

CONSENT IN MODERN CRIMINAL LAW

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This article considers the law, of New Zealand and England and Wales, relating to determinations whether P consented in various kinds of interaction with D. (The interactions considered are between persons old enough to validly consent to the conduct at issue and who are capable of evaluating and reflecting upon the consequences of their actions.) In the context of sexual interactions, the law in both jurisdictions is in a process of fitful change—from a regime in which consent could be vitiated only by threatened or actual force, impersonation, or radical misunderstanding, towards a position where the question of consent is less categorical and at large. A contrast is drawn between sexual and other interactions, including offences against the person and, especially, commercial misconduct. In the former cases, the central concern is justice between the parties. By contrast, in delineating the boundaries of what amounts to lawful commerce, it is permissible to consider what a ruling about consent may entail for the commercial system as a whole: something that can lead to a very thin conception of what makes for valid consent. The most general lesson that goes with this argument is that consent in law is not a pre-legal phenomenon.

I CAVEATS AND CONCEPTS

By "modern" criminal law we mean, in a literal sense, the current criminal law of New Zealand and England and Wales—that is, as of the time of writing. More importantly, the term implies a present different from the past. One site of change, as controversial as it is important, concerns what amounts to consent, and what makes for a lack of consent, in circumstances where a valid consent would be an answer to any criminal charge otherwise arising from those circumstances. Addressing some of these questions will be the subject of this article.

Our concern is with what may be characterised as the *vitiation* of consent, for example by reason of duress or deception. While there are overlaps, matters of vitiation can generally be distinguished from other grounds upon which an ostensible consent is to be disallowed. For instance, a customer of a tattooist and body piercer may ask for an ear and nipple to be removed, or for a tongue to be split.¹

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1 *Regina v M (B)* [2018] EWCA Crim 560, [2019] QB 1.

Assuming the risks are fully understood, should we leave this pair to themselves, or should a well-ordered polity discourage such activities by punishing one or both participants? In legal terms, the answer to this question differs between New Zealand and England.² There are large questions here, many of which we must set aside. The variety of grounds for disallowance of what would otherwise make for consent cannot be adequately addressed within a single article. Our focus is on human interactions that can be consensual but where, for one reason or another, an ostensible consent is vitiated.

We set aside, too, matters of personal *incapacity*, and for similar reasons. For present purposes, the putative victim (P) of a defendant's (D) potential crime is somebody who has reached the age of consent, a person with adequate capacities of perception and reflection. Difficult questions arise where P's faculties of perception and reflection are affected, for example, by a mental disorder. As others have observed,³ those questions share some of the more general challenges surrounding disallowances. In holding that P's ostensible consent was negated by, say, a disability, we disallow that activity *for P*. We may see ourselves as protecting P, but we also in a very real sense *disempower* P. One may well ask, in what circumstances is doing so justified? The answers lie beyond the scope of this article.

Even so, the category of personal incapacity is instructive because it illustrates one way in which the justification of vitiation findings overlaps with that for other grounds of disallowance. Consider a standard timeline involved in criminal convictions:

t_0 : *Ex ante*, the state enacts a criminal prohibition of doing X without consent.

t_1 : D does X without P's consent.

t_2 : *Ex post*, D is tried, convicted, and punished for doing X without consent.

Whether any ostensible consent given by P is vitiated is a question to be adjudicated at trial. But that adjudication ought to be guided by legal principles that are consistent across cases. An *ex ante*

2 In *M (B)*, above n 1, the tattooist was prosecuted and found guilty of wounding with intent to cause serious harm. V's consent was held not to render D's actions permissible, on the understandable ground that what he did was very dangerous and could have resulted in life-threatening infection. By contrast, concerns about health and safety did not trump autonomy in *Barker v R* [2009] NZCA 186, [2010] 1 NZLR 235. D performed scarification on two girls aged 15 and 16 and was convicted of injuring with intent and of wounding with intent to injure. The trial Judge withdrew the defence of consent on the basis that there was no social utility in a dangerous procedure carried out by a person unschooled in surgery and its dangers. On appeal, however, D's convictions were quashed: "judges ... ought to have a high level of respect for the personal autonomy of participants in voluntary activities involving the infliction of harm": at [147] per O'Regan J.

3 For an insightful and humane discussion of the legal regulation of the sex lives of mentally disordered persons, see John Stanton-Ife "Mental disorder and sexual consent: Williams and after" in Dennis J Baker and Jeremy Horder (eds) *The Sanctity of Life and the Criminal Law: The Legacy of Glanville Williams* (Cambridge University Press, Cambridge, 2013) 204.

finding at t_2 that P's consent was vitiated in the circumstances of the case at hand is, at one and the same time, a finding that would apply in respect of *any* person in like circumstances. In effect, it amounts to a ruling about the *ex ante* scope of the prohibition itself (at t_0). Where that ruling is based on findings of personal incapacity, it disallows people like P from ever giving a valid consent to D's doing X at t_1 . It constrains P's freedom as well as D's.

The example illustrates one way in which the determination whether an ostensible consent is legally valid or disallowed involves a trade-off. Any refusal to treat that "consent" as valid risks betokening a lack of respect for P, in addition to interfering with P's liberty. This is, of course, an inherent risk of paternalistic state interventions. Sometimes, even frequently, such interventions may be justified. But we should not ignore the complexity of their justification. In crafting the law of consent, we need to think carefully about the implications our legal principles may have for the social interactions of us all.

That very role, which consent plays within our social interactions, is part of the reason why these issues are so complex. As such, it may be helpful to say something briefly about the juridical character of consent. Let us start by noting some different senses in which a person might be said to "consent" to something. We have gestured already toward one such distinction, in talking about consent, in the full sense, and "ostensible consent". Strictly speaking, as used in this article, an ostensible consent may or may not be valid. However, the idea that a consent is "ostensible" may be thought to suggest that it was *merely* ostensible; that the "consent" was not valid. As the courts sometimes say, it may have been *submission*, or *mere acquiescence*, but it was not *consent*. As such, the difference between ostensible and full consent is in the nature of a conclusion—some "consents" are valid, some invalid, and it is the job of the law to bifurcate them.

At the same time, it is important to identify what valid and merely ostensible consents *have in common*: what underlying phenomenon they rest upon. Confusingly, this underlying phenomenon is frequently also called "consent", something that might in turn be valid or invalid. For clarity, then, let us call the underlying phenomenon *assent*. Roughly summarised: to *assent* to something is to express an attitude of agreement (concurrence, etc) to that thing. That expression might be vocal (by, say, saying "yes") or non-vocal (for example, by nodding or shaking hands), but for present purposes we take it that assenting is something that P *does*,⁴ and does as a matter of choice. There are all sorts of borderline cases here,⁵ but the basic idea is that assent expresses a *choice*; it is something that P chooses to do. It may not be much of a choice, as when it is made under duress, but it is a choice all

4 We assume here that assent is not merely a mental act, and that it must be manifested externally. In the context of vitiation, that question is tangential.

5 Including whether one can assent by silence, or by an involuntary nod. We need not pursue such marginalia here.

the same—an assent, whether or not a valid *consent*. Even if it is a mere submission, P agrees to D's proposal rather than face the alternative.

Assent, thus, is the real-world phenomenon that underpins a finding of consent. In that much, assent has a factive dimension which is both pre-legal and pre-moral. By contrast, consent (and here we are speaking in the full legal sense) is not a real-world phenomenon. What marks out a consent is that the assent is legally *effective*. Hence, as we said earlier, consent may rest on assent, but it is in itself a legal conclusion.

What kind of conclusion? A functional one. The effect of consent is to alter the normative relationship between persons such as D and P, and (frequently) between D, P and third parties.⁶ That is to say, it works to alter the array of rights, duties, and the like that frame the relationship between D and P (and others). In surgical contexts, for example, P's consent can relieve D of her duty to refrain from doing what would otherwise be a serious wrong. The same is true in many other settings, such as sexual intimacy. Of course, there are other means by which D may be relieved of her duty not to operate without obtaining consent. Perhaps P is unconscious and in urgent need of medical intervention.⁷ Similarly, a judicial determination might entitle D to take possession of what was formerly P's property notwithstanding P's lack of assent. Normative relationships can be altered on a wide variety of grounds. What gives consent its distinctive value, though, is that it can transform normative relationships by a voluntary expression of P's will. P can change D's normative position through her own choice. This creates the possibility of new forms of legal interaction, such as the formation of contracts. By placing herself under an obligation to D, P is able to make bargains and to advance her own welfare.⁸ Recognising P's consent thereby empowers P.

One implication of this is that the state may be justified in giving legal effect to P's assent even when the activity involved is "depressingly dehumanising".⁹ On the other hand, empowerment is not the sole consideration when deciding whether to recognise consent. Consider, for instance, the civil law case of *Barton v Armstrong*, in which P entered into a contract with D after D threatened to kill him.¹⁰ It appeared from the facts that P would have signed the contract anyway out of commercial necessity. Nonetheless, P's consent was voidable. While that conclusion was welcome to P at the *ex*

6 Compare Grant Lamond "Coercion, Threats, and the Puzzle of Blackmail" in AP Simester and ATH Smith (eds) *Harm and Culpability* (Oxford University Press, Oxford, 1996) 215 at 233.

