The Cis-normativity of Consent in Deceptive Sexual Relations

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Introduction

The criminal law continues to grapple with the concept of 'deceptive sex' and struggles to draw the appropriate parameters around the provisions on consent contained within the Sexual Offences Act 2003 (henceforth, 'the SOA'). Particularly notable in this regard have been cases involving 'gender fraud', wherein the defendant (D) is alleged to have deceived the complainant (V) as to their gender in order to procure sexual relations. This was found to be the case in *R v McNally*[1], where the Court of Appeal held that the sexual nature of the acts was different where the complainant was deliberately deceived by the defendant as to her biological sex; V's freedom to exercise preference over the gender of their sexual partner was removed.[2] V's consent was therefore vitiated. The language used in this case effectively characterises D's failure to disclose gender history as a deliberate deception (writing, *inter alia*, that D 'had lied to [V] for four years'[3]), and acutely raises this issue of consent: in what circumstances will D's inaction be elevated to a finding of deception? As a corollary to this, in what circumstances are deceptions are sufficient to vitiate consent for the purposes of sexual offences? These are the questions with which this article seeks to contend.

They will be addressed in several parts. First, it will be found that the conceptual framework deployed by the courts in these cases, namely the distinction between active deception versus non-disclosure, cannot bear the analytical weight imposed upon it by the factual intricacies of the cases that have arisen thus far, and of those that will invariably arise in the future. The inadequacy of this binary is brought to the fore by *McNally*: the gaps in the court's reasoning are haphazardly filled with cis-normative prejudices that cannot stand against conceptual scrutiny. It will be argued that the term 'deception' (that is, the act of deliberately causing (someone) to believe something that is not true, especially for personal gain) is not only inappropriate when applied to transgender defendants for ontological reasons, but also risks legitimising discrimination towards transgender individuals through the forum of the criminal law. The court's prejudices are often clouded in repeated references to the need to protect the right to sexual autonomy. It is not disputed that this protection is a valid pursuit, however, the over-prioritisation of V's sexual autonomy has led to a conflation of two analytically distinct questions, namely: (1) did V consent? and (2) did D possess a reasonable belief in V's consent? These questions must remain separate such that due weight is given to the competing interests of D in privacy and self-preservation (particularly in cases involving transgender defendants).

Having exposed the inadequacies of the current model, Section 3 investigates a new conceptual framework upon which the law on sexual offences may be built. In this regard, the distinctions made by Matthew Gibson when he distinguishes between 'principal sexual offences' and 'deceptive sexual relations' prove highly instructive.[4] He observes that the latter are often criminalised under 'principal sexual offences', namely rape, sexual or indecent assault etc.[5] In his view, however, this poses a problem for fair labelling as, while deceptive sexual relations 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*.[6] He therefore advocates for the creation of separate deceptive sexual offences targeting penetrative and non-penetrative sexual relations.[7] Adopting this bifurcation, the model proposed in this article variegates deceptive sexual relations further into a tripartite taxonomy: relations resulting from an active deception, a passive deception, and a unilateral mistake by V. The courts, having already established that the first of these is sufficient to vitiate consent[8], have left the following task for the present enquiry: distinguishing between a passive deception and a unilateral mistake. It is argued that only the former can vitiate consent, arising *either* when D knowingly exploits a unilateral mistake by V to procure sexual relations, *or* when D is

1 [2013] EWCA Crim 1051.
2 ibid [26].
3 ibid [10].
4 Matthew Gibson, 'Deceptive Sexual Relations: A Theory of Criminal Liability' (2020) 40(1) Oxford Journal of Legal Studies 82.
5 ibid 86.
6 ibid.
7 ibid.
8 *Assange v Swedish Prosecution Authority* [2011] EWHC 2849.

under an obligation to disclose certain information but fails to do so. As to the former, D's knowledge and opportunism elevates V's unilateral mistake to a passive deception. As to the latter, regarding the circumstances in which such an obligation may be generated, several possibilities are canvassed with a brief discussion about how the law may develop in the future. It is suggested that the materiality of certain facts to V's consent should remain subjectively determined by V, but any obligation to make V aware of facts that may conflict with this materiality is contingent upon D's actual knowledge, or a reasonable expectation that D have knowledge, of such materiality. This model departs from the court's current approach in that it ensures that the expectation of D's knowledge is conditioned not by cis-normative biases, but instead by an objective assessment of the facts and an introduction of the concept of 'justifiability'.

I. Deceptive Sexual Relations

I.I. The current law

Section 76 of the SOA makes reference to deceptive sexual relations by outlining a conclusive presumption according to which consent will be vitiated when D intentionally deceives V as to the nature or the purpose of the relevant act, or intentionally induces consent by impersonating a person known personally to V. Conclusive presumptions operate analogously to a rule of law—that is, they cannot be changed or displaced by reference to additional evidence or argument. Through its judicial treatment, it has been interpreted narrowly with the courts opting to determine the question of consent through the route under section 74, according to which 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice'.[9] The way this provision has been interpreted in subsequent cases has developed a practice in the courts of criminalising deceptive sexual relations.

It has long been rejected that a consent-vitiating deception can be implied out of D's non-disclosure, even if that non-disclosure was as to D's HIV status;[10] V's consent here is deemed relevant only to the *act* (that is, to sexual intercourse) but not its *consequences* (that is, any sexually transmissible diseases that D may have passed to V).[11] The courts have been careful, however, to delineate cases of mere non-disclosure from those in which a certain set of facts or a particular state of affairs is material to V's consent with D knowing of this materiality but failing, or indeed refusing, to correct V's mistaken belief in the existence of such facts or to ensure that those state of affairs are maintained. In *Assange v Swedish Prosecution Authority*[12], V made clear that her consent was only forthcoming if D used a condom. The materiality of the use of the condom, coupled with D's knowledge of this materiality and subsequent engagement in sexual relations without heeding this condition, was sufficient to ground a finding of active deception that vitiated V's consent. In *R(F) v DPP*[13], V's consent was only forthcoming on the basis that D would ejaculate outside her body. There was 'evidence that he deliberately ignored the basis of her consent',[14] and as such, V's consent was vitiated. These cases have also been explained as instances of 'conditional consent'; V consented on the basis of a premise that, at the time of the consent, was false. When expounding upon this model, the court in *R(F) v DPP*, somewhat unhelpfully, opined that 'evidence relating to 'choice' and 'freedom' to make any particular choice must be approached in a *broad common sense way*' (emphasis added).[15] Precisely how this 'common sense' approach is to be realised in substance was not clarified by the court, regrettably creating a lacuna that has invited more confusion into the question of criminality for deceptive relations. The issue was raised in an acute form in *R v McNally*.

I.II. *R v McNally*

As a preliminary, this article takes as axiomatic that D at the time was living as a transgender boy. However, gender references to D will use 'she' and 'her' pronouns in order to respect D's identification at trial as a female.

