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False Beliefs and Consent to Sex

Mark Dsouza*

When, if ever, do mistaken beliefs render sexual activity non-consensual despite a person's seeming consent? I suggest that existing answers can be improved upon by paying due attention to two things, (1) that valid consent is often given through exercises of sexual autonomy that are, to different extents, unreflective rather than considered; and (2) that a belief can define both the object of consent, and a precondition for it. I propose that where V putatively consents to sexual activity with D, the falseness of a belief that V holds renders the sexual activity non-consensual when it means either that what happened to V fell outside the (consideredly or unreflectively selected) boundaries of the object of V's consent, or that a precondition that V consideredly set for her consent, had not been met.

INTRODUCTION

Do some mistaken beliefs render sexual activity non-consensual despite a person's seeming consent? And if so, which? Most agree that a good answer to these related questions must protect the sexual autonomy that makes consent possible, while generating plausible liability outcomes – convicting those who should be convicted, and acquitting those who should not – when translated into (criminal) law. But finding a good answer has proved difficult. Strongly protecting sexual autonomy appears to generate convictions that are arguably too harsh; presumably we do not want to live under a regime in which every embellished compliment, every padded claim about one's height or wealth, and every understatement of one's age that preceded sexual activity, exposes us to the risk of being convicted of a sexual offence. But in trying to prevent such overly harsh convictions, we undermine the sexual autonomy of people whose exercise of sexual autonomy was predicated on a deception. Such people are left under-protected against sexual assault. Nor, as I explain in a bit more detail below, has any stable middle ground between these extremes emerged.

In this paper, I argue that a good solution to this conundrum is available if we pay due attention to two things: (a) that valid consent is often given through exercises of sexual autonomy that are, to a greater or lesser extent,

*Associate Professor of Law, University College London. I am grateful for the excellent research support provided by Ellen Steiner. My thanks also to Jonathan Herring, Max Kiener, Rachel Tolley, David Emanuel QC, Matt Gibson, Chloë Kennedy, Kevin Toh, John Child, and Emma Milne for the detailed feedback on previous drafts. Drafts of this paper were presented at various seminars, and I thank the attendees for their insightful comments, suggestions and criticisms. In particular, I thank Antony Duff, Sharon Cowan, James Chalmers, and Tanya Palmer for engaging in spirited discussions with me during these seminars. Finally, thanks also to the anonymous reviewers for their feedback and suggestions.

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unreflective rather than considered; and (b) that a belief can define both the object of consent, and a precondition for it.

I argue that whenever V putatively consents to sexual activity with D, she defines the boundaries of the object of her consent. She may also, at that time, set preconditions for her consent to arise. It follows that where V putatively consents to sexual activity with D, the falseness of a belief that V holds renders the sexual activity non-consensual when it means either that what happened to V fell outside the (consideredly or unreflectively selected) boundaries of the object of V's consent, or that a precondition that V consideredly set for her consent, had not been met.

The non-consensual nature of the sexual activity is a necessary condition for holding D criminally liable, but matters like whether D acted with mens rea, or had a defence, are also crucial. Since my focus here is on whether the sexual activity was non-consensual, I venture only incidental comments on D's potential criminal liability.

PREVIOUSLY, ON *FALSE BELIEFS AND PUTATIVE CONSENT*

It is generally accepted that consent is an important variable to consider when determining whether sex is criminally wrong. The standard view is that V's consent to sex negates the actus reus of a criminal offence, whereas D's belief (or in this jurisdiction, reasonable belief) in V's consent negates the mens rea of the offence. Philosophically, consent is explained as an exercise of sexual autonomy – the authority to choose for oneself, whether, and in what circumstances, one will engage in sexual activity. It is argued that V's exercise thereof to grant putative consent is vitiated when she lacked competence, acted under compulsion, or acted under a misapprehension of relevant facts. Here, I focus on the last of these factors. In this necessarily brief survey of how thinking on this issue has hitherto proceeded I outline some of the main lines of argument developed.

Some, like Herring[1] and Dougherty,[2] argue that to truly protect V's sexual autonomy, we must defer to V in her selection of which facts are relevant. This, they say, entails adopting the rule that if at the time of the sexual activity, V was mistaken as to any 'dealbreaker' belief (ie a belief that, if V knew it was false, V would not have consented to sexual activity), then legally, V did not consent to it. Call this the 'Subjective Dealbreakers' view.

Others attempt to enumerate the features, false beliefs as to which will vitiate seeming consent. Such enumerations require us to make a fundamental distinction[3] – usually by reference to objective policy considerations like clarity, coherence, predictability, and practicality[4] – between different features of a sexual encounter. Accordingly, Williams tentatively suggests that only the

1 J. Herring, 'Mistaken Sex' [2005] Crim LR 511, 517.
2 T. Dougherty, 'Sex, Lies, and Consent' (2013) 123 *Ethics* 717, 719, 736-737.
3 *ibid*, 728.
4 See for instance R. Williams, 'Deception, mistake and vitiation of the victim's consent' (2008) 124 LQR 132, 158.

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following narrow set of mistakes regarding 'Objective Dealbreakers' should vitiate putative consent: '*non est facem*' mistakes (where V is mistaken about the nature of the activity to which she agrees), physical difference mistakes (where V is mistaken either about the 'whole identity' of the person to whom she putatively consents, or the physical features of the activity to which she agrees), and 'legal qualification' mistakes (mistakes as to a legal status, such as marriage).[5]

Wertheimer[6] and Kennedy[7] also work within the Objective Dealbreakers paradigm, but focus only on whether deceptions (a subset of false beliefs that necessarily involves D wronging V) vitiate consent. Even so, both support a larger set of Objective Dealbreakers than Williams, albeit at the cost of some certainty. Wertheimer provides no closed list, but suggests that we identify Objective Dealbreakers by reference to 'the seriousness of deception [which] depend[s] upon a range of empirical and moral considerations, including the intensity of the distress to which various forms of deception typically give rise and the value we place on the more abstract autonomy-based right to control the use of one's sexuality.'[8] Kennedy focuses on D's conduct rather than the effects on V, arguing that V's putative consent should be vitiated when D's deception (in which category, she also includes certain critical non-disclosures) also constitutes the wrong of identity nonrecognition. That wrong occurs when D deceives V as to something that V 'has expressly stated … matters deeply to their decision to have sex, as [V does] when [giving] explicit conditional consent', or as to 'roles, statuses and group memberships that are commonly experienced or described as identities in any given time or place' even in (what she says is) the unlikely event that V does not herself care about D's deception.[9] Both then, refer to evaluative criteria to identify Objective Dealbreakers that vitiate consent.

Although proponents of Objective Dealbreakers approaches generally agree that sexual autonomy is important, their models relegate it to the secondary role of justifying their selections of dealbreakers.

Rubenfeld holds the diametrically opposite view that since principled line drawing on the issue of which deceptions (which again, is a subset of false beliefs) should vitiate putative consent seems impossible, they should never vitiate seeming consent to sex. For him, the wrong in deceptive sex is not of the sort that is properly called rape. Only sex in which D violates V's right to self-possession by 'taking possession' of V's body, as one would when enslaving or torturing, should constitute rape.[10]

The judiciary has generally favoured the Objective Dealbreakers approach.[11] Without foreclosing the possibility of other false beliefs vitiating consent,[12]

5 *ibid*, 157-158.
6 A. Wertheimer, *Consent to Sexual Relations* (Cambridge: Cambridge University Press, 2003).
7 C. Kennedy, 'Criminalising deceptive sex: sex, identity and recognition' (2020) LS 1.
8 Wertheimer, n 6 above, 209.
9 Kennedy, n 7 above, 5-9.
10 J. Rubenfeld, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2013) 122 Yale LJ 1372, 1425-1427.
11 See *R (Monica)* v *DPP* [2018] EWHC 3508 (Admin) (*Monica*) at [34]-[37] where even a qualified version of the idea that V gets to choose her dealbreakers was rejected.
12 *Assange* v *Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) (*Assange*).

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statute[13] specifies that V's putative consent to sexual activity is vitiated when D deceives V as to the nature of the activity, or D's purpose in relation to it,[14] or obtains V's putative consent by impersonating someone known personally to V. The CA(CD) has recently ruled that these apart, only deceptions or mistakes about matters closely connected to the nature or purpose of the activity, or to its performance, can vitiate consent.[15] These closely connected matters were said to include D's gender or sex,[16] whether D is using a condom,[17] and whether D proposes to ejaculate inside V.[18] This list is slightly longer than Williams' list, partly because the court did not want to doubt existing precedent, and it includes a limited evaluative component which allows for expanding the list of dealbreakers.

