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Coercion and Deception in Sexual Relations

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Introduction

Julian Assange has become (in)famous for founding Wikileaks, a website which has published numerous highly-sensitive confidential documents leaked to it by insiders.[1] He has also been suspected of raping and sexually molesting two women, charges in respect of which the Swedish authorities sought his extradition from the United Kingdom.[2] According to the Swedish warrant, "Assange, who was aware that it was the expressed wish of the injured party […] that a condom be used, consummated unprotected sexual intercourse with her without her knowledge."[3] *Assange* raises a particularly interesting question of whether a sexual offence is constituted when consent to sexual relations was obtained by deception about the use of protection. When ruling on the extradition request the High Court of Justice discussed this question without limiting the discussion to any specific sexual offence and decided that deception about the use of protection can suffice to vitiate consent and transform Assange's alleged actions into the relevant sexual offence.[4] As a result a man who has intercourse with a partner whom he deceived about the use of protection can be convicted of rape, the

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1. Online: WikiLeaks http://www.wikileaks.org. For a detailed description of the Wikileaks affair, see Yochai Benkler, "A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate" (2011) 46 Harv CR-CLL Rev 311.
2. *Sweden*, *The judicial authority of v Assange* [2011] EW Misc 5 (MC); *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin); *Assange v The Swedish Prosecution Authority* (Rev 1) [2012] UKSC 22. Assange's supporters claim that these charges serve as a mere excuse to bring him back to Sweden in order then to extradite him to the United States where he is sought for his Wikileaks-related activities. See, for example, Katrin Axelsson & Lisa Longstaff, "We are Women Against Rape but we do not want Julian Assange extradited" *The Guardian* (23 August 2012), online: The Guardian http://www.theguardian.com/commentisfree/2012/aug/23/women-against-rape-julian-assange; Dana Kennedy, "'Sex by Surprise' at Heart of Assange Criminal Probe" *AOL News* (3 December 2010), online: AOL http://news.aol.ca/2010/12/03/sex-by-surprise-at-heart-of-assange-criminal-probe/.
3. *Sweden*, *The judicial authority of v Assange* [2011] EW Misc 5 (MC) at 21. A similar statement appears as an aggravating circumstance of rape of the second alleged victim, who was asleep.
4. *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) at paras 87-90. For scholarly discussion of the issue of deception following *Assange*, see, for example, Carmen M Cusack, "Consensual Insemination: An Analysis of Social Deviance within Gender, Family, or the Home" (2011) 2 J L & Soc Deviance 158 at 181-88.

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gravest sexual offence in England.[5] Following the same reasoning a woman who deceives her partner about the use of contraceptives could be charged with sexual assault,[6] despite her partner's consenting to (protected) intercourse.

Whether and how obtaining consent to sexual relations by deception is criminalized varies significantly between countries, with an apparent division between common and civil law jurisdictions. Some European jurisdictions tend to avoid criminalizing deceptive sexual relations. In particular, using deception to obtain consent to sexual relations between mentally-sound adults is not generally criminalized in Germany[7] and Spain,[8] while Italy does not criminalize types of deception other than impersonation.[9] In contrast to these countries, most common-law systems acknowledge that consent can be vitiated by some types of deception. This is particularly evident in the offence of rape. Traditionally, the crime of rape by deception was applied to specific types of deception, such as spousal impersonation and sexual intercourse under the guise of medical treatment.[10] In England the category of spousal impersonation has been augmented over the years to include impersonating a partner who is not the woman's legal husband.[11] In Canada a person was convicted of sexual assault after impersonating his twin brother and sleeping with his brother's girlfriend.[12] The acknowledgment of deception as vitiating consent is by no means limited to these two types of deception. The Supreme Court of Canada interpreted Parliament's removal of the words "false and fraudulent representations as to the nature and quality of the act" as an "intention to move away from the unreasonably strict common law approach to the

5. *Sexual Offences Act 2003* (UK), c 42, s 1.1.
6. *Ibid* at s 3.1.
7. *The German Criminal Code StGB*, c 13, s 177, which criminalizes rape, is limited to coercion (nötigt); "abuse of persons who are incapable of resistance" (*ibid* at s 179) is limited to mental or physical incompetence; and in other sexual offences, deception appears only in the offence of human-trafficking for the purpose of sexual exploitation (*ibid* at c 13, s 181(1)). See also Thomas Fischer, *Strafgesetzbuch und Nebengesetze*, (Munich: Verlag C.H. Beck, 2008) at 1158. Interestingly, Germany used to have a sexual offence criminalizing deceiving a woman into believing that the intercourse was within marriage (*The German Criminal Code*, 1953, s 179). However, it seems that only one person was ever convicted of this offence (Oberlandesgericht Koblenz, NJW 1966, 1524-1525), and it was abolished in 1969 due to practical irrelevance (Germany (West). Grosse Strafrechtskommission, Niederschriften über die Sitzungen der Großen Strafrechtskommission: 76. bis 90. Sitzung. Besonderer Teil, Volume 8 (Bad Feilnbach: Schmidt Periodicals, 1991) at 184-85).
8. Deception is criminalized only when used in the context of trafficking (*Spanish Criminal Code*, tit VII BIS, s 177 bis), prostitution (*ibid* at tit VIII, c V, s 188), or when the victim is between 13 and 16 (*ibid* at c II, s 182).
9. *Italian Criminal Code*, part 2, s 609.
10. For a general description regarding England and the United States, see Jed Rubenfeld, "The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy" (2013) 122 Yale LJ 1372 at 1395-98. Specific reference to spousal impersonation exists in at least 40 US jurisdictions (see Russell L Christopher & Kathryn H Christopher, "Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape" (2007) 101:1 Nw U L Rev 75 at 75, 100). Such cases also appear in the *Model Penal Code*, 1962, c 2, § 213.1(2)(c). For cases in which such impersonators were convicted of rape, see *People v Minkowski*, 23 Cal Rptr 92 (CA 1962); *Pomeroy v State*, 94 Ind 96 (Sup Ct 1883); *People v Crosswell*, 13 Mich 427 (Sup Ct 1865); *Story v State*, 721 P (2d) 1020 (Wyo Sup Ct 1986). For Australia, see *Papadimitropoulos v The Queen*, (1957) 98 CLR 249 at 257-59 (HCA).
11. *R v Elbekkay*, [1995] Crim L Rev 163.
12. *R v Crangle*, 2010 ONCA 451.

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vitiation of consent by fraud".[13] Tennessee applies the offence of rape to cases of deception without mentioning any specific form of deception.[14] Massachusetts is even considering a new bill imposing life imprisonment for "rape by fraud", where sexual intercourse to which consent was obtained "by the use of fraud, concealment or artifice".[15] In Israel, a married Arab man was recently convicted of rape after he represented himself to the complainant as a Jewish bachelor interested in a significant romantic relationship.[16] Nor is acknowledging deception as vitiating consent limited to the offence of rape. As mentioned above, Canada provides one example in which deception applies to offences other than rape (sexual assault). In England, any sexual offence which requires lack of consent is constituted when consent was induced by impersonating a person 'known personally to the complainant'.[17] Alabama has an offence of Sexual Misconduct which applies to men (and only men) who engage in sexual intercourse with a woman 'with her consent where consent was obtained by the use of any fraud or artifice'.[18]

As these examples illustrate, deceptive sexual relations are usually criminalized with the same offence that is used to criminalize coercive sexual relations. This trend is strongly supported by some feminist scholars who regard deceptive sexual relations as wrongful as coercive sexual relations. Discussing the offence of rape, Estrich holds that "[t]he "force" or "coercion" that negates consent ought to be defined to include […] misrepresentation of material fact".[19] Others conflate coercion and deception,[20] and some even go as far as considering deception to be a form of coercion.[21]

Against this trend the present paper argues, firstly, that coercive and deceptive sexual relations are fundamentally different. This is done by showing that deceptive sexual relations are analytically distinct from both coercive and consensual sexual relations. Secondly, this paper argues that to the extent that cases of deception should be criminalized,[22] this should be done by using an offence

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13. *R v Cuerrier*, [1998] 2 SCR 371 at para 3, L'Heureux-Dubé. A similar statement appears at para 105, Cory J (discussing whether failure to disclosure HIV infection vitiates consent).

14. *Tenn. Code Ann*, 2013, title 39, c 13, part 5, § 503(a)(4).

15. US, HR 1494, *An Act Relative to the Crime of Rape by Fraud*, 186th Gen. Court, Mass, 2009, s 22B, online: MaLegislature http://malegislature.gov/Bills/186/House/H1494.

16. *Israeli Penal Code*, 1977, c 10, s 345(a)(2); CrimC (Jer.) 561/08 *State of Israel v Sabbar Kashur*, CourtDM1996 (123) 1 [2010].

17. *Sexual Offences Act 2003* (UK), c 42, s 76(2)(b).

18. *Code of Alabama*, tit 13A, c 6, article 4, § 65(a)(1).

19. Susan Estrich, *Real Rape: How the Legal System Victimizes Women Who Say No* (Cambridge: Harvard University Press, 1987) at 102-03. Estrich holds that if a woman "submits only in response to lies […] it is a serious offence that should be called 'rape'" at 103.

20. For example, when discussing deception and violence, Bok asserts that "[b]oth can coerce people into acting against their will", Sissela Bok, *Lying: Moral Choice in Public and Private Life* (New York: Vintage Books, 1989) at 18.

21. Larson, for example, holds that "[c]oercion can take many forms. Free choice may be thwarted […] more subtly by creation of false belief through deception", Jane E Larson, ""Women Understand So Little, They Call My Good Nature 'Deceipt'": A Feminist Rethinking of Seduction" (1993) 93:2 Colum L Rev 374 at 414.

22. This paper does not address which means of deception ought to be criminalized (if any), which types of information constitute misrepresentation, whether deception is possible only by action or also by omission, whether the deception is examined with respect to the actual complainant or a reasonable person (and similarly with respect to the perpetrator) and so on. Rather, this paper focuses on the question of *how* deceptive sexual relations ought to be criminalized.

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distinct from, and less grave than, the offence applicable to coercive sexual relations. To support the latter conclusion this paper suggests a novel argument for why coercive sexual relations are more wrongful than deceptive sexual relations. The coercer's conduct is more wrongful because it involves typical wrongmaking features that deception lacks: the coercer cruelly proceeds with the coercion while faced with the victim's suffering and they dismissively disregard the victim's negative reactive attitudes, such as resentment and anger that the victim forms and expresses toward them.[23] By contrast, the deceiver's conduct, wrongful as it may be, does not typically involve these wrongmaking features. Since the deceiver obtains invalid consent by using deceptive means, they are not confronted with their victim's suffering and negative attitudes. It is then argued that this difference in wrongfulness serves as a reason for criminalizing coercion and deception in separate offences, the former being graver than the latter.[24]

The structure of this paper is as follows. Section A seeks to analyse deceptive sexual relations by suggesting several distinctions with regard to consent. Its object is not to draw normative implications from the very definition of consent, but rather to facilitate a more accurate discussion of deceptive sexual relations.[25] Section B seeks to identify the moral difference between coercion and deception. After the argument for moral difference has been laid out Section C turns from moral to legal analysis and explains why this moral difference should affect the types of offence suitable for criminalizing coercive and deceptive sexual relations.

