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Expanding Liability for Sexual Fraud Through the Concept of 'Active Deception': A Flawed Approach

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Abstract

This article considers recent judicial expansion of criminal liability for sexual fraud. This has occurred through the criminalisation of words or conduct considered to amount to 'active deception'. In contrast, non-disclosure of information does not attract criminal liability. The article argues that (i) the distinction between active deception and non-disclosure of information provides an inadequate basis for setting the parameters of criminal liability for sexual fraud, and (ii) the distinction is vulnerable to analytical collapse and therefore criminal law overreach. In relation to (i), five justifications for reliance on the distinction will be considered and rejected. These are that criminalisation of active deception is less offensive to principles of liberty and causality than criminalisation of non-disclosure and that active deception is more morally culpable, involves a greater violation of sexual autonomy and/or is more harmful than non-disclosure. In developing this argument the article will draw on examples of sexual intimacy where one of the parties is HIV+. In relation to (ii), the article will focus on application of the distinction to 'gender fraud' claims. The example is a useful one because it serves to dramatise the problem of judicial slippage between active deception and non-disclosure.

Keywords

Sexual fraud, rape, active deception, non-disclosure, transgender, cisgender, HIV, liberty, causality, moral culpability, sexual autonomy, harm

Introduction

This article considers recent legal developments in relation to criminal liability for sexual fraud under English law. While criminalisation of rape-by-fraud, as opposed to rape-by-force, has always proved

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contentious,[1] the courts have, through a series of recent cases, extended liability in relation to the former and indeed sexual fraud more generally. They have done so through invoking an act/omission distinction, whereby some deceptions that can be characterised as 'active', as opposed to 'passive', occasion criminal liability.[2] Not all 'active' deceptions produce this effect because the courts have made clear that some deceptions will, as a matter of 'commonsense', not have the effect of vitiating consent.[3] However, in relation to deceptions the judiciary consider sufficiently material to vitiate consent, establishing criminal liability in the future will turn on whether they are characterised as 'active' or 'passive'. Passive deception would appear to refer to the non-disclosure of information. The article will *not* consider judicial reluctance to criminalise all forms of active deception. While the judicial 'commonsense' which animates this approach is questionable,[4] the article will focus on forms of active deception that concern the courts and which are likely to be viewed as more serious transgressions in normative terms.

For some scholars, irrespective of whether the defendant's conduct is characterised as non-disclosure or active deception, convictions for sexual fraud are a step too far.[5] They represent unwarranted state intrusion into the field of sexual relations. Moreover, concern has been expressed as to whether 'the courts can be trusted to draw a clear line between consent that may be regretted in hindsight, and consent that can be said to have been legally negated'.[6] For others, the distinction represents a failure of the courts to acknowledge fully the value of sexual autonomy.[7] Most notably, Jonathan Herring has asserted very clearly, and consistently, that non-disclosure of information, considered material to the complainant, ought to vitiate consent and that liability is appropriate in circumstances where the defendant appreciates the importance of the information to the complainant.[8] For other scholars again, the problem is not so much one of too much or too little law, but the wrong kind of law. In particular, they argue that rape-by-fraud cases are inappropriately labelled, and in ways that fail to capture and communicate the

1. J. Herring, 'Mistaken Sex' [2005] Crim LR 511; H. Gross, 'Rape, Moralism and Human Rights' [2007] *Criminal Law Review* 220; J. Herring, 'Human Rights and Rape: A Reply to Hyman Gross' [2007] *Criminal Law Review* 228; M. Bohlander, 'Mistaken Consent to Sex, Political Correctness and Correct Policy' (2007) 71(5) *Journal of Criminal Law* 412; A. Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent' [2014] *Criminal Law Review* 207; K. Laird, 'Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003' [2014] *Criminal Law Review* 492.
2. *Assange* v *Swedish Prosecution Authority* [2011] EWHC 2849 (Admin); *R (on the application of F)* v *DPP* [2013] EWHC 945 (Admin); *R* v *McNally* [2013] EWCA Crim 1051.
3. Thus, for example, in *McNally*, above n. 2, Leveson LJ made clear that s. 74 should 'be approached in a broad commonsense way'. He considered lying about financial status to fall outside this ambit (at [25]). This judicial view implies that some types of deception are too trivial to vitiate consent.
4. Laird, above n. 1 at 505.
5. D. Ormerod, *Smith and Hogan's Criminal Law*, 13th edn (Oxford University Press: Oxford, 2011) 734; A.P. Simester *et al*., *Criminal Law: Theory and Doctrine*, 4th edn (Hart Publishing: Oxford, 2010) 755; Gross, above n. 1; Bohlander, above n. 1. It may also be that expansion of criminal liability in this area is out of step with community sentiment. In one US study (D.P. Bryden, 'Redefining Rape' (2000) 3 *Buffalo Criminal Law Review* 317, 470–5, 480–7), 519 male and female respondents across a range of age cohorts were asked to indicate whether criminal penalties were appropriate in relation to 18 specific examples of deception prior to sex. A majority of respondents answered affirmatively in relation to only five, one of which also involved coercion. The other four examples concerned intimate medical examination, impersonation of the victim's husband, lying about having a venereal disease and failing to disclose a venereal disease (471–2). Interestingly, in the English context, the first two are covered by s. 76 of the Sexual Offences Act (SOA) 2003, while the third falls with the 'active deception' category developed by the courts. Only the final example falls outside English law. In relation to deception concerning 'infidelity, wealth, marital status, use of a birth control device (by a woman), intention to marry, [and] intention to pay a prostitute' the respondents 'rejected criminal liability by a wide margin' (472).
6. C. McCartney and N. Wortley, 'Raped by the State' (2014) 78(1) *Journal of Criminal Law* 1 at 3.
7. Herring, above n 1. See also S. Schulofer, 'Taking Sexual Autonomy Seriously' (1992) 11 *Law and Philosophy* 35 at 90; D. Archard, *Sexual Consent* (Boulder, CO: Westview Press, 1998); A. Wertheimer, *Consent to Sexual Relations* (Cambridge: Cambridge University Press, 2003); T. Dougherty, 'Sex, Lies and Consent' (2013) 123(4) *Ethics* 717.
8. Herring [2005], above n. 1 at 517. Herring has acknowledged that few legal scholars are prepared to endorse his position (J. Herring, *Criminal Law: Text, Cases and Materials*, 5th edn (Oxford University Press: Oxford, 2012) 484. Indeed, Andrew Simester and David Ormerod, respectively, have described it as 'preposterous' and as 'frightening in its ramifications' (A.P. Simester *et al*., above n. 5 at 755; Ormerod, above n. 5 at 734).

wrong involved.[9] In this article, I do not propose to enter into the debate between Jonathan Herring and his many detractors,[10] or at least not directly. I have elsewhere expressed serious misgivings about the expansion of criminal liability in this area.[11] Rather, it is use of the act/omission distinction as the means to establish criminal liability for sexual fraud that this article will challenge.

In my view, there are two principal difficulties with judicial reliance on the distinction. First, it is questionable whether the distinction provides an adequate basis for setting the parameters of criminal liability. Second, while the distinction appears to carve out a legal space for the protection of privacy and liberty, at least to the extent that no representations are made through speech or conduct, this assumes that distinctions between non-disclosure and active deception are always easy to make. If this assumption is false, at least in some cases, then the distinction is susceptible to 'judicial manipulation',[12] and a danger arises that non-disclosure of information might, of itself, lead to convictions.

To clarify then, the questions to be considered in this article are:

1. Does the distinction between active deception and non-disclosure of information provide an adequate basis for setting the parameters of criminal liability?
2. Is the distinction sufficiently clear-cut to avoid analytical collapse and therefore criminal law overreach?