7 For a more challenging example, see *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147 (CA).

8 See for example Stephen Smith "Towards a Theory of Contract" in Jeremy Horder (ed) *Oxford Essays in Jurisprudence* (4th ed, Oxford University Press, Oxford, 2000) 107.

9 John Gardner and Stephen Shute "The Wrongness of Rape" in Jeremy Horder (ed) *Oxford Essays in Jurisprudence* (4th ed, Oxford University Press, Oxford, 2000) 193 at 209.

10 *Barton v Armstrong* [1976] AC 104 (PC).

post point of litigation, it implies that D had made it *impossible ex ante* for P to enter into a non-voidable, binding contract. P's power to consent was thereby diminished by D's actions, regardless of P's own choices and preferences. One might similarly imagine, in the context of sexual offences, a threat by D (say) to commit suicide unless P agrees to have sex, in a situation where P had wanted to do that anyway. Should such a threat deprive P of the power to consent to sexual activity? Here, as will be seen below, we might—or might not—reach a different conclusion.

Our point is that a finding of assent is no more than a starting point in the inquiry whether P validly consented in a given case. The conclusion of that inquiry will depend upon such matters as the circumstances in which the assent was given, the conduct of the parties, the interests of third parties (especially in commercial scenarios¹¹) and the kind of interaction involved. Consent is fundamentally *transactional*. But not all transactions are valuable, and consent is not a simple "pass key" that P can choose whether to issue. It is a normative phenomenon rather than a factual one. Frequently, in a given situation there will be some reasons to recognise it and some countervailing reasons to reject it.

Can we say anything of a general nature, then, about the criteria for recognising an act of assent as constituting consent? To some extent, we can. Given that consent is a normative conclusion, it should in principle be recognised when, and only when, there are good reasons to give legal effect to P's assent. Those reasons will differ according to the type of interaction involved, and so the criteria for recognising consent will vary according to the context. Broadly speaking, however, whether P's assent should constitute a consent is reflected in the following question: ought we to give normative effect to that expression of P's will in the context of *this* transaction? Vitiating, in particular, may be warranted when P does not adequately assent to the interaction: for example, when the assent is undermined by a crucial mistake, or by circumstantial pressure, or where the value of P's "consent" is undermined by D's wrongdoing. What unites these various cases is the idea that the underlying grounds for validating an ostensible consent—the reasons for giving effect to P's choice in changing the relevant normative relationship of P with D (and others)—are, in the particular circumstances of their interaction, negated.

II CONSENT IN THE COURTROOM

The theory of consent may be complex, but in practice it is fairly intuitive. Consent is a familiar word in the English language, one that is well understood at its core. From early childhood one becomes aware of the difference between asking for something that belongs to someone else and taking something, belonging to someone else, without that other's permission.¹² Consent shines

11 The potential interests of third parties supply one reason why, in *Barton v Armstrong*, above n 10, P's consent to the contract was voidable rather than void. See further Part III below. For general discussion of the void/voidable distinction, see AP Simester "Correcting Unjust Enrichments" (2010) 30 OJLS 579 at 588 and following.

12 Philippe Rochat "Five levels of self-awareness as they unfold early in life" (2003) 12 *Consciousness and Cognition* 717 at 727.

brightest when given full-heartedly and without any reservation. ("Of course you can have it, it's yours to keep.") We have noted already, however, that there is a wide spectrum of candidates for vitiation, ranging from easy "money or your life" cases to much more difficult ones such as the threatened suicide example mentioned earlier. The law lacks simple metrics for determining the difference between a genuine choice, however hard to make, and a mere assent, for example when P "surrenders" to the will of another.

Deciding when a purported consent is vitiated on a particular set of facts may be a divisive issue between adjudicators because of generational, cultural and psychological factors. Nonetheless, the juridical question can be put relatively simply: did P consent in the sense of voluntarily choosing, or allowing, *this* exchange with D, without surrendering to the will of D? The language of "surrendering" (or of "submitting" or "merely acquiescing"¹³) may be somewhat awkward, but it reflects the fact that vitiation does not require compulsion or physical coercion. Something done or not done by P by way of compliance with D's wishes might be the product of reflection and calculation on P's part. When courts suggest, as they sometimes do, that lack of consent must mean lack of free will,¹⁴ they risk allowing too much latitude to exploitative behaviour. An act of surrender includes both acts that are compelled and instinctive ("P shot up his hands in terror") and acts that are considered ("The soldiers concluded their position was hopeless and decided that in the morning they would walk slowly towards the enemy position with no weapons and a white flag"). An assent given under duress is still P's assent—it is given intentionally by P. But that does not make it consent.

We have said that adjudicating such cases requires scrutiny of both P's and D's conduct, and of any wider ramifications the decision might have for the community. Typically, the jury is competent to make such judgements. Our example where D threatens to commit suicide is based loosely on the rather stronger facts of *Regina v Jheeta*, where P agreed to have sex with D after D had sent P text messages, purporting to come from the police, warning her that if she ended the relationship D was likely to commit suicide and that, in this event, P could be fined.¹⁵ The jury found that the intercourse was not consensual, a finding upheld on appeal. In terms of statutory guidance, s 74 of the Sexual Offences Act 2003 (UK) offered only a very general definition of consent: did P have the freedom and capacity to choose to have sexual intercourse with D?¹⁶ How helpful that was to the jury cannot be known, but it does not provide a bright-line answer to the question whether this was a case of a

13 For the distinction between consent and mere "submission", see for example *Robinson v R* [2011] EWCA Crim 916. Contrast, however, *Watson v R* [2015] EWCA Crim 559 at [34]. Below, in Part IV, we draw a distinction in our own usage between two forms of vitiated consent, submission (to threats) and mere acquiescence (especially in cases of exploitation).

14 Compare the trial Judge's answer to a jury question in *Brewer v R* CA516/93, 26 May 1994: "if the degree of coercion was so great that the complainant was not in a position to make a decision of her own free will".

15 *Regina v Jheeta* [2007] EWCA Crim 1699, [2008] 1 WLR 2582.

16 New Zealand lacks a parallel provision in the Crimes Act 1961, a point to which we return in Part IV.

reluctant (yet valid) consent or a mere acquiescence. If a conclusion that P was not free required a finding that P was compelled, it would seem that P *did* consent on the facts of *Jheeta*. Nonetheless, the jury accepted that an exceptionally difficult choice was not a free choice, a verdict sustained on appeal and one that seems to us right. The jury reached its own normative conclusion. Doubtless it was influenced by the fact that the suicide threat was a deception by D. Moral evaluation of D's conduct will feed into the jury's discussion, as it should. Cases like *Jheeta* may lack clear-cut decision rules, but it was not a perverse verdict to find D guilty of rape and it was correct for the Court of Appeal to uphold the conviction. A random collection of English-language users from various walks of life is an appropriate forum to decide such questions.

A Consent on Appeal

In most circumstances, then, the evaluation of consent can safely be left to the jury,¹⁷ subject to judicial guidance on the evidence and the burden of proof, as well as guidance concerning any legislation or binding case law applicable to the facts of the case.¹⁸ Even though the normative reasoning involved in such evaluations is conceptually closer to legal reasoning than it is to fact-finding, if the evaluation is one for the jury to make it is regarded juridically as answering a question of fact. Evaluations of this kind are common: was the negligence *gross*? Was the taking *dishonest*? The normative dimension to questions of consent may be less obvious in plain cases, as when D punches P unawares or uses force to take P's money. In such cases there is not even assent. Yet as *Jheeta* illustrates, a significant component of the jury's verdict may comprise normative evaluation, especially of D's conduct. The judge has some control of the process of this form of fact-finding. If she considers that, on the best version of the prosecution case no reasonable jury could make a finding of non-consent, she can rule that D has no case to answer. If the question of consent goes to the jury in general terms (that is, where no conclusive or rebuttable presumptions apply), the judge is also entitled to make a comment on the evidence. She may say something like, "You may think that the fact that D is P's employer, that D had obtained compromising photographs of P which D threatened

17 Judges in criminal cases frequently approve the practice of allowing juries to use their own sense of the meaning of ordinary English words. For example, in *Regina v Moloney* [1985] AC 905 (HL) it was said that only in cases of oblique/indirect intention was there a need to direct juries on the meaning of intention. In all other cases, the jury should be left to themselves to find whether a consequence was an intended consequence. Following this practice is not invariable. Examples are given below of appellate courts' rejecting jury verdicts which were unobjectionable in terms of English usage but which the appellate court held to be inappropriate.