D, a thirteen-year-old, met V (a cis-gender girl), a year younger, through a gaming website. The pair developed an online relationship for three and a half years, throughout which D presented herself as a boy named 'Scott Hill' and used male pronouns. This relationship culminated in several in-person visits, during which D wore a strap-on dildo and engaged in sexual relations (orally and digitally) with V. V's mother later confronted D about her birth sex, leading D to admit that she was biologically female. The facts were somewhat contested, with D claiming that V knew of her gender history throughout their relationship while V denied having any such knowledge. The Court of Appeal held that 'while, in a physical sense, acts of assault of penetration of the vagina were the same whether perpetrated by a male or a female, the sexual nature of such acts is, on any common sense view, different where the complainant was deliberately deceived by a defendant into believing that the latter is male'.[16] V's consent was vitiated under section 74, supporting a conviction for sexual assault by penetration. Several noteworthy elements of the judgment require observation. First, D's acts are characterised as a deliberate (or active) deception as opposed to a non-disclosure. Second, the court relies upon the 'common sense view' alluded to in *R(F)* as a fulcrum to advance this characterisation. The significance of these findings ought not to be understated; they spotlight the fragility of the court's current approach, reveal its cis-normative prejudices, and signal the need for a new conceptual framework. These will be discussed in turn.

I.II.I. Active deception as to gender

The court identified the following factors that contributed to the finding of deliberate deception: D's use of a different last name, the claim that D and V discussed 'getting married and having children',[17] D's gender confusion (particularly in witness statements where D used female pronouns when referring to herself), D telling V that she would '[put] it in'[18] (which V took to mean D's 'penis'), and D's purchase of condoms. In a convincing counter by Alex Sharpe, none of these factors ought to be deemed deceptive if we take transgender identity seriously.[19] Gender identity 'confusion' is common, especially among young transgender people, and should be interpreted not as gender inauthenticity but as part of their navigation through a transphobic world.[20] All of these factors could just as easily point to the authenticity with which D presented herself

9 *R v Jheeta* [2007] EWCA Crim 1699 [24].
10 *R v B* [2007] 1 WLR 1567.
11 ibid [17].
12 *Assange* (n 7).
13 [2014] QB 581.
14 ibid [25].
15 ibid [26].
16 ibid [26].
17 ibid [4].
18 ibid [5].
19 Alex Sharpe, 'Criminalising sexual intimacy: transgender defendants and the legal construction of non-consent' (2014) 3 Crim LR 207, 217 (henceforth, 'Criminalising sexual intimacy').
20 ibid.

as a transgender boy at the time of the events and, in any case, are not conclusive (individually or cumulatively) of D's desire to induce a false belief in V. Indeed, again, on D's account of the facts, D did not know that V was mistaken about D's transgender identity; she claimed that V was aware of D's gender history. To characterise D's acts as a *deliberate* deception therefore seems unsustainable. More generally, the rhetoric of deception that pervades these cases implies a preoccupation with the 'truth', prompting a question about what constitutes the 'truth' for these purposes. The state of affairs to which the criminal law seems to attribute the moral significance of the 'truth' is the defendant's gender history; the transgender defendant's gender presentation, no matter how authentically lived, is deemed a pretence through which the law must see. This view of the 'truth' is contestable on two grounds: first, it deflates the importance of self-determination, and second, it runs the risk of legitimising discrimination against transgender individuals through the forum of the criminal law.

The Foucaultian perspective finds that '[e]ach society has its regime of truth, its 'general politics' of truth: that is, the types of discourse which it accepts and makes function as true'.[21] Simplifying this view, the truth is not divorced from power but is a product of it; any truths about gender or sexuality which claim universality and objectivity must be viewed as 'part of a 'truth' game'[22] in which the real victor is power. From this, it may be deduced that what is too readily accepted as the 'truth' behind the transgender defendant's 'deception', namely their biological sex, is not *the* truth, but merely *a* created truth that is conditioned by an engagement in a system of power that privileges the cis-gender individual's conformity to the cultural matrix. The truth is therefore *constructed* and *internalised*, as opposed to *pre-determined*. We have been conditioned to accept the gender binary as *the* truth, which renders the transgender person's departure from it deceptive. Applying the constructivist perspective, Judith Butler uses the concept of performance to describe the phenomenon of gender, arguing that gender, in contrast with sex, is socially and relationally constructed, distinct from the body of the subject.[23] Separating these categories allows for gender to be seen as a performance through which the individual may subjectively determine the expression of their identity rather than as a necessarily cohesive expression of their biological sex. She explains this with such clarity that it is worth quoting in full: '[W]hen the constructed status of gender is theorised as radically independent of sex, gender itself becomes a free-floating artifice, with the consequence that *man* and *masculine* might just as easily signify a female body as a male one, and *woman* and *feminine* a male body as easily as a female one' (emphasis in original).[24] Naturality is developed through repetition; the rehearsal of the rules of gender serves to reinforce the connection between gender and sex, thus cementing hetero- and cis-normativity. The transgender identity is thought to be 'untruthful' due to its disruption of these rules. It presents an ontological challenge to the taxonomies of gender and sex, 'evoking complex questions about the construction, deconstruction, and ongoing reconstruction'.[25] These performances, however, ought not to be conflated with masquerades in which the performer hides the 'truth' behind their gender expression. 'There is no gender behind the expressions of gender; that identity is performatively constituted by the very 'expressions' that are said to be its results'.[26] As such, gender is not a fixed universal truth that lies behind a performance; it is simply deemed to be universal due to the power structures that animate and repeat its legitimacy. Instead, the truth is *in* the individual's gender performance. This idea is one that has been scientifically recognised and has gained empirically support from the definition of gender provided by the World Health Organization. It defines gender as 'the characteristics of women, men, girls and boys that are socially constructed'.[27] Further, it makes clear that '[g]ender interacts with but is different from sex, which refers to the different biological and physiological characteristics of females, males and intersex persons … Gender identity refers to a person's deeply felt, internal and individual experience of gender, which may or may not correspond to the person's physiology or designated sex at birth'.[28] Clarifying the understanding of gender in this way destabilises the very underpinnings of the *McNally* judgment, and the rhetoric of deception in this area more broadly. If there is no ontological referent against which *the* truth is determined (and instead simply a default normative position to biological sex that has garnered societal acceptance due to repetition and powerful discursive influences), there can be no deception. For precision, this proposition does not seek to exclude the possibility of gender fraud *altogether*. There may be instances in which an individual deliberately projects an identity contrary to one's subjective truth, such as the oft-cited 'man' who pretends to be a woman to gain access to women's bathrooms. This may prompt calls for the potential of a test of 'authenticity' to determine the extent to which a person's self-identified gender is to be recognised, as well as the metric against which deceptive versus non-deceptive fact-patterns can be distinguished. At this juncture, an important preface must be made.

When demanding a test of authenticity, we must be acutely aware that the motivations for doing so may subconsciously, almost surreptitiously, resort to the very narratives that this article seeks to resist. It is worth noting that the narrative of the 'man' attempting to gain access to women's bathrooms is premised on 'earlier feminist anxieties that transgender women would—stealthily, deceptively—infiltrate, commandeer, and 'rape' women- and lesbian-only spaces'.[29] Once it is understood that these anxieties are the same as those which mobilised the racist desire to prevent 'blacks entering white-only bathrooms',[30] we are forced to scrutinise our desire to ask for authenticity: is it truly rooted in the practical need and sincere desire for clarity, or is it simply defaulting to the 'long history of [transgender people] being made suspect',[31] once again assumed as 'counterfeit'[32] until they prove otherwise? This question becomes all the more salient when we recognise that the readiness with which we feel able to develop such tests is not easily transposable to other contexts. There is a general discomfort, for example, to demand the authenticity with which someone identifies with a particular religion—there are no such tests to determine whether someone is 'truly' Christian. Our hesitance to intervene in these matters is indicative of our reluctance to impose a yardstick of 'correctness' in matters of great personal significance and of great

21 Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings* (The Harvester Press Limited 1980) 131.