Judicial Expansion of Criminal Liability for Sexual Fraud

Before turning to these two questions, the article will first summarise the recent legal trend by virtue of which liability for sexual fraud has been expanded. In 2003, the Sexual Offences Act (SOA), informed by the *Setting the Boundaries Report*,[13] expanded the *actus reus* element of non-consent.[14] However, in relation to sexual offences committed by fraud, and despite the Report's recommendation to criminalise 'sexual penetration of anyone in any part of the world by deception',[15] the Act developed this area of the law to only a limited extent. By virtue of s. 76, consent is to be conclusively presumed to be absent where the defendant intentionally (a) deceived the complainant as to the nature or purpose of the relevant act or (b) induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant. In general, the courts have proved reluctant to rely on these provisions, and in particular s. 76(2)(a), as a means of extending liability,[16] in large part due to their conclusive nature with regard to the consent question. In contrast to this restrictive interpretation of s. 76, and despite the view of some legal commentators that s. 76 exhausts the ways in which sexual fraud might be perpetrated,[17]

9. A. Pundik, 'Coercion and Deception in Sexual Relations' (2015) 28 *Canadian Journal of Law and Jurisprudence* 97; J. Chalmers and F. Leverick, 'Fair Labelling in Criminal Law' (2008) 71 *Modern Law Review* 217; B. Mitchell, 'Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling' (2001) 64 *Modern Law Review* 393. Fair labelling, in this context, would require a new offence, either a lesser sexual offence, like a degendered version of the repealed offence of 'procuring a woman by false pretences' (SOA 1956, s. 3) or a non-sexual fraud offence.
10. Gross, above n. 1; Bohlander, above n. 1; Ormerod, above n. 5; Simester *et al*., above n. 5.
11. Sharpe, above n. 1.
12. T. Elliot and D. Ormerod, 'Act and Omissions—A Distinction Without a Defence' (2008) 39 *Cambrian Law Review* 40 at 42.
13. Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences* (HMSO: London, 2000), vol. 1.
14. SOA 2003, ss 74–6.
15. Home Office (2000), above n. 13 at recommendation 14, p. xiii.
16. See *R* v *Jheeta* [2007] EWCA Crim 1699 at [28]; *Assange*, above n. 2 at [87]; *R (on the application of F)* v *DPP*, above n. 2 at [26]; *R* v *B* [2013] EWCA Crim 823 at [24]; *McNally*, above n. 2 at [18]. The case of *R* v *Devonald* [2008] EWCA Crim 527 provides an exception.
17. J. Miles, 'Sexual Offences: Consent, Capacity and Children' [2008] *Archbold News* 6; J. Rogers, 'The Effect of 'Deception' in the Sexual Offences Act 2003' (2013) *Archbold Review* 7; J. Rogers, 'Further Developments under the Sexual Offences Act' (2013) 7 *Archbold Review* 7.

the courts have interpreted the general consent provision in s. 74[18] in an increasingly liberal manner to cover fraud cases.

The emergence of the active deception/non-disclosure distinction, whereby liability for sexual fraud has been both expanded and delimited is, perhaps, first evident in the case of *R* v *EB*.[19] In this case, Latham LJ made clear that 'there was no question of any deception'[20] in circumstances where the defendant had not disclosed his HIV+ status to the complainant. This raised a question as to the significance of more active forms of deception, such as lying.[21] This question was addressed in *Assange* v *Swedish Prosecution Authority*, where the Divisional Court first emphasised that *R* v *EB* 'goes no further than deciding that a failure to disclose HIV infection is not of itself a relevant consideration under s. 74.'[22] The court went on to make clear that active deception fell within the provision. The active deception in this case was found to consist in having sexual intercourse without a condom or continuing to do so after removing, damaging or tearing the condom, after it had been made clear by the complainant that consent was conditional on condom use.[23] In the subsequent cases of *R (on the application of F)* v *DPP* and *R* v *McNally,* the courts also found against defendants on the basis of explicit findings of active deception.[24] In these cases, active deception was found to consist in ejaculating into the defendant's wife's vagina despite prior agreement that consent was subject to not doing so,[25] and in deliberately deceiving the complainant 'into believing that the [the defendant was] male'.[26] Thus it would appear that criminal liability for fraud in this area now turns on the act/omission distinction. It is toward a critique of the use of this distinction for the purposes of establishing criminal liability that attention now turns.

Does the Distinction between Active Deception and Non-disclosure of Information Provide an Adequate Basis for Setting the Parameters of Criminal Liability?

In thinking about the merits of the judicial distinction between active deception and non-disclosure there are a number of potential justifications for the criminalisation of the former, but not the latter. First, it might be argued that criminalising active deception does not offend against the principle of liberty, or at least not to the same degree as criminalising omission. Secondly, it might be argued that, unlike active deception, non-disclosure of information lacks a causal relationship to harm. Thirdly, it might be argued that active deception involves greater moral culpability than non-disclosure. Fourthly, it might be argued that active deception entails a greater violation of sexual autonomy. Finally, it might be argued that active deception is more harmful to the victim. I will argue, to the contrary, that lying or actively misleading do not necessarily entail all, or indeed any, of these things, or at least not in the ways that might be imagined. To illustrate the difficulty, I will work with four hypothetical scenarios where one of the sexual parties is HIV+ and where the other would not have consented to sexual intercourse if aware of this fact. Until recently, 'apparent' consent to sex with a person infected with the HIV virus operated as

18. SOA, s. 74: 'A person consents if he agrees by choice, and has the freedom and capacity to make that choice.'
19. *R* v *EB* [2006] EWCA Crim 2945.
20. Ibid. at [21].
21. R. Card, *Criminal Law*, 20th edn (Oxford University Press: Oxford, 2012) 340.
22. *Assange*, above n. 2 at [90].
23. Andrew Simester *et al*. have expressed scepticism concerning the view that Assange's conduct vitiated consent under s. 74. They argue that if this proposition is correct then it must also follow logically, though perhaps counter-intuitively (see Bryden, above n. 5), that 'a man's consent would be vitiated if he made it clear that he would not have sexual intercourse with a woman unless she was practising contraception, and the woman, wishing to get pregnant, told him that she was when she was not' (above n. 5 at 475).
24. *R (on the application of F)* v *DPP*, above n. 2; *McNally*, above n. 2.
25. *R (on the application of F)* v *DPP*, above n. 2.
26. *McNally*, above n. 2 at [26].

valid consent for the purposes of adult sexual offences, irrespective of the judicial distinction.[27] In view of recent cases, however, prosecution is now perhaps likely to be viewed as appropriate by the CPS in circumstances of active deception concerning HIV+ status. The selection of HIV as the example to work with is informed by this fact and also by the fact that it is generally considered to be a particularly serious transgression in normative terms.[28] This can be contrasted with examples of 'fraud' that have generally been given short shrift by the courts in terms of their analysis of consent and harm.[29]

Hypothetical Scenarios (A–D)

(A) D, aware V would not have consented to sex had D disclosed his HIV+ status, had sex with V.
(B) D, aware V would not have consented to sex had D disclosed his HIV+ status, lied when asked and then had sex with V.
(C) D, aware V would not have consented to sex had D disclosed his HIV+ status, had sex with V. Sexual intercourse was unprotected and D was not on ART (anti-retroviral treatment).
(D) D, aware V would not have consented to sex had D disclosed his HIV+ status, lied when asked and then had sex with V. D was on ART, had a very low viral load, and used a condom.

Justifications for the Distinction

The Liberty Principle. According to the liberty principle, punishing omissions, in the absence of a specific duty to act, is considered a much more serious encroachment on personal liberty than the punishment of acts.[30] The essence of the concern is explained by Herring: '[w]hen the law renders a particular act illegal, that is often not a huge infringement of liberty. The fact that you cannot hit somebody still leaves you with plenty of other options with what to do with your time! However, by punishing omissions, the law leaves the citizen with only one thing they can do to comply with the law.'[31] There are, however, various objections to the use of the liberty principle to limit criminalisation of omissions. Thus, for example, in the classic case of the drowning child,[32] an obligation to rescue is arguably a minimal encroachment on personal autonomy. This is because encountering a child facing this particular peril is (a) unlikely for any particular individual, (b) requires little in terms of time and personal resources to meet the obligation and therefore is unlikely to interfere with pursuit of life goals, and (c) is unlikely to have a significant impact on the rescuer, especially when compared with the impact omission may have on the child. Another major objection to the liberty principle, as a reason for not criminalising omissions, is that it sacrifices the fostering of obligations of social responsibility.[33]

Of course, it may be that different factors will assume different degrees of significance depending on the specific issue that the courts seek to resolve through the act/omission distinction. Thus, for example, analysis of the rescue principle might differ from analysis of the criminal law homicide distinction between killing and letting die. In the present context of sexual intimacy there are clearly differences. Moreover, the differences tend against the liberty argument for not criminalising omissions. Thus, while an obligation to act may, in some cases, divert an individual from other activity, including socially

