The Ethicality of the Demand for (Trans)parency in Sexual Relations\*

1.1 Introduction

#### In life we are all faced, more or less continuously, with situations where we might choose to reveal, withhold or modify information about ourselves, our pasts and/or our future aspirations. This article is interested in the ethical status of such choices and the legitimate expectations of others to know the ‘truth.’ Its specific focus lies with occasions of sexual intimacy between cisgender and gender non-conforming people, though the article we will focus on transgender people.[[1]](#footnote-1) More particularly, the scenario to be considered involves a claim, made by a cisgender person,[[2]](#footnote-2) not to know that their sexual partner is transgender. This scenario is not an abstract one. On the contrary, and disturbingly, there has been a spate of such cases prosecuted in the UK between 2012-2017.[[3]](#footnote-3) So far, all these cases have involved young cisgender female complainants and young gender non-conforming defendants, some of whom are certainly transgender.[[4]](#footnote-4) All of the cases led to convictions, to sex offender registration and, in all but two cases, to a prison sentence of between two and a half and eight years.[[5]](#footnote-5)

#### This article is not interested in questions of criminal law, criminalisation or public policy. Rather, its focus lies with ethics, primarily the ethics of non-disclosure and, as we will see as the argument develops, the ethics of a cisgender demand to know. A focus on ethics is important because, while many criminal law commentators appear sceptical regarding expansion of the fraud category within sexual offences law, a position that would appear to hold in relation to cases involving gender identity,[[6]](#footnote-6) it seems that this same scepticism often evaporates in the face of the ethical characterisation of the role transgender people play in sexually intimate scenarios. In other words, while the liberal distinction between illegality and immorality is insisted upon as a bulwark against the state,[[7]](#footnote-7) the notion that ‘lying’ about or non-disclosure of gender history, constitute unethical practice/omission proves more resilient. This claim is informed not only by what is implicit in criminal prosecution and by wider community sentiment,[[8]](#footnote-8) but by conversations had with numerous legal and non-legal academics over the last few years while researching these issues.[[9]](#footnote-9)

In many respects, challenging this view is as, if not more, important as challenging criminal prosecution, albeit under current English law non-disclosure of information is, at least ostensibly,[[10]](#footnote-10) insufficient to ground prosecution.[[11]](#footnote-11) This is because it is a widespread view that transgender people are synonymous with deception that is most antithetical to the liveability of transgender lives. The fact that many cisgender people feel, almost ‘instinctively,’ that they have a right to know, and transgender people an obligation to disclose, gender history, is something this article will contest. In doing so, it will situate ethical thinking within the context of cisgender privilege and power. The article will proceed as follows. First, it will issue an important caveat concerning complainant claims of ignorance of defendant gender identity. This is important because without the caveat the analysis which follows might be viewed as conceding too much, as reinforcing the transgender/deception coupling. Second, and before considering and challenging the characterisation of transgender decision-making as unethical, the article will attempt to delineate the relevant ‘facts’ in relation to which ethical conclusions might appropriately be drawn. This is important because the article takes as axiomatic the view that transgender men and transgender women are men and women. Indeed, it will argue this to be the only view available consistent with maintaining an ethical relation to transgender people.

Thus, the article will begin by approaching the question: *do transgender people have an ethical obligation to disclose the truth about their gender identity*? through an external critique, one which turns that question on its head and reveals how posing the question in this way is both hubristic and demonstrative of a failure to approach moments of cis-trans sexual intimacy in an ethical manner. Third, the article will then adopt an internal critique, that is, it will engage with arguments derived from normative ethics, ones which accept gender identity claims, but view non-disclosure of gender history to be unethical. It will do so in order to problematise this distinction and to show that, even when issues of ideology, power and privilege are ignored or suspended, the view that an ethical obligation to disclose ought to exist will not necessarily win the day. Finally, the article will look to the future and consider what it might mean to be ‘ethically gendered,’[[12]](#footnote-12) and the implications of being so for the way we think and feel about sexual encounters in world characterised by gender variance.

1.2 An Important Caveat

#### The article will assume complainant ignorance regarding defendant gender history. However, it does so only in order to consider the ethical implications of lying and, more particularly, non-disclosure of information in such circumstances. In reality, complainant versions of the facts would appear to require that we (as well as prosecutors, judges and juries) ‘suspend our disbelief’ to a quite extraordinary degree.[[13]](#footnote-13) In saying this, I am not suggesting complainants lied. This may or may not true. Rather, I am suggesting that we resist automatically concluding that complainant ignorance equates with non-consent in these cases. While this might be considered to sail uncomfortably close to feminist heresy, what I am drawing attention to is the fact that ignorance and knowledge are not two mutually exclusive cognitive domains. This necessarily raises implications for agency, and therefore consent.

In other words, we might view ignorance as a form of knowledge, rather than its absence. This is an idea developed by Eve Sedgwick in the context of queer sexuality.[[14]](#footnote-14) In coining the phrase, the ‘privilege of unknowing,’ she is referring to a cultural and psychological process whereby privileged people learn not to see, to a kind of ‘careful education’[[15]](#footnote-15) which erases difference from view. That is, difference is in plain view, yet remains unrecognised by privileged onlookers. Accordingly, ignorance should not be placed beyond critique. Rather, we should ask after the erotics of its ‘human production and distribution,’[[16]](#footnote-16) which include the ‘psychological operations of shame, denial [and] projection’ that surround it.[[17]](#footnote-17) In the context of gender identity fraud cases, complainant ignorance of gender identity or history, in relation to which ‘deception’ is said to have been perpetrated, is readily translated into non-consent. Yet, following Sedgwick, ignorance here might be viewed as a form of knowledge, one that requires labour, not passivity, a psychological and cultural participation in learning not to know. Once acquired, ignorance might operate so as to refuse contrary facts, including those that come through our bodies, and our lovers’ bodies, wave after wave.

In other words, in a hetero and cisnormative society we may have learned not to recognise difference, especially trans and genderqueer differences, ones which might produce crisis at the level of sexual identity. Thus, while belief that one’s sexual partner is male may be genuinely held, it might also be based on learned ignorance regarding the existence of trans and other gender non-conforming people, and be an effect, at least in part, of repudiation, disavowal or wilful blindness, especially perhaps regarding sensory information that passes between bodies during intimacy. Repudiation can occur through repression or, in Lacanian terms, where ‘the ego rejects (*verwirft*) the incompatible representation’ and ‘behaves as if the representation had never occurred to the ego at all.’[[18]](#footnote-18) These matters, and their implications for how we think about consent, are ones that ought to register within feminism and wider criminal justice debates. However, because this article is interested in the question of what we owe to each other by way of information disclosure prior to sexual intimacy, it will assume complainant ignorance of defendant gender history and will not pursue the kind of critique indicated here.

1.3 Gender, Truth and Power

Any discussion of what parties might owe to each other in contexts of sexual intimacy ought, from the outset, to acknowledge any underlying assumptions that might influence the process of ethical reflection and the conclusions drawn. Accordingly, we should recognise that ‘lying’ or non-disclosure of information assumes some factual ‘truth’ against which the ethicality of conduct/omission might be measured or tested. As Scanlon notes, ‘[i]f judgments of right and wrong can be said to be true or false, this must be because there is some realm of facts that they are meant to describe, and to which they can correspond, or fail to correspond.’[[19]](#footnote-19) If therefore, we want to describe acts or omissions as unethical, we must first establish the facts to which they pertain.

Let us begin then by stating that the central fact in cases of sexual intimacy between cisgender and transgender people is that transgender men and transgender women who present as men and women, are men and women and ought to be treated as such. As Judith Butler has noted: ‘we are all ethically bound to recognise another person’s declared or enacted sense of sex and/or gender’[[20]](#footnote-20) and, of course, it is sex/gender in this sense, rather than any other, that best accords with the ethical conception of being true to oneself and others. As Talia Mae Bettcher explains, in distinguishing metaphysical from existential understandings of gender identity, while there may be dispute concerning the definition of sex and gender, we ought to privilege existential understandings of gender self-identity because they best address who we are in the most meaningful and ethical sense. An existential understanding captures what we are about, what moves us, what we stand for and what we care about the most regarding our gender identity.[[21]](#footnote-21) While this article recognises that gender identities are socially constructed, it also recognises that they are tied to embodied experiences, that is, to lived (and sadly, for some transgender people, unliveable) realities.

