Oxford Journal of Legal Studies, Vol. 0, No. 0 (2019), pp. 1–28
doi:10.1093/ojls/gqz031

Deceptive Sexual Relations: A Theory of Criminal Liability

Matthew Gibson *

Abstract—Many common law jurisdictions criminalise penetrative and non-penetrative deceptive sexual relations. Often, they prohibit that conduct under their principal sexual offences, namely rape, sexual/indecent assault etc. This article challenges that practice via two linked processes: criminalisation and fair labelling, respectively. First, it argues that, whilst deceptive sexual relations (with one exception) are *equally* harmful to a victim's right to sexual autonomy as the relations proscribed by the principal sexual offences, they represent a *different* wrong. Secondly, it contends that this view entails the creation of separate sexual offences targeting penetrative and non-penetrative deceptive sexual relations. This would better signal to the criminal law's audiences the distinct wrongdoing inherent in these relations. Such labelling becomes critical at the point of conviction given its effects on defendants and other parties.

Keywords: sexual autonomy, consent, deception, sexual offences, criminalisation, fair labelling

1. *Introduction*

One person (D) deceives another (V) into sexual activity. Both are mentally competent and sober adults. On realising D's deception, V claims the activity with D was non-consensual. Such an occurrence is not uncommon. To date, across various common law jurisdictions (notably Australia, Canada, England and Wales, United States)—as well as those based on the common law

* Senior Lecturer, Liverpool Law School, University of Liverpool. Email: m.j.r.gibson@liverpool.ac.uk. I should like to thank Andrew Ashworth, James Chalmers, John Child, Tom Dougherty, Mark Dsouza, Marie Fox, Stuart Green, Thomas Horsley, Findlay Stark and the anonymous reviewers for their helpful comments on earlier drafts of this article. Different versions of this paper were presented at the Socio-Legal Studies Association Annual Conference, University of Bristol, March 2018; Faculty of Law, University of Cambridge, May 2018; and Faculty of Laws, UCL, May 2019. I am grateful to participants at these events for their feedback and, in particular, my commentator at UCL, Kate Greasley. I also thank Rachel Clement Tolley for various discussions. The usual proviso applies.

(especially Israel)—individuals have been convicted of serious sexual offences for deceptions inducing 'consent' to sexual relations.[1]

This article challenges the appropriateness of that criminalisation practice. Many of these deceptions concern penile penetration and so amount to rape, or the equivalent offence.[2] In the most extreme scenarios, V is unaware that intercourse is taking place. Here, deceptions include a doctor misrepresenting sex as a surgical operation to cure fits;[3] another doctor surreptitiously replacing a medical instrument with his penis during an intimate examination;[4] and a voice coach disguising sex as a procedure to aid his pupil's singing voice.[5] Other deceptions take place where V *is* aware that intercourse is taking place. These include impersonation.[6] They also comprise cases where D and V share the same purpose—sexual gratification—yet D deceives V about: a physical aspect of the encounter, for instance his intention not to ejaculate during penetration,[7] risk of disease transmission[8] or use of a condom;[9] or an attribute of D, such as his age,[10] marital status to V,[11] mental state,[12] or ethnic and religious background.[13] Conversely, purpose may be the very *subject* of the deception: here, V does not know that (at least one of) D's purpose(s) was sexual gratification—as where D untruthfully informs V that V has contracted a disease and that intercourse with D is a valid medical 'cure'.[14]

Meanwhile, some deceptions occur *outside* the penile-penetrative context, thereby constituting other sexual offences. Once again, D may deceive V as to the purpose for engaging in the activity. This can happen where D touches V for bogus non-sexual reasons which conceals D's real purpose: sexual gratification. In some of these instances, V is unaware that the touching is

1 Common law jurisdictions criminalise deceptive sexual relations more readily than their civil law counterparts. Indeed, some European civil law jurisdictions do not criminalise deceptive sexual relations at all: A Pundik, 'Coercion and Deception in Sexual Relations' (2015) 28 CJLJ 97, 98.

2 For example, in Canada the crimes of rape and indecent assault have been replaced by a single, differentiated, offence of sexual assault.

3 *R v Flattery* (1877) 2 QBD 410.

4 *People v Minkowski* 23 Cal Rptr 92 (1962). See also *R v Mobilio* [1991] VR 339.

5 *R v Williams* [1923] 1 KB 340.

6 Such as impersonating V's boyfriend (who was D's twin brother) in *R v GC* 2010 ONCA 451. See also *R v Elbekkay* [1995] Crim LR 163.

7 *R (F) v DPP* [2013] EWHC 946 (Admin).

8 *R v Mabior* 2012 SCC 47; *R v DC* 2012 SCC 48.

9 *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin). Relatedly, see *R v Hutchinson* 2010 NSCA 3.

10 *State of Israel v Mehadakar* 522/07 Nazareth District Court (2007) 38.

11 *Papadimitropoulos v R* [1957] HCA 74.

12 *R v Jheeta* [2007] EWCA Crim 1699.

13 CrimA 5734/10 *Kashur v State of Israel* [2012] (Isr).

14 *Boro v Superior Court* 210 Cal Rptr 122 (1985). Whilst the prosecution here failed, California's penal code now includes within its definition of rape, 'fraudulent representation that the sexual penetration served a professional purpose when it served no purpose': s 261(a)(4)(D). A rape conviction may still follow where V *is* (presumably) aware that D sought sexual gratification, but is deceived as to another purpose—as where D purports to be an accommodation officer and promises V public housing in return for sex: CrimA 2411/06 *Saliman v State of Israel* [2008] Isr. However, compare *R v Linekar* [1995] 2 Cr App R 49, where D deceived V, a prostitute, as to one of his purposes (obtaining sex without payment), but not another (sexual gratification). On appeal, D's conviction for rape was quashed.

sexual—for example, V may believe that D is measuring V for a modelling agency (sexual assault).[15] Alternatively, V *will* be aware that the touching is sexual—for instance, D may masturbate V as part of a pretend medical procedure (indecent assault).[16] Sometimes, D may deceive V into engaging in *solo* sexual activity for a sham purpose which obscures D's true purpose—as where D persuades V to masturbate online via a webcam, supposedly for D and V's mutual sexual gratification, but D simply wants to use the footage to humiliate V (causing someone to engage in sexual activity without consent).[17] Aside from purpose, so-called 'gender fraud' may arise where D identifies and presents as transgender, and V later discovers D's transgender status. Many of these cases involve transgender men: here, non-penile penetration of V is assault by penetration[18] or even rape,[19] whilst sexual touching of V can amount to sexual or indecent assault.[20]

This practice of criminalising deceptive sexual relations under the principal sexual offences raises two vital—and neglected—questions. How accurately, if at all, do such offences capture the harmfulness and wrongfulness of these relations? And, depending on this, should there be separate sexual offences targeting those relations? Previously, England and Wales criminalised deceptive sexual *intercourse* through the offence of 'procurement of a woman by false pretences' under the Sexual Offences Act 1956.[21] This gendered provision, which only applied to penile–vaginal penetration, covered deceptions other than those where V was unaware that intercourse was taking place, along with impersonation—these falling within rape. It was repealed, but not replaced,[22] by the Sexual Offences Act 2003 (SOA 2003). The Law Commission for England and Wales supports the existence of such a crime,[23] as do numerous scholars,[24] whilst writers elsewhere argue for a similar offence, albeit

15 *R v Piper* [2007] EWCA Crim 2151. Similarly, see *R v Tabassum* [2000] 2 Cr App R 328 (indecent assault).

16 *R v Green* [2002] EWCA Crim 1501.

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

18 *R v McNally* [2013] EWCA Crim 1051.

19 *State of Colorado v Clark (Sean O'Neill)* No 1994 CR003290 (Colo Dist Ct, 16 February 1996) (on file with Harvard University Law School Library); *State of Washington v Wheatley* No 97-1-50056-6 (Wash Superior Ct, 13 May 1997), albeit Wheatley's conviction was for third-degree rape; *State of Israel v Alkobi* [2003] Isr DC 3341(3), albeit Alkobi's conviction was for attempted rape; CrimC 2372/07 *Gross v State of Israel* [2012] (Isr).

20 *Alkobi* (n 19).

21 Sexual Offences Act 1956, s 3. A similar offence existed in Scotland: Criminal Law (Consolidation) (Scotland) Act 1995, s 7(2)(b).

22 It is unclear why the offence was not replaced: see K Laird, 'Rapist or Rogue: Deception, Consent and the Sexual Offences Act 2003' [2014] Crim LR 492, 499–500. Its Scottish equivalent (n 21) was also abolished and not replaced—this time by the Sexual Offences (Scotland) Act 2009.

23 Although de-gendered and extended to 'penetration of the mouth, anus or genitalia by a penis, other body part or any object': Law Commission, *Consent in Sex Offences*, LC CP No 139 (2000), para 5.45.

24 See JR Spencer, 'Sex by Deception' (2013) 9 Arch Rev 6, 8–9; Laird (n 22) 509. For more muted support, see R Williams, '*R v Flattery* (1877)' in P Handler, H Mares and I Williams (eds), *Landmark Cases in Criminal Law* (Hart Publishing 2017) 167–9. In favour of a general 'rape by deception' offence, see T Dougherty, 'No Way Around Consent: A Reply to Rubenfeld on "Rape by Deception"' (2013) 123 Yale LJ 321, 328.

encompassing penetrative and non-penetrative activity.[25] However, this article proposes a third, more preferable, option: a *series* of deceptive sexual relations crimes mirroring the principal sexual offences—thereby tracking, as in most legal systems, the form of contact (penetrative or non-penetrative) perpetrated by D.