It should be clarified that this paper focuses on consent to sexual relations between mentally sound adults and takes no particular stand on sexual offences in which the victims lack the capacity or competence to consent, such as when they are a minor or mentally ill. Unlike in the case of mentally sound adult victims, the problem in cases of incapacity is not that the victim *did not* consent, but that the victim *could not* consent. Most jurisdictions regard sexual offences not as aimed at protecting only those victims capable of providing consent and competent to provide it, but also at protecting particularly vulnerable victims, for whom there is no significance from the outset whether they gave consent. Cases of incapacity arguably involve issues other than lack of consent,[26] since it is questionable whether the lack of consent suffices to explain the wrongfulness in sexual relations with a six-year-old child, for example. It is therefore assumed herein that the victims in

23. This paper refers to a "victim" (as opposed to a "woman") in order to maintain the generality of the discussion. This wording does not deny that there are distinct characteristics stemming from the victim's gender and/or that a comprehensive understanding and analysis of sexual offences requires accounting for these characteristics. However, these characteristics, important as they may be, are irrelevant to the argument presented in this paper.

24. The issue of consent obtained by deception arises in a number of legal fields, such as contract and tort law. This paper does not address consent in these fields because there might be a substantial difference in the importance ascribed in these fields to considerations of wrongfulness, especially in relation to other principles and objectives which guide those fields.

25. After critically examining the role of conceptual analysis in the discussion of consent to sexual relations, Wertheimer concludes that "[n]o analysis of the meaning of consent will enable us to say whether A's conduct should be illegal". Alan Wertheimer, *Consent to Sexual Relations* (Cambridge: Cambridge University Press, 2003) at 122.

26. Wertheimer discusses in detail the relation between consent and competence, *ibid* at 215-57.

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question are capable of consenting to sexual relations and that consent, were it to be given in the absence of deception, would have been effective.

A. The Concept of Consent: A Few Possible Distinctions

A.1 Specific and General Consent

The first distinction important to understanding coercion and deception is between specific and general consent.[27] Specific consent often refers to an agreement of an agent to a well-specified act that involves a large degree of specificity. By contrast, general consent usually applies to a wide variety of possible scenarios or situations. In giving general consent the agent agrees to do something the exact nature of which will be determined in the future, according to the circumstances. Although specificity is a matter of degree and it might be difficult to determine where consent switches from general to specific,[28] this distinction is important because contemporary criminal law considers consent to sexual relations valid only if it is highly specific. Firstly, consent to sexual relations ought to be provided to a specific individual and not to the group to which he or she belongs. Even if a tourist consented to sexual relations with a local man because she wanted to experience sexual relations with a local, other local men cannot take this consent as applicable to them. Secondly, consent is also specific in temporal terms and consent given in the past cannot be construed as on-going consent that can be invoked in order to justify ignoring expressions of lack of consent in the present.[29] Common Law had been influenced for years by Canon Law, according to which, by entering into matrimony, the wife provides her on-going consent to having sexual intercourse with her husband, which remains in effect throughout their marriage. The grim outcome of this construction was the utter disregard of the rape of wives by their husbands.[30] Unfortunately, Common Law

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27. The above distinction should not be confused with the distinction between general and specific intent, used mainly in the context of intoxication (see *R v George,* [1960] SCR 871 at 877 and *DPP v Majewski*, [1976] 2 WLR 623 at 478, critically discussed in Tim Quigley, "Specific and General Nonsense" (1987) 11 Dal LJ 75).

28. Dougherty captures this difficulty by noting that consent is both restrictive and extensive; while it is limited to certain courses of actions but not others, it nevertheless permits several courses of action. See Tom Dougherty, "Sex, Lies, and Consent" (2013) 123:4 Ethics 717 at 735.

29. *People v John Z*, 60 P (3d) 183 (Cal Sup Ct 2003), and the comment by Matthew R Lyon, "No Means No?: Withdrawal of Consent During Intercourse and the Continuing Evolution of the Definition of Rape" (2004) 95:1 J Crim L & Criminology 277. For "change of heart" more generally, see Amanda O Davis, "Clarifying the Issue of Consent: The Evolution of Post-Penetration Rape Law" (2004) 34:3 Stetson L Rev 729; Lois Pineau, "Date Rape: A Feminist Analysis" (1989) 8:2 Law & Phil 217. This situation should be distinguished from a different scenario in which one person gave their on-going consent in the past and shows no expression of either consent or lack of consent in the present. The question is whether their partner can regard the past consent as valid or must they ascertain consent afresh.

30. Several other factors might have contributed to this outcome, such as that the consent could not be withdrawn without a divorce, that women were considered less credible as witnesses than their husbands, and that they were sometimes treated as property. For an evaluation of the more recent causes of this phenomenon, see Irene Hanson Frieze, "Investigating the Causes and Consequences of Marital Rape" (1983) 8:3 Signs: Journal of Women in Culture and Society 532 at 537-38.

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systems took quite a while to remove the fetters of this Canonic construction,[31] but nowadays there is little doubt that the consent required for sexual relations is highly specific also in temporal terms. Finally, as *Assange* illustrates, specific consent to a particular type of sexual relations (protected, in that case) cannot be assumed to include consent to other types of sexual relations (unprotected in particular). The consent required for sexual relations is therefore highly specific.

Sometimes courts might infer consent from other previous instances of consent,[32] and one might argue that this practice shows that courts regard consent given in the past as general and hence applicable to the event in question. It is important, though, to distinguish between substantive and evidential questions. Such inferences need not be based on the understanding that the previous instance of consent was general consent, applicable to future events. Rather, the previous instance of specific consent can be regarded as providing relevant evidence supporting (even if not conclusively proving) the finding that there was another instance of specific consent during the event pertinent to the complaint. In *R v. A*, for example, the defence submitted that the complainant's consensual sexual relations with the accused several weeks prior to the event in question was relevant evidence supporting the finding that the sexual relations pertinent to the complaint was also consensual.[33] Similarly, as in *Assange*, the complainant's consent to one type of sexual relations (protected) can be regarded as relevant evidence that she consented to another type of sexual relations (unprotected). Such inferences are evidential and this paper takes no stance on the questions of whether such evidence is indeed relevant or should be used in court.[34] The important point is that these inferences seek to resolve an evidential dispute about the presence of *specific* consent, and hence using such evidence does not imply that courts consider general consent valid. Interestingly, while regarding evidence of past consent as relevant is considered by many to be problematic,[35] regarding evidence of past *lack of consent* as relevant seems straightforward. For example, if the complainant repeatedly refused sexual relations with the accused in the past, this seems relevant evidence supporting the prosecution's claim that she did not consent to sexual relations in the event in question. To take another example, it is difficult to dismiss as irrelevant evidence that the complainant had told the

31. In English Law, for example, the first instance of restricting the right of husbands effectively to rape their wives appeared only in 1949. In the United States, by 1985 this sweeping permission was still valid in 40 out of 50 States. More information can be found in Estrich, *supra* note 19 at 74.

32. Such inferences are sometimes prohibited under contemporary "rape shield" laws, Michelle J Anderson, "From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law" (2002) 70:1 Geo Wash L Rev 51 at 80-94.

33. *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 at para 150.

34. Arguments against using such evidence in court can be divided into those showing that it is *irrelevant* (and hence inadmissible) and those holding that such evidence should be inadmissible even if relevant. Regarding "sexual history evidence" see, for example, Di Birch, "Rethinking Sexual History Evidence: Proposals for Fairer Trials" (2002) Crim L Rev 531; Jennifer Temkin, "Sexual History Evidence – Beware the Backlash" (2003) Crim L Rev 217.

35. Vivian Berger, "Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom" (1977) 77:1 Colum L Rev 1; Clifford S Fishman, "Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior" (1994) 44 Cath U L Rev 709.

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accused at some point prior to the event that she would never consent to unprotected sexual relations. Yet if evidence of past lack of consent is relevant, why is evidence of past consent not relevant as well? Be that as it may, these evidential matters are beyond the scope of this paper. The important point is that even if either type of evidential inference is legitimate, it is still possible to regard consent to sexual relations as valid only if it is highly specific.

A.2 Consent, Refusal and Absence of Consent

Other distinctions relevant to coercion and deception are between consent, refusal and absence of consent. Consent is an active and conscious resolve of an agent to engage in a given course of action and refusal is an active and conscious resolve not to engage in a proposed course of action. Distinct from both consent and refusal, absence of consent is the lack of an active and conscious resolve of the agent either to engage or not to engage in a given course of action.[36] In other words in a state of absence of consent the question of whether to consent or refuse is not consciously resolved by the agent (for example, because this question has never crossed their mind). Consider an example not related to sexual relations. A flight attendant offers a passenger a drink from a jug the attendant believes to contain coffee. The passenger considers the offer and resolves to have a cup of coffee, but to their equal surprise, what comes out of the jug is tea. Clearly, the passenger did not consent to have tea, as she in fact resolved to have coffee. But neither does this scenario indicate that during the event itself the passenger resolved not to have tea. Perhaps the question of whether she is interested in having tea never crossed her mind. If she did not maintain an active resolve to have or not to have tea, the passenger was in a state of absence of consent.

Consent, refusal and absence of consent should not be confused with *expressions* of consent, refusal and absence of consent, or with the absence of such expressions respectively. In referring to consent, refusal and absence of consent this paper refers to the mental states of the agent rather than to any external behaviour which expresses such mental states.[37] The passenger's resolve to have coffee should be distinguished from her expression of consent ("Yes, please"). If she failed to express her desire to have coffee clearly, it does not mean that she did not resolve upon consenting. In the context of consent to sexual relations the possibility of gaps between the relevant mental state and its expressions is particularly troubling. This is because refusal or absence of consent which were mistaken for consent might lead to a situation in which the

36. Westen suggests a similar distinction, between 'prescriptive' and 'imputed' consent. See Peter Westen, *The Logic of Consent*: *The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct* (Burlington: Gower Publishing, 2004) at 4-9.

37. For a detailed discussion of the ontological question of whether consent is a mental state or expression, see Wertheimer, *supra* note 25 at 144-52. While this paper takes consent to be a mental state (similarly to Larry Alexander, "The Ontology of Consent" (2014) 55:1 Analytical Philosophy 102), it seems likely that the argument made in this paper can be adopted to incorporate views that consider consent to be either expression or a hybrid combination of expression and mental state (such as Wertheimer's).

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victim experienced sexual relations without consenting while their partner was unaware of that fact and hence, arguably, lacked the *mens rea* required for the relevant sexual offence.[38] This gap between the mental states and their expression therefore poses a serious challenge to criminal law, and perhaps reveals an unresolved tension between the need on the one hand to protect victims from sexual relations to which they did not consent, and on the other to convict only those perpetrators who knew that their partner did not consent.[39] However this challenge is addressed, it is outside the scope of this paper. This paper focuses on the mental state of consent rather than on its expressions because the difference between coercion and deception is not a result of any gap between the mental state and its expressions. Rather, cases of deception raise the question of whether the victim's mental state during the event constitutes an element of the *actus reus* in the relevant sexual offence.