It is these facts we must insist on, and which must inform judgment, at least if judgment is to remain ethical. It is not that other conclusions cannot be drawn. After all, from a social constructionist perspective, claims about gender, sexuality and the body are inevitably part of a ‘truth’ game which produces them as ‘truth-effects.’[[22]](#footnote-22) Rather, it is that ethics demands that we draw this conclusion and act accordingly, at least in circumstances where gender identity claims are non-trivial. In the case of transgender people, such claims are clearly non-trivial because they speak to a sense of (dis)embodiment, psychic reality and experiential truth. Accordingly, this article adopts a ‘hermeneutics of suspicion’[[23]](#footnote-23) in relation to the view that transgender people who do not confess a ‘truth’ that is not their own are deceptive. This problematic view defines transgender people against their will and measures ethical performance against an ability to live up to an imposed gender identity.

There will be those who, while accepting gender identity claims, say that other gendered facts exist in relation to which lying might occur or in relation to which non-disclosure of information might assume ethical importance. This may be so, and it is a matter we will consider in the following section. For now, it should be noted that alighting on such facts always, if indirectly, appears to amount to a denial, or at least the problematising, of the very gender identities such arguments nominally concede. At this stage however, I aim to develop my claim, and article of ethical faith, that assertions of gender identity by transgender people are grounded in lived reality and ought to be respected. It is important to labour this point because the gender identities of transgender people are, to one degree or another, refused by the fact of criminal prosecution, complainant assertions of non-consent, harm and deception, and the foregrounding of an ‘ethical’ question put to transgender people concerning facts that ought to be disclosed.

If we take seriously assertions of gender identity we must recognise that no relevant gap exists between a transgender person’s actual gender identity and the gender identity some cisgender people assume. Thus, if a cisgender woman believes her object of desire to be a man, a conclusion of unethical deception on his part is only possible if we accept the following propositions: (i) a transgender man’s understanding of his own gender identity is trumped by a cisgender woman’s interpretation, (ii) her sexual autonomy is, despite the desire-led nature of intimacy, undermined because the privileging of her interpretation produces a gap between her belief about his gender identity and his actual gender identity, and (iii) because of (i) and (ii) she has suffered harm. Accordingly, a conclusion that a transgender man acts unethically in circumstances where he asserts his masculinity, either through statements or through gender performance, is unsustainable. It would be a conclusion, possible only through vacating the space of ethics.

To reiterate, in insisting on the reality of the gender identities of transgender people, it is not intended to suggest a pre-discursive subject exists. Rather, we *all* bear the mark of social construction. That is, while transgender people perhaps render the constructedness of gender especially transparent, we are, as Jack Halberstam notes, ‘all transsexual’[[24]](#footnote-24) in the sense that ‘gender uncertainty is visited upon us all’ and in as much as gender ‘is not so much a status but a lifelong project for everyone.’[[25]](#footnote-25) However, as Judith Butler observes, ‘[t]hinking the body as constructed demands a rethinking of the meaning of construction itself.’[[26]](#footnote-26) To emphasise construction is not to deny that bodies are thrown into the world with a particular materiality, or set of body parts. Rather, it is to recognise that ‘their irrefutability in no way implies what it might mean to affirm them and through what discursive means.’[[27]](#footnote-27)

In other words, what matters is not so much raw facts about bodies, as much as how we make sense of, experience, and live them. Moreover, making sense, presupposes that we are engaged in constructive activity, that the line between nature and culture has already been crossed, ‘[a]nd if certain constructions appear constitutive, that is, have this character of being that “without which” we could not think at all, we might suggest that bodies only appear, only endure, only live within the productive constraints of highly gendered regulatory schemas.’[[28]](#footnote-28) Importantly, these schemas produce hierarchies in which some bodies do not matter, or matter less. This is precisely what we encounter in the context of criminal prosecutions for gender identity fraud and, problematically, it is this not mattering of some bodies which precedes and informs the formation of ‘ethical’ questions. To put the matter more simply, some socially constructed genders are more likely to be read as ‘real’ than others and this is an effect of relations of power.

To speak of transgender people as deceptive is immediately to risk implication in a history of oppression and to deny the constructedness of cisgender bodies. It is also a failure on the part of cisgender people to acknowledge the privilege and interpretative power they possess and necessarily bring to the viewing exercise. The cultural means through which transgender and fraud become associated is citation through time, a cisgender communal chant, what Butler has described as ‘an imaginary chorus that taunts.’[[29]](#footnote-29) What needs to be emphasised here however, is the obvious difficulty experienced when attempting to uncouple ethical reflection from ideologies in which it is embedded and from which it issues. It is through posing questions about the obligations transgender people owe to cisgender people that ‘cis-supremacy is enacted.’[[30]](#footnote-30) As Natalie Reed notes, the question of transgender obligation ‘frames cisgender identity, experience and perspective as … the *yardstick by which ethics and morality themselves are determined*. It extends cis privilege into the concepts of “right” and “wrong” itself, determining morality primarily by how it relates to a cis person’s experience of a conflict, cis perceptions of identity, cis perceptions of “truth” and “falsehood,” cis perceptions of what are the salient issues in identity and sexual interaction.’[[31]](#footnote-31)

This problem is also apparent in the differential value we accord to the feelings of the parties to desire. Thus, and as criminal prosecutions reveal, concern tends to lie with ‘harm’ experienced by cisgender people, occasioned through ‘discovery’ of ‘unwitting’ sexual communion with transgender people. That is, legal and broader cultural conversations about such scenarios tend to focus, almost exclusively, on feelings of hurt, outrage, distress, humiliation and disgust that a cisgender person (understandably) experiences at the moment of ‘discovery’ and subsequently. Indeed, so seriously do we take cisgender feelings at the moment of ‘discovery’ that they have frequently served as a basis for a diminished responsibility type defence on occasions when transgender people have been murdered.[[32]](#footnote-32)

Conversely, less, if any, ethical attention is given to the fact that transgender people are, in such circumstances, subjected to considerable shaming and to other forms of degradation. After all, the typical complainant, and subsequent legal and societal, response to knowledge that ‘inadvertent’ cis-trans sexual intimacy has occurred is to seek to expel what has been experienced as ‘polluting.’[[33]](#footnote-33) Through the expression of individual and collective disgust, transgender people are literally abjected,[[34]](#footnote-34) that is, ‘treated like “shit”’[[35]](#footnote-35) and, of course, this process is integral to their very constitution as Other.[[36]](#footnote-36) The point here however, is not to introduce a harm calculus, to attempt to weigh relative harms. This is an issue we will explore in the following section where we will consider the demands of normative ethics. Nor is it to highlight how the ever-present threat of such shaming and othering practices serves to preclude disclosure, though this point certainly stands repetition. Rather, it is to highlight how the perspectives and feelings of cisgender people tend to condition ethical thought itself.

The tendency to approach ethical questions from a cisgender perspective, one that proceeds from the assumption that everyone is cisgender, an assumption that is clearly unwarranted and demonstrably false, must be avoided if proper ethical characterisation of sexual conduct/omission is our object. Indeed, we might focus on the cisgender demand to know as the proper object of ethical scrutiny. Posing the question in this way shines a light on those who would otherwise sit in judgment and whose sexual ethics normally escape our attention. Further, it brings into sharp relief the question of burden and who should bear it. After all, it is peculiar that those for whom particular facts are apparently fundamental, are relieved from having to make any effort to ensure that sexual scenarios conform with those facts. Surely, refusing to bear any responsibility for the possibility that actual sex might differ from imagined sex is questionable in ethical terms.

