

OSTENSIBLE CONSENT AND THE LIMITS OF SEXUAL AUTONOMY

JACK VIDLER*

This article theoretically and critically analyses the jurisprudential consistency of the application of the principle of sexual autonomy to, and its interplay with, consent as its index in sexual offences in England and NSW. It initially frames its investigation in the historical and inter-jurisdictional jurisprudential development of sexual offences. In doing so it traces the ascension of the principle of sexual autonomy and the use of consent as the legal determinant in sexual interactions. It then assesses the limitations of these concepts in the context of contemporary debates in critical legal scholarship – in particular sexual interactions involving the risk of HIV transmission, and transgender sexual interactions – using hypotheticals to facilitate theoretical analysis before comparing the criminal sex law’s actual treatment of the posited scenarios using real case examples. Concordant with, and drawing on, substantial existing scholarship it finds that the principle of sexual autonomy is inconsistently applied to various sexual interactions, despite being the almost universally accepted tenet at the core of sex law. Arguing further, the article employs an original touchstone of ‘ostensible consent’ to elucidate the underlying and inherent misalignment between consent and sexual autonomy and illustrates how consistent applications of sexual autonomy may still produce undesirable results.

I INTRODUCTION

This article demonstrates how sexual interactions involving ostensible consent reveal the limited practical applicability and theoretical desirability of the principle of sexual autonomy. In addressing this problem, it adopts a critical theoretical approach to analyse the implementation of sexual autonomy in the criminal sex law of New South Wales (‘NSW’)¹ and England.² The overarching purpose of this paper is to critique theoretical problems with the existing law in these contexts, as well as scholarly responses to these defects. Accordingly, the article draws heavily on theory and jurisprudence developed in other jurisdictions, predominantly the United States (‘US’), where the underlying principles or legal history are largely similar.³

As explained in Part III, the term ‘ostensible consent’ is used to refer generally to a situation wherein sexual activity was understood by the parties involved to be consensual when it occurred, with seemingly no negative outcomes and no malevolent element operating either expressly or impliedly. In this context, assertions of sexual assault or violation of sexual autonomy occur retrospectively, upon informational revelation. The fundamental enquiry here concerns the effect of *informational* constraints in sexual activity on the legal construction of sexual assault, pursuant to the principle of sexual autonomy. As such, this article does not address instances of sexual assault involving force, coercion, threats, abduction, incapacity through intoxication, age or mental illness and so on. In some sense, the concept of ostensible consent attempts to finesse the alignment of the personal experience, and the law’s delineation, of the boundary between sexual assault and a ‘negative’ sexual experience. This paper uses the terms ‘sexual assault’ and ‘rape’

¹ Under the *Crimes Act 1900* (NSW) (‘NSW Act’).

² Under the Sexual Offences Act 2003 (UK) c 42 (‘UK Act’).

³ Unless obviously related to a specific jurisdiction, use of phrases such as ‘the law’ and ‘the criminal sex law’ will refer generally to the shared traits of sexual offences in these various jurisdictions.

interchangeably as the degree of the sexual conduct (the precise elements of specific offences)⁴ is not in issue, only the operation of consent.⁵

Part II demonstrates the jurisprudential links and operational similarities between the criminal sex law in England and in NSW. In that context, it also establishes the interplay of consent and sexual autonomy by underscoring that the former's statutory formulation attempts to embody the latter. It then summarises the relevant statutory offences and, particularly, the statutory definitions of consent in both jurisdictions. The statutes and judicial precedents that apply in England may also variously apply in other United Kingdom ('UK') jurisdictions, but for clarity of reference this paper focuses on English criminal sex law.⁶ The term 'UK' is used to refer to jurisdictions subject to the *UK Act*.⁷

Part III expands on the principle of sexual autonomy by providing an account of its theoretical development and by distilling a generalised definition. Part III also establishes the two focus areas of ostensible consent — transgender sexual interactions and sexual activity involving the risk (or occurrence) of transmission of the human immunodeficiency virus ('HIV'). These contexts are established as hypotheticals to facilitate analogy and theoretical analysis. Lastly, Part III revisits the statutory consent provisions summarised in Part II to illustrate some implications for sexual autonomy that inhere in their formulations, and then theorises the relationship between (communicative) consent, sexual autonomy and ostensible consent.

Part IV analyses problems with the principle of sexual autonomy. Firstly, it summarises the law's inconsistent applications of, or adherence to, sexual autonomy. Again, analysis of inconsistencies is restricted to informational constraints regarding the obtaining of consent. It then outlines the criminal sex law's actual treatment of the hypothetical contexts established in Part III, highlighting further logical inconsistencies. Both the NSW and English approaches to HIV transmission are canvassed but, due to existing case law, only English treatment of transgender sexual interactions is considered.⁸ Lastly, Part IV analyses the problematic construction of sexual autonomy itself in the context of transgender sexual relations, showing that consistent application may still produce undesirable results.

Part V discusses some suggested responses to the various problems identified by the preceding analysis. Part VI concludes by suggesting some guiding principles for theoretical review of sexual autonomy and its place in the criminal sex law, given the identified deficiencies.

⁴ The *NSW Act* no longer contains a 'rape' offence, it concerns only 'sexual assault': see *Crimes (Sexual Assault) Amendment Act 1981* (NSW). However, England retains the offence of rape (involving penile penetration) as separate from assault by (non-penile) penetration and sexual assault: *UK Act* ss 1–3.

⁵ Generally, however, more serious forms of conduct are contemplated throughout this paper as they perhaps render the analysis more poignant than somewhat reductive considerations of what could literally constitute, for example, 'sexual touching': see, eg, *UK Act* s 3(1).

⁶ Obviously, to the extent the law is similar, the forthcoming analysis would apply in those other jurisdictions.

⁷ Predominantly England and Wales: *UK Act* s 142. Similarly, England and Wales share a judicial system that is (nowadays) separate from those of Scotland and Northern Ireland, although historical cases generally have wider purview.

⁸ The comparable law in NSW has not been similarly tested; though concordant legal development and theory suggest the same approach could be taken in NSW.

II SEXUAL ASSAULT IN NSW AND ENGLAND

A Legislative Reform — Rationale and Process

The law concerning sexual assault and consent in NSW is closely related to its English equivalent. Admittedly, many common law jurisdictions (for example, Canada, New Zealand, England, various Australian states and parts of the US) have reformed their sexual offences over the past 20–30 years, generally reconceptualising consent and emphasising it as paramount.⁹ However, the most recent NSW reform in this area directly followed, and was largely modelled on, the *UK Act*.¹⁰ In order to develop jurisdictional focus, and to demonstrate the relevance of the law and legal theory in one jurisdiction to the other, the following is a brief account of the historical development of consent in English criminal sex law, and the recent statutory reforms, first in England and then NSW.

1 England (and the UK)

In 1999, the UK Home Office Sex Offences Review ('UK Review') was created to conduct a comprehensive review of the law relating to sexual offences.¹¹ The rationale for the review was the criminal sex law's haphazard and inconsistent development and its embodiment of antiquated social values.¹² In relation to consent and the crime of rape, historical common law development was confusing and contradictory. In early feudal England rape was a property crime against either a father, who would lose the asset of his daughter's marriageability, or a husband, who would lose certainty as to the bloodline of his wife's child; both necessary in a system of 'patriarchal inheritance rights'.¹³ Although the concept of consent was contemplated in law as early as 1285,¹⁴ its centrality to rape was not enunciated until the 1845 case of *R v Camplin*.¹⁵ That case interpreted the established element of 'against her will'¹⁶ to mean 'non-consensual', as opposed to requiring force.¹⁷

However, this principle was applied irregularly in successive cases as various judges reaffirmed contrary requirements of rape such as force and physical resistance.¹⁸ This resulted in an 'incoherent'¹⁹ legal structure (and 'patchwork' amendments to address its deficiencies)²⁰ that persisted throughout the 20th century, with statutory enactment in 1956²¹

⁹ Home Office Sex Offences Review, *Setting the Boundaries: Reforming the law on sex offences* (July 2000) 13 ('Setting the Boundaries').

¹⁰ Substantial reform occurred in 1981 pursuant to the *Crimes (Sexual Assault) Amendment Act 1981* (NSW), though this did not address consent: NSW, *Parliamentary Debates*, Legislative Assembly, 25 March 1981, 5182–97 (John Dowd).

¹¹ *Setting the Boundaries*, above n 9, i-ii; Home Office, *Protecting the Public: Strengthening protection against sex offenders and reforming the law on sexual offences*, Cm 5668 (November 2002) 34 ('Protecting the Public').

¹² *Setting the Boundaries*, above n 9, iii, 1.

¹³ Carol E Tracy et al, 'Rape and Sexual Assault in the Legal System' (Paper presented to the National Research Council of the National Academies Panel on Measuring Rape and Sexual Assault in the Bureau of Justice Statistics Household Surveys Committee on National Statistics, Washington DC, 5 June 2012) 4; Omar Madhloom, *Protecting Autonomy in Non-consensual Sexual Offences: A Kantian Critique* (MPhil Thesis, De Montfort University, 2014) 87.

¹⁴ Madhloom, above n 13, 88.

¹⁵ (1845) 1 CAR & K 746, quoted in Madhloom, above n 13, 90.

¹⁶ Stephen J Schulhofer, 'Taking Sexual Autonomy Seriously: Rape Law and Beyond' (1992) 11 *Law and Philosophy* 35, 36; Jed Rubinfeld, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2013) 122 *Yale Law Journal* 1372, 1396.

¹⁷ Madhloom, above n 13, 90; Rubinfeld, 'The Riddle of Rape-by-Deception', above n 16, 1396.

¹⁸ Madhloom, above n 13, 91–2.

¹⁹ *Protecting the Public*, above n 11, 5.

²⁰ *Setting the Boundaries*, above n 9, iii.