Separating the mental state and its expression is particularly important in the context of threats. For example, if a perpetrator points a gun at the victim's head and forces them to declare that they consent to sexual relations, the victim's statement does not necessarily indicate that they resolved upon consent. One possibility is that while the victim expressed consent, their actual mental state was one of refusal. Another possibility is that the victim had a mental state of consent (as they chose to agree to the sexual relations in preference to risking their life), but their consent was induced by illegitimate means.[40] The distinction between (morally/socially/legally) legitimate and illegitimate means of inducing consent to sexual relations is tricky, since some means are clearly legitimate (expressing honest feelings), others are clearly illegitimate (pointing a gun), and many are somewhere in between in one or more senses of legitimacy (threatening to divorce, denying money, manipulating feelings and so on). Wherever one draws the line between legitimate and illegitimate means, this is a separate

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38. For example, in *R v Sansregret*, [1985] 1 SCR 570, the complainant, fearing for her safety because of the accused's threats and violent behaviour, did not express her actual refusal. If the accused was aware (or should have been aware, see *infra* note 39) of her actual refusal, then he coerced her to engage in sexual relations with him regardless of the lack of expression of refusal. However, if the accused sincerely believed that she consented, the issue is one of mistake.

39. Some jurisdictions, like England, introduced a requirement that such a situation would be excluded from the relevant sexual offence only if the partner's belief was reasonable (*Sexual Offences Act 2003* (UK), c 42, s 1(1)(c), s 75). This approach denies protection to victims who experienced non-consensual sexual relations whenever the mistake made by their partner was reasonable (assuming reasonable people are not totally immune to such misunderstandings). Furthermore, this approach is arguably unfair because criminal liability should not be imposed on people who made sincere mistakes, regardless of what a reasonable person would have done. For these questions, see Douglas N Husak & George C Thomas III, "Rapes without Rapists: Consent and Reasonable Mistake" (2001) 11:1 Philosophical Issues 86; and, more generally, Arthur Ripstein, *Equality, Responsibility, and the Law* (New York: Cambridge University Press, 1999) at 172-214. A good summary of the various considerations for and against the reasonableness requirement can be found in UK, Law Commission, *Consent in Sex Offences: A Report by the Law Commission to the Home Office Sex Offences Review* (London: Law Commission 2000) at 64, online: Law Commission http://lawcommission.justice.gov.uk/docs/Consent_in_Sex_Offences.pdf.

40. A more complicated scenario appears in *R v McFall*, [1994] Crim L Rev 226, in which the defendant was so afraid of being violently coerced that even in the absence of an explicit threat, she decided to pretend that she desired the sexual relations.

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question from that central to this paper. While this line is between coercive and consensual sexual relations, this paper focuses on the distinction between coercive and deceptive sexual relations.

The distinction between refusal and absence of consent should not be obfuscated by the similarity of their legal implications. In many cases, and for certain reasons, the law treats the absence of consent as refusal for practical purposes. For example, in contract law, absence of consent to a contractual offer leads to similar outcomes as explicit refusal to accept that offer, and the offerer's claim that silence implies consent is usually not recognized.[41] Even when refusal and absence of consent produce the same legal implications, the similar treatment is better explained as a result of certain normative considerations rather than by the law's regarding these mental states as identical. Evidence that the law acknowledges this distinction can be found in cases in which absence of consent is treated as consent rather than as refusal. For example, in some medical situations, a refusal of a certain treatment is honoured if made, but if the patient loses their capacity to consent without expressing such a refusal in advance, their absence of consent produces the same legal implications as consent.[42] Whether absence of consent should be treated similarly to consent or refusal is hence a normative question and should be considered in the light of the objectives the law seeks to achieve, and in consideration of matters such as who the agent is, what they are asked to consent to, and so on. This paper considers whether absence of consent in the context of sexual relations should have the same legal implications as refusal.

A.3 Actual and Counterfactual Consent

Actual consent is a mental state that the agent has at the time of the event itself. By contrast, counterfactual consent is the mental state that the agent would have had at the time of the event *if* some of the circumstances had been different from what the agent perceived them to be.[43] One important category of counterfactual consent consists of cases of absence of actual consent in which it is possible to determine what the agent's mental state would have been had they been required to resolve upon consent or refusal at the time of the event. In the flight attendant example, the passenger actually consented to have coffee, but was in a state of absence of consent to having tea. However, if the passenger always prefers tea to coffee when offered the choice, then she would have consented to have tea had

41. For England, see *Felthouse v Bindley*, [1862] EWHC CP J35, 142 ER 1037; for the United States, see *McGlone v Lacey*, 288 F Supp 662 (Dist Ct S Dak 1968). For Canada, see *Schiller v Fisher*, [1981] 1 SCR 593 at 598.

42. For the United States, see *Congrove v Holmes*, 308 NE 2d 765 (Ohio Ct Com Pl 1973); for Canada, see *Norberg v Wynrib*, [1992] 2 SCR 226.

43. Counterfactual propositions raise many complex questions as to their logical, metaphysical and epistemic nature (see, for example, David Lewis, *Counterfactuals*, 2nd ed (Oxford: Blackwell, 2001)). This paper assumes that it is possible to determine the truth of at least *some* counterfactual propositions, since without this assumption many legal tests would become impossible to implement (for example, compensation for a victim of negligence is made based on what would have happened if the tortfeasor had not acted negligently).

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she known that the drink in the jug was tea rather than coffee. In that sense she had counterfactual consent to have tea.[44]

A similar distinction can be drawn between actual and counterfactual refusal. Counterfactual refusal (and consent) has a broad extension, since the agent's perception might differ from reality in a broad range of aspects, be it as a result of a misrepresentation or an innocent mistake (either theirs or the other party's). The broad extension is particularly important in the context of sexual relations, since the communication in this context is typically less explicit and detailed than in other contexts (e.g., commercial). Yet, that this concept has a broad extension is not a flaw in the analysis. This is because it should not be assumed that all sexual relations conducted in spite of counterfactual refusal are wrongful or criminal.[45] Which counterfactual refusal renders the sexual act wrongful or criminal is a normative question which no analysis of the concept of consent can purport to answer.[46] This analysis seeks to answer a different question: what distinguishes two types of wrongful sexual relations, coercive and deceptive.

Counterfactual refusal should be distinguished from regret (or a change of heart). Regret is an attitude that the agent forms *after* the event, disapproving of the consent that they formed at the time of the event and desiring that they had not formed that consent.[47] In the context of sexual relations, counterfactual refusal should be distinguished from situations in which one of the partners regrets the sexual relations to which they gave their actual consent during the event.

Counterfactual states of mind can be understood as a property of either the actual or a reasonable victim. Treated as property of the actual victim, the question becomes whether the actual victim would have consented or refused had they known the truth, regardless of how bad their subjective reasons are. For example, if a partner misrepresents themselves as 1.8m tall despite being 1.79m and the actual victim would not have consented had they known that, there is counterfactual refusal even if the actual victim's refusal is based on some ludicrous superstition about people below 1.8m. Alternatively, counterfactual states of mind can be understood as a property of a reasonable victim, which turn on the question of what information would have changed the victim's actual state of mind had they been reasonable. It then becomes possible to conclude that the victim was in a state of counterfactual consent (or refusal) even if the actual victim would have refused (or consented) had they known the truth. This paper does not presuppose either understanding since this question affects the distinction between deceptive and consensual sexual relations, while this paper focuses on the distinction between deceptive and coercive sexual relations.

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44. Counterfactual consent is sometimes called "hypothetical consent". This paper uses the former term since "hypothetical consent" can also refer to situations in which the agent formed an actual refusal but the law does not recognize that refusal as valid. See also Westen, *supra* note 36 at 4-7, for a distinction between factual and prescriptive consent.

45. See *supra* note 22.

46. See Wertheimer, *supra* note 25.

47. Compare with Smilanski's definition of regret: "if it were within one's power, would one choose to prevent the relevant state of affairs?", Saul Smilanski, "Morally, should we prefer never to have existed?" (2013) 91:4 Australasian Journal of Philosophy 655 at 656-57.

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A.4 Scope of Disagreement

We may now consider again consent to sexual relations which was obtained by deception and analyse it in light of the distinctions proposed above. Cases of deception are characterized by two additive features. The first is the presence of actual consent to the course of action proposed by the perpetrator, consent which was specific rather than general and, crucially, matched the misrepresentations made by the perpetrator. If these representations were real, the case would not have been one of deception and would probably not have constituted an offence at all. In *Assange*, for example, had the sexual relations been protected, no offence would have been constituted. The second feature of cases of deception is counterfactual refusal to the course of action proposed by the perpetrator. Again, this counterfactual refusal is specific rather than general and its specifics match the circumstances as they actually were.[48] Had the victim known the truth, they would have refused to engage in that activity.[49]

Cases of deception include two broad categories. In the first, during the event the victim formed actual refusal to the proposed course of action with the specifics matching reality, but the misrepresentations made by the perpetrator led them to consent to another proposed course of action, the specifics of which match these misrepresentations. For example, in *Assange*, it was alleged that the first victim had formed (and expressed) actual refusal to unprotected sexual relations and consented only to the protected sexual relations (which Assange misled her to believe she was having). In the second type, during the event the victim was in a state of actual absence of consent with regard to the proposed course of action with the specifics matching reality. For example, perhaps in *Kashur* the victim did not resolve to consent or refuse to engage in sexual relations with an Arab, because the thought that Kashur was an Arab did not cross her mind. There is counterfactual refusal in this type of case as well, because had the complainant known the truth, she would have resolved upon refusal.[50]

One might argue that the feature of counterfactual refusal is redundant because the very fact that the victim's actual consent was obtained as a result of the perpetrator's misrepresentations suffices to constitute a sexual offence. Similarly, one could argue that cases of deception should be analysed as consisting of actual

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48. Notably, counterfactual refusal is constituted not only when the agent would not have consented had they known the truth about the *content* of the misrepresentations themselves. Counterfactual refusal is also constituted when the agent would have consented had the perpetrator been honest with them about the content of these representations, but would nevertheless not have consented had they known that the perpetrator deceived them, just because the perpetrator was not honest about these representations.

49. While counterfactual refusal is the central case of deception, one might wonder whether counterfactual absence of consent should also be considered deception. This paper focuses on the central cases of deception because its two main tenets, that deception is both different from and less grave than coercion, hold however counterfactual absence of consent is classified.

50. Some cases combine elements of both coercion and deception; for instance, when the perpetrator had forced the victim to engage in intercourse at gunpoint, but used a plastic gun instead of a real one, without the victim's noticing. In such cases the perpetrator deceives the victim about the efficacy of the means of coercion the perpetrator uses. This issue is discussed below, see text accompanying *infra* note 76.