18 In New Zealand, for example, while there is no statutory definition of consent, the sexual offences legislation stipulates that certain circumstances are incompatible with a finding that P agreed to sexual connection with D: Crimes Act 1961, s 128A. Likewise for England and Wales, the sexual offences legislation provides that certain circumstances give rise to conclusive presumptions of no consent to sexual connection and other circumstances give rise to rebuttable presumptions of no consent to sexual connection: Sexual Offences Act 2003 (UK), ss 76 (conclusive presumptions) and 75 (rebuttable presumptions). In neither jurisdiction are these provisions exhaustive on matters of consent and cases (such as *Jheeta*, above n 15) will arise that require a verdict on general principles.

to send to P's partner made resistance to D's demands for sex very difficult." Such a direction is permitted provided it falls short of a direction to convict, as it does.¹⁹

In principle, save for perverse verdicts, the matter should end with the jury's verdict. This does not always happen. A finding of non-consent by the jury (or other initial fact finder²⁰) may be perfectly tenable in terms of English-language usage, yet be displaced on appeal by a legal ruling or by a differing finding of fact. Generally, such displacement is to be deprecated. However, before taking up that claim, an exception to this generalisation should be acknowledged, where a reasonable finding of fact may legitimately be set aside.

Consider the following example. New Zealand has no legislation or appellate criminal decision establishing that deceiving, or not disclosing, your positive HIV status to your sexual partner may make any sexual connection with the uninformed person non-consensual. If such a case were brought to trial, there would be nothing to prevent the trial judge from leaving it to the jury to decide whether an act of sexual intercourse in such circumstances was non-consensual and therefore rape. Should the jury so conclude, there would be no objection to the Court of Appeal's affirming the conviction. It is not perverse to hold that this was a case of rape, as has been held in other jurisdictions. Neither, however, would it be objectionable if the Court of Appeal were to quash the conviction on the basis that it is not for the courts to decide to extend the boundaries of rape in cases like this. There are difficult trade-offs to be made between, on the one hand, punishing conduct which many would take to be culpably wrong and, on the other hand, potentially frustrating other public values. For instance P, who suspects that he may be HIV-positive, might refrain from being tested in order to avoid having to disclose his status; or, where P is indeed HIV-positive, he may fail to disclose details of his sexual contacts to an official with public health responsibilities, for fear that the information given might be used as evidence in criminal proceedings.

Contrast the finding of fact displaced by a legal rule in the 19th-century civil case of *Latter v Braddell*.²¹ At trial, the Judge (unsurprisingly) found that the tearful and protesting P, a domestic servant, did not consent to an intimate examination to test for pregnancy, an examination demanded on the spot by her employer in order to decide whether she was to be kept in employment or summarily dismissed. On appeal, D's conviction was overturned by a ruling that only force or the threat of force could undermine consent. If the view that only force or the threat of force can undermine consent is put forward as a truth about the psychology of human beings, it can safely be dismissed as nonsense. The facts of *Latter* make for a plain case of non-consent for anyone who believes that every person,

19 For an excellent account of interactions between judges and juries, see Paul Roberts and Adrian Zuckerman *Criminal Evidence* (Oxford University Press, Oxford, 2004) at 132–146 ("Fact, Law and Opinion").

20 Fact finders other than juries may include magistrates, a judge in a case of civil assault, and a judge who in order to decide the civil case before her must resolve whether particular facts amount to a crime.

21 *Latter v Braddell* (1880) 50 LJQB 166 (Comm Pleas).

whatever their station in life, should be treated with dignity and respect. But the plight of the servant girl made no impression on the Queen's Bench Judges. They applied to the civil law of assault Blackstone's very restrictive view as to what made for a lack of consent regarding the crime of rape, namely that force or the threat of immediate force and nothing lesser could establish non-consent.²² *Latter* was an important contribution to the law of Master and Servant. The ruling of the appellate Court quashed a verdict attuned to the vulnerabilities of women in domestic service.²³ An important precedent was set: that compulsory testing and dismissal for pregnancy was legally unproblematic. The trial Judge's finding of non-consent was not as such challenged factually. It was in error because the Judge took account of consent-diminishing factors which, in the opinion of the reviewing Court, were legally irrelevant.

A different approach can be seen in *Brewer v R*,²⁴ in which the jury had found D guilty of sexual violation.²⁵ He had interviewed P for a job she was "desperate" to have. During the interview, D let P know that her chances would be much enhanced if she took off her shirt. P allowed D to take her shirt off; her breasts were fondled by D who then asked for and received oral sex. His conviction was upheld by the Court of Appeal.

In many ways, this case is quite unlike *Latter v Braddell*, inasmuch as D's conviction was upheld, and upheld despite the fact that the dilemma facing P in *Brewer* lacked the same severity of threatened consequences. (Albeit it was a serious dilemma if we take her desperation for a job at face value.²⁶) *Brewer* is also different in that it does not proceed by substituting a legal rule that supervenes over a finding of fact. Yet it remains in certain respects problematic. The task set for the jury in *Brewer* was to ponder P's freedom of choice, in all the circumstances. The jury would have had the advantage of seeing P and D in person and of hearing their testimony. Yet the Court of Appeal showed little interest in P's economic circumstances. The Court took the opportunity of reasserting that physical fear, rather than desperation, was what mattered:²⁷

Insofar as ... it was desperation for work which induced and therefore negated the genuine consent, it must be regarded as inappropriate. She would still have had a choice whether to consent or not. The issues

22 William Blackstone *Commentaries on the Laws of England* (Clarendon Press, Oxford, 1769) vol 4 at 210.

23 Albeit no physical force was used to gain access to intimate parts of P's body, she had no practical options: either submit to the examination or be instantly dismissed from the place where she lived as well as worked.

24 *Brewer v R*, above n 14.

25 Contrary to the Crimes Act 1961, s 128.

26 P had been unemployed since leaving school and was trying to end her economic dependence on her boyfriend.

27 *Brewer v R*, above n 14, at 9.

for the jury in this case were whether to accept her account of the fear she described, and whether in all the circumstances it effectively removed that choice.

We shall object to this—unnecessary—gloss below in Part IV. Even so, it is to be said against *Latter* and in favour of *Brewer* that only in the former was an evaluation of fact, one that was not unreasonable, set aside. There are several reasons why factual findings by juries should ordinarily be allowed to stand, one of which is that normal English usage is not a matter of legal expertise. To the modern eye, P's lack of consent in the case of *Latter* is obvious and the legal justification offered by the Queen's Bench unconvincing. *Brewer* may be less clear. Opinions generally might divide on the right outcome of the case. But that is beside the point. In the absence of more detailed and relevant legal rules, a properly formed jury found that, *in all the circumstances*, P did not consent. A controversial finding is not for that reason perverse.

There is a natural tendency for appellate courts to overstep this division of labour, most notably in *Latter*. Where they do so, they create a precedent for future cognate cases. It cannot be said, though, of either England and Wales or New Zealand that the case law on consent makes for an integrated body of jurisprudence. What rulings we have, like that in *Brewer*, are of an interstitial character. There are no leading cases, no reshaping or recasting of doctrine. The case law on consent is a succession of rulings on particular facts.

We should be unsurprised by this. The *idea* of consent is deceptively simple. But we have seen already that the theory behind it is very complex. It is predictable that difficulties arise when we get to the details: when opinions differ about vitiation on particular facts. Ideally, a general legal definition of consent would deliver more clarity. But it is hard to fathom how a general definition of consent could set down rules to be followed rather than questions to be asked. In England and Wales, the statutory definition applying to sexual offences could be improved by a requirement that P must be sufficiently informed about what it was that P was assenting to and what consequences might follow.²⁸ Beyond that, however, there seems little more that could be specified in an *ex ante* legislative definition.

Inevitably there will be cases not covered by statutory rules or previous appellate decisions. Consider the open-textured terms of non-consensual sexual offences, which foster discord over particular decisions. One drastic remedy would be to curtail radically the number of occasions when rulings on consent are required. Under the common law, consent to sexual penetration or sexual touching was vitiated only by force or the threat of immediate force, by impersonating a husband, and by deception about the nature and purpose of D's act. Allowing other factors to vitiate consent inevitably adds to the potential for uncertainty in the current law, uncertainty centred on disparate

28 See s 74 of the Sexual Offences Act 2003 (UK), which asks if P had "the freedom and capacity to make that choice" when assenting to D's conduct. The definition has been criticised for its uncertainty, particularly the use of the word "freedom" as a test of consent: see David Ormerod and Karl Laird *Smith, Hogan, and Ormerod's Criminal Law* (15th ed, Oxford University Press, Oxford, 2018) at 759.

findings for and against the presence of consent. Yet there is no turning back. The modern jurisprudence surrounding such offences contains examples of serious moral and legal wrongs where consent was overridden by means other than force or the threat of force. It is right that the modern law of sexual wrongdoing is much wider-ranging than was the common law.

Accepting, then, that a perspicuous and detailed general legal definition is not available, it seems to us that what can most usefully be developed are some principles of guidance when adjudicating questions of consent. In this light, we turn now to look at some more concrete areas of vitiating in the law, and at their moral justification.

III EVERYDAY COMMERCIAL TRANSACTIONS

Most discussions of consent in the criminal law focus primarily on sexual offences, and to a lesser extent on offences against the person. This article is no exception. It is important, however, to acknowledge that these are not the only areas of the criminal law in which questions of consent are important. Property offences, too, can raise such questions. Ease of transacting brings enormous benefits. In a transaction-based economy, tokens of consent should create legal commitments in an easily provable form. But it is not hard to fall into a trap, to involve oneself in transactions that one poorly understands. These are risks arising even in normal commerce, placing to one side the machinations of fraudsters who operate online across the world. This Part will briefly address what makes for consent to quotidian transactions at civil law as well as criminal law, since the interaction between civil and criminal law must be addressed when analysing criminal liability in the context of commercial transactions.

