

# Dude Looks Like a Lady: Gender Deception, Consent and Ethics

**Abstract** - *Finding the answer to whether consent is present within a sexual encounter has become increasingly difficult for the courts. We argue that this is due to the focus placed on entrenching gender binaries, a conservative sexual ethic and clear offender/victim roles. It should be the case that the court's task is to find the truth of the encounter in coming to a judgment as to the ethical balance, rather than judging the parties' conformity to cisnormative and heteronormative roles. This endeavour is obscured by the court's need to exclude 'sex talk', or otherwise testimony as to the messy reality of the encounter, in favour of asserting gender identity and a procreative understanding of sex. We are, therefore, left in the position where the required information necessary for valid consent is obscured by the courts. We draw on an analysis of cases involving issues relating to consent to sex in order to argue for a judicial approach that is informed by a more flexible understanding of sexual autonomy.*

## Introduction

When sexual offences come to trial, little of the actual sex is discussed, much less understood. The law, whether it be judges, the jury, or those presenting the case for the complainant and the defendant, is resistant to talking explicitly about bodies. Yet beneath this dry and distanced language of the law, there are a multiplicity of implicit conversations about bodies, about lust, in the form of judgments. These judgments are about the suitability of any given body to fit the 'heteronormative' and arguably procreative agenda of the law. It could be argued that the law is progressive, which allows gender recognition, and preserves the requirement of sexual autonomy at the heart of the consent framework under the Sexual Offences Act 2003. It is clear through recent transphobic judgments made in cases such as *McNally*, that the law remains preoccupied with the endeavour of categorising bodies, and keeping any real discussion of sex as far from the courtroom as possible. The result is that there is a hidden dialogue that continues to embed a conventional understanding of bodies and sexuality, which feeds into the repeated assertion of problematic, oppressive and sex-negative judgments in relation to trans bodies.

In recent judgments, trans-bodies are drawn into the same economy of gender conformity that maligns a myriad sexual offences cases. Trans-bodies are pushed and pulled by the law, to force them into the same categories as cis-male and female bodies. It is often the case that these bodies will not, do not, and do not wish to fit within these tired and harmful narratives. The law has tended to respond by re-categorising these bodies as 'deceptive', or otherwise, bodies to be feared. The other more disturbing result of this is that they are deprived of a fully-owned and respected sexuality. It is unlikely that trans sexuality can reach a position of acceptance at law along its current trajectory of judgment. For this reason, we set out to consider how and why trans bodies become 'deceptive' in relation to obtaining consent to sex. We consider recent cases where this narrative of asserting conventional understandings of gender and sexuality, and where trans bodies are constructed as deceptive in favour of privileging cisgendered bodies. We begin by setting out the consent framework under the Sexual Offences Act 2003 and how this has been applied in cases concerning trans bodies and contested consent, before considering the theoretical and practical challenges of trans sexual autonomy.

## Sexual Offences, s74 and Cisnormativity

The Sexual Offences Act 2003 outlines consent in a framework comprised ss74-76. Central to this is s74, which provides a general outline of the meaning of consent, 'a person consents

if he agrees by choice, and has the freedom and capacity to make that choice.<sup>1</sup> This generality has been seen to create a law which is 'riddled...with uncertainty'.<sup>2</sup> Furthermore, consent may be restrained by the evidential presumptions of s.75 or the conclusive presumptions of s.76. The effect of s76 is that it can be possible to find that the actions of the defendant (D) will render any consent that the complainant (C) has given, to be invalid, or otherwise, that it is impossible that C consented. Consent, here, will be negated where 'the defendant intentionally deceived the complainant as to the *nature or purpose* of the relevant act'<sup>3</sup> or where 'the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.'<sup>4</sup> The meaning of 'purpose' has been indicated by *R v B* [2013]<sup>5</sup> where the D, posing as two other men online, induced his partner into perform degrading sexual acts on webcam. The appellate court held that no deception as to the purpose of the act had occurred because the D's purpose was sexual gratification and his partner had performed the acts with a view to sexually gratifying the viewer. The 'unpleasant kind' of the 'catalogue of deception' that was also part of this case was held to be irrelevant to the *purpose* of the act.<sup>6</sup> In this case, the 'deceptive' part of the case (and rather severe deception at that) was resolutely separated from the purpose of the act, which was simply sexual gratification. There was therefore no deception as to the purpose of the act.

We can also see in cases concerning the physicality of sex, the court is able to be quite clear about deception in cases of heterosexual sex or with cisnormative bodies. In *R (on the application of F) v DPP*,<sup>7</sup> a judicial review case challenging the decision not to prosecute, the court considered the general meaning of consent under s74 and referred to an incident where the claimant consented to sexual intercourse on the clear understanding that the defendant would refrain from ejaculating inside her. Since the defendant did ejaculate inside her, despite knowing of the rider placed on consent, the court held that the complainant did not freely consent to the sexual intercourse. Consent was thereby vitiated on a 'broad common sense'<sup>8</sup> view of the facts and the defendant convicted.<sup>9</sup>

Similarly, in *Assange v Swedish Prosecution Authority*,<sup>10</sup> where consent to sexual intercourse was given on the proviso that a condom was used and the defendant knew of this, the court held that whilst the deception did not fall within the 'nature or purpose' ambit of s76, the consent was nonetheless vitiated by the failure to adhere to the proviso under s74. The result being that conduct without the scope of s76 will not preclude the application of s74.<sup>11</sup> This approved *R v Jheeta*,<sup>12</sup> where the defendant fearful that his partner would end their relationship instituted a campaign of text messages claiming that he had tried to kill himself and she would be advised to have sex with him to prevent further suicide attempts. As a result, it was held that there was no consent for the purposes of s74. Whilst the conduct was not held to fall within the scope of s76, it was held that the pressures placed upon her by his campaign meant that her decision to 'consent' was 'not a free choice, or consent for the purposes of the

---

<sup>1</sup> s74 Sexual Offences Act 2003.

<sup>2</sup> Laura-Anne Douglas, 'The criminalisation of transgender-cisgender sexual relations: "gender fraud" or compulsory cisnormativity? Assessing the meaning of consent in sexual offences for transgender defendants' (2017) 3 Jur. Rev. 139-68, 146.

<sup>3</sup> s76(2)(a) SOA (*our emphasis*)

<sup>4</sup> s76(2)(b) SOA.

<sup>5</sup> [2013] EWCA Crim 823.

<sup>6</sup> *ibid*, at [21].

<sup>7</sup> [2014] QB 581.

<sup>8</sup> *Ibid*, at [26].

<sup>9</sup> *Id*.

<sup>10</sup> [2011] EWHC 2849 (Admin).

<sup>11</sup> *ibid*, at [90].

<sup>12</sup> [2007] EWCA Crim 3098.

