Sexual Offences and Defined Consent:

Lessons from the Past and a Framework for the Future

Kyle L. Murray

Introduction

In recent years, there has been renewed public discussion of the ethical and legal issues raised by deceptive sexual encounters. This has been sparked by high profile legal cases – involving stealthing/contraceptive sabotage, so-called gender fraud, and undercover police relationships – along with representation in popular TV shows such as Michaela Coel's 2020 BBC series, *I May Destroy You* (the subject of Christina Mansueti's chapter in this collection).

When might such encounters lead to a sexual offence? When *should* they? Under the current structure of non-consensual sexual offences – defined as sexual contact without the consent of the complainant, and without a defendant's reasonable belief in consent – the legal question becomes: when does a false belief make a sexual encounter non-consensual?[1]

These are by no means new questions, however – they have troubled the law for centuries. This chapter critically examines the way the law of England and Wales has approached them, historically and today. I identify a repeated tendency to draw restrictive lines around what matters are capable of undermining consent – the legacy of a framework dating back to the nineteenth century.

My core argument is that these line-drawing approaches are unsuitable for a modern and

principled law of sexual offences supposedly grounded in the value of sexual autonomy. They require judges to answer what are deeply personal and contestable questions surrounding the true 'nature' or 'essence' of a sexual encounter. If we are to respect sexual autonomy, these questions belong in the hands of the people involved. On this basis, I set out a framework of 'defined consent'. The act of consenting already necessarily involves an idea of what it is one is agreeing to. This approach holds that outside the scope of this defined encounter, there is no consent.

The argument proceeds as follows: the second and third sections trace the history of the courts' approach from the early nineteenth century to the modern day. While the courts have long recognised the principle of non-consent in cases of fraudulent/mistaken sex, in practice this has consistently been limited by their own interpretations of the nature of a sexual act.

In the fourth section, I draw out the harms these restrictive approaches do to the idea of sexual autonomy. Looking forward, I demonstrate how an alternative conception of these cases – an expansive approach of 'defined consent' – can work to protect sexual autonomy more fully, while avoiding the concerns that have worried the courts.

Historical Distinctions: Fraud, Vitiated Consent, and Non-consent

An early strand of case law – dating back to 1824 – applied a general rule that fraud vitiates consent. This was used to uphold non-sexual assault convictions in cases where defendants had: persuaded (and physically assisted) a woman to strip under the pretence of a medical examination;[2] induced sexual activity by impersonating a woman's husband;[3] and had intercourse while not disclosing their infection with a venereal disease.[4] As one judge explained to the jury: the key to conviction was that the complainant 'would not have

consented if she had known the fact' of the matter involved, because then 'her consent is vitiated by the deceit'.[5] While one of these cases saw a conviction for indecent (in modern terms, sexual) assault through intercourse,[6] the courts repeatedly rejected that the vitiated consent could lead to a rape charge. The illogic of this distinction between what was, really, the same issue of consent about the same conduct, was later realised.[7]

For sexual offences, the logic of vitiated consent eventually came to be replaced by the different idea of non-consent. This idea was first seen in *R v Case* (1850). A medical practitioner had sexual intercourse with a young girl under the pretence that it was treatment rather than a sexual act. The court upheld the assault conviction on the basis that the complainant had 'consented to one thing' – treatment – and the defendant 'did another materially different'.[8] The issue was not that agreement was tainted by fraud, but that there was in fact *no agreement at all* to what happened. While it had not been charged, the Chief Justice further indicated that this logic could 'perhaps' ground the offence of rape.[9] This was followed up on in *Flattery* (1877), upholding a rape conviction in similar circumstances: 'the only thing she consented to was the performance of a surgical operation'.[10] The vitiated consent strand of cases was finally killed off following *Clarence* (1888), which rejected clearly the general proposition that fraud vitiates consent. The leading judgments explained the previous cases instead on the basis that 'consent […] does not exist at all, because the act consented to is not the act done'.[11] This idea was applied to both sexual and non-sexual assault offences.[12]

The material difference view of non-consent, then, had come to apply across the spectrum of non-consensual offences. Cases of fraudulently-induced consent came to be covered by the different statutory offence of procuring intercourse with a woman by 'false pretences or false

representations'.[13]

Non-consent and the 'Nature' of the Act: A Legacy of Judicial Line-drawing

The idea that there is no consent when someone has agreed to something different to what happens seems intuitive.[14] Applying it, of course, requires one to determine when the act is 'materially different' to that agreed. It seems equally logical, however – given the issue is whether *the complainant* agreed to what happened – that this question should be answered by looking at exactly what it is *the person doing the agreeing* considered themselves to be agreeing to. This is the approach I will propose in this chapter.

