurent* (1993) 90 CCC (3d) 291 (Que CA) [94]-[95]. Recognition of this symbiotic relationship between integrity and autonomy does not require us to hold that autonomy grounds the right to integrity, or that the right to integrity is interest-based.

sufficient, then sexual integrity would be afforded scant protection; all sorts of sexual integrity-defeating activity (threats, coercion, deception) can produce a statement of assent. As indicated above, what looks, in a moment, *like* consent may not *be* consent. In order to understand when an ostensible consent fails to amount to consent, it is important to understand two important relationships: that between consent and sexual integrity, and that between sexual integrity and ethical sex. The next two sections of this chapter will address each of these relationships in turn, explaining firstly the functional role of consent in securing the right to sexual integrity, and secondly why C's right to sexual integrity is not always violated when D acts unethically in sexual interactions with C. This analysis will set the stage for a further exploration of the specific content of the right to sexual integrity in Chapter 5, the identification of the obligations imposed on others under that right, and an analysis of how far those obligations extend in the context of mistake and deception.

2.3 THE ROLE OF CONSENT

Understanding the functional role played by consent in securing and defending the right to sexual integrity is an important precursor to any analysis of mistake, deception and consent. Some critics, however, accept sexual autonomy or integrity as the right underpinning rape/SA, but nonetheless challenge the role of consent as the mechanism through which that right is exercised and protected.[156] The rejection of consent arises primarily from four concerns:

[156] Lois Pineau, 'Date Rape: A Feminist Analysis' (1989) 8 Law & Phil 217; Chamallas (n90); Anderson 'Negotiating Sex' (n90); Tadros (n116); Tanya Palmer, 'Distinguishing Sex From Sexual Violation' in Alan Reed and others (eds), *Consent: Domestic and Comparative Perspectives* (Routledge 2017).

1. The term is vague and malleable.[157]

2. Consent is insufficiently context-sensitive.[158]

3. An approach based on consent places the ethical burden on women.[159]

4. Consent is 'inherently and problematically asymmetrical'.[160]

Before rebutting these specific criticisms, it is necessary to consider the meaning and function of consent in further detail.

2.3.1 THE MEANING AND FUNCTION OF CONSENT

There are multiple points of disagreement across the vast literature on the meaning of consent, ranging from whether consent is an internal, subjective state of mind,[161] an expressive

[157] Tadros (n116) 517.

[158] Dripps (n138); Lacey (129) 117; Tadros (n116); Jonathan Herring, 'Relational Autonomy and Rape' in Shelley Day Sclater and others (eds), *Regulating Autonomy: Sex, Reproduction and Family* (Hart 2009) 63-65; Palmer (n156).

[159] Cahill (n125); Ann J Cahill, 'Unjust Sex vs. Rape' (2016) 31 Hypatia 746. Of course, men can be victims of non-consensual sexual offences, and so Cahill's argument could, and perhaps should, be reframed to focus on the burden of the potential victim, irrespective of their gender.

[160] Palmer (n156). See also Lacey (n129) 114; Cahill, *Rethinking Rape* (n125); Anderson 'Negotiating Sex' (n90); Herring, 'Relational Autonomy and Rape' (n158); Cahill, 'Unjust Sex vs. Rape' (n159) 753-54.

[161] See Hurd, 'The Moral Magic of Consent' (n77); Larry Alexander, 'The Moral Magic of Consent (II)' (1996) 2 LEG 165; West, 'A Comment on Consent, Sex, and Rape' (n90) 249; Westen (n76); Douglas Husak, 'The Philosophy of Criminal Law: Extending the Debates' (2013) 7 Criminal L & Philosophy 351.

act,[162] or both;[163] to the content of consent (be it preference or acquiescence,[164] mutual desire,[165] an intention that another person perform a certain act,[166] authorisation, or the waiver of a moral right to complain about another's otherwise impermissible act[167]) to whether the law should demand an affirmative signal of consent, and, if so, what that signal should be;[168] and to whether, and when, mistake, deception, coercion and deficiencies in capacity invalidate consent.[169] Space precludes a complete consideration of all of these issues here. However, the functional role of consent and its communicative nature are worth further discussion.

THE FUNCTIONAL ROLE OF CONSENT

Consent it is the *means* by which we control our sexual integrity by granting or denying sexual bodily access. How we understand consent must be responsive to the right that consent functions to exercise and protect. Instead of seeking to identify the content of the right to sexual

[162] John Kleinig, 'The Ethics of Consent' (1982) 8 Canadian Journal of Philosophy; Supplementary Volume 91, 93-96; Feinberg, *Harm to Self* (n147) 173; Stephen J Schulhofer, 'The Feminist Challenge in Criminal Law' (1995) 143 U Pa L Rev 2151, 2181; H M Malm, 'The Ontological Status of Consent and its Implications for the Law on Rape' (1996) 2 LEG 147; Archard, *Sexual Consent* (n116) 4; Wertheimer (n81).

[163] Emily Sherwin, 'Infelicitous Sex' (1996) 2 LEG 209.

[164] Westen (n76).

[165] Chamallas (n90).

[166] Hurd, 'The Moral Magic of Consent' (n77).

[167] Sherwin (n163), Alexander (n161).

[168] Lani Anne Remick, 'Read Her Lips: An Argument for a Verbal Consent Standard in Rape' (1993) 141 U Pa L Rev 1103; Schulhofer, *Unwanted Sex* (n116); Anderson 'Negotiating Sex' (n90).

[169] For discussion see Wertheimer (n81) Chs 8-11.

integrity[170] by analysing the requirements of consent, the requirements of consent are determined by reference to the demands of proper respect for sexual integrity. Consent may be the question put to the jury but it is primarily a vehicle for the key normative determinant: sexual integrity. The right does the moral work behind the scenes and consent is how that right is operationalised in practice. Clearly, if D penetrates C by force, C's sexual integrity has been violated. When *ostensible* consent has been given under conditions of constraint, we must determine whether the nature and extent of those constraints, and their impact on C's decision-making, were legitimate. Do they reach a threshold at which we can say that C's integrity has been violated? What *looks* like consent, in a quick snapshot of the moment of assent, may not be an autonomous authorisation of D's conduct.[171] The risk of conflating assent with consent is minimised, as this analysis requires fact-finders to remain alert to the very real possibility that an expression of assent was not the result of a (sufficiently) autonomous choice and does not, therefore, amount to consent. Similarly, we can recognise that the exercise of autonomy is often, if not always, constrained, and the key issue for reformers, legislators, and courts, is the point at which those constraints reach a certain threshold where it can be said that the decision was not *sufficiently* autonomous and therefore the assent, or ostensible consent, was invalid. This will be relative, in the sense that the same kind of pressure will affect some people more than others.[172] The challenge for lawmakers and courts is to balance context- and person- sensitivity with predictability and the rule of law. I will return to these tensions in Parts III and IV in the context of deception and mistake.

Consent transforms the normative relations between two people. C either consents or she does not. If C gives some expression of assent or permission to D to engage in sexual activity,

[170] Or autonomy for those who prefer that analysis of the right underpinning rape/SA.

[171] See, for example, *Olugboja* (n8).

[172] Gardner 'Appreciating Olugboja' (n116).

under conditions that violate her right to sexual integrity, C simply does not consent. It is oxymoronic to speak of 'invalid' consent, and the descriptor 'valid' similarly adds nothing of substance to the noun 'consent'. Accordingly, I use 'assent' or ostensible consent to refer to some expression of permission that does not (or may not) amount to consent. Sometimes, however, efficiency of communication calls for recourse to language of (in)validity; this should not be taken to suggest that the concept of invalid consent is conceptually coherent.

THE ONTOLOGY OF CONSENT

In determining whether a mere state of mind will suffice, or whether some 'performative' or communicative act is required, the functional role of consent must be kept in mind. Consent changes the normative relationship between the consenting party and the person who receives consent (C and D, respectively). Without consent, D is under a duty not to sexually touch C. C's consent removes that duty by giving D permission to touch. It does not provide an obligation for D to act, nor does it provide a reason for him to do so. But, crucially, D no longer has a mandatory reason *not* to act.[173] How can a purely internal mental state change the rights and obligations of D in this way, if D does not have any epistemic access to that permission? Consent functions to protect C's sexual integrity. That integrity – contingent upon the ability to control sexual bodily access, to determine when, where and with whom to engage in certain activity – cannot be protected through the formation of an unexpressed mental state.[174] For C to affect the duties of D, something must pass between C and D. Communication is required, and accidental assent is

[173] See Michelle Madden Dempsey, 'Victimless Conduct and the Volenti Maxim: How Consent Works' (2013) 7 Criminal L & Philosophy 11. Unless such a duty is external to the question of C's consent. For example, a therapist, sixth-form teacher or prison officer might have a mandatory duty not to have sex with the patients, students or prisoners for whom they are responsible. On teachers and others in a position of trust in relation to children over 16, see SOA 2003, ss16-24.

[174] Those who adopt the 'internal' view disagree on what precisely the relevant mental state entails. See Hurd, 'The Moral Magic of Consent' (n77), Alexander (n161), and Westen (n76) for three alternative accounts.

not consent.[175] It is important to recognise that whilst there is no inherent requirement for verbal consent, silence and inactivity only constitutes consent in certain circumstances, not least when the potential consent-giver understands that an absence of dissent will itself communicate consent, when the means of dissenting is some action that is both 'reasonable' to expect people to undertake and relatively easy to perform and when the consequences of dissenting are not detrimental.[176] Furthermore, the decision to communicate by failing to dissent must be sufficiently autonomous in order for the tacit assent to amount to consent.

2.3.2 DEFENDING CONSENT

It is now possible to return to, and either rebut or neutralise, the four major critiques of consent outlined above.

1. CONSENT IS MALLEABLE AND VAGUE

Westen's work demonstrates that consent is understood and used in different ways, by different people.[177] Defendants and complainants may assume that a mere lack of resistance, or a 'yes' given under coercion, amounts to consent.[178] This does not mean that consent is *necessarily* vague and indeterminate. Relevant actors in the criminal justice system must remain alert to the fact that people may use the term 'consent' inaccurately, and ensure that steps are taken to determine whether C *consented* in the legal sense, rather than gave some assent incapable of

[175] Hurd and Alexander both miss this crucial point, in their rejection of a 'performative' account of consent. See Hurd, 'The Moral Magic of Consent' (n77); Alexander (n161).

[176] See A John Simmons, 'Tacit Consent and Political Obligation' (1976) 5 Philosophy & Public Affairs 274, 279-80. It might be that there are good instrumental reasons for the law to require affirmative, active consent, be it verbal or non-verbal.

[177] See Westen (n76).

[178] Tadros (n116) 522.

normative effect. The meaning of consent takes its shape from the requirements of the right to sexual integrity. 'Consent' becomes vague and malleable only when this relationship is misunderstood.

2. CONSENT IS INSUFFICIENTLY CONTEXT-SENSITIVE

Various critics have expressed concern that a consent standard is insufficiently sensitive to the broader context in which that consent is given.[179] The contention that the current approach does not or cannot recognise the relevance of contextual factors 'extend[ing] beyond the immediate surrounding conditions in the moment that a decision is taken'[180] is inaccurate. Courts can, should and do take account of background evidence including, for example, previous abuse, trafficking and economic deprivation.[181]

3. AN APPROACH BASED ON CONSENT PLACES THE ETHICAL BURDEN ON THE VICTIM

Cahill argues that a focus on consent 'inevitably place[s] the ethical burden on the victim', because 'the ethical question that courts must pursue becomes whether the victim sufficiently communicated her nonconsent, or whether that nonconsent was likely given the history of the victim'.[182] Cahill also assumes that under a consent theory 'women must express nonconsent in every possible, bodily way'.[183] However any understanding of consent that is marked by the

[179] See n158.

[180] Palmer (n156) 15 (emphasis added).

[181] See, for example, *R v Kirk* [2008] EWCA Crim 434.

[182] Cahill, *Rethinking Rape* (n125) 174-75.

[183] ibid 173. As a feminist philosopher committed to analysing rape as a gendered offence predominantly affecting women, Cahill's concerns about the use of consent are often phrased in language that excludes male victims. It should also be noted that Cahill is an American scholar, and the force requirement is still present in some US jurisdictions, but has long been removed from English law. See, for example, *State v Jones* No 36841, 2011 WL 4011738 (Idaho Ct

absence of any resistance is defective. Though the commonly-held understanding that consent is a state of mind may encourage the inference of 'consent' from silence or a lack of physical resistance, on a communicative conception of consent, much of this criticism is neutralised.[184]

4. CONSENT IS ASYMMETRICAL

Palmer, Cahill, Anderson, Lacey and Herring have all taken issue with the allegedly asymmetrical nature of consent: one party requests, or initiates, and the other can consent or refuse.[185] A consent standard is incapable of ensuring that the interaction is shaped by the desires of both parties. Palmer therefore claims that consent is 'a minimal, reactive form of participation'. These roles are generally shaped and conditioned by heavily gendered cultural expectations and stereotypes. Because consent does not 'make room for the more radical possibility of reciprocity or co-production of sexual experience',[186] it cannot distinguish between sex and sexual violation.

Palmer assumes that consent is absent in the 'most positive… encounters jointly instigated by mutually active partners', as they have gone 'beyond consent'.[187] Gardner also argues that consent is absent in 'good' sex (despite accepting that consent distinguishes between lawful sex and rape).[188] A request or invitation goes further than consent, in that it gives the other person a positive reason to do the action (the initiator wants the action to be done) rather than merely

App, Sept 12 2011), affd *State v Jones* 299 P3d 219 (2013) (Idaho). See discussion in Corey Rayburn Yung, 'Rape Law Gatekeeping' (2017) 58 BCL Rev 205, and n134.

[184] Cahill herself seems to concede this point, at least in principle. See Cahill, *Rethinking Rape* (n125) 175.

[185] See n160.

[186] Palmer (n156) 13.

[187] ibid.

[188] John Gardner, 'The Opposite of Rape' (2018) 38 OJLS 1 and Gardner, *Offences and Defences* (n98). See discussion of 'good' sex at Ch 2.4.1.

removing a negative reason not to do the action (there being no permission or authorisation to do it). Nevertheless, (generally) a request or initiation incorporates and implies consent.[189] To describe *good* sex as consensual does not come close to describing what is important or central to it. To describe Shakespeare's process in writing Hamlet as 'making marks on parchment in ink' would radically under-describe Shakespeare's achievement in writing one of the greatest works of English literature and indeed insult the artistic value of that work. In a similar way, describing good sex as consensual sex radically under-describes, perhaps even insults, the value and practice of good sex. But when Shakespeare wrote Hamlet he *did* make marks on parchment in ink and when people engage in good sex they *do* consent.

Palmer's criticisms of consent culminate in her claim that the initiator-responder asymmetry in consent-based models cannot account for certain types of cases. She introduces an example of a real interaction between a woman, **Rosa**, and her (now ex-) partner. Rosa describes the relationship as unhealthy and details an occasion in which Rosa initiated rough sex with her partner, who had returned home angry, because she felt that was the only way she could possibly defuse his anger and thereby avoid an assault.[190] Palmer's failure to acknowledge that consent is embedded within a request or initiation, combined with her underestimation of the context-sensitivity of consent, results in a mistaken conclusion that reliance on a consent standard cannot mark this encounter as non-consensual and thus wrongful. Given its functional role, consent *must* look behind, beyond and before the moment of the 'yes', or, indeed, the request, to determine whether the assent (which – remember – may be embedded within a request, invitation or initiation) amounts to consent.

[189] Feinberg, *Harm to Self* (n147) 178.

[190] Palmer (n156) 21.

Palmer's second error is to focus on *positive* sexual encounters rather than permissible ones. Consent neither ensures nor forecloses negotiation, discussion, and the joint construction and pursuit of sexual engagement shaped by the desires, needs and emotions of both parties. However, in critiquing consent for failing to secure this standard, Palmer assumes that the distinction between rape/sexual assault and legal sexual activity should map onto the distinction between morally valuable, good, or positive sex, and morally suspect sex. The role of the criminal law in general (including the law of sexual offences) is not to distinguish between the morally good or valuable on the one hand and the unlawful on the other. That which is morally permissible includes the morally invaluable or unethical.[191] We should not expect the definition of rape and sexual assault to identify morally 'good' sexual activity by reference to the 'negative space' of permissibility around the criminal prohibition. I will now turn to consider in more detail the distinctions between rape/SA, ethical sex and unethical sex.

2.4 SEX, ETHICS AND RAPE

In any discussion of the scope and application of sexual offences it is vital to keep in mind that the proper use of the criminal law does not extend to the enforcement of morally valuable sexual behaviour. Waldron takes it as uncontroversial that a person may have a legal right (whether in the sense of a hohfeldian privilege or claim-right) to do something that is morally wrong,[192] and the legally impermissible is a subset of the morally impermissible (wrong).[193] It may be wrong to

[191] Wertheimer (n81) 5-7.

[192] Jeremy Waldron, 'A Right to Do Wrong' (1981) 92 Ethics 21, 23.

[193] Wertheimer (n81) 5-7.

break confidences, break a promise, or lie, but very often these moral wrongs are not subject to criminal liability.[194] In the sexual context, we might readily agree that it is morally wrong to commit adultery, or to have sex with the spouse of a close relative or friend, but these activities are no longer contrary to law.

The morally impermissible is also a subset of the morally unworthy (bad):[195] a boy's refusal to share his chocolates with his sister may be open to moral criticism, but his refusal is not morally impermissible.[196] The key to understanding the difference between the morally unworthy and the morally impermissible is not whether D has a moral reason to do or refrain from doing the morally bad act, but whether others have a moral reason to intervene to prevent D's doing that act. If we have a reason *not* to do X, the mere right to do X does not provide a *reason* to do it. However, there may also be 'moral reasons why others should not interfere' with A's doing of X.[197]

The distinctions between the morally good, the morally bad, the morally impermissible, and the legally impermissible, are of crucial importance in the sexual context, but remain under-explored by commentators and academics.[198] The 'liberal tendency to valorize consensual sex'[199] may ultimately undermine efforts to prevent morally and legally impermissible sexual activity, and

[194] Of course, in certain circumstances criminal liability might follow; fraud or perjury criminalise lies in certain contexts, but lies in general are not subject to criminalisation as a result of their moral wrongfulness.

[195] Wertheimer (n81) 5-7; Waldron (n192).

[196] Wertheimer (n81) 6, citing Judith Jarvis Thomson, 'A Defense of Abortion' (1971) 1 Philosophy and Public Affairs 47.

[197] Wertheimer (n81) 5-7.

[198] West, 'Sex, Law and Consent' (n90) 224.

[199] ibid.

change a culture in which the desires of young women in particular are conditioned through a lens of gendered sexual expectations.[200]

West argues that liberal accounts of rape/SA often ascribe two distinct purposes to consent. The first is to demarcate between legal and illegal sexual activity. The second, 'rhetorical', purpose, seeks to 'legitimate' all consensual sex. West resists the idea that consensual sex should be immune from '[non-criminal] legal regulation of any sort, including the imposition of civil sanctions, and perhaps non-legal community disapprobation or political critique'.[201] Similarly, Nicola Gavey has argued that there exists a 'gray area' of unjust sex that does not fall within the category of rape/SA, but which cannot be described as ethical sexual activity.[202] Cahill has sought to articulate the shared (un)ethical qualities that unite 'unjust sex' and rape, as well as explain the basis of the distinction between the two.[203] In the process she provides an account of ethical sex that reflects similar thematic concerns to accounts of 'good' sex offered by both Gardner[204] and West.[205] I will consider these accounts of ethical or 'good' sex, identify similar themes and provide a tentative working account of what marks out 'bad' sex. I will then explain why morally bad sex should be distinguished from rape and the 'valorization' of consensual sexual activity is so concerneing. The distinction between lawful sex and ethically good sex is an important starting

[200] See Sarah J Walker, 'When "No" Becomes "Yes": Why Girls and Women Consent to Unwanted Sex' 6 Applied and Preventive Psychology 157.

[201] West, 'Sex, Law and Consent' (n90) 222.

[202] Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape* (Routledge 2005).

[203] Ann J Cahill, 'Recognition, Desire, and Unjust Sex' (2014) 29 Hypatia 303; Cahill, 'Unjust Sex vs. Rape' (n159).

[204] Gardner, 'The Opposite of Rape' (n188).

[205] West, 'Sex, Law and Consent' (n90).

point for assessing the legality of mistaken sex and sex obtained by deception, as such sex might fall short of the standards of ethically 'good' sex without amounting to rape/SA.

2.4.1 ETHICAL VS UNETHICAL SEX

Rape/SA scholars often locate the moral 'goodness' of sex in a concept like mutual desire. Pineau[206] and Chamallas[207] construct accounts of rape based on the premise that a criminal charge is appropriate in circumstances where the sex was not mutually desired.[208]

However, putting aside the flaws in conflating a model of 'good sex' with lawful sex, any model of good sex should not be based on desire, at least in this simplistic way. Sexual desire is a complex phenomenon and, for many women in particular, research suggests that desire may be reactive, leaving open the very real possibility that women might desire *to feel desire* and so engage in perfectly ethical sexual activity hoping that sexual desire develops in the process.[209] Moreover, sex that is unwanted may nevertheless be welcome, and consented to 'for friendship, for love, as a favour, to cement trust, or to express gratitude', in the context of a 'relationship that is in its whole constructive, healthy, and pleasing'.[210] To hold such sex as unethical would be to over-simplify both the relationship between 'good' sex and desire and also an individual's decision-making process in light of their own complex desires.

[206] Pineau (n156).

[207] Chamallas (n90).

[208] See Eric Reitan, 'Rape as an Essentially Contested Concept' (2001) 16 Hypatia 43, 59.

[209] See Cahill, 'Recognition, Desire, and Unjust Sex' (n203).

[210] West, 'Sex, Law and Consent' (n90) 239. This point is also made by Gavey (n202) 151, cited with approval in Cahill, 'Recognition, Desire, and Unjust Sex' (n203) 314.

Cahill has offered a more sophisticated account of good sex. Building on the work of Nicola Gavey,[211] Cahill accepts that there is a distinction between 'sexual violence' and 'unjust sex'.[212] According to Cahill, 'just' (ethical) sex is marked by 'the recognition by the parties involved of the relevance and efficacy of each other's desire or lack of the same… [T]he presence or absence of desire *matters* to the quality or even the occurrence of the interaction'.[213] Where D does not care about C's first or second order desires,[214] and C is not 'empowered to affect… the nature of the interaction,' the sexual interaction is unethical.[215] Cahill observes that the 'desire to provide one's partner with a sexual experience that one may not have an internal desire for may not be ethically problematic, if the desire-to-provide is recognized as a generous act that makes a certain interaction possible', and generosity here is distinct from acquiescence, in that generosity requires an 'ability to affect the situation… to be seen as capable of doing otherwise'.[216] Cahill's account thus recognises the importance of desire to shaping ethical sexual interaction without privileging the existence of sexual desire at the inception of, or even during, a sexual encounter over other ethically unproblematic second order desires.

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[211] Gavey (n202).

[212] Cahill, 'Unjust Sex vs. Rape' (n159).

[213] Cahill, 'Recognition, Desire, and Unjust Sex' (n203) 315.

[214] The distinction between first and second order desires is drawn by Harry Frankfurt; a first order desire is a desire in relation to an action: 'I want to eat that chocolate bar'. A second order desire is a desire in relation to a desire: 'I want to *not want* to eat that chocolate bar' (because it is bad for my health). See Harry G Frankfurt, 'Freedom of the Will and the Concept of a Person' (1971) 68 J Phil 5.

[215] Cahill, 'Recognition, Desire, and Unjust Sex' (n203) 316.

[216] ibid.

Gardner offers a different, more demanding conception of 'good sex'. He argues that good sex involves 'teamwork'.[217] This goes beyond merely recognising the needs, interests and desires of the other but insists that participants engaging in good sex have a shared goal which is regarded as something that is, and perhaps can only be, achieved by both acting together as a 'team'.[218] Participants in good sex must remain highly responsive to the contributions of others and the responses to those contributions in 'a sustained interpersonal feedback loop'.[219] There need not be exact symmetry in terms of action or activity but there must be the sense that the activity is 'not done by one… to the other… but… by both together'.[220] Such sex may not be *morally* good; it might be undertaken for immoral purposes or as part of some 'wider nefarious scheme'.[221] However, like Cahill's conception of 'just sex', Gardner's account of 'good sex' does speak to the ethical quality of the sexual interaction as between the parties directly engaged in that interaction.

Both Gardner and Cahill's accounts require some kind of cooperation in light of the desires of both parties. In this respect, they both resonate with Nussbaum's account of objectification. Nussbaum identifies seven 'notions… involved' in treating something or someone as an object, including the denial of subjectivity (where 'the objectifier treats the object as something whose experience and feelings… need not be taken into account').[222] We see this at work in both

[217] Gardner, 'The Opposite of Rape' (n188).

[218] ibid 8.

[219] ibid 7.

[220] ibid 11-12.

[221] ibid 5.

[222] Martha C Nussbaum, 'Objectification' (1995) 24 Philosophy & Public Affairs 249.

conceptions of bad sex. If D is sensitive to C's choice to authorise the relevant touching, and any subsequent revocation of that authorisation during the course of the activity, and that authorisation amounts to consent, in accordance with the requirements of the right to sexual integrity, then the sex is lawful, but not necessarily ethical. If D does not recognise and adjust to C's desires or feelings in relation to the details and the dynamic of the sexual interaction, or does not attempt to ensure that the pleasure and enjoyment is mutual, in so far as possible and in accordance with C's second order desires, then the sex, though consensual and lawful, is ethically problematic. D demonstrates a denial of, or lack of respect for, C's subjectivity and thus objectifies her. The analysis in Part III of this thesis will explore how sex obtained by deception or on the basis of a mistake does not always violate the right to sexual integrity. Such sex may nevertheless fail to meet the ethical standards set out here. As this discussion demonstrates, however, the distinction between lawful and ethical sex is not unique to the deception/mistake context.

2.4.2 UNETHICAL SEX VS RAPE

Following Cahill's account, we might understand unethical sexual activity (on D's part) to be sexual activity in which D denies the subjectivity of his partner – in which D fails to recognise the relevance and importance of C's desires, feelings, and needs in shaping the nature and quality of the encounter, beyond merely seeking her consent to sexually touch. The accounts of rape/SA discussed in section 2.3.2. above blur this distinction by including consensual, unethical sex within the scope of criminal liability.[223] This move must be resisted.

Gardner and Shute argue that in general people 'must have some moral space to go wrong and to permit others to go wrong with them', and that we should allow people to engage in

[223] Cahill is less emphatic on this point, stating that she does not assume that unethical sex should be illegal, but doubts the whether 'the US justice system has the necessary conceptual and bureaucratic tools to address such cases', Cahill, 'Unjust Sex vs. Rape' (n159) 758.

'dehumanising' sexual activity 'when [their]… consent is genuine', because the 'moral credit' people are given to make such choices 'rehumaniz[es]' them.[224] Furthermore, the actions of the other party/ies do not constitute a wrong *against* the consenting party, or at least they are not 'a wrong against [her] *under the same heading* as that under which rape is a wrong against its victim', because 'consent is capable of licensing' these kinds of 'suboptimal' sexual activities. In this sense, C *positively* exercises her sexual autonomy.[225] The law of rape does not track the boundary between 'good' and 'bad' sex, because an individual can and should be able to license another to engage in bad, or 'dehumanising' sexual activity with them. To do otherwise would be to infantilise individuals through the assumption that autonomous consent cannot legally authorise such sexual activity.

The criminalisation of unethical sexual activity implies that people – particularly women – must be saved from their own poor decision-making. If the law refused to recognise consent in order to express moral condemnation of, or to protect C from, the selfishness and objectification inherent in the activity to which that consent is given, the criminal law would strip the consenting party of agency and responsibility. Whilst pervasive gender inequality exists in society, is played out through culture, art, politics, and traditional expectations of gender roles in a way that too-often encourages and rewards unethical conduct by men, constructs female sexual desire and disempowers women to pursue their own sexual desires, the criminal law cannot support the exercise of sexual agency and autonomy if sexual decision-making is only recognised and supported provided that the choice is a good one; one that does not involve subjecting oneself to poor treatment, or undermining one's long term best-interests.

[224] Gardner, *Offences and Defences* (n98) 20.

[225] ibid 20-21.

More systemically the criminal law is not apt to respond to the social conditions that shape choice and disempower women to engage in sexual activity on their own terms. The criminal law is premised on individual responsibility for socially aberrant behaviour. The risk in using the criminal law to punish and prohibit unethical sexual conduct - D's reliance upon a permission to engage in activity despite the fact that D's intentions and perspective in relation to the consenting party are selfish and objectifying - risks obscuring the broader social factors at work. It risks inhibiting our ability to recognise and reconstitute those social forces that disempower sexual decision-making and encourage and normalise unethical sexual conduct. This does not mean that such social forces must be accepted, and unethical (but consensual) sexual activity given immunity from criticism or indeed any state response outwith the criminal law. As West, Gardner and Cahill have variously contended, any temptation to 'valorize'[226] consensual sexual activity must be resisted. Whilst the criminal law may not be an appropriate regulatory tool to respond to unethical sexual activity, state policy may play a legitimate role in encouraging ethical sexual activity amongst young men in particular, and empowering young women to engage in sexual activity on their own terms.

CONCLUSION

In this chapter, I have argued that a focus on *experience* leads to the mischaracterisation of both the harm and wrong of rape/SA. Accounts that foreground victim experience are often narrower in scope than the account offered here, and arguably trivialise certain non-consensual conduct. Anderson, for example, claims that 'in some cases [non-consensual sex] may be little

[226] West, 'Sex, Law and Consent' (n90).

more than a minor irritant'.[227] By rejecting experience as the touchstone for identifying the scope of criminal liability, an account which recognises the violation of sexual integrity as the conceptual core of rape/SA recognises the severity and gravity of a wider range of sexual wrongdoing.

This project ultimately seeks to identify the circumstances in which sexual activity obtained by deception, or on the basis of an uninduced mistake, should amount to a criminal offence. We might approach that question by asking whether or not the consent given was 'valid', in light of the deception or mistake. However, I have argued in this chapter that consent plays a functional role in a rights-based account of rape/SA. It is the mechanism through which the right to sexual integrity is protected. Accordingly, it is preferable to assess whether or not D's sexual touching/penetration violated C's right to sexual integrity. I will consider how this right should be understood and applied in the context of deception and uninduced mistake in Part III. The final section of this chapter is an important reminder that the analysis offered in Part III should leave room for the existence of consensual, but unethical, sexual activity in the deception/mistake context.

[227] Anderson (n90) 67.

PART II

Let us return, briefly, to the current approach taken by English courts to deceptive and mistaken sex. As noted in Chapter 1 the first step in the courts' approach to s74 is to ask whether the complainant's material mistake[228] was induced by deception, or whether the case was one of non-disclosure. Yet there are two competing theoretical paradigms within which we might deal with 'information gap' cases. Within one paradigm, deception invalidates consent, whereas material mistakes do not. In the other, the focus is on material mistake alone, at least at the consent-validity stage of the analysis. On this second account, what matters is that the complainant ostensibly consented on the basis of a mistake; but for the mistake, she would never have given that ostensible consent. Such mistaken consent is not valid consent, even if that mistake was *not* brought about through deception, and even if the defendant was not aware that the complainant was mistaken.[229] Of course, the aetiology of the mistake may be indirectly relevant at the mens rea stage. If D deceived C, thereby inducing the mistake and the resulting consent, it is more likely that D will be held liable for the non-consensual sexual activity, than if C was merely mistaken (either on a recklessness-based mens rea standard or a culpable inadvertence-based mens rea standard) than if C was merely mistaken. However, the deception/mistake distinction is not dispositive of the mens rea question – it is merely of potential evidential relevance. In Part III of this thesis, I will consider these competing approaches in more detail, and develop an argument in support of distinguishing between deception and non-disclosure at the consent stage of the analysis. But any normative

[228] Material in the but-for sense, rather than the objective sense.

[229] Jonathan Herring, 'Mistaken Sex' [2005] Crim LR 511.

argument in favour of such a distinction is contingent upon a coherent definition of deception and a robust distinction between deception and non-disclosure/mistake.

The way that the Court of Appeal draws this distinction in *McNally*[230] suggests an understanding and taxonomy of deception and related conduct that leaves much to be desired.[231] Indeed, the incoherent analysis in *McNally* has led Alex Sharpe to claim that the distinction between deception and non-disclosure is 'inherently prone to analytical collapse'.[232] But Sharpe is too quick to extrapolate this pessimistic conclusion from the Court's application of their ill-reasoned version of the distinction to the facts of *McNally*. Whilst the so-called 'gender fraud' cases do pose particular challenges to applying the deception/non-disclosure distinction, it does not automatically follow that the distinction cannot be drawn coherently.

The aim of this Part is to construct a cogent legal definition of deception and distinguish deception from a related concept, 'pure non-disclosure' or 'uninduced mistake'.[233] I will develop a robust conceptual foundation capable of carrying the normative weight placed upon it in Part III. In constructing these definitions, I will draw upon the philosophy of language and moral philosophy, as well as civil fraud, i.e., the tort of *deceit*, the current criminal offence of *fraud* under sections 1 – 4 of the Fraud Act 2006 (FA 2006), and the now repealed *criminal deception* offences[234]

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[230] (n5).

[231] See Ch 1.2.

[232] See Sharpe, 'Expanding Liability for Sexual Fraud' (n51) and Sharpe, *Sexual Intimacy and Gender Identity 'Fraud'* (n52) 120-30.

[233] These two terms denote the same concept, described from differing perspectives: from that of D who does not disclose, and from that of C whose false belief arises from an uninduced mistake. I do not use the unqualified terms 'non-disclosure' and 'mistake' because all deceptions involve a mistake and in some, limited, circumstances, non-disclosure can amount to deception. See Ch 4.

[234] For the sake of efficiency, I use the term 'doctrines', somewhat imperfectly, to refer to these criminal offences and civil causes of action together.

in the Theft Acts 1968 and 1978.[235] Unfortunately, major work on the definition of deception in the field of moral philosophy does not provide a basis of a legal definition that would be workable in general, and in the sexual offences context in particular. As will be shown in Chapters 3 and 4, certain key questions are left open by the philosophical literature,[236] which must be answered if the law is to define deception with any degree of certainty. Unfortunately, as Chapter 3 shows, the existing legal doctrines that address deceptive conduct do not offer a coherent or principled translation of deception. Chapter 4 explains how a causation-based definition should be developed in a way that captures both active deception (by conduct) and passive deception (by omission). I will also demonstrate how passive deception and 'pure non-disclosure' are distinguished by reference to the causation analysis. Finally, I will set out the necessary mental elements of deception and explain how the 'external' causal connection between deception and consent should be understood in the law of sexual offences.

By looking to both philosophy and law in the search for the optimal legal translation of deception, the strengths and weaknesses in current legal approaches can be diagnosed, and the distortions of deception apparent in other areas of the law can be avoided in the sexual offences context.

One final note on terminology: in addition to using D and C to denote *defendant* and *complainant*, I will also use it to denote *defendant* and *claimant* in the context of civil causes of action, and to both at once. I will also use these terms to refer to the deceiver and the deceived when discussing deception in general.

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[235] Theft Act 1968 (TA 1968), s15, 15A, 16, 20(2); Theft Act 1978 (TA 1978), s1, s2(1)(a), s2(1)(b), s2(1)(c). Note that in this Part, offences and causes of action will be written in italics, so as to avoid confusion between different usages of common terms, i.e., to distinguish between *'deception*' as an offence under the Theft Acts and deception as a general concept, and to differentiate '*misrepresentation*' as a cause of action from *a* misrepresentation.

[236] The deception/non-disclosure borderline; the definition of truth; whether recklessness or intention suffices with regard to D's mens rea in relation to C's false belief.

CHAPTER THREE: REJECTING A REPRESENTATION-BASED FRAMEWORK FOR LEGAL TRANSLATIONS OF DECEPTION

In this chapter, I will argue that the legal constructions of deception in English law are anchored around the concept of a false representation, and that this involves a departure from the non-legal definition of deception and is inappropriate in the sexual offences context. In section 3.1, I will set out a detailed overview of the dominant approach to deception within the philosophical literature, before setting out more brief descriptions of the three legal doctrines, that are of primary interest and import when assessing legal translations of deception: *deceit*, *criminal deception* and *fraud*.[237]

In section 3.2 I will begin the search for an optimal translation of deception by drawing insights from across these philosophical and legal approaches and unpacking the details of the legal translations of deception in more detail. I begin with explaining the relatively uncontroversial: all of these translations of deception rightly involve a belief, held by C, of a false proposition of fact.[238] More complex is the relationship between that belief and D's conduct. The hallmark of non-legal understandings of deception is a causal relationship between D's conduct and C's false belief. Yet the legal doctrines centre their understanding of deception around the notion of a representation.[239] Although this orthodox approach has received some critical attention in the

[237] For reasons given in Ch 3.1.3, *fraud* does not map onto deception. Nevertheless, certain fraud cases are worthy of analysis when considering how particular elements of a legal definition of deception ought to be understood.

[238] Recent developments in the tort of deceit have cast doubt on whether a false belief on C's part is necessary. See discussion of *Hayward v Zurich Insurance Co Plc* [2016] UKSC 48, [2016] 3 WLR 637 at text to n377-385.

[239] In the context of *deceit*, otherwise known as fraudulent misrepresentation or 'civil fraud', the definition of an 'actionable misrepresentation' is the analytical and judicial starting point but it should be noted that actionable misrepresentations may have alternative legal consequences: claims in contract law for rescission of the contract and damages under s2(1) of the Misrepresentation Act 1967 (MA 1967), or claims for negligent misrepresentation/misstatement under the rule in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL)

context of academic treatment of the *criminal deception* offences,[240] it appears to receive overwhelming acceptance at both the academic and judicial level. Sections 3.2 and 3.3 will challenge this orthodox approach, in particular by reference to the incoherent judicial understanding of implied representations.

There is a tension running through the civil law between an often-stated definition of an implied representation,[241] and the desire to ensure that fraudulent representors are captured by *deceit* or *criminal deception*, even if the proposition of fact they intended to represent to C would *not* have been inferred by a reasonable person with those characteristics of C which were known to D. In other words, the most common expression of the test for an implied representation seems to leave an 'unreasonable representee' gap. As will be detailed in section 4.3, the only clear judicial attempt to remedy this gap[242] involves a misreading of previous authority[243] and is at odds with the generally accepted orthodoxy that 'representation' has the same meaning across all the various causes of action involving actionable misrepresentations in the civil law. An optimal legal translation of deception should not include such an 'unreasonable representee' lacuna in coverage. This is particularly important in the sexual offences context where much communication will be implicit, where interpersonal or structural vulnerabilities may exacerbate the likelihood of deception being committed in circumstances where C may well draw objectively unreasonable

may follow. These alternative causes of action are not directly relevant to this chapter as, by virtue of their mens rea requirements, they do not map onto deception.

[240] See Anthony Arlidge, Jacques Parry and Ian Gatt, *Arlidge and Parry on Fraud* (2nd edn, Sweet & Maxwell 1996) Ch 4(a).

[241] The meaning that would be inferred from the words/conduct of the representor, D, by a reasonable representee with those characteristics of the actual representee, C, which were known to D.

[242] *Leni Gas and Oil Investments Ltd v Malta Oil Pty Ltd* [2014] EWHC 893 (Comm).

[243] *Akerhielm v De Mare* [1959] AC 789 (PC).

inferences, and where any exploitation of such unreasonable inference or vulnerability ought to be regarded as seriously as any other deception. The analysis of *deceit* offered in this chapter demonstrates that the concept of a 'representation' should not be used in the definition of deception adopted here. The ambiguity evident in existing representation-based frameworks risks destabilising a definition offered in a different context; this is best avoided. An alternative approach, explored further in Chapter 4, follows the philosophical literature and will be anchored around a causation requirement.

3.1 DEFINITIONS OF DECEPTION IN PHILOSOPHY AND IN THE LAW

My aim in this section is to set out a brief account of the leading philosophical definition of deception, before explaining how deception is 'translated' into a legal context by the *criminal deception* offences, *fraud*, and the tort of *deceit*. I will provide only an overview of these three legal doctrines, as the main point here is that the biggest difference across the two disciplines rests in the lawyer's insistence upon a *representation* requirement. The remainder of this chapter rejects this orthodox legal approach to 'translating' the concept of deception into a legal context, in favour of the causation-based approach taken by many philosophers.

3.1.1 PHILOSOPHICAL APPROACHES

Philosophers have defined deception in various ways. For Bok, 'when we undertake to deceive others intentionally, we communicate messages meant to… make them believe what we ourselves do not believe'.[244] Carson roughly sketches a definition of deception as 'intentionally causing

[244] Sissela Bok, *Lying: Moral Choice in Public and Private Life* (Harvester 1978) 13.

someone to have a false belief that the deceiver believes to be false'.[245] Deception may encompass a broader range of conduct than lying, as the latter is restricted to false assertions. Lies must be literally false, rather than technically true, but misleading in their effect.[246] Whilst lying does not require verbal conduct,[247] non-verbal lies are restricted to 'conventional' signs, as opposed to 'natural or causal' signs, - i.e. non-verbal conduct that is effectively equivalent to verbal language.[248] Deception, on the other hand, '[encompasses] an unlimited variety of devices by which the deceiver creates false impressions in others' minds… [including] actions and omissions, as well as words and strategic silences.'[249]

Deception is a 'success verb', or a 'perlocutionary' concept.[250] If I try to deceive you, but I fail to cause you to obtain or persist in a false belief, then my actions do not amount to deception, but attempted deception. Lies will not always deceive ; if I lie to you and fail to cause you to obtain a false belief, my actions still amount to a lie. The relationship between lying and deception is thus more complex than a category/subcategory relationship. Lies that do not cause the hearer to obtain false beliefs are still lies but are not instances of deception (though they may amount to

[245] Thomas L Carson, *Lying and Deception: Theory and Practice* (OUP 2010) 46.

[246] Roderick M. Chisholm and Thomas D. Feehan, 'The Intent to Deceive' (1977) 74 J Phil 143; Stuart P Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (OUP 2007) 77-78; James E Mahon, 'Two Definitions of Lying' (2008) 22 Intl J of Applied Philosophy 211, 215; Thomas L Carson, 'Lying, Deception and Related Concepts' in Clancy W Martin (ed), *The Philosophy of Deception* (OUP 2009); Don Fallis, 'What is Lying?' (2009) 106 J Phil 29; Carson, *Lying and Deception* (n245) 49; Andreas Stokke, 'Lying and Asserting' (2013) 110 J Phil 33.

[247] Fallis, (n246) 38; Carson, *Lying and Deception* (n245) 18; Mahon (n246) 215.

[248] Mahon (n246) 215. Mahon gives examples of feigning a yawn or wearing a hairpiece or an engagement ring as actions which do not have a conventional language meaning.

[249] Larry Alexander and Emily Sherwin, 'Deception in Morality and Law' (2003) 22 Law & Phil 393. Alexander and Sherwin also take as read the additional requirement that the deceiver *intend to deceive* his audience.

[250] Mahon (n246) 211; James E Mahon, 'A Definition of Deceiving' (2007) 21 Intl J of Applied Philosophy 181, 181.

attempted deception), and so-called 'bald-faced' lies do not require any intention to deceive.[251] Carson, whose particularly thorough treatment of deception largely informs the analysis adopted in this Part, defines the concept as follows:

D deceives C when

- D intentionally causes C to have, or persist in having
- false beliefs about a proposition of fact 'X'
- D knows or believes that X is false, or D does not believe that X is true.

This differs markedly from the various legal doctrines, outlined below, which are structured around a *false representation*, rather than a causal, requirement (that D cause C to have or persist in having a false belief).

The Gricean framework of conversational implicature can help us to understand this causal relationship, at least where verbal deceptions are concerned. Grice argues that as 'conversation', essentially using language to communicate within a linguistic community, is a cooperative exercise; there is 'to some extent, a common purpose… or at least a mutually accepted direction'.[252] This

[251] See Roy Sorensen, 'Bald-Faced Lies! Lying without the Intent to Deceive' (2007) 88 Pacific Philosophical Q 251; Fallis (n246); Carson, *Lying and Deception* (n246) 49; Stokke (n246). Such lies constitute false statements made with neither the intention that the listener believe the statement to be true, nor that the listener believes that the speaker believes the statement to be true. For example, one can imagine a police officer calling at a house after the neighbours report screaming. A visibly injured woman opens the door and tells the police officer that she fell down the stairs. The woman does not wish to persuade the police officer that she sustained her injuries in this way. Indeed, she is hoping that the police officer will disbelieve her and investigate further. She is fairly certain that the police officer will not believe her account of her injuries. She gives a false account because she is scared of the consequences if her violent partner were to hear her telling the police officer the truth: that he has beaten her. If lying is concerned primarily with the incongruity between the mental state of the speaker (knowledge or belief that P is not true) and his representation (that P is true), or 'to have one thing in one's heart and another ready on one's tongue,' (Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor tr and ed, CUP 1996) 182) it is not clear why this kind of bald-faced lie (although perfectly justifiable) should be excluded from the definition.

[252] H Paul Grice, 'Logic and Conversation' in P Cole and JL Morgan (eds), *Syntax and Semantics: Speech Acts* (Academic Press 1975) 44-45.

does not mean that conversations cannot be adversarial, but, in order to make sense of each other, individuals must play by the same rules. Under the umbrella of a broad 'cooperative principle', Grice articulates various norms that fall under four broad maxims: Quantity, Quality, Relation and Manner. Under these maxims fall submaxims:

Quantity:

1 Make your contribution as informative as is required (for the current purposes of the exchange)

2. Do not make your contribution more informative than is required

Quality:

1. Do not say what you believe to be false.

2. Do not say that for which you lack adequate evidence.

Relation

1. Be relevant

Manner:

1. Avoid obscurity of expression.

2. Avoid ambiguity.

3. Be brief (avoid unnecessary prolixity).

4. Be orderly.[253]

[253] ibid 45-46.

Grice's theory demonstrates how ostentatiously 'exploiting these maxims gives rise to 'conversational implicatures' or implied meaning. For example, if you ask me whether I will vote for a particular political party, I might respond with '*pigs can fly!*' I seem to have blatantly flouted the first maxim of Quality. In order to reconcile this statement with the assumption that I am observing the cooperative principle, a conversational implicature is generated. I have 'exploited' the maxim to communicate the proposition that *'I am about as likely to vote for that party as pigs are to fly - not very!'*. If a speaker quietly and covertly 'violates' this maxim, saying something false without being so obvious that the hearer detects the falsity and reasons from the normative principle of cooperation towards an implicated meaning, then the false statement is likely to be read as true (as the norms of conversation require participants not to say that which is false).[254]

Don Fallis has argued that a *lie* should be defined as a violation of Grice's first maxim of Quality.[255] This understanding of lying has the advantage of distinguishing lies from false statements made in irony or other ways of exploiting the maxim to imply meaning, *and also includes* within the definition of lying so-called called 'bald-faced lies'.[256] However, Fallis' theory does not fully articulate how 'sometimes the *violation* of the first maxim of Quality may be anchored in flouting', as opposed to a covert violation.[257] I suggest that the difference between lying and deception might be that deception delays discovery of, or masks, the truth, whereas a lie denies it

[254] ibid 49.

[255] Fallis (n246).

[256] See n251. Thomas Carson offers a different alternative, based on a concept he describes as 'warranting the truth' of a statement which also excludes jokes, etc., and includes bald-faced lies, Carson, *Lying and Deception* (n245) 24-30. However, Carson's theory excludes a situation where an individual actively, fully, and deceitfully disclaims their warrant of the truth, before deliberately making a false statement (I didn't get a good view of the incident, so I may be wrong, but I think that the suspect was driving a blue car…). Secondly, he does not identify the normative basis of this warrant.

[257] Marta Dynel, 'A Web of Deceit: A Neo-Gricean View on Types of Verbal Deception' (2011) 3 Intl Rev of Pragmatics 139, 149.

outright. A 'metaphorical lie' is, on this account, more like a non-lying deception, as the listener has an opportunity to unmask the metaphor. Consider an easier example:

> I ask James whether he has ever held a Swiss bank account. He answers, 'my company did last year'. This statement is true. James believes it to be true. This is not a lie. However, the representation James means to communicate to me (that he has never held a Swiss bank account – only his company did) is false. James knows it is false.[258]

I could follow up the question with another: 'I didn't ask about your company; what about you? Have *you* ever held a Swiss bank account?' This leaves James forced to lie, tell the truth, or refuse to answer the question. If this explains the distinction between lies and deception, it might in turn indicate why lies are often thought to be worse, all other things being equal, than deception. Deception leaves a further opportunity to reach the truth, within the conversation. Once lied to, however, an individual usually can do no more to ascertain the truth from the speaker without looking to evidence beyond the conversation (which may not exist). Thus, lying, at least epistemically, appears to be more problematic.

The Swiss bank account is a good example of a 'half-truth'. Just as a lie can be understood as a covert violation of the First Maxim of Quality, verbal deception can be understood as violations of other maxims. The answer I give about my *company's* Swiss bank account flouts the Relevance Maxim: it is seemingly irrelevant to the question you asked and therefore gives rise to the implicature that I have never held a Swiss bank account and that the closest I have come to holding such an account was when my company held one. If I have, in fact, held a Swiss bank account, this is a false implicature, which meets the definition of deception, and might be characterised as a 'half-truth'. It does not provide you with the information you have requested, and which I know you need, but I have provided you with true information, which in turn implies

[258] This example is drawn from *Bronston v United States* 409 US 352 (1973) (US).

false information. Crucially, for our purposes in understanding a causal account of deception, given the way conversation functions, I can be said to have caused your false belief. On the same principles, false implicatures arising under the violations of the other maxims will be deceptive. For example, if you ask me how many children I have, and I say, 'I have a 5 year-old son, and a 3 month-old daughter,' but I exclude the fact that I also have a troublesome 25 year-old son', I violate the First Maxim of Quantity: *make your contribution as informative as is required.* Violating the maxim causes you to obtain a false belief (I have two children).

The Gricean framework does not cover the whole ground in understanding deception. It adds nothing to our understanding of non-conversational deceptions.[259] Consider the well-known example provided by Kant of an individual who intends to deceive people into thinking he is taking a journey. He packs a suitcase, and his observers draw the intended conclusion. He has deceived them because, inter alia, his actions have caused their false belief. But he has not made any conversational contribution and he has not lied to them. Similarly, unless silence is part of a quite specific conversational framework,[260] the Gricean framework does not explain when silence/non-disclosure will cause false beliefs. The point of this discussion is not, therefore, to suggest that all deception can be understood through a Gricean lens, but rather to encourage more careful thought about how we label various examples of potentially deceptive conduct.