²¹ *Sexual Offences Act 1956*, 4 & 5 Eliz 2, c 69.

primarily incorporating 19th century common law development.²² Feminist critique during the last quarter of the 20th century highlighted the prevalence of inconsistencies, discriminatory effects and outdated values embodied in criminal sex law, providing the impetus for reform discourse²³ and encouraging an emphasis on consent.²⁴ In accordance with such criticism, the terms of reference that guided the UK Review expressly included protection of individuals, fairness, principles of anti-discrimination and *coherency* of sexual offences.²⁵

The UK Review published its findings in 2000 in the *Setting the Boundaries* report. Most importantly, this report stated unequivocally that the harm caused by rape, and sexual assaults more generally, is due to the *violation* of the complainant's²⁶ *right*²⁷ to *sexual autonomy*.²⁸ Such a violation occurs, it found, when sexual intercourse²⁹ or (non-penile) sexual penetration³⁰ is performed *without consent*.³¹ The report recommended that consent should be statutorily defined as 'free agreement'³² and that the definition should involve a non-exhaustive list of situations in which consent would be deemed to not be present.³³ Although a somewhat open process of review, *Setting the Boundaries* did not incorporate public consultation.³⁴ Its mandate was narrow in scope, designed to initiate and contextualise the reform discourse by providing preliminary recommendations to relevant Ministers.³⁵

Accordingly, a process of public consultation followed, resulting in the 2002 *Protecting the Public* report that considered over 700 submissions responding to *Setting the Boundaries*.³⁶ As far as it pertained to the suggested need to clarify and statutorily (re)define consent, the later report's proposals were consistent with *Setting the Boundaries*.³⁷ *Protecting the Public* also proposed that the list of factors presumed to negate consent be more precisely refined into two categories — rebuttable presumptions, where the facts (if proved) would require the accused to demonstrate the presence of consent, and conclusive presumptions, where 'the [complainant] will be deemed not to consent'.³⁸ This latter model of consent presumptions was the one enacted.³⁹ The ideas and themes underlying the consent revisions took statutory form in the *UK Act*,⁴⁰ although their precise formulations were slightly altered in parliamentary deliberations.⁴¹ *2 New South Wales*

Following suit, in 2004 the NSW Attorney General constituted the Criminal Justice Sexual Offences Taskforce ('Taskforce') to scrutinise 'issues surrounding sexual assault' from both

²² *Protecting the Public*, above n 11, 9.

²³ Schulhofer, above n 16, 36; *Setting the Boundaries*, above n 9, 13.

²⁴ Madhloom, above n 13, 80.

²⁵ *Setting the Boundaries*, above n 9, iii.

²⁶ Either male or female, whereas sexual offences were historically gendered — for example, many sexual offences could only be committed by a man or against a woman: see eg, *Sexual Offences Act 1956*, 4 & 5 Eliz 2, c 69, ss 1–9. However, in England the crime of rape currently requires penile penetration: *UK Act* s 1(1)(a).

²⁷ *Setting the Boundaries*, above n 9, iv, 14.

²⁸ *Ibid* 9, 14.

²⁹ *Ibid* 15.

³⁰ *Ibid* 16–17.

³¹ *Ibid* 9, 14, 17.

³² *Ibid* 18.

³³ *Ibid* 18–20.

³⁴ *Ibid* i–ii.

³⁵ *Ibid* i.

³⁶ *Protecting the Public*, above n 11, 34.

³⁷ *Ibid* 16–18.

³⁸ *Ibid* 16.

³⁹ Arabella Thorp, 'The *Sexual Offences Bill* [HL]' (Research Paper No 03/62, House of Commons Library, 10 July 2003) 20.

⁴⁰ See *UK Act* ss 1–3, 74–6.

⁴¹ See eg, Thorp, above n 39, 16.

social and criminal justice perspectives.⁴² The Taskforce particularly focused on the law surrounding consent,⁴³ which was not statutorily defined.⁴⁴ The *Taskforce Report*, published in 2005, recommended that consent should be statutorily defined and modelled on the definition in the *UK Act*.⁴⁵ While the proposed definition was only ‘partially based’⁴⁶ on the *UK Act*, the Taskforce also adopted the approach of outlining certain, non-exhaustive, factors that could affect a determination of whether consent was present, either evidentially or conclusively.⁴⁷ Although not elaborated on in-depth, the report contained considerations of sexual autonomy and its interplay with consent. The Taskforce referred to the Canadian consent definition of ‘voluntary agreement’ and its capacity to emphasise sexual autonomy.⁴⁸ It concluded its consent analysis by recommending a definition of ‘free and voluntary agreement’⁴⁹ – a ‘positive’ consent formulation designed to safeguard sexual autonomy.⁵⁰

Similar to the UK Review, the *Taskforce Report* was directed to the NSW Attorney General and did not involve public consultation.⁵¹ Its consent recommendations were then opened to public consultation in 2007 via a discussion paper comprised of the relevant portions of the report, prefaced with a list of pertinent issues.⁵² The policy objective of protecting sexual autonomy outlined in this discussion paper was referred to with approval in parliamentary deliberations and the eventual consent provisions enacted were largely unchanged from the Taskforce’s recommendations.⁵³ The NSW legislature’s acceptance of the Taskforce’s recommendations and its subsequent enactment of consent provisions closely resembling the *UK Act* implies its intention to incorporate the underlying legal theory surrounding sexual autonomy that informed UK reform.

B Current Statutory Formulations

In England, rape is penile penetration of a person where that person ‘does not consent to the penetration’ and the perpetrator ‘does not reasonably believe’ the person consents.⁵⁴ Assault by penetration follows the same pattern except penetration need not be penile, only sexual.⁵⁵ Sexual assault has the same consent requirements, but involves sexual ‘touching’.⁵⁶ An assessment of ‘all the circumstances’ is required to determine reasonable belief, importantly incorporating ‘any steps ... taken to ascertain consent’.⁵⁷ Consent is agreement by ‘choice’ where the person ‘has the freedom and capacity to make that choice’.⁵⁸ For all three offences, presumptions regarding consent apply.⁵⁹ Relevantly to this paper,⁶⁰ if the physical act

⁴² Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: the way forward* (December 2005) NSW Department of Justice, iii
<http://www.justice.nsw.gov.au/justicepolicy/Documents/cjsot_report.pdf> (*Taskforce Report*).

⁴³ *Ibid* v.

⁴⁴ *Ibid* 32.

⁴⁵ *Ibid* 2. However, this recommendation was stridently opposed by members of the Taskforce and was therefore termed a recommendation of the Criminal Law Review Division – a part of the NSW Attorney General’s department with several members in the Taskforce: at i, vi, 34–5.

⁴⁶ *Ibid* 2–3.

⁴⁷ *Ibid* 36–42.

⁴⁸ *Ibid* 34.

⁴⁹ *Ibid* 33, 35.

⁵⁰ *Ibid* 35.

⁵¹ *Ibid* iii, iv.

⁵² Criminal Law Review Division, *The Law of Consent and Sexual Assault* (Discussion Paper, NSW Attorney General’s Department, May 2007).

⁵³ NSW, *Parliamentary Debates*, Legislative Assembly, 14 November 2007, 4188 (Lylea McMahan).

⁵⁴ *UK Act* s 1(1).

⁵⁵ *Ibid* s 2(1).

⁵⁶ *Ibid* s 3(1).

⁵⁷ *Ibid* ss 1(2), 2(2), 3(2).

⁵⁸ *Ibid* s 74.

⁵⁹ *Ibid* ss 1(3), 2(3), 3(3).

⁶⁰ In England there are numerous factors that may vitiate consent, including sleep, fear of violence and ‘physical disability’: *ibid* s 75(2).

occurred where the accused ‘intentionally deceived the complainant as to the nature’ of the act, consent *and* belief in consent are conclusively presumed to be absent.⁶¹

In NSW, sexual assault is non-consensual sexual intercourse with a person where the perpetrator knew that person did not consent.⁶² Read in conjunction with s 61H,⁶³ sexual assault is equivalent to the English offences of rape and assault by penetration — involving (penile⁶⁴ and non-penile)⁶⁵ penetration of the person’s body.⁶⁶ Consent is free and voluntary agreement.⁶⁷ It is conclusively negated when (inter alia)⁶⁸ the ‘consenting’ party holds ‘any ... mistaken belief about the nature of the act induced by fraudulent means’.⁶⁹ If the perpetrator knew consent occurred ‘under such a mistaken belief’, they are conclusively presumed to know consent was absent.⁷⁰

III ESTABLISHING SEXUAL AUTONOMY

A Theoretical Development

In the US, academic discussion and development of the principle of sexual autonomy preceded the legislative reform debate in the UK. US jurisprudence subsumed the historical development of English common law, leaving the US to address the same shortcomings as those identified above.⁷¹ As noted, rape was historically a property crime.⁷² Incrementally, the crime of rape developed away from a literal property conception, although it retained its emphasis on notions of virginal purity,⁷³ female modesty and defilement.⁷⁴ Although consent became increasingly central in the 19th and 20th centuries, it continued to be interpreted through a lens of violence and force in both England⁷⁵ and the US.⁷⁶ Beginning in the 1970s,⁷⁷ feminist legal scholars criticised the state of rape law for its then-still-extant expressions of the male proprietary interest in women and its lack of a coherent theoretical basis.⁷⁸ The substantive nature of the physical, criminal act had remained the same for centuries, while its core justifications changed absolutely over time.⁷⁹ Rape and sexual assault were perceived as grievous criminal offences, but there was no clear or consistent theoretical conception of

⁶¹ Ibid s 76.

⁶² NSW Act s 61I.

⁶³ Ibid s 61H.

⁶⁴ Ibid s 61H(1)(a)(i).

⁶⁵ Ibid s 61H(1)(a)(ii).

⁶⁶ Ibid s 61H(1)(a)–(b).

⁶⁷ Ibid s 61HA(2).

⁶⁸ In NSW other factors including ‘cognitive incapacity’, unconsciousness and unlawful detainment also conclusively vitiate consent: *ibid* s 61HA(4).

⁶⁹ Ibid s 61HA(5)(a)–(b).

⁷⁰ Ibid s 61HA(5).

⁷¹ Tracy et al, above n 13, 4.

⁷² Ibid; Madhloom, above n 13, 87; Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing, 1998) 106.

⁷³ Madhloom, above n 13, 78.

⁷⁴ Rubinfeld, above n 16, 1388–92.

⁷⁵ Madhloom, above n 13, 87, 89, 91–2.

⁷⁶ Schulhofer, above n 16, 63; Tracy et al, above n 13, 6; Stephen J Schulhofer, ‘Rape in the Twilight Zone: When Sex is Unwanted but not Illegal’ (2005) 38(2) *Suffolk University Law Review* 415, 417–18.

⁷⁷ Schulhofer, above n 16, 36; Corey Rayburn Yung, ‘Rape Law Fundamentals’ (2015) 27(1) *Yale Journal of Law & Feminism* 1, 4.

⁷⁸ Lacey, above n 72, 106; Tracy et al, above n 13, 5.

