

Deceiving Someone into Having Sex

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Abstract

This paper aims to provide an in-depth examination of the fundamental elements of rape, specifically focusing on intention and consent, within the context of “deceiving someone into having sex”. The analysis will involve exploring model cases and scrutinising the intentions of both the deceiver and the deceived in relation to consent. Through conceptual analysis, the concept of “deceiving someone into having sex” will be clarified, drawing insights from typical applications of this concept. Additionally, this paper will critically evaluate the main arguments against these conceptualisations of “deceiving someone into having sex”. This is done to demonstrate the flaws that undermine these arguments, thus highlighting the insufficiency of these approaches in fully discrediting the concept. Moreover, it will be argued that deceiving someone into having sex can be regarded as a form of coercion, and thus rape, aligning with the established criteria for identifying rape cases. In conclusion, this paper argues that the conception of “deceiving someone into having sex” as a form of rape challenges the narrow framework through which we traditionally understand rape, necessitating the recognition that the scope of the concept of rape extends beyond our previous limits.

About the author

Shirah Theron graduated with *cum laude* for her Philosophy MA thesis, titled “Pornography Conceptualised as an Addictive Substance”. She now delves into her doctoral dissertation, “Good Sex and Bad Sex: Investigating the Moral Epistemology of Sex Online”. Shirah’s primary research revolves around sexual ethics and the philosophy of sex, with an eagerness to explore intersections with psychology and sexology. In addition to her academic pursuits, for the past two years, Shirah proudly served as the President of the philosophy department’s Socratic Society and as the Editor-in-Chief of the Stellenbosch Socratic Journal. Beyond academia, Shirah advocates for positive change in her community, advocating for Krav Maga techniques for self-defence with a collaborative ethos: “We work together to empower each other”. This reflects her broader commitment to community well-being. And, lest we forget, amidst her academic and community endeavours, Shirah remains an unabashed cat enthusiast.

1. Introduction

The way we conceptualise the act of rape has an extensive history. Hilkje Charlotte Hänel opens her introduction of *What is Rape?* by stating: “Rape is not a new phenomenon. In fact, it is probably as old as the first human beings who walked this earth” (2018: 9). Rape has been described in various ways, such as forced sex, coerced sex, and non-consensual sex. The act of rape serves as an archetypal example of consent violation, where it pertains to the act of engaging in sexual penetration without the explicit consent of the individual involved (Bryden, 2000; Plaut, 2006; Danaher, 2018). This paper views rape as a violent act that does not require physical force, (physical) resistance from the victim, nor the use of a weapon (Easteal, 2011) – which is in agreement with South African law.¹ The concepts of intent and non-consent appear to be key factors in identifying a case of rape. In academic literature, however, there does exist some difficulty in conceptualising sexual consent. Theories of consent present a range of conceptions, from giving sexual consent explicitly, voluntarily, and affirmatively, to giving consent non-verbally (Dougherty, 2015: 224–253). Louise du Toit highlights that “[i]n no other crime does the response of the victim play *such* a large role in the very definition of the crime” (2007: 61, own emphasis). Ultimately, it is the act of consent that makes some actions permissible that would otherwise be impermissible (Dougherty, 2013: 722). Du Toit further asks us to “imagine that one’s response to being robbed or hijacked during the very event could plausibly be considered a decisive factor in determining whether the crime has actually transpired” (ibid.). Evidently, the victim’s response and status of consent far outweigh other factors in distinguishing between sex and rape,

as the intent of the rapist to rape does not give us enough information to make a case of rape.

In contemporary discourse on sexual ethics and consent, the complex and multifaceted nature of human interactions has given rise to a spectrum of perspectives, each grappling with the boundaries and definitions of consent, coercion, and the implications of deception in sexual encounters. Firstly, I examine the intricate dynamics of consent within the context of explicit agreements and desires, and assert that any level of intentional deception that leads to invalid sexual consent cannot be justified. This argument prompts us to question the role of deception in matters of sexual autonomy and the extent to which detailed conditions can be imposed for consent. Secondly, I introduce the notion of weak and strong dealbreakers in sexual consent, shedding light on cases where consent remains valid despite the presence of certain undisclosed information. It invites us to explore the distinction between regretting granted consent and having one’s consent invalidated through deception. Thirdly, I discuss some of the complexities of implicit consent, drawing parallels with non-sexual scenarios where individuals implicitly accept a range of potential outcomes. Lastly, I challenge conventional definitions of rape by extending the concept to include sex-by-deception, contending that deceiving someone into having sex is a form of coerced sex and should be considered a form of rape.