Earlier, when discussing consent in the context of personal interactions, we identified voluntary choice as fundamental to consent. That choice must be adequately informed, in that P sufficiently understands what she is consenting to, and not subordinated to the will of another. But matters can be more complicated in retail, commercial, and even in banking and insurance contexts. By and large, the maxim *caveat emptor* applies. The onus is on the buyer to inform herself about the nature of what she is buying. Provided that fraudulent misrepresentations are avoided, there is no general duty of disclosure. Occasionally, because of some mental disorder, a customer may lack awareness of what she is doing: as when, in a supermarket, D, who was very depressed, put items in her shopping bag instead of the basket provided. Although she was not guilty of theft because of a lack of dishonesty,²⁹ she would be liable to pay at the checkout for all items selected. Particularly in retail contexts, and save for extreme cases where there is no understanding of one's actions,³⁰ there can be no concern with the personality disorders of customers. The alcoholic must pay for his drinks and the elderly person with dementia must pay for his chosen items even though the sales assistant in the busy store knows that what he has chosen to buy goes far beyond his needs. Of course, it would be a better world

29 *R v Clarke* [1972] 1 All ER 219 (CA).

30 Where the *non est factum* defence would apply.

if the shop assistant had coaxed the demented customer to put back the excess purchases; yet thwarting the will of a demented person is not without risk, and there may be other customers to serve.³¹ Matters are different if P's consent is tainted by D's fraud, in which case the transaction will normally be voidable.³² Yet, even then, it remains a valid transaction until, if ever, P takes steps to rescind the transaction; and in the meantime, third parties may acquire rights to what formerly was P's property. We are left in the striking position that D may commit a fraud on P yet P will be taken by default to have consented to the very transaction that was the vehicle for D's fraud. Consent can be a very thin concept at civil law.

Even so, there are difficult questions here, especially regarding when a transaction may be voidable (or even void). It is beyond the scope of this article to analyse in detail the law concerning when title to property passes at civil law. We restrict our discussion to certain observations regarding the interchange between civil and criminal approaches to consent in property transactions. Consider a case of exploitation:

P, dressed for a summer day, leaves the train station late because of a delayed train. She is confronted by very loud thunder, sheet lightning and torrential rain. She is delighted to see one cab at the rank as she is terrified of thunder and lightning—as is clear from her demeanour. Because it is past midnight, under a municipal regulation the fare is off metre, and is agreed with the cab driver. P knows D the driver, and usually his off-metre rate is reasonable. Tonight, he asks for 10 times his usual rate, a sum that P pays.

Such a bargain may be voidable for unconscionability. Yet, we think, on balance it would not be theft. The payment, although reluctant, was sufficiently consensual, at least for the criminal law of *theft*. The example highlights the fuzzy line between vitiated and reluctant consent. There is no bright-line answer and, arguably, there is a case to go to the jury that the excess payment was coerced rather than consensual and thereby stolen. Yet this does not seem to be a case of *theft*. The wrong here seems to be one of exploitation rather than of non-consensual taking.³³

Two broader lessons may be drawn here. First, in concluding that taking the money is not theft, part of our reasoning is specific to the operational needs of the law of property. We have pointed to those needs already. It is important, so far as practicable, that people know what is and is not theirs.

31 One might prefer that such cases should turn not on consent but on lack of dishonesty. Yet, if we transpose the example to a village store, a place where everyone knows everyone else, a different conclusion could well be reached. Profiting from such sales would be seen as reprehensible and could lead to a prosecution for theft. As will be noted later in this Part, in *Regina v Hinks* [2001] 2 AC 241 (HL), there was a ruling that profiting from a transaction valid at civil law because it was consensual could nonetheless be theft if the means by which the profit was made were dishonest.

32 Exceptionally, the fraud may induce a fundamental mistake (eg, regarding D's identity), which renders the contract void. See further below in this subpart.

33 Compare Crimes Act 1961, s 219(1)(a). As will be noted in the text below, the position may be different in England and Wales.

Who owns what is a question of law: as such, the answer should conform to the rule of law. It should be predictable and not infinitely nuanced. In this respect, our opportunistic taxi-driver may be contrasted instructively with the case of *Brewer*, discussed in Part II, where an exploitative potential employer was prosecuted for sexual connection by coercion. There are certain similarities between these two cases, yet there is also a crucial difference of context. One interaction is in the nature of a property transaction, the other is sexual. In the latter context, we did not need special legal rules to know whose body was whose. In fact, ordinarily *we do not need law at all* to know that.³⁴ This is my arm; that is your leg: these are pre-legal matters, matters of identity. As such, inquiries into consent in the sexual offences are not constrained by the need for commercial certainty. *Pace* the Court of Appeal in *Brewer*,³⁵ had our taxi-driver asked for sex rather than money, the case for a finding of non-consent would be stronger.

This brings us to our second point. One might respond to the foregoing: well, so much the worse for property law! Why not convict the taxi-driver of theft anyway? A controversial precedent for doing just that is the English case of *Regina v Hinks*.³⁶ In that case, D was convicted of stealing from P. Yet, at the trial, it was accepted that P, a man of limited intelligence, had gifted the relevant property (in the form of cheques and cash) to D, and that those gifts were valid at civil law. As such, D owned the money she allegedly stole. Nonetheless, the House of Lords upheld D's conviction. Their Lordships ruled that, for the purposes of the criminal law, ownership remained with P at the point of D's receipt.

Doubtless, as the jury implicitly found, D was dishonest and exploited P's naïve trust in her. But the money was hers. The difficulty about convicting D of theft was not a lack of *mens rea* but a lack of *actus reus*. To be sure, the purposes of the criminal law and the civil law may diverge somewhat when it comes to the protection of property. The criminal law exists, in part, to punish the deserving, whereas the civil law is more concerned with matters such as vindicating ownership and giving certainty to transactions. So, one might think, it was reasonable to have convicted the defendant in *Hinks*. But the difficulty with this reasoning is that, in effect, it sunders the criminal law of ownership from the law of ownership at civil law: whereas the very point of the law of theft is to protect civil

34 We take no view here on the complex question whether, and to what extent, we "own" our own bodies at law. In the context of theft, see for example AP Simester and others *Simester and Sullivan's Criminal Law* (7th ed, Hart Publishing, Oxford, 2019) at 533–534.

35 See the text above at n 27. Admittedly, *fear* is present in our taxi-driver example, albeit not of force. But, at least in this context, it is hard to see how to draw a clear line—or why we should want to—between desperation and fear of things other than force. We return to this issue in Part IV(C).

36 *Regina v Hinks*, above n 31. For criticism, see for example various notes by JC Smith [2001] Crim LR 162; ATH Smith "Theft or Sharp Practice: Who Cares Now?" (2001) 60 CLJ 21; and J Beatson and AP Simester "Stealing One's Own Property" (1999) 115 LQR 372. Supporters include Stephen Shute "Appropriation and the Law of Theft" [2002] Crim LR 445; and Alan Bogg and John Stanton-Ife "Protecting the Vulnerable: Legality, Harm and Theft" (2003) 23 LS 402. See also Simon Gardner "Property and Theft" [1998] Crim LR 35.

law property rights. Suppose that our unrepentant taxi-driver finishes his shift in a late-night pub, where he tells his story to the barman, B, and pays for his drinks with the proceeds of P's fare. B might then become at risk of convictions for receiving or money laundering. Just as the sexual offences exist to protect rights of sexual autonomy, and the offences against the person exist to protect rights of physical autonomy and integrity, theft exists to protect rights of property—and the determination of those rights is a matter for the civil law. Theft is a dependent offence.³⁷

It follows from all this that the perimeters of consent can, and sometimes should, vary across different families of criminal offences. What does *not* follow, however, is that the basic structure of consent is different across those families of offences. Consent may, for example, be disallowed in property transactions for incapacity,³⁸ albeit the conditions for doing so are more stringent than they are, say, in sexual offences. We can say something similar for vitiation. If P hands over a wallet at the point of a knife, she does not validly consent to transfer ownership to that wallet. She is a victim of theft as well as robbery. To a lesser extent, and as we have noted, consent can also be vitiated by deception. In such cases, however, the consent is voidable rather than void: again, this consequence is distinctive to the transactional world of the civil law. It arises because of the need for third parties to be able to rely in good faith on the appearance of a validly-transferred title. Such considerations are not germane to sexual offences or offences against the person.