[259] I say non-conversational, rather than non-verbal, on the basis that some non-verbal signals function as language, see n248.

[260] In which a teacher, for example, asks anyone who forgot their swimsuit to raise their hand before going on the swimming trip and a child neither raises her hand nor otherwise indicates to the teacher that she forgot her suit. This silence comes in response to a direct question, which is crucial to the derivation of some kind of positive meaning from this silence, as it violates the First Maxim of Quantity.

3.1.2 DECEIT AND MISREPRESENTATION IN CIVIL LAW

Deception is primarily translated into the civil law through the common law tort of *deceit*, sometimes referred to as *fraudulent misrepresentation* or *misstatement. Deceit* often overlaps with the factual circumstances that may ground a claim under the MA 1967. If a defendant induced the claimant to by making a misrepresentation, the claimant would have a claim under the MA 1967.[261] It is not uncommon for parties to allege fraudulent misrepresentation and non-fraudulent misrepresentation in the alternative.[262] Given the overlapping claims of fraudulent and non-fraudulent misrepresentation, it is a challenge to distil a translation of deception from the case law. Nevertheless, it is clear that the first step to proving liability in a *deceit* case, or any other case at civil law involving an alleged misrepresentation (fraudulent or not), is to establish that the defendant made an 'actionable misrepresentation', which many regard as a proxy for the internal causal link that characterises deception in its non-legal sense.[263]

[261] This is complicated by the fact that the court need not make a finding of fraud to attract damages on the fraud scale. The respondent to a claim under the MA 1967 will be liable for damages on the fraud scale, 'notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true', (s2(1)).

[262] However, as noted by Chamberlain J in *Hussain v Mukhtar* [2016] EWHC 424 (QB), an alternative claim under s2(1) of the MA 1967 should be pleaded clearly and expressly in alternative terms. Fraud must always be specifically pleaded and supported with sufficient particulars, see *Three Rivers DC v Bank of England (No 3)* [2001] UKHL 16, [2003] 2 AC 1 [183]-[190].

[263] John Cartwright, *Misrepresentation, Mistake and Non-disclosure* (4th edn, Sweet & Maxwell 2017) paras 1.03: 'misrepresentation is really a sub-category of mistake: induced mistake. In a claim of misrepresentation the claimant asserts that… the defendant caused him to make a mistake', 1.04: 'The claim for non-disclosure is… fundamentally different from the claim for misrepresentation in that, as in the case of mistake, the claimant cannot say that his misunderstanding or lack of information was *caused by* the defendant', 17.43: 'It has generally been said that… [deceit] is committed only if the defendant caused the representee to be deceived, which means that he must have made an active misrepresentation', 5.01, 5.02, 5.06, 17.4; John Cartwright, 'Defects of Consent in Security of Contract' in Peter Birks and Arianna Pretto-Sakmann (eds), *Themes in Comparative Law: In Honour of Bernard Rudden* (OUP 2002),154; Peter MacDonald Eggers, *Deceit: The Lie of the Law* (Informa 2009) para 2.73: 'it might be thought that deceit is a form of action that rests on positive assertions… the misunderstanding… is *created by virtue of the defendant's conduct*, which *necessarily attends* a positive misrepresentation…. The untrue statement or representation is a communication between minds… By contrast, a non-disclosure *does nothing but fail to enlighten the claimant of his or her own misapprehension, which itself is not necessarily produced by the defendant's affirmative conduct*' (emphasis added); John Cartwright, 'Liability in Tort for Pre-contractual Non-disclosure' in A. S. Burrows and Edwin Peel (eds), *Contract Formation and Parties* (OUP 2010).

An actionable misrepresentation comprises a (1) false[264] (2) statement of fact[265] (3) made to C or his agent, or a class of persons of whom the claimant is a member[266] (4) by the defendant or his agent.[267] (5) The statement must induce C to act to their detriment.[268] The representation may be express or implied, by words or conduct, and may relate to D's present state of mind, implied by statements of future intention or opinion. [269] In cases of non-fraudulent misrepresentation, it is often said that the representation must be objectively material.[270] In cases involving fraudulent misrepresentation/*deceit*, the better view is that there is no objective materiality requirement.[271]

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[264] *Avon Insurance Plc v Swire Fraser Ltd* [2000] 1 All ER (Comm) 573 (QBD) [15]-[17].

[265] See *Government of the United Arab Emirates v Allen* [2012] EWHC 1712 (Admin), [2012] 1 WLR 3419.

[266] *Bedford v Bagshaw* (1859) 4 H & N 538, 548 (Bramwell B).

[267] Or a principal, partner or employer on whose authority the representation was made. See K R Handley and George Spencer Bower, *Spencer Bower & Handley Actionable Misrepresentation* (5th edn, LexisNexis 2014) Ch 8.

[268] ibid Ch 7.

[269] *Peek v Gurney* (1873) LR 6 HL 377 (HL) 931-32 (Lord Chelmsford) and 403 (Lord Cairns); *Edgington v Fitzmaurice* (1885) 29 Ch D 459 (CA); *Brown v Raphael* [1958] 2 WLR 647 (CA); *Economides v Commercial Union Assurance Co Plc* [1998] QB 587 (CA); *IFE Fund SA v Goldman Sachs Intl* [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep 449; *Watts v Watts* [2014] EWHC 3056 (Ch), [2014] WTLR 1781.

[270] In that it would induce a reasonable person to rely on the misrepresentation. See *Smith v Chadwick* (1884) 9 App Cas 187 (HL), Edwin Peel, *Trietel on The Law of Contract* (14th edn, Sweet & Maxwell 2015) para 9.020; Hugh G Beale, *Chitty on Contracts*, vol 1 (32nd edn, Sweet & Maxwell 2017) para 7.031. However, note that in *Museprime Properties Ltd v Adhill Properties Ltd* (1991) 61 P & CR 111 (Ch), Scott J adopted the view of Goff and Jones in *The Law of Restitution* that if a representation is 'material' in this sense, then there is a presumption that C relied on that misrepresentation, and the onus is on D to show that C did not so rely. If the representation is not material, then the onus is on C to show that the misrepresentation did induce reliance. The issue is one of onus of proof; the language of materiality is 'misleading and unnecessary'. See ibid 124, citing Robert Goff and Gareth Jones, *The Law of Restitution* (3rd edn, Sweet & Maxwell 1986) 168.

[271] Peel (n270) para 9.021, citing *Smith v Kay* 11 ER 299 (HL); *Rafsanjan Pistachio Producers Cooperative v Bank Leumi (UK) Ltd* [1992] 1 Lloyd's Rep 513 (Comm) 542; *Agapitos v Agnew (The Aegeon) (No.1)* [2002] EWCA Civ 247, [2003] QB 556; *Dadourian Group International Inc v Simms (Damages)* [2009] EWCA Civ 169, [2009] 1 Lloyd's Rep 601 [101]. See also Handley and Spencer Bower (n267) para 6.20; Michael Jones (ed), *Clerk & Lindsell on Torts* (22nd edn, Sweet & Maxwell 2017) para 18-38; Cartwright, *Misrepresentation, Mistake and Non-disclosure* (n263) para 5.12. Eggers has argued that an objective materiality requirement should apply in the tort of *deceit*. See Eggers (n263) paras 3.47-3.56; Ch 9. A detailed analysis of the materiality doctrine in misrepresentation and deceit is outside the scope of this thesis; whatever the *normative* justification for an objective materiality requirement in misrepresentation and deceit may be, an objective materiality requirement in the context of deceptive and mistaken sex must be considered on its own terms. To reject

Repeatedly, civil courts have been at pains to note that mere silence does not constitute misrepresentation,[272] and this has generally resulted in the refusal to allow an action in deceit for non-disclosure.[273] However, it is now confirmed that an action in deceit may lie for non-disclosure, in breach of a duty to disclose, though in these cases the court will spell out from the breach of duty an implied representation that there is nothing to disclose.[274] This development of the law has been criticised, and it is still not clear whether this extends to cases beyond those where a fiduciary relationship grounds the duty to disclose.[275]

3.1.3 FRAUD

The current offence of *fraud* in English law is found in sections 1-4 of the FA 2006. The Act creates one offence (s1) but specifies three separate ways in which that offence may be committed either by 'false representation' (s2); by 'failing to disclose information' (s3) or by 'abuse of position' (s4). Section 2 of the act describes a false representation as including a false representation of fact or law and includes a representation as to the state of mind of any person.[276]

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or impose a materiality requirement in the definitional question of deception risks obscuring the moral, theoretical and doctrinal implications of such a move; implications that are central to the overarching questions of this thesis: '*should we draw a distinction between deceptions that induce and invalidate consent to sexual activity and deceptions that induce consent without so invalidating that consent? If so, how do we draw that line?'.*

[272] See *Walters v Morgan* (1861) 3 De GF & J 718, 723; *Smith v Hughes* (1871) LR 6 QB 597; *Ward v Hobbs* (1878) 4 App Cas 13 (HL) 26; *Turner v Green* [1895] 2 Ch 205 (Ch D) 208; *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205 (HL) 211; *JD Weatherspoon plc v Van De Berg & Co Ltd* [2007] EWHC 1044 (Ch), [2007] PNLR 28 [17]; *BSkyB Ltd v HP Enterprise Services UK Ltd (formerly t/a Electronic Data Systems Ltd)* [2010] EWHC 86 (TCC), [2010] BLR 267 [312].

[273] See *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co* [1990] 1 QB 665 (QB).

[274] *Conlon v Simms* [2006] EWCA Civ 1749, [2008] 1 WLR 484 [202].

[275] See sources at n263.

[276] s2(3).

It may be made expressly or impliedly[277] and it must be either 'false or misleading' and the maker of the statement must 'know […] that it is, or might be, untrue or misleading'. Fraud by failing to disclose information is only committed where there is a legal duty to disclose the relevant information,[278] and fraud by abuse of position applies in situations where an individual 'occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person' and then abuses that position by either acting or omitting to act.[279] If D commits one of the three courses of conduct outlined in ss 2 – 4 'dishonestly' and with an intention to gain or cause loss by that action, then he commits the s1 offence.[280] A striking feature of *fraud* is the 'inchoate' nature of the statutory offence. The prosecution need not prove that D *did* make a gain or cause any loss. Nor does the prosecution need to prove that the actions of the defendant deceived C. The offence is only concerned with the conduct (with mens rea) of D.[281] Therefore *fraud* does not amount to a legal translation of deception. [282]

The central concern of this thesis is to explore the relationship between deception and consent. Whether an inchoate offence, similar to *fraud*, should be enacted in the sexual offences

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[277] s2(4).

[278] s3(a).

[279] s4(1)(a), 4(1)(b), 4(2), and *R v Valujevs (Juris)* [2014] EWCA Crim 2888, [2015] QB 745.

[280] See Fraud Act 2006, s1-5.

[281] David Ormerod, 'The Fraud Act 2006 - Criminalising Lying?' [2007] Crim LR 193.

[282] This was a deliberate policy choice. The FA 2006 was the result of a lengthy reform process. See Law Commission, *Legislating the Criminal Code: Fraud and Deception* (Law Com CP No 155, 1999); Law Commission, *Fraud* (Law Com No 276, 2002); Home Office, *Fraud Law Reform: Consultation on Proposals for Legislation* (Fraud Law Reform, 2004). This exclusion was primarily designed to facilitate prosecution in cases involving the misuse of credit cards, and ATMs or other machines, where using the concept of deception is either an artificial strain on the concept or is not possible. See specifically Law Commission, *LC No 276*, paras 7.15-7.17; 3.25-3.35 and Home Office, *Fraud Law Reform: Consultation on Proposals for Legislation* 8-9. On the approach to deception and machines under the pre-2006 law, see ATH Smith, *Property Offences: The Protection of Property Through the Criminal Law* (Sweet & Maxwell 1994) para 11.02; Edward Griew, *The Theft Acts* (7th edn, Sweet & Maxwell 1995) para 8.12.

context, focusing on 'dishonestly making false representations intending to obtain consent to sexual activity thereby', lies beyond the scope of this thesis. However, as noted in multiple pre-2006 Act reform papers, the limitations and technicalities of the *criminal deception* offences were significantly hindering efforts to respond to fraud on a national scale. In 2000, in a jointly commissioned paper for the Home Office and Serious Fraud Office, the National Economic Research Associates estimated that fraud was costing the UK economy £14 billion annually.[283] Concern that the existing law of criminal deception was 'over-specific and vulnerable to technical assaults',[284] and unable to keep pace with changing technology[285] played a significant role in the Law Commission's and Home Office's justification of the inchoate drafting of the offence. These policy concerns do not exist in the sexual offences context, and so an offence akin to *fraud* in the sexual context might amount to legislative overreach.

3.1.4 CRIMINAL DECEPTION

The *criminal deception* offences under the Theft Acts provide a clear example of how the moral concept of deception was previously directly operationalised and understood in the criminal law. The Theft Acts contained eight separate offences of 'dishonestly getting something by deception'.[286] The 'event' or 'act' to which these offences responded differed: *obtaining property by deception* might be seen as the paradigmatic offence; however the Acts also included obtaining a

[283] National Economic Research Associates, *The Economic Cost of Fraud: A Report for the Home Office and the Serious Fraud Office* (The Economic Cost of Fraud, 2000), cited in Home Office, *Fraud Law Reform: Consultation on Proposals for Legislation* (n282) 5, 23. See also Law Commission, *CP No 155* (n282) para 1.9.

[284] Home Office, *Fraud Law Reform: Consultation on Proposals for Legislation* (n282) 7; Law Commission, *LC No 276* (n282) paras 1.6, 3.11–3.24.

[285] Law Commission, *LC No 276* (n282) para 1.6; Law Commission, *CP No 155* (n282) paras 1.3-1.7; Home Office, *Fraud Law Reform: Consultation on Proposals for Legislation* (n282) 7.

[286] JC Smith, *The Law of Theft* (8th edn, Butterworths 1997) para 4.01. For ease of reference, the following discussion will use 'obtaining' as a reference point for the deception offences – where a specific offence is not being discussed, references to obtaining should be understood as also applying to the inducing and procuring offences, unless specified.

pecuniary advantage by deception; procuring the execution of a valuable security by deception; and obtaining services by deception, amongst others. All eight offences required the prosecution to prove deception, a causal nexus between deception and the act, and dishonesty.

Section 15(4) of the TA 1968 provided that 'deception means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person'. However, as Arlidge and Parry correctly note, this is 'not so much a definition as a resolution of certain specific issues'.[287] In *DPP v Ray*, the House of Lords endorsed the definition of deception articulated by Buckley J in *In re London and Globe Finance Corporation Ltd*: 'to deceive is… to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false'.[288] It was generally accepted that the prosecution were required to prove that D made a false representation,[289] that the representation caused C to believe the (false) proposition so represented, and that C's belief in the truth of this proposition induced reliance, so as to trigger the specific 'obtaining' offence (i.e., obtaining property, a pecuniary advantage, etc.).[290] In so far as

[287] Arlidge, Parry and Gatt (n240) para 4.002.

[288] *Re London and Globe Finance Corp Ltd* [1903] 1 Ch 728 (Ch) 732; *DPP v Ray* [1974] AC 370 (HL) 373.

[289] This is the approach taken by both Ormerod and Montgomery in their leading work on Fraud: David Ormerod, Clare Montgomery and Tony Shaw QC, *Fraud: Criminal Law and Procedure* (OUP 2015) para D.2.02. See also Smith (n282) Ch 17; Griew (n282) Ch 8, especially para 8.14; Smith (n286) Ch 4; A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine* (2nd rev. edn, Hart 2003) 515; David Ormerod, *Smith & Hogan: Criminal Law* (11th edn, OUP 2005) 742-43; Andrew Ashworth, *Principles of Criminal Law* (5th edn, OUP 2006) 379; Richard Card, Rupert Cross and P Asterley Jones, *Criminal Law* (17th edn, OUP 2006) 10.4-10.5. See also *Ray* (n288); *R v Charles (Derek Michael)* [1977] AC 177 (HL); *R v Lambie (Shiralee Ann)* [1982] AC 449 (HL).

[290] It should be noted that the deceived party need not have been the 'victim' of the fraud. For example, a shopkeeper who accepts a cheque and guarantee card may be deceived, however the bank is the ultimate victim of the offence. See *R v Kovacs (Stephanie Janika)* [1974] 1 WLR 370 (CA).

mens rea is concerned, the deception must have been either deliberate or reckless, and, finally, D's conduct must also have been dishonest.[291]

This orthodox view was challenged by Arlidge and Parry, who advocated a causal approach to criminal deception, akin to the philosophical definition outlined in section 2.1. above.[292] This distinction between the representation-based approach to deception maintained across the criminal and civil law, and the causation-based approach found in the philosophical literature is the sharpest point of contrast between the two disciplines. In the following section, I will argue that a rejection of the representation-based orthodoxy is necessary to make the definition of deception in the law of sexual offences coherent and principled.

3.2 SEARCHING FOR THE OPTIMAL LEGAL TRANSLATION

If we are to get to grips with the law on deception and consent validity in the sexual offences, it is crucial to have a robust understanding of deception and clearly articulate how this is to translate into a legal framework. Normative weight can be placed upon such a distinction at the consent-validity stage of the analysis only if the conceptual distinction can bear that load. The current doctrine on deception and consent validity is unclear, ill-principled, controversial and complex at the level of theoretical and academic debate. The introduction of an unstable or inadequate definition and taxonomy of deception and related conduct will only further complicate this already difficult area of the law. Indeed, we can already see this at work in *McNally,* where the

[291] TA 1968, s15. Dishonesty was a separate requirement. See Smith (n286).

[292] Arlidge, Parry and Gatt (n240) paras 4.003-4.014. Note that the Theft Acts contain no reference to a 'false representation'. In particular, s15(4) of the TA 1968 uses only the language of 'deception'.

court introduced a nascent taxonomy of deception and non-disclosure which suffers from a lack of attention to how those concepts are to be understood and applied.[293] This has resulted in at least one academic claiming that the distinction between deception and non-disclosure cannot be drawn with a sufficient degree of clarity.[294] Sharpe might be criticised for rejecting the possibility of a robust conceptual distinction between deception and non-disclosure without engaging in any meaningful attempt to explore what the best version of that distinction might be. Yet, in fairness to Sharpe, such an effort has been widely overlooked in the literature on sexual deception, which has not yet grappled with precisely what deception entails, and how it is distinct from non-disclosure. The tendency is to build an account of consent-validity upon this distinction, reject it as normatively irrelevant, or remain agnostic over the distinction. Before deconstructing and rejecting the existing legal approaches to deception, I will first note some aspects of deception that are relatively uncontroversial and feature within both legal and philosophical definitions. If deception is about anything, it is about false beliefs in propositions of fact. When searching for an optimal legal translation of deception, that seems like the right place to start.

3.2.1 BELIEF IN A FALSE PROPOSITION OF FACT

Deception must **induce C into believing a false proposition of fact**. Of course, it is important to recognise that belief isn't binary; there are shades of belief, confidence and trust ranging from absolute faith and acceptance in the truth of a proposition to its outright rejection as false. Between these two extremes, individuals are not always 100% sure in their beliefs, and often we *choose* to believe someone, or something, despite our doubts. We might evaluate the situation and *on balance* form a belief in certain facts. So, in a legal context (or indeed any other), it

[293] See discussion in introduction.

[294] Sharpe, 'Expanding Liability for Sexual Fraud' (n51).

should be sufficient to show that C believed that the (false) proposition was, on balance, *probably* true.

It is also important to note that ignorance may be viewed 'as a form of knowledge', where those with privilege in society learn not to see or know that which challenges that privilege.[295] Sharpe raises this possibility in the context of cisgender complainants' claims that they were ignorant of the defendant's gender history or identity in the sexual offences context. This concern should be captured in the legal context by a caveat that in cases where the false belief is caused by conduct or ambiguous implications, rather than clear and express false statements, C should be precluded from claiming a false belief if C was wilfully blind to the truth – if C 'deliberately shut his eyes to the obvious or refrained from inquiry because he suspected the truth but did not want to have his suspicion confirmed.'[296] The standard by which the fact finder must be satisfied both in C's belief that X was probably true, and in the fact that X was false, depends on the relevant standard of proof but, assuming that our paradigm involves a criminal prosecution, that standard would be high.[297]

The identification of a false-believed proposition of fact is contingent on that proposition being capable of being proved false. Some statements or representations, like an expression of opinion, a promise or the sentence 'Hello, Paul' have no inherent truth-value (i.e. falsifiable).[298] Statements with no truth-value may, however, imply a proposition which does have truth-value:

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[295] See Sharpe, *Sexual Intimacy and Gender Identity 'Fraud'* (n52) 11-12, 116-18, drawing on the work of Eve Sedgwick: Eve Sedgwick, 'Privilege of Unknowing' (1988) 1 Genders 102; Eve Sedgwick, *Tendencies* (Routledge 1994).

[296] *Westminster City Council v Croyalgrange Ltd* [1986] 1 WLR 674 (HL) 684.

[297] The criminal standard is often referred to as 'beyond reasonable doubt', however the instruction to the jury is better put as a requirement that they be 'satisfied so that they are sure'. See Judicial College, *Crown Court Compendium: Part I: Jury and Trial Management and Summing Up* (Crown Court Compendium, 2018) para 5-01. In a civil case, the standard of proof is on the balance of probabilities.

[298] Green, *Lying, Cheating, and Stealing* (n246) 77.

this opinion is based on sound evidence and is genuinely held; this promise is made with *bona fide* intentions; I believe the person I am greeting to be called Paul. When seeking to identify deceptive conduct, it is important to locate a proposition with an inherent truth-value. This is reflected in legal translations of deception, which extend to implied representations, including those to the effect that opinions are honestly held or, in certain circumstances, that they are based on reasonable grounds, and that statements of intention are genuinely held.[299] A false belief is also, necessarily, a belief *about something*. This fits with Carson's observation that that deception is inherently propositional.[300] The importance of establishing a proposition to which the deception relates is particularly acute in the legal context; it is a recognised principle that allegations of fraud and deceit must be particularised, as a matter of fairness to the individual against whom it is alleged.[301]

Finally, we might ask why deception cannot encompass facts that are true, but which are believed by D (and C) to be false. Bok's definition of deception leaves scope for the true, but false-believed, proposition to constitute deception: to deceive is to '(intentionally) communicate a message to another person that makes the other person believe to be true what is not believed to be true'.[302] Mahon rightly characterises this as 'absurd'. As noted above, the verb 'deceive' is perlocutionary – i.e. it affects the mind of the person on the receiving end of the communication (the deceived).[303] It makes little sense to suggest that we might characterise deception in a way that allows the effect on the mind of the audience to be no more than the acquisition of a true belief.

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[299] See n269.

[300] Carson, *Lying and Deception* (n245) 49.

[301] See n262.

[302] See discussion in Mahon, 'A Definition of Deceiving' (n250) 184.

[303] ibid 181.

The observation that deception is perlocutionary is certainly in accordance with the way people, in general, conceive of deception. If I attempt to deceive you and fail, this usually means I failed *to change your mind*. Equally, if you try to deceive me, but the proposition you induce me to believe happens to be true, I am unlikely to consider myself wronged by you because I have been deceived. Instead, it is your *dishonesty* that would offend me – the act of representing something you believed to be false as true – the misrepresentation of your own mental state in relation to the facts that you communicated to me. We might also characterise this as attempted deception.[304] This feature of deception is reflected in various legal frameworks. In the context of *criminal deception*, the case of *Patel* turned on this issue.[305] The defendant was not liable for obtaining a pecuniary advantage by deception, as her express representation on an application form that she had never been convicted was technically true, pursuant to legislation governing the status of conditional discharges. Her representation was, therefore, technically true. Whether or not the defendant knew her representation to be true, or believed it to be false, was immaterial.[306]

3.2.2 CAUSATION AND REPRESENTATIONS

From both a philosophical and legal perspective, there is general agreement that deception involves C believing a particular proposition of fact to be true when it is false. There is further general agreement that D must *cause* that false belief.[307] The philosophical and legal literature is divided on how to capture the causal nexus between D's conduct and C's false belief.[308] The law

[304] The extent to which attempted deception is as morally iniquitous as successful deception has no bearing on the conceptual definition sought here.

[305] *R v Patel (Rupal)* [2006] EWCA Crim 2689, [2007] 1 Cr App Rep 12.

[306] ibid [6].

[307] See Buckley J in *London and Globe Finance* (n288) 732, cited in *Ray* (n288) 373.

[308] cf *Hayward v Zurich* (n238).

uses a representation requirement as an initial proxy for this causal inquiry;[309] however, in the philosophical literature, causation itself remains central to the definition of deception, particularly when distinguishing deception from another key concept: non-disclosure.

The essence of deception is *convincing* someone else about a proposition. Some causal link between D's conduct – be that non-verbal behaviour or speech - and C's acquisition of a false belief must be identified. It must be possible to point to something that the defendant did, or something that he should have done, that can be identified as the reason for which C adopts the relevant mental state. The philosophical literature is consistent in holding that the definition of a lie is dependent upon the making of a statement,[310] but that deception can be carried out by way of a broader range of conduct, both conversational (spoken, written or signed language communication) and non-conversational (i.e. non-verbal conduct that does not conventionally represent some meaning within a shared language, such as packing a suitcase,[311] wearing a wig, hiding a hole in the wall with a poster of Rita Heyworth[312]). What matters is D's causal responsibility for C's false belief, not the manner in which this distorting effect on the mental state of another is achieved. Non-disclosure will sometimes be deceptive, if D's failure to disclose caused C's false belief. However, mere awareness of C's mistake, combined with a failure to correct

[309] See n263.

[310] See Mahon, 'A Definition of Deceiving' (n250) 181.

[311] Immanuel Kant, *Lectures on Ethics* (Louis Infield tr, Methuen 1930).

[312] Stepen King, 'Rita Hayworth and the Shawshank Redemption' in *Different Seasons* (Hodder 1992).

it is insufficient.[313] Many true beliefs I hold will be irrelevant to the matter at hand or add unnecessary detail.[314] Consider the following:

> Steve knows that Clarence is a devoted Bruce Springsteen fan. They spend their lunch break in the office watching Springsteen give a live interview on a television show to promote an upcoming tour. After lunch, Clarence invigilates a three-hour exam. During this time, Steve hears that Springsteen has died suddenly in a car crash. When Clarence returns to the office to collect his belongings, Steve chooses not to tell Clarence that Springsteen is dead. Clarence spends the day hoping that he will be able to buy tickets for the show when he gets home. He does not discover Springsteen's death until he sees the evening news at home.

Does Steve's silence causally contribute to Clarence's false belief? Would the situation be different if Clarence were not a Bruce Springsteen fan at all? What if Steve did not know whether Clarence was a fan? Answering these questions requires a more robust understanding of how silence and non-disclosure might cause false beliefs. This discussion is under-developed in the philosophical literature. The law avoids this question by structuring translations of deception around the concept of a representation. However, as the remainder of this chapter will demonstrate, such an approach is not fit for purpose and an explicitly causation-based approach should be adopted instead. This will not come without its challenges; not least in determining the deception/non-disclosure distinction with a greater degree of clarity and precision than we see in the philosophical literature. I will address these challenges in Chapter 4.

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[313] Mahon, 'A Definition of Deceiving' (n250) 187.

[314] For a related discussion in the context of keeping secrets, see James E Mahon, 'Kant on Keeping a Secret' (2009) 44 J of Religion and Culture 21.

3.2.3 UNDERSTANDING THE REPRESENTATION-BASED FRAMEWORK

Given the centrality of the representation enquiry to the analytical structure of the tort of *deceit*, and to the current law of fraud, and the primacy of the language of representations and statements in the *criminal deception* offences, the absence of a coherent understanding of a 'representation' is surprising. But, as this section will demonstrate, the civil law approach to representations adopts a test for identifying an implied representation that leaves a lacuna in which deceptive conduct can go unrecognised. This occurs when D intends to imply X to C, and C infers X from D's words or conduct, but a reasonable representee would not have inferred X from D's words or conduct. In such circumstances, the orthodox civil law approach denies the existence of an implied representation, despite the clear deception involved. Focus on the reasonable representee, rather than the actual representee, therefore, leaves the orthodox civil law approach an inadequate resource to draw upon in the search for a legal translation of deception for use in the sexual offences context. In the case law on *criminal deception*, there is little indication of a clear and consistent approach to identifying implied representations. There is no explicit statement of law in any appellate criminal case that clearly suggests that a *deceit*-style 'reasonable representee' test was in use.[315] Yet the courts did not reject a reasonable representee approach in favour of a test focused on the dual subjective requirements of D's intent to imply X and C's actual inference of X. On three occasions the House of Lords either remained silent on the question of how an implied representation should be identified in the *criminal deception* context, or took a different approach entirely, imputing a representation based on the law of agency in a commercial setting in order to reach an appropriate result, but at some cost.[316] The result is the lack of a consistent and coherent definition of implied representations arising from the criminal deception context.

[315] This appears to be the test used in *fraud*. See n327.

[316] *Ray* (n288); *Charles* (n289); *Lambie* (n289). See discussion below.

Whilst the notion of an express representation may be fairly straightforward, the meaning of an implied representation is not immediately obvious. Certainly, an implied (false) meaning can be derived from express statements that are, on their face, true.[317] Equally, conduct such as a wink or a smile might impliedly convey a false meaning.[318] However questions arise as to when, and in what circumstances, a particular meaning will be implied in a written or spoken communication, or in D's conduct. The courts have historically offered little guidance on this issue. Indeed, the case law suggests that the courts take a deeply pragmatic approach, often outlining the facts which amount to the pleaded representation and declaring that an implied representation does or does not arise in that context.[319] The academic literature follows suit, often providing a summary of the cases in which implied representations have been found, without any attempt to offer any guidance on or definition of an implied representation.[320]

The clearest, and relatively recent, judicial articulation of an implied representation is the frequently cited dictum of Toulson J (as he then was) in *IFE Fund SA v Goldman Sachs International*:

> In determining whether there has been an express representation, and to what effect, the court has to consider what a reasonable person would have understood from the words used in the context in which they were used. In determining what, if any, implied representation has been made, the court has to perform a similar task, except that it has to

[317] *Curtis v Chemical Cleaning & Dyeing Co* [1951] 1 KB 805, [1951] 1 All ER 631 (CA) 809.

[318] *Walters v Morgan* (n272), 724. Of course, representations by conduct may also be express representations – sign language, or a nod or shake of a head would be a good example.

[319] *Schneider v Heath* 170 ER 1462, (1813) 3 Camp 505; *Barnard* (1837) 7 C & P 784; *Ward v Hobbs* (n272) 161-162; *Taylor v Corp of Glasgow* 1921 SC 263 (IH) 134, 142, (Lord Salvesen, obiter); *Firth Shipping Co v Earl of Morton's Trustees* [1937] SLT 554 (OH); *Gordon v Selico Ltd* (1986) 18 HLR 219 (CA); *Hit Finance Limited v Cohen Arnold & Co (a firm)* [2000] Lloyd's Rep PN 125 (CA) [18]-[22]; *Man Nutzfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm); *Contex Drouzhba Ltd v Wiseman* [2007] EWCA Civ 1201, [2008] BCC 301; *Matthews v Smith* [2008] EWHC 1128 (Admin), (2008) 152(23) SJLB 32; and *Lindsay v O'Loughnane* [2010] EWHC 529 (QB), [2012] BCC 153.

[320] This applies across criminal law and tort law texts addressing this definitional issue in the context of *deceit* and *criminal deception*: see Smith (n282) paras 17.09-17.93; Griew (n282) paras 8.15-8.35; Smith (n286) paras 4.19-4.22; Eggers (n263) paras 3.2-3.21; Ormerod, Montgomery and Shaw QC (n289) para D.2.202; Jones (n271) para 18(2)(a).

> consider *what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context*.[321]

This 'reasonable representee' approach is now firmly embedded and is, in most cases, either stated explicitly by the courts when providing the test for implied representations in the context of a claim in *deceit* or is given implicitly, through the citation of judgments which provide the full test.[322]

It is important to note that the courts, in practice, tend to run two questions together. Instead of asking a) would a reasonable person understand the express words/conduct used to imply some further representation, and b) if yes, what would the reasonable person understand to be the meaning of that further representation, the courts tend to skip directly to the question 'would the reasonable representee have inferred X from the words/conduct used by D'. This might well be a product of the structure of the litigation, where one party claims that a specific, particularised, implied representation was made. The court then asks whether a reasonable person would infer *that particular* representation from the words or conduct of the representor. As a matter of principle, it is arguably appropriate to run the two questions together in this manner. Recall that deception is propositional – it is about something. Instead of beginning by asking whether there has been some sort of false representation, the starting point should always be to identify a false proposition of fact believed by C and then determine whether D deceived C into this belief, or whether this was a unilateral mistake of C's own making. Furthermore, the law generally is

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[321] *IFE Fund SA v Goldman Sachs* (n269) [50] (emphasis added). Subsequently adopted in *Raiffeisen Zentralbank Osterreich AG v The Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep 123 [82]-[83], and *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] 1 CLC 701 [213]-[215], [221] in the context of claims in both non-fraudulent misrepresentation and *deceit*.

[322] See *Sumimoto Bank Ltd v Banque Bruxelles Lambert SA* [1997] 1 Lloyd's Rep 487 (QB) 515; *Jaffray v Society of Lloyd's* [2002] EWCA Civ 1101, (2002) 146 SJLB 214 [54],[59]; *Greenwood Forest Products (UK) Ltd v Roberts* [2010] Bus LR D146 (QB) [190]-[191]; *Brown v InnovatorOne Plc* [2012] EWHC 1321 (Comm); *Mabanga v Ophir Energy* [2012] EWHC 1589 (QB) [25]-[28]; *Bonham Carter v Situ Ventures Ltd* [2012] EWHC 3589 (Ch) [122], [156]; *Graiseley Properties Ltd v Barclays Bank Plc* [2012] EWHC 3093 (Comm) [15], revd *Deutsche Bank AG v Unitech Global Ltd* [2013] EWCA Civ 1372 (hereafter *Deutsche Bank (CA))*; *Deutsche Bank AG v Unitech Global Ltd* [2013] EWHC 471 (Comm) [23]–[29] (hereafter *Deutsche Bank (HC)),* affd *Deutsche Bank (CA)*; *Foster v Action Aviation Ltd* [2013] EWHC 2439 (Comm) [92]; *Deutsche Bank AG v Unitech Global Ltd* [2013] EWHC 2793 (Comm), [2014] 2 All ER (Comm) 268 [171]; *Barnsley v Noble* [2014] EWHC 2657 (Ch) [195]; *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2014] EWHC 3615 (Comm) [739]-[743].

interested in deception or lies only when such conduct results in detrimental reliance by another.[323] Accordingly, when translating the concept of deception into legal doctrines concerned about the relationship between deception and some detrimental reliance by C,[324] the starting point should always be to consider a) what false belief induced C's action; and b) was that belief induced by deception?[325]

Beguilingly straightforward on the surface, the reasonable representee approach has stark implications, articulated and accepted in *Greenwood Forest Products,* in the context of a fraudulent misrepresentation claim:

> [T]he reference… is to the reasonable person in the position in which the particular representee finds himself at the time. The representee's actual understanding cannot be relevant, if that understanding is not reasonable.[326]

In other words, D might make a statement intending C to infer a particular meaning (X) which he knows to be false; C might indeed infer X and believe it to be true. In such a case, D has only made an implied representation of X if a *reasonable* person in C's position would have inferred X. If a reasonable person would *not* have inferred X, then despite D's clear intention to imply X, and C's actual inference of X, no implied representation has been made and so, in theory, an action in *deceit* cannot lie. We might call this lacuna the 'unreasonable representee gap'.

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[323] The offence of perjury is an exception to this general trend, as it is not necessary to demonstrate that the defendant's false statement given in evidence was believed by the finder of fact or otherwise relied upon. See *R v Millward* [1985] QB 519 (CA). Whilst the inchoate drafting of fraud removes any requirement for detrimental reliance or belief in the falsity of the representation, this is primarily driven by policy reasons relating to the difficulties of proof that bedevilled the *criminal deception* offences, and the state's concern about the ability to control certain types of fraud without such a broadly drafted offence. See sources at n282. In contrast, it might be argued that perjury does not give rise to analogous policy concerns.

[324] For example, the giving of ostensible consent when, absent the deception, it would not have otherwise been given.

[325] The practical importance of taking this approach is emphasised in *McNally* (n5), where the failure of the Court of Appeal to take this approach led to the mis-categorisation of the case as one involving deception, rather than non-disclosure and in turn resulted in the rejection of McNally's appeal. See discussion on this point at Ch 1.2.

[326] *Greenwood Forest v Roberts* (n322) [191].

In the criminal context, the current law of *fraud* appears to adopt a reasonable representee approach to identifying implied representations, though there is very little case law on the matter.[327] When interpreting and applying the *criminal deception* offences, the courts did not unambiguously state a test for establishing implied representations. No coherent or principled test for identifying an implied representation can be distilled from the relevant case law.

In *DPP v Ray*, D (the appellant) had ordered a meal and eaten it, having, at the time, the intention of paying, and the genuine belief that he would be able to do so. However, upon finishing, D and his friends apparently decided that they would not pay. They waited for the waiter to leave the room before leaving the restaurant. The issue was the effect of D's subsequent 'change of mind' and whether a false representation could be identified which had causally led to D's obtaining a pecuniary advantage (evading a debt). Despite the fact that counsel for the appellant's argument that no such representation had been made clearly invoked the reasonable representee test found in *deceit,*[328] and could have therefore prompted some consideration of the appropriate test, the House was able to avoid this issue by framing the initial order as giving rise to a *continuing* implied representation of an intention to pay. Given that it is so 'trite' as a matter of law that a current intention to pay is implied within the initial order, the court was able to avoid any explanation of how, in general, implied representations are to be identified.[329]

[327] See *UAE v Allen* (n265), [37]. Note that this case is not a criminal appeal. The issue was whether the factual basis of a charge laid against the respondent in the UAE amounted to a criminal offence in the UK (in this case, fraud) for the purposes of an extradition request. Note also that *fraud* is quite deliberately not concerned with deception. Implied representations under the FA cannot be determined by reference to what the representee *actually* inferred, as there is no requirement for anyone to hear the representation in order for liability under s2 to be triggered.

[328] 'One must ask whether a reasonable man would have inferred from [D's] conduct a representation of an intention to pay', *Ray* (n288) 377B.

[329] ibid 386A- 387A.

In *Charles* and *Lambie*, the House considered whether the mere use of a credit card (*Lambie*) or cheque guarantee card (*Charles*) carries the implication that the user was authorised by the issuing bank to do so. The appellants had used the cards without authority[330] In both cases, the House of Lords found that the defendants had impliedly (and falsely) represented to those processing the relevant transactions the fact that they were authorised by the bank to use the cards. In the search for an implied representation in *Charles* the House of Lords deviated from both the actual representee and reasonable representee approaches, and instead adopted a contract law-flavoured 'business efficacy approach'.[331] Lord Diplock observed that the card essentially allows the holder to act as an agent of the bank and gives the user the 'ostensible authority' so to act, but that legally this ostensible authority is dependent upon 'a representation made to the other party that he has the actual authority of the principal for whom he claims to be acting to enter into the contract on that person's behalf'. To hold otherwise would be to 'stand […] the doctrine of ostensible authority on its head', as its 'whole foundation… is a representation, believed by the person to whom it is made, that the person claiming to contract as an agent for a principal has the actual authority of the principal to enter into the contract on his behalf'. This contractual approach is also echoed in the judgements of Viscount Dilhorne[332] and Lord Edmund Davies,[333] and in *Lambie*.[334] This approach converts the legal steps that underpin the transaction within the law of agency into implied representations, regardless of whether the D's conduct would have been so understood by the reasonable representee with the characteristics of C. The suggestion that a reasonable

[330] *Charles* (n289); *Lambie* (n289).

[331] *Charles* (n289) 183A-B; *Lambie* (n289) 458 (Lord Roskill).

[332] *Charles* (n289) 185F-186F.

[333] ibid 191 E-G.

[334] *Lambie* (n289) 458, 460.

representee is deemed to know the doctrine of ostensible authority, or would have understood D to be representing the fact that they were authorised to use the cards in less technical terms is not particularly plausible in this context. The very purpose of the card is to absolve retailers of concerning themselves with the authority or creditworthiness of the purchaser, and it ignores the fact that C's characteristics likely included the lack of such technical knowledge. Whilst we might regard such a representation as imputed by law, to insist that an implied representation was made, believed, and relied upon, in circumstances where the representee did not make the inference from D's conduct[335] results in the decoupling of *criminal deception* from the general concept of deception which requires D to induce a false belief in C's mind[336] and also transforms an implied representation from a conversational phenomenon into a legal artifice. This may allow the courts to reach the desired result in *Charles* and *Lambie*, but only at the expense of the broader conceptual landscape.[337] The result is that *criminal deception* does not offer a coherent understanding of implied representations to draw upon when assessing whether a representation-based framework should be used in the sexual context.

3.2.4 THE IMPLICATIONS OF THE UNREASONABLE REPRESENTEE GAP

The unreasonable representee gap is the logical outcome of the orthodox approach taken to representations in the civil law. Given that in these cases D *intended* to deceive C, this 'lacuna' is deeply concerning from a theoretical standpoint. Nevertheless, it is difficult to find reported cases

[335] See Smith (n286) paras 4.8-4.10.

[336] See Buckley J in *London and Globe Finance* (n288).

[337] This was acknowledged by the Home Office who noted that an advantage of the Fraud Bill was the avoidance of artificiality in the analysis of card fraud cases. See Home Office, *Fraud Law Reform: Consultation on Proposals for Legislation* (n282) 8-9.

– certainly at the appellate level – which clearly fall into this lacuna, though a small number of criminal and civil cases either expose its implications or challenge the reasonable-representee test.

Whilst there is no clear example of a *criminal deception* prosecution that failed on the basis that the court explicitly applied the reasonable representee test to a case involving an unreasonable inference by the representee that the representor intended to communicate, *Patel* does, on further analysis, involve precisely this sort of unreasonable inference. The defendant in *Patel* had completed an application form for a job with the Metropolitan Police.[338] She had ticked 'no' in response to a question asking whether she 'had ever been convicted of an offence'. Patel had been convicted of an offence at age 17, nine years earlier, and the court had ordered a conditional discharge which, pursuant to various highly technical statutory provisions was deemed not to be a conviction for all but a very small set of purposes which did not apply to these facts.[339]

The existing case law distinguished between having a conviction and being found guilty of an offence.[340] The prosecution argued that whilst it was true to say that Ms Patel *had no convictions*, the representation that she *had never been convicted* was false.[341] The Court of Appeal held that the relevant statute did not recognise this distinction and that the construction of the relevant section of the questionnaire, taken as a whole, suggested that no distinction between *having been convicted* and *having been found guilty* was contemplated. The Court also noted that whilst the Police had a legitimate interest in knowing the criminal history of applicants, including conditional and absolute

[338] *Patel* (n305).

[339] ibid [7].

[340] ibid [10]-[11].

[341] ibid [12].

discharges, they ought to have been more specific in the framing of the question.[342] Given that the only relevant representation made by D was 'I have never been convicted of any criminal offence' (by ticking 'no' in response to the question whether she had ever been convicted of an offence), which was, in the context of the legislation true, the court upheld the trial judge's ruling that D had no case to answer. Yet the Court of Appeal did seem to accept that D had intended to deceive the police;[343] and it seems that both D and C thought that the relevant question was asking 'whether she had been found guilty'.[344] Of course, the false statement 'I have never been found guilty of an offence' may be implied within D's true statement 'no (I have not been convicted of an offence)'. Therefore, the case could have framed in the following terms: 1) when answering the question, D intended to cause the Police to believe that she had never been found guilty of a criminal offence; 2) C understood her to be making an implied representation to that effect; 3) this was false; 4) D knew it was false; 5) as such, there had been a deception, by which D gained an advantage.

Patel is a rare example of a set of facts that may fall into the unreasonable representee gap. Whilst the issue was not before the court in those terms, the suggestion of the Court of Appeal was that the police should have understood the question they were asking in light of the statutory context. In other words, a reasonable police force would know that the question they were asking did not apply to conditional or absolute discharges and so would not infer that D had never been found guilty of an offence simply from the statement that D had never been convicted of one. This case demonstrates the potential for cases of deliberate deception to fall within the unreasonable representee gap. And whilst no firm conclusions can be drawn from the limited

[342] ibid [15]-[17].

[343] ibid [6].

[344] David Ormerod, 'Conditional Discharge: False Representation' [2007] Crim LR 476.

information available, it is possible that the incoherent approach to implied representations at the appellate level may have obscured this route to conviction for the prosecution.

The outcome in *Patel* was perhaps appropriate: the police were responsible for formulating the question and had every means of knowing that there was a technical difference between being convicted and being found guilty. However, in fraud-based criminal offences in general, the negligence, fault, gullibility or naiveté of the victim does not exculpate D, particularly when it is that very naiveté that D exploits. Indeed, cases that most seem to fall into the unreasonable representee gap on the facts are often successfully prosecuted: where vulnerable individuals exploited by unscrupulous tradesmen who make (often unsolicited) business arrangements with elderly, vulnerable individuals and charge grossly extortionate prices for the work. Any potential inconsistency between the unreasonableness of C's inferences, and the meaning that a *reasonable* representee might infer from D's quotation of a glaringly extortionate price for simple work remains unacknowledged. In the *criminal deception* context, two cases stand out. *Silverman* involved a grossly disproportionate quote for limited work and the court's finding of a representation that the price was 'fair and proper' was based in significant part on the pre-existing relationship of trust built up between D and the victims over the course of many years.[345] However, on the facts in *Mitchell (Sam)*, it seems that the defendant's conviction was based on implied representations as to a fair price when there was no such prior relationship.[346] These kinds of cases pre-date the TA 1968[347] and are now prosecuted under the FA 2006.[348] Although there is no discussion of a test

[345] R *v Silverman (Michael John)* (1988) 86 Cr App R 213 (CA).

[346] R *v Mitchell (Sam)* [2006] EWCA Crim 244, [2006] 2 Cr App R (S) 65.

[347] R *v Jeff and Bassett* (1966) 51 Cr App R 28 (CA).

[348] R *v Cowan (Raymond)* [2007] EWCA Crim 340; R *v Greig* [2010] EWCA Crim 1183; R *v Fulke-Greville (Christopher Brooke)* [2014] EWCA Crim 2249.

for implied representations in *any* of these cases, and the 'unreasonable representee' gap need not necessarily arise in these cases, liability in such scenarios is nevertheless difficult to square with the objective approach to identifying implied representations. As Griew notes:

> [T]he grosser the overcharging, the greater the temptation may be to allege that a deception has occurred. But the more grossly excessive the price is, the more hopelessly innocent and trusting P must be (and be thought to be) if he is to suppose D to be asserting the propriety of the price (and if D is to anticipate his reliance on such an assertion). Some people, indeed – as, apparently, the victims in Silverman – are astonishingly gullible and a claim to have supposed that even an absurdly exorbitant price was a normal price may compel belief. But paradoxically, the greater the price, the more critically considered must be the suggestion that P was deceived into paying it. [349]

Although Griew's scepticism here is directed at the likelihood of D's quote causing C to believe such a price was fair and therefore obtaining the payment *by deception*, similar scepticism may be directed at the notion that liability in these kinds of cases is explicable on the reasonable representee test. The driving force behind the moral obliquity in these cases is the exploitation of those who are *unusually and unreasonably* gullible. The suggestion that a reasonable representee in the position of C would infer that D is implying that a wildly and obviously extortionate price is 'within the range of prices likely to be quoted for the same services by other tradesmen'[350] is difficult to sustain, without resorting to paradox: the unreasonably gullible 'reasonable representee'. Reference to the actual representee approach far better explains these cases.

Whilst it is difficult to find analogous reported cases in the civil context which fall into the unreasonable representee gap, the orthodox approach has nevertheless come under pressure in recent cases. The first example of such pressure arises from a comparison of two High Court judgments, which demonstrate how a rigorous application of the reasonable representee test can result in a finding that no implied representation was made, whereas an approach which focuses

[349] Griew (n282) para 8.31.

[350] Griew recommends using this formula, or something like it, to properly frame the proposition that the price is 'fair and reasonable' into one of fact, rather than opinion, ibid para 8.29.

less on the reasonable representee test and more on the potential for deception by D, can result in the opposite outcome, despite almost identical facts.

The *Graiseley Properties v Barclays* and *Deutsche Bank (DB) v Unitech* litigation arose out of the LIBOR scandal. A series of interlocutory proceedings took place in the High Court and Court of Appeal in relation to both claims. In the first interlocutory application in *Graiseley*, the claimants sought to amend their statement of claim to plead fraudulent misrepresentation [351] and in the *Deutsche Bank* litigation, Unitech sought to amend pleadings to include claims under the MA 1967 and *Hedley Byrne*.[352] Both applications relied on allegations that the banks had made implied representations in relation to the banks' honesty and activity concerning, *inter alia,* the submission of answers to the body responsible for calculating the LIBOR rate and the banks' understanding of the integrity of that rate. [353] In both *Graiseley* and *Deutsche Bank*, the alleged implied representations were based on two key factors: firstly, that both banks involved in the litigation were 'rate-setting' banks under the LIBOR scheme, and secondly that the contracts between Graiseley and Barclays, on the one hand, and Deutsche Bank and Unitech, on the other, had both referenced the LIBOR rate as the benchmark for interest rate payments and swaps.[354]

In each interlocutory hearing, the High Court had to decide, *inter alia*, whether the argument that the pleaded implied representations could be spelled out of the Banks' conduct bore a realistic prospect of success. Graiseley were successful in their argument before Flaux J. Unitech were unsuccessful before Cooke J. The Court of Appeal considered both in a conjoined appeal.

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[351] *Graiseley* (n322) [1]-[2].

[352] *Deutsche Bank (HC)* (n322) [1], [9].

[353] *Graiseley* (n322) [8]; *Deutsche Bank (HC)* (n322) [11].

[354] *Graiseley* (n322) [9]; *Unitech Deutsche Bank (HC)* (n322) [10].