2. What does it mean to be deceived into having sex?

Deceiving someone into having sex involves intentional deception, disrespecting their sexual choices, and thus disregarding their sexual autonomy. Sexual

¹ In South African criminal law, a distinction is further made between rape and compelled rape. It states that, “[a]ny person (“A”) who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”), without the consent of B, is guilty of the offence of rape” while compelled rape is defined as, “[a]ny

person (“A”) who unlawfully and intentionally compels a third person (“C”), without the consent of C, to commit an act of sexual penetration with a complainant (“B”), without the consent of B, is guilty of the offence of compelled rape” (2007: 20).

autonomy is the capacity for “individuals to act freely on their own unconstrained conception of what their bodies and their sexual capacities are for” (Schulhofer, 1992: 70). That is to say that it is up to each individual to determine which features of a sexual encounter are particularly important to them or not, as well as which sexual activities they want to engage in or not. “Deceiving someone into having sex” relies on a number of different constitutive concepts for its meaning. To elaborate this meaning clearly, the concepts of sexual consent, the intention to deceive, and the intention to consent need to be understood first.

There is an ongoing debate within academic literature regarding the agreed-upon criteria for determining what qualifies as sexual consent, as it can include giving sexual consent explicitly, voluntarily, affirmatively and/or non-verbally (Dougherty, 2015). However, most have agreed that the voluntariness of consent is non-negotiable. An act of consent is valid *only* if it is “properly voluntary” (Manson, 2017: 418), meaning that consent granted under duress or via coercion is not valid consent. Alan Soble examines the adequacy of sexual consent by drawing upon the concept of free and informed consent (2022: 1–3). His contention revolves around the idea that adhering to the principle of free and informed consent necessitates that “each individual understands their own motivations for engaging in a sexual encounter and comprehends the motivations of the other party or parties involved” (ibid.: 8). He emphasises the significance of self-reflection regarding our reasons for desiring sexual engagement with another person. Thus, the implication is that when one grants valid consent one must also have *intended* to consent – the notions of consent and intent go hand-in-hand. We could then say that, to intend consent, it must be granted (in the least) voluntarily.

The intention to consent can be reflected upon as something we presently wish to do, or did in the past.² For instance, we can declare our present intent to consent to our partner touching our shoulders, and we can also affirm that we had intended to consent to such an action yesterday when we granted our consent at that time. In both scenarios, our act of granting consent is marked by intentionality and voluntary choice. However, if our partner were to deceive us to secure our consent, our initial intention to consent remains unchanged. This intention remains intact precisely because we are unaware of the deceptive tactics employed by our partner during the consent-granting process. This notion complicates the conceptualisation of “intending consent” elaborated previously. In such a scenario, the intention to consent is there, but the consent granted cannot be valid, since it is grounded in deception. It is important to note that in the case of being deceived into having sex and afterwards becoming aware of the deception, the consent is not “withdrawn” as in some cases as explained by Tom Dougherty (2014). Rather, the consent was invalid to begin with, as consent would not have been granted if they were aware of the deception (consent was thus not “properly voluntary”). It is *this* unawareness that allows for the consent to be intentional yet invalid.

It is crucial to understand what sexual consent is to understand what it means to deceive someone into having sex. This is, I argue, because the concept is to be understood as “deceiving someone into having *consensual sex*”. Once we become aware that the sex referred to in this concept is (supposedly) consensual sex, we start to realise that the concept of deception and using that deception to gain valid consent is mutually exclusive. In other words, the idea of deceiving someone into having consensual sex implies a

² To speak of a future situation and say that ‘I will intend to consent’, almost as some kind of promise of consent, brings about its own fair share of issues (Dougherty, 2013: 717–744, 2014: 25–40).

contradiction, as consent and deception are fundamentally incompatible in this context. The intent to deceive, on the other hand, requires that the deceiver be *aware* that the deception would result in the deceived granting consent. The deceiver knows that they are deceiving to receive the consent. The deception could even result in the deceived believing that they themselves wanted to do nothing but grant their consent.