27. However, non-disclosure of HIV+ status will ground a successful prosecution for non-fatal assault in circumstances where the virus is transmitted. *R* v *Dica* [2004] EWCA Crim 1103; *R* v *Konzani* [2005] EWCA Crim 706). For a critique of criminalisation of HIV transmission generally, see M. Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (Routledge: London, 2007).
28. Bryden, above n. 5.
29. Above n. 3.
30. G. Williams, 'Criminal Omissions—The Conventional View' (1991) 107 *Law Quarterly Review* 87.
31. J. Herring, *Great Debates in Criminal Law*, 3rd edn (Palgrave MacMillan: London, 2015) 32.
32. K. Ridolfi, 'Law, Ethics, and the Good Samaritan: Should there be a Duty to Rescue?' (2000) *Santa Clara Law Review* 957; S. Heyman, 'Foundations of the Duty to Rescue' (1994) 47 *Vanderbilt Law Review* 673.
33. A. Ashworth, 'The Scope of Criminal Liability for Omissions' (1989) 105 *Law Quarterly Review* 424.

beneficial activity, this is not the case regarding sexual intimacy. This is because, in this context, the purpose in which the actor is engaged is the sexual intimacy itself. Thus, unlike in the case of the drowning child, the liberty principle appears to be of little relevance. The actor cannot pursue other options precisely because he has commenced or is pursuing a sexually intimate encounter with the party to whom a moral, if not legal, obligation to act might be said to exist.

The Causal Nexus. The criminalisation of omissions is also said to fall foul of the logic of causality.[34] Thus, it is argued, that in contrast to acts, 'omissions do not cause anything'.[35] As Moore puts it: 'when I omit to prevent some harm I do not make the world worse . . . only when I cause that harm to occur—through my actions—do I worsen the world.'[36] At worst, doing nothing leaves the victim in the same condition as she was to begin with. This causality argument has produced a series of counter-arguments.[37] These include arguments centred around scientific cause and effect and recognition that legal causation is more important than 'but-for' causation in attributing liability. In relation to the former argument, emphasis is sometimes placed on the distinction between events and facts. While omissions are not events, they are clearly facts. In this way, a causal nexus can be established through focusing on the relationship between facts (as opposed to events) and outcomes.[38] In the present context of sexual intimacy, the case for claiming the existence of a causal relationship between omission and outcome is stronger than, for example, in the case of the drowning child. In the latter case, it might be said that 'but-for' the defendant not happening upon the drowning child, the child would have died in the same way. Of course, and in a reversal of the argument, it could be contended that 'but-for' 'the defendant's failure to rescue the child that child would have lived'.[39] The difficulty with this argument, as Herring notes, is that it is 'subject to the riposte that but for everyone's failure to rescue the child he or she would have lived'.[40] In any event, in relation to sexual intimacy, the case for arguing that a causal relationship exists between omission and outcome appears much stronger. While not the only cause, it seems clear that omission is a causal factor in circumstances were, for example, a complainant would not have had sex with the defendant had she known that he was HIV+. Moreover, unlike the drowning child example, where liability for omission might extend to everyone present, in the case of sexual intimacy liability is limited to a single individual.

Moral Culpability of the Defendant. It has been noted that the act/omission distinction is 'deeply rooted in the common law'[41] and that over time the courts have tended to restrict the criminalisation of omission.[42] In doing so, they have been quite explicit in 'espousing moral differences between acts and omissions'.[43]

34. The argument that liability should arise where the defendant created the risk of harm is really a species of the causation argument (G.P. Fletcher, *Rethinking Criminal Law* (Oxford University Press: Oxford, 1978) 601.
35. M.S. Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* (Clarendon Press: Oxford, 1993) 28–9. See also M. Moore, *Causation and Responsibility* (Oxford University Press: Oxford, 2009); H. Beebee, 'Causing and Nothingness' in J. Collins and N. Hall (eds) *Causation and Counterfactuals* (MIT Press: Cambridge, MA, 2004).
36. Moore (1993), above n. 35 at 29 (as quoted by Roni Rosenberg, 'Between Killing and Letting Die in Criminal Jurisprudence' (2014) 34 *Northern Illinois University Law Review* 391 at 401).
37. Moore himself offers some caveats (above n. 35 at 54–7).
38. D.H. Mellor, *The Facts of Causation* (Routledge: London, 1995).
39. Herring, above n. 31 at 30.
40. Ibid. One response to this dilemma can be found in Hart and Honore's approach to causation. This approach distinguishes between *normal* and *abnormal* events (H.L.A. Hart and A. Honore, *Causation in the Law* (2nd edn) (Oxford University Press: Oxford, 1985). According to this distinction, causation might be established in relation to an omission to respond to an abnormal event (such as a child drowning). However, the distinction begs the question regarding what is normal/abnormal and is likely to render law unpredictable if utilised for the purposes of developing doctrine.
41. J.G. Fleming, *Law of Torts*, 8th edn (Law Book Company: Sydney, 1992) 146. See also P. Glazebrook, 'Criminal Omissions' (1960) 76 *Law Quarterly Review* 386.
42. A. Norrie, *Crime, Reason and History* (Butterworths: London, 2001) 120.
43. Elliot and Ormerod, above n. 12 at 53. See, for example, *R* v *Lowe* [1973] 1 QB 702.

Indeed, they have perhaps persisted with the distinction 'precisely because of [their] belief that the distinction reflects an important moral distinction'.[44] However, while the courts place emphasis on the moral importance of the distinction, this appears to be more a matter of judicial 'common sense' than the product of rigorous analysis. The failure of the courts to articulate a clear rationale does not, of course, mean one is lacking. Accordingly, in thinking about the moral culpability of defendants, we should recognise the *claim* that there are morally significant differences between acting and omitting to act. Stephen Wilkinson has argued that there are moral distinctions between lying, actively misleading and non-disclosure.[45] He contends that 'lying is worse than other ways of not telling the truth' because 'lying does more damage to relationships of trust'.[46] This may or may not be true. It is an empirical question, as Wilkinson recognises. An emphasis on trust, however, proves problematic for a number of other reasons. In the first place, Wilkinson develops his claim in the medical context of the doctor–patient relationship, where the element of trust is especially recognised. A focus on trust in the criminal law context may be less appropriate because of the different and non-professional nature of the relationship and because of the implications for liberty that necessarily attend the criminal law. In *R* v *McNally*, the Court of Appeal refused to characterise the defendant's 'active deception' as a breach of trust, precisely because the relationship between defendant and complainant lacked this professional quality.[47]

Alan Wertheimer suggests that, while the question of criminal liability for sexual fraud must be resolved 'by moral argument as to what the parties who engage in sexual relations owe to each other by way of intentional falsehood and disclosure of information'[48] it would 'probably be a mistake to apply a strong fiduciary model to sexual relations among competent adults'.[49] However, application of such a model to sexual relations has its supporters. Thus, Herring contends that 'sexual partners owe to each other heightened standards of obligation of a fiduciary nature.'[50] Of course, Herring would insist on a heightened standard irrespective of whether a defendant acts deceptively or fails to disclose material information. Importantly, even if we were to concede that a fiduciary model of sexual relations is an appropriate one for establishing criminal liability, any assumption that the active deception/non-disclosure distinction expresses, or indeed is even consistent with, the underlying rationale of that model is dubious. That is to say, it is difficult to conclude that lying, more than non-disclosure, necessarily constitutes a more serious breach of trust. This claim can be demonstrated through considering the hypothetical scenarios involving HIV.