The Court of Appeal judgment is of limited interest for current purposes: the Court upheld the decision of Flaux J and overturned that of Cooke J, on the basis that, on an interlocutory application, where the key test is whether the application has 'reasonable prospects of success', it 'is dangerous to dismiss summarily an allegation of implied representation in a factual vacuum'.[355] Of more interest is the comparison between the Graiseley and *Deutsche Bank* hearings at first instance. These cases may well fall into the unreasonable representee gap,[356] in that it arguably *would* be unreasonable for a sophisticated commercial party to read such detailed implied representations about the nature of the bank's involvement in the LIBOR process, and its understanding of the integrity of that rate and its submissions to the panel, from a mere reference to the LIBOR rate in contractual and peri-contractual documents. However, if the critical issue is whether the banks deceived the contracting parties, the unreasonableness of any inference should go to the evidential assessment of the claim that the party did draw such an inference from the contractual terms and the fact that the bank was a LIBOR rate-setting bank.

When assessing the plausibility of the pleading that such implied representations had been made, both Flaux J and Cooke J adopted the orthodox, reasonable representee approach as the proper test that would be applied at trial.[357] Their divergent approaches to the application of this test are striking. In *Graiseley,* the *deceit* case, Flaux J adopted a broad approach that found the implied representation to be arguable on the basis of the dishonest activities of the bank, rather than an analysis of the inferences a reasonable representee would have made. In *Deutsche Bank*, where the

[355] *Deutsche Bank (CA)* (n322) [24], [31].

[356] The *Graiseley* litigation was settled on the steps of the court and, following an order to pay $120m into court that Unitech was unable to fulfil, the *Unitech* litigation will similarly fail to proceed to a full hearing. Without full consideration of the implied representation issue, it is difficult to conclusively identify these cases as potentially falling within the lacuna, however, the analysis of Flaux J's approach to the *Graiseley* case in particular suggests this to be a strong possibility.

[357] It is noteworthy that Flaux J does not cite the test directly, but briefly cites a passage from the judgment of Popplewell J in *Mabanga v Ophir Energy* (n322) as 'usefully summaris[ing]' the relevant principles, whereas Cooke J, on the other hand, sets out the test in detail.

counterclaim was issued under the MA 1967 and *Hedley Byrne*,[358] Cooke J (criticising the earlier decision of Flaux J) adopted a methodical and rigorous application of the test, returning to the question of what a reasonable representee would have inferred from the link between the agreements and the LIBOR rate and the documentation that passed between the parties.[359] Quite rightly, the dishonesty of the bank was considered entirely irrelevant to whether the representation was made. This contrast in approach exemplifies the tension that may arise in *deceit* cases where the dishonesty of the defendant is flagrant, but where the reasonable representee test is a difficult fit. If the concept of deception is to be legally structured around an implied representation, then the test should involve dual subjective requirements: what the *actual* representee inferred from the express statement(s) made by the representor, and whether the representor *intended* the representee to draw such an inference. If Flaux J found the reasonable representee test too limited to engage with this pertinent issue, it is all the more unfortunate that these limitations were not openly confronted.

The most recent and direct challenge to the reasonable representee test in deceit *Leni Gas and Oil Investments v Malta Oil Pty Ltd.*[360] When responding the defendant's argument that no reasonable representee would have inferred the alleged implied representation from the statements made, Males J departed from the orthodox approach and held that 'what matters is whether the defendant intended to make the implied statement in question and whether the claimant understood it as being made'.[361] This being the case, 'it would not matter whether a reasonable

[358] See n239.

[359] His lordship's approach is undoubtedly too rigorous. The Court of Appeal were, it is submitted, correct to overturn the decision on the basis that such a fact-specific enquiry should be reserved for the full trial of the issues.

[360] *Leni Gas* (n242).

[361] ibid [7].

person in the claimant's position would (or even could) have understood the words in the same way'.[362] Whether or not a reasonable representee would have inferred the alleged representation was considered to be relevant only in an evidential sense: if a reasonable representee would not have so inferred, it is 'highly unlikely that [the court] will find either that this is what [the defendant] intended or that this is what [the claimant] in fact understood'.[363] Males J adopted the 'dual-subjective' test recommended above.[364] This approach closes the lacuna. However, in assessing the value and impact of the *Leni Gas* decision, three points should be noted.

Firstly, the claim in *Leni Gas* ultimately failed on all bases, including the claim that an implied representation had been made.[365] In concluding that D had not intended to make the implied representation Males J relied heavily on the evidential value of what a reasonable person would have understood.[366] This was not a case in which the unreasonable representee gap arose on the facts, so the rejection of the orthodox test was *obiter*. Secondly, the reasoning in *Leni Gas* is open to significant criticism because in adopting the 'dual subjective' approach, Males J erroneously relied[367] on the decision of the Privy Council in *Akerhielm v De Mare*.[368] The judgment in *Akerhielm* dealt with the appropriate approach to the mens rea elements of deceit when the relevant statement is ambiguous, in that two alternative propositions could be inferred, one true

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[362] ibid [7].

[363] ibid [8]-[9].

[364] 1) what proposition did D *intend* to impliedly represent and 2) did C *actually infer* that particular identifiable proposition.

[365] *Leni Gas* [143]-[144]; [143]; [164]; [171]-[181].

[366] ibid [144].

[367] ibid [7]-[8].

[368] (n243).

and the other false. The Privy Council held that when the statement is capable of more than one meaning, the defendant is only liable in deceit if he knew or was reckless as to the falsity of the representation *he understood himself to be making*.[369] The decision in *Akerhielm* did not displace the orthodox approach, and Males J quoted from the case extensively and out of context. Thirdly, in the years following Leni Gas, the reasonable representee approach has remained in place and has been deployed regularly in the High Court and the Court of Appeal.[370] Thus, despite these challenges to the orthodox formula, the unreasonable representee lacuna persists.

As a result of the near-universal acceptance of the reasonable-representee orthodoxy and the lack of any direct and open challenge to the test in a case hinging on the distinction between the traditional approach and the dual-subjective requirement, the academic literature and the higher courts have overlooked the inherent instability within a representation-based framework for deception.

3.2.5 REJECTING A REPRESENTATION-BASED APPROACH

The dominant approach to identifying implied representations in the law, the reasonable representee test, clearly does not capture all instances of deception. The exclusion of cases where D intends C to infer X, C does infer X and X is, to D's knowledge, false, makes little sense, particularly in cases where D has set out to exploit any unreasonableness or vulnerability on C's part. As both a matter of principle and a pragmatic concern, undoubted victims of dishonest

[369] Note that D must also intend C to understand his statement in the sense in which it was false or at the very least 'deliberately use[…] the ambiguity for the purpose of deceiving him', see *Cassa di Risparmio* (n321) [221] and *Barley v Muir* [2018] EWHC 619 (QB) [182], both citing *Goose v Wilson Sandford & Co (No 2)* [2001] Lloyd's Rep PN 189 (CA) [41].

[370] *Parish v Danwood Group Ltd* [2015] EWHC 940 (QB), [2015] 2 Costs LR 435 [143]; *Baturina v Chistyakov* [2017] EWHC 1049 (Comm) [141]; *Aurora Developments Ltd v Delta Holdings Ltd* [2018] EWHC 1047 (Ch) [49]; *Ali v Abbeyfield VE Ltd* [2018] EWHC 669 (Ch) [64]; *Barley v Muir* (n369) [178]; *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2018] EWCA Civ 355, [2018] 1 WLR 3529 [128]-[132].

conduct cannot go unprotected merely on the basis that their inference was an unreasonable one.[371] Note also that in the *sexual* deception context, where the range of relationships in which D might deceive C to induce ostensible consent to sex is incalculably wide, some defendants will have a deep personal understanding of the complainant's character, idiosyncrasies and vulnerabilities. A definition of deception that excludes the deliberate exploitation of individual characteristics in order to cause the complainant to draw a false inference from a statement, on the basis that a 'reasonable person' would not have drawn such an inference, fails to secure the sexual integrity of such complainants, without good reason. Outside pre-existing close personal relationships, one might imagine deception that takes place in the context of sexual exploitation trafficking. The notion that D does not deceive C about X in cases where a 'reasonable' person in the position of the trafficking victim would not infer X from D's words or actions leaves a particularly vulnerable group doubly exposed, in a context where such insidious forms of deception are more likely. In the context of interpersonal relationships and pre-sexual interactions, express representations may well be rare. Indeed, it is unlikely that there will be documentation that forms the evidential basis of various representations at the heart of an allegation of deception. Implied representations will be commonplace in a body of case law that deals with sexual deception.

It is vital that any definition of deception based on a representation framework must incorporate a clear, consistent and principled understanding of what constitutes a representation. Reference to the civil law of *deceit* can offer neither a clear and coherent understanding of an implied representation nor one that unambiguously falls in line with the non-legal concept of deception. Any implied representation in the context of a deception inquiry would have to be understood in terms of the dual subjective analysis offered by Males J in *Leni Gas.*[372] However,

[371] That X is an unreasonable inference to draw will be relevant evidence against which to assess the truth of C's claim that she did indeed infer X.

[372] See n364.

there is a long history of cross-pollination between *deceit, fraud* and *criminal* deception,[373] and it is hard to imagine the courts interpreting a 'representation' requirement without reference to the extensive body of existing case law. Such cross-pollination would pose a real risk of cross-contamination. As such, it would be preferable to dispense with the 'representation' requirement. There is no need to funnel the substantive requirements of deception through a representation-based framework. One might merely translate deception into legal form by requiring that the prosecution demonstrate that:

1. D caused C to believe X
2. D intended to cause C to believe X[374]
3. When X is false,
4. And D knew X was false or was reckless as to the falsity of X.

There are two further advantages to such a shift. The first is the avoidance of artificiality. Arlidge and Parry have suggested that the representation framework is artificial in some cases – particularly those in which there are 'no direct dealings between the parties'.[375] Imagine the following:

[373] Civil law jurisprudence has been cited by the courts in cases of criminal cases, and vice versa, when addressing the definition of deception: see *Ray* (n288) 379G, 384E, quoting Buckley J in *London and Globe Finance* (n288). See also *Lambie* (n289) 452. See also the citation of *DPP v Ray* in Handley and Spencer Bower (n267) paras 3.04, 4.09 and *Deutsche Bank (CA)* (n322) [28]. Civil law cases were often cited in academic works dealing with the *criminal deception* offences, see Smith (n282) paras 17.09, 17.12-17.13, 7.22; Griew (n282); Arlidge, Parry and Gatt (n240) paras 4.035, 4.064, 4.073, 4.076; Smith (n286) para 4.17, 4.22; Simester and Sullivan (n289) 515; Ashworth, *Principles of Criminal Law* (n289) 379; Card, Cross and Jones (n289) para 10.4. Civil law authorities are also cited regularly in support of analysis of the representation requirement under FA 2006, s2. See David Ormerod and David Huw Williams, *Smith's Law of Theft* (9th edn, OUP 2007); David Ormerod and David Huw Williams *Smith's Law of Theft* (9th edn OUP 2007); Anthony Arlidge and others, *Arlidge and Parry on Fraud* (5th edn, Sweet & Maxwell 2016) Ch 4.

[374] See discussion in Ch 4 on intentionality and recklessness in this context.

[375] The authors of *Arlidge and Parry* cannot conclusively identify such a case. Arlidge, Parry and Gatt (n240) paras 4.006-4.008.

> Anna wants to play a prank on her housemate, James. Anna goes into his room when he is out for the afternoon and hides his prized possession, an antique music box, under his bed, knowing that James will think the box has been stolen. When James returns to his room, he panics upon seeing the empty space on the shelf where the box should be and calls the police.

It is artificial to frame Anna's behaviour as an implied representation, but entirely straightforward to frame the example in terms of intentionally causing a false belief. This is not to say that this or any other example of active deception cannot possibly be rationalised within a representation framework.[376] However, given the risk of cross-contamination and the availability of a more intuitive formula to capture deception cases than the notion of a 'representation', it is submitted that deception ought to be structured around a requirement that D intentionally or recklessly causes C to believe X.

Secondly, the rejection of a representation framework and the adoption of an explicitly causal framework avoids the risk of the gradual and eventual decoupling of the legal test from the underlying rationale – to capture deceptive conduct. In *Hayward v Zurich* the Supreme Court held that causing a false belief is not a necessary condition of liability.[377] Some years previously, Hayward had deliberately exaggerated the extent of his injuries suffered in an accident at work, when making a claim for compensation from Zurich, his employer's insurers. Although Zurich's did not know that his claims were false, they were suspicious, as a result of his 'lack of candor' and were aware of the real possibility of fraud. [378] Unable to conclusively disprove his claims and

[376] ibid paras 4.012-4.014, See also Smith (n286) para 4.05.

[377] (n239).

[378] *Hayward v Zurich* (n238)[10], [15], [20]-[22], [44].

concerned that they would be believed, in whole or in part, by the judge, Zurich agreed to settle.[379] Subsequently, Hayward's neighbours came forward, providing evidence that he had fully recovered from his injuries prior to signing the settlement. Zurich therefore commenced proceedings against Hayward for damages in *deceit*, despite the fact that they at no point acted on the basis of a belief that his representations were true.[380] The Supreme Court held that 'it is not necessary, as a matter of law, to prove that the representee believed that the representation was true',[381] and suggested even if the representee *knew* (as supposed to merely suspected) that the representation was false, an action in deceit might still be available.[382] Despite indications in the academic literature and authorities that the representee must believe the truth of the statement,[383] one may, in rare cases, be induced by a misrepresentation even if one knows or suspects it to be false.[384]

[379] ibid [10].

[380] ibid [2]-[5].

[381] ibid [25] (Lord Clarke).

[382] ibid [45].

[383] See Jones (n271) para 18.37. See *Arkwright v Newbold* (1881) 17 Ch D 301 (CA) 324 (Cotton LJ) 'the claimant 'must… shew that he was deceived by the statement, and acted upon it to his prejudice'; *Smith v Chadwick* (n270) 190 (Earl of Selbourne LC) 'the representation 'must have produced in his mind an erroneous belief, influencing his conduct'; *Sprecher Grier Halberstam LLP v Walsh* [2008] EWCA Civ 1324, [2009] CP Rep 16 [17] (Ward LJ) 'A man cannot be deceived if he knows the truth'. See also *Gordon v Selico Ltd* (n319) 238; *Standard Chartered Bank v Pakistan National Shipping Corp (No. 2)* [2002] UKHL 43, [2003] 1 AC 959 [14]; *Crystal Palace FC (2000) Ltd v Dowie* [2007] EWHC 1392 (QB), [2007] IRLR 682 [6], [129]; *Soutzos v Asombang* [2010] EWHC 842 (Ch), [2010] BPIR 960 [123], [129].

[384] *Hayward v Zurich* (n238) [63]-[67] (Lord Toulson). Note that many of the authorities discuss the *inducement* requirement in ways that need not involve belief. See *Edgington v Fitzmaurice* (n269) 483; *Barton v Armstrong* [1976] AC 104, [1975] 2 WLR 1050 (PC) 118 (Lord Cross); *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501 (HL) 517C, 517E (Lord Goff) 545E, 546C, 551C (Lord Mustill). Rosa Lee has argued that 'inducement' differs from reliance in that only the latter requires C to act on a false belief. See Rosa Lee, 'Proof of Inducement in the Law on Misrepresentation' [2017] LMCLQ 150, 152.

The upshot of *Hayward v Zurich* is that *deceit* is no longer concerned with deception at all.[385] The claimants in Zurich may have been unfairly induced into settling Hayward's claim by his lies - but they were not *deceived* by them. Their overriding concern was the effect of Hayward's lies on others (i.e., that the trial judge would find him credible). A thorough analysis of the underlying rationale of *deceit* lies outside the scope of this thesis, but it seems that the conceptual underpinnings of *deceit* may be structurally compromised. The internal causal link is an essential criterion within any legal translation of deception. To jettison that causal link altogether is to divorce a legal translation of deception from its rationale.

Even in the context of criminal deception, it has been suggested that the court should consider whether C 'acted on the strength' of a false representation made by D, or 'in reliance upon it', but without inquiring whether 'in any positive sense' C believed or disbelieved it; if C would not have acted as she did, had she known the truth, no inducement will be present.[386] However, this approach is designed to impose liability in cases where D has not caused any belief in the mind of the 'representee' (i.e., those cases where the cashier who processes a credit card transaction does not form any belief about D's authority to use the credit card issued by the bank).[387] An unconscious assumption, as ATH Smith has noted, is 'a very different thing from a belief' and is 'not articulated, and is apt to be formed with the benefit of hindsight'. Criminal liability imposed on this basis would be based on 'speculation and conjecture scarcely appropriate for the criminal law'.[388] If the prosecution need only show that C acted on the strength of the representation, without showing that C in any positive sense believed it to be true, it might be

[385] Recall that deception is a perlocutionary concept, or a 'success' term, see Ch 3.

[386] As suggested in Griew (n282) paras 8.45-8.47 and Smith (n286) para 4.02, *Lambie* (n289).

[387] See n335.

[388] ATH Smith, 'The Idea of Criminal Deception' [1982] Crim LR 721, 723-24.

difficult to exclude cases like *Hayward*, where C suspected (or even knew) the representation to be false but nevertheless *acted on the strength of it*. Furthermore, this approach to unconscious assumptions elides the distinction between misrepresentation and non-disclosure. ATH Smith has noted that the approach criticised here entails that:

> a person is deceived when he acts in reliance on an assertion that is untrue. He acts in reliance when he would have done otherwise had he known the truth. Therefore, a person is deceived when he would have done otherwise had he known the truth. As a general test for deception, this is manifestly not adequate. A person who acts on the strength of a mistaken belief has not necessarily… been deceived, since he may have formed his belief without reference to anything said or done by the defendant… the prior question is whether or not he has been induced to form the belief or assumption and rely on it.[389]

As Chapter 5 will demonstrate, the deception/pure non-disclosure distinction carries significant normative weight at the consent stage of the analysis, and so it is of crucial importance that this distinction is robustly maintained.[390] The rejection of a representation-based framework will assist in this regard, as counsel, judge and jury will remain focused on the key question: the *causation* of a false belief, rather than the potentially distracting issue of a false *representation*. Of course, if one is to jettison the orthodox and, for the most part, unquestioned acceptance of a representation-based framework when translating deception into legal requirements, one must guard against losing the one benefit that a representation framework undoubtedly brings. As a matter of fairness to the defendant, any allegation of deception must be clearly and specifically pleaded or charged,[391] and the representation itself must be an identifiable representation of fact. Whilst the representation requirement provides a structure which ensures that these standards are maintained, it is not the *only* means to this end. A legal translation of deception which makes it

[389] ibid 728.

[390] See Ch 5.

[391] See n262.

very clear that the false proposition must be one of fact, and must be clearly particularised in the indictment, would suffice.

CONCLUSION

This chapter has demonstrated that existing legal translations of deception are reliant on a representation-based framework which, despite being widely accepted in the civil law, is lacking a coherent, consistent or principled rationalisation of a crucial sub-type of representation – the implied representation. The orthodox approach to implied representations does not map adequately onto deception, leaving people exposed to the most exploitative forms of deception. The risk of instability borne of cross-contamination of prior case law militates against maintaining an adjusted representation-based framework which adopts a dual-subjective approach to identifying implied representations. Instead, a causation-based structure can and should be adopted which involves asking whether D caused C to believe a false proposition of fact. In the next chapter, I will explain in more detail how a causation-based approach should function, alongside the other necessary elements of deception relating to D's required mental state.

CHAPTER FOUR:
ADOPTING A CAUSATION-BASED FRAMEWORK FOR LEGAL TRANSLATIONS OF DECPETION

In this chapter, I will explain how an optimal legal translation of deception ought to be structured through an explicitly causal inquiry (the 'internal' causal link), set out the necessary mental elements of deception, and explain the importance of the 'external' causal link between deception and C's consent.

As I will demonstrate in section 1, the hallmark of deception is D's causation of C's false belief. The relevant distinction is not, therefore, between deception and non-disclosure, because in some circumstances non-disclosure can cause false beliefs. The distinction between deception on the one hand, both active (by words/conduct) and passive (by omission), and 'pure non-disclosure' on the other captures this important insight. 'Pure non-disclosure' thus refers to non-deceptive non-disclosures. When seeking to describe this category from C's perspective, rather than D's, we should avoid the use of the term 'mistake', because *all* deceptions necessarily involve a mistake. What is distinctive about the deception/pure non-disclosure distinction is that in the latter category C's mistake is uninduced. I will, therefore, use the term 'uninduced mistake' to refer to pure non-disclosure from C's perspective. By drawing on an analysis of causation by omission in general legal theory I will develop an argument that D's omission (to disclose X+) causes C's false belief (X-) if:

1) that omission is a but-for cause of the false belief;

2) D's omission was a deviation from a prescriptive expectation of disclosure; and

3) C draws an inference of X- *from the omission to disclose X+*.

This intermediate inferential step between a norm deviation-by-omission and a determination of causal status is vital to the proper delimitation of deception. In s1.2, I will argue that passive

deception is a narrow category in the sexual context; that legally recognised passive deception should involve a breach of a legal duty of disclosure, placed on statutory footing; and that legal passive deception may be narrower than passive deception in moral terms. This is justified by the need to ensure that legally salient distinctions between deception and non-disclosure are sufficiently predictable, bearing in mind that the distinction between deception and uninduced mistake is merely the beginning of the relevant legal analysis, not the end.[392] In more specific terms, I will argue that non-disclosure on D's part will be capable of constituting passive deception when it: a) relates to causing a significant risk of serious harm; or b) when D learns that a belief he had previously caused, thinking it to be true, is or may be false; or c) when D caused a true belief, that later becomes false, and D has either subjectively assumed responsibility for the continuing accuracy of C's belief, or should be held so responsible.

Having thus set out the 'actus reus' of deception, in section 2 I will turn to the 'mens rea' of deception and argue that D deceives C only when he: a) intends to cause C's false belief; and b) knows it to be false or is reckless as to whether it is false. In section 3, I will turn to the 'external' causal link. Strictly speaking, this has nothing to do with legal translations of deception at all, as it focuses on the relationship between D's deception and C's reliance: in this context, C's decision to consent. I will argue firstly that but-for causation should be required when establishing this link and secondly that D must have intended, known, or suspected that the deception was material to C's decision to consent.[393]

It should be noted that this chapter does not offer any argument as to when deceptions will be 'actionable' in the sexual offences context. Indeed, at the heart of this thesis lies the

[392] I will argue in Parts III and IV that in some circumstances, uninduced mistake will invalidate consent.

[393] Here I use 'material' in the sense that Herring uses the word, meaning that C would not have consented had she known the truth, Herring, 'Mistaken Sex' (n229).

argument that not every deception that induces C to consent to sexual activity will invalidate C's consent in law. The prior question, however, is when deception has induced consent to begin with and, as explained in the introduction to Part II above, this in turn requires a coherent and rigorous definition of deception. This sets the scene for the argument in Part III that deception and pure non-disclosure should be distinguished at the consent stage, and the analysis in Part IV in relation to the balancing of competing rights and interests when determining when consent induced by deception should be criminalised.

4.1 A CAUSAL APPROACH TO DECEPTION

In the previous chapter, I argued that the essence of deception is *convincing* someone else about a proposition. It is clear from the philosophical literature that there is a generally accepted distinction between deception and mistake. As the hallmark of deception is the causation of a false belief, this might suggest that the distinction between deception on the one hand and *any* non-disclosure on the other is explained by, and is a function of, this causal enquiry.[394] However, the distinction between deception and non-disclosure thus stated is over-simplistic and misleading. The crucial distinction that obtains on the boundary of deception is not a contrast between deception (or misrepresentation, in the language of the orthodox legal analysis) and non-disclosure per se, but between deception and un-induced mistake. We might call this 'pure' non-disclosure, rather than deception, but it must not be assumed that an express or implied representation is *necessary* in order to establish deception. Indeed, it takes little effort to construct an example where silence or non-disclosure itself causes the false belief: if the childminder promises that she will call you as soon as your child returns home from school, and by 4.30pm you have not heard from the

[394] See (n263).

childminder, despite the fact that your child returned on time at 3pm, your false belief that your child is not home is a consequence of the childminder's silence. Her failure to communicate to you that your child returned home is the cause of your false belief. The verbal promise may be a necessary background condition, but no more than that.

Taking advantage (advertently or otherwise) of another's uninduced mistake may be ethically wrong, depending on the circumstances, but it does not in and of itself amount to deception. What characterises deception is some interference by D in the epistemic standpoint of C: D creates (or contributes to the creation of) a state of mind within D that is incongruous with the truth. Only this crucial causal connection between D's conduct and C's belief allows us to hold that in every case of deception the false belief held by C is, in some way, D's responsibility.

Given this complexity, it is not surprising that the assumption that the false representation/non-disclosure distinction tracks that between deception and uninduced mistake has caused some difficulty in the civil law.[395] Where the courts have recognised non-disclosure as grounding liability in *deceit*, a legal duty to disclose has been a necessary pre-condition from which they derive an implied representation that there was nothing relevant to disclose. This latter aspect of the analysis is artificial. Similar ambivalence and artificiality arise in the criminal law context. It may be thought that *Firth* stood for the authority that non-disclosure could amount to *criminal deception*, whether or not D was under a duty to disclose. D was a doctor who referred his private patients for hospital treatment without indicating on the relevant forms that they were private patients.[396] This was held to amount to *criminal deception* and certainly could be described as deception through non-disclosure (the failure to disclose the private status of the patients). However, when D did the positive action of referring the patients, he gave the hospital partial

[395] See text to n272-275.

[396] *R v Firth (Peter Stanley)* (1990) 91 Cr App R 217 (CA).

information, leading to an implication that they were NHS, not private, patients. *Firth* is better viewed as a case involving an implied representation by conduct. And it was stated, obiter, in *Rai*[397] that 'the decision in *Firth* should not be taken as any general authority for the proposition that mere silence can constitute a deception' because D was under a contractual obligation to inform the hospital when his referrals were private patients, and the decision in *Firth* made no reference to s15(4) of the TA 1968, which suggests that deception must be effected through words or conduct.[398]

Rai itself is an example of the court stretching to find some positive representation out of silence, to avoid basing the defendant's deception on non-disclosure. D had applied for a council grant to install a downstairs bathroom for his elderly mother to use. She died two shortly before the work commenced. D failed to inform that council of his mother's death, and the contractors completed the work. The Court of Appeal upheld D's conviction for obtaining services by deception contrary to s1(1) of the TA 1978, not because his failure to disclose his mother's death caused the council and their contractor to conduct the work on the basis of a belief that his mother was alive to benefit, but because he 'positively acquiesced' to the work proceeding. This positive acquiescence was identified explicitly on the basis that the alterations were to 'his house and [because] he was living in it continuously'. This 'positive acquiescence' could amount to conduct under s15(4) of the TA 1968. Positive acquiescence is vague and unhelpful, and it remained unclear as to whether non-disclosure alone could constitute deception under the Theft Acts.[399] Avoiding unnecessary artificiality in translating 'passive deception' into the law provides another reason to

[397] *R v Rai (Thomas)* [2000] 1 Cr App R 242 (CA) 247.

[398] Which provides guidance on the meaning of deception, see Ch 3.1.4.

[399] See discussion in Arlidge and others (n373) paras 5.019-5.026.

reject a representation-based framework in favour of a causation-based framework, in addition to those in Chapter 3.

Carson, in a leading philosophical treatment of deception, devotes a mere paragraph to his observation that withholding information does not in and of itself constitute deception, even if disclosure would 'help someone acquire true beliefs and/or correct false beliefs'.[400] He claims that in some circumstances 'withholding information can constitute deception if there is a clear expectation, promise and/or professional obligation that such information will be provided'.[401] He provides the example of a tax advisor who, in intentionally failing to inform her client of an available tax exemption, 'intentionally causes her client to believe falsely that there is no way for him to save money on his taxes'.[402] Here the professional relationship sets up a duty to disclose information relevant to tax matters, and the silence, *in the context of this duty*, gives rise to an implication that there is nothing further that should be disclosed. Carson avoids the difficult question: when does such a duty exist outside of this context, where the terms, conventions and expectations within the (personal) relationship will not be so clear.

In order to identify this outer limit of deception more richly and robustly than is signalled in much of the philosophical literature, it is helpful to turn to the treatment of causation and omissions in legal theory, to determine when an omission to communicate X+ causes the false belief X-. In section 4.4.1, I will argue that D's omission (to disclose X+) causes C's false belief (X-) if that omission is both a but-for cause of the false belief,[403] *and* D's omission was a deviation

[400] Carson, *Lying and Deception* (245) 56.

[401] ibid.

[402] ibid.

[403] If C thinks that D is a habitual liar and never believes him, D's conduct would not cause her false belief, which she actually acquires by relying on either the word of another third party or her own assessment of externally observable facts.

from a prescriptive expectation of disclosure. Furthermore, C must draw an inference of X- *from the omission to disclose X*+. This intermediate inferential step between a norm deviation-by-omission and a determination of causal status is vital to the proper delimitation of deception. In section 4.4.2, I will argue that when translating passive deception into a legal framework, these prescriptive obligations must be placed on statutory footing, in the form of legal duties of disclosure. I will give an account of those duties of disclosure that should exist in the sexual offences context.

4.1.1 DECEPTION, NON-DISCLOSURE, OMISSION AND CAUSATION

The first requirement is that the omission is a necessary (but not necessarily the sole) factual condition (or a 'but for' cause) of the consequence.[404] Yet there are countless factual contributions behind any single occurrence, many of which would not generally be described as causing that occurrence. Hart and Honoré have argued that a 'but for' condition will be elevated to the status of a 'cause' when it is either a 'voluntary human action intended to bring about what in fact has occurred,' or it is an 'abnormal' condition (either a human action which is not wholly voluntary, or something which is not a human action at all). Those contributions 'which are present alike both in the case where… [the relevant consequence] occur[s] and in the normal cases where they do not… do not "make the difference" between disaster and normal functioning' and so 'are treated as mere conditions'.[405] What is taken as normal includes both 'pervasive natural feature[s] of the human environment' and 'artefact[s] of human habit, custom or convention…. 'adopted to prevent the harm we know will occur without human intervention. Thus, a human-made 'second

[404] I make no attempt here to contribute to the extensive literature on the adequacy or appropriateness of the 'but for' test of causation, given the well-documented difficulties which fall outside this thesis. In 'the vast majority of cases, the But For test is perfectly fit for purpose': Sarah Green, *Causation in Negligence* (Hart 2015) 10. As such, I begin from the premise that But For causation is the first step in the causal analysis.

[405] HLA Hart and Tony Honoré, *Causation in the Law* (2nd edn, Clarendon Press 1985) 41. See also Tony Honoré, 'Are Omissions Less Culpable?' in Tony Honoré (ed), *Responsibility and Fault* (Hart 1999).

norm' arises, and a deviation from this norm 'will be regarded as exceptional and so rank as the cause of harm'.[406]

Omissions cause an outcome when the omission factually contributes to the occurrence of the outcome (in the 'but for' sense) and constitutes a deviation from the 'status quo', or the 'normal' or 'at rest' conditions.[407] Arthur Leavens argues that a failure to act to prevent harm will not always involve 'a departure from normality or a disturbance of the status quo.' However, we 'do expect certain persons to engage in particular types of preventative conduct as a matter of routine' and we tend to develop systems and precautions designed to prevent avoidable harms and build our sense of 'normal conditions' around these precautions.[408]

The identification of the 'normal' conditions is therefore crucial to distinguishing causal from non-causal omissions. This might vary depending upon the context and circumstances,[409] but one important question to address at the outset is whether regularity of performance of some act alone will render that act 'normal' for this purpose, or whether there is a normative aspect to determining the 'status quo'. In cases involving actions, rather than omissions, the violation of a prescriptive norm is not necessary to establish causal status; atypicality is sufficient, at least in some cases.[410] Consider the following:

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406 Hart and Honoré (n405) 34-37.

407 Arthur Leavens, 'A Causation Approach to Criminal Omissions' (1988) 76 CLR 547.

408 ibid 573-74.

409 ibid 574.

410 This example is adapted from one given in J Knobe and B Fraser, 'Causal Judgment and Moral Judgment: Two Experiments' in W Sinnott-Armstrong (ed), *Moral Psychology: Vol 2 The Cognitive Science of Morality: Intuition and Diversity* (MIT Press 2008).

> The receptionist in the law department keeps her desk stocked with pens, for herself and other staff members to use. Paul typically does take a pen; Jane typically does not. On Monday morning, both walk past the desk and take pens at the same time. Later that day, the receptionist needs to take an important message… but she has a problem. There are no pens left on her desk.

What is the cause of the receptionist's lack of pens? One likely response would be Jane taking a pen, as she typically does not do so. When seeking to apply the causal inquiry to natural, non-human causes, deviations from descriptive norms are also commonly identified as causes. However, in the omissions context, Leavens takes the clear view that 'regularity of performance alone does not constitute normality'. Instead, he suggests that there is '*both* a "probability aspect" and "normative aspect" of normality'.[411] In other words, it must be the case that there is:

> both an empirically valid expectation that persons in similar stances will act to prevent a harm… and also a deeply ingrained common understanding that society relies on that individual to prevent the harm… It is this combination of deviance - departing from a pattern of regular performance - and reprehensibility - being blameworthy - that makes us conclude that failure to act caused the harm.[412]

Benyon and Mead[413] also take the view that, in order to elevate an omission to causal status, that omission must constitute a deviation from a prescriptive norm,[414] rather than a merely

[411] Leavens (n407) 576 (emphasis added).

[412] ibid 575. Reprehensible has a particular meaning under the Criminal Justice Act 2003, s12 in relation to bad character, and in colloquial terms it is used generally to refer only to particularly egregious violations of serious norms. Here, it connotes merely the violation of some prescriptive obligation. I will, where possible, avoid the use of the term reprehensible.

[413] Helen Benyon, 'Causation, Omissions and Complicity' [1987] Crim LR 539; Geoffrey Mead, 'Contracting into Crime: A Theory of Criminal Omissions' (1991) 11 OJLS 147, 148.

[414] Under which D has some normative obligation to do X. This may be a very serious obligation like a parent's duty to feed their child, or a relatively trivial one, like a social obligation to send a thank you note for a wedding gift.

descriptive norm.[415] Conversely, Stapleton argues that sometimes the route to identifying a cause amongst the conditions is 'non-evaluative' (i.e., based on a descriptive norm), and sometimes the route will be 'evaluative' (based on a prescriptive norm).[416] Stapleton gives an example of an omission violating merely a descriptive norm, but which might be labelled – at least by some – as a cause:

> [S]ay X has gratuitously always watered her neighbour's prize orchids. X stops doing this and the orchids die during a heatwave… X's conduct can be selected as a cause of the plants' death because her past behaviour provides part of the backdrop against which we ask for an explanation of the outcome. In light of the past behavior her omission… provides an explanation for the death of the orchids….[417]

According to Stapleton this shows that 'we can select a cause… without making an evaluation of X's conduct of a legal or moral kind'. She notes that that people may have different opinions about whether something should be considered a cause, suggesting that if X had only watered the plants for one week, disagreement might be likely.[418]

However, it seems equally plausible to suggest that such disagreement might not stem from a difference of opinion in relation to whether or not there is a sufficiently regular pattern of performance to warrant the identification of a descriptive norm, but whether or not the week of gratuitous watering provides evidence of an assumption of responsibility to water the plants (so that they do not die). Whilst deviations from descriptive norms can provide the route to 'elevating' a condition to a cause in the context of natural events or actions, usually, if not always, a prescriptive norm dominates the analysis in omissions cases. If an individual regularly performs a

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[415] How people *do* habitually act, whether or not they ought to so act.

[416] Jane Stapleton, *Product Liability* (Butterworths 1994) 122. See also Feinberg, *Harm to Others* (n80) 171-85; and Alan W Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (3rd edn, CUP 2014) 152.

[417] Stapleton (n416) 122.

[418] ibid.

gratuitous, supererogatory action (designed to avert a harmful outcome), this seems to provide a tangible indication that they have assumed responsibility to undertake that action in order to prevent the harmful outcome. Regularity of performance is important, not because it constitutes the (descriptive) norm itself, but because irregular performance would be an inadequate evidential basis upon which to draw such an inference of an assumption of responsibility.

Similarly, if humans have 'developed customary techniques, procedures and routines to counteract [harm which we know will arise unless we intervene]'[419] then generally some person or institution is tasked by society to ensure such steps are put in place. Instead of elevating a condition to a cause based on a descriptive norm, to the effect that *people in A's position usually do X act,* we can instead identify a prescriptive *role-based* norm imposed on certain actors or institutions: doctors; local authorities; governments, fire-fighters, are tasked, on behalf of society, with taking certain steps to ensure that medications are prescribed, services are provided, food reserves are built up,[420] fires are fought and harmful consequences are thus averted. These actors do habitually take such actions but when one omits, the condition becomes a cause not because they have deviated from a habitual practice but because they have violated a prescriptive norm.[421]

Accordingly, we might say that D's omission (to disclose X+) causes C's false belief (X-) if that omission is both a but-for cause of the false belief *and* D's omission was a deviation from a prescriptive expectation of disclosure. But this account is incomplete. The causal process involved in deception is distinct from the causal processes involved in general cases. This is due to the specific relationship between D's conduct and C's mental state that lies at the heart of deception. It is not sufficient to hold that D deceives C if C believes X-, and D has omitted to disclose X+

[419] Hart and Honoré (n405) 37.

[420] See the example relating to the Indian Government and the World Food authority provided in ibid 35.

[421] And in these instances, such prescriptive norms are generally recognised in law and placed upon statutory footing.

in circumstances which amount to a deviation from the normal course of events. Just as in cases of *active* deception where C must draw an inference, or derive meaning, from the words or conduct of D, so in cases of *passive* deception C must draw an inference of X- *from the omission to disclose X*+. This intermediate inferential step between an omission in deviation from a norm and a determination of causal status is vital to the proper delimitation of deception. Without the inferential step, deception loses its distinctive character, which involves C's *interpretation* of D's conduct. Of course, if there is a prescriptive norm in favour of disclosure, it might be appropriate to view D's breach of that duty as wrongful (and perhaps in some circumstances deserving of a legal response). But this would not be due to the *direct* causation of the false belief through the interpretive relationship captured within the notion of deception.

This further requirement raises three final questions:

1. **What if D's non-disclosure (of X+) does not violate a prescriptive norm, but C wrongly assumes that such a norm is in place and, as a result of D's non-disclosure in that context, assumes that X- is the truth, given the lack of disclosure to the contrary?**

The inferential step alone cannot be sufficient to transform such a case into an instance of passive deception. Of course, as Stapleton notes, people may have different opinions about whether and when a norm is in place. Some of those opinions will be wrong. If C's opinion is incorrect then it is her mistake about the norm which leads to her (uninduced) false belief about X. To hold otherwise would both overlook any rigorous causal analysis and in so doing elide the distinction between deception and the deliberate exploitation of another's mistake.

Of course, in the sexual context, the deliberate exploitation of another's mistake may be a common paradigm of the consent/information gap cases and it may invalidate consent. But

passive deception and the deliberate exploitation of an uninduced mistake are conceptually distinct and interact with consent in different ways. This will not always mean that the latter is not blameworthy, but we might consider the deliberate exploitation of an uninduced mistake more blameworthy in the sexual context than in the sale of goods.

2. What if there is a norm in place, but C doesn't realise that D *should* disclose?

In cases where C doesn't realise that D should disclose X+, deception is dependent on the existence of the inferential process. If D omits to disclose X+ in deviation from the norm, and C infers X- from his silence, then the basis for C's inference (i.e., whether she infers X- *because she knows D should disclose X*+, or for any other reason) is irrelevant. C has inferred X- from D's omission to disclose X+ and as that omission deviates from the norm, it can be elevated from a condition to the status of 'cause'.

3. Is D's belief as to whether or not the norm requires disclosure relevant?

Whether or not D knows or thinks that the norm requires disclosure cannot be relevant to the causal question.[422] However, as will be explained in section 4.2, deception also involves internal mens rea requirements. D's non-disclosure may cause C's false belief without D being aware of the relevant norm, but in order to deceive C, D must intend to cause C's false belief, and it is less likely that D will have this intention if he is unaware of the norm. Similarly, when deception is translated to a legal context, it is important to consider carefully whether it would be appropriate

[422] Note that occasionally it may be relevant to determining whether or not the norm requires disclosure. If the norm requires disclosure because, for example, D has assumed the responsibility to disclose, the very assumption of responsibility would itself require D's advertence. However, this is not an additional requirement, and is only necessary when the precise grounding of the norm so requires.

to criminalise someone for a deception-based offence if the deception was *passive* and D was inadvertent to the normative requirement of disclosure.

In general, then, we can and should identify deception by reference to causation: has D caused C's false belief? In adopting a causal framework, the position with respect to non-disclosure becomes both clearer and more complex. Some non-disclosures do cause false beliefs and thus may (dependent on the presence of other required conditions) constitute deceptions. The distinction between active and passive deception might be introduced in order to descriptively differentiate between those false beliefs caused by active conduct (verbal, non-verbal or a combination of the two) and those caused by non-disclosure. The most important distinction in terms of the delimiting deception is not, therefore, that between deception and non-disclosure but that between deception and pure non-disclosure or uninduced mistake.

4.1.2 PASSIVE DECEPTION IN THE LEGAL FRAMEWORK OF SEXUAL OFFENCES

It will be argued in Ch 5 that the distinction between passive deception and pure non-disclosure is of significance. As demonstrated above, this distinction is causal in nature and the causal inquiry is itself determined by the failure to discharge a prescriptive expectation of disclosure. Of course, prescriptive obligations to disclose information need not be legal obligations. All sorts of moral obligations exist over and above those which are recognised in law,[423] and often prescriptive norms are not reflected in current legal or institutional practice. However, when translating this understanding of deception from a moral context into a legal context, the existence of an external legal duty to disclose must be required prior to any recognition of non-disclosure as passive deception as a matter of law. This is because the duty requirement

[423] It is not against the law to simply break a promise, or to betray a friend's secret, or cheat on one's partner.

plays a vital role in the legal analysis of omissions liability beyond acting as a mere proxy for the causal inquiry.[424]

Norrie notes that there are '*competing* moral values at play' when identifying any norm that might exist in an omissions context, and the duty 'provides for a socio-political 'fixing' of those omissions that are held to be criminal around a *particular* conception of what is to be expected of the individual'.[425] According to Norrie, the current approach is best characterised and explained by reference to a narrow, laissez-faire individualist understanding of autonomy, but a communitarian approach to omissions liability, entailing a greater scope for criminal sanction in recognition of, and to secure respect for, a social responsibility model for individual relationships, would not be without its downsides.[426] Even if concerns around the vagueness and indeterminacy of obligations not based on some pre-existing, quasi-contractual relationship could be solved, 'an authoritarian element is implicit in the communitarian approach'.[427] In other words, Norrie's analysis makes clear that there is a choice to be made in relation to those causal omissions that should ground *criminal liability*. And the choice is complex; reliance on a duty requirement allows for a political community to make that choice with reference to a greater set of relevant moral considerations than merely the question of causation. Various other interests must be met in the balance: accounting for problems around indeterminacy in expressing and predicting duties, the ramifications on individual autonomy, whether specific offences with differential sentences should

[424] Leavens (n407) overlooks this point in his analysis of the duty requirement and causation of omissions.

[425] Norrie (n416) 155 (emphasis in original).

[426] ibid 156-63. See also Andrew Ashworth, 'The Scope of Criminal Liability for Omissions ' (1989) 105 LQR 424.

[427] Norrie (n416) 164.

be adopted, or whether a breach of duty which constitutes a factual condition of any relevant consequence should ground liability for the full consequence offence in question.

In the criminal context, the indeterminacy problem is significant. Contrary to Leavens' argument that the legal duty requirement can be subsumed by an appropriately rigorous causation analysis because 'at any one time there is a sufficiently definite understanding in the community, the "common" understanding, concerning how people are expected to act',[428] Stapleton is correct to note that people may disagree on when a duties to act (or disclose) arise. In the context of sex, deception and disclosure, much of the controversy and difficulty in this area of the law stems from the vast range of different opinions held about what should and should not be disclosed in order to engage in sexual activity in an ethical manner. It is crucial that individuals have a clear understanding of when duties of disclosure are in place given that the failure to discharge such duties may have criminal law consequences. And in the sexual context in particular, indeterminacy of the information individuals are required to disclose can only contribute to the probability of miscommunication. It might be that D would prefer not to disclose certain information (say, that he has the herpes virus) unless he is either under an obligation to do so, or he is asked about his sexual health. If C and D hold different views as to what duties of disclosure exist, it is possible that C will not make an inquiry, thinking that D is under an obligation to disclose this information, and D will not disclose, thinking that he is not. Only clearly delineated, publicised statutory duties of disclosure can minimise errors of this sort and facilitate increased sexual autonomy. The existence and publicity surrounding duties of disclosure will also minimise the difficulties associated with the kinds of difficult cases highlighted at the end of section 4.1.1, as it will help to reduce instances where individuals draw inferences from silence in circumstances where no duty

[428] Leavens (n407) 578-83.

to disclose exists. Clearly this kind of socio-political decision to fix liability at certain agreed points offers a great deal of substance over and above a mere causation inquiry.

The overarching questions with which this thesis is concerned cannot be glibly dispatched in the definitional distinction between passive deception and pure non-disclosure. Indeed, it is important to remember that this distinction represents the beginning of the analysis of consent validity in the information gap context, not the end. I do not contend here that all deceptions, active and passive, will invalidate consent. Nor do I suggest that pure non-disclosure can never be grounds to invalidate consent. At this stage of my analysis, the key point is that the choices to be made are morally, legally and politically complex. This means that the deception/pure non-disclosure distinction cannot be established on the basis of abstract logical analysis, kept separate from the society in which we live, and it also means that, when importing that definition into a criminal law context, duties of disclosure must be clearly articulated, and preferably placed on statutory footing.

When determining what duties of disclosure should be imposed in a pre-sexual legal context, we should also expect that these duties are universally imposed. This is not to deny that moral obligations to disclose certain information might arise out of specific relational features or in particular contexts. For example, D's moral obligation to disclose certain information might arise out of the fact that D and C are married, or that they are both members of the same religion and see their relationship as being of particular significance within the context of that religion. However, an obligation to disclose X cannot arise just because C cares about X and expects D to disclose X, even if D knows this to be the case. Such a move would eradicate any distinction between passive deception and the deliberate exploitation of a mistake, and would also hold an individual hostage to the unreasonable expectations of others. Contextual and fact specific prescriptive obligations must still be grounded in some sort of norm over and above the simple observation that another person cares about a particular piece of information and expects it to be

disclosed. This causes some difficulty, as it is vital that the statutory duties of disclosure are clear, well publicised and predictable in their application. Yet a long list of specific duties will not assist in the efforts to publicise those duties, and with flexibility of application comes increased unpredictability and vagueness. A smaller number of universally imposed duties will ensure that the law remains predictable. This does not sacrifice sexual integrity at the expense of the formal rule of law: individuals can always make inquiries about information that they consider to be important prior to sexual activity and the enactment of a small number of duties of disclosure may well encourage conversation about what we consider our deal-breakers to be prior to sexual consent, rather than discourage it. Secondly, as I will argue in Ch 5, the passive deception/uninduced mistake distinction is important at the consent-validity stage, as they affect consent-validity in different ways. But this does not mean that uninduced mistake does not affect consent-validity at all. The enactment of a small number of duties of disclosure, within this broader context, will inevitably result in passive deception in legal terms failing to capture every instance of passive deception in moral terms,[429] but this is justified by the need to strike the right balance between moral accuracy and certainty of application in the criminal law.

In delineating the specific duties of disclosure that should be imposed, therefore, we are seeking to identify that information which D must tell C even if: a) C hasn't asked, b) D has no evidence to suggest that C cares about this information, or is even mistaken about it, and c) C doesn't care about this information. In other words, what is C entitled to infer from non-disclosure, even if D has no reason to believe that C cares about such information and C is aware of D's ignorance of this fact. It is not possible to give a complete and perfect answer here. Any one individual's answer to this question will necessarily be conditioned by their own experience

[429] See Honoré (n405).

and perspective on how this social and political choice should be made.[430] Given that statutory intervention is necessary if this area of the law is to be reformed with any degree of coherence, a full public consultation exercise should be undertaken to consider what duties of disclosure should be enacted. However, the imposition of a legal obligation to disclose should be reserved for information that matters to a large majority of the sexually active population and should not be based on particular conceptions of sexual morality over which people disagree. On these terms, it is difficult to imagine where a legal duty of disclosure should arise (for the purposes of passive deception). It is easier to identify information that should not be subject to such a duty: marital status, previous sexual history, religion, etc., such that the failure to disclose amounts (or can amount) to passive deception.

However, if an exogenous legal right demands disclosure of information, then there is a strong argument in favour of recognising non-disclosures in violation of that external legal right as capable of constituting passive deception. The obvious example would involve the right to physical integrity and security, under which others have a duty not to cause physical harm. One might consent to a (harmful) act, but in order to consent to the *harm* that results from the act (such that D would have a defence to any criminal offence), one must have had sufficient knowledge about the potential resulting harms. If an act, sexual or otherwise, carries a risk of harm that cannot reasonably be expected,[431] C does not consent to the harm (or exposure to the harm) simply by virtue of consenting to the act.[432] In other words, D is under an obligation to disclose the nature and extent of the harm, unless he has reason to think that C is otherwise aware of that information. If D seeks to perform a particular act (including a sexual act) which puts C at risk of serious

[430] See summary of Norrie's argument above.

[431] See discussion of harmful but consensual sex in Ch 2.1.2.

[432] *R v Dica* [2004] EWCA Crim 1103, [2004] QB 1257.

physical harm, any expectation that D inform her of the risk of that serious harm is legitimate, and D is obliged, by virtue of an exogenous legal obligation, to disclose the nature and extent of the risk to C. If C infers the absence of any such risk from D's silence, we ought to recognise this as an instance of passive deception.

Two points should be made here. Firstly, this argument is limited the identification and delineation of passive deception. This analysis does not determine whether (or when) deception (active or passive) should be regarded as consent-invalidating in criminal law. Deception in relation to the risk of serious physical harm may be regarded as a likely-candidate for deception that does invalidate consent, but we should not dismiss the possibility that, even in this context, competing rights and policy interests ought to be taken into account.[433] Secondly, in the sexual context, the risk of serious harm is most likely to arise in the context of sexually transmitted diseases, including, but not limited to, HIV. One might have a virus or disease, but the particular sexual activity carries no meaningful risk of transmission. As will be explained in Chapter 7, most people living with HIV (PLWH) in the UK cannot transmit HIV even through unprotected penetrative sex. Accordingly, non-disclosure of HIV+ status (or any other health status) alone does not constitute passive deception on this analysis.

