


RESEARCH ARTICLE

# Criminalising deceptive sex: sex, identity and recognition

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## Abstract

This paper is concerned with when, if ever, deceptive sex should be criminalised. It defends the idea that it is necessary to distinguish between deceptions that will generally be punishable from those that will not and puts forward a novel framework for carrying out this task. Based on the concept of identity nonrecognition, this framework also offers a new way of understanding what makes certain kinds of deceptive sex wrongful. After setting out this framework, I analyse each of the deceptions that is most often carried out within ‘ordinary’ contexts, explaining why only some of these should generally be punished. The paper concludes by suggesting that identity nonrecognition has the potential to inform criminalisation debates more generally, and that its relevance extends beyond discussions about deceptive sex.

**Keywords:** criminal law; rape by deception; sexual offences; consent; identity; recognition

## Introduction

In recent years, the questions of whether and how deceptive sex – that is, sex that occurs when one party is operating under a false belief, which has typically been induced by the other party’s deceit<sup>1</sup> – ought to be criminalised have arisen across a number of jurisdictions, where they have elicited a variety of responses. Courts and commentators disagree not only about which deceptions ought potentially to lead to criminal liability but also about which category of offence best fits the defendant’s conduct. Furthermore, as the range of punishable deceptions has grown to include more of those carried out within ‘ordinary’ contexts, such as deceptions relating to gender or to the use of contraception,<sup>2</sup> the contention surrounding the punishment of deceptive sex has grown correspondingly. Unlike deceptive sex that occurs within special relationships of power or authority (the relationships between doctors and patients, employers and employees, or spiritual leaders and their followers, for example), deceptive sex that takes place within ordinary contexts tends neither to involve the clear-cut

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<sup>1</sup>SP Green *Criminalizing Sex: A Unified Liberal Theory* (Oxford: Oxford University Press, 2020) p 101. The distinction between active, or express, deception and non-disclosure that some courts have tried to maintain (but was recently rejected in *R v Lawrence* [2020] EWCA Crim 971 (para 41)) is not the main focus of this paper but, as others have argued, it can be hard to sustain in practice and the difference in culpability is less clear than in other contexts: A Sharpe ‘Expanding liability for sexual fraud through the concept of active deception: a flawed approach’ (2016) 80(1) *The Journal of Criminal Law* 28.

<sup>2</sup>The categories of deceptive sex that are punishable, and others that might come before courts, are set out in sections 3 and 4.

exploitation of vulnerability nor the corrosion of trust in important institutions.<sup>3</sup> In the absence of these features, questions about whether deceptive sex ought to attract criminal punishment – and, if so, why – are particularly vexing.<sup>4</sup>

In this paper, I engage directly – and indeed exclusively – with these questions<sup>5</sup> and argue that there are good reasons to justify punishing some deceptive sex that occurs outside special relationships of power or authority. In making this argument, I develop and rely on an original account of what makes some deceptive sex that occurs within these ordinary contexts wrongful. At the core of this account is the claim that some kinds of deceptive sex can be understood as a form of ‘identity non-recognition’ – a failure on the part of the deceiver to respect the identity-formation of the person deceived. As I explain more fully in section 2, this claim reflects the impetus that underlies the recent increased punishment of deceptive sex – a concern with respecting the interest of sexual autonomy – but puts forward a novel interpretation of that interest, which connects it to the more general interests we have in constructing our own identities.<sup>6</sup>

As the following sections make clear, locating deceptive sex within an account of identity construction supports a substantively and structurally different approach to criminalisation than existing doctrinal or theoretical approaches. Capturing a fuller array of deceptions than traditional approaches, the framework I offer in this paper, which is based on the concept of identity nonrecognition, nevertheless provides greater legal certainty than contemporary approaches that are more encompassing in their scope. It does this through articulating a principled basis on which to construct a list of deceptions that will generally be punishable that is finite but is not, or at least is not exclusively, predicated on any of the existing criteria that are used to circumscribe criminal liability (each of which is discussed in more detail in the next section).

Of course, an exhaustive review of all the factors that might be relevant in deciding whether deceptive sex ought to be punished would require consideration of a wide array of issues, including the privacy rights of potential defendants and public health goals. While these are important concerns, and are touched on briefly in the sections below, they cannot be addressed fully within the confines of this paper and so I have made no attempt to do so. Nevertheless, the arguments I advance provide a new way of answering the prior question of which instances of deceptive sex we might have good reason to criminalise in the first place, as well as additional reasons that would count against prosecution in particular circumstances.

As this summary makes clear, the main objective of this paper is to contribute towards the debate over criminalising deceptive sex. Yet because identity nonrecognition is a particular kind of wrong and harm it has, in my view, the potential to inform criminalisation debates more generally. In the

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<sup>3</sup>Eg public confidence in medical professionals: [www.bbc.co.uk/news/uk-england-london-50727810](http://www.bbc.co.uk/news/uk-england-london-50727810); <https://www.dailyrecord.co.uk/news/crime/sex-predator-doctor-branded-master-21451812>. Although I discuss a case involving an undercover police officer who had sex with citizens to whom he had not disclosed his identity in subsequent sections of this paper, this example is used to consider the significance of deceptions about political beliefs and the difference between genuine and false identity expression. Since these issues might arise in the context of ordinary relationships, the case is relevant for my purposes even though the particular harms of police misconduct and the peculiar sanctions it deserves are not.

<sup>4</sup>Falk describes deceptive sex that occurs within special relationships of power or authority – those involving ‘professional, trust-based alliances or relationships involving authoritative positions or power imbalances’ – as ‘the most noncontroversial and unassailable fact patterns’: PJ Falk ‘Rape by fraud and rape by coercion’ (1998) 64(1) *Brooklyn Law Journal* 44 at 131. Deceptive sex that occurs within the context of sex work is considered by many to be controversial but it cannot be addressed adequately within the confines of this paper.

<sup>5</sup>In addition to focusing exclusively on deceptive sex that occurs within ordinary contexts, I am concerned only with sex that is solely deceptive. Cases that involve both deception and coercion, eg *R v Jheeta* [2007] EWCA 1699, where the defendant posed as a police officer but also made the complainant believe that she would be liable for a fine unless she had sex with him, are therefore excluded. For one account of the difference between deceptive and coercive sex, see A Pundik ‘Coercion and deception in sexual relations’ (2015) 28(1) *Canadian Journal of Law & Jurisprudence* 92.

<sup>6</sup>In this way, this paper aims to develop a better understanding of what is valuable about sexuality and how this might be reflected, albeit imperfectly, in law: see N Lacey ‘Unspeakable subjects, impossible rights: sexuality, integrity and criminal law’ (1998) 11(1) *Canadian Journal of Law and Jurisprudence* 47 at 52–54.

penultimate section of this paper I therefore canvass some of the ways this may be so and set the groundwork for a wider consideration of whether and how identity might be important to the criminal law.<sup>7</sup>

## 1. Distinguishing deceptions

Since one of the key contributions of this paper is establishing a new framework for deciding which deceptions should generally be punishable (ie those that will ‘count’), the value of undertaking this kind of line-drawing exercise needs to be made clear from the outset. Generally speaking, line-drawing efforts are aimed at limiting the kinds of deceptions that may lead to criminal liability; they operate to restrict the categories of deceptive sex that are deemed punishable on an objective basis. As a consequence, when deceptive sex is considered to be an infringement of sexual autonomy, as is now the case in many jurisdictions and in much legal scholarship, this line-drawing exercise can appear undesirable or even infeasible. Combined with a desire to protect sexual autonomy, which has been interpreted as the right to be able to choose freely whether to engage in sexual conduct, including where, when and with whom to have sex, and under what additional circumstances,<sup>8</sup> the contention that deceptive sex infringes sexual autonomy can make it seem as though all deceptions, or indeed failures to disclose information, that could possibly have any bearing on a person’s decision to have sex should automatically count. This would render the line-drawing exercise otiose, for there would be no need – and indeed no way – of distinguishing between deceptions. Following this line of thought, at least one commentator has argued that deceptive sex should never be considered a sex offence.<sup>9</sup>

The idea that all deceptions or indeed failures to disclose information that could possibly have a bearing on a person’s decision to have sex should automatically count is, I would accept, unattractive. To subscribe to this view would suggest that all information deficits are equally significant, which, intuitively, does not seem to be the case. Perhaps more importantly, there are reasons to resist treating them as if they were. As others have argued, using the criminal law to try to reduce vulnerability can lead to uncritical expansions in state punitivity<sup>10</sup> and, in the context of deceptive sex, trying to secure against all interferences with decision-making seems like an attempt to reduce vulnerability too far. Aside from challenges in application and concerns about privacy, there is also a danger that extending criminal liability this far would, perversely, serve to increase individuals’ feelings of vulnerability. Interpersonal trust and respect for others’ autonomous decision making are important values, but fostering some degree of resilience to insecurity, including within intimate and sexual relationships, is beneficial to self-development and is arguably essential to building ‘unconditioned’ (in this case, by law) relationships of trust.<sup>11</sup>

Yet rejecting the possibility that deceptive sex might sometimes constitute a sex offence seems unpalatable too. Those who agree that sex offence laws should be predicated on sexual autonomy, or a closely allied alternative like dignity, tend to agree that deceptive sex should sometimes constitute

<sup>7</sup>See <https://gtr.ukri.org/projects?ref=AH%2FS013180%2F1>; <https://www.law.ed.ac.uk/research/research-projects/identity-deception>.

<sup>8</sup>This interpretation of sexual autonomy is discussed further in M Gibson ‘Deceptive sexual relations: a theory of criminal liability’ (2020) 40(1) OJLS 82 at 94. For critical engagement with concepts of sexual autonomy, including their use in structuring sex offences see V Munro ‘Sexual autonomy’ in MD Dubber and T Hörnle *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) and J Herring ‘Relational autonomy and rape’ in S Day Sclater et al *Regulating Autonomy: Sex, Reproduction and Family* (Oxford: Hart Publishing, 2009).

<sup>9</sup>J Rubinfeld ‘The riddle of rape-by-deception and the myth of sexual autonomy’ (2013) 122(6) *The Yale Law Journal* 1372, arguing that only ‘violent’ sex (meaning sex that is forced by ‘bondage, beating, torture, imprisonment, or any other instrument of enslavement’) should constitute rape.