3. Discussing model cases of sex-by-deception

One can say that someone is deceived into having sex when the “deception conceals a feature of the sexual encounter that makes a decisive difference to the victim’s decision to have sex” (Dougherty, 2013: 731). Dougherty’s argument in *Sex, Lies, and Consent* concerns the moral scope of consent (the extent to which the consent is granted – to whom, to which environment and setting, to which actions, and so on) induced by deception. The best way to understand what sex-by-deception looks like is to consider various examples of such an instance. I present three model cases below.

Dealbreaker: A man has been convicted of rape after having sex with a woman who had believed him to be a fellow Jew.³ According to her understanding at the time, she agreed to having sex with him because he led her to believe that he was also Jewish and interested in a long-term relationship, just like her. If she knew that he lied at the time,

she would not have agreed to have sex with him.

Dr Feelgood: A man impersonates a doctor and tells a female patient over the phone that her blood test results show she has contracted a dangerous, extremely infectious, and possibly deadly disease. He tells her that she has two options: an extremely painful and expensive surgical procedure that her medical aid will not cover, or to have sex with an anonymous donor who would administer a cure through sexual intercourse with her. The female patient agrees to the sexual intercourse, the man arrives as the “anonymous donor”, and she agrees to have sex with him because she believes (falsely) that her life was threatened if she did not receive this “treatment”. The man uses no physical force.

Stealth: Matt arranges a meeting with a fellow Grindr⁴-user for casual sex. They agreed to have safe sex – with a condom. However, because of the sexual position they engage in, Matt could not confirm that a condom was used. The man takes out a condom but does not use it when proceeding with penetration. If Matt knew that the man was not wearing a condom, he would not have agreed to have sex with him.

All three of these are examples of deceiving⁵ someone into having sex. All three of these examples are also cases that actually took place. In *Dealbreaker*, the man was sentenced to 18 months in prison (Adetunji &

³ Interfaith marriage within Judaism, often referred to as mixed marriage or intermarriage, has historically faced significant disapproval from Jewish leaders. This sentiment persists as a contentious issue today. Traditionally, many Jews adhered to the Talmud and the resulting Jewish law, Halakha. According to Halakha, the marriage between a Jew and a non-Jew is both prohibited and considered void under Jewish law. The various movements within Judaism hold differing perspectives on the definition of a Jew, influencing their stance on interfaith marriages. In contrast to Reform Judaism, the Orthodox stream does not recognise an individual as

Jewish whose mother is not Jewish or a convert whose conversion does not adhere to classical Jewish law (Kohler & Jacobs, 2021).

⁴ Grindr is an application designed for social networking and online dating, utilising location-based features, and specifically catering to the gay, bisexual, and transgender community (“About Grindr”, 2023).

⁵ I wish to note that lying by omission is also a form of deception. However, this would be a more nuanced case of deceiving someone into having sex and lies beyond the scope of this paper.

Sherwood, 2010); *Dr Feelgood* had allegedly persuaded more than 7 women to have sex with him as the “anonymous donor” (Blau, 1987); and Matt tested positive for HIV after *Stealth* occurred (Strudwick, 2016). Dougherty argues that when someone is deceived into having sex, the deception vitiates the victim’s sexual consent (2013: 740). Each case contained apparently-valid consensual sex at the time of the event, but the consent was obtained via deception – making the consent invalid.

To summarise, Dougherty formulates his moral argument against sex-by-deception as follows (2013: 720):

1. Having sex with someone, while lacking their morally valid consent, is seriously wrong.
2. Deceiving another person into having sex involves having sex with that person, while lacking their morally valid consent.
3. Therefore, deceiving someone into having sex is seriously wrong.

