

P1. SUSTAINED IDENTITY DECEPTIONS

[Caroline Derry](#)

The current law includes one specific statutory provision on identity deception: [section 76\(2\)\(b\), Sexual Offences Act 2003](#) creates an irrebuttable presumption that there is no valid consent if the accused impersonated someone known *personally* to the complainant, leaving other identity deceptions to be considered under the general definition of consent. In practice, this has meant that the only other aspect of identity deemed relevant to consent is genital sex.⁶⁴ The current law has been subject to extensive criticism.⁶⁵ It over-criminalises ‘gender fraud’ (where the defendant is allegedly understood by the complainant to be male but has female genitalia, or vice versa) and under-criminalises other sustained deceptions (e.g. where police officers working undercover as ‘activists’ had relationships with fellow activists). A new approach – and a new offence, ‘obtaining sexual activity by sustained identity deception’ – is needed.

The existing caselaw seeks, through inconsistent and hair-splitting distinctions, to limit criminal liability to deception as to the physical or sexual nature of the immediate sexual act.⁶⁶ The High Court thus held in [Monica](#)⁶⁷ that an undercover officer’s sustained, wide-ranging and profound deception did not vitiate consent because the complainant understood the physical nature of the act itself. Yet that principle does not account for the absence of lawful consent in ‘gender fraud’ cases where, for example, digital penetration is agreed to and occurs. The Court of Appeal in [McNally](#) ultimately fell back upon the problematic claim that it is ‘common sense’ that deception as to gender vitiates consent while almost no other deception does.⁶⁸ There have been no other appellate decisions directly upon ‘gender fraud’, although *Monica* glossed *McNally* as a sort of ‘identity or impersonation case, given the centrality of an individual’s sexuality to her or his identity’,⁶⁹ and added to ‘common sense’ the requirement that it be ‘closely connected to the performance of the sexual act’.⁷⁰

Three key and interrelated problems underlie the current law and are addressed in this proposal. The first is the law’s underlying discrimination around gender and sexuality. The second is the misidentification of harms caused by identity deception; the third problem is the inadequate time frame considered by the criminal courts. Specific sexual acts are divorced

⁶⁴ By contrast, the *Oxford English Dictionary* definition includes *what* a person is, the impression they present to others, and the characteristics that distinguish them from others.

⁶⁵ For overviews see e.g. A Sharpe, *Sexual Intimacy and Gender Identity ‘Fraud’: Reframing the Legal & Ethical Debate* (Routledge 2018); C Derry, *Lesbianism and the Criminal Law: Three Centuries of Regulation in England and Wales* (Palgrave Macmillan 2020) ch 8; C McCartney and N Wortley, ‘Under the Covers: Covert Policing and Intimate Relationships’ [2018] *Criminal Law Review* 137.

⁶⁶ E.g. *Lawrance* [2020] EWCA Crim 971: see the editors’ introduction.

⁶⁷ *R (on the application of ‘Monica’) v Director of Public Prosecutions* [2018] EWHC 3508 (Admin): see editors’ introduction.

⁶⁸ *R v McNally* [2013] EWCA Crim 1051.

⁶⁹ Para 77.

⁷⁰ Para 80.

from their wider relationship context. The law therefore disregards both the actual duration of the deceptions and the harms identified by victims. Almost all prosecutions have related to prolonged relationships between the parties, with deceptions extending significantly beyond the details of specifically sexual intimacies.⁷¹ These intimate sexual relationships founded in deception would be better addressed through abolition of the *McNally* principle that gender deception automatically vitiates consent, combined with creation of a new offence which criminalises the obtaining of sexual consent by sustained and intentional identity deception.

Scope of the Proposal

This proposal does not directly address other types of deception discussed in the editors' [introduction](#). It does not, for example, explore the contraception cases,⁷² which raise quite different issues around express conditions of consent. Nor does it explicitly consider the situation where the complainant consented to one type of penetration, such as penile penetration of the vagina, but another actually occurred (eg anal penetration or penetration with a dildo). In that situation, the current law is appropriate in holding that there is no valid consent to the act which actually took place (although the proposed new offence might be a more appropriate charge in some such cases).