22 Alex Sharpe, 'The Ethicality of the Demand for (Trans)parency in Sexual Relations' (2017) 43(2) Australian Feminist Law Journal 161, 167 (henceforth, 'Ethicality').

23 Judith Butler, *Gender Trouble: feminism and the subversion of identity* (first published 1990, Routledge 2006).

24 ibid 9.

25 Sally Hines, *TransForming gender: Transgender practices of identity, intimacy and care* (Bristol University Press, Policy Press 2007) 17.

26 Butler (n 23) 34.

27 Anna Kari, 'Gender and Health' (*World Health Organization*, n.d.) <https://www.who.int/health-topics/gender#tab=tab_1> accessed 7 February 2022.

28 ibid.

29 Joseph J Fischel, *Screw Consent: a better politics of sexual justice* (University of California Press 2019) 99.

30 ibid.

31 ibid.

32 ibid 100.

variation and complexity. In light of the exposition above about the legitimacy of transgender identities, it is important to recognise that the lived gender experiences of transgender individuals are no less significant. This recognition means that the criminal law should be slow to develop stringent tests of authenticity, being sensitive to both the cis-normativity that can underlie such tests and the general social climate that is still unaccepting of transgender identities. Such a climate can prevent the formation of a singular, uniform gender identity narrative against which the court can test all lived realities. This article therefore advocates for a presumption in favour of authenticity, unless it can be shown that the gender identity adopted by the defendant was truly for the purposes of procuring sexual relations. The factors outlined here are listed with caution due to the recognition that gender identity can be experienced in different ways, particularly at the intersections of culture, race, and religion. Nevertheless, the court may look to indications of gender expression, the length of time for which the defendant has lived in a particular gender identity, any expressions of a desire for sex/gender reassignment, and other factors pointing to gender dysphoria. When these factors are applied to the case of *McNally*, it is clear that the findings of deception could plausibly be viewed as expressions of D's authentic gender identity. These include D's gender confusion and D's use of the phrase 'putting it in'. As Sharpe argues, gender confusion is neither uncommon nor surprising particularly among young people who need to negotiate through a transphobic world.[33] Further, many transgender men truly consider a prosthetic device to be their penis.[34]

It is stressed that these factors are not exhaustive and should only be used in the event that there is sufficient evidence to rebut the presumption of authenticity. Ethically speaking, Butler argues that authenticity is ultimately found in the individual: 'we are all ethically bound to recognise another person's declared or enacted sense of sex and/or gender'.[35] Any legal system that purports to take assertions of gender identity seriously must therefore recognise that no relevant gap exists between a transgender person's gender identity and the gender identity that cis-gender people assume. A transgender D, presenting as male, is not deceiving V (who assumes or accepts D's male gender identity) because D's gender identity (as opposed to gender history) ought to be the truth that the court identifies. This is particularly relevant in cases like *McNally* where D's anatomy was never relevant to the acts themselves (that is, oral and digital penetration). A conclusion that a transgender man acts deceptively in circumstances where he asserts his masculinity, either through statements or other aspects of his gender performance, is not only unsustainable in light of the ontological challenges highlighted above, but also serves to undermine the individual's self-determination by indirectly prescribing the acceptability of some gender performances, those which are conveniently consonant with biological sex, while labelling others as deceptive.

This labelling, particularly when done through a forum with the finality and gravity of the criminal law, has the effect of legitimising discrimination against transgender individuals in several ways. First, social theory suggests that labelling contains latent judgments about similarity and difference, as well as of inclusion and exclusion, which subsequently affect the way people understand themselves and others in the organisation of society.[36] In this way, labelling becomes a form of segregation and categorisation. Second, this process is almost always socially rooted, constituting an exercise of power that involves some degree of 'symbolic violence'.[37] This links back to the Foucauldian understanding of truth as power—labels imposed through language and practice simply conceal the domination inherent in our systems.[38] Taken together, the label of 'deliberate deception' imposed upon transgender defendants not only underlines their ostracism from the gender conformity matrix, but also connotes a level of humiliation for their supposed transgression from what is deemed to be morally upright (the cis-gender identity). As highlighted by Allison Moore, '[t]erms like… deception and fraud are hardly imbued with moral integrity'.[39] She adds that these labels create an expectation that transgender defendants disclose their gender history, which 'serves to naturalise and reinforce relations of dominance and subordination in the gender hierarchy'.[40] The cumulative effect of this labelling process is to conceive of any truthful transgender or gender nonconforming defendant as a self-loathing individual who has not only registered prejudice but has also internalised it, readily anticipating that they can never legitimately nor convincingly claim to be the object of a cis-gender individual's desire.[41] After all, if their very identity is deemed to be deceptive, the social climate within which the transgender defendant operates is automatically conditioned by cis-normativity; the label of deception pre-determines the *mens rea* question (requiring that D did not reasonably believe that V consented) and renders it redundant by impliedly establishing that D, a liar, cannot reasonably (in most, if not all, cases) expect V to have consented.

It is particularly concerning when this labelling process is done through the criminal law because conduct is not only condemned as a mere *legal* wrong but also 'as [a *moral*] wrong in a way that should concern those to whom it speaks, and that warrants the further consequences (trial, conviction, and punishment) that it attaches to such conduct' (emphasis added).[42] Indeed, its moral potential means that the criminal law cannot, and should not, shy away from condemning behaviour that has been proven to fall within its scope; it is arguably one of the State's most powerful means through which those who have committed wrongs are called to account. However, when used in contexts where the law may have a part to play in creating the social narrative lived by the people to whom it must respond, it is precisely because of its primacy, its thrust, and its finality, that the criminal law should be slow to reinforce prejudices that other parts of the law seek to eliminate. As Brooks and Thompson highlight, 'the harm suffered arises out of the victim's own intolerance and prejudice, something which the criminal courts ought not to vindicate'.[43] There is a public policy concern here: unlike

33 Sharpe, 'Criminalising sexual intimacy' (n 19) 217.

34 Zowie Davy, *Recognising Transsexuals: Personal, Political and Medicolegal Embodiment* (Ashgate 2011).

35 Cristan Williams, 'Gender Performance: The TransAdvocate Interviews Judith Butler' (*TransAdvocate*, 1 May 2014) <http://www.transadvocate.com/gender-performance-the-transadvocate-interviewsjudith-butler_n_13652.htm> accessed 19 December 2020.

36 Howard Becker, *Outsiders: Studies in the Sociology of Deviance* (first published 1963, Free Press 1977).

37 John Thompson, 'Symbolic Violence: Language and Power in the Writings of Pierre Bordieu' in *Studies in the Theory of Ideology* (Polity Press 1984) 42.

38 ibid.

