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Sexual Offences and General Reasons Not to Have Sex

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Abstract—This article contends that there are general (but defeasible) reasons not to engage in penetrative sex. If there are such reasons, then we are able to refute a predominant justification for the current drafting of the crimes of rape and assault by penetration. The implication is that for such crimes the provision of consent ought to be available as a justificatory defence rather than the absence of consent being an element of the offence. This argument is developed out of three propositions that are substantiated in this article: (i) that there is a conceptual distinction between the elements of an offence and a justificatory defence that is based upon general reasons against performing an act and specified reasons in favour of performing the act; (ii) that a general feature of penetrative sex is the application of force to a person's vagina or anus; and (iii) that the principle of (reflexive) self-ownership is able to explain the wrongness of nonconsensual penetrative sex. Given these three propositions, I will suggest that there are general (but defeasible) reasons not to engage in penetrative sex as the application of force that is required to achieve penetration is an infringement of a person's rights of self-ownership. This analysis reveals that proponents of the view that there are *no* general reasons not to engage in penetrative sex ultimately presume that a person exercises their rights of control over their body in favour of sexual activity. The purpose of this article is to isolate, and then displace, this presumption.

Keywords: offences, defences, rape, assault by penetration, consent, self-ownership

1. *Introduction*

John Gardner has laid down the following challenge:

> Those who think that, in the law of rape, sexual intercourse *tout court* should be regarded as the real offence and consent as the defence had best be able to identify a general reason not to have sexual intercourse, such that one needs a defeating reason in favour before one should engage in it.[1]

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[1] J Gardner, 'Fletcher on Offences and Defences' (2003) 39 Tulsa L Rev 817, 820.

This article takes up this challenge. I will argue here that there are general (but defeasible) reasons not to engage in penetrative sex. If there are such reasons, and if one of the conditions of justifiable criminalisation requires the elements of a criminal offence to represent conduct that is generally wrong,[2] then we are able to refute a predominant justification for the current drafting of the crimes of rape[3] and assault by penetration.[4] The implication here (without overlooking a series of other relevant principles of criminalisation)[5] is that for such crimes,[6] the provision of consent ought to be available as a justificatory defence rather than the absence of consent being an element of the offence.

I will formulate this argument through the analysis of three seminal publications. In section two, I will explore Kenneth Campbell's conceptual distinction between offences and defences.[7] In section three, I will explain why Michelle Madden Dempsey and Jonathan Herring do not (save for one exception) identify general reasons not to engage in penetrative sex.[8] The one exception is their observation that penetration requires the application of force to another person. In section four, I will argue that Stephen Shute and John Gardner mischaracterise the principle of self-ownership when they dismiss the infringement of rights of self-ownership as an explanation for the wrongness of rape.[9] This analysis then arrives at the claim in section five that the application of penetrative force to another person is an infringement of the person's rights of self-ownership. This infringement, I will argue, provides general (but defeasible) reasons not to engage in penetrative sex.

This analysis reveals that proponents of the view that there are *no* general reasons not to engage in penetrative sex ultimately presume that a person exercises their exclusive rights of control over their body in favour of sexual activity. The purpose of this article is to isolate and then displace this presumption.

2. *Offences and Defences*

A. *L'Hôtel de l'information imparfaite*

Consider two hotel rooms in *L'Hôtel de l'information imparfaite*. Two people enter Room 1, and after some time, one of them emerges from the room with

[2] My thanks to an anonymous referee for suggesting this proviso.
[3] Sexual Offences Act 2003, s 1.
[4] ibid s 2.
[5] See J Herring and M Madden Dempsey, 'Rethinking the Criminal Law's Response to Sexual Penetration' in C McGlynn and VE Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Taylor and Francis 2010) 30, 38–40.
[6] Perhaps also for sexual assault (Sexual Offences Act 2003, s 3) if we were to broaden the analysis beyond penetrative acts.
[7] K Campbell, 'Offence and Defence' in IH Dennis (ed), *Criminal Law and Justice: Essays from the W.G. Hart Workshop* (Sweet & Maxwell 1987).
[8] M Madden Dempsey and J Herring, 'Why Sexual Penetration Requires Justification' (2007) 27 OJLS 467.
[9] S Shute and J Gardner, 'The Wrongness of Rape' in J Gardner (ed), *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (OUP 2007).

bruising around their eye socket. Two people also enter Room 2, and after some time, one of them emerges with vaginal (or anal) bruising. We know very little about the events that occurred in both rooms except that we know that the bruising was caused by the actions of other person in the room.

The criminal law would treat the events in Room 1 differently from the events in Room 2. The events in Room 1 would satisfy the elements of the offence of assault occasioning actual bodily harm.[10] In the absence of being able to justify the application of force to the eye socket, the applier of the force would be liable for an offence against the person.

Room 2 is different. To find that a sexual offence was committed we would need to establish that the vaginal (or anal) penetration was nonconsensual.[11] In the absence of being able to establish that the penetration was nonconsensual, we are unable to establish that a sexual offence occurred. Curiously, given the vaginal (or anal) bruising, we would be able to establish that a crime had occurred if the events in Room 2 were viewed as an offense against the person (assault occasioning actual bodily harm) rather than a sexual offence (rape or assault by penetration).[12] Sexual offences are somehow different from other offences against the person.

B. *The Conceptual Distinction*

The above scenarios help illustrate how different criminal offences have a different set of minimal conditions. For sexual offences, the absence of consent forms part of the set of minimal conditions of an offence. In comparison, an offence against the person can be established without establishing the absence of consent. Rather, for offences against the person, establishing that the contact or injury was consensual may satisfy a justificatory defence.

According to Kenneth Campbell, there is a conceptual distinction between the elements of an offence and the elements of a (justificatory) defence.[13] Given all the aspects of an actor's conduct, some aspects of the actor's conduct will constitute an offence, whilst other aspects may negate liability by justifying the commission of the offence.[14] The way in which a particular crime is divided up into the elements of the offence itself and the elements of a (justificatory) defence will depend on the underlying distinction 'between reasons against doing something and reasons in favour'.[15] According to Campbell, out of the set of rules that 'completely defines the incidence of liability in respect of any act' we can create a 'subset' of rules that defines the

[10] Offences Against the Person Act 1861, s 47.
[11] Sexual Offences Act 2003, s 1(1)(c), s 2(1)(c).
[12] My thanks to an anonymous referee for suggesting this further point.
[13] Campbell (n 7) 73–86; See G Fletcher, *Basic Concepts in Criminal Law* (OUP 1998) 93–110; J Gardner, 'Fletcher' (n 1) 817–18; cf G Williams, 'The Logic of "Exceptions"' (1988) 42 CLJ 261.
[14] P Westen, 'Offences and Defences Again' (2008) 28 OJLS 563, 570.
[15] Gardner, 'Fletcher' (n 1) 819.

scope of the offence.[16] This offence-subset defines an action that *we have general reasons not to perform*. The remaining subset represents a set of conditions that, if satisfied, can justify or exonerate an action that would otherwise be a criminal wrong.