⁷⁹ Rubinfeld, above n 16, 1387–8, 1392; Deborah Tuerkheimer, ‘Sex Without Consent’ (2013) 123 *Yale Law Journal Online* 335, 335
<http://www.yalelawjournal.org/pdf/1222_tajrpb6w.pdf>.

why this was so — of what the justifying harm or ‘wrong’ was.⁸⁰ Academic analysis of the developing law revealed a growing trend of placing sexual autonomy at the centre of rape and sexual assault crimes, beginning as early (albeit impliedly) as 1965.⁸¹ This was expressly stated,⁸² perhaps originally, in *Coker v Georgia*,⁸³ which recognised that the harm of rape was the ‘total contempt for the ... autonomy of the ... victim’ and was second only to murder in its ‘violation of self’.⁸⁴

B Definition

Sexual autonomy (and autonomy more generally) is a philosophical concept, so its fundamental features are relatively consistent throughout various interpretations. According to Madhloom’s Kantian analysis of autonomy, a person must have the ‘capacity ... to *decide ... and pursue* a course of action’.⁸⁵ This highlights the dual requirement of autonomy: possession of relevant information, and the (ideally unrestrained) ability to act in accordance with a personal assessment of that information. Lacey defines sexual autonomy as ‘the freedom to determine one’s own sexual experiences, to choose how and with whom one expresses oneself sexually’.⁸⁶ Schulhofer conceives of sexual autonomy as the ‘right of every person to freely choose or refuse any sexual encounter’.⁸⁷ He argues this right ‘must be *fully* protected’,⁸⁸ requiring a model of ‘affirmative *consent*’, wherein the emphasis is to look for the presence, not absence, of consent.⁸⁹ Further, a comprehensive review of US jurisdictions in 2012 found that the common elements of the various consent definitions were freedom and ‘capacity’, such as *acting* on free will with relevant *knowledge* of the act.⁹⁰ The presence of the philosophical dyad of autonomy in the operational principle of consent both suggests that sexual autonomy is simply personal autonomy in a sexual context, and reaffirms the link between sexual autonomy and consent in general. Herring similarly understands sexual autonomy as the ‘right to choose with whom we have sexual contact’.⁹¹ Providing a more operational account, however, Herring posits that sexual autonomy is violated when, *inter alia*, consent is given in *ignorance of significant relevant facts*.⁹² Thus, deception and informational constraints may vitiate consent and violate sexual autonomy.⁹³ Though this is a common theme in other authors’ conceptions, Herring specifically acknowledges its operational consequences — that consent is vitiated if the complainant would not have engaged in the sexual interaction if they ‘had known the truth’; that is, if they had had access to the relevant information that was previously obscured from them.⁹⁴ They must have knowledge of the key facts involved in making the decision to engage in sexual conduct in

⁸⁰ Jonathan Herring, ‘Mistaken Sex’ [2005] *Criminal Law Review* 511, 516; Tracy et al, above n 13, 6; John Gardner, ‘Reasonable Reactions to the Wrongness of Rape’ (Research Paper No 7, University of Oxford, February 2016) 2–4; Lacey, above n 72, 101.

⁸¹ Rubinfeld, above n 16, 1379, 1382–4, 1387, 1392–4; Schulhofer, above n 16, 63; Lacey, above n 72, 104.

⁸² In fact, *Coker v Georgia* literally referred to ‘personal autonomy’ as opposed to ‘sexual autonomy’. However, it was discussing autonomy in a sexual context which, as suggested in the next section, *is* sexual autonomy. The latter phrase was nascent at the time but grew to prominence later and, in retrospective analysis of the case, it may be accurately stated that this was among the first, express enunciations of the *concept* of sexual autonomy.

⁸³ 433 US 584 (1977).

⁸⁴ *Coker v Georgia* 433 US 584 (1977), 597, quoted in Madhloom, above n 13, 16–17.

⁸⁵ Madhloom, above n 13, 85 (emphasis added).

⁸⁶ Lacey, above n 72, 104.

⁸⁷ Schulhofer, above n 76, 420.

⁸⁸ *Ibid* 423 (emphasis in original).

⁸⁹ *Ibid* 420–1 (emphasis added).

⁹⁰ Tracy et al, above n 13, 19.

⁹¹ Herring, above n 80, 516.

⁹² *Ibid*.

⁹³ *Ibid* 515.

⁹⁴ *Ibid* 513–14.

order for their consent to properly safeguard their autonomy.⁹⁵ These facts have also been termed ‘material facts bearing significantly on the decision to consent’.⁹⁶

Surveying these analyses, then, the two elements required for the effective exercise of autonomy are: knowledge of all the information that would significantly influence the decision, and the unfettered capacity to act on that decision. Sexual autonomy is thus applied to sexual decisions.⁹⁷ This conception is used throughout this paper, although only informational constraints are considered in the following discussions. A ‘constraint’ is considered to be present only when information is known by one party and not the other.⁹⁸

C Ostensible Consent and its Interplay with Sexual Autonomy

It is overwhelmingly clear that determining the existence of consent is the fundamental concern of rape and sexual assault offences in England and NSW and that this is connected to the protection of sexual autonomy. Consent is expressly defined in respective legislation and the definitions seek to outline a model of consent (somewhat concordant with Schulhofer’s analysis) that protects and empowers the right to sexual autonomy in societal sexual interactions.⁹⁹ Sexual autonomy is the right to be safeguarded and consent is the index of whether it has been exercised or violated. The two concepts have a reciprocal relationship – if consent is absent or vitiated, then sexual autonomy is violated; if sexual autonomy is violated, this means consent was not given or was vitiated. While this is a positive evolution away from violence, physical resistance, force or ‘clear-verbal-no’ elements of consent (in the sense that, by not relying on these factors, it more precisely circumscribes the core wrong or harm of *sexual* assault), this model results in a disconnect between consent and sexual autonomy that is problematic in certain contexts.¹⁰⁰

The next two sections will establish sexual interactions involving, respectively, transgender individuals and potential HIV transmission as exemplars of ostensible consent. For the purpose of this Part, these contexts are established as hypotheticals to allow the proper analogies to be drawn and autonomy analysis to be applied. The law’s actual approach to these areas is assessed in Part IV.¹⁰¹ While posed hypothetically, the factual progressions are relatively easy to envisage as reality.

1 Transgender Sexual Relations

Theoretical analysis of transgender sexual relations may prominently exemplify how sexual activity may violate sexual autonomy, despite seeming wholly consensual. This may occur due to a combination of: the potential lack of physical obviousness of transgender identity (the transitional nature of the presented gender may not be apparent), the non-disclosure of gender transition concordant with genuine transgender self-identification,¹⁰² and the general

⁹⁵ Ibid 516.

⁹⁶ David Archard, *Sexual Consent* (Westview, 1998) 46, quoted in Herring, above n 80, 518.

⁹⁷ Madhloom, above n 13, 112.

⁹⁸ Analysis of mutual ignorance of relevant factors is reductive and outside the scope of this paper.

⁹⁹ Schulhofer, above n 76, 420–1; see above nn 87–88 and accompanying text.

¹⁰⁰ See, eg, Madhloom, above n 13, 90; see, eg, Tracy et al, above n 13, 4.

¹⁰¹ See below Part IV(B).

¹⁰² Danielle Poe, *Can Luce Irigaray's Notion of Sexual Difference be Applied to Transsexual and Transgender Narratives?* (2011) University of Dayton eCommons, 122–5 <http://ecommons.udayton.edu/cgi/viewcontent.cgi?article=1012&context=phl_fac_pub>; Aeyal Gross, ‘Rape by Deception and the Policing of Gender and Nationality Borders’ (2015) 24 *Tulane Journal of Law & Sexuality* 1, 10–11; Aeyal Gross, ‘Gender Outlaws Before the Law: The Courts of the Borderland’ (2009) 32(1) *Harvard Journal of Law & Gender* 165, 211.

presumption that the gender a person presents aligns with the gender associated with their birth sex.¹⁰³

As one example: imagine that a heterosexual, cisgender adult consents to sexual activity with a heterosexual, transgender adult who self-identifies and presents as the gender opposite to that of the cisgender person.¹⁰⁴ The consent is given in full knowledge of all information presented in, or garnered from, all previous interactions between the two people; no information available to, or accessible by, the cisgender person would disturb their decision to consent. It may even have been given after years of online, telephone, webcam and in-person, physical, interactions with the transgender person.¹⁰⁵ Accordingly, the consent may be as express, free from coercion, honest, enthusiastic, proactive (and so on) as possible. Presumably, however, a significant foundation of the cisgender person's decision to engage in sexual activity is their heterosexuality, combined with their perception of the activity as conforming to that sexuality.¹⁰⁶ That is, their consent is contingent on their perception and understanding of the transgender person's gender being opposite to their own. Similarly, the transgender person's gender identification and heterosexuality inform their perception that the sexual activity conforms to their sexuality (as defined by their gender identification).

Some time after the interaction, the cisgender person becomes aware of the transgender person's gender history. Now, if the cisgender person considers transgender identity to not be conclusively determinant of the sexuality of sexual interactions — that is, in the context of a mutual, sexual exchange they perceive the transgender person as 'in truth' having a gender corresponding to the gender associated with that person's birth sex — then their sexual autonomy has been violated.¹⁰⁷ An informational constraint relevant to their decision to consent (likely reversing it) was placed on the cisgender person. Per Herring, the person would not have consented if they knew beforehand what they later discovered.¹⁰⁸ However, given the transgender person's genuine internal understanding of their gender and sexuality, they could be said to have not known that by not disclosing their gender history they withheld information relevant to the cisgender person's decision to consent.¹⁰⁹ No amount of communication *regarding consent* to the contemplated activities (or affirmative ascertainment thereof) would alter the progression of the above facts. Discussion, or positive disclosure, of gender history could be presumed to do so but the facts provide no reason for this to occur. Auxiliary issues of intentional or active lies or deception have been eschewed to facilitate examination of the core, irreducible tension between sexual autonomy and consent. The sexual interaction was, ostensibly, as consensual as possible or desired.

2 HIV Transmission

The potential for such ostensible consent is similarly possible in sexual interactions between a HIV-positive adult and a HIV-negative adult. Here the analysis is essentially identical to the preceding context. Imagine a HIV-negative person consents to sexual activity with a HIV-positive person who knows they are HIV-positive but who uses protective barriers (and

¹⁰³ See, eg, *McNally v The Queen* [2013] EWCA Crim 1051 (27 June 2013) [33], [39] ('*McNally*').

¹⁰⁴ One-to-one mapping of heterosexuality and cisgender-transgender identification are not prerequisites to this analysis but are used to simplify illustrations, and because the real court cases tend to reflect these dyads.

¹⁰⁵ *McNally* [2013] EWCA Crim 1051 (27 June 2013) [3]–[5].

¹⁰⁶ See, eg, *ibid* [11].

¹⁰⁷ Assuming this new understanding of the sexuality of the interaction breaches the 'perception contingency' of consent, assumed above. In fact, the cisgender person's informational revelation is irrelevant to the violation occurring, it is only relevant to their awareness of the violation.

¹⁰⁸ Herring, above n 80, 513–14.

¹⁰⁹ Gross, above n 102, 211.

perhaps has an ‘undetectable viral load’) such that the risk of transmission is minimal.¹¹⁰ The HIV-negative person consents under the mistaken belief that both parties are HIV-negative, although makes no enquiries, and receives no representations, as to the truth of this belief. Upon later becoming aware this belief was mistaken, the HIV-negative person asserts they would not have consented to the sexual activity had they known the other person was HIV-positive, due to the risk of transmission. As in the transgender context, the HIV-negative person’s ignorance of the risk of transmission is an informational constraint that violates the first requirement for effective exercise of autonomy.¹¹¹ Herring specifically acknowledges that, on his conception, sexual autonomy would be violated in a way sufficient to support a rape conviction where there was a failure to disclose the presence of a ‘sexually transmitted disease’, even though there was no active lie.¹¹² However, no amount of communication of *consent*, or actions to ascertain *consent*, could have uncovered the unknown information. Discussion, or positive disclosure, of HIV status could be presumed to do so but given the precautions taken this may arguably have been unnecessary or not contemplated (again, issues of active deception are ignored). The sexual interaction was, ostensibly, as consensual as possible or desired.