39 Allison Moore, 'Shame on You: The Role of Shame, Disgust and Humiliation in Media Representations of 'Gender-Fraud' Cases' (2016) 21(2) Sociological Research Online 118, [7.5].

40 ibid.

41 Alex Sharpe, 'Queering Judgment: The Case of Gender Identity Fraud' (2017) 81(5) J Crim L 415, 434.

42 RA Duff, 'Responsibility Citizenship and Criminal Law' in Stuart P Green and RA Duff (eds) *Philosophical Foundations of Criminal Law* (OUP 2011) 127.

43 Victoria Brooks and Jack Clayton Thompson, 'Dude Looks Like a Lady: Gender Deception, Consent and Ethics' (2019) 83(4) J Crim L 258, 268.

the intolerance that is readily expressed by the law for instances of racism or sexism, 'if you are a transphobe, the legal message is: assume everybody to be cis-gender and if your unreasonable assumption fails to accord with reality, feel free to channel your sense of outrage through the criminal law'.[44] This is not to underplay any sense of 'outrage' on the part of V, flowing from a sense of being 'misled', but simply an argument that this outrage ought not to be vindicated by the criminal law. Understandably, the criminal law's immense moral capacity means that it is an inappropriate outlet for judicial activism: it must *keep pace* with social norms rather than *lead* them, lest the law becomes unduly moralistic and suffocatingly prescriptive. Instead of aspiring towards norm-generation, therefore, we may settle for its capacity for norm-reflection. However, this does not mean that all aspirations for *positive* norms to be reflected ought to be abandoned. The norms reflected ought not to be those rooted in discrimination and prejudice, seeking to delegitimise, through its labels, certain factions of the very society that it is tasked with regulating. To say that one's 'humanity is a pretence' tells them 'that all social norms are suspended in dealings with them because they are not human'.[45]

I.II.II. The 'common sense' approach: a duty to disclose?

The court in *McNally* cites the 'common sense' approach to claim that the sexual nature of the acts was different by virtue of D's deliberate deception. When scrutinised, however, this justification is not analytically robust, when read in either a broad or a narrow sense. A broad understanding of 'sexual nature', which would follow the approach taken to 'nature' under section 76, would mean that D's deliberate deception led V to believe that a sexual act in which they partook was non-sexual. Axiomatically, this reading of the judgment must be rejected given V's knowledge that the acts were of a sexual nature. A narrow reading of 'sexual nature', one that is perhaps more generous to the judgment, would mean that D's deliberate deception altered the nature of the acts (at least from V's point of view) from being 'heterosexual' to 'homosexual' by virtue of D's (undisclosed) biological gender. This seems to imply that the difference in the acts' 'sexual nature' by virtue of D's deliberate deception is important not wholly because of D's culpability, but because of its incompatibility with V's sexuality. The upshot seems to be that a bisexual V, deceived as they may be, may be said to have consented given that the difference in sexual nature would not be incompatible with their sexuality.[46] For several reasons, this model cannot be correct.

First, the analysis on 'sexual nature' charted by the court conflates two analytically distinct questions: (1) did V consent? and (2) did D possess a reasonable belief as to V's consent? (a question about *mens rea*). The court uses the idea that, from V's perspective, the sexual nature of the acts became different upon her realisation of D's biological gender, which in turn grounds the finding of non-consent. While some may suggest that the sexual nature of the act itself never changes (that is, V is performing an act with an individual who possesses a quality with whom they would not want to engage in acts of such nature), this is not how the court approaches the question. The court explicitly finds that 'the sexual nature of the acts *is*… *different* where the complainant is deliberately deceived by a defendant into believing that the latter is a male' (emphasis added).[47] This privileges V's *subjective* understanding of the act, which is understandable when determining the answer to question (1) given the need to protect sexual autonomy (an interest explored in more detail in Section 3). However, the court continues to prioritise V's subjective reality when answering question (2). Instead of undertaking a meaningful inquiry into the reasonableness of D's belief, the bulk of the court's analytical labour was expended on the finding of non-consent, which was grounded in an *assumption*, rather than a reasoned conclusion, that D's gender identity was deceptive. By making unsupported references to this deception, cloaked in the language of 'common sense' without further elaboration, the *mens rea* question was rendered hollow by reference to V's subjective reality. Yet it must not be forgotten that D was living authentically as a transgender boy and, on the question of sexual nature, could have conceivably deemed the act as heterosexual. When determining the reasonableness of D's belief, the court failed to recognise that there were two subjective realities at play, the normative hierarchy between them being far from self-evident. As Joseph Fischel identifies, '[s]ubjective feeling is no more but no less exhaustive of gender than any other criterion, not least because gender … is made and remade relationally, not individually'.[48] Here, the deficiencies of the court's distinction are brought forward and the true role of deception is revealed; it is used as an analytical tool to prioritise a characterisation of the acts only as *V* understood them, rather than engaging with how *both* parties may have viewed and experienced the events—an exercise that would have been all the more important in this context given the contested nature of the facts. This is not to undermine any feelings of shame or betrayal felt by V, legitimate as they are, but simply to highlight that the difference in sexual nature was only felt by *V*, rather than objectively as the court seems to suggest. The court finds that '[V] chose to have sexual encounters with a boy and her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by the defendant's deception'[49], and halts its analysis here, failing to venture into an enquiry about reasonable belief. Again, although this is understandable in the determination of (non)consent, the primacy of V's sexual autonomy must not be extended to the question of reasonable belief. On question (2), the court privileges the reality lived by V, one that is hetero- and cis-normative, without elaborating upon why, conceptually or doctrinally, this is done and instead retreating into the safety of principle by insisting that this privilege is simply part of the 'common sense' approach.

Second, by focusing on its ability to deprive V of the choice to 'have a sexual encounter with a girl',[50] the rhetoric on deception seems to imply an ability to make a 'straight' choice.[51] To characterise the facts as a *deprivation* is to imply that the right held by V to have a specific sexual encounter, and the resulting harm from the infringement thereof, outweighs any interests in non-disclosure that may be possessed by D, and further, is of such significance that it warrants the intervention of the criminal law. Yet it is trite from cases involving deceptive sexual relations that sexual autonomy is *not* an unlimited right; as Schulhofer rightly observes, '[s]exual autonomy, like every other freedom is necessarily limited by the rights of others'.[52] It is submitted that the harm experienced by

44 Alex Sharpe, 'Sexual Intimacy, Gender Variance, and Criminal Law' (2015) 33(4) Nordic Journal of Human Rights 380, 390.

45 William Ian Miller, *Humiliation And Other Essays on Honor, Social Discomfort and Violence* (Cornell University Press 1993) 165–167.

46 Gavin A Doig, 'Deception as to Gender Vitiates Consent' (2013) 77 J Crim L 464, 467.

47 *McNally* (n 1) [26].

48 Fischel (n 29) 115.

49 *McNally* (n 1) [26].

50 ibid.