Thus application of the distinction would lead to convictions in scenarios B and D, but not A and C. I would argue that such outcomes, ones that follow the line of reasoning exhibited in the cases discussed, contradict any claim that the distinction satisfactorily distributes defendants in terms of moral culpability. In all four scenarios, the defendant was unwilling to disclose his HIV+ status and was aware that sex was conditional on his *not* being HIV+. In this regard, the scenarios are not distinguished by an intent/recklessness divide. That is, none of the scenarios involve *only* risk-taking. Two differences between scenarios B and D, and scenarios A and C, are that in scenarios B and D the victim is proactive in asking about the defendant's HIV status and the defendant lies. However, in relation to the culpability question, only lying is relevant. Of course, lying is a more active form of deception than non-disclosure. But this does not, of itself, demonstrate greater culpability. Indeed, I would suggest that while the defendant in

44. Elliot and Ormerod, above n. 12 at 53.
45. S. Wilkinson, 'Why Lying Is Worse Than Merely Misleading' (2000) 13 *Philosophy Today* 6–7.
46. Ibid. at 7.
47. In this regard, the court distanced itself from the view of the trial judge, and this factor proved significant in sentence reduction. The court also noted that s. 21 of the SOA, while not directly applicable, 'defines ''position of trust'' for the purposes of ss 16–19 of the Act as covering relationships such as teacher and pupil or doctor and patient' (*McNally*, above n. 2 at [49–51]).
48. A. Wertheimer, 'Consent and Sexual Relations' (1996) 2 *Legal Theory* 89–112, 105.
49. Ibid. at 109.
50. Herring [2005], above n. 1 at 515.

scenario B may be more morally culpable than the defendant in scenario A, it is certainly not the case that active deception in scenario D is more morally culpable than non-disclosure in scenario C. This is because in scenario D lying needs to be considered in relation to other features of the scenario.

The specific features that ought to be valued here are that the defendant is (i) on anti-retroviral drugs and has a low viral load and (ii) used a condom. While the defendant's actions might be viewed as unethical, they do demonstrate a quite different relation to risk and harm, one that might be viewed as lessening culpability. Certainly, in scenario C, the defendant exposes the victim to a significant risk of serious harm, whereas in scenario D, though the defendant lies, the risk of harm to which the victim is exposed is minimal.[51] Moreover, while the defendant in scenario C is highly likely to be aware of a serious risk of harm to the victim, the defendant in scenario D is likely to be aware of the exceptionally low risk of transmission of the virus. It is true in scenario D, that while lying might not be motivated by a desire to have sex, the defendant is aware of the absence of consent. However, this is true in all four scenarios. What is problematic is the fact that the defendant who took responsibility for his own sexual health, practised safe sex and who accordingly exhibited some degree of care and concern toward the 'victim', is more likely to be convicted of a sexual offence under the judicial distinction under consideration. This appears to me to be intuitively wrong. Reasoning by analogy in this way suggests that the assumption that active deception necessarily involves a greater breach of trust than non-disclosure is misplaced, at least in some plausible cases. As Ashworth has reminded us, 'the act-omission distinction should not be used as a cloak for avoiding the moral issues.'[52]

Violation of the Victim's Sexual Autonomy. Sexual autonomy is an important right. It is debateable, however, whether it ought to be viewed as having been infringed by deception in circumstances falling outside s. 76 of the SOA. According to Jennifer Temkin, while deceptions falling within s. 76 deprive a woman of 'her right to choose whether and with whom to have sexual intercourse . . . the same is not true of the man who falsely assures a woman that he will love, marry, promote or house her if she has intercourse with him.'[53] Conversely, Herring insists on a contextual and subjective approach which recognises that, for some people, a declaration of love makes 'all the difference in the world'.[54] For present purposes, however, we are not concerned with the subject-matter of fraud, but rather with the manner in which it is perpetrated, and crucially whether it can be said that the manner of perpetration matters in terms of the degree to which the right to sexual autonomy is violated. In essence, the question becomes: if we assume violation of sexual autonomy in cases of deception, can it be said that the violation is any greater in the case of active deception than it is in cases of non-disclosure? While there are scholars who would support/oppose prosecution in either case, the point here is to express scepticism concerning any claim that the right to sexual autonomy can justify the judicial distinction. Turning to our hypothetical HIV scenarios, it is clear, assuming the victim has a right to know about the defendant's HIV+ status,[55] that consent is lacking in all four scenarios. This is so because the victim would not have had sex with the defendant in any of the scenarios had she known the truth. However, in order to make the case that active deception is more problematic than non-disclosure it would be necessary to conclude that the *source* of our ignorance or error matters. Yet, as Claudia Mills points out: 'All that really seems to matter, for evaluating the

51. ART (antiretroviral treatment) reduces the HIV viral load in blood, semen and vaginal and rectal fluids to very low levels, reducing the risk of HIV transmission. Studies have shown the risk to be reduced by 96% (M.S. Cohen *et al*., 'Prevention of HIV-1 Infection with Early Antiretroviral Therapy' (2011) 365(5) *The New England Journal of Medicine* 493). Follow-up studies have confirmed very low infection rates (J.M. Baeten, 'Antiretroviral Prophylaxis for HIV Prevention in Heterosexual Men and Women' (2012) 367(5) *The New England Journal of Medicine* 399).
52. A. Ashworth, *Principles of the Criminal Law* (Oxford University Press: Oxford, 2009) 100. See also Elliot and Ormerod, above n. 12; V. Tadros, *Criminal Responsibility* (Oxford University Press: Oxford, 2005) ch. 7.
53. J. Temkin, 'Towards a Modern Law of Rape' (1982) 45 *Modern Law Review* 399, 405.
54. Herring [2005], above n. 1 at 521.
55. It is not clear that HIV+ people should necessarily bear a moral obligation to disclose, and this is especially so where the risk of transmission is exceptionally low.

autonomy of my choice, is what I know or do not know, not how I came by my state of knowledge or ignorance.'[56]

Harmful Consequences. If lying cannot be described as more culpable than non-disclosure, or at least not sufficiently so to justify a different criminal law response, and if sexual autonomy is about informed consent rather than how information is acquired, it might still be argued that active deception produces greater harm than non-disclosure and that this justifies differential treatment. However, a number of difficulties arise here. Putting to one side debate over whether sexual fraud produces harm sufficient to justify resort to the criminal law,[57] we are still left with the problem of explaining how active deception involves a surfeit of harm. In my view, while sexual fraud might lead to harm (psychological or emotional)[58] and does entail harm in the sense of a set-back to a rights-based interest[59] or public good[60] (sexual autonomy), it is hardly convincing to suggest that harm is magnified in the case of lying, as opposed to non-disclosure of facts that bear such psychological/emotional significance.

Thus, if we consider our hypothetical scenarios involving HIV, it is hardly plausible to argue that the active deception in scenarios B and D led the victim to experience a greater degree of psychological or emotional harm than non-disclosure in scenarios A and C. In all four scenarios, assuming that the victim learns of the defendant's HIV+ status subsequent to sexual intimacy, there is either anxiety about the possibility of transmission or there is not. Indeed, in terms of possible psychological harm, non-disclosure might actually be more harmful than active deception. While this might seem counter-intuitive, we should recognise that in the case of non-disclosure, the victim who proceeds with sex is likely to have made a false assumption regarding the HIV status of the other party. Accordingly, she might feel more responsible for the sexually intimate encounter than had she been the recipient of a lie.

Another example that illustrates the difficulty of the active deception/non-disclosure distinction, at least if harm is the benchmark of its intelligibility, is one that compares HIV scenario C[61] with the case of *R* v *Devonald*.[62] In this case, a middle-aged man was convicted under s. 4 of the SOA on the basis that he had caused a young man to masturbate in front or a webcam as revenge for what he believed to be the boy's mistreatment of his daughter. Yet, the potential for harm evident in HIV scenario C, a scenario which according to the logic of the active deception/non-disclosure distinction would not lead to a criminal conviction, appears to be out of all proportion to the 'harm' occasioned in the active deception case of *Devonald.*

Is the Distinction Sufficiently Clear-cut to Avoid Analytical Collapse and Therefore Criminal Law Overreach?