To demonstrate this conceptual distinction, Campbell provides an example of a legislator creating an offence of 'operating a radio receiver without a radio licence'. Campbell asks whether the offence is that of 'operating the radio' (with the 'possession of a licence' being available as a defence), or whether 'both elements are within the offence part'.[17] According to Campbell, the answer will turn on whether 'the legislator regards there as being *prima facie* reason against all instances of operating a radio receiver' or takes the view that 'there is reason against operating a radio receiver only if one does so without a licence'.[18]

Campbell's radio licence example highlights two important aspects of the offence–defence distinction. The first is that the general reasons not to perform an action depend on how the action is viewed. How the law against 'operating a radio without a licence' is divided up between the offence and the defence subsets of rules turns on whether the legislator views there being reason against all instances of operating a radio, and, as Campbell recognises, 'there could, according to circumstances, be different answers to this'.[19] The circumstances may be such that the wrong is viewed as 'depriving the state revenue' or the wrong is viewed as 'using Western-invented technology'. The distinction between offences and defences is therefore a distinction as to how the component parts of the prohibited action are viewed.

The second aspect of the conceptual distinction worth highlighting is that the general reasons not to perform an action are *general* reasons insofar as they all apply to 'all instances' of the action.[20] There may be various wrongful ways to operate a radio, or various wrongful circumstances in which to operate a radio, yet 'operating a radio' ought only to be an offence if there are general reasons that apply to operating a radio *per se* (or, operating a radio *in all instances*).

We can therefore say that where there are general (but defeasible) reasons not to perform an action, the components of that action will form the elements of an offence. The general reasons not to perform the action are *defeasible* insofar as they are not conclusive reasons not to perform the action (some commentators use the term 'prima facie wrong' to describe an action that is contrary to defeasible reasons). We may recognise instances where the performance of the action is nonetheless justified, and in such instances, the

[16] Campbell (n 7) 75.
[17] ibid 80–81.
[18] ibid 80.
[19] ibid.
[20] ibid 81.

criminal law may provide a defence. When the elements of the defence are satisfied, the defendant is acquitted since the reasons in favour of performing the action 'prevail' over the reasons against.[21] If, however, the elements of the defence cannot be satisfied, we can then view the action as being contrary to *indefeasible* reasons, and view the action as a wrong (or wrong 'all things considered').

C. *Consent and the Orthodox View*

As we have seen, consent appears in the defence-subset of rules that govern offences against the person. The rules that govern sexual offences are different. To satisfy the elements of the offence of rape, sexual penetration or sexual assault, it is necessary to establish that penetration or touching was nonconsensual. The orthodox explanation for why sexual offences are defined with reference to the absence of consent contends that there is only a general reason not to engage in a sexual act where the penetration or touching is nonconsensual. In other words, the minimal set of conditions for there being general reasons not to engage in a sexual act with another person necessarily include *the absence of consent*. There is otherwise *no* general reason not to engage in a sexual act with another person.

Hence, when Campbell considered an alternative definition of rape, as 'sexual intercourse by a man with a woman where the consent of the woman is available as a defence', he found the alternative definition to be 'strange'.[22] As he explains:

> The reason why this statute would be so odd is that it implies that the legislator takes the view that there is some reason against all sexual intercourse.[23]

A number of theorists have since explained why the absence of consent to sexual activity falls within the subset of rules that define the offence by applying the same reasoning. According to Gardner:

> Actual bodily harm is *per se* an unwelcome turn of events, even when consensual; sexual intercourse is not *per se* an unwelcome turn of events, but only becomes one by virtue of being non-consensual.[24]

Stephen Shute agrees:

> If there were always a reason against having sexual intercourse, the offence element of rape should be defined as 'engaging in sexual intercourse' . . .

[21] Gardner, 'Fletcher' (n 1) 819.
[22] Campbell (n 7) 82.
[23] ibid.
[24] Gardner, 'Fletcher' (n 1) 820.

> However drafting a statute in this way seems wrong. The reason is that it reflects a morality that is foreign to us. We simply do not think that there is always a reason against sexual intercourse.[25]

As does Victor Tadros:

> there is no prima facie reason against having sexual intercourse. When one has consensual intercourse, it is not as though the prima facie reason against having intercourse has been balanced or outweighed by the fact that it was consensual. There is no prima facie reason at all.[26]

The explanation for why the *absence of consent* is an element of the offence in sexual offences (rather than being available as a justificatory defence) is premised upon the view that there are no general reasons not to engage in sexual intercourse. By inserting this 'orthodox view' into Campbell's conceptual distinction between offences and defences, Campbell, Gardner, Shute and Tadros argue that sexual intercourse itself cannot be an offence. Instead, the further condition—the absence of consent—is required to define the scope of a criminal wrong.

3. *Does Sexual Penetration Require a Justification?*

In opposition to this orthodox view, others have argued that there are general reasons to not engage in sexual acts. George Fletcher viewed a variety of touchings (touching, sexual contact, forcible sexual contact, and non-consensual sexual contact) in 'ascending incrimination', and argued that 'sexual contact' itself satisfied the 'minimal set of elements necessary to incriminate the actor' since 'initiate touching of the genitals is hardly routine, the touching requires a good reason'.[27]

Whereas Fletcher views the touching of the genitals to be 'hardly routine', Williams views 'consensual sexual intercourse' to be 'such a normal and frequent activity'.[28] As Campbell explains, 'except insofar as it may point to more fundamental issues' the 'relative frequency or infrequency of occurrence' of the conduct cannot explain why the conduct is or ought to be permitted or prohibited.[29] Rather, 'the idea of normality and abnormality' if interpreted in a value-laden way is 'getting closer to the truth'.[30] Hence, whether there are general reasons not to engage in penetrative sex or sexual touching will therefore depend on some kind of value-laden view or understanding of the act and not the frequency or infrequency of the act.