This argument is rather straightforward and relies on the principles, firstly, of non-consensual sex being seriously wrong and, secondly, that someone does not properly consent when deceived into having sex. More complex considerations arise when one attempts to determine whether *all* deception that leads to sex lacking valid consent is equally seriously wrong.⁶ Dougherty reviews the academic literature in this regard, stating that the “lenient thesis” proposes that it is “only a *minor* wrong to deceive another person into sex by misleading her or him about certain personal features such as natural hair colour, occupation, or romantic intentions” (ibid.: 718). According to this

lenient thesis, *Dealbreaker* thus contains a minor wrong – when the deceiver lied about wanting a long-term relationship. However, lying about one’s religious affiliation falls outside of the scope of characteristics allowed by the lenient thesis. The lenient thesis, I argue, also undermines our sexual autonomy. Who are we to decide which features of a potential sexual act and/or partner are to be considered as “real” dealbreakers on behalf of anyone else?⁷ Dougherty also adds that the idea that certain aspects of a sexual experience are morally more paramount than others, is problematic, because it separates the core components from peripheral components of a sexual encounter in a way that may not represent the beliefs and preferences of each individual party (ibid.: 729). Such differentiation of sexual components typically relies on “religious, social, and historical conceptions of what is important about sex” (Liberto, 2017: 138).

Of course, it is possible to consider the potential desire of wanting to be deceived in the name of the “magic of romance”. One might also wish to put their “best foot forward” on a first date to impress the other party through misleading statements. Even those in settled relationships do not always approve of the way that they would react to certain truths about their partners – perhaps out of jealousy or insecurity. The deceptions sometimes considered appropriate while looking for sexual partners are deceptions related to the interests believed to be at stake when and how one looks for potential partners. Elements such as physical desire, creating a type of closeness, establishing a sense of value, and forming stable emotional relationships are all obvious choices for those interests. In some cases,

⁶ I wish to point out that I agree with Dougherty, that “the serious wrong here is the non-consensual sex [induced by the deception], rather than the deception in itself” (2013: 740). Hallie Liberto, on the other hand, notes that, “it is important to remember that not all that is wrong with sex has to do with consent. Sometimes lying or misleading someone into a sexual scenario is wrong for the rich and varied reasons for which deception is often wrong” (2017: 140). I agree that Liberto makes a valid point, and I too do not deny the wrongness of the deception-element in sex-by-deception.

⁷ We can imagine that Person B deceiving Person A about their religious affiliation undermines Person A’s consent, just as in *Dealbreaker*. However, we can also think that Person B deceiving Person A about having attended Harvard does not undermine Person A’s consent. Yet, it might matter just as much to Person A that Person B attended Harvard than that they follow a specific religion.

intimacy might not even be attainable without some level of insincerity due to the desire to avoid the vulnerability it may involve. One cannot choose how a sexual partner responds to a sexual encounter, and we may, as Robert Jubb argues, “reasonably want to secure ourselves against certain kinds of response” (2017: 229). Given this, it may be preferable for some that a partner lie to not incite certain reactions in them. Despite these points, however, I again agree with Dougherty that they do *not* legitimise deceiving someone into having sex and that the “possible benefits of romance and relationships would *not* justify having non-consensual sex with someone” (2013: 740). In other words, while there might be various motivations for deception in relationships, including a desire to avoid negative reactions or vulnerability, I maintain that these do not excuse engaging in sexual acts without valid consent.

Furthermore, Dougherty points out that we have rights over our persons and our property, and we can “waive specific rights against particular interactions with particular individuals” (2013: 734). He then puts forward the “intentions thesis”, which is: “The rights that we waive are the rights that we *intend* to waive” (ibid.: own emphasis). We all have personal realms where our choices determine precisely what is permissible within these realms. This is why we can say that our rights are intimately linked to our autonomy and agency (ibid.). This creates responsibilities for others to respect our will – they must respect our decisions about what happens in our personal realms. If our decisions are to determine as much as possible about the admissibility of the actions of others from our personal realms, then the rights we give up must be the rights we *intend* to give up (ibid.: 735). In other words, Dougherty’s argument underscores the connection between our rights and our autonomy, emphasising that when we waive specific rights, it is a deliberate choice related to our personal realms where we want to determine what is permissible. This, in turn, places a responsibility on others to respect our decisions within these realms.

Now that we have a clear understanding of sex-by-deception, which involves intentionally misleading or manipulating someone to obtain their sexual consent under false pretences or without their full awareness, thus rendering their consent invalid, I will proceed to the next section. In this upcoming section, I will critically evaluate Dougherty’s conceptual framework and analyse both cases that align with his concept of deceiving someone into having sex and cases that, according to Dougherty’s description, might not typically be seen as instances of sex-by-deception.