<sup>10</sup>Eg P Ramsay *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford: Oxford University Press, 2012).

<sup>11</sup>A Giddens *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Cambridge: Polity Press, 1991) p 73; H Ikäheimo ‘Conceptualizing causes for lack of recognition: capacities, costs and understanding’ (2015) *Studies in Social and Political Thought* 250, doi: <https://doi.org/10.20919/sspt.25.2015.45>.

a sex offence, even if they do not specify precisely when.<sup>12</sup> It is worth noting, since disagreement exists over how to structure sexual offences, that this perspective is compatible with either using or avoiding consent in defining these crimes. If consent is used to define sexual offences then any qualifying deception would render prima facie consent invalid on the basis that it is insufficiently voluntary or informed;<sup>13</sup> if consent is not used then engaging in a qualifying deception would instead constitute one of several punishable ways of having sex.<sup>14</sup> In either case, the challenge is to construct a clear list of the deceptions that will count and a satisfying explanation for why they do.

This task is necessary to keep the scope of criminalisation defensible but also to exclude the problematic gendered norms that have historically supported the belief that most deceptive sex is merely unobjectionable, or even valuable, seduction. As McJunkin has argued, these norms are so tenacious that they have adapted to innovations in the definition and application of sex offences laws, with the result that the range of deceptions that will be punishable has for a long time remained narrow.<sup>15</sup> Making clear in advance which deceptions will count would reduce the influence of these gendered norms, assuming that attempts were made to exclude them from the process of constructing the list. Constructing a clear and defensible list would also help to increase certainty and predictability in the law, both of which are undermined when the contours of liability are governed by judicial development or jury determination.<sup>16</sup>

Assuming, therefore, that we need a way to pick out which deceptions or failures to disclose should count, the question is how this should be done. Tests like ‘materiality’ or ‘sufficiently serious’ are inadequate because, being essentially empty concepts, they do not convey what makes a deception material or sufficiently serious.<sup>17</sup> On the other hand, tests that draw the line at deceptions that go to the nature or purpose of the act, which have a long heritage in the distinction between fraud in the factum and fraud in the inducement, have more substance but are problematic both in terms of the complexity of defining the ‘act’ and because they seem underinclusive if sexual autonomy, or dignity, is the underpinning principle. Drawing the line at deceptions or failures to disclose that have detrimental physical consequences is underinclusive for the same reason.<sup>18</sup> Discouraged by the challenges in deciding where to draw the line, some scholars have suggested that there is no non-arbitrary way of doing this.<sup>19</sup>

One response to this difficulty is to hold that any deception that informs the complainant’s decision to have sex ought to amount to a sex offence if the defendant knew or ought to have known its significance.<sup>20</sup> Others have made similar suggestions by, for example, arguing that any deception or lack

<sup>12</sup>Autonomy and dignity do not seem to be substantively different in this context: M Dan-Cohen ‘Defending dignity’ in *Harmful Thoughts: Essays on Law, Self and Morality* (New Jersey: Princeton University Press, 2002) p 150. On dignity and sex offences see O Kamir ‘A dignitarian feminist jurisprudence with applications to rape, sexual harassment and honor codes’ in R West and C Grant Bowman (eds) *Research Handbook on Feminist Jurisprudence* (Cheltenham: Edward Elgar, 2019) p 303. Kamir argues that deceptive sex involving ‘fundamental deceptions’ should be a sex offence (p 316).

<sup>13</sup>See eg J Feinberg ‘Victims’ excuses: the case of fraudulently procured consent’ (1986) 96(2) *Ethics* 330.

<sup>14</sup>See eg V Tadros ‘Rape without consent’ (2006) 26(3) *OJLS* 515. Much feminist literature has engaged critically with laws’ constructions of sexual consent and the extent to which they capture material and power inequality and relational agency: see eg S Cowan ‘“Freedom and capacity to make a choice”: a feminist analysis of consent in the criminal law of rape’ in VE Munro and CF Stychin *Sexuality and the Law: Feminist Engagements* (Abingdon: Routledge-Cavendish, 2007) p 11.

<sup>15</sup>B McJunkin ‘Deconstructing rape by fraud’ (2014) 28(1) *Columbia Journal of Gender and Law* 1.

<sup>16</sup>On the malleability of concepts like consent, coercion and exploitation and their capacity to be interpreted over- and under-inclusively see VE Munro ‘An unholy trinity? Non-consent, coercion and exploitation in contemporary legal responses to sexual violence in England and Wales’ (2010) 63(1) *Current Legal Problems* 45 and E Finch and VE Munro ‘Breaking boundaries? Sexual consent in the jury room’ (2006) 26(3) *Legal Studies* 303.

<sup>17</sup>‘Materiality’ and ‘sufficiently serious’ appear in various places (see eg Falk, above n 4, at 166–172) and ‘sufficiently serious’ was recently endorsed as a test by counsel for Monica in *R v Monica* [2019] 2 *WLR* 722.

<sup>18</sup>On physical harm see LE Chiesa ‘Solving the riddle of rape by deception’ (2017) 35 *Yale Law & Policy Review* 407. Chiesa raises the possibility of emotional harm providing a basis on which to draw a line, but he does not develop this idea. On physical harm as a limit in tort law see JE Hasday *Intimate Lies and the Law* (New York: Oxford University Press, 2019) and DP Sacks ‘Intentional sex torts’ (2008) 77(3) *Fordham Law Review* 1051.

<sup>19</sup>Eg A Pundik ‘The law of deception’ (2018) 93(1) *Notre Dame Law Review Online* 172.

<sup>20</sup>J Herring ‘Mistaken sex’ (2005) *Criminal Law Review* 511.

of information which plays a significant role in the complainant's decision to have sex ought to be punished, irrespective of whether the deception would matter to anyone else.<sup>21</sup> These solutions align with the notion that all deceptions or information deficits should be capable of counting but are more restrictive insofar as they focus on the particular complainant and the issues that were significant to them in deciding whether to have sex.<sup>22</sup> They are attractive in the way they protect sexual autonomy and evade the unsatisfactory line-drawing efforts outlined above, but they present challenges. The tests these solutions use depend on legal decision-makers determining that a particular issue was significant to the complainant's decision to have sex, that the defendant knew or ought to have known it was significant in this way and, depending on how expansive the culpability requirements are, that the defendant intended to induce the complainant to have sex through the deception or failure to disclose. In the absence of incontrovertible proof of each of these issues – proof that seems unlikely to be available in many cases<sup>23</sup> – these decision-makers will be guided by their own assessments of which deceptions are important.<sup>24</sup> This generates a degree of unpredictability, which is undesirable in and of itself, and gives rise to the possibility that problematic narratives about purportedly unobjectionable seduction will structure the decision-making process.

The solution I propose is to generate a list of deceptions that will generally be punishable (ie that will count) that is based on a test that captures the spirit of the dignitarian or sexual autonomy rationale – and is therefore not, or at least not exclusively, predicated on the nature or purpose of the act or its detrimental physical consequences – but which has more substance than 'materiality' or 'sufficiently serious'. This is what I aim to develop, using the concept of identity nonrecognition, in the following three sections. Subject to a defence outlined in the penultimate section of this paper, these deceptions, which constitute identity nonrecognition, would lead to criminal liability without the complainant having to prove that the subject of the deception mattered to them or that the defendant knew or was subjectively reckless about this.<sup>25</sup> Indeed, because the wrong of identity nonrecognition is based on the defendant's conduct, rather than its effects on the complainant, it would not matter (for the purposes of establishing liability) whether the deception mattered to the particular complainant even though such deceptions do, as I argue in the next sections, typically matter.<sup>26</sup>

Importantly, however, this list would not operate to prohibit other forms of deception from grounding liability when a defendant could clearly be shown to have known – by way of explicit conditional consent – that the issue was central to the complainant's decision to have sex. In these situations, it seems appropriate that any deal-breaker, no matter how idiosyncratic,<sup>27</sup> ought in principle (subject to a full consideration of countervailing concerns, such as privacy) to constitute a sex offence. The complainant has given as clear a communication as possible that a particular issue is centrally important to their decision to have sex and, as I explain more fully in the next section, respecting this is an obvious corollary of valuing dignity or sexual autonomy. This remains true even when

<sup>21</sup>O Madhloom 'Deception, mistake and non-disclosure: challenging the current approach to protecting sexual autonomy' (2019) 70(2) Northern Ireland Legal Quarterly 203.

<sup>22</sup>See also T Dougherty 'Sex, lies and consent' (2013) 123(4) Ethics 717, arguing that every 'deal-breaker' ought to render sexual consent invalid.

<sup>23</sup>Apps that encourage people to set out in advance all of the conditions on their consent to sex have been widely criticised (eg [https://www.vice.com/en\\_us/article/paqvn7/dont-fuck-anybody-who-wants-to-get-your-consent-uploaded-to-the-block-chain-legalfling-app](https://www.vice.com/en_us/article/paqvn7/dont-fuck-anybody-who-wants-to-get-your-consent-uploaded-to-the-block-chain-legalfling-app)).

<sup>24</sup>I am grateful to Rachel Clement Tolley for drawing my attention to this point.

<sup>25</sup>On the link between objective recklessness/negligence and setting standards see C Kennedy 'Questioning culpability: lessons from soterial-legal history' (2018) 12(2) Law and Humanities 159.

<sup>26</sup>This is similar to the way that the Domestic Abuse (Scotland) Act 2018 does not require that the complainant actually experience any of the negative effects outlined in the legislation. Others, such as Gardner and Shute, have argued in favour of punishing rape on the basis that it is wrongful even when it is not harmful in particular cases: J Gardner and S Shute 'The wrongness of rape' in J Horder (ed) *Oxford Essays in Jurisprudence: Fourth Series* (Oxford: Oxford University Press, 2000) p 193.

