

RAPE AND CONSENT

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In this article, I want to discuss a very difficult issue in the law on rape: In a case where a woman *agreed* to have sex with a man, but her agreement was flawed in some way, when should we say that the woman did *not* consent to have sex?¹ The issue is difficult because neither of the two possible extreme answers to this question seem sensible.

The first extreme answer says that if a woman agrees to have sex with a man, then she is *always* consenting to have sex even if her agreement is flawed in some way. This seems wrong. If M holds a gun to W's head and says he will pull the trigger unless W agrees to have sex with him, then even if W agrees to have sex, we should clearly say that she is not consenting to have sex with M.

The second extreme answer says that if a woman agrees to have sex with a man, but her agreement to have sex is flawed in some way, then she *cannot* be said to have consented to have sex. This also seems wrong. If M tells W that he is a national karate champion and W is so impressed by this that she agrees to sleep with him, most people would say that W did consent to have sex with M, even if M was lying about his prowess at karate.

So in order to answer the question that we started with, it seems we have to adopt a position somewhere in between these two extremes: a flawed agreement to have sex with someone else will sometimes mean that the sex is non-consensual, and sometimes mean that the sex is consensual. But it is hard to know where that position lies. And, unsurprisingly, the courts have had real problems coming up with a clear answer to our question.

The purpose of this essay is twofold. (1) To set out as clearly as I can, what the current state of the law is on when a flawed agreement to have sex will render the sex non-consensual. (2) To discuss what the law *should* say on this issue.²

I. THE LAW

Some basic distinctions

We can begin by identifying four basic flaws that might affect someone's agreement to have sex with someone else. These four basic flaws can be grouped into two pairs.

The first pair is made up of: (1) *threats*, and (2) *needs*. Someone whose agreement to have sex is flawed by (1) agrees to have sex in order to avoid suffering some harm (as in the case where W agrees to have sex with M to avoid being killed).

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¹ It is perfectly possible for a man to commit rape by having sex with another man; but for the sake of simplicity, I will only discuss in this essay the situation where there is an issue as to whether a man has committed the crime of rape by having sex with a woman.

² There is a third issue I could have discussed, which is whether – given the difficulties attendant on saying whether or not sex is consensual in these kinds of cases – we should stop thinking of rape as involving specifically non-consensual sex. See, on this, Tadros, 'Rape without consent' (2006) 26 *Oxford Journal of Legal Studies* 515. However, as there is no chance in the foreseeable future of the law on rape in the UK taking such a direction, I have preferred to leave this issue alone.

Someone whose agreement to have sex is flawed by (2) agrees to have sex in order to obtain some benefit (as is the case where W, who is homeless, agrees to have sex with M in return for his giving her a warm place to stay overnight).

The second pair of flaws is made up of: (3) *deceptions*; and (4) *spontaneous mistakes*. Someone whose agreement to have sex is flawed by either (3) or (4) agrees to have sex because she has made a mistake – but in (3), the mistake is created by the person with whom she has sex (as in the case where M gets W to go to bed with him by lying that he is a karate champion); while in (4), it is not (as is the case where W sleeps with M simply assuming that he is unmarried, when in fact he is married).

The Sexual Offences Act 2003

Turning now to what the law says about all this, our starting point is the Sexual Offences Act 2003, s 1 of which defines the actus reus and mens rea of rape. Section 1(1)(b) makes it clear that the actus reus of rape requires that the victim not consent to penetration. We have to go all the way to sections 74 to 76 to see what guidance the Act gives us as to when someone can be said to have consented to penetration:

(1) *Section 74* contains the basic provision on consent: ‘a person consents if he agrees by choice, and has the freedom and capacity to make that choice.’ This is very unilluminating: it doesn’t help us understand at all whether W can be said to have consented to have sex with M in cases where W had sex with M in the mistaken belief that he was a national karate champion, or that he was unmarried.

(2) *Section 75* sets out some situations where it will be presumed that W did not consent to have sex with M. The presumptions created by section 75 are rebuttable: it is possible that in these situations W did genuinely consent to have sex, but the starting point of the courts will be to assume that W did not consent and then ask M to prove that W did in fact consent. For our purposes, the most interesting situation where it will be presumed that W did not consent to have sex with M is provided by s 75(2)(b): it will be presumed that W did not consent to have sex with M if, at the time she had sex, or immediately before, she was put in fear that violence would be used against her.

(3) *Section 76* sets out two situations where it will be definitively established that W did not consent to have sex with M:

(a) Where M intentionally deceived W as to the ‘nature or purpose’ of what they were about to do.

(b) Where M intentionally induced W to have sex with him by impersonating someone personally known to her.

Against this statutory background, let’s now look at what the cases say as to when a flaw in W’s agreement to have sex with M will mean that she did not consent to have sex with M.

Threats

It seems pretty clear that if W agrees to have sex with M because of a threat of violence towards her, then the sex will be non-consensual. The Court of Appeal's decision in *Jheeta*³ might be taken as indicating that *any* threats that induce W to have sex with M will render the sex non-consensual.

That case concerned a very dysfunctional sexual relationship between the defendant, J, and a woman known as D in the proceedings. Soon after J and D started going out together and having sex, D received a barrage of text messages making various threats that she would be killed or kidnapped. Unknown to her, it was J who was sending the messages. J offered to help out by going to the police on her behalf and D agreed to J's doing this. Some time after that, D wanted to end her relationship with J. However, she then started getting texts from the 'police' (in reality, J again) saying that J would kill himself if she didn't sleep with him, and that she should do her duty and have sex with him, and if she did not, she would be liable to be fined. She received 50 odd texts to this effect over four years, and on each occasion she ended up meeting J in a hotel and having sex with him.