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consent alone, though invalid since it was obtained using illegitimate means. Such approaches would supposedly promote desirable goals in respect of victim rights and sexual autonomy. Firstly, it is important to emphasise that the points made in the following sections can be rephrased to fit these approaches (by discussing "invalid actual consent" instead of "counterfactual refusal"). These points seek to articulate the special wrongfulness of coercion and hence they do not hinge on any particular analysis of cases of deception. More to the point, such approaches might result in problematic outcomes since a sexual offence might be constituted even if the victim would have *consented* had they known the truth about the misrepresentations and that they were being deceived. In light of these problematic outcomes this paper considers only cases of deception which include the feature of counterfactual refusal.[51]

To summarize, cases of deception are based on the premise that the victim consented to the specific sexual relations as they were represented to them (otherwise the case would become a straightforward case of coercion). Cases of deception thus raise the following question: what sexual offence, if any, ought to be inferred from coupling (1) the perpetrator's misrepresentations which led to the victim's actual consent to the sexual relations as they were presented to them, and (2) the victim's counterfactual refusal to these sexual relations as they really were?

B. The Moral Difference between Coercion and Deception

A coercer is a perpetrator who engages in sexual relations with a victim who is in a state of actual refusal to the sexual relations as they are presented to the victim. A deceiver is a perpetrator who engages in sexual relations with a victim who is in a state of actual consent to these relations as they are misrepresented to the victim by the perpetrator and who is in a state of counterfactual refusal to these relations as they really are. The remainder of this paper proceeds on the basis of this analysis of coercive and deceptive sexual relations. However, even if one insists that coercive or deceptive sexual relations should be analysed differently, this section can be understood as identifying a difference in wrongfulness between cases of actual refusal and cases of actual consent accompanied by counterfactual refusal. Furthermore, even if one defines coercive or deceptive sexual relations differently, these categories are likely to be at least somewhat related to the categories suggested here. To the extent that one accepts that the analysis of this paper properly identifies *some types* of coercive or deceptive sexual relations, then this section can be understood as identifying a difference in wrongfulness between (some types of) coercion and (some types of) deception.

The purpose of this section is to put forward an argument establishing that while both the coercer and the deceiver wrongfully engage in sexual relations without

51. It can be argued that this problematic outcome is theoretical because the prosecution only indicts when the victim files a complaint, and in such cases the victim is unlikely to complain in the first place. This response conflates substantive (What are the elements of the offence?) and procedural (When should the prosecution indict a suspect?) questions.

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the victim's consent,[52] coercive sexual relations are more wrongful than deceptive sexual relations. The first subsection identifies the special wrongfulness of coercion by highlighting wrongmaking features that coercion has and deception lacks. The second subsection describes the scope of the argument, explaining *inter alia* why it applies to coercive threats and cases of coercion which lack resistance or violence. The last subsection discusses and rejects a few possible objections.

This section does not attempt to draw the line between consensual and non-consensual sexual relations and thus it does not explain what distinguishes coercive (or deceptive) sexual relations from consensual sexual relations. Instead, it seeks to show that wherever this line is drawn, coercive sexual relations have typical features in addition to lack of consent which render them more wrongful than deceptive sexual relations. It should also be emphasised that the claim is not that every single case or token of coercion is more wrongful than every single case or token of deception. The claim is that coercion, as one category or type of non-consensual sexual relations, is more wrongful than deception, as another category or type of non-consensual sexual relations. While it might be possible to find specific cases of deception which are more wrongful than specific cases of coercion, this is due to some aggravating or exonerating circumstances respectively.

B.1 The Special Wrongfulness of Coercion

The coercer's conduct is especially wrongful because of its cruelty and dismissiveness. The first wrongmaking feature of coercion is the coercer's cruel disregard of the victim's suffering, despite its being "in their face". Being in a state of actual refusal, the victim of coercion is likely to suffer during the event and to express their suffering in one way or another.[53] The coercer, faced with the victim's suffering, is nevertheless not moved by it in the way that they ought to be moved (namely, to stop causing the victim's suffering). Being faced with the suffering one causes to another human being and yet remaining unmoved by it is sheer cruelty. Kekes defines cruelty as "the disposition of human agents to take delight in or be indifferent to the serious and unjustified suffering their actions cause to their victims".[54] Consider, for example, a visitor to a slaughterhouse who devours a raw steak while being shown how cows are tormented and then painfully butchered. Even if one believes that vegetarianism ought to be adopted by everyone, regardless of whether they are shown the cows' suffering, it is difficult to ignore the cruelty that the visitor's conduct exhibits. There is hardly a clearer way to convey how little the visitor cares about the cows and

52. For an elaborated argument why deceptive sexual relations are seriously wrong, see Dougherty, *supra* note 28.

53. This claim is consistent with regarding actual refusal as a state of mind rather than expression (*supra* note 37), because the claim that actual refusal is *likely* to be accompanied by expressions does not imply that actual refusal is *constituted* by these expressions. Cases in which actual refusal is not accompanied by expressions of refusal are discussed in the text accompanying *infra* note 62. Regarding incapacitated victims (like in 'rape drug' cases) who either do not suffer or are unable to express their suffering, see text accompanying *infra* note 67.

54. John Kekes, "Cruelty and Liberalism" (1996) 106:4 Ethics 834 at 838.

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their suffering.[55] The coercer seems even crueller than the slaughterhouse visitor because unlike the visitor who is not moved by the suffering someone else causes, the coercer is not moved by the suffering they cause and have the power to stop. This paper thus argues that the coercer's conduct is more wrongful than the deceiver's because the coercer's conduct includes the cruelty of being faced with and remaining unmoved by "the serious and unjustified suffering their actions cause to their victims".[56]

The same cannot be said of deception. The deceiver obtains the victim's consent by using deceptive means and, as a result, avoids the need to face the victim's suffering. While deception might cause the victim significant suffering, this suffering would appear only after the event, once the victim finds out the truth.[57] Deception does not include the cruelty of being faced with and remaining unmoved by the victim's suffering and thus it is not as wrongful as coercion. This difference between coercion and deception remains valid even if the victim of deception eventually suffers as much as the victim of coercion.[58] It also remains valid even if the deceiver imagines the deceived's suffering when they find out the truth because the deceiver's conduct still does not manifest the cruelty of being faced with and remaining unmoved by the victim's suffering. Lastly, it remains valid even when the victim explicitly tells the deceiver beforehand that they would have refused to engage in sexual relations had the deceiver lacked a certain property which the deceiver misrepresented themselves as having (e.g., being rich, sexually healthy, etc.). While such a deceiver has stronger evidence to support the fact that the victim had counterfactual refusal, they are not confronted with the victim's suffering and do not cruelly disregard it during the event.

The second wrongmaking feature of coercion is the coercer's dismissive disregard of the victim's negative reactive attitudes. According to Strawson, we tend to ascribe great significance to the existence and content of negative attitudes such as resentment and anger when engaging in moral judgments of responsibility and guilt.[59] This paper switches the focus from the attitudes themselves to the way in which the perpetrator *responds* to them. It argues that part of the special wrongfulness of coercion lies in the coercer's disregard of the victim's negative reactive

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55. A few days after visiting a slaughterhouse, Tolstoy writes: "man suppresses in himself, unnecessarily, the highest spiritual capacity—that of sympathy and pity toward living creatures like himself—and by violating his own feelings becomes cruel", Leo Tolstoy, "The First Step" in *Essays and Letters* (New York: 1909) at 82-91.

56. Kekes, *supra* note 54.

57. Some deceivers might take particular pleasure from revealing their deception to the victim after the fact and seeing their victim suffer. Such actions are not part of the deception as such but additional wrongful conduct which is indeed cruel.

58. The difference between the harm each causes and the difficulty in focusing only on harm are discussed in C.2.

59. Strawson argues that this great significance diminishes the importance of the metaphysical question of the relationship between freedom and determinism, and renders it merely theoretical. This paper focuses on the reactive attitudes and the role they play in interpersonal relations without endorsing Strawson's approach to the problem of free will. See PF Strawson, "Freedom and Resentment" in *Freedom and Resentment and Other Essays,* (London: Methuen, 1974) at 1-25, and the large number of works citing this paper, e.g., Michael McKenna & Paul Russell, eds, *Free Will and Reactive Attitudes: Perspectives on P.F. Strawson's "Freedom and Resentment*" (Farnham: Ashgate, 2008).

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attitudes. Being in a state of actual refusal, the victim of coercion is likely to form and express during the event attitudes such as resentment and anger toward the coercer for making them engage in a course of action against their will. In response to another person's resentment, one ought to cease the conduct in question, check the reason for the resentment, explain oneself, and, if the resentment is justified, offer an apology and perhaps reparation. Instead, the coercer proceeds with the coercion and hence fails to respond to the victim's negative reactive attitudes as they should. A constitutive part of being human is the capacity to form and express reactive attitudes that ought to influence how others treat this human being.[60] Coercion is more wrongful than deception because of its dismissiveness: the coercer's failure to respond to these attitudes signifies a failure to treat the victim as a human being in that sense.

Deception lacks this wrongmaking feature. The victim of deception does not form and express negative reactive attitudes during the event, because their refusal is counterfactual rather than actual. Surely the victim is likely to form and express negative reactive attitudes once they find out the truth, but during the event these attitudes are not yet formed and expressed and therefore they cannot be responded to. As a result the deceiver's conduct does not manifest the same dismissive disregard of the victim's negative reactive attitudes as the coercer. Deception is therefore not as wrongful as coercion. As before, this remains true even when the victim explicitly tells the deceiver beforehand that they would have refused to engage in sexual relations had the deceiver lacked a certain property which the deceiver misrepresented themselves as having.

The special wrongfulness of coercion is evident in the context of sexual offences. While both coercive and deceptive sexual relations consist of engaging in sexual relations without the victim's consent, coercive sexual relations are more wrongful because of the wrongmaking features of coercion. Firstly, coercive sexual relations are cruel because the coercer is faced with and unmoved by the suffering they cause to the victim by coercing them to engage in sexual relations against their will. Secondly, coercive sexual relations are dismissive because the coercer disregards the negative attitudes that the victim forms and expresses toward the coercer while being coerced to engage in sexual relations against their will. In contrast, since the deceiver obtains actual consent to sexual relations by using deceptive means, they are not faced with their victim's suffering and negative reactive attitudes. Therefore, while deceptive sexual relations are non-consensual and thus wrongful, they are not as wrongful as coercive sexual relations.[61]

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60. For victims who lack this capacity, either temporarily or permanently, see text accompanying *infra* note 67.