4. Expanding on the main arguments against the conceptualisation of “deceiving someone into having sex”

I now discuss some of the main arguments posited against the conceptualisation of “deceiving someone into having sex” described in the previous section. I respond to each of them individually to establish that these arguments have a number of flaws that render them insufficient to fully undermine the coherency of the concept of deceiving someone into having sex – and that this concept deserves our continued focus. As previously mentioned, after Dougherty’s article was published in 2013, various papers were produced with the focus of critiquing his conceptualisation of sex-by-deception, and what the consequences of such a concept would be. I will divide these arguments and cases into separate sections below.

4.1 Conditions too detailed for consent

The first case made against Dougherty’s argument that I will discuss here, is one stating that he demands too much and sets an excessively high standard by emphasising the significance of the specific conditions under which valid consent would be given. Jubb asks us to imagine a scenario where a landlord demands that his tenants sing in the shower every morning (2017: 227–228). He argues that, if the tenants were to lie about whether they actually will sing in the shower in order to rent the property, this deception is not wronging the landlord in any way – even when the landlord

could technically refuse to rent them the property if they did not promise to sing, just as Matt would not have consented to have sex with the man in *Stealth*. Jubb argues that it is thus clear that “deception about a deal-breaker is not always as important as Dougherty thinks” (Jubb, 2017: 227).

Even though this is an intriguing case, I argue that deceiving someone into granting sexual consent is different because it allows the individual the right to stipulate any list of conditions, regardless of how fine the detail: “Individuals should, in light of their own conception of the sexual good, be able to place whatever conditions they like on their sexual consent” (Chadha, 2021: 337). This is, I argue, because sexual consent is explicitly and directly related to bodily autonomy. So, if a person would only consent to having sex with Brian while he wears a cowboy hat and Crocs, it is for Brian to decide whether he feels like wearing a cowboy hat and Crocs and engage in sex with that person. Of course, the more demanding the list of conditions, the less likely Brian will agree to consent to them in return. This is what may set sexual consent apart from just any other kind of consent and thereby defines sexual autonomy. It therefore still stands that any level of intentional deception that leads to invalid sexual consent does not legitimise such deception.

4.2 Weak and strong dealbreakers

Another interesting case is brought forward by Neil Manson. He conceptualises a difference between weak and strong dealbreakers. Weak dealbreakers are dealbreakers that are not held so strongly that they cannot be set aside when sufficiently motivated. Consider, for example, Person A who does not want to have sex with anyone who is over the age of 45. Person B is aware of this and changes their appearance to look younger. Suppose now that Person A finds Person B attractive, sexy, and even witty, and willingly consents

to have sex with Person B. Person B then tells Person A their real age, but Person A simply expresses, “Who knew? Not all old people are monsters!” (Manson, 2017: 419). A strong dealbreaker would be like any of the examples *Dealbreaker*, *Dr Feelgood* or *Stealth*. In these examples of strong dealbreakers, the consentor would ‘never in a million years’ grant their consent under *any* circumstances if they had known all the information. Manson goes on to further explain that “[t]here is nothing incoherent about the idea of valid consent that we *regret* with the benefit of hindsight...” and that, “[i]n such cases our consent does render others’ actions permissible even though *we would not* have consented had we known of the relevant fact” (ibid.: 424).

I put forward that Manson’s argument about weak and strong dealbreakers fails for one very simple reason. The first case he suggests (where Person A’s consent remains valid) is a case where, by the end of the scenario, there is *no* dealbreaker.⁸ Person B did, however, still deceive Person A, which remains morally questionable. This is a (rare) example of a case where Person A’s consent remains intact, since the content of the lie made no difference as to whether Person A would have consented to having sex or not. This case therefore does not present a dealbreaker that would cause the consent to be invalidated. However, it is important to note that this could only be determined retrospectively *after* Person A expresses their acceptance of Person B’s true age. Furthermore, I wish to point out that there is a difference between regretting that consent was granted and reflecting upon the consent given and knowing or stating that one would not have given consent if one knew x, y and z. Regretting consent implies the acknowledgment that consent *was* provided at the specific moment, and the regret stems from the present wish that consent had not been given, without any additional information (that was

⁸ For clarity, even though this specific case contains no dealbreaker, a case of statutory rape (where one of the individuals is below the legal age of consent) cannot be justified with this same

line of reasoning and therefore remains morally impermissible and illegal.

previously lacking) surfacing to justify this feeling of regret. This does not include the invalidation of consent based on deception. In other words, regretting that consent was granted does not necessarily make the consent invalid, but being deceived into granting consent does. Of course, one can be deceived into granting sexual consent (making the consent invalid) and feel regret. In the scenario of only *regretting* that consent was granted, it is usually a case that the information surrounding the scenario that did not change (i.e., one was not intentionally deceived), but rather that one's attitude towards the information changed – for whatever reason.