In doing so, the article does not attempt to reconstruct the sexual offences framework of any specific common law jurisdiction(s). Rather, it focuses on two preliminary processes in criminal law theory: criminalisation (identifying crimes) and fair labelling (communicating crimes). In this way, it advances original accounts of the harmfulness and wrongfulness of deceptive sexual relations and the relations caught by the principal sexual offences. On this basis, it asserts that penetrative and non-penetrative deceptive sexual relations should be criminalised independently (with one exception). Accordingly, the above processes are linked:[26] application of substantive criminalisation principles provides a normative guide as to what conduct should, or should not, be a crime; whilst the fair labelling imperative flows from efforts to define those crimes, requiring separation of sufficiently different wrongdoing into families of individually and appropriately named offences. The former process underlines the arguments developed in section 4; the latter process informs the claims outlined in section 5.

Prior to that, sections 2 and 3 lay some important conceptual foundations. Section 2 defines 'deception'—the wrong at the heart of deceptive sexual relations. It then distinguishes deception from mistake, explaining the relevance of that distinction to D's liability. Following this, it considers characteristics of D which problematise the deception–mistake boundary. Thereafter, section 3 introduces consent, the paradigm around which sexual offences are usually constructed. It argues that this paradigm recognises V's right to sexual autonomy, before submitting that consent implicates V's negative sexual autonomy in relations proscribed by the principal sexual offences, and V's positive *and* negative sexual autonomy in deceptive sexual relations. This process reveals that consent and sexual autonomy are intertwined in both sets of relations, albeit in contrasting ways. Further, the section also suggests that the right to sexual autonomy entails—morally and legally—a victim-orientated (subjective) approach to consent in these relations.

Next, section 4 contends that, whilst deceptive sexual relations are *equally* harmful to V's right to sexual autonomy as the relations proscribed by the principal sexual offences, they represent a *different* wrong. In the relations criminalised by the principal sexual offences, V is attempting, or defaulting to a

25 See eg Pundik (n 1).

26 On this link, see RA Duff and SP Green, 'Introduction: The Special Part and Its Problems' in RA Duff and SP Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (OUP 2005) 4–17; J Horder, 'The Classification of Crimes and the Special Part of the Criminal Law' in Duff and Green, 23; RA Duff and others, 'Introduction: The Boundaries of the Criminal Law' in RA Duff and others (eds), *The Boundaries of the Criminal Law* (OUP 2010) 11–12.

state of, negative sexual autonomy deployment: unwilling, at the very least, to engage in those relations. D's conduct duly harms V's right to sexual autonomy by setting it *back*: reversing its course. Exceptionally, the same is true for those deceptions where V is unaware that the activity—because of its nature (like intercourse) or purpose (like touching)—is sexual: consequently, these should remain within the principal sexual offences. In all such cases, D's wrongdoing is *external* to the sexual context: V did not desire any sexual activity and so, for V, the relations could never come to any good. Meanwhile, in deceptive sexual relations, V is attempting to deploy positive *and* negative sexual autonomy: willing, at the very least, to pursue those relations subject to a 'deal-breaker', although wishing to avoid relations outside that deal-breaker. D's deception harms V's right to sexual autonomy by *frustrating* its progress: V does not achieve the deal-breaker. However, such 'harm' is, *ceteris paribus*, negligible. The real impact is on V's negative sexual autonomy: V gets a sexual experience V did not want. As with the relations prohibited by the principal sexual offences, V's right to sexual autonomy is thus set back. Nonetheless, this time, D's wrongdoing is *internal* to the sexual context: V did desire sexual activity, pursuant to a deal-breaker. Absent D's deception, V would have achieved positive sexual autonomy fulfilment. Accordingly, in deceptive sexual relations, D's wrongdoing has a separate moral foundation to that in the relations precluded by the principal sexual offences.

Finally, section 5 submits that this view entails the creation of independent deceptive sexual relations offences (covering penetrative and non-penetrative activity). This is a matter of fair labelling: such relations constitute a different wrong to the relations proscribed by the principal sexual offences. That contrast ought to be signalled by the criminal law to its various audiences. Such labelling becomes critical at the point of conviction given its effects on defendants and other parties.

2. *'Deceptive' Sexual Relations?*

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

Deception has long been the subject of conceptual debate in the philosophical and legal literature. From these debates, it is possible to identify an orthodox interpretation of deception. In criminal law, that interpretation often finds expression in those offences to which deception is conceptually central—namely, property offences (through crimes like obtaining property, money or services by deception). This section outlines the orthodox interpretation, before explaining how deception is different to mistake and why that difference

matters to D's liability. It then highlights characteristics of D which pose problems for the deception–mistake boundary in sexual relations.

A. *Defining Deception*

In philosophy, it is generally recognised that deception occurs where D intentionally causes V to believe something false (X) and D knows or believes that X is false, or at the least does not believe that X is true.[27] This definition is roughly reflected in criminal law doctrine, with recklessness often included as an additional culpability mode regarding D's causing of V's belief in X. In many jurisdictions, deception often raises a *second* causal issue in criminal law—as seen in deception-based property offences. Liability for these offences is usually result-orientated:[28] the deception must be *material* to V's decision to transfer money or property to D, or provide services to D etc. Moreover, within such offences, and in philosophy, deception is capable of being active or passive. The former demands a representation from D by way of words or actions, whilst the latter requires that D fails to disclose a fact where D has an obligation to disclose that fact.

Unfortunately, in passive deception, it is not always clear when the disclosure obligation arises. Morally and legally, professional duties count. Arguably, however, these duties should extend to situations where there was a promise or clear expectation that information would be provided.[29] Inevitably, there is no consensus on which circumstances should be capable of creating that expectation, although there is support for the view that sexual relations ought to cross this threshold. For example, Wertheimer claims that, 'if we were to think of sexual relations along the lines of a medical procedure or the sale of a house, then D has an obligation to disclose information that might be material to [V's] decision'.[30] Indeed, the idea that sexual relations should surmount the disclosure threshold seems plausible given their fundamentally intimate character, grounded in whatever meanings (religious, transactional, procreative, loving, pleasure-seeking etc) they have for the participants. Consequently, it may be that D's obligation to disclose information relevant to V's decision to engage in sexual relations is *just* as serious as the obligation (in active deception) not to lie about such information.[31] In line with this reasoning, Dougherty defines deception in active and passive forms, before

27 TL Carson, 'Lying, Deception and Related Concepts' in C Martin (ed), *The Philosophy of Deception* (OUP 2009) 177–8. Similarly, see T Dougherty, 'Deception and Consent' in A Müller and P Schaber (eds), *The Routledge Handbook of the Ethics of Consent* (Routledge 2018) 165. In the criminal law literature, see SP Green, *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime* (OUP 2006) 76–7.

28 See eg Canadian law on fraud: *R v Olan* [1978] 2 SCR 1175; see also the old deception offences in England and Wales under the Theft Acts 1968, 1978 and the Theft (Amendment) Act 1996. Controversially, the latter jurisdiction has not only dispensed with this second causal element; it also no longer requires that the deception causes the initial false belief in V, rendering deception inchoate: see the Fraud Act 2006, ss 2–4.

29 Carson (n 27) 179.

30 A Wertheimer, *Consent to Sexual Relations* (CUP 2003) 195.

31 D's obligation to disclose information, especially private information, is discussed in section 4B.

contending that sexual activity creates disclosure obligations.[32] Similarly, in active and passive contexts, Herring argues that 'sexual partners ... owe each other heightened standards of obligation of a fiduciary nature'.[33]

On this basis, the problem with deception is its manipulation of V's beliefs. In turn, this impacts V's *decision making*, usually resulting in a gain for D or a loss to V, or both. Such manipulation and exploitation not only obliterate professional or personal trust; they also disrespect V's autonomy, constraining it in the process.[34] This is a vision of autonomy in the traditional, liberal, sense: one which prizes individual freedom and the conditions for its realisation.[35] Deception interferes with a number of those conditions, notably the ability to self-determine and make authentic choices. In the active and passive realms, Alexander and Sherwin therefore write, '[a] successful lie distorts the reasoning process of the person lied to, displacing his will and manipulating his action ... The liar thus fails to respect the victim's capacity for reasoned self-governance'.[36]

Inevitably, commentators frequently invoke autonomy to rationalise the existence of deception-based property offences. For instance, Simester and Sullivan note that deception is about *inducing* V to behave in a particular way,[37] whilst Shute and Horder describe how deception hinders 'what should have been an autonomy enhancing transaction ... the victim's chances of making an authentic choice are deliberately or recklessly undermined by the fraudster'.[38] Unsurprisingly, the autonomy-based objection to deception hints at the problem with deceptive sexual relations. These *also* compromise V's autonomy, but in a specific, sexual, way.[39]

B. *Distinguishing Mistake*

The difference between deception and mistake concerns the source of V's false belief and D's associated blameworthiness. An active or passive deception by D as to something (X) must engender in V a false belief about X, with D intending to cause (or recklessly causing) that belief through words/actions (active deception) or non-disclosure (passive deception). In deception, D is thereby culpably involved in bringing about V's false belief—a belief which D then exploits, producing a gain for D, a loss to V or both, via its materiality to V's decision making. In contrast, whilst mistake identically

32 Dougherty (n 27) 164–5.

33 J Herring, 'Mistaken Sex' [2005] Crim LR 511, 515.

34 A Strudler, 'Deception and Trust' in Martin (n 27) 150.

35 This notion of autonomy is associated with a long line of philosophers. See more recently J Raz, *The Morality of Freedom* (OUP 1988) 369; R Dworkin, *Life's Dominion* (Vintage Publishing 1994) 224.