Act.<sup>13</sup> The courts appear clear that s76 ought to be restricted to rare circumstances that relate to the physicality of the act, such as those in the above cases (which s.74 would cover) and not to be applied where there is a background of (albeit serious) ‘common or garden lies’, since they do not go to the nature and purpose of intercourse.<sup>14</sup> Accordingly, even cases of severe deception ought to fall within s74. This means that ‘nature and purpose’ is narrowly applied by the courts as relating to the physicality of the act. In cases where there are surrounding circumstances of deception, the case is unlikely to fall within s.76. This indicates that the court considers it can legitimately analyse sex and desire between bodies, such that it is competent to discern, in every case, what the sexual purpose of D was (or indeed whether the purpose was sexual, or not).

As we can see from cases where s.76 has been successfully argued, it appears the court is able to distinguish when a situation is motivated by the assertion of power, rather than sexual gratification within heteronormative sex. In *R v Devonald*,<sup>15</sup> the defendant, aggrieved by the breakdown of his daughter’s relationship with her boyfriend, the complainant sought to teach him a lesson by taking on a female online persona and persuading the complainant to masturbate on webcam. Here the trial judge held that s76 applied and consent was not valid. The Court of Appeal noted that the defendant’s purpose was *not* to secure sexual gratification in this instance, but to cause the complainant to engage in the act per se. Similarly, in *R v Bingham*<sup>16</sup> where the defendant impersonated a series of people to encourage the complainant into performing sexual act on webcam, the court held that s76 applied. On appeal, Hallett LJ argued s76 ‘effectively removed the accused of his only line of defence...it will be a rare case in which s76 should be applied.’<sup>17</sup> In so doing, the judge noted the Act was silent as to *whose* purpose s76 was referring to and the purpose of the parties might be different.

In *R v B* [2006],<sup>18</sup> the defendant failed to disclose his positive HIV status to the claimant and his conviction under s.76 was quashed on appeal. In a situation where the consequences of the non-disclosure were severe in terms of the risk of being infected with HIV, the court did not accept that s.76 applied. On appeal, Latham LJ was clear that whatever the ‘risk’, the sex ‘remained a consensual act’.<sup>19</sup> Consent was therefore valid under s.74. This consent, even in these arguably serious circumstances, was judged to be a case of *non-disclosure* rather than *active deception*. The trend in the courts favours widening the scope of the general definition of consent of s.74, rather than framing D as being actively deceptive under s.76. This is certainly the case for heteronormative cases and cisgendered defendants, yet the situation appears to be different when considering trans-bodies.

## Gender Fraud and Sexual Offences

In the following cases, ‘gender fraud’ has formed the basis of prosecutions for sexual offences because given consent is subsequently vitiated. The defendants are transgender men, or at least considered themselves to be at the time, and engaged in sexual relations and intimacy with cisgender women. Upon discovery of the defendant’s gender history those sexual relations were deemed to be non-consensual because of deception, therefore falling within s.74. In each of these cases, charges were based on s2 Sexual Offences Act 2003. The offence is deemed to be subjected to the same meaning of consent set out in s74 of the Act,

---

<sup>13</sup> *ibid*, at [29].

<sup>14</sup> *Id*.

<sup>15</sup> [2008] EWCA Crim 527.

<sup>16</sup> [2013] EWCA Crim 823.

<sup>17</sup> *Ibid*, at [20].

<sup>18</sup> [2006] EWCA Crim 2945

<sup>19</sup> *Ibid*, at [17]. Note: the fact that the act is consensual will not provide D with a defence to a charge under the Offences Against the Person Act 1861 for the harm caused by the sex, since the consent does not include consent to infection.

and the same consent framework which incorporates s.75 and s.76. In this section, we outline two of the 'gender fraud' cases.<sup>20</sup>

### ***R v McNally***<sup>21</sup>

The defendant, JM, met the complainant, V, aged 13 on a social networking website where JM introduced himself as 'Scott'. They communicated extensively online. When Scott was 17 and V was 16 the two agreed to meet and did so on several occasions. On two of those occasions digital and oral penetration of V by Scott took place. It was also alleged that vaginal penetration by a prosthetic device occurred but this charge was dropped. It was later discovered, by V's parents, that Scott was biologically female and the police were called. Scott had before and at the time of the incidents identified and presented as male.<sup>22</sup> JM subsequently pled guilty to six counts of sexual assault by penetration and was sentenced to three years' imprisonment and placed on the Sex Offenders' Register for life. This conviction was appealed on the grounds that JM's plea had been given on the basis of inaccurate legal advice.

The Court of Appeal upheld the conviction. Leveson LJ, making reference to s74, confirmed the approach in *R v B* [2006] whereby a distinction was drawn between cases of 'non-disclosure' and those of 'active deception'. The present case, it was found, fell within the latter class and thus, within the scope of s74. JM had perpetrated an 'active deception',

In reality, some deceptions (such as, for example, in relation to wealth) will obviously not be sufficient to vitiate consent. In our judgment, Lord Judge's observation that "the evidence relating to 'choice' and the 'freedom' to make any particular choice must be approached in a broad commonsense way" identifies the route through the dilemma.<sup>23</sup>

Deception as to gender, *in a broad commonsense way*, it was held, *could* vitiate consent,

...while, in a physical sense, the acts of assault by penetration of the vagina are the same whether perpetrated by a male or a female, *the sexual nature of the acts is, on any common sense view, different where the complainant is deliberately deceived by*

---

<sup>20</sup> There are other cases litigated on the same basis. *HM Advocate v Wilson* Unreported 6 March 2013 HCJ taken from Laura-Anne Douglas, 'The criminalisation of transgender-cisgender sexual relations: "gender fraud" or compulsory cisnormativity? Assessing the meaning of consent in sexual offences for transgender defendants' (2017) 3 *Jur. Rev.* 139-68, 143-4. *R v Lee* [2015] unreported; 'Woman who used fake penis to have sex with a woman avoids jail' 15<sup>th</sup> December 2015 *The Guardian* <<http://www.theguardian.com/uk-news/2015/dec/15/woman-who-used-fake-penis-to-have-sex-with-a-woman-avoids-jail>> (accessed 6<sup>th</sup> September 2018). *R v Barker* [2012] unreported; Chris Parsons, David Wilkes and Claire Ellicott, 'Court hears of amazing double life of girl, 19, who disguised herself as a boy so she could date GIRLS' 18<sup>th</sup> January 2012 *Daily Mail* <<http://www.dailymail.co.uk/news/article-2087804/Gemma-Barker-19-disguised-boy-date-GIRLS.html>> (accessed 6<sup>th</sup> September 2018). *R v Saunders* [1991] unreported; taken from Alex Sharpe, 'Expanding Liability for Sexual Fraud Through the Concept of 'Active Deception': A Flawed Approach' (2016) 80(1) *Journal of Criminal Law* 28-44, 38. *R v Staines* [2016] unreported; Dan Bunting, 'Jennifer Staines – woman jailed for posing as a man to 'get sex' 23<sup>rd</sup> March 2016 *UK Criminal Law Blog* <http://ukcriminallawblog.com/jennifer-staines-woman-jailed-for-posing-as-a-man-to-get-sex/> (accessed 6<sup>th</sup> September 2018) and 'Woman who posed as man jailed for sexual assaults' 23<sup>rd</sup> March 2016 *BBC News* <<https://www.bbc.co.uk/news/uk-england-bristol-35886441>> (accessed 6<sup>th</sup> September 2018).