[25] S Shute, 'Second Law Commission Consultation Paper on Consent' (1996) Crim L Rev 684, 690.
[26] V Tadros, *Criminal Responsibility* (OUP 2005) 107.
[27] G Fletcher, *Rethinking Criminal Law* (Little Brown 1978) 707.
[28] G Williams, 'Offences and Defences' (1982) 2 LS 233, 254.
[29] Campbell (n 7) 82.
[30] ibid.

Michelle Madden Dempsey and Jonathan Herring have argued that sexual penetration is (morally) a 'prima facie wrong' that 'calls for justification'.[31] This 'alternative view' suggests that 'if a man penetrates the vagina or anus of a women with his penis, he should do so for a good reason'.[32] They identify a culmination of factors that explain the 'prima facie wrongfulness' of sexual penetration. These factors include the use of physical force on another person in sexual penetration, the risk of physical and psychological harm that stems from sexual penetration and the negative social meaning associated with sexual penetration. As I will explain, with the exception of the 'use of physical force', these factors do not provide *general* reasons not to engage penetrative sex because these factors do not apply to 'all instances' of penetrative sex.

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A. *Penetrative Sex Poses a Nontrivial Risk of Harm*

According Madden Dempsey and Herring, sexual penetration carries the risk of physical harm. The potential physical harm is three-fold: the risk of sexually transmitted diseases, the risk of unwanted pregnancy, and the physical injuries (abrasions, lacerations, tearing or chafing of tissues) that are 'not uncommon' in consensual sexual intercourse.[33] Madden Dempsey and Herring also suggest that penetrative sex 'poses a nontrivial risk of causing some significant psychological harm'.[34] However, these physical and psychological harms are unable to explain the 'prima facie wrongfulness' of penetrative sex (for the purposes of satisfying Campbell's conception of an offence).[35] To explain why, let us consider how Shute and Gardner explain why 'harms' are unable to explain the wrongness of rape. We can then apply the same reasoning to explain why the 'non trivial risks of harm' do not explain why sexual penetration calls for an explanation.

Sexual penetration in the absence of consent is wrongful. Sexual penetration in the absence of consent is also harmful. It is tempting to explain the wrongfulness of nonconsensual sexual intercourse with reference to the harmfulness of nonconsensual sexual intercourse. In addition to the physical and psychological injuries that a victim may suffer, the traumatic experience itself that may generate a feeling of violation, a sense of insecurity and a loss of trust. Although the seriousness of these harms cannot be understated, Shute and Gardner contend that they do not explain the wrongness of rape.[36]

[31] Madden Dempsey and Herring, 'Sexual Penetration' (n 8) 647.
[32] ibid 649.
[33] ibid 477, citing: R Hoffman and S Ganti, 'Vaginal Lacerations and Perforation Resulting from First Coitus' (2001) 12 Paediatric Emergency Care 113; E Ahmed and N Parveen, 'Female Consensual Coital Injuries' (2006) 12 J College Physicians 333.
[34] Madden Dempsey and Herring, 'Sexual Penetration' (n 8) 479.
[35] In fairness to Madden Dempsey and Herring, they were 'not directly concerned with questions of criminalisation'. Their aim was to 'simply map the moral landscape of sexual penetration'. See Madden Dempsey and Herring, 'Sexual Penetration' (n 8) 467.
[36] Shute and Gardner (n 9) 5.

The difficulty is that we are attempting here to isolate the wrong that explains *all instances* of nonconsensual penetrative sex. The variation in physical or psychological injuries that may or may not be inflicted during nonconsensual sexual penetration makes the harm (understood as the injury suffered) too specific to the particular instance of rape in order for the harm to be able to explain the wrongfulness of all instances of rape. The same is true of the feelings that the experience of rape may generate. Since the reactions and attitudes of victims of rape will vary, understanding the harm (as the feelings of violation, insecurity or loss of trust) will depend on the evaluations of the particular victim. 正如舒特和加德納所解釋的那樣，這些傷害不是構成強姦的不法，而是加劇了強姦的不法

As Shute and Gardner explain, rather than these harms constituting the wrongfulness of rape, these harms *aggravate* the wrongfulness of rape.[37] A victim may feel violated because a serious wrong has been committed to her, but her feelings of violation are not what makes the nonconsensual penetrative sex wrong; the wrongfulness of the act 'remains even in the absence of these harms'.[38] In fact, Shute and Gardner argue that the 'pure case' of rape, 'stripped of distracting epiphenomena' is where a 'victim may be forever oblivious to the fact she was raped'.[39] There remains a serious wrong committed against the victim even where the associated harms are not experienced by the victim.

Returning now to Madden Dempsey and Herring's claim that the prima facie wrongfulness of sexual penetration stems from a 'nontrivial risk of significant harm', these harms do not provide *general* reasons not to engage in sexual penetration. This is because Madden Dempsey and Herring accept that there are exceptions to these reasons not to engage in penetrative sex, and view these exceptions as cumulative.[40] It is the existence of these exceptions that is problematic. In terms of physical harm, the fact that there are instances of penetrative sex where there is no risk of sexually transmitted disease or pregnancy suggests that the nontrivial risk of harm is not a *general* reason not to engage in penetrative sex. Rather, the risk of significant harm only generates particular and person- and context-specific reasons not to engage in penetrative sex. If there is a general (and defeasible) reason not to engage in sexual intercourse, then the reason will be generally applicable (ie, apply to all instances of the act) and not be dependent on person- and context-specific factors.

[37] ibid 7.
[38] ibid.
[39] ibid.
[40] Madden Dempsey and Herring, 'Sexual Penetration' (n 8) 473: 'in order to avoid prima facie wrongdoing, a man engaging in sexual penetration must satisfy each and every potential exception.'

B. *The Social Meaning of Penetrative Sex*

Madden Dempsey and Herring suggest that 'the prima facie wrongfulness of conduct can be grounded in the negative social meaning of the conduct', and identify a current social meaning of penile penetration of a women's vagina or anus as 'an act through which she is rendered less powerful, less human, whilst the male is rendered more powerful and more human'.[41] As persuasive as their concern is, for the same reasons as outlined above, we can anticipate that this *context-specific* concern for the social meaning that is associated with penetrative sex will not provide *general* reasons not to engage in penetrative sex. Given that there are social contexts in which penetrative sex is not associated with a negative social meaning, the negative social meaning of penetrative sex does not provide *general* reasons not to engage in penetrative sex.