36 L Alexander and E Sherwin, 'Deception in Morality and Law' (2003) 22 Law and Philosophy 393, 397.

37 AP Simester and GR Sullivan, 'On the Nature and Rationale of Property Offences' in Duff and Green (n 26) 189.

38 S Shute and J Horder, 'Thieving and Deceiving: What is the Difference?' (1993) 56 MLR 548, 553.

39 See section 4.

requires that V holds a false belief, that belief is not caused by D: V forms it unilaterally.[40] Nonetheless, in the criminal law, assuming V's mistake is linked to V's subsequent conduct, D is not necessarily without culpability. The question is whether D knows, or perhaps ought to know, of V's mistake. Where D has such knowledge and—under a duty to disclose—withholds it from V, this similarly amounts to exploitation of V's false belief where that belief is material to V's decision making (generating a gain for D, a loss to V or both).

Deception and mistake duly feature conflicting dynamics between D and V at the point at which V forms a false belief. That conflict flows from the *power* D exercises over the creation of V's beliefs in deception and the absence of this in mistake. In deception, D not only exploits V's false belief, but also illegitimately procures it in the first place—thereby culpably creating the conditions for that exploitation. By comparison, in mistake, D's conduct carries no culpability at the start: V's false belief has nothing to do with D. Instead, D's conduct only becomes culpable *if* D holds information which D comes to know that, were it revealed to V, would correct V's false belief—and D, under a duty to disclose, retains this information in order to exploit that belief.

On this analysis, even if deception and mistake undermine V's autonomy to the same degree, then, *ceteris paribus*, D's conduct in the former demonstrates *greater* blameworthiness than that in the latter. Deception is thus a more *egregious* basis for criminal liability than mistake. This is not to rule out alternative liability for 'mistaken sexual relations'. It is just that deceptive sexual relations represent a separate wrong which should be isolated from, and not conflated with, their mistake-based equivalents in the criminalisation debate.[41]

C. *Problematising Deception and Mistake in Sexual Relations: D's Characteristics*

It is especially important to be alert to the difference between deception and mistake where V's false belief relates to characteristics of D which lack *constancy*—such as gender identity and sexuality. The key boundary here is that which divides passive deception from mistake. Ignorance of that boundary, and the active/passive deception split it implies, can lead to erroneous conclusions of deception in these cases. Recent sexual offence convictions for gender fraud illustrate not only the dangers of an impoverished analysis of passive deception

40 Where V's belief is formed via a third party, it may not always be uninduced—as where the third party's conduct itself constitutes deception.

41 Contrary to this view, Herring (n 33) supports criminalising deceptive and mistaken sexual relations under one rule: 517. See also R Williams, 'Deception, Mistake and Vitiation of the Victim's Consent' (2008) 124 LQR 132.

versus mistake, but also a resulting failure to understand the active and passive dimensions of deception.

A notorious example is *McNally*.[42] D, who was aged 17 and biologically female, identified as a transgender boy at the time of performing various oral and digital penetrative acts upon V—a cisgender girl aged 16.[43] During the interactions between D and V, D presented as transgender: this included using the male pseudonym 'Scott' (D's legal name was Justine), wearing a penile prosthesis under clothing and speaking of 'putting it in' (which V took to mean penis).[44] Following the acts of penetration, and D's subsequent disclosure of birth sex, D pleaded guilty to six counts of assault by penetration.[45] V told the police she only consented to the acts because she believed D to be a boy.[46] Unsuccessfully appealing against conviction, D contended *inter alia* that deception as to gender identity does not undermine consent. The Court of Appeal rejected this claim. In doing so, it failed to address adequately the contrast between deception and mistake.

Particularly troubling was the finding that D had perpetrated *active* deception as to gender identity.[47] That view was informed by D's presentational conduct (described above), together with related conduct—such as discussing with V the prospect of getting married and having children;[48] keeping clothing on during sexual activity;[49] and having sexual activity in the dark.[50] However, as Sharpe discusses, it is arguable that this behaviour highlighted D's adoption of, and ongoing adjustment towards, an *authentic* transgender male identity prior to and at the time of sexual activity,[51] reinforced by D's desire to undergo gender reassignment surgery.[52] Whilst D later reverted to a cisgender female identity, this does not invalidate authenticity. Gender identity may fluctuate: the legal focus must be on D's identity at the *time* of the activity itself.[53] Consequently, to treat authentic transgender identity and its outward presentation as 'active' deception is problematic: it suggests pretence and disguise. Moreover, it denies not only the authenticity of the relevant gender, but also the *possibility* of that authenticity. This marks an existential challenge to transgender people, an ontological issue which—for Sharpe—shows that those individuals, 'cannot

42 See above (n 18).

43 The terms 'cisgender' and 'transgender' denote those who, respectively, feel alignment, or a lack thereof, between their birth sex and gender identity. The prefixes 'cis-' and 'trans-' are Latinate: the former meaning 'this side of' and the latter 'the other side of'.

44 *McNally* (n 18) [3]–[7] (Leveson LJ).

45 SOA 2003, s 2.

46 *McNally* (n 18) [11] (Leveson LJ).

47 *McNally* (n 18) [26] (Leveson LJ).

48 *McNally* (n 18) [4] (Leveson LJ).

49 *McNally* (n 18) [8], [43] (Leveson LJ).

50 *McNally* (n 18) [8] (Leveson LJ).

51 A Sharpe, *Sexual Intimacy and Gender Identity 'Fraud': Reframing the Legal and Ethical Debate* (Routledge 2018) 171–2. Authenticity would be a question of fact.

52 *McNally* (n 18) [10] (Leveson LJ).

53 Sharpe (n 51) 94–5, 126, 173.

avoid active status. Every word, every gesture, every mannerism, no matter how consistent with authentic gender identity, is a manifestation of active deception'.[54]

For these reasons, the Court of Appeal might have better characterised D's conduct as *non-disclosure* of transgender identity. But this does not mean that D passively deceived V as to that identity. Notwithstanding the lack of disclosure, the ontological challenge remains: D was simply living *as* a transgender boy.[55] On this view, whilst V held a false belief that D was a cisgender boy, D's behaviour did not cause that belief. Rather, V—acting from a position of cisnormativity—*assumed* that D was a cisgender boy and made a mistake. If mistaken sexual relations had been criminalised, liability would have turned on whether D knew, or ought to have known, of V's mistake and withheld information so as to exploit that mistake. On the facts, it appears D did *not* know that V was mistaken about D's transgender identity: indeed, D claimed to believe that V knew D was biologically female.[56] Whether D ought to have known of V's mistake depends on how D should have interpreted V's conduct during their interactions. Whatever the outcome of that determination, it should not be premised on the transphobic view that a cisgender person would never knowingly become sexually intimate with a transgender person.

Overall, then, where D is authentically transgender, and D's behaviour represents non-disclosure of transgender identity, it is incorrect to say that D induces V into having a false belief about that identity.[57] This is true even where D *does* disclose an authentic transgender identity to V (for instance, through speech). In both cases, there are ontological barriers to determining passive and active deception, respectively: if V forms a false belief that D is cisgender as opposed to transgender, then V is just mistaken—the issue is whether D knew, or ought to have known, of that mistake and, if so, exploited it.[58] Further challenges may arise where D makes a genuine assertion (actively or passively) concerning *other* characteristics material to V's engagement in sexual relations—specifically those which contain no verifiable 'truth', like wealth (D's conception of wealth is modest; V's is large). Here, it might be impossible to say V possesses even a *false* belief about D's wealth—in which case, there can also be no mistake.

54 A Sharpe, 'Expanding Liability for Sexual Fraud through the Concept of "Active Deception": A Flawed Approach' (2016) 80 JCL 28, 39.

55 In any event, under the SOA 2003, passive deception is incapable of undermining consent: see *McNally* (n 18) [20]–[24] (Leveson LJ); more generally, *R v B* [2007] 1WLR 1567.

56 *McNally* (n 18) [12], [30]–[33] and [41]–[42] (Leveson LJ).

57 This would be true even where, unlike in *McNally* (n 18), the charges related to penetration by a prosthetic penis. Sharpe (n 51) suggests that, for some transgender men, such a device 'is experienced as an extension of the embodied self ... no different phenomenologically from the fleshy kind': 97.

58 Although Sharpe (n 51) states that even where D's transgender identity is authentic, D may still intend to cause V to believe falsely that D is cisgender out of a desire for self-preservation (to avoid a violent response from V): 96, 129.

Deception could be present where D's active or passive assertion of a material characteristic is *in*authentic. This may arise in relation to gender identity; it is additionally possible in relation to unverifiable characteristics such as wealth—though limited to clear cases where D causes V to believe that D is wealthy and D is in fact destitute, with D intentionally or recklessly inducing V's false belief as to wealth, knowing or believing that D has neither any money, nor real or personal property (all of this being evidenceable). Of course, deception would be easier to establish for verifiable characteristics, like age.

3. *Consent to Sexual Relations and the Right to Sexual Autonomy*

Many legal systems organise their sexual offences around the absence of V's consent. This practice recognises that consent plays a 'morally transformative' function in the sexual realm: if V does not consent, then—subject to D's *mens rea* regarding V's consent—that turns legal sexual relations into those which are criminal.