While each of these models has its merits, each also has stark demerits. The Subjective Dealbreakers approach offers the most protection to V's sexual autonomy, but seems to spread the net of criminal liability too widely to be plausible or practical.[19] The Objective Dealbreakers models, both theoretical and judicial, criminalise more conservatively. But this limits how much they protect V's sexual autonomy. They identify dealbreakers by reference not to what V considers important to her consent, but to objective (or partly objective) considerations. Such lists of dealbreakers can therefore seem underinclusive[20] or overinclusive,[21] and are criticised as being based on 'an objectionably moralized conception of sex'.[22] At least Rubenfeld's approach cannot be called overinclusive. It sidelines sexual autonomy entirely, for no better reason than that Rubenfeld thinks it impossible to draw a principled line between deceptions that should vitiate putative consent, and those that should not. Given the unpalatable[23] results that this proposal generates, it should, at best, be our last resort.

In a radical critique of these approaches, some theorists challenge the centrality of concept of consent in the law of sexual offences.[24] Gardner, for instance,

13 Sexual Offences Act 2003, s 76.
14 *R* v *Devonald* [2008] EWCA Crim 527, *R* v *Matt* [2015] EWCA Crim 162 (*Devonald*).
15 *R* v *Lawrance* [2020] EWCA Crim 971 (*Lawrance*) at [35].
16 *R* v *McNally* [2014] QB 593 (*McNally*).
17 *Assange* n 12 above.
18 *R(F)* v *DPP* [2013] EWHC 945 (Admin) (*R(F)*).
19 Williams, n 4 above, 133, 149-150; Kennedy, n 7 above, 3.
20 Because, where a matter that is vitally important to V is not on the list (however drawn up) of objective dealbreakers, D's deception as to it seems not to matter. Kennedy, n 7 above, attempts to correct for this by allowing V to stipulate a dealbreaker by stating an explicit condition for her consent. But this solution falls short – one cannot expect people to recite the complete list of (even just the idiosyncratic) matters that are especially important to their decision to agree to sex each time they contemplate sexual activity.
21 Even where something is not a dealbreaker for V, these views insist that V's consent is nevertheless vitiated. The clearest example is Kennedy, n 7 above, 5 who writes: 'it would not matter (for the purposes of establishing liability) whether the deception mattered to the particular complainant', unless the defendant reasonably believed this was the case.
22 Dougherty, n 2 above, 730.
23 Kennedy, n 7 above, 3-4.
24 See for instance, C.A. MacKinnon, 'Rape Redefined' (2016) 10 *Harvard Law & Policy Review* 431, 450, 476; T. Palmer, 'Distinguishing Sex from Sexual Violation: Consent, Negotiation and Freedom to Negotiate' in A. Reed and others (eds), *Consent: Domestic and Comparative Perspectives* (Abingdon: Routledge, 2017) 13; and J. Gardner, 'The Opposite of Rape' (2018) 38 OJLS 48, 60.

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has built on previous work in which he and Shute argued that the central wrong-making feature of rape is not so much the absence of consent, as it is dehumanisation,[25] to make the intuitively appealing argument that the central feature in good sex is not so much consent, as it is consensus. Good sex, he says, is not done by one person to another; it is done together – an act of 'teamwork' in which the players' *consensus* makes their consent irrelevant. But if consent is not a necessary feature of either the worst or the best instances of sex, then perhaps our focus on consent in relation to sex is misplaced entirely. Perhaps, instead of searching for principle in the way in which consent-granting exercises of autonomy are undermined by mistaken beliefs, we should be looking elsewhere – at how people ought ideally to treat each other when negotiating sexual relations. On this view, it is irrelevant whether V's purported consent was undermined – we should instead focus on whether D behaved appropriately.

But this development of the radical critique does not imply that consent is irrelevant to the criminal law. Even if we agree that good sex is 'teamwork' done together, rather than by one party to another, all sexual intercourse inevitably involves *some* things done to others – some touching of the other will be involved.[26] For these not to be problematic, consent must have been given to them, even if neither party dwelt upon them. So even teamwork sex must involve some consent. Moreover, even if the line between non-criminal and criminal sexual activity can be drawn without reference to consent, non-consensual sexual activity may be especially, or at least distinctly, bad as compared to other criminalised sexual acts. The organisation of the Sexual Offences Act 2003 (SOA 2003) supports that hypothesis. The 'main' offences, from sections 1–4 are the only offences in which V's non-consent to participating in sexual activity is an element.[27] The SOA 2003 criminalises other sexual acts, including those to which V consents, because other factors taint them.[28] If there is something distinctively bad about non-consensual sexual activity, then it is appropriate to separately criminalise such activity. Consent therefore continues to be relevant to the criminal law of sexual offences.

Accordingly, the central questions for this paper, *viz* whether, and when, the falseness of beliefs that V held when permitting sexual activity make the sexual activity non-consensual, remain relevant. The answers have implications for the application of non-consensual sexual offences. I have sympathy for the view that there are good reasons to criminalise consensual sexual activity that is tainted

25 J. Gardner and S. Shute, 'The Wrongness of Rape' in J. Gardner, *Offences and Defences* (Oxford: OUP, 2007) 1.

26 K. Chadha, 'Sexual Consent and Having Sex Together' (2020) 40 OJLS 619, 629.

27 Consent is mentioned in some other offence-creating sections, but that is either in relation to activity that is not itself sexual (like the administration of an intoxicant under SOA 2003, s 61), or activity in which V does not 'participate' (like the voyeurism offences under ss 67, 67A), or activity which is an offence despite V's consent (like having sex with an adult relative under s 65).

28 For instance, SOA 2003, ss 9-13 criminalise sexual activity with children under the age of 16, *despite* their consent, because engaging in sexual activity with such young persons is exploitative. But note that the consent of children aged 13 or more is recognised: it takes the offending out of the scope of the offences under ss 1-4. A similar analysis can also be applied to various other offences in the SOA 2003, including those in ss 16-19, 25-26, 30-33, 34-37 and 38-41.

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by other factors, including exploitation and deception,[29] but I do not defend that view here.

In sum, although most agree that the protection of sexual autonomy should play a vital role in how non-consensual sexual offences are framed, there remains widespread disagreement about what this means for when a putatively consent-granting exercise thereof is vitiated by a false belief. How do we make progress in the face of this widespread disagreement? Is it even possible to draw up rules that can both protect sexual autonomy, and avoid being overinclusive, uncertain, and impractical?[30] I think the answer to the latter questions is 'Yes'. My suggestion in response to the former question is that we refine the autonomy-focused Subjective Dealbreakers approach by bringing to the fore and combining two often overlooked features of consent. The first relates to the manner in which we give consent, and the second, to how we define the effective scope of our consent.

THE MANNER IN WHICH WE GIVE CONSENT

When you engage in consensual sex, it is possible that you have thought through how you will exercise your sexual autonomy on this occasion by evaluating the pros and cons, and – what I am interested in here – reminding yourself of the beliefs you hold which have led you to the point of consenting to sex. Perhaps you consciously reminded yourself (of your belief) that your prospective partner is single, owns that lovely house, is Muslim, does not have chlamydia, and genuinely loves you. But let's be honest – this considered analysis is not how it usually goes. More often you make, at most, a very attenuated, almost subconscious calculation when engaging in consensual sex – it will either 'just feel right', or not. Such a decision to engage in sex is a deliberate mental act that generates valid consent to sex. The courts have (somewhat inaptly) described the decision-making process involved as 'largely visceral rather than cerebral … ow[ing] more to instinct and emotion rather than to analysis'.[31] Here, I use the terms 'unreflective' and 'considered', instead of 'visceral' and 'cerebral', to capture the same meaning.

To be clear, I am not suggesting that individual grants of consent are either entirely considered, or entirely unreflective. Most are some combination of the two. Nor am I suggesting that purely physiological responses to stimulus, such as getting an erection, or becoming lubricated, suggest (unreflective) consent. Even unreflective consent involves making a choice in relation to the sexual activity. The difference between considered and unreflective consent lies in whether V deliberates about this choice intellectually, or chooses emotionally

29 In particular, I would support the enactment of something like the erstwhile offence of procuring sex by deception under Sexual Offences Act 1956, s 3.

30 See doubts expressed by Williams, n 4 above, 158; Rubenfeld, n 10 above, 1408-1412.

31 Per the CA in *IM* v *LM, AB, and Liverpool City Council* [2014] EWCA Civ 37 at [80], the CA(CD) in *R* v *A(G)* [2014] EWCA Crim 299 at [28], the HL in *R* v *C* [2009] UKHL 42 at [15], and the Law Commission, *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (London: Law Commission, 2000) [4.59].

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and instinctively. But whether granted unreflectively or consideredly, consent is an exercise of sexual autonomy, and autonomy cannot be exercised through uncontrolled physiological responses to stimuli.

Despite the ubiquity of unreflective agreements to sex, both theorists, and in courtrooms, judges, almost always implicitly refer to the paradigm of considered agreements to sex when considering whether the falseness of a belief undermines consent. This is not just a matter of focusing on considered agreements to the detriment of unreflective ones; the possibility of unreflective agreements goes entirely unacknowledged. More concerningly, insights drawn from this sort of analysis are not confined to cases involving considered agreements to sex. In other words, it is assumed that a rule drawn up by reference to the paradigm of considered agreements to sex, applies to all agreements to sex, including the unreflective ones.