Placing the obligation on transgender people produces a situation where the one who has no problem with his/her identity/body (why would s/he), is required to disclose personal information to the one who has a problem. On this account, the ethical characterisation of sexually active transgender people becomes an effect of a willingness to respond to and endorse the (cis)sexism and (trans)phobia harboured by others. Indeed, the transgender person who wishes to remain ethical must not only respond to prejudice, but must, in order to do so, have already internalised it. In this respect, the truly ethical transgender person emerges as a self-loathing individual who cannot legitimately imagine him/herself to be the object of another’s desire. It seems to me that if inquiry is to proceed from such ‘givens,’ it can hardly be described as ethical.

Indeed, we might consider it ethical for a transgender person to withhold information in circumstances where it is feared a cisgender sexual partner may be transphobic. Not because of potential violence, though this is an important issue we will return to in the following section. But because dehumanised people might first want to give others the opportunity to get to know them as fully human before potentially being dismissed as ‘freaks.’[[37]](#footnote-37) Indeed, and while recognising that fear of transphobic reactions might not be based on knowledge or even suspicion of their likelihood in the context of a specific sexual encounter, but on prior experiences and internalised transphobia, we might even choose to characterise a person who is willing to love in the face of another’s prejudice, to run that risk, as laudable or even heroic.

Of course, I recognise that, in the same way that most Jews would not want to become sexually intimate with an anti-semite, and most black people would not want to become sexually intimate with a racist, most transgender people would not want to become sexually intimate with a transphobe. It is revealing nevertheless, how those transgender people whose love might survive an encounter with prejudice are likely to be read in terms of deception rather than virtue. This observation becomes especially pronounced once we recognise the virtual silence concerning the dubious relationship between ethical selfhood and failure to disclose a transphobic mindset prior to sexual intimacy with a person who, after all, may be transgender.

Having marshalled my position on the ‘authenticity’ of gender identity, and having teased out the conundrum that questions of authenticity present for establishing ethical first principles, I now turn to addressing the concerns of those who, while accepting gender identity claims, might argue that other facts about gender exist in relation to which lying or non-disclosure of information might assume ethical importance. In my view, such arguments always seem to pull the rug from under the very identities they nominally concede. Nevertheless, while I adopt a skeptical position in relation to such arguments, it is important to address them, at least strategically, because in a cisnormative society they have acquired traction in ethical debates.[[38]](#footnote-38)

1.4 Engaging with Normative Ethics

In this section we turn to consider the demands of normative ethics. It is recognised that ethical inquiry within philosophy also encompasses *applied*, *meta* and *descriptive* ethics.[[39]](#footnote-39) Moreover, thinking about ‘deception’ in the specific context of cis-trans sexual intimacy, necessarily entails these other avenues of ethical inquiry. Thus our inquiry involves applied ethics, given the specific focus adopted. It is meta ethical given our interest in what it means to be ethically gendered, a theme we will explore in depth in section 1.5, and it covers descriptive ethics in that it covers actual and widespread moral beliefs held by cisgender people. Nevertheless, it is primarily the normative ethical question of what we owe to each other in sexual contexts, and specifically prior to sexual intimacy, with which we are concerned. So far, we have proceeded on the basis that we should accept gender identity claims, except in rare circumstances where they are demonstrably false.[[40]](#footnote-40) It might be argued however, that while a person’s gender identity cannot be considered a lie, nor can it call for disclosure because it is already on show performatively, lying about other facts which bear a gendered character or not disclosing such facts might constitute unethical deception.

The kind of facts likely to be identified here are those pertaining to the body, to its past and/or present (especially genital) state, to gender history and/or legal status, and perhaps gender socialisation.[[41]](#footnote-41) As already noted, any attempt to disaggregate such facts from gender identity must be treated with caution given that such information seems to have little value beyond its use in challenging gender identity claims. In this sense, the ethical significance of a distinction between gender identity and other facts concerning gender is less analytically distinct than might be imagined. Nevertheless, and while bearing this important concern in mind, let us turn our attention to considering the ethical significance of lying about or not disclosing other gendered facts.

Let us begin by noting that the phrase ‘unethical deception’ presupposes that deception, either through acts or omission, is not necessarily unethical. This point is perhaps easier to grasp in relation to non-disclosure of information, because characterisation of omission as unethical requires first establishing a duty to act. However, even in relation to lying, while we perhaps bear a general moral duty to refrain from doing so,[[42]](#footnote-42) there are clearly cases where lying is less easily described as unethical.[[43]](#footnote-43) As Carson observes, ‘[i]f we say that lying is always wrong no matter what, then we are claiming that the duty not to lie is always more important than any conflicting duties. However, on reflection this claim is very dubious. There is no good reason to think that the duty not to lie is always and necessarily more important than the duty to prevent harm to others.’[[44]](#footnote-44) If it were it would produce some perverse results. For example, it would lead to a conclusion that a Jewish woman, who lied about her Jewish status to a Nazi officer in order to avoid being sent to a concentration camp, acted unethically.[[45]](#footnote-45) As Judith Butler has noted, such moments are ‘not the time to go Kantian.’[[46]](#footnote-46)

In developing my argument, I reject the notion that there is an overriding duty-based obligation not to lie about or to disclose facts pertaining to gender, though accept that such an obligation may arise if telling the truth or disclosing information can be shown to produce the best overall consequences. In other words, I am adopting a consequentialist approach to the problem facing us and will argue that lying and/or non-disclosure may, and typically will, produce the best overall result.[[47]](#footnote-47) Accordingly, I will focus on consequential harm arising, or potentially arising, out of a decision to lie about or not disclose facts about gender, and argue, at least for the purposes of this part of the article, that this ought to prove decisive in any evaluative exercise. Emphasis on harm, and the need to balance harms, as central to proper ethical characterisation of decision-making ensures analysis remains grounded in social reality and embodied experience. It also reveals, indeed heightens, what is at stake for parties to desire. While harms can clearly be disaggregated from wrongs,[[48]](#footnote-48) and while complainants in gender identity fraud cases identify both as a source of complaint, it remains the case that harms or potential harms occasioned by discovering facts pertaining to gender must be balanced against those harms arising, or likely to arise, from having to disclose those same facts. Indeed, within a consequentialist framework, wrongs are rendered unimportant, or at least important only to the extent that they identify harms.

Before proceeding further, and in order to ensure that ethical analysis remains tied to real life situations, it will be helpful to clarify what is envisaged by ‘unethical deception.’ To begin with, let us remove from the table a whole series of rather abstract and somewhat unreal situations. To begin with, we are not dealing with scenarios where a transgender man announces that he is, or has always been, legally or chromosomally male. Nobody makes statements of this kind because there is no need to do so, and because to make such a statement is immediately to call into question, in the mind of the addressee, the authenticity of the claim. Equally, nobody asks questions along these lines, and if they did it would appear to suggest that they have knowledge, or at least suspicion, concerning the gender history of their intended sexual partner.

Indeed, when one stops to think about it, it is actually quite difficult to imagine the content of a lie that might actually be told or the content of a question that might actually be asked and which might produce a lie by way of response. This claim is borne out, not only by common sense, but by the gender identity fraud cases prosecuted.[[49]](#footnote-49) Moreover, given the difficulty of identifying a lie that a transgender person might tell or a question his/her sexual partner might plausibly ask, it would seem that the substantive ethical issue relates to information and its disclosure. In other words, it is non-disclosure or omission which provides the substance around which practical moral reasoning needs to be organised and, for this reason, the remainder of this section will focus on it rather than lying, and will argue that non-disclosure of facts about gender, beyond the fact of gender identity itself, is not necessarily unethical for at least two reasons. First, a conclusion that non-disclosure constitutes unethical omission depends on the existence of a prima facie moral obligation to disclose information, and second, if such an obligation exists, it presupposes that non-disclosure cannot otherwise be justified according to normative ethical considerations. It is to these matters that we now turn.