This section explores the operation of consent in deceptive sexual relations and the relations proscribed by the principal sexual offences. As with deception, such an analysis is critical to understanding the nature of deceptive sexual relations. Initially, the section scopes the boundaries of consent. It then argues that the significance of using a consent standard in sexual offences is its recognition of V's right to sexual autonomy. It explores that right, before contending that consent implicates V's negative sexual autonomy in relations prohibited under the principal sexual offences, and V's positive *and* negative sexual autonomy in deceptive sexual relations. This process reveals that consent and sexual autonomy are intertwined in both sets of relations, albeit in contrasting ways. Further, the section also suggests that the right to sexual autonomy entails—morally and legally—a victim-orientated (subjective) approach to consent in these relations.

A. *Scoping Consent*

Like deception, consent has prompted much conceptual discussion in philosophical and legal scholarship. Those discussions usually centre on an initial ontological question: what *is* consent? Some argue that consent depends on V's mental attitude towards the activity, this ranging from wantedness or desire, through to acquiescence or ambivalence. Consent is thereby an exercise of the will: it must be sufficiently free.[59] In sexual offences, the absence of this consent usually forms part of the *actus reus* of

59 See eg HM Hurd, 'The Moral Magic of Consent' (1996) 2 Legal Theory 121; L Alexander, 'The Moral Magic of Consent II' (1996) 2 Legal Theory 165; L Alexander, 'The Ontology of Consent' (2014) 55 Analytic Philosophy 102.

those offences. Meanwhile, others suggest that consent is performative: in addition to exercising consent in a psychological sense, did V's conduct communicate that consent?[60] In sexual offences, it is this performative aspect which permits D to proceed with the activity—something which is relevant when assessing D's *mens rea* as to V's consent.

However, these attitudinal and performative issues paint only a partial consent picture. Beyond them, there exist profound normative questions—especially in the sphere of sexual relations. *Which* factors should be capable of undermining consent in these relations? And *when* should these factors be deemed to have undermined that consent? There is broad agreement on the answer to the first question: deception, incapacity (usually voluntary or involuntary intoxication) and coercion (physical compulsion, blackmail, emotional manipulation, threatened violence, improper offers, etc) are the factors which impair consent. In these circumstances, even though V may appear to have factually 'consented', that consent has no prescriptive force in morality or law.

Unfortunately, there is less agreement on the answer to the second question: scholars dispute when these factors should be viewed as undermining consent—both morally and legally.[61] Those disputes particularly arise in relation to coercion and deception. Here, commentators typically veer between two views: that V's consent should be assessed by examining the subjective effect of D's behaviour on V, irrespective of how minor that behaviour may appear to others; or that V's consent should be assessed by more objective judgments about D's behaviour. Both views, along with the consent-undermining factors—coercion and deception—to which they attach, are explored shortly when considering how consent affects V's autonomy. Prior to this, the article defends the link between consent and autonomy. Indeed, it claims that the relevance of consent in gauging the permissibility of sexual relations is its protection of a right to *sexual* autonomy.

B. *Consent and the Right to Sexual Autonomy*

The need for consent in sexual relations recognises V's autonomy as the locus of decision making. This reflects the fact that in certain domains—sexual or otherwise—consent and autonomy are unavoidably connected: the former is an exercise of the latter. Moreover, autonomy in this context assumes a specific form: *sexual* autonomy. Schulhofer offers the leading account of this type of autonomy, identifying it as a major personal right. He contends that:

60 See eg HM Malm, 'The Ontological Status of Consent and its Implications for the Law on Rape' (1996) 2 Legal Theory 147; P Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct* (Ashgate 2004) 5; T Dougherty, 'Yes Means Yes: Consent as Communication' (2015) 43 Philosophy & Public Affairs 224.

61 On this moral and legal distinction, see Wertheimer (n 30).

> [t]he emotional vulnerability and potential physical danger attached to sexual interaction make effective legal safeguards at least as important for sex as they are for the sale of land or the purchase of a used car … A decent regime for safeguarding fundamental rights should place sexual autonomy at the center of attention and protect it directly, for its own sake, just as we protect physical safety, property, labor, and informational privacy, the principal interests of every human being.[62]

He pinpoints three elements of the right to sexual autonomy that are required for meaningful decisions regarding consent to sexual relations.[63] The first two are mental: an internal capacity to make reasonably mature and rational choices; and an external freedom from impermissible pressures and constraints (like coercion or deception) on those choices. The third pertains to physicality: the separateness of the corporeal person from sexual interference.

On Schulhofer's view, the right to sexual autonomy is *different* from other personal rights (including that of bodily autonomy). As Childs observes, '[t]he *centrality* of sexuality to personhood, and its complex involvement in both physical and affective relations, suggests that there are good reasons for retaining a category of sexual wrongs legally and conceptually distinct from other violations of autonomy'.[64] Green also emphasises the distinctiveness of the right to sexual autonomy, albeit not as a single, monolithic, right, but rather a complex, multifarious, bundle of rights to engage in or refrain from various types of sexual and sex-related activity.[65] These activities include, but are not limited to: vaginal intercourse, anal intercourse, oral sex, kissing, fondling, foreplay, masturbation, preserving or giving up one's virginity, inflicting or receiving sexual pain, viewing sexual images and performances, using sex toys, displaying (or concealing) one's sexual identity and history, cross-dressing, changing one's gender identity, mutilating or modifying one's own genitals, becoming pregnant, undergoing fertility treatments, having an abortion, using contraception, being protected from or allowing oneself to be exposed to sexually transmitted diseases, selling sex, buying sex, and thinking, talking, reading or writing about sex.[66] Further, he notes that sexual autonomy also includes the right to decide with whom one will have sexual activity, where and when one will have it, and under what additional circumstances.[67]

From these analyses, the right to sexual autonomy clearly comprises *negative* and *positive* dimensions.[68] The former is the ability to refuse to have sexual relations with anyone at any time and place, for any reason or for no reason at all; the latter is the ability to choose the sexual activity one wishes to pursue,

62 SJ Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard UP 1998) 101–2.
63 Schulhofer (n 62) 111.
64 M Childs, 'Sexual Autonomy and Law' (2001) 64 MLR 309, 311 (emphasis added).
65 SP Green, 'Lies, Rape, and Statutory Rape' in A Sarat (ed), *Law and Lies: Deception and Truth-Telling in the American Legal System* (CUP 2015) 207.
66 Green (n 65) 208.
67 Green (n 65).
68 Schulhofer (n 62) 99. See also Green (n 65) 207.

with any consenting person(s) at any time and place, for any reason. Together, these two dimensions frame the right to sexual autonomy as one of fundamental importance in the corpus of personal rights that humans hold.[69]

Nevertheless, some scholars reject any role for that right in assembling the parameters of permissible sexual relations. Most (in)famously, Rubenfeld has acclaimed the 'myth' of sexual autonomy, describing it as an unsustainable sexual free-for-all. For him, such autonomy is illusory because, 'one person's sexual self-determination will inevitably conflict with others': John's will require that he sleep with Jane, but Jane's will require otherwise'.[70] However, John's right to sexual autonomy does not extend as far as Rubenfeld suggests. As Herring clarifies:

> Autonomy provides us with a reason for leaving a person alone to fulfil their desires. It does not require us to fulfil other people's desires. That would be an impossible burden ... there is nothing unjustifiable in refusing to have sex with another and such a refusal does not unjustifiably harm another.[71]

Accordingly, where D wishes to exercise positive sexual autonomy in having sexual relations with V, the legitimacy of those relations turns on how V chooses to exercise sexual autonomy in return.

C. *Consent and Relations Proscribed by the Principal Sexual Offences: Implicating Negative Sexual Autonomy*

In the relations proscribed by the principal sexual offences—concerning incapacity or coercion—V is trying to exercise *negative* sexual autonomy. Here, V is, at the very least, unwilling to engage in sexual relations.[72] This must also be the presumption in 'pure' sexual violation cases—as in the pure case of rape where D has sexual intercourse with an unconscious V, without V ever becoming aware of this.[73] Here, without more information, V's unconsciousness cannot be taken as an effort to achieve positive sexual autonomy; rather, V defaults to a state of negative sexual autonomy deployment. Thus, in all examples of incapacity or coercion, D's conduct compromises V's attempt at

69 It is possible to view autonomy in a more 'relational' way (so that it is interactive and less individualistic, requiring a mutuality of relationship and responsibility between D and V). That perspective will not be pursued here. On relational autonomy, see C MacKenzie and N Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (OUP 2000); J Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (OUP 2012). In the sexual realm, see N Lacey, 'Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law' (1998) 11 CJLJ 47.

70 J Rubenfeld, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2013) 122 Yale LJ 1372, 1418.

71 J Herring, 'Rape and the Definition of Consent' (2014) 26 National Law School of India Review 62, 66–7.

72 This is true even where V commences consensual sexual relations, thereby asserting positive sexual autonomy, but *revokes* consent during those relations, thus asserting negative sexual autonomy instead, and D proceeds without V's consent.

73 See J Gardner and S Shute, 'The Wrongness of Rape' in J Horder (ed), *Oxford Essays in Jurisprudence* (OUP 2000), albeit rejecting consent as the basis for why rape is wrong in place of the Kantian 'sheer use' principle.

sexual abstention—thereby undermining V's consent. Even if V factually 'consented' to the relations, that should not—morally or legally—amount to prescriptive consent where incapacity or coercion is present.

