Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent

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Consent; Deception; Sexual assault; Transsexualism

Case 1: Justine McNally

On March 21, 2013, Justine McNally received a custodial sentence of three years after pleading guilty at Wood Green Crown Court, London, to six counts of sexual assault by penetration. She was also placed on the Sex Offenders’ Register for life. The background story to her convictions can be described as follows: McNally met a cisgender girl through an online video game and communicated with her through a chat room and skype. At the time, she was 13 and the girl 12 years old. After more than three years of online communication the two met in person on several occasions. On two of those occasions McNally digitally and orally penetrated the girl. At the time of these sexual acts she was 17 and the girl 16. While McNally was born with female genitalia, she identified and presented as male prior to and at the time of the incidents.

Case 2: Christopher Wilson

On March 6, 2013, Christopher Wilson, after entering a plea of guilty, was convicted by the Edinburgh High Court on two counts of obtaining sexual intimacy by fraud. While a custodial sentence was anticipated, he received three years probation and 240 hours of community service. He was also placed on the Sex Offenders’ Register for life. The background story to his convictions can be described as follows: Wilson met two cisgender girls on separate occasions. In relation to the first girl, who was either 15 or 16 at the time (there is uncertainty on this point), sexual contact was limited to kissing. Wilson was aged 20 at the

* I would like to thank Professor David Omerod and the two Criminal Law Review anonymous referees for their helpful comments.

1 Sexual Offences Act (SOA) 2003 s.2. On appeal, the sentence was reduced to nine months’ detention in a young offender institution suspended for two years with a supervision order (McNally [2013] EWCA Crim 1051; [2013] 2 Cr. App. R. 28 (p.294) at [2]). At the time of release McNally had served almost three months in prison [52]).

2 The term *cisgender* man or woman refers to “individuals who have a match between the gender they were assigned at birth, their bodies, and their personal [gender] identity” (K. Schilt and L. Westbrook, “Doing Gender, Doing Heteronormativity: Gender Normals, Transgender People, and the Social Maintenance of Heterosexuality” (2009) 23(4) Gender & Society 440, 461). The term can be distinguished from *transgender* which highlights a feeling of incongruence between gender identity and anatomy. The term *cisgender* is seen as preferable to “biological” or “genetic” as these terms tend to reinforce the primacy of cisgender people.

3 “Obtaining sexual intimacy by fraud” is an odd choice of words. There is no such offence contained within the Scottish SOA 2009. The most appropriate charges appear to be s.2 (sexual assault by penetration) in relation to vaginal penetration by an object and s.3 (sexual assault) in relation to kissing.
time of kissing girl 1. Two years later he commenced a relationship with the second girl. She was aged 15 at the time, but told Wilson that she was 16. This relationship culminated in penetrative sexual intercourse by means of a prosthetic device.\(^4\)

While Wilson was born with female genitalia, he identified and presented as male prior to, at the time of, and subsequent to the incidents.

**Introduction**

This article challenges the legality and public policy interest in prosecuting transgender people for sexual offences in circumstances where they do not disclose their gender history to sexual partners in advance of sexual intimacy. It does not do so in the abstract. Rather, and despite the view of the Law Commission that prosecution in these circumstances would be incompatible with art.8 of the European Convention on Human Rights which guarantees the right to privacy,\(^5\) consideration of these issues is informed by a recent spate of successful prosecutions brought against young transgender people. The two cases detailed above are examples of this prosecutorial turn and will serve as vehicles for thinking through the characterisation of non-disclosure as fraud.\(^6\)

Before proceeding further it is necessary to provide greater detail concerning the facts of the McNally case, especially as these additional facts may have been important both to the acceptance of a guilty plea and to the reasoning of the Court of Appeal in dismissing McNally’s appeal against conviction. Moreover, the reader might be confused, and perhaps offended, by my use of female pronouns in referring to McNally. The reason why I refer to McNally as Justine and use female pronouns throughout the article is because Justine now apparently identifies as female, a gender position consistent with her birth designated sex. At the time of the alleged offences however, she appears to have identified and lived as a young man and made reference to her desire for gender reassignment surgery.\(^7\) It is true that she


\(^5\) Law Commission, Consent in Sex Offences: A Policy Paper: Appendix C of Setting the Boundaries (London: Home Office, 2000), Vol.2, para.5.32). It should be acknowledged that the Law Commission confined its comments to those transgender people who, unlike the defendants in the cases under consideration, have undertaken gender reassignment surgery (para.5.33). However, the Gender Recognition Act (GRA) 2004 provides for legal recognition of gender identity irrespective of surgical intervention. Accordingly, for the purposes of English law, gender status is not contingent on surgery. This being so, gender claims cannot be viewed as false or fraudulent on the basis of the defendant’s surgical status. The same point holds in relation to possession of a Gender Recognition Certificate (GRC). This legal document does not effect any kind of change in a person’s gender identity. Rather, it simply provides pre-existing facts concerning gender with the imprimatur of law.

\(^6\) The first recorded prosecution of this kind is Saunders Unreported October 12, 1991 Doncaster Crown Ct, Pink Paper, 196. Jimmy Saunders was convicted under the old law of indecent assault (s.14 SOA 1956) and sentenced to six years imprisonment. While the sentence was later reduced to two years probation, Saunders served almost nine months in prison (Saunders Unreported 1992 CA). For an analysis of the case see A.M. Smith, “The Regulation of Lesbian Sexuality Through Erasure: The Case of Jennifer Saunders” in K. Jay (ed.), Lesbian Erotics (New York: New York University Press, 1995) pp.164–179. In a similar case last year, Gemma Barker was convicted on two counts of sexual assault (s.3 SOA 2003). The Daily Mail Online, March 6, 2013, available at: http://www.dailymail.co.uk/news/article-2110430/Gemma-Barker-jailed-Victims-girl-dressed-boy-date-speak-anguish.html [Accessed December 19, 2013]. There are also similar cases reported in other jurisdictions including the US and Israel. For an excellent analysis of these cases, and in particular the Israeli case of Hen Alkobi, see A. Gross, “Gender Outlaws Before the Law: The Courts of the Borderland” (2009) 32(1) Harvard Journal of Law and Gender 165.