Eventually, the truth came out and J was arrested. He pleaded guilty to rape, on the basis of advice from his lawyer that s 76(1)(a) (which gives rise to a conclusive presumption of non-consent when the complainant was intentionally deceived about the nature or purpose of what she was doing with the defendant) meant that he was guilty of rape. The Court of Appeal held that this was wrong but still upheld J's conviction for rape on the basis that J's threats that J would kill himself and that she would be fined if she did not have sex with him rendered the sex non-consensual.

However, we should hesitate before we say that *any* threat that induces W to have sex with M will render the sex non-consensual. Consider *Boyfriend*: M threatens to dump his girlfriend, W, unless she agrees to have sex with him. Or *Husband*: M threatens his wife, W, that he will start having an affair with his secretary unless she has sex with him more regularly.

Needs

It is a very difficult question whether W can be said to have consented to have sex where she agrees to have sex with M in order to obtain some kind of benefit such as food or shelter or money.

Some cases look easy. Consider *Prostitute*: W agrees to have sex with M for money. Or *Sex Addict*: W agrees to have sex with M because she loves having sex and can't have enough of it. The law has never suggested that the sex in such cases is non-consensual.

However, we should again hesitate before saying that *whenever* W agrees to have sex with M in order to obtain some kind of benefit, the sex will *always* be consensual. Consider the case of *Kirk*.⁴ Terence Kirk was convicted of raping a girl called 'JM', who had run away from home when 'still under 14... When she had nothing to eat and was alone she went to see Terence K who worked in a minicab office. She waited there for hours until the office emptied. He had sexual intercourse with her in return for providing her with £3.25 for food' (at [16]). When the case was tried, the prosecution emphasised JM's degree of desperation when she had sex with Terence Kirk:

³ [2008] 1 WLR 2582.

⁴ [2008] EWCA Crim 434.

‘She slept on the streets or sometimes at the homes of friends. She was tired, dirty and hungry and had nowhere to go. One night her desperation was such that she went to the minicab office, where one of her abusers worked, as the only place left to her to get help and, in particular, something to eat. She waited for hours until only Terence K was in the office. They had sexual intercourse on a sofa. JM was paid £3.25 with which she bought food’ (at [85]).

The judge directed the jury that the question of whether JM genuinely consented to have sex, or had merely submitted to having sex with Terence Kirk, was a matter of fact for them to decide. The jury decided that JM had not genuinely consented to have sex in these circumstances, and the Court of Appeal refused to disturb its verdict.

Deceptions

As we have seen, s 76 of the Sexual Offences Act 2003 sets out two situations where inducing someone to have sex through a deception will definitely render the sex non-consensual: (a) where M intentionally deceives W as to the ‘nature or purpose’ of what they are about to do; and (b) where M intentionally deceives W into thinking that he is someone that she knows personally.

On lies that mislead W as to the ‘nature or purpose’ of what she is about to do with M, the courts have repeatedly emphasised that very few lies will fall into this category. Lies about whether M is wearing a condom⁵ or whether M loves W⁶ or whether M intends to pay W for having sex with him⁷ will not amount to deceptions about the ‘nature or purpose’ of what M and W are about to do. So what will count? In both *Flattery*⁸ and *Williams*⁹ the defendant lied to a girl that he was going to perform an operation on her (in *Flattery*, to cure her fits, and in *Williams*, to improve her singing) and proceeded to have sex with her. Those sorts of lies would count as deceptions as to the ‘nature or purpose’ of what M and W are about to do together, and are in line with more recent authorities such as *Tabassum*¹⁰ and *Green*¹¹ which take the view that consent to being touched will be rendered non-consensual if the complainant has been deceived into thinking that the touching is for medical purposes (in *Tabassum*, to help the complainant understand what she has to do to check herself for lumps in her breasts, and in *Green* to monitor the complainant while she masturbates so as to test her for impotence) when it is in fact for the defendant’s own sexual gratification.

But a deception that does not fall within s 76 may still render sex non-consensual. This has been made clear by the very important case of *Assange v Swedish Prosecution Authority*.¹² In *Assange*, Julian Assange – the founder of WikiLeaks – was contesting the validity of a European Arrest Warrant (EAW) issued by the Swedish authorities, requiring the UK to extradite Assange to Sweden so that he could be tried for various sex offences allegedly committed on Swedish soil. One

⁵ *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin), at [85]-[86].

⁶ *Jheeta* [2008] 1 WLR 2582, at [24]: ‘No conclusive presumptions arise merely because the complainant was deceived in some way by disingenuous blandishments or common or garden lies by the defendant.’

⁷ *Linekar* [1995] QB 250.

⁸ (1877) 2 QB 410.

⁹ [1923] 1 KB 340.

¹⁰ [2000] 2 Cr App Rep 328.

¹¹ [2002] EWCA Crim 1501.

¹² Above, n 5.

of the bases on which Assange was challenging the EAW was that it did not satisfy the requirement of *dual criminality*. Under this requirement, it had to be shown that what Assange was alleged to have done not only amounted to a crime under Swedish law, but also under UK law.

One of the offences that the Swedish authorities wanted to try Assange for was ‘sexual molestation’. He was supposed to have committed this offence by doing the following:

‘[being] aware that it was the expressed wish of the injured party and a prerequisite of sexual intercourse that a condom be used, [he] consummated unprotected sexual intercourse with her without her knowledge’ (at [3] 2.).