Aside from situations where C is at a significant risk of serious physical harm, there are two further scenarios where a prescriptive obligation to disclose can be identified, and should be placed on statutory footing, for the purposes of defining the contours of passive deception in law. One is where D intentionally causes C to believe X, erroneously thinking that X is true but then, prior to the sexual activity, D learns that X is false. We might call this a 'post-realisation' case. The second is where D intentionally causes C to believe X, correctly thinking that X is true but then, prior to C consenting, X becomes false. We might call this a 'post-falsification' case. These post-

[433] See Ch 7.

falsification cases can be divided into two types: those where D is not responsible for the falsification of the proposition and those where D is responsible, either because the proposition relates to a mental state on D's part and D subsequently changes his mind, or because D has taken some action that results in falsification. In the realisation cases 'what was originally false remains false and discovery turns innocence into fraud' and in the falsification cases, 'later events convert truth into falsehood'.[434]

Let's take each sort of case in turn. The post-realisation cases really involve a coincidence problem, in that the 'actus reus' aspect of deception and the 'mens rea' aspect of deception do not coincide in time, though both aspects have arisen by the time C relies upon the false belief and engages in sexual activity on that basis. In criminal law, if D becomes aware of a risk that he has created by his prior, inadvertent, action, he comes under a duty to take reasonable steps to avert the event.[435] Similarly, if D becomes aware that information he has innocently communicated to C is false, he is under an obligation to take reasonable steps to disclose the truth of the matter to C.[436]

Both types of post-falsification cases have been found to constitute actionable misrepresentations in *deceit*[437] or *criminal deception*.[438] However, the courts have reached this conclusion by artificially fashioning a continuing representation out of the initial true representation, rather than recognizing that when D learns of the later falsification of his

[434] Handley and Spencer Bower, (n267) para 4.10.

[435] *R v Miller* [1982] UKHL 6, [1983] 2 AC 161.

[436] Such a duty is recognised in the law of *deceit*, see *Reynell v Sprye* (1851) 1 De GM & G 656, 42 ER 708; *Brownlie v Campbell* (1880) 5 App Cas 925 (HL).

[437] *With v O'Flanagan* [1936] Ch 575 (CA).

[438] See *Ray* (n288); *Rai* (n397).

previously true statement he may be under a duty to disclose the (new) truth to C. The courts have conflated the continuing inducing *effect* of a (true) representation from the point it is made, up until the point of reliance, with the concept of the representation *itself* continuing.[439] It is preferable to recognise that if D knows or comes to suspect the falsification of the information prior to the sexual act, then D will may be under an obligation to disclose the relevant information to C.[440] However, it cannot be the case that there is *always* a duty to disclose imposed upon D to disclose the fact that something he previously said to C has since become false (for the purpose of identifying passive deception in the law of sexual offences). For a duty to be imposed when D learns of the falsification of the proposition, D must have continuing responsibility for the accuracy of the initial communication.[441] D may expressly or impliedly assume responsibility for the continuing accuracy of the information. Alternatively, if D has reason to suspect that that his previous, now false, communication may have an impact on C's future actions, if there is a relatively short period of time between the initial communication, and the falsification, and if there is an inequality of access to the new information between the parties, such that C is unlikely to discover the falsification without disclosure, then the duty should be imposed.

In all of these cases, D must know or suspect the falsity of the relevant belief/proposition in order to commit passive deception. This is a mens rea requirement for deception, but in any event the duty does not arise unless D at least suspects the falsity of the belief he has caused. Moreover, as will be argued in s4.3, in order to be liable for a deceptive-sex offence, D must intend,

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[439] Lord Wright MR in *With* (n437) 584 made exactly this mistake, treating the approach of Lord Cranworth in *Smith v Kay* (noting the continuing persuasive *effect* of false and fraudulent representations) as if his Lordship was suggesting that the representation itself was continuing. The artificiality of this analysis is conceded, somewhat, in *English v Dedham* [1978] 1 WLR 93 (Ch) 104, where Slade J notes that in both post-falsification and post-realisation cases the 'wrongful failure to disclose may be treated as a deemed misrepresentation'.

[440] This is the reading of *With* adopted by Neuberger J, as he then was, in *RG Kensington Management Co Ltd v Hutchinson IDH Ltd* [2002] EWHC 1180 [37], and by the Supreme Court in *Cramaso LLP v Viscount Reidhaven's Trustees* [2014] UKSC 9, [2014] AC 1093 [22].

[441] See *Cramaso LLP v Viscount Reidhaven's Trustees* (n440) [24].

know, or be reckless as to whether the relevant deception is material to C's decision to consent. Consequently, D may breach a duty of disclosure and passively deceive C about a particular fact, but D would not be liable for an offence unless, after the duty to disclose arose it can be shown that D at least suspected that C's mistake (now the result of passive deception) would be material to the decision to consent.

4.2 THE MENS REA OF DECEPTION

It is not enough to show that D caused C to hold a false belief. Deception is a moral concept. It is at least *prima facie* blameworthy conduct. Of course, one can accidentally or inadvertently cause another to have a false belief, but this is not deception. We might label this as something like 'inadvertently misleading' someone. But deception requires some kind of fault, some necessary mental state or mens rea. This comes in two parts: intention to cause the false belief and knowledge that the belief is false or an absence of belief in the truth.

4.2.1 INTENTION TO CAUSE THE FALSE BELIEF

Carson's philosophical account requires an intention on D's part to induce C's belief. He is correct in saying that as deception is typically understood as conduct worthy of moral condemnation (and it is, at least, prima facie, wrong), it would not be appropriate to consider a person to have deceived another if they had caused a false belief unintentionally. In these cases, Carson is right to identify a useful distinction between misleading another by inadvertently causing false beliefs and deceiving another by doing so intentionally.[442]

But what if D does not intend to cause C to believe X, through D's words, actions, or non-disclosure (despite a duty to disclose) but recognises the possibility that C may form such a belief

[442] Carson, *Lying and Deception* (n245) 47.

in response? Perhaps D's words or conduct are capable of two different meanings and whilst D intends to communicate the first meaning (which is true), he recognises the possibility that C might infer the second meaning (which is false) and indeed C does just that. Carson briefly acknowledges that such instances may be 'borderline' cases of deception, but this unhelpfully avoids resolving a crucial issue within the definition of deception.

The requirement that D intend C to cause a false belief is not necessarily synonymous with an intention to deceive. The claim is not that D intend to *cause a false belief,* but that D must intend to cause a belief in a particular proposition. D's mental state in relation to the truth or falsity of that proposition is a separate question. The language of an intention to deceive unhelpfully conflates the two and is best avoided, not least because, as Hoyano has pointed out, an intention to deceive is inconsistent with any possibility that D may deceive C when he is reckless in relation to the truth or falsity of the relevant proposition.[443] In recognition of this, the Court of Appeal has held that, despite occasional references to an intention to deceive at the highest level,[444] an intention to deceive is not an element of the tort of *deceit.*[445] The mental elements of the tort require that a) D 'know[…] that the representation is false, [or be..] reckless as to whether it is true or false, and b) D 'intend[…] that the claimant should act in reliance on it'.[446] An intention to deceive

[443] Laura CH Hoyano, 'Lies, Recklessness and Deception: Disentangling Dishonesty in Civil Fraud ' (1996) 75 Can Bar Rev 474. It will be argued below that deception should encompass such scenarios.

[444] *Derry v Peek* (1889) 14 App Cas 337 (HL) 344 (Lord Halsbury LC); *Nocton v Lord Ashburton* [1914] AC 932 (HL) 963 (Lord Dunedin); *Bradford v Borders* (n272) 220 (Lord Wright).

[445] *Ludsin Overseas Ltd v Eco3 Capital Ltd* [2013] EWCA Civ 413.

[446] ibid [77].

is not a 'free-standing element of the tort of deceit', but 'is merely another way of describing the mental element of the tort'.[447]

Some support can be drawn from the civil law authorities for the existence of a requirement that D intend C to acquire the relevant belief (that is false). However, it should be noted that an intention to cause the relevant belief does not map neatly on to the conduct element of deception when it is understood within a representation-based framework.[448] It is most likely the case that D must intend to use the words or perform the conduct that forms the basis of the pleaded representation (express or implied). As Eggers puts it 'if a defendant made a statement which he or she thought was true, but because of his or her erroneous choice of words was in fact false, it would be most unfair for the representor to be held liable in deceit, even if that defendant apprised of the true meaning of the representation would have known that it was false'.[449] In cases where the intentionally used words or deliberate conduct of D is capable of bearing more than one meaning (one true and one false), the courts have consistently held that in order to be liable in *deceit*, D must have intended the representation to be understood in the sense in which it was

[447] ibid.

[448] And note that under the approach taken in *Hayward v Zurich* (n238) discussed in Ch 3, it is not necessary for C to believe that X is false, as it is possible, in certain circumstances, for C to be influenced by the false representation despite a lack of belief in its truth. If this is the proper approach to *deceit*, then an intention on D's part to cause a false belief should not be necessary. However, as argued above, this approach divorces the tort of deceit from its rationale in responding to deceptive conduct that induces detrimental reliance (see Eggers (n263) Ch 1) and is contrary to a significant body of authorities and academic work that proceed on the assumption that *deceit* requires C to be deceived. See text to n378-385.

[449] ibid para 5.11

false, rather than an alternative sense in which it was true,[450] unless it can be shown that D 'deliberately used the ambiguity for the purpose of deceiving the claimant'.[451]

An 'intention to cause the belief' should therefore be understood in a somewhat broader sense, in order to capture those cases where D deliberately plays on the ambiguity of his words or conduct in order to cause C's false belief whilst giving himself 'plausible deniability', and also those cases where D knows that C will acquire the relevant belief as a result of D's words or conduct, although this is not D's purpose (i.e., oblique intention).[452] However, deception should not be made out simply when D is reckless as to the possibility of C inferring a particular proposition from D's words and conduct. This ensures that deception retains its unique character as capturing D's deliberate attempt to subvert the mind of C. Indifference on the part of D as to the message he is communicating does not sit coherently with this understanding of the essence of deception.

4.2.2 KNOWLEDGE OR RECKLESSNESS IN RELATION TO FALSITY

Carson's philosophical account of deception seems to impose a requirement that D know that the relevant proposition, X, is false. Yet, on further reflection, Carson admits of some ambivalence as to whether knowledge of falsity is necessary, or whether it is sufficient that D does not believe X to be true, suggesting that there may be 'broader and narrower concepts of deception'.[453] The law cannot take refuge in such ambivalence; it is long-settled that knowledge of falsity is not required for liability in *deceit*: recklessness in the truth or falsity of the relevant

[450] *Akerhielm* (n243); *Whyte v Michael Cullen & Partners* [1993] EG 193 (CS) (CA); *Goose v Wilson Sandford* (n369); Cassa di Risparmio (n321) 221.

[451] *Crystal Palace FC (2000) Ltd v Dowie* (n383); *Barley v Muir* (n369).

[452] *R v Woollin* [1999] 1 AC 82 (HL).

[453] Carson, *Lying and Deception* (n245) 48.

proposition will suffice.[454] Reckless as to the truth or falsity of the relevant representation was also sufficient to establish liability for *criminal deception*.[455] Although it might well be said that 'the cheat who sets out to defraud someone through deliberate connivance and trickery must be guilty of greater moral obliquity than the sharpster who, anxious to close a deal, is oblivious to the truth of his or her representations',[456] it seems that the hallmark of deception – the manipulation of C's mental processes to cause false beliefs – is present where D is indifferent to the truth of the belief he intentionally induces within C's mind. We might draw moral distinctions between different forms of deceptions; we might regard lying as more wrongful than other, non-lying, forms of deception,[457] but just as this form of 'reckless deception' was sufficient for criminal liability in the context of the *criminal deception* offences, and for civil liability in *deceit*, it should suffice for a concept of deception used in the sexual offences context.

[454] *Derry v Peek* (n444).

[455] See Smith (n286) 4.16.

[456] Hoyano (n443) 480-81.

[457] See discussion in Ch 3.1.1.

4.3 INDUCING CONSENT BY DECEPTION: ACTUS REUS AND MENS REA

In order to make a successful claim in *deceit*, it must be demonstrated that C acted upon the statement,[458] and that D intended C to act upon the statement.[459] These are not actus reus and mens rea elements that are internal to the definition or legal construction of deception, but rather relate to the necessary 'external' causal link between deception and some detrimental act by C. In the sexual offence context, the analogous external link is between D's deception and C's consent. Two questions must be resolved to hold D criminally liable: what sort of causal link is necessary, and what should be a sufficient mens rea in relation to that causal relationship.

4.3.1 THE EXTERNAL CAUSAL LINK: ACTUS REUS

At the actus reus stage, it may be assumed that the necessary causal relationship for legal liability is one of but for causation; it must be proved that but for the deception, C would not have consented. However, Victor Tadros has challenged this approach, arguing that a but-for causal relationship between error[460] and consent is neither necessary nor sufficient. For Tadros, questions of consent-validity cannot be answered by reference to what C 'would have chosen had they known about the facts but about how deeply the error undermines the meaning the act has for them as part of their sex life'.[461] Three hypotheticals play a significant role in Tadros' argument

[458] *Briess v Woolley* [1954] AC 333 (HL); *Mellor v Partridge* [2013] EWCA Civ 477 [20]; *Hayward v Zurich* (n238).

[459] *Peek v Gurney* (n269); *Smith v Chadwick* (n270) 195-96, 201; *Edgington v Fitzmaurice* (n269) 481-82; *Bradford v Borders* (n272). Handley and Spencer Bower (n267) para 6.05.

[460] Tadros does not take a firm position on whether we ought to distinguish between deception and mistake, see Victor Tadros, *Wrongs and Crimes* (OUP 2016) 243.

[461] ibid 253.

that counterfactual accounts of error and consent validity do not produce the intuitively correct outcomes.

The first scenario is where 'Harry has sex with Beth, thinking that Beth is her identical twin sister, Elsa, to whom Harry is married'.[462] Beth is aware of Harry's mistake. Harry would have consented had he known that he was having sex with Beth, because he had always fantasised about having sex with Beth. For Tadros, Harry's error undermines consent because the error radically changes the meaning of the sexual act as far as Harry is concerned. This is the case, despite the fact that he would have consented anyway. Another route to identifying this as a case of non-consent is to argue that (sexual) consent is given to a specific individual to do a specific thing. Harry was giving his consent *to Elsa*, and so *Beth* did not have Harry's permission to engage in sexual activity with him. Tadros argues that whilst certain categories of facts like personal identity and the nature of sex might be metaphysically robust 'in the sense that changes in the properties of that person or act do not alter the identity of the person or the nature of the act', this cannot be the basis of holding the consent in his example invalid because 'this idea does not adequately explain why there is a moral difference between errors about the identity of a person or the nature of the act on the one hand and properties of the person or the act on the other'. Tadros' argument that a counterfactual relationship between error and consent is under-inclusive is supported only by examples involving these sort of discrete personal identity errors.

However, I will argue in Ch 5 that when the right to sexual integrity is recognised as a meta-right, comprising various component rights or aspects, we can identify the case of Harry and Beth as an example of non-consensual sexual intercourse and retain the requirement of a causal relationship between deception and consent in other cases. The key point developed in Ch 5 is that a) whether C has given a token of ostensible consent to D to do X, and b) whether C's decision

[462] ibid 245.

to give that token of ostensible consent has been interfered with, are separate questions that implicate two distinct component rights within the overall right to sexual integrity. This more nuanced analysis of the right to sexual integrity allows for an appropriate response to Tadros' twins example without assuming that robust identity mistakes do all of the normative work in the theory of consent-validity.

The second of Tadros's hypotheticals is also used to demonstrate the supposed over-inclusivity of the counterfactual requirement. He points to an example where 'Herbert is in a long-term sexual relationship with Enrico. He consents to sex with Enrico, not realizing that he will miss his favourite television show. He would not have consented had he realised this. Enrico knew that Herbert would not have consented had he so realised'.[463] He contrasts this with the third hypothetical which he says involves a 'much more serious' error. In this case, an 'undercover police officer infiltrates a patently non-dangerous group of eco-warriors in order to discover whether they are up to no good. In order to deeply embed himself in the group, he starts a sexual relationship with Mike. When the operation ends…. he disappears'. Tadros argues that in the *Sex and Telly* example, 'the validity of consent seems not to have been undermined', but the same cannot be said for the *Undercover Cop* example. He argues that this 'big intuitive difference in the gravity of the wrongdoing in these cases should lead us to doubt' the argument that a counterfactual relationship between the error and the sex is sufficient to explain why these cases are wrong. Tadros argues that the difference the error makes to the meaning of the sexual act explains this.

However, Tadros assumes that because the counter-factual analysis is not sufficient to distinguish *sex and telly* and *undercover cop* then it is not necessary. This error stems, in part, from the failure to recognise the significance of the source of the error. Tadros overlooks the fact that one

[463] ibid 253.

*undercover co*p involves deception and *sex and telly* involves an uninduced mistake. As I will argue in Ch 5, this has a significant impact on the consent-validity question under a differentiated account of sexual integrity. Ch 5 also shows that there are many cases in which C may be mistaken about a fact which radically alters their understanding of the meaning of the sexual act, but their consent is valid (even if they would not have consented had they known the truth). An error that alters the meaning of the sexual act is not sufficient, in all cases, to invalidate consent. And nor should it be necessary. If Enrico had deceived Herbert in *Sex and Telly*, interfering with his decision-making processes, this would be an example of Enrico manipulating Herbert to gain personal sexual gratification at the expense of Enrico's right to determine what information is relevant to his own decision to have sex and to act on that informational basis. If the right to sexual integrity (or autonomy) is to be taken seriously, this should be recognised as a moral wrong.

As I will argue in Ch 7, it is not the case that all deceptions that induce consent will invalidate that consent in either moral or legal terms. Competing rights and interests must be balanced against the right to sexual integrity, and in some cases we may need to acknowledge that morally invalid consent may nevertheless be valid in the criminal law for particular policy reasons. *Sex and Telly* may be one such context. Tadros' concerns about under- and over-inclusivity arising from a causal nexus between error/deception and consent can be addressed through a more nuanced understanding of the underlying right and proper recognition that there are other rights and interests to be weighed in the balance before reaching ultimate determinations of moral wrongfulness or criminal liability. A causal relationship between the deception and consent remains fundamentally important to link the deception (a wrong which would not, ordinarily, attract criminal liability)[464] with the violation of sexual integrity. For deception to be the concern

[464] See n194 and n323.

of the criminal law, in most cases the deception must have an *effect* on C's decision to give a token of ostensible consent.

The remaining question is therefore whether a but-for causal relationship is necessary and sufficient. Neil Manson criticises those who regard consent as invalid whenever it is given on the basis of a mistake but for which C would not have consented,[465] as disregarding that some deal breakers may be stronger or weaker than others.[466] Manson claims that only mistakes as to 'strong' deal-breakers (one that has an enormous impact on the decision, as opposed to a 'weak' deal breaker, that only just makes the difference, or tips the scales, between the decision to 'consent' or not) should invalidate consent. For Manson, a but-for test is insufficient to establish liability. However, Manson does not identify a clear normative basis for distinguishing between 'weak' and 'strong' deal breakers, other than the idea that sometimes there may be 'no close possible worlds where [C] knows the truth and consents' or there may be many close possible worlds where '[C] knows the truth and consents'.[467] Given that in *this* world, D deceives C, and thus interferes with her decision making, it is not clear why the number of close possible worlds in which the deception would *not* have made a difference should matter to the moral or legal assessment of consent-validity. On a pragmatic level, it is not clear how a fact-finder would determine between strong and weak deal-breakers. Whilst the counterfactual analysis (would C have consented, had she known the truth) may well pose difficulties for prosecution and jury, Manson's alternative does not alleviate matters, it being similarly difficult for a jury to assess, after the fact, how strong of a deal-breaker the information in question was.

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[465] Herring, 'Mistaken Sex' (n229); Tom Dougherty, 'Sex, Lies, and Consent' (2013) 123 Ethics 717. Herring describes this as a 'material mistake' and Dougherty as a 'deal breaker'. See Ch 5.

[466] Neil C Manson, 'How Not to Think about the Ethics of Deceiving into Sex' (2017) 127 Ethics 415.

[467] ibid 419.

In the tort of *deceit*, there is some tension amongst the authorities as to whether a 'but for' causal relationship between the misrepresentation and C's reliance is necessary,[468] or whether 'inducement' in the relevant sense can be established even if C would have acted in the same way had C known the truth, provided that the representation operated, to some extent, on D's mind.[469] The difficulty with the latter approach is that the courts do not, as a general rule, permit the relative weighing of various different influences on C's decision.[470] When the deception (or false representation) must be at least a but-for cause of C's action, this is appropriate. But if there is no but-for relationship, the refusal to consider whether the representation was a real and substantial part of what induced C to act, by encouraging or supporting C's decision,[471] would allow liability to be imposed on the basis that D deceived C, rather than the fact that D deceived C *into* acting in a certain way.

Putting aside any question of policy in the civil law context that may, or may not, justify this approach, criminal liability for a substantive offence generally is not, and should not be, premised upon lying or deceiving; it is the *effect* of D's deception has on C's decision-making that matters. A but-for causal relationship should be required.[472] This need not be the sole cause, or even a dominant causal factor. It is submitted that the approach of Lord Hoffmann in *Standard*

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468 *Standard Chartered Bank*, (n383) 967 (Lord Hoffmann); *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] 1 WLR 577 [59] (Clarke LJ), [187] (Sir Christopher Straughton).

469 See Handley and Spencer Bower (n267) para 6.09 and Cartwright, *Misrepresentation, Mistake and Non-disclosure* (n263) para 3.54, and both citing *Edgington v Fitzmaurice* (n269).

470 *Barton v Armstrong* (n384).

471 *Avon Insurance v Swire Fraser* (n264) 540 (Rix J). This approach is criticised as contrary to authority in Handley and Spencer Bower (n267) para 6.09.

472 For an argument that but-for causation should be required in *deceit*, see Eggers (n263). Cf Handley and Spencer Bower (n267) para 6.09, and Cartwright, *Misrepresentation, Mistake and Non-disclosure* (n263) para 3.54.

Chartered Bank, with appropriate adjustment for the sexual offences context, provides useful guidance:

> '…if a [deception induces consent] in the sense that the claimant would not have parted with his money if he had known it was false, it does not matter that he also had some negligent or irrational belief about another matter, and but for that belief, would not have parted with his money either. The law simply ignores the other reasons why he paid… the law does not allow an examination into the relative importance of contributing causes'.[473]

It should also be required that the deception be operating on the decision *to consent* at the time of the sexual activity in question. Many of these deceptive sex cases will involve ongoing relationships. It might be the case that D practised some deception that resulted in C commencing a romantic (or even platonic) relationship with D and which gave room between the two individuals for a relationship and attraction to grow. Sexual consent may be given on that basis so that at this stage the deception is part of the background narrative. But for the relationship, there would not be consent, and but for the deception, there would not be a relationship. This sort of question, put into a legal context, is quintessentially a jury question, and would have to be determined on its facts, but it is important to remember that outside of the overly-broad offence of *fraud* and the developing law on deception and sexual consent, deceiving a friend, partner or, indeed, anyone, is rarely unlawful and certainly rarely criminal. It is the nexus between the deception and the consent to sex that matters, and so the deception in question must play a role in the *actual decision* taken by C.

4.3.2 THE EXTERNAL CAUSAL LINK: THE MENS REA

Having established that a but-for relationship between D's conduct and C's false belief is necessary to establish the 'actus reus' aspect of the external causal link, it only remains to consider the requisite corresponding mens rea element. An action in *deceit* requires the intention that C rely

[473] *Standard Chartered Bank* (n383) 967.

on the false representation.[474] However, under ss1-4 of the SOA 2003, if C consented to sexual activity in response to an implicit threat by D, D may be liable for an offence even if D did not intend his threat to cause C to consent.[475] This is because those provisions impose liability if the prosecution can establish that any belief on D's part that C was (validly) consenting was unreasonable in all of the circumstances. In other words, even if D does not intend that any threat induce consent, D will have the requisite mens rea if he either has a positive, but unreasonable, belief in C's consent, or if he appreciates that C may not be consenting and so lacks any positive belief in C's consent at all.[476]

In the context of liability for rape and sexual assault, a requirement that D intends C to rely on the deception when deciding to consent sets the bar too high. If D deceives C and thinks that the deception may induce consent then this should, prima facie, suffice for liability. I contend in Ch 7 that there are some instances where liability should not be imposed, despite the presence of a deception that induces consent, even if D realises that C might not have consented without the deception. However, this argument is not based on an argument that a recklessness-based mens rea is insufficient, but that the mens rea analysis cannot do all of the work in identifying

[474] See n459.

[475] The sort of case I am envisaging does not involve an explicit threat that D will do some harmful act towards C unless she has sex with him. Rather, I am imagining the latent threat of physical violence, within the context of a generally violent relationship, that might induce C to 'consent' to D when he initiates sexual activity, for fear that he would react violently if C exercised her right to refuse.

[476] This latter mental state is often referred to as recklessness, though note that this does not correspond with the definition of recklessness in *R v G* [2003] UKHL 50, [2004] 1 AC 1034 which refers to the conscious taking of an *unjustified* risk. Prior to 2003, if D could raise doubt as to whether he may have had a positive belief in consent, he would not be liable, no matter how unreasonable the belief, see *DPP v Morgan* [1975] UKHL 3, [1976] AC 182. However, the unreasonableness of any belief is always relevant evidence going to whether D actually held that belief. Nevertheless, concern over the possibility of defendants escaping liability due to holding a genuine but unreasonable belief in consent was a significant driver behind the reform project that ultimately led to the Sexual Offences Act 2003.

conduct that warrants criminalisation. Instead, competing rights and interests must be balanced against the right to sexual integrity.[477]

If an intention-based mens rea sets the bar too high, does a negligence, or 'culpable inadvertence' mens rea standard set the bar too low? It might be argued that such a standard is sufficient and appropriate: D will be liable if it can be shown that his belief in consent was unreasonable, that he *should* have realised that his deception induced consent. Of course, one might argue that it is *never* reasonable to assume that deception won't have an impact on sexual decision-making. Why else would one deceive? Lying and deception are common practices in dating relationships, ranging from white lies about relatively innocuous topics to more serious and egregious deceptions. As will be demonstrated in Ch 7, there are many reasons individuals might lie or deceive another in a social, romantic or pre-sexual context; it is not always (or perhaps even often) that people lie or deceive *in order to obtain sex*. The deception might be self-focused: to protect privacy, or reputation, or massage and inflate one's public persona. Moreover, people disagree about the extent to which deception in interpersonal social, romantic and sexual relationships is permissible and even expected. We might think deception is always at least *prima facie* wrong, but also think that deception about certain facts doesn't affect consent-validity for most people.[478] If C asks D a question in a context that makes clear that the information is relevant to the decision to consent, the presence of a reasonable belief in consent despite deception is implausible. But often deception will come earlier in the narrative, at the 'getting to know you' stage. It may even pre-date the serious contemplation of a sexual relationship. In this context, it may be reasonable

[477] The rights to sexual integrity and privacy are not inherently oppositional, but will conflict in certain circumstances. See Ch 7.2.

[478] Though, as I argued above, this is always speculative.

for D to assume that deception about a whole range of information would not be material to any subsequent sexual consent.

On this spectrum between innocuous white lies and egregious deceptions perpetrated in order to manipulate another into sexual activity, there is a significant grey area in which there is likely to be significant disagreement about whether it is reasonable to believe that someone is (validly) consenting despite the deception. Part of the difficulty is that it is not clear how 'reasonable' is to be understood in this context. Is it an empirical criterion, in that it is unreasonable for D to fail to disclose a fact if a certain proportion of people in society would find that fact material? Or is it a normative assessment? On either approach, is the relevant sample the whole jurisdiction or a particular community of which D, C, or both may be a member? In any event, a mens rea criterion based on culpable inadvertence carries a real risk of uncertainty, unpredictability, irrationality and biased application.

On an empirical understanding of reasonableness, the indeterminacy problem is immediately obvious: how is anyone to know whether 'most' people in society would find any particular fact material to their decision to consent? Whilst we may entertain some fairly safe assumptions about certain types of information (it is certainly hard to imagine many people would want to engage in sexual intercourse with someone who had committed child sex offences, or who had been cheating on them with their sibling or best friend), what matters to individuals in their sexual decision-making is highly subjective and there is simply no evidence to support claims that certain information matters to 'most' people. In the absence of evidence, an empirical reasonableness criterion is an invitation for jury speculation. To some degree, this risk is inevitable in a jury system, but given the widely divergent views on sexual morality,[479] and certain features of these cases, such speculation is particularly worrisome in this context. Jury speculation would be

[479] Evidenced by the intractable nature of the line-drawing problem with which this thesis is primarily concerned.

based on an extrapolation from what matters to individual jury members and their communities. Various factors may have an impact on what one thinks matters, or is likely to matter, to sexual decision making: age, religion, political and cultural beliefs, upbringing and prejudices. The less representative the jury is of wider society, the less accurate their determination of reasonableness (on an empirical basis) will be. Juries might well return different verdicts on similar facts, because they have disagreed on the application of the reasonableness criterion.

The possibility for prejudice to affect the application of this criterion is also palpable. a jury might assume that it is unreasonable for a transgender or bisexual defendant to believe that their gender history or sexual identity would not be material to C's consent. A jury might think it reasonable for a gay male defendant to believe that his HIV+ status was not material to C's decision to consent to casual sex given that they wore condoms and he had a low viral load,[480] That *same* jury might also conclude that a heterosexual male's belief that such information would not be material to a female complainant was unreasonable. One consequence is that for individuals with marginalised identities or those who already face discrimination in society, such an empirical assessment of reasonableness encourages, indeed requires, those individuals to turn that stigma and discrimination inwards and become self-loathing. They must assume that most people would not wish to consent to sexual activity were they to know of the information that attracts social stigma, in order to stay on the right side of the criminal law. This fosters insecurity and risks exacerbating mental ill-health amongst the most vulnerable in society.[481]

With this level of indeterminacy affecting the jury decision, the rule of law implications are stark. How is D to predict whether 'most' people in society would find the subject of his deception

[480] In which case, the chances of transmission are zero. See discussion in Ch 7.2.

[481] I am grateful to Alex Sharpe, and attendees of the Sexual Relationships: Deception, Consent and Protecting Autonomy Panel at the Annual SLSA Conference 2018 at the University of Bristol, for helpful discussion on this point.

material? Is D without complaint; on 'thin ice', as the deception is wrong in the first place? Given the prevalence of deceptive conduct in ordinary social life, much of which would be widely regarded as innocuous, and the general reluctance to criminalise lying or deception alone, this argument is unpersuasive. Moreover, what happens when social mores change? We might assume that whether a woman is a virgin is not something that is material to the sexual decision-making of most people in modern Britain. That has not always been the case. How is a jury or defendant to determine when the empirical picture shifts, such that it is now reasonable to believe in consent? For these reasons, an empirical understanding of the reasonableness criterion is untenable.

A normative understanding of reasonableness suffers from similar deficiencies. Decoupling what is reasonable to believe immaterial from what most people believe to be material does not make for increased consistency and predictability, as juries and defendants are just as likely to differ on what they think *ought* to be material and immaterial to sexual decision-making, and bias and prejudice are just as likely to have the same negative effects. Accordingly, liability should be imposed only if D intends or knows that the deception will be material to C's consent, or if he thinks it may be material to C's consent.

CONCLUSION

In general, the current legal approach to identifying deception seeks first to identify a representation – express or implied – which caused the false belief. This enquiry is undertaken in the context of establishing whether some action taken by C was in turn caused by the misrepresentation. This is an unhelpful starting point, not least because the concept of an implied representation is somewhat unstable, as explained in Ch 3, but also because some instances of deception do not arise out of a false representation at all, but from non-disclosure. The orthodox legal approach to translating deception from a moral to a legal concept should therefore be rejected, in favour of a framework which requires that the prosecution prove that:

1. D caused C to hold a belief in a proposition of fact (X),

   This can be satisfied through words, conduct or an omission in breach of a legal duty of disclosure. In the latter case, C must infer X from D's failure to disclose.

2. That fact was false,
3. D intended to cause C to hold a belief in X,
4. D knew X to be false or did not believe X to be true.

In order to impose criminal liability on D for any sexual consent that is obtained through the deception, it must be shown that but-for the deception, C would not have consented (i.e., the deception was material to C personally); C's belief in X was still operating at the time of the decision to consent; and that D knew or was reckless as to whether the deception would be material to C's consent.

In any given case, the better approach when seeking to establish whether an individual has acted in a certain way as a result of being deceived[482] is to begin from this external causal link. One should first identify the false belief(s) that caused C to consent. Once that false belief has been identified, the court should then consider whether this mistake was uninduced by D, or resulted from D's deception, active or passive. If D did cause that false belief, deception will be contingent upon D having the relevant mental state, or *mens rea*. This approach will guard against the slippage between deception and uninduced mistake evident in *McNally*, which ultimately stemmed from the court's failure to identify at the outset the *false* belief that induced consent. This error makes it all too easy to overlook the fact that in the gender identity cases D and C may disagree about which

[482] Which in legal contexts is always the ultimate question, given that neither the civil law nor criminal law prohibits deception per se, but is concerned with situations where deception induces certain behaviour or consequences. See n323.

of C's beliefs are true, and which are false. By beginning the deception inquiry with an explicit search for a false belief that induced consent, courts will be encouraged to confront these challenging cases head-on and to take a position within that dispute.[483]

[483] See discussion on this aspect of *McNally* (n5) and the gender fraud cases in Ch 1 and Ch 7.

PART III

CHAPTER FIVE:
A DIFFERENTIATED APPROACH TO DECEPTION AND MISTAKE

As demonstrated in Chapter 1, the current approach of the courts in England and Wales is to draw a distinction between 'active' deception and mistake when assessing the validity of consent under section 74 of the SOA 2003. This distinction has been drawn without adequate consideration of its legislative or theoretical basis. In this chapter, I will offer a theoretical justification for distinguishing between mistake and deception when addressing the validity of any ostensible consent.

There are two broad approaches to analysing the legality of sexual consent obtained by deception and sexual consent given on the basis of an uninduced mistake. One is to adopt what I will call a 'unified approach', under which consent is invalidated by a mistake; the process by which that mistake arose – whether it was induced by deception or was the result of a unilateral false assumption by C – is only relevant to the mens rea inquiry. An alternative 'differentiated', approach recognises that mistakes resulting from deception and uninduced mistake affect consent and sexual integrity in different ways. In this chapter, I will offer an argument in favour of the differentiated approach.

In the first section I will respond to Sharpe's argument that the distinction between mistake and deception is inherently prone to analytical collapse. I will also recap the formal basis for the distinction, as set out in Part II of this thesis. I will then provide an account of the unified approach to deception and mistake in section 2, before critiquing the conceptual foundations and practical application of this approach, in section 3.

The rest of the chapter will demonstrate how the differentiated approach, itself underpinned by a differentiated account of the underlying right, meets these concerns.[484] Rather than viewing the right to sexual integrity, as a 'monolithic' right, in section 4 of this chapter I will build on the analysis of integrity offered in Part I, and provide a more detailed explanation of how deception and uninduced mistake implicate different aspects of the right to sexual integrity. I will argue that when D deceives C into consenting, he violates C's right to be free from illegitimate interference when deciding whether to exercise her normative power to consent. When C merely makes an uninduced mistake (even if that mistake is material to her consent), there is no such violation. Rather, the right to know information relevant to the decision to consent is implicated in such cases. In section 5, I will argue that this right is nowhere near as extensive as the unified approach to deception and mistake would suggest, due to the need to carefully balance C's interests in disclosure against various other rights and interests of all potential parties to sexual activity. It is important to consider how an obligation to disclose might affect D's privacy at a systemic level, as well as how the right to privacy may be particularly relevant in cases involving the non-disclosure of certain types of information (i.e., gender identity or history, HIV+ status, race or ethnicity, religion, etc.). I will consider how the right to privacy may interact with the right to know relevant information in the context of specific fact patterns or types of information in Chapter 7. In that chapter, I will also assess whether the right to privacy might ever justify the infringement of C's right to be free from illegitimate interference in her decision-making, if D deceives C in order to maintain secrecy and control over sensitive information in which he has a privacy interest. But before the relationship between the right to privacy and these two aspects of the right to sexual integrity is evaluated in specific, substantive contexts, it is important to note that, at a systemic level, one can identify a conceptually coherent differentiated approach to deception and mistake

[484] Proponents of the unified accounts refer to sexual autonomy as the right at the centre of rape/SA.

that better reflects the complex nature of sexual integrity and is more sensitive to competing and complementary rights, interests and values.

5.1 DEFENDING THE DISTINCTION AT THE CONCEPTUAL LEVEL

Sharpe has argued that a differentiated approach is inappropriate as, inter alia, the distinction between deception and non-disclosure is insufficiently clear and robust, and that in any event there is no adequate normative basis for that distinction.[485] This argument is supported only by an extended discussion of *McNally*.[486] She contends that the 'judicial treatment' of the facts in 'gender fraud' cases like *McNally* 'reveals the ease with which non-disclosure of gender history can be translated into active deception'.[487] Sharpe is correct to question the Court of Appeal's treatment *McNally* as a case involving 'active deception';[488] it is, in fact, a case involving non-disclosure. However, instead of signalling the inevitable slippage between deception and non-disclosure, *McNally* might instead signal a warning against attempting to apply a distinction that is poorly understood.

Analysis of the facts and decision in *McNally* is set out in detail in Chapter 1.2. By way of brief recap, Justine McNally was initially convicted of six counts of assault by penetration (oral and digital penetration) contrary to section 2 of the SOA 2003, following a guilty plea in the Crown

[485] Sharpe, 'Expanding Liability for Sexual Fraud' (n51).

[486] *McNally* (n5). For a detailed explanation of the facts of, and decision in *McNally*, see Ch 1.

[487] Sharpe, 'Expanding Liability for Sexual Fraud' (n51).

[488] ibid.

Court. McNally, legally female and referred to by the court by her legal name, Justine, called herself 'Scott' online and in her interactions with C, wore 'male' clothes and referred to herself in terms suggestive of a male gender identity. At home, and at school, McNally's gender presentation was feminine. The Court of Appeal viewed McNally's actions as amounting to deception that she was a boy, when, in fact, she was a girl, and held that such deception was capable of vitiating consent to sexual activity.[489] The court distinguished *McNally* from *EB*,[490] a case in which D's failure to disclose his HIV+ status was held to be irrelevant to the question of C's consent, on the basis that *McNally* was a case of 'active deception' and *EB* was not.[491] In drawing this distinction, the Court of Appeal offered no guidance on what constitutes 'active deception', why, or if, that is to be distinguished from (presumably) 'passive deception', and how deception and non-disclosure are to be differentiated in general. Similarly, Sharpe's own formulation of the distinction is under-analysed, despite arguing that it cannot robustly be drawn. Sharpe overstates the difficulties in distinguishing between deception and non-disclosure by extrapolating too widely from *McNally* and similar cases involving gender as the focal point of the inquiry.

As argued in Chapter 1.2, in order to correctly understand the facts of *McNally* it is important to step back and consider the subject matter of the alleged 'deception'. In order to be deceived, or indeed to be mistaken, C must believe a false proposition of fact. In order for that mistake or deception to affect the validity of any consent to sexual activity (and therefore be relevant to criminal law), that deception or mistake must be material to C's decision to engage in sexual activity. In most cases, the propositional content of the material false belief will not be in issue. But in a case like *McNally*, this is the first and most important issue to be addressed. The

[489] *McNally* (n5) [26]-[27].

[490] (n34).

[491] *McNally* (n5) [20]-[21].

failure to get to grips with this central question led directly to the miscategorisation of the case. C's false belief in *McNally* was not that McNally was male. The false belief held by C was that McNally was a *cis*gender man, rather than a transgender man. The deception/non-disclosure distinction must be determined with respect to this particular proposition. Did D deceive C into this belief, or did C make an uninduced mistake to this effect? The actions used by the Court of Appeal as evidence of 'active deception' are entirely consistent with authentic male gender presentation.[492] C made an assumption that, because McNally looked, sounded, acted and identified as a man, he must have been a *cisgender* man. The Court of Appeal's classification of this case as one of active deception was incorrect. This error stems from the failure to first ask the question 'what *false* belief induced C's consent'.

The feasibility of applying the distinction between deception and mistake is not as hopeless as Sharpe suggests. Although the distinction was poorly applied in *McNally*, it was also poorly understood. As demonstrated in Chapter 4, there is a way to distinguish between deception (active and passive) and *uninduced* mistake (UM), or 'pure non-disclosure' (PND).[493] I do not wish to overstate the ease with which the deception/PND distinction is to be drawn. In cases of non-disclosure, the distinction between passive deception and PND is determined primarily by reference to whether or not there is a prescriptive expectation of disclosure in place. Although this determination is fact-centric, the prescription and delimitation of the relevant circumstances in which a prescriptive expectation of disclosure arises is most appropriately charged to policy makers, rather than a judge or jury. A closed list of scenarios must be placed on statutory footing, in order to secure crucial values of certainty, consistency and predictability in the operation of the criminal law. The decisions to be made in relation to the appropriate content of this list are not

[492] ibid [4]-[8]. See Sharpe, 'Criminalising Sexual Intimacy' (n51) 217 and discussion in Ch 1.

[493] I will use the term uninduced mistake when describing these sorts of cases from C's perspective, and 'PND' when describing these sorts of cases from D's perspective.

easy. However, once a determination has been made about whether or not, in the circumstances, a prescriptive obligation is in place, the assessment of whether or not C was (passively) deceived, or made an uninduced mistake can be undertaken with a reasonable degree of robustness. Before we assess the relative normative merits of unified and differentiated accounts, it is worth recapping the formal distinctions between deception and UM, set out in Part II.

D deceives C when D causes C to believe a false proposition of fact. D must intend to cause C to believe X, and must be at least reckless as to whether X is true. Deception is 'active', when D causes C's false belief by words or actions. Deception is 'passive' when D causes this belief by failing to disclose a fact, in circumstances where D is under an obligation to disclose X- and C infers X from D's silence, in the light of such expectation. D must intend that C infer X from his silence, and be at least reckless as to whether X is true. The distinction between deception and mistake is therefore policed by a causal requirement. Non-disclosures will sometimes be deceptive, but unless the criteria for passive deception are established, such that D can be said to have caused the false belief, C's mistake will be uninduced, and the case is one of pure non-disclosure. In all instances, for the mistake or deception to be at all relevant to the permissibility of sexual activity, there must also be a causal relationship between the mistake and the sex. It must be a mistake/deception but-for-which consent would not have been given. Only then is the deception/mistake sufficiently connected to the relevant sexual activity so as to implicate the right to sexual integrity. When assessing the relevant mens rea/culpability in PND/UM cases, it must be noted that there are two relevant mental states to consider on D's part – his mental state in relation to both whether C was mistaken and whether that mistake was material to consent. In deception cases, D's mental state in relation to the materiality of the false belief will be an important factor in assessing culpability. His mental state in relation to C's mistaken belief is wrapped up in the definition of deception offered above. Whilst the distinctions between deception and non-disclosure can be complex, the misapplication of the distinction in *McNally* and

the particular challenges that arise in 'gender fraud' cases do not indicate that the distinction is inevitably prone to collapse. Rather, they act as a warning of the potential consequences of failing to understand the deception/non-disclosure distinction before attempting to assess its normative or legal salience.

5.2 A UNIFIED APPROACH TO DECEPTION AND MISTAKE

Tom Dougherty and Jonathan Herring offer two leading 'unified' accounts of how mistake and deception affect the validity of consent.[494] These accounts are 'unified' in that they identify any material mistake[495] on the part of C as resulting in consent-invalidity, regardless of its provenance. The distinction between deception and PND is not relevant to consent-validity, though it may be highly relevant to D's culpability for the non-consent/violation of sexual autonomy. In this section I will outline the structure and reasoning of the unified approach.

Central to Dougherty's argument is the notion that consent is a waiver of a specific claim-right against an individual and that 'the rights that we waive are the rights that we intend to waive'. Our intentions carry restrictions – implicit and sometimes explicit. Dougherty gives the example that, whilst we intend to buy a puppy we would not intend to buy a *rabid* puppy, and 'when I intend to waive my rights against Aisha to bring around her dog, I do not intend to permit her to bring around a rabid dog, even if I do not explicitly consider or mention rabies'. Dougherty argues that valid consent only extends to the 'restricted range of possibilities', both implicit and explicit, that

[494] Herring, 'Mistaken Sex' (n229); Dougherty, 'Sex, Lies, and Consent' (n465) 717-22, 727-34.

[495] Mistakes but-for which ostensible consent would not have been given. By referring to these mistakes as material, Herring is not suggesting that there is any sort of objective 'materiality' criterion. Dougherty refers to these sorts of mistakes as 'deal-breakers'.

the consenter intends to allow. If D or D's actions are tainted by any fact or feature that falls outside of that range of possibilities 'then what happened is not that for which consent was given'.[496]

Whilst Dougherty is not concerned with legal consent-validity and restricts his account to morally valid consent, he does not give any indication of what might justify a bifurcated approach to legally and morally valid consent. Herring's work is concerned with what constitutes legally valid consent; his argument shares salient normative features with Dougherty's. Herring argues that the meaning of any act is inherently dependent on its context, circumstances and the cultural understandings of the participants.[497] Herring suggests that, to protect sexual autonomy and sexual integrity, consent should be rich and meaningful. Merely the 'mouthing of the word "yes"' will not do; the standards of consent should amount to a 'full expression of the victim's will'.[498] We ought to consider the detailed *meaning* of the act in which C *thought* she was engaging, from her perspective. If that does not correspond to reality – if C was mistaken as to any material fact – then there is no valid consent. As an aside, it is possible to disagree with Herring's expansive approach to criminalising 'mistaken sex' without reducing legally valid consent to the 'simplistic question, "did the victim say yes or no"',[499] but for now it is pertinent to focus on the similarities between the Dougherty and Herring theses. Herring seeks to construct and define consent in terms of the 'full expression of the victim's will', focusing on the meaning of the act, as C understood it. Dougherty seeks to define consent as only applying to acts that can be described in accordance with any implicit, uncommunicated restrictions on the 'range of possibilities' C intended to permit.

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[496] Dougherty, 'Sex, Lies, and Consent' (n465) 736. Internal quotation marks omitted.

[497] Herring, 'Mistaken Sex' (n229) 513-14.

[498] ibid 516.

[499] ibid 515. See Ch 2.3.2.

Herring and Dougherty describe the same normative requirement in two different ways, and both are ultimately guided by an underlying commitment to a 'rich' and demanding conception of sexual autonomy.[500] Before considering the conception of sexual autonomy at work here, it is important to appreciate the extensive practical ramifications of the unified approach that might be overlooked on an insufficiently attentive reading of the unified accounts.

Whilst in 'Mistaken Sex', Herring is clear about the unified nature of his thesis from the outset, Dougherty does not state his ultimate commitments so quickly. His argument in initially seems differentiated, rather than focusing on mistake as the invalidating feature. The title of the paper and its entire first half suggest that deception and lying lie at the heart of his thesis. When discussing the potential culpability of various defendants, Dougherty's hypothetical scenarios often involve deception.[501] This is rhetorically powerful, but the true focus of Dougherty's unified thesis is revealed later in the paper, where, once (if) persuaded by his analysis that material deception precludes valid consent, it is only logical to extend this conclusion to material mistakes too. As a result, whilst at the outset of his argument, Dougherty sets out his aim as justifying the claim that 'deceiving another person into sex involves having sex with that person while lacking her morally valid consent [and is therefore] seriously wrong',[502] by the end of his analysis his position is significantly more expansive, defining a far wider array of scenarios as non-consensual. This rhetorical move, leading with and therefore focusing the reader's attention on deception, rather than mistake, is not merely of aesthetic or stylistic interest. It is common in work dealing with deceptive and mistaken sex to construct compelling scenarios involving morally dubious or culpable conduct, which appeal to intuitions that favour a designation of non-consensuality, only

[500] ibid; Herring, 'Relational Autonomy and Rape' (n158); Dougherty, 'Sex, Lies, and Consent' (n465). On Dougherty's use of autonomy, see Manson (n466).

[501] See Dougherty, 'Sex, Lies, and Consent' (n465) 734, 740.

[502] ibid 720.

for these designations of non-consensuality to apply equally to far less intuitively serious, grave or wrongful scenarios. Of course, our intuitions may not be grounded in reasons and so may lead us astray. However, we ought to test our reasoning against the harder cases, not the easy ones. Dougherty's common invocation of cases in which D deceived C, and Herring's powerful invocation of cases in which D *knew* that C was materially mistaken,[503] should not obscure the far wider ramifications of the unified approach.

On this unified account, when D has sex with C, and C was materially mistaken about a) any fact relating to D, including facts about his identity, attributes, qualities, intentions or any other state of mind, motivation or purpose; b) any feature of the act; c) any circumstance surrounding the act; or d) the wider context in which the act takes place; then D has sex with C while lacking her morally valid consent, and therefore seriously wrongs C. More should be said to ensure that the full ramifications of the unified approach are clearly understood. On this account, not only is C's consent invalid if she is unaware of the presence of a 'deal-breaking' fact that she knew, in advance of the sex, would be a deal-breaker, but C's consent is *also* invalid if she was unaware at the time of the act that the particular fact of which she was ignorant would even *be* a deal-breaker. Dougherty acknowledges that in matters sexual, as well as general, people do not always know what their 'deal-breakers' are until after the fact. This does not alter his view that if, upon subsequent realisation of her mistake, C also realises for the first time that that fact is actually one of her deal-breakers, her ostensible consent was not valid as a result of her mistake.[504] Consider the following examples:

1. **Cara** does not realise that she would not consent to sex with transgender individuals, because it is only after discovering that **Dev**, with whom she recently had sex, is

[503] Herring, 'Mistaken Sex' (n229) 512-13, 518, 520-21, 524.

[504] Dougherty, 'Sex, Lies, and Consent' (n465) 736, 738.

transgender, that she learns of the existence of trans people. Cara is certain that, had she been aware of Dev's gender history prior to their sexual activity, she would not have consented.