Or should it? To be sure, there is disagreement about *when* consent is undermined in coercion cases. Chiefly, should it be decided according to subjective or objective standards? Wertheimer appears to endorse an objective strategy. For instance, where D coerces V into sex by threatening to kill V's goldfish, he says this only 'might' undermine morally valid consent and strongly doubts that it would undermine legally valid consent.[74] In contrast, Burgess-Jackson attacks such objectivity, particularly at the legal level. He asks '[w]hy should V be held to a higher standard of "resolution" than [V] actually has in order to have [the] assault considered a crime?'[75] Ultimately, he goes on to support a subjective interpretation of consent in rape, saying '[D] has no right to coerce V ... How others similarly situated might have responded in these circumstances is neither here nor there'.[76] That view shows why subjectivity is attractive when assessing consent in coercion cases: V is attempting to engage negative sexual autonomy. Reinforcing this idea, Herring contends that:

> [I]f we accept that the right to choose with whom to have sexual contact is of huge importance, surely we should ensure that when we talk about consent in this context we are discussing consent as a full expression of the victim's will.[77]

Nonetheless, there remain criminalisation concerns regarding objectively 'trivial' coercion. For example, if V has sex with D because D threatens to pinch V, should that *really* be enough to undermine V's consent and render D potentially liable for a principal sexual offence? In answer to this, Dsouza persuasively argues that:

> [I]n most cases, a jury simply will not believe that [V] was coerced into having [sexual relations] against [V's] will because [V] was threatened with a pinch. But even if they did, and it was found that consent was vitiated, [D] might credibly claim lack of mens rea on the basis that [D] didn't [(reasonably)] believe that [V's] consent to [sexual relations] was caused by the mere threat of a pinch, and therefore, [D] acted on the basis of putative consent. In the unlikely event that the jury believes that consent was vitiated, and that [D] knew [(or ought to have known)] it was, then there seems to be no reason to treat this instance of non-consensual sex any less seriously than one would treat any other instance of non-consensual sex.[78]

74 Wertheimer (n 30) 184–5. See also Schulhofer (n 62) chs 7 and 8.

75 K Burgess-Jackson, 'A Theory of Rape' in K Burgess-Jackson (ed), *A Most Detestable Crime: New Philosophical Essays on Rape* (OUP 1999) 107.

76 Burgess-Jackson (n 75).

77 Herring (n 33) 516.

78 M Dsouza, 'Undermining Prima Facie Consent in the Criminal Law' (2014) 33 Law and Philosophy 489, 500–1.

If this perspective has merit, then it begins to point to a legal view of consent which is appropriately deferent to, and duly respectful of, V's pursuit of negative sexual autonomy.

D. *Consent and Deceptive Sexual Relations: Implicating Positive and Negative Sexual Autonomy*

What, then, is different about the link between deceptive sexual relations and the right to sexual autonomy? Here, V is trying to exercise positive sexual autonomy: willing, at the very least, to have sexual relations with D, although V requires that those relations have condition(s) attached and respected as part of V's sexual self-determination. By implication, V is *also* attempting to deploy negative sexual autonomy: the avoidance of sexual relations which do not satisfy V's condition(s).[79]

In these cases, D's deception as to V's condition(s) undermines V's consent. V agrees to one form of sexual relations but, crucially, not to that which actually occurred. As already seen,[80] the criminal law generally demands that D's active or passive deception be *material* to V's engagement in specific conduct: in this instance, sexual activity. A counterfactual test underscores that connection, requiring a 'but for' relationship between the deception and V's non-consent. In the sexual realm, this relationship concerns whether, but for D's deception, V would or would not have consented to the sexual relations. Dougherty's work is instructive in this context. He employs a 'deal-breaker' analogy: where the deception concerns a feature of the sexual encounter to which V is *opposed*, then V does not consent.[81] Clearly, the deal-breaker must be decisive—so deceptive features of the encounter which were immaterial to V's decision to consent are unproblematic. Otherwise, where the deal-breaker *is* material to that decision, V's consent is absent. This is true whether V is only 'just' unwilling to have sexual relations, but the deception tips V into consenting (a 'weak' deal-breaker); or 'never in a million years' would V consent to such relations, yet the deception induces consent (a 'strong' deal-breaker). For this reason, it is unhelpful to contrast—as others have done—weak and strong deal-breakers in grading the *voluntariness* of consent (the assumption being that deceptions as to weak deal-breakers undermine that voluntariness much less, indicating potential consent).[82] This is because, in both circumstances, although V factually consents to the relations, there is no

79 Exceptionally, V will be attempting to exercise *just* negative sexual autonomy in some deceptive sexual relations: see section 4A.

80 See section 2A.

81 T Dougherty, 'Sex, Lies, and Consent' (2013) 123 Ethics 717, 719, 736–7. For a similar view see Herring (n 33) 517.

82 See J Feinberg, 'Victims' Excuses: The Case of Fraudulently Procured Consent' (1986) 96 Ethics 330, 335–44; D Archard, *Sexual Consent* (Westview Press 1998) 50–3. On 'weak' and 'strong' deal-breakers in deceptive sexual relations, see D Archard, 'Sexual Consent' in Müller and Schaber (n 27) 180; N Manson, 'How Not to Think about the Ethics of Deceiving into Sex' (2017) 127 Ethics 415, 418–20.

prescriptive consent because deception as to that deal-breaker creates *counterfactual* non-consent.[83] As long as there is counterfactual non-consent, then debates about whether the deal-breaker is weak or strong seem irrelevant.

Unsurprisingly, though, this does beg further questions. Subjectively, should V be able to invoke *any* deal-breaker? Or only those deal-breakers which, objectively, seem *plausible* or *reasonable*? Attempts to take an objective stance—often based on mere moral intuition—have led to awkward line-drawing.[84] Most familiar is the distinction between frauds in the 'factum' and the 'inducement'.[85] The former induce counterfactual non-consent because they deceive V into being unaware that a sexual act is taking place;[86] the latter have no such effect, because V is aware of the sexual act and only deceived about another matter—like a physical aspect of the act, an attribute of D or D's purpose.[87]

Yet there is something capricious about dictating the presence (or otherwise) of V's consent according to fluctuating intuitions about the legitimacy of deal-breakers. This dilemma has led some commentators to make a more explosive claim: that the validity of V's deal-breaker should be judged subjectively. As long as that deal-breaker made a 'but for' difference to V's engagement in sexual relations, it is irrelevant that it appears ridiculous to external observers. Such a claim endorses V's ability to pursue a personal conception of positive sexual autonomy. It also means accepting that V's deal-breaker may be based on prejudice—for instance, V may only want sexual relations with people who are cisgender or of V's race. Whilst these prejudices may not be condonable, they are permissible as part of the right to sexual autonomy.[88] So Dougherty is correct that, '[w]hen it comes to consent, we must respect other people's wills as they actually are, not as they ought to be'.[89] Regarding rape, this also enables Herring to say that:

> We may think it absurd that V will only sleep with rich lawyers or unpleasant that V does not like to have sex with Jewish men, but ultimately it is for V to decide with whom to have sex … [V] is under no duty to supply sexual service to others on a non-discriminatory basis.[90]

Although Dougherty only discusses deal-breakers in relation to *morally* valid consent, there is no barrier to extending it to assessment of *legally* valid consent. Inevitably, with the validity of deal-breakers assessed subjectively, this

83 Counterfactual non-consent may also be termed 'counterfactual refusal' or 'invalid actual consent': see Pundik (n 1) 108.

84 See Wertheimer (n 30) 213; Spencer (n 24) 7.

85 For indicative analyses, see Archard (n 82) 49–50; Wertheimer (n 30) 195–7.

86 See *Flattery* (n 3); *Minkowski* (n 4); *Mobilio* (n 4); *Williams* (n 5).

87 See section 1.

88 This raises a possible clash between V's right to positive sexual autonomy and D's right to privacy: see section 4B.

89 Dougherty (n 81) 730.

90 Herring (n 71) 71. See also Herring (n 33) 517.

would revise up the criminal law's penalisation of deceptive sexual relations—perhaps leading to greater criminalisation.[91] Some academics have balked at this prospect, preferring to prescribe which deal-breakers should, and should not, count as legitimate,[92] or suggesting a test of 'reasonable materiality'.[93] But such line-drawing is unsatisfactory for the reasons already noted.

Moreover, criminalisation would be reliant on a number of factors. It would require V to identify the deal-breaker and show that D intentionally or recklessly caused V to believe falsely that D satisfied it, with D knowing or believing this, or at the least not believing it was true. Proving any of these elements could be tricky, especially where the deal-breaker concerned fluid or unverifiable characteristics of D.[94] Furthermore, establishing the 'but for' role the deal-breaker played in inducing counterfactual non-consent might be difficult: does the jury believe V's claims about materiality? Or are those claims suspect because they seem distorted by regret and hindsight?[95] What if D's deception placed pressure on V to consent? Here, D's conduct might fall under a principal sexual offence because, at the time, that pressure meant V no longer desired sexual relations (pursuing negative sexual autonomy; no consent), notwithstanding the initial deal-breaker. Where a provable causal link *did* exist between the deal-breaker and V's counterfactual non-consent, D would need to know about the materiality of V's deal-breaker—although it might be sufficient that D *ought* to have known about that materiality to prevent claims of ignorance by D regarding obvious deal-breakers. However, it might not always be easy for a jury to decide whether D knew, or even ought to have known, that V's condition was a deal-breaker—particularly where it was *not* an obvious deal-breaker. D's state of mind regarding V's deal-breaker would also be relevant to gauging D's belief—reasonable or otherwise—in V's consent.