It is essential to recognise that the physical harm potentially resulting from actual HIV transmission is irrelevant from a sexual autonomy perspective. Sexual autonomy is violated by ignorance of factors that would influence the decision to consent. The potential harm (even lethality) of HIV is doubtless what may inform the substance of the decision, but the physical manifestation of the virus is an adjacent harm to the violation of sexual autonomy.

D Further Aspects of the Relationship Between Consent and Sexual Autonomy

Having established the focus areas of ostensible consent, this section illustrates the relevant implications and limitations of the statutory consent provisions summarised above¹¹³ and the disconnect between communicative consent and sexual autonomy, as evidenced by ostensible consent analysis. These concepts are incorporated into the forthcoming analysis of the capacity of consent to safeguard sexual autonomy, and the desirability of sexual offences designed to do so.

1 Implications of Statutory Consent Formulations

Current statutory consent provisions in England and NSW implicitly focus on ‘communicative’ issues of consent.¹¹⁴ They are concerned with the facts of ‘*how*’ consent was expressed or ‘*sought and given*’, or why it must not have been.¹¹⁵ The nature of this model is particularly evidenced by reform discussion that focused on notions such as ‘mutuality’,¹¹⁶ dialogue,¹¹⁷ conveyance and understanding;¹¹⁸ and is exemplified by the (NSW and English)

¹¹⁰ See, eg, Jennifer Smythe Brady, Melissa Woodroffe and Indraveer Chatterjee, *Disclosing your HIV status: A guide to some of the legal issues* (August 2013) HIV/AIDS Legal Centre, 3, 5 <<http://halc.org.au/wp-content/uploads/2012/10/Final-Version-for-distribution.pdf>>; see also *Taskforce Report*, above n 42, 40; see also Abigail Groves and Sally Cameron, ‘Criminal prosecution of HIV transmission: the policy agenda’ (Discussion Paper, Australian Federation of AIDS Organisations, May 2009) 6.

¹¹¹ Herring, above n 80, 518.

¹¹² *Ibid.*

¹¹³ See above Part II(B).

¹¹⁴ *Taskforce Report*, above n 42, 34, 47; NSW Department of the Attorney General and Justice, *Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900* (October 2013) NSW Department of Justice, 22 <http://www.justice.nsw.gov.au/justicepolicy/Documents/consent_review.pdf>.

¹¹⁵ *Protecting the Public*, above n 11, 16 (emphasis added).

¹¹⁶ *Taskforce Report*, above n 42, 33, 35;

¹¹⁷ NSW Department of the Attorney General and Justice, above n 114, 4.

¹¹⁸ *Protecting the Public*, above n 11, 16.

consent provision mandating consideration of ‘steps taken ... to ascertain’ consent.¹¹⁹ This model is also reflected in certain US states.¹²⁰ While this model effectively (at least theoretically) criminalises sexual activity in circumstances of absent or impaired capacity and where volition is reasonably in doubt, its aim of buttressing sexual autonomy is limited.¹²¹ Ostensibly consensual sexual interactions reveal these limitations by showing how sexual autonomy may be violated despite the most unmistakable, enthusiastic and voluntary expressions of consent — which satisfy statutory consent requirements (all else being equal).

An adjacent, but important and related, point is the innately limited statutory protection for sexual autonomy hiding in plain sight in rape and sexual assault offences. This is the second limb of the offences; the requirement that the defendant did ‘not reasonably believe’ the complainant consented,¹²² or knew that they did not.¹²³ This is the *mens rea* element of sexual offences.¹²⁴ Thus, in rape and sexual assault, consent (unusually) informs both the *actus reus* (where consent is the complainant’s subjective state of mind)¹²⁵ and the *mens rea* (where belief that consent has been communicated affects the perpetrator’s state of mind).¹²⁶ That is, perhaps true consent is the subjective mindset of the complainant, but how this mindset manifests communicatively is also termed ‘consent’.¹²⁷ While this manifestation might be more accurately termed an ‘expression of consent’ (as far as it relates to the mindset of the complainant), from the point of view of the defendant it is ‘consent-proper’ — the only accessible indication of consent. Criminal sex offences limit the circumstances in which non-consensual sexual conduct will be rape or sexual assault in an attempt to ensure that only defendants who are criminally guilty are subject to the provisions.¹²⁸ While aimed at creating the *mens rea* component, these limitations inherently allow for situations where the complainant’s sexual autonomy is violated, but where rape or sexual assault cannot be held. This compromises the ability of rape, sexual assault and consent provisions to protect sexual autonomy.

2 Theorising Communicative Consent and Sexual Autonomy

The disconnect between consent and sexual autonomy is the basis of the concept of ostensible consent, wherein (often exemplary) consent is present yet sexual autonomy is still violated. Although somewhat broader overall, a primary enquiry regarding the concept of ostensible consent is understanding if, when and why it may be justifiably said that consent can be validly withdrawn retroactively. While possibly applicable to any construction of consent, this is arguably most likely to occur, and the disconnect is most operative, within the model of *communicative* consent. Communicative consent places heavy emphasis on the ‘expression’ of consent, and the measurable *actions* taken to ascertain this expression, in a way that elides reference to a person’s subjective ‘consent-proper’ and the underlying principle of their sexual autonomy. It suggests that as long as some certain (non-specific or prescribed) actions occur — most generally an enquiry-response interchange of a non-trivial degree directed towards the sexual act — consent to sexual interaction has been validly obtained. While such a model clearly allows for consent to be withdrawn through communication during a sexual interaction, it has no scope to allow consent to be withdrawn

¹¹⁹ *NSW Act* s 61HA(3)(d); *UK Act* ss 1(2), 2(2), 3(2).

¹²⁰ Tracy et al, above n 13, 20; Schulhofer above n 76, 419.

¹²¹ See, eg, *NSW Act* s 61HA(4), (6); see, eg, *UK Act* s 75.

¹²² *UK Act* ss 1–3.

¹²³ *NSW Act* s 61I.

¹²⁴ *R v Ewanchuk* [1999] 1 SCR 330, quoted in *Taskforce Report*, above n 42, 50.

¹²⁵ *Taskforce Report*, above n 42, 32.

¹²⁶ *Ibid* 42; *R v Ewanchuk* [1999] 1 SCR 330, quoted in *Taskforce Report*, above n 42, 50; Lacey, above n 72, 112.

¹²⁷ See eg, *R v Olugboja* [1982] QB 320 (17 June 1981) 332, quoted in Madhloom, above n 13, 93–4. This was the leading case on the common law definition of consent, and it held the jury should be directed to the subjective mindset of the complainant.

¹²⁸ *Setting the Boundaries*, above n 9, 11, 74.

post-factum; the consent is valid until the communicative status quo changes, something which cannot justifiably occur after the interaction because it relies on manifested, set-in-time communication. However, it is possible for the content of the enquiry-response interchange, regardless of how broad or substantial, not to have broached certain issues that would have been fundamental to a party's consent, arguably vitiating that consent and thus justifying its retroactive withdrawal. In the face of these instances, it would be facile and anachronistic to prioritise the oral or physical 'cues' between the parties over the core concern of effective exercise of sexual autonomy.¹²⁹

A potential counter-argument to the implication that ostensible consent more readily encompasses such situations is to assert that, even on an ostensible consent analysis, consent is not *withdrawn retroactively* but *vitiated at the time* and all that occurs after the event is an *awareness* of the past violation. That is, that the autonomy violation and invalidation of consent is always contemporaneous with the physical interaction, regardless of awareness, in which case it would similarly apply in the communicative consent model. However, philosophically, ostensible consent survives this rebuke, but the analysis requires non-linear temporal considerations so, when applied to real-world scenarios, communicative consent remains a plausible approach and ostensible consent remains a conundrum. Theoretically, if, *at the time* of the sexual interaction, a person would not have consented had they known the informational disparity that they *later* found out, then their sexual autonomy was violated. That is, their subjective, *future*, mindset *actually influences* (in theory) the 'acceptability' of a physical interaction in the past, because it is the first point in time that they are able to fully consider the relevant information. This construction allows for a whole slew of future informational revelations (about information hidden at the time) that do *not* violate sexual autonomy, regardless of their seemingly objective significance, because it puts this determination directly into the hands of the person in question, fully empowering their sexual autonomy. To illustrate, it is hardly contentious to say that a person who discovers, for example, that a previous sexual partner had (at the time of the sexual interaction) transitioned genders or was HIV-positive is fully entitled to consider that this informational disparity did *not* violate their sexual autonomy and that they still would have consented had they known. However, the communicative consent model requires; either, that the degree and nature of the communication validates the expression of consent or, that despite the communication, the expression of consent was always invalid because it was vitiated in the first instance by the informational disparity.

Overall, communicative consent's emphasis on the enquiry-response interchange largely precludes (all else being equal) the possibility for the expression of consent to be invalid (despite possible autonomy violations), and has no scope to consider that this invalidation may occur retroactively. Contrastingly, adherence to the principle of sexual autonomy mandates that in certain situations retroactive withdrawal of consent can and should validly occur, due to the autonomy violation. For example Cowan, discussing HIV transmission in the Canadian context, argues that: only cases of non-disclosure of HIV-positivity (informational deficit) that result in actual transmission (ie actually cause the recipient to consider that they would not have consented had they known) should be prosecuted.¹³⁰ Accordingly, no prosecution would occur if this was not the reaction, ie if the recipient accepted the outcome). Cowan acknowledges that this will *always* mean that the duty to disclose (alternatively, the autonomy violation and consent invalidation arising from a failure to disclose) will *only* apply or manifest retroactively.¹³¹ Communicative consent's failure to encompass this results in a significant shortcoming in its ability to effectively safeguard sexual autonomy. However, considerations of ostensible consent are possibly only

¹²⁹ See eg, Rubinfeld, above n 16, 1408.

¹³⁰ Sharon Cowan, 'Offences of Sex or Violence? Consent, Fraud and HIV Transmission' (2014) 17(1) *New Criminal Law Review: An International and Interdisciplinary Journal* 135, 161.

¹³¹ *Ibid* 149.

relevant or important in cases on the borderline between an informational constraint (and later revelation of that constraint) that invalidates consent, and one that does not.