If we are careful not to assimilate unreflective agreements to sex into a paradigm based on considered ones, there is a sense in which we can cash out the intuitive plausibility of the notion that 'teamwork' sex makes consent irrelevant. To see this, first examine a considered agreement to have sex:

> SURPRISE: V agrees, despite not being in the mood, to have sex with her long-term partner D because she calculates that doing so would help keep the relationship strong, and make D happy. The ensuing intercourse is good – even unusually good – as D pleasantly surprises V with some 'new moves'.

While V's consent to the sexual intercourse as a whole was considered – V dwelt on the merits and demerits of acquiescing to D's advances – she probably did not dwell on her stance on each individual aspect of the sexual encounter. She did not separately evaluate her attitude to each button undone, each individual touch, every caress, and every kiss. Still, there was consent to these things. Dougherty suggests that consent to these things is implicit in the overall consent.[32] Now, plausibly in consenting to sex, V implicitly consents to things entailed in having sex (ie individual acts strictly necessary for the purpose of intercourse), and to things that V contemplates or expects.[33] But that cannot be the full story. Even people who have been in stable relationships for years may hope that sexual encounters will sometimes go beyond 'playing all the old hits'. We might like some experimentation; the odd bit of surprise is probably healthier for the relationship than monotonous routine. Sometimes, surprise moves will be unwelcome, and prompt objection. But some surprise moves, like those in SURPRISE, will be welcome. If we think that these welcome surprise moves are consensual, we need some explanation of how that might be.

One part of the explanation seems to be that D and V have, over the course of their relationship, created certain conventions, including a 'Surprise me sometimes!' convention, by which each consents in advance to the other surprising

32 Dougherty, n 2 above, 735-736.

33 This seems to be what Dougherty, *ibid*, 735-736 n 40 has in mind.

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them occasionally during subsequent sexual encounters.[34] This consent explains why there is (initial) consent to both welcome and unwelcome surprises.[35]

Once the surprise has been sprung, so to speak, we move onto the next stage. V now has a choice to make – does she welcome the surprise, or not? A lot turns on this choice – if V does not welcome the surprising move, then D acts non-consensually if he persists. But in the heat of the moment, it is exceedingly unlikely that much calculation will go into deciding whether a particular surprise is welcome. Even so, if V welcomes the surprise move at this time, it seems appropriate to think of the surprising act as having been consensual, despite this consent not being implicit in some broader consent. The alternative – thinking of these acts as non-consensual but ratified – would mean that D commits a sexual offence, but V chooses not to complain. Not only does this get the phenomenology wrong by making V sound like the victim of a sexual offence who 'lets the offender get away with it', it also means that D could, in principle, be prosecuted regardless of V's 'ratification', since subsequent ratification cannot undo a prior offence.[36] If the contemporaneous welcoming of an unexpected surprise is consent, then this consent must have been given unreflectively, and without considered deliberation. So in SURPRISE, the considered consent to the overall sexual encounter implies consent to entailed and contemplated acts. Additionally, there is unreflective consent to surprising, but nevertheless welcome, acts.

Genuine teamwork sex differs from the sex in SURPRISE. It involves no considered evaluation of one's attitudes even at the overall level; not only do the parties to teamwork sex not dwell upon their attitudes to surprising moves, they also do not dwell upon their attitudes towards the overall sexual encounter. This does not mean that they do not consent to it – it is just that the consent is unreflective, rather than considered. Perhaps the better way of interpreting the intuition that Gardner pushes is to say that it points to the irrelevance of considered consent in teamwork sex.

HOW WE DEFINE THE EFFECTIVE SCOPE OF CONSENT

To see how this helps us with identifying when false beliefs vitiate seeming consent to sex, recall that we define the effective scope of our consent by identifying the parameters of the object of our consent, setting preconditions for it to arise, or both.

34 My thanks to an anonymous reviewer for pressing me to address the effect of conventions in long-term relationships. For support for the proposition that it is possible to consent in advance, see Wertheimer, n 6 above, 159-160; M. Dsouza, 'Undermining Prima Facie Consent in the Criminal Law' (2014) 33 *Law and Philosophy* 489, 496-497.

35 Though, as I will argue in the text to nn 58-59 below, there are some limits.

36 M. Dsouza, 'The power to consent and the criminal law' UCL Research Paper Series No 4, 2020, 23-24 at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787374 (last visited 11 January 2022).

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Parameters

Say you like a bicycle you've spotted in a shop. The shopkeeper consents to you sitting on it, testing the brakes, and even ringing the bell. But she does not consent to you removing the price tag, or adjusting the saddle height. The shopkeeper can allow or disallow these things because, by virtue of exercising autonomy over the bicycles in her shop, she gets to choose what to permit in relation to them. She gets, that is, to identify the object of her consent. In this case, the object of the shopkeeper's consent is described by reference to parameters like 'You may sit on the bicycle', 'You may test the brakes', 'You cannot remove the price tag', and 'You cannot adjust the saddle height'. And in fact, not only does the shopkeeper *get to* identify the object of her consent, *she must necessarily* do so, because consent requires an object to make sense: one does not consent in the abstract; one can only consent to something.[37]

This is true also for someone exercising their sexual autonomy to consent to sexual activity. The consenter gets to, and indeed must, decide the object of her consent ie what she consents to. She does this by reference to various parameters that describe the bounds of her consent.

Events Subsequent to Sexual Activity

Hurd supports the general idea that V gets to choose the parameters which describe the bounds of her consent,[38] but notes an important objection when discussing what she calls the 'description thesis' *viz*, that V consents to D's actions if and only if those actions match V's mental description thereof. The description thesis maximises the protection of V's sexual autonomy by giving V absolute authority to frame the object of her consent. However, since act descriptions can be 'causally complex', ie specify that certain consequences should flow from the acts intended, adopting the description thesis would entail embracing the implausible position that if V chooses a causally complex act description, subsequent events will dictate the precedent validity of her consent.[39] To avoid this, Hurd rejects the description thesis in favour of what she calls the 'identity thesis': that 'for [V's] consent to insulate [D] from liability, [V] must intend what [D] must intend in order for [D] to be prima facie liable'.[40] This is, in fact, the approach that the SOA 2003 takes. To perform the actus reus of rape, D must intentionally penetrate V's vagina, anus, or mouth with his penis. For V's consent to insulate D against a charge of rape, it must also relate to the penetration of V's vagina, anus, or mouth with D's penis.[41] Similarly, to perform the actus reus of assault by penetration, D must intentionally penetrate V's vagina or anus with a part of his body or with something else, and for V's

37 H. Hurd, 'The Moral Magic of Consent' (1996) 2 *Legal Theory* 121, 125; Dougherty, n 2 above, 734-736.

38 Hurd, *ibid*, 127. See also L. Alexander, 'The Moral Magic of Consent (II)' (1996) 2 *Legal Theory* 165, 167.

39 Hurd, *ibid*, 133. See also Dsouza, n 34 above, 503-504.

40 Hurd, *ibid*, 127.

41 SOA 2003, s 1.

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consent to insulate D against this charge, it must also relate to the penetration of V's vagina or anus with a part of D's body or with something else.[42]

There are several reasons to doubt this solution.[43] The one of interest here relates to how much Hurd's solution limits V's ability to frame the object of her consent in the exercise of her sexual autonomy. It does not *just* prevent V from exercising her sexual autonomy to make subsequent events dictate the precedent validity of her consent to a sexual act; it prevents her from making *any* matters other than those that D must intend in order to be prima facie liable, relevant to her consent. To see this, consider the facts of *McNally*.[44]

D was born with female genitalia and identified as male. D (who used a male avatar) befriended V online, and they started a long-distance relationship which lasted several years, throughout which V thought D was a cisgender male. When they finally met, D was 17, and V had just turned 16. The meeting moved to the bedroom, where, with the lights off, and with V's enthusiastic approval, D digitally and orally penetrated V's vagina. When V (eventually) learned that D had female genitalia, D was charged with assault by penetration under section 2 of the SOA 2003. The CA ruled that V's putative consent to the sexual activity was vitiated because V 'chose to have sexual encounters with a boy and her preference … was removed by [D's] deception'. The characterisation of D's presenting as male as a 'deception' is contestable,[45] but even assuming that D deceived V into believing that D was a cisgender male, the conclusion that V's consent was vitiated does not, in law, follow. Recall that section 2, which adopts Hurd's preferred formulation of the appropriate object of V's consent, is not concerned with V's full description of the object of her consent. It is concerned only with whether V consented to that which D had to intend to do to perform the actus reus of the offence. Accordingly, it is not concerned with whether V had in mind 'sexual encounters with a boy' when consenting – it is only interested in whether she consented to the penetration of her vagina with D's fingers and tongue. That, she undoubtedly did. The CA failed to notice this, but on this ground alone, D ought to have been acquitted. Regardless of whether we think D deserved to be convicted in *McNally*, I hope it is uncontroversial to say that D ought not to be acquitted on this *technical* ground.