2. **Christoff** has never contemplated the idea that some people enjoy dressing in animal costumes, then having sex with each other, 'as animals'. Christoff meets **Danielle** and they begin a sexual relationship which does not involve this sort of activity, but Danielle has enthusiastically participated in such activity in the past and hopes to do so again in the future, either with Christoff, or with others. When Danielle explains these sexual interests to Christoff, he is horrified and repulsed, both at the existence at such practices, and by the fact that he has been having sex with someone (Danielle) who enjoys such practices. Christoff knows that he would never have consented to *any* kind of sexual activity with Danielle, had he been aware of her preferences and past activities.

Under the unified approach, neither Cara nor Christoff validly consented. Dougherty is untroubled by this elision between something that *was* a dealbreaker and something that *would have been* a deal breaker, had C thought about it.

Dougherty is similarly untroubled by the fact that C's consent will be invalid even if D was unaware of the relevant 'deal-breaking' fact at the time of the activity. So, for example, if **George** is not aware that his father, whom he has never met and of whose identity he is ignorant, is in prison for murdering a child, and his sexual partner, **Izzy**, would not have consented to sex with **George**, had she known the truth, then the sex between **George** and **Izzy** is non-consensual, even though **George** himself was justifiably ignorant of the 'deal-breaking' fact. George's ignorance is relevant only to his culpability for the non-consensual sex, rather than consent itself.

Herring does not explicitly accept that consent will be invalid even if C was not aware that the sort of fact about which she was ignorant would actually be a 'deal-breaker' to her until after the sexual activity. Nor does he explicitly accept that consent is nevertheless invalid even if D was not aware and had no reason to be aware of the existence of that fact. However, whilst Dougherty's reasoning focuses on the *scope* of valid consent, and Herring's reasoning is causation based, the doctrinal outcomes of each argument are co-extensive. Herring is clear that consent is 'invalid' in cases where C's mistake was material, i.e. when C would not have 'embarked on [the] sexual activity… had she known the truth'.[505] The application of this causation-based test would mark the consent in the examples given above as invalid. By necessary implication, therefore, Herring's analysis results in consent-invalidity in cases where C was not aware of her (relevant) deal-breakers prior to sexual activity, even in cases where D made enquiries as to C's deal-breakers before engaging in the activity.

This is unsurprising, given the similar normative commitments underpinning both accounts. As Manson has noted, Dougherty's approach is clearly based on a wide-ranging and demanding conception of C's right to sexual autonomy.[506] Manson notes that Dougherty's argument 'seems to favour some kind of "ideal autonomy"' that requires much more than a 'properly voluntary' decision to permit.[507] Manson criticises Dougherty for failing to provide any reasoned basis in support of this particular grounding of consent. We find a more detailed explanation of this sort of 'ideal' autonomy in Jonathan Herring's work, which suggests that a decision is only 'richly' autonomous if it is both self-determined, in that C was free from external interference or constraint; self-governing, in that there was no 'volitional or cognitive failing',

[505] Herring, 'Mistaken Sex' (n229) 523. (In the original text, these phrases appear in the reverse order. I have inverted them here to emphasise the structure of Herring's 'but-for' test of consent-invalidity).

[506] See Dougherty, 'Sex, Lies, and Consent' (n465) 723, 730, 744-46; Manson (n466) 424-25.

[507] Manson (n466) 425.

including 'weakness of will'; and that C's decision 'cohere[s] with her sense of herself', does not feel alienating to her and reflects her values, beliefs and commitments.[508] According to Herring, the reason why mistaken consent is invalid is because a decision made on the basis of a material mistake does not cohere with C's values, beliefs and commitments and is therefore lacking in the requisite 'authenticity'. In order to ensure that C's autonomy is secured, C must be aware of any and all information that turns out to be relevant to C's decision to consent – even if she was not aware of its relevance at the time of the sexual activity, and even if D did not tell, nor could have told C of this information.

Proponents of the unified approach argue that the implications of the demanding conception of consent can be justified, as D's interests are protected at the mens rea stage (or when assessing overall culpability for a serious wrong). However, the idea that we do not need to worry about the ease and frequency with which consent is invalid on the basis of the unified account, because D may not be culpable, all things considered, offers little reassurance on closer analysis. We might assess D's culpability, or mens rea, by employing one of two tests. We might, to use the language of the criminal law, impose an advertent test of mens rea, whereby D lacks mens rea for the offence, if he has an *honest belief* in C's consent. Alternatively, we might impose a test of culpable inadvertence. The current mens rea for the non-consensual sex offences is based on this model, whereby D is liable if his belief in C's consent was unreasonable.[509]

On either account of mens rea/culpability, the unified account requires too much work to be done at this stage. In some circumstances, particularly those in which C was not aware of his deal-breaker at the time of the activity, or where D was not, nor ever could have been, aware of the existence of the deal-breaking fact, it is simply inapt to characterise D's conduct as seriously

[508] Herring, 'Relational Autonomy and Consent' (n145) 30-31.

[509] See discussion in Chs 1 and 4.3.2.

wrongful, even if non-culpably so. Consider the following example of **Nathan** (C) **and Meredith** (D):

> **Meredith** is a widow and **Nathan's** wife, Megan, went missing in combat over ten years ago and has long been presumed dead. Nathan believes that he is a widower. After years of loneliness and celibacy, they finally move on from their grief and begin a relationship with each other, having bonded, initially, over their experiences as grieving widow(er)s. They build their relationship slowly, and only engage in sexual intimacy after a while, when they both begin to feel as if they may be falling in love once more. Both are surprised, scared but excited about the prospect of being in love again…….
>
> Unbeknownst to both Nathan and Meredith, Nathan's wife is, miraculously, alive. Some time after they begin their (sexual) relationship, Megan is discovered, rescued and returns home. Nathan is devastated; he would never have begun a relationship with Meredith had he known that Megan was alive, and he would never have had sex with another woman – with Meredith – had he known the truth.[510]

Nathan was mistaken about a fact (Megan was alive) and that fact was material to his decision to consent. On the unified account, Nathan's consent is invalid. The sex between him and Meredith was a serious wrong (against Nathan). However, Meredith is not culpable, and would not be guilty of any offence. Yet, to describe the sex between Nathan and Meredith as non-consensual seriously mischaracterises the nature of that activity both at the time it was undertaken and afterwards. Nathan and Meredith were falling in love. They waited; they talked about each other's feelings; each made sure the other was comfortable with taking the next step into sexual

[510] This story may be familiar to viewers of the popular US television drama, *Grey's Anatomy*. See Krista Vernoff and Debbie Allen, *Breaking Down the House, Grey's Anatomy* , (season 14, episode 1, originally aired September 28, 2017).

intimacy. To describe the sex as non-consensual is unfair both to Meredith and to the connection that Meredith and Nathan shared at the time.

At a less abstract level, recourse to the culpability/mens rea analysis cannot save the unified account from accusations of over-reach. On an 'unreasonable belief in consent' standard, much will rest on a jury determination as to whether D's belief that C was *not* materially mistaken was reasonable. It is not entirely clear how 'reasonable' is to be understood in this context, and on either an empirical (it is unreasonable for D to fail to disclose a fact if a certain proportion of people in society would find that fact material) or a normative assessment, there is a real risk of uncertainty, unpredictability, irrationality and biased application.[511] The same can be said for the 'honest belief in consent' standard. Such a belief is inconsistent with any suspicion that C *may* be materially mistaken. Insecure defendants will be more likely to commit the offence than those who confidently assume that no one would care, given that they are so charming, charismatic and attractive. Juries may illegitimately bring their own prejudices to bear on the issue, resulting in arbitrary decision-making and over-criminalisation:[512] a jury might think there was no possibility that a transgender or bisexual defendant could have believed that C was not materially mistaken about their gender or sexual identity. A jury might believe a gay male defendant's claim that he did not think C was materially mistaken about his HIV+ status, but assume that a heterosexual male did not honestly believe that the female complainant was not materially mistaken about his HIV+ status. Different juries might come to different decisions in factually identical cases, as a result of differences in their preconceptions and prejudices. The rule of law implications are stark, but, for the reasons demonstrated in sections 5.3 and 5.5, the advertent mens rea criterion, when combined with a unified approach to consent-validity, is also incapable of ensuring that the rights and

[511] See Ch 4.3.2 for critique of an inadvertent mens rea standard in the context of mistake and deception.

[512] See Chss 5.5 and 4.3.2.

interests of C are appropriately balanced against other competing rights and values, including D's right to privacy, D and C's right to positive sexual autonomy, and C's right to waive valuable information.

5.3 DIFFICULTIES WITH THE UNIFIED APPROACH

In this section, I will argue that the unified approach gives rise to a number of practical and conceptual difficulties. It is based on an idea of autonomy that is difficult to realise and renders it impossible for the individual to know for certain that they are either exercising or respecting autonomy; it erodes the distinction between regretted sex and non-consensual sex; and it leaves limited scope to recognise and prevent the frustration of important goods, such as privacy, the valuable exercise of positive sexual autonomy, and the freedom to waive one's right to relevant information.

5.3.1 IMPOSSIBLE AND UNKNOWABLE AUTONOMY

If a 'deal-breaking' fact exists, any ostensible consent C gives in relation to D's actions will be invalid, even if neither D nor C knew, had reason to know, nor could have discovered the existence of that fact,[513] and even if C did not know at the time of giving 'consent' that a fact of that sort would be a deal-breaker to her.[514] The upshot is that even if the parties demonstrate the highest level of conscientious communication, honestly discussing what matters to each of them about the sex they plan to have, and the people with whom they have it, neither one can be certain

[513] Recall the example of Meredith and Nathan above.

[514] Consider the examples given Cara and Christoff above.

that they are *receiving* morally valid consent *or* that they are *themselves giving* valid consent.[515] Put another way, the right to sexual autonomy, under the unified approach, is so heavily idealised that one can never be certain that one is exercising that right, or that one's right is being respected, no matter the efforts one undertakes in order to be sure. D can certainly take steps to ensure that he is not *culpable* for any wrongful (non-consensual) sex, but it nevertheless seems fundamentally flawed to construct a right so central and important that its violation can constitute harm in and of itself (even if no experiential harm is thereby caused)[516] in such a way that one cannot be certain whether or not one is validly exercising or respecting it.

5.3.2 REGRET AND CONSENT

The extensive invalidating ramifications of the unified approach also erode the distinction between regretted sex and non-consensual sex. We regularly make decisions that we later regret. Sometimes that regret is based on errors of judgement that result from the agent's failure to properly or accurately evaluate the risks and benefits of a course of action: we have all of the relevant facts but we either make a mistake as to our own values, or incorrectly evaluate how well a certain course of action, fully understood, will cohere with those values or help us realise our ultimate aims and desires. Sometimes we fail to appreciate a foreseeable consequence of our action and sometimes, unforeseeable consequences arise. We might regret our decision because our values and commitments later change. We might act impulsively, out of weakness of will, and prioritise a desire that we would not wish to prioritise, were we stronger in the face of temptation.[517] Similarly, we might regret decisions because we later learn of information that was not available to us at the time. This is a common source of regret; 'there is nothing incoherent about the idea of

[515] Dougherty, 'Sex, Lies, and Consent' (n465) 737-38.

[516] See discussion in Ch 2.

[517] Sarah Conly, 'Seduction, Rape, and Coercion' (2004) 115 Ethics 96, 111-12.

valid consent that we regret with the benefit of hindsight'[518] and hindsight often accords us more information than we had at the time. In claiming that these sorts of decisions were not autonomous, the unified thesis erodes the distinction between regretted sex and non-consensual sex, on the basis of a definition of autonomy so demanding that many of our daily decisions would fail to meet this vital standard of self-authorship. As will be demonstrated in section 5.4, a different, differentiated account of the right in question[519] will leave the distinction between non-consent and regret more clearly intact, reject the expansive approach taken by the unified thesis, and recognise that in certain, more limited scenarios mistaken consent can involve a violation of that right.

5.3.3 THE FRUSTRATION OF VALUABLE GOODS AND OTHER RIGHTS

PRIVACY

When assessing the impact of the unified approach, it is important to recall both that consent can be invalid on the basis of a material mistake even if D has no idea that C is materially mistaken, and that D must determine whether or not he has valid consent in an informational vacuum. D must decide whether or not to disclose information (in order to be certain that the consent obtained is valid) *ex ante*, without any indication as to whether C is mistaken about X, or whether that mistake would be material. We all have information we wish to keep private, or as private as possible; information that we would not wish to disclose unless *absolutely necessary*. This information might relate to previous sexual history, including same-sex sexual activity; race,

[518] Manson (n466) 424.

[519] The right to sexual integrity, see Ch 2.2.2.

ethnicity or religion;[520] gender history or identity;[521] reproductive capacity or history; previous criminal convictions; previous sexual abuse; virginity; non-virginity; marital status (D may be separated, but not divorced, or in hiding from an abusive spouse); HIV status or other health information, including whether or not one has a non-contagious illness or long term health condition/disability.

The unified approach effectively imposes an obligation on individuals to disclose intensely private information but, crucially, D has no means of knowing the precise scope of that obligation *ex ante*. Under such uncertainty, D has three choices: (1) decide not to disclose and risk engaging in non-consensual sexual activity with C; (2) disclose this acutely private information, knowing that it might in any event be unnecessary, as C is either a) not mistaken or b) does not consider the information to be material to her decision to consent; or (3) refrain from engaging in sexual activity altogether.

The response from proponents of the unified approach is likely to be that given the importance of sexual autonomy, it is unreasonable for D to risk committing such a serious wrong by failing to disclose information that he is aware *may* materially affect C's decision to disclose, even if that information is private, and even if D assesses the risk of materiality to be relatively slim. The mens rea criterion will protect D from criminal liability if he is insufficiently culpable for the non-consensual, mistaken sex. Any restriction of D's right to privacy is justified purely because the right to sexual autonomy trumps the right to privacy.[522] However, the argument that 'privacy trumps sexual autonomy' argument is inadequate. Recall that D must assess the situation in a

[520] See *Kashur v State of Israel* [2012] CrimA 5734/10/10 Takdin (Isr), Nevo Legal Database, discussed in Aeyal Gross, 'Rape by Deception and the Policing of Gender and Nationality Borders' (2015) 24 Tul JL & Sexuality 1.

[521] See n58

[522] See Herring, 'Mistaken Sex' (n229) 522-23.

vacuum. There is no guarantee that disclosure is necessary to protect sexual autonomy: C may not be mistaken and/or C's mistake may not be material to the decision to consent. The oft-discussed paradigm of D knowingly exploiting C's material mistake is not the appropriate case against which to evaluate the privacy-impact of the unified approach. D may only be concerned that the private information *might* affect C's decision, and even then that appreciation may be rooted more in a generalised fear and insecurity that no-one would be prepared to engage in sexual activity with D (say, as a result of D's hidden disability) rather than any individualised suspicion that this particular person would not wish to have sex with D were she aware of the information. And, of course, D's suspicion may be false. In which case, D has been forced to disclose private information with little overall benefit. A high cost to D's right to privacy does not secure C's autonomy, as it was never lacking in the first place. Surely there is a more sensible way to balance the competing rights and interests of C and D?

POSITIVE SEXUAL AUTONOMY AND VALUABLE SEXUAL ACTIVITY

The obligation to disclose acutely private information has an impact on C's sexual autonomy too. D may take the third option set out above, and refrain from engaging in sexual activity because he is unprepared to disclose the private information or to take the risk of non-consensual sex. D may not only refrain from engaging in sexual activity with this particular person, but with anyone at all. Yet it may often be the case that D's non-disclosure would not have been consent-invalidating. C may not have been materially mistaken. In which case, both D and C's positive sexual autonomy is impeded, and the valuable good at stake - a fully consensual, mutually desired encounter, is frustrated due to the effects of an over-broad approach to sexual autonomy and mistake.

Dougherty downplays fears that the unified approach will have this sort of chilling effect on perfectly consensual and valuable sexual activity, and suggests that 'when consent is very

important… each party has more moral reason to communicate about their intentions'.[523] It is not at all clear how this meets the concern. What kind of moral reason do the participants have? What would be the consequences of failing to communicate? Dougherty cannot be suggesting that only when the relevant facts about the sexual activity/actor/circumstances fall outside of the *explicitly* verbalised restrictions on the 'range of possibilities' that C intends to permit will the action be non-consensual. This would be entirely inconsistent with his overall thesis. Perhaps Dougherty is making a *descriptive* claim that people generally *will* communicate about their intentions, and so therefore this chilling effect is unlikely in practice. If this is his meaning (which is unlikely, given his reference to a '*moral reason* to communicate'[524]) then there is no evidence to assume that this is the case. Indeed, as O'Neill has suggested, the nature of communication in sexual relationships makes miscommunication likely.[525] Dougherty also suggests that if C's values are 'highly idiosyncratic', 'it may be his responsibility to disclose [his preference], rather than his partner's responsibility to inquire into whether he has this preference'.[526] This suggestion, included in a footnote, is inconsistent with Dougherty's central argument. It would also be contrary to Dougherty's argument to say that in such cases, absent disclosure of idiosyncratic preferences by C, D's act is not a serious wrong, as Dougherty premises his argument on the claim that *all* non-consensual sex is seriously wrongful. If the responsibility to communicate is to be shared, the question of when and how to share that responsibility is hugely important in understanding the proper approach to mistaken sex. It is telling that Dougherty, having accepted the stark ramifications of his unified thesis in theory (that neither party in a sexual encounter can be sure

[523] Dougherty, 'Sex, Lies, and Consent' (n465) 738.

[524] ibid (emphasis added).

[525] Onora O'Neill, 'Between Consenting Adults' (1985) 14 Philosophy & Public Affairs 252, 269.

[526] Dougherty, 'Sex, Lies, and Consent' (n465) 741.

that they have either given or received morally valid consent, even if they have discussed theirs and their partner's 'deal-breakers'), demonstrates some hesitancy over how this might cash out in practice, in the hard cases.

THE POWER TO WAIVE THE RIGHT TO RELEVANT INFORMATION

Finally, as well as risking C's right to sexual autonomy, the unified approach also frustrates C's ability to exercise an important power: the power to *waive* her right to relevant information. The meaning and significance of this right will become clearer in section 5.4. I will argue that there are multiple aspects of the right to sexual integrity, one of which is the right to know relevant information (relevant, that is, to the decision as to whether or not to consent to sexual activity). This right is violated when D knowingly exploits a material mistake made by C. It suffices to note that if C holds such a right, she also holds the power to waive that right, by explicit or tacit means. C may exercise her own autonomy by deciding that she would rather not know certain things, and, as a result, choose not to ask certain questions.[527] Herring himself gives credence to something like this argument, accepting that some sexual relationships may legitimately involve fantasy and the suspension of belief. He defends the unified account, however, by recourse to the knowledge paradigm: such an argument cannot hold in 'cases where one party *knows full well* that the other does not wish to be deceived'.[528] Similarly, Dougherty acknowledges that there can be benefits to deception in the romantic context and that often people may want to be deceived or to have certain information withheld from them.[529] However, he suggests that 'when sexual partners deceive each other about themselves there is frequently some risk, however small, of this deception leading to

[527] This analysis is influenced by a passage in Tadros, *Wrongs and Crimes* (n460) 250.

[528] Herring, 'Mistaken Sex' (n229) 521 (emphasis added).

[529] Dougherty, 'Sex, Lies, and Consent' (n465) 740, citing Sarah Buss, 'Valuing Autonomy and Respecting Persons: Manipulation, Seduction, and the Basis of Moral Constraints' [2005] 115 Ethics 195.

non-consensual sex' because it is difficult to know what information will matter to one's sexual partners.[530] Dougherty addresses this concern by suggesting that, in contexts where D has not deliberately deceived C into sex, but may have acted recklessly, the key issue is the extent of the *acceptable* risk and the appropriate balance of epistemic responsibility. Costs involving the loss of privacy and the risk of frustration of valuable sexual activity must be balanced against the 'seriousness of the moral wrong of non-consensual sex'. Dougherty suggests that the balance must be drawn on a case by case basis (and notes that if C's values are 'idiosyncratic', s/he may have a responsibility to disclose their deal-breakers), but claims that in general it would be 'hard to justify' a situation in which 'potential victims' were expected to 'assume the *risk of misrepresentation* in intimate relationships'.[531]

Both Herring and Dougherty address the extensive and worrying implications of their theses on D's right to privacy, C's power to waive her right to relevant information, and both D's and C's positive sexual autonomy, by invoking powerful rhetoric of deliberate misrepresentation and knowing exploitation of a material mistake. The pressing challenge is to defend the unified account against the argument that it is over-reaching and excessive in the context of the harder cases, in which D neither deceives C nor knows that C is materially mistaken. When our focus is fixed on these cases, it is clear that the expansive, unified approach comes with serious costs. In many cases, this conceptualisation of sexual autonomy and consent results in the frustration of a range of rights and interests of both D and C, without any positive pay-off for C's sexual autonomy. An alternative, differentiated, approach to deception and mistake is available. This approach is built upon a differentiated conception of sexual integrity as the right underpinning

[530] Dougherty, 'Sex, Lies, and Consent' (n465) 741.

[531] ibid.

rape/SA. Not only does this approach better satisfy the concerns identified above, it is rooted in a more plausible conception of the right in question.

5.4 DIFFERENTIATING SEXUAL INTEGRITY

To speak of the right to sexual autonomy isn't particularly helpful. We ought to think of sexual autonomy not as one 'monolithic right' but as a concept or value that is both constituted by, and realised through, the protection of a 'bundle' of rights, 'organized around the idea of securing for its possessor various forms of sexual self-determination'.[532] This bundle includes rights that we might not typically consider when thinking about the criminal law of rape/SA. For example, the right to be free from sexual harassment, the right to receive an adequate sexual education and the right to be free from discrimination on the grounds of sexual orientation, sex and gender identity all play a role in the realisation of sexual autonomy. As does the positive right to exercise sexual autonomy (i.e., to have sex with other consenting adults).

The 'negative' right to sexual autonomy is widely-regarded as the conceptual core of rape/SA. However, as Lacey has explained, when we focus on sexual *autonomy* as the right lying at the normative heart of rape/SA, we risk obscuring the physical and emotional aspects of rape, as well as the extent to which the implied separation of the body and emotions from our cognitive decision-making in sexual matters belies a far more messy, complex reality.[533] Viewing the right at stake in rape/SA as sexual integrity, which is not reducible simply to an autonomy interest, and

[532] Green, 'Lies, Rape and Statutory Rape' (n142) 207.

[533] Lacey (n129) 114.

with all its connotations of 'intactness' and inviolability,[534] allows us to ensure that the offence is understood in this embodied way, and remain clear about the relationship between the right at the heart of rape/SA and its relationship to sexual autonomy as a positive right which can be exercised to permit D to do that which would otherwise be a violation of the right to sexual integrity.[535]

The differentiated approach to mistake and deception rests on a particular appreciation of the structure of the right to sexual integrity. This right is best understood as a meta-right, with 'component' rights sitting underneath it. In this, it resembles the right to a fair trial, for example, which includes the right to a fair and public hearing, the right to be presumed innocent until proven guilty, the right to the assistance of an interpreter, and the right to silence and the freedom from self-incrimination.[536] We can identify three rights falling within the right to sexual integrity. The right to give or withhold a token of consent, the right to be free from illegitimate interference with that decision, and the right to know information relevant to that decision.

The first right – the right to give or withhold a token of consent – should be thought of as a bare right to control access. It plays a gatekeeping function. No one can gain sexual access to or over another's body unless that individual authorises such access by communicating permission for such access.[537] The sort of rape/SA that involves sexual activity without any kind of assent involves a violation of this aspect of the overarching right to sexual integrity. Such a case might arise when C resists, verbally or physically, when C is unconscious, or has been rendered unconscious, or when D gropes or molests C before C has a chance to even realise what is about

[534] See discussion in Ch 2.2.2.

[535] See discussion in Ch 2.2.2.

[536] See Ryan Goss, *Criminal Fair Trial Rights: Article 6 of the European Convention on Human Rights* (Hart 2014) 1.

[537] See Ch 2.3.1 for the need for communication.

to happen, or when C has frozen in the face of unwelcome advances and D, facing no resistance, proceeds to engage in sexual activity, despite the lack of authorisation. In all of these cases C's right to control D's access by granting or withholding authorisation is violated.

The second right is the right to be free from illegitimate interference in the decision-making process. C makes a decision based on an evaluation of her available options, their consequences, and her preferences. Illegitimate interference with this decision may come in a range of forms, for example: D may interfere with C's range of options, the consequences of those options, her understanding of those options or consequences, or he may interfere with C's evaluative processes. D might employ a range of techniques including (but not limited to) coercion, the exertion of undue influence, drink spiking, or grooming tactics. What constitutes illegitimate interference cannot always be answered in the abstract and may require some detailed consideration of the factual circumstances. We make decisions in the context of relationships: we influence and are influenced by those around us. This second right does not seek to exclude benign or legitimate influence or persuasion. Whilst a detailed analysis of every set of circumstances in which interference may be illegitimate lies beyond the scope of this thesis, it is helpful to consider two scenarios in a little more detail, before turning to deception, in order to exemplify how this right to freedom from illegitimate interference in sexual decision-making might operate in practice and support arguments in favour of changing English law, or lend clarity to key areas of debate.

Consider intoxication: under the current law, 'a drunken consent is still consent', and provided C is not so intoxicated as to cross the threshold into total incapacity, her drunken decision to authorise or engage in sexual activity constitutes valid consent.[538] Under the pre-SOA 2003 law, provided C remained above the threshold of capacity, a decision to permit sexual activity constituted valid consent, even if she was disinhibited, as a result of D drugging her, and would

[538] *R v Bree* [2007] EWCA Crim 256.

not have consented had D not done so.[539] However, such conduct on D's part clearly amounts to an interference in C's decision-making processes and any ostensible consent given as a result of such interference should be regarded as invalid, even if C is merely disinhibited, rather than entirely lacking in capacity.[540] In an effort to maintain the space to recognise that a voluntarily disinhibited C can engage in sexual behaviour which, though later regretted, was always consensual, and which does not violate her right to sexual integrity, the current law does not acknowledge that the right to sexual integrity *is* violated when D interferes with C's evaluative processes, by involuntarily intoxicating her.

Interference may also come in the form of coercion. In these cases, D illegitimately interferes with C's options and the consequences of taking up her options, or perhaps interferes with C's perception of her options and their consequences. Note that merely *affecting* C's options is not sufficient to trigger a violation of the right. As explained above, *illegitimate* interference is required. As Conly has argued, a sexual partner who approaches C genuinely to raise his concerns that a lack of sexual intimacy is proving damaging to his self-esteem and happiness, and that he does not wish to remain in a relationship with C that is devoid of sexual intimacy, does not *illegitimately* interfere with C's decision, as D is certainly entitled to leave a relationship for such a reason and is entitled to discuss the matter with C in case some compromise that both are content with, all things considered, can be reached.[541]

Illegitimate interference with C's decision-making may also take the form of deception. When D deceives C, he interferes with her decision-making by altering the information upon

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[539] *R v Lang* (1976) 62 Cr App R 50 (CA). See discussion in Emily Finch and Vanessa Munro, 'Intoxicated Consent and the Boundaries of Drug Assisted Rape' [2003] Crim LR 773, 778-79. The position under the 2003 act is unclear.

[540] Finch and Munro (n539).

[541] Conly (n517) 110. If this threat was entirely empty and was instead merely a ploy to coerce sex, then such an interference may well be illegitimate.

which she makes that decision. The right to be free from illegitimate interference imposes a negative obligation upon D to refrain from engaging in such interference; to refrain from drugging, coercing, or deceiving C. This is the right violated when D deceives C (actively or passively) into consenting.

On the other hand, the right to make a decision free from illegitimate interference is *not* implicated when C makes an uninduced mistake. D does not interfere with C's decision to consent. C consistently remains in control of the information basis upon which the decision is to be taken. C can check the validity of her mistaken assumption by making inquiries, and a non-deceptive defendant will provide the information requested. Only a deceptive defendant will remove the possibility of choice from C, and at this stage thereby interfere with C's decision-making, violating C's right to non-interference. Consider again the 'hard' cases captured by the unified thesis. If C is mistaken as to a fact and D does not realise that C is either mistaken or *materially* mistaken about that fact, and so doesn't disclose the information, D does not infringe C's non-interference right. There is no violation of sexual integrity in this sense. But if this is a 'hard case' for proponents of the unified thesis, what is the 'hard case' for opponents of that thesis? Cases where D knowingly exploits C's material mistake pose a challenge to those who may be inclined to think that mistakes do not invalidate consent. Whilst there is no violation of the right to be free from interference in sexual decision-making in such cases, there is nevertheless a problem with respect to C's sexual integrity. We can diagnose this problem by observing that, in these cases, D's actions objectify C by instrumentalising her.[542] Even if D sees C as some kind of means to an end of his own (perhaps he does not much care about C being sexually gratified, but certainly desires sexual gratification himself), in order to refrain from instrumentalising C, D must avoid treating her *merely* as a means to his own end. As Gardner and Shute have noted, it is perfectly coherent to validly consent to

[542] On objectification, see Nussbaum (n222).

sex that is objectifying. And by remaining 'astute' to C's consent, D does not treat C as a *mere* means to an end.[543] However, if D *knows* that C would not consent were she not materially mistaken and fails to disclose the information in order to ensure that C engages in sexual activity, C's ostensible consent cannot possibly have this kind of licensing effect. D uses C *merely* for his own ends. This is a red flag. It indicates that cases involving the 'knowing exploitation of a mistake' implicate the overarching right to sexual integrity, despite the fact that the right to be free from illegitimate interference in the decision to engage in sexual activity is not the right that is violated.

Instead it is the third right contained within the overarching right to sexual activity that is infringed in these sorts of cases: the right to know information relevant to the decision to consent. This is the right that D violates when he knowingly exploits C's material mistake. This right is different from the other two rights falling within the overarching right to sexual integrity in one important respect: the nature of the obligation or duty imposed on other people under that right.

The right to make a decision, and the right to be free from illegitimate interference when making that decision both impose negative obligations on other people: a negative obligation not to engage in sexual activity with someone unless they have authorised you to do so, and a negative obligation not to illegitimately interfere with other persons' decision-making in that regard. The right to relevant information, on the other hand, imposes positive obligations on individuals – to assess C's epistemic position and disclose relevant information. Whilst the content of the negative obligations under the first two rights are relatively straightforward both to delimit and respect (by ensuring one has authorisation, and ensuring that one has not interfered with C's decision-making processes), the same cannot be said for the positive obligation under this third right. It is not so easy merely to require that D disclose to C all relevant information. That much is clear from the discussion in section 5.3. When determining the scope of the positive obligation that this right

[543] Gardner, *Offences and Defences* (n98).

imposes upon others, it is important to be sensitive to the potentially onerous effects of construing the obligation broadly, as well as the importance of C's interest in maximizing her sexual autonomy and integrity.

5.5 THE RIGHT TO KNOW AND THE DUTY TO TELL

When determining the appropriate scope of the obligation to disclose relevant information, it should be recalled that D may be a) unaware of the relevant information himself, b) unaware that information of which he *is* aware potentially could be material to C, or c) unable to *discover* whether there is any information he knows of that is relevant to C's decision, because C herself is not aware of her own deal-breakers. The relevant information may relate to D himself, or some feature or circumstance of the sexual activity, but this is need not be the case. Recall the example of **Meredith** and **Nathan** (wife missing in action), or **George** and **Izzy** (unknown father is a child murderer).[544] Neither Meredith nor Nathan could ever have known the truth about Megan being alive – the mistake that supposedly 'invalidates' Nathan's consent. Similarly, George had no reason to suspect his father was a child murderer. Whilst the information about Megan's existence and George's parentage is relevant to Nathan's and Izzy's decision to have sex, and those facts could be described as information they each had an interest in knowing, when viewed from the perspective of Meredith's and George's *obligation*, rather than Nathan's and Izzy's right or autonomy/integrity interest, it makes little sense to say that Meredith and George breached their obligation to disclose relevant information, even if we include the caveat that they would not be culpable for any such breach.

[544] See Ch 5.2.

A determination must be made on the appropriate scope of the right and corresponding positive obligation. The criticisms of the unified account, outlined above, can be reframed in this context as an indication of the burdens and costs that would be associated with construing this obligation to disclose relevant information in such a way as to extend to cases involving ignorance, either as to C's mistake or the materiality of that mistake. The obligation would be severely onerous, requiring D to disclose huge amounts of information, just in case any information – no matter how obvious - might be the subject of a mistake, or just in case anything – no matter how objectively trivial – might be material to C's consent. It would also have a significant impact on D's privacy – forcing the disclosure of private information, just in case it is the subject of a material mistake. Such costs will often come with no benefit to C's autonomy and may often frustrate C's power to tacitly *waive* the very right the obligation seeks to protect. It may also come at a cost to the positive sexual autonomy of *both* D *and* C, and the valuable good of mutually beneficial, consensual sex, if an individual prefers to eschew sexual activity altogether rather than disclose information to all potential sexual partners.

The obligation under the right does not extend to disclosures when D is unaware that C is materially mistaken. Such an obligation would be impossible or disproportionately onerous to fulfill. Once this is established, the force of much of the criticism of the unified approach falls away. It is useful to note that D, ignorant of C's material mistake, does not instrumentalise C in this context. He does not treat her merely as a means to an end. Instead D is similarly mistaken about the fact that they cannot share in each other's ends, as a result of the material mistake. The red flag, indicating a sexual integrity problem, in cases involving the 'known exploitation of a mistake', is absent here.

When analysing the appropriate criminal law response to deception and mistake in the sexual context, property offences are often used as a point of contrast, not least because traditionally property rights have received more substantive protection in the criminal law.

Distinctions commonly drawn in the sexual context between different types of deceptions[545] are not relevant to the current law of fraud, which can be committed by any kind of false representation, provided the other elements of the offence are made out.[546] A contrast between sexual consent and the fraud offence could also be made in the context of this argument on consent-validity in the face of material mistakes. The approach advocated here now seems more demanding than the approach taken under the current Fraud Act, which only criminalises fraud on the basis of non-disclosure if there is a legal duty to disclose.[547] If D is not under a legal duty to disclose information, then there is no liability *even if* D knows that C is materially mistaken and would not have transferred/given/sold the property or money had C known the truth.[548] The difference in how the right to know relevant information is delimited in different contexts poses no conceptual difficulties. The content of the right and the scope of the duty under that right is appropriately sensitive to the particular context in which it operates. Sexual activity carries a unique and acute importance as a result of both individual and societal understandings of sex as a phenomenon and an activity. High emotional, physical and psychological stakes are often in play, whether our sexual endeavours go right or go wrong. The highs can be transcendent; the lows can be devastating. Sex can develop, affirm, challenge or jeopardise our core understanding of our self. Sex isn't, in general, conceived of as an adversarial game. 'Good' sex certainly isn't.[549] These are all relevant points of contrast to the more often legitimately adversarial commercial context in which property transactions tend to take place, and which the law of fraud must regularly police. I do not

[545] See discussions in Ch 1 and Ch 6 for more detail.

[546] See Ch 3 for an outline of fraud.

[547] FA 2006, s 3.

[548] Note that C need not actually lose any money or property, nor need D make any kind of gain, in order for the offence of Fraud to be made out, see FA, s 5. The offence is essentially inchoate. See discussion in Ch 4.

[549] See Ch 2.4.

mean to make any sort of argument here as to how the sort of 'knowing exploitation of a mistake' cases should be dealt with under the criminal law of fraud.[550] My point is merely that the right to know relevant information may be cashed out differently in non-sexual contexts, without any threat to the underlying conceptual integrity of the analysis laid out here.

The duty extends to cases in which D knows C is materially mistaken and does not extend to cases in which D is ignorant as to either the mistake or its materiality. The imposition of an obligation would require impossible or disproportionately burdensome measures in the latter kind of case, but not the former. When D knows that C is materially mistaken there is no risk of D's disclosure frustrating C's waiver of the right to know relevant information, as D knows that C has not waived such a right. Should D decide to avoid sex rather than disclose, there is no risk of stifling valuable, mutually consensual sexual activity, because the sex would not have been valuable and consensual in the absence of disclosure. Impact on D's privacy is also minimised: whilst D must still choose whether or not to disclose private information or avoid the sexual activity, the cost to his privacy interest does come with a clear and certain benefit in securing C's sexual integrity. He is not disclosing private information *just in case* it matters to C, but because he *knows* it matters to C. At a systemic level, the impact on D's right to privacy is less extensive.[551] So far, I have only considered the 'easy cases' under my differentiated conceptual framework. But what of my own 'hard cases'? What if D only appreciates a *risk* that C *might* be materially mistaken? Perhaps D knows that C is mistaken but only thinks that this mistake may be material. Or perhaps he doesn't know either of the mistake or its materiality but appreciates both possibilities. Does the obligation to disclose extend to such cases?

[550] Though I would be strongly inclined to argue against any expansion of the current law of fraud.

[551] It might be that D's right to privacy nevertheless might justify non-disclosure even if he knows that C is materially mistaken. See the discussion at the end of this section, and Ch 7 for further analysis of the way that substantive privacy concerns affect the scope of the obligation to disclose relevant information.

There are good reasons to suggest that it should do so. We tend, certainly in the criminal law, to avoid distinguishing between knowledge/intention and recklessness when determining culpability. The separation of 'knowledge' cases from 'suspicion' cases in this context is inconsistent with the recognition that recklessness can be highly culpable and often similarly disrespectful to the rights of others (including the right to sexual integrity). By recognising that C *may* be materially mistaken and proceeding regardless, D *risks* instrumentalising C in the way that he would do had he known she was materially mistaken. Given the importance of the right to sexual integrity, and the ease with which D could, by disclosing, avert any such risk, one might argue that the right should impose an obligation in these cases.

However, this is not straightforwardly the case. The scope of the positive obligation under the right must be determined not only by reference to the importance of the corresponding right, but also by reference to the nature and extent of the burdens imposed thereunder, and any rights, interests or values that would be threatened as a result. The systemic costs to privacy, positive sexual autonomy and valuable sexual activity, and the frustration of C's power to waive the right to information, associated with the imposition of the obligation in cases in which D does not know of C's material mistake apply here, too. The impact of the imposition of an obligation of disclosure in such circumstances is not minimal, as it is in the *knowing* exploitation of a material mistake cases. There is also an additional risk of differential application here: defendants who are either conscientious, sensitive, and emotionally intelligent, or who, out of misplaced insecurity and self-consciousness wrongly assume that most people would refuse to engage in sexual activity with them, as a result of some private information (perhaps that they have a hidden disability), are more vulnerable to the imposition of the obligation than inward-looking, insensitive, less emotionally intelligent, or arrogant defendants. The courts have been willing to accept a very thin, fleeting,

concept of foresight in other contexts,[552] and it would be concerning if fleeting moments of insecure fears (*perhaps he wouldn't want to have sex with me if he knew I really wasn't all that pretty under this make up)* were sufficient to trigger the imposition of the obligation in this context.

One way to avoid this difficulty might be to express the scope of the obligation in slightly stronger language; triggered by something like *'suspicion of a real and tangible risk.'* However, when evaluating the plausibility of D's denial that she had any awareness that C was mistaken about a particular fact (X), and/or that X would have made a difference to C's decision to engage in sexual activity, it is unlikely that a juror's response will only be based upon the evidence presented in court and their assessment of the relative credibility of D and C. That evidence will be interpreted through the jurors' own subjective sexual lens. They will be influenced by whether or not X would have mattered *to them.* If X is something about which they would have cared deeply (so deeply as to be a 'deal-breaker') then it is, I would suggest, more likely that they will determine that D did foresee a real and tangible risk of a material mistake and is making false denials to the contrary in her testimony. Of course, jurors may be similarly influenced by their own subjective sexual attitudes when assessing whether a defendant who denies *knowledge* of a material mistake is telling the truth, but the risk is minimised by certain likely-features of the knowledge cases. It is not plausible for D to *know* that C is materially mistaken merely on a generalised assessment of what most people would consider material. For D to *know*, rather than merely suspect, that C has made a material mistake, that knowledge must come from somewhere specific: perhaps D's knowledge of C's values, personality and preferences, or via communication from some third party.[553] On the other hand, whilst an appreciation of a risk that C may be materially mistaken may well come from individualised knowledge of C's personality and values, it is also plausible that D's suspicion might

[552] See discussion of *R v Parker (Daryl)* [1977] 1 WLR 600 (CA), in *G* (n476) [14] (Lord Bingham).

[553] If there has been any communication between D and C about X, then it is difficult to see how the case would involve an uninduced mistake, rather than deception.

be rooted in D's own assessment of how people in general might feel about sex in scenarios where fact X exists. The fact that D can arrive at knowledge only through a more specific assessment leaves the jury less room to superimpose *their own* assessment of what people generally care about when having sex and inappropriately attribute the conclusion of that assessment to D. This would not only constitute an inappropriate replacement of the relevant legal question (*did D appreciate a real and tangible risk of a material mistake as to X on C's part*), with a different, irrelevant question (*would X have mattered to the jury*), but it may also result in arbitrary, inconsistent decisions, in cases with identical *salient* facts, taken by differently constituted juries who have different views on whether X would have mattered to them.

Given the risk of arbitrary and inconsistent application, the inhibition of privacy, and the stifling of potential valuable goods, it is worth considering the implications of restricting the scope of the obligation to disclose only to cases of knowing exploitation of a material mistake. Although C's strong interest in favour of disclosure goes unprotected by an obligation to disclose, C is not without options: she may make enquiries into X, at which point D will be required to disclose the truth, or to lie. If D lies, any sex engaged in on that basis will be, prima facie, a violation of sexual integrity, on the basis that D interfered with C's decision-making process. When balancing the rights and interests of C (which includes *C's* interest in engaging in valuable consensual sexual activity, and her power to waive her right to information), D's right to privacy, and the practical implications of the positive obligation to disclose information, there are strong reasons to interpret this obligation narrowly. Dougherty and Herring regularly return to the paradigm of a knowing exploitation of a material mistake when defending their expansive 'unified' accounts for good reason: this is the only paradigm in which their consent-invalidating approach to mistakes makes sense.

So far I have argued that the right to know relevant information imposes a duty of disclosure upon D only when D knowingly exploits a material uninduced mistake made by C. This

conclusion is supported by analysis that relies, in significant part, on the observation that a more expansive interpretation of the scope of this positive obligation would inhibit privacy rights at a systemic level. I have not yet considered whether the positive obligation to disclose information should be further limited, on the basis of D's right to privacy as it relates to specific facts or information about D's life, identity, attributes and history. For example, in Chapter 7 I will argue that, even if D knows that C would not consent if she were aware that D is a transgender man, D is not under an obligation to disclose his gender history, on the grounds that such an obligation would be an unjustified interference with his right to privacy. A similar argument might be made in relation to a range of information in which one has a legitimate privacy-based interest. Herring denies the legitimacy of any such claim. In the context of transgender history/identity, he claims that the 'right [to privacy] must be subservient to the right to sexual integrity'.[554] He offers no reasoning to support this assertion.

Certain aspects of the right to sexual integrity may be absolute. The right to control sexual engagement with another through the granting of permission or authorisation cannot be outweighed by the right to privacy or anything else. However, given that the right to know relevant information imposes a positive obligation upon D, and given the potentially onerous implications of that obligation in certain contexts, we ought to consider in more detail the possibility that the right to privacy might sometimes trump this particular aspect of the right to sexual integrity. It may also be the case that the right to privacy can and should be balanced against the obligation not to interfere with the decision-making of another person in the context of deception. Whilst deception always involves an infringement of the right to be free from interference in sexual decision-making, in some specific cases, that infringement may be justified on the basis of D's right to privacy. I will not engage in a substantive analysis of the way that the non-disclosure of,

[554] Herring, 'Mistaken Sex' (n229) 523.

or deception about, various facts or attributes may be justified (or not) on the basis of the right to privacy. I will turn my attention to this substantive balancing exercise in Chapter 7, where I will explain when and how the right to privacy ought to be balanced against both the right to know relevant information and the right to be free from illegitimate interference. What remains in this chapter is simply to clarify how the foregoing analysis of the right to know results in a clearly differentiated approach in practice between deception and mistake.

5.6 A STRUCTURAL OVERVIEW OF THE DIFFERENTIAL APPROACH

Unlike Herring and Dougherty's 'unified approach', the conceptual framework outlined above provides a justificatory basis for the differentiation between deception and mistake as potential 'consent-invalidating' features of any given case. Assuming there is no substantive privacy interest that outweighs the particular aspect of the right to sexual integrity in question (either the right to know relevant information or the right to be free from illegitimate interference),[555] the impact of mistake or deception on the prima facie validity of consent diverges under this theoretical account of the different rights and obligations implicated by PND and deception.

If D is ignorant of C's mistake, the mistake does not invalidate C's consent as the obligation to disclose relevant information does not extend to D in such circumstances. Deception, by definition, does not encompass cases where D is ignorant of C's mistake: D must intentionally cause C to believe a false proposition of fact, being at least advertently reckless as to whether or

[555] See Ch 6 for a detailed analysis of these cases.

not that fact was true.[556] However, if D *accidentally* causes C to believe a false statement of fact, it may still be argued that C's consent is invalid, although D would not be culpable (under criminal law) for the violation of the right.[557]

If D is ignorant of the materiality of C's mistake, that mistake does not invalidate C's consent as, again, the obligation to disclose does not extend to such circumstances. If C's mistake was induced by deception, C's consent is invalid whether or not D is aware of the materiality of the mistake, as D's deception nevertheless illegitimately interfered with C's decision-making. Again, D may or may not be culpable for this violation of C's right, depending on the requisite mens rea. Given that the criminal law does not seek to punish deception itself,[558] but the violation of C's right to sexual integrity, D's mens rea should correspond to the crucial relationship of materiality between the deception and C's ostensible consent.[559] However the mens rea issue is resolved, it should be noted that at the *consent-validity* stage, the appropriate approaches to mistake and deception nevertheless diverge. Similarly, if C is mistaken, and D does not know/believe that C is materially mistaken, but only suspects as much, C's consent is valid, as the obligation to disclose does not extend to these circumstances. If D has deceived C, on the other hand, but only suspects that his deceptive efforts have been successful and that C is therefore materially mistaken, C's consent is invalid. It is only when D *knows* that C is materially mistaken that the approach to mistake and deception converge: C's consent is invalid whether that mistake resulted from deception, or from an uninduced mistake.

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[556] See *Derry v Peek* (n444) and discussion in Ch 3.

[557] See critique of an inadvertent mens rea standard in this context in Ch 4.3.2.

[558] Save for the FA 2006 which is, controversially, inchoate in its drafting. See Ormerod, 'Criminalising Lying?' (n281) and discussion in Ch 3.

[559] See Ch 4.3.2.

CONCLUSION

Contrary to the claims made by proponents of the unified approach, an account of rape/SA based on the violation of sexual integrity is not only consistent with a differentiated approach to uninduced mistake and deception, but a proper understanding of the right in question requires such a differentiated approach.[560] As this chapter has shown, the right to know relevant information is one aspect of – a constituent right within – the overarching right to sexual integrity. The obligation imposed under the right to know relevant information is a positive one and its scope must be carefully limited, so as not to impose impossible or disproportionate burdens on individuals who must assess the situation, and the need for disclosure, *ex ante*. Deception and uninduced mistake can and *should* be differentiated precisely because they impinge upon different constitutive rights within the right to sexual integrity and the obligations under these rights are not imposed co-extensively. When D deceives C, he breaches his obligation to refrain from interfering with C's decision-making, whether or not he knows that C is materially mistaken. When D merely fails to disclose information to C, he does not interfere with her decision-making. Instead, he potentially breaches his positive obligation, imposed under C's 'right to know', but only in a far more limited range of circumstances.

[560] Alex Sharpe, who shares neither Herring nor Dougherty's views on the appropriate approach to mistaken and deceptive sex, also argues that the distinction between deception and mistake carries no normative substance and does not have a differential impact on C's autonomy. See Sharpe, 'Expanding Liability for Sexual Fraud' (n51) 35-36. The preceding analysis in this chapter demonstrates why Sharpe's claim, like the unified thesis, is misconceived.

CHAPTER SIX:
DISTINGUISHING BETWEEN ISSUES OF OSTENSIBLE CONSENT AND CONSENT VALIDITY

I have argued that the right to sexual integrity is best understood as a meta-right, encompassing three component rights: the right to make a decision, right to be free from illegitimate interference with that decision, and the right to know information relevant to that decision. Only in certain circumstances will uninduced mistakes result in a violation of the duty to disclose, namely when D knows both that C is mistaken, and that C would not consent if she knew the truth. We might call these *relevant* uninduced mistakes or *relevant* non-disclosures for the sake of convenient reference. When consent is obtained on the basis of deception or a relevant mistake, D infringes C's right to sexual integrity. But when C gives a token of consent to a person other than D, and D does the act in question, or when C gives a token of consent to D to do act Y, but D does act X, then no token of ostensible consent is given in the first place. In Part IV, I will consider when tokens of ostensible consent induced by deception or given on the basis of a relevant mistake might be morally and/or legally valid, despite the prima facie infringement of the right to sexual integrity. In this chapter, I will consider the relationship between the question of consent-validity and the existence of a token of ostensible consent.

I have argued that the first component right is a sort of gate-keeping right to the right to sexual integrity; one has the right not to be touched sexually by any other person, unless one permits another person to so touch, by giving them a token of consent. D is therefore prohibited from engaging in sexual acts with C unless C has given this token or permission to do so specifically to D.[561] That token functions as *ostensible* consent, in that it may be invalid. The other two rights

[561] Recall that consent as a partly communicative act. See Ch 2.3.1.

falling within the overarching right to sexual integrity go directly to the consent-validity. It is essential, then, to keep separate two types of cases:

1) C gives a token of ostensible consent to A to do X, but either:
    a. A does Y; or
    b. B, a third party, does X

    (Note that I am avoiding using 'D' and 'C' because in track 1(a) cases, C gives a token of consent to D, but in track 1(b) cases, C gives a token of consent to a third party)

2) C gives a token of ostensible consent to D to do X, and that token of consent is invalid as a result of:
    a. Deception
    b. Relevant non-disclosure.