51 Brooks and Thompson (n 43) 266.

52 Stephen Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press 1998) 99.

V, although legitimate, is culturally conditioned, and ought to be weighed against the normatively and empirically rooted interests possessed by D: D's privacy and self-preservation.[53] For clarity, this is an argument in recognition of D's *interest* in non-disclosure, one that is bolstered by well-established *rights* to privacy and self-preservation. Charles Fried has argued that privacy allows individuals to control the information that they disclose to, or conceal from, others, which in turn has important implications for individual integrity and interpersonal relationships.[54] The absence of this right is harmful because 'to regard ourselves as objects of love, trust, and affection is at the heart of our notion of ourselves as persons among persons, and privacy is the necessary atmosphere for these attitudes and actions'.[55] Similarly, Thomas Nagel supports the view that privacy is a precondition to individual integrity and development, writing that '[t]he more we are … asked to expose our inner lives, the more the resources available to us in leading those lives will be constrained by the collective norms of the common milieu'.[56] The protection of privacy is thus undergirded by a significant moral concern: intrusion on one's privacy (particularly in the form of demanding the proclamation of one's gender history) damages the individual's ability to engage in relationships *internally* and *externally*, with themselves and with others. The normative importance of this protection is heightened by the empirical reality of transgender individuals. Reports of harassment, assault, and murder of transgender people are ubiquitous.[57] 'Bathroom bills' in several state legislators in countries like the United States,[58] effectively prohibiting transgender people from using the bathroom that aligns with their gender identity, coupled with narrative tropes of 'transgender people as duplicitous',[59] have created an oppressive cultural landscape in which the decision to be reticent about one's gender history begins to garner compassion, or at the very least begins to compete for attention in the consideration of V's sexual autonomy. Some may suggest that, in light of the above, *voluntary disclosure* of one's transgender status may be helpful as it avoids an individual being in a situation where they are harmed by transphobic individuals during sexual relations. In other words, perhaps transgender people are less likely to be the subject of harm if their identity is *communicated prior* to sexual relations rather than *discovered during or after* sexual relations. However, the empirical reality shows that the violence towards transgender people is not by virtue of the *means* through which their identity is discovered, but simply from their status as transgender individuals. The deaths of transgender or gender non-conforming people recorded by the Human Rights Campaign in 2021 were not situated within contexts of sexual encounters; many were fatally shot or violently killed by other means—the perpetrators ranged anywhere from acquaintances, partners or strangers.[60] The suggestion that a voluntary proclamation of transgender identity would alleviate concerns about violence is therefore misplaced. Violence may be, and has been, enacted towards transgender people irrespective of setting, be it public or private, and context, be it sexual or otherwise.

Without seeking to undermine the feelings of V, her harm 'should be understood as constructive disgust in so far as it is socially and culturally contingent'.[61] What was once desire-led sex is retrospectively coloured by V's conditionings of hetero- and cis-normativity. When engaging in the balancing exercise, therefore, it is not automatically obvious that the normatively constructed harm experienced by V ought to establish a finding of deception by D, who possesses compelling countervailing interests in privacy and self-preservation. Once these interests and their legitimacy are brought forward, the lack of scrutiny by the courts in its protection of V's sexual autonomy becomes alarmingly hubristic. As such, the section below seeks to revisit this right and to propose a workable framework that rectifies the deficiencies in the court's approach to deceptive sexual relations.

II. The Search for a New Conceptual Framework

II.I. Revisiting sexual autonomy

The *McNally* judgment's failure to account for the limits of the 'common sense' approach and to highlight when deceptions as to gender would *not* vitiate consent gives de facto trump card status to V's sexual autonomy. The need to protect this right is understandable, given that autonomy is underpinned by the individual's right to self-governance and self-sovereignty. As Joseph Raz has explained, '[t]he ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives'.[62] However, the view advanced by academics such as Jonathan Herring[63] and currently mirrored by the *McNally* model, one in which V's sexual autonomy is, and ought to be, allotted unquestioned primacy above D's potential interests in privacy and self-preservation, is problematic. It characterises V's sexual autonomy as an *absolute* right, at least when juxtaposed against the rights of a transgender D. As Laura-Anne Douglas argues, this hierarchy of rights creates an informational 'right to know' for the purposes of V's sexual autonomy, thus compelling transgender defendants to define and disclose their gender history.[64] Of course, sufficient and relevant knowledge is a reasonable precursor to autonomy as it allows the individual to make an informed choice, which in turn facilitates the individual's freedom of action. Beyond the purposes of seeking to invalidate the transgender person's gender identity, however, it is difficult to see why this 'right to know' is more important in cases with transgender defendants. Again, the preoccupation with biological sex is unjustified when we accept that the gender presentation of the transgender defendant *is* their gender identity. For precision, this is not a suggestion that biological sex can never be material to one's sexual experience. It is simply a clarification that a *default* preoccupation with biological sex intrudes

53 Sharpe, 'Ethicality' (n 22).

54 Charles Fried, 'Privacy' in Ferdinand Shoeman (ed) *Philosophical Dimensions of Privacy* (CUP 1984).

55 ibid 205.

56 Thomas Nagel, 'Concealment and Exposure' (1998) 27(1) Philosophy and Public Affairs 3, 20.

57 Cynthia Lee and Peter Kwan, 'The Trans Panic Defense: Masculinity, Heteronormativity and the Murder of Transgender Women' (2014) 66 Hastings Law Journal 77, 94.

58 Diana Ali, 'The Rise and Fall of the Bathroom Bill: State Legislation Affecting Trans & Gender Non-Binary People' (*NASPA*, 2 April 2019) <https://naspa.org/blog/the-rise-and-fall-of-the-bathroom-bill-state-legislation-affecting-trans-and-gender-non-binary-people> accessed 8 March 2021.

59 Fischel (n 29) 100.

60 HRC Foundation, 'Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2021' (*Human Rights Campaign*, n.d.) <https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-non-conforming-community-in-2021> accessed 7 February 2022.

61 Moore (n 39) [9.7].

62 Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon 1986) 369.

63 Jonathan Herring, 'Mistaken Sex' (2005) Crim LR 511.

64 Laura-Anne Douglas, 'The criminalisation of transgender-cisgender sexual relations: 'gender fraud' or compulsory cisnormativity? Assessing the meaning of consent in sexual offences for transgender defendants' (2017) 3 Jur Rev 139, 154.

upon the transgender person's right to maintaining the privacy of their gender history.

Further scrutiny is therefore required of the *substance* of the right to sexual autonomy; its content must be adequately explored such that the appropriate boundaries are drawn when determining the scope of criminality. More specifically, this right must be examined in tandem with its relationship to the defendant's conduct. Currently, the court's model relies upon a distinction between active deception and non-disclosure with only the former being sufficient to vitiate consent. As has been revealed throughout this article, this model is inadequate due to its inability to signpost, with sufficient clarity, instances of when the latter is elevated to be an active deception. Again, D in *McNally* never (conclusively) engaged in actively deceptive behaviour: on her account, she was never aware of V's desire to engage in sexual relations specifically with a cis-gender male, and as such, her level of knowledge can be distinguished from the defendants in *Assange* and *R(F)*. In those cases, D was made aware of the materiality of certain facts to V's consent yet proceeded with the act while inducing a belief in V that the conditions central to her consent were heeded. Enveloping the facts of *McNally* into the same label would fail to capture the varying shades of culpability and would likely lead to inconsistency in approach. There is a spectrum of behaviour, across which the appropriate label cannot always be active deception. The sections below will find that there is something that lays between active deception and non-disclosure, namely passive deception, and this is to be kept separate from a unilateral mistake made by V. It is argued that, along with active deception, passive deception can vitiate consent, arising *either* when D knowingly exploits a unilateral mistake by V to procure sexual relations, *or* when D is under an obligation to disclose certain information but fails to do so. As to the former, D's knowledge and opportunism elevates V's unilateral mistake to a passive deception. As to the latter, several approaches are considered below to help determine when an obligation is imposed upon D to disclose information for the purposes of V's sexual autonomy. The discussion below does not seek to offer a complete account of when deception-induced consent will be rendered invalid, and is instead an overview of various approaches that have been explored throughout the literature, with some comment on the best way to proceed in this controversial area.