In the century and a half which has followed the recognition of the non-consent idea, however, the courts have answered the question in a more limited way, using their own judgements about the essence of a sexual act.

The Historic Nature and Identity Categories

We saw this first in the 'nature of the act' category set out in *Clarence.* Justices Wills and Stephen were careful to limit the scope of the non-consent principle, noting that it had never been applied outside the context of ignorance of the 'nature of the act' as a sexual act *per se* – as in the medical pretence cases – or impersonation of a woman's husband.[15] This is often referred to as two categories: deception 'as to the nature of the act or the identity of the agent'.[16] In reality, however, the identity of the agent was relevant *because* it altered the nature of the act which occurred. Initially, this applied only to the husband impersonation situation, the logic being that marital and adulterous intercourse were 'wholly different in their moral nature', so that agreement to one is not agreement to the other.[17]

In the century which followed, the principle continued to be applied exclusively in these situations of surgical fraud and impersonation – although the impersonation idea was eventually updated at common law to cover impersonation of the (long term) partner of a woman, to reflect changes in societal values by the latter part of the twentieth century.[18] *Clarence* itself had rejected the relevance of venereal disease to the nature of the act. The majority dismissed the argument that the complainant had consented only to intercourse with a healthy partner – 'a natural and healthy connection', as Justice Field put it in his dissent.[19] Instead, the consent to the intercourse that happened was said to be 'as full and conscious as consent could be'.[20] In 1995, *Linekar* used the narrow approach to overturn a conviction for rape where a sex worker had intercourse on the basis that the customer would pay as agreed. Despite his never having the intention nor means of paying, the court found no relevant difference – the complainant had agreed to the 'actual act of intercourse'.[21]

What other situations could lead to a finding of non-consent remained to be decided on a case-by-case basis. As some noted at the time, the lack of clarity this brought to the scope of non-consensual sexual offences was unfortunate.[22] What was clear, however, was that the issue of whether a sexual encounter was different to that agreed to was a matter over which the courts had taken ownership.

The Modern Approach: The Closely Connected Test

The law of sexual offences was overhauled in 2003 through the Sexual Offences Act (SOA). The aim was to create a clear and coherent law, updated for the twenty-first century.[23] In particular, the reform was based on the idea that sexual offences are 'primarily crimes against the sexual autonomy' of people, defined as the 'right and the responsibility to make decisions

about their sexual conduct'.[24] For the first time, the SOA 2003 introduced a statutory definition of consent. Under Section 74, 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice'. This definition is relevant both for the issue of whether the complainant consented to the sexual activity, and whether the defendant lacked a reasonable belief in consent.

Although the aim was to update the law, the historic categories found their way into the SOA's use of presumptions for consent and deception, albeit with some alterations. Under Section 76, if the defendant has 'intentionally deceived the complainant as to the nature or purpose of the relevant act' (s76(2)(a)), or 'intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant' (s76(2)(b)), it will be concluded that there was no consent, and no belief in consent. In these circumstances, there can be no further argument at trial. The jury will be directed to convict. For this reason, the courts have been reluctant to use the presumptions.[25] Instead, most of the consideration of mistaken/deceptive sex post-2003 has been under the general consent provision in Section 74.

Emphasising the idea of choice in Section 74, the courts found that rape could be established where complainants consented to sex on the basis that a condom be used, or that their partner withdraw before ejaculation, and the defendants had deliberately failed to do so.[26] As the Court of Appeal in *McNally* summarised these developments in 2013: 'the alleged victim had consented on the basis of a premise that, at the time of the consent, was false'.[27] Applying this logic, the Court of Appeal upheld a conviction where the defendant had – as the case was presented to them – 'falsely represented' their gender: this undermined the choice of the complainant 'to have sexual encounters with a boy'.[28]

Like the material difference view of non-consent, the choice logic also had the potential to be wide in scope. As it was put in *F v DPP,* for example, the complainant 'was deprived of choice relating to the crucial feature on which her original consent to sexual intercourse was based'.[29] There was no mention of a limit on what that feature could be. Once again, however, it was not long before the courts took a more restrictive reading. In doing so, they have come back to the familiar task of assessing for themselves the relevant nature of the sexual encounter.