The court that heard the case gave more details later on (at [74]) about what Assange is supposed to have done. Assange came to Sweden to give a lecture there. AA had offered Assange the use of her apartment while he was there. They had dinner at AA’s apartment, and Assange began fondling AA’s leg. Assange was encouraged by the fact that AA seemed to welcome this into ripping AA’s clothes off, and taking his own clothes off. AA wasn’t happy with this, but felt she should go along. They then lay down on a bed, and Assange tried to have sex with her. AA resisted because she knew that Assange did not have a condom on. After a while, Assange asked AA why she was resisting, and she said that she wanted him to put a condom on. Assange put on a condom, but it seems to have been alleged (see [87]) that he then tore or damaged or removed the condom before having sex with AA.

The question the court had to resolve was whether Assange’s conduct (as alleged) amounted to an offence under English law, so as to satisfy the requirement of dual criminality. The court resolved this issue by asking whether Assange would have committed the crime of rape had he had sex with AA under the same circumstances on English soil. The court decided that he would have. Significantly, the court ruled that this was *not* a case where s 76 applied (at [87]). By deceiving AA as to whether or not he was wearing a condom, Assange had not deceived her as to the ‘nature or purpose’ of what they were about to do. But the court held (at [86]) that even though s 76 did not apply here, lack of consent had still been made out (on the facts as alleged, where AA had made it clear that she did not want to have sex without a condom, and Assange had procured her agreement to have sex by falsely assuring her that he was wearing an undamaged condom).

The decision in *Assange* throws into doubt all the earlier cases where consent to sex was found on the basis that the complainant was not deceived as to the ‘nature or purpose’ of what the defendant was proposing to do with her. Could it be that in those cases, the courts will now find that even though s 76 does not apply, the complainant still did not consent to have sex under s 74? For example, in *Linekar*,¹³ the defendant induced a prostitute to have sex with him by lying to her that he intended to pay her for having sex with him (which he did not). It was held that no rape had been committed in this case. But could it now be argued that while the defendant’s lie did not mean that the prostitute was deceived about the ‘nature or purpose’ of what she and the defendant were about to do together, she still did not consent to have sex with him – as she had made it clear her consent was conditional on his having an intention to pay her for sex, and he had no such intention? It is now unclear what the position will be in such a case (particularly in a case where prostitute insists that she will not

¹³ Above, n 7.

have sex with the defendant unless and until he pays her in advance, and he deceives her into thinking that he has – by, for example, giving her some fake bank notes).

Spontaneous mistakes

So far as spontaneous mistakes are concerned, it would seem to follow logically that if W has sex with M because she has made a mistake that would render the sex non-consensual if it were induced by M, then it should also render the sex non-consensual if W spontaneously made that mistake. (Though that does not mean M is guilty of rape: mens rea on his part would still have to be established.)

For example, consider *Twins*: W is in a sexual relationship with M's identical twin brother, and one night at a party, W approaches M (thinking that M is his brother) and suggests they have sex upstairs. M and W then have sex. If M had lied to W that he was his brother to induce her to have sex with him, the sex would be non-consensual under s 76. But whether M lied to W or not should be irrelevant to the question of whether W consented to have sex with him. So in *Twins*, we should find that W's sex with M was non-consensual.

In *R v B*,¹⁴ the Court of Appeal considered what the position would have been had a woman *agreed* to have sex with a man, in ignorance of the fact that he was HIV+. The Court of Appeal held that as a matter of law 'the fact that the defendant may not have disclosed his HIV status is not a matter which could in any way be relevant to the issue of consent under section 74 of the 2003 Act...' (at [21]). The decision in *Assange* may have thrown this into doubt.

Suppose that in *Assange*, AA had been unwilling to have unprotected sex with Assange because she was scared of contracting an STD from him. Suppose further that he reassured her that he had no sexual diseases and she agreed to have unprotected sex with him on that basis. Suppose finally that he was lying and he was in fact HIV+. *Assange* could be taken as indicating that, on these assumed facts, AA did not consent to have sex with Assange under s 74.

Given this, what would be the position if AA had not been willing to have sex with Assange if he had an STD, but she blithely assumed that he did not (thinking that if he did, he would tell her) and proceeded to have sex with him on that basis? If a lie that Assange was STD-free would have the effect of rendering AA's decision to have sex with him non-consensual, then why wouldn't AA's assuming that he was STD-free have the same effect? As a matter of logic, this argument seems to stand up. It would, however, be very difficult to establish that AA *believed* that Assange was STD-free, as opposed to it being the case that AA *hoped* that Assange was STD-free. After all, not everyone knows whether or not they are carrying an STD; so it is not legitimate to infer from someone's silence on the matter that they are in fact STD-free.

II. DISCUSSION

So – when *should* the law say that a flaw in W's agreement to have sex with M meant that she was *not consenting* to have sex with M? I don't think we will get anywhere on this issue simply by discussing the concept of consent. The reason why the cases in

¹⁴ [2007] 1 WLR 1567.

this area are so difficult is because the abstract concept of consent doesn't help us understand whether or not we should say W has consented to have sex in these types of cases.¹⁵

I think a more fruitful way forward is to focus on a case ('*Rapist*') where M has obviously committed rape – say, where M has used physical force to compel W to have sex with him – and ask: What is so *wrongful* about what M has done in *Rapist* that we should find him guilty of rape? If we can identify this, then that will give us a guide as to when we should say about cases where W agreed to have sex with M, but W's agreement was affected by some flaw. If M's conduct in having sex with W involved the same kind of wrong as is present in *Rapist* then we should say that W did not consent to have sex with M, and M committed the actus reus of rape. If it did not, then we should say that W consented to have sex with M, with the result that we will not find that M committed the actus reus of rape.

There are a number of different theories as to what sort of wrong is committed by M in forcing W to have sex with him in *Rapist*. I will focus on five.