II.I.I. Positive versus negative sexual autonomy

As mentioned above, this article adopts the distinction identified by Matthew Gibson between 'principal sexual offences' (such as rape, sexual or indecent assault etc) and 'deceptive sexual offences' (such as those in the cases of *Assange*, *R(F)*, and *McNally*). Per Gibson's argument, while deceptive relations 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.[65] The distinct nature of the wrongs in these offences can be elucidated by reference to the *type* of sexual autonomy that is engaged by D's conduct. In principal sexual offences, V is attempting to invoke, or defaulting to a state of, *negative* sexual autonomy.[66] V is unwilling, at the very least, to engage in such relations.[67] This is the case in instances that align with the paradigmatic understanding of rape, namely when there is coercion involved or incapacity on V's part to consent. Understood in this way, negative sexual autonomy is closely linked with the question of *whether* to have sex or engage in sexual relations. As regards the level of knowledge that is required to exercise such autonomy, V does not need all the information about the specific features of the act that is to occur, simply that a *sexual* act is to occur at all.

By contrast, in deceptive sexual relations, V is attempting to exercise both positive *and* negative sexual autonomy. V is willing to pursue those relations subject to a caveat (positive sexual autonomy) while wishing to avoid relations falling outside that caveat (negative sexual autonomy).[68] Positive autonomy involves the individual's right to choose *when*, *how*, and *with whom* to have sexual relations. D's deception harms V's right to positive sexual autonomy by frustrating its progress.[69] Sexual autonomy in the positive sense leads to a more textured understanding of the 'right to know'. Beyond knowing *whether* the act will be sexual, V will need to know more detail about some of the features of the act, D's characteristics, or other circumstances surrounding the relations, in order to make a judgment about whether they fall within the ambit of their caveat. Although deceptive sexual relations may seem more harmful due to their engagement of both positive *and* negative sexual autonomy, violating negative sexual autonomy is much *more* serious than violating than violating its positive counterpart.[70] Negative sexual autonomy allows everyone to resist unwanted sexual encounters altogether whereas positive sexual autonomy, which is only valuable to those wishing to engage in sexual relations, is less conducive to requiring the full force of the criminal law (that is, through labels such as 'rape' or 'sexual assault').[71] The "harm' to an individual from the non-fulfilment of any preferred sexual activity is…simply disappointment'.[72] Conceptualising and tracking sexual autonomy in this way assists in determining the moral and legal significance that ought to attach to D's acts. The next section proposes that deceptive sexual relations should be further variegated into a tripartite taxonomy.

II.II. A taxonomy for categorising deceptive relations

Deception in general may involve 'actions, omissions, as well as words and strategic silences',[73] the intention behind, and result of, which is to cause V to believe something false (X). D knows or believes that X is false, or at least not believe that X is true. Active deception involves a representation by D (either through words or actions) that *induces* a false belief in V, while passive deception requires that D *fail to disclose* a fact where D has an obligation to do so. A unilateral mistake still requires V to hold a false belief but, unlike deception, there can be no causative attribution of this belief to D; unilateral mistake per se does not attract culpability for D. For completeness, this article also takes the view that failing or refusing to correct a unilateral mistake made by V, one that D knows to exist, will also constitute a passive deception. This is not, however, the impetus of the current enquiry. The present task is to determine when D is under an obligation to disclose certain information such that a failure to do so will attract criminality. It is argued that when this obligation is triggered, coupled with D's failure to discharge, V's unilateral mistake is elevated to a passive deception. The question then becomes: in what circumstances is such an obligation generated? Space precludes an in-depth exploration of all

65 Gibson (n 5) 100.
66 ibid 86.
67 ibid.
68 ibid 97.
69 ibid 86.
70 ibid 103.
71 ibid.
72 ibid.
73 Larry Alexander and Emily Sherwin, 'Deception in Morality and Law' (2003) 22(5) Law and Philosophy 393, 400.

perspectives on this matter, but a survey of the literature in this area has produced several possible approaches to this question:

a) There are certain features of sexual relations that are *always* material and therefore *always* need to be disclosed. This equates to an argument that gender history is *always* relevant, and the transgender defendant is *always* under a reciprocal obligation to V's 'right to know'.
b) The materiality of certain facts or features of sexual relations is *subjectively* determined by V, but D's obligation to disclose is contingent on whether this materiality meets an *objective* test of reasonableness.
c) The materiality of certain facts or features of sexual relations is *subjectively* determined by V, but D's knowledge, or the reasonable expectation that D possesses knowledge, of this materiality generates the obligation to make V aware of any dissonance between those facts and the true state of affairs.

These will be discussed in turn.

II.II.I. Implied conditional consent

Amanda Clough is a proponent of the view that gender history is *always* relevant to the question of what V is entitled to know for the purposes of her sexual autonomy.[74] She argues that the correct analytical lens to be placed on a case like *McNally* is one that views it as a case of implied conditional consent, rather than as a case of deception as to biology. V consents to 'what they think is a sexual encounter in line with their sexual orientation, and this is implicit'.[75] Their partner is then required to 'meet the condition of being a biological gender to fit with the victim's sexual orientation'.[76] If D does not disclose that this condition is not met, V cannot be deemed to have truly consented. Gender, therefore, and its compatibility with one's sexual orientation, is a paramount consideration in, and indeed *always material* to, one's consent to a sexual encounter. With respect, there are several deficiencies in this argument.

First, as explored in Section 2, gender and sexual orientation are not always fixed. They are made and remade reflexively, adjusting to the postures of the individual's negotiation with the world and with their identity. Again, as the World Health Organization notes, '[a]s a social construct, gender varies from society to society and can change over time'.[77] The inherent complexity involved in pinpointing one's gender and sexual identity, let alone in conveying it with sufficient cogence such that others may also comprehend it, risks injecting another slippery concept into what is already a contentious area of the criminal law. Using sexual orientation as the implicit basis upon which consent is premised places an enormous burden on individuals to correctly anticipate the sexual orientation of their potential partner lest their biological gender be incompatible with it. The prudent transgender defendant may of course enquire about this openly, but this comes at the price of exposing themselves to a potential transphobe, and more generally, is not conducive to the spontaneity that often accompanies sexual intimacy. Second, this reasoning serves to reinforce that cis-normativity that is latent in the *McNally* judgment. It effectively forces transgender individuals to disclose what is likely private and highly sensitive information, on the ill-informed assumption that a heterosexual and cis-gender individual would never knowingly engage in sexual relations with them. This assumption is evident throughout Clough's analysis, particularly in her assertion that 'McNally *knew* her victim has made a presumption about biological sex that was essential to her agreement in sexual intercourse' (emphasis added).[78] Again, there is insufficient evidence to ground such an assertion; on D's account, she had no such knowledge about this materiality to V's consent. To claim that she knew is to assume that transgender individuals should *always* know that theirs is a gender identity that cannot be accepted as it is presented, effectively relegating them as inferior versions of cis-gender individuals. Adopting such an approach would sharpen the law's discriminatory potential and would '[fly] in the face of the empirical reality of successful unions between cisgender and transgender people, [rendering] transgender people and their bodies undesirable'.[79]