Where the incident does not involve misrepresentation of the nature of the physical act, it should fall under the proposed new offence. This offence would therefore have applied to the undercover policing cases and the leading 'gender fraud' case of [McNally](#), where the complainant had agreed to, and the accused had performed, acts of digital penetration. The new offence may lead to a different outcome in future cases, as liability would depend on the specific nature of the relationship and deception rather than upon blanket principles that gender deception negates consent and other deceptions do not. Brief consideration of [Xavier](#) provides a helpful illustration of the practical effects.⁷³ In 2018, Duarte Xavier was convicted of six offences of causing a person to engage in sexual activity without consent.⁷⁴ The male defendant had impersonated a young woman in online dating services and in some instances persuaded the male complainants to engage in one-off acts of 'vaginal' intercourse in circumstances where they could not see their partner; in fact, what took place was anal intercourse. Thus the physical act was not the one to which they had consented; liability for that behaviour would be unaffected by the new offence. Other complainants had agreed to be fellated while blindfolded or otherwise unable to see the defendant. The physical act was the one to which they had agreed but, following *McNally*, their consent was vitiated by the use of a male mouth instead of a female one. Under the proposed reform, that would no

⁷¹ A rare exception is *Duarte Xavier*, considered later.

⁷² *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin); *R (F) v DPP* [2014] QB 581; *R v Lawrance* [2020] EWCA Crim 971. See the editors' introduction, 'Where we are now'.

⁷³ *Duarte Xavier* (unreported, Kingston Crown Court, 9 November 2018).

⁷⁴ Contrary to the Sexual Offences Act 2003, s4.

longer be an automatic assumption. Instead, the new offence would focus the court's attention upon the wider relationship between the parties. In particular, it would consider the prior interactions which formed the context for their encounters. Newspaper reports suggested that in some instances, there had been brief online discussions followed by a meeting in a public park with the complainant already blindfolded. The act had clearly been agreed in advance but it is far from evident that identity was of significant importance; or that if so, gender was the critical feature rather than, say, age or physical attractiveness. Of course, the details of the prior communications might well suggest a different interpretation of what had been agreed and communicated, something a court would well be able to decide. Depending upon those, an offence may or may not have been committed.

Addressing Key Issues with the Current Law

Discrimination

On its face, the [Sexual Offences Act 2003](#) ended discrimination which had permeated the previous law. For example, it removed the gendered distinctions in many offences⁷⁵ and the continued criminalisation of some consensual male same-sex activity. However, the removal of formal statutory discrimination has not ended its influence upon the caselaw. The courts' approach continues, perhaps unconsciously, to draw upon homophobic and transphobic assumptions about the greater value of normative heterosexual relationships as well as sexist assumptions that a significant element of women's worth is tied to their relationships with men. [McNally](#), for example, is underpinned by the assumption that a same-sex relationship is fundamentally different from, and implicitly less desirable than, a heterosexual one. At the same time, the law fails to protect complainants subject to equally extensive and exploitative deceptions which happen not to include gender.

A rejection of that approach does not mean that complete decriminalisation is the only or best alternative. While the present law is influenced by transphobia, replacing it with a principle that 'gender fraud' by trans defendants can never be criminal would not make the law non-discriminatory. First, 'gender fraud' should not be straightforwardly equated with trans identities,⁷⁶ as many of the defendants in these cases did not identify as trans, did identify as lesbian, or did not express a clear identity.⁷⁷ An assumption that these are 'trans' cases risks judgments being made by prosecutors and courts about whether a particular defendant is 'trans enough' or, in a term used by Alex Sharpe and adopted and extended by

⁷⁵ E.g. between indecent assault of a male or female; see the 'Sexual Offences Act 1956' section of the Introduction.

⁷⁶ This slippage has occurred in the academic literature: while trans theorist Alex Sharpe acknowledged the complexities and uncertainties in Sharpe (n 60), subsequent work has not always shown the same nuance.

⁷⁷ As well as [McNally](#), post-2003 cases include [Gemma Barker](#) (unreported, 5 March 2012, Guildford Crown Court), [Gayle Newland](#) [2016] All ER (D) 85, [Kyrán Lee \(Mason\)](#) (unreported, 16 December 2015, Lincoln Crown Court), [Jennifer Staines](#) (unreported, 24 March 2016, Bristol Crown Court) and [Gemma Watts](#) (unreported, 9 January 2020, Winchester Crown Court).

Matthew Gibson, 'authentic'.⁷⁸ Some of the most vulnerable young people would fail such a test. Many 'gender fraud' defendants were reported as being confused about their sexual and gender identities; such confusion is not uncommon and is in large part a consequence of systemic pressures towards gender and sexual conformity.