<sup>27</sup>Eg vegans who strongly object to having sex with or dating non-vegans, [https://www.vice.com/en\\_uk/article/dpk3az/vegans-who-only-have-sex-with-vegans?fbclid=IwAR3Fbl-uAocIH0wWzEvKimHg73H185E3XopbhNr6QR6x4k4OUxsUjG8pCXg](https://www.vice.com/en_uk/article/dpk3az/vegans-who-only-have-sex-with-vegans?fbclid=IwAR3Fbl-uAocIH0wWzEvKimHg73H185E3XopbhNr6QR6x4k4OUxsUjG8pCXg).

these values are located within a broader account of identity construction. Furthermore, in these circumstances the defendant can predict that their deception has the potential to lead to criminal liability because they have been informed that its subject matter is central to the complainant's decision to have sex. The problems of lack of certainty and predictability are therefore avoided.

## 2. Identity nonrecognition

The concept of identity nonrecognition that I suggest could be used to construct a list of those deceptions that will generally be punishable (ie those that will count) draws on work by Charles Taylor on the politics of recognition. According to Taylor, contemporary society is underpinned by a close association between identity – meaning a person's understanding of who they are – and recognition – meaning attending to and respecting this sense of one's self.<sup>28</sup> In modernity, so Taylor argues, identity is to a large extent inwardly generated (though in dialogic relation with others) rather than primarily imputed by others, so there is now greater scope for others to fail to recognise our identities. I defend the idea that this failure to recognise another's identity is often wrongful and harmful shortly, but in Taylor's view identity nonrecognition constitutes a non-trivial lack of respect and can force a person into an inauthentic, and thereby diminished, mode of being.<sup>29</sup>

Furthermore, and importantly for present purposes, intimate relationships are an important site of identity construction and recognition: as Taylor puts it, they are 'crucibles of inwardly-generated identity'.<sup>30</sup> This is important because for many people sex is part of establishing and maintaining intimate relationships. For this reason alone, sex can plausibly be associated with identity construction and recognition.<sup>31</sup> Sex has an independent role to play in identity construction too, though, for, as Wendy Doniger has observed, sexual activity can be understood as an extension of the self; it can be understood as a way of defining oneself.<sup>32</sup> The consequences of sex can also be significant in identity-constructing terms, irrespective of whether the sex takes places within an intimate relationship or not. What this suggests is that the potential for sexual encounters to be a site of identity nonrecognition is not limited to sex within intimate relationships. Indeed, as I show in the next two sections, the disparity that can exist between sex and intimate relationships is important to the way I suggest the idea of identity nonrecognition be used to distinguish between deceptions in deciding which should count.

In order to elaborate further on how deception, and specifically deceptive sex, might constitute a form of identity nonrecognition, and how this might help differentiate some kinds of deceptive sex from others, it is first necessary to say a bit more about the meaning of identity and why its construction should be deemed valuable and worthy of respect. In other words, it is necessary to say more about why respecting other people's identity construction is an appropriate response to their normatively and evaluatively significant features.<sup>33</sup>

The assertion that identity construction is significant and valuable, and thus worthy of respect, is reflected in a range of philosophical and psychological literature and is based on the fact that human

<sup>28</sup>C Taylor 'The politics of recognition' in A Guttman (ed) *Multiculturalism and the Politics of Recognition* (Princeton: Princeton University Press, 1994) p 25.

<sup>29</sup>Ibid, pp 25–26.

<sup>30</sup>Ibid, p 36.

<sup>31</sup>Although intimacy exists outside sexual relationships and sexual relationships do not necessarily lead to intimacy, sex is often part of achieving intimacy: Giddens, above n 11, p 96; A Giddens *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Cambridge: Polity Press, 1992).

<sup>32</sup>W Doniger *The Bedtrick: Tales of Sex and Masquerade* (Chicago: University of Chicago Press, 2000) pp 91–95.

<sup>33</sup>A Laitinen 'On the scope of "recognition": the role of adequate regard and mutuality' in H-C Schmidt am Bush and CF Zurn (eds) *The Philosophy of Recognition: Historical and Contemporary Perspectives* (Maryland: Lexington Books, 2010) p 319; H Ikäheimo 'Recognition, identity and subjectivity' in MJ Thompson (ed) *The Palgrave Handbook of Critical Theory* (New York: Palgrave MacMillan, 2017) p 567.

beings are capable of developing a ‘description under which their lives and selves have value’.<sup>34</sup> This description gives us reasons to act and, furthermore, makes some of the actions we choose and the events we experience – those that reflect, and help generate, the description under which our lives and selves have value – particularly worthwhile and valuable for us.<sup>35</sup> Together, these features of the human experience mean that we have a strong interest in being able to make decisions that accord with the description under which we value our lives and selves.<sup>36</sup> It follows from this that since sex is one way that we construct our identities, we have a strong interest in being able to make decisions about whether and how we have sex in a way that accords with, and contributes to constituting, our sense of self.

Disregarding the interest we have in constructing our identities, that is, engaging in identity non-recognition, can be described as wrongful and potentially harmful for at least two reasons. The first is that interfering with a person’s ability to make decisions in accordance with their sense of self fails to respect the importance that this process holds for human beings, particularly in light of the way these decisions constitute and do not merely reflect that person’s sense of self. This is broadly what underpins the ideas that autonomous decision-making is something that deserves respect and that interferences with it are therefore often wrongful. The second reason relates to the association between autonomous decision-making and a person’s self-sentiments. When a person’s interest in autonomous decision-making is not respected by others this can have a negative effect on their self-sentiments – their sense of self-worth, self-esteem, and self-efficacy.<sup>37</sup> These negative effects are especially pronounced when the disrespected person’s life narrative is changed as a result of the decision, because changes to a person’s life narrative can have a dramatic impact on their self-sentiments. Where such a revision does not cohere with that person’s desired life narrative – the description under which their life has value – the impact is negative.<sup>38</sup>

Understanding what ‘life narrative’ means in this context requires a fuller explanation of the self that underpins identity construction. In contemporary writings on identity, and indeed in other work by Taylor,<sup>39</sup> the self is often described in narrative terms such that self-construction amounts to the ongoing, reflexive process of integrating one’s experiences and identities into a meaningful autobiography.<sup>40</sup> This is a further way of identifying which kinds of actions and events are important to identity construction. Just as not all actions and events will reflect and help generate the description under which one’s life has value, not all actions and events will be significant in a life-extensive sense. The significance (if any) of some actions and events will be merely episodic and their role in the identity-constructing process will accordingly be diminished.

As the above reference to experiences and ‘identities’ suggests, the word ‘identity’ can be used, sometimes confusingly, to refer both to the self and *also* its composite parts – its content. While these composite parts are, on the one hand, highly personal in consequence of the fact that each person develops their own description under which their life has value, they are also, on the other hand,

<sup>34</sup>As Korsgaard writes, ‘[c]arving out a personal identity for which we are responsible is one of the inescapable tasks of human life’: CM Korsgaard *Self-Constitution: Agency, Identity, and Integrity* (Oxford: Oxford University Press, 2009) p 24.

<sup>35</sup>CM Korsgaard *The Sources of Normativity* (Cambridge: Cambridge University Press, 1996) pp 122–123.

<sup>36</sup>This insight can be applied to other decision-making processes mediated by law: J Wall ‘Being yourself: authentic decision-making and depression’ in C Foster and J Herring (eds) *Depression: Law and Ethics* (Oxford: Oxford University Press, 2017) p 134.

<sup>37</sup>NJ MacKinnon and DR Heise *Self, Identity, and Social Institutions* (New York: Palgrave MacMillan, 2010) p 114; A Laitinen ‘Recognition, needs and wrongness: two approaches’ (2009) 8(1) *European Journal of Political Theory* 13.

<sup>38</sup>MacKinnon and Heise, above n 37, p 166.

<sup>39</sup>Eg C Taylor *Sources of the Self* (Cambridge, Mass: Harvard University Press, 1989); cf B Lyshaug ‘Authenticity and the politics of identity: a critique of Charles Taylor’s Politics of Recognition’ (2004) 3 *Contemporary Political Theory* 300, which argues that in embracing the politics of recognition Taylor risks presenting identity as ossified.

<sup>40</sup>Giddens, above n 11, pp 52–58; MacKinnon and Heise, above n 37, pp 96–107; F Coulmas *Identity: A Very Short Introduction* (Oxford: Oxford University Press, 2019); G Glas ‘Idem, ipse, and loss of the self’ (2003) 10(4) *Philosophy, Psychiatry & Psychology* 347; D Pellauer and B Dauenhauer ‘Paul Ricoeur’ (Winter 2016) *The Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/archives/win2016/entries/ricoeur/>.

culture-dependent: the most prevalent components of identity-construction vary across time and place. In contemporary English language speaking societies, these components typically include social identities (ie collective or group memberships), roles, and statuses that relate to occupation, wealth or social class, nationality, ethnicity, gender, sexuality, religion, kinship, and leisure.<sup>41</sup> The skills and abilities we have and the values and ideals that matter most to us, which will often be associated with these social identities, role and statuses, are also included.<sup>42</sup> In contrast, even though identifiers (eg name, date of birth, height, fingerprint, DNA) are frequently referred to as part of our identity, on account of the fact that they help mark us out as unique and identify us as such over time, they tend not to be components of the self in the narrative sense that the term is used here. What some of these identifiers connote – biological relationships or disease, for example – might be, however.<sup>43</sup> When these components of the self are modified, lost or acquired as the result of a failure to respect autonomous decision making, the negative effects on self-sentiment are likely to be worse than they would otherwise be.<sup>44</sup>

Tying this discussion back to the topic in hand, engaging in deception can be considered a form of identity nonrecognition that is wrongful and potentially harmful in the ways just described. Some deceptions or failures to disclose prevent a person from being able to decide in accordance with their sense of self; indeed, deception might be a means of manipulating a person into deciding in a way that contradicts their sense of self. In the case of deceptive sex, this kind of manipulation might even give pleasure to the deceiver.<sup>45</sup> Furthermore, where a deception alters the deceived person's life narrative it has the potential to generate negative self-sentiments in both of the senses outlined above. In my view, these are independent wrong-making features of some instances of deceptive sex and the source of distinctive kinds of potential harm. This does not mean, however, that identity nonrecognition exhausts the array of wrongs and potential harms that inhere in, and emanate from, deceptive sex. The infliction of physical harm, the exploitation of power imbalances, and the breach of relationships of trust are all species of wrongdoing and sources of harm that might exist alongside identity nonrecognition in cases of deceptive sex. Importantly, however, identity nonrecognition provides a fuller account of what makes some instances of deceptive sex wrong and potentially harmful,<sup>46</sup> particularly within ordinary contexts. It also offers a different way of identifying deceptions that should be punishable that is, as I hope to show, preferable to relying solely on existing alternatives.