II.II.II. Reasonable materiality

The difficulties involved in determining which deceptions should count for the purposes of vitiating consent have led some academics to propose a model in which the law, rather than the individual, prescribes the legitimacy of V's 'deal-breakers'. On this view, V's consent is vitiated only if what is material to their consent would also be material to the *reasonable* person. This standard of reasonableness is justified by the idea that sexual autonomy is not an absolute right; its magnitude 'may be graded, some violations [being] greater than other ones'.[80] Further, the harm to which the criminal law must respond should not be defined by the victim's idiosyncratic perceptions of harm, but rather the set of moral and legal principles that are formed by 'the values assigned by society to specific interests and the magnitude of a setback to those interests'.[81]

Vera Bergelson's approach to reasonable materiality attempts to temper the primacy of V's sexual autonomy by focusing on D's culpability. She explains that any intentional violation of V's rights, with intention being the highest level of culpability, will warrant criminal punishment.[82] Moving the down the spectrum, when D is at fault but does not act intentionally, the amount of the inflicted harm should determine whether D should be held liable.[83] This harm is determined by reference to the types of interests that V possesses. When applied to deceptive sexual relations, she finds that there is no general duty to tell the truth, which in turn means that any obligation to do so would be contingent on the types of interests that are engaged if V is lied to. The greater is the probability that the risk of harm would materialise, and the more important is the jeopardised interest, the stronger is the legal claim not to be lied to about it.[84] This would mean that negligently failing to inform a sexual partner about one's HIV status would attract criminal liability, while negligently failing to provide information about one's age would not.[85] The materiality of the former is objectively reasonable by reference to the harm done to V's *welfare* interests (that is, in physical health), whereas the latter is only likely to infringe upon one of V's specific sexual preferences. She argues that 'since there is

74 Amanda Clough, 'Conditional Consent and Purposeful Deception' (2018) 82(2) J Crim L 178.
75 ibid 189.
76 ibid.
77 Kari (n 27).
78 ibid 190.
79 Sharpe, 'Ethicality' (n 22) 175.
80 Vera Bergelson, 'Sex, Lies and Law: Rethinking Rape-By-Fraud' in Nicola Wake, Chris Ashford and Alan Reed (eds), *Legal Perspectives on State Power: Consent and Control* (Cambridge Scholars Publishing 2016) 161.
81 ibid 162.
82 ibid.
83 ibid 161.
84 ibid 164.
85 ibid 162.

no general legal duty to tell the truth, then…one's grievance relating to the sexual partner's lie may only be derivative': V has a right to be free from physical harm, but there is no *positive* right that V may invoke against a lie about one's age.[86] Although this model offers more nuance than the implied conditional consent model described above, particularly in its ability to tie together the interplay of actor's culpability and the corresponding harm in cases of deceptive sexual relations, it nevertheless poses its own evidentiary and conceptual difficulties.

Beyond having to show that their belief in the existence of a 'deal-breaker' was causally attributable to D, V would also have to show that being induced into such a belief results in a harm that is objectively reasonable or serious. This not only imposes an added evidentiary hurdle upon V, but, in Bergelson's model, is underpinned by an incorrect understanding of how the right to (sexual) autonomy is conceptually understood. In her account, misrepresentations that do not hurt V physically, and instead cause emotional distress or financial and career disappointment, are beyond the proper reach of sex crimes law.[87] Again, this is because lie-induced harms that are not derived from V's existing rights (such as a right not to be harmed physically) cannot fall within the scope of the criminal law. This assumes that the reasonableness of harm must be determined by reference to *physical* consequences that flow from deception (for example, the consequence of pregnancy in cases of condom-related deception). Yet this overlooks precisely the reason that the rhetoric of deception is used in the first place. The moral significance of the term lies not in its ability to capture the physical harm of deception, but in its ability to mirror the *wrong* involved in distorting the choices open to an otherwise autonomous individual and subjecting them to the distress of having their choices taken away. Bergelson's model in turn conceives of V's sexual autonomy in deceptive sexual relations as *derivative* of a right to be protected against the physical consequences of sex, as opposed to a right, deserving of protection *on its own merit*, to be the author of one's choices. To adhere to such an account, one in which the calculus of harm done to V by a deception is externally pre-determined by legal principles, is to deflate *positive* sexual autonomy of its very essence—that is, the ability and freedom to seek out sexual encounters that fall within the ambit of one's desires, while avoiding those that fall beyond its bounds.

II.II.III. Subjective materiality

Although this article rejects Bergelson's reasonable materiality model, it nevertheless shares her desire to return to the fundamentals of the law on sexual offences and to recalibrate the interplay between the victim's *harm* and the defendant's *culpability*. As discussed above, one of the errors in the *McNally* judgment was its failure to disaggregate questions about V's consent and D's *mens rea*. The finding of deception, which (for the reasons stated above) was unsubstantiated, was premised on V's perception of harm, which in turn pre-determined D's lack of reasonable belief (that is, D's culpability). What is proposed here seeks to segregate these questions in order to better track the corresponding levels of harm and culpability in deceptive sexual relations, such that the infringement upon V's sexual autonomy can be properly weighed against the need for the intervention of the criminal law.

Sovereignty-based accounts of consent have explained autonomy as a person's authority to make demands on others and to claim a space of autonomous choice.[88] If D steps on V's foot without voluntary agreement from V, D causes harm to V by failing to recognise V's authority to demand that others do not do so.[89] Consent is therefore the mechanism through which one expresses their demands on others and elects their choices; it is D's destruction of that mechanism, whether through coercion, deception or otherwise, that leads to V's *harm*. To externally determine the validity of what is material to V's consent, often guided by the vagaries of moral intuition, therefore undermines V's inherent authority to make demands about the circumstances or conditions of their sexual encounters. Given this autonomy-based rationale, it is submitted that the validity of V's 'deal-breakers', or the materiality of certain aspects to V's consent, ought to remain subjectively determined by V. Gibson is correct in identifying that 'there is something capricious about dictating the presence (or otherwise) of V's consent according to fluctuating intuitions about the legitimacy of deal-breakers'.[90] Consent must be *harms*-oriented give due weight to V's personal *positive* sexual autonomy, enabling V to *subjectively* define the harm arising from the infringement thereof, and to determine the boundaries of their sexual desire. V is therefore the author of their sexual autonomy. Of course, this subjective approach is allied to allowing 'deal-breakers' that may be intuitively outlandish or downright prejudicial—V may choose to have sexual relations only with individuals who voted for Elizabeth Warren in the Democratic primary, or only with individuals of a particular race. Such an approach is reminiscent of Herring's somewhat all-or-nothing stance on sexual autonomy, when he writes that 'ultimately it is for V to decide with whom to have sex…She is under no duty to supply sexual service to others on a non-discriminatory basis'.[91] While this aligns with the *substance* of V's sovereignty-based sexual autonomy, the position adopted here departs from Herring's view in his assertion that any privacy rights of a transgender person must be subservient to their partner's right of sexual integrity.[92] Again, as mentioned above, this hubristic approach is difficult to defend: feelings of humiliation, shame, or disgust may serve to retrospectively and constructively aggravate the harm felt by V, but may not necessarily reflect the level of culpability that ought to be attributed to the transgender D, given their compelling reasons for non-disclosure.