Thus far, this article has considered whether the distinction between active deception and non-disclosure provides an adequate basis for setting the parameters for criminal liability. To that end, a series of justifications for the distinction have been considered and their shortcomings highlighted. However, even if a clear rationale and justification for the distinction between active deception and non-disclosure proves

56. C. Mills, 'Passing: The Ethics of Pretending to Be What You Are Not' (1999) 25(1) *Social Theory & Practice* 29–51, 14.
57. While liberal scholars generally insist on the demonstration of harm or the risk of harm as a necessary pre-condition to the criminalisation of conduct, it is clear that wrongs can occur in the absence of harm, as Gardner's 'pure rape' example illustrates (J. Gardner, 'The Wrongness of Rape' in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press: Oxford, 2007) 5). Gardner refers to scenarios where the victim (and everyone else) remains oblivious to the fact that she was raped while unconscious.
58. In rejecting Gross' accusation of legal moralism (above n. 1 at 225–7), Herring insists that deceptions may and do produce 'serious harms', above n. 1 at 228.
59. Archard, above n. 7 at 97.
60. Gardner, above n. 57 at 1–32, 31.
61. *EB*, above n. 19.
62. *Devonald*, above n. 16.

elusive, it might be thought that the distinction offers a clear legal test likely to assist courts in navigating their way through the murky waters of sexual fraud. Framing the issue in this way, however, assumes that the distinction is analytically robust. Yet scholars have highlighted difficulties associated with the so-called 'definition question'.[63] Criticism has, perhaps, been especially pronounced in relation to the criminal law homicide distinction between killing and letting die.[64] This is due, at least in part, to the willingness of courts, in this context, to characterise as omission what is, on any logical reckoning, action. Thus in *Airdale NHS Trust* v *Bland*, the House of Lords defined the turning off of a life support machine as an omission on the basis that it was equivalent to having never turned the machine on in the first place.[65]

In this part of the article, however, I want to challenge the analytical robustness of the distinction through considering how it is applied to gender fraud cases. This example serves to highlight the definitional problem. It will be argued that the legal reasoning in cases of this kind evinces considerable slippage between active deception and non-disclosure. Moreover, this slippage is, it will be argued, the effect of the power of cissexism.[66] Thus, while Elliot and Ormerod have expressed concern that the act/omission distinction is vulnerable to 'judicial manipulation',[67] the argument here is that the problem is not simply one of judicial intent but an unacknowledged, and perhaps unconscious, interpretational commitment to cisnormativity. In the first part of this article, we considered HIV scenarios as a vehicle for thinking about whether the distinction is an adequate basis for setting the parameters of criminal liability. It is worth stating what might seem obvious, namely that HIV+ status is a fact that may or may not be disclosed and in relation to which active deception might occur. In relation to gender status, however, the 'facts' in question are considerably more complex and contestable and in ways that call the distinction, or at least its practical application, into question.

The Case of Gender Fraud

In recent decades, a series of successful 'gender fraud' prosecutions have been brought in the UK, the US and Israel against young female-bodied people who identify as transgender[68] men, gender queer[69] and/or

63. Rosenberg, above n. 36 at 393.
64. See, for example, J. Keown, 'Restoring Moral and Intellectual Shape to the Law after Bland' (1997) 113 *Law Quarterly Review* 481; J.M. Finnis, 'Bland: Crossing the Rubicon' (1993) 109 *Law Quarterly Review* 329.
65. [1993] AC 789 (HL).
66. 'Cissexism' refers to the belief that transgender people's gender identities 'are inferior to, or less authentic than, those of cissexuals;' (J. Serrano, *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity* (Seal Press: Berkeley, CA, 2007) 12). The term 'cissexual' refers to people 'who have only ever experienced their subconscious and physical sexes as being aligned' (33). It is used in preference to terms like 'natural', 'real', 'biological', 'genetic' or other terms which presuppose and reinforce the primacy of cissexual people. The term 'cisgender' refers to those cissexual people who are comfortable with gender expectations that are socially constructed to follow from the fact of cissexuality. In this article, I will use both 'cisgender' and 'cissexual' depending on the context. However, I will typically use 'cisgender' because cisgender people are also cissexual, while the reverse is not necessarily so (queer identified people, in particular, are not cisgender) and it is cisgender, rather than cissexual, status that is likely to be the better indicator of whether a gender fraud complaint will be made.
67. Elliot and Ormerod, above n. 12 at 42.
68. The term 'transgender' has become something of an umbrella term for all trans identified people (see K. Bornstein, *Gender Outlaw: On Men, Women and the Rest of Us* (Routledge: New York, 1994); L. Feinberg, *Transgender Warriors: Making History from Joan of Arc to RuPaul* (Beacon: Boston, MA, 1996). For the purposes of this article, it is used in a more limited sense to refer to people who feel incongruence between their gender identity and their anatomy. The term 'transsexual' is often used in this respect. However, the term 'transsexual' fails to exhaust this group because many transgender people refuse the 'transsexual' label because of its medical history and pathologising effects (see A. Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Cavendish: London, 2002) ch. 2).
69. The term 'gender queer' denotes a person who does not subscribe to conventional gender distinctions but identifies with neither, both or a combination of male and female genders: J. Nestle *et al*., *GenderQueer: Voices from Beyond the Sexual Binary* (Alyson Books: New York, 2002).

lesbian.[70] At the time of the alleged offences, the convicted defendants were aged between 17-23, while the complainants, who were all cisgender women, were aged between 15–26.[71] The first prosecution occurred in 1991. In *R* v *Saunders* (unrep), Jimmy Saunders, then aged 17, was sentenced to prison for six years after being convicted of several counts of indecent assault pertaining to two young cisgender women.[72] The 1990s also witnessed two prosecutions in the United States. In *People* v *Clark*, Sean O'Neill was tried in the State of Colorado and convicted of the rape of four young women, each of whom he had dated.[73] He received a custodial sentence of three months and a period of probation.[74] The following year, Christopher Wheatley, then aged 20, was convicted of third degree rape in the State of Washington.[75] He was sentenced to prison for 27 months.[76] In 2003, in *Israel* v *Alkobi*, Hen Alkobi, then aged 20, was convicted of false impersonation of a man and attempting to penetrate the complainant's genitalia with an object and was sentenced to six months in prison, commuted to six months of community service and 24 months' probation.[77] In 2012, in *R* v *Barker* (unrep), Gemma Barker, then aged 19, was convicted by an English court of two counts of sexual assault, and received a custodial sentence of 30 months.[78] In 2013, two further prosecutions followed in the UK. First, in *R* v *McNally*, Justine McNally, then aged 17, was convicted of six counts of sexual assault by penetration and sentenced to three years' imprisonment.[79] Later that year, in *R* v *Wilson* (unrep), Christopher Wilson, then aged 22, was convicted by a Scottish court of two counts of *obtaining sexual intimacy by fraud* and sentenced to three years' probation and 240 hours of community service.[80] In 2015, in *R v Newland* (unrep), Gayle