Second, a blanket rule that an 'authentic' gender presentation is always a barrier to criminal liability allows the criminal justice system to ignore the context in which apparent consent was given. Most cases which came before the courts involved deceptions going far beyond misrepresentations of gender identity or gender history. Some involve significant manipulation, exploitation and deception and cause substantial harm to their victims. For example, the defendant in [Barker](#) had adopted four identities in person and more online.⁷⁹ One alter ego would encourage or pressurise complainants into having or continuing a sexual relationship with another alter ego. [Newland](#) included allegations that the defendant had pressured the complainant into giving up a job, as well as securing a final sexual encounter by threats of suicide.⁸⁰ Trans man [Kyran Lee](#) used a different male name, photographs of someone else, and an invented family history including single parenthood. [Gemma Watts](#) became physically aggressive towards a much younger complainant to pressurise her into sexual activity. Simply abandoning the *McNally* principle would leave complainants without redress before the criminal courts.

Third, only overturning the *McNally* principle would continue to mean that some defendants are guilty on the basis of deception as to the nature of the act (e.g. using a dildo instead of a penis). Decisions about their prosecution, conviction and sentencing could continue to be informed by discriminatory presumptions, particularly where they do not appear to prosecutors to be 'authentically trans'. The current law's focus upon an immediate physical act leaves no space for a context which can include genuine struggles with sexuality or gender identity, and where 'assault by penetration' may not seem an appropriate label. The challenge for the criminal law is to find a way of appropriately identifying the wrongs in some 'gender fraud' cases and criminalising them, at the same time as preventing prosecution and conviction where it is not justified. Abolition of the *McNally* principle combined with the proposed new offence could achieve this.⁸¹

The undercover policing cases further illuminate the courts' failure to adequately consider the harms done to women in particular in cases of deceptive consent. That is consistent with their concern to preserve men's scope to lie and mislead in the course of 'seduction'. Thus *McNally* simply dismissed deceptions as to wealth as 'obviously' irrelevant, while [Monica](#) confirmed that wide-ranging deceptions as to almost every aspect of life

⁷⁸ M Gibson, 'Deceptive Sexual Relations: A Theory of Criminal Liability' (2020) 40 *Oxford Journal of Legal Studies* 82, 90; A Sharpe, 'Expanding Liability for Sexual Fraud Through the Concept of 'Active Deception'' (2016) 80 *The Journal of Criminal Law* 28, 39.

⁷⁹ *Gemma Barker* (unreported, 5 March 2012, Guildford Crown Court),

⁸⁰ *Gayle Newland* [2016] All ER (D) 85.

⁸¹ The other situation in which deception currently means there is no consent – impersonation – would be unlikely to overlap with the new offence as such impersonation of a known person is unlikely to be sustained (and was not in the few reported cases).

including politics, marital status, identity, and life history did not vitiate consent. However, the preservation of male sexual prerogatives is achieved at significant cost for women, as the following section explores.

Harms

The Court of Appeal decision in [McNally](#) arguably owes less to legal principle than to the harms which the courts have identified in this and other 'gender fraud' cases. They focus on 'disgust' at engaging in same-sex activity and assume that questioning of one's sexuality is necessarily traumatic to an extent that other identity deceptions are not. These assumptions are rooted in protection of the young women's heterosexuality, not their sexual agency. Since the undercover police officers did not challenge their partners' heterosexuality, their victims could be left without the criminal courts' protection.

Complainants emphasise different harms, and describe many in similar terms for both 'gender fraud' and undercover policing cases. (In the latter, the additional element of state complicity is also significant.⁸²) These harms are consequences of the sustained and intentional nature of the deceptions, rather than the specific physical acts. For example, the extent of the deception itself may be more important than the gender of the deceiver. The initial complaint in [Barker](#) was prompted by discovering that two friends' boyfriends were the same man under different identities; Barker's 'gender fraud' was only uncovered at the police station. Complainants frequently describe something akin to bereavement as they mourn a lover who never existed. One complainant felt 'like he had just died';⁸³ another said her lover 'died that day'.⁸⁴ Complainants have considered suicide and made suicide attempts.⁸⁵ They also feel that their trust has been violated, as they shared not only sexual activity and emotional engagement but also intimate details of their lives, hopes and dreams. In consequence, they are left doubting their own judgment and ability to trust others in future.⁸⁶ Many had welcomed the deceiver into their wider families. Several victims of undercover police officers were left to bring up the couples' children alone after their partners simply disappeared.⁸⁷

Attention to these harms helps us to understand which identity features should engage criminal liability: those sufficiently important to the complainant's perception of who their lover is that the defendant realises the deception makes them a 'different person'. For example, the undercover officers were aware their political beliefs were fundamental for the women with whom they had relationships, while there is no suggestion that that was the case

⁸² C McCartney and N Wortley, 'Raped by the State' (2014) 78 *Journal of Criminal Law* 1.