<sup>21</sup> [2013] EWCA Crim 1051.

<sup>22</sup> But does not presently, see: Alex Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent' (2014) 3 *Criminal Law Review* 207-223, 208-9.

<sup>23</sup> *R v McNally* [2013] EWCA Crim 1051, at [25].

*a defendant into believing that the latter is a male.* Assuming the facts to be proved as alleged, M chose to have sexual encounters with a boy and her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by the appellant's deception.<sup>24</sup>

What was left unanswered, was why it was *obvious* that some deceptions were sufficient to vitiate consent and others were not, and why the defendant's biological sex made a material difference to the sexual nature of the acts considering the acts in question were digital and oral penetration. We will return to these questions in the following section.

### ***R v Newland***<sup>25</sup>

The complainant, X, and the defendant, Gayle Newland, met at the University of Chester in 2011 when they were students. Central to this case was Gayle's alter ego, Kye Fortune, which was established through a Facebook account that had been created some years previously. The online profile included information about this character and using it, X was contacted by 'Kye'. The friendship developed between X and Kye and simultaneously X and Gayle were becoming close friends. Kye made numerous excuses as to why they could not meet in the flesh. Mostly this was based on the claim that Kye had suffered a disfiguring injury and was embarrassed to be seen. As Gayle, she consoled X over her disappointment that she could not meet. Eventually, Kye and X agreed to meet but under strict restrictions. Central to this was a requirement that X wear a blindfold at all times. Later, the pair engaged in sexual intercourse by use of a prosthetic strap on penis on several occasions. X believed that she was having 'full sexual intercourse with a man and nothing less'.<sup>26</sup> The defendant, Dutton J noted, 'pursued this course of conduct over a lengthy period during which you played with her affections acting entirely for your own sexual satisfaction and choosing to ignore the devastating impact that the eventual discovery of the truth would have on her.'<sup>27</sup> Yet, Newland claimed that the use of Kye was to heteronormalise their lesbian relationship as neither were ready to 'come out'.<sup>28</sup> Later, X became frustrated with the relationship and discussed this with Kye who threatened to kill himself. The pair met and engaged in oral sex during which X removed her blindfold and saw that it was Gayle. A subsequent row was caught on CCTV and Gayle sent several emails to X apologizing. At trial, Newland claimed that X knew all along that Kye was Gayle and that the relationship was based on role play.

At the first trial, Newland was convicted and sentenced to eight years' imprisonment along with a life time Sexual Harm Prevention Order. This conviction was appealed and quashed by the Court of Appeal with an order for retrial.<sup>29</sup> At the retrial, by an 11:1 majority, Newland was again convicted on all three counts of sexual assault by penetration and sentenced to six years' imprisonment.<sup>30</sup>

---

<sup>24</sup> Ibid, at [26] (*our emphasis*).

<sup>25</sup> *R v Newland* (unreported) 12 November 2015 Sentencing Remarks at <<https://www.judiciary.gov.uk/wp-content/uploads/2015/11/r-v-newlandsentencing.pdf>> (accessed 6<sup>th</sup> September 2018).

<sup>26</sup> Ibid, 2.

<sup>27</sup> Ibid.

<sup>28</sup> Sophie Wilkinson, 'Consent, Dildos and Deception: Reexamining The Trial of Gayle Newland' 21st December 2017 *Vice* <[https://www.vice.com/en\\_uk/article/43qvz9/consent-dildos-and-deception-reexamining-the-trial-of-gayle-newland](https://www.vice.com/en_uk/article/43qvz9/consent-dildos-and-deception-reexamining-the-trial-of-gayle-newland)> (accessed 6<sup>th</sup> September 2018).

<sup>29</sup> 'Gayle Newland: Woman accused of posing as man wins appeal' 12<sup>th</sup> October 2016 *BBC News* <<http://www.bbc.co.uk/news/uk-england-merseyside-37632913>> (accessed 6<sup>th</sup> September 2018).

<sup>30</sup> Jonathan Humphries, 'Gayle Newland jailed for six years for duping friend into sex with fake penis' 20<sup>th</sup> July 2017 *Liverpool Echo* <<https://www.liverpoolecho.co.uk/news/liverpool-news/gayle-newland-jailed-six-years-13360437>> (accessed 6<sup>th</sup> September 2018).

## Sexual Autonomy

Autonomy, at a basic level, is understood as the ability for individuals to make choices in relation to how they are to live their lives.<sup>31</sup> This generates ideas of self-governance, self-rule, decision-making and practical reason, freedom and liberty of the will, and with other concepts such as dignity, identity, and responsibility. It relates to one's beliefs, values and reasons for acting.<sup>32</sup> Autonomy has often been criticised as being a central theoretical tenet of what has been accepted as a regime of law that does not consider broader political, social and moral complexities of legal personhood, focusing too heavily on the isolated individual.<sup>33</sup> However, autonomy can be conceptually complexified to take on intersecting social determinants, as Mackenzie and Stoljar outline:

The term "relational autonomy"...[is] premised on...the conviction that persons are socially embedded and that agents' identities are formed within a context of social relationships and shaped by a complex of intersecting social determinants, such as race, class, gender, and ethnicity.<sup>34</sup>

This conception of autonomy is deeper than how autonomy has been traditionally conceived, as Sherwin argues:

A relational approach to autonomy allows us to maintain a central place for autonomy...but it requires an interpretation that is both deeper and more complicated than the traditional conception acknowledges – one that sets standards that involve political as well as personal criteria of adequacy.<sup>35</sup>

We can think of autonomy as a concept that accommodates the complexities and vulnerabilities of the body. Meyers has argued that autonomous individuals gain authenticity in their choices as they develop their 'autonomy competencies'. This considers, '...the repertory of coordinated skills that makes self-discovery, self-definition, and self-direction possible. The authentic self is the evolving collocation of traits that emerges when someone exercises autonomy competency.'<sup>36</sup> Autonomy in this sense then is a lifelong project, a piecemeal process, given our 'murky, fallible' nature as 'human beings'.<sup>37</sup> Contrary to other conceptions of autonomy which consider it to be an inherent, complete trait which all humans share – provided it is voluntary and informed<sup>38</sup> - this approach recognises that it is something which is practiced, requires development and learning, is expressible to greater or lesser extent and is necessarily subjective to the individual using it.