Madden Dempsey and Herring are nonetheless right to be attentive towards the social context in which sexual penetration occurs. As Campbell explained in his account of the conceptual distinction between offences and defences, whether there are general reasons against an activity will depend on social 'circumstances' and underlying 'values'.[42] As Shute has remarked:

> Campbell's . . . reason-based approach can provide a principled way of separating out the offence elements of a crime from the defence elements . . . everything, in fact, depends on the underlying value judgments, which are themselves sensitive to the context in which the issue arise.[43]

Herein lies the difficulty with assessing whether there are any general reasons not to engage in penetrative sex: what underlying value judgments can we make about penetrative sex *in general*? The difficulty stems from the variety of contexts and circumstances in which sexual penetration occurs. When we think about an act of penetrative sex we, perhaps unavoidably, place the act in a particular context. We then disagree about whether there are general reasons against sexual penetration because we have in mind a context and set of circumstances that may differ significantly from the contexts and circumstances that others have in mind. As Peter Westen vividly explains:

> Consider two hypothetical acts of sexual intercourse . . . a loving married couple, having always striven to be entirely honest with one another, celebrate a non-alcoholic 30th wedding anniversary by having sexual intercourse . . .
> In contrast, a girl, celebrating her 16th birthday in a bar, drinks enough to place her blood-alcohol limit at twice that allowed for driving but less than sufficient to render her incompetent to have sex . . .
> Duff may have something like the married couple in mind when we says that 'it makes no sense to citizens of contemporary liberal democracies [that] we

[41] Madden Dempsey and Herring, 'Sexual Penetration' (n 8) 481, 485.
[42] Campbell (n 7) 82.
[43] Shute (n 25) 690.

> should . . . have to answer to our fellow citizens . . . for every act of sexual penetration. And he is right: the married couple has nothing to account for . . .
> Michelle Madden Dempsey and Jonathan Herring have something like the 16-year-old in mind when they say that sexual intercourse requires moral justification. And they are right too. The 31-year-old, married father of three is socially understood to have something account for in having unprotected sexual intercourse with the heavily intoxicated 16-year-old.[44]

In trying to determine whether sexual penetration is, itself, a 'prima facie wrong', Dempsey and Herring ultimately adopt the same methodology as Gardner, Shute, Tadros and Duff. In resolving this disagreement 'it might be thought that the solution depends on which side is correct about how sexual intercourse is socially understood'.[45] Yet, as Westen explains, it is a mistake 'to think that lawful sexual intercourse is socially understood to be either costly or costless under all the circumstances under which it occurs.'[46]

There may be many instances where sexual penetration is undertaken in a context where the social meaning of penetration renders the women 'less-powerful', 'violated' or 'less human',[47] but the existence (and frequency) of these instances do not produce general reasons not to engage in penetrative sex. Equally, there may also be many instances where sexual penetration is undertaken in a loving and mutually respectful relationship, but the existence (and frequency) of these instances do not preclude there being general (defeasible) reasons not to engage in sexual intercourse. Unlike owning a radio without a licence, the social conditions and circumstances in which people engage in sexual acts are too diverse to generate a statement about 'whether or not sexual intercourse is socially understood to involve costs that agents ought morally to address'.[48] For Westen, both sides pose this question 'that cannot be answered'.[49]

C. *Force is Required to Achieve Penetration*

Madden Dempsey and Herring are nonetheless able to identify a *general* feature of sexual penetration that explains its 'prima facie wrongfulness'. They contend that:

> one reason why penile penetration of the vagina or anus is properly understood to require justification is due to the physiological fact that force is required to achieve

[44] Westen (n 14) 573.
[45] ibid 571.
[46] ibid 573.
[47] Madden Dempsey and Herring, 'Sexual Penetration' (n 8) 485.
[48] Westen (n 14) 572.
[49] ibid. For Westen, 'the socially meaningful question is, "*When* is sexual intercourse thus socially understood, and when is it *not*".' To see why social understandings of the morality of sexual intercourse are context dependent, we must explore what both sides ignore, namely, an understanding of what it is to 'consent' to sex.

> such penetration . . . if a penis is to achieve penetration, it must push through muscled walls into the vagina or anus.[50]

In identifying this general feature of sexual penetration, Madden Dempsey and Herring brush over a normative premise. That is, they do not explain *why* the application of force to another person's body is (prima facie) wrongful (or contrary to general (and defeasible) reasons). The application of force to another person may be harmful to the person, and the application of penetrative force may express a negative and subordinating social meaning, but for the reasons canvassed above, these harms or meanings provide general reasons not to apply penetrative force.

Beyond physical, psychological or social harms, an activity may be wrongful if it infringes a person's interests. Again, an analogy with the wrongness of nonconsensual sexual penetration is helpful here. Since we can explain (in the following section) the wrongfulness of nonconsensual sexual penetration in terms of the infringement of the person's *interests,* we may be able to, by reduction, explain how the wrongfulness of the application of force lies in its interference with an *interest* of the person who is subject of the force.

Note that we are now viewing sexual penetration as a physiological action. We are forced to do this for the reasons advanced by Westen: since sexual penetration occurs in a variety of different social contexts, we cannot view sexual intercourse with reference to a single 'underlying value judgment'.[51] We may, however, be able to generate an underlying value judgment about the application of penetrative force to another person's body.

4. *The Wrongness of Rape*

Shute and Gardner locate the wrongfulness of rape in terms of 'the sheer use of the person', that is an infringement or denial of their personhood.[52] Shute and Gardner also contemplate, and then discard, an account of the wrongfulness of nonconsensual intercourse that explains the wrong in terms of an infringement of the proprietor's rights, citing GA Cohen's description of rape as the nonconsensual 'borrowing of sexual organs'.[53] According to Shute and Gardner's version of the 'self-ownership' principle:

> The wrongness of rape . . . comes of the fact that the victim of rape has a proprietary interest in, and derived from that a proprietary right over, her own body. It is her body, she owns it, nobody else may use it without her say-so.[54]

[50] Madden Dempsey and Herring, 'Sexual Penetration' (n 8) 473.
[51] Shute (n 25) 690.
[52] Shute and Gardner (n 9) 14–17.
[53] GA Cohen, *Self-Ownership, Freedom and Equality* (CUP 1995) 244; Shute and Gardner (n 9) 9.
[54] Shute and Gardner (n 9) 9.

Shute and Gardner identify a series of problems with this property rights-based account of the wrongfulness of nonconsensual sexual intercourse. In one sense, their critiques are apt: there are some key differences between an item of property and a person's body. The problem with Shute and Gardner's critique is that no one (least of all GA Cohen) relies on a full-blown analogy with *property* rights to explain the rights or interests that we have in our body. By extension, the principle of self-ownership does not rely on a full-blown analogy with property rights to explain the wrongness of nonconsensual penetrative sex.