\(^7\) McNally [2013] EWCA Crim 1051; [2013] 2 Cr. App. R. 28 (p.249) at [10].
expressed some confusion about her gender, something which, like shame, guilt and internalised transphobia/homophobia, is not uncommon among young transgender people coming to terms with their gender identity in our society. Thus I use female pronouns in order to respect McNally’s present articulation of gender identity. However, irrespective of this development, and while McNally might be viewed as an example of a hard case producing bad law, this article will challenge judicial reasoning in the case because at the time of conviction and appeal there was, as in the case of Wilson, sufficient information available to conclude that McNally identified as male prior to and at the time of the alleged offences, and therefore that apparent consent was valid consent and that McNally was not deceptive. Before considering the specific legal issues arising in relation to transgender people, I will situate their discussion within the broader context of existing debates surrounding the elasticity of the concept and actus reus element of non-consent in fraud contexts, and I will introduce my argument.

Sex, deception and criminalisation: the background debate

As is well known, the Sexual Offences Act (SOA) 2003, informed by the Setting the Boundaries Report, expanded the actus reus element of non-consent. However, in relation to sexual offences committed by fraud, and despite the Report’s recommendation to criminalise “sexual penetration of anyone in any part of the world by deception,” the Act developed this area of the law only to a limited extent. Specifically, it added the phrase or purpose to the pre-existing common law prohibition on fraud as to the nature of the sexual act so that it now reads as “fraud as to the nature or purpose of the sexual act”. It also expanded fraud in the inducement, beyond its prior marital and gendered parameters, to include “impersonating a person known personally to the complainant”. This provision is clearly inapplicable in the present context, while s.76(2)(a) has been given a restrictive interpretation by the courts. Of course, irrespective of the applicability of either conclusive presumption, consent obtained by fraud might be viewed as

9 “Transphobia is an emotional disgust toward individuals who do not conform to society’s gender expectations… The ‘phobia’ suffix is used to imply an irrational fear or hatred, one that is at least partly perpetuated by cultural ideology” (D. Hill and B. Willoughby, “The Development and Validation of the Genderism and Transphobia Scale” (2005) 53 Sex Roles 531–544).
12 SOA 2003 ss.74–76.
13 Setting the Boundaries, SOA 2003 ss.74–76, recommendation 14, p.xiii.
15 Prior to the SOA 2003, inducing a married woman to have sexual intercourse through impersonating her husband constituted rape (s.1(2) SOA 1956).
16 SOA 2003 s.76(2)(b). More significantly perhaps, the Act repealed the already existing and much broader offence of “procuring a woman by false pretences or false representations” (s.3 SOA 1956).
17 The defendants did not impersonate persons known personally to the complainants (Elbekkay [1995] Crim. L.R. 163).
18 In relation to Scottish law, these presumptions are contained in s.13(d) and (e) SOA 2009.

vitiated under the general meaning of consent, especially since it was redefined to mean: “agreement by choice where a person has the freedom and capacity to make that choice”.19 However, the courts have generally proved reluctant to viewing consent obtained by fraud as vitiated under s.74, although reliance on s.74 rather than s.76 would leave open the possibility of an argument about reasonable belief. As we shall see, this restrictive reading is most apparent where the facts lack the element of coercion. Accordingly, the convictions of McNally and Wilson are, at first sight, curious. It is true that Assange20 has been interpreted as drawing a distinction between non-disclosure and lying whereby the latter may fall with s.74.21 However, it will be argued, despite the view of the Court of Appeal in McNally, that characterisation of McNally’s conduct as “active deception”22 is simply wrong.

The criminalisation of deception in sexual contexts and the specific scope of s.76(2)(a) and s.74 have been the subject of considerable, and at times heated, academic debate. Most notably, Jonathan Herring has contended that consent ought to be considered vitiated whenever a complainant “is mistaken as to a fact,” would not have consented to sexual activity had she “known the truth about that fact,” and in circumstances where the defendant was aware of the same.23 This argument is premised on sexual autonomy. While Herring is not alone in favouring the adoption of a much broader understanding of non-consent in relation to s.76(2)(a) and more generally,24 he notes that few legal academics have been willing to endorse his position25 and that some have described it as “preposterous”.26 Others see Herring’s proposal as overly “ambitious”27 and, if it were to be adopted, as “frightening in its ramifications”.28 While I have significant reservations regarding Herring’s position, I am sympathetic to the concerns that animate it. Clearly, it is important to take the sexual autonomy of women seriously, especially given the systemic nature of sexual violence in our society, an empirical reality to which Herring points.