Rape as unjustified sex

Jonathan Herring and Michelle Madden Dempsey have argued that all acts of sexual penetration require to be justified.¹⁶ Where they are not justified, they are wrongful. If this is right, then we could argue that what's wrong with M's conduct in *Rapist* is simply that the sex he had with W was unjustified. There was no value attached to that sex that could overcome the *prima facie* wrong that M committed by having sex with W.

If this view is correct, it suggests that in a case where W's agreement to have sex with M was affected by some flaw, we should refuse to find that W consented to have sex with M if M's having sex with W was unjustified. This will be the case where the flaw affecting W's agreement to have sex with M stripped W's sex with M of any value, and thus justification. So – looking back at some of the real and hypothetical cases we have been discussing above – *Jheeta* and *Kirk* were rightly decided as the sex in both of those cases was of no value at all; it merely came out of, and reflected, an abusive relationship that existed between the parties in those cases. *Linekar* was wrongly decided as the sex in that case was only of value to the prostitute in that case if she was paid for it, which she never was going to be. The hypothetical situation considered in *R v B* and the situation that gave rise to *Assange* are more difficult, as one could imagine there being some value in the sex in those situations. However, if W made it clear that any value she found in having sex with M was outweighed by the potential disbenefits of having sex with M without using a condom, or having sex with M when he had an STD, then if M turned out not to be using a condom, or turned out to have an STD, then we should conclude that having sex with M was of no net value to W, and therefore unjustified.

¹⁵ More than one commentator has pointed out the difficulties this leaves juries in, in a case where W's agreement to have sex with M was flawed in some way and they are simply directed to determine whether W consented to have sex with M. They could focus on the agreement and say that she did; or focus on the flaw and say that she didn't. And they have normally have no idea which they should do. See Tadros, above n 2, 521-522; and Westen, 'Some common confusions about consent in rape cases' (2004) 2 *Ohio State Journal of Criminal Law* 333, 341.

¹⁶ Herring & Dempsey, 'Why sexual penetration requires justification' (2007) 27 *Oxford Journal of Legal Studies* 467.

The view that sex is wrongful if it is unjustified creates an interesting division between the hypothetical cases of *Boyfriend* and *Husband*. In both cases, W has sex with M in order to keep her relationship with M going. We could argue that the sex with M in *Boyfriend* is unjustified as there is no value in keeping W's relationship with M going. The fact that M is willing to dump W if she does not have sex with him shows that he views their relationship as good for nothing except the sexual satisfaction he can get out of it – and if that is all their relationship is good for, then it is, literally, good for nothing. But the same cannot be said in *Husband*, where W and M's relationship may have accrued considerable value over the years and W's overcoming any natural disinclination she might currently feel to have sex with M may be justified in order to keep that relationship intact.

Rape as sheer use of a person

In their paper on 'The wrongness of rape',¹⁷ John Gardner and Stephen Shute attempted to determine what sort of wrong is committed in a case like *Rapist* by considering a case of 'rape pure and simple'¹⁸ where M has sex with an unconscious W, who never becomes aware of what M has done to her. They argued that what is wrong with M's having sex with W in this situation is that he has used her to satisfy himself sexually. And that is what is wrong with rape, of and in itself: rape involves the 'sheer use of a person.'¹⁹ So what's wrong with M's conduct in a case like *Rapist* is that he 'objectifies his victim by treating her as a mere repository of use-value'.²⁰

One problem with this view is that *a lot* of sex which is treated as legitimate in our society seems to involve the 'sheer use of a person' – in the sense of M having sex with W solely for the purpose of satisfying *himself* sexually. This is certainly the case where M has sex with a prostitute, or has a one-night stand with someone he has met in a bar, or hooked up with casually at university or at a swingers' party. But even in more permanent relationships, it cannot be uncommon that a man has sex with his partner purely because *he* wants to have sex and what *she* wants does not really come into it.

Gardner and Shute get round this problem²¹ by arguing that where W has agreed to allow M to use her as, essentially, a sex aid, that should not count as rape because we have to regard people like W as:

'moral agents capable of understanding their own value and making up their own minds about their relationships with others. We must work on the assumption that they respect themselves or else we do not ourselves respect them. It follows that even when people betray that assumption they enjoy some latitude to do so.'²²

¹⁷ In Horder (ed), *Oxford Essays in Jurisprudence 4th Series* (OUP, 2000) (henceforth, 'Gardner & Shute').

¹⁸ Gardner & Shute, 198.

¹⁹ Gardner & Shute, 205.

²⁰ Gardner & Shute, 204.

²¹ Another way of doing so is to say that M does not *simply* regard W as an object of use if he is unwilling to use certain means to get her to satisfy his desires. But that argument does not really work, as it could be used to say that M did not *simply* regard W as an object of use in a case where he had sex with her when she was unconscious if he would not have been willing to force himself on her had she been conscious.

²² Gardner & Shute, 208.

So rape, for Gardner and Shute, involves M's making use of W's body purely for his own satisfaction in circumstances where W would regard M's making use of her body in that way as objectionable.

What does this imply for the sort of cases we have been considering in this article? Herring invokes Gardner and Shute's views to argue that:

'A man who has sexual intercourse with another knowing that that person would not be agreeing to the activity if s/he knew the truth is using that person for his own ends. It is the "sheer use of another person". It should be rape.'²³

This seems too quick. For example, suppose that in a case like *Assange*, M – on being told by W that she was not willing to have sex with him unless he was using a condom – thought to himself, 'If we use a condom, we won't enjoy having sex half as much as we could if we didn't use one. I'm sterile, and know I have no sexual diseases, so there's no need for us to use a condom – but I've only just met W and there's no way she's going to believe me when I say that we don't need to use one. So, in both our interests, the best thing to do is to tell her I'm using a condom, but secretly go ahead and have sex without using one.' It's not clear that M, despite his deception, can be fairly accused in this sort of case of using W's body simply for his own sexual satisfaction.