The potential of identity nonrecognition to perform these tasks is twofold. When a person has expressly stated that something matters deeply to their decision to have sex, as they do when they give explicit conditional consent, any deception or failure to disclose that relates to the condition(s) is an instance of identity non-recognition and thus, on the account put forward here, ought to be punishable. This is due to the fact that identity construction is highly personal and each person develops their own description under which their life has value. In the absence of this kind of communication, however, identity nonrecognition can still be used to identify which deceptions should generally be punishable because of the way that identities (the components of self-construction) are culturally

<sup>41</sup>MacKinnon and Heise, above n 37, pp 29–35, pp 50–70.

<sup>42</sup>D Sollberger 'On identity: from a philosophical point of view' (2013) 7(1) *Child and Adolescent Psychiatry and Mental Health* 29.

<sup>43</sup>On biological information and identity, see E Postan *Defining Ourselves: Narrative Construction and Access to Personal Biological Information* PhD thesis, <https://era.ed.ac.uk/bitstream/handle/1842/25733/Postan2017.pdf?sequence=1>; E Postan 'Defining ourselves: personal bioinformation as a tool of narrative self-conception' (2016) 13(1) *Journal of Bioethical Inquiry* 133.

<sup>44</sup>Some roles are more significant than others, and the alteration or loss of a central one might be identity-shattering: M Dan-Cohen 'Constructing selves' in T Cross and D Ambrose (eds) *Morality, Ethics, and Gifted Minds* (New York: Springer, 2009) p 151.

<sup>45</sup>S Morgan 'Dark desires' (2003) 6(4) *Ethical Theory and Moral Practice* 337.

<sup>46</sup>The account offered here supports the claim that deceiving others into sex is wrong because it causes them to act in ways that violate values that are important to them: A Wertheimer *Consent to Sexual Relations* (Cambridge: Cambridge University Press, 2003) p 209.



shaped.<sup>47</sup> The fact that self-construction is shaped, albeit not determined,<sup>48</sup> by culture means that the roles, statuses and group memberships that are commonly experienced or described as identities in any given time or place are very likely to constitute the components of self-construction at that time and place.<sup>49</sup> When deceptive sex bears on these identities it therefore constitutes a failure to respect the importance of identity construction as it is understood and experienced within that culture – it is an instance of identity nonrecognition.<sup>50</sup> The relevant deceptions should therefore, by this account, count.

These claims will become less abstract in the following two sections, where I argue that some, but not all, of the commonest deceptions perpetrated by those seeking sex fall into this category. In making these arguments, I rely wherever possible on empirical data which shows the significance of the subject of the deception to identity construction, fleshing out the conceptual framework set out in this section by reference to contemporary lived experience. Where I have not been able to locate this (which could signal that the relevant deception is not significant for identity construction or that the question has not been the subject of a published academic research) I rely on my own intuitions, which are based partly on the evidence I have located and partly on the potential distinction between sex and intimate relationships that exists in late modernity. These intuitions are undoubtedly contestable but by situating them within the framework of sex and identity construction I have articulated a grounding upon which any disagreement might meaningfully occur.

### 3. The existing categories of deception

In this section, I argue that identity nonrecognition can explain the growth in deceptions that have come to be punishable (though I will not claim that judges or other legal actors have framed the expansion this way) and can provide a more satisfactory basis for justifying this expansion than existing line-drawing tests. The examples are drawn from the law of England and Wales and Scotland, the jurisdictions with which I am most familiar and in which conversations about the criminalisation of deceptive sex have been gaining pace. I refer to other jurisdictions too, though, where these broadly match the experience in Britain. In section 4, I argue that taking identity nonrecognition seriously – including as something that might afflict the deceiver – can also provide a basis on which to restrict the scope of criminalisation, both in respect of the deceptions that count (insofar as they should sometimes not be prosecuted) and in respect of others that might seem like they should count (insofar as I suggest that they should not). In that section, I refer to jurisdictions where the range of deceptions that count is wider than in Britain.

One of the longest-standing forms of deception that counts is deception that goes to the nature or purpose of the sexual act. Examples of this include deceiving someone that the sexual activity is a form of medical treatment<sup>51</sup> or a way of improving one's singing ability.<sup>52</sup> It is not difficult to see why these deceptions should count; indeed, if either the physical or sexual character of the conduct is obscured it could be said that the deceived party does not consent to the conduct at all. Similarly, the longest-standing category of impersonation that invalidates consent to sex – impersonating a woman's husband – could also be described as going to the nature of the act, at least it could during the period in which it emerged.<sup>53</sup> In the nineteenth century, this kind of deception could be said to change the nature of the intercourse from marital sex into adultery, ie from 'legitimate' to 'illegitimate'

<sup>47</sup>A MacIntyre *After Virtue: A Study in Moral Theory* (London Duckworth, 1985) p 221.

<sup>48</sup>L McNay 'Gender and narrative identity' (1999) 4(3) *Journal of Political Ideologies* 315.

<sup>49</sup>MacKinnon and Heise, above n 37, pp 8, 10–11, 17, 19–22, 29–35.

<sup>50</sup>It is worth reiterating the point, made in section 1, that it is the likely (and predictable) relationship between these deceptions and identity-formation that matters in identifying the wrong of identity nonrecognition.

<sup>51</sup>*R v Flattery* (1877) 2 QBD 410.

<sup>52</sup>*R v Williams* [1923] 1 KB 340.

<sup>53</sup>*R v Dee* [1884] 14 LR Ir 468; Sexual Offences Act 1956, s 1(2). A number of US jurisdictions and the Model Penal Code refer to spousal impersonation in rape by deception laws: see Pundik, above n 19, at 174.

sex.<sup>54</sup> At this stage in the law's development there was therefore a unity between the deceptions that counted: both categories could be described as going to the nature or purpose of the act.

Yet as the law has expanded to accommodate more categories of deception, this explanation has come under pressure. So too has the plausibility, and desirability, of relying on 'changing the nature or purpose of the act' as a way of setting limits on which deceptions should count. It is true that deceptions that go to the nature or purpose of the act remain one of the categories of deception that count<sup>55</sup> and some of the more specific deceptions that have been accepted as counting in recent years could also be considered to go to the nature of the act. Deception about one's HIV status,<sup>56</sup> the use of a condom<sup>57</sup> and reliance on the withdrawal method<sup>58</sup> could all be said to alter the ontology and/or purpose of sex on the basis that these deceptions increase the risks of pregnancy and disease or, in the case of condom use and perhaps the withdrawal method, that a physically different act has taken place. These interpretations are controversial, though, since in these cases the sexual nature of the act and its sexual purpose is known. These diverse ways of interpreting which deceptions alter the nature or purpose of the act, and the unsatisfactory outcomes to which this diversity can give rise, are well-illustrated by a recent decision of the English Court of Appeal. Quashing two convictions for rape of a man who lied to his sexual partner about having had a vasectomy, the Court held that whereas deceptions about the use of a condom or the withdrawal method relate to the sexual act and its performance, deceptions about fertility relate only to the act's potential consequences. On this basis, the Court concluded that deceptions about fertility are incapable of invalidating consent to sex even when, as had occurred in the case before them, that consent was explicitly based on the complainant's understanding that she was not at risk of becoming pregnant.<sup>59</sup>

The difficulty in using the 'nature or purpose of the act' test to account for the range of impersonations that has come to count, which has grown from spouses to include partners and persons known personally to the deceived,<sup>60</sup> is even more pronounced. Even if we grant the questionable assumption that a distinction between 'legitimate' and 'illegitimate' sex based on adultery remains meaningful and stable, a person 'known personally' to the deceived will not necessarily be someone with whom they are in a sexual or romantic relationship (never mind one that has an expectation of fidelity). Similarly,

<sup>54</sup>For a version of this argument in the American context see Falk, above n 4, at 66–67.

<sup>55</sup>This is now listed as one of the two situations involving deception where there is no consent under the Sexual Offences (Scotland) Act 2009 (s 13(2)(d)) and one of the two situations where lack of consent, and lack of belief in consent, is conclusively presumed under the Sexual Offences Act 2003 (s 76(2)(a)).

<sup>56</sup>In *R v B* [2007] 1 WLR 1567, the Court of Appeal held that failure to disclose one's HIV status would not invalidate consent to sex. According to the decision in *R v McNally* [2014] QB 593 (para 24), however, the judgment in *R v B* left open the possibility that active deception about one's HIV status might invalidate consent to sex (see also *Lawrence*, above n 1, where this point is recognised (para 40)). Canadian courts have held that failure to disclose HIV status and the 'sabotage' of contraception (condoms) can invalidate consent to sex (*R v Cuerrier* [1998] 2 SCR 371; *R v Mabior* 2012 SCC 47; *R v Hutchinson* 2014 SCC 19). For critical commentary see I Grant 'The prosecution of non-disclosure of HIV in Canada: time to rethink *Cuerrier*' (2011) 5(1) McGill Journal of Law and Health 7.

<sup>57</sup>*Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin). Non-consensual removal of condom has led to convictions for rape (later lowered to 'defilement') in Switzerland (<https://www.reuters.com/article/us-swiss-stealthng/swiss-court-upholds-sentence-in-stealthng-condom-case-idUSKBN1851UN>) and sexual assault in Germany, though this finding apparently meant that the sexual activity itself was deemed consensual (<https://edition.cnn.com/2018/12/20/health/stealthng-germany-sexual-assault-scli-intl/index.html>).

<sup>58</sup>*R (on the application of F) v DPP* [2013] EWHC 945 (Admin).