4.3 The case of implicit consent

Next, I set out examples of general critique found in literature discussing cases of explicit and implicit consent. To better understand cases of implicit consent, David Boonin offers the example of a man leaving a tip for the waiter at a restaurant (2002: 155–156). This man never explicitly communicates his consent to the waiter taking his money, but does not need do so to grant consent to the waiter taking his money. In this way, Boonin argues that consent can be given implicitly. However, it is crucial to note that both Boonin and Dougherty agree that, for implicit consent to be valid, it must be the case that, if the consenter is asked, they would agree about whether they had meant to allow all the particular events that took place. Dougherty uses the example of going for a haircut (2013: 735). The argument goes that, when we consent to a haircut, we implicitly consent to another person touching our heads, ears, shoulders, and necks – despite not explicitly granting consent to the hairdresser to do any of this. We end up granting consent to any of a variety of methods by which the hairdresser could reasonably go about cutting our hair, as long as the end-product is more or less what we agreed upon. Liberto states that, if she would be asked whether she gave consent to the hairdresser to clip around her left ear before cutting her bangs, she would say yes (2017: 129). In such a case, Liberto consented to all these events without explicitly stating so. However, her granting consent does not

automatically mean that she even considered for a moment in which order the hairdresser would cut sections of her hair. What matters, according to Liberto, is that *if she had known* which method the hairdresser would use, she *would still* have granted consent to it.

While the example of the hairdresser is somewhat compelling, I put forward that an argument for implicit *sexual* consent would result in *assumed* sexual consent – causing an ethical and legal slippery slope. A “yes” can only be a valid yes if “no” was an option. How can we then assume that “no” was an option on behalf of someone else? Can we really assume someone else's status of consent on their behalf? In most cases, to avoid harm, we need consent to be affirmative and explicit. The assumption of implied consent, particularly in cases where consent is assumed and it is unclear if a “no” was possible, cannot escape the risk of invalid consent. Nevertheless, while it is possible that we (more often than not) grant sexual consent based on our own assumptions and subjective perspective, deceiving someone into having sex relies on the *intentional* deceit of the other person, rendering the sexual consent invalid, as the deceived party would not have consented if they *knew* they were being deceived into giving consent.

4.4 Consenting to gambles

Liberto offers another intriguing case: consenting to a gamble – where one gives consent without knowing (with certainty) what the outcome will be. She uses the example of possibly falling pregnant after having sex (2017: 132): Consider, A has sex with B, knowing that there is a small chance that she might get pregnant. The sex that she has with B is sex that gets A pregnant. If she had known that the sex would involve impregnation, then A would not have agreed to have sex. However, she consents to the gamble – though not to the impregnation. In this way, A has sex that involves a feature that counts as a dealbreaker for her. Yet, A has still consented to the sex.

Liberto argues that when we agree to certain activities, purchases, or other people's behaviour, we usually do

not rule out a wide variety of possibilities for what may be involved in that to which we consent (as with the hairdresser example from Dougherty). Even though we may not examine all the potential outcomes, Liberto argues that such detailed examination is not a requirement for consenting to a gamble (2017: 132). After all, the woman who consents to intercourse and becomes pregnant may never have even contemplated the prospect of falling pregnant in the first place. In other words, Liberto posits that it is enough to know that *if* the woman had examined all the potential outcomes, pregnancy would have reasonably been one of them. Furthermore, Liberto also points out that, “[c]onsenting to gambles does not mean consenting to *all* possibilities – but just those we have *not ruled out*” (ibid.: 132-133, own emphasis). For example, if someone were to give us information and we believe them, that means that we rule out all those possibilities in the realm of potential outcomes that are contradicted by the information given. That is to say that, in this case, we do not consent to a gamble that involves the set of information that has been ruled out.