Central to the debate between Herring and his detractors are two important themes: identifying the proper reach of the criminal law and the place of moralism to that end and dispute over the kind of harms deception in sexual contexts produces. Thus, Hyman Gross insists that many types of non-disclosure involve only a “moral wrong”29 with no “genuine harm”30 arising and that in these circumstances criminalisation “is objectionable on grounds of political morality

19 SOA 2003 s.74. Scottish SOA 2009 s. 12 also states that consent requires “free agreement.”
with reference to basic human rights”. \(^{31}\) Herring rejects accusations of moralism insisting that deceptions may and do produce “serious harms”. \(^{32}\) Of course, calculations of harm, always difficult exercises, will vary depending on the examples we choose to consider: non-disclosure of HIV positive status or false declarations of love. In all examples, however, Herring appears to take an absolute position whereby the right to sexual autonomy trumps all other rights claims, including the right to privacy. In this respect, there is some substance to Gross’ claim that Herring places “the sex act on an elevated moral plane”. \(^{33}\) This is not inevitable, not is it necessarily desirable.

In this article, I want to test the absoluteness of Herring’s position by dealing not with a series of deception scenarios that clearly lie outside the actus reus element of non-consent under current law. Rather, I want to raise the stakes by considering the justice of his position with regard to a very specific set of defendants, some of whom have been incarcerated due to interpretations of consent that conform to the logic of his position. In considering McNally and Wilson I aim to: (a) challenge characterisation of non-disclosure of gender history as deceptive; (b) contest the claim that harm (or offence) arising through non-disclosure ought to be viewed as sufficient to invoke the criminal law; \(^{34}\) and (c) highlight how Herring’s emphasis on a subjective determination of the materiality of facts lends itself to attitudes of intolerance within our society. In short, and in the present context, my objections to Herring’s reform ambitions are threefold: ontological, harm-sceptical and public policy based, directed to countering transphobia/homophobia. If the reader is persuaded by my arguments it will not mean that Herring’s arguments lose all cogency. But it will mean that the absolutism of his position becomes not only suspect but dangerous.

For the purposes of this article, and irrespective of the dubious nature of the assumption, \(^{35}\) I will assume that the complainants did not know about the defendants’ gender history. I make this assumption because I want to examine the legality of convictions based upon it. In considering the legal rules concerning the actus reus element of non-consent, I will argue that only one of the eight charges brought against the two defendants is supported by legal authority. However, even here, where prosecution and conviction can be viewed as legally sound, the factors that have animated prosecution and justified conviction appear to go beyond the rule of law and in ways which suggest discrimination against transgender people.


\(^{35}\) The characterisation of consent as having been obtained by fraud belies a feature of these cases that requires us to suspend our disbelief to an uncanny degree. That is to say, the complainants’ claim that they believed the defendants to be cisgender men is hard to believe on the objective facts available to the courts. Specifically, it is hard to believe that the complainants in McNally and Wilson were unable to differentiate between a penis and a prosthetic device, especially if used on multiple occasions (while McNally was not charged in this respect, and while the claim was disputed, the complainant did allege that penetration by object had occurred (McNally) [2013] EWCA Crim 1051; [2013] 2 Cr. App. R. 28 (p.249) at [8])). Indeed, in McNally, the defendant claimed that the complainant had discovered the facts about gender identity over a year before they physically met [12] It was also claimed that the complainant “commented on her breasts and her high pitched voice” [42]. In these respects, the bringing of complaints may have had less to do with consent obtained by fraud and more to do with repressed transgender or lesbian desire and/or parental pressure informed by homophobia. There is certainly precedent for these types of concern (Gross, “Gender Outlaws Before the Law: The Courts of the Borderland” (2009) 32(1) Harvard Journal of Law and Gender 165, 172, 209).

At the very least, the cases appear to demonstrate more stringent application of criminal law rules to transgender defendants.

**Obtaining consent by fraud**

Turning to the convictions and their legality, the defendants in the cases detailed were convicted of “Sexual Assault by Penetration” under the SOA and, somewhat confusingly,\(^{36}\) of “Obtaining Sexual Intimacy by Fraud” under the Scottish Sexual Offences Act 2009. In relation to all counts, the central tenet of the prosecution case was that the complainants did not consent to various forms of sexual activity due to fraud. In theory, convictions might be supported by the conclusive presumption in s.76(2)(a) or, in the Scottish context, s.13(d). Therefore it will be necessary to address this possibility. However, in circumstances where this presumption does not apply, the question of consent is to be resolved by reference to its general meaning and therefore to common law decided both before and after the enactment of s.74 or, in the Scottish context, s.12. In the cases under consideration the courts appear to have adopted the latter approach. The difficulties begin when we consider judicial application of these rules to the facts of the cases. In particular, the unsatisfactory nature of the legal resolution of these cases appears to be explicable, at least in part, in terms of an act/identity distinction that, in transgender contexts, appears to unravel in judicial hands.

**Fraud as to “the nature and purpose of the sexual act”**

It could be argued that the complainants in the cases under consideration were deceived as to “the nature and purpose of the sexual act”. The invocation of this conclusive presumption, however, appears to have limits on the facts of the cases under consideration. Nevertheless, reliance on it would appear to be legally justified in relation to instances of vaginal penetration by means of a prosthetic device. However, only in *Wilson* was a charge brought on this basis. In this respect at least, there is clearly a discrepancy between what the complainant thought she was engaging in (penile-vaginal intercourse) and what actually occurred.\(^{37}\) This discrepancy is inconsistent with consent. In relation to the charges that did not involve vaginal penetration with an object (being seven out of eight across the two cases), it does *not* appear possible to rely on the conclusive presumption. Thus the other count against Wilson involved kissing only. In relation to McNally, all charges related to oral and digital penetration of the vagina. In relation to these sexual acts, consent was not lacking on the basis of s.13(d) or s.76(2)(a) because there was no discrepancy between what the complainants thought they were engaging in and what actually occurred. The English case law on this point seems fairly clear.