In *Lawrance* (2020), the Court of Appeal stated that the test is whether the matter 'is so closely connected to the nature or purpose of sexual intercourse' to be capable of negating consent.[30] Cast in these terms, condom removal and non-withdrawal were said to be related to the physical nature of the act,[31] whereas the gender cases were explained on the basis that 'the nature of the sexual act was "on any common-sense view, different where the complainant is deliberately deceived by the defendant into believing that the latter is male"'.[32]

In *Lawrance,* the defendant assured the complainant that he had undergone a vasectomy – she had made clear she would only agree to sex on this basis. He was convicted of rape accordingly. Using the closely connected test, the Court of Appeal overturned the conviction. That the complainant would never have agreed to the sex had she known the truth about the vasectomy was, the court found, not enough to undermine consent in law because fertility did not relate to the 'physical performance of the sexual act but to risks or consequences associated with it' – pregnancy.[33]

In coming to this formulation, the courts were explicitly looking to the common law categories dating back to the nineteenth century: they rejected the idea that the SOA 2003 should be taken as having changed the law from this traditional approach.[34]

Historical Concerns: Difficult Questions and Overcriminalisation

The legacy of the historical approach is evident in another way. In resisting the idea that the current law should be interpreted less restrictively, the courts have explicitly referred back to concerns first put by the judges of the nineteenth century.

In 1888, the leading judges in *Clarence* had worried that a more expansive application of non-consent would mean that 'many seductions would be rape', given the widespread use of fraud, non-truths, or blandishments in sexual relations.[35] Flash forward to *Lawrance* in 2020, and we see the courts still worried that there would be 'many circumstances in which a complainant is deceived about a matter which is central to her choice to have sexual intercourse': lies about marital or relationship status, 'employment or wealth', 'political or religious views' were the examples given, but the court feared they could be 'multiplied'.[36]

Yet, if such overcriminalisation was to be avoided – the worry continued – courts would need to be able to draw a bright line between those frauds which are capable of negating consent, and the 'thousand kinds' which, apparently, no one had ever thought to consider assault or rape. This would require answering what Justice Wills described in 1888 as difficult and 'very subtle metaphysical questions'.[37] Today, we are told by the Lord Chief Justice, these 'conceptual and practical difficulties of where to draw the line' are yet to be successfully confronted by those arguing for a more expansive approach.[38] The irony, however, is that the courts have brought these very difficulties on themselves: drawing substantive lines based on

the nature of the act, or matters closely connected to it, necessarily draws them into these subtle questions.

We saw this already in the idea from the husband impersonation cases that there is a moral difference between the nature of marital and adulterous intercourse. Judges have long been happy to endorse *this* metaphysical distinction. Indeed, it seemed obvious even to the judges in *Clarence* that 'consent to connection with a husband is not consent to adultery'.[39] When updated in 1994 to cover an unmarried partner there still appeared to be an implicit judging of the necessary quality of the relationship being impersonated, depending on how much significance one attaches to the references to 'long term' partner.[40]

Even the widely accepted medical pretence cases were based on metaphysical distinctions. The issue was not that the complainants were unaware that the acts were being done at all – it was their sexual meaning of which they were ignorant. Deeper than this, the courts' concern was not simply that the young victims were ignorant of the acts' sexual nature: the point was that they were unaware that the acts were, because of this nature, 'morally' wrong.[41] The courts accepted *this* metaphysical distinction too, apparently out of concern to preserve the moral integrity of – as one judge explicitly put it – the 'innocent girls' involved.[42]

While less openly moral in their concerns, the courts today still fail to appreciate the metaphysical and contestable nature of the distinctions they are making. For example, on their current explanation of the case law, the courts have taken the view that gender – while physically irrelevant – clearly goes to the heart of the sexual nature of an act, whereas marital status or wealth 'obviously' do not.[43] This may have been obvious to the court, but to others it reveals a narrow, heteronormative conception of sexual activity.

The courts never did avoid making the difficult and subtle metaphysical distinctions, then: it is just that the distinctions they do make *seem* straightforward because they accord with the judges' own concerns and inclinations.

Lawrance focussed on the *physical* nature of the act, but the lines drawn here are not much less subtle and contestable. There have now been rape convictions in cases of condom removal/non-wearing, and at least one of sabotage.[44] Applying *Lawrance*, we might say that in these cases the physical act is altered: in the first, through the skin-on-skin contact of unprotected sex as opposed to the barrier of a condom; in the second, through bodily contact with semen through a sabotaged condom. Yet, as Beatrice Krebs points out, the court overlooked that there *is* in fact a physical difference in the vasectomy situation also: the existence or non-existence of sperm in the semen.[45]

Krebs accuses the court in *Lawrance* of misapplying its own test regarding the physicality of the act. But, more fundamentally I suggest, the fact that we have so quickly arrived at the possibility of such miniscule – in the fertility example, literally microscopic – distinctions shows once again that the courts have drawn themselves deeply into the difficult, subtle questions they have for centuries claimed to avoid. Nor does this technical hair-splitting fit with the respect which, I argue below, these important issues – and the people they are important to – warrant.