⁸³ M Blake, '[They Were Completely Different People, Even When We Kissed](#)': Teen Duped into Dating Two Boys without Realising They Were Both the SAME GIRL' *Daily Mail* (London, 7 March 2012).

⁸⁴ 'Woman's Life 'Ruined' after Finding Boyfriend She Had Sex with Was a Woman Wearing a Prosthetic Penis' *Crosby Herald* (Liverpool, 8 September 2015).

⁸⁵ BBC News, '[Gemma Watts: Sex Attacks Woman Posed as Teenage Boy](#)' *BBC* (London, 10 January 2020).

⁸⁶ R Evans, '[Women Start Legal Action against Police Chiefs over Emotional Trauma - Their Statement](#)' *Guardian* (London, 16 December 2011).

⁸⁷ R Evans and P Lewis, '[Undercover Police Had Children with Activists](#)' *Guardian* (London, 20 January 2012).

in *McNally*. The court there assumed it was obvious that wealth could never be similarly important; but sustaining a false picture of one's income over a longer time period would involve a defendant in wide-ranging associated deceptions around home life, social life, income source, and so on.

As the following section explores, the mismatch between the harms identified by courts and complainants is in part due to incompatible temporal framings: the ongoing relationships experienced by complainants and the discrete incidents of sexual touching considered by the criminal courts. By considering complainants' experiences, one can see that sexual violation is one, but not the only, form of harm done in these cases. They therefore belong within sexual offences law, but the current sexual offences do not adequately capture their wrongs.

Time frames

The statutory definition of consent emphasises 'agreement by choice', a formulation which has scope to encompass a process of active agreement between two parties. However, the highly gendered formulation of consent as male request and female submission continues to underlie the caselaw. One consequence is that the timeframe of consent is narrowed to an immediate 'yes' or 'no', rather than the broader period during which consent is or is not co-created between the parties. In other words, the instant event is shorn of even immediate context. The result is one or several staccato snapshots of moments deemed relevant to the instant sexual act, which make certain aspects (previous consent, 'flirting', etc) overly visible while concealing those which are most relevant to the relational, emotional, nuanced and contextual process of consent to sexual activity. That issue is particularly acute when consent is given as part of an ongoing relationship, as in most of the identity deceptions that have been before the courts.

Merely attempting to find a consistent principle to guide these cases, extending the approach in gender fraud to undercover policing cases or vice versa, would not be adequate. Fundamentally, it would not address the misidentification of harms or problems of temporal framing discussed here. There are also more immediate, practical problems. Given the courts' resistance to criminalising undercover policing deceptions, and determination to criminalise 'gender fraud', they are likely to be hostile to treating them in the same way; in any event, formulating a principle in line with the current jurisprudence would be fraught with difficulties. A more comprehensive response is necessary.

It would be possible for a different view of consent to be taken under the current statutory framework. 'Agreement' could – and, I suggest, should – be understood as a process which occurs over time rather than a singular 'offer and acceptance'. (Even contract law recognises the significance of the parties' dealings before that singular moment.) However, that will require a shift in the understanding of this process in time which is unlikely to happen quickly or without prompting; until it does, the identity deception cases will continue to pose particular problems.

Reform

The discussion above points to the need for a profound shift in the courts' perspective. The current law prioritises particular, privileged heterosexual male subjectivities about the meanings of sexual acts. Those acts are largely decontextualised, limited to the time frame of normative heterosexual intercourse (that is, to use a legally resonant phrase, from penetration to emission). The relevance and import of contextual information is assessed from that same perspective: a notorious example is sexual evidence history, whose admissibility had to be restricted through the use of a specific and detailed statutory provision but still remains problematic and controversial.⁸⁸ Ultimately, meaningful change will depend upon a more relational understanding, and temporal reframing, of consent. However, such cultural shifts are long-term projects, as demonstrated by the uneven results of the [Sexual Offences Act 2003](#)'s redefinition of consent.

A shorter-term solution is needed, then, even if the wider shift in understanding should be our longer-term goal. That solution might best take the form of a specific statutory offence which addresses these cases by shifting the emphasis from individual sexual acts and explicitly making the wider relationship context relevant. Such an offence would not only better address the particular harms in these cases, but would do so by adjusting their legal temporalities in a way which might prove a model for other sexual offences.