Hurd's preferred solution to the problem with the description thesis inexorably leads to this outcome because it insists that the key question is whether V consented to the conduct element of the actus reus of a sexual offence. Now, in framing a sexual offence, lawmakers must of course identify the key attributes of the sexual act that is involved. This is what distinguishes one sexual offence from another, or from a non-sexual offence, or from a non-offence. The attributes identified by the lawmakers constitute the conduct element of the actus reus of the concerned sexual offence. But in tying the issue of V's consent so tightly to the attributes enumerated by lawmakers as characterising the relevant sexual act, Hurd's solution deprives V of the autonomy to select for herself the attributes

42 SOA 2003, s 2. The same pattern is replicated in the offences under ss 3 and 4 as well.
43 Dsouza, 'Power', n 36 above, 10-12.
44 n 16 above.
45 A. Sharpe, 'Criminalising sexual intimacy: transgender defendants and the legal construction of non-consent' [2014] Crim LR 207, 217.

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that are important to her when consenting. There is no reason that V must necessarily exercise her sexual autonomy *solely* by reference to the attributes identified by lawmakers as the actus reus of a given sexual offence; her selection of critical attributes may well include attributes *in addition to* those selected by the lawmakers. V's sexual autonomy does, after all, entitle her to choose the specific sexual activity to which she consents, and so V should get to frame the object of her consent as she deems appropriate. Lawmakers are perfectly entitled to limit their interest only to sexual activity that features certain key attributes. But *pace*. Hurd, there is no reason to impose the lawmakers' selection of key attributes onto V such that V cannot also make other attributes critical when consenting to activities that include those key attributes. In a law that accords due respect to V's sexual autonomy, the analysis of V's consent would therefore proceed as follows: What (activity) happened to V? Does it differ from the object of V's consent? If so, then did the activity include the conduct element of the actus reus of a sexual offence?

This approach better preserves V's sexual autonomy: it recognises V's authority to frame the object of her consent. The easy solution to the problem of causally complex act descriptions is to caveat that, when identifying non-consensual *sexual* wrongs against V, references in V's description to events subsequent to the sexual activity are irrelevant (though they *may* be relevant when identifying other wrongs against V). This caveat is not ad hoc. In the context of the law of sexual offences, our interest is in cases where a sexual act wrongs V. Where V's act description includes a sexual act and a subsequent event, and the subsequent event does not come to pass, V is really wronged by the fact that the subsequent event did not come to pass, rather than by the sexual act. Consider in this context, the case of *R* v *Linekar*[46] (*Linekar*). V, a prostitute, agreed to have sex with D for £25, to be paid after the fact. D did not pay. The trial judge instructed the jury that if, having had sexual intercourse, D decided not to pay, this would not vitiate V's consent to the sex.[47] The central wrong V suffered on those facts would relate to D not paying, rather than D having sex with her. As such, calling what V suffered a sexual offence would be to mislabel the wrong. This also explains why someone who consents to 'sex that results in impregnation' is not the victim of a sexual offence when she does not fall pregnant.[48]

Of course, sometimes an expectation as to subsequent events can be rephrased as a belief as to present circumstances, and perhaps such a belief could be incorporated into V's description of the sexual act. For instance, in *Linekar*, V could have had the belief that at all times during the sexual intercourse, D remained willing and able to pay the agreed price. If V had consented to 'sex with D who is willing and able to pay £25 for sex', and D was unwilling or unable to do so,[49] then, as the trial judge noted, that might mean that V had not consented

46 [1995] QB 250.
47 *ibid*, 254.
48 See Hurd, n 37 above, 133-134.
49 And in fact, he was not – he was not carrying enough money to pay for the sex, *Linekar* n 46 above, 253.

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to the sexual activity.[50] But the significance of this possibility is limited, for two reasons.[51] First, since V has the authority to frame the object of her consent, what matters is not what V *could have* done, but what she actually did. In other words, if V phrased her agreement to sex in terms of an expectation of later payment, then the fact that she *could have* phrased it by reference to a belief in D's willingness and ability to pay during the sexual intercourse, will not avail her. We are interested in consent as it was granted, not as it could have been granted. And second, even if, in the *Linekar* example, V had so rephrased her consent, this would not make its validity contingent on subsequent events. While one could, on that statement of V's consent, convict D if he never intended to pay, if, having intended to pay, D later changed his mind, a conviction would remain impossible.[52]

In sum, the following rule best protects V's sexual autonomy in framing the object of her consent without tying the validity of her sexual consent to subsequent events: V may frame the object of her consent however she wishes, but references in V's description to events subsequent to the sexual activity are irrelevant to the law of sexual offences.

Boundary disputes

V can, in principle, identify the precise boundaries of the object of her consent by exhaustively listing each parameter thereof. Then, reference to V's list of parameters would resolve any dispute about whether V's consent extended to some 'X'. But in the context of consent to sex, such cases are vanishingly rare. More often, even when consenting consideredly, V frames the object of her consent by reference to a non-exhaustive list of key parameters. This list may well leave the issue of whether V's consent extended to 'X' underdetermined – there is a 'correct' position on the issue, but merely reading V's list will not reveal it. In the context of a discussion of intention, which, like consent, requires an object to make sense, Dougherty offers this example: Aisha intends to buy a puppy. She expressly restricts herself to puppies in a shelter, but like most prospective dog owners, she does not consider the possibility that puppies can have rabies.[53] Reading Aisha's list of express parameters does not tell us whether Aisha intends to buy a rabid puppy from a shelter.

Now recall that sexual consent is often granted unreflectively. Since consent needs an object, it follows that it must also be possible to frame the object of one's sexual consent unreflectively. In such cases, even more such boundary disputes will be left underdetermined by V's list (such as it is) of parameters.

So how do we determine whether V consented to 'X' when the answer is underdetermined by V's list of parameters? When discussing the puppy example, Dougherty plausibly asserts that despite not giving any thought to the possibility of getting a rabid puppy, Aisha almost certainly does not intend to buy

50 *ibid*, 253-254. In fact, the jury convicted D on this basis, though the conviction was quashed on appeal.
51 Dsouza, n 34 above, 505.
52 *Linekar* n 46 above, 254.
53 Dougherty, n 2 above, 735.

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one. For Dougherty, '[t]his restriction on her intent is entirely implicit'.[54] But if by 'implicit' Dougherty means entailed, or unstated but nevertheless contemplated, then this explanation does not work. It is *possible* to buy a rabid puppy, so this restriction is not entailed, and *ex hypothesi*, Aisha did not contemplate the possibility of rabid puppies. Dougherty clearly means something else, but is coy about what. He simply says: '[i]f Aisha tells you that she intends to get a puppy, then you would infer that it is not the case that she wants to get a rabid puppy. We assume that conversational participants make utterances that are informative but will not waste everyone's time with excessive detail.'[55] But if we want to know *whether* it was implicit in Aisha's stated intention to get a puppy, that she intended not to get a rabid one, then Dougherty's claim that Aisha would have been wasting time and providing excessive detail by expressly stating that she did not intend to buy a rabid puppy, is plainly question begging. This argument then, is unconvincing. Dougherty also advances a different proposal two pages later when he suggests that each of V's dealbreakers (ie beliefs that, if V knew they were false, V would not consent) is an implicit restriction on what she consents to.[56] But this too is implausible – implicit, but existent, restrictions cannot be identified by asking questions about counterfactual worlds. The answer to the question 'Would you have objected to "X" had you thought about it?' tells us about restrictions that would have been set in a counterfactual world. It does not tell us what restrictions were set in this one.

Instead, we should resolve disputes as to the boundaries of the object of V's consent by reference to what V was actually (mentally) picturing when consenting (whether this be a consideredly defined image, or an unreflective sketch, or a bit of both). When doing so, we must be meticulous not to let what we know about V's deep commitments 'colour in' the image in V's mind – that would be to smuggle in the Subjective Dealbreakers view through the back door. Instead, we should consider only the parameters consideredly or unreflectively selected, and fill in only the details entailed by these. The parameters vocalised or otherwise expressed are positive, but not conclusive or exhaustive, evidence of what was contemplated. So for instance, Aisha's express stipulations that she buy a puppy, and that it come from a shelter, are the only consideredly selected parameters of the object of her intention. We cannot ignore these, but they do not imply that *any* puppy from a shelter will do. Unreflectively contemplated parameters may well modify the partial picture of the object of Aisha's intent. If, when forming her intention, Aisha was picturing a healthy puppy, then she unreflectively selected a further parameter that also limits the scope of her consent. This parameter would logically entail ruling out puppies with distemper, rabies, or broken limbs. Based on our experience of people, and an absence of contrary indications, we'd probably find it quite plausible to believe Aisha if she claimed to have been picturing a healthy puppy

54 *ibid*.
55 *ibid*.
56 *ibid*, 736-738, especially while discussing an example involving an agreement to store antique skis, which happen to have belonged to Josef Stalin.