<sup>59</sup>*Lawrence*, above n 1, paras 4, 7, 39, 43. Like *McNally*, which is discussed further below, *Lawrence* was decided under s 74 of the Sexual Offences Act 2003, which is the general consent provision and states that a person consents if they agree by choice and have the freedom and capacity to make that choice, rather than s 76, which deals specifically with deceptions as to the nature or purpose of the act. For a summary of the case and short critique, see N Davis 'Does a lie about fertility negate consent?' 23 July 2020, <https://www.parksquarebarristers.co.uk/news/lie-fertility-negate-consent/>.

<sup>60</sup>*R v Elbekkay* [1995] Crim LR 163; the second conclusive presumption of consent and lack of reasonable belief in consent under the Sexual Offences Act 2003 (s 76(2)(b)) and the second of the two situations involving deception where there is no consent under the Sexual Offences (Scotland) Act 2009 (s 13(2)(e)). Under the Italian Penal Code, it is punishable to induce someone to engage in sexual acts by impersonating another person: RA Van Cleave 'Sex, lies, and honour in Italian rape law' (2005) 38 Suffolk University Law Review 427 at 447.

it is hard to see how deception as to one's gender can be said to alter the nature of the sexual act. Some English law decisions have held that it does, suggesting that the gender of one's sexual partner can alter a sexual act's 'sexual nature', even where the act does not involve the genitals of the defendant.<sup>61</sup> This appears to be an effort to reject an alternative interpretation of why deception as to gender might count, ie that consent given in such circumstances was based on a false premise.<sup>62</sup> If accepted as a general test, this would presumably allow any kind of false premise to count, thereby eradicating any basis for distinguishing deceptions. This would amount to the situation described – and rejected – in section 1, ie all deceptions would automatically count. Yet without further explanation it seems that 'sexual nature' is merely operating as a shorthand for sexual preference – here, specifically gender preference. If this is right then, again, there is no basis for identifying those deceptions that should count from amongst those that relate to any number of sexual preferences (however idiosyncratic).

Identity nonrecognition, on the other hand, can explain why this range of deceptions should count. To start with gender, it is clear that for the majority of people the gender of their sexual partner has a highly significant relationship with their own sexual identity (and possibly even their gender identity). Even acknowledging the diversity and fluidity of sexual orientations and the inadequacy of sexual identity labels, in most cases the gender of one's sexual partner tends to matter in constructing one's sexual identity.<sup>63</sup> In fact, seeing the construction of sexual identity as a narrative process rather than the realisation of a fixed trait might strengthen the argument in favour of requiring candour about gender. The situation is more complex in the case of transgender defendants, however, when to speak of gender deception is on one view, with which I would tend to agree, to deny the self-identified or lived gender of the defendant.<sup>64</sup> Moreover, even if the subject matter of the deception is reframed as gender history, rather than gender, concerns over privacy and discrimination suggest that criminalisation might be unjustifiable.<sup>65</sup>

As for impersonations, these provide perhaps the quintessential example of how deceptive sex and the identity of the deceived person can be connected. As Wendy Doniger writes in her expansive study of so-called 'bedtricks' (sex with someone who pretends to be another person), although 'people in different cultures do not react in the same way to the shock of discovering that their lovers *and hence their selves*, are not who they thought they were... surprisingly many do'.<sup>66</sup> Since identity construction is relational and can be effected through sex, who, in the most holistic sense, we are having sex with is crucial. This does not mean that all impersonations are equally significant, however. Impersonating a celebrity or some other person who is unknown to the deceived does not display the same lack of respect for the role that sex plays in identity construction as impersonating someone known personally to them. This is because only in the latter case does the deceiver fail to respect a relationship in which sex with that person is likely to be significant to the deceived person's identity narrative and its dialogic formation. If the impersonation is of someone with whom the deceived person has an existing relationship that does not involve sex then the transition of that relationship into a

<sup>61</sup> *Monica*, above n 17, at para 76, discussing the judgment in the earlier case of *McNally*, above n 56 (para 26). In at least one case involving the undisclosed use of a prosthetic penis there was significant physical harm in addition to deception: *HM Advocate v Carlos Delacruz* unreported, 2018: <http://www.scotland-judiciary.org.uk/8/2047/HMA-v-Carlos-Delacruz>.

<sup>62</sup> *McNally*, above n 56, at para 24.

<sup>63</sup> Except perhaps in the cases of asexuality that are characterised by no sexual arousal and pansexuality: EM Morgan 'Contemporary issues in sexual orientation and identity development in emerging adulthood' in J Jensen Arnett (ed) *The Oxford Handbook of Emerging Adulthood* (Oxford: Oxford University Press, 2015) p 262.

<sup>64</sup> A Sharpe 'Why we should oppose gender identity fraud prosecutions' *Legal Voice* 10 July 2017, <http://legalvoice.org.uk/oppose-gender-identity-fraud-prosecutions/>.

<sup>65</sup> On the instances of 'gender fraud' prosecutions, including those that are for sex offences, in the US, Israel and Britain and for the most sustained engagement with the arguments surrounding the criminalisation of transgender defendants see A Sharpe *Sexual Intimacy and Gender Identity 'Fraud': Reframing the Legal and Ethical Debate* (New York: Routledge, 2018). On taking account of substantive inequality when debating criminalisation for 'gender fraud', see S Cowan 'The heart of the matter: criminalising fraudulent consent to sex' *Edinburgh School of Law Research Paper No 2019/26*, <https://dx.doi.org/10.2139/ssrn.3429592>.

<sup>66</sup> Doniger, above n 32, p 91, emphasis added.

sexual one – the pretence that is created by the impersonation – would likely be significant to the deceived party’s identity narrative. The disrespect is even more pronounced when it comes to impersonating spouses and long-term partners, for these kinds of relationships are generally central to identity formation and are often characterised by sex occurring between the parties to the relationship.<sup>67</sup>

When it comes to deceptions that could lead to pregnancy or HIV transmission, identity nonrecognition can explain why these should count even though HIV is now (in some parts of the world) highly treatable and pregnancies, even when unplanned, may sometimes come to be welcomed. When HIV is easily treated it constitutes a minor physical burden and so physical harm cannot be said to provide the only, or even main, explanation for why this deception counts. Unlike other sexually transmitted infections (except perhaps for genital herpes),<sup>68</sup> living with HIV – which is chronic albeit treatable – is now acknowledged to entail deep and multi-faceted identity shifts. This is the case even aside from the stigma that, unfortunately, still exists around the illness.<sup>69</sup> Similarly, the wide, and now explicit, acknowledgement that parenting entails a fundamental shift in identity<sup>70</sup> can help explain why deceiving another about the use of condoms or the withdrawal method, or indeed any other factor pertaining to fertility, is wrong – it is a failure to respect the interest people have in deciding whether to acquire the identity of ‘parent’. For those who can become pregnant there is the additional prospect of termination, the experience of which is known to be connected to identity-formation.<sup>71</sup>

Hints of this perspective are present in empirical studies that have investigated women’s attitudes towards non-consensual condom removal (NCCR). In one Canadian study, lack of respect was amongst the reasons respondents gave when asked to explain why NCCR is wrong, alongside the reasons that sex with and without a condom are different acts and that the latter may lead to unplanned outcomes.<sup>72</sup> Similarly, an earlier US study showed that NCCR felt to those who had experienced it like a violation of trust and autonomy. In addition to pointing out that they had not agreed to unprotected sex and that unprotected sex carried a higher risk of undesired physical consequences, ie STIs and pregnancy, the women’s responses indicated they had suffered dignitary harm, with one woman describing the message she received this way: ‘[y]ou are not worthy of my consideration’.<sup>73</sup> The women who reported these feelings, especially in the more recent Canadian study, often characterised their experience as rape or sexual assault, though sometimes they preferred to describe it as ‘abuse’, ‘akin to sexual assault’ or ‘comparable to rape’.<sup>74</sup> It is striking that men who are subject to the same behaviour during same-sex intercourse, a practice whose colloquial name ‘stealth breeding’

<sup>67</sup>LK Soulsby and KM Bennett ‘When two become one: exploring identity in marriage and cohabitation’ (2017) 38(3) *Journal of Family Issues* 358. In contrast, for some men who have sex with men dating apps appear to provide a foundation for identity-construction insofar as they afford men greater control over the casual sexual encounters they seek: R Jaspal ‘Gay men’s construction and management of identity on Grindr’ (2017) 21(1) *Sexuality and Culture* 187.

<sup>68</sup>A Merin and JE Pachankis ‘The psychological impact of genital herpes stigma’ (2011) 16(1) *Journal of Health Psychology* 80.

<sup>69</sup>LM Baumgartner ‘The incorporation of the HIV/AIDS identity into the self over time’ (2007) 17(7) *Qualitative Health Research* 919; LM Baumgartner and KN David ‘Accepting being poz: the incorporation of the HIV identity into the Self’ (2009) 19(12) *Qualitative Health Research* 1730.

<sup>70</sup>T Lott ‘Becoming a parent is the greatest identity change we go through’, <https://www.theguardian.com/lifeandstyle/2016/apr/29/becoming-a-parent-is-the-greatest-identity-change-we-go-through>.

<sup>71</sup>KR Smith *Experiencing Abortion: A Phenomenological Investigation* PhD dissertation, University of Tennessee (1998), [https://trace.tennessee.edu/utk\\_graddiss/2514/](https://trace.tennessee.edu/utk_graddiss/2514/); SM Beynon-Jones ‘Untroubling abortion: a discourse analysis of women’s accounts’ (2017) 27(2) *Feminism & Psychology* 225.

<sup>72</sup>K Czechowski et al ‘“That’s not what was originally agreed to”: perceptions, outcomes, and legal contextualization of non-consensual condom removal in a Canadian sample’ (2019) 14(7) *PLoS ONE* at 12. It is perhaps significant that the latter two responses, which made up the majority of the answers given, reflect the rationales found in Canadian legal judgments.

<sup>73</sup>A Brodsky ‘“Rape-adjacent”: imagining legal responses to nonconsensual condom removal’ (2017) 32(2) *Columbia Journal of Gender and Law* 183 at 187.