*(i) A Moral Obligation to Disclose Information*

While it is generally accepted that there exists a prima facie moral obligation to refrain from lying, there is a lack of consensus as to the moral status of non-disclosure of information. Certainly, non-disclosure of information is typically thought to be less morally problematic than lying.[[50]](#footnote-50) As Scanlon argues, ‘[a] principle forbidding one to lie (or to give intentionally misleading information) is, obviously, easier to argue for than one requiring the provision of information.’[[51]](#footnote-51) Importantly, and emphasising liberal ideas of autonomy and privacy, many, if not all,[[52]](#footnote-52) philosophers consider non-disclosure to fall outside the sphere of ethical condemnation altogether. Thus, Shoeman observes that provided that ‘a person does not misrepresent himself to those who, within the relevant domain, reasonably rely on his projected image, that person is not acting deceptively.’[[53]](#footnote-53) Others have articulated this position more strongly. Thus, according to William Ross,[[54]](#footnote-54) and as noted by Carson, while there is generally ‘a duty to refrain from lying’ there is ‘no duty to tell the truth or reveal information.’[[55]](#footnote-55)

Moreover, a duty to reveal information, if it does exist, presupposes that the party who chooses not to reveal, appreciates the importance of the information either to the other sexual party, or in general normative terms. In the present context, this presents some difficulties which we will consider before addressing justifications for non-disclosure that might operate in any event. In essence, what we are considering here is the question of knowledge, as distinct from motivation. While both bare down on questions of ethicality, it should be recognised that knowledge that particular facts hold importance to the other sexual party does not demonstrate that non-disclosure was motivated by a desire to deceive, either in order to have sex irrespective of consent or at all, an issue to be considered later in the context of justification. As Sissela Bok notes, ‘[t]o confuse secrecy and deception is easy, since all deception does involve keeping something secret … But while all deception requires secrecy, all secrecy is not meant to deceive.’[[56]](#footnote-56)

Thus, for the purposes of this section, my argument is that a duty to disclose, if it arises at all, can only arise in circumstances where a person has knowledge, or ought to have knowledge, of the importance of particular gendered facts to his or her sexual partner. One of the problems, in the present context, lies in the tendency to assume that cisgender people would consider it important to know that their sexual partner is transgender, and transgender people therefore must have knowledge of the importance of this information. While one might argue, as Ross does, that a duty to disclose information does not, or ought not, to arise in any event, if one were to accept that a duty does arise with knowledge, then a duty might be said to arise here. The difficulty, of course, rests with assumptions about what cisgender people consider important and what transgender people are assumed to know, or ought to know, about what cisgender people consider important.

First, the assumption that transgender status is an important fact for cisgender people to know proceeds from and reinforces the cissexist notion that a cisgender person’s consent would not be forthcoming if she were aware of the other party’s gender history. This outlook, one that flies in the face of the empirical reality of successful unions between cisgender and transgender people, renders transgender people and their bodies undesirable,[[57]](#footnote-57) and therefore sexual congress with us unimaginable. By the same token, we should not assume transgender people to be self-loathing individuals, incapable of imagining ourselves to be the proper object of cisgender desire. In other words, if duty presupposes knowledge, a conclusion that omission constitutes ethical failure must rely on actual knowledge, or at least knowledge one ought to possess, rather than on non-empirically based assumptions concerning cisgender desire or transgender self-repudiation.[[58]](#footnote-58) Crucially, a duty to disclose cannot be founded on the manufacture of knowledge out of prejudice.

In any event, if there is a prima facie obligation to disclose gendered facts, non-disclosure may nevertheless be justified. While the burden of proof must rest ultimately with those who sit in judgment, I will argue that there are at least two broad justifications for not disclosing facts about gender history or past or present anatomical or legal gender status, justifications which, if persuasive, ought to uncouple non-disclosure from moral censure. These justifications are to be found in the value of privacy, both in relation to individual well-being and human intersubjectivity, and in a concern to preserve the self, both in physical and psychic terms. It is contended that in determining the ethicality of decision-making, such factors must be considered and weighed, at least if the ethical bar is not to be set too high, and that these factors, when properly considered, demonstrate, at least in some and perhaps most cases, that non-disclosure produces the best overall consequences. Both of these justifications, in addition to providing support for characterising non-disclosure as ethical, point to motivational forces for non-disclosure other than a desire to have sex irrespective of the other party’s consent. While this latter motivation tends to be readily assumed, consent, as Moira Carmody argues, ‘remains a limited concept without some consideration of how individuals as sexed and gendered bodies constitute themselves as ethical.’[[59]](#footnote-59)

*(ii) Justifications*

*(a) Privacy*

Privacy is an important value and one compromised by an obligation either to disclose information or to always tell the truth. As already noted, the focus here lies with non-disclosure of information. In making an ethical case for not disclosing historical or present facts bearing a gendered character, I will argue that privacy constitutes a significant good in the consequentialist weighing exercise. While privacy is clearly a right that comes with some baggage, as feminist scholars have long pointed out,[[60]](#footnote-60) it remains necessary to recognise its importance and to carve space for an inner life. After all, as Charles Fried has argued, privacy is essential to the formation of relationships, including those of love and friendship, for relationships between self and others are based on an individual’s ability to share and control personal information.[[61]](#footnote-61)

Indeed, for Fried, without privacy, such relationships ‘are simply inconceivable.’[[62]](#footnote-62) This is a view shared by Thomas Nagel who insists that ‘the boundary between what we reveal and what we do not, and some control over the boundary, are among the most important attributes of our humanity.’[[63]](#footnote-63) Moreover, the need to exercise some control over personal information is perhaps especially marked in relation to identity. As Bok notes, in relation to personal identity, secrecy guards its central aspects.[[64]](#footnote-64) Indeed, for Bok, ‘without perceiving some sacredness in human identity, individuals are out of touch with the depth they might feel in themselves and respond to in others.’[[65]](#footnote-65) Accordingly, and in this sense, privacy or reticence with regard to the sharing of personal information might be viewed as a necessary ground of ethics, of ethical decision-making, of an ethical relation with others.[[66]](#footnote-66)

*(b) Self-Preservation*

Female complainants in gender identity fraud cases speak of distress, humiliation and disgust when describing their experience of ‘discovering’ that their sexual partners are transgender. It is not my intention to trivialise such experiences. However, it is important to recognise that they are inextricably connected to homo/trans phobias which they sustain. As Cressida Heyes notes, it is inadequate to identify harms without first recognising as an ethical problem, disciplinary practices that produce harms, that render practices meaningful in terms of harm. In other words, any theory that presents itself as ethical must both acknowledge and challenge normalisation, lest it contribute to the very harms it identifies and on the basis of which presumes to judge.[[67]](#footnote-67)

Moreover, and more pertinently for present purposes, harms which cisgender people identify need to be balanced against the harms transgender people face, and experience on a fairly regular basis, whenever we expose our transgender status. As we will see, these harms appear to be more significant than cisgender disgust, and therefore support maintaining privacy as a consequentialist rule. In a passage that has particular resonance for transgender people, Thomas Nagel argues that ‘[s]ome forms of reticence have a social function, protecting us from one another and from undesirable collisions and hostile reactions. Other forms of reticience have a personal function, protecting the inner life from a public exposure that would cause it to wither, or would require too much distortion.’[[68]](#footnote-68) In essence, Nagel, while referring to people generally, captures both sides of the dilemma transgender people face in trying to negotiate their way in a cissexist and transphobic society. In relation to protecting the inner life from a public exposure that would cause it to wither, for many transgender people, disclosing highly personal information concerning chromosomal status, earlier or present gonadal and/or genital condition, as well as a history of coerced gendered performance is a source of pain and trauma.

It is perhaps difficult here to specify the most appropriate analogy. However, secrecy, or the maintenance of privacy, in relation to gender history might be compared to the control of information exhibited by some victims of child abuse. We would not demand that a victim of child abuse disclose details of the abuse or even the fact of abuse within the context of an intimate relationship. Indeed, even in the context of a lengthy marriage, it would be hard to insist on an ethical obligation to disclose a history of child abuse. The reader might respond that this is because (a) an intimate partner would remain unaffected by such personal information and (b) it would be intolerable to demand disclosure in these circumstances. In relation to (b) the point is well made. In relation to (a) however, it is far from clear that an intimate partner would remain unaffected over the course of a relationship. A history of child abuse might make its presence felt in numerous ways.[[69]](#footnote-69) The important point here is to recognise the relationship between non-disclosure of core personal information and psychic survival. If ethics requires sacrifice, this surely cannot encompass the abandonment of a desire to preserve the self or amount to psychic suicide. That is, we ought not to demand a supererogatory kind of ethical performance.