---

<sup>31</sup> John Christman, "Autonomy in Moral and Political Philosophy", in Edward N. Zalta (ed.), *The Stanford Encyclopaedia of Philosophy* Spring Edition (2015), at <<http://plato.stanford.edu/archives/spr2015/entries/autonomy-moral/>>.

<sup>32</sup> Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press, 1988), 6.

<sup>33</sup> Catriona Mackenzie and Natalie Stoljar, 'Introduction: Autonomy Refigured' in Catriona Mackenzie and Natalia Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press, 2000), 4.

<sup>34</sup> Id.

<sup>35</sup> Susan Sherwin, 'A Relational Approach to Autonomy in Health Care' in Susan Sherwin et al (eds), *The Politics of Women's Health: Exploring Agency and Autonomy* (Temple University Press, 1998), 44.

<sup>36</sup> Diana Tietjens Meyers, *Self, Society and Personal Choice* (Columbia University Press, 1989), 76.

<sup>37</sup> Diana Tietjens Meyers, 'Intersectional Identity and the Authentic Self?' in Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press, 2000) 151, 174-5.

<sup>38</sup> Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* 6th ed (Oxford University Press, 2009).

In these cases, it is notable that almost all of the complainants and defendants are young and sexually inexperienced. They are unlikely to fully understand their likes and dislikes, their expectations of the sexual experience or any parameters they may wish to set on the experience. In these situations, the inexperience and vulnerability is shared between the parties. That is to say, neither party is completely autonomous. What we are seeing is practice, and learning, about themselves, about sex and about the act of consenting. This is important for the development of their autonomy competencies. Both in terms of learning what parameters they may wish to set in the future, but also to take responsibility for the exercise of those choices that are made. Autonomy is developed by taking responsibility for decisions that are made in error. If an individual enters into an intoxicated one-night-stand and wakes with feelings of regret, their autonomy is better enabled by taking responsibility for a poor choice than it is by blaming the other party for that bad decision. Especially as that other party may, on their own system of autonomous reasoning, perceive that decision and experience as a positive one.

With this notion of autonomy as a developing/developable capacity in mind, we are faced with the question of when it is appropriate for the law to intervene to protect that autonomy, or at least the moral value of autonomy. That is, at what point is it necessary to protect an individual's autonomy rather than allowing that autonomy to develop and thrive through exercise in imperfect circumstances.<sup>39</sup> Furthermore, in these cases we are discussing the need for the criminal law to step in to protect that autonomy and punish the offender for their actions effect on autonomy.<sup>40</sup> As Gross asks,

Are women in need of the law's protection against the sort of lies that Ted told Mary [that he loves and wishes to marry her], or are women quite comfortably and securely in a position to protect themselves? Is the criminal law needed to protect women against the disappointments and humiliations that are a consequence of their bad judgment, their gullibility, or their too trusting nature? Does the woman suffer a loss that leaves her worse off than she would have been had she said no? It is, after all, the protection of women, not the punishment of lying men, that is the business of the criminal law.<sup>41</sup>

It is for this reason that the courts need to create a narrative of power and deception, of evil and mistreatment, we will return to this in the next section. This allows us to perceive the complainants as needing *protection* from said evil. However, is it an appropriate domain to for the law to step into and protect inexperienced, sexually naïve individuals or their corresponding vulnerability from poor decisions (or at least subsequently determined poor decisions).<sup>42</sup> The law ought to question both whether it is helpful to the complainant to incorporate them into the criminal law and whether it is fair to punish the defendant for this wrongdoing. We would suggest that this is an inappropriate use of the criminal law, neither the complainant needs protection for their autonomy nor does the defendant need to be punished for their actions, or the effect of their actions on the complainant's autonomy. There

---

<sup>39</sup> Take, for instance, the example given by Pill J in *R v Zafar* (1992), unreported, taken from Bethany Simpson, 'Why has the concept of consent proven so difficult to clarify?' (2016) 80(2) *Journal of Criminal Law* 97-123, 101: 'A female partner may not particularly want sexual intercourse on a particular occasion, but because it is her husband or her partner who is asking for it, she will consent to the sexual intercourse. The fact that such consent is given reluctantly or out of a sense of duty to her partner is still consent.'

<sup>40</sup> Laura-Anne Douglas, 'The criminalisation of transgender-cisgender sexual relations: "gender fraud" or compulsory cismatativity? Assessing the meaning of consent in sexual offences for transgender defendants' (2017) 3 *Jur. Rev.* 139-168, 152.

<sup>41</sup> Hyman Gross, 'Rape, Moralism and Human Rights' (2007) *Criminal Law Review* 220-227, 224-225.

<sup>42</sup> *Ibid*, 224

has been a suggestion that the victim in *Newland* was willing to become engaged to 'Kye' before meeting him and agreed to spend 100 hours in his company whilst wearing a blindfold.<sup>43</sup> If this is within the reasonable reach of the criminal law, what other 'deceptions' are we also to allow? Marital status, religion, race, wealth, career, political views, criminal convictions, and STI status are all potential reasons why someone might consent, if so why would they not be sufficiently deceptive in order for a sexual assault charge?<sup>44</sup> As Douglas argues, 'If marital status or religion is of vital importance to a complainant and forming an integral part of their consent, not a fleeting interest, will their consent be vitiated, or are these too "obviously" not sufficient?'<sup>45</sup> Whilst these are all facts which an individual arguably *ought* to disclose to their potential partner, this is not the same as suggesting that non-disclosure is a sufficient basis for a criminal conviction. A point which the courts seem to recognise in those other circumstances. These cases pose a problem for the courts specifically because they are concerned with bodies which are not agentic or desirable.

## Sex-talk and Judgment

It is not only cases concerning trans bodies that sex-talk is absent to the detriment of justice. In cisgender cases, the process of judgment deprives (usually female) bodies of their sexual agency.<sup>46</sup> In arguing for the sexual autonomy of bodies conventionally considered as without privilege, and without agency, it is useful to begin by considering the position of female complainants that relate to the construction of female sexuality as incoherent and deceptive. We have seen through our analysis in relation to s.76, that the court has repeatedly found deceptive activity to not vitiate consent. The court prefers to find such defendants to fall within 'non-disclosure'. This inclination demonstrates an acceptance of 'self-interested justification[s] for coercive behaviour'.<sup>47</sup> Often in these cases, active deception is communicated, and accepted as, apparent 'innocent misunderstanding' of the complainant's refusal to give consent.<sup>48</sup> This is a practical dynamic which operates during judgment, which serves to obscure the reality of consent. This dynamic has also been demonstrated in the way that the courts privilege cisgendered masculine desire and are disinclined to disrupt this narrative in favour of finding potentially obscured deception.