<sup>74</sup>Czechowski et al, above n 72, at 13.

connotes pregnancy even though this is not a possible outcome, characterise the conduct as rape or even ‘worse than rape’.<sup>75</sup>

The difference between men’s and women’s responses could be attributable to many factors, and these would be worth investigating. For present purposes, there are only two relevant points to draw out from the preceding discussion. The first is that in addition to the physical consequences that attach to unprotected sex, the lack of respect for autonomous decision-making, denial of dignity, and lack of regard entailed in these kinds of deceptive sex are experienced as significant wrongs and harms. Furthermore, the consequences that might occur cannot be described solely in terms of physical detriment in light of the treatability of HIV and the fact that contraceptive or fertility deceptions might be perpetrated by women.<sup>76</sup> Identity nonrecognition provides a substantive explanation as to why these particular examples of autonomy denial and non-physical consequences matter so deeply: they go to the heart of our identity construction. That the people who are subject to these kinds of deceptions describe their experience as rape or sexual assault is significant, too, and bolsters the suggestion that classifying the instances of deceptive sex that share these wrong-making and harm-causing features as a sex offence might be appropriate. Relying on identity nonrecognition as a way of identifying which instances of deceptive sex have these features has the further advantage of providing a substantive and unifying foundation for this area of law – it can explain the significance of impersonations and gender deception in a way that focusing solely on the nature of the act cannot.

Of course, there may be countervailing reasons which suggest that criminalising deceptions that entail the risk of HIV transmission or parenthood is not desirable. These might include the detrimental impact of criminalisation on public health goals<sup>77</sup> and the disproportionately burdensome impact of criminalisation on vulnerable women.<sup>78</sup> These are amongst no doubt many important concerns that would need to be factored into an exhaustive discussion of the merits of criminalising these kinds of deceptive sex, a discussion that is beyond the scope of this paper. Nevertheless, identity nonrecognition might play a role in these fuller discussions by providing different reasons against criminalising, or in some cases prosecuting, deceptive sex, with respect to both the categories of deception I have just suggested should count and other kinds of deceptions that look, at first glance, as if they should.

#### 4. Amending the categories of deception

There are two bases on which identity nonrecognition might provide reasons against the criminalisation or prosecution of deceptive sex. The first basis is that the deception is not, generally speaking, sufficiently connected to the identity construction, via sex, of the deceived person or to their identity construction more generally to constitute a relevant instance of identity nonrecognition in the absence of express conditional consent. This would suggest that the deception, examples of which will be discussed shortly, should not appear on the list of deceptions that count. The second basis is that deceptive conduct which is an example of identity nonrecognition might itself be a response to the defendant’s own experience of identity nonrecognition. In these cases, the defendant’s experience of identity nonrecognition might be a factor that undermines the case for criminal prosecution, at least when the state is responsible for creating, or compounding, this recognition deficit.

To take the second basis first, Gustavo Beade has recently argued that states lose their moral standing to blame members of disadvantaged groups who commit particular kinds of crime when the state

<sup>75</sup>J Brennan ‘Stealth breeding: barebacking without consent’ (2017) 8(4) *Psychology and Sexuality* 318. One of the participants in the study speaks of ‘knocking up young guys’ (at 322).

<sup>76</sup>Amanda Clough points out that the only risk involved in deception as to use of the contraceptive pill is pregnancy and wonders whether this, when it results in conception, ought to be considered reproduction (rather than sex) without consent: ‘Conditional consent and purposeful deception’ (2018) 82(2) *Journal of Criminal Law* 178. The same could be said about the withdrawal method, although the burdens of reproduction differ for men and women.

<sup>77</sup>P O’Byrne et al ‘HIV criminal prosecutions and public health: an examination of the empirical research’ (2013) 39(2) *Medical Humanities* 85.

<sup>78</sup>Brodsky, above n 73, at 193.

is itself responsible, through its acts or omissions, for creating the conditions under which the group is disadvantaged. Using the example of homeless squatters, he argues that there are two conditions on which this loss of standing to blame depends. The first condition is the state's complicity in the crime – its partial responsibility for the behaviour of the offender (here, by failing to provide adequate housing). The second condition is the state's hypocrisy – the symmetry between the offender's behaviour and the state's failure (here, demanding that property rights be respected on the basis of a formal equality that excludes socio-economic realities).<sup>79</sup>

In the context of deceptive sex, similar arguments about the state's loss of standing to blame might apply.<sup>80</sup> When the defendant's deceptive conduct can be explained by reference to the disadvantage they face and the state is partially responsible for generating that disadvantage the first condition would be satisfied. The second condition would be satisfied when the defendant's offending conduct took place on the same 'plane' as the state's failures. Conceptualising one of the wrongs of deceptive sex as identity nonrecognition suggests that some instances of deceptive sex would satisfy both of these conditions. For example, the gender fraud prosecutions that have been levelled at trans, lesbian and genderqueer defendants have been criticised in light of the fact that gender nonconforming people and sexual minorities are already disadvantaged by multiple, structural vulnerabilities and inequalities.<sup>81</sup> But the discrimination and subjugation experienced by these groups could equally be described as instances of identity nonrecognition on the part of the state;<sup>82</sup> in other words, defendants belonging to these groups could be said to have suffered identity nonrecognition through the state's (in)activity. Since deceptive sex can, on the account offered here, also be said to involve identity nonrecognition, the defendant's offending conduct and the state's failures can be seen as taking place on the same plane: they are both examples of identity nonrecognition. Furthermore, assuming that the defendant's offending conduct can be described as deceptive,<sup>83</sup> it is plausible to characterise the deception as, in some cases, a method of stigma management.<sup>84</sup> Put differently, the continued existence of stigma towards members of the relevant group might partially, or wholly, explain the offending conduct. Where the continued existence of this stigma is perpetuated by the state, this fact would eradicate the state's standing to blame.

The same could be said of defendants who are members of disenfranchised nationalities and have deceived their sexual partners about their nationality,<sup>85</sup> and perhaps other members of groups whose marginalisation is generated, or exacerbated, by state institutions. Importantly, the dialogic nature of identity formation provides a compelling reason to attend to the recognition claims on both sides of the 'victim'–'perpetrator' dyad, the result of which might be that prosecution is deemed inappropriate, even if the category of deception counts.<sup>86</sup> In contrast, there would be no such reason counting against prosecution where the defendant's deceptive conduct cannot be described as a response to a recognition deficit. One reason the defendant might have suffered no recognition deficit is that they are not

<sup>79</sup>GA Beade 'Who can blame whom? Moral standing to blame and punish deprived citizens' (2019) 13(2) *Criminal Law and Philosophy* 271.

<sup>80</sup>If, as considered in the penultimate section, a civil action were available to the deceived party this loss of standing argument would not be likely to apply.

<sup>81</sup>M Travis 'The vulnerability of heterosexuality: consent, gender deception and embodiment' (2019) 28(3) *Social & Legal Studies* 303; Cowan, above n 65.

<sup>82</sup>Claims of identity nonrecognition can exist alongside claims about (and critiques of) materialist inequality: see S Hines *Gender Diversity, Recognition and Citizenship: Towards a Politics of Difference* (Basingstoke: Palgrave MacMillan, 2013).

<sup>83</sup>It is worth repeating that I am sceptical about this claim in the case of transgender defendants.

<sup>84</sup>For discussion of the complex relationships between discourses of 'passing' and deception, see TJ Billard "'Passing" and the politics of deception: transgender bodies, cisgender aesthetics, and the policing of conspicuous marginal identities' in T Docan-Morgan (ed) *The Palgrave Handbook of Deceptive Communication* (Cham: Springer International Publishing, 2019) p 463.

<sup>85</sup>A Gross 'Rape by deception and the policing of gender and nationality borders' (2015) 24 *Tulane Journal of Law & Sexuality* 1.

<sup>86</sup>Not prosecuting rather than mitigating punishment seems to be the appropriate response here, since prosecuting is a form of blaming: L Campbell 'Criminal labels, the European Convention on Human Rights and the presumption of innocence' (2013) 76(4) *MLR* 681 at 688.

engaging in genuine identity expression when they act deceptively, such as in the case of *R v Monica*, where a police officer had three long-term sexual and romantic relationships whilst undercover, or gender fraud cases that do not involve transgender defendants. Alternatively, the defendant might have suffered no recognition deficit because their deception does not relate to a feature of their identity that others, including the state, can fail to recognise in the relevant sense.<sup>87</sup>

In thinking about how identity nonrecognition can help identify deceptions that should not count in the first place, a useful starting point is the list of issues about which ‘intimates’ (which includes people in, or attempting to enter, sexual or romantic relationships) tend to be deceptive and therefore are most likely to form the basis of an argument that the deceptive conduct ought to constitute a sex offence. These include fidelity, biological parenthood, use of birth control, fertility, desire for children, sexual orientation, marital history, marital status, health, addictions, finances, professional or educational achievements, criminal record/behaviour, age, religion, racial background, whole life history,<sup>88</sup> appearance (including height, weight, etc), political affiliation, and whether one has a child.<sup>89</sup>

I have already considered imposters, contraception and fertility and suggested that, in principle, they should count (though, as per the discussion in the previous section, this would not include all imposters). According to my analysis, a number of deceptions just listed should not count, though. For example, it is difficult to see – at least in the case of less serious crimes – how, generally speaking, the criminal record of one’s sexual partner bears on one’s identity construction (which is not to deny that criminal conviction impacts on the identity of the convicted person).<sup>90</sup> Similarly, the appearance or educational achievements of one’s sexual partner do not seem generally to be relevant to identity construction in anything other than a superficial sense. Some older research suggests that women constructed their class identity (social status) around their husband’s ‘objective class’, ie his occupation, education, and income, but we cannot assume that this remains true.<sup>91</sup>

In any case, although long-term relationships are generally central to identity construction, their significance is separable from the significance that sex, and its direct consequences, has in this regard both within relationships and outside them. Although distinguishing between sex and relationships (or their possibility) in this way might seem counter-intuitive, given the common association between the two, research shows that in the context of late modernity such a divide does exist.<sup>92</sup> Given this, in my view deceptions that bear primarily on either the likelihood or quality (if they do eventualise) of intimate relationships should not be added to the list of deceptions that will count.<sup>93</sup> This is in deference to the idea that crimes ought to reflect the wrong that they entail, where possible.<sup>94</sup> The situation is different where the subject matter of any of these deceptions is unambiguously central to the deceived person’s decision to have sex, ie when there is express conditional consent. As I have explained, in these circumstances the deceptive sex is clearly an instance of identity nonrecognition that relates directly to sexual autonomy and should therefore in principle (subject to a full consideration of countervailing concerns, such as privacy) constitute a sex offence.