A Framework for the Future: Sexual Autonomy and Defined Consent

It is hardly satisfactory for legal certainty that the lines drawn have come to be determined largely by judges' own conceptions of sexuality, or else by the vividness of the imagination

of the lawyers and judges who happen to be in the courtroom at the time. In this section, however, I argue that the main harm the restrictive approach does is to the value of sexual autonomy. The very idea of the judicial line-drawing approach should be rejected as a matter of principle. I then set out what a practical way forward more firmly grounded in the value of sexual autonomy could look like.

Sexual Autonomy and Non-consent

As noted above, the value of sexual autonomy underlying the current legislative framework of sexual offences holds that the individual has the right to make decisions about their own sexual conduct.[46] Putting this value to work requires that we are attuned to the way in which people actually make these decisions.[47] In any act of consent, the people involved will already have an understanding of the act to which they are agreeing. After all, agreement is always agreement *to something.* As Daniel Dennett explains more generally, 'one cannot want without wanting something, imagine without imagining something'.[48] This might be a clear and explicitly considered definition, such as 'I am agreeing to sex with a condom'. More often, however, it will be like what Mark Dsouza calls a 'visceral' idea – a picture in one's mind. Picturing the sexual act as sex with a specific person, for example.[49]

Yet, in turning their attention to external judgements about the nature of the act and what matters are relevant to it, we have seen the courts displace these understandings via their own, or, occasionally, wider societal standards (literal 'common sense').[50] If we are to take seriously a person's right to make decisions about their own sexual conduct, however, we ought to focus on the content of *their* decisions from the start. It is for the individual to define for themselves what the sexual encounter means to them. Doing otherwise takes the autonomy out of 'sexual *autonomy*'.

The Defined Consent Approach

I argued earlier that the reasoning behind the courts' refusal to give unfiltered attention to individuals' own definitions of what it is they are agreeing to is incoherent – self-defeating, even. However, even on an expansive approach, there is some truth to the idea that we need a clear and practical way of distinguishing those background misconceptions which do not change the nature of the encounter agreed to, from those central ones which do. It is surely not the case that every single matter *whatsoever* about which someone might be mistaken at any time (probably a lot!) would make their sexual encounters non-consensual – it is difficult to see how we could consent to *anything* in that case. The point is that the relevant scope of the sexual encounter is that set by the complainant's own characterisation.

The dominant test among those who accept that at least *some* mistaken beliefs can undermine consent limits these to so-called dealbreakers. For example, on Jonathan Herring's much-discussed 'Mistaken Sex' proposal, if, at the time of the sexual activity, a person is mistaken about a fact (any fact), and 'had s/he known the truth about that fact would not have consented' to the sexual act, there is no consent.[51] On the courts' current restrictive approach, it also appears to be this 'but for' test that is mediated by the closely connected standard.[52] However, the counterfactual nature of this test risks missing the point of non-consensual offences. The point is, as Emily C. R. Tilton and Jonathan Jenkins Ichikawa put it, 'what one *does* agree to, not what one *would have* agreed to in counterfactual circumstances'.[53]

Also rejecting this counterfactual, Dsouza emphasises the need to look to the state of mind of the complainant at the time of the consent. On his Refined Model, a belief may play a part in a person's consent in two ways: they may impose a specific precondition on their agreement,

or the matter might form part of 'the parameters of the object of [their] consent'.[54] The second maps onto the idea above that agreement is, by definition, agreement *to something* in particular. However, the first – the preconditions category – extends beyond that. As Dsouza sees it, even in cases where the precondition does not go to the content of the encounter as envisaged by the complainant, the fact that this condition is unfulfilled would still negate their consent. He gives the example of it being highly unlikely one would frame a precondition that their partner washes the dishes before sex as consent to 'post-dishwashing sex'.[55] Even if not, for Dsouza, as long as the person actually had in mind this precondition of consent at the time they gave their agreement, the act would be non-consensual.

But this also seems overinclusive. Like the counterfactual, in this instance the precondition does not, even in the complainant's own mind, go to the issue of what was agreed to *as part of the sexual encounter at the time.* As Dsouza explains, its relevance is that the fulfilment of the prior condition was set by the complainant as necessary for the consent's 'validity' – necessary for the consent 'to arise'.[56] In focusing on how the validity of consent may be triggered, this looks more like an approach of tainted or induced consent than non-consent which, as this chapter has traced, is concerned with the content of the sexual encounter agreed to rather than its background conditions. Indeed, it is still a dealbreaker approach. Put another way, in the same way Dsouza notes about making one's consent depend on *future* matters – 'wash the dishes *afterwards*' – (which he rejects), here the complainant is wronged 'by the fact that the […] event did not come to pass, rather than by the sexual act'.[57]

Instead, to remain focussed on the central idea of non-consent – the encounter to which the complainant did or did not agree – I suggest the following formulation. We can call this 'defined consent':

> Whether the complainant agreed to the sexual activity should be determined with reference to the complainant's understanding of the sexual encounter of which it was a part, including any factors they understood to be a defining or crucial feature of that encounter at the time.