Thus in *Jheeta*,\(^{38}\) a case involving a complainant who had sexual intercourse with the defendant after receiving texts from him purporting to come from the police and advising her to continue sexual relations lest a fine be incurred due to

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\(^{36}\) See above fn.3.

\(^{37}\) It is worth noting however, that the “phenomenological body does not simply stop at the surface of the skin” (Z. Davy, *Recognizing Transsexuals: Personal, Political and Medicolegal Embodiment* (Farnham, Surrey: Ashgate, 2011), Ch.3). Thus some transgender men experience prosthetic devices as part of, or as an extension of, self.

\(^{38}\) *Jheeta* [2007] EWCA Crim 1699; [2008] 1 W.L.R. 2582.
stress caused to the defendant, the English Court of Appeal insisted that “section 76(2)(a) had no application”. This approach was reiterated in Assange, a case where the defendant had sexual intercourse without a condom, or continued sexual intercourse after removing, damaging or tearing a condom, after it had been made clear to him that consent was conditional on condom use. While the Divisional Court accepted the proposition that sexual intercourse without a condom could be viewed as different to sexual intercourse with a condom “given the presence of a physical barrier, a perceived difference in the degree of intimacy, the risks of disease and the prevention of a pregnancy,” thereby pointing to a possible s.76(2)(a) analysis, it preferred to rely on s.74, insisting that “s.76 should be given a stringent construction, because it provides for a conclusive presumption”. More recently, in B, a case involving a defendant who, having created false identities on a social media website, blackmailed a female victim into engaging in sexual activity through the threatened use of sexually explicit photographs shared between the parties, the Court of Appeal quashed the defendant’s conviction holding that “[r]eliance upon section 76 … on these facts and this evidence, was misplaced”. Moreover, the court stressed the need for trial judges to provide clear directions to juries concerning the limited meaning of the word “purpose” in s.76(2)(a). The issue arose again in R. (on the application of F) v DPP. In this case, which involved judicial review of a decision by the CPS not to prosecute, a wife had sexual intercourse with her husband on the understanding that he would not ejaculate inside her vagina. Here the High Court insisted on a stringent construction of the provision given its status as a conclusive presumption. The judicial approach taken in these cases, especially in Assange and R. (on the application of F) v DPP, suggests that establishing non-consent will prove onerous even where, unlike in the transgender cases, some kind of physical discrepancy exists. It should be acknowledged however, that there has been some judicial movement on the interpretation of “nature and purpose of the sexual act”. The phrase has certainly been given a more permissive interpretation in Devonald. In this case, a father pretended to be a 20-year-old woman on the internet in order to seduce a young man to masturbate in front of a webcam as revenge for what he believed to have been the boy’s mistreatment of his daughter. The Court of Appeal accepted that the motivation of one of the parties may bear down on the interpretation of what falls within the ambit of the phrase. While the court’s analysis might be viewed as inconsistent with s.77, Herring suggests it may be

Assange [2011] EWHC 2849 (Admin) at [87]. Simester et al., have expressed scepticism concerning the view that Assange’s conduct vitiated consent under s.74. They argue that if this proposition is correct then it must also follow logically, though perhaps counter-intuitively, that “a man’s consent would be vitiated if he made it clear that he would not have sexual intercourse with a woman unless she was practising contraception, and the woman, wishing to get pregnant, told him that she was when she was not” (A.P. Simester et al., Criminal Law: Theory and Doctrine, 5th edn (Oxford: Hart Publishing, 2013), p.475).
While the courts in Jhetta, Bingham and R. (on the application of F) were not prepared to bring the facts within s.76(2)(a), it was recognised that consent was absent in each case through the application of s.74. The correctness of this approach also finds support in a number of criminal law textbooks (Ormerod, Smith and Hogan’s Criminal Law (2011), p.866; P. Rook and R. Ward, Rook and Ward on Sexual Offences: Law & Practice, 4th edn (London: Sweet and Maxwell, 2010), para.1.216).
Devonald [2008] EWCA Crim 527.
“that the position the courts are reaching is that they will ask whether the deception means the act is something very different to the act [the complainant] thought they were doing.”

Even if this is so, it ought not to assist the prosecution in the cases under consideration. As already noted, the complainants were under no illusions concerning kissing and digital and oral vaginal penetration. The approach taken in Devonald, and the possible trend indicated by Herring, does not accommodate the facts of these cases. While the complainant in Devonald thought he was masturbating for the enjoyment of a 20-year-old woman rather than a middle-aged man, the complainants in the transgender cases engaged in sexual activity with the people who stood before them. Moreover, the complainants in McNally and Wilson understood the defendants’ motivation to be sexual gratification. There was no desire to humiliate or other ulterior intent in these cases.

However, the bringing of complaints in these cases, as well as the justifications for conviction, appear to have more to do with the supposed identity of the defendants than with sexual acts or motives. This is not to deny the potential applicability of s.13(d) in Wilson in relation to the use of a prosthetic device without the complainant’s consent. Indeed, a proper basis for conviction exists here irrespective of whether a defendant is transgender or cisgender. Rather, it is to highlight how law problematises the gender identities of transgender people. This emphasis on identity rather than acts is rendered apparent in McNally where, according to prosecuting counsel, the complainant had been literally sickened upon discovery of the defendant’s gender history. The characterisation of the defendants as deceptive in these cases appears to be based on a legal and broader cultural view that they are not men. This view seems to have been adopted by both prosecuting counsel and the judges in the cases. Thus Crown Court judge, H.H. Judge Patrick, described McNally’s non-disclosure of gender history in these circumstances as amounting to “an abuse of trust” and as “selfish and callous behaviour”. This framing of events during sentencing, and of McNally as deceptive in identity terms, was subsequently reproduced by the tabloid and broadsheet media. Thus McNally was variously described as “posing” as, being in the “disguise” of and “masquerading as” a boy.