Moreover, the force of an ethical demand to disclose information would, if it is not to be diluted, have to overcome, not only a legitimate desire to stave of psychological harm, but also a concern to avoid physical, including lethal, violence. Violence against transgender people is pervasive and well-documented.[[70]](#footnote-70) In fact, it is worth emphasising that a more typical outcome of non-disclosure of gender history is not criminal prosecution, but the hospitalisation or burial of transgender people.[[71]](#footnote-71) In this respect, and in terms of political theory, the ethical demand to disclose would appear to sit uncomfortably with the state’s failure to meet its first obligation to its citizens, namely to provide physical protection.[[72]](#footnote-72) To argue for an ethical demand to disclose then, is literally to put lives on the line. It is also indicative of a failure to recognise the ‘double-bind’ in which transgender people are placed.[[73]](#footnote-73) On the one hand, transgender people are expected to be invisible, to disappear into binary gender.[[74]](#footnote-74) In doing so, we reassure cisgender people about the proper relationship between and the naturalness of their own sex, gender and sexuality. On the other hand, whenever cisgender people express desire toward transgender people, we are expected to reappear quick smart, and irrespective of the always present dangers that accompany disclosure.

Ultimately, we have to wonder whether ‘gender deception’ is best understood as ‘one laudable tactic of attempted survival in what appears to be an exceptionally violent no-win situation.’[[75]](#footnote-75) After all, isn’t telling the ‘truth’ ‘only to acquiesce to the morality of oppression’[[76]](#footnote-76) and isn’t ‘disclosure discourse,’ a discourse ‘used to justify real violence against transgender people,’ also ‘one of the primary grounds on which cis-supremacy is enacted.’[[77]](#footnote-77) As Wilchins observes, in posing the Foucauldian question, *what does it cost to tell the truth?*,[[78]](#footnote-78) some of us bare a different and more costly relationship to telling the ‘truth’ about our gender than others. For those whose sense of gender self matches their anatomy it perhaps costs little. For ‘the rest of us, though, it can cost a great deal.’[[79]](#footnote-79)

This section of the article has sought to engage with normative ethics in order to demonstrate that within these philosophical terms non-disclosure of gender history can be justified. To that end, it relied on rule consequentialism and demonstrated how this approach is, in the present context, capable of doing the necessary work, albeit such an approach necessarily sacrifices claims about individual justice and rights. However, ultimately, ethical analysis about what we owe to each other in contexts of cis-trans sexual intimacy cannot be reduced to a cost-benefit analysis or to an assessment of what produces the greatest good, albeit such an analysis appears to favour non-disclosure. Nor, for that matter, can it be reduced to questions of duty or right. Rather, if ethical thinking in this context is to avoid impoverishment, it must engage more seriously with the complexity of gender and sexuality, of the body and desire. In other words, we must move beyond a concern with normative ethics in order to deal with meta-ethical concerns, principally the matter of how we conceive of and make ethical judgments about gender, and in doing so we necessarily return to the social-relatedness of ethical issues, that is, to questions of privilege and power. In the present context, to act and think ethically first requires that we assume a position which Julia Serano has described as ‘ethically gendered.’[[80]](#footnote-80)

1.5 To Be(come) Ethically Gendered: Beyond Cisnormativity

In this section, we turn away from the concerns of normative ethics in order to venture into the territory of what it might mean to be(come) ethically gendered in a cisnormative society. As Tim Dean notes, ‘it is not the recognizable other but the unrecognizable other … that most urgently calls for an ethical attitude.’[[81]](#footnote-81) Ultimately, ethical thought in the context of sexual intimacy between cisgender and transgender people requires reflexivity and openness. Of course, it requires recognition of cisgender privilege or gender entitlement, something which, in the present context, means never having to ‘come out’ or declare one’s gender identity, or even consider what this might mean, and which, in addition to producing a sense of intelligible gender that requires no explanation, encourages a view that cissexuality exhausts sexual desire, an outlook, it should be emphasised, that fails to conceive of the possibility of other forms of consensual intimacy. It requires recognising ‘how a culturally central concept like public/private is organized so as to preserve for [cissexuality as well as] heterosexuality the unproblematicalness, the apparent naturalness, of its *discretionary* choice between display and concealment.’[[82]](#footnote-82) But it requires more than acknowledging privilege, it requires self-examination.

As Serano argues, it requires ‘gender-anxious cissexuals to look deep within themselves and ask why they *choose* to view transsexual bodies as unsettling or disturbing.’[[83]](#footnote-83) Crucially, being ‘ethically gendered … requires us to engage in personal reflection and questioning.’[[84]](#footnote-84) As Serano suggests, ‘this process might begin by critically examining that [to] which we are not attracted.’[[85]](#footnote-85) Thus we might ask: ‘[i]f we do not desire a particular type of person or sexual practice, why is that? Does it simply not pique our interest? Or do we have a strong visceral reaction against it? Do we find it abhorrent? Or do we experience some level of attraction, but we are reluctant to act on it because we would be too embarrassed if someone else were to find out?’[[86]](#footnote-86) Thinking about these and other questions ought to be central to any enterprise that aims to draw conclusions about ethical selfhood.

Crucially, we ‘must stop projecting what we wish were true about gender and sexuality onto other people, and instead learn to yield to their unique individual identities, experiences and perspectives.’[[87]](#footnote-87) The first step in this process perhaps, is to disabuse ourselves of the ludicrous assumption that everybody is cisgender. While this assumption is demonstrably false, it continues to structure the approach of most, if not all, cisgender people to the sexual life-world. However, ‘seeing’ transgender people, or overcoming ‘the killing pretense that a culture does not know what it knows,’[[88]](#footnote-88) is not enough. We must also resist the tendency toward what Ann Cahill has described as ‘derivitization.’[[89]](#footnote-89) To derivatize is to treat another as a thing, rather than a self. Not to derivatize ‘requires encountering a person, even a person one might want to have sex with, without asking what this encounter says about me. … Not to derivatize another person means not confusing my encounter with her for a horrifying portrait of myself, an event that is entirely about me.’[[90]](#footnote-90)

As Judith Butler explains, the task is to understand how ‘we encounter the difference that calls our grids of intelligibility into question without trying to foreclose the challenge that the difference delivers.’[[91]](#footnote-91) It is to ask, ‘[w]hat might it mean to learn to live in the anxiety of that challenge, to feel the surety of one’s epistemological and ontological anchor go, but be willing, in the name of the human to become something other than what it is traditionally assumed to be.’[[92]](#footnote-92) As Adriana Cavarero points out, with a nod to Arendt, the question we pose is ‘who are you?’[[93]](#footnote-93) This question, though simple, is unanswerable.[[94]](#footnote-94) But in the face of it we can at least avoid, or attempt to avoid, violence. As Butler explains:

The violent [and, of course, the unethical] response is the one that does not ask, and does not seek to know. It wants to shore up what it knows, to expunge what threatens it with not-knowing, what forces it to reconsider the presuppositions of its world, their contingency, their malleability. The nonviolent response lives with its unknowingness about the other in the face of the Other, since sustaining the bond that the question opens is finally more valuable than knowing in advance what holds us in common, as if we already have all the resources we need to know what defines the human, what its future life might be.[[95]](#footnote-95)

1.6 Conclusion

This article has concerned itself with ethical rather than criminal law questions in thinking about occasions of sexual intimacy between cisgender and transgender people. A focus on ethics is considered especially important because, while liberal scholars have generally exhibited scepticism regarding the use of criminal law in the context of desire-led intimacy, and certainly in the present context, such scepticism was noted to often evaporate when attention turned to the proper ethical characterisation of non-disclosure of gender history. In view of this tendency to view non-disclosure as unethical deception, the article began by considering the relationship between gender, truth and power. In doing so, it recognised the contested nature of ‘truth’ about gender identities and the bodies to which they (sometimes uneasily) correspond. While the posing of some ‘ethical’ questions appears to problematise the gender identities of transgender people, it was taken as given that transgender men and transgender women are the men and women they claim to be. Indeed, insistence on this point was considered unavoidable if analysis was to be properly described as ethical.