4. *Criminalising Non-consensual Sexual Relations*

The finding that consent implicates V's negative sexual autonomy in the relations proscribed by the principal sexual offences, together with V's positive and negative sexual autonomy in deceptive sexual relations, is significant. It reveals a basis for arguing that the practice of criminalising deceptive sexual relations within the principal sexual offences is inappropriate.

91 For judicial support in favour of such criminalisation, see L'Heureux-Dubé J in *R v Cuerrier* [1998] 2 SCR 371 at [18]. In England and Wales, whilst a subjective approach to deceptions operates in fraud offences—see Williams (n 24) 168—the Divisional Court suggests an objective view of deceptions prevails in sexual offences: *R (Monica) v DPP* [2018] EWHC 3508, [81]–[86] (Lord Burnett CJ and Jay J).

92 See eg Williams (n 41); Green (n 65); V Bergelson, 'Rethinking Rape-by-Fraud' in C Ashford, A Reed and N Wake (eds), *Legal Perspectives on State Power: Consent and Control* (Cambridge Scholars Publishing 2016).

93 AP Simester and GR Sullivan and others, *Simester and Sullivan's Criminal Law* (6th edn, Hart Publishing 2016) 486.

94 See section 2D.

95 See Green (n 65) 219; *Cuerrier* (n 91) [20]–[21] (L'Heureux-Dubé J). Relatedly, see DP Bryden, 'Redefining Rape' (2000) 3 Buffalo Criminal Law Review 317, 463–4; Wertheimer (n 30) 201; Dougherty (n 24) 332.

This section develops that argument. In doing so, it applies the concepts of harmfulness and wrongfulness to the relations prohibited by the principal sexual offences and deceptive sexual relations. These concepts embody the orthodoxy in criminalisation decision making—about whether or not certain behaviour should be criminalised—with each representing an alternative starting point in that process (such that, if satisfied, the other acts as a constraint).[96] The emphasis in this section is on harmfulness supplying the *positive* reason to criminalise, with wrongfulness acting as a restriction on criminalisation. This approach, which has been called 'negative Legal Moralism',[97] marks the dominant paradigm in criminalisation theory,[98] albeit challenged by forms of 'positive Legal Moralism' (where wrongfulness provides the positive reason to criminalise, with harmfulness serving to curtail criminalisation).[99]

Accordingly, and irrespective of their penetrative or non-penetrative nature, the section contends that deceptive sexual relations and the relations prohibited by the principal sexual offences (concerning incapacity and coercion) are *equally* harmful to V's right to sexual autonomy. Nonetheless, that harm arises in contrasting ways, such that deceptive sexual relations represent a *different* wrong to the relations proscribed by the principal sexual offences (although within these relations—deceptive or incapacitated/coercive—penetration remains distinct from non-penetration). Impairment of the right to sexual autonomy comprises the *minimum* harm in cases of deception and incapacity/coercion, with any concrete ('experiential') harm being a further—empirical—matter. Moreover, that right exists as an interest worthy of criminal law protection, this extending beyond its status as a basic requisite of sexual well-being (in its negative mode)[100] to something that may enhance that—or any other personal—well-being (in its positive mode).[101]

A. *Criminalising Relations Proscribed by the Principal Sexual Offences*

What harming impact do the relations prohibited by the principal sexual offences have on V? A compelling answer is that they detrimentally affect V's

96 See L Farmer, 'Criminal Law as an Institution: Rethinking Theoretical Approaches to Criminalization' in RA Duff and others, *Criminalization: The Political Morality of the Criminal Law* (OUP 2014) 82–3; RA Duff, 'Towards a Modest Legal Moralism' (2014) 8 Criminal Law and Philosophy 217, 228; A von Hirsch, 'Harm and Wrongdoing in Criminalisation Theory' (2014) 8 Criminal Law and Philosophy 245, 250–1; P McGorrery, 'The Philosophy of Criminalisation' (2018) 12 Criminal Law and Philosophy 185, 198.

97 Duff (n 96) 218–19; RA Duff, *The Realm of Criminal Law* (OUP 2018) 55–8.

98 It is a form of the Harm Principle, similar to that espoused in J Feinberg, *The Moral Limits of the Criminal Law, Volume 1: Harm to Others* (OUP 1984) 31–6. For recent interpretations, see D Husak, *Overcriminalisation: The Limits of the Criminal Law* (OUP 2008) 72; AP Simester and A von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing 2011) ch 3. Within this tradition, when discussing criminalisation of sexual offences, some writers apply wrongfulness before harmfulness: see Gardner and Shute on rape (n 73).

99 See eg M Moore, *Placing Blame: A Theory of Criminal Law* (OUP 1997) ch 1; Duff (n 96) 222–4; Duff (n 97) 71–5.

100 Reminiscent of what Feinberg (n 98) would term a 'welfare interest': 37.

101 Simester and von Hirsch (n 98) suggest that interests (or 'resources') are the long-term assets or capabilities that humans have, independent of consciousness, relating to quality of life, which sustain or *enhance* well-being: 37. Separately, von Hirsch (n 96) also emphasises the positive dimension of resource-use: 250.

right to sexual autonomy. This presupposes an abstract—non-experiential—view of harm in these circumstances.

Of course, it is also possible to understand harm in such cases as *experiential* (usually psychiatric or physical: the former constituting conditions like post-traumatic stress disorder, the latter comprising serious bodily harm—including injury, pregnancy and sexually transmitted infection). However, these are empirical issues: the relations in question may be experienced as more *or* less harmful by different individuals, despite the fact that the form of those relations remains constant: incapacitated, or coerced, (penile) penetrative or non-penetrative sexual activity. Another problem is that experiential harm is necessarily absent in the 'pure' (unconscious) cases of sexual violation.[102] Wertheimer's view—that it is enough that D's conduct is *likely* to result in experiential harm, without insisting that V *is* harmed in any one case—is unconvincing.[103] It rests on a further empirical claim about the *probability* of harm occurring, something which, as Dougherty highlights, has never been investigated and, in any case, is susceptible to the challenges of collecting reliable evidence about the frequency of harm caused by, for instance, sex with unconscious people.[104]

In these relations, then, irrespective of any experiential harm which may arise, the claim is that, as a minimum, D's conduct *always* causes non-experiential harm.[105] V is attempting to deploy negative sexual autonomy, unwilling to engage in sexual activity at all (the baseline). However, D then has non-consensual sexual relations with V, *reversing* that baseline.[106] This harms V's right to sexual autonomy by setting it back: putting it in a worse condition to that which it was in prior to D's conduct. In deceptive sexual relations, V's right to sexual autonomy is similarly set back: V tries to deploy negative sexual autonomy, but experiences non-consensual sexual relations. However, that non-consent is counterfactual: V had been seeking sexual activity according to V's deal-breaker. D's deception means V obtained an undesired experience in the course of trying, but failing, to acquire a desired experience. Whilst the deception thus affects V's negative sexual autonomy, it also impacts V's positive sexual autonomy.[107] The exception is deceptions where V is unaware that the activity—because of its nature (like intercourse) or purpose (like touching)—is sexual. In these circumstances, V did *not* seek a sexual encounter (through positive sexual autonomy fulfilment). In which case, V defaults to a state of

102 See section 3C.

103 Wertheimer (n 30) 111.

104 Dougherty (n 81) 726.

105 Non-experiential harm could be understood as 'principal' harm, with experiential harm viewed as 'aggravated' harm—in the context of rape, see D Archard, 'The Wrong of Rape' (2007) 57 *Philosophical Quarterly* 374, 380–2.

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

107 See section 4B.

negative sexual autonomy deployment. Consequently, these deceptions, like the relations proscribed by the principal sexual offences, are concerned with attacks solely on V's negative sexual autonomy—the only dimension of the right to sexual autonomy with which V was concerned. This common wrong-making feature explains why such deceptions should be criminalised under those offences.

On this assessment, the principal sexual offences are less concerned with capturing the *means* (incapacitation, coercion, etc) by which D obtains sexual relations with V than with the wrongful way those relations target V's negative sexual autonomy. These relations thereby represent a wrong unique to the principal sexual offences, notwithstanding their individuation along specific lines—usually the form of sexual activity: penetration, non-penetration etc.[108] Broadly, that individuating process tracks the long-standing social and cultural meanings ascribed to these activities.[109] Of course, the principal sexual offences *could* be variegated further so as to reflect the means D used to secure sexual relations with V.[110] Using property offences as a template, this would particularise those offences even more: for example, in relation to non-consensual penile penetration, it would require multiple rape offences, such as rape by force (akin to robbery), rape by coercion (akin to blackmail), etc. Whether this degree of particularity is needed remains doubtful: the wrongfulness of the harm—directed only at V's negative sexual autonomy—is constant across these means. Of course, matters change where D uses *deception* to engage V in sexual relations.

B. *Criminalising Deceptive Sexual Relations*

The harming impact of deceptive sexual relations also links with V's right to sexual autonomy. Once more, this presupposes an abstract—non-experiential—view of harm.