Just as for those other offences, there must be a sufficient understanding on P's part of what it is that P is consenting to. Indeed, this requirement is embedded in the underlying common law rule that ownership of property passes in accordance with the transferor's *intention*.³⁹ The operation of this principle can be seen, for example, in cases where the contents of a container are mistakenly transferred along with the container. Where a desk is sold that, unknown to the seller, contains a valuable ring, the buyer gains no title to the ring and for him to deal with it dishonestly would be theft.⁴⁰ It can also be seen in the context of fundamental mistake doctrines, especially governing the identity of property that is ostensibly transferred. In *R v Davies*, for example, D was the owner of a nursing home.⁴¹ He procured two elderly residents to endorse cheques, of which they were the payees, by getting them to sign the back of the cheques. The victims thought that they were signing mere

37 For this reason, it is submitted, if P takes back from D her own property to which she had an absolute entitlement she commits no theft, even if she acts dishonestly: *R v Meredith* [1973] Crim LR 253 (Crown Court). In such circumstances, D does not violate any property right of V's. Compare JC Smith "Civil Law Concepts in the Criminal Law" (1972) 31 CLJ 197; and Glanville Williams "Theft, Consent and Illegality" [1977] Crim LR 127.

38 Incapacity at civil law may also arise from lack of authorisation: see for example *R v Bhachu* (1977) 65 Cr App R 261 (CA).

39 Compare *Fawcett v Star Car Sales Ltd* [1960] NZLR 406 (CA).

40 *Thomas v Greenlade* [1954] CLY 3421; and compare *Moffatt v Kazana* [1969] 2 QB 152 (Assizes).

41 *R v Davies* (1982) 4 Cr App R (S) 302.

pieces of paper. As such, they did not consent to pass property in the cheques to D, who was rightly convicted of theft when he paid them into his own bank account. A piece of paper is a very different thing from a bill of exchange.

A victim's intention to transfer *this* property to *this* person can also be vitiated, subject to certain conditions, when there is a mistake regarding the identity of the transferee,⁴² or a mistake about the quantity of things being transferred.⁴³ The law in this area is complex, and we need not pursue its details here. It suffices to note that, while the conditions of vitiation differ *in their details* from those in other families of consent-based offences—again, in large part because of the distinctive features of commercial transactions—the broad grounds of vitiation are common to all. We turn now to explore some of those grounds more fully in the context of sexual offences.

IV SEXUAL OFFENCES

A Do We Need a Requirement of Non-Consent?

Setting aside the age-based crimes, in New Zealand, like England and Wales, questions around consent are central to trials for the most serious sexual offences.⁴⁴ In a modern society, this seems the correct approach. But the matter is not entirely straightforward. As we have noted, in the past these offences tended to focus on whether the defendant had deployed or threatened force in order to coerce sexual activity. Nowadays, modern sexual offences engage with more subtle and difficult questions, such as the line between reluctant consent and mere submission or surrender.

The evolution is not endorsed by all. Catharine MacKinnon objects that the consent model moves away from the necessary connections between rape, coercion and domination. The latter two phenomena would be defining elements of her preferred model of rape.⁴⁵ Consent is rejected as a defining element because, in a patriarchal society (which she takes the United States of America to be), sex between a woman and a man is typically an assertion of male dominance. Court findings that female/male couplings were consensual disguise the true nature of such relations. The role that the legal standard of consent plays is to "assimilat[e] [female] accommodation to inequality to freedom for women in sex".⁴⁶ For MacKinnon, "coitus 'provides [patriarchy's] most fundamental concept of power'.⁴⁷ The overall picture is bleak: "Consent as a legal standard in the law of sexual assault

42 As in *Rex v Hudson* [1943] KB 458 (Divisional Court).

43 *Russell v Smith* [1958] 1 QB 27 (Divisional Court).

44 For very useful discussions, see Alan Wertheimer *Consent to Sexual Relations* (Cambridge University Press, Cambridge, 2003); and Stuart P Green *Criminalising Sex: A Unified Liberal Theory* (Oxford University Press, Oxford, 2020).

45 Catharine A MacKinnon "Rape Redefined" (2016) 10 *Harvard Law & Policy Review* 431.

46 At 442.

47 At 458.

commonly exonerates sexual interactions that are one-sided, nonmutual, unwanted, nonvoluntary, nonreciprocal, constrained, compelled, and coerced."⁴⁸ She argues that findings of consent made by courts operating in a patriarchal society leave too much latitude to sex obtained by deployment of forms of male dominance. Things would improve, in her view, if rape were to be defined without reference to consent at all:⁴⁹

... a physical invasion of a sexual nature under circumstances of threat or use of force, fraud, coercion, abduction, or of the abuse of power, trust, or a position of dependency or vulnerability ... when deployed as forms of force or coercion in the sexual setting, that is, when used to *compel* sex in a specific interaction ...

MacKinnon does accept that there can be sexual equality between men and women when having sex, provided the "sexual connection is mutual, intimate, desired, and equal".⁵⁰ Yet when these conditions are met, MacKinnon, like John Gardner,⁵¹ considers that any reference to consent is beside the point. Indeed, it would be odd if D, enjoying a loving, sexual partnership of equals with P, were to ask P if they might have *consensual* sex tonight. In part, this way of putting things looks odd because of the point made earlier, that consent is a normative conclusion in such cases rather than a distinct natural fact. But reference to consent in the criminal law is not redundant. Suppose that their relationship eventually fails. If, during the course of a bitter divorce, D is asked by P's lawyer whether the sex in their marriage was always consensual, he could answer truthfully that it was. The consent (the consent-constituting-*assent*) was always there, but there was no need to mention that until it mattered.

It is a strength of MacKinnon's argument that she sees consent as *interactional*. Its validity is not assessed simply by focusing solely on P and P's choices. MacKinnon brings to the forefront the truth that P's consent may be vitiated because of the misconduct of another. However, the point to be made here is that, *prima facie*, the various forms of abusive behaviour that are referenced in her proposed definition can all be accommodated by posing the question whether P *consented* to the specific interaction with D. In MacKinnon's definition, the question to be asked is whether one or more of those abusive means *compelled* the specific interaction. In our view, to ask whether use of these (or indeed, any other) means rendered the interaction non-consensual is a better and more accommodating question. The threshold of compulsion need not be reached before we can sensibly put the question whether the activity was consented to by P. There seems little to be gained, in terms of doing justice to women, by abandoning a model of serious sexual wrongs based on non-consensual sexual

48 At 443.

49 At 474 (emphasis added).

50 At 465.

51 John Gardner "The Opposite of Rape" (2018) 38 OJLS 48.

interactions, or by restricting the criteria of such wrongs to specific forms of abuse.⁵² In what follows, therefore, we ally ourselves with the focus on consent to be found in the modern law of sexual offences in jurisdictions like New Zealand and England and Wales.

B Force and Threats

As foreshadowed in Part I, we set aside cases where P's powers of ratiocination are completely absent or deeply compromised, as when P is asleep, or unconscious, or seriously affected by drink or drugs. In such cases P does not even assent: there is no choice at all, or at least an insufficiently understood choice for consent to be possible.⁵³ Similarly, when D uses force to overwhelm P's resistance, a finding that P does not consent is uncontroversial. Again, there is nothing upon which a finding of consent can be predicated. Typically, cases of these kinds will not require any conceptual analysis when concluding that P lacked the freedom and capacity to make a choice.

A more complex scenario arises where D uses threats to coerce P into assenting to sexual activity. As noted earlier, traditionally the threat of force has been held to vitiate consent. But cases of force and cases of threatened force are different. In the former, there is no assent; in the latter, there is.⁵⁴ (Albeit there is no consent.) Of course, the fact that what is threatened is *force* makes the extension to threats seem a relatively short step. The extension is certainly unobjectionable. It is not, however, as small as it may look. What vitiates P's ostensible consent is not the force but the *threat*. In turn, this opens up the possibility of vitiation by other kinds of threat—as it should. The better view, it is submitted, is that there is no categorical rule that only violence or the threat of violence has sufficient coercive effect to negate consent. In this we align with MacKinnon. As a matter of principle, threats of a non-physical kind are surely capable of inducing submission rather than consent.

Recall *Brewer*, in which P allowed D to kiss and fondle her breasts and then at D's request performed a sexual act in the hope of being given the job she was "desperate" to have.⁵⁵ In that case, it seems that what D made was an offer rather than a threat. (Or so we assume for the purposes of this article.) We shall look at such cases in the next subpart. For now, however, let us vary the facts. Suppose that P was already an employee of D's, and D had *threatened* to terminate her employment

52 This is not to deny that it may be helpful for a statutory provision explicitly to list various forms of abusive behaviour that may vitiate consent: but it seems undesirable to specify an exhaustive list.

53 In *Regina v Bree* [2008] QB 131 (CA) at 139, the Court of Appeal of England and Wales confirmed that "a drunken consent is still a consent". The Court advised that the capacity to consent could be lost prior to sleep or unconsciousness. It was for the jury to find whether P's condition at the time of the relevant act by D precluded consent.

54 An exception might be if P was overwhelmed by fear or phobia of D's threats, such that her "assent" was not the product of her rational choice. An example might be the use of a rat in George Orwell *Nineteen Eighty-Four* (Secker & Warburg, London, 1949). For brief discussion of this kind of case, see AP Simester *Fundamentals of Criminal Law* (Oxford University Press, Oxford, 2021) at ch 17.5.