Coupling transgender with impersonation, and therefore fraud, is to misunderstand the phenomenon of transgender and its ontology. It is also to


overlook the fact that the state recognises “gender dysphoria”, provides state funded medical treatment for this “condition” as well as a mechanism for legal recognition of gender identity. Transgender men identify as men and typically do so from an early age. There is nothing fabricated about their feelings or performance of masculinity, or at least none more so than in the case of cisgender men. Moreover, in the cases under consideration, and while not a requirement of legal gender recognition, both defendants had indicated an intention to undergo gender reassignment surgery. Further, there is a developing consensus within the medical field of endocrinology that gender identity in transgender people is an effect of the interaction between the developing brain and sex hormones in utero. In this respect, there is significant and growing evidence for the view that transgenderism has a biological explanation. However, even if it can be demonstrated that the conclusive presumption is either inapplicable or applicable only to some counts, it remains the case that prosecutions might be justified through a general claim that consent is lacking under s.74.

Section 74 and the general meaning of consent

The courts have upheld convictions using s.74 where defendants have obtained sexual intercourse by deception. Thus, in Jheeta, the defendant’s conviction was upheld on the basis that, at least in relation to some instances of sexual intercourse, the deception was a relevant factor in concluding that consent was lacking under s.74. More recently, in B, while quashing a conviction sustained on the basis of s.76(2)(a), the Court of Appeal noted that the “prosecution needed to look no further than the provisions of section 74”. Finally, in R. (on the application of F) v DPP the High Court, having rejected a s.76(2)(a) argument, suggested that the facts lent themselves to a conclusion of non-consent under s.74 and ordered the CPS to review the case. However, the approach adopted in these cases does not lend itself easily to transgender cases involving non-disclosure of gender history. In contrast to transgender cases, the cases of Jhetta, B and R. (on the application of F) v DPP all involve circumstances that can, to one degree or another, be described as coercive.

In order to understand judicial approaches to s.74 in the context of non-disclosure of gender history it is instructive to consider the cases of B and Assange. In B, Latham L.J. insisted that non-disclosure of HIV positive status was “not relevant

54 Indeed, this was rendered explicit in the Wilson case (Gay Star News, March 7, 2013, available at http://www.gaystarnews.com/article/man-%E2%80%99guilty%E2%80%99-fraud-not-telling-girlfriend-he-was-trans070313 [Accessed December 19, 2013]).
58 R. (on the application of F) [2013] EWHC 945 (Admin); [2013] 2 Cr. App. R. 21 (p.228) at [26].
60 Assange [2011] EWHC 2849 (Admin) at [90].
to the issue of consent under s.74 in relation to the sexual activity”. 61 However, in 
Assange, the Divisional Court emphasised that B “goes no further than deciding 
that a failure to disclose HIV infection is not of itself a relevant consideration 
under s. 74”. 62 Thus, and as Richard Card notes, this leaves open “the possibility 
that if the defendant lies, when asked about his HIV status by the complainant, 
this may be viewed as a relevant consideration”. 63 While, in contrast to B, the 
element of exposure to physical harm is absent in transgender cases, the Court of 
Appeal in McNally appears to have taken the morally problematic distinction 
between non-disclosure and “express” or “active deception” as its cue to uphold 
McNally’s conviction. Like the defendants in Assange and R. (on the application 
of F) v DDP, McNally was considered to have engaged in explicit deception. In 
the words of the court: “the sexual nature of the acts is, on any common sense 
view, different where the complainant is deliberately deceived by a defendant into 
believing that the latter is a male”. 64

This judicial statement is problematic in at least two respects. First, the so-called 
“common sense view,” upon which the court bases its decision, assumes McNally 
is not male. Yet, there was evidence before the court indicating that, prior to and 
at the time of the alleged offences, McNally identified as male: living, at least on 
a part-time basis, in the male gender role which made McNally “feel more 
comfortable” and a stated intention to undergo “a sex change”. 65 The fact that 
McNally now identifies as female, a fact perhaps explained in terms of a retreat 
into “normality” provoked by criminal prosecution and media persecution, rather 
than a genuine change in gender identity, does not alter the fact that, at the relevant 
time, McNally identified as a man and was not, in this respect, deceptive. Secondly, 
the statement is curious in that it implies, in order to avoid a collapse of the very 
distinction that the court erects, that the sexual nature of acts is rendered different 
by active deception but not non-disclosure. Surely, while the distinction might be 
relevant to a legal finding of non-consent, it can hardly be relevant to the sexual 
nature of acts performed once it has already been concluded that the defendant is 
not male. In both cases, a complainant would unwittingly become intimate with a 
person considered female, believing her to be male.

In view of the court’s emphasis on “active deception,” the implication appears 
to be that non-disclosure of gender history is, of itself, insufficient to vitiate consent. 
Accordingly, the court appears to have left room for counsel to distinguish McNally

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61 EB [2006] EWCA Crim 2945; [2007] 1 W.L.R. 1567 at [21]. Of course, a successful prosecution could be brought 
under the Offences Against the Person Act 1861 in these circumstances (Dica [2004] EWCA Crim 1103; [2004] Q.B. 
1257; Konzani [2005] EWCA Crim 706; [2005] 2 Cr. App. R. 14 (p.198)). For a critique of the criminalisation of 
HIV transmission in sexual contexts see M. Weait, Intimacy and Responsibility: the Criminalisation of HIV 
Transmission (Abingdon: Routledge, 2007).