We will label 1(a) and 1(b) 'track 1 cases', and 2(a) and 2(b) as 'track 2 cases', for ease of reference. It is vital to recognise that there is no normative difference between an act to which *no* ostensible consent is given (track 1) and an act to which an *invalid* token of ostensible consent is given (track 2). In both cases C's sexual integrity has been violated, in both cases there is no consent, and in both cases the harm and wrong that form the conceptual core of rape/SA are present.[562] It is worth recalling the point in Chapter 2 that whilst the language of valid and invalid consent often provides a helpful shorthand, consent is a binary concept that changes the normative relationship between two people. It either exists, or it does not. The qualifier 'valid' offers nothing

[562] See Ch 2. I'm bracketing the issue of whether there may be cases where there is an infringement of sexual integrity, but no violation of that right. See Ch 7.

of substance to the noun 'consent', and invalid consent to X is the same as the absence of consent to X. Accordingly, the absence of a token of consent to X, and an invalid token of consent to X are two separate 'tracks' to the same outcome: no consent to X.[563] Nevertheless, the distinction between track 1 and track 2 remains significant, because each track involves a different internal analysis and so there are two downstream implications to the categorisation of any case as falling within either track 1 or track 2.

At the heart of this chapter lies the argument that a permission, or token, given to one person to do a sexual act does not give another person permission to do that act and that, similarly, permission to do act X does not amount to permission to do act Y. C is mistaken in such cases, often as a result of deception as to either the act that is taking place or the identity of the person performing the act with/upon C. However, unlike in track 2, where the deception or mistake has direct normative relevance to the validity of a token of ostensible consent, here the mistake on C's part (induced by deception or otherwise) merely serves to explain why C might appear to be consenting to D's actions. D is not in a position to object or withhold consent because she does not realise that either D is doing X, not Y, or that D is doing X, not T. These cases do not involve deception or mistake undermining an ostensible consent given to D to do X because there is no ostensible token of consent to be undermined.

In section 1, I will argue that distinctions between *what* an act is, or *who* the actor is, and facts that go towards why an individual might decide to permit a particular person to do a particular act can, and indeed must, be kept separate. It is not the case that an unlimited number of facts can be packed into the meaning of 'the act itself', or the 'identity' of the actor. Deception or mistakes in relation to information that alters, in C's mind, the moral status, emotional resonance or psychological or physical ramifications of the sexual act might well invalidate a token of ostensible

[563] See Ch 2.3.1.

consent to a particular act, but that does not mean that the relevant information alters the identification of and demarcation between particular identifiable acts (or actors). This argument is easier to accept, once the significance of the factum/inducement distinction (for want of a better label) is understood. When used as the boundary line between (valid) consent and invalid/no consent, the distinction is indefensible. It is no surprise that the courts' insistence upon treating it as such has resulted in analytical distortion, unpredictability and arbitrariness.[564] By reconceptualising the role that the factum/inducement distinction plays within the framework of the meta-right to sexual integrity, we can see how the distinction remains relevant to consent, without providing an under-inclusive and untenable distinction between consensual and non-consensual sexual conduct.

In section 2, I will explore the two downstream implications of this argument. The first implication is that the mistake/deception distinction is not relevant to track 1. For example, when C has sex with D, mistaking him for her boyfriend, T, she does not give even an ostensible token of consent to D. Similarly, if C were to mistakenly consent to one act, but D performed a different, sexual act upon C, no token of ostensible consent for the performed sexual act would have been given. It is irrelevant whether C's mistake arose as a result of deception, as the issue is one of the presence or absence of ostensible consent to the act which took place, rather than the validity of any ostensible consent. Secondly, track 2 cases depend on the establishment of a counterfactual consent, whereas track 1 cases do not. For consent to be invalid on the basis of a deception or relevant mistake, it must be shown that C *would not* have consented had she not been deceived/known the truth. If C does not offer a token of consent to D to do X, it does not matter that she would or might have done so under other circumstances. D remains under a duty not to

564 Illustrated by *McNally* (n5). For discussion of the manipulation of the factum/inducement distinction in particular cases, see Falk, 'Rape by Fraud and Rape by Coercion' (n14) 159-61.

do X, regardless of the hypothetical question of whether C would have consented to D to do X had she been given the opportunity.

6.1 THE NATURE OF THE ACT AND IDENTITY OF THE ACTOR: TRADITIONAL BOUNDARIES REDRAWN

As explained in Ch 1.2, the traditional basis for distinguishing between both objectively trivial and important deceptions on the one hand and the very small set of deceptions that will be capable of invalidating consent on the other, centres on the distinction between fraud in factum and fraud in the inducement, to use the terminology adopted in the US.[565] Fraud in *factum* is generally understood as distinguishing between fraud as to the 'act itself', where there is 'no legally recognised consent because what happened is not that for which consent was given', and 'fraud in the inducement' where 'the deception relates not to the thing done but merely to some collateral [fact]', and so the induced consent is legally effective.[566] The English common law locates the same conceptual distinction in the requirement that the deception goes to the 'nature of the act' and, additionally, in that consent is be invalid if D impersonated C's spouse or sexual partner.[567] The factum/inducement distinction (or nature of the act category) has been criticised on the basis that

[565] Falk, 'Rape by Fraud and Rape by Coercion' (n14); John F Decker and Peter G Baroni, '"No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law' (2013) 101 J Crim L & Criminology 1081.

[566] See Falk, 'Rape by Fraud and Rape by Coercion' (n14) 158, citing at Rollin M Perkins and Ronald N Boyce, *Criminal Law* (3rd edn, Foundation Press 1982) 1079.

[567] *Flattery* (n11); *Williams* (n10); *Elbekkay* (n9); see Ch 1.2.

it is conceptually incoherent,[568] normatively under-inclusive,[569] and has the effect of 'pass[ing] off judgments that are normatively contestable as if they were conceptually indisputable'.[570] If the category of an ostensible consent given to a particular person, in relation to a particular act, is to be maintained, it must be demonstrated both that a person's nominal identity can be separated from a collection of their attributes, and that distinctions can be made between discrete and identifiable acts.

6.1.2 ACTORS AND ATTRIBUTES

If C engages in sexual activity with D, mistakenly believing that C is another person, T, C does not consent to D. The kind of sexual activity for which consent is needed is a tripartite act, involving three points of interest: the self, the act, and the other(s). It is not, generally, the kind of activity to which we give a general, open, consent. An individual gives consent *to* a specific person to *do* a specific thing. If that done is not that to which C has consented, then there is no consent for that which is done (this is the point recognised by the traditional focus on fraud in the factum.) Similarly, if we consent to a person other than s/he who does the thing, then the person who does the thing does not have consent. If C has permitted T to do X, D's duty not to sexually touch C remains unaltered; C's consent removes only T's duty.

[568] Falk, 'Rape by Fraud and Rape by Coercion' (n14) 159; Wertheimer (n81) 206; Herring, 'Mistaken Sex' (n229); Douglas Husak, 'The Complete Guide to Consent to Sex: Alan Wertheimer's "Consent to Sexual Relations"' (2006) 25 Law & Phil 267, 279.

[569] Joan McGregor, 'Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes: A Critical Reconstruction of Consent, Sex, and the Law' (1996) 2 LEG 175, 200; Falk, 'Rape by Fraud and Rape by Coercion' (n14) 160-61; Schulhofer, *Unwanted Sex* (n116) 154-59; Wertheimer (n81) 209; Herring, 'Mistaken Sex' (n229); Rebecca Williams, 'Deception, Mistake and the Vitiation of the Victim's Consent' (2008) 124 LQR 132; John Kleinig, 'The Nature of Consent' in Franklin G Miller and Alan Wertheimer (eds), *The Ethics of Consent: Theory and Practice* (OUP 2010) 17; Tadros, *Wrongs and Crimes* (n460) 247.

[570] Westen (n76) 198.

Although people are simply a collection of individual attributes, thinking that D is a different person, and thinking that D has certain attributes are different orders of mistake. Mistakes as to identity only arise when C confuses the attributes of two or more people. In other words, C mistakes D for another person of whom she is aware. C is not mistaken as to D's nominal identity when D uses an alias, but only when C confuses D for some other identifiable individual.[571]

One might object to this distinction on normative grounds, as deception and mistakes as to attributes can be equally significant as deception and mistake as to identity. But this conceptual distinction only produces arbitrariness when used as the fulcrum of lawful and unlawful conduct. As the basis of the distinction between track 1 and track 2, this criticism dissipates, as deception (or relevant mistakes) as to attributes can still invalidate consent and render D's conduct criminal (if mens rea requirements are met).

If D induces consent by deceiving C into thinking that D is some other person (T) of whom C knows, it does not matter whether C and T are married, in a relationship or even 'known personally' to one another. [572] What matters is that C mistakes D for an entirely different person.[573] In addition, if C unilaterally mistakes D for T, C still does not token consent to D. There is no need for deception.[574]

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[571] Glanville Williams, 'Mistake as to Party in the Law of Contract' (1945) 23 Can Bar Rev 271, 279.

[572] See SOA 2003, s76(2)(b), and discussion in Ch 1.2.

[573] This point was acknowledged, albeit obiter, in *The Queen v Clarence* (1888) 22 QBD 23 (CCR) 30 (Wills J), and 44 (Stephen J), and in *Papadimitropoulos* (n9). See also *United States v Traylor* 40 MJU 248 (CMA 1994) 249, '[C] must be agreeable to the penetration of her body by a particular "membrum virile"'. For discussion, see Turkheimer (n133).

[574] See Ch 6.2.

6.1.3 DISTINGUISHING BETWEEN ACTS

Just as we can say that when C consents to X, thinking that she is giving that consent to T, D's duty not to do X remains in place, we can also say that when C gives consent to D to do Y, D's duty not to do X remains in place. This underpins the distinction between fraud in the factum and fraud in the inducement and lies at the heart of the English common law's focus on deception as to the 'nature' of the act. Both doctrines are concerned with the identity of particular acts and distinguishing between distinct and identifiable acts. But the same two objections might be made. The first is that it is conceptually impossible to distinguish between discrete acts: acts are simply collections of qualities and there is no central essence of any act that holds true in the face of variations in the sort of qualities it exhibits. The second is that any such distinction would be normatively under-inclusive. The argument from under-inclusivity has already been dispatched. Just as with deceptions or relevant mistakes as to attributes of actors, deceptions or mistakes as to qualities or features of acts may be consent-invalidating. The distinction operates to funnel a given case into track 1 (no ostensible consent) or track 2 (ostensible consent); it does necessarily render any conduct consensual, as a token of ostensible consent may yet prove invalid.

The main difficulty, then, is to defend the distinction at the conceptual level. How are we to pick out facts going to the nature of the act or, perhaps better put, facts going to what the act *is*, from facts going to the features or qualities of the act or the range of other factual information relevant to a decision to consent? We should start by comparing two cases, **Gynaecologist** and ***Boro***. In the **Gynaecologist** case, C attended an appointment with D, a gynaecologist, and consented to the insertion of a surgical instrument. Unbeknownst to her she is subjected to penile penetration by D.[575] In ***Boro***, D telephoned C and deceived her into believing that she had a fatal illness that could be cured either through expensive surgery, or by paying a significantly lower fee

[575] This hypothetical is similar to the facts of *People v Minkowski* 204 Cal App 2d 832 (1962), 23 Cal Rptr 92 (Cal Ct App).

and having sexual intercourse with a person who had been injected with a curative serum. C chose to pay the lower fee and have sexual intercourse with this person. This was, in fact, D himself, who had devised and then taken advantage of the ruse.[576]

C's sexual integrity was violated in both cases. Both involve egregious wrongs. But there is a conceptual difference between the two cases. In *Boro*, C understands the act to which she is consenting (penile-vaginal penetration), and D deceives her as to the reasons for and consequences of the sexual act (its curative properties). He thereby induces her to give a token of ostensible consent to that act, when she would not have done so otherwise. In the gynaecologist case, C does not give a token of ostensible consent to penile-vaginal penetration, but penetration with a speculum or another surgical instrument. She appears to consent to the act, because she does not understand what the act is. But appearances can be misleading. No ostensible consent is given for penile penetration. Accordingly, the gynaecologist case falls within the 'track 1' category, whereas *Boro* falls within 'track 2'.

Boro provides excellent evidence of why the factum/inducement distinction is normatively under-inclusive when treated as the basis for establishing consensual or non-consensual acts, but even when the distinction is capable of doing the less taxing normative work of distinguishing between 'no ostensible consent' cases and 'consent-validity' cases, it is necessary to examine whether the factum/inducement distinction (for lack of a more elegant term) is too slippery, as much will depend on how any given act is described, and how many facts might be 'pack[ed]… into the description of what was consented to'.[577] This critique comes in two different forms: firstly, that the *nature* or *meaning* of an act cannot be separated from how the consenting party

[576] *Boro v Superior Court* 210 Cal Rptr 122 (1985) (Cal Ct App).

[577] Joel Feinberg, 'Victims' Excuses: The Case of Fraudulently Procured Consent' (1986) 96 Ethics 330, 335; Falk, 'Rape by Fraud and Rape by Coercion' (n14); Wertheimer (n81) 206; Husak, 'The Complete Guide to Consent to Sex' (n568) 279.

understands that act in a rich sense, and secondly, that the same conduct may be described in numerous ways and so what an act is becomes an arbitrary and amorphous concept dependent on the level of physical specificity with which it is described. Neither of these critiques is fatal to the distinction, when we maintain our focus on the fact that the finding of non-consent, and perhaps criminal liability, is not dependent upon the distinction; that in the context of the right to sexual integrity, an act's sexual nature is fundamental to what the act is, and finally that consent is tripartite: it is given by C, to D, to do X. When C mistakes D for a third party, D's duties to refrain from sexual contact are not affected by the consent.

ACTS AND MEANING

It might be argued that it is impossible to determine what an individual act *is* without considering the wider meaning of that act, or without accounting for the moral or cultural contextual factors in which the act is situated.[578] Sexual intercourse may have legal significance as an act of consummation, or 'special religious significance', or may be 'an expression and conformation of love'; it may be for sexual pleasure alone, or may be 'regarded solely as a procreative act'.[579] However, whilst a potentially consenting party's understanding of the moral status, purpose and value of the act may be contingent on its features, the actor, or the context in which it takes place, the tendency to pack questions of 'meaning' into 'what the act to which C consented *is*' obfuscates categorical distinctions.

Consider *Papadimitropolous*, where D deceived C into thinking that the pair had undergone a valid ceremony of marriage before they engaged in sexual intercourse for the first time.[580] The

[578] Herring, 'Mistaken Sex' (n229) 514.

[579] ibid 515.

[580] *Papadimitropoulos* (n9).

fact that C would not have consented to sexual intercourse with D had she known that it was taking place outside of a valid marriage did not transform the act of penile-vaginal penetration into a different act. We can recognise the fact that, for a particular complainant, non-marital sex has a different moral, religious and/or motional meaning, without denying that both non-marital and marital sex are the same act. The tendency to deny this is, I would suggest, rooted in the desire to resist the traditional insistence on a fundamental normative distinction between a case like *Papadimitropolous* and a 'fraud in the factum' case like *Gynaecologist*. If we accept that both cases are worthy of criminalisation, then the desire to categorise a case like *Papadimitropoulos* as a deception which changes *what the act is* becomes less compelling. Whether the sexual intercourse is marital or non-marital, it remains sexual intercourse. A token of ostensible consent to the act of penile penetration was given in *Papadimitropoulos,* and so the route taken to establishing a violation of sexual integrity and the absence (or invalidity) of consent is therefore different to the route to non-consent taken in the gynaecologist case, where no ostensible consent to penile penetration was given. If the question 'what is an act' is to be determined by C's understanding of the social, emotional, moral and spiritual ramifications of the act, we lose the ability to pick out categorical differences between these cases like *Boro* and *Papadimitropolous* on the one hand, and *Gynaecologist* on the other.

AMBIGUOUSLY SEXUAL ACTS

A greater challenge to the notion that the identity of an act can be separated from its qualities, features and the other information that might motivate a person to consent to another performing it (upon/with) them, can be found in cases like *Green*[581] or *Bolsinger.*[582] In *Green,* D, a

[581] *Green* (n19).

[582] *State v Bolsinger* 709 NW2d 560 (2006) (Iowa). For the purposes of this discussion, issues around the age of consent are not relevant. The complainants were not under the age of consent in Iowa.

doctor, deceived male patients into believing that it was necessary for either D or the patient himself to touch the patient's penis in order to stimulate ejaculation, so that semen samples could be obtained for medical/diagnostic purposes. The doctor's motives were sexual. In *Bolsinger,* a counsellor at a juvenile correction facility asked and received permission to touch the genitals of boys in order to check for bruises, hernias and testicular cancer. In fact, D was touching the boys for sexual purposes. The boys testified that they would not have consented, had they been aware that the touching was sexual. These cases differ from *Boro*, because, in *Boro*, C was aware that she was engaging in a *sexual* act but thought that it was in her interests to permit D to have sex with her because of the supposedly therapeutic benefits of the sexual act. D's deception in *Boro* gave C a strong second-order preference to consent to what was otherwise unwanted sex. That deception illegitimately interfered with C's sexual decision-making, violated her right to sexual integrity (the non-interference right) and accordingly her consent ought to have been recognised as invalid.[583] In contrast, in *Green*, and *Bolsinger,* D's acts were ambiguous. They could have been sexual, or they could have been non-sexual. Today, cases like *Green* tend to arise in relation to acts that are ambiguous in this way, excluding penile-vaginal penetration and other forms of genital-to-genital contact. Yet this was not always the case: on close inspection *Flattery* and *Williams*, in which young, naïve women in 1877 and 1923 'consented' to quasi-medical procedures to 'cure' illness or improve the singing voice, it seems that the complainants were not deceived as to that with which they were being penetrated (D's penis). However, they had no idea that this action was, or could be, sexual. These facts might be almost inconceivable today, other than where C has moderate to severe learning difficulties, but they were unsurprising in an era before adequate sexual education.

Focusing on *Green* and *Bolsinger*, one might argue that the complainants consented to touching for certain reasons (therapeutic or diagnostic) and whilst deception or mistakes in relation

[583] The court held that the consent was valid, on the application of the factum/inducement distinction.

to those reasons might invalidate the consent, ostensible consent was nevertheless given to the act of touching itself. Alternatively, one might argue that, if the distinction between medical purposes and sexual purposes goes to the identity of the act to which C consented, then the distinction between marital sex and non-marital sex should be relevant to the ostensible-consent question, if that distinction changes C's understanding of the moral or religious meaning of the act. However, there is a principled basis for distinguishing between, on the one hand, cases like *Papadimitropoulos,* where C tokens consent to a particular physical act, understanding that the act is sexual, but not understanding the emotional/spiritual/moral significance of the act due to some deception or mistake, or cases where some deception or mistake affects the decision-making process, and, on the other hand, cases where C tokens consent to a particular (ambiguous) physical act without understanding it to be sexual. Unlike other moral/psychological/emotional/contextual features, the *sexual* nature of the act cannot be separated from the act itself, given the nature of the underlying right which consent seeks to protect and secure. If non-consensual sexual touching only implicated the right to bodily integrity, and were treated as any other non-consensual touching, then the sexual nature of the act would not comprise part of the 'act itself' (though the concealment of a sexual purpose would likely be relevant to an analysis of whether D interfered with C's decision to consent to that act, and might result in the consent invalidity). However, the right at stake is not a mere right to bodily integrity, but the right to *sexual integrity*. In law, and in morality, we distinguish between bodily contact and *sexual bodily contact*. That any given instance of bodily contact is sexual therefore becomes fundamental to the question of what the (sexual) act *is*. The same cannot be said for whether the act is an 'expression of love', has 'special religious significance' or is for procreative purposes alone. This reasoning explains why the English courts were correct to extend the category of 'deception as to nature' to cases involving 'deception as to

purpose', where the act in question was ambiguous and D concealed the sexual purposes that rendered the act a sexual act, rather than a non-sexual one.[584]

PHYSICAL ACTS AND PHYSICAL FEATURES OF ACTS

In order to avoid violating the first aspect of the right to sexual integrity, C must token consent to D, permitting him to do the act (or acts) which D then performs. If C gives a token of ostensible consent to a physical act without understanding that act to be a sexual one, then C does not give a token of ostensible consent to the *sexual* act that takes place and so D violates C's first sexual integrity right (the right to give or withhold a token). In all cases apart from those involving ambiguous acts, the appropriate way to distinguish between different acts is on a purely physical, mechanical, basis. If C tokened consent to penile penetration, but was penetrated with an object, a different act took place. If C tokened consent to penile-*vaginal* penetration, but penile-*anal* penetration took place, a different act took place to the one for which C tokened ostensible consent.

The difficulty, of course, lies in differentiating between different acts on this basis. Westen has noted that 'simply by virtue of making it an offence to subject [C] to X without her consent, a jurisdiction commits itself to requiring that [C] possess knowledge of a certain kind – namely knowledge of the existence of what the jurisdiction indisputably means by X'.[585] In the sense that by defining rape as penile penetration of the anus, mouth or vagina in the SOA 2003, s1, C must know that she is consenting to penile-vaginal/penile-anal/penile-oral penetration in order for D to be given consent under the legislation, this is correct. However, we cannot rely on a statute to posit definitions of discrete and identifiable acts. If consent and sexual integrity are moral

[584] See discussion in Ch 1.2.

[585] Westen (n76) 196.

phenomena, legislation cannot do the work to distinguish between cases where C has not tokened ostensible consent to X at all, and cases where C has given an ostensible token of consent to X, but that token of consent is invalid. Similarly, different jurisdictions might define the behavioural component of rape and sexual assault with varying degrees of physical specificity.[586] Indeed, whilst s1 of the SOA 2003 defines rape in quite specific terms, s3 of the act defines sexual assault more broadly, as any sexual touching.[587] But clearly if C consents to a kiss, she does not consent to the touching of her genitals. The fact that both acts fall within the scope of 'sexual touching' is irrelevant.

We must therefore find a way to distinguish between *different physical acts* without recourse to the legislation. Wertheimer has cast doubt on the feasibility of this, noting that what an act is 'turns on the way in which a case is described', and acts can involve an enormous range of varying physical features.[588] However, the tendency to overstate the difficulty of distinguishing between facts that go to what the proposed act actually *is* and facts which go to features or qualities of the act stems from the unease many commentators rightly feel about the normative weight that has traditionally been placed on this distinction, and its under-inclusivity when used to distinguish between consensual and non-consensual conduct.

We might describe two instances of penile penetration: in one, D wears a ribbed condom. In the other, he wears a non-ribbed condom. These cases involve the same physical act with varying physical features. Both can be sensibly described as penile-vaginal penetration. Contrast

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[586] Compare, for example, SOA 2003, s2 to Criminal Code of Canada, s273.1(1), which requires that C voluntarily agree to the '*sexual activity* in question' (emphasis added).

[587] SOA 2003, s78 defines touching as sexual if: penetration, touching or any other activity is sexual if a reasonable person would consider that: (a)whatever its circumstances or any person's purpose in relation to it, 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.

[588] Wertheimer (n81) 206.

this with the difference between penile-vaginal penetration and penile-anal penetration, or between vaginal penetration with a penis or with an object. These acts cannot be described in the same way. The physical variations between these three acts are not variations between potential physical features of the same act, but differences that demarcate the boundaries between different acts. Condom usage is a physical variation on the same act – penile penetration. So, penetration with and without a condom are both instances of the same act, with physical variations, just in the same way that differences in brand of condoms or whether the condom is made of latex or a latex alternative are all variations on physical features.

The difficulty is not one of infinite specificity, but of infinite regression. We might question whether penile-vaginal penetration is the identifiable act, rather than just vaginal penetration. If vaginal penetration is the identifiable act, then the distinction between penetration with the penis or an object is simply a distinction between variant physical features of the same act, rather than a distinction between two different acts. Both penile-vaginal-penetration and object-vaginal-penetration can be described, after all, as vaginal penetration. Alternatively, we might say that penile penetration is the act type, and whether the anus, mouth or vagina is penetrated simply involves a distinction between variant physical features of the same identifiable act. We must ask why the level of specificity stops at penile-vaginal penetration/penile-anal penetration etc, or does not go further to pick out more granular physical distinctions, like the use of a condom, or the brand of that condom. The answer is to be found in the tripartite nature of sexual activity. C consents to a person doing a particular action. The sexual act is a point of connection between two people. In order to identify the act in question, both individuals must be borne in mind. We cannot identify the relevant act by reference to only the point at which D makes contact with C, or at which C makes contact with D, but the point at which each makes contact with the other. In order to identify the relevant act that took place we must therefore ask 'what does D touch C with *and* which part of C is touched?'. We can classify multiple different acts by focusing on one

perspective. Thus, 'penile penetration' is a class of multiple identifiable acts of penile penetration (vaginal, anal, oral), but it is not a sexual act-type in and of itself. In order to give a token of ostensible consent to D, C must consent to D touching a particular part of her body, with a particular part of his body/object. The essence of the act is the point of contact between them, rather than simply comprising the point of contact *on one of them*.

There is a tendency to assume that if C consents to penetration with a condom, then D performs a different act when he penetrates her without one. This analysis is over-simplistic. Condom usage and non-usage are again physical variations on the same act-type. D makes contact with C through the condom, but we wouldn't say that D touches C *with* the condom any more that we would say that D shakes C's hand *with* a glove. D shakes C's hand with his gloved hand, and D penetrates C with his sheathed penis. The powerful instinct that these are different acts can be explained by the fact that penile penetration without a condom (or with a damaged condom) often results in an *additional act* to which consent may or may not have been given: the act of ejaculation inside the vagina/anus/mouth. Consent may or may not be given to ejaculation, and it is consistent with the analysis in Chs 2 and 5 to treat an instance of non-consent to ejaculation as rape/SA, even if consent had been given to penile penetration.[589] But if penetration without a condom takes place and ejaculation does not, then C has tokened ostensible consent to the relevant act. Of course, in the final analysis, deception or relevant mistake as to condom usage might invalidate that ostensible consent.

CONDITIONAL CONSENT

What if C makes it clear that by consenting to an act-type she is only prepared to consent to certain variations within that act-type (e.g., a condom, or non-latex condoms, being used)? By explicitly conditioning her consent in this way, C no longer consents to the general act type but to

[589] Provided D intended to ejaculate and had the requisite mens rea in relation to C's lack of consent to the ejaculation.

a specific sub-set of that act-type. The condition must be communicated. We token ostensible consent to all variations within that act type, unless we explicitly narrow our consent. By narrowing our consent through a condition, we communicate both what we do *not* consent to, as well as what we *do* consent to. If the condition were not made explicit, the objections to the unified approach, raised in Ch 5.3, return: autonomy would become impossible and unknowable to D, as C might hold in her mind an infinite range of unexpressed conditions, the distinction between non-consensual sex and regretted sex would blur, and positive goods like privacy, positive sexual autonomy and the ability to waive one's right to know information will be unnecessarily frustrated.

But not every explicit condition precedent will narrow the scope of the 'act' to which C gives ostensible consent. C might condition her consent on financial payment, an assurance of love, or an agreement to marry. Such condition-precedents may be violated, and promises on D's part to uphold these conditions may be deceptive. Whilst this may invalidate the token of ostensible consent, D's false promise of love/payment/marriage in return for penile-vaginal penetration does not alter the fact that an act of penile-vaginal penetration took place, and that C gave a token of ostensible consent to that act-type. Facts which alter the meaning of the act to C might be fundamental to her decision to consent, but these facts are relevant only to the track 2/consent-validity analysis, even if C has explicitly conditioned her consent on these acts. When C conditions her consent on factors such as D's feelings for her, or D's intention to pay for sexual services, C is not communicating that her token of ostensible consent is restricted to certain sub-sets of physical acts and those sub-sets alone. Instead, she is seeking information – about the circumstances that exist at the time of the penetration (do you love me?), or D's intentions at the time of the penetration (will you pay me?). She gives a token of consent to an identifiable act on the basis of that information, and that identifiable act is then performed. There is no incongruity between the act-type which is the subject of her consent-token and the act-type which D subsequently does.

One might object to this analysis by drawing an analogy to another context in which consent is often given in conditional terms:

> A private patient says to his surgeon: I give you permission to remove my liver if, and only if, the biopsy reveals a tumour. Immediately before the surgeon goes into the operating theatre, where her patient is already anaesthetised, she receives a phone call; she has lost a significant amount of money in a bad investment and is now in serious need of money. The biopsy reveals no tumour. Knowing that she will receive significantly more money for a longer surgery, the surgeon removes her patient's liver.

Here, it seems that C did not give a token of ostensible consent to the surgeon's actions at all. But why the difference in analysis? The key distinction is that, in contrast to the conditional consent cases in the sex context, the patient was unconscious at the moment the relevant information (the absence of the tumour) was discovered. He cannot obtain this information and then make a decision about whether to give consent. He instead gives the doctor a clearly limited advance consent. This may well be a different (though closely linked) moral phenomena to contemporaneous consent, with different structures and effects. Such 'advanced consent' can arise in the sexual context; in Canada, consent to sexual activity is only recognised *as* consent when it is contemporaneous with the activity. If C is unconscious and unable to revoke consent at the time, no 'advance consent' will be valid and give D permission to sexually touch C.[590] Space precludes a full consideration of these issues, but it suffices to note that advanced consent can and should be distinguished from conditional consent and so the differences in the way these two concepts are treated in the criminal law does not provide a strong reason to doubt the analysis in this section.

The final point to consider is how we are to distinguish between variations in physical features and variations in non-physical features. I suggest that physical features can be appropriately restricted to those which alter the bodily mechanics of an act or generally affect the sensation or materiality of contact between two people in a way that is more than *de minimis*. A

[590] *R v JA* [2011] SCC 28, [2011] 2 SCR 440.

person's skin is materially and significantly distinct from synthetic or organic materials that cover one's skin; latex and ribbed versus non-ribbed condoms are sensually different; the material differences between latex and non-latex condoms are different in a way that is more than a minor, insignificant alteration of properties across different brands.

Crucially, this means that seropositivity and fertility (the presence of live or sufficiently active sperm) do not constitute physical features of the act. If they did, it would follow that the presence, absence or variation of any genetic material or individual cell within bodily fluids would also constitute a physical variation. Imagine a racist, C, consents to unprotected sex with D but only on the explicit condition that he is 'racially pure' and has no trace of non-white heritage. D, who was adopted and is not aware of his multi-racial heritage, tells C that she need not worry as he is white. They have sexual activity. D's parentage is reflected in his gene code which is contained within the sperm cells he ejaculates into her vagina. Does this mean that C has not tokened ostensible consent to the act that has taken place? Certainly not: C tokened consent to penile-vaginal penetration and ejaculation and she did not place any restriction on the physical variants of the act to which she was prepared to token consent. Whether her ostensible consent is valid is a separate question.[591]

The obvious rejoinder to this counterexample is to note that the presence of the HIV virus or the active sperm change the potential physical *consequences* of the act (i.e., there is now a risk of HIV transmission or a risk of pregnancy). On this basis, we might say that this amounts to a physical variation of the act because they may cause very different outcomes. Firstly, it is important to note that recent scientific developments reliably show that unprotected sexual intercourse with

[591] And we might have some concern in holding that her consent is invalid, given the racist animus behind the condition. Though many would argue that if sexual autonomy is to be taken seriously, we cannot limit those deceptions that invalidate consent to those that pass objective moral muster. See Ch 7.3.

the vast majority of PLWH in the UK does not carry a risk of transmission.[592] However, for present purposes it suffices to note that the same act can carry differential risks without those risks affecting the identity of the act. Two people throw snowballs in a snowball fight. Mindy is much stronger than Devon. The risk of Mindy causing injury is greater than the risk posed by Devon, but both perform the same act: throwing a snowball. Selina and Binky go to the swimming pool. They both walk barefoot from the changing room to the edge of the pool, and then back again after their swim. Binky has a verruca, so she risks infecting others. But the act(s) performed by Binky (which pose the risk of giving others her verruca) are the same as the act(s) performed by Selina - namely walking barefoot in and around the swimming pool complex. Note also that it is incorrect to assume that the race example and the HIV and fertility examples can be distinguished on the basis that only sex with HIV-positive individuals or intra-vaginal ejaculation carries the risk of a physical consequence. The presence of D's mobile sperm does not necessarily change the risks arising from the act. C may be infertile, knowingly or otherwise, and as noted above, a person who has HIV and is on effective treatment carries zero risk of transmitting HIV to his sexual partner, even without the use of a condom. The act of ejaculation is the same, regardless of fertility and HIV status and contagiousness. Again, deception in relation to factors affecting the likelihood of certain consequences may affect the validity of any token of ostensible consent – indeed deception or mistake relating to fertility and HIV status are commonly arising cases that must be considered in some detail. However, at this stage of the analysis, factors affecting the likelihood of certain negative consequences arising from an act do not necessarily constitute physical features of that act, in which case explicitly conditioning consent on such a feature does not preclude the finding of a token of ostensible consent to the act performed.

[592] See detailed discussion in Ch 7.2.

6.2 TESTING THE IMPLICATIONS OF THE TWO-TRACK APPROACH

Now that the distinction between cases falling within track 1 (issues of ostensible consent) and track 2 (issues of consent-validity) is clear, it is important to set out the downstream implications of this distinction. If a token of ostensible consent has not been given, the first of the three rights sitting within the overarching sexual integrity right has been violated (the right to give or withhold a token). If a token of ostensible consent has been given, that ostensible consent may be valid or invalid. Deception which induces consent, *prima facie*, violates the second, non-interference right resulting in no consent being given at all, despite the appearance of an ostensible consent. Similarly, a relevant mistake results in consent-invalidity. The outcomes of the *no ostensible consent to X* cases and the *invalid ostensible consent to X* cases are the same: D is under a duty not to do X. It does not follow, however, that the distinction is *irrelevant*; the track 1/track 2 distinction has a significant impact on the deception/mistake distinction and the relevance of C's counterfactual conduct, had she been aware of the truth.

For a mistake or deception to interfere with C's decision-making, so as to render an ostensible consent invalid, it must be the case that C would not have consented had she not been deceived/known the truth. However, in order to do X to C, D needs a valid token of C's consent. If D touches C sexually without a token of *ostensible* consent, he violates the first aspect of her sexual integrity right. This is not dependent on an assessment of whether D interfered with her decision-making but asks whether, on this occasion, the person who touched C sexually had permission to touch C in that way. This insight allows us to address the difficult hypothetical posed by Victor Tadros involving Harry, who has sex with Beth, thinking that she is Elsa, her twin, to whom Harry is married. Tadros argues that even if Harry would have consented to Beth had he known her true identity, his consent is invalid because his error radically changes the meaning of

the sexual act as far as Harry is concerned.[593] Tadros is therefore motivated to reject a counterfactual approach altogether. But if Harry was not in a relationship with Beth, was acquainted equally with both sisters, and would happily have sex with either one, the meaning of the sexual interaction would not be radically changed and this encounter would be inappropriately marked as consensual on Tadros' account. The reason why Harry does not consent in either variation of this hypothetical is because he never gave a token of ostensible consent to Beth in the first place. The question of validity, therefore, does not arise. Within the context of a differentiated approach to deception and mistake, these scenarios can be recognised as non-consensual without necessitating the rejection of the counterfactual analysis at the consent-validity stage.

The second important implication relates to the deception/mistake distinction. Uninduced mistake and deception relate to consent *validity* in different ways. But unlike issues of consent-validity where the deception or mistake bears normative relevance to the consent question, the only relevant question at the consent-token stage of the analysis is whether C gave D a token of consent to do the particular act in question'. If the answer to that question is no, it matters not whether C was merely mistaken or was deceived about the identity of D or the nature of the act. The deception or mistake might explain why C neither voiced any objection to D doing X, nor experienced any fear/distress/trauma during the performance of the act. But beyond this explanatory force, the deception/mistake distinction bears no normative relevance to the legal question at issue. Here, and only here, is the relevance of any deception confined (indirectly) to the mens rea question.

[593] See discussion in Ch 4.3.1, where I defend the relevance of the counterfactual analysis in the context of the assessment of consent validity.

CONCLUSION

This chapter has shown that the traditional basis for distinguishing between consensual and non-consensual conduct in the deception/mistake context ought to be repurposed. The categories of mistakes as to identity of the actor and mistakes as to the nature of the act are relevant to this area of the law, but not as the fulcrum between lawful and unlawful conduct. When viewed through the lens of the track 1/track 2 distinction, within a differentiated understanding of the right to sexual integrity, these distinctions are broadly relevant, though only at the first stage of the analysis. It now remains to consider consent validity in Part IV. Will all deceptions and relevant mistakes invalidate consent, or should some line be drawn, beyond which criminal liability will not attach? This chapter has explained why the traditional common law approach to answering this question is inapt: such issues are properly located at the 'token of ostensible consent' stage of the analysis, rather than at the assessment of the validity of that token of consent.

PART IV

CHAPTER SEVEN: STRIKING THE BALANCE BETWEEN SEXUAL INTEGRITY AND PRIVACY

It might be thought that any prima facie infringement of sexual integrity should result in consent-invalidation. The argument is that if sexual integrity is undermined then any token of ostensible consent given as a result of deception or a relevant mistake was invalid (provided that a 'but-for' causal relationship can be established between the deception or relevant non-disclosure and C's decision to consent). In this chapter, I will argue that this analysis fails to account for the competing rights and interests that militate against identifying all deceptions and relevant mistakes as consent-invalidating.

Most courts, legislatures and commentators also insist on dividing deceptions and mistakes into two groups: those that can invalidate consent and those that cannot. Herring's strict approach to deception and mistake is an outlier in this respect.[594] However, there is little agreement as to how or where to draw the line between those deceptions and mistakes which are consent-invalidating, and those which are not. The current legal approach is unsatisfactory,[595] and there are a wide range of approaches to, and rationales for, a 'line-drawing' approach across the academic literature. There is little doubt that the difficulties inherent in determining where such a line should be drawn explain the legal uncertainty in this area.

Herring's and Dougherty's approaches, outlined in the previous chapter, are examples of **expansionist unified approaches**. The mistake/deception distinction is irrelevant at the consent stage, and there is no further distinction to be drawn between material mistakes which invalidate

[594] In *R v Cuerrier* [1998] 2 SCR 371, the Supreme Court of Canada considered whether all 'frauds' should invalidate legal consent to sexual activity. L'Heureux-Dubé J advocated a position close to Herring's proposal. However, the majority favoured a line-drawing approach.

[595] See Ch 1.2.

consent and those which do not; *all* subjectively material mistakes[596] invalidate consent. This can be contrasted with an **expansionist differentiated approach**, under which it is recognised that deception and mistake cannot be treated in the same way at the consent-validity stage, as they are to be considered under different aspects of the meta-right to sexual integrity,[597] but once a deception or *relevant* mistake has been established, along with the causal nexus between such deception/mistake and C's 'consent', that consent is consequently regarded as invalid. Under an ***expansionist* unified approach,** no line is drawn between those deceptions or *relevant* mistakes that invalidate consent and those which do not.

Another option would be to identify consent as invalid only when induced by certain kinds of deceptions and mistakes. This 'restricted' approach again bifurcates into differentiated and unified approaches. On a **restricted differentiated approach**, only certain types of deception and *relevant* mistakes will invalidate consent. On a **restricted unified approach** only certain types of deception and uninduced mistakes will invalidate consent; a distinction is drawn between deceptions and mistakes by reference to their subject matter, but no formal distinction between deception and uninduced mistake is seen as relevant to consent-validity.

In Chapter 5, I argued that the unified approach should be rejected in favour of a differentiated approach. In this chapter, I will argue that an expansionist approach is equally inappropriate; it is necessary to adopt a restricted approach, whereby only certain kinds of deceptions and relevant mistakes will invalidate consent. In other words, I will argue in favour of a **restricted differentiated approach**.

[596] I.e., but for which C would not have tokened consent.

[597] Ch 5.

I do not attempt to set out a complete account of the distinction between consent-invalidating and non-invalidating deception and relevant non-disclosure in this chapter. But, building on the conceptual foundations laid in Parts I-III, and after explaining, in Section 1, why existing line-drawing accounts are ill-principled, insufficiently reasoned, or too narrow in focus, this chapter will make two crucial contributions to the line-drawing debate.

In section two, I will argue that the principled basis for drawing a distinction between consent-invalidating and non-invalidating[598] deceptions is rooted in a human rights analysis of competing individual rights and interests. Some deceptions and relevant non-disclosures will infringe, but not violate, the right to sexual integrity, as a result of the competing rights in service of which D deceives C or fails to disclose information. Both the right to privacy and the right to sexual integrity are recognised and protected under Article 8 of the ECHR. Indeed, these rights are not inherently in opposition. The right to privacy is best understood as rich and demanding, concerned with facilitating autonomy and dignity in a wide sense and thus concerned with sexual integrity, informational autonomy, the right to self-determination and self-realisation and to forge relationships with others as one's authentic self. Thus understood, the right to privacy both has distinct social value and may be simultaneously engaged for both parties in cases of mistaken/deceptive sex; D may have a privacy interest in maintaining secrecy over the relevant information, and C's interest in knowing the information also falls within her art.8 right to private and family life, via the right to sexual integrity. The rights of both C and D must be taken seriously in these cases, and this requires careful consideration of the appropriate balance between competing aspects of the same article 8 right.

In section three, I will demonstrate that even when no privacy-based justification for deception/relevant non-disclosure is available, arguments based on public and legal policy will, in

[598] This shorthand is for convenient refence to whether deceptions and relevant mistakes invalidate consent in law. The context will make clear when I am referring to consent validity in moral terms.

some circumstances, militate against criminalisation. We must recognise a gap between morally valid consent and legally valid consent. Nevertheless, creative use of the concept of conditional consent might allow us to narrow the gap between morally valid and legally valid consent in appropriate cases.

I cannot hope in this single chapter to give a full account of every instance of valid or invalid consent. By focusing on two case studies (gender and HIV/herpes) in detail, I hope to show that careful, nuanced analysis of the conflicting rights and interests at stake in a wide range of contexts in which deception and mistaken sex might arise is vital, if the line-drawing problem is to be properly addressed. Similarly, the policy analysis offered in section three should be seen as an indication of the work still to be done in this area, and guidance on how that work should be approached, rather than an incomplete compendium of firm policy positions. This chapter makes a modest but vital contribution to that work by outlining in some detail why the right to privacy and other, related, rights of the defendant should form the normative basis of the much-debated 'dividing line', and demonstrating why, and potentially when, policy arguments might justify a distinction between morally and legally valid consent.

7.1 LEARNING LESSONS: UNSATISFACTORY APPROACHES TO THE LINE-DRAWING PROBLEM

In opposing an expansionist account of deceptive and mistaken sex, courts and commentators have regularly adopted or recommended some objective materiality requirement,[599] i.e., an objective limitation on the deceptions and/or mistakes that invalidate consent.[600] The key

[599] In contrast to 'subjective materiality' (n596).

[600] Wertheimer (n81) 209; Lucinda Vandervort, 'HIV, Fraud, Non-Disclosure, Consent and a Stark Choice: Mabior or Sexual Autonomy?' (2013) 60 CLQ 301; Sharpe, *Sexual Intimacy and Gender Identity 'Fraud'* (n52) 64.

to the line-drawing problem lies not in denying the fact that all deceptions and relevant mistakes infringe sexual integrity, but in recognising the importance of distinguishing between the infringement of sexual integrity and the violation of sexual integrity.

Examples of objective materiality requirements abound in the literature. The US and English common law approaches discussed in Chapter 6 amount to an objective materiality requirement, excluding 'trivial' mistakes. One recurring principled critique of the expansionist approach is that in many cases of deception or mistake, criminalisation is inappropriate as the complainant does not suffer any harm resulting from the sexual intercourse.[601] This argument might be said to track a distinction between 'objectively trivial' and 'objectively more serious' mistakes/deceptions,[602] but the central question would be whether the particular instance of deceptively induced/mistaken sex led to some specific level of (experiential) harm. The claim that at the very least some, objectively trivial, deceptions are not harmful leaves the criminalisation of *all* consent-inducing deceptions and mistakes open to charges of 'legal moralism'.[603] However, this analysis overlooks the important fact that the conceptual core of rape/SA is not located in an experiential account of harm, but the violation of the right to sexual integrity.[604]

Many examples of objective materiality requirements across the literature fail to reflect sexual integrity as the key right underpinning the non-consensual sexual offences. Wertheimer invites consideration of a distinction between a) sex as a cost for which C expects to receive a

[601] See Richard A Posner, *Sex and Reason* (Harvard University Press 1992) 392; Schulhofer, *Unwanted Sex* (n116) 156; Wertheimer (n81) 203; Westen (n76) 187, 225.

[602] Putting aside, for now, who determines objective seriousness. On this, see below.

[603] Hyman Gross, 'Rape, Moralism, and Human Rights' [2007] Crim LR 220; Vera Bergelson, 'Sex, Lies and Law: Rethinking Rape-By-Fraud' in Chris Ashford, Alan Reed and Nicola Wake (eds), *Legal Perspectives on State Power: Consent and Control* (Cambridge Scholars Publishing 2016) 167.

[604] Ch 2.2.

benefit and b) sex as an activity in which C would like to engage with D. In the first type of encounter, Wertheimer suggests that the deception undermines the expected benefit or outcome, rather than the value of the sexual activity itself. In the latter type of encounter, the 'character and value of the activity' is undermined by the deception.[605] He suggests that in the former category, we might distinguish between levels of wrongdoing (analogous to the distinction between petty theft and grand larceny), on the basis of whether C was responding to a modest offer or an offer that was objectively difficult to refuse.[606] Wertheimer tentatively suggests that criminal liability might be appropriately excluded in cases where C responded to an (objectively) modest offer.[607] Similarly, Westen suggests that it would be 'normatively untenable' for deceptions relating to high or low ranking employment status, wealth, sexual (in)experience, marital status or age to invalidate legal consent, based on his apparent sympathy for the rationale of rape/SA as 'protecting persons who safeguard sexual intimacy as being integral to their identity and well-being', rather than those who 'value sexual intimacy so little that they are willing to trade sexual intercourse for goods and status'.[608]

Sharpe also indicates her support for an objective materiality requirement in her work on the so-called 'gender fraud' cases. Although she rejects the argument that in cases involving transgender defendants there is any 'gap' between C's belief about D's gender identity and D's

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[605] Wertheimer (n81) 209. Given the complexities of sexual decision-making, this distinction might exist in theory more than practice. Furthermore, and worryingly, this distinction encourages D to play to the stereotype that women are not interested in sex for pleasure and tolerate sex with men only because they want a romantic relationship.

[606] ibid 207. Wertheimer uses the example of a wealthy man offering to pay for lifesaving treatment for C's child, if she has sex with him.

[607] The tensions between objectivity, subjectivity and sexual integrity arise here, too. A modest offer to one might very difficult for another to refuse. How should the distinction be drawn, and by whom? These questions are a central feature of the literature on coercion.

[608] Westen (n76) 200; Jeffrie G Murphy, 'Some Ruminations on Women, Violence and the Criminal Law' in Jules L Coleman and Allen E Buchanan (eds), *In Harm's Way: Essays in Honor of Joel Feinberg* (CUP 1994). This is an unsatisfactory account of the harm/wrong of rape/SA. See Ch 2.

actual gender identity, Sharpe concedes that C may be mistaken about, and D may deceive C about, secondary facts relating to D's gender history (e.g., their assigned sex at birth). She argues that such mistakes/deception should not be 'considered material as a matter of law',[609] but her analysis on this point is highly specific to the gender identity context. She does not explain how a materiality requirement could work in a wider range of cases.

The difficulty with these accounts, and indeed any restricted account resting on an objective criterion, is that, when assessing whether a particular individual's sexual integrity has been infringed, it is of no relevance how anyone else would make the decision to give or withhold consent in the relevant factual context. Objective materiality requirements decouple consent from the logic of the underlying right to sexual integrity.[610] Sexual integrity/autonomy is necessarily individualistic. In cases involving deceptive/mistaken sex, L'Heureux-Dubé J has stated that the 'focus… should be on whether the nature and execution of the deceit deprived the complainant of his or her ability to exercise his or her will in relation to his or her physical integrity with respect to the activity in question'.[611] An objective materiality requirement gives those with idiosyncratic but nonetheless deeply-held preferences or convictions (whether moral, religious, aesthetic or inexplicable) no opportunity to ensure that their sexual decision-making is respected, either by others or by the state. If C has idiosyncratic deal-breakers, even if that individual makes enquiries of D, clearly explaining their deeply held conviction that they would only consent under certain circumstances and seeking assurances from D that such circumstances did obtain, D would have

[609] Sharpe, *Sexual Intimacy and Gender Identity 'Fraud'* (n52) 93.

[610] For which consent is a vehicle. See analysis in Ch 2.3.

[611] *Cuerrier* (n594) [15]; Herring, 'Mistaken Sex' (n229) 523. The reference to 'physical integrity', rather than sexual integrity should not be read as a suggestion that the Supreme Court of Canada regards the right underpinning rape/SA as physical, rather than sexual integrity. The language of 'physical integrity' is instead explained by the fact that sexual assault is built upon the definition of (non-sexual) assault, provided in s265 and the provision in s265(3)(c) that C's consent is vitiated by fraud applies to all assaults, sexual and otherwise. L'Heureux-Dubé J's reference to physical integrity arises in this context.

a legal *carte blanche* to lie in order to obtain sexual gratification at the expense of C. Sexual integrity is protected for some, but not all, but with no justification for the differing levels of protection.

A related difficulty that arises as a result of the ill-principled efforts to identify a boundary line between legally relevant and irrelevant consent is determining who should be charged with determining the threshold of objective materiality. If legally relevant deception and mistakes should be confined to those which go to an 'essential aspect' of the sexual activity,[612] or are non-trivial in some way, it raises the question: who is to decide what is essential or trivial. To allow C to decide for herself would be to concede an expansionist account. But a restricted account must grapple with the difficult observation that one's experience (including one's gender, religion, age, upbringing) may well have a bearing both on how one distinguishes between important or trivial information, and also on how one might imagine the majority of society would draw such a distinction.

Perhaps the most judicially well-developed approach to the line-drawing problem is found in Canada. Over a series of cases, mostly involving HIV non-disclosure, the Supreme Court of Canada (SCC) have identified legally relevant 'fraud' (both deception and mistake) by reference to the risk of harm involved in the sexual activity itself. It is worth considering this ill-principled and uncertain approach in some detail, in order to identify the specific problems inherent in the Canadian solution. The Criminal Code of Canada does not distinguish between rape and sexual assault. It provides for offences of sexual assault (s271),[613] and two aggravated forms of sexual assault: sexual assault with a weapon, threats to a third party or causing bodily harm (s272), and aggravated sexual assault (s273). D commits aggravated sexual assault when, in committing sexual assault, he wounds, maims, disfigures or endangers the life of C. Consent is defined in s273.1(1)

[612] Vandervort (n600).