In taking this position, it was not suggested that identity should be understood in some essentialised way. Rather, we are all products of social construction. The point the article sought to emphasise however, is that the gender identities of transgender people are no less, albeit no more, real than those of cisgender people. Accordingly, they should be taken as seriously and receive the same degree of respect. In developing this theme, the article highlighted how questioning gender identity is an effect of the power and privilege cisgender people enjoy. Moreover, it was argued that cisgender identity, experience and perspective actually operate to frame ethical thinking itself in relation to these particular kinds of desire-led intimacy. Indeed, an ‘ethical’ focus on an assumed obligation to disclose gender history perhaps gives the game away. That is to say, scrutiny of a cisgender demand to know rarely, if ever, receives proper attention. Yet, it is precisely this demand that ought perhaps to preoccupy us if it is the ethical that we wish to appeal, that is, if we wish to approach sexual intimacies between cisgender and transgender people through an appropriate moral grammar.

The article then considered the possibility that it might constitute unethical deception to lie about or to fail to disclose facts relating to gender beyond the fact of gender identity itself. While recognising that such a distinction is always vulnerable to analytical collapse, given other facts about gender tend to prove relevant only to the extent that they cast doubt on gender identity, the article first considered whether a duty to disclose exists and, if it does, argued that non-disclosure of gendered facts might nevertheless be justified in normative ethical terms. That is, and while recognising that deception is not necessarily unethical, the article sought to defend what might be considered deception against precisely this charge. To that end, the article considered the costs of disclosure. It argued that non-disclosure of highly personal information can be viewed as consistent with ethical selfhood. This argument entailed consideration of the importance of a private life and the threat disclosure can pose to preservation of self, both in psychological and physical terms. In these latter respects, the article emphasised that ethical significance attaches to the fact that the costs of disclosure are unevenly distributed across the cisgender-transgender divide.

Finally, the article returned to questions of privilege and power. In opposition to kinds of ethical framing which centre the experiences and perspectives of cisgender people, it asked instead what it might mean to be ethically gendered. Drawing on transgender and queer theories it called on cisgender people to not only recognise their privilege, but to engage in self-examination. Importantly, this requires abandoning the gender fiction that cisgender people exhaust the categories of men and women. It also necessitates some introspection concerning the nature and sources of anxieties held about communion with transgender bodies. And it most certainly requires assuming a degree of ownership for desires that are pleasurably acted out and only retrospectively reimagined as harmful, and this is perhaps especially so where gender ambiguity lies at the heart of a desire-based encounter. Ultimately, as Butler contends, we must all learn to feel the surety of our epistemological and ontological anchor go, at least if we wish to maintain ethical sexual relationships with gendered others.

1.7 Postscript

On 20 July 2017 I submitted this article to the editors. On the same day, Judge Stockdale handed down a six and a half year prison sentence to Gayle Newland[[96]](#footnote-96) at Manchester Crown Court.[[97]](#footnote-97) Sadly, it seems unlikely that Gayle’s case will mark the end of gender identity fraud prosecutions in the UK. Rather, the attrition against gender non-conforming kids looks likely to continue unabated. Each of us must consider our complicity in this state of affairs.