IV PROBLEMS WITH SEXUAL AUTONOMY

A Inconsistencies Relating to Informational Constraints

Putting aside the identified limitations for the moment, this section demonstrates the criminal sex law's general failure to proscribe informational violations of sexual autonomy. Jed Rubenfeld presents a thorough and convincing account of the irregular and inconsistent embodiment of the principle of sexual autonomy in criminal sex law.¹³² Rubenfeld highlights that sex obtained through deception is generally not criminalised (consent in these instances is held to be valid) and argues that, applying the principle of sexual autonomy, it should be.¹³³ Writing in 1992, Schulhofer identified a similar shortcoming of the criminal sex law's conception of consent — that '[a]utonomy, though analytically central, remained peripheral in practice'.¹³⁴ Although Rubenfeld deals predominantly with examples of deception (deliberate lies or intentional trickery as opposed to unintentional or 'innocent' non-disclosure of information), his autonomy analysis is applicable to contexts of ostensible consent. In both contexts it is the informational deficit that violates autonomy; *intention* to deceive commutes only to the deceiver's culpability, affecting neither the occurrence nor degree of the autonomy violation.

Deception was traditionally insufficient to negate consent because rape required force.¹³⁵ However, in the 19th century English courts developed two exceptions wherein sex achieved by deception constituted rape.¹³⁶ These were contexts in which someone misrepresented a sexual act as medically necessary or procured sexual activity with a woman by impersonating her husband.¹³⁷ Termed 'fraud in the factum', these factors vitiated consent by changing the 'core nature of the act'.¹³⁸ As such, the act actually participated in was considered so fundamentally different to the act contemplated and consented to, that the expression of consent could not be said to validly apply to the actual act.¹³⁹ All other forms of deception, termed 'frauds in the inducement', were deemed insufficient to negate consent because they only influenced the decision to consent, while the act consented to was unchanged.¹⁴⁰ These exceptions were subsequently adopted in Australian common law,¹⁴¹ and parts of the US,¹⁴² and now have (modified) statutory form in England¹⁴³ and NSW.¹⁴⁴

However, Rubenfeld argues that a practically ubiquitous principle in law (other than the criminal sex law) is that deception and fraud vitiate consent as readily and fundamentally as

¹³² Although writing from a US perspective, much of Rubenfeld's theoretical analysis is applicable to rape and sexual assault offences in England and NSW.

¹³³ Rubenfeld, above n 16, 1376, 1379, 1403. Rubenfeld further argues that the principle of sexual autonomy should be abandoned in favour of 'self-possession': at 1380.

¹³⁴ Schulhofer, above n 16, 64.

¹³⁵ Rubenfeld, above n 16, 1395–6.

¹³⁶ *Ibid* 1397; see also Schulhofer, above n 16, 62.

¹³⁷ Rubenfeld, above n 16, 1397.

¹³⁸ Tom Dougherty, 'No Way Around Consent: A Reply to Rubenfeld on "Rape-by-Deception"' (2013) 123 *Yale Law Journal Online* 321, 322 <<http://www.yalelawjournal.org/forum/no-way-around-consent-a-reply-to-rubenfeld-on-rape-by-deception>>.

¹³⁹ *Ibid*.

¹⁴⁰ Rubenfeld, above n 16, 1398–1400; Schulhofer, above n 16, 62–3.

¹⁴¹ *Papadimitropoulos v The Queen* (1957) 98 CLR 249, cited in Rubenfeld, above n 16, 1397.

¹⁴² Rubenfeld, above n 16, 1397.

¹⁴³ *UK Act* s 76.

¹⁴⁴ *NSW Act* s 61HA(5).

force.¹⁴⁵ He cites various examples of this in instances of ‘larceny, trespass, and contract’.¹⁴⁶ For example, misrepresentation of occupation often vitiates consent if consent was gained on the basis of that misrepresentation — ‘the false meter reader cannot claim consent when he enters a person’s home’.¹⁴⁷ Further, acknowledging fraud in the factum exceptions invites intensified scrutiny of why deception generally should not be criminalised in sex law.¹⁴⁸ Rubenfeld asserts that the distinction between factum and inducement is not as rational as it purports to be. For example, the deception in medical fraud instances ‘may concern solely the [perpetrator’s] purposes’, but there is no logical reason (on an autonomy argument) to distinguish these misrepresented purposes from any others, as long as they similarly influence a decision to consent.¹⁴⁹ While in medical fraud cases the disparity between the represented necessity and the (presumably demonstrable) unwarrantedness of the ‘procedure’ in question may evidence (false) intention or purpose; issues of proof regarding subjective intentions, thoughts or feelings may inhibit the practicability of this approach more generally. However, ‘an institutional [in]competence argument’ does not justify theoretical inconsistencies or arbitrary designations of which deceptions are criminal.¹⁵⁰

Rubenfeld agrees with the anticipated counter-argument that not all deceptions are sufficiently relevant, or ‘material’, to negate consent.¹⁵¹ However, whether a factor, or deception thereof, is ‘material’ depends on a determination of which factors one should consider in constructing a decision.¹⁵² Rubenfeld argues that unduly restricting this determination (for example, to the facts of the physical act) risks reanimating strict and outdated operations of consent wherein the only consideration was the ‘woman’s decision to *have sex*’, ignoring contextual determinants of this decision.¹⁵³ Thus, materiality must be expansive enough to incorporate factors that inform a person’s decision ‘from a sexual point of view’ — though these are clearly vast and heterogeneous.¹⁵⁴ In the context of sexual activity, then, autonomy only requires a person to demonstrate that their ‘right to make an *autonomous choice* about [their] sexual activity was violated’.¹⁵⁵ Rubenfeld lucidly demonstrates that this is not the approach of the criminal sex law, and that the principle of sexual autonomy has a thoroughly inconsistent application. This inconsistency is further highlighted by the law’s treatment of sexual interactions involving possible HIV transmission.

B *The Law’s Treatment of (the above) Instances of Ostensible Consent*

1 *HIV Transmission*

(a) *Overview – NSW and England*

In NSW and England, sexual interactions involving HIV transmission are not sexual offences, but may be offences of grievous bodily harm (‘GBH’). This stems from *R v Clarence*,¹⁵⁶ which held that consent to sex necessarily includes consent to the risk of contracting a sexual disease.¹⁵⁷ Subsequent contraction of the disease could not vitiate

¹⁴⁵ Rubenfeld, above n 16, 1376–8, 1395, 1404.

¹⁴⁶ Ibid 1398.

¹⁴⁷ Ibid 1399.

¹⁴⁸ See, eg, *Taskforce Report*, above n 42, 41.

¹⁴⁹ Rubenfeld, above n 16, 1399.

¹⁵⁰ Ibid 1400.

¹⁵¹ Ibid 1406–7.

¹⁵² Ibid 1407.

¹⁵³ Ibid 1408 (emphasis added).

¹⁵⁴ Ibid.

¹⁵⁵ Ibid 1407 (emphasis added).

¹⁵⁶ (1888) 22 QBD 23.

¹⁵⁷ *R v Konzani* [2005] EWCA Crim 706 (15 Feb 2005) [38] (‘Konzani’), citing *R v Clarence* (1888) 22 QBD 23.

consent, thus sexually transmitting diseases could not constitute sexual assault or rape. *R v Dica*¹⁵⁸ expressly overruled this point (in England); though the fact such a statement was needed in 2004 illustrates the entrenched effect of *R v Clarence*¹⁵⁹ in excising disease transmission from the remit of sexual offences. Limited by this precedent, public policy requiring sanction of the malicious or reckless transmission of HIV (due to its potentially severe health ramifications) manifested in the law of GBH.¹⁶⁰

In NSW, GBH is defined to include transmission of a ‘grievous bodily disease’,¹⁶¹ which has been interpreted and applied to include HIV.¹⁶² Actual transmission is required,¹⁶³ and this may be intentional,¹⁶⁴ reckless¹⁶⁵ or by ‘any unlawful or negligent act, or omission’.¹⁶⁶ Notably, failure to disclose one’s HIV-positive status before sexual intercourse is an offence, regardless of actual transmission, punishable by pecuniary penalty — again, *not* a sex crime (nor even a crime).¹⁶⁷ No offence is committed if the risk was disclosed to the other person and they ‘voluntarily agreed to accept the risk’.¹⁶⁸ This suggests, rather obviously, the other person needs to *consent* to the risk of transmission, and thus the exception reflects an autonomy argument — if the person, having *knowledge* of the risk, voluntarily agrees (that is, can *freely* decide) then no offence occurs (because autonomy is exercised).¹⁶⁹ The physical, sexual acts subject to this offence are largely the same as the physical, sexual acts that may constitute criminal sexual assault.¹⁷⁰ It is irregular, then, why in these two contexts the same sexual acts are subject to the highly similar considerations of consent, yet the sanctions for consent violations (and the confluent violations of autonomy) are wholly disparate.¹⁷¹

Similarly in England, sexual transmission of HIV may be GBH.¹⁷² Consent is a defence but it must have been ‘informed’, or given in ‘knowledge’, of the risk of contraction and must be *directed to that risk*.¹⁷³ Consent in the context of non-disclosure of HIV-positive status is technically possible (as knowledge is not per se required), but highly impractical and probably ‘wholly artificial’.¹⁷⁴ Thus, in the event of transmission, non-disclosure will most likely conduce to a finding of GBH precisely because ‘consent is not properly informed, and [cannot be given] to something of which [one] is ignorant’.¹⁷⁵ In *R v Konzani*¹⁷⁶ the court expressly recognised that non-disclosure is, at the very least, not conducive to the complainant’s autonomy and is most likely a deception severe enough to vitiate consent.¹⁷⁷

¹⁵⁸ [2004] EWCA Crim 1103 (5 May 2004) [59]; Matthew Weait, ‘Knowledge, Autonomy and Consent: *R v Konzani*’ [2005] *Criminal Law Review* 763, 764.

¹⁵⁹ (1888) 22 QBD 23.

¹⁶⁰ See generally *Taskforce Report*, above n 42, 41; *Konzani* [2005] EWCA Crim 706 (15 February 2005) [42].

¹⁶¹ *NSW Act* s 4(1) (definition of ‘grievous bodily harm’).

¹⁶² Groves and Cameron, above n 110, 2–3.

¹⁶³ *NSW Act* s 4(1) (definition of ‘grievous bodily harm’).

¹⁶⁴ *Ibid* s 33(1).

¹⁶⁵ *Ibid* s 35(2).

¹⁶⁶ *Ibid* s 54.

¹⁶⁷ *Public Health Act 2010 (NSW)* s 79(1).

¹⁶⁸ *Ibid* (emphasis added). It is also a defence if ‘the defendant took reasonable precautions to prevent the transmission’: at s 79(3). The substance of these has not been determined: Brady, Woodroffe and Chatterjee, above n 110, 3.

¹⁶⁹ In NSW, consent is free and voluntary agreement: *NSW Act* s 61HA(2). In England, consent is agreement by choice, with the ‘freedom and capacity to make that choice’: *UK Act* s 74.

¹⁷⁰ That is, penile penetration of the vagina, anus or mouth, or cunnilingus: *Public Health Act 2010 (NSW)* s 77; *NSW Act* s 61H(1).

¹⁷¹ 50 penalty units compared with 14 years jail-time: *Public Health Act 2010 (NSW)* s 79(1); *NSW Act* s 61I.