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when formulating her intention.[57] After all, which prospective puppy procurer pictures poorly pups? This line of thinking also explains why, in Wittgenstein's famous example of the parent who tells her babysitter, 'Teach the children a game' and returns to find the babysitter gambling with dice with her five-year-old twins, the parent can legitimately say 'I didn't mean that sort of game'.[58] The explanation is not that the parent specifically thought of, and mentally excluded, gambling games when giving her initial instruction to the babysitter – that would be absurd. Instead, it is that the parent was unreflectively picturing children's games when she gave her instruction. Or, for an example in the sexual context, think back to SURPRISE. There, even though D and V's 'Surprise me sometimes!' convention applies to both welcome and unwelcome surprises, there will inevitably be *some* limits to the surprises that it can render consensual. If, when forming (and over time, renegotiating) the convention with D, V had in mind relatively tame surprises carrying no serious risks, like trying a new sexual position or act, or perhaps using a blindfold to heighten other sensory perceptions, then that limits the reach of what the convention can render consensual at the 'springing the surprise' stage. Despite her adoption of the convention, V does not consent, even at the 'springing the surprise' stage, to D springing a surprise that is different in quality or magnitude from the range of surprises that V contemplated. So, for instance, if D involved a third party in the sexual act while V was blindfolded, or (assuming this was not the norm) deliberately ejaculating inside V's vagina, there would be no consent to these acts. While they would, no doubt, be a surprise for V, they are not within the range of surprises that V was actually picturing when she adopted the 'Surprise me sometimes!' convention with D.

Let's return now to Aisha. Suppose we also had proof of a persistent personal pattern of preoccupation with her pets' pedicures on our protagonist's part. Should that, in itself, lead us to think that Aisha had also *unreflectively* selected a parameter to the effect that the puppy's nails be freshly trimmed? I'd argue, not. That would show only that not having freshly trimmed nails was in fact a dealbreaker for Aisha. But what really matters is whether the puppy Aisha was picturing when stating her intention actually had freshly trimmed nails. If Aisha did not even claim to have actually been picturing such a puppy, then the fact that she would never have bought a puppy with long nails, or would have been horrified if she'd known about the state of the puppy's nails when the purchase was made on her behalf, is beside the point.[59]

57 J. Kleinig, 'The Nature of Consent' in F. Miller and A. Wertheimer (eds), *The Ethics of Consent: Theory and Practice* (Oxford: OUP, 2009) 3, 17-18 makes a similar move, suggesting that 'conventional expectations', including those coming from 'the set of mutual understandings that is implicit in the relationship existing between [the consenter and consentee]' is evidence of what was consented to.

58 L. Wittgenstein, *Philosophical Investigations* (1953, London: Basil Blackwell, Eng tr, 2nd ed, 1958) 33.

59 If Aisha did claim to have been unreflectively picturing a puppy with freshly trimmed nails a fact finder would have to decide whether to believe her. This might matter relatively little in the context of procuring pets, but in the context of sexual offences, we might need clear guidance on how we should decide what to believe. Such guidance about the evidential value of complainant testimony is beyond the scope of this paper, but I have strong sympathies for the

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Alternatively, Aisha could have specifically considered the matter, and decided to buy only a puppy with freshly trimmed nails. On those facts, she would have consideredly defined the object of her intention accordingly. Were this disputed, we might require Aisha to provide corroboration of her assertion that she consideredly selected this parameter, but seeking such corroboration is entirely routine – we would think nothing of asking Aisha for proof that she only wanted a puppy from a shelter, if that was in dispute.

In short, the answer to the question, 'What matters restrict the scope of our consent/intention?' is not, as Dougherty suggests, 'All stated or consideredly contemplated parameters and all dealbreakers'. Instead, it is 'All consideredly and unreflectively contemplated parameters, and the matters logically entailed thereby'.[60] These parameters, and the matters logically entailed thereby may include some dealbreakers, and some other matters besides. But there is no reason to expect them to include all dealbreakers.[61]

Like the parameters of the object of one's intention in the puppy case, the parameters of the object of one's consent to sex can be selected consideredly or unreflectively when consenting. Only parameters actually in contemplation at that time, be they affirmative[62] or negative,[63] will shape the object of consent. But there are two important differences between these cases. First, as previously explained, since our interest is in identifying whether a sexual act wrongs V, parameters of the object of V's consent that refer to events subsequent to the sexual activity are irrelevant. And second, there might be a difference in how much thought goes into typical instances of buying puppies, and consenting to sex. Perhaps our decisions about the former might even be more considered than our decisions about the latter. So, when consenting unreflectively to sex, it seems less likely than in the puppy example, that our picture of what we consent to will be detailed enough to incorporate all, or even most, dealbreakers. An HIV negative person may not incorporate something as seemingly important as their prospective partner's HIV status when consenting unreflectively;[64] their consent may simply be to 'sex with that guy'. On this formulation of the parameters of consent, all that would matter is that the person who engages in sex with the consenter actually be a guy, and more specifically, the guy to whom the consenter was referring. It would not matter what the consenter thought

view that complainants should be taken at their word unless we are offered a compelling reason to disbelieve them. This paper aims to contribute to progress on these matters by identifying the correct questions to ask. My thanks to Jonathan Herring, Antony Duff, and Sharon Cowan for separately pushing me on these points.

60 'Logically entailed', as I use it here, is elliptical for the sort of connection that Simester describes between matters that directly motivate an agent's actions, and any side-effects of those action that are so inseparable from the actions in the world as the agent understands it that they are also, by virtue of this inseparability, intended. A.P. Simester, 'Moral Certainty and the Boundaries of Intention' (1996) 16 OJLS 445, 459, 463-466. My thanks to an anonymous reviewer for pressing me to make this clear.

61 In what follows, references to the parameters of the object of consent should be taken to also include all matters logically entailed by these parameters, though for convenience, I will not always make this explicit.

62 For example 'This is my spouse'. See *R* v *Dee* [1884] 14 LR Ir 468 (*Dee*).

63 For example 'D will not ejaculate inside the vagina'. See *R(F)* n 18 above.

64 Dsouza, n 34 above, 506.

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or assumed that guy's HIV status was. Nor would it matter what other features she would attribute to 'that guy' if she sat down and decided to describe him ('he is a dentist', 'he is neat', 'he is a vegan', and so on). The consenter has not made any of these features a parameter of the object of their consent to sex.

This is why I think that proponents of Subjective Dealbreaker views have hitherto overestimated the number of false beliefs that vitiate putative consent. While acts that fall outside the boundaries of the object of our consent are not acts 'for which consent was given',[65] we rarely, if ever, succeed in letting all our dealbreakers shape the boundaries of our consent. In fact, especially because we regularly frame the objects of our consent, in part, unreflectively, many acts featuring dealbreakers are consensual (though depending on the facts, this consent may well be tainted by other factors such that criminal liability is merited). Conversely, some acts may fall outside the boundaries that we actually (unreflectively or consideredly) defined for our consent because of unexpected non-dealbreakers. Strictly, these acts are non-consensual. However, they are unlikely to generate protest given that the unexpected feature was not a deal-breaker. Moreover, a person relying on the putative consent would often have a mens rea based answer to liability based on a potentially reasonable belief that the unexpected feature had not limited the consenter's consent.[66]

Preconditions

Let's return to our bicycle seller. Another way in which she can exercise her autonomy over the bicycle to set limits on her consent, is by setting conditions that must be satisfied *before* her consent (to the object thereof) arises.[67] For instance, she may say 'You can take a test ride outside the shop, provided that you've left your credit card as a deposit'. When setting a precondition for consent, one identifies a proposition, and mentally links its truthfulness to the consent's validity. This mental linking isn't done automatically or instinctively; it is a considered mental act performed when giving[68] consent. This implies that the concerned grant of consent must also have been considered. It follows that the false belief that a supposed precondition was satisfied can only defeat putative consent when V granted the putative consent consideredly. Only then can we plausibly think that she also took the additional step of consideredly setting a precondition for the consent to arise. Of course, it is exceedingly unlikely that she took this extra considered step in respect of all dealbreakers. But where V granted putative consent largely unreflectively, she probably did not set any preconditions. Again, all of this analysis also applies to persons exercising their sexual autonomy to consent to sexual activity.

Having previously explained what I mean by the parameters of consent, and now introduced the notion of a precondition for consent, let me, at this stage, make two quick clarificatory points. First, while the perceptive reader may note

65 Dougherty, n 2 above, 736.
66 My thanks to Rachel Clement Tolley for pushing me on these points.
67 Dsouza, n 34 above, 505.
68 Throughout this paper, where appropriate, I take this to include the revision of a previous grant of consent.