Instead, the wrongness of nonconsensual penetrative sex can be explained in terms of the infringement of rights of *self-ownership,* where the rights of self-ownership are not synonymous property rights. In responding to Shute and Gardner's critiques, I will substantiate what is meant by 'the infringement of the rights of self-ownership'. I will then go on, in the next section, to attempt to explain why there are general reasons not to engage in penetrative sex that are based on the principle of self-ownership.

A. 自己就是一個人擁有的東西

A. *Oneself is Rudimentarily What One Owns*

According to Shute and Gardner, we ought to reject the analogy between our property rights and our relationship with our body on the basis that:

> one cannot . . . analogize what happens to oneself to what happens to what one owns, because oneself cannot be an addition to what one owns. This is the first and major flaw in all self-ownership doctrines, including but not restricted to those that focus on ownership of one's body.[55]

This criticism mischaracterises the principle of self-ownership. Let us start, therefore, by clarifying what is meant by 'self-ownership'. As Ngaire Naffine explains, the expression 'self-owners' has become 'a sort of legal shorthand, a rhetorical device, which serves to accentuate the fullness of the rights enjoyed by persons in relation to themselves'.[56] We can therefore understand the basic notion of 'self-ownership' as GA Cohen's proposition: 'that each person enjoys, over himself and his powers, full and exclusive rights of control and use'.[57] This is the basis of the analogy between rights of self-ownership and property rights: both represent the power to exclude an open set of persons[58] and 'literally and figuratively provide the necessary walls to separate oneself from others'.[59]

'Self-ownership' describes a functional relationship of exclusive control by a person over their body. It confers, according to Cohen, 'the fullest right a

[55] ibid 13.
[56] N Naffine, 'The Structure of Self-Ownership' (1998) 25 JL & Soc 193, 194.
[57] GA Cohen, *The Blackwell Dictionary of Western Philosophy* (Blackwell Publishing 2004) 630.
[58] JE Penner, *The Idea of Property in Law* (OUP 1997) 74: 'The contours of the legal right to exclude others from one's body are the product of legal and moral ingenuity in recognizing appropriate general duties *in rem*.'
[59] J Nedelsky, 'Law, Boundaries and the Bounded Self' (1990) 30 Representations 162, 168.

person (logically) can have over herself provided that each other person also has just such a right'.[60] Importantly, Cohen explains further that:

> The term 'self' in the name of the thesis of self-ownership has a purely reflexive significance. It signifies that what one owns and what is owned are one and the same, namely, the whole person.[61]

It is therefore not a contradiction to say that 'I' have 'full and exclusive rights of control and use' over 'my body'. Just as it is not a contradiction to describe someone as 'self-governing', 'self-legislative' or 'autonomous'. We can formulate these concepts without forcing a separation between the governor and the governed, the legislator and the legislated, or the *autos* (the 'self') and the *nomos* (the 'law'). Similarly, the principle of self-ownership does not rely on the separation or alienation of the 'owned-thing' from the 'owner'.

Shute and Gardner are correct in saying that 'oneself cannot be in addition to what one owns'.[62] Yet, since the principle of self-ownership does not alienate the owner from the owned-thing, the principle of self-ownership does not position the body as an *additional* item of property. Insofar as 'ownership' represents 'full and exclusive rights of control and use', we can describe ourselves as self-owners, where oneself is *rudimentarily* what one owns.

B. 一種非偶然的關係

B. *A Non-contingent Relationship*

Shute and Gardner also criticise the principle of self-ownership for viewing the relationship with oneself as a contingent relationship. Whilst it is true that the relationship between the property rights-holder and an item of property is a contingent relationship, the principle of self-ownership need not import this feature from the analogy with property. In fact, we ought to resist conflating notions of ownership with notions of property. I can exercise 'full and exclusive rights of control and use' over my body and 'full and exclusive rights of control and use' over the clothes in my wardrobe,[63] but my relationship between myself and my relationship with my clothes are ultimately different. As James Penner explains:

> Only those 'things' in the world which are contingently associated with a particular owner may be objects of property; as a function of the nature of this contingency, in theory nothing of normative consequences beyond the fact that the ownership has changed occurs when an object of property is alienated to another.[64]

[60] Cohen, *Self-Ownership* (n 53) 213.
[61] ibid 69.
[62] Shute and Gardner (n 9) 13.
[63] cf ibid 12.
[64] Penner, *The Idea of Property* (n 58) 111.

It therefore follows that:

> A necessary criterion for treating something as property . . . is that it is only contingently ours; we much show why it is ours because it might well not have been.[65]

Property rights represent a contingent relationship between the owner and the owned-thing. A dimension of the contingency of the ownership relationship is that a subsequent owner is able to stand in the same position with regards to the owned-thing as the original owner. In contrast, the relationship of exclusive use and control over our bodies (our self-ownership) is a non-contingent relationship; another person cannot stand in the same position as ourselves with regards to our body.

Shute and Gardner are therefore correct that the analogy between nonconsensual sexual intercourse and the infringement of *property rights* is a poor analogy and renders 'one's relationship to oneself contingent in such a way that there is no longer any self to any owning, of itself or of anything else'.[66] But such a criticism cannot be levelled against an account of nonconsensual sexual activity as an infringement of rights of *self-ownership*.

C. *A Person's 'Non-Use Value'*

Shute and Gardner's third criticism follows from the above two concerns. According to their interpretation, a 'consequence' of the self-ownership doctrine is the 'alienation of the body from the self'.[67] The value of the body, 'like other tools and receptacles, artefacts', therefore becomes the *use-value*,[68] that is, 'the valuable things' that can be done with body.[69] The principle of self-ownership is interpreted by Shute and Gardner as protecting only a 'use value', whereas Shute and Gardner want to locate the wrongfulness of nonconsensual sexual intercourse in the denial of someone's *non-use value*. The non-use value is a further value that is denied when we 'use' or 'treat' people 'as something other than people'.[70]

The problem is that there is nothing in the principle of self-ownership that implies that the 'full and exclusive rights of control and use' are premised solely on the use-value of the body. Rather, the 'full and exclusive rights of control and use' are promoted as a means of protecting the non-use value of each person. By asserting exclusive rights of control, the self-owner prevents their body from being 'used' as only a functionally useful *thing*. According to Robert Nozick, for instance, rights of self-ownership 'reflect the underlying Kantian

[65] Penner, *The Idea of Property* (n 58) 112.
[66] Shute and Gardner (n 9) 14.
[67] ibid 14.
[68] ibid.
[69] ibid 9.
[70] ibid 14.

principle that individuals are ends and not merely means'.[71] As we shall see, this is the same *non-use value* that Shute and Gardner appear to premise their account of the wrongness of rape upon.[72]

Therefore, the principle of (reflexive) self-ownership is able to explain the wrongfulness of nonconsensual sexual penetration. Sexual offences infringe rights to exclusive control over the body, where such rights secure the non-use value that persons may not be used for another's sexual ends without their consent.