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   The term *transgender* has become something of an umbrella term for all trans identified people (Bornstein Kate *Gender Outlaw: On Men, Women, and the Rest of Us* New York Routledge New York 1994; Feinberg Leslie *Transgender Warriors: Making History from Joan of Arc to Ru Paul* Beacon Press Boston 1996). For the purposes of this article, it is used in a more limited sense to refer to people who feel incongruence between their gender identity and their anatomy. The term *transsexual* is often used in this respect. However, the term *transsexual* fails to exhaust this group because many transgender people refuse the *transsexual* label because of its medical history and pathologising effects, and because not all transgender people seek to resolve the conflict through surgical intervention (see Sharpe Alex *Transgender Jurisprudence: Dysphoric Bodies of Law* Cavendish London 2002, Chp 2). [↑](#footnote-ref-1)
2. The term *cisgender* refers to those cissexual people who are comfortable with gender expectations that are socially constructed to follow from the fact of cissexuality. The term *cissexual* refers to people ‘who have only ever experienced their subconscious and physical sexes as being aligned’ (Serano Julia *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity* Seal Press Berkeley, CA 2007 p 33). It is used in preference to terms like *natural*, *real*, *biological*, *genetic* or other terms which presuppose and reinforce the primacy of cissexual people. In this article, I will use both *cisgender* and *cissexual* depending on the context. However, I will typically use *cisgender* because cisgender people are also cissexual, while the reverse is not necessarily so (for example, queer identified people do not identify as cisgender) and it is cisgender, rather than cissexual, complainant status that is likely to be the better indicator of whether a gender identity fraud complaint will be made and whether the ethicality of gender non-conforming people will be challenged. *Cisnormativity* assumes people to experience harmony between their gender identity and their anatomy, and privileges those who do. The related term, c*issexism*, refers to the belief that transgender people’s gender identities ‘are inferior to, or less authentic than, those of cissexuals’ (Serano p 12). [↑](#footnote-ref-2)
3. *R v Gemma Barker* 5/3/12 (Unrept, Guildford Crown Court, Judge Moss); *R v Chris Wilson* 7/3/13 (Unrept, Edinburgh High Court, Lord Bannatyne); *R v Justine McNally* [2013] EWCA Crim 1051; *R v Gayle Newland* 15/9/15 (Unrept, Chester Crown Court, Judge Dutton); *R v Kyran Lee (Mason)* 16/12/15 (Unrept, Lincoln Crown Court, Judge Heath); *R v Jason Staines* 24/3/16 (Unrept, Bristol Crown Court, Judge Cotter); *R v Newland* 29/6/17 (Unrept, Manchester Crown Court, Judge Stockdale). There was also an earlier case (*R v Jennifer Saunders* 12/10/91 (Unrept, Doncaster Crown Court, Judge Crabtree)). [↑](#footnote-ref-3)
4. Chris Wilson, Kyran Lee (Mason), and Jason Staines as above note 3. In other cases the matter is less clear. However, even in the *Newland* case, where the defendant self-described as lesbian, a pre-sentencing psychiatric report, referred to by Newland’s barrister after Newland’s conviction in 2017, noted that Newland suffered from a number of mental health conditions, including gender dysphoria (Jonathan Humphries ‘Gayle Newland to be Sentenced for Posing as Man to Dupe Friend into Sex with Fake Penis’ *The Liverpool Echo* 20/7/17 available at <http://www.liverpoolecho.co.uk/news/liverpool-news/gayle-newland-sentenced-posing-man-13358713> (last accessed: 20/7/17). [↑](#footnote-ref-4)
5. Gayle Newland received eight years at her original trial. Her conviction was set aside by the Court of Appeal who found it unsafe, due to the summing up of the trial judge, and ordered a retrial. In June 2017, Newland was convicted by a second jury, and in July was sentenced to six years, six months in prison. However, the six months related to financial fraud offences unrelated to Newland’s involvement with the complainant (Humphries as above). [↑](#footnote-ref-5)
6. See, for example, Simester Andrew, Sullivan GR, Spencer John and Virgo Graham *Criminal Law: Theory and Doctrine* (4th edn) Hart Publishing, Oxford 2010 p 755; Ormerod David *Smith and Hogan’s Criminal Law* (13th edn) Oxford University Press Oxford 2011 p 734). [↑](#footnote-ref-6)
7. The view that not all immoral acts should be subject to the criminal law or, which is the same thing, opposition to ‘legal moralism,’ is well-established within liberalism. In particular, ‘immoral’ acts that are private, consensual and self-regarding are viewed as being rightly beyond the law, as none of its business (see Hart Herbert LA *Law, Liberty and Morality* Stanford University Press Palo Alto, CA 1964). [↑](#footnote-ref-7)
8. Moore Alison ‘Shame on You: The Role of Shame, Disgust and Humiliation in Media Representations of ‘Gender Fraud’ Cases’ (2016) 21(2) *Sociological Research Online* 10. [↑](#footnote-ref-8)
9. This attitude is one noted by others within the legal academy (Colb Sherry F ‘Is There a Moral Duty to Disclose That You’re Transgender to a Potential Partner?’ *Verdict* 6/18/15 available at <https://verdict.justia.com/2015/06/18/is-there-a-moral-duty-to-disclose-that-youre-transgender-to-a-potential-partner> (last accessed: 19/7/17). [↑](#footnote-ref-9)
10. It is far from clear in practice that the distinction between active deception and non-disclosure of information serves to protect transgender people who simply exercise privacy. In most of the gender identity fraud cases prosecuted it was not made clear whether the basis for conviction lay with acts or omission. [↑](#footnote-ref-10)
11. As established by the Court of Appeal in *R v McNally* [2013] as above note 3. It should be noted however, that non-disclosure may have other legal consequences. Thus, in the context of marriage, failure to disclose ‘gender history’ prior to a marriage operates as a legal ground for having the marriage annulled (s. 12(h) Matrimonial Causes Act 1973) (for a discussion of this provision see Sharpe Alex ‘Transgender Marriage and the Legal Obligation to Disclose Gender History’ (2012) 75(1) *Modern Law Review* 33. [↑](#footnote-ref-11)
12. Serano Julia *Excluded: Making Feminist and Queer Movements More Inclusive* Seal Press Berkeley CA 2013 p 259. [↑](#footnote-ref-12)
13. The phrase, ‘suspension of disbelief,’ was first coined by the poet and aesthetic philosopher, Samuel Taylor Coleridge (*Biographia Literaria* (vol 2) Clarendon Press London 1907). It was used to suggest that if a writer could inject a ‘human interest and a semblance of truth’ into a fantastic tale, the reader would suspend judgment concerning the implausibility of the story (Chp XIV p 6). The ‘semblance of truth’ in the gender identity fraud cases lies in complainant claims of ignorance regarding the gender history of defendants. After all, no matter how otherwise implausible an account may be, young heterosexual cisgender women do not, apparently, willingly choose to become sexually intimate with transgender or other gender non-conforming people. In support of the claim that at least some complainant tales were ‘fantastic,’ consider the cases of *Newland* and *Barker* (as above note 3). In *Newland*, the parties had sex on ten occasions and spent over hundred hours in each other’s company. The complainant was apparently unaware of the truth about Newland’s lesbian identity due to a blindfold worn on all occasions at Newland’s request, claims Newland disputed. Her other senses, apparently, also deserted her. Thus her sense of touch proved insensitive to the contours and smooth surface of Newland’s body, which had not been masculinised through testosterone administration, to Newland’s long hair which reached the mid of her back, and to the prosthetic penis which Newland used, while her sense of hearing proved impervious to Newland’s voice which falls within the female range. In *Barker*, one of the complainants, who knew Barker previously as Gemma, claimed not to realise that she had been sexually intimate with Barker even though she had dated Barker in different ‘guises’ and under different pseudonyms. Thus after the termination of a sexually intimate relationship with Luke Jones (Barker) the complainant became sexually intimate with Connor McCormack (Barker) and at all times claimed to remain ignorant of the fact that Barker, Jones and McCormack were all one and the same person. For more detailed discussion of these issues see Sharpe Alex *Sexual Intimacy and Gender Identity ‘Fraud’: Reframing the Legal & Ethical Debate* Routledge London 2018 esp Chp 5 forthcoming. [↑](#footnote-ref-13)
14. Sedgwick Eve ‘Privilege of Unknowing’ (1988) 1 *Genders* 102; Sedgwick Eve *Tendencies* Duke University Press Durham 1993. [↑](#footnote-ref-14)
15. Sedgwick (1993) as above note 14 at 24. [↑](#footnote-ref-15)
16. As above at 25. [↑](#footnote-ref-16)
17. As above. [↑](#footnote-ref-17)
18. Laplanche Jean and Pontalis Jean-Bertrand, ‘Appendices: [Vocabulaire de la psychanalyse]’ (1972) 48 *Yale French Studies* 179 at 187. [↑](#footnote-ref-18)
19. Scanlon Thomas Michael *What We Owe to Each Other* Harvard University Press Cambridge MA 1998 p 2. [↑](#footnote-ref-19)
20. Williams Cristan ‘Gender Performance: The TransAdvocate Interviews Judith Butler’ *TransAdvocate* 1/5/14 available at <http://www.transadvocate.com/gender-performance-the-transadvocate-interviews-judith-butler_n_13652.htm> (last accessed: 19/7/17). [↑](#footnote-ref-20)
21. Bettcher Talia Mae ‘Trans Identities and First-Person Authority’ in Shrage LJ (ed) *You’ve Changed: Sex Reassignment and Personal Identity* Oxford University Press New York 2009 p 98 at 110. [↑](#footnote-ref-21)
22. Foucault Michel *Power/Knowledge: Selected Interviews and Other Writings*, 1972-1977 Pantheon New York 1980 p 132. [↑](#footnote-ref-22)
23. Ricoeur Paul *Freud and Philosophy: An Essay on Interpretation* Yale University Press New Haven 1970 p 356.  [↑](#footnote-ref-23)