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that my contrast between 'mistakes as to parameters' and 'mistakes as to preconditions' bears some similarity to the existing contrast between 'fraud in the factum' and 'fraud in the inducement',[69] a key difference is that my contrast is relevant also to cases where there is no hint of fraud or any other wrongdoing by any party. It applies equally to cases involving unilateral mistakes.

And second, many things that V may want in a sexual encounter can quite plausibly be packaged as either preconditions or parameters. For instance, 'consent to sex on the condition that a condom is used' (precondition) can be repackaged as 'consent to safe/protected sex' (parameter of the object of consent).[70] Perhaps any precondition for consent can also be made a parameter of the object of consent and vice versa,[71] especially since we have excluded subsequent events (which by definition, cannot be *pre*conditions[72]) from the relevant stipulation of the object of consent. Williams doubts this. She discusses the example of someone who lies about the mileage of a car before selling it[73] and says that whatever the mileage, since the purchaser knows he is buying a car, this may be a fraud in inducement, but it is not a fraud in factum (in this context, a fraud as to the object of the purchaser's consent).[74] But so what if the purchaser knows he is buying *a* car? If he wants to buy *'a car with X mileage'*, rather than just '*a car*', he is entitled to make the mileage of the car a parameter of the object of his exercise of autonomy. He is, after all, the sole master of his exercises of autonomy. And subject to the qualification about subsequent events in object-descriptions, the same logic carries over to the sexual context too – V gets to frame the object of her consent as she wishes.[75]

But although I disagree with Williams' critique of *this* example, I accept that some things are much more likely to be preconditions than parameters, and vice versa. For instance, consider this precondition for consent to sex: 'I consent to sex, but you must first wash the dishes'. It is difficult to think of a plausible way to repackage this into a parameter form. Consent to 'post-dishwashing sex' is theoretically possible, but it sounds so odd that it is difficult to imagine anyone actually defining the object of their consent in that way. Conversely, consider these statements in which the bracketed text represents the object of consent: 'I consent to [sex with P, my partner]'; 'I consent to [heterosexual sex]'; and 'I consent to [penetration of a sexual nature]'. It seems difficult to convert the stated parameter of the object of consent in these statements into precondition forms. Consent to sex 'on the condition that you are P, my partner', or 'on the condition that you are a cisgender female', or consent to 'this penetration on the condition that it is sexual in nature', are technically possible, but again, these statements sound so odd that it is difficult to imagine anyone actually setting these 'preconditions'.

69 See for instance, Williams, n 4 above, 153-154. My thanks to an anonymous reviewer for pushing me to address this point.
70 Dougherty, n 2 above, 732-733 give us another example in his 'case of the Chihuahua'.
71 As Wertheimer, n 6 above, 206 and J. McGregor, *Is it Rape?: On Acquaintance Rape and Taking Women's Consent Seriously* (Aldershot: Ashgate, 2005) 185 seem to suggest.
72 Dsouza, n 34 above, 504.
73 This example comes from Wertheimer, n 6 above, 197.
74 Williams, n 4 above, 153-154.
75 See also Wertheimer, n 6 above, 206.

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Still, even in these cases, maybe one could perform the requisite mental gymnastics to repackage preconditions as parameters and vice versa. But I needn't commit to a position on this issue here because as Wertheimer notes, '[e]verything turns on the way in which a case is described.'[76] *Pace* Wertheimer though, what matters is how the putative consenter actually described the case, rather than how the commentator, prosecutor, or judge describes it. In other words, what matters is not what it is *possible* that the consenter did, but rather, what the consenter actually did (and in the criminal law context, what a jury believes that the consenter actually did). As always, the evidence, including V's account of her thinking, and evidence of the surrounding circumstances, will guide our conclusions about what actually happened. Where it seems implausible that something was made a precondition rather than a parameter, or vice versa, it will probably take more to convince a jury that the implausible option was actually picked by V.

A MATTER OF TIMING

Based on the observations made so far, it appears that a putatively consensual act is rendered non-consensual:

(a) when V consents unreflectively, if V's false belief makes it the case that what happened fell outside the (unreflectively selected) parameters of her consent and matters logically entailed thereby; and
(b) when V consents consideredly, if V's false belief makes it the case that what happened fell outside the (consideredly or unreflectively selected) parameters of V's consent, or if V falsely believed that a precondition she had set for her consent had been fulfilled.

But we still need to refine this model by identifying exactly *when* V sets the parameters for the object of, or preconditions for, her consent to a sexual encounter. Consider two cases. In *Monica*,[77] an undercover policeman, D, assumed a fake identity and infiltrated a group of environmental activists to spy on their activities. V, a member of this group, became friendly with D. Eventually, they had a six-month long sexual relationship. Years later, V discovered D's true identity. V pressed for D to be prosecuted for sexual offences, on the basis that 'under no circumstances would she have entered into any sort of relationship with [D] had she known the truth … The fact that she believed that he shared her core beliefs was central to her decision to enter into a relationship with him.' In *Papadimitropoulos* v *The Queen*[78] (*Papadimitropoulos*), an Australian case, D, a Greek man who spoke English, convinced V, a Greek woman who didn't, to marry him in a civil ceremony at the registry office. They signed some forms together

76 *ibid*.
77 n 11 above. In this case, the High Court upheld the CPS's decision not to prosecute D despite his deception.
78 *Papadimitropoulos* v *The Queen* (1957) 98 CLR 249 (HCA). In this case, while D was initially convicted of rape, the conviction was quashed by the High Court of Australia.

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(V not understanding their contents), and afterwards, D told V that they were married. In fact the forms were just a notice of intention to marry, which had to be posted at the registry office for several days before a wedding could be performed. From the registry office, having not previously had intercourse, D and V went to a lodging house, obtained a room, consummated their 'marriage', and lived together for 4 days, allegedly having intercourse once or twice more before D decamped.

Can we say in *Monica*, that D's genuine commitment to the same core beliefs that V held was either a precondition for, or parameter of the object of, V's consent? And in *Papadimitropoulos*, was V's requirement that D be validly married to her a precondition for, or parameter of the object of, consent to the sexual intercourse that occurred between them?

It is, I think, entirely possible to consent to a sexual act in advance of when it happens.[79] One can always reconsider and withdraw consent,[80] but it is when granting consent that V frames the object of her consent and sets preconditions for it to arise. Therefore, the answers depend on whether, *when agreeing to the sexual intercourse*[81] in these cases, V made these things preconditions for, or parameters of the object of, her consent. In either case, what happened would be non-consensual, as opposed to 'consensual but otherwise tainted'. It would therefore be appropriate to consider applying the principal, ie non-consensual, sexual offences in these cases.[82]

The complainant in *Monica* did not claim that, *at the time of agreeing to sexual activity*, she made D's genuine commitment to her own core beliefs a precondition for her consent, or that she consideredly or unreflectively made it a parameter of that to which she was consenting. In the absence of any other reason to think that this had happened, a conviction for any of the principal sexual offences would have been exceedingly unlikely, even if we accept that V would never have consented to sex with D if she knew his true identity. That V would never have reached the point where she exercised her sexual autonomy to consent to sex with D but for D's deception, may be grounds for arguing that D ought to be convicted of some (not presently enacted) consensual sexual offence, but it does not suggest that the actus reus of a non-consensual sexual offence was committed.[83]

79 Wertheimer, n 6 above, 159-160; Dsouza, n 34 above, 496-497.

80 Or if one prefers that analysis, dissent. See Gardner, n 24 above, 65.

81 I have in mind here the entire time spent actively considering whether to agree to sex. This may be longer or shorter, depending on whether the decision is being made consideredly or unreflectively. Either way, it excludes much of the history between the parties.

82 *pace* M. Gibson, 'Deceptive Sexual Relations: A Theory of Criminal Liability' (2020) 40 OJLS 82.

83 This is in line with both the CPS's and the High Court's conclusions. To be fair, there is nothing to show that the complainant in *Monica* had been asked questions that would have brought out whether her consent, at the relevant time, was actually to sex with 'my fellow activist', or something to that effect. It isn't implausible to think that there may, for instance, be relevant gendered differences between how much contemplation goes into typical grants of consent to sex, and that a more sensitive investigation of the complainant's complaint might have revealed facts that throw the outcome in *Monica* into doubt. I have no quarrel with those that say we need to improve our fact-finding especially in sexual offence cases, but my substantive point stands. In view of the allegations and evidence available, the outcome in *Monica* insofar as it relates to the allegation of rape, is defensible.