70. Precise gender identification is not always clear from legal and media reporting of some of the cases and this might be viewed as serving only to complicate the legal issues and their resolution.
71. The fact that some complainants were minors (for example in the *Barker* and *Wilson* cases) ought not to be viewed as relevant because, at least in relation to the UK prosecutions: (a) no defendant was charged with a sexual offence against a minor, (b) Wilson had a reasonable belief that the complainant was 16 and (c) CPS practice is not to prosecute, in the absence of aggravating factors, where consensual sexual activity takes place between parties who are young and close in age. http://www.cps.gov.uk/legal/s_to_u/sentencing_manual/s9_sexual_activity_with_a_child/ (accessed 22 December 2015).
72. [1991] (unrep) Pink Paper, 196, 12 October 1991. For a discussion of the *Saunders* case see A.M. Smith, 'The Regulation of Lesbian Sexuality through Erasure: the case of Jennifer Saunders' in J. Kay (ed.) *Lesbian Erotics* (New York University Press: New York, 1995) 164–79. The offence of indecent assault was repealed in 2003 by the SOA and replaced by the s. 3 offence of sexual assault, which is committed where the defendant intentionally touches the victim without her consent.
73. No. 1994CR003290 (Colo. Dist Ct. Feb. 16, 1996) (on file with Harvard Law School Library). Clark was given the name O'Neill at birth. For discussion of the case see J.L. Nye, 'The Gender Box' (1998) 13 *Berkeley Women's Law Journal* 226; P. Califia, *Sex Changes: The Politics of Transgenderism*, 2nd edn (Cleis Press: San Francisco, CA, 2003) 234–7.
74. J. Green, 'Predator?' *San Francisco Bay Times*, 22 February 1996.
75. *State* v *Wheatley* No. 97-1-50056-6 (Wash. Superior Ct. 13 May 1997).
76. Ibid.
77. For a discussion and critique of the *Hen Alkobi* case, see A. Gross, 'Gender Outlaws Before the Law: the Courts of the Borderland' (2009) 32(1) *Harvard Journal of Law and Gender* 165.
78. *Daily Mail Online*, 'I felt repulsed and dirty and wanted to kill myself': Schoolgirl victims of teenage girl who dressed as boy to date them speak of their anguish as she is jailed (6 March 2013), available at http://www.dailymail.co.uk/news/article-2110430/Gemma-Barker-jailed-Vctims-girl-dressed-boy-date-speak-anguish.html (accessed 22 December 2015); *The Mirror*, My boyfriend was really a girl: Teenage victim of sex con woman tells of her horror (6 March 2013) available at http://www.mirror.co.uk/news/real-life-stories/agony-of-teen-victims-of-gemma-barker-752654 (accessed 22 December 2015); *The Sun*, Boy-girl groper Gemma Barker ruined my life (7 March 2013), available at http://www.thesun.co.uk/sol/homepage/news/4176927/Boy-girl-groper-ruined-my-life.html (accessed 22 December 2015).
79. *McNally* (above n. 2). The offence of Sexual Assault by Penetration, which is an offence under s. 2 of the SOA, requires non-consensual and intentional penetration of the vagina or anus by any part of the body or any object. The facts of *McNally* involved oral and digital penetration of the complainant's vagina.
80. *Gay Star News*, Man 'guilty' of fraud for not telling girlfriend he was trans (7 March 2013) available at http://www.gaystarnews.com/article/man-%E2%80%98guilty%E2%80%99-fraud-not-telling-girlfriend-he-was-trans070313/ (accessed 22 December 15); *Pink News*, Scotland: Case of trans man facing jail for sex 'by fraud' raises concerns of Scottish Transgender Alliance (12 March 2013) available at http://www.pinknews.co.uk/2013/03/12/scotland-case-of-trans-man-facing-jail-for-sex-by-fraud-raises-concerns-of-scottish-transgender-alliance/ (accessed 22 December 2015); *BBC News*, Sex fraud woman put on probation (9 April 2013) available at http://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-22078298 (accessed 22 December 2015).

Newland, then aged 25, was convicted of three counts of sexual assault by penetration and sentenced to 8 years imprisonment. Most recently, in *R v Kyran Lee (Mason)* (unrep), Kyran Lee, then aged 25, was convicted of one count of sexual assault by penetration and received a suspended sentence of two years. All convicted defendants were placed on sex offenders registers for life.[81]

In most of these cases it is unclear whether convictions were sustained on the basis of active deception or non-disclosure or whether any consideration was given to such a distinction. In reality, and precisely because the distinction tends to unravel in transgender and gender queer contexts, it is likely that non-disclosure has proved sufficient for conviction. This is certainly the case in the transgender case of *Wilson*, where Lord Bannatyne made clear in his sentencing judgment that 'deception lay in not disclosing . . . biological sex.'[82] In other cases, the basis for conviction is not rendered explicit. In the *Alkobi* case, conviction for false impersonation of a man reveals the dilemma such a distinction produces for transgender people. The word 'impersonation', which, of course, hints at an ontological problem evident in such prosecutions, suggests active conduct as opposed to omission. Yet, on this reckoning, and precisely because transgender operates as a synonym for deception in a ciscentric society, transgender people cannot avoid active status. Every word, every gesture, every mannerism, no matter how consistent with authentic gender identity, is a manifestation of active deception. In this regard, the definition problem is brought to crisis.

In exploring the issue of sexual fraud, the remainder of this article will focus on the English decision of *R* v *McNally*. It will do so because, in the UK context, it is the only case so far to be considered by a superior court and because, unlike other cases, it enshrines the active deception/non-disclosure distinction as the basis for establishing criminal liability. Moreover, and crucially, it seeks to explain conviction explicitly by reference to it. In this case the court held that 'the sexual nature of the acts is, on any common sense view, different where the complainant is deliberately deceived by a defendant into believing that the latter is a male.'[83] In other words, the legality of conviction is predicated on two judicial findings: (i) the defendant is female, and relatedly (ii) actively deceived the complainant into believing the contrary.

Determining Gender

On the surface of things it may seem unsurprising that McNally was found to be female. After all, McNally is a female-bodied person, with a female birth certificate. However, and while the Law Commission has previously recommended gender reassignment surgery as the tipping point where 'apparent' consent 'should not be disregarded',[84] it is clear, since the Gender Recognition Act (GRA) 2004, that surgery is not a condition for legal recognition of gender identity in the UK.[85] Moreover, to determine gender status for the purposes of criminal prosecution by reference to legal gender status, would serve to make most young transgender people fair game, given that a condition of gender recognition is that an

81. *R v Newland* [2015] (unrep) The Telegraph, The Gayle Newland sentence sets a dangerous precedent for transgender rights (13 November 2015), available at http://www.telegraph.co.uk/news/uknews/crime/11993361/The-Gayle-Newland-sentence-sets-a-dangerous-precedent-for-transgender-rights.html (accessed 22 December 2015); *R v Lee* [2015] (unrep) The Guardian, Woman who used fake penis to have sex with a woman avoids jail (15 December 2015), available at http://www.theguardian.com/uk-news/2015/dec/15/woman-who-used-fake-penis-to-have-sex-with-a-woman-avoids-jail (accessed 22 December 2015).

82. *R* v *Wilson* [2013] (unrep) *Gay Star News*, above n. 80. Indeed, Lord Bannatyne accepted that Chris Wilson, who had lived as a boy since childhood and who had indicated an intention to undergo gender reassignment surgery, genuinely felt that he was male rather than female. Strangely, while his Lordship felt this fact reduced Wilson's culpability, he did not consider it to undermine the deception claim: BBC News, Sex fraud woman put on probation (9 April 2013), available at http://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-22078298 (accessed 22 December 2015).

83. *McNally*, above n. 2 at [26].

84. Law Commission, *Consent in Sex Offences*. The report was annexed to vol. 2 of *Setting the Boundaries*, above n. 13 at para 5.33.

85. GRA, s. 3.

applicant be 18.[86] By the same token, a diagnosis of gender dysphoria, a diagnosis which operates as a trigger for everything that happens under the GRA,[87] is unlikely to have been made prior to the time when young transgender people begin to explore their sexuality.[88] To determine gender by reference to conferral of a Gender Recognition Certificate (GRC), surgical intervention and/or a diagnosis of gender dysphoria is, effectively, to place transgender youth beyond the protection of the criminal law. Further, while such factors should not be viewed as determinative of gender, given their potential exclusionary effects, it should be noted that McNally, at least prior to prosecution, identified as male, felt 'more comfortable' in the male gender role,[89] and indicated an intention to undergo gender reassignment surgery.[90] This is entirely consistent with the conclusion that McNally is a transgender man and inconsistent with the court's conclusion of female identity.

However, the *McNally* case is complicated by McNally's own contrary statements on the question of gender. Thus in a witness statement, McNally stated: 'I accept that [the complainant] did not consent to the sexual activity between us because she did not realise I was a girl and not a boy.'[91] This statement is relevant to the question of McNally's self-understanding of gender and to the question of deception. The latter question, which the reader might think the statement resolves, is one that will be considered in the next part of this article, where a contrary view will be offered. In relation to gender, McNally's apparently unambiguous statement should be treated with caution. In the first place, McNally speaks of gender in the past tense, never stating 'I am a girl/woman', but always 'I was a girl.' This might be read as consistent with a particular gender journey and conceptualisation of a gendered past. Secondly, it is important to recognise that a witness statement referring to female gender identity is not necessarily indicative of actual or authentic gender identity.