D."對人的純粹使用

D. *'The Sheer Use of the Person'*

Unsatisfied with explanations based on harms or the infringement of property rights, Shute and Gardner explain the wrongness of rape in terms of the 'objectification' or 'abuse' of another person. Proceeding from the premise that people, unlike things, have a value that is beyond their 'use-value', the wrongness of nonconsenual sexual intercourse is explained by Shute and Gardner as the 'the sheer use of the person' where the sheer use of human beings is '*ab*use'.[73] According to Shute and Gardner, it is then possible to explain 'how consent comes to be pivotal' to the wrongfulness of nonconsensual sexual intercourse.[74] Since only the subject can consent, 'by being astute to another's consent, someone who has sexual intercourse with that other is not treating that other . . . merely as a means'.[75] In other words, a person's astuteness to another's consent is a recognition of the other person's non-use value.

Shute and Gardner are ultimately correct in their explanation of the wrongfulness of nonconsensual penetrative sex. The wrongfulness of nonconsensual penetrative sex can be explained in terms of the denial of a person's non-use value. Their mistake has been to dismiss the principle of self-ownership as a way of isolating the wrongfulness of nonconsensual penetrative sex. For Shute and Gardner:

> the value of having a system of sexual relations in which people control by consent the treatment of their bodies secures optimally respect for the ultimate value of people.

It is merely my suggestion here that such a 'system of sexual relations' is best understood as a system founded upon the principle of self-ownership. When constructed properly, the principle of self-ownership provides a way of connecting 'the ultimate value of people' (their non-use value) with the

[71] R Nozick, *Anarchy, State, and Utopia* (Basic Books 1974) 31.
[72] Shute and Gardner (n 9) 14: 'to use people without at the same time respecting this further non-use value involves treating them as something other than people. It means treating them as things.'
[73] ibid 16.
[74] ibid 17.
[75] ibid.

wrongness of a particular act (nonconsensual penetrative sex). As we shall now turn to consider, the principle of self-ownership may also provide a way of connecting 'the ultimate value of people' with general (and defeasible) reasons not to engage in penetrative sex.

5. *Self-Ownership and the Application of Force*

In addition to Campbell's conceptual distinction between offences and defences, we have identified and developed two important ideas. First, that the application of force (sufficient to penetrate muscled walls) is a general feature of sexual penetration that, for some reason, calls for an explanation. Second, that nonconsensual sexual penetration is wrong because it is contrary to the principle that every person has exclusive rights of control and use over their own body. We are now at the stage where we can connect these two ideas and explain why there are general (and defeasible) reasons not to engage in penetrative sex.

渗透是他人使用和控制

A. *Penetration is Use and Control by the Other*

Recall that Madden Dempsey and Herring presumed that the application of force calls for an explanation. Since we are concerned here with identifying *general* reasons not to apply force to another person (reasons that apply in all instances) then we are unable to understand the 'prima facie' wrongfulness of the application of penetrative force in terms of the harmfulness of the force or the negative social meaning of penetrative force. The application of penetrative force is, however, the infringement of the rights of self-ownership. It is this rights-infringement that is able to explain why there are general (but defeasible) reasons not to apply penetrative force to another person.

The connection between self-ownership and the application of penetrative force is as follows: given the principle that each person exercises 'full and exclusive rights of control and use' over their body, and given the 'physiological fact that force is required to achieve' penetration, the activity of forceful penetration—of pushing through the muscled walls of another person—renders the person other than the self-owner in control of the self-owner's body. If we were to cast the net wider and consider the penetration of the vagina or anus without the application of force,[76] the contact and physical invasion of the body would nonetheless be the use and control of the body by the other. Simply put, penetration of the vagina or anus, forceful or otherwise, is the use and control by the other, rather than use and control by the self.

[76] Madden Dempsey and Herring, 'Sexual Penetration' (n 8) 474.

B. *The Presumption Behind the Orthodox View*

We can immediately anticipate an objection. Proponents of the 'orthodox view' would argue that penetrative sex will only be an infringement of a person's rights of self-ownership where the sex is inconsistent with the way in which the person exercises their rights of control and use. According to this objection, it will only be a wrong when the penetration is *contrary* to the person's self-ownership. If a person consents to the penetrative sex, then the activity is consistent with the person's self-ownership. If a person does not consent to the sexual intercourse, then it is an infringement of the person's self-ownership and the denial of their non-use value. Hence, the likes of Campbell, Gardner, Shute, Tadros and Duff are likely to respond by suggesting that the activity is only contrary to the rights of *control* over the body when the activity is *nonconsensual*.

It may appear as if we have made no progress in combating the 'orthodox view', except we can now identify the presumption that underlies the orthodox view. Proponents of the orthodox view presume that a person exercises their rights of control over their body in favour of sexual activity and intercourse: that unless we know that the sexual activity was nonconsensual we presume that it is consistent with a person's self-ownership. I have suggested here that this underlying presumption may stem from the context in which these commentators place the activity of sexual intercourse. To that extent, the 'context' and 'circumstances' of sexual penetration are epiphenomenal and we should focus on the phenomenon of penetrative sex as a physiological action.

For Gardner, sexual intercourse 'is not *per se* an unwelcome turn of events'.[77] It is not clear what features the '*per se*' in this statement is keeping out of the equation (or is leaving in the equation). Sexual penetration '*per se*' must, for Gardner, have some kind of positive or welcoming feature that enables us to view it as a 'not unwelcome' turn of events. It is this feature that then enables the presumption that a person would exercise their rights of control over their body in favour of sexual intercourse. However, there is no reason why the law should reflect this (perhaps naïve) presumption that underlies the orthodox view.