61. While these wrongmaking features explain why one form of non-consensual sexual relations (coercive) is more wrongful than another form of non-consensual sexual relations (deceptive), they do not provide a full explanation of what makes sexual relations coercive or wrongful to begin with. This is because the wrongfulness of coercive sexual relations consists not only of these features but also of the victim's lack of consent. Accordingly, even when sexual relations include these wrongmaking features, they are neither coercive nor as wrongful as coercive if they are consensual. For example, a person who consents to engage in sexual relations with

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B.2 Types of Coercion

Coercive sexual relations are more wrongful even when the victim does not accompany their actual refusal with attempts of resistance or explicit verbal statements. However the victim expressed their actual refusal, the victim is likely to manifest suffering even if they do not accompany their refusal with resistance or verbal statements and hence the coercer is still faced with and remains unmoved by the victim's suffering. If the coercer proceeds with the sexual relations while aware of the victim's actual refusal,[62] they do so while cruelly disregarding the victim's suffering. Furthermore, negative reactive attitudes are expressed independently of attempts of resistance and they too can be expressed non-verbally. Therefore, even when the victim does not resist or refuse verbally, the coercer still proceeds with the coercion while dismissively disregarding the victim's negative attitudes. More generally, while the form and intensity of the victim's expressions of suffering and negative attitudes might affect the *degree* of the wrongfulness of coercive sexual relations, they do not change the coercive nature of these relations or the *type* of wrongfulness they involve.

The argument applies also to cases of coercive threat in which the victim consented to the sexual relations after facing a choice between consenting and suffering the harsh consequences of refusing (recall the example of consent obtained at gunpoint). As noted above, it is questionable whether the victim's expression of consent reflects being in a state of actual consent or actual refusal.[63] Either way the victim is still likely to suffer and to form and express to the coercer attitudes such as resentment and anger (recall Tosca's reactions to Scarpia's "offer" to pardon Cavaradossi in exchange for sexual relations).[64] Therefore, even if the victim eventually expressed their consent in response to the coercive threat, it does not undermine the wrongmaking features of coercion.

The argument also applies to coercive yet non-violent sexual relations and sheds new light on the discussion of the necessity of violence or force in some sexual offences. The traditional requirement of force in the offence of rape has been rightly criticised by feminist scholars as reflecting hegemonic stereotypes about sexual offences (e.g., the offender is a stranger taking the victim by surprise, refusal ought to include resistance, etc.).[65] As the previous paragraphs show, the argument of this paper also applies to non-violent cases of coercive sexual relations: it applies to refusal unaccompanied by resistance and to coercive threats which are not necessarily violent. This paper thus explains why

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a partner who openly states an interest only in sexual relations, might still suffer and express negative reactive attitudes toward the partner, yet this does not necessarily render the partner's conduct coercive or as wrongful as coercive sexual relations.

62. If the coercer was unaware of that refusal, the issue is one of mistake, see text accompanying *supra* note 38.

63. See text accompanying *supra* note 40.

64. Luigi Illica & Giuseppe Giacosa (English version by William Beatty-Kingston), "Tosca" (G Ricordi & Co, 1899) at 41-42.

65. Susan Estrich, "Rape" (1986) 95 Yale LJ 1087 at 1105-21; see Estrich, *supra* note 19 at 29-32.

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violence is not necessary to understanding the wrongfulness of coercive sexual relations. However, the paper also explains why violence is a core case of coercion. The use of violence highlights the existence of the wrongmaking features which render coercion especially wrongful. By using violence, the coercer exacerbates the victim's suffering and bluntly disregards their negative attitudes. While violent coercion manifests these wrongmaking features to a large degree, these features appear also in non-violent cases of coercion. Therefore, coercive sexual relations are more wrongful than deceptive sexual relations even when the coercion is not violent.[66]

By contrast, the argument does not apply to cases in which the victim is unconscious, such as in 'rape drug' cases, in which the perpetrator, without the victim's knowledge, inserts into the victim's drink a chemical substance and engages in sexual relations with the victim while they are drugged. Such cases do no exhibit the wrongmaking features of coercion because an unconscious victim does not suffer and does not form and express negative reactive attitudes during the event. However, such cases might involve wrongmaking features that neither coercive nor deceptive sexual relations involve. For example, and perhaps similarly to cases of incapacity (minors and mentally ills), the special wrongfulness of engaging in sexual relations with an unconscious person might stem from the perpetrator's exploitation of the victim's special vulnerability.[67] 'Rape drug' cases are paradigmatic examples of such wrongfulness because it was the offender themselves who induced the victim's vulnerability. The important point is that if sexual relations with an unconscious victim are (at least) as wrongful as coercive sexual relations, and/or more wrongful than deceptive sexual relations, this is not because of the wrongmaking features of coercion but because of some other wrongmaking features.[68]

B.3 Possible Objections

Now that the argument is laid down it is necessary to discuss possible objections. The first is that deception also has typical wrongmaking features that coercion lacks, thereby making it (at least) as wrongful as coercion. One such possible feature is that deception makes the victim an accomplice in their own plight by exploiting and harnessing the victim's own will against themselves.[69] Another possible feature is that while coercion leaves the victim with the dignity of knowing the truth, the deceiver does not dignify the victim with knowing what the situation is really like. Lastly, the victim might blame themselves for the part they played in their own suffering or despise themselves for being so stupid as to fall prey to such deception.

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66. This is unlike Rubenfeld's approach, which boils down to reintroducing the force requirement into the offence of rape, see Rubenfeld, *supra* note 10 at 1435-36.

67. See *supra* note 26.

68. While Dougherty compares cases of deception and comatose, he makes this comparison merely to show that deception too is seriously wrong, see Dougherty, *supra* note 28 at 724-27.

69. "A's deception *uses* B's will against herself, making her an unwitting agent in the violation of her own rights", Wertheimer, *supra* note 25 at 194 [emphasis in original].

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Isolating the features of wrongmaking that deception has and coercion lacks and explaining why they render deception as wrongful as coercion is more difficult than it seems. Starting with making the victim an accomplice, it is unclear that it is a feature that deception has and coercion lacks because coercion too can involve making the victim assist in bringing about their own plight (e.g., Sophie's choice). It is also unclear in what significant sense the victim of deception is more of an accomplice than the victim of coercion. Neither victim was a willing accomplice since both refused, either actually or counterfactually. It is thus necessary to explain why the deceived's refusal being counterfactual rather than actual makes them more of an accomplice in a way that renders deception as wrongful as coercion. As for dignifying the victim with the truth, it is unclear what kind of dignity there is in knowing how little the coercer cares about the victim's suffering and negative attitudes. It is thus unclear how the notion of dignity can be invoked to explain why deception is as wrongful as coercion.[70] Lastly, that the victim blames themselves is unfortunately not typical of deception alone, since victims of coercion also tend to blame themselves for getting into a situation that enabled the coercion to begin with or for not doing enough to stop the coercion once it started.[71]

Moreover, whatever this feature is and however it renders deception wrongful, it is also necessary to establish that this feature outweighs or at least compares with the wrongmaking features of coercion. Not only does deception have to involve some wrongmaking features that coercion lacks: these features also have to outweigh or at least balance the coercer's complete disregard of the victim's suffering and negative attitudes.

More generally, the claim that deception is (at least) as wrongful as coercion has counterintuitive implications. It is counterintuitive that violently forcing a suspect to disclose information is no more wrongful than tricking them into disclosing it to a cellmate who is an informer. One might retort that it is the violence that makes this type of coercion more wrongful than deception. The objection would then boil down to arguing that deception is as wrongful as non-violent coercive threats, while conceding that any form of violent coercion is more wrongful than deception. However, threatening to distribute intimate pictures of the suspect all over the internet unless they reveal the information also seems worse than deceiving them into believing that their cellmate is a friend.

The second objection is that this paper's argument is not persuasive when applied to cases of deception in which the victim did not consent to anything *sexual* at all.[72] For example, it could be argued that cases in which consent to sexual relations was obtained under the guise of medical treatment are as wrongful as cases of coercion.[73] It seems, however, that the aggravated wrongfulness

70. Regarding using the victim only as means, see text accompanying *infra* note 88.

71. Patricia A Frazier, "Victim attributions and post-rape trauma" (1990) 59:2 Journal of Personality and Social Psychology 298; Linda S Williams, "The Classic Rape: When Do Victims Report?" (1984) 31:4 Social Problems 459.

72. For a critical discussion of the Common Law distinction between *fraud in the factum* and *fraud in the inducement*, see Wertheimer, *supra* note 25 at 206-09.

73. See, for example, *R v Harms*, [1944] 1 WWR 12, 81 CCC4, 2 DLR 61.

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of this type of deception results from some unique features. For example, the aggravated wrongfulness of such deception might stem from the fact that these cases involve breach of the special trust owed by a medical doctor, healer and the like.[74] Alternatively, perhaps such deception is more wrongful than deception as to the specifics of the sexual relations because sexual relations differ categorically from any other type of interpersonal relations (for example, due to the intimacy they require).[75] Be that as it may, even if such deception is as wrongful as coercion, this does not mean that this paper's argument does not apply to these cases. If such deception is as wrongful as coercion, it is only because of its unique features, which form a separate consideration that applies *in addition* to this paper's argument. Lastly, some of these cases are not cases of deception at all but rather cases of coercion in disguise. For example, when a medical doctor tells a patient that her fatal disease will not be cured unless she has sexual relations with him, this is not merely deception, but more importantly, an illegitimate threat. This is because the doctor's conduct is similar to that of coercers who use a gun they know to be made of plastic.[76] In both cases, the sexual relations are obtained by coercion, albeit the perpetrator deceives the victim about the efficacy of its means. These are not cases of deception which are as wrongful as coercion, but rather cases of coercion *per se*.

C. From Morality to Law

Moving from the moral to legal discussion, the remainder of this paper is devoted to the question of criminalization. It is argued here that the difference in wrongfulness provides a salient (albeit inconclusive) consideration not only for imposing a harsher sanction for coercive sexual relations, but also for criminalizing them under an offence separate from and graver than that used for deceptive sexual relations.[77] The first subsection explains why the special wrongfulness of coercion identified in the previous section should affect the types of offence suitable for criminalizing coercive and deceptive sexual relations. The second and

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74. Notably, if the deception includes not only misrepresenting the sexual relations as medical treatment but also misrepresenting the perpetrator as belonging to the medical profession, the above point presupposes the plausible assumption that an imposter owes the victim the duties implied by the role they assume (for why should an imposter be allowed to benefit from their own deception and be exempted from respecting the rights that the patient would have possessed had the perpetrator been a real doctor?).

75. The nature of sexual intercourse as a special interpersonal interaction (a nature that, for example, cautions against state intervention) drew substantial criticism from feminist theorists. See, for example, Catherine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, Harvard University Press, 1989) at ch 7; Andrea Dworkin, *Intercourse* (New York: Basic Books, 1987).

76. For a description of the plastic gun case, see *supra* note 50.

77. On the importance of specificity to the definition of offences, see Amit Pundik, "Should Criminals be Convicted of Unspecific Offences? On Probability Theory, Efficiency, and Cognitive Psychology" [forthcoming in Criminal Law and Philosophy]. For classification of offences more generally, see Stuart P Green, "Prototype Theory and the Classification of Offenses in a Revised Model Penal Code: A General Approach to the Special Part" (2000) 4:1 Buff Crim L Rev 301; Douglas N Husak, *Overcriminalization: the Limits of the Criminal Law* (New York: Oxford University Press, 2008).