55 *Brewer v R*, above n 14.

unless P complied with D's requests. In our view, a threat of this kind should vitiate consent. The English case of *R v Wellard* is compatible with this view.⁵⁶ When deciding a sentencing appeal, the Court noted without criticism D's prior conviction for rape, a conviction resting on the fact that P's assent had been obtained by D's threatening, in his capacity as a security guard, to report wrongdoing by P that D had observed. That seems right: a similar approach would have upheld the trial Judge's finding in *Latter v Braddell*.⁵⁷

To be clear, we are not arguing that scenarios falling short of threats (as in *Brewer* itself) *cannot* vitiate consent. Sometimes, we contend, they can, and we turn to that possibility in the next subpart. Here, our concern is with threats. Our proposal is that, in principle, P's consent should be vitiated *whenever* her assent is induced by D's threat.

Sometimes, the difference is intuitively clear. "Your money or your life" scenarios contrast sharply with those where, say, D offers to punch or tattoo P if P pays D a fee—a transaction that can be entirely legitimate.⁵⁸ On other occasions, though, the distinction between a threat and, say, an offer or a warning is itself difficult to draw. What is it about threats that makes them so distinctively problematic for findings of consent?

Within the scope of this article, we can give only a sketch of the answer to that question. Suppose that DV stops his vehicle on the side of a road where parking is prohibited. As DV is about to get out of the car and walk off, a nearby traffic officer, TO, advises him that if DV does so, TO will give him a ticket and have the vehicle towed away. Just like threats, TO's statement contains an embedded condition: "If you do X, I shall do Y." Yet it is a warning rather than a threat. To see this, let us set out some features of threats:

- (i) Y is unwelcome to V, the target of the threat;
- (ii) T, the threatener, has control over whether Y occurs;⁵⁹
- (iii) T makes the condition-embedded statement *in order* to induce V to do X.⁶⁰

Our parking example shares the foregoing features. What it lacks, however, are certain further features of a threat:

- (iv) T selects Y *because* it is unwelcome to V.

⁵⁶ *R v Wellard* (1978) 67 Cr App R 364 (CA) at 368.

⁵⁷ *Latter v Braddell*, above n 21.

⁵⁸ Perhaps P is training as a boxer and wants to learn how to absorb D's blows.

⁵⁹ Compare Joseph Raz *The Morality of Freedom* (Oxford University Press, Oxford, 1986) at 36.

⁶⁰ This is not true of all warnings (or indeed offers), but let us assume for argument's sake that it is true of our example.

In our example, TO nominates her course of action (Y) not because it will inconvenience DV and cost him money, but because Y is the response specified in traffic policing protocols. Still, one might quibble about this. In the background, the state generally provides for issuing parking tickets as a deterrent—in other words, because such tickets are generally unwelcome to drivers. Moreover, the unwelcomeness of Y is part of the inducement DV has to heed TO's warning. Thus a counter-argument might be made that condition (iv) is also satisfied here. We doubt this. It seems to us that, in threats, it is T's *personal* motivation that counts, not the motivations of others lying in the background. But the very possibility of such a counter-argument illustrates how closely in structure threats can resemble some other kinds of condition-embedded statements that are not threats. Ultimately, what marks out our parking example from a threat is its lack of the following feature:

- (v) In saying, "If you do X, I shall do Y", T communicates a commitment that she will impose the unwelcome consequence upon V (doing Y) just because V does not comply with the condition (doing X) that T imposes.⁶¹

This too is a point about motivation. The point is that, while T's threat can create *for V* a (prudential) reason to do X, it also creates a reason *for T* to treat non-compliance *in itself* as a peremptory reason to do Y. This does not occur in TO's case—the officer will do Y because Y is what ought to be done, not because DV has failed to do as she says. TO will simply be doing her job. Thus her communication is not a threat.

Why does (v) matter? The link between V's prudential reason and T's peremptory reason is the key to understanding why threats are distinctively problematic. When issuing a *threat*, T commits herself to doing Y if V fails to comply, and she does so *in order* to give V reason to comply. T's action is, thus, a deliberate manipulation of V's will; an interaction in which T seeks to subordinate V's will to hers. T communicates to V that she will treat V's insubordination as reason for her to do Y. This is not merely a wrong of disrespect. It is a wrong of subjugation. In turn, where V assents to Y because of T's threat, she does not consent. She merely submits. For these reasons, we conclude that V's consent should be vitiated whenever her assent is induced by D's threat, regardless of the content of the threat.

C Vitiating without Force, Threat, Deception or Mistake

We have said that it is a precondition of consent that P's choice must be both voluntary and sufficiently free. In terms of the cases to be discussed in this subpart, what amounts to consent involves a continuum, from whole-hearted acceptance, through different degrees of acceptance, to the point when P unwillingly acquiesces rather than reluctantly consents to the relevant activity. If there is evidence of mere acquiescence, the question whether P lacked the freedom to give a valid consent should go to the jury. In turn, when deciding whether such evidence exists, the judge should bear in

61 More precisely, T commits herself to treating D's non-compliance as a peremptory reason *in itself* for doing Y. For sensitive discussion, see Lamond, above n 6, at 227–228.

mind that surrender, whether submission or acquiescence, can take different forms of expression. It may take an obvious form, as in a collapse of body and spirit, leading to helplessness and non-resistance. Or it may involve P's reviewing her options and deciding resentfully though calmly that the cost of rejecting D's indecent proposal is too high. The point is that a choice to acquiesce may be voluntary, indeed considered, yet it may not be sufficiently free to count as consent. Reasoning about one's predicament and choosing what seems the least bad thing to do engages one's agency but need not constitute consent.

Legally speaking, there is no requirement that P should in any way communicate her reluctance to have sexual contact with D. Rightly so. No inference of consent should be drawn from mere passivity.⁶² Rather, the onus is on the prosecution to prove an absence of consent and the fact that P evinced no form of assent may be helpful to its case. Conversely, and unlike passivity, the fact that P initiates some sexual act may be helpful to the defence case, although that too is not conclusive. There may, for example, be evidence that D put P in a position that showed a wanton lack of respect for P's dignity and personhood, treating her as a means to an end, and that such treatment undermined P's *free* choice. If there is such evidence, the question of consent should go to the jury.

Admittedly, when questions relating to consent go beyond force, deception, and the like, a potentially large measure of uncertainty is introduced into the law. There is some legislative guidance to be had regarding what counts as (non-)consent in New Zealand,⁶³ and in England and Wales.⁶⁴ The provisions in these two jurisdictions regarding consent in specific circumstances are similar in terms of coverage. Despite this, the most testing cases arise predominantly on facts not covered by specific provisions. Rather, they engage with consent at a more abstract level, raising the question whether P was genuinely free to make the choice she did.

Let us return once more to the 1994 case of *Brewer*.⁶⁵ The trial verdict in *Brewer* was advanced for its time, and legitimately so. Perhaps, by the standards of that time, it might have been viewed in some quarters as indulgent. After all, it seems that P could have walked out of the interview when D

62 *Ah-Chong v R* [2015] NZSC 83, [2016] 1 NZLR 445 at [55].

63 Section 128A of the Crimes Act 1961 (as amended) identifies various circumstances where allowing sexual activity does not amount to consent, but s 128A(8) makes clear that the section does not impose a limit on the circumstances in which a lack of consent can be found.

64 Which, indeed, contains a general definition of sorts. Per s 74 of the Sexual Offences Act 2003 (UK), "a person consents if he agrees by choice, and has the freedom and capacity to make that choice." In addition, s 76 of the United Kingdom Act provides there is no consent if D intentionally deceives P as to the nature and purpose of the relevant act, or by impersonating a person known personally to P. Section 75 also details certain circumstances that give rise to a presumption of non-consent.

65 *Brewer v R*, above n 14.

made his first indecent proposal.⁶⁶ The Court of Appeal certainly thought that desperation for that job was compatible with consent. A similarly tough-minded approach was taken in obiter remarks by the English Court of Appeal in *Watson v R*:⁶⁷

The dichotomy set up by the [trial] Judge (free consent/submitting to a demand that [P] felt unable to resist) did not accurately summarise what had gone before and does not reflect the law. It is possible for a person to submit to a demand which he or she feels unable to resist, but without lacking the capacity or freedom to make a choice. This is an example of reluctant consent.

Reluctant consent, it seems, included any state of reluctance falling short of compulsion.

Let us now imagine *Brewer II*, a case being tried 30 years later, with the same facts except that there is no suggestion on P's part of any fear of force. Suppose that, in this imaginary trial, the judge considers *Brewer* (1994) to be a binding authority that there is no case to answer because a promise of a job in return for sex is compatible with consent to that sex. This conclusion is reached despite the judge's accepting that P's financial circumstances were dire and that her promised employment was essential to meet family responsibilities. Yet, for persons in such circumstances, it does not quite hit the mark to say they are free to walk out of a job interview. The famished homeless girl in *Kirk v R* was similarly free, in the sense of facing no threat or physical barrier to prevent her from going back to walking the streets.⁶⁸ In *Jheeta*, P could have left the supposedly suicidal D to his fate.⁶⁹ In both of these cases, trial court findings that consent was vitiated were upheld on appeal.