[613] See n611.

as 'the voluntary agreement of the complainant to engage in the sexual activity in question', and s265(3)(c) provides that 'no consent is obtained where the complainant submits or does not resist by reason of… fraud'. The SCC has held that there is a two-step approach to assessing consent. First, it must be determined whether there was the requisite 'voluntary agreement' under s273.1(1) (which involves voluntary agreement to 'the touching, its sexual nature [and] the identity of the partner'[614]). If such voluntary agreement was given, it must then be determined 'whether there are any circumstances that may vitiate her apparent consent'.[615]

Cuerrier and the later case of *Mabior* both involved defendants who had failed to disclose HIV status to their sexual partners, who would not have consented to unprotected sexual intercourse had they been aware of the truth. In *Cuerrier*, the majority resoundingly rejected the dissenting view of Justice L'Heureux-Dubé, who argued that sexual autonomy demanded that every type of deception or mistake, regardless of the subject matter, be capable of vitiating consent. Concerned about the risks of trivializing the offence of sexual assault and the 'proliferation of petty prosecutions',[616] the Court sought to '[capture] the kinds of deceptions that should give rise to liability for sexual assault without making everyone who lies in the prelude to a sexual encounter into a sex offender'.[617] One central difficulty faced by the majority was how the plain wording of s265(3)(c), which seems to apply to 'fraud' without any restriction in terms of the subject matter of that fraud, could be given a restricted interpretation. The majority adopted the understanding of fraud used in the commercial criminal law, and held that fraud under s265(3)(c) must involve

[614] *R v Hutchinson* [2014] SCC 19, [2014] 1 SCR 346 [5].

[615] ibid [4]-[5]. Here, the analysis is structurally consistent with the track 1/track 2 approach advocated in Ch 5, though the language of 'vitiation' is unfortunate.

[616] *Cuerrier* (n594) [135].

[617] Martha Shaffer, 'Sex, Lies and HIV: Mabior and the Concept of Sexual Fraud' (2013) 63 U Toronto LJ 467.

'dishonesty, which can include non-disclosure of important facts, and deprivation or risk of deprivation'. Deceit or non-disclosure of HIV status satisfies this test when 'the dishonest act [deception or non-disclosure] had the effect of exposing the person consenting to a significant risk of serious bodily harm'.[618]

Despite the fact that Cory J, writing for the majority, seemed to indicate that condom usage would lower the risk below the relevant threshold,[619] the approach taken following *Cuerrier* was characterised by inconsistency and uncertainty in relation to the meaning and application of 'significant risk' in the HIV transmission context. Courts took inconsistent approaches to whether condom use lowered the risk sufficiently and inconsistency also arose in relation to the level of risk involved in specific sexual acts and the significance of a low viral load.[620] The SCC revisited the issue of 'significant risk' in *Mabior*, and held that in the HIV context, 'significant risk of serious bodily harm' requires disclosure of HIV+ status if there is a 'realistic possibility of transmission of HIV'.[621] The court held that use of a condom or a low viral load[622] alone would not suffice to lower the risk beyond the relevant threshold. *Both* condom usage *and* a low viral load would be required for penetrative sex to fall below this risk threshold.[623] The decision in *Mabior* has been roundly criticised on the basis that *either* a condom load or low viral load places the risk of HIV transmission

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618 *Cuerrier* (n594) [116]-[117].

619 ibid [129].

620 Eric Mykhalovskiy, Glenn Betteridge and David McLay, *HIV Nondisclosure and the Criminal Law: Establishing Policy Options for Ontario* (Ontario HIV Treatment Network, 2010) 20-21; Isabel Grant, 'The Prosecution of Non-disclosure of HIV in Canada: Time to Rethink Cuerrier ' (2011) 5 MJLH 7; Elaine Craig, 'Personal *Stare Decisis*, HIV Non-disclosure and the Decision in *Mabior*' (2015) 53 Alta L Rev 207.

621 *R v Mabior* [2012] SCC 47 [91].

622 The amount of HIV present in the blood. If viral load falls below a certain level, HIV is not contagious. See Ch 7.3.2.

623 *Mabior* (n621) [94].

from penetrative sex at a negligible level; there is no scientific or medical basis to require the use of *both* in order to negate a 'realistic possibility of transmission'.[624] The harm-based approach to identifying legally relevant 'fraud' was applied outside of the HIV context in *Hutchinson*, which involved a defendant who pierced holes in a condom, unbeknownst to his girlfriend, who had expressed her desire not to become pregnant.[625] The SCC held that D's deception relating to the barrier contraception must be considered under the *Cuerrier* test. The SCC clarified that 'harm', within the meaning of the *Cuerrier* test, extends to 'the sorts of profound changes in a woman's body… resulting from pregnancy' and so '[d]epriving a woman of the choice whether to become pregnant or increasing the risk of pregnancy is equally serious as a "significant risk of serious bodily harm" within the meaning of *Cuerrier*'.[626]

Despite the clear concern to protect sexual autonomy present in the judgments of the SCC, and explicit recognition that the principles of dignity and agency and sexual autonomy lie at the heart of the Canadian law on sexual offences,[627] the *Cuerrier-Mabior-Hutchinson* approach results in a series of odd results that demonstrates an ill-principled divergence between sexual integrity/autonomy and the meaning of consent. For example, if C explicitly conditions her consent on D's use of a condom, or agreement to withdraw prior to ejaculation, and D falsely states his intention to wear a(n intact) condom or to withdraw, the vitiation of consent is dependent upon the consequences of the act (risk of HIV transmission; unwanted pregnancy), not the act itself and C's consent in relation to it. If D were infertile and had no STDs, C's consent

[624] See Ch 7.2.3; Isabel Grant, 'The Over-Criminalization of Persons with HIV' (2013) 63 U Toronto LJ 475 and Shaffer (n617).

[625] *Hutchinson* (n614).

[626] ibid [70].

[627] *Ewanchuk* (n155); *Mabior* (n621) [43], [45], [48].

would be legally valid. If D was fertile, or had an STD,[628] And consider the facts of *Hutchinson* with the genders reversed: if the male party explicitly conditioned his consent on his wearing a condom, and the female party poked holes in it, to try to become pregnant, the male complainant's consent to the sexual activity would be legally valid.[629] These distinctions cannot be explained by reference to C's sexual autonomy/integrity. In these examples, C's sexual integrity is infringed. They cannot be explained by reference to any legitimate interest D might have in deceiving the other party. D has no more legitimate interest in deceiving C about his intentions in relation to condom usage or withdrawal when the sexual act does not carry risk of pregnancy or disease than when it does. Of course, D poses a greater risk of *physical* harm to C when physically injurious consequences may result from the act, but by drawing the boundary line between legally relevant and irrelevant deception/non-disclosure on this basis, the SCC have decoupled the law on sexual offences from its normative underpinnings.[630]

In cases such as *Papadimitropoulous,*[631] and *Boro*,[632] C understood the sexual nature of the act to which she ostensibly consented, and the identity of the defendant; as the sexual acts did not expose C to a significant risk of serious bodily harm, the *Cuerrier* test marks them as lawful and D's actions as consensual. In the context of *Boro*, this result is startling. The lesson to be drawn from

[628] The STD would need to be serious; gonorrhoea, hepatitis, and herpes constitute grievous bodily harm in English law: *R v Golding* [2014] EWCA Crim 889, [2014] All ER (D) 73 (May).

[629] The definition of 'serious harm' in the *Cuerrier* test does not extend to financial harm (i.e., liability for child support), *Hutchinson* (n614) [72]. As the majority in *Cuerrier* rejected the argument that their interpretation of fraud in s265(3)(c) amounted to judicial legislation by holding that Parliament intended fraud to have the same meaning as it does in the commercial criminal law, the restriction of 'harm' to physical, and not financial, harm is odd. This reveals fundamental weaknesses in the *Cuerrier* decision.

[630] It cannot even be said that the test at least provides certainty, given the inconsistency that has bedevilled the cases involving risk of HIV transmission. See n620 and n624.

[631] *Papadimitropoulos* (n9) (sham wedding ceremony).

[632] *Boro* (n576) (doctor lied about medical condition and curative sex).

the Canadian approach is not that an expansionist approach is necessary, but that danger and difficulty lies in any approach which departs from a clear understanding of the values at stake, within the law of sexual offences, when seeking to identify legally (ir)relevant deception/non-disclosure. By importing concerns more appropriately dealt with in the non-fatal non-sexual offences against the person (the risk of bodily harm), the Canadian approach inevitably descends into incoherence. The error made by the expansionist account is to assume that only C's interests are relevant to the question of consent-validity. To draw an appropriate line between legally relevant and irrelevant deceptions, we must recognise not only that D's deception might infringe C's sexual integrity, but also confront the reality that D's deception or non-disclosure will often serve some legitimate interest.

7.2 SEXUAL INTEGRITY AND PRIVACY

In the deceptive/mistaken sex context, the expansionist account requires D to be forthcoming concerning a spectrum of information which D might reasonably wish to keep private, including from D's wider community such as family, friends, and employers. The contention that the right to sexual integrity must always outweigh competing rights and interests is facile in pushing these concerns aside; 'as much as we value people's sexual autonomy, we have other values that we may want to protect, too', involving freedom of expression, privacy, and allowing people to 'reinvent themselves and have a "fresh start"'.[633] On this latter point, Lazenby and Gabriel have observed:

> You must be allowed some degree of separation from your past if you are to flourish in the present. Within certain parameters, we must all be allowed to define ourselves as we

[633] Bergelson (n603) 167.

> now are, and not as we once were. A duty of disclosure [in the sexual offences context] that may encompass any part of our history steals from us an open future.[634]

Whilst there has been normative debate over whether any rights are absolute,[635] very few rights could fall into this category. Even the right to life often is circumscribed in the face of competing rights, albeit under more tightly constrained circumstances,[636] than other rights such as privacy, freedom of expression, association and assembly, amongst others.[637] However, balancing the right to sexual integrity against the right to privacy is controversial, not least as it evokes memories of old arguments against recognising and punishing domestic violence and marital rape as criminal offences.[638] Yet whilst sexual offending is a highly gendered offence, generally characterised by D's exercise of power and control over C, this paradigm breaks down in the information gap cases. MacKinnon and Crompton challenge the notion that cases involving the non-disclosure of HIV status in particular reflect this dynamic where D is the powerful, menacing aggressor and C is a powerless victim.[639] Rather, they suggest that HIV+ status is a position of

[634] Hugh Lazenby and Iason Gabriel, 'Permissible Secrets' (2018) 68 The Philosophical Q 265.

[635] See, Alan Gewirth, 'Are there any Absolute Rights?' (1981) 31 The Philosophical Q 1; Jerrold Levinson, 'Gewirth on Absolute Rights' (1982) 32 The Philosophical Q 73; Alan Gewirth, 'There are Absolute Rights' (1982) 32 The Philosophical Q 348.

[636] See ECHR, art 2(2), which provides that: '[d]eprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.'

[637] See ECHR, arts 8(2), 10(2), 11(2).

[638] MacKinnon (n90); Jill Elaine Hasday, 'Contest and Consent: A Legal History of Marital Rape' (2000) 88 CLR 1373; Kimberly D Bailey, 'Lost in Translation: Domestic Violence, "The Personal is Political", and the Criminal Justice System' (2010) 100 J Crim L & Criminology 1255, 1259-65; Kimberly D Bailey, 'It's Complicated: Privacy and Domestic Violence' (2012) 49 Am Crim L Rev 1777, 1777-85; Nicola Grover and Terry Thomas, *Domestic Violence and Criminal Justice* (Routledge 2013) 47.

[639] Emily MacKinnon and Constance Crompton, 'The Gender of Lying: Feminist Perspectives on the Non-Disclosure of HIV Status' (2012) 45 UBC L Rev 407.

disempowerment and vulnerability, given the significant social stigma that exists. That is not to say that PLWH cannot have more power than C, or exercise that power over C to obtain sex. However, 'HIV+ status is not the locus of power', and 'withholding HIV status should not be read as a coercive manoeuvre executed from a position of power conferred by seropositivity'.[640] We see this assumption of relational power imbalance in a range of cases.

In 'gender fraud' cases, trans or gender non-conforming people have been cast as sexual predators controlling and manipulating vulnerable young women,[641] but MacKinnon's and Crompton's analysis in the HIV context is equally applicable here. Similarly, deception and non-disclosure might interact with domestic violence to create scenarios in which the deception was perpetrated by the putative defendant in a sex offence case in order to secure their physical safety under the threat of unlawful intimate partner violence. Women, in particular, might lie to abusive partners from fear of a violent response, yet that information might be material to the partner's consent to a particular instance of sexual activity. Deception about marital status is often cited as an example of common deceptive sex. The paradigm is usually a man lying about his married status to another woman. Consider a domestic abuse victim who leaves her (or his) partner, changes her name and sets up a new life, making every effort to ensure that her former partner cannot find her. If she does not disclose to her new partner that she is still married, it is not so easy to claim that her rights to both privacy and physical security are trumped by her partner's right to sexual integrity.

It is easier to make sexual integrity a trump card when we cast the putative defendant in the sexual interaction as powerful and manipulative, using deception or calculated non-disclosure

[640] ibid 426.

[641] Allison Moore, 'Shame on You: The Role of Shame, Disgust and Humiliation in Media Representations of 'Gender-Fraud' Cases' (2016) 21 Sociological Research Online 1, paras 7.3, 7.5, 8.3; Sharpe, *Sexual Intimacy and Gender Identity 'Fraud'* (n52) 22, 96-97.

as a weapon to induce C's consent. Once this characterisation is recognised as over-simplistic in the information gap cases, it is easier to conceive of a more nuanced balance being struck between sexual integrity and competing rights and interests.

In fleshing out the right to privacy, we must avoid the caricature of privacy as concerned with an individual isolating herself from the social community, or as a 'right not to participate in collective life'.[642] Rather, privacy is better viewed as a rich right which secures for the individual the ability to develop their dignity, autonomy, sense of self, and personal relationships.[643] Conceived in this way, it has real social value and facilitates social bonds.

Privacy can operate to secure these demanding, highly social, goals in a range of ways. 'Our lives are, at least in part, shaped by the way in which we are seen by others. In order to succeed, in whatever calling we might choose to follow, we inevitably must be image builders, shaping our public image in a favourable way.'[644] Image-building should not be read as a cynical exercise in deception, but as a necessary part of continual human growth and development as we discover, pursue and finesse our sense of self: 'identity is the central experience of being human: so long as we can control "what is me" and "what is not me," then we can each come to understand and define who and what we are… [P]rivacy is the boundary that enables us to do that'.[645] Privacy protects people from the 'judgment of the mob', who may direct criticism wrongly at certain

[642] See Dorota Mokrosinska, 'Privacy and Autonomy: On Some Misconceptions Concerning the Political Dimensions of Privacy' (2018) 37 Law & Phil 117, 120, citing Alan F Westin, *Privacy and Freedom* (Bodley Head 1970). See also Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 Harvard L Rev 193.

[643] *Tysiac v Poland* (2007) 45 EHRR 42; Katja S Ziegler, 'Introduction: Human Rights and Private Law: Privacy as Autonomy' in Katja S Ziegler (ed), *Human Rights and Private Law: Privacy as Autonomy* (Hart 2007).

[644] Hans Nieuwenhuis, 'The Core Business of Privacy Law: Protecting Autonomy' in Katja S Ziegler (ed), *Human Rights and Private Law: Privacy as Autonomy* (Hart 2007) 720.

[645] Valerie Steeves, 'Reclaiming the Social Value of Privacy' in Ian Kerr, Valerie Steeves and Carole Lucock (eds), *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (OUP 2009), citing Irwin Altman, *The Environment and Social Behavior: Privacy, Personal Space, Territory, Crowding* (Brooks/Cole 1975).

activities,[646] it may act as a vital safeguard certain forms of social relationships or activities that would be illegitimately suppressed if widely known.[647] It also allows individuals to differentiate different levels of intimacy within their personal relationships. What marks certain relationships as important is that we trust the other with information that we want to keep secret from others. Giving them this information draws them to us, marks that relationship as distinct from, and perhaps more important than, relationships that we share with others. But disclosure, as well as a symbol of trust, represents a test: will the trusted individual share the secret with others, breaking the trust and indicating that the relationship was not as valuable as initially thought?[648]

One might argue that engaging in sexual activity with someone marks that relationship as particularly intimate or central to each individual and that a relationship of such status is one in which sensitive disclosures can be made. However, it is entirely possible for individuals to engage in mutually satisfying and morally unproblematic sexual activity together, without considering their sexual partner to be someone with whom they have an otherwise intimate or close relationship. The notion that privacy is somewhat suspended in any sexual relationship because the sex signals a personal intimacy between the parties is premised on a conservative view of sexuality that is not shared by all. Moreover, it is for the individual to decide what information about themselves they wish to share, and with whom, in order to differentiate between the types of social relationships they hold. One person may be personally forthcoming with their work colleagues, another may be reticent and private, even amongst a small number of close friends. If personal autonomy

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[646] N W Barber, 'A Right to Privacy?' in Katja S Ziegler (ed), *Human Rights and Private Law: Privacy as Autonomy* (Hart 2007) 71. See also David Feldman, 'Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty' (1994) 47 CLP 41, 57-58, and Daniel J Solove, *Understanding Privacy* (Harvard University Press 2008) 23.

[647] Such relationships or activities might range from the high school student who wishes to keep their membership of the chess club secret from their school peers for fear of being bullied for having an 'uncool' hobby, to an LGB individual deciding to conceal their sexuality from their neighbours, colleagues, or family.

[648] Charles Fried, 'Privacy [a moral analysis]' in Ferdinand David Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (CUP 1984). See also Solove (n646) 72, 79-80.

underpins privacy, it cannot be assumed that certain types of relationships (sexual, familial, etc), ought to involve any specific level of informational transparency intimacy.

The courts have recognised the role of privacy in facilitating self-identity and autonomy.[649] Article 8 of the ECHR protects the right to respect for private and family life. The state may restrict the exercise of that right, provided the restriction is in accordance with the law, and is necessary in a democratic society in the interests of, inter alia the protection of the rights and freedoms of others. The ECtHR has also stated explicitly that '[a]rticle 8… protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world…' and that 'the notion of personal autonomy is an important principle underlying the interpretation of its guarantees'.[650]

Information relevant to C's decision to consent will often be particularly sensitive or personal, the sort that is generally captured within an individual's right to privacy. However certain facts are irrelevant to D's privacy interests, e.g., that D does not intend to honour his promise to the sex worker to remunerate for her services,[651] or the fact that a doctor knows that the sexual intercourse he has suggested to his patient is purely for his sexual gratification, rather than the curative benefits he has falsely claimed will follow.[652] However, facts about gender identity, ethnicity or nationality, marital status, and health status (including sexual and mental health) have

[649] *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, [50]-[51] (Lord Hoffmann).

[650] *Pretty v United Kingdom* (2002) 35 EHRR 1, para 61.

[651] *Linekar* (n9).

[652] *Boro* (n576).

all featured in deceptive sex/mistaken sex cases in various jurisdictions;[653] and all implicate D's right to privacy in relation to that information. The right to privacy will also be relevant when considering non-disclosure or deception relating to fertility, contraception, sexual history, virginity, previous criminal convictions, or having been previously sexually abused. Non-disclosure or deception protects D's interest in keeping such information confidential.

However, it must be recognised that the right to privacy and the right to sexual integrity are not inherently in opposition to one another, as both fall within the scope of the right to private life within article 8, and both can, under the logic of article 8, be justifiably infringed in order to protect the rights and interests of others. In certain mistaken/deceptive sex cases, these aspects of the same right may come into simultaneous competition, when disclosure/non-deception would facilitate C's sexual integrity at the expense of D's informational privacy or capacity for self-realisation. On D's side of the balance, rights to positive sexual autonomy, physical and psychological security, and freedom from discrimination might also weigh in the balance, depending on the context. It will not be the case that sexual integrity will *always* outweigh other competing aspects of the right to privacy, or that those other aspects of privacy will *always* outweigh sexual integrity. Careful, nuanced analysis is required before conclusions can be reached.

In the following section, I will use the framework of Article 8 to engage in that careful, nuanced analysis to strike the appropriate balance between competing rights and interests in two case studies, involving gender identity/history, and HIV+ and HSV+[654] status. In so doing, I hope to offer some guidance on how we might justify a restricted approach to deceptive and mistaken sex and think in more nuanced ways about just where the criminal law should draw the boundary

[653] *McNally* (n5); *Kashur* (n520); *Cuerrier* (n594). See also discussion of *Denino v State of Israel* (unreported) in Eugene Volokh, 'Israeli Rape by Fraud Cases' (7 October 2010) <http://volokh.com/2010/10/07/israeli-rape-by-fraud-cases/> .

[654] Herpes Simplex Virus.

line between consent-invalidating and non-invalidating deception/relevant non-disclosure. In section 3, I will reflect on these case studies to draw conclusions on the wider implications of the balancing rights analysis for this area of the criminal law in general.

7.3 GENDER IDENTITY

As discussed in Chapter 1, since 2012, there has been a series of prosecutions and convictions for sexual offences on the basis that D deceived C as to their gender identity.[655] The decision in *McNally* is effectively to impose an obligation of disclosure upon transgender individuals.[656] If a transgender individual does not disclose that they are transgender, or deceives their partner into thinking that they are cisgender, then C's consent will be invalid under s74 of the Sexual Offences Act 2003, provided that the prosecution can show that C would not have consented, had she known the truth. As explained in Chapter 1, the six cases prosecuted under the SOA 2003 all involve defendants who were designated female at birth, and who, at the time of the relevant conduct, presented as male to their sexual partners, all of whom were cisgender heterosexual women. However, the purpose of this section of the thesis is not to assess the current doctrinal position in UK law, but to consider from a normative perspective whether ostensible consent should be invalid if C gave it based on a relevant mistake, or as a result of deception in relation to D's gender.

When considering these cases, we must be sensitive to the wide range of facts around which a claim of deception or mistake might coalesce. *McNally* and most of the other 'gender

[655] n58.

[656] See Ch 1.2.

fraud' cases were prosecuted on the basis that C's mistake (resulting from deception, according to the courts) related to D's gender: the complainants believed that the defendants were male when, in fact, they were female. In four out of the six cases, some or all of the convictions against the defendants related to sexual acts, the mechanism of which C was fully aware. Only in *Newland*[657] and *Lee*[658] were the convictions solely based on penetration with a prosthetic, which the complainants believed to be D's fleshy penis.[659] I argue below that these cases should be treated as track 1 cases, rather than track 2 cases, and so warrant different analysis. The prosthetic cases aside, when C engages intimately with a transgender person, thinking that they are a cisgender person, they are not mistaken as to D's gender, but rather D's gender history.[660] Categorising cases where C would not have consented had she known D was a transgender man as cases involving a mistake on C's part that D was male rather than female, is to allow C to define D's identity. The right to sexual integrity does not grant C the power to define D's gender.[661] The key point here is that D is male. D is a transgender man. C may well be mistaken about D's gender history or secondary gendered facts relating to D's biology or *legal* sex status (which is not determinative of D's gender identity), but C is not mistaken as to D's gender.

Deception or relevant non-disclosure might arise in relation to D's gender history/transgender identity, or gendered facts of a secondary nature – i.e., D's current or previous legal sex category, D's hormone production, chromosomes or anatomical features. Sharpe has argued that mistakes and deception relating to whether D is transgender or relating to other

[657] *Newland* (n58).

[658] *Lee* (n58).

[659] See Sharpe, *Sexual Intimacy and Gender Identity 'Fraud'* (n52) 44-51.

[660] See Ch 1.2.

[661] Sharpe, *Sexual Intimacy and Gender Identity 'Fraud'* (n52) 65.

gendered facts about D are not (objectively) material and should not invalidate consent.[662] Any other approach, she argues, would imply a 'hierarchy of men before the law'. Sharpe argues that 'we should accept neither an argument that negates gender identity through allowing a complainant's interpretation of a defendant's gender identity to trump his own, nor one that seeks to otherwise diminish him'.[663] The point Sharpe makes is that usually people care about secondary gendered facts or gender history because they consider those facts to be dispositive of D's actual gender identity, even if that conflicts with D's own self-understanding. In other words, if C would not have consented to D performing oral sex upon her, because D was assigned female at birth, was legally female, has XX chromosomes, or has a vagina, this is usually because C believes these facts to lead inexorably to the conclusion that D is female, despite the fact that D is a (transgender) man. However, although Sharpe offers persuasive, principled arguments against liability for non-disclosure or deception in relation to gender identity, gender history and secondary gendered facts, her reliance on an objective materiality requirement is unhelpful.[664] Nevertheless, D's gender history, identity and gendered secondary facts fall within the ambit of a transgender individual's right to privacy, and the balance between sexual integrity and competing rights – including the right to privacy – can be used as the basis for restricting the scope of liability in information gap cases.

7.3.1 PRIVACY, GENDER IDENTITY AND ARTICLE 8 ECHR

A duty to disclose trans identity/status clearly interferes with art.8(1), but it is important to note the specific shape of art.8 in this context. From an analysis of the Strasbourg case law, an emerging concept of a right to gender autonomy can be identified, rooted, in turn, in the rich

[662] ibid 64-65, 93.

[663] ibid 65.

[664] ibid Ch 7.1.

conception of privacy as underpinned by values of self-definition, dignity and autonomy in a broad and highly social sense.

The ECtHR has interpreted Art. 8 widely.[665] It has also taken a hierarchical approach, by which the restriction of certain elements, comprising particularly important and intimate aspects of an individual's private life, requires particularly serious justification.[666] 'Gender identification, name, sexual orientation and sexual life' have been included in this category.[667] The ECtHR's approach goes beyond a merely internal conception of privacy and has recognised the fundamental underlying principle of autonomy and personal identity, conceiving of private life in a communal or relational context: relationships with others are constitutive of one's identity and so art.8 can protect and secure the ability to develop relationships with others.[668] As such, there is a 'zone of interaction... with others' that falls within the scope of art 8.[669] In cases involving transsexual applicants, this autonomy-based view of Article 8 is particularly significant.[670] In *Van Kuck v Germany*, the Court described 'the applicant's freedom to define herself as a female person' as 'one of the most basic essentials of self-determination', and noted that in light of 'the very essence of

[665] *Niemietz v Germany* (1993) 16 EHRR 97 [57].

[666] *Dudgeon v UK* (1983) 5 EHRR 573.

[667] *Goodwin v UK* (2002) 35 EHRR 18 [77]; *Peck v UK* (2003) 36 EHRR 41 [57]; *Van Kuck v Germany* (2003) 37 EHRR 51 [69].

[668] (n643).

[669] *PG v UK* (2008) 46 EHRR 51 [56]; *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 45 [61].

[670] The ECtHR, and courts in general, usually refer to transsexuals in judgments. This terminology is arguably easier for the legal system to comprehend, as it does not pose a real challenge to the existence of a binary system of sex and gender, but merely indicates that one's sex and gender can conflict within that binary. The wider term transgender might provide a greater challenge to the legal system if it clings to a rigid, unrealistic, binary model of sex and gender. See Lesley-Anne Barnes, 'Gender Identity and Scottish Law: The Legal Response to Transsexuality' (2007) 11 EdinLR 162. However, the term transgender is preferable to transsexual, not least because 'many transgender people refuse the *transsexual* label because of its medical history and pathologizing effects, and because not all transgender people seek to resolve the conflict through surgical intervention': Sharpe, *Sexual Intimacy and Gender Identity 'Fraud'* (n52) 5.

the Convention being respect for human dignity and human freedom, protection is given to the right of transsexuals to personal development and to physical and moral security'.[671] In *I v UK*, heard prior to the introduction of the Gender Recognition Act 2004, the Court stated in relation to the applicant's inability to obtain legal recognition of her female gender identity, that:

> ...the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.[672]

The principles developed in the case law cohere into an overarching principle of gender autonomy: emphasis is placed on the notion that in order to live fully and autonomously, the basic requirements of self-determination must be secured. This includes building rewarding relationships with others in an environment of physical, moral and psychological security. For many trans persons, this necessitates state facilitation of the desired, and psychologically necessary, realisation of their gender identity. This involves positive obligations on the state to provide medical treatment,[673] mechanisms for altering legal documentation and sex categorisation,[674] and to ensure trans individuals are included under anti-discrimination legislation, and itself to refrain from discrimination against trans individuals. A duty to disclose gender identity is clearly a prima facie violation of art.8(1), as is a duty not to deceive others about one's transgender identity or gender history, either through lying in response to a direct question about one's transgender

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[671] *Van Kuck* (n667) [73]-[69].

[672] *I v UK* (2003) 36 EHRR 53 [71].

[673] *Van Kuck* (n667).

[674] *Goodwin* (n667) [92].

identity/gender history or by deceiving another about secondary 'gendered' facts, such as where one went to school (especially if a single sex school), or one's experiences of puberty.

That the right to privacy is infringed under art 8(1) by an obligation to disclose should be uncontroversial. The argument that the right to privacy is also infringed by an obligation to refrain from deception might be considered more problematic. However, if privacy does not also apply to the possibility of such an obligation, the right would mean very little. It would be protected only in the face of individuals who did not seek to impinge upon it. If an obligation to refrain from deceiving anyone about one's transgender identity or gender history[675] were thought not to infringe the right to privacy, then whether that individual could maintain their privacy would depend upon how intrusive others are. The moment someone seeks particularly sensitive information, the privacy right would disappear, no matter how acute D's interest in confidentiality might be, in comparison with the questioner's interest in the information. It is inadequate to suggest that an individual need not deceive and if asked questions they find intrusive they can simply refuse to answer, or state that the question is 'none of your business'. Aside from the fact that this requires some presence of mind from a defendant with a pressing desire for confidentiality and who may, as a result, feel particularly vulnerable, a refusal to answer will often (rightly) be read as an admission to whatever question has been asked. Ultimately, the balancing analysis outlined below does not turn on the deception/relevant non-disclosure distinction. The right to gender autonomy outweighs the right to sexual integrity in both cases. Indeed, it is only when the art 8 right in question here is framed through the lens of gender autonomy (through an obligation either to disclose to or to refrain from deceiving C) can the true extent and severity of the infringement of art 8 be fully appreciated.

[675] Or any other information that would fall under art 8 in general.

Of course, an infringement of art 8 may be justified under art 8(2). The central question is whether the restriction of the transgender individual's privacy is 'necessary in a democratic society', so as to protect the art.8 right of the complainant to her sexual integrity. The House of Lords has identified four issues around which the proportionality analysis is to be structured.[676] The first and second issues (whether the aim of the state is sufficiently important to justify the limitation of the right and whether the measure is rationally connected to the state's aim), are not in question here. Most relevant are the third and fourth issues: whether the interference went no further than necessary to achieve the legitimate aim, and, even if necessary, whether the interference was nevertheless unjustifiable in relation to the gravity of the interference.

If the necessity element is satisfied, the seriousness of the right infringed must be weighed against the competing right of the complainant. That competing right must be sufficient to justify the interference.[677] A measure will be disproportionate if it imposes an 'individual and excessive burden' on the applicant, or impairs the very essence of the right'.[678] As interaction with others on an intimate, romantic and sexual level is a fundamental aspect of social interaction, and given that the duty to disclose would arise even if the sexual activity in question amounted to merely a kiss,[679] it would appear that the very essence of the right to gender autonomy and self-determination, is impaired.

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[676] *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621 [45]; *Steinfeld v SSHD* (n60).

[677] *Dudgeon* (n666) [61].

[678] *Sporrong and Lonroth v Sweden* (1983) 5 EHRR 35 [73]; *Rees v UK* (1987) 9 EHRR 56 [50].

[679] And note that all Gemma Barker's convictions, one of Chris Wilson's convictions and one of Jason Staines' convictions related to kissing and cuddling only. See discussion in discussion in Sharpe, *Sexual Intimacy and Gender Identity 'Fraud'* (n52) 44-51.

Even if it is held that the very essence of the right is not impaired, the duty still imposes a disproportionately heavy burden on trans individuals. The restriction of sexual integrity is a serious infringement of a right carrying obvious weight, and which may well result in distress, revulsion or even psychological harm to C. However, this harm is socially mediated in a particular way: as Sharpe has argued, the complainants in the gender identity cases were attracted to the defendants in question, and it was not so much information about the defendants that would have altered their deception making process, but rather how that information was rendered socially significant in a cis-normative world. The fact that trans men and women are widely regarded as disgusting, deviant and deceptive, not 'really' men or women at all, plays a central role in the generation of C's emotional distress. The idea of engaging in sexual activity with a transgender person is threatening to the individual in this context, because in a world view where trans men are 'really women' and homosexual sexual activity is also deviant, the sex C desired with D reflects negatively on her own (potentially now deviant) sexuality. Of course, C is caught up in the social structures which create and condition these responses as much as D; her responses are real, and she cannot be blamed for them. Nevertheless, it is important to bear this context in mind when assessing whether these harms outweigh the harms suffered by D as a consequence of imposing a duty to be forthcoming with C.[680]

Requiring disclosure or non-deception in this context negates the trans person's ability to self-identify and live an autonomous and authentically gendered life, potentially resulting in psychological and physical harm. A leading survey into the experiences of trans individuals in the UK found that trans individuals faced high rates of harassment, workplace discrimination, childhood bullying, familial or social rejection, and they were 'very likely to experience assault and

[680] I mean this as convenient shorthand for capturing both/either a duty to disclose and a duty not to deceive.

abuse at home, in the workplace and out on the streets'.[681] Navigating social and bureaucratic processes in order to transition presents difficulties and, of those who had experienced interactions with the police, 18.5% felt that their treatment by them was inappropriate. 34% of those surveyed reported at least one suicide attempt.[682] Such is the social context in which a duty to be forthcoming about one's gender history/trans identity would operate. As Sharpe notes, '[f]or many transgender people, having to disclose their chromosomal status, present and/or past genital and/or gonadal condition as well as a history of coerced gender performance is a source of pain and trauma'.[683] Some trans individuals view their assigned sex at birth as a physical anomaly or miscategorisation. The obligation to be forthcoming can be even more emotionally and psychologically damaging for such individuals when the information is 'material' to C precisely because C considers the transgender individual to be inauthentic in that he/she is 'really' female/male. Such a duty reinforces and legitimises the discrimination and harassment rooted in these stereotypes.[684]

Beyond distress or psychological injury, there are further risks associated with such a duty. Disclosure to one person may risk an individual being 'outed' to their social circle, workplace or community. This risk is more acute if their partner also occupies any of these social or professional circles. At its extreme, this might force trans individuals into celibacy. And it should be noted that if sexual integrity is considered to outweigh informational autonomy, this will prevent any trans

[681] Stephen Whittle and others, *Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination* (Communities and Local Government Publications, 2007).

[682] Although there is a lack of comprehensive research into suicide attempts in general, a comparison with a study in San Diego suggests that this figure is likely to be significantly higher than in comparison to the general population, ibid 79. See also Jay McNeil, Sonja J Ellis and Fiona J R Eccles, 'Suicide in Trans Populations: A Systematic Review of Prevalence and Correlates' (2017) 4 Psychology of Sexual Orientation and Gender Diversity 341.

[683] Sharpe, *Sexual Intimacy and Gender Identity 'Fraud'* (n52) 88.

[684] See Bettcher (n65).

person deceiving anyone about their secondary gendered characteristics or trans identity, even if they only *foresee the possibility* that the deception may be material to C's consent. A jury would be unlikely to find that D was not reckless as to C's lack of consent, and be unwilling to believe D's claim that D believed the deception about (trans)gender identity/history would be immaterial to C, such is the power of the 'cisnormative conceit that a cisgender person would not, at least knowingly, become sexually intimate with a transgender person'.[685] Alternatively, an individual may feel the need to disclose beyond C, to prevent C from subsequently denying any knowledge of D's gender history, should C peer group or family respond negatively later.[686]

Finally, there may be a risk of physical danger attendant to the duty to disclose. The transphobic murder of Gwen Araujo, killed by young men with whom she had recently engaged in sexual activity, after they discovered that she was a transgender woman, looms large here, not least because the rhetoric that the defendants, charged with murder, had reacted emotionally to being tricked and raped characterised both the media discourse surrounding the trial and was taken up by the defendants in a 'trans panic' defence.[687] Although there is no solid data showing the physical risks of coming out to a prospective partner after engaging in sexual activity, the abuse and violence faced by trans people in general suggests such a risk may be present. The Scottish Trans Alliance conducted a study into trans people's experiences of domestic abuse which pointed to some worrying conclusions.[688] 80% of respondents reported experiencing emotionally, sexually or physically abusive behaviour by their partner or ex-partner; 45% reported physical abuse. Often

[685] Sharpe, *Sexual Intimacy and Gender Identity 'Fraud'* (n52) 88.

[686] ibid.

[687] Bettcher (n65).

[688] Amy Roch and others, *Out of Sight, Out of Mind: Transgender People's Experiences of Domestic Abuse* (The LGBT Domestic Abuse Project and the Scottish Transgender Alliance, 2010).

this was caused by the victim revealing feelings of conflict in relation to their gender identity, or stating an intention to transition. A legal obligation to disclose would prevent the individual having the freedom to assess the risk themselves. Any obligation must apply to any level of sexual contact, in any relationship, however minor or short-term. This context also provides a firm basis from which to challenge the notion that trans individuals 'deceive' their victims over their gender in order to exercise power and control the victim into sexual activity. Within this context, deception or non-disclosure as to gender identity/status is a site of disempowerment, and non-disclosure more likely to be motivated by a desire for physical and psychological survival and security.[689]

There is thus a strong argument that deception or relevant non-disclosure as to (trans)gender identity, secondary gendered facts (which would indicate a transgender identity) and gender history, should be excluded from the range of consent-invalidating deceptions or non-disclosures.

Of course, if D's gender presentation is inauthentic, genuinely deployed as a manipulative ruse to obtain sexual activity from an individual who would not otherwise consent to D,[690] then this privacy analysis does not apply and criminalisation would be an appropriate response. However, a strong note of caution is warranted here. Whilst historically, the law has tended to exclude broader narratives of non-binary or fluid gender identities from the legal protections granted to transgender individuals,[691] the above arguments apply equally to those who do not identify within a binary conception of sex or gender. It is important to ensure that 'the notion of 'authenticity' remains compatible with the assertion of different gender identities at different times.

[689] Sharpe, *Sexual Intimacy and Gender Identity 'Fraud'* (n52) 96.

[690] *Devonald* (n23); *Newland* (n58).

[691] *Goodwin* (n667) and *I v UK* (n672).

For gender identity can be fluid in some people. It can change over time'.[692] The law must strike the appropriate balance between competing rights and ensure that poorly-understood non-binary and gender fluid identities are not simply assumed to be inauthentic, much in the way that more binary and static transgender identities are still assumed to be deceptive. Deception as to gender should be entirely excluded from the class of consent-invalidating deceptions unless the prosecution can demonstrate beyond all reasonable doubt that D *intentionally* engaged in an inauthentic gender performance for the purposes of obtaining sexual gratification from an individual who D suspected would not otherwise consent.

Cases involving the use of a prosthetic instead of a penis do not rest on a deception or non-disclosure analysis. Such cases are track 1 cases, i.e., where C does not give a token of ostensible consent in relation to the act D actually performs, rather than track 2 cases, where deception or relevant mistake potentially invalidates that token of ostensible consent.[693] *Newland*, *Wilson*, and *Lee,* all involved at least one conviction relating to the use of a prosthetic which C took to be a fleshy penis. It may well be the case that, in these cases, C's sense that they had been deceived as to D's gender was at least as important as the fact they had been penetrated with an object, rather than a penis. However, the fact remains that in these cases D lacked even a token of ostensible consent for the sexual act performed. In such circumstances, the right to sexual integrity is violated. Gender is not the relevant criterion here: if D was a cisgender man who was too ashamed to disclose that he was born without a penis, or lost his penis in an accident, or has a particularly small penis and so secretly uses a prosthetic to replace or extend it, his sexual act would be performed without C's consent and so amount to rape, given that D could not possibly have had any belief at all in consent, as any such belief must be concomitant with the consent itself.

[692] Sharpe, *Sexual Intimacy and Gender Identity 'Fraud'* (n52) 16.

[693] Ch 6.

7.4 HIV AND OTHER SEXUALLY TRANSMITTED DISEASES

Often, when asked to think about information that might be relevant to sexual decision-making, and a subject matter of deception/mistake that one might expect to be legally consent-invalidating, HIV status is invoked. This response is perhaps unsurprising, given the history of public health campaigns on the modes and risk of transmission and the fact that, of all sexually transmissible diseases, HIV is undoubtedly the most feared and the most stigmatised, and for a long time was the deadliest. The non-disclosure of HIV status and other sexually transmitted infections may already, in some circumstances, give rise to criminal liability in English law as a non-fatal, non-sexual offence against the person.[694] Given the serious potential consequences of unprotected sexual activity with a PLWH, it might be thought that deception (active or passive) or relevant non-disclosure relating to HIV status should undoubtedly invalidate consent. Not only does such conduct infringe C's sexual integrity but it also exposes C to the risk of harm, in the

[694] The Court of Appeal have clarified that HIV (along with other serious sexually transmissible infections) may amount to Grievous Bodily Harm, and D may be liable for committing GBH under Offences Against the Person Act 1861, s18 or 20 if he either recklessly or intentionally transmits HIV to another. D will have a valid defence to this charge if C consented to running the risk of acquiring HIV, or D had an honest belief that C so consented. However, such consent must be 'fully informed' and any belief on D's part that C had consented to the risk must be concomitant with that informed consent. This need not necessarily involve disclosure of HIV+ status by D, if C was aware of D's status through other means. However, in practical terms, disclosure would be required in most cases, in order to be sure that C consented, or for D to claim that he had an honest belief in C's (informed) consent. In order to be considered reckless for the purposes of s20 GBH, D must know s/he is HIV+, be aware that there is was a risk of sexual transmission and fail to ensure that what they believe to be adequate safeguards against transmission are in place. See *Dica* (n432); *R v Konzani* [2005] EWCA Crim 706, [2005] 2 Cr App R 14; Crown Prosecution Service, 'Intentional or Reckless Sexual Transmission of Infection' <https://www.cps.gov.uk/legal-guidance/intentional-or-reckless-sexual-transmission-infection> . Partly on this basis, I suggested in Ch 4.1.3 that the non-disclosure of HIV status and other sexually transmissible diseases might constitute passive deception (only where there is a non-negligible risk of transmission). The development of the law in this area has received support in some quarters, Damian Warburton, 'A Critical Review Of English Law In Respect Of Criminalising Blameworthy Behaviour By HIV+ Individuals' (2004) 68 JCL 55; Lisa Cherkassky, 'Being Informed: The Complexities of Knowledge, Deception and Consent when Transmitting HIV' (2010) 74 JCL 242; George R Mawhinney, 'To Be Ill or to Kill: The Criminality of Contagion' (2013) 77 JCL 202;. It has also come under sustained criticism, most notably: Matthew Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (Routledge 2007), Sharon Cowan, 'Offenses of Sex or Violence? Consent, Fraud, and HIV Transmission' (2014) 17 New Crim L Rev 135, Samantha Ryan, 'Disclosure and HIV Transmission' (2015) 79 JCL 395. For criticism of the criminalisation of HIV exposure in Canada, see Shaffer (n617); Grant, 'The Over-Criminalization of Persons with HIV' (n624).

form of a serious illness,[695] which remains a pressing public health concern.[696] It might be argued that, whilst seropositive status (along with other health information), unquestionably falls within the ambit of D's right to privacy,[697] in this context the balancing exercise applied above in the context of gender identity/history cashes out very differently.

But, as in the gender context, the assumption that sexual integrity will always outweigh privacy must be challenged. In the context of HIV, a condition that remains highly stigmatised in society today, and which can carry significant negative social consequences for infected individuals if their seropositive status is known, the potential harms of mandatory disclosure are palpable and realistic. When the risk of HIV transmission is properly understood, on the basis of the most up-to-date medical and scientific evidence, in the vast majority of cases the risk of transmission of HIV is negligible. Also to be weighed in this balance, is public health policy. Whilst the criminal law is paradigmatically focused on the defendant's wrong and any harm to the victim(s), it is irresponsible to ignore the wider effects that criminalisation of conduct might have in society by inhibiting efforts to combat HIV transmission more widely.

7.4.1 HIV, SEX AND TRANSMISSION RISK

To understand how a combination of the right to privacy and public health policy outweigh the right to sexual integrity in the context of HIV deception/non-disclosure, it is necessary to discuss the risk of HIV transmission associated with sexual activity in the UK today. HIV is transmitted in one of a few specific ways, through the bodily fluids of an infected person, namely

[695] Today in the UK, HIV is a chronic, manageable condition, rather than a life-shortening, deadly disease, Public Health England, *HIV in the UK: 2016 Report* (2016); Françoise Barré-Sinoussi and others, 'Expert Consensus Statement on the Science of HIV in the Context of Criminal Law' (2018) 21 J of the Intl AIDS Society 1.

[696] In 2015, 6,095 people were newly diagnosed with HIV, which is one of the highest diagnosis rates in Western Europe. Transmission rates among men who have sex with men (MSM) in London are particularly high. See Public Health England (n695).

[697] *Z v Finland* (1998) 25 EHRR 371, para 95; *Campbell* (n649) [53] (Lord Hoffmann), [145] (Baroness Hale).

blood, semen, pre-seminal fluid, rectal or vaginal fluids, or breast milk.[698] This fluid must come into contact with particular sites on a person's body through which transmission may occur. Contact with skin is not sufficient; there must be contact with 'mucous membranes, damaged tissue or inflamed ulcers', and 'the virus must overcome the person's innate immune defences so that infection can be established and propagated'.[699] HIV is not an easily transmittable virus.

When HIV is transmitted to another person, it replicates. The goal of anti-retroviral therapy is to reduce the amount of HIV virus present in the blood stream and thereby suppress the effects of the virus on the individual's immune system.[700] The amount of HIV present in the blood is known as a person's 'viral load', and it is measured in units of particles, or 'copies', per millilitre. Viral loads can reach to 'over a million copies/mL in people not receiving treatment'.[701] If a person takes highly active antiretroviral therapy (HAART), their viral load will be reduced to low or undetectable levels. A low level of 200 copies/ml is referred to as 'viral suppression';[702] in the UK a person's viral load is classed as 'undetectable' at 20 copies/ml.[703] Studies have shown HAART takes up to 6 months to suppress a person's viral load. 'Effective treatment' is therefore used to describe someone who has an undetectable viral load and who has been on treatment for

[698] Barré-Sinoussi and others (n695) 3.

[699] ibid 3.

[700] Mykhalovskiy, Betteridge and McLay (n620) 27.

[701] ibid.

[702] Public Health England (n695).

[703] Terrence Higgins Trust, 'Viral Load and Being Undetectable' (27 July 2018) <https://www.tht.org.uk/hiv-and-sexual-health/about-hiv/viral-load-and-being-undetectable> accessed 20 Aug 2018. Note that different studies class an undetectable viral load at different levels. See n705.

more than six months.[704] There is now a significant body of scientific evidence that shows that if a person's viral load is suppressed, they cannot transmit HIV through sexual intercourse. Following three key studies, it has been concluded that if a person's viral load is <200 copies/mL,[705] the chance of transmitting HIV to a sexual partner is negligible, i.e., statistically zero.[706] Taking the three studies together, in approximately 126,000 instances of vaginal or anal sex between serodiscordant couples,[707] where D had an undetectable viral load and a condom was not used, no transmission occurred. This research has been widely accepted and is already informing public health policy at an international level.[708]

Even without HAART, HIV remains a very fragile virus. It cannot be transmitted through kissing. The risk of transmitting HIV through oral sex is either zero or negligible. As a recent body of experts have noted, the per-act risk of transmission for oral sex is 'so low that scientists have

[704] Andrew Mujugira and others, 'HIV Transmission Risk Persists During the First 6 Months of Antiretroviral Therapy' (2016) 72 J of Acquired Immune Deficiency Syndrome 579.

[705] The PARTNER studies refers to this as an 'undetectable' viral load, but PHE refer to a <200 copies/mL viral load as 'surpressed', and 'undetectable' is often used, in the UK, to refer to a viral load of <20 copies/mL. See n695 and 703.

[706] A Rodger and others, 'Sexual Activity Without Condoms and Risk of HIV Transmission in Serodifferent Couples When the HIV-Positive Partner Is Using Suppressive Antiretroviral Therapy (PARTNER STUDY)' (2016) 316 JAMA-J Am Med Assoc 171; B Bavinton and others, 'HIV Treatment Prevents HIV transmission in Male Serodiscordant Couples in Australia, Thailand and Brazil' (9th International AIDS Society Conference on HIV Science, Paris, July 2017); A Rodger and others, 'Risk of HIV Transmission Through Condomless Sex in MSM Couples with Suppressive ART: The PARTNER2 Study Extended Results in Gay Men' (2018) 21 J of the Intl AIDS Society 163.

[707] Where one partner is HIV+ and the other is not.

[708] 'NAM Endorses Undetectable Equals Untransmittable (U=U) consensus statement' (*NAM aidsmap*, 9 February 2017) <http://www.aidsmap.com/NAM-endorses-Undetectable-equals-Untransmittable-UU-consensus-statement/page/3116508/> accessed 20 August 2018; 'Evidence of HIV Treatment and Viral Suppression in Preventing the Sexual Transmission of HIV' (*US Centers for Disease Control and Prevention*, December 2017) <https://www.cdc.gov/hiv/pdf/risk/art/cdc-hiv-art-viral-suppression.pdf> accessed 20th August 2018; Public Health England (n695); World Health Organisation, 'Viral Suppression for HIV Treatment Success and Prevention of Sexual Transmission of HIV' (13 July 2018) <http://www.who.int/hiv/mediacentre/news/viral-supression-hiv-transmission/en/> accessed 20 Aug 2018; UNAIDS, *Public Health and HIV Viral Load Suppression* (2017).

been unable to establish a statistically sound estimate'.[709] The per-act transmission likelihood estimate for vaginal-penile intercourse is 0.08%. The per-act transmission likelihood estimate for anal sex ranges between 0.01%-3% in individual studies, with two systematic reviews placing the per-act transmission risk at 1.4% where the HIV+ partner is the insertive partner, and 0.11% where the HIV+ partner is receptive.[710]

Research shows that 96% of those diagnosed with HIV in the UK are on treatment, and 94% of those on treatment are virally suppressed or undetectable.[711] This means that almost-all of those receiving treatment pose no risk of transmission; this group represents 89% of those diagnosed with HIV in the UK. One recent study found a high level of accuracy in self-reporting of viral load. Of those who self-reported an undetectable viral load, 96.4% were correct, and the majority of those who incorrectly said that they had an undetectable viral load had one less than 1000 copies/mL 'making HIV transmission very unlikely'.[712] As a group, therefore, it is those who have HIV but remain undiagnosed that pose the greatest risk of transmission. This group is estimated to comprise around 13% of PLWH in the UK. It is also important to note that the rate of late diagnosis remains high, at around 39%.[713] It is thought that those diagnosed late will likely

[709] Barré-Sinoussi and others (n695) 5.