<sup>87</sup>Eg age. Failure to acknowledge one’s preferred age would not count as identity nonrecognition, since age is not (yet?) in any sense self-determined (<https://www.bbc.co.uk/news/world-europe-46425774>). For a tragic example of the significance that a mismatch between imputed and lived or self-identified age can hold, see <https://openjusticecourtprotection.org/2020/07/13/hunger-striking-for-his-identity-autonomy-capacity-and-justice/>.

<sup>88</sup>Hasday, above n 18, p 11.

<sup>89</sup>A Schmitz et al ‘Do women pick up lies before men? The association between gender, deception patterns, and detection modes in online dating’ (2013) 3(3) *Online Journal of Communication and Media Technologies* 52.

<sup>90</sup>L Fiftal Alarid and OL Vega ‘Identity construction, self perceptions, and criminal behavior of incarcerated women’ (2010) 31(8) *Deviant Behavior* 704.

<sup>91</sup>J Baxter ‘Is husband’s class enough? Class location and class identity in the United States, Sweden, Norway, and Australia’ (1994) 59(2) *American Sociological Review* 220.

<sup>92</sup>Giddens, above n 11, pp 95–96; MacKinnon and Heise, above n 37, pp 79, 81.

<sup>93</sup>I briefly discuss their potential legal salience in the next section, however.

<sup>94</sup>See J Chalmers and F Leverick ‘Fair labelling in criminal law’ (2008) 71(2) *MLR* 217.

With this in mind, it seems that deceptions about religious or political views should not count either.<sup>95</sup> There may be a link between the religious or political views of one's sexual partner and one's identity, but the connection seems primarily to rest on the importance of concurring religious or political views to long-term relationships. For religious communities, interfaith marriage appears to be the primary concern and in some parts of the world attitudes towards this are gradually relaxing.<sup>96</sup> Furthermore, in *Monica* the complainant described her belief that the defendant, the undercover police officer, shared her core political (environmentalist) beliefs as central to her decision to enter a *relationship* with him.<sup>97</sup> If the pretended religious or political belief is of a kind that involves the prohibition of sex with those from outside that group, however, the case for any deception pertaining to this belief being included on the list of deceptions that count would be stronger.

Deceptions as to age do not generally seem to engage the identity construction of the person deceived unless there is an identity-changing consequence to having sex with the deceiver, such as being convicted of a sex offence.<sup>98</sup> Similarly, it is not obvious that having sex or even a relationship with a person who has been deceptive about their race, nationality or ethnicity would constitute a failure to respect the identity of the person who is deceived. Someone with strong racist or xenophobic views might consider their identity to comprise not having sex with someone of a particular race, nationality or ethnicity but in the context of drawing objective lines about deceptions that should count in law it seems problematic to countenance such perspectives.<sup>99</sup>

Since the role of 'parent' is usually considered to be important to identity construction and the desire to have a child is connected to parenthood, deceiving another about one's intentions in this regard might be considered a form of identity nonrecognition. It seems clear, however, that the potential parenthood is more remote in this kind of case than in cases where contraception or fertility is the subject of the deception. The acquisition of the identity of parent is better described as a future prospect and the intention to have a child is arguably primarily relevant to the viability of a long-term intimate relationship. In accordance with the reasons offered above, the case for this kind of deception belonging on the list of those that count is therefore, in my view, weak. The same could be said for deceiving another about having children but here the connection between the deception and identity formation is even more tenuous, as there might not be any obligation to take on parenting duties even if a long-term relationship were to materialise. With caution, something similar could be suggested about deceptions that relate to the health (assuming the illness is not chronic and sexually communicable) or addictions of a sexual partner, where these would give rise to caring responsibilities. Research shows that those with such responsibilities sometimes shiftily adopt and identify with the role and label of caregiver or carer, yet those who are expected to assume the caring role (usually spouses) are less inclined to do so.<sup>100</sup> This suggests that becoming a carer for one's sexual partner is most likely to arise within the context of a long-term relationship but also that the materialisation of caring responsibilities in this context does not necessarily entail the acquisition of a new identity.

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<sup>95</sup>In the different context of Hong Kong and Taiwan, 'deceptions' as to supernatural ability have underpinned prosecutions for procuring sex by deception and rape, respectively: J Chen 'Lying about god (and love) to get laid: the case study of criminalizing sex under religious false pretense in Hong Kong' (2018) 51(3) *Cornell International Law Journal* 553; J Chen 'Joyous Buddha, Holy Father, and Dragon God desiring sex: a case study of rape by religious fraud in Taiwan' (2018) 13(2) *National Taiwan University Law Review* 183.

<sup>96</sup>N Schaefer Riley *'Til Faith Do Us Part: The Rise of Interfaith Marriage and the Future of American Religion, Family, and Society* (New York: Oxford University Press, 2013); J Van Niekerk and M Verkuyten 'Interfaith marriages in Muslim majority countries: a multilevel approach' (2018) 28(4) *The International Journal for the Psychology of Religion* 257.

<sup>97</sup>*Monica*, above n 17, para 3.

<sup>98</sup>If this kind of deception counted this would have the effect that an underage child who lied about or failed to disclose their age could be liable for a sex offence. As with incest laws that render both parties liable to prosecution, however, it would be possible not to prosecute the child.

<sup>99</sup>On the disappearance of annulment actions based on deception as to racial background in post-civil rights era America, see Hasday, n above 18, pp 117–124.

<sup>100</sup>N Hughes et al 'Personal identity and the role of "carer" among relatives and friends of people with multiple sclerosis' (2013) 96 *Social Science & Medicine* 78.



The sexual orientation of one's partner, as opposed to their gender, appears primarily to matter because of its association with the formation of a long-term relationships, too. On its own terms, deception as to sexual orientation does not seem to bear on the identity construction of the person deceived because the sexual orientation – the sexual identity – of the person deceived would likely remain stable (insofar as sexual orientation is stable) in the wake of the deception. On the other hand, this kind of deception might make a difference to the likelihood of an intimate relationship materialising if the deceiver's sexual orientation makes it unlikely that they would enter into this kind of relationship with the deceived person. The key point is that it would be deception as to the likelihood of a relationship, rather than deception about sexual orientation per se, that would matter in identity-constructing terms (on the basis that long-term romantic relationships are generally important to identity).<sup>101</sup> For the reasons already explored, on the basis of the account offered here this kind of deception should not count. The same reasoning would also seem to rule out deceptions as to the marital status (or marital history) of one's partner, insofar as they impact upon the likelihood of a subsequent long-term relationship, and being manoeuvred into potentially incorporating into one's identity the role of the 'other woman (or man)'.<sup>102</sup> Whilst these deceptions might preclude a future relationship, such a relationship would not necessarily follow from a discrete sexual act even in the absence of this kind of deception. Furthermore, allowing a 'sham' relationship based on a deception of this kind to develop might rightly be described as an example of identity nonrecognition but the distinction that exists between sex and relationships under modern conditions suggests that it would be appropriate to consider this a discrete wrong.

Finally, undisclosed infidelity might have a devastating impact on the identity of the person deceived when it is discovered. As one description of learning about an extra-marital affair puts it: '[i]n that same instant, I lost my own identity as well as the identity of my wife'.<sup>103</sup> This raises the question of whether it is the alteration and possible total breakdown of the significant relationship that leads to this experience of lost identity or something else about the discovery of sexual and/or emotional infidelities of the kinds that are typically dubbed affairs. If it is the former, then arguably any deception that results in the breakdown of a long-term relationship would have this effect; this reflects the fact that long-term relationships, of all kinds, are generally important for identity construction. In keeping with the distinction that can be drawn between sex and relationships, however, even if these deceptions could be considered examples of identity nonrecognition (insofar as they fail to respect the importance of long-term relationships to identity formation), this would not, on its own, mean that the deception should generally invalidate consent to sex (or otherwise constitute a sex offence). On the other hand, if there is something specific about fidelity within relationships that is significant to the parties to the relationship, in an identity-constructing sense, then the case for adding infidelity to the list of deceptions that count would be stronger.

The emergence of the idea of 'relational orientation' – a phrase used to describe a facet of one's identity which pertains to the kinds of intimate relationships in which one participates – suggests that the terms of one's intimate relationships could be considered significant in precisely this sense.<sup>104</sup> Crucially, even where these terms permit sex and/or emotional intimacy 'outside' the still-dominant model of monogamy, openness and honesty about the occurrence and particularities of

<sup>101</sup>In India, deception based on a promise to marry has been held to invalidate consent to sex: A Garg 'Consent, conjugality and crime: hegemonic constructions of rape laws in India' (2019) 28(6) *Social & Legal Studies* 737. The conviction in Israel of Sabbar Kashur of rape involved a married Arab man presenting himself as a Jewish bachelor who was interested in a significant, romantic relationship: see Pundik, above n 5, at 99.

<sup>102</sup>MD White 'Adultery: what about the other woman (or man)?', <https://www.psychologytoday.com/us/blog/maybe-its-just-me/201004/adultery-what-about-the-other-woman-or-man>.

<sup>103</sup>R Alan *First Aid for the Betrayed* (Victoria: Trafford Publishing, 2006) p 19.

<sup>104</sup>AK Stephens and TM Emmers-Sommer 'Adults' identities, attitudes, and orientations concerning consensual non-monogamy' (2020) 17 *Sexuality Research and Social Policy* 469; M Robinson 'Polyamory and monogamy as strategic identities' (2013) 13(1) *Journal of Bisexuality* 21.

these ‘outside’ interactions is typically expected.<sup>105</sup> Infidelity is not, therefore, a form of deceptive conduct that is confined to monogamous sexual relationships, let alone marriages. The challenge of knowing the precise boundaries of what would be considered infidelity across this diverse range of relationships, even to the parties concerned who might still be working this out,<sup>106</sup> might render the possibility of this deception counting both unworkable and undesirable, however. Privacy and other concerns, like the extent to which infidelity is practised,<sup>107</sup> would tend to add weight to this conclusion.