We accept that the line between reluctant consent and mere acquiescence can be difficult to draw. But it need not be unprincipled. Moreover, drawing that line is very much a suitable task for juries. Evaluating the facts of *Brewer II* surely requires, not an exercise in analytical jurisprudence, but a normative judgment on what is tolerable. Attitudes change, and sometimes for the better. In England, the immunity of husbands from liability from raping their wives was ended judicially because it was so far out of step with contemporary attitudes to women and marriage. In 2023, many would think it intolerable that unscrupulous men be allowed to conduct themselves as did the defendant in *Brewer*. It is to be hoped that *Brewer II* would not be bound by its predecessor, on the basis that both the times and the law have changed. Under the reformed law of sexual violation, a more holistic evaluation is possible. All factors relevant to P's state of mind at the time of the event, including her financial circumstances, could properly be considered by the jury. The relevant question for the judge is

66 P alleged that she was frightened that D might attack her had she not complied but there appeared no additional evidence to support this.

67 *Watson v R*, above n 13, at [34].

68 *Kirk v R* [2008] EWCA Crim 434. P was a 13-year-old girl who had run away from home. She went to the workplace of D, who had previously sexually abused her. After waiting until everyone else had left, P had sex with D in return for a payment of £3.25, which she used to buy food.

69 *Regina v Jheeta*, above n 15.

whether there is evidence sufficient to go to the jury that, in these degrading circumstances,⁷⁰ P lacked the freedom to reject D's advances and forgo the job she was desperate to have.

D Deception and Non-Disclosure

So far, we have discussed contexts in which sexual activity was unwelcome at the time it occurred. In other cases, the activity may have been something that P was willing to engage in at the time. Later, however, information may come to light which, if known about earlier, would have led P to make a different decision. In cases of this kind, P gives a prima facie consent to the activity under a description (eg, sex with her husband or boyfriend⁷¹) that turns out to be inaccurate. There are analogies here with the grounds for vitiating in commercial transactions, especially regarding the nature of the transaction and identity of the other party—although the law is rightly more willing to recognise vitiating in certain sexual contexts. In both New Zealand and England and Wales, legislation provides that consent is vitiated where D passes himself off as someone known personally to P (in England) or as someone other than himself (in New Zealand). The same holds where D deceives P regarding the nature or purpose of their sexual act.

A test based on purpose goes beyond that found in the law of transactions, which, for reasons noted in Part III, tends to focus on the details of the transaction itself rather than the parties' motivations. One (rare) example of this kind of deception is *Matt v R*.⁷² D, a plumber by trade, had represented himself to P as a casting agent for a remake of the film *Basic Instinct*. They acted out a scene which, in the absence of P's consent, would have amounted to a sexual assault by D. There was no consent. P apparently believed that D's motivation was commercial rather than sexual, and D was convicted.

Deceptions and non-disclosures regarding the *nature* of alleged sexual activity have presented the courts, especially in England and Wales, with many more challenges. Some are clear cases: as when P permits D to have intercourse with her because she understands from D, a doctor, that what is involved is a medical procedure.⁷³ Beyond that, however, the statutory guidance is of little assistance when dealing with instances of non-disclosure, or with the question whether D's deception goes to the very nature of the interaction between D and P or is merely ancillary.

70 The facts exemplify what Keith Burgess Jackson terms "manipulated vulnerability": Keith Burgess Jackson "A History of Rape Law" in Keith Burgess-Jackson (ed) *A Most Detestable Crime: New Philosophical Essays on Rape* (Oxford University Press, Oxford, 1986) 92 at 99–103.

71 Compare the extraordinary case of *Regina v Collins* [1973] QB 100 (CA).

72 *Matt v R* [2015] EWCA Crim 162.

73 *The King v Williams* [1923] 1 KB 340 (Crim App). See also *The Queen v Flattery* (1877) 2 QBD 410 (Cr C R). Such cases would now be covered by the Sexual Offences Act 2003 (UK), s 76, but were already criminalised at common law.

An example is *Regina v McNally*.⁷⁴ P, a teenage girl, willingly engaged in various sexual activities with D, also a teenage girl. D, however, was passing herself off as a teenage boy: she self-identified as male. In confirming D's conviction for assault by penetration, the Court of Appeal considered that the facts of the case could have come within the conclusive United Kingdom statutory presumption regarding deceptions about the nature of their activity. In the Court's view, however, invoking the presumption was unnecessary: sex with a boy was said to be different in kind from sex with a girl, and so P's consent was vitiated. A simple case, it seems, at least for the Court of Appeal. But there are real difficulties here. (Not least given that, had D been granted a full gender recognition certificate under the Gender Recognition Act 2004 (UK), in terms of legal status she would have been the teenage boy she wished to be.) In the Court's view, it was relevant that D had "actively" deceived P about her gender.⁷⁵ Yet it is not obvious that an active-versus-passive distinction should be maintained in this context. Putting legal weight on that distinction is, in effect, to apply a type of *caveat emptor* principle to non-disclosure in intimate sexual contexts. That does not seem appropriate. In the area of sexual relations, there are powerful reasons why D should be under a duty to correct misapprehensions by P that go to the heart of their interaction.⁷⁶

Even if we are right about this, though, that does not resolve the question of what features of their actions are sufficiently central that a misapprehension by P may vitiate consent. In *McNally*, it was suggested that a deception about D's having great wealth would not vitiate P's consent.⁷⁷ In *Regina v B*, the same Court ruled that D's failure to disclose his HIV-positive status did not negate P's consent to sexual intercourse but could found a case for an offence against the person in the event of infection.⁷⁸ This attribute, too, was not an essential part of P's and D's interaction *qua* sexual activity.⁷⁹ Similarly, in *Regina v Lawrence*, in obiter yet considered remarks of the whole Court, it was strongly advised that no distinction should be drawn between deception and non-disclosure of

74 *Regina v McNally* [2013] EWCA Crim 1051, [2014] QB 593.

75 At [27].

76 In cases of non-disclosure, it is of course possible that D is unaware of P's mistake, a fact that would be relevant to D's mens rea.

77 At [25].

78 *Regina v B* [2006] EWCA Crim 2945, [2007] 1 WLR 1567.

79 The Supreme Court of Canada would disagree: *R v Cuerrier* [1998] 2 SCR 371. The decision in *Cuerrier* was favourably commented upon in *KSB v Accident Compensation Corporation* [2012] NZCA 82, [2012] NZAR 578.

one's sexually-transmitted-disease (STD) status: neither negates P's consent to sexual intercourse.⁸⁰ On the face of it, English law draws a clear distinction between sex and the risks of sex.⁸¹

Deceptively clear. Consider *Assange v Swedish Prosecution Authority*, an extradition case.⁸² P agreed to have sex with D on condition that D used a condom. He did not use a condom. D was held to have committed a rape. In *Regina (F) v Director of Public Prosecutions*, decided post-*Assange*, P agreed to have sex with D, provided D did not ejaculate inside her. He did ejaculate inside her and was convicted of rape.⁸³ In neither case did the Court discuss a separation between the sexual act per se and the risks of that act. Then followed *Lawrance*, which arose because D had lied to P about having had a vasectomy.⁸⁴ P's consent to sex was won by the lie, yet D's conviction of rape was quashed by the Court of Appeal. So, it seems, lies or non-disclosure of an STD do not preclude consent to sex. Neither do lies about having had a vasectomy. Lies about condom use and about withdrawal before ejaculation, by contrast, negate P's consent.

Perhaps the most obvious disjunct here is between *Assange* and *Lawrance*. The former is a case about D's assuring P that he will wear a condom; the latter is about persuading P that there is no need for a condom. Yet no legal disjunct is acknowledged between any of these cases. The difference, apparently, is that in the case of non-disclosure of an STD or a lie about a vasectomy, the nature of the sexual activity remains the same. By contrast, in the case of condom use and premature withdrawal, the deception goes to the manner in which the activity itself is to be done, and thus to its nature. Those features have a "close connection" with the activity itself, a feature lacking in *B* and *Lawrance*.

Given the uncertain character of the line being drawn here, from an institutional perspective there is something to be said in favour of a restrictive approach, and against opening up the net of criminalisation too broadly. Prima facie, however, the descriptive distinction being drawn by English courts makes no normative difference. *Assange*, *Regina (F)* and *Lawrance* have sufficient in common to be decided in the same way. On balance, and despite the institutional worries about over-extending state regulation of intimate relations, we think that in all three D should have been held guilty of rape.

Some commentators would go much further, and argue that *any* deceit, non-disclosure or deliberate failure to rectify a mistake on P's part should vitiate P's consent, provided that P would not

80 *Regina v Lawrance* [2020] EWCA Crim 971, [2020] 1 WLR 5025.

81 Again, there is an analogy here with the vitiation of commercial transactions when P is fundamentally mistaken about the nature of what she is buying. By contrast, P's mistake will not vitiate a contract when it is ancillary: for example, a mistake about the *value* of what she is buying: *Leaf v International Galleries* [1950] 2 KB 86 (CA).

82 *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin).

83 *Regina (F) v Director of Public Prosecutions* [2013] EWHC 945 (Admin), [2014] QB 581.