This proposal for a new offence, 'obtaining sexual consent by sustained identity deception', therefore offers a medium-term response to some of the shortcomings of the present law. By taking the issue of identity deception outside sections 1-3 of the 2003 Act, it could allow the full relationship context to be considered, including the range of different expectations of candour between a single, casual encounter and more intimate relationships, whatever their length. While such an offence would be new to sexual offences law, it would be consistent with other criminal law developments that have shifted the temporal framing of offences. In particular, controlling or coercive behaviour in an intimate or family relationship, contrary to [section 76 Serious Crime Act 2015](#), is based upon repeated or continuous behaviour. While that behaviour must be coercive or controlling, it need not be criminal in itself. In other words, the offence is based upon continuing conduct which has a cumulative impact rather than upon a single incident or event.

Implicit in this proposal is a rejection of simple decriminalisation by overruling the principle in [McNally](#) without more. While that would both simplify the law and protect some vulnerable defendants, particularly those who are struggling with lesbian or trans identities, it would do so at a price. First, the harms caused to complainants would be ignored, however egregious the deception. Most cases prosecuted in recent decades involve alleged deceptions going far beyond the non-disclosure of gender history; and by no means all involved defendants who claimed trans identities. Second, abandonment of the *McNally* principle alone would not protect the most vulnerable potential defendants. For example, young

⁸⁸ Section 41, Youth Justice and Criminal Evidence Act 1999.

people whose partners are of similar age but below the age of consent would still be committing a criminal offence. That does not mean that they would inevitably be criminalised: most sexual activity involving minors is not brought to police attention and by no means all that is becomes the subject of prosecution. However, some are both reported and prosecuted, with potentially serious legal consequences. Such decisions could be informed by the unspoken homophobia and transphobia that critics have identified in the *McNally* decision.

Finally, the timeframe of the proposed offence must extend to online communications as well as in-person meetings. The former do not include physical sexual contact but can involve as much vulnerability, emotional investment, and co-creation of intimacy as the latter. The law has not been quick to take on that point, but experiences during the Covid-19 pandemic have brought greater familiarity with online communications, and their strengths and weaknesses, which it is hoped will inform future decision-making. Thus the offence might extend to situations like *Devonald*,⁸⁹ where the defendant impersonated a woman online to persuade his daughter's ex-boyfriend to commit sex acts on webcam, and *B*,⁹⁰ where the defendant impersonated other men to coerce his girlfriend into on-camera acts. In both cases, the complainant thought they were performing for the viewer's own sexual gratification but the defendant apparently intended to 'teach them a lesson'. *Devonald* was convicted on the basis that he had deceived the complainant about the purpose of the act being sexual. *B*, however, was acquitted since the court assumed that his purpose was partly sexual gratification. In each case, that appeared to owe as much to assumptions about heteronormative male desire as to actual evidence. The proposed offence would offer a more principled basis for deciding such cases.

Caveat

There is an important caveat to the following recommendations. The proposed offence would not resolve all issues in this area. In particular, there are important questions about why 'gender fraud' cases have very high prosecution and conviction rates, in stark contrast to other sexual offences cases. That may be an issue better addressed by prosecution guidelines than the substantive criminal law, but carrying out that assessment in relation to a more appropriate offence should assist the process. Sentencing guidelines would also need to be carefully drafted following wide consultation.

Recommendations

- An offence of obtaining sexual activity by sustained identity deception should be created.

⁸⁹ [2008] EWCA Crim 527.

⁹⁰ [2013] EWCA Crim 823.

- 'Sexual activity' would not be limited to penetration (a limitation which would privilege male subjectivities and ignore many of the actual harms).
- A sexual act must have taken place; this would include those performed 'virtually', eg via webcam, as well as direct sexual touching of the complainant by the accused.
- Deception needs to be carefully defined. It must be as to material facts upon which consent is based, and which misrepresent the defendant's identity (in the wider sense of their characteristics, not name and gender alone). These would typically be broad in range, although a single factor might suffice if the defendant is aware that the complainant considers it crucial.
- The deception must be intentional; this encompasses both intentional misrepresentation and intentional non-disclosure of information the accused knows is relevant to the complainant's decision to consent.
- The deception must be sustained: this offence is aimed at the harms caused by intimate relationship deceptions (even where the intimate relationship is short in duration) rather than those during one-off casual encounters, where a narrower approach may be appropriate.
 - Any definition of 'sustained' must focus upon the continuity of the relationship, rather than a series of 'occasions' (as in harassment offences) which invoke exactly the staccato temporal framings this offence must avoid.
- There must be a causal connection between the deception and consent to the sexual act.
- In sentencing the offence, its severity would depend upon the nature and duration of the relationship, not (only) the type of sexual contact.
- The principle in *McNally* that deception as to gender means there is no consent under s74, would be abolished and such cases would fall under the new offence.