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In *Papadimitropoulos*, the facts and the social context suggest that V made a valid marriage to D a precondition for at least the first instance of sexual intercourse with him. If so, then there was no consent to at least that instance of intercourse. It might even be the case that V framed the object of her consent in each relevant sexual encounter as 'sex with my husband, D'. Today, this notion might seem quaint, but perhaps as a relatively unintegrated Greek immigrant in 1950s Australia, V saw sex as something that should only happen between a husband and wife.[84] If she did, then that might make it more plausible to think that on each occasion that she slept with D, she unreflectively (if not consideredly) framed the object of her consent as 'sex with my husband'.[85] On these findings, there would be no consent even to those encounters.

FACT-FINDING

We now have in place a 'Refined Model' of when V's false beliefs as to dealbreakers actually vitiate her putative consent. They do so when their falseness means either:

(a) that what happened to V fell outside the (consideredly or unreflectively selected) boundaries of the object of V's consent and matters logically entailed thereby, or
(b) that a precondition that V consideredly set for her consent, had not been met.

Moreover, V sets the preconditions for, and boundaries of the object of, her consent at the time of agreeing to sexual activity.

To apply this Refined Model, we need to know whether:

(a) V (consideredly) made the satisfaction of the dealbreaker a precondition for her consent to arise, or
(b) the dealbreaker was one of the parameters by (considered or unreflective) reference to which V defined the object of her consent, or
(c) neither.

If either (a) or (b) above is the case, we probably need to know which. This may matter for D's mens rea – one can imagine circumstances in which it is more plausible for D to deny awareness of a parameter of the object of V's consent than a precondition for it, and vice versa. But as previously noted, although

84 Perhaps years from now, we'll reflect on *McNally* n 16 above, and think the notion that V always 'unreflectively' framed the object of her consent to sexual activity with D as 'penetration by a cisgender D' equally quaint.
85 Note however, that the High Court of Australia quashed D's conviction, in line with precedent that suggested that so long as V knew 'what [was] about to take place … the identity of the man and the character of what he [was] doing' she knew enough to consent. It held that frauds as to other 'inducing causes' could not vitiate consent. *Papadimitropoulos* n 78 above, 261. As I have previously argued, this approach fails to adequately protect V's sexual autonomy.

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some dealbreakers are more naturally connected to preconditions for consent, and others to parameters of the object of consent, most – perhaps even all – can be connected to the putative consent in either way.

In sum, it will be challenging, in real life, for the tribunal of fact to ascertain whether something was genuinely a dealbreaker for V; and if so, whether she made it relevant to her putative consent; and if so, how.

But these challenges should not be overstated. A jury can make such findings, as it always does, by drawing inferences based on the evidence before it, and the jurors' experience of how people normally behave. In fact, there are several cases in which finders of fact have already done this when deciding similar questions. In *Monica* for instance, based on the complainant's allegations, both the CPS and the High Court found it unlikely that V had defined the object of her consent to sex with D by reference to her belief as to the genuineness of D's assumed persona, or made its truth a precondition for that consent. Conversely, in a recent case, the Bournemouth Crown Court found that V had made the use of a condom a precondition for consent to sex.[86] In *McNally*,[87] the belief that D was a cisgender male was found to have been a parameter of V's consent to sexual activity. With adequate instruction, the tests proposed here should not be beyond the ability of the average judge, lawyer, or jury to apply.

We should therefore resist the temptation to adjust the rules in the Refined Model to make fact-finding easier. There is value – and not just intrinsic value – in trying to get the substantive rules exactly right, even if fact-finding proves challenging. Consider the background of *Assange*.[88] The facts alleged occurred in Sweden, but D was in England. The Swedish authorities applied to have D extradited to face trial for rape. Under English law, D could be extradited if the material allegations would amount to an offence under both, the law of the jurisdiction seeking extradition (so, Sweden), and English law. Notice that in making this assessment, the English court had to refer to the allegations, since it could not itself act as a fact-finder. The Refined Model is well equipped to decide such cases, since it focuses on substantive legal rules, and is not influenced by anticipated challenges in fact-finding.

APPLYING THE REFINED MODEL

I now propose to consider a series of examples to demonstrate how we can make plausible inferences about key facts, and apply the Refined Model to reach intuitively appealing outcomes. Of course, in the nature of this sort of enterprise, not everyone will share my outcome intuitions. Assuming that there are no major gaps in the internal logic of this paper, my interlocutors and I would appear then to be at an intuition-based impasse. Fortunately, progress is possible if, instead of a binary 'agree/disagree' metric, we employ a scalar

86 G. Aspinall, 'A British man has been convicted of rape after removing a condom during sex' at https://graziadaily.co.uk/life/in-the-news/stealthing-conviction-rape/ (last visited 11 January 2022).

87 n 16 above.

88 n 12 above.

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metric that rates how plausible we find an outcome. A reader who finds that, when applied to these cases, the Refined Model generates most, or many, of their preferred outcomes, and reaches outcomes that they consider plausible in respect of others, will have reason to accept the Refined Model, at least until they find another model that better accommodates their preferred intuitions.[89]

Consider then, the following scenarios, in each of which, V argues that the fact that she held a false belief as to a dealbreaker when agreeing to sexual activity with D means that the sexual activity was non-consensual. Unless specified otherwise, V's false belief is formed unilaterally, or due to something a third party, not acting in concert with D, did or said.

(1) *V believes that D is performing a medical procedure on her. D performs a sexual act instead.*[90]

This case is straightforward. Whatever else she does when permitting the act, V does not successfully exercise her *sexual* autonomy, since she does not know to call upon it. Hence, she does not consent to the sexual act.

(2) *V believes that she and D have just signed papers at the registry office making them legally married, and so, having hitherto refrained from having sex with D, she willingly consummates the 'marriage'. In fact, the said papers just gave notice of an intention to marry.*[91]

This is most straightforwardly thought of as a case in which V consideredly set a precondition (marriage) for valid consent to sex to arise. Since that condition was not met, the sex is non-consensual.[92]

(3) *V has sex with D, who she believes is a fellow animal rights activist. In fact D is an undercover police officer who had previously infiltrated the activist group to which V belongs.*

As described, this is not a preconditions case. Nor is it likely to be a parameters case – it seems unlikely that at the point of exercising her sexual autonomy to consent to sex, V either consideredly or unreflectively defined the object of her consent by reference to whether D was truly an animal rights activist. As such, this false belief does not vitiate consent to sex[93] (even though, if D's deception caused the false belief, or if D knowingly exploited V's false belief, having sex with V would be deplorable conduct on D's part, possibly meriting criminal liability).

(4) *V has sex with D, who she believes is a millionaire. In fact, D is nowhere near as rich.*

89 I have also used this approach when reaching across the aisle to people who do not share my outcome intuitions in M. Dsouza, *Rationale-Based Defences in Criminal Law* (Oxford: Hart Publishing, 2017) xv-xvii.
90 Based on *R* v *Flattery* [1877] 2 QBD 410.
91 Based on *Papadimitropoulos* n 78 above.
92 But cf the ruling in that case.
93 This conclusion is in line with the CA(CD)'s ruling in *Monica* n 11 above.

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This appears not to be a parameters case, but though unlikely, it is theoretically possible that V consideredly made D's wealth a precondition for her consent to sex at the point of exercising her sexual autonomy in relation to the concerned sexual encounter. If that happened, then V's putative consent would be vitiated by her false belief as to D's bank balance. But, possibly influenced by how unlikely this is to be the case, and how difficult it would be to prove D's mens rea even if it were, courts regularly (but I think, mistakenly) assert that this sort of false belief can never vitiate consent.[94]

(5) *V has sex with D, who she believes is Jewish. In fact, D is Muslim.*[95]

Here, although D's not being Jewish is a dealbreaker for V, it seems unlikely that V made D's being Jewish a precondition for her consent to sex, or that the object of her consent was 'sex with a Jewish man'. That said, if V did either of these things, then her seeming consent to sex with D would be vitiated.

(6) *V has unprotected sex with D, who she believes is sterile. D is fertile.*

Again, although D's being fertile is a dealbreaker for V, it would not vitiate her seeming consent to sex unless she made D's being sterile a precondition for her consent, or her consent was to sex with 'a sterile man'. Of the two, the former seems more likely, and indeed that scenario arose in *Lawrance*,[96] in which the CA(CD) controversially concluded that V's consent was not vitiated. Under the Refined Model, the conclusion in *Lawrance* would be rejected.

(7) *V has sex with D, who she believes is using a condom. D is not.*

This is plausibly thought of as either, a parameters, or a preconditions, case. Either way, V's putative consent would be vitiated by the fact that D is not wearing a condom.[97]

(8) *V has sex with D, who she believes will withdraw before ejaculation. In fact D (deliberately) does not.*

Here, V could have defined the object of her consent by reference to the parameter that D intends to withdraw before ejaculation, by consenting to 'sex without (deliberate) ejaculation inside the vagina'. If she did so, then the sexual act that occurred would not be one to which consent was given.[98] Alternatively, she could have made it a precondition for her consent that D withdraw before

94 See for instance *Dee* n 62 above, *McNally* n 16 above, *Monica* n 78 above, and *Lawrance* n 15 above.
95 Based on CrimA 5734/10 *Kashur* v *State of Israel* [2012] (Isr), where the allegation was that D deceived V as to his religion. In that case, D pled guilty.
96 n 15 above.
97 This conclusion is in line with the ruling in *Assange* n 12 above.
98 However, because of the awkward drafting of SOA 2003, s 1 – it appears to be concerned only with whether V consented to the penetration of her vagina, anus, or mouth with D's penis – it might be difficult to obtain a conviction for rape on this basis.