It may be that McNally was exhausted by criminal prosecution and the media persecution[92] that followed. Thus, and as noted by the Court of Appeal, McNally, in signing the witness statement, 'just wanted it to be over'.[93] In other words, we should not discount the possibility that such statements, as well as McNally's guilty plea, point to an understandable retreat into cisnormativity, rather than indicating anything important about veracity or ontology. Of course, I appreciate that these observations about McNally's gender identity might be viewed as speculative and I understand that courts have to deal with evidence as presented. Nevertheless, the idea that McNally might have sublimated identity and desire in the face of a legal and cultural world in which transgender and deception are viewed as synonymous,[94] is one that finds support in medical evidence dealing with rates of gender persistence. Thus,

86. GRA, s. 1.
87. GRA, s. 2(a).
88. As noted by GIRES (Gender Identity, Research and Education Society): 'Social pressures, especially within the family and at school, currently prevent all but a few from revealing their gender variance and being referred for medical care, especially in adolescence' (B. Reed *et al*., *Gender Variance in the UK: Prevalence, Incidence, Growth and Geographic Distribution* (2009), available at http://www.gires.org.uk/assets/Medpro-Assets/GenderVarianceUK-report.pdf (accessed 22 December 2015). See also P.T. Cohen-Kettenis and F. Pfafflin, *Transgenderism and Intersexuality in Childhood and Adolescence: Making Choices* (SAGE: Thousand Oaks, CA, 2003) 65.
89. *McNally*, above n. 2 at [12].
90. Ibid. at [10].
91. Ibid. at [37].
92. *Daily Mail Online*, Schoolgirl, 18, pretended to be a boy called Scott for three and a half years to get another teenage girl, 16, into bed and take her virginity (21 March 2013), available at http://www.dailymail.co.uk/news/article-2296982/Justine-McNally-18-pretended-boy-girl-bed-virginity.html (accessed 22 December 2015); Daily Record and Sunday Mail, Schoolgirl who posed as boy for more than three years to have sex with teenage girl jailed for three years (22 March 2013), available at http://www.dailyrecord.co.uk/news/scottish-news/schoolgirl-who-posed-boy-sex-1778083 (accessed 22 December 2015); *The Telegraph*, 18-year-old woman masqueraded as boy to get girl into bed (24 March 2013), available at http://www.telegraph.co.uk/news/uknews/crime/9946687/18-year-old-woman-masqueraded-as-boy-to-get-girl-into-bed.html (accessed 22 December 2015).
93. *McNally*, above n. 2 at [40].
94. T.M. Bettcher, 'Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion' (2007) 22(3) *Hypatia* 43.

while many young children exhibiting gender variant behaviour do not go on to identify as transgender as adults, those insisting on non birth-designated gender identities after adolescence have a very high rate of persistence into adulthood.[95] Thus it may be that McNally, who after all, initially indicated a desire for gender reassignment surgery, has participated in a kind of self-repudiation.[96] This draws attention to a very real danger in prosecuting young transgender people on the basis of their intimate relations with others.[97] In many respects, *R* v *McNally* can be view as a hard case producing bad law.

In this respect, we might wonder what the implications of the Court of Appeal's decision are for sexually active transgender people who offer different gender narratives at trial. Thus, we might ask, what would be the legal position of a transgender person who asserted their gender identity very clearly and consistently throughout the criminal justice process? Would this lead the court to take the view that consent is valid because of the existence of a symmetrical relationship between the complainant's sexual object choice and the defendant's gender identity, or would the court continue to find a disjunction, serving to vitiate consent?[98] If so, in what circumstances would consent be found to exist? Would possession of a GRC and/or having undertaken gender reassignment surgery resolve the gender question in a transgender person's favour? The question of how gender is to be determined for the purposes of sexual fraud offences is obviously an important one, yet it remains unclear. There is an urgent need for judicial, and perhaps legislative, clarification. However, even in circumstances where a transgender person's gender identity were to be acknowledged by the courts, the question of active deception would not necessarily disappear. While rejection of a gender identity claim (or in *R* v *McNally*, the countermanding of such a claim by the defendant) will bring active deception to the fore, judicial acceptance of gender identity might serve only to kick it down the road. It is to this question of active deception that we now turn.

Finding Active Deception

The court's finding of female gender status did not seal McNally's fate. The question of *mens rea* still had to be faced. Indeed, even resolving the question of consent under s. 74 of the SOA seems to have required consideration of *mens rea*, given that the active deception/non-disclosure distinction appears to have injected 'a certain degree of knowledge or intentionality' into the provision.[99] In other words, and according to the court's logic, even if we were to accept that McNally is female, mere non-disclosure of this 'fact' would not, of itself, lead either to vitiation of consent or to proof of *mens rea*. Accordingly, the court had to find, whether through words or deeds, active deception on the part of McNally.

The Court of Appeal referred to various facts which appear, individually or collectively, to have been interpreted as constituting active deception. Before considering them, however, it is necessary to deal

95. B. Wren, 'Early Physical Intervention for Young People with Atypical Gender Identity Development' (2000) 5 *Clinical Child Psychology and Psychiatry Review* 22031; K.J. Zucker, 'Gender Identity Disorder' in D.A. Wolfe and E.J. Mash (eds) *Behavioral and Emotional Disorders in Adolescents: Nature, Assessment, and Treatment* (Guilford Press: New York, 2006) 535–62; K.J. Zucker and P.T. Cohen-Kettenis, 'Gender Identity Disorder in Children and Adolescents' in D.L. Rowland and L. Incrocci (eds) *Handbook of Sexual and Gender Identity Disorders* (John Wiley & Sons: London, 2008) 376–422.

96. C.A. Shelley, *Transpeople: Repudiation, Trauma, Healing* (University of Toronto Press: Toronto, 2008).

97. This is perhaps especially so given that young transgender people are a very vulnerable group within society and have exceptionally high suicide rates. Indeed, one recent UK study, reported in the *Guardian*, found that nearly half of young transgender people have attempted suicide: Nearly half of young transgender people have attempted suicide – UK survey (19 November 2014), available at http://www.theguardian.com/society/2014/nov/19/young-transgender-suicide-attempts-survey (accessed 22 December 2015).

98. In view of the recent conviction of Kyran Lee by an English court (above n. 81), it would seem that consistent expression of a male gender identity will not, of itself, preclude a finding that consent is vitiated. In this respect, the English courts have failed to chart a different course to their Scottish counterparts (see *R v Wilson*, above n. 82).

99. Laird, above n. 1 at 505.

with an important matter that the reader has perhaps anticipated. It might be thought, given the court's conclusion that McNally is female, that active deception is abundantly evident in McNally's male gender performance. The difficulty here is that, although articulating a female gender identity at trial and subsequent appeal, McNally appears to have asserted a male gender identity prior to and at the time of the alleged offences. As discussed above, we should not conclude that this is disingenuous simply because of subsequent retraction and/or because McNally expressed some 'gender confusion'.[100] It may be that retraction served to conceal rather than reveal authentic gender identity in the case. At a minimum, a masculine gender performance might have been consistent with McNally's gender identity at the time of sexual intimacy with the complainant, and therefore at the moment of criminal liability.

In any event, we should not assume gender flux or playfulness to be evidence of deceit. There is a real danger here that cissexist understandings of gender, identity and authenticity will expand the net of criminalisation beyond the example of transgender, even on the limited question of gender identity 'fraud'. Thus, for example, a woman who identifies as gender queer might perform gender in a masculine way. However, her performance is not deceptive. She does not act inauthentically, nor is she motivated by a desire to deceive. On the contrary, gender queer is precisely the identity position that she occupies and lives. She should not be punished because a sexual partner mistakenly assumes her to be male. Crucially, we should recognise the very real danger of coupling truth with gender performances that faithfully and consistently replicate the gender binary, a binary which is, after all, more ideological than real.[101]

Returning to the facts of *R* v *McNally*, let us consider the question of active deception. It is important here to begin by recognising the degree to which we are expected to suspend our disbelief regarding the complainant's testimony.[102] The *McNally* case involved repeated sexual intimacies over a period of time, culminating in at least six occasions of oral and digital penetration of the complainant. Her claim that she did not know McNally was a female-bodied person seems highly implausible on the facts. This is especially so given that McNally was not on male hormones and so had not benefited from their significant masculinising effects.[103] Moreover, McNally claimed that the complainant had 'commented on her breasts and her high pitched voice'.[104] Leveson LJ's penchant for approaching the evidence in a 'broad commonsense way' seems to have deserted him in these respects. In my view, this is an effect of an underlying cissexist conceit that no cisgender person would knowingly have sex with a transgender person. This enables fanciful claims of ignorance on the part of cisgender people to be entertained by the courts. It is true that McNally admitted, despite an earlier contradictory statement, that the complainant was not informed about gender history. However, an admission of non-disclosure is an inadequate basis for criminal liability according to the logic of *R* v *McNally*.