This 'naïve presumption', I would suggest, follows from a viewpoint that is blinkered by two mistakes that we have already encountered in this discussion. The first is mistaking frequency for normativity. It may be that most instances of sexual penetration are instances where both participants to the sexual intercourse are exercising their rights of exclusive control over their bodies in favour of the intercourse. We then presume that a person would exercise their rights of exclusive control over their body because we perceive it as a 'normal and frequent activity'[78] (despite the alarming instances of unwanted sexual

[77] Gardner, 'Fletcher' (n 1) 820.
[78] Williams, 'Offences and Defences' (n 28) 254.

touching highlighted by Madden Dempsey and Herring).[79] Yet recall Campbell's explanation, that the 'relative frequency or infrequency of occurrence' is only relevant insofar as 'it may point to more fundamental issues'.[80] To put it bluntly, the frequency or commonality of prima facie wrongful conduct surely cannot dilute the wrongfulness of the conduct.

The second mistake that blinkers our viewpoint is that we, following Campbell's direction,[81] search for a value-laden understanding of the conduct by looking the context and social circumstances in which the conduct occurs. We view sexual penetration in a social context, and the context most theorists presume is context in which sexual intercourse *per se* is socially understood as *not* involving 'costs that agents ought to morally address'.[82] Given the positive, 'costless' or 'not unwelcoming' social context in which sexual penetration occurs, we then presume that a person exercises their rights of exclusive control over their body in favour of sexual penetration. Yet, as Westen makes clear,[83] this approach is not available to theorists given the variety of contexts in which sexual penetration occurs. We cannot make general statements about sexual penetration *per se* that draw upon fundamentally variable social contexts and circumstances.

The naïve presumption therefore stems from our thinking about sexual penetration in terms of the frequency of (not wrongful) sexual penetration and in terms of social context in which (not wrongful) sexual penetration occurs. The core of the problem is that we need to assess sexual penetration '*per se*', and sexual penetration '*per se*' is a physiological action. Once we strip away assumptions about generally 'normal activities' and general 'social understandings', there remains no basis for why we should presume that every person exercises their rights of self-ownership in favour of penetrative sex *per se*.

If the presumption (that we exercise our rights of control over our bodies in favour of sexual activity) is not a sound presumption, then when force is applied to another person in order to achieve sexual penetration, then we ought to presume—*as we do in all other instances of application of force*—that the penetration was an infringement of a person's self-ownership, and therefore contrary to general (and defeasible) reasons. Hence, there are general (and defeasible) reasons not to engage in sexual penetration.

C. *Justifying Penetrative Sex*

Still, others may feel an unease with this suggestion that there are general (and defeasible) reasons not to engage in penetrative sex. Throughout this discussion we have relied upon a distinction between defeasible reasons and

[79] Madden Dempsey and Herring, 'Sexual Penetration' (n 8) 481.
[80] Campbell (n 7) 82.
[81] ibid.
[82] Westen (n 14) 572.
[83] ibid.

indefeasible reasons (or 'prima facie wrongs' and 'all things considered wrongs'). With regards to the relationship between these two types of reasons (or types of wrongs), Campbell,[84] Gardner, Dempsey and Herring adopt a 'remainders thesis' that suggests that 'justified action still leaves a remainder of conflicting reasons that were, regrettably, not conformed to'.[85] It follows that 'justified prima facie wrong doing leaves a moral residue of regret',[86] and the regret 'generates reasons to prefer less wrongful alternatives to securing the values that justify prima facie wrongful conduct'.[87]

Contrary to this position, I will argue here that although there are general (and defeasible) reasons not to engage in penetrative sex (and hence penetrative sex can be described as a prima facie wrong), the provision of consent is able to justify an act of penetrative sex in a way that does not leave a 'moral residue of regret'. I attempt here to carve out an exception to the 'remainders thesis' merely to address possible 'unease' with my conclusion that there are general (and defeasible) reasons not to engage in penetrative sex.

Dempsey and Herring suggest that when a surgeon cuts into the body of a patient, the surgeon ought to regret the 'prima facie' wrong. That is, the surgeon ought to regret that there are not 'less wrongful alternatives to securing the values sought by the surgery'.[88] The implication is that, if there are general (and defeasible) reasons not to engage in penetrative sex, then when someone engages in consensual penetrative sex, the act itself remains as a type of wrong, and the act remains as something to 'regret'. This is, of course, not true. There is nothing wrong (all things considered) with consensual sexual penetration nor is there any reason (all things considered) to regret consensual sexual penetration. We may regret some of the epiphenomena of even consensual sexual penetration, such as the associative negative social meaning or the risk of harm,[89] but the contention here is that the general (and defeasible) reasons not to engage in penetrative sex that are based upon the right of self-ownership do not generate regret when these reasons are defused by the provision of consent.

We can avoid this implication, that consensual penetrative sex generates regret, if we consider further how consent works to justify an otherwise wrongful act. If we view, as Gardner does, a wrong as a 'protected reason' not to perform an action that 'excludes from considerations all competing reasons', we can see that a justification acts to remove the 'secondary layer of protection'

[84] Campbell (n 7) 83: 'The reasons may have been overwhelming in favour of performing an action, but as long as the law takes the view that some harm has nevertheless been done it recognises the continuing existence, even in those circumstances, of a prima facie reason against it.'
[85] Gardner, 'Fletcher' (n 1) 820.
[86] Madden Dempsey and Herring, 'Sexual Penetration' (n 8) 488.
[87] ibid.
[88] ibid 489.
[89] My thanks to an anonymous referee for raising this point.

and allows 'certain specified countervailing' reasons in favour of performing the action.[90] In terms of the surgeon, there are 'protected reasons' not to cut into the body of a patient. These reasons are protected from competing reasoning, such as the desire to obtain blood or tissue to save the life of another patient. This 'competing reason' in favour of the cutting into the body is excluded from consideration. The cut or incision into the body of the patient may be justified if it is necessary to save the life of that patient. This reason in favour of the cut or incision may be 'unexcluded'[91] from consideration though the justification of necessity, and may 'prevail'[92] over the general reason not to cut into the body of another person. The 'remainders thesis' is preserved in the term 'prevail'. Justifications defeat or prevail over the reasons against performing the otherwise wrongful act, they *do not cancel* the reasons against the act.[93]

However, consent is a particular kind of justification.[94] According to Gardner:

> to consent is to exercise a normative power to permit (or empower) another to do something that the other has, or would otherwise have, a duty not to do.[95]

Since the act of consent is permissive or empowering, it does not itself provide a reason in favour of performing the action[96] (just because a person consents to penetrative sex, does not mean that there is a *reason* to engage in penetrative sex with that person). Rather, consent 'delegates' to the consentor the ability to permit a set of reasons in favour of performing the actions that are no longer excluded by the wrong.[97] The justification of consent operates to enable *the consentor to include reasons in favour of an action* that would otherwise be excluded from consideration. A patient may therefore consent to the removal of blood or tissue from their body in order to save the life of another patient, and in doing so, the patient includes an otherwise excluded reason in favour of cutting into their body.