¹⁷² Prosecuted under the *Offences Against the Person Act 1861*, 24 & 25 Vict, c 100, ss 18, 20: see, eg, Weait, above n 158, 763. This is importantly distinct from the *UK Act*, which deals with sexual offences.

¹⁷³ *Konzani* [2005] EWCA Crim 706 (15 February 2005) [35], [39], [41]–[42], [46].

¹⁷⁴ *Ibid* [42]; Weait, above n 158, 764.

¹⁷⁵ *Konzani* [2005] EWCA Crim 706 (15 February 2005) [42].

¹⁷⁶ [2005] EWCA Crim 706 (15 February 2005).

¹⁷⁷ *Konzani* [2005] EWCA Crim 706 (15 February 2005) [42].

Although only the conclusive presumptions in statutory consent provisions¹⁷⁸ expressly address deception, deception may still contravene the general consent definition¹⁷⁹ in s 74.¹⁸⁰

(b) GBH vs Sexual Assault

This melange of sex law and assault law results in an awkward theoretical approach to criminalising sexual transmission of HIV. If a person consents to sexual activity involving an undisclosed risk of HIV transmission, and transmission occurs, the person will be deemed to have consented to the sex, but the other person will have no defence to charges for the damage caused by the HIV, because that GBH was not consented to.¹⁸¹ The real, unitary expression of consent is artificially partitioned to validly apply to the sex but not to the harm of infection.¹⁸² This legal fiction is irreconcilable with the reality that the sexual activity and the risk of transmission are (in certain circumstances) inextricably concomitant and thus that, logically, consent must be given to both or neither.¹⁸³ Non-disclosure means no opportunity is available to consent to the sexual activity and the risk of transmission as separate elements. Thus, logically speaking, consent is given as a whole and must, if vitiated, be vitiated as a whole. Informational constraints that deny a person the ability to consent to both elements violate that person's sexual autonomy. If non-disclosure of the risk of HIV transmission vitiates consent to *sexual activity involving that risk* (taken as a whole) then sexual autonomy requires such activity to constitute sexual assault.¹⁸⁴ So, again, the law's approach to HIV transmission is contrived and incongruous with sexual autonomy theory and the operation of consent in sexual offences.

(c) Significance of the Risk/Probability of Transmission

It is worth briefly considering whether there is a substantive effect on this autonomy argument that flows from the probability, or level of risk, of transmission. In Canada, non-disclosure of HIV-positive status is prosecutable both when there is an unrealised risk and in the instance of actual transmission, but (in either scenario) only where there was a 'significant risk of serious bodily harm' (that is, infection with HIV).¹⁸⁵ The requirement of 'significant risk' is a non-trivial difference between Canadian law and that in England and NSW (where non-consent is the basis for liability), which requires various separate considerations beyond the scope of this paper.¹⁸⁶ However, at its simplest, it is relevant because analysis regarding the effect of the level of risk gives rise to considerations of medical treatment and management of HIV (for example, condom use, anti-retroviral treatment and pre-exposure prophylaxis medication), and how these might affect the

¹⁷⁸ *UK Act s 76(2)(a)*; see also *NSW Act s 61HA(5)(c)*.

¹⁷⁹ *R v EB* [2006] EWCA Crim 2945 (16 October 2006), quoted in *McNally* [2013] EWCA Crim 1051 (27 June 2013) [20]; *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) (2 November 2011) [88]–[90], quoted in *McNally* [2013] EWCA Crim 1051 (27 June 2013) [21].

¹⁸⁰ *UK Act s 74*.

¹⁸¹ *R v EB* [2006] EWCA Crim 2945 (16 October 2006) [17].

¹⁸² As a matter of principled logic, the current approach also invites the potential for persons, in full knowledge of their prospective partner's HIV-positive status and the risk of transmission, to expressly consent to sex but expressly withhold consent to infection: "yes we can have sex, but if I contract HIV then I will press charges of GBH". This would be an iniquitous, legally endorsed, power imbalance in the sex lives of all HIV-positive people; but if this is so in the case of non-disclosure, why could it not be so in the case of disclosure?

¹⁸³ Such reasoning seems to have been applied in *R(F) v DPP* [2013] EWHC 945 (Admin) (24 April 2013) wherein sexual intercourse, consented to on the understanding ejaculation would occur externally but actually occurred internally, constituted rape because the person 'was deprived of choice relating to the crucial feature on which her original consent to sexual intercourse was based': at [26]. Given the more separable natures of intercourse and ejaculation compared to intercourse and the risk of HIV transmission, such a principle should apply even more readily in the latter context.

¹⁸⁴ See especially *R v Cuerrier* [1998] 2 SCR 371, quoted in *Taskforce Report*, above n 42, 40; see especially *R v Williams* [2003] 2 SCR 134, quoted in *Taskforce Report*, above n 42, 40; Cowan, above n 130, 152.

¹⁸⁵ *R v Cuerrier* [1998] 2 SCR 371 [128], quoted in Carissima Mathen and Michael Plaxton, 'HIV, Consent and Criminal Wrongs' (2011) 57(4) *Criminal Law Quarterly* 464, 468; Cowan, above n 130, 141.

¹⁸⁶ See, eg, Cowan, above n 130, 148–9, 153–4.

autonomy argument regarding non-disclosure of HIV-positive status. On the strict application of the forgoing autonomy analysis non-disclosure of HIV-positive status would vitiate consent, despite a low risk of transmission, if the HIV-negative person would not have consented had they known there was a risk.¹⁸⁷

Further, it appears difficult to soften the application of this analysis despite considerations of the risk-reduction methods stated above. In the case of condom use, Mathen and Plaxton point to the obvious theoretical shortcomings relying on condom *use* (the mere presence or absence of a condom) in accurately assessing risk — that condoms are not ‘all or nothing ... [and] may be used more or less effectively’.¹⁸⁸ In *R v Mabior*¹⁸⁹ the Canadian Court of Appeal identified numerous factors involved in assessing the effectiveness of condoms in actually decreasing the risk of transmission — for example: the expiry or manufacture date of the condom, how it was opened, how it was stored, how it was applied, whether lubricant was used and what type was used, how it was removed after ejaculation, and so on — all of which present significant evidentiary difficulties and arguably highlight the insufficiency of the theoretical bedrock in this approach.¹⁹⁰

The relationship between viral load and probability of transmission is also a difficult yardstick by which to measure liability. While a HIV-positive person may reduce their viral load (and the probability of transmission) through anti-retroviral medication, whether their viral load is low or undetectable at the time of a sexual interaction will only be known to that person in the case of recent testing.¹⁹¹ Given the difficulty of establishing a person’s viral load at any specific time, especially retrospectively, Grant argues that self-assessment of viral load, and a personal determination of the likelihood of transmission, is not a desirable basis on which to construct the duty of disclosure or liability for non-disclosure.¹⁹² The use of pre-exposure prophylactic medication (‘PrEP’) is an interesting example because it is a risk reduction method on the part of the HIV-negative person. However, it turns out that analysis of autonomy and informational constraints in this context is somewhat reductive and circular.

The primary concern of considering risk management is to determine what (if any) level of management would reduce the probability of transmission to the point where non-disclosure of HIV-positive status does not denigrate from the other person’s sexual autonomy sufficiently to vitiate consent. However, in the case of PrEP there are arguably only two relevant scenarios, in both of which the determinative factor of valid consent will be the PrEP user’s mindset. That is, there is no need to investigate an interplay between the HIV-positive person’s actions and the effect on the HIV-negative person’s consent or sexual autonomy. In the first set of scenarios, an HIV-negative person takes PrEP in anticipation of a specific interaction, or an interaction with a specific person where the HIV-negative person understands and *accepts* that there may be (or knows that there is) a risk of transmission. In this context, the person has considered the risk of transmission and, in the fullest sense of the word, consents to it, so non-disclosure of HIV-positive status would not vitiate their consent. In the second set of scenarios, a person takes PrEP as a general precautionary measure (perhaps due to a heightened occurrence of HIV transmission in that person’s sexual subculture) but does not, in any specific instance, consent to the risk of transmission and would not, if they had the relevant information, consent to sexual activity with a HIV-positive person. In this context, non-disclosure of HIV-positive status would vitiate their consent. In either case, the PrEP user’s (theoretically) directly accessible mindset is the

¹⁸⁷ Ibid 147.

¹⁸⁸ Mathen and Plaxton, above n 185, 474.

¹⁸⁹ [2011] 2 WWR 211.

¹⁹⁰ *R v Mabior* [2011] 2 WWR 211 [91]. When the case was later heard in the Supreme Court of Canada, it was held that a combination of condom use and a low viral load may render non-disclosure acceptable: *R v Mabior* [2012] SCC 27 (5 October 2012) [108].

¹⁹¹ Mathen and Plaxton, above n 185, 475.

¹⁹² Cowan, above n 130, 143; Mathen and Plaxton, above n 185, 476.

determinative factor of valid consent, and enquiry of this nature is simply asking ‘does the PrEP user consent to the risk of HIV transmission?’ The answer to this will of course vary individually, but requires no analysis of interplay and is not causally influenced by the use of PrEP (and the reduction of risk).

(d) *Nature of the act*

Further, it could be argued that ‘HIV status is ... fundamental to ... the *nature and quality* of the act’, negating consent via the fraud in the factum doctrine (conclusive presumptions).¹⁹³ It seems logical that transmission of a potentially lethal and debilitating disease would sufficiently vary the nature of the act (that is, the physical elements of the conduct) in such a way as to vitiate consent given in ignorance of the risk of transmission. This proposition was the object of some express support in the Canadian Supreme Court.¹⁹⁴ Similarly, the NSW Taskforce considered the argument for criminalising non-disclosure of HIV-positive status on this basis.¹⁹⁵ However, it declined to recommend doing so, preferring the current approach in NSW to proscribe such conduct under GBH.¹⁹⁶ In doing so, it tacitly endorsed the view that the presence of HIV does *not* change the nature of the act in such a way as to conclusively negate consent, a view maintained in NSW (and English) law.

(e) *Summary*

Overall, the law’s treatment of sexual transmission of HIV is another example of its inconsistent adherence to the principle of sexual autonomy. Entrenched precedent (developed well before HIV was first diagnosed)¹⁹⁷ forced jurisprudential development to sidestep the principles of sexual offences, but consent’s contemporary centrality to offences involving sexual transmission of HIV demonstrates the law’s flawed internal logic. This centrality constitutes recognition that sexual autonomy should, and somewhat does, apply in this context – although if this is so, its violation should occasion sexual assault, not GBH.

2 *Transgender Sexual Relations*

In stark contrast, the law’s approach (at least in England) to transgender sexual relations involves a faithful application of the principle of sexual autonomy.¹⁹⁸ In England, *McNally*¹⁹⁹ established precedent to the effect that gender is a material fact sufficient to alter the ‘sexual nature of the acts’ and, given this, that non-disclosure of gender history may be deceit sufficient to vitiate consent.²⁰⁰ This falls within the operation of the conclusive presumptions in s 76,²⁰¹ essentially recognising a third category of fraud in the factum.²⁰² The factor that changes the nature of the act is gender history, but gender transition is clearly not the ‘wrong’ involved. The wrong lies in the ‘deliberate deception’, which has been interpreted to include the *withholding of information* regarding gender history such that the complainant’s ‘cho[ice] to have sexual encounters [according to their sexual] preference ([their] freedom to

¹⁹³ *Taskforce Report*, above n 42, 41 (emphasis in original).