Put into the structure of non-consensual offences, the scope of a sexual encounter is necessarily limited to those matters framed in relation to the time the act mentioned in the offence – e.g., penetration – takes place. On this basis, past and future conditions – if merely triggers for the consent's validity – would be excluded.[58]

Defined Consent in Practice

We can see further how this approach looks in practice by reading some recent case law in this way. The cases of contraceptive sabotage would be regarded as involving consent to *sex-with-a-(viable)-condom*. The case of non-withdrawal is read in the same way: the complainant chose to have *sex-without-internal-ejaculation.* On this reading, these cases do not depend on the idea of conditional consent – that unfulfilled preconditions invalidate consent.[59] Instead, the existence of such explicit conditions is evidence of the fact that, for the complainant, these matters were defining features of the sexual encounter to which they agreed. Likewise in the vasectomy situation. Reconsidering the sex worker case, a condition of payment may be evidence that the complainant at the time conceived of the sex as *sex-with-a-bona-fide-customer* – that is, someone with the intention and means of paying. This logic also provides a plausible account of the reasoning we saw in *McNally*: that there was no consent because the complainant 'chose to have sexual encounters with a boy'. She did *not* choose to have 'a sexual encounter with a girl'.[60] As was put simply when the non-consent idea was originally recognised back in 1850: in these cases, the complainant agreed to one thing, the defendant did another. As such, there was no agreement to what happened.[61]

Viewing matters this way avoids the conceptual difficulties that have troubled the courts. The issue of what the *individual* took as a core part of the encounter agreed to is a factual, evidential issue, rather than a metaphysical or moral question: what did the complainant picture themselves as agreeing to? This – along with what the defendant realised (or should reasonably have) about the complainant's consent – are questions of the kind juries already answer in criminal law whenever we ask them to establish the state of mind of complainants and defendants.

Some Common Objections Answered

Part of the worry has been that if we do not draw the line *somewhere* substantive, we bring a whole range of new conduct within the scope of criminal law. However, as emphasised already, not *every* single misconception or white lie in the circumstances of sexual relationships would negate consent. Nor even all those which *would* have made a difference to the complainant had they known. Consent is negated only where the matter formed a core feature of the encounter envisaged by the complainant at the time of the sexual act. Even then, criminalisation would only follow where it is also found that the defendant lacked a reasonable belief in consent. The more obscure (by general standards) a view of what was a key part of the encounter, the less likely it is that the defendant will have, or ought *reasonably* to have realised its importance (absent a particularly express statement from the complainant). Before that, its actual importance to the complainant would also be more difficult to establish to a jury. This already limits the scope of the offences and ensures that those matters which do make it through fit with their core justification: a culpable violation of the complainant's consent.

The defined consent framework can also put into perspective some often-raised concerns regarding discriminatory criminalisation. Reading the cases on gender/gender history within this framework avoids implying a challenge to the authenticity of trans or gender non-conforming people – as has been argued against the dominant reading of so-called 'gender fraud'.[62] There is no need for the 'fraud' label at all because deception is not the basis of culpability on this framework: the issue is that what happened differed from the complainant's idea of what they were agreeing to, and the defendant knew this (or ought reasonably to). This is about the complainant's consent, not the validity of the defendant's self-identity or the way they perform it.

Further, while justifying these convictions on the basis that gender and/or biological sex[63] is closely connected to the nature of a sexual act *per se* – as the courts currently do – does commit the law to a narrow, arguably hetero- and cis-normative view of sexual relations,[64] the defined consent approach does not invite the courts to make any such judgement. In looking to the definition of the encounter envisaged by those involved, that matter is properly left to people themselves to decide.

There may be concern that this nonetheless leaves the door open to criminalisation based on 'bigotry' – where consent is premised on racial heritage, or again, gender/gender history, for example.[65] Perhaps, then, the problem of discriminatory attitudes has merely been moved from the minds of judges to complainants. However, this placement is important, because here we come across the principle of sexual autonomy. From here, I suggest, we can tackle the concern head-on: respecting this core value of sexual offences means respecting the right of individuals to make choices we do not agree with – even those we find morally problematic. This is especially so given that criminalisation is based on a further element of a

lack of (reasonable) belief in consent which, as already noted, works to ensure that liability only arises for culpable violations of sexual autonomy.