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third subsections defend this claim from various possible challenges according to which the suitable type of offence should be determined according to the harm the action causes or according to the culpability of the agent performing it. The last subsection argues that the condemnation associated with offences used to criminalize coercive sexual relations might be diluted if they are also used to criminalize deceptive sexual relations because such criminalization is unlikely to convey the appropriate condemnation needed to signify the special wrongfulness of coercion.

C.1 The Meaning of Coercion

Even if coercion is more wrongful than deception because of the abovementioned features, the question is why this special wrongfulness of coercion should affect the type of offence suitable for criminalizing either coercive or deceptive sexual relations. The first step in answering this question is to explain how the special wrongfulness of coercion relates to the moral assessment of the action of coercion, the harm it causes to the victim and the coercer who performs it. An action is distinguishable from both its consequences and the mental states of the agent carrying it. Arguably, not only the effects of an action and the agent who performs it are susceptible to moral assessment, but also the action itself. For example, insulting someone could be wrongful even if the target of the insult is not offended and even if the insult was not intended (while the agent might be excused, their action might still be wrongful). The action itself is also open to moral assessment because its significance goes beyond the significance of its consequences and the mental states of the agent performing it. The significance of the action itself is termed here "the meaning of the action".[78] Just as the action itself is separate from its consequences and the intentions of the agent carrying it out, so the meaning of an action is also separate from the meaning actually perceived by the recipient of the action and from the meaning that the agent intended to convey.[79]

The special wrongfulness of coercion changes its meaning because coercion reflects on the relationship between the perpetrator and the victim in a different way from deception. Both the coercer and the deceiver seek to engage in sexual relations with the victim with or without the victim's consent, and both their actions lead to non-consensual sexual relations. Nevertheless, the actions of coercion are cruel by nature because the coercer's conduct manifests indifference to the victim's suffering. The coercer's actions also add insult to injury by ignoring not only the victim's suffering, but also their ensuing resentment and anger.

By changing the meaning of the action, the special wrongfulness of coercion affects the *type* of action which comprises the conduct element of the crime. The

78. TM Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge: Harvard University Press, 2008) at 52. While this term is borrowed from Scanlon, this paper is not committed to Scanlon's own interpretation of this term or to the relation that he draws between this term and other concepts.

79. *Ibid* at 53. Gardner also highlights the significance of the meaning of an action. See John Gardner, "The Wrongness of Rape" in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007) 1 at 24.

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special wrongfulness of coercion has distinct external manifestations that are separate from both the agent's mental states and the consequences of their action. A hypothetical bystander, who knows nothing about the agent's mental states or lacks a full account of the consequences of the agent's action, can still notice that the coercer is not moved by the victim's suffering and negative reactive attitudes in the way they ought to be moved. Coercive sexual relations require a separate offence from deceptive sexual relations because the special wrongfulness of coercion changes the meaning of the non-consensual sexual relations, thereby affecting the conduct element of the crime and thus its *actus reus*.

C.2 The Harm of Coercion

One might insist that the type of offence used to criminalize an action should be determined by the harm it causes. Hence the only way to show that coercive sexual relations should be criminalised using an offence separate from and graver than that used for deceptive sexual relations is to establish that coercive sexual relations cause greater harm. A key question for such a position is what counts as harm: does it consist only of physical and psychological harms suffered by the victim (hereafter "experiential harms")[80] or can it also include more abstract categories such as autonomy infringements or right violations (hereafter "non-experiential harms").[81] Some theories reject the abstract notion of non-experiential harm and insist that the way an action is criminalized should be determined by the experiential harm it causes to the victim.[82] On such a theory one might hold that the important question for determining the suitable type of offence is whether coercive sexual relations cause greater experiential harm than deceptive sexual relations.

While this paper does not purport to settle this empirical question, focusing on experiential harm is unlikely to yield results which would disprove the claim that coercive and deceptive sexual relations should be criminalized with separate offences. True, *if* victims of deceptive sexual relations typically suffer similar experiential harm to that of victims of coercive sexual relations, then this similarity in experiential harm could be used to argue that deceptive sexual relations should be criminalized with the same offence as coercive sexual relations. However, substantiating the claim that the experiential harm is similar faces two challenges. Firstly, in order to establish this claim with empirical research, it would be necessary not only to assess the harm of deceptive sexual relations, but also to compare it in detail with the harm of coercive sexual relations, which often takes

80. "The victim" refers not only to the direct victim but also to derivative victims (like the direct victim's family and friends).

81. For a similar distinction between well-being and rights-based interests and its relation to experience, see Wertheimer, *supra* note 25 at 93 & 94-95 respectively. For criticism of attempts to base the wrongfulness of rape on the non-experiential harm to the victim's right over her body, see Gardner, *supra* note 79 at 8-14.

82. In addressing the connection between experiential harm and "rights violations", Wertheimer claims that "the latter are largely, if not entirely, parasitic on the former". Wertheimer, *supra* note 25 at 100.

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severe physical and psychological form. Somewhat surprisingly, there has been no empirical research either to establish or disprove this claim, or even a general reference to the distinction between coercive and deceptive sexual relations.[83] Moreover, to the extent that it is possible to draw conclusions from non-sexual offences to sexual offences, empirical research on property offences shows that coercion is more harmful than deception.[84] Secondly, the wrongmaking features of coercion discussed above can also explain some of the harm typically caused by coercive sexual relations, in addition to other harms caused by the sexual relations being non-consensual or by the coercive means themselves (e.g., violence). By ignoring the victim's suffering and resentment the perpetrator forces the victim to confront the cruel and dismissive way in which they are treated, thereby causing them additional harm.[85] This additional harm, which can easily be overlooked, ought to be included in the comparison as well. For these two reasons substantiating the claim that deceptive sexual relations should be criminalized with the same offence as coercive sexual relation by focusing on the experiential harm they cause is harder than it looks.

Furthermore, it is worth noting the general difficulties of focusing on experiential harm, particularly in sexual offences. It seems hard to accept that *in general* the way wrongful actions should be criminalized is determined solely according to the experiential harm they create. For example, when a perpetrator steals money from the victim's bank account, the stealing is criminalized as any other action of stealing, even if the victim did not notice that the money was missing. Such theories are no less problematic in the specific context of sexual offences. For example, in the context of rape, Gardner discusses a case he labels "pure rape", in which the victim (and everyone else) remains oblivious to the fact that she was raped while unconscious, and persuasively argues that such a wrongful action is still rape.[86] If the type of offence should be determined only by the experiential harm that the criminalized action creates, then such a case could not be criminalized at all because no experiential harm resulted from the perpetrator's actions.[87] Moreover, since in many cases the deception is not exposed and thus not experienced, establishing that coercive and deceptive sexual relations should be criminalized with the same offence by referring to experiential harm is

83. For an example of empirical research assessing the harm to rape victims without separating between coercion and deception, see Dean G Kilpatrick et al, "The Psychological Impact of Crime: A Study of Randomly Surveyed Crime Victims", online: (1987) National Institute of Justice https://www.ncjrs.gov/pdffiles1/Digitization/107740NCJRS.pdf. For research which distinguishes between violent and non-violent rape (but not between coercion and deception), see Patricia A Resick, "The Psychological Impact of Rape" (1998) 8 Journal of Interpersonal Violence 223.

84. Stuart P Green & Matthew B Kugler, "Community Perceptions of Theft Seriousness: A Challenge to Model Penal Code and English Theft Act Consolidation" (2010) 7:3 J of Empirical Legal Stud 511.

85. This harm in turn adds another layer of significance to the meaning of coercion. While the meaning of an action is not exhausted by its likely effects, this additional harm further changes the meaning of coercion and makes it worse than it would have been without it.

86. Gardner, *supra* note 79 at 5.

87. Wertheimer defends his experiential harm approach from such examples by suggesting that "the wrongfulness of A's action is principally a function of […] the *expected* harm of his act, and not the actual harm that ensued", *supra* note 25 at 102. For a critical examination of Wertheimer's response, see Dougherty, *supra* note 28 at 726-27.

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particularly difficult, and this is admitted even by its proponents.[88]

By contrast, if harm can be non-experiential, one could argue that coercive and deceptive sexual relations should be criminalized using the same offence because they both cause similar non-experiential harm. For example, one might hold that coercive and deceptive sexual relations cause a similar non-experiential harm because both consist of using the victim only as a means to some other end rather than as an end in themselves. Herman, for example, draws on Kant when referring to coercion and deception as the two most egregious instances of illegitimate manipulation of the will.[89] According to Herman, deception infringes upon the will in a manner as grave as coercion, because it exploits the victim's dependence on information provided by the deceiver, information the victim needs in order to exercise their judgment freely and rationally. Exploiting this dependency transforms deception into a clear instance of using another person as means rather than an end. Following Herman's equalisation of coercion and deception in using the victim as means, one might argue that coercion and deception create similar non-experiential harm and thus should be criminalized using the same offence. A similar objection can be made by employing the concept of sexual objectification. One could argue that coercive and deceptive sexual relations should be criminalized with the same offence because both consist of treating the victim as a sexual object whose purpose is to satisfy the perpetrator's desire rather than as a human being with feelings and desires of their own.[90] Lastly, one could argue that the same offence should be used to criminalize coercive and deceptive sexual relations because both violate similar rights of the victim.

However, just as it is difficult to accept that experiential harm is the sole consideration which should determine the types of offence suitable for criminalizing coercive and deceptive sexual relations, it is also difficult to accept that with regard to non-experiential harm. This is because non-experiential harm is also unlikely to exhaust all the distinctions which should determine the offence with which a certain wrongful action is criminalized. Starting with autonomy, in many if not all offences, the perpetrator uses the victim only as means to other ends: a robber uses the robbed only as means to obtaining their belongings, a pimp uses the prostitute only as means to obtaining profit and a brute assaults others only as means to dominating them. Similarly, most types of sexually-offensive conduct consist of sexual objectification: rape, sexual assault, non-consensual sexual touching and sexual harassment all treat the victim as an object whose purpose is to provide sexual pleasure to the perpetrator. They might differ in the way

88. In discussing deceptive sexual relations Wertheimer admits that "[H]ere I have a problem" and concedes that "it really does not matter" whether an action is wrong because of its expected harm or because of the non-experiential harm it causes, Wertheimer, *supra* note 25 at 202 and 203 respectively. For a similar criticism of Wertheimer, see Dougherty, *supra* note 28 at 725-27.

89. Barbara Herman, *The Practice of Moral Judgment* (Cambridge: Harvard University Press, 1993) at 203-07.

90. "That a rapist objectifies his victim by treating her as a mere repository of use-value is what is basically wrong with rape", *Gardner*, *supra* note 79 at 15. According to this view both the coercer and the deceiver objectify their victim because they both fail to respect their non-use value.