In finding active deception, the court focused on several pieces of evidence. We have already dealt with the issue of McNally's gender performance, which cannot easily be squared with deception, at least not at the time of the alleged offences. However, the court identified two statements made by McNally which relate to facts that might be considered material, and which might therefore be considered to constitute active deception.[105] First, McNally and the complainant discussed 'getting married and having children'.[106] Yet there is nothing necessarily deceptive about such future speculations. McNally would be able to marry a woman after obtaining a GRC and the couple would be able to have children either

100. *McNally*, above n. 2 at [47].
101. J. Butler, *Bodies That Matter: On the Discursive Limits of Sex* (Routledge: New York, 1993). See also A. Gross, above n. 77.
102. This proves to be a feature of all 'gender fraud' cases that have come before the courts.
103. In terms of changes likely to be visible, transgender men, prescribed testosterone, typically experience increases in muscle, body and facial hair, as well some degree of deepening of the voice: World Professional Association of Transgender Health, *Standards of Care for the Health of Transsexual, Transgender and Gender Nonconforming People*, 7th edn (WPATH: Minneapolis, MN, 2012) 36.
104. *McNally*, above n. 2 at [84].
105. *McNally* (above n. 2) used an alias, Scott Hill, while online and subsequently in person-to-person meetings with the complainant [3]. This deception, however, does not go to a material fact. Nor does it cast doubt on McNally's gender identity.
106. Ibid at [4].

through adoption or in vitro fertilisation. Second, McNally apparently spoke of '"putting it in," which the complainant took to mean "his" penis'.[107] This statement, which was made during phone sex prior to meeting in person, was part of an exchange in which both parties spoke 'about what they wanted to do to each other sexually'.[108] A conclusion that McNally's statement indicates deception fails to recognise that many transgender men consider a prosthetic device to be their penis.[109] The court also attached significance to the fact that the complainant had purchased condoms 'intending that the couple have intercourse'.[110] The inference the court drew from this fact was that McNally's (subsequently retracted) claim that the complainant already knew about McNally's gender identity was false.[111] Yet, even if McNally had lied about disclosure this does not demonstrate active deception. More importantly, for present purposes, there is no necessary logical relationship between the complainant buying condoms and a belief that McNally had a penis. Insistence on such a relationship relies on the view that condoms have no use in the absence of a penis. Yet, purchase could be explained in terms of a concern over hygiene in the context of potential use of a prosthetic device that McNally did possess.[112] Judicial treatment of these various facts reveals the ease with which non-disclosure of gender history can be translated into active deception. In this sense, *R* v *McNally* presents and should be read as a cautionary tale.

The predicament of sexually active transgender people is also evident in the ease with which criminal lawyers conjure up 'problematic' sexual scenarios. Thus Laird offers the example of deception in relation to chromosomes. He raises this example in relation to his analysis of the applicability of s. 76, rather than s. 74. He argues: '[i]f the allegation is that D presented himself as chromosomally male and C believes she is engaging in intercourse with someone who is chromosomally male, then it is not contrary to the legislative language to conceptualise this as a case involving deception as to the nature of the act.'[113] Yet, this analysis raises some serious difficulties. Even if the courts were willing to process such a case through s. 76,[114] thereby avoiding having to wrestle with the *McNally* distinction, it would still be necessary to prove that 'the defendant intentionally deceived the complainant.'[115] Yet it is not clear from Laird's example where deception would lie. It is also unclear what he means by: 'D presented himself as a chromosomal man.' Perhaps Laird is envisaging a scenario where a complainant makes an assumption about the chromosomal status of her sexual partner. This is little different to scenarios where false assumptions are made about legal or genital status. Transgender men present as the men they are. They do not, in doing so, make any claim about their chromosomal, legal or genital status. The fact that cisgender people routinely make the assumption that all men are cissexual (and therefore are likely to possess an XY chromosome)[116] should not be a basis for finding transgender people deceptive. To find fraud in these circumstances is tantamount to rendering deceptive the very fact of transgender existence. We should also recognise that a transgender person may not be aware of the significance of the absence of an XY chromosome to a sexual partner.

107. Ibid at [5].
108. Ibid.
109. Z. Davy, *Recognizing Transsexuals: Personal, Political and Medicolegal Embodiment* (Ashgate: Farnham, 2011) ch. 3.
110. *McNally*, above n. 2 at [8]. McNally's solicitor also placed emphasis on the fact of condom purchase, stating that 'it would be clear to the jury who was telling the truth' [35].
111. This problematic inference is also drawn by Laird, above n. 1 at 505.
112. *McNally*, above n. 2 at [7].
113. Laird, above n. 1 at 492 and 509 fn 97.
114. The courts have proved especially reluctant to do so (*Jheeta*, above n. 16 at [28]; *Assange*, above n. 2 at [87]; *R (on the application of F)* v *DPP*, above n. 2 at [26]; *B*, above n. 16 at [24]; *McNally*, above n. 2 at [18]).
115. SOA, s. 76(2)(a).
116. We should not assume all cissexual men have an XY chromosome. Some intersex people, who lack an XY chromosome, identify as male, have a male anatomy/penis, and were registered as male at birth. The clearest example of this is Klinefelter Syndrome (J.A. Greenberg, *Intersexuality and the Law: Why Sex Matters* (New York University Press: New York, 2012) 137).

Conversely, Laird perhaps imagines that a complainant might ask a direct question about chromosomal status. I think this to be rather implausible, and also likely to indicate some degree of knowledge or suspicion regarding chromosomes, serving to problematise a claim of non-consent.[117] However, in any event, we ought to resist an argument that lying about chromosomes or, for example, some portion of childhood biography, constitutes intentional deception as to the 'nature of the act', for the purposes of s. 76, or active deception regarding a material fact, for the purposes of s. 74. This might seem counter-intuitive to some readers. Such is the power of cissexist ideology.[118] To accept such an argument is to make chromosomes, or a linear gender narrative, critical to the question of gender determination. As a matter of law, they are not.[119] Nor should they be. To argue that the nature of the sexual act is different because of a lie of this sort, or that the lie pertains to a material fact, is to collude in the ontological degradation of transgender people. The question 'Are you a chromosomal man?' cannot be a neutral question. It only makes sense in a world in which a hierarchy of men is imagined. To answer in the negative involves self-diminution or repudiation. Law ought not, through defining 'the nature of the sexual act', or the materiality of facts, to privilege cisgender people in sexual relations nor confer upon them a right to define the bodies and authentic experiences of others. Moreover, and irrespective of the ethicality of lying, we should not assume its purpose is to deceive. This is a likely inference when the question is posed from a ciscentric perspective. Yet, the sorts of lies detailed here might, more realistically, be read in terms of self-preservation.[120]

Conclusion

This article has considered judicial expansion of criminal liability for sexual fraud. This has occurred through the articulation of an active deception/non-disclosure dyad, whereby the former, but not the latter, has served to vitiate consent under s. 74. It was argued that the distinction is wanting in two respects. First, it lacks a convincing basis for setting the parameters of criminal liability. Principles of liberty, causality, moral culpability, autonomy and harm all fail to do the necessary work. Second, it is not sufficiently robust to prevent analytical collapse and therefore criminal law overreach. Consideration of 'gender fraud', primarily through the case of *McNally*, served to dramatise this difficulty. After all, how does one stay on the right side of the law when, in legal and cultural terms, active deception characterises one's ontological position? That is, how can one avoid liability, when the cultural terms through which one is defined are duplicity, subterfuge and dissimulation? For those who favour criminal prosecution irrespective of whether 'deception' is active or passive, my objections to using the distinction for the purposes of establishing liability for sexual fraud may count for little. For the judiciary, I hope they encourage caution in this area.

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117. It is also important here to avoid reproducing the notion that transgender people would want to have sex with transphobic people.
118. Serrano, above n. 66.
119. GRA, s. 3.
120. I mean here, psychological and physical preservation. In relation to the latter, it should be recognised that transgender visibility can, and frequently does, lead to violence: S. Whittle *et al*., *The Equalities Review: Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality & Discrimination* (Press for Change: London, 2007) 23; J. Morton, *Transgender Experiences in Scotland: Research Summary* (Scottish Transgender Alliance: Edinburgh, 2008).