84 *Regina v Lawrance*, above n 80.

have assented were she aware of the truth. To not embrace this, according to Jonathan Herring, is to treat fraudulent deception more seriously than deception to obtain sex.⁸⁵ It is certainly true that the emotional impact of sexual deceptions may be much greater than financial ones.⁸⁶ But, equally, a conviction for sexual offending, with its lifelong consequences for the offender, is, typically, much more stigmatic than a property offence. We should not be gung-ho about inflicting such sanctions in the very personal and idiosyncratic world of sexual relations. The test proposed by Herring would leave the parameters of sexual offences very difficult to control. Even protestations of love, or adulterous betrayals, could become the stuff of serious sexual offending.

V CLOSING TIME

On basic criminal law principles, the concurrence principle requires that actus reus and mens rea elements must generally coincide in time. Whether it be a theft, an assault or a sexual violation, if the relevant behaviour by D occurred at some given point in time (t), resolving whether P consented to that behaviour may be thought to demand a particular conclusion about the state of P's mind at t.⁸⁷ That is generally true.

As so often with consent, however, things are not always so simple. We have seen already that a finding of assent on the part of P may not lead to a determination that P consented because of misconduct on the part of D. The concurrence principle implies that P's valid consent at time t cannot be undermined by D's *subsequent* conduct; but her consent at t may be vitiated by D's actions (for example, threats) either at t or earlier. The primary force driving D's conviction can be the conduct of D rather than a finding about the state of mind of P.

Strikingly, the same can be true for P. Unlike forgiveness, consent is not inherently retrospective. But it may be prospective. Suppose that P plans to give a book to D. She tells him that he can pick it up from her porch when he gets off work, because she will be asleep. D becomes the owner of the

85 Jonathan Herring "Mistaken Sex" [2005] Crim LR 511. For argument to the same effect, see Tom Dougherty "Sex, Lies, and Consent" (2013) 123 Ethics 717. But see also Neil C Manson "How Not to Think about the Ethics of Deceiving into Sex" (2017) 127 Ethics 415.

86 A particularly troubling example is *R (Monica) v Director of Public Prosecutions* [2018] EWHC 3508 (Admin). P thought that D loved her (they lived together and had a child), unaware that D was an undercover policeman who had infiltrated her environmental protest group and who disappeared into thin air when P was no longer relevant to his mission. The High Court found that her mistreatment did not amount to rape. Undoubtedly, though, P had suffered a grave wrong, including (since D was an agent of the state) a breach of the European Convention on Human Rights, art 8 (right to family and private life) and perhaps art 3 (inhuman and degrading treatment).

87 That state of mind may change. Suppose that, at t₁, P initially consents to sexual intercourse with D, but then withdraws her assent at t₂. If D thereafter continues having intercourse, the actus reus of rape is established at that later time: *R v Kaitamaki* [1984] 1 NZLR 385 (PC).

book when he takes delivery of it. P consents to his doing so even though she is asleep at the time, by virtue of her prior arrangement.

In the legal regulation of sexual relations, this possibility is less readily accepted. Famously, Lady Hale once opined that "[o]ne does not consent to sex in general. One consents to this act of sex with this person at this time and in this place".⁸⁸ But need the consent be *given* at that time? English law allows for the possibility that D may have lawful sexual intercourse with P while P sleeps, at least where the couple have agreed this diversion from the norm beforehand.⁸⁹ Not so in New Zealand. Rather than acknowledging that a person cannot consent to sexual activity *while* asleep, s 128A(3) of the Crimes Act 1961 asserts that "[a] person does not consent to sexual activity if the activity occurs while he or she is asleep or unconscious". One may, of course, think such a rule justified on paternalistic grounds, or even for evidential reasons. But it is not required conceptually.

This truth is a commonplace in the context of surgery under general anaesthesia. The same holds for the long-term exposure to risks of serious injury inherent in playing professional sport. Take the case of P, a rugby player who has just been badly injured by a forceful and late tackle. P may well be asked to give her account of how she was injured, but the crucial question of whether P consented to her injury does not require any examination of her state of mind at t, the point in time when she was injured. The issue of consent is resolved by the rules of the sport, its customs and practices, and, above all, by the question whether D intended to hurt P to the extent that he did. If D did not so intend, then—save for cases of exceptional recklessness—P will be held to have consented to the risk of her injury even when that injury is serious and life-changing.⁹⁰ In the near future, it seems likely that the boundaries of this rule will be tested at civil law, at least in England. Be that as it may, the point to be made here is the issue of consent is resolved in large part by an objective inquiry into what kinds of injuries are accepted as inherent to the playing of rugby football.

A Temporal and Cultural Changes

A closing note, perhaps an optimistic one. What makes for a moral wrong is of course subject to temporal and cultural change, change that may influence the law in terms of both legislation and interpretation. At the time, no legal wrong was to be found on the facts of *Latter v Braddell*,⁹¹ the case of the servant girl subjected to an intimate examination. Much more recently, B, a 15-year-old black school student, was taken from her classroom and strip-searched in the school by police officers

88 *Regina v Cooper* [2009] UKHL 42, [2009] 1 WLR 1786 at [27].

89 By virtue of the Sexual Offences Act 2003 (UK), s 75(2), a (rebuttable) evidential presumption that P does not consent arises when P is asleep or otherwise unconscious at the time of the relevant activity.

90 Compare the judgment of Lord Woolf CJ in *Regina v Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910, which offers a comprehensive account of the possibilities of criminal acts arising in the course of lawful sporting contests.

91 *Latter v Braddell*, above n 21.

who were searching for, but did not find, cannabis hidden on her person. This intrusion caused outrage, expressed in street demonstrations and posts on social media leading to press and television coverage. The police officers involved were suspended from duty.⁹²

Undoubtedly both the servant girl and B suffered high levels of distress when subjected to an unwanted intimate search. In *Latter*, no interest was shown by the Court in P's state of mind—there was merely an insistence on the need for force or threats of force to vitiate consent. Nowadays, for sexual offences and other offences against the person, consent is more readily articulated by the courts in terms of P's free choices. This is a welcome development. If facts similar to *Latter* were to occur today (make P an immigrant farm worker, working under a gangmaster⁹³), it is likely that any charge of sexual assault or assault would be decided without a significant discussion of consent. Absent evidence of a freely made choice, a finding of non-consent seems inevitable. And if criminal proceedings were to be brought against police officers in the case of school student B, the same would apply: there was no evidence of consent.

In an article about consent in modern criminal law, it is encouraging to find that things have moved on since 1881. One of the strengths of the common law is that it *can* modernise: that our concerns about the Court of Appeal's approach to *Brewer* need not resurface some 30 years later when hearing *Brewer II*. The common law's traditional insistence on narrow categories of consent-vitiating factors could in 1993 be transcended substantively yet not formally. That formal emphasis, it is to be hoped, is no longer so intransigent.

But there is room for pessimism. Many workers throughout the world are required to wear a small device that records every move they make and every word they say.⁹⁴ Suppose that F works diligently at her job in a delivery warehouse owned by G plc. The company has informed the workforce that these surveillance devices must be worn by all non-managerial staff. F refuses to wear the device and gets on with her tasks. She is told to leave the premises but refuses, whereupon security staff are called. They forcibly eject F, a prima facie assault. But a question arises that parallels the Master and Servant issue in *Latter*: did F have a right to withhold consent to wearing such a device, without being dismissed? Liability for G seems unlikely: one may anticipate a ruling that this was a matter of the internal management of the company, which was entitled to eject her because of non-compliance with a lawful order.

92 Tobi Thomas "Two Met officers who strip-searched school girl removed from frontline duties" *The Guardian* (online ed, United Kingdom, 23 March 2022).

93 Gangmasters are licensed under the Gangmasters (Licensing) Act 2004 (UK) to organise work and accommodation in the agricultural sector for temporary immigrant workers. Working conditions can be grim.

94 See for example Ryan Derousseau "The tech that tracks your movements at work" *BBC* (online ed, United Kingdom, 15 June 2017).

In many cases, including F's, striving for an optimal statutory definition of consent will not help us. The problematics of consent arise not from meaning but in the normative process of application. That process is very much influenced by external circumstances of date and place. The verdict against the servant girl in *Latter v Braddell* seems unthinkable now. But moral progress can be reversed. If, in the United Kingdom of (say) 1975, a company management had ordered workers in a manufacturing plant to wear the all-seeing, all-hearing devices available now, an immediate walkout would have ensued. The power dynamic between unions and corporate managements at that time would have made such an innovation unfeasible even if the technology had been to hand. Indeed, the exclusion of management from the company's *diktat* would have been a red rag to a bull. But times have changed.⁹⁵

95 In the United Kingdom, the loss of manufacturing, mining, steel-making and car-manufacturing jobs has led to an economy where 80 per cent of jobs are in services. Many of these jobs are unskilled and low paid with concomitant loss of bargaining muscle. For a brief account, see GR Sullivan "Workplace Welfare and State Coercion" in Alan Bogg and others (eds) *Criminality at Work* (Oxford University Press, Oxford, 2020) 35 at 35–37.