62 Assange [2011] EWHC 2849 (Admin) at [90].


64 McNally [2013] EWCA Crim 1051; [2013] 2 Cr. App. R. 28 (p.249) at [ 20].


66 My emphasis. This judicial statement 
raises the question as to why the court did not approach the consent issue through s. 76(2)(a).


on the facts in future cases involving transgender defendants. However, this leads us to ask: what were the circumstances that led the court to a conclusion of active deception in McNally? The answer to this question is important for all sexually active transgender people because it indicates the manner in which non-consent and the accompanying mens rea are likely to be identified in future cases.

The judgment of the Court of Appeal refers to a number of features of the case, one or more of which it may have relied upon in coming to its decision. First, McNally used a different surname, Hill, throughout the relationship with the complainant. While deceptive, this hardly casts doubt on the information before the court supporting a conclusion as to masculine identity. Moreover, it is understandable that a transgender person may wish to conceal information that might lead to the discovery of gender history. Secondly, McNally and the complainant discussed “getting married and having children”. There is nothing necessarily deceptive about such future speculations. McNally would be able to marry a woman after obtaining a Gender Recognition Certificate (GRC) and the couple would be able to have children either through adoption or in vitro fertilisation. Thirdly the court noted that McNally had experienced “confusion surrounding her gender identity”. Lest this fact serve to challenge McNally’s gender identity, the reader should be reminded that such “confusion” is neither uncommon, nor surprising, especially among young people having to negotiate their way in a transphobic society. In short, confusion should not be read as a sign of gender inauthenticity. Fourthly, McNally apparently spoke of “‘putting it in,’” which the complainant took to mean ‘his’ penis”. While this statement is clearly interpreted as intentional deception, many transgender men consider a prosthetic device to be their penis. Fifthly, much was made of the fact that McNally had purchased condoms and that this occurred after a time when, according to McNally, the complainant had either discovered or suspected that the defendant was not a cisgender man. The inference that the court drew from this evidence was that McNally was lying about the complainant’s knowledge. There are two points that need to be made here. First, if McNally was lying this does not serve to call into question gender identity. Secondly, purchase of condoms need not be read as evidence of lack of veracity. The assumption of the court appears to be that McNally purchased condoms in order to deceive the complainant regarding genitalia. Yet, the fact of purchase could be interpreted as: (a) concern over hygiene in the context of potential use of a prosthetic device that McNally did possess; and/or (b) as consistent psychologically with a sense of masculine identity. Finally, in various witness statements McNally used female pronouns. However, this fact needs to be approached with considerable caution because: (a) McNally pleaded guilty believing that she had no defence (a fact that later served as a ground of appeal) ;

71 McNally [2013] EWCA Crim 1051; [2013] 2 Cr. App. R. 28 (p.249) at [47].
74 McNally [2013] EWCA Crim 1051; [2013] 2 Cr. App. R. 28 (p.249) at [29]–[30].
75 McNally [2013] EWCA Crim 1051; [2013] 2 Cr. App. R. 28 (p.249) at [13]. Indeed, prior to McNally’s guilty pleas, counsel, like the Court of Appeal, interpreted condom purchase as favouring the prosecution and advised McNally that this weakened the defence case [35].
and (b) use of female pronouns might be viewed as a reference to birth designated
sex, rather than gender identity.

The importance attributed to these facts reveals the somewhat illusory nature
of the distinction between non-disclosure and active deception in the context of
transgender defendants charged with sexual offences. That is to say, and as the
reasoning of the Court of Appeal demonstrates, it may not take much in terms of
defendant conduct and/or speech before non-disclosure of gender history is
translated into active deception. Moreover, in view of the fact that “gender
confusion” and use of pronouns in witness statements are not directed toward the
complainant, such facts have no relevance to any claim of deception going to
sexual acts. Accordingly, judicial emphasis upon them serves, perhaps, to reveal
that it is non-disclosure per se rather than “active deception” that ultimately grounds
the decision. What is clear is that the court, in interpreting the facts and applying
the law, gave scant regard to transgender experiences and perspectives. Rather, it
has delivered a judgment rich in unacknowledged cis-sexism. Indeed, the judgement
appears to be premised on the conceit that a cisgender person would not knowingly
become sexually intimate with a transgender person, a conceit that renders an
argument of reasonable belief, an argument made available through the processing
of the consent question through s.74, redundant.

Of course, and returning to the broader debate surrounding sex, deception and
criminalisation, it might be argued that non-disclosure of, as opposed to active
deception pertaining to, gender history ought to be a sufficient basis for concluding
that consent is absent. While such an argument would perhaps be inconsistent with
the Court of Appeal’s decision in *McNally*, though this is far from clear, it is one
that should be rejected because:

(a) gender history ought not to be viewed as a material fact serving to
vitiates consent; and
(b) consent ought not to be viewed as vitiated even if it is concluded
that gender history is a material fact.

**Gender history ought not to be viewed as a material fact serving to
vitiates consent**

In opposition to this first claim is the view that gender history is a material fact
that sexual partners ought to know if their consent is to be considered valid. This
view is premised on the value of sexual autonomy and it almost certainly enjoys
considerable weight in normative terms. The argument is, as already noted, put
most forcefully by Jonathan Herring.76 While recognising that total transparency
would place an undue burden on individuals, Herring insists that, if consent is to
be valid, facts must be disclosed where considered “material”. This amounts to a
claim that the right to sexual autonomy trumps the right to privacy. Indeed, Herring
renders this claim explicit in relation to transgender-cisgender sexual relations.77
I find this claim unpersuasive. However, before articulating my argument that
consent should not be viewed as vitiated even in circumstances where gender
history is considered a material fact, I want to put in issue precisely the claim that

gender history ought to be considered a material fact. The claim that gender history ought to be considered a material fact serving to vitiate consent is grounded either in general normative terms, which amounts to a claim that such a view enjoys widespread support, or focuses more specifically on the importance of this historical information to a sexual partner. Herring makes the latter claim.