This characterises a problematic position, whereby for the cisgendered male, active deception is near impossible – only the possibility that women must learn to communicate more effectively, and that the coercive behaviour of men is unavoidable and explainable.<sup>49</sup> The problem is that it is embedded within the process of judgment, even in respect to jury perceptions.<sup>50</sup> The further problem is that this narrative is accepted to the point that it is not considered actively deceptive.

---

<sup>43</sup> Sophie Wilkinson, 'Consent, Dildos and Deception: Reexamining The Trial of Gayle Newland' 21st December 2017 *Vice* <[https://www.vice.com/en\\_uk/article/43qvz9/consent-dildos-and-deception-reexamining-the-trial-of-gayle-newland](https://www.vice.com/en_uk/article/43qvz9/consent-dildos-and-deception-reexamining-the-trial-of-gayle-newland)> (accessed 6<sup>th</sup> September 2018).

<sup>44</sup> Carole McCartney and Natalie Wortley, 'Raped by the State' (2014) 78(1) *Journal of Criminal Law* 1-3, 3.

<sup>45</sup> Laura-Anne Douglas, 'The criminalisation of transgender-cisgender sexual relations: "gender fraud" or compulsory cisheteronormativity? Assessing the meaning of consent in sexual offences for transgender defendants' (2017) 3 *Jur. Rev.* 139-168, 161.

<sup>46</sup> Nicola Lacey 'Unspeakable subjects, impossible rights: Sexuality, Integrity and Criminal Law (1997) *Women: A Cultural Review*, 8:2, 143-157.

<sup>47</sup> Kitzinger, C and Frith, H 'Just say no? The use of conversation analysis in developing a feminist perspective on sexual refusal (1999) as cited by David Gurnham, 'Debating Rape: To Whom does the Uncanny 'Myth' Metaphor Belong' (2016) 43(1) *Journal of Law and Society* 123-143, p128.

<sup>48</sup> David Gurnham, 'Debating Rape: To Whom does the Uncanny 'Myth' Metaphor Belong' (2016) 43(1) *Journal of Law and Society* 123-143, p128.

<sup>49</sup> *Ibid.*, at p129.

<sup>50</sup> *id.*

Gurnham has argued that this dynamic operates as a 'rape myth' operating to detract from the factual truth of cases. While the myth operates, there is no need to trouble the courts with inconvenient distinctions in desire, or the messy reality of sex talk. Where sex talk does become part of the defence, as in *R v Lock*,<sup>51</sup> where D argued that he and C were enacting a Fifty Shades of Grey scenario, as Dymock has argued, the jury are keen to accept the (in this case fictional) possibility that such a 'kink' to heteronormative desire, is an acceptable normalisation of male sexual violence.<sup>52</sup> It seems the acceptance of deception and violence in cases of cisgendered defendants, is easily explained away. This, as we have seen, is far from the case, if you are trans.

One aspect of the cases we have examined which is particularly pertinent, is the persistent framing of the victim-offender dynamic. This is possible to see in all of the gender fraud cases, but appears with particular clarity in *McNally*: 'her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by the appellant's deception.'<sup>53</sup> Here we see the privileging of the ability to make a 'straight' choice (with 'straight' choice being the *only* choice), or rather, to have an unqualified right to know the gender history of bodies.<sup>54</sup> The absence of 'knowing' the body of D, is turned into a clear case of deception, and the status of 'victim' is asserted as powerless and unable to consent without clarity as to gender, and the ability for the circumstances to fall squarely within heteronormative narratives of sex.

This demonstrates the need to create an image of power and deception in the offenders in these cases. Rejection of the offender's male identity in favour of their female biology is simultaneously rejected for the idea of male dominance. The courts require these defendants to become male for the purposes of the sexual offence, it allows the law to frame their behaviour within the heteronormative narrative to which the law subscribes. This is illustrative of 'marginal sexuality through a focus on the gender performances that accompany it...prosecution is always about the punishment of gender "deviance."<sup>55</sup> On this basis, they are represented as manipulative predators and the victims are represented as vulnerable, weak and naive and thereby take on their architype male/female roles.<sup>56</sup>

Here we see that the persistent perpetuation of 'rape myths', together with assertion of victim/offender roles, and find built a fully-fledged ontological position for the trans body: one that is both male, 'misunderstood' (although far from innocently), and one that is also prone to manipulation, willful naivety and destructively vulnerable. This leads resolutely to the construction of the trans body as deceptive. A trans defendant is likely to be doomed to deception, before they enter the courtroom,

...how does one stay on the right side of the law when, in legal and cultural terms, active deception characterises one's ontological position? That is, how can one avoid

---

<sup>51</sup> Unreported, [2013].

<sup>52</sup> Alex Dymock 'Abject Intimacies: Sexual Perversion in the Criminal-Legal Imaginary' (2015) as cited in David Gurnham 'Debating Rape: To Whom does the Uncanny 'Myth' Metaphor Belong' (2016) *Journal of Law and Society* 43:1, 123-143, p136. See also Sophie Wilkinson, 'Consent, Dildos and Deception: Reexamining The Trial of Gayle Newland' 21st December 2017 *Vice* <[https://www.vice.com/en\\_uk/article/43qvz9/consent-dildos-and-deception-reexamining-the-trial-of-gayle-newland](https://www.vice.com/en_uk/article/43qvz9/consent-dildos-and-deception-reexamining-the-trial-of-gayle-newland)> (accessed 6<sup>th</sup> September 2018).

<sup>53</sup> *Ibid*, at [26] (*our emphasis*).

<sup>54</sup> *R v McNally* [2013] EWCA Crim 1051, at [26].

<sup>55</sup> Alex Sharpe, 'Sexual Intimacy, Gender Variance and the Criminal Law' (2015) 33(4) *Nordic Journal of Human Rights* 380.