Nonetheless, as with the principal sexual offences, it is similarly possible to conceive of the harm in deceptive sexual relations as *experiential*—for instance, where V discovers D's deception and endures 'deception regret', a type of psychological injury;[111] or where the sexual relations again cause V to sustain serious bodily harm in the shape of pregnancy and/or a sexually transmitted infection. Yet the empirical factors concerning experiential harm apply here too. Deceptive sexual relations may be experienced as more *or* less harmful by different people, despite the fact that the form of those relations is the same: deceptive (penile) penetrative or non-penetrative sexual activity. Moreover, there is the problem of the 'pure' case where V never discovers D's deception:

108 Green (n 65) 210. Individuation does not always occur along these lines: see the Canadian example (n 3).

109 L Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (OUP 2016) ch 9.

110 See SP Green, *Criminalizing Sex: A Unified Liberal Theory* (OUP 2020).

111 Wertheimer (n 30) 202.

as where V's deal-breaker enhances the intrinsic sexual gratification value of the encounter for V and V 'achieves' that gratification in ignorance of the deception. Wertheimer's response that it is enough that D's deception is *likely* to lead to experiential harm is again unpersuasive,[112] for the empirical reasons identified by Dougherty.

On this basis, irrespective of any experiential harm that may occur, D's conduct in deceptive sexual relations, as a minimum (and like in the relations proscribed by the principal sexual offences), *always* causes non-experiential harm. V is trying to secure positive sexual autonomy: a vision of sexual liberty according to V's deal-breaker (the baseline). But D's deception *frustrates* this vision, thwarting the advancement of that baseline. Simultaneously, V is additionally trying to secure negative sexual autonomy: the avoidance of sexual relations which go against that vision (the same baseline). Accordingly, the deception harms V's right to sexual autonomy by not only impeding the progress of V's baseline, but also, ultimately, reversing it.[113]

From this, it may seem that deceptive sexual relations are more harmful to V's right to sexual autonomy than the relations prohibited by the principal sexual offences: the former violate both positive and negative sexual autonomy, whilst the latter only violate negative sexual autonomy. But violating negative sexual autonomy is much *more* serious than violating its positive counterpart. Negative sexual autonomy permits everyone to resist undesired sexual encounters. It thereby applies to all individuals by virtue of their status as sexed human agents, regardless of whether they value sexual activity and are sexually active or not.[114] In comparison, positive sexual autonomy, which is only valuable to those who wish to enter into sexual relations, is less conducive to legal protection (although it requires that criminal law refrain from creating prohibitions which would constrain legitimate sexual options). This is because the 'harm' to an individual from the non-fulfilment of any preferred version of sexual activity is, *ceteris paribus*, negligible:[115] it is simply disappointment.

For these reasons, whilst V will be dissatisfied at not securing positive sexual autonomy in deceptive sexual relations, the proper basis of V's complaint will be that D violated V's negative sexual autonomy—by subjecting V to counterfactually non-consensual sexual activity. In reality, then, given that V's baseline finishes in an identical position–set back from where it started–in deceptive sexual relations and the relations prohibited by the principal sexual offences, both sets of relations harm V's right to sexual autonomy to an *equivalent degree*.

Nevertheless, for criminalisation purposes, it is significant that V attempts to deploy positive sexual autonomy in deceptive sexual relations. Here, D's attack

112 Wertheimer (n 30) 203–4.

113 This is true even where D deceives V about V's deal-breaker *during* sexual relations. Here, V secures positive and negative sexual autonomy up until D's deception, at which point V stops securing both these forms of sexual autonomy.

114 Archard (n 105) 391–2.

115 Indeed, Herring (n 71) claims there is no harm: 66–7.

on V's positive sexual autonomy signals a difference in wrongfulness between those relations and the relations caught by the principal sexual offences. In the former, D's wrongdoing is *internal* to the sexual context into which V willingly enters with a deal-breaker—absent D's deception, the relations would have proceeded along the lines V sought, leading to positive sexual autonomy fulfilment. In the latter, D's wrongdoing is *external* to that context—V is unwilling to be a part of it.[116] That unwillingness means that, for V, the relations can never come to any good.[117] In each case, the relationship between D and V is qualitatively different: D's wrongdoing has a separate moral foundation. Deceptive sexual relations thus represent an *independent* wrong from the relations prohibited by the principal sexual offences. Aside from instances where V is unaware that the activity—because of its nature (like intercourse) or purpose (like touching)—is sexual, this is true for *all* deceptions, whether they concern impersonation, purpose *simpliciter*, an attribute of D, the legality of the relations[118] or even a physical aspect of the encounter—for example, D's biological sex, condom use, ejaculation, disease transmission, the body part or object with which D will penetrate V, or the part of V's body which will be penetrated.[119]

One implication of criminalising deceptive sexual relations is that it subordinates D's right to non-disclosure to V's right to sexual autonomy. In some scenarios—especially those concerning D's gender or HIV-positive status—it may be that D's motive for deceiving V is that this information as acutely personal and difficult to disclose. This will undoubtedly be true. Moreover, D may fear adverse reactions from V or others if D reveals the information. However, the harm which D's deception does to V's right to sexual autonomy justifies prioritising that right over D's right of non-disclosure.[120] Legally, if not morally, D's motive cannot negate D's culpability in committing a wrong—in this case, deception (assuming deception can be proved).[121] Ultimately, if D wishes to keep information private, the only way of avoiding criminalisation is to refrain from sexual relations with V where that information is material to V's decision to consent. This may be frustrating for D if D really wishes to have such relations with V, but it does not stop D having sexual relations with others for whom this sort of information is not material in that way.

116 V may be unwilling either from the very start of the relations or after they have begun.

117 Shute and Horder (n 38) make a similar argument for distinguishing deception from theft: 553.

118 As where D, who is below the age of sexual consent, tells V, an adult, that D is above the age of sexual consent, that fact being a deal-breaker which induces V into sexual relations. See Green (n 65) 238–51.

119 Although deception as to physical matters could constitute 'aggravated' deceptive sexual relations.

120 See Herring (n 33) 523. For a contrary view in the context of gender fraud, see Sharpe (n 51) 74–83.

121 Sharpe (n 51) challenges this idea in the gender fraud realm, suggesting that deception may arise out of a desire for self-preservation, particularly in relation to structural and cultural inequalities that constrain transparency, and the potentially violent consequences associated with gender disclosure: 96. Of course, depending on V's threat, possible defences for D may include duress or one specially constructed as part of a series of deceptive sexual relations offences.

5. *Communicating Crimes: Fair Labelling*

The contrast in wrongdoing between deceptive sexual relations and the relations proscribed by the principal sexual offences suggests that the former relations merit separate criminalisation—individuated according to the type of the sexual activity (penetrative or non-penetrative)—from the latter. This is an issue of fair labelling.

The principle of fair labelling was originally identified by Ashworth.[122] It reflects, in his words, a:

> need to ensure that widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking.[123]

This highlights a desire to differentiate between families of offences and individual crimes within those families, so that on conviction the essence of D's conduct is communicated unambiguously to specific audiences. As identified in section 4, the problem with criminalising deceptive sexual relations within the principal sexual offences is that this *misrepresents* the wrongfulness of D's conduct. That is objectionable of itself. But it is especially objectionable because of the effects that *follow* conviction. Such effects are created by the audiences to which criminal offence labels speak. Generally, these audiences are located either *within* the criminal justice system (like prosecutors, barristers, judges) or *outside* it (chiefly the public). The division of audiences into these categories is a function of the different ways in which they process the names of crimes.

This section starts by discussing how criminal justice professionals process offence names, generating what are the 'formal' effects of conviction (stemming from application of relevant laws, rules, codes, etc). It then analyses how the public processes those names, inflicting what are the 'informal' effects (i.e. the social consequences) of conviction. Indeed, it pays special attention to these informal effects given their more problematic nature. Ultimately, the range and nature of *both* kinds of effects amplify the need to criminalise deceptive sexual relations independently.

A. *Criminal Justice Professionals and Offence Labels: The Formal Effects of Conviction*

Within the criminal justice system, offence labels generate formal effects on conviction—notably, at sentencing (whether this comprises custodial sentences or other punishments, such as community service or signing a sex offenders'

122 Albeit initially termed 'representative labelling' and limited to denoting fault: A Ashworth, 'The Elasticity of Mens Rea' in CFH Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworth 1981) 45, 53.

123 A Ashworth, *Principles of Criminal Law* (6th edn, OUP 2009) 78.

register for a period of time). This is significant for individuals who deceive others into sexual relations. As many common law jurisdictions currently criminalise these relations under their principal sexual offences, those individuals are sentenced as if their wrongdoing was the *same* as that under those offences. Yet, as this article has suggested, that wrongdoing is different. Deceptive sexual relations thus require a tailored sentencing regime to tackle this difference—even if, because of identically serious harms, that regime bears some resemblance to the one attached to the principal sexual offences.

Moreover, the offence a person is convicted of will have implications for any *future* criminal conduct they commit. This is certainly the case in England and Wales. Here, when deciding whether prosecution of a crime is in the public interest, prosecutors are entitled to refer to D's *previous* convictions in determining D's level of culpability for that crime.[124] If a prosecution proceeds, those convictions may even be admitted during trial as evidence of D's bad character—and thereby taken into account by the judge or jury in reaching a verdict.[125] Where that verdict is one of guilt (or D pleads guilty), the accompanying sentence can also be influenced by previous convictions.[126] For these reasons, there is a need for criminal records to capture the essential elements of an offence (including differences in wrongdoing) in a form that is useful.[127]

B. *The Public and Offence Labels: The Informal Effects of Conviction*

Outside the criminal justice system, offence labels produce 'informal' (and, potentially, longer-lasting) effects. Convictions are matters of *public* record,[128] manifestations of official state censure—against a particular person—in the most open of forums, with their own symbolic and condemnatory quality. Inevitably, that encourages negative judgment of the wrongdoer by society. Such judgments are the product of complex social phenomena caused by the stigma that is attached (in varying degrees across time and space) to different crimes. Communities use that stigma to devalue and discredit the person in question.[129] As Hoskins notes, this stigma 'can manifest in the decisions of employers or landlords to deny jobs or housing, respectively, to offenders'.[130] This dual impact on jobs and housing extends beyond the offender to include families and dependents too. In particular, the effect of a conviction on

124 Crown Prosecution Service, 'The Code for Crown Prosecutors' (January 2013) www.cps.gov.uk/sites/default/files/documents/publications/code_2013_accessible_english.pdf, accessed 16 January 2019.