It is in this way that consent operates as 'exclusionary permission'. According to Joseph Raz:

> The simplest case of giving an exclusionary permission is a case of a man who consents that another shall perform an act harmful to his interests. *The permission does not alter the reasons against the action. It will still harm the person's interests.*

[90] See J Gardner, 'Justification and Reasons' in AP Simester and ATH Smith (eds), *Harm and Culpability* (Clarendon Press 1996) 103, 117; Gardner, 'Fletcher' (n 1) 823; J Gardner, 'In Defence of *Offences and Defences*' (2002) 4 Jrslm Rev LS 110, 118–21.
[91] J Gardner, 'Justification under Authority' (2010) 23 Can JL & Juris 71, 79.
[92] Gardner, 'Fletcher' (n 1) 819.
[93] J Gardner, 'Justifications and Reasons' in Gardner (ed), *Offences and Defences* (n 9) 96.
[94] Gardner, 'Justification under Authority' (n 91) 80.
[95] ibid 75.
[96] ibid 78–79.
[97] ibid 80.

> The intention and import of the permission is to allow the man who contemplates the action to disregard the interests of the person who granted the permission.[98]

Following Raz, Herring and Madden Dempsey apply this dimension of permissive norms to explain 'the normative force of consent' and suggest that a 'woman's consent to sexual penetration allows the man to *opt not to conform* to some of the set of reasons he otherwise has not to sexually penetrate her'.[99]

I disagree. The provision of consent (in some instances) *does alter* 'the reasons against the action' or 'the set of reasons a person otherwise has not to sexually penetrate another'. This is because consent can have a transformative effect. It is able to transform grevious bodily harm into an everyday medical procedure, and it is able to transform assault occasioning actual bodily harm into a praiseworthy athletic act. The provision of consent is also a necessary condition (*but not a sufficient condition*)[100] of transforming the prima facie wrongfulness of penetrative sex into a valued part of an intimate relationship. This is because such acts, performed in the absence of consent, constitute the infringement of a person's exclusive rights of control over their body, and thus are performed contrary to protected reasons not to perform the act. Whereas the same acts, performed with the provision of consent, are acts performed with the support of 'unexcluded' reasons to perform the act, where the consentor is exercising their exclusive rights of control over their body in 'unexcluding' the reasons in favour of the act.

The provision of consent may be able to avoid the conflict of reasons: that is, the conflict between the general reason not to perform the action and the unexcluded reason in favour of performing the action. The general (and protected) reason not to engage in penetrative sex is premised upon the rights of self-ownership. As we know, the provision of consent removes the layer of protection and allows otherwise excluded reasons in favour of penetrative sex to enter the frame. According to the above account, the reason in favour of the action may prevail over the reasons against the action but 'the permission does not alter the reasons against the action'.[101] It remains that the action 'will still harm the person's interests'.[102] Yet, 'the person's interests' or the 'reasons against the action' are premised upon the rights of self-ownership whilst at the same time the provision of consent is the exercise of the rights of

[98] J Raz, *Practical Reason and Norms* (Hutchinson 1975) 96–97 (emphasis added).

[99] Herring and Madden Dempsey, 'Rethinking the Criminal Law's Response' (n 5) 35.

[100] R West, 'Legitimating the Illegitimate: A Comment on "Beyond Rape"' (1993) 93 Columbia L Rev 1442, 1459: 'Legality does not imply legitimacy, *any more than consent implies value*. Many of our sexual practices may be beyond the reach of any sensible understanding of the scope of the criminal law. But it does not follow that they are commendable, or even noninjurous. What follows is that they are in need of criticism, whether or not in need of punishment' (emphasis added); Herring and Madden Dempsey, 'Rethinking the Criminal Law's Response' (n 5) 37: 'the value of sexual penetration (ie the positive aspects of sexual penetration) can be found in a wide variety of things . . . in the circumstances surrounding the act, the meaning parties attach to it, and the consequences of it.'

[101] J Raz, *Practical Reason* (n 98) 96–97.

[102] ibid.

self-ownership. Consent is a double-edged sword in this regard: the 'protected reasons' against performing the action are premised upon rights of self-ownership and the 'unexcluded reasons' in favour of performing the action are unexcluded by the exercise of rights of self-ownership.

If there is a conflict of reasons, between the general (and protected) reason not to engage in activity and the provision of consent that unexcludes reasons in favour of the activity, we find that self-ownership is a normative force behind both sides of the conflict. In these instances, I suggest that the protected reason not to perform the action (that is defeated by an unexcluded reason in favour of the action) *does not remain* as a type of wrong that generates residual regret. This is because the normative force of self-ownership can only be on one side of the conflict. The provision of consent shifts the normative force behind the protected reason not to perform the action to the normative force of the permission to perform the action. Surgeons therefore do not have a long list of regrets following a day full of surgical procedures, the rugby field is not covered with residual regret following a match full of forceful tackles, and it follows for participants in consensual penetrative sex that there remains no 'wrong' to regret.

We can therefore identify general (and defeasible) reasons not to engage in penetrative sex. Such reasons are based upon the principle of self-ownership. We can adopt this stance without having to view consensual penetrative sex as a type of wrong since the act of consent transforms (rather than balances or outweighs)[103] the reason against the act into a permission to act on reasons in favour of the act.

6. *Conclusion: returning to L'Hôtel de l'information imparfaite*

The overall purpose of this article has been to suggest that the criminal law should treat the events in Room 1 and the events in Room 2 the same. In both rooms there was the application of force sufficient to cause bruising, and in both rooms we have imperfect information about the circumstances under which the force was applied. The current legal approach is to presume that the application of force (to the eye socket) in Room 1 was not part of a consensual activity, and to presume that the application of force (to the vagina or anus) in Room 2 was part of a consensual activity. I have argued here that the latter presumption is an unsound presumption. Since we ought not to presume that we exercise our exclusive rights of control over our bodies in favour of sexual activity, then the predominant explanation given for why the absence of consent is an element of a sexual offence (rather than that the provision of consent should be available as a justificatory defence) may not be a defensible explanation.

[103] cf Tadros (n 26) 107: 'it is not as though the prima facie reason against having intercourse has been balanced or outweighed by the fact that it was consensual.'