¹⁹⁴ *R v Cuerrier* [1998] 2 SCR 371, quoted in *Taskforce Report*, above n 42, 40.

¹⁹⁵ *Taskforce Report*, above n 42, 41.

¹⁹⁶ *Ibid.*

¹⁹⁷ See eg, The Aids Institute, *Where did HIV come from?* (2011) <<http://www.theaidsinstitute.org/node/259>>; see, eg, Avert, *Origin of HIV & AIDS* (20 February 2017) <<https://www.avert.org/professionals/history-hiv-aids/origin>>.

¹⁹⁸ Due to limited case law, the analysis in this section applies only to cases under the *UK Act*. However, given the similar legislation and jurisprudence, it is conceivable the same could occur in NSW. To illustrate this, the equivalent provisions of the *NSW Act* are cited where relevant in the forthcoming footnotes.

¹⁹⁹ [2013] EWCA Crim 1051 (27 June 2013).

²⁰⁰ *McNally* [2013] EWCA Crim 1051 (27 June 2013) [26]–[27].

²⁰¹ *UK Act* s 76.

²⁰² *McNally* [2013] EWCA Crim 1051 (27 June 2013) [17].

choose whether or not to have a sexual encounter [contrary to this preference]) was removed'.²⁰³ Thus it is accurately construed as a violation of sexual autonomy.²⁰⁴

This fraud in the factum approach to criminalising sexual HIV transmission was considered and rejected in NSW (and is not the approach in England).²⁰⁵ However, as established in Part III, the autonomy violation in instances of undisclosed gender history is demonstrably concordant with the autonomy violation in instances of undisclosed HIV-positive status.²⁰⁶ In both, there is a material (even physical) fact — gender history (or, the physical differences between the gender associated with birth sex and the presented gender) and HIV-positive bodily fluid — that is known by one party and not the other, and there is non-disclosure leading to ostensible consent. Yet only non-disclosure of gender history, and not HIV status, is considered to vitiate consent and violate sexual autonomy sufficiently to constitute sexual assault or rape. This is even more irregular given that the manner in which non-disclosure of gender history is held to vitiate consent is by changing the physical nature of the act, yet the physical nature of the act in the HIV context (the unavoidable presence of the virus in certain bodily fluids) is confluent with the risk of contracting a potentially lethal or debilitating disease. While Part III noted that the physical manifestation of HIV is an adjacent harm to the violation of autonomy, it is surely an important element informing the 'physical nature of the act'.²⁰⁷

Therefore, the strict sanction of informational violations of sexual autonomy in the context of transgender sexual relations represents a double inconsistency — it is inconsistent with the law's general treatment of sex by deception, and inconsistent with the law's approach to HIV transmission, to which it is highly analogous.

C Potential Solution of Strict and Consistent Autonomy

Is it the case, then, that problems relating to sexual autonomy result only from its inconsistent application? If sexual autonomy is the right to be protected then perhaps it should be applied strictly, so all violations relating to both knowledge and capacity would conduce to sexual assault. Although writing in support of this proposition, Herring helpfully summarises a number of pertinent drawbacks often identified in this approach. These are likely obvious to the reader and include concerns such as: the rampant 'use of deceptions to obtain sex'; the fact 'sexual activity is a risky business and this is well known'; the 'enormous difficulties in proving that emotional representations are untrue'; 'weaken[ing] the stigma that properly attaches to rape'; 'too great a burden' of disclosure; and 'the difficulty ... over deciding what is "material"'.²⁰⁸ Rubenfeld additionally argues that, if autonomy were thus applied, a person who rapes (in the current sense) another person *because* the latter represented some false quality, the former could also assert they were raped by fraud.²⁰⁹

However, further to these problems, centred on (in)consistent application, is the problematic construction of sexual autonomy itself. The contention that sexual autonomy is a loaded concept will now be specifically analysed in the context of transgender sexual interactions.

²⁰³ Ibid [26].

²⁰⁴ Alex Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent' [2014] (3) *Criminal Law Review* 207, 210, quoting Herring, above n 80, 517.

²⁰⁵ *Taskforce Report*, above n 42, 41.

²⁰⁶ See above Part III(C).

²⁰⁷ See above Part III(C)(2).

²⁰⁸ Herring, above n 80, 520–3.

²⁰⁹ Rubenfeld, above n 16, 1415.

D *The Problematic Construction of Sexual Autonomy in Transgender Sexual Relations*

It is clear the rationale for criminalising non-disclosure of gender history in sexual interactions is the violation of sexual autonomy. However, in these situations the actual harm experienced by the complainant (as opposed to the in-principle ‘wrong’) is contingent on retrospective, subjective realisations — the harm is not experienced in the actual sexual activity, but the later perception of that activity.²¹⁰ Sharpe more scathingly characterises the harm as ‘pleasurable sexual acts retrospectively reimagined’.²¹¹ While it is not asserted here that retrospective subjectivity inherently limits the *degree* of harm that may be personally experienced, its wholly subjective *nature* invites closer analysis of the autonomy argument used to criminalise it.²¹² Retrospective mental (subjective) changes, however dramatic, should not be an adequate basis for criminalising any conduct so severely. To justify criminalising activities that result in, *prima facie*, only subjective harm, the law must assign objectivity to those internal and personal epiphenomena — to do so in this context, the law invokes the principle of sexual autonomy.

However, the law’s fundamental index of whether sexual autonomy has been exercised or violated is *consent*. In the last four years, there have been at least six recorded²¹³ prosecutions (all successful) of a transgender person for sexual offences²¹⁴ on the basis of this purported ‘gender fraud’ under the *UK Act*.²¹⁵ In keeping with the hypothesis in Part III, some of these cases illustrate how these scenarios may exhibit almost none of the elements proscribed by statutory provisions of (communicative) consent.²¹⁶ They are contexts in which consent may be fully communicated, demonstrating the potential for ostensible consent as a matter of principle, though this would of course depend on the facts. In *McNally*²¹⁷ a romantic online, telephone and webcam relationship developed over more than three years and involved, towards the end, three in-person meetings over some months, all of which involved intimate touching.²¹⁸ This degree of verbal, visual and inter-personal exchange provides a strong basis for asserting that consent to the eventual sexual activity was well communicated and well informed, to the extent that it was based on significant prior contact, and also that (McNally’s) belief that consent was present was genuine and *reasonable*.²¹⁹ Thus, in these instances, there are almost no discernible issues of dubious consent — excepting, of course, the issue of the ‘nature of the act’.

English courts have determined that gender transition alters the sexuality of the activity (from the complainant’s perspective), and that sexuality is a fundamental aspect of sex such that the complainant should be fully aware of it when deciding whether to participate.²²⁰ From a certain standpoint this may not appear problematic; perhaps it is the law’s prerogative to make this delineation and perhaps it even makes some intuitive sense. However, problems arise, firstly, because a ‘nature of the act’ offence requires *intentional*

²¹⁰ Gross, ‘Gender Outlaws’, above n 102, 199; see also Sharpe, above n 204, 221.

²¹¹ Alex Sharpe, *Sexual intimacy, gender identity and fraud: A conversation* (10 August 2015) ANU College of Law <<https://law.anu.edu.au/event/discussion/sexual-intimacy-gender-identity-and-fraud-conversation>>.

²¹² Cf Sharpe, above n 204, 221.

²¹³ Only McNally’s case was legally reported; other instances have been documented in general media.

²¹⁴ The actual charges seem to be mostly assault by penetration, under the *UK Act* s 2: LGBT Foundation, ‘*Sex by deception*’ — *Statement from LGBT Foundation* (17 December 2015) <<http://lgbt.foundation/news-articles/sex-by-deception/>>; Alex Sharpe, ‘The dark truth behind convictions for “gender fraud”’, *New Statesman* (online), 16 December 2015 <<http://www.newstatesman.com/politics/feminism/2015/12/dark-truth-behind-convictions-gender-fraud>>.

²¹⁵ Sharpe, above n 211; see also LGBT Foundation, above n 214.

²¹⁶ See above Part III(C)(1).

²¹⁷ [2013] EWCA Crim 1051 (27 June 2013).

²¹⁸ *McNally* [2013] EWCA Crim 1051 (27 June 2013) [3]–[9].

²¹⁹ See *UK Act* ss 1(1)(c), 2(1)(d), 3(1)(d).

²²⁰ See, eg, *McNally* [2013] EWCA Crim 1051 (27 June 2013) [26]–[27].

*deceit*²²¹ and, secondly, because a finding of this deceit supports a conviction by conclusively negating *belief in consent* (as well as consent itself).²²²

Sharpe addresses the factors the court cited to establish deception in *McNally*²²³ and shows each of them to be concordant with genuine transgender identification.²²⁴ For example, McNally's gender 'confusion' was not evidence of 'inauthenticity' but the personal struggle often associated with gender transition; discussions between McNally and the complainant contemplating marriage and parenthood were also not inconsistent with (McNally's) transgender identity.²²⁵ This suggests McNally's non-disclosure was the innocent and incidental result of genuine self-identification, not intentional deceit. Further, while in *McNally*²²⁶ the court's scepticism of gender authenticity informed its finding of deceit, Kyran Lee was convicted 'on the basis of obtaining "sex through deception" ... [or] "gender fraud"' despite having consistently identified as a man for about 10 years before the incident.²²⁷ Similarly, Chris Wilson was convicted on this basis for incidents occurring when he was 20 and 22, despite having 'lived as a man since childhood'.²²⁸ This indicates a broad construction of 'deceit' that ignores the effect of genuine transgender self-identification and incorporates innocent non-disclosure. Moreover, in order for an accused to be culpable they must have had no reasonable belief that consent was present.²²⁹ Reasonable belief can be inferred 'having regard to all the circumstances' and *especially* from actions taken to ascertain consent.²³⁰ Given the well-communicated (albeit ostensible) consent, an accused in this context is arguably entitled to have a reasonable belief that consent was given. However, this is inconsequential if a conclusive presumption applies.²³¹

In summary, the courts invoke the principle of sexual autonomy to assign objectivity to the subjective harm experienced in this context. They then circumvent the (exemplary) presence of communicative indicia of consent, and the concomitant genuine and reasonable belief in consent, by characterising gender transition as changing the 'nature of the act'. As such, only deception *as to that nature* is required in order to apply a conclusive presumption that belief was absent. However, the courts have also broadly construed deceit to include innocent non-disclosure that results from genuine gender self-identification. The law understands and accepts (as it arguably should, albeit perhaps too readily) the complainant's claim that they would not have consented to sex with a transgender person, but it also asserts that, *objectively speaking*, the defendant would have known there was no true consent by virtue of their gender transition. This is essentially a statement that, in sexual interactions, every transgender person 'surely knows' their identified gender is spurious, and that it is so aberrant that no person would have sex with them (remember the *conclusive* presumption) unless they were fully aware of the gender history.