Having said that, in cases where M has induced W to engage in sex purely for M's own gratification by lying to her, Gardner and Shute's view suggests that we should find that M has committed the *actus reus* of rape as W would almost certainly regard M's conduct in having sex with her as objectionable, given the circumstances. Similarly, in a case like *Twins* (but, again, if we adopt Gardner and Shute's views, we might not want to say that the wrong of rape is present in a case like *Twins* if M is thinking, when he is going upstairs with W, 'If we can just have sex, then W will see how much better it is being with me rather than my loser brother, and will dump him for me').

Jheeta, *Linekar* and *Kirk* are obvious cases where the 'wrongness of rape' is present, on Gardner and Shute's view – in all of these cases, the defendant had sex with the complainant for purely selfish purposes, and the complainant in each case would have found the defendant's conduct in having sex with her objectionable, given the circumstances. It would be different in *Prostitute* or *Sex Addict* – in those cases, M may be having sex with W for purely selfish purposes, but in the circumstances, W does not object to M's using her body in that way. So in these kinds of cases, the latitude W enjoys to determine for herself how her body is to be used would be engaged, even though she is allowing her body to be simply used by someone else.

What about the hypothetical situation considered in *R v B* where M has sex with W, without telling her of his HIV+ status? If M were simply using W for sex, then the 'wrongness of rape' would be present as M would be treating W as a sheer object of use, and W would object to his having sex with her, given all the circumstances. It is hard to think of a scenario where it could be said that: (i) M knew he was HIV+, and had failed to tell W this before having sex with her, but (ii) M was *not* simply using W for sex. There seems no other motive for M not to tell W of his HIV+ status, other than to maximise his chances of using her for sex. Given this, on Gardner and Shute's view, we should probably say that the *actus reus* of rape has been committed in a case where M has sex with W, without telling her of his HIV+ status.

²³ Herring, 'Mistaken sex' [2005] *Criminal Law Review* 511, 524.

Rape as harmful experience

One criticism that can be made of Gardner and Shute's view is that it is far too defendant-centred: it fails to give any weight to the experience of the victim of rape in defining what is so wrong about rape. Gardner and Shute's central case of rape is the case where the victim experiences *nothing at all* and is never made aware of what has happened to her. For Gardner and Shute, this is essential. They argue that the reactions of a victim to being raped *reflect*, rather than *constitute*, the wrongness of rape. The horror, terror and disgust that the victim of a rape feels when she is being raped are a product of the wrong that the defendant is inflicting on her by raping her. So to understand what that wrong is, we need to strip away the horror and the terror and the disgust as distractions, and consider a 'pure and simple' case where the victim does not react at all to the experience of being raped in order to see clearly what the wrong in rape consists in.

However, it is not clear that the experiences that the victim of a rape goes through when she is being raped *are* a product of her being aware that her assailant is *wronging* her in doing what he is doing. These experiences might simply reflect the fact that rape *is* horrifying, and terrifying, and disgusting – rather than *wrongful*.²⁴ And rape is horrifying and terrifying and disgusting for many reasons, identified in the following passage by Robin West:

'The physical invasion of the self and body, the interruption and denial of sovereignty over one's physical boundaries that the invasion entails, the fear of death foremost in the mind of the victim, the sure knowledge that one's will is irrelevant, the immediate and total reduction of one's self to an inanimate being for use by another, and the sustenance of multiple injuries, both vaginal and non-vaginal, internal and external – all of [these], simultaneously experienced, typify – constitute – the experience.'²⁵

On this view, what makes M's conduct in a case like *Rapist* wrongful is its tendency to result in W suffering all of these experiences simultaneously. Of course, this tendency may not be realised in every single case of rape. It isn't in the case Gardner and Shute consider, where M has sex with an unconscious woman. But for M's having sex with W to amount to rape, it could be argued that it has to have the *potential* to cause W to suffer these kinds of experiences.

If this view is correct, then we should *not* say that W's having sex with M was non-consensual if W positively welcomed the prospect of having sex with M – and this is so even if W's agreement to have sex with M was flawed in some way. Michael Bohlander takes this view in considering a case first discussed by Herring, where Ted deceives Mary into sleeping with him by lying to her that he loves her and wants to marry her.²⁶

²⁴ As a thought experiment, it might be worth considering what emotions a woman would go through if she were subjected to forcible sexual intercourse by an animal, rather than a man – the crucial difference between the two cases being that the animal is incapable of committing a wrong, unlike a man. I don't think the experiences would be that different – though it is obviously hard for me to say. (Interestingly, Gardner and Shute refer to the defendants in *DPP v Morgan* [1976] AC 182 as 'animals *par excellence*': Gardner & Shute, 213.)

²⁵ West, 'Sex, law and consent' in Wertheimer and Miller (eds), *The Ethics of Consent: Theory and Practice* (OUP, 2009), 227.

²⁶ Herring, 'Mistaken sex' [2005] *Criminal Law Review* 511, 511.

‘at the time intercourse takes place with the fraudulently obtained consent of Mary, she may be enjoying it at that moment, even if it is based on a wrong assumption, so the penetration is anything but a “dangerous act which requires strong justification” for her. The harm that is being done to Mary by Ted at that moment is that she is being duped, not that she is being penetrated. The harm is thus psychological, not physical, and it only achieves its effect after she finds out... I find it difficult to classify an activity which in and of itself is not perceived to be personally harmful, but quite the opposite, at the time of its occurrence by the victim, as a *harm* for the purpose of basing criminal liability on it.’²⁷

However, it is not true to say that in all the cases we are considering in this article that sex is positively welcomed by W at the time it happens. In real cases like *Jheeta*, *Kirk*, *Flattery* and *Williams* the sex was not positively welcomed at all by the complainant, and the same is true in hypothetical cases like *Boyfriend* and *Husband*. What should we make of these cases, if we take the view that the wrongfulness of rape lies in its tendency to cause the victim to suffer the kind of experiences described by Robin West, above?