Conclusions

The law's take on sex in circumstances of deception or mistake has a long legacy of failing to respect sexual autonomy. In a way, this seems unsurprising, given that even the courts' modern approach can be traced back to Victorian times, in both its content and rationale. After all, that was a time which entertained the idea that there was an obligation on women to submit to intercourse with their husbands.[66] But today, when sexual offences are purportedly grounded in a modern view of sexual autonomy and choice, we can, and should, do better. In looking backwards, the courts have sought to draw lessons from previous cases. However, I suggest that the lesson to be learned from the history traced in this chapter is, instead, this: if we are to achieve a principled approach to sexual consent, we must shake off the historical legacy of judicial line-drawing and place the decisions about the scope of a sexual encounter where they belong – in the hands of the people themselves. The defined consent approach allows us to do this in a clear and practical way. The courts' longstanding worries about the dangers of doing so are – and always have been – misguided.

Notes

[1] The non-consensual offences are found in the Sexual Offences Act 2003: Sections 1 (rape); 2 (non-consensual penetration); 3 (sexual assault); and 4 (causing another to engage in sexual activity without consent).

[2] *R v Rosinski* (1824) 1 Moody 19; 168 ER 1168.

[3] *R v Saunders* (1838) 8 C & P 265; 173 ER 488; *R v Williams* (1838) 8 C & P 286; 173 ER 497.

[4] *R v Bennett* (1866) 4 F & F 1105; 176 ER 925; *R v Sinclair* (1867) 13 Cox CC 28.

[5] *Sinclair*, p. 29 (Shee J).

[6] *Bennett*.

[7] See, for example, *R v Dee* (1884) 15 Cox CC 579, p. 585 (May CJ.

[8] *R v Case* (1850) 1 Den 580; 169 ER 381, p. 382.

[9] Ibid., p. 382 (Wilde CJ).

[10] *R v Flattery* (1877) QBD 410, p. 413.

[11] *R v Clarence* (1888) 22 QBD 23, p. 44.

[12] The case has since been departed from for bodily harm offences involving sexually transmitted infections, distinguishing consent to sex from consent to risk of harm: *R v Dica* [2004] EWCA Crim 1103; [2004] QB 1257.

[13] First introduced for underage girls in Offences Against the Person Act 1861, s49. Extended to women (of 'good moral character') in Criminal Law Amendment Act 1885, s3(2). Extended to all women in Sexual Offences Act 1956, s3. It was quietly repealed by the Sexual Offences Act 2003.

[14] For theoretical analysis of this idea, see Emily C. R. Tilton and Jonathan Jenkins Ichikawa, 'Not What I Agreed To: Content and Consent', *Ethics*, 132.1 (2021), 127–54.

[15] *Clarence*, p. 44 (Stephen J), pp. 28–29 (Wills J). On husband impersonation, see e.g., *Dee* (1884); clarified in Criminal Law Amendment Act 1885 s.4; restated in SOA 1956 s.1(2) and Criminal Justice and Public Order Act 1994 s.142.

[16] See *R (on the application of Monica) v DPP* [2018] EWHC 3508 (Admin); [2019] 2 WLR 722, [52].

[17] *Dee*, p. 587 (May CJ).

[18] *Elbekkay* [1994] EWCA Crim 1 (unreported). In the surgical fraud category, see *R v Williams* [1923] 1 KB 340 (agreement under pretence that intercourse with a singing teacher was a procedure to assist with breathing).

[19] *Clarence*, p. 59.

[20] Ibid., p. 44.

[21] *Linekar* [1995] QB 250, p. 255.

[22] Law Commission, 'Consent in Sex Offences', Annex C to Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences*, 2 vols (2000), II [5.5]; Criminal Law Revision Committee, Fifteenth Report, *Sexual Offences* (1984), [2.25].

[23] Home Office, *Setting the Boundaries: Reforming the law on sexual offences*, 2 vols (2000), I pp. i–iii.

[24] Ibid., I [2.7.2].

[25] See *R v Jheeta* [2007] EWCA Crim 1699; [2008] 1 WLR 2582, [24].

[26] *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin); [2011] 11 WLUK 63; *R (on the application of F) v DPP* [2013] EWHC 945 (Admin); [2014] QB 581.

[27] *McNally* [2013] EWCA Crim 1051; [2014] QB 593, [24].

[28] Ibid., [26].

[29] *F v DPP*, [26].

[30] [2020] EWCA Crim 971; [2020] 1 WLR 5025, [35]. For a detailed examination of the roots of this test, see Kyle L Murray and Tara Beattie, 'Conditional Consent and Sexual Offences: Revisiting the Sexual Offences Act 2003 after *Lawrance*', *Criminal Law Review,* 7 (2021), 556–74.

[31] *Lawrance*, [37].

[32] Ibid., [32], quoting *McNally*, [26] [sic].