<sup>56</sup> Alison Moore, 'Shame on You: The Role of Shame, Disgust and Humiliation in Media Representations of 'Gender Fraud' Cases' (2016) 21(2) *Sociological Research* 10.

liability, when the cultural terms through which one is defined are duplicity, subterfuge and dissimulation?<sup>57</sup>

The law is struggling to look beyond myths that underlie their processes of judgment, in relation to cisgendered bodies. We argue that the law needs to be careful of clumsily asserting cishnarratives, and thereby not only privileging cisbodies, but imbuing transbodies with guilt before trial. At present, the court, and indeed society, is resistant to the notion of trans sexual autonomy, preferring instead to revert to the way it has historically treated ciswomen. As Sharpe has found, the evidence for this position is in the court's flawed concept of active deception, 'Law ought not, through defining 'the nature of the sexual act', or the materiality of facts, to privilege cisgender people in sexual relations nor confer upon them a right to define the bodies and authentic experiences of others.'<sup>58</sup> In these 'gender-fraud' cases, the law is succeeding in two-fold oppression: continuing to assert gender lines and offender/victim roles, thereby denying victim autonomy, while denying trans sexual autonomy. There is a crucial movement to 're-signify' the bodily difference of trans individuals, while overcoming the 'hegemonic forces that stigmatize trans embodiment.'<sup>59</sup> Law is but one of these forces of stigmatization, which, through its judgments, consistently frames trans bodies as deceptive and threatening. We argue that this position is due to the court's inclination to repeatedly return to the narratives we have outlined above. In order to continue moving against stigmatization, we argue against the assertion of gender and victim/offender roles. We also argue against the fetishisation of gender and gender history as factors indicating deception, and indeed the very notion of 'gender-fraud'. Instead, we argue for a right to sexual autonomy that is instead focused on the power-dynamic within cases, and the corresponding responsibilities and complex factual nuances, within each case.

## Sexual Autonomy, Material Facts and Disclosure

In this section we discuss the nature and scope of the right to sexual autonomy, the violation of which forms the basis to these charges. It is worth beginning with an outline of what is meant, in this context, by the concept of a right to sexual autonomy. Rights assertions to certain 'things' (such as to bodily integrity, or property, or, as here, to autonomy) are assertions to complex formations of individual rights to (not) do certain things.<sup>60</sup> Often, these assertions will usually imply a right that another person do or not do some action relevant to the thing; for example, the right to bodily integrity may imply the duty of others not to interfere with that body. These assertions may be used to claim the ability of the right holder to act freely in some way; for example, to move one's body as that person wishes. The assertion may be used also to claim the ability to alter or waive these or other rights; for example, to consent to another person touch that body. The assertion might be used to claim an inability in other's to alter or waive these or other rights; for example, an immunity from another waiving your rights on the grounds of temporary incapacity. On this basis, the right to sexual autonomy is a formation of a variety of these individual incidents coming together within the domain of a given 'good'. The right to sexual autonomy will intersect with and overlap the right to bodily integrity, at points it will be indistinguishable. This is because the individual rights which make up the complex formations will exist within both.

The harm, in these cases, is best summarised as being an injury to one's sexual autonomy on the basis that not all of the information required to make an informed choice was

---

<sup>57</sup> Alex Sharpe, 'Expanding Liability for Sexual Fraud Through the Concept of 'Active Deception': A Flawed Approach' (2016) 80(1) *Journal of Criminal Law* 28–44, 44.

<sup>58</sup> *Id.*

<sup>59</sup> Elijah Edelman and Lal Zimman, 'Boycunts and Bonus Holes: Trans Men's Bodies, Neoliberalism and the Sexual Productivity of Genitals' (2014) 61(5) *Journal of Homosexuality* 687.

<sup>60</sup> Jack Clayton Thompson, 'The Rights Network: 100 Years of the Hohfeldian Rights Analytic' (2018) 7(3) *Laws* 28 <<http://dx.doi.org/10.3390/laws7030028>>.

available. Given that gender history goes to the heart of the defendant's identity it is worth comparing these cases to similar yet distinct examples. Sharpe captures this problem,

[A] white woman and a man of mixed race, who outwardly appears white, meet in a wine bar. They flirt... The woman invites the man to her apartment where mutually satisfying sex takes place. Subsequently, the woman discovers the mixed race-background of the man and claims to feel violated. She reports the matter to the police and requests that the man be charged with rape on the basis of his failure to disclose his racial background.<sup>61</sup>

Consider the Israeli case wherein a Palestinian man presented himself as a Jewish bachelor, for reasons not connected to the pursuit of sexual intercourse, met and, on the same day, had sexual intercourse with a Jewish woman was prosecuted for rape by deception.<sup>62</sup> Sharpe, again, provides an example, '...an anti-Semitic woman makes clear to a Jewish man that she would not consent to sexual intercourse with Jewish men. The Jewish man does not disclose his Jewish identity and sexual intercourse follows. Should this be viewed as rape?'<sup>63</sup> What if the man is no longer a practicing the faith but did previously, if he were born and raised in the faith but when he became old enough elected not to continue practicing that faith; would this be rape if he fails to disclose his history of practicing Judaism? In all of these cases, the 'common sense' approach would tell us that the harm suffered arises out of the victim's own intolerance and prejudice, something which the criminal courts ought not to vindicate. Yet, in these cases the victims describe their 'immeasurable emotional harm'<sup>64</sup> and being left feeling 'physically sick'<sup>65</sup> by their partner's gender history. These counter-examples are not used to belittle the harm which is suffered by the victims in these cases, but rather to question the criminal law's role in vindicating and protecting these harms. There ought to be some justifiable reason for differentiating the 'gender fraud' case from 'racial fraud'. What is it about cases such as *McNally* and *Newland* which create an overriding *right to know* sufficient to warrant State intervention and punishment?

Herring has argued in favour of a limitless conception and protection of sexual autonomy. That is, we need to 'be strict about what is meant by consent. We should require "genuine, morally significant consent".'<sup>66</sup> This justifies an expansion of potential liabilities where consent is given on the basis of mistake.<sup>67</sup> Such an approach justifies requiring disclosure by defendants of 'all issues from the past which they think might affect their partner's consent to sexual relationships.'<sup>68</sup> Herring provides the following example,

...would a trans-person be required to reveal their bodily history to their partners in case they would not consent to sexual relations if they knew. If so, would that be an improper invasion of the rights of privacy of a trans-person. It is an invasion of their

---

<sup>61</sup> Alex Sharpe, 'Sexual Intimacy, Gender Variance and the Criminal Law' (2015) 33(4) *Nordic Journal of Human Rights* 380, 390.

<sup>62</sup> Dina Newman, 'Unravelling the Israeli Arab 'Rape by Deception' Case' 17<sup>th</sup> September 2010 *BBC News* <<http://www.bbc.co.uk/news/world-middle-east-11329429>> (accessed 7<sup>th</sup> August 2018) and Simon McGregor-Wood, 'Palestinian Who Claimed to be a Jew Jailed For Rape by Deception' 21<sup>st</sup> July 2010 *ABC News* <<http://abcnews.go.com/International/palestinian-claimed-jew-jailed-rape-deception/story?id=11224513>> (accessed 7<sup>th</sup> August 2018).

<sup>63</sup> Alex Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent' (2014) 3 *Criminal Law Review* 207-223, 222.