I want to suggest that in a case where W has agreed to have sex with M, but the sex is unwelcome and unwanted by W, M’s having sex with W will be capable of producing *enough* of the experiences described by Robin West to count as rape (on the view of the wrongfulness of rape considered in this section) if W feels *trapped* into having that sex. And W will feel trapped into having sex with M if she feels that she has no realistic alternative but to have sex with M, in that any other option was unthinkable for her. I think this condition was satisfied in *Jheeta*, *Kirk*, *Flattery* and *Williams* with the result (at least on the view of the wrongfulness of rape considered here) that the courts were right to say that the actus reus of rape had been committed in those cases. *Boyfriend* would be another case where this condition is fulfilled, if W feels extremely dependent on M, and cannot contemplate not being in a relationship with him. It is more unlikely that this condition would be fulfilled in *Husband*: the option of not having sex with M with the result that he might have an affair with his secretary is not likely to have been unthinkable for W.

Rape as theft

One worry about the account of the wrongfulness of rape that we have just considered is that it does not satisfactorily account for why we should regard sex with an unconscious woman as being rape. The argument that such sex should be regarded as being rape because it is capable of producing the kind of experiences described by West, above, does not really satisfy. It is too easy to think of examples where this argument could not work, but we would still want to say that M has raped W. For example, suppose that M has sex with W while she is lying in an irreversible vegetative state in hospital.

Donald Dripps puts forward a theory of the wrongfulness of rape that finds it easier to explain why sex with an unconscious woman amounts to rape. This theory – dubbed the ‘commodity theory’ – views sex as ‘a service much like any other, which individuals have a right to offer for compensation, or not, as they choose.’²⁸ The law

²⁷ Bohlander, ‘Mistaken consent to sex, political correctness and correct policy’ (2007) 71 *Journal of Criminal Law* 412, 414-5.

²⁸ Dripps, ‘Beyond rape: an essay on the difference between the presence of force and the absence of consent’ (1992) 92 *Columbia Law Review* 1780, 1786.

specifies the conditions that have to be satisfied before this service may be provided to someone else. Rape is wrongful because it subverts those conditions – it involves M obtaining sex from W outside the circumstances where the law allows M to obtain sex from W. So Dripps considers a case very similar to that discussed by Gardner and Shute – Clyde discovers Dawn passed out drunk in a bedroom at a party and proceeds to have sex with her and ‘she has no knowledge of the act, no physical injury results, and no disease is transmitted’:

‘The commodity theory substantiates the intuition that Clyde acts wrongly. According to the commodity theory, individuals have a property right to the use of their own bodies... Thus Clyde acts wrongly because he expropriates Dawn’s body, a benefit that he may obtain only by persuading Dawn that sexual cooperation is to her advantage. If Clyde had stolen Dawn’s purse while she slept, instead of her body, the violation of her rights would be similar but less severe.’²⁹

The ‘commodity theory’ suggests that in the sort of cases we are considering in this article, we should say that the actus reus of rape has been committed if M has obtained sex from W through means that the law regards (or ought to regard) as illegitimate means of obtaining sex from someone else.³⁰

So what would amount to illegitimate means of obtaining sex from someone else? One would have thought that threats that someone is not entitled to make, and lies, would clearly count as illegitimate means. Dripps himself was unwilling to go so far as to say that M’s inducing W to have sex with him by lying to her would count as illegitimate means of obtaining sex from her.³¹ However, other thinkers such as Herring and Susan Estrich have not been so hesitant, pointing out that if the law regards it as illegitimate to obtain property from someone else by lying to them, then it could hardly regard it as legitimate to obtain sex from someone else by lying to them.³² On this view, we should say that the actus reus of rape is committed in cases like *Assange*, *Linekar*, *Jheeta*, *Flattery* and *Williams*. It is harder to argue that the law does, or should, regard it as illegitimate to obtain sex from someone else by: (i) making a threat that you are entitled to make under the general law (as in *Boyfriend* or *Husband*), or by (ii) promising to pay someone for sex (as in *Kirk* or *Prostitute*), or by (iii) taking advantage of someone’s spontaneous mistake (as in *Twins* or the hypothetical considered in *R v B*). Under the civil law, at least,³³ it is regarded as legitimate for someone to engage in these forms of behaviour to obtain a benefit from someone else.

Rape as damaging to integrity

²⁹ Ibid, 1789.

³⁰ For a similar view, see Westen, above n 15, 355: ‘The controlling issue [in a case where a woman has agreed to have sex under some pressure is] a normative question as to whether in choosing sexual intercourse for [herself, she does] so with the freedom the [law] regards as sufficient to leave the decision to [her].’

³¹ Dripps, above, n 28, 1803.

³² See Herring, ‘Human rights and rape: a reply to Hyman Gross’ [2007] *Criminal Law Review* 228, 231: ‘If obtaining the property of another by deception is an offence, so much more so should we outlaw the engaging in sexual activities induced by a deception’; Estrich, ‘Rape’ (1986) 95 *Yale Law Journal* 1087, 1093: ‘The law should be understood to prohibit claims and threats to secure sex that would be prohibited by extortion law and fraud or false pretenses law as a means to secure money.’