[33] Ibid., [37].

[34] Ibid., [42]. This idea had first been discussed, but not decided, in *Monica*, [48]; [71]. For an argument against this interpretation of the SOA 2003, see Murray and Beattie, pp. 569–72.

[35] *Clarence*, p. 43. For the view that these concerns were originally rooted in a desire to secure the sexual freedoms of men, see Lois S. Bibbings, *Binding Men: Stories About Violence and Law in Late Victorian England* (Abingdon: Taylor and Francis, 2014), p. 140.

[36] *Lawrance*, [34].

[37] *Clarence*, p. 29.

[38] *Monica*, [52] (Lord Burnett CJ).

[39] *Clarence*, p. 44.

[40] *Elbekkay* (unreported transcript). See also *Monica*, [59].

[41] *Case*, p. 382; *Williams* [1923], p. 341 (she 'did not know that what he did was wrong'). See further, *R v Lock* (1872) LR 2 CCR 10 – not a case of fraud, but the young boys, because of their age, were said to lack understanding of the 'indecent and immoral' nature of the act (p. 12).

[42] *Hegarty v Shine* (1878) 14 Cox CC 145, p. 148 (Ball C).

[43] *McNally*, [25]. The court described the physical nature of the acts (oral and digital penetration) as the same whether carried out by a boy or a girl.

[44] *Lee Hogben* (unreported: sentenced 23rd April 2019, Bournemouth Crown Court); *Andrew Lewis* (unreported: sentenced 2nd October 2020, Worcester Crown Court).

[45] Beatrice Krebs, 'Rape, Consent and a Lie about Fertility', *Journal of Criminal Law*, 84.6 (2020), 622–25 (pp. 624–25).

[46] For an argument that this is the central wrong of rape see, e.g., John Gardner and Stephen Shute, 'The Wrongness of Rape', in *Oxford Essays in Jurisprudence*, ed. by Jeremy Horder (Oxford: Clarendon Press, 2000), pp. 193–217.

[47] See Mark Dsouza, 'False Beliefs and Consent to Sex', *Modern Law Review*, 85.5 (2022), 1191–1217 (pp. 1196–98).

[48] Daniel Dennett, *Content and Consciousness* (London: Routledge, 1968), p. 21. See also, Heidi M Hurd, 'The Moral Magic of Consent', *Legal Theory*, 2 (1996), 121–46 (p. 125).

[49] Dsouza, p. 1196. For analysis of the way in which we give content to our consent, see Tilton and Ichikawa.

[50] For critical examination of the relevance of 'common sense', and its use in recent case law, see Murray and Beattie, esp. pp. 559–61.

[51] Jonathan Herring, 'Mistaken Sex', *Criminal Law Review*, 7 (2005), 511–24 (p. 517). See also Tom Dougherty, 'Sex, Lies, and Consent', *Ethics*, 123 (2013), 717–44.

[52] *Lawrance*, [34].

[53] Tilton and Ichikawa, p. 142 (emphasis added).

[54] Dsouza, p. 1198.

[55] Ibid., p. 1207.

[56] Ibid., p. 1206.

[57] Ibid., p. 1201.

[58] As there is still *some* harm to sexual autonomy, it may be justified to apply a version of a tainted consent offence. Perhaps reviving a (gender neutral) form of procurement under false pretences most recently seen in SOA 1956, s3.

[59] This is how they are currently framed by the Crown Prosecution Service: *Rape and Sexual Offences – Chapter 6: Consent*, 21 May 2021 <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent> [accessed 7 May 2023]. See also Carole McCartney and Natalie Wortley, 'Under the Covers: Covert Policing and Intimate Relationships', *Criminal Law Review*, 2 (2018), 137–56 (p. 149).

[60] *McNally* [26].

[61] See *Case*.

[62] See Alex Sharpe, 'Criminalising sexual intimacy: transgender defendants and the legal construction of non-consent', *Criminal Law Review*, 3 (2014), 207–23.

[63] *McNally* is ambiguous on whether the issue is gender identity, gender history (biological/birth sex), or both. On the defined consent approach, the matter would depend on how the complainant defined the encounter.

[64] See generally, Alex Sharpe, *Sexual Intimacy and Gender Identity 'Fraud': Reframing the Legal and Ethical Debate* (Abingdon: Routledge, 2018).

[65] Alexandra Brodsky, '"Rape-Adjacent": Imagining Legal Responses to Nonconsensual Condom Removal', *Columbia Journal of Gender and Law*, 32.2 (2017), 183–210 (pp. 194–95). An example often given is a conviction under Israel's rape by deception law for

misrepresentation of Jewish Israeli lineage (*Kashur v. State* [2012] CrimA (Jer) 5734/10 (Israel)).