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they do so, but none seems to treat the victim as a human being with personal preferences that ought to be respected.[91] As for rights-violation, it is difficult to see why murder infringes a different right of the victim from manslaughter. If the fact that both coercive and deceptive sexual relations use the victim only as means, sexually objectify them or violate similar rights of theirs were sufficient to establish that they should be criminalized with the same offence, then this would apply to a wide variety of other offences. Criminal law distinguishes between murder and manslaughter (and between aggravated and common sexual assault), and acknowledges that the former is graver than the latter. As a result either criminal law rejects these methods as appropriate to identifying which offence fits which wrongful action, or it only accepts them *in addition* to other methods. Either way, even if coercive and deceptive sexual relations cause similar non-experiential harm, this does not show that they should be criminalized using the same offence.

Furthermore, it seems that the argument of this paper can be reiterated by basing it on non-experiential harm, thus showing that coercive sexual relations cause greater non-experiential harm than deceptive sexual relations. For example, not responding to the victim's suffering and negative reactive attitudes arguably makes the infringement of the victim's (sexual) autonomy graver. Not only does the coercer disrespect the victim's autonomy by engaging in sexual relations without the victim's consent, the coercer further disrespects the victim's autonomy by not responding to their suffering and resentment. While this paper does not attempt to make such an argument in full, the important point is that the notion of non-experiential harm opens some space for this paper's argument, even if one insists that the type of offence suitable for criminalizing coercive and deceptive sexual relations should be determined solely by the harm they cause.

C.3 The Coercer's Culpability

The claim of this section can be challenged from another direction, by arguing that what matters most for determining the suitable offences for criminalizing coercive and deceptive sexual relations is the agent's mental states and, in particular, their subjective reasons or motives for performing this action. It could be further argued that the deceiver might prefer deception to coercion not because they seek to avoid facing the victim's suffering and negative attitudes, but because they believe that it will be easier to deceive than coerce, the sexual relations will be more pleasurable, or the criminal sanction will be more lenient if they are caught. According to such an approach, deceptive sexual relations should be criminalized with the same offence used for coercive sexual relations

91. Gardner argues that "the main importance of the "objectification" argument lies in the way that it begins to differentiate rape […] from other paradigms of criminal wrong, including paradigms of non-sexual criminal violence", *ibid* at 16, yet it is difficult to see how non-sexual criminal violence does not objectify the victim, because it too fails to respect the victim's non-use value.

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if the deceiver is motivated by reasons as bad as the coercer. One way to understand this challenge is by connecting it to the common distinction between wrongfulness and culpability, where "wrongful" is a property of an act while "culpable" is a property of an agent.[92] According to this understanding, the challenge is that the suitable offence should be determined according to the coercer's culpability rather than the wrongfulness of the coercive act.

Firstly, the argument of this paper can be reiterated to focus on the perpetrator's culpability because the features of coercion discussed above also influence the moral assessment of the coercer's culpability by reflecting badly on them. Not being moved by their victim's suffering and disregarding the victim's resentment exposes the coercer's cruelty and shows what little respect they have for other people. Secondly, while focusing on the agent's subjective reasons and motives may be relevant to other contexts, the general approach of criminal law to subjective reasons and motives is that while they serve as a consideration for determining the appropriate punishment at the sentencing stage, they are considered irrelevant at the trial stage.[93] For example, a perpetrator who robs a rich person is guilty of robbery whether their motive was to enrich themselves or to distribute the money to the poor, and their motives might be taken into account only when determining their punishment. Similarly, in the context of sexual offences, while differences between the perpetrators' (coercers or deceivers) subjective reasons and motives might be relevant at the sentencing stage, they are irrelevant to the type of offence the perpetrator committed.[94]

Setting subjective reasons and motives aside and focusing on the wrongfulness of coercion renders this paper's argument applicable to all sorts of coercers. Firstly, it is applicable to the sadistic coercer, who derives some sort of perverted pleasure from the victim's suffering or from their negative reactive attitudes.[95]

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92. That an act is wrongful does not imply that the agent who committed the act is culpable and that an agent is culpable does not imply that they committed a wrongful act. There might be reasons for condemning the act while exculpating the agent (like insanity) and there might be reasons for condemning the agent without condemning the act (as in the case of impossible attempts). For more on these distinctions see Heidi M Hurd, "Justification and Excuse, Wrongdoing and Culpability" (1999) 74 Notre Dame L Rev 1551 at 1558-59; Michael S Moore, "Prima Facie Moral Culpability" (1996) 76 BU L Rev 319 at 320-21.

93. "Hardly any part of penal law is more definitely settled than that motive is irrelevant", Jerome Hall, *General Principles of Criminal Law*, 2nd ed (Indianapolis: Bobbs-Merrill, 1960) at 88. "It has been uniformly accepted in Anglo-American jurisprudence that motive is neither an element of a crime, nor a defense to its existence", Theodore Sachs, "Criminal Law: Humanitarian Motive As a Defense To Homicide – State v. Sander, (N.H. 1950)" (1950) 48:8 Mich L Rev 1199. For critical examination of the criminal law's approach, see Douglas N Husak, "Motive and Criminal Liability" (1989) 8:1 Criminal Justice Ethics 3.

94. Notably, one outcome of the criminal law's disregard of the perpetrator's motives is that some coercers might be punished more severely than deceivers not because they are more culpable but because they lack the sophistication needed to obtain the victim's consent by deception. This issue is part of a general problem in criminal law and seems particularly relevant to white collar offences. While the issue is troubling, providing a general solution to it lies outside the scope of this paper.

95. This is not a remote possibility, as criminological research demonstrates that many rapists act out of a desire to feel power and control, or are motivated by anger. See AN Gorth, AW Burgess & LL Holmstrom, "Rape: Power, Anger, and Sexuality" (1977) 134:11 American Journal of Psychiatry 1239. For a critical review of this literature, see Wertheimer, *supra* note 31 at 70-80.

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While the sadistic coercer does not ignore the victim's suffering and attitudes altogether, they are nevertheless not moved by these suffering and attitudes *in the way they ought to be moved*: instead of ceasing to cause the victim's suffering and ensuing attitudes, they are heated by them and take pleasure in them. Another type of coercer is a perpetrator who is entirely indifferent to the victim's suffering or negative reactive attitudes. The indifferent coercer is also not moved in the way they ought to be moved because they continue to coerce the victim despite being aware of the suffering and negative reactive attitudes that they cause.[96] Lastly, there is the agonising coercer, who takes the victim's suffering and negative reactive attitudes to heart and yet continues coercing the victim to engage in sexual relations against the victim's will. While the agonising coercer does not take pleasure in the victim's suffering and attitudes or ignores them altogether, their conduct nevertheless manifests that they are not moved in the way they ought to be, that is to stop coercing the victim. More generally it is the wrongfulness of the action which determines which actions should be criminalized and why, while the role of culpability at the trial stage is limited to being a constraint which prohibits the conviction of non-culpable agents (e.g., excused agents). Since this paper questions which type of offence is suitable for criminalizing coercive and deceptive sexual relations, the answer should focus on the wrongfulness of the action and not on the culpability of the agent.

One could reply that the wrongmaking features of coercion identified in this paper merely derive from a difference between the coercer's character and that of the deceiver because cruelty is primarily an attribute of agents.[97] As a result this difference, similarly to the perpetrator's motives and subjective reasons, is arguably irrelevant at the trial stage, so if the special wrongfulness of coercion should affect criminal law at all, it should only affect sentence. However, even if the wrongdoer's character is as irrelevant to the trial stage as their motives and subjective reasons, the special wrongfulness of coercion should still affect the type of offence suitable for its criminalization. Even if the features differentiating between coercion and deception stem from a difference in character, they also manifest themselves as a difference in the meaning of the action. While differences in character do not necessarily have an external manifestation, differences in the meaning of action usually do: a hypothetical bystander who knows nothing about the coercer's character can still notice that the coercer is not moved in the way they ought to be moved by the victim's suffering and negative reactive attitudes. By changing the external manifestations of the action, these features affect the conduct element of the crime and thus its *actus reus*, thereby requiring a separate type of offence.[98] Analogously, even if, for the sake of the argument, the wrongmaking features differentiating robbery and theft stem from a difference between the (aggressive, confrontational and so on) character of the robber and the (opportunistic, cowardly and so on) character of the thief, the difference

96. For mistakes, see text accompanying *supra* notes 39 and 62.
97. As Kekes notes, "[t]o say that an action is cruel is thus to say that it is the kind of action that would be performed by a cruel agent", Kekes, *supra* note 54 at 837.
98. See section C.1.

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in wrongfulness between robbery and theft remains relevant to criminal law. In either case the difference in wrongfulness should affect the type of offence even if it flows from a difference in character.

C.4 The Risk of Dilution

Whatever the genealogy of the special wrongfulness of coercion is, a more general concern is that ignoring this special wrongfulness at the trial stage might dilute the condemnation associated with offences used to criminalize coercive sexual relations if they are also used to criminalize deceptive sexual relations. This is because offences capturing both coercive and deceptive sexual relations are unlikely to convey the appropriate condemnation needed to signify the special wrongfulness that arises from ignoring the victim's suffering and negative attitudes.[99]

The risk of dilution is troubling under each of the major theories of punishment. This is clearest under expressivist theories, which justify punishment by its communicative role in delivering a clear and accurate moral message of condemnation either to the perpetrator or to members of the public.[100] While expressivist theories rarely state explicitly the requirement of an accurate description of the condemned action, this requirement seems to be taken for granted by such theories.[101] Criminalizing coercive sexual relations under a separate and graver offence would enable criminal law to convey a clearer and more accurate message according to which the more wrongful conduct of coercive sexual relations is also more condemnable. By contrast, criminalizing both coercive and deceptive sexual relations under an inclusive offence would render the message conveyed by conviction blurred and confusing. This is particularly relevant for members of the public, for whom it would be harder to know whether a perpetrator who was convicted of the inclusive offence was ignoring the victim's suffering and negative attitudes.

The dilution of condemnation should also trouble retributivist theories of punishment, which seek to punish the perpetrator according to what they deserve,

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99. The question of proper labelling might be dismissed as formalistic and non-practical since the only thing that matters is the term of imprisonment inflicted on each perpetrator, rather than how the offence is construed or named. Such a stance neglects the general significance of proper labelling in criminal law. Convicting the accused of 'murder' and labelling him a 'murderer' forms a crucial part of the criminal sanction, which includes not only the term of imprisonment, but also the condemnation attached to the offender. That labelling and stigma are of practical significance is not only intuitive but also in accordance with empirical research; see, for example, Franklin Zimring & Gordon Hawkins, "The Legal Threat as an Instrument of Social Change" (1971) 27:2 Journal of Social Issues 33; Eric Rasmusen, "Stigma and Self-fulfilling Expectations of Criminality" (1996) 39:2 JL & Econ 519.

100. See, for example, RA Duff, *Punishment, Communication and Community* (Oxford: Oxford University Press, 2001); Joel Feinberg, "The Expressive Function of Punishment" in *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton: Princeton University Press, 1970) 95; and John Braithwaite & Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Clarendon Press, 1990) at 25-53.

101. For example, Hampton seeks to justify punishment as a way of teaching the wrongdoer that the action is wrong; see Jean Hampton, "The Moral Education Theory of Punishment" (1984) 13:3 Phil & Pub Aff 208 at 212, 225. In order to serve this educational purpose successfully, punishment should be attached to a prohibited action which is accurately defined.