<sup>64</sup> *R v Lee* [2015] unreported; Laura-Anne Douglas, 'The criminalisation of transgender-cisgender sexual relations: "gender fraud" or compulsory cisnormativity? Assessing the meaning of consent in sexual offences for transgender defendants' (2017) 3 *Jur. Rev.* 139-168

<sup>65</sup> *McNally*, [10]

<sup>66</sup> Jonathan Herring, 'Mistaken sex' (2005) *Criminal Law Review* 511-524, 516.

<sup>67</sup> *ibid*, 511.

<sup>68</sup> *Ibid*, 522.

private life, but it is suggested that that right must be subservient to the right to sexual integrity of their partner.<sup>69</sup>

Herring provides no justification why rights to privacy are subservient to corresponding rights to sexual integrity or why it is justifiable for a trans-person specifically to disclose their bodily history rather than a cisperson being required to disclose their bodily history. It appears there are a number of claims made within Herring's narrative. Firstly, individuals hold the right to sexual autonomy or integrity. Secondly, individuals hold a right to privacy of their information, or rather a right to control the dissemination of information pertaining to oneself. Thirdly, in these circumstances the first right outweighs the second right. This is justified on the basis that the right to sexual autonomy is an unlimited one.<sup>70</sup> Yet the law does not presently hold this view, 'the courts have taken the view that sexual autonomy, while an important right, is not an unlimited one, at least not in fraud contexts.'<sup>71</sup>

Herring's narrative tends towards a slightly one-sided outline of the sexual experience, this is understandable when discussing sexual offences, but obscures the issues from the perspective of rights analysis. This one-sided nature comes through on the basis of placing the right to sexual autonomy of the complainant at the forefront of the dispute. In contentious cases, this requires a duality in the traditional consent narrative.<sup>72</sup> As Schulhofer has noted, 'Sexual autonomy, like every other freedom, is necessarily limited by the rights of others.'<sup>73</sup> Both parties owe equal and mutual rights to one another. We claim, therefore, that what is needed is a discussion of both parties' rights to sexual autonomy and both parties' rights to privacy. This is to question the perceived absolute nature of the right to sexual autonomy sought and instead advocate that any right are necessarily qualified. We do not have unlimited rights to sleep with who we want to, but we do have rights to choose who we do or do not sleep with.<sup>74</sup> We do not have a right to every piece of unsolicited information about another person prior to engaging in sexual activity, indeed even in long term relationships we do not hold any such right to know everything about the other person. Our sexual autonomy is shaped by the rights of those we engage with, it is defined and maintained by our relationships with others, those close to us and those we casually engage with, and the systems and structures which govern our lives.<sup>75</sup> When agreeing to have sexual relations, those involved are offering, accepting and negotiating the terms of that meeting 'on-the-fly'. The exercise of autonomy is just as much about seeking a mutually pleasurable sexual experience as it is about 'no means no' and 'yes means yes'.<sup>76</sup>

We are able to see the multitude of rights alongside one another, the contours of each right shaped by those around it.<sup>77</sup> Herring's assertion is that the right to privacy makes way for

---

<sup>69</sup> Ibid, 522-523.

<sup>70</sup> Laura-Anne Douglas, 'The criminalisation of transgender-cisgender sexual relations: "gender fraud" or compulsory cisheteronormativity? Assessing the meaning of consent in sexual offences for transgender defendants' (2017) 3 *Jur. Rev.* 139-168, 151.

<sup>71</sup> Alex Sharpe 'Queering Judgment: The Case of Gender Identity Fraud' (2017) 81(5) *Journal of Criminal Law* 417-435, 429-430.

<sup>72</sup> David Archard, *Sexual Consent* (1998, Westview), 46.

<sup>73</sup> Stephen Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press: London, 1998), 99.

<sup>74</sup> Alex Sharpe, 'The Ethicality of the Demand for (Trans)parency in Sexual Relations' (2017) 43(2) *Australian Feminist Law Journal* 161-183.

<sup>75</sup> Jennifer Nedelsky, "Reconceiving Rights as Relationships" (1993) 1(1) *Review of Constitutional Studies* 1-26 and Catriona Mackenzie and Natalia Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press, 2000).

<sup>76</sup> Hyman Gross, 'Rape, Moralism and Human Rights' (2007) *Criminal Law Review* 220-227, 224.

<sup>77</sup> Alex Sharpe, 'Sexual Intimacy, Gender Variance and the Criminal Law' (2015) 33(4) *Nordic Journal of Human Rights* 380, 389.

the right to sexual autonomy, that the need for 'full' factual information on which to make such a decision is more important to us, as a society, than the need to exercise one's autonomy in choosing to divulge potentially harmful information about oneself.<sup>78</sup> In traditional rights theory this would require a 'right to know' to catalyse in the complainant and a corresponding duty to tell in the defendant.<sup>79</sup> But some factor or circumstance is necessary for the catalysation of such a right, a point in time when, at least, the defendant becomes aware of such a duty.<sup>80</sup> Herring uses the knowledge that the mistaken fact is pertinent to the provision of consent as the catalyst.<sup>81</sup> This requires the defendant to recognise themselves as in some way undesirable and to consider that consent cannot be given to them *as an individual*.<sup>82</sup> As Sharpe has argued, 'I express concern that the truthful transgender or gender non-conforming defendant is likely to be equated with some kind of self-loathing individual who can never legitimately or convincingly claim to be the object of another's desire.'<sup>83</sup> Similarly, Douglas notes that 'gender history cannot be categorised as a "material fact" if the law supposedly takes self-determination of gender seriously.'<sup>84</sup> It is for this reason that we find discomfort in the 'race' or 'religion' fraud examples, it is contrary to our cultural narratives that one ought to be required to recognise and vindicate another's intolerance towards them.<sup>85</sup> The same ought to be true in the 'gender fraud' cases.

If, however, the proposed sexual act cannot be performed as the complainant understands it, this would require disclosure. For instance, if the complainant consents to be penetrated by a biological penis and the defendant is unable to do so, because they do not have one, the use of a prosthetic penis would not be acceptable.<sup>86</sup> In this situation, consent must be given for the relevant act (if the defendant understands that this is to what consent has been given for) and so disclosure would be necessary. Yet, in regards to digital or oral penetration it is difficult to see how, '...the sexual nature of the acts is, on any common-sense view, different where the complainant is deliberately deceived by a defendant into believing that the latter is a male.'<sup>87</sup> This,

...statement is curious in that it implies, in order to avoid a collapse of the very distinction that the court erects, that the sexual nature of acts is rendered different by active deception but not non-disclosure. Surely, while the distinction might be relevant to a legal finding of non-consent, it can hardly be relevant to the sexual nature of acts performed once it has already been concluded that the defendant is not male.<sup>88</sup>

---

<sup>78</sup> Alex Sharpe, 'The Ethicality of the Demand for (Trans)parency in Sexual Relations' (2017) 43(2) *Australian Feminist Law Journal* 161-183, 177-180.