This raises numerous problematic questions of legal transphobia that are expounded on by other authors, and are beyond the scope of this article.²³² Still, it is apparent that a special category of fraud in the factum has been created to override considerations of actual consent that do comply with the essence of the communicative model of consent — the purported champion of sexual autonomy. The creation of this category is anomalous given the close

²²¹ *UK Act* s 76(2)(a). Or, in NSW, 'mistaken belief about the nature of the act *induced by fraudulent means*' and knowledge that consent was given 'under such a mistaken belief': *NSW Act* s 61HA(5)(c) (emphasis added).

²²² *UK Act* s 76(1); see also *NSW Act* s 61HA(5)(c).

²²³ [2013] EWCA Crim 1051 (27 June 2013).

²²⁴ Sharpe, above n 204, 217–18.

²²⁵ *Ibid* 217.

²²⁶ [2013] EWCA Crim 1051 (27 June 2013).

²²⁷ LGBT Foundation, above n 214; Sharpe, above n 214.

²²⁸ BBC News, *Sex fraud woman put on probation* (9 April 2013) <<http://www.bbc.com/news/uk-scotland-north-east-orkney-shetland-22078298>>.

²²⁹ *UK Act* ss 1(1)(c), 2(1)(d), 3(1)(d); see also *NSW Act* ss 61I, 61HA(3)(c).

²³⁰ *UK Act* ss 1(2), 2(2), 3(2); see also *NSW Act* s 61HA(3)(c)–(d).

²³¹ *UK Act* s 76(1)(b); see also *NSW Act* s 61HA(5).

²³² See eg, Sharpe, above n 204; see eg, Gross above n 102.

analogy shown between sexual activity involving potential HIV transmission and transgender sexual interactions. Clearly, ‘to the extent the criminal law respects or restricts autonomy, it inevitably makes judgments about the nature and context of a subject’s autonomous choices’.²³³

V SUGGESTED RESPONSES TO THESE PROBLEMS

Various redresses for, or defences of, the law’s use of the principle of sexual autonomy have been suggested, though these invariably involve their own significant disadvantages. For instance, Herring and Dougherty advocate a principled and strict application of autonomy, though the shortcomings of this approach are summarised by Herring himself and incisively criticised by Rubinfeld.²³⁴

Rubinfeld posits an operational principle of ‘self-possession’, violation of which (equated with rape or sexual assault) occurs when ‘the victim’s body is utterly wrested from her control, mastered, possessed by another’.²³⁵ However, this has been widely denounced for its basic reliance on force, which is considered an unacceptable normative backwards step.²³⁶ Responding to Rubinfeld, Yung argues that various socio-historical (in addition to legal) rationales underpin the current state of the criminal sex law – sexual autonomy is just one utilised principle, useful for its connection to consent.²³⁷ Yung argues that recognising the deficiencies of sexual autonomy theory should not lead to a revival of the force requirement. Other dominant rationales such as the ‘severity and nature of the harm caused, gender dynamics involved, and terror inflicted by widespread sexual violence on the general population’ also contribute to the modern state of rape law and condemn the force requirement.²³⁸ In a similar vein, Falk argues Rubinfeld’s conception of self-possession is reductive as it only identifies acts that *must be rape* rather than effectively identifying what *rape must be*, ignoring the incremental and reasoned expansion of sexual offences over time.²³⁹

However, while the premises of such refutations are noteworthy, they possibly address an issue different in nature to that of Rubinfeld’s argument. Yung identifies various reasons that justify the *existence* of the criminal sex law and rationalise it as a body of law to deal with sexual offences in a manner different to other bodily assaults. This provides no guidance for a determinative standard, principle or device that may be utilised to adjudicate an allegation of sexual assault, which is a primary aspect of Rubinfeld’s analysis.²⁴⁰ Yung offers a convincing value-based account of why rape law should not return to dependence on force, but this is a separate enquiry from locating a principle that can be invoked to determine whether or when sexual assault occurs.

Brennan-Marquez presents a similar response to Rubinfeld, arguing that Rubinfeld’s defence of self-possession – that it would be ‘principled, if “unappealing”’ – provides no justification for abandoning sexual autonomy.²⁴¹ Brennan-Marquez argues sexual autonomy has equal capacity for axiomatic application that would lead to undesirable results, yet

²³³ Lacey, above n 72, 105.

²³⁴ Dougherty, above n 138, 333–4; Herring, above n 80, 516, 520–3.

²³⁵ Rubinfeld, above n 16, 1427.

²³⁶ Yung, above n 77, 4; Patricia J Falk, ‘Not Logic, but Experience: Drawing on Lessons from the Real World in Thinking About the Riddle of Rape-by-Fraud’ (2013) 123 *Yale Law Journal Online* 353, 356–7 <<http://www.yalelawjournal.org/forum/not-logic-but-experience-drawing-on-lessons-from-the-real-world-in-thinking-about-the-riddle-of-rape-by-fraud>>; Dougherty, above n 138, 324.

²³⁷ Yung, above n 77, 5.

²³⁸ *Ibid* 5–6.

²³⁹ Falk, above n 236, 356–7.

²⁴⁰ Rubinfeld, above n 16, 1380.

²⁴¹ Kiel Brennan-Marquez, ‘A Quite Principled Conceit’ (2013) 80 *University of Chicago Law Review* 81, 83, quoting Rubinfeld, above n 16, 1438.

‘polities are free to set the parameters of categories like “rape” as they see fit ... there is no maxim that conceptual purity must trump human experience’.²⁴² This again fails to grapple with Rubenfeld’s initial endeavour to locate a *measure* by which certain actions can be accurately designated as sexual assault or not, except by appealing to the ‘democratic polity’s’ prerogative to construct the law as it sees fit – the results of such a prerogative are essentially what Rubenfeld critiques.²⁴³

Further, ultimate reliance on the collective (as superior to ‘stoic rationality’) also fails to address concerns about sexual autonomy’s problematic construction, which results from latent norms and value judgments.²⁴⁴ This is particularly pertinent given that the above issue of transgender prosecutions is recently developed and emergent from a socio-legal context that is historically transphobic. As such, in the context of transgender sexual interactions logic should be utilised because it can make a substantiated determination, buttressed despite its apparent contrariness to ‘actual values held by actual members of our polity’.²⁴⁵ A logical comparison suggests little to separate the transgender and HIV contexts, and little reason to treat either of them as sexual assault when other forms of deception are not treated as such.

It is interesting to examine Lacey’s suggested solution to the problems of sexual autonomy because it is seemingly attractive, and because the NSW Taskforce prominently cited her analysis.²⁴⁶ Lacey’s operational principle is ‘integrity’, which is achieved when a person’s ‘sexual imago’ aligns (is integrated with) their actual sexual experience.²⁴⁷ On this view, rape is fundamentally harmful in that it ‘violates its victims’ capacity to integrate psychic and bodily experiences’.²⁴⁸ While desirable for its holistic notion of the human (particularly female) experience of sexual assault,²⁴⁹ as a point of logic, integrity is only valuably achieved if there is perfect alignment of each party’s integrated experience. If one person’s imago aligns with their bodily experience but their imago is predicated, as it presumably often is, on an understanding of the other party’s imago (how the other person understands and perceives the sexual interaction) then in order for the first person to truly have integration, their imago (including their understanding of the other’s) must be accurate. If one party perceives, for example, mutually love-filled sex and for that reason has an integrated experience, but the other person is not in love, then the first person’s imago (envisioning mutually loving sex) is, in fact, not aligned with their bodily experience (sex with unrequited love) and thus they are not integrated. This misalignment of imagoes would conceivably be pervasive in sexual interactions, rendering Lacey’s principle operationally defunct and very difficult to establish evidentially.

Tuerkheimer’s conception of ‘sexual agency’²⁵⁰ has similar self-governance ideals as autonomy, but recognises that the ‘self is socially constructed’ and people (especially women) must ‘operate under meaningful constraints’.²⁵¹ It thus allows for some ‘sexual misrepresentation’ because consent ‘cannot be discounted solely by virtue of its imperfection’.²⁵² Due to its lack of principled rigour (its failure to reliably delineate when deception vitiates consent or not) it too may lack desirability and effectiveness in the same

²⁴² Brennan-Marquez, above n 241, 84.

²⁴³ Ibid 85–6.

²⁴⁴ Ibid 83.

²⁴⁵ Ibid 87.

²⁴⁶ *Taskforce Report*, above n 42, 33.

²⁴⁷ Lacey, above n 72, 118.

²⁴⁸ Ibid.

²⁴⁹ Ibid 118–23.

²⁵⁰ Tuerkheimer draws heavily on Kathryn Abrams, ‘From Autonomy to Agency: Feminist Perspectives on Self-Direction’ (1999) 40(3) *William & Mary Law Review* 805.

²⁵¹ Tuerkheimer, above n 79, 337–8.

²⁵² Ibid 344–5.

ways as autonomy.²⁵³ However, at the very least it would be a more honest starting point for the law, avoiding a situation in which legal theory promises to protect a certain right as fundamental, yet fails to do so in many cases.

VI CONCLUSION

The purpose of this article was to critique theoretical problems with the criminal sex law's use of sexual autonomy, particularly in the context of ostensible consent. However, the preceding analysis suggests that re-evaluation and theoretical review of sexual autonomy law should be informed by tenets of logical consistency and integrity. Sexual autonomy is touted as a fundamental right that the criminal sex law will protect; yet this is patently untrue in almost all sexual interactions involving fraud, which normally vitiates consent and violates autonomy. However, a stricter implementation of sexual autonomy likely leads to additional, significant problems. Further, the recent spate of transgender prosecutions, and particularly the manner in which criminality was construed, highlights problematic value judgments in the law's construction and understanding of sexual autonomy. Given these problems, the proper response is to re-assess the construction and role of sexual autonomy in the law, not to strengthen its application.

Sexual autonomy, while doubtless fundamental and seemingly laudable, should perhaps join ranks with other normative rationales justifying the existence of the criminal sex law as opposed to being the operational principle undergirding consent. In an operational sense, it is fraught with inconsistencies and false premises. Instances of ostensible consent should not be retroactively criminalised as sexual assault precisely because they accord exceptionally with the communicative model of consent. To circumvent such compliance raises serious questions concerning the law's value judgments. In particular, considering the law's general approach of not criminalising deceptions or informational constraints in sexual activity, criminalising deception (especially innocent non-disclosure) as to gender history has a questionable basis.

²⁵³ Jed Rubenfeld, 'Rape-by-Deception — A Response' (2013) 123 *Yale Law Journal Online* 389, 395–7 <<http://www.yalelawjournal.org/forum/rape-by-deception-a-response>>.