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neither more nor less.[102] Retributivist theories hold that what the perpetrator deserves is determined by their culpability and, while the relations between wrongfulness and culpability are complicated,[103] there seems to be some correlation between them. Given that coercive and deceptive sexual relations differ in their wrongfulness, criminalizing both under an inclusive offence is problematic under retributivist theories too. It is problematic both because the punishment of coercers might be unfairly lenient as it might consist of a diluted stigma that fails to convey that they ignored the victim's suffering and negative attitudes, and because the punishment of deceivers might be unfairly excessive as the stigma might be perceived as conveying the special wrongfulness of coercion. While imposing a harsher sanction on coercers can be used to offset the reduced punitive effect of convicting both coercers and deceivers of the same offence, to the extent that condemnation makes a unique contribution to punishment, such a contribution will be lost.

Moving to deterrence, criminalizing coercive and deceptive sexual relations under the same offence might reduce the deterrence of potential coercers. The labelling of prohibited behaviour needs to be precise because empirical research shows that the criminal stigma forms an integral part of the deterrent effect.[104] The criminal stigma consists not only of labelling the perpetrator a 'criminal', but also of labelling them according to the offence ('murderer', 'rapist', 'robber', etc.).[105] The dilution of condemnation might lead to a reduced deterrent effect on coercers because some potential coercers, who would have been deterred by the stronger condemnation attaching to a separate offence highlighting the special wrongfulness of coercion, might no longer be deterred by an inclusive and less condemnatory offence. Again, while imposing harsher sanction only on coercers could somewhat offset the reduced deterrent effect of the inclusive offence, whatever unique contribution labelling adds to deterrence will be lost.[106]

One could argue that using an inclusive offence is preferable because it would have an increased deterrent effect on potential deceivers. An offence which includes both sexual coercive and deceptive sexual relations is likely to

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102. See, for example, Herbert Morris, "Persons and Punishment" in *On Guilt and Innocence* (Berkeley: University of California Press, 1976) 31 at 31-59; CS Lewis, "The Humanitarian Theory of Punishment" in Walter Hooper, ed, *First and Second Things: Essays on Theology and Ethics* (Glasgow: Collins Fount, 1985); Michael Moore, "Justifying Retributivism" (1993) 27 Isr LR 15.

103. See section C.3 above.

104. For a survey of the empirical research on the economic and social implications of the criminal stigma, see Rasmusen, *supra* note 99.

105. For a similar position, see the Irish Law Reform Commission report, "Homicide: Murder and Involuntary Manslaughter" (2008) at 6, online: http://www.lawreform.ie/_fileupload/Reports/rMurderandInvoluntaryMS.pdf: "The Commission believes that differentiating between homicide offences […] underlines the differing stigma attaching to each category of killing. If murder ceased to be a distinct offence, the criminal law would fail to convey the degree of stigma and revulsion society attaches to the most heinous killings."

106. It could be argued that other considerations affect the deterrence analysis. For example, if deceptive sexual relations are harder to deter because of enforcement difficulties, then the sanction for it should be (at least) as severe as that for coercive sexual relations. While there could be other relevant deterrence considerations, the point of this paper is that the difference in wrongfulness generates a salient consideration for deterrence theories as well.

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create stronger condemnation than a lighter offence dedicated only to deceptive sexual relations and therefore would be more effective in deterring some potential deceivers. However, while an inclusive offence might deter some potential deceivers more effectively, it might be less effective than a lighter yet dedicated offence in deterring other potential deceivers. Using a separate offence would sharpen the message for those potential deceivers who mistake the stronger condemnation associated with the inclusive offence to imply that this graver offence is not applicable to deception but only to the more wrongful conduct of coercion. For example, if the offence of rape is used to criminalized deceptive intercourse, some potential deceivers might mistakenly believe that their conduct does not amount to rape (the offence of which Kashur was convicted and Assange is suspected).[107] Therefore, if one's main motive for using an inclusive offence is to enhance the deterrence of potential deceivers, one needs empirically to establish that an inclusive offence would increase deterrence rather than decrease it. Furthermore, even if an inclusive offence deters more potential deceivers, this advantage might be offset by the weaker deterrence of potential coercers, resulting from the dilution of the condemnation attached to the inclusive offence. These points show that it is difficult to establish that an inclusive offence is better for deterrence and that the risk of dilution has to be taken into account either way.

This section has argued that the difference in wrongfulness serves as a salient consideration for separate offences because an inclusive offence might dilute the condemnation it conveys, thereby undermining expressivist, deterrent and retributivist goals. While there are other considerations for and against separate offences, one consideration is particularly relevant for any argument based on dilution. It could be argued that if criminal law consists of separate offences for each circumstance which makes the perpetrator's conduct more wrongful, it will become so inflated with offences that members of the public will no longer be able to recognize what the offence name means. As a result, using overly-refined offences might undermine the stigma because it does not allow grouping criminals as 'murderers', 'rapists', etc. Over-refinement in offence definition is indeed problematic, but this paper does not call for a separation of every two forms of conduct which differ in wrongfulness into two separate offences (e.g., criminalizing robbery of 20 dollars with a different offence from robbery of 200 dollars). This paper argues that coercive and deceptive sexual relations are different types of wrongful conduct. It seems more plausible to separate offences when the *types* of wrongful conduct differ than when a particular circumstance differs.[108]

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107. For a description of the way conventional perceptions of rape by deception are reflected in English and US judgments, see Rubenfeld, *supra* note 10 at 1395-98.

108. In a recent paper Harel and Porat argue that in some cases the accused should be convicted of an unspecific offence if there is evidence that the accused committed at least one of several offences, Alon Harel & Ariel Porat, "Aggregating Probabilities Across Cases: Criminal Responsibility for Unspecific Offences" (2009) 94 Minn L Rev 261. This seems to challenge this paper's position from the other direction, because it suggests that the important category is 'criminal' rather than 'rapist', 'robber', etc. For a detailed criticism of their proposal, see Pundik, *supra* note 77.

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Conclusion

The first section has identified the features which distinguish deceptive from coercive sexual relations. It suggested that cases of deception are characterized by two additive features: firstly, the victim's actual specific consent to engage in sexual relations based on the perpetrator's misrepresentations and, secondly, counterfactual specific refusal to engage in these relations as they actually were. The second section has argued that coercive sexual relations are more wrongful than deceptive sexual relations because the coercer remains cruelly unmoved by the suffering they cause to the victim and dismissively disregards the victim's negative reactive attitudes. The last section has shown that this difference in wrongfulness favours criminalizing coercive and deceptive sexual relations by using separate offences.

The last point is relevant to many sexual offences because the extent to which deception vitiates consent affects a wide range of sexual offences. This is because consent is a crucial element in most sexual offences between mentally-sound adults, especially since other obsolete elements were abolished, such as in the offence of rape, that once required use of force and excluded victims of rape within marriage.[109] In England "consent" is defined in a separate section and applies to a variety of sexual offences such as rape and sexual assault.[110] In Canada, where offences such as rape and sexual assault were removed from the Sexual Offences chapter and integrated into a general graded offence of sexual assault under the Assaults section,[111] "consent" is defined separately and applies to all three grades of sexual assault.[112] Consent also plays a key role in the offences which remained in the Sexual Offences chapter.[113] In other jurisdictions as well, consent stands at the heart of most sexual offences between mentally-sound adults and lack of consent is the only thing which transforms what would otherwise be lawful sexual relations into a sexual offence.[114]

That coercive sexual relations ought to be criminalized separately is relevant to several jurisdictions. While Massachusetts considers introducing a sexual offence which is dedicated to deceptive sexual relations, many other jurisdictions include deception and coercion in the same sexual offence (e.g., England, Tennessee, Israel).[115] According to this paper, these jurisdictions understate the difference in wrongfulness between coercion and deception and risk dilution of

109. Temkin acknowledges these changes but nevertheless regards them as mere appearances, Jennifer Temkin, "Rape and Criminal Justice at the Millennium" in Donald Nicolson & Lois Bibbings, eds, *Feminist Perspectives on Criminal Law* (London, UK: Cavendish Press, 2000) 183.

110. *Sexual Offences Act 2003* (UK), c 42, s 74.

111. *Canada Criminal Code*, RSC 1985, c C-46, ss 271-73.

112. *Ibid* at s 273.1.

113. For example, *ibid* at s 153.1(2) defines "consent" for the purpose of sexual offences against disabled persons and *ibid* at s 150.1 defines a variety of exceptions to the rule that consent is no defence in sexual offences against minors.

114. See, for example, Sexual Offence of First Degree in Alaska (Alaska Stat. § 11.41.410 (2014)); Victoria, Australia (*Crimes Act 1958* (Vic), s 38), South Africa (*Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*).

115. See text and examples accompanying *supra* note 10.

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the attached condemnation. Canada is a particularly interesting case in this respect. Canada's criminal code includes two versions of aggravated offences of sexual assault, and some of the circumstances which constitute the graver versions are coercive in nature (such as threats and use of a weapon). Not only do these aggravated offences carry longer imprisonment,[116] they are also separate offences whose labelling is more condemnatory.[117] Therefore, while the division between the offences in Canada's criminal code is not coextensive with the distinction between coercive and deceptive sexual relations,[118] this code nevertheless exemplifies, at least to some extent, how coercive sexual relations can be separated into distinct and graver offences.

While this paper's focus is sexual offences, the difference in wrongfulness between coercion and deception might be relevant to other issues both inside and outside criminal law. In criminal law this difference in wrongfulness can be used to distinguish between different forms of conduct that should be separated into two offences (such as extortion and fraud). Outside criminal law the difference in wrongfulness could be used to explain and justify the different implications of duress and misrepresentation in contract law (e.g., rendering the contract void and voidable respectively).

Moreover, the argument of this paper has broader implications than distinguishing between coercion and deception. For example, it could be used to distinguish between different types of harm (for example, stabbing the victim while ignoring their screams of pain and pleadings for mercy and causing a similar injury using a non-fatal time-bomb). Not only could this argument be used to distinguish between different principal perpetrators, it could also be used to distinguish between different types of perpetrator who are parties to the offence (those who aid or abet the principal perpetrator). The argument could justify distinguishing between parties to the crime who were exposed to the victim's suffering and negative reactive attitudes and parties to the crime who were not.[119] While this paper's focus was relatively narrow (arguing for a difference between coercive and deceptive sexual relations), these preliminary examples illustrate that the argument may have significantly broader explanatory force and normative implications which need to be further explored.

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116. *Canada Criminal Code*, RSC 1985, c C-46, ss 271-73.

117. For example, "Aggravated sexual assault" vs. "Sexual assault", *ibid*, s 273 and s 271 respectively.

118. This is particularly evident when the accused failed to disclose having HIV, see, for example, *R v Cuerrier*, [1998] 2 SCR 371. In such cases it is the "danger to the victim's life" which renders these sexual relations more wrongful than deceptive sexual relations which did not put the victim's life at risk.

119. This distinction should not be confused with the distinction between accomplices and accessories.

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