<sup>79</sup> Andrew Halpin, 'Rights, Duties, Liabilities and Hohfeld' (2007) 13 *Legal Theory* 23-39.

<sup>80</sup> *Ibid.*

<sup>81</sup> Jonathan Herring, 'Mistaken sex' (2005) *Criminal Law Review* 511-524.

<sup>82</sup> Gavin Doig, 'Deception as to gender vitiates consent' (2013) 77(6) *Journal of Criminal Law* 464-468.

<sup>83</sup> Alex Sharpe 'Queering Judgment: The Case of Gender Identity Fraud' (2017) 81(5) *Journal of Criminal Law* 417-435, 434.

<sup>84</sup> Laura-Anne Douglas, 'The criminalisation of transgender-cisgender sexual relations: "gender fraud" or compulsory cisnormativity? Assessing the meaning of consent in sexual offences for transgender defendants' (2017) 3 *Jur. Rev.* 139-168, 155.

<sup>85</sup> Aeyal Gross, 'Gender outlaws before the law: the courts of the borderland' (2009) 32 *Harvard J L & Gender* 165, 208.

<sup>86</sup> Alex Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent' (2014) 3 *Criminal Law Review* 207-223, 212.

<sup>87</sup> *R v McNally*, at [26].

<sup>88</sup> Alex Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent' (2014) 3 *Criminal Law Review* 207-223, 216.

After all, the tongue or finger of 'Scott', in *McNally*, is the same whether 'Scott' is a boy or a girl.<sup>89</sup> As Temkin notes, regardless of the 'lies' that are told, '...however reprehensible his conduct, it is sexual intercourse with him that he offers her. He has not deprived her of the right to choose whether to have intercourse with him or not.'<sup>90</sup>

An approach which demonstrates a true respect for the exercise of autonomy ought to require the disclosure of any operant conditions, if the law is to protect the breach of those conditions. As in *R v DPP*<sup>91</sup> and *Assange*,<sup>92</sup> where conditions of consent are disclosed by the complainant which, in these cases, the defendant subsequently breach and therein consent is vitiated. As Sharpe argues,

In the first place, the cases of *Assange* and *R (on the application of F) v DPP* involved an express condition...There was no express condition in [*McNally*]...and any suggestion that a condition was or ought to be implied would raise difficulties for the Crown because to give legal effect to an implied condition would be tantamount to criminalising non-disclosure of personal information.<sup>93</sup>

This approach similarly recognises that the 'defendant' has sexual autonomy to exercise; they may then choose whether to consent to a person who has expressed views which denigrate their status. As Gross argues,

Sex simply for the pleasures of sex is not consented to conditionally, and though *in deciding* to have such sex a woman may well have made certain assumptions and may entertain certain expectations her *willingness* will not be conditional upon those expectations being pursued through the sex.<sup>94</sup>

This places the responsibility of bearing the right to sexual autonomy on the holder - they are free to control the domain of acceptable sexual interaction but this requires disclosure to the other party so that they may also exercise their reciprocal and mutual sexual autonomy.<sup>95</sup> As Sharpe argues, 'vitiating of consent for the purposes of sexual fraud requires, not only active deception but also either an express condition or the element of coercion, at least in circumstances where the parties meet face to face.'<sup>96</sup> This also negates the possibility of after-the-event conditions being attached to the consent.

## Conclusion

In this paper, we have argued that the courts' focus is placed on entrenching gender binaries, a conventional sexual ethic and clear offender/victim roles. We argued that this position is due to the court's inclination to repeatedly return to the narratives we have outlined above. To continue moving against stigmatization, we argued against the assertion of gender and victim/offender roles. We also argued against the fetishisation of gender and gender history as factors indicating deception, and indeed the very notion of 'gender-fraud'. Instead,

---

<sup>89</sup> Gavin Doig, 'Deception as to gender vitiates consent' (2013) 77(6) *Journal of Criminal Law* 464-468, 467.

<sup>90</sup> Jennifer Temkin, 'Towards a modern law of rape' (1982) 45 *Modern Law Review* 399, 405.

<sup>91</sup> [2014] QB 581.

<sup>92</sup> [2011] EWHC 2849 (Admin)

<sup>93</sup> Alex Sharpe, 'Queering Judgment: The Case of Gender Identity Fraud' (2017) 81(5) *Journal of Criminal Law* 417-435, 431.

<sup>94</sup> Hyman Gross, 'Rape, Moralism and Human Rights' (2007) *Criminal Law Review* 220-227, 223.

<sup>95</sup> Karl Laird, 'Rapist or rogue? Deception, consent and the Sexual Offences Act 2003' (2014) 7 *Criminal Law Review* 492-510, 508.

<sup>96</sup> Alex Sharpe 'Queering Judgment: The Case of Gender Identity Fraud' (2017) 81(5) *Journal of Criminal Law* 417-435, 432.

we argued for a right to sexual autonomy that is instead focused on the power-dynamic within cases, and the corresponding responsibilities and complex factual nuances, within each case.

In response to these cases of ‘gender fraud’ we suggested that it is necessary to consider the balancing of rights between the parties involved in these cases. To understand whether the right to sexual autonomy has been impeded sufficiently for a criminal conviction we ought to consider the interface of rights between the parties to encounter. Both the defendants and the victims are young “women”, for many this is their first sexual experience. By definition, they are sexually inexperienced, it is for this reason that we are required to ‘suspend our disbelief’<sup>97</sup> at the facts of these cases. The question for our criminal justice system is whether justice is served by punishing the defendants with a view to upholding sexual autonomy. We suggest that this does not do anything to empower or develop the autonomy competencies of the victims. Much in the way that we would not see justice in punishing an Arab who held himself out to be a Jew, a woman who failed to disclose her marital to her prospective partner, a garbageman who pretends to be a premiership footballer, or a man who pretends to not be a Trump supporter, these cases do not achieve justice. If autonomy is a capacity for which our legal system wishes to demonstrate true respect then it is necessary to recognise that in certain situations autonomy can be impacted, or not fully realised, without legal intervention, and indeed this may be *useful* to the lifelong development of autonomy competencies.

This balancing of competencies must be a practical exercise. As we have seen, the discriminatory reality of these decisions is embedded within the act of judgment which asserts the court’s priority of maintaining the false coherence of bodies as resolutely gendered and within the victim/offender narrative. Trans-bodies are a threat to the coherence of this narrative, but rather than seizing upon the opportunity to move away from this pattern, and to talk about sex in a meaningful way, courts remain intent on constructing trans-bodies as a threat to the integrity of cis sexual autonomy.

---

<sup>97</sup> Alex Sharpe, ‘The Ethicality of the Demand for (Trans)parency in Sexual Relations’ (2017) 43(2) *Australian Feminist Law Journal* 161-183, 164.