With regards to Liberto’s example of consenting to having sex that involves a gamble⁹ of becoming pregnant, I propose more avenues to consider: Suppose that A would not consent to having sex with B without some form of birth control, one could still argue that there remains a 1-2% chance of falling pregnant when using contraceptive methods. Are we then to consider *that* a gamble as well? This question might show that some gambles are greater than others, and that we have to analyse them on a case-by-case basis. Moreover, I would have to argue that Liberto’s reasoning on what we have ruled out from the realm of potential outcomes and what we consent to does not consider all practical examples. Consider this case: A is a young adult who posts photos of herself to a public social media platform. She would “never in a million years”

consent to some serial killer viewing her photos online, but that potential outcome remains every time she uploads a picture. However, according to Liberto, when we consent to a gamble, we consent to the possibilities we have not ruled out. A has not (and could not) rule out the possibility that a serial killer might view her photos online. Nevertheless, if A would be asked whether she consents to such, she would fully deny it. And I would maintain that it is not possible to consent to a certain act or event without intending to do so – even if it is a gamble.

4.5 Consent as the intention to waive rights

Recall Dougherty’s intentions thesis which states that, when we waive a right, we intend to waive that right. Similarly, when we consent, we intend to grant consent. A particular act of sexual consent can waive some sexual rights and not others. For example, via sexual consent Sam might waive her right against Mike engaging in vaginal sex with her but retain her right against Mike engaging in anal sex with her (Liberto, 2017: 128). Liberto makes the controversial argument that instances where we attempt to include information that pertains to another person’s exclusive realm of personal rights into the description of our own right, it is an act of “over-reaching” and fails to actually describe the moral right we hold (ibid.: 137). She explains this with the following example: Casey and Joe are having sex, but Casey is experiencing pain. Casey knows that if Joe were aware she was experiencing pain, Joe would not want to further continue having sex. When Joe asks Casey whether all is well, Casey lies and says yes. Joe and Casey continue to have sex.

If I am interpreting Dougherty correctly, this could be viewed as a unique case of someone being deceived into having sex. Casey intentionally lied to Joe to get Joe to (continue to) consent, since Joe is uncomfortable having sex with someone who is in pain. If Joe

⁹ Even though, I argue, this case does not directly put Dougherty’s conceptualisation of deceiving someone into having sex at risk, it

aims to show the importance of the intention to consent by the consenter.

knew that Casey was experiencing pain, Joe would not have continued to consent to having sex with Casey. This fits into how Dougherty frames sex-by-deception – Casey is deceiving Joe into having sex with her. Liberto, on the other hand, claims that Casey’s experience of pain is *exclusively* within Casey’s personal realm of legitimate discretion (2017: 138). This would mean that Casey experiencing pain is not (and cannot) be included into any right that belongs to Joe. Yet, it is the case that Joe intends to have sex with Casey where she does not experience pain. However, if Casey’s experience of pain is only in her personal realm of judgement, then Joe has no right against Casey having sex with him while Casey is in pain. Liberto posits that, by virtue of consenting to Casey having sex with Joe, Joe consents to Casey having sex with him while (or even if) she is in pain (ibid.). Thus, according to Liberto, the importance of conserving our personal realm of legitimate discretion carries more weight than the wrongness of intentional deceit.¹⁰ This would mean that intentional deceit can be “protected” when it (the deceit) is used to protect something in the personal realm. Even though the right to privacy is important, I find it difficult to distinguish between someone experiencing pain, which their partner would not want, and lying about it to ensure their partner continues to consent, and another scenario where, for instance, someone lies about their sexual fantasies (which they know their partner will express disgust towards) to gain sexual consent from their partner, whether that deception happens before or during the sexual activity. In both cases, someone is intentionally misleading their partner, either about physical discomfort or their personal interests, to ensure that their partner continues to consent to having sex with them. Despite these counterarguments challenging Dougherty’s conceptualisation, a thorough examination of

the ethical dimensions of sex-by-deception underscores its robust nature. These critiques, while thought-provoking, do not justify the dismissal of conceptualising deceiving someone into having sex.