125 Criminal Justice Act 2003 (CJA), ss 101–8. 'Bad character' includes 'evidence of, or a disposition towards, misconduct': s 98. 'Misconduct' means 'the commission of an offence or other reprehensible behaviour': s 112(1).

126 CJA, s 143(2).

127 J Chalmers and F Leverick, 'Fair Labelling in Criminal Law' (2008) 71 MLR 217, 231.

128 Ashworth (n 123) 78.

129 See E Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Simon & Schuster 1963) ch 1.

130 Z Hoskins, 'Criminalization and the Collateral Consequences of Conviction' (2018) 12 Criminal Law and Philosophy 625, 626.

employment prospects can be especially devastating, with studies demonstrating at least some discrimination by employers directed at offenders.[131] Logan also notes that convictions can disrupt or sever the social ties that can be key to finding a job—and even where employment is offered, offenders on average enjoy much lower earning capacity than those without a conviction (fuelling depression and low perceived self-worth).[132] Elsewhere, the ignominy associated with a conviction can have a self-fulfilling criminogenic effect, predisposing offenders to becoming the deviants they were branded to be, and result in social ostracising—sometimes resulting in offenders (and close family and friends) being singled out for death, beatings, arson or vandalism by fellow community members.[133]

Whilst it is not clear exactly how a *specific* offence label affects access to jobs or housing, it is probable that the more stigmatic the crime, the more likely that access will be compromised. The principal sexual offences are undoubtedly stigmatic,[134] with rape being uniquely tainting. As Warburton notes, the social opprobrium reserved for the 'rapist' is 'huge'.[135] In Great Britain, rape continues to be seen as the most serious crime after murder,[136] with the Scottish Law Commission noting that 'rape' has an 'important role in expressing social disapproval of a certain sort of sexual wrong'.[137] Meanwhile, 'sexual assault' and 'indecent assault' are also presumably stigmatic given their well-known status as sexual offences. Considering, then, the view that deceptive sexual relations represent a different wrong to the relations prohibited by the principal sexual offences, it is appropriate that such conduct be given its own set of crimes. This is so that civilians can discern the criminal law's designation of that wrong as *distinct* and deserving of its *own* condemnation.

Indeed, this distinction will be relevant to employers and landlords in their decisions regarding those convicted of deceptive sexual relations. Of course, they may view these individuals just as negatively even where that distinction is made clear. However, the point is that, in deciding whether to embark upon a professional relationship with D, they are given a more precise idea of the *type* of conduct D has perpetrated. Labelling deceptive sexual relations and the relations prohibited by the principal sexual offences separately would also sharpen the stigma attached by communities to these different wrongs.

131 See H Lam and M Harcourt, 'The Use of Criminal Record in Employment Decisions: The Rights of Ex-offenders, Employers and the Public' (2003) 47 Journal of Business Ethics 237; R Homant and D Kennedy, 'Attitudes Towards Ex-offenders: A Comparison of Social Stigmas' (1982) 10 JCJ 383.

132 W Logan, 'Informal Collateral Consequences' (2013) 88 Wash L Rev 1103, 1108.

133 (n 132) 1107.

134 On tracking the evolving perceived seriousness of sexual offences, see Farmer (n 109) 291.

135 D Warburton, 'The Rape of a Label: Why It Would Be Wrong to Follow Canada in Having a Single Offence of Unlawful Sexual Assault' (2004) 68 JCL 533, 534 and 542.

136 Government Equalities Office, 'Has Anything Changed? Results of a Comparative Study (1977–2010) on Opinions on Rape' (April 2010) 4. The survey excludes Northern Ireland.

137 Scottish Law Commission, *Rape and Other Sexual Offences* (Scot Law Com No 131, 2006) para 4.16.

Of course, the tailored criminalisation of deceptive sexual relations would not only bring *ex post* labelling benefits; it would also provide improved *ex ante* guidance for civilians. This is a fair warning point: citizens should be advised as to *how* their conduct will be censured so that the criminal law embodies certainty, clarity and prospectivity.[138] But fair warning has implications for fair labelling. This is because there is a *link* between the *ex post* ability of societies to react appropriately to criminal conduct and their *ex ante* perception of how far that conduct is criminalised legitimately. That link matters because it affects the criminal law's *credibility*—and hence its fair labelling *power*—in the eyes of a community. But what if the criminal law's guidance does not correspond to what those communities believe to be valid differences in wrongdoing? Will that not compromise fair labelling? Perhaps a community thinks that deceptive sexual relations are a lesser, or even greater, wrong than the relations prohibited by the principal sexual offences. If so, it may under- or over-stigmatise deceivers, respectively, even where deceptive sexual relations are prohibited separately. Or maybe a society considers that deceptive sexual relations are not wrong at all, so should not be criminalised—resulting in no stigmatisation of deceivers and likely disrespect for, and disobedience of, any crimes targeting those relations.

In between these two positions, it is easy to envisage other possibilities. A community might believe that some deceptive sexual relations are as wrong as the relations criminalised by the principal sexual offences, whilst all others are different wrongs and should be criminalised independently. Or that whilst some such relations are different wrongs, and so should be criminalised independently, not all are wrong, so should not be criminalised. This would yield further stigmatisation issues, with associated effects. These problems become even more challenging where groups *within* a community take diverging views on the wrongfulness of deceptive sexual relations.

Unfortunately, in securing fair labelling, there is limited empirical evidence to determine what the citizens of any community feel about the wrongfulness of deceptive sexual relations. In property offences, there is some proof that lay people interpret deception as a much *lesser*, rather than just qualitatively different, wrong than most other illegitimate means of taking another's property (save for receiving stolen goods and failing to return misdelivered property).[139] There is also data which shows that popular opinion does not think that *all* deceptive sexual relations should be criminalised—only fraudulent medical procedures, spousal impersonation and sexually transmitted diseases.[140]

138 Simester and von Hirsch (n 98) 198–9.

139 SP Green and MB Kugler, 'Community Perceptions of Theft Seriousness: A Challenge to Model Penal Code and English Theft Act Consolidation' (2010) 7 Journal of Empirical Legal Studies 511, 526–30. In England and Wales, see also Criminal Law Revision Committee, *Eight Report: Theft and Related Offences* (Cmnd 2977, 1966) para 38.

140 Bryden (n 95). See also Green (n 65) 223–38.

Accordingly, there is a risk that, were this article's criminalisation suggestions to be adopted, this would actually frustrate fair labelling. What to do?

Ultimately, there is no presumption that the criminal law should follow community intuitions about wrongdoing in criminalisation and labelling decisions. Of course, it is *desirable* that the content and scope of criminal law reflect such intuitions,[141] otherwise it may suffer from a lack of public respect and compliance.[142] But this will not happen all the time: societal perspectives on criminalisation and labelling will differ, and those differences may be difficult to capture in law. Even where there are majority perspectives on these factors, embracing them raises questions about majoritarianism at the expense of minority interests. Consequently, the criminal law should occasionally take its own line on what to criminalise and how to label it—particularly in sensitive areas like sexual offences, where public attitudes may be regressive. This involves defending exactly the kind of normative position this article has taken in relation to criminalising conduct. To this end, sometimes the criminal law should educate popular opinion as to why and how a certain kind of behaviour should be prohibited.[143]

6. *Conclusion*

Deceptive sexual relations are wrong. Indeed, this article has argued that *all* such relations are wrong—morally and legally. But the article has also argued that deceptive sexual relations represent a *different* wrong to the relations proscribed by the principal sexual offences, even though they cause equal harm to V's right to sexual autonomy (via its negative dimension). In common law jurisdictions, where deceptive sexual relations are often prohibited by the principal sexual offences, this raises matters of criminalisation and fair labelling, necessitating the creation of a separate series of deceptive sexual relations offences (thereby also reflecting the specific forms of contact—penetrative or non-penetrative—that D may inflict on V). This idea recognises the need for what Green calls a more *nuanced* approach to the way liberal societies structure their sexual offences.[144] In pursuing such an approach, it is evident that deceptive sexual relations – when compared to other means of sexual violation – require independent criminalisation in any sexual offences framework. They thus represent a more pressing problem for the structure of sexual offences, at least in common law jurisdictions, than has hitherto been understood.

141 Horder makes one of the most forthright cases for this in the context of homicide: see J Horder, *Homicide and the Politics of Law Reform* (OUP 2012) ch 1.

142 V Tadros, 'Fair Labelling and Social Solidarity' in L Zedner and J Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (OUP 2012).

143 Chalmers and Leverick (n 127) 241. See also L Green, 'Should Law Improve Morality?' (2013) 7 Criminal Law and Philosophy 473.

144 Green (n 65) 219. Green would not, however, criminalise every kind of deceptive sexual relation, instead, following an empirical guide to criminalisation based on the research by Bryden (n 95): Green (n 65) 219–38.