³³ The position under the criminal law has been complicated by the extension of the law of theft effected in cases like *Gomez* [1993] AC 442 and *Hinks* [2001] 2 AC 241 to cover any dishonest appropriations of property belonging to another.

Our fifth and final theory as to what is distinctively wrong about raping someone else comes from Nicola Lacey. In her essay ‘Unspeakable subjects, impossible rights: sexuality, integrity and criminal law’, Lacey argues that:

‘a crucial part of existence for all humans is our status as sexed and embodied beings, and our sexual desire: without access to the means of expressing one’s desire, and of having one’s sexuality accorded such respect as is consistent with a similar respect for others, one can never have the psychic space to pursue the project of personhood. For one is barred from the identification with one sexual imago which is central to the possibility of imagining oneself as a whole being, worthy of respect and capable of self-esteem.

Might the notion of sexual integrity...constitute a better analytic peg on which to hang our framing of sexual offences...? ...Within the language of integrity, the real damage of rape might be expressed more fully, recognising the way in which rape violates its victims’ capacity to integrate psychic and bodily experiences. Understood in this way, respect for victims’ integrity seems an eminently worthy ideal for rape law and its enforcement.’³⁴

On this view, what is wrong with M’s conduct in a case like *Rapist* is the consequent damage that W experiences to her sense of herself as being a *whole* person, whose body and mind are united in living out a coherent and self-determined plan of life. W can no longer think of herself in that way when her body has been used by M for purposes that were not chosen by her, and represent the complete negation of what she would have wanted for herself, had she been given the opportunity to choose.

What does this imply for the sorts of cases that we are considering in this article? Vanessa Munro has suggested that even agreed-to sex (in her words, sex to which someone has given a ‘token of consent’) can be damaging to W’s sense of herself as being a whole person if her agreement to have sex is not the product of ‘serious reflection and endorsement’.³⁵ If such reflection and endorsement is not present, then a divide will exist between what W *really* wants for herself in her mind, and what ends up happening to W’s body. Obviously, such reflection and endorsement were absent in real cases like *Flattery*, *Williams*, and *Jheeta*, and are absent in hypothetical cases like *Twins*. A law on rape that is seriously concerned to protect people’s capacities ‘to integrate psychic and bodily experiences’ (in Lacey’s words) will accordingly find that the actus reus of rape is committed in those kinds of cases. And in a case like *Sex Addict*, the sex that W has with other people may be casual and episodic, but it still represents a seriously made lifestyle choice and poses no threat to her thinking of herself as being a whole person. So an integrity-protecting law of rape will decline to find that sex with W in *Sex Addict* amounts to the actus reus of rape.

That still leaves a lot of other cases – *Prostitute*, *Linekar*, *Boyfriend*, *Husband*, *Assange*, *Kirk*, and the hypothetical considered in *R v B* – that need very careful consideration. So far as *Prostitute* is concerned, Munro would draw a distinction between cases where W has become a prostitute because she finds the lifestyle attractive, and cases W has become a prostitute because she has been driven to do so – either out of economic need or because of the threats of someone close to her.³⁶ Sex with what we might call a ‘willing prostitute’ does not threaten to damage her sense of integrity, whereas sex with an ‘unwilling prostitute’ does and could amount to rape

³⁴ (1998) 11 *Canadian Journal of Law and Jurisprudence* 47, 63.

³⁵ Munro, ‘Constructing consent: legislating freedom and legitimating constraint in the expression of sexual autonomy’ (2008) 41 *Akron Law Review* 923, 949.

³⁶ *Ibid*, 952.

(if the law on rape were genuinely integrity-protecting). Where does this leave *Linekar*? What if the prostitute in *Linekar* were a willing prostitute? Would having sex with her, without intending to pay her for the sex, damage her sense of herself as being a whole person? Perhaps, in the sense that when she discovered that she was no longer going to be paid for the sex she had with *Linekar*, she could no longer identify with her decision to have sex with him.

Boyfriend, *Husband*, *Assange* and the hypothetical considered in *R v B* are difficult cases – from the point of view of a law of rape that is seriously concerned to protect people’s integrity – because of the potential for W to take one view of having sex with M before the event and another view afterwards. For example, in *Boyfriend*, W might be unwilling to have sex with her boyfriend before the event because she has never had sex before, but after the event she may be very happy to have had sex with him and be eager to have more. But such a happy outcome is only one possibility: having sex with M might turn out to be an utterly awful experience, and one that W bitterly regrets.

The same could be said of *Husband* or *Assange* or the hypothetical considered in *R v B*. The decision to have sex in *Husband* might prove to be one that W is very happy to have taken as it helped to improve her relationship with M; alternatively, things could turn out much more unhappily and W could regard having regular sex with M as a loathsome chore that she has to undergo for fear of what might happen if she does not. In *Assange*, if AA did not contract an STD or become pregnant as a result of having sex with a condom-less *Assange*, then it is hard to see how AA would come to regret her decision to have sex with *Assange*; but easy to see how AA would look back on her decision to have sex with *Assange* with bitter regret if she did. Similarly, with the hypothetical considered in *R v B*. W’s having sex with someone who is HIV+ but does not disclose that fact is far more likely to be damaging to W’s integrity if she ends up becoming HIV+ herself as a result of having that sex than if she doesn’t.

There are two ways an integrity-protecting law on rape could handle such cases. It could: (1) say that the actus reus of rape has been committed where M’s having sex with W has had the *effect* of damaging W’s integrity; that is, her sense of herself as being a whole person whose bodily experiences are in line with what she really wants for herself. Or it could: (2) say that the actus reus of rape has been committed where M’s having sex with W has the *potential* to damage W’s integrity. In principle, I would suggest that an integrity-protecting law on rape should do (1) unless a particular type of sex is so likely to be damaging to someone’s integrity that the law would be justified in criminalising all forms of that sex. If that is right, then an integrity-protecting law on rape would probably say that the actus reus of rape is committed in *Assange* and the hypothetical considered in *R v B*, but is *not necessarily* committed in *Boyfriend* or *Husband*.