In my view, gender history ought not to be considered a material fact for the purposes of criminal prosecution. To treat it as such is to cast doubt on the authenticity of the gender identities of transgender people. As argued earlier, transgender people are not engaged in some form of pretence or masquerade. Typically, their gender identities manifest early in life and, as already noted, the phenomenon of transgenderism is recognised by the medical community and the state provides both public funding for treatment and provision for gender recognition. Further, and while it is not my contention that the legitimacy of prosecution should turn on whether gender claims have been legally recognised, the fact of legal recognition appears to introduce a further objection to prosecution. While the transgender defendants in the cases under consideration have not, as yet, received a GRC, a fact perhaps due to their tender age, possession of a certificate signifies legal recognition of “acquired” gender “for all legal purposes”.

Further, while non-disclosure of gender history constitutes a ground for nullity proceedings under the Matrimonial Causes Act 1973, the Gender Recognition Act (GRA) 2004 did not introduce or amend any criminal legislation to produce the same effect. For example, non-disclosure might have been added to the list of conclusive or evidential presumptions contained within the SOA. Accordingly, in the context of legally recognised transgender people, criminal prosecution might be viewed as a denial of the recognition conferred and contrary to the GRA. However, suppose we were to concede that gender history is a material fact, would this then clinch the argument in favour of criminalisation of non-disclosure? I argue that it does not. For the justification of a disclosure requirement depends not merely on establishing gender history as a material fact, but on demonstrating that a right to know in such circumstances is not trumped by other considerations.

Consent ought not to be viewed as vitiated even if it is concluded that gender history is a material fact

The argument that prosecution is appropriate in cases of non-disclosure of material facts is one based on the primacy of the right to sexual autonomy. In this part of the article I will contend that prosecution is inappropriate for at least three reasons: (i) it produces legal inconsistency and is potentially discriminatory; (ii) the right to sexual autonomy does not necessarily trump the right to privacy; and (iii) there are compelling public policy reasons against criminalisation.

78 GRA 2004 s.9.
Objection 1: Prosecution produces legal inconsistency

In the *McNally* and *Wilson* cases the defendants were convicted of sexual offences on the basis of fraud. Yet, few deception scenarios fit or are processed within either conclusive presumption and s.74 is generally only invoked where fraud is supplemented, to one degree or another, by coercion. This is certainly what an analysis of the relevant case law, explored on pp.212 onwards of this article above, suggests. The forms of non-disclosure that do not serve to vitiate consent for the purposes of sexual offences appear to range widely and include non-disclosure of HIV positive status. In view of the approach taken by the courts in *Dica* and *Konzani*, other forms of non-disclosure producing no legal consequences are likely to include non-disclosure of facts concerning racial or ethnic status, disability, past sexual experience including, in the heterosexual context, homosexual experience, drug addiction, religious faith or atheism and convictions for child abuse. The list is potentially endless. All of these facts may be ones sexual partners wish to know. Yet, in all these and many other circumstances law views consent as legally valid. Of course, one might argue, as Herring appears to, that s.74 should be interpreted so as to include these and/or other forms of non-disclosure. In other words, it might be said that the problem is one of under-regulation. That might be so. Nevertheless, the problem of inconsistency remains. Moreover, the targeting of gender history, as opposed to other types of historical information, and the fact that it is only the gender histories of transgender people rather than people at large with which law appears to be concerned, points to the possibility that prosecution might constitute discrimination under art.14 of the European Convention on Human Rights.

Objection 2: A right to sexual autonomy is not an unlimited right

The legal obligation to disclose gender history to sexual partners requires the disclosure of highly personal and private information. Accordingly, it might be viewed as breaching art.8 of the Convention, a view already expressed by the Law Commission. The content of the phrase “private and family life” has been interpreted widely. Indeed in the House of Lords decision in *Campbell v Mirror Group Newspapers*, Lord Hoffmann noted that “the protection of human autonomy and dignity” includes “the right to control the dissemination of information about one’s private life”. Of course, art.8(2) enables a state to justify invasions of privacy. For present purposes, the relevant part of art.8(2) that might be legitimately invoked is the part that expresses concern for “the protection of the rights and freedoms of others”. In the present context, this requires balancing the right to privacy against the right to sexual autonomy. Sexual autonomy is, of course, an important right. However, it is not a trump card, as legal treatment of fraud by deception cases demonstrates, nor should it be. It is contended that in order to

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81 Above see fn.5.
82 *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; [2004] 2 A.C. 457 at [51].
83 While not explored in this article, due to space considerations, it should be recognised that it is not only the the sexual autonomy of cisgender people that is at stake here. Disclosing gender history and present and/or past anatomical form in contexts of sexual intimacy clearly has implications for the sexual autonomy of transgender people.
conclude that sexual autonomy should trump privacy it should be demonstrated, by those who favour prosecution, that potential or actual harm suffered by cisgender people is: (a) significant; and (b) outweighs the harm to transgender people associated with disclosure. Without the possibility of significant consequential harm it is difficult to see why an informational right to know gender history should trump the right to privacy.