[66] While disputed, this influenced at least some of the judges in *Clarence* (see, e.g., Pollock B, pp. 63–64). It was eventually rejected beyond doubt in *R v R* [1991] UKHL 12; [1992] 1 AC 599.

Table of Cases

Assange v Swedish Prosecution Authority [2011] EWHC 2849 (Admin); [2011] 11 WLUK 63.

Barrow (1868) LR 1 CCR 156.

Bennett (1866) 4 F & F 1105; 176 ER 925.

Case (1850) 1 Den 580; 169 ER 381.

Clarence (1888) 22 QBD 23.

Dica [2004] EWCA Crim 1103; [2004] QB 1257.

Dee (1884) 15 Cox CC 579.

Elbekkay [1994] EWCA Crim 1 (unreported transcript).

R (on the application of F) v DPP [2013] EWHC 945 (Admin); [2014] QB 581.

Flattery (1877) QBD 410.

Hegarty v Shine (1878) 14 Cox CC 145.

Hogben (Lee) (unreported: sentenced 23rd April 2019, Bournemouth Crown Court).

Jheeta [2007] EWCA Crim 1699; [2008] 1 WLR 2582.

Kashur v. State [2012] CrimA (Jer) 5734/10 (Israel).

Lawrance [2020] EWCA Crim 971; [2020] 1 WLR 5025.

Lewis (Andrew) (unreported: sentenced 2nd October 2020, Worcester Crown Court).

Linekar [1995] QB 250.

Lock (1872) LR 2 CCR 10.

McNally [2013] EWCA Crim 1051; [2014] QB 593.

R (on the application of Monica) v DPP [2018] EWHC 3508 (Admin); [2019] 2 WLR 722.

R v R [1991] UKHL 12; [1992] 1 AC 599.

Rosinski (1824) 1 Moody 19; 168 ER 1168.

Saunders (1838) 8 C & P 265*;* 173 ER 488.

Sinclair (1867) 13 Cox CC 28.

Williams (1838) 8 C & P 286; 173 ER 497.

Williams [1923] 1 KB 340.

Bibliography

Brodsky, Alexandra, '"Rape-Adjacent": Imagining Legal Responses to Nonconsensual Condom Removal', *Columbia Journal of Gender and Law,* 32.2 (2017), 183–210

Criminal Law Revision Committee, Fifteenth Report, *Sexual Offences* (1984)

Crown Prosecution Service, *Rape and Sexual Offences – Chapter 6: Consent*, 21 May 2021

<https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent> [accessed 7 May 2023]

Bibbings, Lois S., *Binding Men: Stories About Violence and Law in Late Victorian England* (Abingdon: Taylor and Francis, 2014)

Dennett, Daniel, *Content and Consciousness* (London: Routledge, 1968)

Dougherty, Tom, 'Sex, Lies, and Consent', *Ethics*, 123 (2013), 717–44

Dsouza, Mark, 'False Beliefs and Consent to Sex', *Modern Law Review*, 85.5 (2022), 1191–1217

Gardner, John, and Stephen Shute, 'The Wrongness of Rape', in *Oxford Essays in Jurisprudence*, ed. by Jeremy Horder (Oxford: Clarendon Press, 2000), pp. 193–217

Herring, Jonathan, 'Mistaken Sex', *Criminal Law Review*, 7 (2005), 511–24

Home Office, *Setting the Boundaries: Reforming the law on sexual offences*, 2 vols (2000), II

Hurd, Heidi M., 'The Moral Magic of Consent', *Legal Theory*, 2 (1996), 121–46

Krebs, Beatrice, 'Rape, Consent and a Lie about Fertility', *Journal of Criminal Law*, 84.6 (2020), 622–25

Law Commission, 'Consent in Sex Offences', Annex C to Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences*, 2 vols (2000), II

McCartney, Carole, and Natalie Wortley, 'Under the Covers: Covert Policing and Intimate Relationships', *Criminal Law Review*, 2 (2018), 137–56

Murray, Kyle L., and Tara Beattie, 'Conditional Consent and Sexual Offences: Revisiting the Sexual Offences Act 2003 after *Lawrance*', *Criminal Law Review*, 7 (2021), 556–74

Sharpe, Alex, 'Criminalising sexual intimacy: transgender defendants and the legal construction of non-consent', *Criminal Law Review*, 3 (2014), 207–23

——, *Sexual Intimacy and Gender Identity 'Fraud': Reframing the Legal and Ethical Debate* (Abingdon: Routledge, 2018)

Tilton, Emily C. R., and Jonathan Jenkins Ichikawa, 'Not What I Agreed To: Content and Consent', *Ethics*, 132.1 (2021), 127–54