Although the *content* of V's sexual autonomy must remain personally defined by V, the *exercise* of such autonomy should not be absolute in the eyes of the criminal law. As has been repeated throughout this article, the hamartia of the *McNally* judgment was its privilege of V's autonomy in the question of D's *mens rea*. In finding that D acted deceptively simply by virtue of her authentic gender identity, the court was complacent in its determination of reasonable belief. This inappropriately extends the *exercise* of V's autonomy and superimposes it onto questions about D's culpability. The calculus of harm and culpability was prematurely altered in V's favour. In order to restore balance, the criminal law must ensure that *subjective* questions about V's consent and sexual autonomy (harm) are adequately and robustly tempered against *objective* questions about D's reasonable belief in consent, or the reasonable expectation of knowledge about the materiality to V's consent (culpability). It is submitted that the determination of deception and reasonable belief

86 ibid 164.
87 ibid.
88 Stephen Darwall, 'The Value of Autonomy and Autonomy of the Will' (2006) 116(2) Ethics 263, 267.
89 Tom Walker, 'Consent and Autonomy' in Andreas Müller and Peter Shaber (eds) *The Routledge Handbook of the Ethics of Consent* (Abingdon: Routledge 2018) 137.
90 Gibson (n 5) 98.
91 Jonathan Herring, 'Rape and the Definition of Consent' (2014) 26 National Law School of India Review 62, 71.
92 Herring, 'Mistaken Sex' (n 63).

should include the concept of 'justifiability' in order to illustrate more holistically the picture of D's culpability. What is proposed here does not seek to be a complete or comprehensive account of how the law ought to be developed, but hopes to highlight where the deficiencies of the current approach may be corrected and to provide a starting point for further discussions.

First, any reasonable expectation of D's knowledge about the materiality of V's consent for the purposes of passive deception must be divorced from cis-normative assumptions about sexual intimacy. The law cannot condition the threshold of reasonableness by pointing to the prejudice latent in society and leveraging it to expect that transgender people anticipate their sexual partner's involvement within such prejudice. Any expectation to make reasonable enquiries must be made by reference to the *facts* of the case rather than arbitrary and inevitably ever-changing assumptions about the larger socio-cultural landscape within which they operate. The law would not impose, for the purposes of meeting a reasonableness threshold, an expectation upon a Jewish man to make enquiries about whether his sexual partner is anti-Semitic, let alone label him deceptive simply by virtue of his failure to readily volunteer this information.[93] On the facts, that D was authentically living as a transgender boy means that the only way in which an expectation to disclaim her gender history would arise is through a concession that there is something undesirable in her identity that ought to be prefaced. The court's current standard of reasonableness is therefore cis-normative, which places an enormous and, in this author's opinion, unjust burden upon transgender defendants. As Sharpe cogently argues, '[p]lacing the obligation on transgender people produces a situation where the one who has no problem with his/her identity/body…is required to disclose personal information to the one who has a problem'.[94] The law must therefore remove the 'supererogatory kind of ethical performance' that it seems to demand of transgender people in order to reinvigorate the importance and essence of the *mens rea* element in these offences.[95]

Second, the calculus of culpability when determining passive deception should involve an enquiry into the 'justifiability' of the defendant's actions. The broad view adopted here is that defended by Scanlon, namely that when we claim that an action is wrong, such an action would be one that we could not justify to others on grounds that we could expect them to accept.[96] Although seemingly abstract, what this concept seeks to introduce is not a rigid multi-factor assessment into the morality of a defendant, but instead simply invites the court to consider any reasons that may underlie a defendant's actions (or, in the case of non-disclosure, inaction). For example, when taking cases of undisclosed HIV status, the 'wrongness' or culpability that we may attribute to the defendant's inaction flows from the fact that there are likely many reasons to reject any justification of such conduct. The defendant may invoke stigma as a justification, but this is unlikely to outweigh the victim's harm, both to sexual autonomy and to physical health. In the case of the transgender defendant, as mentioned above, the justifications for non-disclosure ranging from privacy to self-preservation, with both interests being normatively and empirically rooted, are likely to garner acceptability such that the broader image of the defendant's culpability can be illustrated, in turn pointing away from a finding of deception. Such a calculation would not rely on mere moral intuition, but instead on the court's institutional capacity for fact-finding, as well as its well-established ability to weigh relative harms.

When these factors are taken together, it is clear that D in *McNally*, on her account of the facts, was not under an obligation to inform V of her gender history. The authenticity with which she lived as a transgender boy points away from a reasonable expectation of knowledge about V's cis-oriented consent. This, coupled with the justifiability of non-disclosure, means that any inaction would not lead to a finding of passive deception. Put simply, V made a unilateral mistake that should not have been redressed by the criminal law.

Conclusion

McNally was decided incorrectly. This article has argued that the current approach taken in the law of consent in sexual offences failed the defendant through its characterisation of her transgender identity as deceptive. Beyond the lack of sensitivity shown towards the ontological implications of such an identity, the distinction between active deception and non-disclosure has proven insufficient to categorise the types of behaviour to which criminality should attach. This article has proposed that a better form of categorisation would involve, first, separating principal sexual offences from deceptive sexual relations in order to reflect the *type* of sexual autonomy that is engaged, with the former warranting stronger sanction given its gravity, and second, variegating deceptive sexual relations into a tripartite taxonomy, namely, active deception, passive deception, and unilateral mistake. Only active and passive deceptions are sufficient to attract liability. The approach advocated for in this article holds that the *content* of sexual autonomy must remain subjectively defined by V, but its *exercise* must be appropriately circumscribed. This can be done by ensuring that the law refrains from expecting transgender defendants to anticipate transphobia for the purposes of the reasonableness threshold, and by making a meaningful enquiry into the justifiability of D's actions. An over-emphasis on V's harm, likely to be normatively constructed by cis-normativity, has led to oversight on the proper organisation of the legal enquiry that ought to be undertaken in criminal offences. This article has made clear that the question of V's consent (which ought to be *harm*-oriented, to reflect the *subjective* nature of sexual autonomy) must be kept distinct from the question about D's *mens rea* (which ought to be *wrong*-oriented, to adequately capture D's level of culpability). Doing so will bring much-needed clarity to the law on sexual offences, and will ensure that the disturbing reality in which McNally is labelled a sexual predator is never repeated.

93 Sharpe, 'Criminalising sexual intimacy' (n 19) 222.
94 Sharpe, 'Ethicality' (n 22) 170.
95 ibid 178.
96 Thomas M Scanlon, *What We Owe to Each Other* (Harvard University Press 1998) 4.