## 5. Identity nonrecognition and legal responses

The example of infidelity and, even more clearly, the other examples that involve identity nonrecognition but where the wrong and possible harm are in my view best described as pertaining to the possibility or quality of an intimate relationship, suggest that the concept of identity nonrecognition has salience outside the realm of sex offences. Within this realm, however, what I have argued is that in the context of ‘equal’ parties who both know they are engaging in sexual activity for sexual purposes, deceptive sex should only constitute a sex offence when the links between deception, the identity of the deceived person, and the sexual conduct seem closest. This is in accordance with the view, advanced in this paper, that the unifying (but not the only) wrong of deceptive sex in these contexts is failing to respect the way we construct our identities through sex and its most direct consequences. As I argued in sections 1 and 2, this wrong does not require that the defendant knew that the deception would matter to the complainant or subjective recklessness with respect to this. Indeed, it does not require that the deception actually matter to the complainant. It seems fair, however, that there should be no criminal liability if the defendant reasonably believed either that the complainant knew of the relevant matter or that it would not be important to them. Based on the account developed in this paper, this stipulation would more appropriately be expressed as a defence rather than as an aspect of the offence.<sup>108</sup> As Nicola Lacey has argued, a negligence-based fault standard supplemented by a ‘no-negligence’ defence best captures the mutual responsibility that respecting sexual integrity entails while at the same time recognising the asymmetry of potential harm that exists when mistakes about willingness to engage in sex arise.<sup>109</sup> Admittedly, this re-introduces the possibility that regressive attitudes towards gender and seduction will shape the outcome in specific cases, but this is attenuated by the fact that the onus is on the defendant to explain their beliefs.<sup>110</sup>

Although the analysis offered here proceeds on the basis that the qualifying instances of deceptive sex ought to constitute a sex offence, those who advocate treating deceptive sex as a kind of fraud<sup>111</sup> might find the analysis useful in distinguishing between deceptions that should be considered material

<sup>105</sup>M Barker ‘This is my partner, and this is my... partner’s partner: constructing a polyamorous identity in a monogamous world’ (2005) 18(1) *Journal of Constructivist Psychology* 75.

<sup>106</sup>Stephens and Emmers-Sommer, above n 104, at 473.

<sup>107</sup>It is notoriously difficult to ascertain the prevalence of infidelity but for one discussion of the phenomenon in the context of contemporary relationship expectations, see E Perel *The State of Affairs: Rethinking Infidelity* (New York: Harper Collins, 2018).

<sup>108</sup>In contrast, under the Sexual Offences (Scotland) Act 2009 the prosecution has to prove a lack of reasonable belief in consent even where one of the circumstances that indicate there is no consent pertains (which includes deceptions that go to the nature or purpose of the act and impersonating someone known personally to the complainer) (cf *GW v HM Advocate* [2019] HCJAC 23). Under the Sexual Offences Act 2003, where either of the deceptions specified in the Act (which correspond with the two listed in the 2009 Act) occur, it is conclusively presumed that the complainant did not consent *and* that the defendant did not believe that the complainant consented.

<sup>109</sup>Lacey, above n 6, at 66.

<sup>110</sup>I do not here suggest what kind of onus this should be but note that in some jurisdictions, such as Canada, a similar defence imposes an evidentiary burden on the defendant: K Barranco ‘Canadian sexual assault laws: a model for affirmative consent on college campuses’ (2016) 24(3) *Michigan State International Law Review* 801 at 816.

<sup>111</sup>As suggested by SF Colb ‘The Jerusalem ‘rape by deception’ case: can a lie transform consensual sex into rape?’, <https://supreme.findlaw.com/legal-commentary/the-jerusalem-rape-by-deception-case-can-a-lie-transform-consensual-sex-into-rape.html>. In Scotland, at least one instance of ‘gender fraud’ has been charged as ‘obtaining sexual intimacy by fraud’

from those that should not. Indeed, even those who suggest that deceptive sex should be a sex offence but do not believe it should be described as rape or sexual assault might benefit from the analysis offered here, assuming that they accept the need to formulate an objective basis on which to distinguish between deceptions.<sup>112</sup> Finally, deceptive sex might be dealt with through civil remedies as well as, or instead of, criminal punishment.<sup>113</sup> One proponent of imposing civil liability for deceptive sex has argued that the tort of sexual battery should encompass deceiving or failing to disclose a ‘material fact’ that would be important to the plaintiff in deciding whether to have sex. She suggests that societal expectations, as reflected by the jury, should determine both when consent to sex is invalidated and the parameters of constructive intent.<sup>114</sup> Whatever the shape of the civil wrong, the analysis here could prove useful insofar as it would provide a substantive basis for determining when consent should be invalidated or, in the case of fraud, when a deception should be considered material and, as outlined in this section, a different approach to culpability. It would also help avoid the problems of unpredictability and reliance on regressive gender norms to which jury and judicial discretion can give rise.

Beyond this, it is possible that the other examples of deceptions that constitute identity nonrecognition discussed in this paper – those that relate more closely to relationships – could help shape legal responses to this kind of conduct, too. For example, fraud is typically considered to be a crime that involves economic loss or gain<sup>115</sup> and in the intimate realm even this kind of deception has tended to be ignored by courts (including when it is compounded by deception as to the sincerity of the relationship).<sup>116</sup> This speaks – on two levels – to the inability of the law, as it is currently formulated and widely understood, to recognise the kinds of wrongs and harms that arise within deceptive relationships: if the injury is not financial the law will struggle to recognise it and if the injury occurs within a relationship it is more likely to be overlooked. Taking identity nonrecognition seriously might help make legible one of the wrongs and harms that arises in these contexts.<sup>117</sup> Though there is no space to explore the idea here, identity nonrecognition might also have a role to play in theorising the potential wrongs and harms that arise from interferences with identity more generally, including identity ‘theft’, as it is colloquially described, and so-called catfishing,<sup>118</sup> and in thinking critically about suggestions to respond to these practices using the criminal law.

## Conclusion

As I have aimed to make clear, the need to fix a boundary between the kinds of deceptions that will count and those that will not arises within civil and criminal law and across different legal categories. In this paper, which focuses on deceptive sex, I have offered a contribution towards the process of fixing this boundary that, I believe, leads neither to an arbitrarily narrow nor to an unattractively wide range of qualifying deceptions. The concept of identity nonrecognition I have used in making this contribution has the additional benefit of acknowledging explicitly that the exercise of determining which categories of deception will count is inherently social and political; it is not a matter of applying an

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(*Wilson* (2013, unreported)) and in Israel three cases heard between 1973 and 1998, before defendants began being convicted of rape five years later, were also prosecuted as an offence of this kind: see Pundik, above n 19, at 173.

<sup>112</sup>cf Gibson, above n 8.

<sup>113</sup>For some concerns about duplicative wrongs, see F Stark ‘Tort law, expression and duplicative wrongs’ in P Miller and J Oberdiek (eds) *Civil Wrongs and Justice in Private Law* (Oxford: Oxford University Press, 2020) p 441.

<sup>114</sup>Sacks, above n 18.

<sup>115</sup>Eg Fraud Act 2006, s 5. In Scotland, fraud encompasses any ‘practical result’ obtained through intentional deception: *Whyte (Craig) v HM Advocate* [2017] HCJAC 14.

<sup>116</sup>Hasday, above n 18, pp 140–152.

<sup>117</sup>This would be in addition to the other psychological and emotional harms that are not adequately recognised: C Cross et al ‘Understanding romance fraud: insights from domestic violence research’ (2018) 58(6) *British Journal of Criminology* 1303.

<sup>118</sup>Especially when liability might attach to the unauthorised use of another’s identity, such that the person whose image, name or voice is used is construed as the victim: see the Oklahoma Catfishing Liability Act 2016.

abstract and unarticulated notion of common sense.<sup>119</sup> It would be surprising if everyone constructed their identity through sex and relationships in the same way and what is presented here is merely a culturally-specific set of identities and a set of arguments, informed partly by empirical research and partly by intuition, about which deceptions (among those commonly committed by those seeking intimacy) most directly engage these.

Yet the fact that the wrong of identity nonrecognition depends on prevailing, some might even say hegemonic, attitudes merely brings into relief what is true of the criminal law (and perhaps law of all kinds) more generally: it has a role in expressing and constructing social norms. As Srinivasan points out of sex '[t]here is nothing else so riven with politics and yet so inviolably personal'.<sup>120</sup> Being conscious of this means that we can, and should, interrogate these prevailing attitudes, especially in terms of the way they work to further marginalise already subordinated groups, such as women,<sup>121</sup> gender non-conforming people and other disenfranchised populations.<sup>122</sup> Identity nonrecognition provides a new framework within which these interrogations can be undertaken. Furthermore, through providing a sense of how identity can be compromised by deceptive sex, this paper has sought to show how identity construction is a value worthy of consideration in our ongoing discussions about whether and how the law ought to intervene.

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<sup>119</sup>cf McNally at paras 25–26. On the problems of invoking common sense, see S Rosenfeld *Common Sense: A Political History* (Cambridge, Mass: Harvard University Press, 2011).

<sup>120</sup>A Srinivasan 'Does anyone have the right to sex?' (2018) 40(6) *London Review of Books*, <https://www.lrb.co.uk/v40/n06/amia-srinivasan/does-anyone-have-the-right-to-sex>.

<sup>121</sup>So-called amatory torts that flourished in the nineteenth century, for example, were largely founded on women's financial and social dependency on men: Hasday, above n 18, ch 4; L Leneman 'Seduction in eighteenth and early nineteenth-century Scotland' (1999) 78 *The Scottish Historical Review* 39; S Lettmaier *Broken Engagements: The Action for Breach of Promise of Marriage and the Feminine Ideal, 1800–1940* (Oxford: Oxford University Press, 2010).

<sup>122</sup>The role of families and educational authorities in notifying the police and amplifying the distress of the complainants in 'gender fraud' cases cannot be ignored: Travis, above n 81.