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ejaculation. In that case, the consent to (continued) sexual intercourse at the point of ejaculation would not arise.[99]

(9) *V has sex with D, who she believes has done the dishes. In fact, he has not.*

Even if D's not having done the dishes was a dealbreaker for V, it seems unlikely that she would actually have made D's having done the dishes relevant to her consent to sex. But if she had, it is only plausible to think she did so by making D's washing of the dishes a precondition for her consent. Perhaps, with some extreme mental gymnastics, she could have made D's having washed the dishes a parameter of the object of V's consent, but that is so unlikely that I doubt it would be possible to convince anybody (let alone a jury, beyond reasonable doubt) that she did. And even if V did make D's having done the dishes a precondition, such that his failure to do them meant that V's consent to sex never arose, the unusualness of such a precondition will often (though not always) mean that D can credibly claim not to have realised that V was serious about the precondition. This could ground a denial of the mens rea for an offence on the basis of an arguably reasonable belief in V's unconditioned consent.

(10) *V has sex with D, who she believes will pay her for the sex immediately afterwards. In fact D has no intention of doing so.*

This case looks at first glance to involve a proposition about something that will happen subsequent to sexual intercourse. This kind of proposition can neither be a relevant parameter of the object of V's consent, nor a precondition for it. But look again. If D never intended to pay for the sex, then V may well have framed her consent such that it did not apply to this sexual encounter. She may have made it a parameter of the object of her consent that D be willing to pay for sex at all relevant times during the sexual intercourse (consent to 'sex with a person willing to pay me for sex'). Or, she may have made D's continuing willingness to pay for sex at all relevant times during the sexual intercourse a precondition for her consent to the continuing sexual intercourse (consent to the penetration occurring *at this instant* on the condition that D *is presently willing to pay* me for this sexual encounter). If either of these things happened, and D did not intend to pay for sex at any time during the intercourse, then V did not consent to the sex at that time.[100] If V was a prostitute and was willing to accept subsequent payment, then it seems possible (though not inevitable) that V did link D's continuing willingness to pay to her consent to intercourse in one of these ways.

(11) *V has sex with D, believing that D wants it for sexual gratification. In fact, sexual gratification forms no part of D's purpose for having sex with V – D wants only to humiliate V.*[101]

99 In *this* situation, it would be possible to convict D of rape under English law. See *R(F)* n 18 above at [25]-[26].

100 In fact, this was a possibility that the trial judge in *Linekar* n 46 above, 253-254 expressly identified for the jury. The CA however held that V's consent would not be vitiated.

101 Based on *Devonald* n 14 above.

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It seems unlikely on these facts, that V would have made it a precondition for her consent to sex with D that D's purpose be sexual gratification. It is more plausible to think that V (most likely unreflectively) made it a parameter of the object of her consent that the act be for mutual sexual gratification. In that case V would not have consented to what actually happened. But that conclusion is not inevitable. If all V was interested in was her own sexual gratification, then she might not have cared, even instinctively, about whether D was deriving any sexual gratification. On those facts, V would have consented to sex. Admittedly, this analysis is not in line with how English law would treat such a case. Under English law, if D deceived V as to his purpose, it would irrebuttably be presumed that V did not consent and that D did not believe that V consented, even if V did not care about D's purposes in relation to the sexual act.[102] Moreover, the CA(CD) has suggested that V's consent might be vitiated by such a false belief even if it came about without D's deceit, under the general definition of consent under section 74 of the SOA 2003.[103] I see no normative reason for the law to take such an uncompromising stance on V's belief as to D's purpose in relation to the sexual act, especially where V herself does not really care about D's true purpose.

(12) *V has sex with D, who she believes does not have HIV. In fact, D is HIV+.*

In this case, it is possible that V consideredly made it a precondition for her consent that D was not HIV+. It is less likely (though not impossible) that she either consideredly or unreflectively made D not being HIV+ a parameter of the object of her consent. If either of these things happened, then D being HIV+ would mean that V had not consented to the sexual act. But it is also possible that V did not give any thought to D's HIV status, or had unreflectively defined the object of her consent without reference to it. In that case, V would have consented to the sexual intercourse. If there is a reasonable possibility that this is what happened, a criminal court would acquit D of any non-consensual sexual offence.[104]

(13) *V allows D to digitally penetrate her vagina believing D to be a cisgender male. In fact, D is a transgender male.*

Assuming that V identified as heterosexual, it is quite plausible to think that even if she gave no express thought to whether D was cisgender when agreeing to D digitally penetrating her, V unreflectively consented only to 'straight digital penetration'. Since what happened was not what she understood as a heterosexual sexual act, V did not consent to it.[105] Whether D ought to be

102 SOA 2003, s 76.
103 *Lawrance* n 15 above at [29], [33]-[35], referring to in *Monica* n 11 above at [72], [80]. Elsewhere, I have argued that the CA(CD)'s doctrinal logic in *Lawrance* is seriously flawed in that it has misapplied certain conditional and obiter dicta observations made by the High Court in *Monica*. See M. Dsouza, 'Deception, Consent to Sex and R v Lawrance (Part 1)' 6-7 at https://www.ucl.ac.uk/criminal-law/news/2020/aug/deception-consent-sex-and-r-v-lawrance-part-1 (last visited 1 March 2022).
104 As it did in *R* v *B* [2006] EWCA Crim 2945.
105 See *McNally* n 16 above.

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convicted of a sexual offence though, also depends on whether D had the mens rea for the offence.

(14) *V has sex with D, who she believes is actually her partner, P.*

Here, quite clearly, even if V gives no express thought to the identity of the person engaging in sexual activity with her, she unreflectively defines the object of her consent as 'sex with P'. Since that is not what happened, V does not consent to the sex.[106]

(15) *The counterparts of cases 1 to 14, except in these cases, V's false belief is brought about by D's deception.*

As I have made clear, under the Refined Model, the source of the error in V's belief does not make a difference to whether V consents, though it might provide additional evidence to the effect that D did not believe, or did not reasonably believe, that V had consented.

These ought to be sufficient datapoints to demonstrate how the Refined Model would operate. I hope that my interlocutors would find themselves in agreement with many, if not all, of my conclusions here. But to the extent that they do not, I am less concerned about differences that stem from disagreements with my claims about factual inferences that a jury may plausibly draw from the evidence available. I may be wrong about those fact-finding related claims, but the substantive arguments that are the crux of my thesis in this paper can stand independently (and perhaps be applied better by a more adroit fact-finder than me). To the extent that our disagreements stem from the substantive claims I make in this paper, I hope that my interlocutors will at least find my claims somewhat plausible – plausible enough at least, to establish the desirability of the Refined Model as a whole.

CONCLUSION

It is an understatement to say that not all sexual consent is carefully thought out. But you wouldn't know that from reading theorists' analyses of sexual consent. Perhaps it isn't a complete surprise that people in the business of carefully thinking through issues sometimes project their own (meticulous) methods of analysis onto the subjects of their analyses. Still, in this paper I suggest that we can refine our understanding of how sexual consent works, and when it is undermined, by recognising that most people don't overthink sexual consent. Indeed, on at least some occasions, many barely think it through at all. The Refined Model I defend here keeps sight of this social fact when identifying false beliefs that vitiate putative sexual consent. According to it, the falseness of a belief that V held while putatively consenting to sexual activity will make what happened non-consensual, when it means either:

106 This is in line with the ruling in *Dee* n 62 above.

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(a) that what happened to V fell outside the (consideredly or unreflectively selected) boundaries of the object of V's consent, or
(b) that a precondition that V consideredly set for her consent, had not been met.

V sets the preconditions for, and boundaries of the object of, her consent at the time of agreeing to sexual activity. This Refined Model robustly defends genuine exercises of sexual autonomy without overextending the net of criminal liability. By focusing, not on the *worthiness* of V's chosen dealbreakers, but rather, on whether V actually exercised her sexual autonomy at the relevant time to make them relevant to her consent, it draws a sexual autonomy-protecting line that does not criminalise every background white lie, embellished fact, and half-truth, that has ever nurtured a nascent relationship. And while applying the Refined Model does require fact-finders to engage in a fair bit of mindreading to establish the relevant facts, in truth, fact-finders already routinely do much the same. I hope that the reader will find the outcomes generated by the Refined Model as desirable as I do, but even if she accepts that they are plausible, I will have offered a credible alternative approach to determining when false beliefs vitiate putative sexual consent.

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