[710] ibid 5-6.

[711] Public Health England define virological suppression as having a viral load less than 200 copies/mL. They note that 'people who are virologically suppressed are very unlikely to pass on their HIV infection through sexual contact', Public Health England (n695) 31.

[712] J Sewell and others, 'Accuracy of self-report of HIV viral load among people with HIV on antiretroviral treatment' (2016) 18 HIV Med 463.

[713] Late diagnosis is defined as those who have a particularly low CD4 count (<350 cells/mm^3) within three months of diagnosis. CD4 cells are white blood cells targeted and destroyed by the HIV virus. Public Health England, 5-6.

have had HIV for at least three years.[714] Persons with late and undiagnosed HIV are responsible for most incidents of transmission.[715]

Unprotected sexual intercourse with a HIV+ person is far less risky than is believed as, despite medical advances, ignorance and stigma around HIV transmission and life with HIV remain widespread. The HIV Public Knowledge and Attitudes Report 2014 demonstrated that, of those surveyed, 16% incorrectly thought that HIV can be passed on from kissing someone (compared with 9% in 2010); only 69% correctly stated that they thought the statement 'in the UK, if someone becomes infected with HIV they will probably die within three years' to be false; 23% of respondents 'didn't know' that the vast majority of people with HIV will enjoy a near-normal lifespan; and only 20% knew that 'the risk of someone who is taking effective HIV treatment passing on HIV through sex is extremely low'. [716]

7.4.2 HIV, PRIVACY AND SEXUAL INTEGRITY

In this medically-informed context, we can reassess the balance between the right to privacy and the right to sexual integrity. The importance of the right to privacy in relation to HIV+ status is seen as particularly weighty in ECtHR jurisprudence, given the social context and risk of hostile reaction, which in turn might have a negative impact on public health if individuals are deterred from seeking treatment.[717] Given that HIV is a serious chronic medical condition (albeit

[714] ibid.

[715] Bluma G Brenner and others, 'High Rates of Forward Transmission Events after Acute/Early HIV-1 Infection' (2007) 195 J of Infectious Diseases 951; Scott Burris and others, 'Do Criminal Laws Influence HIV Risk Behavior - An Empirical Trial' (2007) 39 Ariz St LJ 467, 478; AE Brown, ON Gill and VC Delpech, 'HIV Treatment as Prevention Among Men Who Have Sex with Men in the UK: Is Transmission Controlled by Universal Access to HIV Treatment and Care?' (2013) 14 HIV Med 563; Olivier Robineau and others, 'Combining the Estimated Date of HIV Infection with a Phylogenetic Cluster Study to Better Understand HIV Spread: Application in a Paris Neighbourhood' (2015) 10 PLoS ONE e0135367.

[716] Ipsos Mori, *HIV Public Knowledge and Attitudes, 2014: A Study for the National Aids Trust by Ipsos Mori* (2014) 14.

[717] *Z v Finland* (n697) paras 95-96.

no longer one which is properly described, in this country, as necessarily devastating and severely life-limiting, nor one which requires patients to take large numbers of daily medication[718]) it might be thought that the right to sexual integrity clearly outweighs the right to privacy given the additional risk of transmission to which C is exposed. However, since those people most likely to transmit the virus are undiagnosed, they are not in a position to disclose their HIV status in any event. The overwhelming majority of those who are aware of their HIV positive status are not contagious, and so their deception or relevant non-disclosure will not expose C to additional risk of harm in the form of HIV transmission. Vandevort has argued that the low statistical risk of transmission is 'little comfort to those who… after becoming aware of a reason to believe they may have been exposed to the HIV virus, live with anxiety about their health status for an extended period of time'.[719] However, just as we must bear in mind that when those who feel distress and revulsion when they discover that their sexual partner is transgender are responding, in part, and however blamelessly, due to transphobic and homophobic social conditioning, so too must we recognise that if C fears acquiring HIV despite having engaged in conduct that poses no risk of HIV transmission, that distress is socially conditioned through the ignorance and stigma that still surround HIV.

As in the gender identity cases, non-disclosure or even deception about HIV status generally is not a manipulative act perpetrated from a position of power.[720] Whilst cases may arise where 'non-disclosure involves the objectification of one's sexual partner or the disregard of his or her sexual integrity', in most cases 'the non-disclosure occurs in a context that is far removed

[718] Most people on HAART take one pill a day, Public Health England (n695).

[719] Vandervort (n600) 14.

[720] MacKinnon and Crompton (n639).

from what we usually think of as the power imbalance at the root of sexual assault'.[721] Reasons for non-disclosure include fear of rejection, stigma and discrimination, concern over privacy and confidentiality and fear of abuse or violence.[722] As in the gender cases, D cannot realistically prevent C from making onward disclosures.[723] In 2015, 1576 PLWH were surveyed in the HIV Stigma Index UK. Around half reported feeling shame, guilt or self-blame and one in five had experienced suicidal thoughts. One in five of those surveyed had been subject to verbal harassment or threats, one in three had experienced a friend or family member disclosing their status without consent, and one in five had felt pressure from employers or co-workers to disclose their HIV status at work. A quarter worried about being gossiped about, one in ten had avoided social gatherings and one in five were *excluded* from such gatherings. In addition, 33 percent avoided engaging in sexual activity because of their HIV status.[724]

Women and those also in other vulnerable or minority groups might find themselves in particularly difficult situations if the law compels disclosure or non-deception, not least because their choices, including the choice to disclose or tell the truth, might be constrained due to 'poverty, domestic violence, and discrimination' and so 'where partner notification has the potential to result in domestic violence against women, [t]he risk of physical harm to the female patient from her partner may be greater than the potential benefit of warning the partner.'[725]

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[721] Grant, 'The Over-Criminalization of Persons with HIV' (n624).

[722] Weait (n694) 189.

[723] Ryan (n694) 401.

[724] The People Living With HIV Stigma Survey UK 2015, *HIV in the UK: Changes and Challenges; Actions and Answers* (2015). On this last point relating to fear of disclosure leading to sexual inactivity, see also Mykhalovskiy, Betteridge and McLay (n620) 53.

[725] Lawrence O Gostin and James G Hodge, 'Piercing the Veil of Secrecy in HIV/Aids and Other Sexually Transmitted Diseases: Theories of Privacy and Disclosure in Partner Notification -- Contact Tracing, the 'Right to Know,' and the 'Duty to Warn'' (1998) 5 Duke J of Gender L and Policy 9, 69. See also MacKinnon and Crompton (n639); Grant, 'The Over-Criminalization of Persons with HIV' (n624) 481; UNAIDS, *Criminalization of HIV Transmission* (2008); Ceri Evans, 'The Impact of Criminalising Disease Transmission on the Healthcare Professional-

An example of gender and fear situating the non-disclosing HIV+ defendant in a disempowered position can be seen in *DC*.[726] In that Canadian case, D, a woman with a young son, disclosed her HIV+ status to her boyfriend, C, two months after meeting him. They had already engaged in one instance of sexual intercourse which C claimed was unprotected. The relationship continued for four years, during which time they had both protected and unprotected sex (without transmission of HIV). When D ended the relationship, C violently assaulted D and her son (and was convicted of assault).[727] Afterwards, C accused D of aggravated sexual assault and sexual assault, relating to the single instance of unprotected sex. At the relevant time D had an undetectable viral load. D did not disclose her HIV status prior to unprotected sex for fear that her son would suffer adverse social consequences.[728] The trial judge in the case noted that C was likely making the allegations in order to get his revenge on D.[729] D was convicted at trial, but the conviction was set aside on the basis that the trial judge's inference that no condom was worn during the alleged instance of unprotected sex was unreasonable and speculative.[730]

In light of the foregoing analysis, the balance between privacy and sexual integrity is more finely struck than it may first appear, at least for those with undetectable viral loads who are not contagious, or in relation to those forms of sexual activity (oral sex, kissing) which carry no or negligible risk of transmission regardless of D's viral load. For these individuals, or in relation to

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Personal Relationship' in Catherine Stanton and Hannah Quirk (eds), *Criminalising Contagion: Legal and Ethical Challenges of Disease Transmission and the Criminal Law* (CUP 2016) 87.

[726] *R v DC* [2012] 2 SCR 626.

[727] ibid [4]-[6].

[728] *R v DC* [2008] QCCQ 629 [32].

[729] *R v DC* (726) [12].

[730] ibid [30].

these actions, the right to privacy should outweigh the right to sexual integrity, given the vulnerability and stigma which may arise as a result of compelled disclosure, and as

> [o]ne cannot make these decisions for others when it would be undeniably difficult for each person to make them for ourselves… one cannot make judgments for others about exactly whom they should tell, why they should tell specific individuals, and what the necessary circumstances should be surrounding such revelations'.[731]

However, where an individual engages in unprotected penetrative sexual intercourse and does not have an undetectable viral load, there is an argument to be made that the right to sexual integrity outweighs the right to privacy, given the increased risk of transmission. It should be noted that the risk of transmission is still far lower than many would expect (0.08-1.4%, depending on whether the act in question involves penetrative vaginal or anal sex, and whether the individual is the insertive or receptive partner), but given the significance of the potential consequences and the fact that even non-disclosure of HIV status where there is a non-negligible risk of transmission constitutes passive deception,[732] the scales seem to tip marginally in favour of the sexual integrity right. However, at this stage public health policy must be considered, as it may require us to exclude some instances of morally invalid consent from the reach of the criminal law.

7.4.3 HIV, AND PUBLIC HEALTH POLICY: EXCLUDING LIABILITY EVEN WHEN CONTAGIOUS

The proposition that passive deception (i.e, deception that arises out of non-disclosure, rather than active communication, be it express or implied) about, or relevant non-disclosure of, *contagious* HIV status might be consent-invalidating poses a particular concern from a public health perspective. The risks are twofold: one relating to the way in which the law might indirectly

[731] MacKinnon and Crompton (n639) 127-28.

[732] See Ch 4.1.3.

encourage individuals without HIV to make (false) assumptions about their sexual partner's health, and the other relates to the relationship between PLWH and healthcare professionals.

The first public health policy argument against consent-invalidity for relevant non-disclosure or passive deception in relation to HIV+ status derives from the way in which a legal obligation of disclosure might risk encouraging and legitimising the assumption that, if D does not disclose HIV+ status, then D is HIV-, and the sexual activity is therefore 'safe'. This potential effect of increased criminalisation of HIV-status non-disclosure is worrying when we consider how it will affect not so much those who have sex with diagnosed PLWH but with undiagnosed PLWH. We know that most people who transmit HIV cannot disclose in the first place, being unaware of their seropositive status, and most people who are aware of their HIV+ status are not contagious and therefore pose no risk. If D is ignorant of his HIV+ status, he could not be prosecuted for rape/SA in any event, but most people who will transmit HIV will fall into this category. Of course, the notion that, if D does not disclose, D does not have HIV (because people with HIV are effectively legally required to disclose), would be based on a logical fallacy, but this is no guarantee against individuals acting upon that basis. In which case, when people (encouraged by the knowledge that PLWH are under an effective obligation to disclose their status to their sexual partners if there is a non-negligible risk of transmission) assume that D, who is not aware of his HIV+ status, has nothing to disclose, are the greatest risk of infection. We should be cautious about introducing criminal offences which risk undermining public health policy in this way.

Advocacy organisations, NGOs, academics, and those involved in public health have also expressed consistent concern that such use of the criminal law may increase isolation, exclusion and the perception of stigma amongst PLWH, and actually increase stigma and hostility towards PLWH amongst the general population. In turn, it is feared that these effects will discourage disclosure; adversely impact upon treatment adherence and the practice of safer sexual

behaviour.[733] UNAIDS have also expressed concern that the use of the criminal law 'beyond cases of intentional transmission could actually undermine effective HIV prevention efforts' by discouraging testing because ignorance of one's status will preclude legal liability, and by creating 'distrust in relationships with health-service professionals and researchers and [therefore] imped[ing] the provision of quality care and research, as people may fear information regarding their HIV status will be used against them in a criminal case'.[734] Further research undertaken in Canada shows that those working to provide support and counselling to PLWH feel and/or are ill-equipped to advise clients on their criminal law obligations and struggle to incorporate this advice into their clinical relationships.[735] If criminalisation had *positive* benefits from a public health perspective, then any policy-based argument against the imposition of criminal liability would be inapt. However, as UNAIDS have noted:

> [There are] no data demonstrating that the threat of criminal sanctions significantly changes or deters the complex sexual… behaviours which may result in HIV transmission. Available data show no difference in behaviour between places where laws criminalizing HIV transmission exist and where they do not.[736]

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[733] C Galletly and others, 'New Jersey's HIV Exposure Law and the HIV-Related Attitudes, Beliefs, and Sexual and Seropositive Status Disclosure Behaviors of Persons Living With HIV' (2012) 102 American J of Public Health 2135, 2135. See also Weait (n694); UNAIDS, *Criminalization of HIV Transmission* (n733); Mykhalovskiy, Betteridge and McLay (620); Grant, 'Time to Rethink Cuerrier ' (620); Grant, 'The Over-Criminalization of Persons with HIV' (n624); J Stan Lehman and others, 'Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States' (2014) 18 J AIDS and Behaviour 997; Catherine Dodds and others, 'Keeping Confidence: HIV and the Criminal Law from HIV Service Providers' Perspectives' (2015) 25 Critical Public Health 410; C Galletly and others, 'Criminal HIV Exposure Laws: Moving Forward' (2014) 18 J AIDS and Behaviour 1011, 1011; National AIDS Trust, *Tackling HIV Stigma: What Works? Using the Global Evidence Base to Reduce the Impact of HIV Stigma* (Tackling HIV Stigma, 2016) 20.

[734] UNAIDS, *Criminalization of HIV Transmission* (n733) 4-5; Galletly and others (n733); Mykhalovskiy, Betteridge and McLay (620) 50, where, in a focus group including front line counsellors, doctors, and healthcare providers, participants noted that the criminalisation of HIV non-disclosure in Canada was a barrier to clients being forthcoming and therefore receiving the counselling they may need around disclosure issues; Dodds and others, (n733) 419; Evans (n725).

[735] Grant, 'Time to Rethink Cuerrier ' (620); Eric Mykhalovskiy, 'The Problem of "Significant Risk": Exploring the Public Health Impact of Criminalizing HIV Non-disclosure' (2011) 73 Social Science & Medicine 668, 671, 674; Mykhalovskiy, Betteridge and McLay (620) 5.

[736] UNAIDS, *Criminalization of HIV Transmission* (n733) 4.

Just over a decade of mostly US focused research on the relationship between criminal law, serostatus disclosure and the reduction of sexually risky behaviour has failed to show any consistent association between criminalisation and these positive public health outcomes.[737] One paper, assessing the research across the US field in relation to the impact of criminal law on disclosure rates, noted that 'researchers… have found virtually no evidence to support claims that the laws increase seropositive status disclosure among persons who otherwise would not disclose'.[738] Although the social, political and medical context in the US is very different to the UK, not least in terms of access to health care, the outcomes of this body of research, taken as a whole, should caution against the unevidenced assumption that increased use of the criminal law in England and Wales will have public health benefits.

These arguments support the position that D should not be required to *disclose* HIV+ status, even if contagious. But what if C asks D? I would suggest that, if asked, any deception on D's part *should* invalidate an ostensible token of consent given to any sexual intercourse that carried a non-negligible risk of transmission (i.e., penetrative unprotected sex). C's sexual integrity, autonomy and privacy rights outweigh D's, given the increased risk involved, and the public health policy arguments do not weigh as strongly in favour of excluding D's active deception from liability, as they do D's passive deception or non-disclosure. Drawing the line of legal consent-(in)validity here seems to strike a sensible balance between difficult competing values.

[737] Burris and others (n715); Keith J Horvath, Richard Weinmeyer and B R Simon Rosser, 'Should it be illegal for HIV-positive persons to have unprotected sex without disclosure? An examination of attitudes among US men who have sex with men and the impact of state law' (2010) 22 AIDS Care 1221; Galletly and others; C Galletly, SD Pinkerton and Wayne DiFranceisco, ' A Quantitative Study of Michigan's Criminal HIV Exposure Law' (2012) 24 AIDS Care 174; Keith J Horvath, Craig Meyer and B R Simon Rosser, 'Men who have Sex with Men who Believe that their State has a HIV Criminal Law Report Higher Condomless Anal Sex than those who are Unsure of the Law in their State' (2017) 21 J AIDS and Behaviour 51, 52, citing Galletly and others (n733).

[738] Galletly and others, (n733) 1011.

We might argue that D should be required to disclose HIV+ status, if contagious, without requiring C to ask about D's status. Such questions may be embarrassing or difficult for C to ask. Yet however embarrassing it may be to to talk about sex, sexual health should be regarded as a shared responsibility and individuals should be encouraged to talk about sexual health practices before engaging in potentially risky activity. If the law encourages conversation in this regard, so much the better. Whilst the threat of liability for actively deceiving others about HIV status may have some negative effect on the relationships between medical practitioners and PLWH, the vast majority of PLWH are not contagious, and so for those individuals, even deceptively-induced consent would not be legally invalid. Only a relatively-small number of those diagnosed would be subject to potential liability. This is justified, in part, because it would also undermine public health efforts for the criminal law to send the message that there is little point in being responsible by asking your sexual partner if the activity in which you plan to engage poses a risk of HIV transmission, because D is legally free to lie, even if this results in exposure to a non-negligible risk.

This discussion shows that whilst moral responsibility for disclosure of HIV status may well fall squarely at the feet of PLWH, and when viewed from the perspective of C and D alone, the criminal law may seem to be an appropriate way to hold blameworthy actors to account, public health policy cautions us to consider the potential ramifications of focusing only on two particular individuals when constructing the scope of the criminal law, rather than the wider implications on our efforts to control the spread of HIV/AIDS, which is a shared responsibility in any sexual encounter.[739] For these reasons, responsible criminal legislation must accept that there may be a gap between 'morally valid' consent and 'legally valid' consent, in cases of *passive* deception and relevant non-disclosure of HIV+ status when there is a non-negligible risk of disease transmission.

[739] Matthew Weait, 'Taking the Blame: Criminal Law, Social Responsibility and the Sexual Transmission of HIV' (2001) 23 J of Social Welfare & Family L 441, 450.

In the context of other STDs, where there is a more than negligible chance of passing on the relevant condition/disease, the privacy right may well be less weighty in the balance, given the particular stigmas associated with HIV.[740] However, as Evans has noted in the context of the Herpes Simplex Virus (type 1 and type 2), stigma and misinformation are widespread: the virus is neither life-threatening nor serious and is often asymptomatic.[741] Whilst this might cast doubt on the appropriateness of the classification of herpes as GBH under *Golding,*[742] the fact that HSV is a *less serious* and more common than many believe is insufficient to tip the balance of the privacy analysis.

However, the public health arguments are powerfully against criminalisation here, too. As Evans has explained, HSV is highly common, often asymptomatic, transmissible even when asymptomatic, widely undiagnosed, and not always prevented through condom use.[743] Health professionals typically only see HSV patients once (unlike HIV patients who will be in more regular contact with health professionals), and so there are institutional and emotional barriers to giving adequate sexual health counselling, particularly in relation to potential legal obligations.[744] Given these features of the Herpes virus, it is all the more important that the law sends a clear message that silence should not be taken as an indication that there is no risk of transmission. The law should encourage responsibility by encouraging explicit discussion of risk between the parties. Accordingly, it would be unwise to criminalise passive deception and relevant mistake. However,

[740] Weait, *Intimacy and Responsibility* (n694).

[741] Herpes Virus Association Press Release, *Having Genital Herpes is not a Crime - Why Northampton Crown Court is Wrong* (2011), cited in Evans (n725) 93.

[742] *Golding* (n628).

[743] Evans (n725) 94-95.

[744] ibid 96.

unlike HIV, it is not possible for D to ensure that there is no risk of transmission, or a negligible risk of transmission. Under those circumstances, if D deceives C into thinking that he does not have the herpes virus, the public health policy arguments may point in favour of criminalisation in all cases.

The key point to note in the comparison between Herpes and HIV is that the analysis, though structured in the same way (concerned first with privacy and then with policy arguments), results in different conclusions. STDs cannot be simply bundled together and considered en masse: the privacy and policy calculus will differ, depending on the specific disease/condition and the social context in which transmission of that disease takes place. It should also be noted that my argument in relation to herpes is somewhat preliminary. Significant literature exists on the public health implications of the criminalisation of HIV non-disclosure/deception. Some of the insights from that literature can be transferred into the analysis of other STDs, but not all. Given the prevailing winds of the current English law on deceptive sex,[745] and the decision of the Court of Appeal that HSV amounts to GBH,[746] it is likely that future cases under the SOA 2003 will involve claims of consent-invalidity on the grounds of deception as to STDs. Research on public health implications beyond the HIV context is therefore vital both in the short term, as well as in the long term, with a view to informing potential wide-ranging reform projects.

[745] *McNally* (n5) [24].

[746] *Golding* (n628).

7.5 DRAWING CONCLUSIONS IN OTHER CONTEXTS: PRIVACY AND POLICY

It is not possible to consider in this thesis how the competing rights and interests should be weighed across a wide range of scenarios, but two vitally important conclusions can be drawn from the analysis of the gender identity and HIV/herpes cases. Firstly, it is entirely appropriate, and indeed necessary, to recognise that the right to sexual integrity is not an automatic trump: sometimes other rights and interests, including the rights to privacy, physical security and safety, positive autonomy (both in terms of one's capacity to develop one's personality, including gender, and positive sexual autonomy),[747] may outweigh C's right to sexual integrity in the information gap cases. Secondly, the kind of detailed, nuanced analysis undertaken in sections 7.2 and 7.3 sets a standard for the high level of engagement that is necessary if the balancing exercise is to be undertaken properly. Such analysis must be grounded in (where relevant) a rich understanding of the right to privacy, as articulated in section one, and as explained in more detail through the lens of art 8 ECHR in section two. The same level of intense analysis is required when considering whether policy concerns might militate the recognition of a gap between morally valid consent and legally valid consent.

It might be argued that public policy is only a legitimate counterweight to sexual integrity when it forms part of the balancing process between privacy (or another individual right) and sexual integrity, helping to tip the scales, so to speak (as is the case in the STD paradigm). Yet this cannot be correct. Consider the following example:

[747] Fear of disclosing HIV status leads some to forego sex altogether (n724). That is likely in the gender identity cases, too. Given that consent operates across a wide range of sexual activity, the expansionist approach will stifle all forms of sexual activity such as kissing, or sexual touching.

> Mariana is 14 years old. One Saturday afternoon, she is in town with a group of her friends, listening to music in the park. They start talking to a group of boys who come over to listen to their music. She strikes up a conversation with Karl, who is 17. After a while, Karl asks Mariana how old she is. She tells Karl that she is 16. Karl has no reason to disbelieve her. They start 'seeing each other' and a few weeks later they have sex. Karl would not have consented to having sex with Mariana, had he known her age. Mariana knows that Karl would not have sex with her if she knew her real age.

Here, Mariana's deception interferes with Karl's decision-making and there is no basis upon which to argue that Mariana's deception was akin to a trivial embellishment or exaggeration, or that she had some legitimate reason to conceal her age. Karl's sexual integrity has been violated. In a situation like this, one would typically think that Karl is the party most likely to face criminal investigation and potential conviction.[748] Yet under expansionist approaches, Mariana would (also) face criminalisation. This is the type of case that warrants serious consideration from a policy perspective. It might be sensibly argued that the harms of deploying the criminal law in this situation outweigh the benefits, or that other forms of social or even legal intervention outside of the criminal law might be more suitable. Here, the public policy concerns are based, in part, on the oppressive social forces that encourage a young girl to lie about her age in order to engage in sexual activity with an older boy, and also relate to an appropriate reluctance to visit the stigmatising effect of the criminal law upon a child in this context. In *G* the House of Lords dismissed an appeal against a 15 year old boy's conviction for Rape of a child under 13, contrary to SOA 2003, s5. In many ways, the argument rejected by the House (that it was inappropriate to

[748] Given the stipulated facts, Karl's belief that Mariana is 16 is a reasonable one. Even if his belief was *unreasonable*, he would only be liable for an offence in English law if he were over the age of 18. A person can only be liable for the offence of sexual activity with a child, contrary to SOA 2003, s9 if that person is over the age of 18, and if he does not reasonably believe that B is aged 16 or older. If B was under 13, the offence is one of strict liability, and overlaps with liability for rape of a child under 13, contrary to SOA 2003, s5. That offence can be committed by a person of any age, even if that person is themselves a child. See *R v G* [2008] UKHL 37, [2009] 1 AC 92.

impose liability for the more seriously stigmatic s5 offence than the less serious offence with which D could have been charged,[749] and a disproportionate infringement of D's rights under articles 6 and 8 of the ECHR) might be seen to conflict with the suggestion that criminal liability for Marina would be inappropriate in terms of policy. However, what is so striking about the analysis in *G* is that, in dismissing the concerns that criminal liability for a young person who has engaged in sexual activity with a child under the age of 13, who may have lied about her age and pretended that she was 15,[750] the House of Lords cast C as a victim and D as a perpetrator, despite D's claim that C had deceived him as to her age. The House regarded any deception by C as to her age as irrelevant to D's liability because s5 was designed to protect children from anyone, including other young people and including from themselves,[751] and Baroness Hale forcefully stated that 'there is nothing unjust or irrational about a law which says that if [D] chooses to put his penis inside a child who turns out to be 13 he has committed an offence… D takes the risk that the child is younger than he thinks'.[752] Baroness Hale acknowledges that in cases involving young children, appropriate prosecutorial discretion might properly be exercised and recourse to criminal law avoided, but the approach taken by the House in *G* recognises D as a perpetrator and C as a victim and leaves little room for recognition that if C did deceive D as to her age, C will have engaged in sexual wrongdoing, too. It seems inconsistent as a matter of legal policy that Parliament would have deliberately decided that deception as to age was irrelevant to D's liability because D 'takes the risk' that C is under the age of 13, but that, at the same time, C might be exposed to criminal

[749] Sexual activity with a child, contrary to SOA 2003, s9 in conjunction with s13, which applies when D commits one of the specified child sex offences in ss9-12, and D is under the age of 18.

[750] The facts of *R v G* are ambiguous. C initially alleged that she had not 'consented' to the sex, but D's plea was accepted on the basis that C told D that she was 15, and C refused to testify at a *Newton* hearing to agree the factual basis of sentence. See *R v G* (n748) at [50]-[52].

[751] ibid [14], [21], [36] (Lord Hope).

[752] ibid [46].

liability for deceiving D into committing what is, in fact, a sexual offence. People may be victims and perpetrators, vulnerable and wrongdoers at the same time. But if the motivation for disregarding any deception about age on C's part when assessing D's liability is to protect vulnerable children from others, and from themselves, when navigating complex issues around sex and consent, that policy would seem to be undermined if those same decisions from which C is protected under s5 might expose her to liability under SOA 2003 ss1-4.

To engage meaningfully with the possibility that the criminal law should not get involved here is to concede that policy implications may justify regarding deception or relevant non-disclosure as legally irrelevant, even when there is no privacy interest justifying D's deception/relevant non-disclosure and so consent is invalid in moral terms. We can compare this scenario to situations where undercover police officers adopt entire fake identities to infiltrate activist groups and engage in sexual relationships with those upon whom they were spying.[753] No privacy interest by D would be infringed (never mind violated) if such deception is considered legally relevant to consent-validity. The relevant question is whether such deception can be justified in public policy terms. Given the fact that such police conduct is clearly 'damaging to the integrity of the criminal justice system' and would sacrifice the sexual integrity of the victims in order to pursue unethical policing strategies, leaving individuals feeling 'raped by the state',[754] this argument is unsustainable.

Just as detailed, structured, and evidence-based analysis is a necessary component of any robust and principled balancing exercise between competing rights, so too is a high level of

[753] For discussion of examples of this activity in the UK, see Ben Fitzpatrick, '#Spycops: Undercover Policing, Intimate Relationships and the Manufacture of Consent by the State' in Chris Ashford, Alan Reed and Nicola Wake (eds), *Legal Perspectives on State Power: Consent and Control* (Cambridge Scholars Publishing 2016).

[754] See Carole McCartney and Natalie Wortley, 'Raped by the State' (2014) 78 JCL 1, 'Undercover Policing Inquiry' <https://www.ucpi.org.uk/> accessed 1 Oct 2018.

specificity and care necessary when considering when morally invalid consent (due to deception or relevant non-disclosure) should be recognised as legally valid consent.

For these reasons, my observations and recommendations in the remainder of this section are necessarily preliminary, and a starting point for future research work. Nevertheless, in this section, I will make some tentative arguments about how policy and privacy concerns might be dealt with in any future reform project.

POLICY CONCERNS

There is a range of ways in which public and legal policy might create a gap between morally and legally valid consent. One key area in which public policy, equality and legal consistency might be relevant relates to the impact of the law on members of marginalised communities or on those who are otherwise the subject of discrimination and exclusion. The criminal law sends powerful messages to society. We typically recognise this power in the context of fair-labelling debates. However, offence labels are not the only way the criminal law communicates to the community. If the criminal law were to recognise the legal relevance of deception or non-disclosure in relation to race, ethnicity, religion, sexual orientation, previous sexual history, disability, mental health conditions, etc, despite the fact that the subjective relevance of such information to C is rooted in prejudice and discrimination, the criminal law risks legitimising the underlying harmful attitudes upon which the subjective materiality of the information is based, introducing tension between the message sent by the criminal law and the strong anti-discrimination policy enshrined both within the Equality Act 2010 and the offences in the Crime and Disorder Act 1998, ss28-32. This would compound the disadvantage faced by already marginalised individuals, particularly vis a vis those groups who are not socially or politically disadvantaged or stigmatised and who are therefore less likely to find themselves forced to choose between sacrificing their privacy or engaging in clearly lawful sexual activity. In this

sense, Art 14 of the ECHR, which provides the right to freedom from discrimination would also be implicated by obligations of disclosure and non-deception, in conjunction with D's right to privacy. The potential discriminatory aspect of rape/SA liability in this context is heightened when it is recalled that the more marginalised D is, the more D is likely to be prosecuted, and the less likely they will be able to claim that they did not believe that their deception was or may have been relevant to C's decision. Even under an advertent mens rea standard deception, juries are likely to be influenced by an assumption that marginalised people should expect that others wouldn't wish to consent to sex with them, due to the feature that renders them marginalised in the first place.[755] Accordingly, consistency of legal policy geared towards equality and non-discrimination warrants the recognition of a gap between morally and legally valid consent here.

Another way in which policy is also said to be relevant arises in connection with the argument that the expansionist approach risks capturing those 'trivial' deceptions designed to cast a person in their best light during a dating ritual or flirtation.[756] Such activities necessarily involve individuals presenting themselves in their best light. This is something that we all do: we exaggerate our best qualities and minimise or conceal our flaws. We choose our words and our stories carefully, we wear our most flattering clothes. This is not an argument from principle, in that if the deception induces C's consent and D lacks an honest belief in consent,[757] any token of ostensible consent is morally invalid and D would be culpable for that wrong. This is a policy argument underpinned by two related concerns.

[755] See Ch 5.

[756] Wertheimer (n81) 198; Gross (n603) 224.

[757] See Ch 4.3.2 on the requisite mens rea in this context.

Firstly, in this context, distinctions between deception and self-deception, between belief, disbelief, and the wilful suspension of belief, are often blurry. As Schulhofer notes:

> what a date or sexual partner says about his feelings of attraction, future plans, or commitment to the relationship may be disbelieved, half believed, or believed but not relied upon…. [P]arties may believe and not believe all at the same time…. We often want to hear such statements, even though we have conflicting thoughts about whether the speaker expects to be believed and whether we do or do not believe him. This dynamic may be especially common in sexual interaction[758]

Secondly, these practices are widespread. Accordingly, we might have legitimate concerns about 'subjecting too many men (and women) to criminal liability… Punishing persons whose behaviour conforms to widely shared social norms raises all of the problems of overcriminalisation to which legal philosophers must remain sensitive'.[759] This is particularly the case in a context where sexual education is already inadequate and education budgets are increasingly tight.[760] On the other hand, if such a deception *does genuinely* have the necessary but-for causal relationship to a person's decision to consent, is it really acceptable to expect the deceived party to run the risk of deception? Provided D has the requisite advertent mens rea (recklessness for deception; knowledge for relevant non-disclosure),[761] why wouldn't liability be appropriate? There is a powerful argument to be made that it is not only unrealistic but, crucially, undesirable to require total honesty in interpersonal interactions. It should be possible to deceive others in relation to matters which are widely acknowledged to be trivial or the subject matter of expected exaggerations and misdirection. Given many people would expect and brush off trivial deceptions

[758] Schulhofer, *Unwanted Sex* (n116) 158.

[759] Husak, 'The Complete Guide to Consent to Sex' (n568) 279.

[760] Terrence Higgins Trust, *Shh… No Talking: LGBT-inclusive Sex and Relationships Education in the UK* (2016); Alison MacKenzie, Nicki Hedge and Penny Enslin, 'Sex Education: Challenges and Choices' (2017) [Routledge] 65 British J of Educational Studies 27; Geoff Barton, "The funding crisis is putting education standards at risk" *TES* (19 April 2018) <https://www.tes.com/news/funding-crisis-putting-education-standards-risk> accessed 4 September 2018; Jon Andrews and Tom Lawrence, *School Funding Pressures in England* (Education Policy Institute, 2018).

[761] Chs 4.2, 4.3, 5.5.

intended to cast another person in their most flattering light to give room for the initial relationship (sexual or otherwise) to develop before unflattering or embarrassing characteristics are revealed, a recklessness-based mens rea carries heightened risk, in a similar way to the risks involved with using a recklessness-based mens rea in the relevant non-disclosure context. D does not know for sure, *ex ante*, whether his commonplace deceptions as to appearance and general character traits will be relevant to C or not, and given that many regard such activities to be 'part and parcel' of dating practices and may well be tacitly waiving their right to know such information,[762] or choosing to gamble and run the risk of deception in relation to such information,[763] an obligation not to deceive may well be too onerous when viewed systematically. But Schulhofer's suggestion that minor deceptions should never invalidate consent and should be rejected by analogy to legal rules that exclude civil liability for misrepresentation for 'puffing' and 'sales talk', because such deceptions lack objective materiality and cannot be justifiably relied upon,[764] would involve a greater infringement of the right to privacy than is reasonably necessary to meet these concerns. I suggest that the use of *conditional* consent can be deployed to balance the competing interests between C, D, and society as a whole. This leaves intact a widely used and often benign social practice, whilst also facilitating the protection of sexual integrity in appropriate cases. If C explicitly communicates to D that her consent is conditional on this type of factual information and D deceptively avers that the factual condition obtains, then C's consent in legal terms is invalid.

[762] Ch 5.

[763] Hallie Liberto, 'Intention and Sexual Consent' (2017) 20 Philosophical Explorations 127.

[764] Schulhofer, *Unwanted Sex* (n116) 154-55. Emphasis in original. Note that the 'dishonesty' requirement in fraud (see Ch 3.1.3) most likely excludes 'sales talk' deceptions from criminal liability under the FA 2006 but, given the uncertainty and instability of the approach to dishonesty in the criminal law (Edward Griew, 'Dishonesty: The Objections to Feely and Ghosh' [1985] Crim LR 341) it would be unwise to simply import a 'dishonesty' requirement into the sexual offences context, where individuals are even less likely to agree on what constitutes an objective standard of dishonesty.

Without this deceptive affirmation of an explicit condition, ostensible consent may be *morally invalid* (due to deception or relevant non-disclosure) but nevertheless *legally valid*.[765]

Yet there are also widespread deception and relevant-non-disclosures inducing consent which cannot be described simply as self-flattery or as analogous to 'sales talk'. For example, deception in relation to relationship status and infidelity is widespread, but can hardly be said to involve subject-matter widely regarded as trivial. There is little to no privacy interest here, capable of outweighing the right to sexual integrity. Nevertheless, the policy implications of criminalising sexual activity on the basis that one partner deceived the other about their infidelity, or their intention to leave the relationship, or the fact that they were no longer in love with their partner, would make a wide-reaching change in the way in which the criminal law effectively regulates intimate relationships and their breakdown. Careful consideration must be given to whether public policy can justify such conduct resulting in legally valid (if morally invalid) consent, whether it ought to result in liability for rape/SA, or whether the middle-ground solution which requires the deceptive affirmation of a conditional consent might provide a workable and preferable compromise in this context, too.

CONCLUSION

In this chapter, I have argued that the right to sexual integrity is not absolute. It must be balanced against competing, and complementary, rights and interests, including the right to privacy. It must be understood both that the right to privacy is a rich and demanding right that holds potent social value, facilitating the creation and development of personal autonomy, identity and relationships, and that privacy and sexual integrity are not inherently in opposition. Indeed,

[765] It is worth leaving open the possibility that there might be scope for non-criminal legal responses to such conduct, including the tort of battery. This might provide a rich avenue for future scholarship.

the right to sexual integrity falls within the ambit of the right to privacy, though of course this thesis has demonstrated how these two aspects of the right to privacy conflict acutely in specific cases.

In sections 7.2 and 7.3, I have developed two case studies, from which a range of conclusions can be drawn: firstly, these case studies provide tangible examples where the right to privacy, properly understood, will outweigh the right to sexual integrity. Secondly, these case studies demonstrate the careful analysis that is required in order to reach a conclusion on the principled question of rights-balancing that is relevant to consent-validity. The analysis above shows that deception and non-disclosure in relation to gender should not invalidate consent, unless D's gender presentation is inauthentic, and designed to manipulate and control C into consenting. In the HIV context, non-disclosure and deception as to HIV status should not invalidate consent to sexual activity that carries a non-negligible risk of transmission, due to the weight and significance of D's privacy interest. However, where the sexual act in question poses a non-negligible risk of transmission, public health policy militates against recognising legal-consent invalidity in cases of passive deception and uninduced mistake, though not necessarily active deception.

In section 7.4, I argued that if the balancing of competing rights and interests favours the sexual integrity interest, it does not necessarily follow that the criminal law is the appropriate tool to respond to D's wrongful and harmful conduct. The limitations of the criminal law must be confronted if expansion of the law in this area is to be normatively acceptable and publicly accepted.

I have not offered in this chapter an overarching explanation of when, in all cases, privacy and other related rights will outweigh the sexual integrity right in favour of disclosure/non-deception. Nor have I explained which deceptions and non-disclosures which might invalidate moral consent will not be legally consent-invalidating. Nor have I made any recommendations as

to how legislation should be drafted in order to capture the positions I do propose in this chapter. If this chapter demonstrates anything, it is that the necessary analysis to reach a comprehensive position on these questions is too detailed and subtle to complete in one part of this thesis. This chapter therefore marks the end of this one project, which has provided the conceptual framework which identifies these questions as the relevant and necessary questions to ask if a coherent, principled approach is to be developed in the face of the long-standing 'line-drawing' problem. This chapter also marks the beginning of another, much wider ranging project, where these questions may be answered, and those answers built on a firmer, more robust theoretical understanding of mistake, deception and consent than previous contributions to the literature in this area.

CHAPTER EIGHT: CONCLUSION

The aim of this thesis was to develop a robust conceptual framework which would allow courts and legislatures to distinguish between deception and uninduced mistake in the sexual offences context, and to distinguish between those deceptions and mistakes that invalidate consent to sexual activity in criminal law and those which do not. This thesis has made three vital contributions to the literature in this area:

1. I have set out a coherent distinction between deception and uninduced mistake, based on the identification of a causal link between D's conduct and C's false belief. This distinction should form the analytical basis of future reform of the law in this area, but it may also be used by the courts to guide the application of the mistake/deception distinction which, post-*McNally,* takes central stage in the interpretation of SOA 2003, s74.[766]

2. I have recast the right to sexual integrity as comprising three component rights: the right to give or withhold a token of ostensible consent, the right to be free from interference in the decision to give or withhold that token, and the right to know information relevant to that decision. From this 'differentiated' account of the right to sexual integrity emerges a normative basis for differentiating between deception and mistake at the consent stage of the rape/SA analysis.

[766] Ch 1.2.

3. I have provided a much-needed conceptual framework for distinguishing between those deceptions and relevant mistakes which violate the right to sexual activity, and those which do not. This requires competing rights to be balanced against one another, in a careful, nuanced analysis. I have also laid the foundations for future research exploring when policy concerns may require us to accept a 'gap' between morally and legally valid consent.

In making these contributions, the argument has progressed as follows:

In Chapter 1, I set out recent case law on deceptive and mistaken sex under the SOA 2003, and explained why the conceptual foundations of this area of the law are in need of urgent, thorough and rigorous evaluation. I noted that, whilst it is important to recognise that deception may be employed to facilitate coercion and manipulation, such consent-defeating practices must be kept analytically separate from the deception/mistake paradigm with which this thesis is concerned. The analysis in Chapter 1 demonstrated that the current legislative framework is not fit for purpose and with the injustice of the current regime apparent in the treatment of transgender defendants in particular, this area needs urgent, and sustained academic treatment.

In Part I, which comprises Chapter 2, I laid the doctrinal foundations for my analysis of deceptive and mistaken sex. This chapter evaluated the harm and wrong at the core of rape and sexual assault. This is a crucial step in determining whether or not rape/SA extends to sexual activity that is consented to on the basis of a mistake or deception, as some scholars reject the imposition of criminal liability in this context by defining the harm and/or wrong of rape/SA in such a way as to automatically exclude liability for deceptive and mistaken sex. I rejected an *experiential* account of the harm of rape/SA and argued that a violation of the right to sexual integrity itself is capable of amounting to a 'dignitary' harm. Whilst many identify the right to sexual autonomy as the wrong of rape/SA, the right to sexual integrity better reflects the embodied nature

of the offences; they are not simply crimes against the victim's will, but also the victim's embodied sexual self.

I also considered critiques of the concept of consent, and argued that, once understood, two significant features of the criminal law of rape/SA neutralise many of the concerns expressed across the literature. Firstly, we must remember that consent plays a functional role within rape/SA, acting as a vehicle through which the right to sexual integrity can be protected and enforced. We learn nothing about the scope and ambit of rape/SA by asking questions about the conceptual requirements of consent, but rather the requirements of consent are determined by seeking to understand when C's right to sexual integrity is violated, and when it is not. Secondly, it is both appropriate and important to maintain a distinction between unlawful and unethical sexual activity. When we assume that all lawful sex is 'good' sex, and all morally 'bad' sex is rape, we lose the ability to make more subtle distinctions between levels of immoral and harmful conduct and overextend the institutional reach of the of the criminal law. The analysis in this Part sets the scene for consideration of the legality of deceptive and mistaken sex in particular.

In Part II, I moved away from sexual offences to consider the definition of deception, and how best to capture this concept, and the distinction between deception and mistake, within a legal framework. The flaws in the courts' understanding of this distinction lies at the root of much uncertainty and instability within the current law on deceptive and mistaken sex. The success of any future legal developments is dependent upon the adoption of a coherent approach to distinguishing between deception and mistake at the conceptual level.

In Chapter 3, I drew on philosophical definitions and legal 'translations' of deception (primarily the tort of deceit and the criminal deception offences under the Theft Acts 1968 and 1978) to assess how deception should be understood within the sexual offences context. Chapter 3 challenged the legal orthodoxy by rejecting a representation-based framework for constructing a legal definition of deception, in favour of a causal approach. The representation-based

framework, despite being widely accepted in the civil law, lacks a coherent, consistent or principled rationalisation of a crucial sub-type of representation – the implied representation. The orthodox approach to implied representations does not map adequately onto the non-legal meaning deception, leaving people exposed to deliberate exploitation. A causation-based structure to understanding deception can and should be adopted. This involves asking whether D caused C to believe a false proposition of fact, and whether D had the requisite internal 'mens rea' requirements for deception.

In Chapter 4, I expanded upon this 'causal approach' to deception. I set out a tripartite taxonomy of active and passive deception and uninduced mistake (or 'pure non-disclosure'). When D's active conduct (by words or actions) causes false beliefs in C, that conduct may (subject to other relevant criteria) constitute active deception.

Non-disclosures also may be deceptive, provided C has a 'prescriptive expectation of disclosure'. In other words, whether C expected D to disclose X-, understood X to be true as a result of D's non-disclosure, and C's expectation was objectively legitimate, such that D's failure to disclose constituted a deviation from a prescriptive norm. It is vital to the rule of law that Parliament identify and delimit the circumstances in which such an obligation of disclosure is in place, in the form of a closed statutory list, for passive deception to be recognised as such as a matter of law.

Such a duty might appropriately be imposed where D intentionally causes C to believe X, erroneously thinking that X is true but then, prior to the sexual activity, D learns that X is false (a 'post-realisation' case) and the other is where D intentionally causes C to believe X, correctly thinking that X is true but then, prior to C consenting, X becomes false (a 'post-falsification' case). If D is not responsible for the falsification of the proposition, a duty should only be imposed where D has continuing responsibility for the accuracy of the initial communication.

Aside from the 'internal' causal requirement that D cause C's false belief, D must have intended to cause C to hold a belief in C, and knew X to be false, or did not believe X to be true. In order to impose criminal liability on D for any sexual consent obtained through the deception, it is necessary, but not sufficient, for the prosecution to prove that, that but-for the deception, C would not have consented (i.e., the deception was material to C personally); C's belief in X was still operating at the time of the decision to consent; and that D knew or was reckless as to whether the deception would be material to C's consent.

In an information gap case, one should first identify the false belief(s) that caused C to consent. Once that false belief has been identified, the court should then consider whether this mistake was uninduced by D, or resulted from D's deception, active or passive. If D did cause that false belief, deception will be contingent upon D having the relevant mental state, or *mens rea*. If the Court of Appeal adopt this approach under the current legislative framework, the slippage between deception and uninduced mistake that resulted in the deeply worrying decision in *McNally* can be resisted and corrected in future gender identity cases.

In Part III, I took the tripartite structure of deception and uninduced mistake and applied it to the consent-validity question. Chapter 5 begins by setting out the two possible theoretical approaches to consent-validity in the context of deception/mistake. I critiqued the work of Jonathan Herring and Tom Dougherty as representative of the 'unified approach', which identifies any material or 'deal-breaking' mistake as undermining or invalidating consent, and the circumstance under which that mistake arose – whether it was a result of deception or was an *uninduced* mistake – as relevant only to D's mens rea/culpability. I articulated a conceptually coherent basis for a differentiated account, grounded in a detailed, differentiated understanding of the right to sexual integrity and the obligations imposed under that right.

The right to sexual integrity comprises three component rights: the right to give or withhold a token of ostensible consent, the right to be free from illegitimate interference with the

decision to do so, and the right to know information relevant to that decision. An account of rape/SA based on the violation of sexual integrity requires such a differentiated approach to deception and uninduced mistake because these two concepts interfere with different component rights within this group.

Deception prima facie infringes the right to sexual integrity as an interference with the decision-making right. However, the positive obligation to disclose information relevant to C's decision to token consent must be construed carefully, and modestly, in order to balance C's interest in sexual integrity against the need a) to ensure that individuals know when they are giving and receiving valid consent, b) to maintain a distinction between regret and non-consent, and c) to prevent the unnecessary frustration of positive sexual autonomy (both D's and C's) and other important rights and goods, including C's power to waive her right to relevant information. Accordingly, the obligation to disclose information only arises where D knows that C is mistaken about the information and knows that it is relevant to C's decision to consent. I labelled this sub-group of uninduced mistakes *'relevant mistakes'*, for ease of future reference.

In Chapter 6, through the lens of the differentiated right to sexual integrity, I reconsidered the traditional basis for distinguishing between the very small set of consent-invalidating deceptions recognised at common law, and those which were considered to have no effect on consent validity. The traditional view stated that deception (or perhaps mistake) going to the 'act itself' resulted in non-consent, because that which happened is not that for which consent was given. Additionally, in English law, impersonation of a spouse or sexual partner also invalidated consent. I argued that this controversial and undoubtedly under-inclusive distinction (when used as the fulcrum for consent vs non-consent) ought to be repurposed. Under a differentiated understanding of the right to sexual integrity, if C is unaware of the act to which she is consenting, the nominal identity of the person to whom she is giving that consent, or does not understand the act to which she is consenting as in any way sexual, she does not give a token of ostensible consent

in the first place. Contrary to traditional belief, these are not information gap cases at all. The question of consent-validity never arises, as no token of ostensible consent was given to D to do X in the first place.

With the old common law approaches to the line-drawing dilemma put to more modest use, Part IV set out a principled framework for distinguishing between consent-invalidating and non-invalidating deceptions and relevant mistakes. The key to unlocking the difficult questions in this area is to recognise that the right to sexual integrity is not absolute. It must be balanced against competing, and complementary, rights and interests, including the rights to privacy, security and sexual autonomy. I used two case studies, gender identity/history and HIV status, to demonstrate that the right to privacy, properly understood, is capable of outweighing the right to sexual integrity. The nuanced, detailed analysis conducted in Chapter 7 sets the standard for future work in this area. The right to sexual integrity can no longer be simply claimed as a trump card, without due consideration of the alternative interests at stake. Furthermore, the analysis in Chapter 7 demonstrates that even if the balancing of competing rights and interests favours C's sexual integrity, it does not necessarily follow that the criminal law is the appropriate tool to respond to D's wrongful and harmful conduct. The limitations of the criminal law must be confronted if expansion of the law in this area is to be normatively acceptable and publicly accepted.

In many ways, Part IV was initially intended to be the main body of my doctoral thesis. My initial ambition was to cover the whole field of deceptive and mistaken sex and provide an overarching account of *exactly* when deception and mistake would result in consent-invalidity. But over the course of researching this project, I realised that this balancing exercise, in order to be legitimate, must rest upon robust, principled, and carefully constructed conceptual foundations. This is the first dedicated, in-depth analysis of the theoretical structure of deceptive and mistaken sex, and so this thesis aspires not only to assist the courts in their understanding of the application

of the current legislation, particularly with respect to the relationship between deception and mistake, but also to set the standard and provide a road map for all future work in this area.

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