5. Conclusion: sex-by-deception is *rape-by-deception*.

Tom Dougherty argues that “[d]eception’s threat to sexual consent is not taken seriously enough” (2013: 722). To reiterate, valid consent is granted voluntarily – without coercion. Expanding our exploration into the realm of deception as coercion, let us consider the insidious nature of grooming. Grooming, much like the cases discussed earlier, operates on the premise of manipulating perceptions and fostering unawareness. This not only ties back to our discussion on the deceptive nature of obtaining sexual consent but also underscores the profound impact of deceit in coercive dynamics. There are undeniable parallels between grooming and the act of deceiving someone into having sex, both sharing the common thread of exploiting the unawareness of the deceived. In the case of deceiving someone into having sex, the deceived is unaware of the deception (unaware of this *coercion*), and the deceived intends to grant sexual consent (believed to be voluntary at the time). An example of coercion where the victim is unaware of being coerced is the predatory act of “grooming”. Lauren Leydon-Hardy describes grooming as a “preparatory process through which target individuals are primed, coached, or generally readied in some sense, for conduct that is exploitative in nature” (2021: 6). She further explains that victims who have been groomed are “exposed to sustained patterns of behaviour aimed at rendering them acquiescent to – or even complicit in – conduct which, outside of the context of a grooming relationship, might otherwise have been readily recognised as

¹⁰ However, I do acknowledge that how we would or should go about determining our personal realm of legitimate discretion is an important question that lies beyond the scope of this paper.

harmful or exploitative” (Leydon-Hardy, 2021: 119). That is to say that these victims are unaware that they are being groomed and coerced to act or feel a certain way – but, if aware, could have realised that their actions and feelings were not voluntary. This is the nature of predatory grooming. Leydon-Hardy observes that when individuals who have experienced abuse within grooming relationships come to grasp the nature of their experiences, their testimonies typically do not indicate an awareness of having been deceived or coerced (ibid.: 121). The victims are almost completely unaware of the type of abuse to which they were subjected. Grooming aims at “masking abuse even by the lights of the abused” and it is in this way that grooming involves the fostering of an unawareness in its victims: “[g]roomers must hide in plain sight, even from their victims” (ibid.). I put forward that it is in this exact same way that the deceiver must “hide” from the deceived to successfully deceive and so receive the consent of the deceived. It then follows that deceiving someone into granting their sexual consent, is a form of coercion. Thus, deceiving someone into having sex is a form of rape, as it is in accordance with the criteria that determines a case of rape.

As previously mentioned, rape has been described in various ways, such as forced sex, coerced sex, and non-consensual sex. Sex-by-deception is not (necessarily) forced sex, for the deceived *does* intend to grant sexual consent. Sex-by-deception is not non-consensual sex in the way that it is usually understood, since the deceived, again, *does* grant sexual consent to the deceiver – consent is given but can afterwards be proven to be invalid due to the deceived’s erroneous belief

which is created by the intentional deception. However, sex-by-deception *is* coerced sex, despite the deceived being unaware of the deception/coercion. This means that sex-by-deception is rape-by-deception.¹¹ The deceiver’s successful deception results directly in the coerced granting of such consent. The deceived’s intention to consent would not be in place if not for the deceiver’s coercion via deception. Whether or not the deceiver is aware of the known harm (or even potential harm) that the deception can cause for the deceived, is not what determines a case of deceiving someone into having sex. The *intent* of the deceiver to deceive someone into having sex *is* the key-factor that determines sex-by-deception, therefore rape-by-deception. The result of conceptualising “deceiving someone into having sex” as a form of coerced sex, and thus as rape, challenges our existing conceptualisation of rape, be it in legal jurisprudence or academic discourse, necessitating a vigilant awareness of the repercussions inherent in such acts. Our exploration into the phenomenon of deceiving someone into sexual activity prompts us to reflect upon the profound implications of our actions and appreciate the moral responsibility for our sexual choices. This also raises a pivotal ethical and legal question: How should society respond to instances of deceiving someone into sex? This inquiry deserves extremely careful consideration and is a project to be undertaken in the most serious and humanitarian light. Until then, we must become conscious and remain conscious of the significant moral weight and harm that deceiving someone into having sex carries in our society.

¹¹ The act of deceiving in cases of rape-by-deception involves intentionally causing someone to believe something that is not true, in order to get them to consent to having sex. There is, however an argument to be made that there actually is two routes to rape: “One

option is to hold a defendant criminally liable only if he acted intentionally. Other options include holding a defendant liable only if he acted recklessly, or perhaps even negligently” (Chadha, 2021: 340).

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