According to the testimony of complainants in cases that have come before the courts, harm suffered appears to consist in feelings of distress, disgust or revulsion. Thus in McNally, and according to prosecuting counsel, the complainant felt literally sickened upon discovery of the defendant’s gender history. While not wishing to trivialise complainant experiences, a question arises here as to whether we are actually in the territory of harm, as opposed to mere offence. If not, then a further objection to criminalisation has been identified. If we are in the territory of harm, and if harm minimisation is our goal, it remains necessary to balance such harms against those likely to be suffered by transgender people. Disclosing gender history is not an act undertaken without risks. In the first place, coming out as transgender exposes a person to considerable and well-documented physical risks. This concern is perhaps intensified in relation to transgender youth and therefore in relation to all defendants prosecuted so far. In addition to the not inconsiderable physical risks, we need to recognise the psychological and emotional impact of disclosure. For many transgender people, having to disclose their chromosomal status, present and/or past genital and/or gonadal condition as well as a history of coerced gender performance is a source of pain and trauma. Finally, a balancing of harms requires recognition of the fact that complainant distress, disgust and revulsion are emotional responses conditioned by systemic transphobia and/or homophobia, and for this reason also should not be viewed as sufficient in meeting a threshold of harm justifying criminal intervention, and especially not to target a vulnerable minority group. The balancing of harms here may be no easy task. However, it is contended that a policy of prosecution should be preceded by a discharge of this obligation.

Objection 3: A public policy concern

In thinking of prosecution in broader public policy terms it is necessary to develop the theme of transphobia and the state’s interest in ameliorating it. It is instructive here to draw on the analogy of race because once we shift our attention from non-disclosure of gender history to non-disclosure of racial status our concern for

84 Transgender visibility can and frequently does lead to violence, sometimes deadly violence as the tragic cases of Brandon Teena and Gwen Araujo testify. Films have been made telling the stories of these two young transgender people (Boys Don’t Cry, 1999; A Girl Like Me: The Gwen Araujo Story, 2006). In the UK context, Whittle et al. found that “in every sphere of life” transgender people “are subject to high levels of abuse and violence” (S. Whittle et al., The Equalities Review: Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality & Discrimination (London: Press for Change, 2007) p.23).

85 Indeed, through prosecution, law reproduces transphobia and the very harm for which it punishes transgender people. This is because, as Aeyal Gross rightly notes, the harm is not “rooted in what the [complainants] actually experienced”, but in “the social conception of the type of relations that they experienced” which “compel[s] them to understand the experience as injury”. Gross, “Gender Outlaws Before the Law: The Courts of the Borderland” (2009) 32(1) Harvard Journal of Law and Gender 165, 199.

86 Indeed, to the extent that criminalisation decisions involve a balancing of harms, this obligation ought to exist irrespective of art.8.
sexual autonomy tends to wane. Consider the following example: an anti-semitic woman makes clear to a Jewish man that she would not consent to sexual intercourse with Jewish men. The Jewish man does not disclose his Jewish identity and sexual intercourse follows. Should this be viewed as rape? Certainly, it is by those, like Jonathan Herring, who see sexual autonomy in near absolute terms. Yet, surely it is counter-intuitive to conclude in this way. The difficulty here is that Herring appears willing to allow a very broad definition of non-consent to trump a public policy concern to counter racism. In other words, he appears to want to privilege consent even where its apparent absence has its basis in racism. In short, if we are to take consent this seriously, it appears that we must take prejudice seriously in equal measure. The consent argument here is a weak one and is not worthy of defending when measured against the public policy interest in countering racism.

It might be objected that equating transphobia with racism in this context only works if minding about gender history is as transphobic as minding about race is racist. This is precisely my argument. The fact that it provokes resistance reveals not the falseness of the argument but society’s failure to take transphobia as seriously as it does racism. Moreover, there are material differences between non-disclosure of gender history and non-disclosure of Jewish status that ought to add weight to the argument against criminalisation of the former. In the case of the Jewish man, in the example provided, what is not disclosed is the truth of his Jewish identity whereas, in the case of transgender people, gender identity is already in the open. What is concealed is, sometimes uncomfortable facts about bodies, and a history of gender oppression. Further, unlike the Jewish man in the example, who had knowledge of his sexual partner’s feelings, there is no reason to assume this in contexts of trans-cis sexual intimacy. The fact that this assumption tends to be readily made points not to transgender deceit, but to an unacknowledged cisgender conceit. In these circumstances, and especially where society is being asked to accommodate prejudice, we should perhaps give full reign to caveat amator.

Conclusion

Over 20 years ago, Jimmy Saunders was sentenced to six years’ imprisonment on facts very similar to the cases considered in this article. In his sentencing remarks in the case, Crabtree J. asserted that Saunders’ conduct was far more serious than heterosexual rape. As he put it, the defendant had

“called into question [the complainants] whole sexual identity … and I suspect both those girls would rather have been actually raped by some young man than have happened to them what you did.”

87 In 2010, an Israeli court did convict an Arab man of rape by fraud on the basis that he failed to disclose his Arab status to his Jewish female sexual partner. While a conviction on this basis is problematic, it should be appreciated that the defendant pleaded guilty to this charge as part of a plea bargain and there appears to have been evidence of a violent rape and prosecutorial concern that the victim was too traumatised to testify http://www.bbc.co.uk/news/world-middle-east-11329429 [Accessed December 19, 2013].

Sadly, it is precisely this outlook and set of concerns that continue to animate legal responses to the intimate lives of transgender people where they mesh with those of cisgender people. In the final analysis, the primary goal of law in bringing fraud-based prosecutions against transgender people is “not to protect sexual autonomy against fraudulent solicitation of sex, but rather to protect gender norms and compulsory heterosexuality”.