Finally, we have to consider *Kirk*. Clearly, the sex in *Kirk* was not the product of ‘serious reflection and endorsement’. However, the life led by the complainant in *Kirk* was in all likelihood already severely lacking in integrity, in the sense it was very likely there was a huge disparity between the embodied life that the complainant *Kirk* was living on a day-to-day basis and the life she would have liked to live if given the opportunity. So it could be argued that the sex in *Kirk* did not damage the integrity of the complainant’s life, as her life possessed no integrity to be damaged. It is unlikely that an integrity-protecting law on rape would accept this argument: the fact that things were bad for the complainant (in terms of the integrity of her life) does not mean that they could not have been made worse, and they were made worse by what

was done to her by Terence Kirk. If this is right, an integrity-protecting law on rape would find that the actus reus of rape was committed in *Kirk*.

Evaluation

Now that we have reviewed these five different theories of the wrongness of rape, two main points emerge.

First, no theory agrees exactly with the current state of the law in this area – each theory would come up with a different result from the current law in at least one of the real or hypothetical cases we have been discussing.

Secondly, these five different theories *all* agree that we should find that the actus reus of rape was committed in *Jheeta*, *Flattery* and *Williams*, and that it was not in *Sex Addict*. Four out of five theories agree that we should *not* say that the actus reus of rape was committed in *Husband* or *Prostitute*, and that we *should* say that the actus reus of rape was committed in *Kirk* and *Linekar*. But there is more extensive disagreement over what the outcome should be in *Boyfriend*, *Assange*, *Twins* and the *R v B* hypothetical.

These two points lead me to conclude two things. (1) The courts cannot completely determine when they should find that the actus reus of rape has been committed in the kinds of cases discussed in this article without adopting a theory of what's wrong with rape. (2) Once they have adopted such a theory, some cases will end up being overruled or disapproved. For example, it is hard to see *Linekar* and *Assange* standing together in future. Any theory of the wrongness of rape that justifies *Assange* will suggest that *Linekar* was wrongly decided; and the same applies *vice versa*.

So – which theory of what's wrong with rape should the courts adopt? I would suggest that the courts *not* adopt the view that the wrongness of rape lies merely in having unjustified sex with another. Such a view fails to account for how rape involves, in Robin West's memorable phrase, 'spiritual murder'.³⁷ Michel Foucault's view that 'there is no difference, in principle, between sticking one's fist into someone's face or one's penis into their genitalia'³⁸ could not be more wrong. There is all the difference in the world between those two actions – but it is not a difference that can be captured by the view that rape merely involves having unjustified sex with another.³⁹ For the same reason, the courts should *not* adopt Donald Dripps' 'commodity theory' of what's wrong with rape. Theft and rape are qualitatively different wrongs, not close cousins.⁴⁰

Nicola Lacey's call for the law on rape to protect people's capacities 'to integrate psychic and bodily experiences' is too impractical to be workable. As we have just seen, it is very difficult to know what an integrity-protecting law on rape

³⁷ West, 'Legitimizing the illegitimate: a comment on "Beyond rape"' (1993) 93 *Columbia Law Review* 1442, 1448.

³⁸ Quoted in Michal Buchlander-Raphael, 'The failure of consent: re-conceptualizing rape as sexual abuse of power' (2011) 18 *Michigan Journal of Gender & Law* 147, 200.

³⁹ Herring and Dempsey might question this, arguing that the 'social meaning' of sex means that there is a big difference between the two – even if both actions involve applying force to someone else's person – with the result that sex requires much more justification than punching someone in the face, and unjustified sex is much worse than an unjustified punch in the face. But that argument establishes a quantitative difference between rape and a punch in the face when most people would regard the difference between the two as being qualitative in nature.

⁴⁰ For extended criticisms of Dripps' position, see West, above, n 37, and Gardner & Shute, 199-204.

would make of many of the cases we have been discussing in this article. And, as Vanessa Munro observes:

‘Even assuming that the law is capable of engaging with contextual and psychic nuances sufficiently to recognize and accredit those situations in which a woman’s token of consent to intercourse is not supported by a critical endorsement of the benefits associated with that exchange, it may be unduly demanding to hold a defendant criminally liable for rape as a result of his failure to do the same. Indeed, in a context in which the defendant may have already taken reasonable steps to secure the woman’s token of consent, to insist that he must also ensure that this token is not tainted with self-alienation (generated, perhaps, by subtle social or psychic dynamics outwith his control) may seem excessively burdensome...’⁴¹

That leaves Gardner and Shute’s views as to the wrongness of rape, and the view that rape is wrongful because of the harmful experiences involved (or potentially involved) in M’s having non-consensual sex with W. I think adjudicating between these two views involve us in making a fundamental choice about what the law on rape should be about – Should it be about defendants’ attitudes or complainants’ experiences? The law on rape could legitimately be about *either*, but for the sake of clarity in the law, it had better not be about *both*. If I had to choose, my vote would go for a law on rape that is targeted at protecting victims from suffering ‘spiritual murder’, with the result that the actus reus of rape cannot be committed in a case where M’s having sex with W was positively welcomed by W at the relevant time. In a case where M’s bad attitudes have led him to fool W into welcoming having sex with him, it may be justifiable to punish him under the criminal law, but not through the law on rape.

⁴¹ Munro, above, n 35, 954.