24. Halberstam Jack ‘F2M: The Making of Female Masculinity’ in Doan L (ed) *The Lesbian Postmodern* Columbia University Press New York 1994 p 210 at 212. [↑](#footnote-ref-24)
25. Currah Paisley ‘Transgender Rights Without a Theory of Gender?’ 52(3) *Tulsa Law Review* (2017) 441 at 441. [↑](#footnote-ref-25)
26. Butler Judith *Bodies That Matter: On the Discursive Limits of Sex* Routledge London 1993 p xi. [↑](#footnote-ref-26)
27. As above. [↑](#footnote-ref-27)
28. As above. [↑](#footnote-ref-28)
29. As above at 226. [↑](#footnote-ref-29)
30. Reed Natalie ‘The “Ethical Imperative” Of Disclosure, Or: How to Believe Your Victim Owes You an Opportunity for Abuse’ [FreeThoughtBlogs.com](http://freethoughtblogs.com)20/3/12 available at <http://freethoughtblogs.com/nataliereed/2012/03/20/the-ethical-imperative-of-disclosure-or-how-to-believe-your-victim-owes-you-an-opportunity-for-abuse/> (last accessed: 19/7/17). [↑](#footnote-ref-30)
31. As above. [↑](#footnote-ref-31)
32. In the US, defence counsel have relied on ‘trans-panic,’ a variant on the so-called ‘homosexual panic’ defence to murder (see Steinberg Victoria ‘A Heat of Passion Offense: Emotions and Bias in “Trans-Panic” Mitigation Claims’ (2005) 25(1) *Boston College Third World Law Journal* 1). However, the notion of ‘panic’ tends to pathologise and therefore individualise the reaction to discovery, thereby masking the social and historical forces which produce it. [↑](#footnote-ref-32)
33. Douglas Mary *Purity and Danger* Routledge London 1966. [↑](#footnote-ref-33)
34. Kristeva Julia *The Powers of Horror: An Essay on Abjection* (trans. L. Roudiez) Columbia University Press New York 1982. [↑](#footnote-ref-34)
35. Cavanagh Sheila ‘Touching Gender: Abjection and the Hygienic Imagination’ in Stryker S and Aizura AZ (eds) *The Transgender Studies Reader* 2 Routledge London 2013 p 426 at 428. [↑](#footnote-ref-35)
36. Butler Judith *Gender Trouble: Feminism and the Subversion of Identity* Routledge London 1990 p 133. [↑](#footnote-ref-36)
37. Reed as above note 30. [↑](#footnote-ref-37)
38. Laird Karl ‘Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003’ (2014) 7 *Criminal Law Review* 492 at 509. [↑](#footnote-ref-38)
39. van der Burg Wibren ‘Law and Ethics: the Twin Disciplines’ (2010) *Erasmus Working Paper Series on Jurisprudence and Socio-Legal Studies No 10-02* p 5 available at <http://ssrn.com/abstract> (no=1631720) (last accessed 19/7/17). [↑](#footnote-ref-39)
40. *R v Devonald* [2008] EWCA Crim 527. In this case, a father pretended to be a twenty year old woman on the internet in order to seduce a young man to masturbate in front of a webcam as revenge for what he believed to have been the man’s mistreatment of his daughter. [↑](#footnote-ref-40)
41. Gender socialisation has assumed relevance in the context of the importance given to it by some radical feminists for the purposes of determining whether a person is a woman. For these feminists, described as Trans Exclusionary Radical Feminists (TERFs), a pejorative but nonetheless accurate term, gender socialisation as a girl/woman is fundamental to be classified as a woman. Indeed, this particular feminist position serves to redraw our attention to the way in which facts about gender tend to prove important for the purpose of calling into question gender identity itself. For a critique of the TERF position, see Sharpe Alex ‘The Poverty of Gender Critical Feminism’ *Inherently Human: Critical Perspectives on Law, Gender and Sexuality* 17/5/16 available at <https://inherentlyhuman.wordpress.com/2016/05/17/the-poverty-of-gender-critical-feminism/> (last accessed: 19/7/17). [↑](#footnote-ref-41)
42. Mill John Stuart *Utilitarianism* Hackett Press Indianapolis IN 1979. [↑](#footnote-ref-42)
43. Indeed, even Kant appears to have recognised situations where lying would be permissible (see Carson Thomas L *Lying and Deception: Theory and Practice* Oxford University Press Oxford 2010 Chp 3). [↑](#footnote-ref-43)
44. Carson as above note 43 at 85. [↑](#footnote-ref-44)
45. As above. [↑](#footnote-ref-45)
46. Quoted by Harrison Kelby *Sexual Deceit: The Ethics of Passing* Lexington Books Lanham Maryland 2013 p 54. [↑](#footnote-ref-46)
47. To be more precise, I am adopting rule consequentialism concerning information provision, at least for this part of my argument. In assessing consequences, it is harm that will be used as the measure. [↑](#footnote-ref-47)
48. Gardner John ‘The Wrongness of Rape’ in Gardner J *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* Oxford University Press 2007 Chp 1. [↑](#footnote-ref-48)
49. Thus none of the defendants claimed to be chromosomally or legally male and no complainant asked a question along these lines. [↑](#footnote-ref-49)
50. Ross William D *The Right and the Good* Oxford University Press Oxford 1930; Wilkinson Stephen ‘Why Lying Is Worse Than Merely Misleading’ (2000) 13 *Philosophy Today* 6. [↑](#footnote-ref-50)
51. Scanlon as above note 19 at 318. [↑](#footnote-ref-51)
52. Wasserstrom Richard ‘Privacy: Some Arguments and Assumptions’ in Bronaugh R (ed) *Philosophical Law* Greenwood Press Westport Conn 1978; Posner Richard ‘The Right to Privacy’ (1978) 12 *Georgia Law Review* 393. [↑](#footnote-ref-52)
53. Schoeman Ferdinand D ‘Privacy and Intimate Information’ in Schoeman FD (ed) *Philosophical Dimensions of Privacy: An Anthology* Cambridge University Press London 1984 p 403 at 409. [↑](#footnote-ref-53)
54. Ross as above note 50. [↑](#footnote-ref-54)
55. Carson as above note 43 at 103. [↑](#footnote-ref-55)
56. Bok Sissela *Secrets: On the Ethics of Concealment and Revelation* Vintage Books London 1998 p 7. [↑](#footnote-ref-56)
57. While this section of the article assumes the possibility of unethical omission, in order to refute it, the fact that what is really at stake is the desirability of bodies, might be viewed as involving the ethical collapsing into the aesthetic. That is, we might view knowledge as not bearing ethical import, but rather as something that can alter an aesthetic value, and therefore as something trivial when it comes to the ethics of relationships. I am indebted to my colleague, Anthony Wrigley, for this perceptive insight. [↑](#footnote-ref-57)
58. Shelley Christopher A *Transpeople: Repudiation, Trauma, Healing* University of Toronto Press Toronto 2008. [↑](#footnote-ref-58)
59. Carmody Moira ‘Sexual Ethics and the Erotics of Consent’ in Cowling P and Reynolds P (eds) *Making Sense of Sexual Consent* Ashgate Farnham, Surrey 2004 p 45. [↑](#footnote-ref-59)
60. Feminist critiques of liberal privacy emphasise, among other things, how the private realm has long functioned as a site of gendered violence, and it is recognised that state intervention into this realm is, in many contexts, warranted (Pateman Carol ‘Feminist Critiques of the Public/Private Dichotomy’ in Benn SI and Gaus GF (eds) *Public and Private in Social Life* St. Martin’s Press New York 1983 p 281; Okin Susan M *Justice, Gender and the Family* Basic Books New York 1989; Gavison Ruth ‘Feminism and the Public/Private Distinction’ (1992) 45 *Stanford Law Review* 1; Chinkin Christine ‘A Critique of the Public/Private Dimension’ (1999) 10(2) *European Journal of International Law* 387. [↑](#footnote-ref-60)
61. Fried Charles ‘Privacy: A Moral Analysis’ in Schoeman as above note 53 p 203. [↑](#footnote-ref-61)
62. As above at 205. [↑](#footnote-ref-62)
63. Nagel Thomas ‘Concealment and Exposure’ (1998) 27(1) *Philosophy and Public Affairs* 3 at 4. [↑](#footnote-ref-63)
64. Bok as above note 56 at 13. [↑](#footnote-ref-64)
65. As above at 21. [↑](#footnote-ref-65)
66. In Foucauldian terms, ‘[t]he care of the self is ethical in itself … and the ethos of freedom (which it implies) is also a way of caring for others’ (Rabinow Paul (ed) *Essential Works of Foucault, vol 1: Ethics* The New Press New York 1998 p 287). [↑](#footnote-ref-66)
67. Heyes Cressida *Self-Transformations: Foucault, Ethics and Normalized Bodies* Oxford University Press Oxford 2007. [↑](#footnote-ref-67)
68. Nagel as above note 63 at 10. [↑](#footnote-ref-68)
69. Berenson Kathy R and Andersen Susan M ‘Childhood Physical and Emotional Abuse by a Parent: Transference Effects in Adult Interpersonal Relationships’ (2006) 33 *Personality and Social Psychology Bulletin* 1509. [↑](#footnote-ref-69)
70. Whittle Stephen, Turner Lewis and Al-Alami Maryam *The Equalities Review: Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality & Discrimination* Press for Change London 2007; Morton James *Transgender Experiences in Scotland: Research Summary* Scottish Transgender Alliance Edinburgh 2008. In the US context, see GenderPAC *The First National Survey of Transgender Violence* GenderPAC Washington DC 1997; Waters Emily *Report from the National Coalition of Anti-Violence Programs: Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2015* NCAVP New York 2016. [↑](#footnote-ref-70)
71. This violent reality, though commonplace, is dramatised by the films, *Boys Don’t Cry* (1999) and *A Girl Like Me: The Gwen Araujo Story* (2006)which depict the lives, and tragic deaths, of two young transgender people, Brandon Teena and Gwen Araujo. [↑](#footnote-ref-71)
72. As Hobbes made clear, the first duty of government is to protect individuals from private violence or from violence emanating from outside the sovereign body (Hobbes Thomas *Leviathan* Oxford University Press Oxford 2008). [↑](#footnote-ref-72)
73. Bettcher Talia Mae ‘Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion’ (2007) 22(3) *Hypatia* 43. [↑](#footnote-ref-73)
74. Green Jamison ‘Look! No, Don’t!: The Visibility Dilemma for Transsexual Men’ in Stryker S and Whittle S (eds) *The Transgender Studies Reader* Routledge London 2006 p 499 at 501; Enke Finn ‘The Education of Little Cis: Cisgender and the Discipline of Opposing Bodies’ in Stryker S and Aizura AZ as above note 35 p 234 at 238. [↑](#footnote-ref-74)
75. Bettcher as above note 73 at 60. [↑](#footnote-ref-75)
76. As above. [↑](#footnote-ref-76)
77. Reed as above note 30. [↑](#footnote-ref-77)
78. Foucault Michel ‘How Much Does It Cost to Tell the Truth’ in Foucault M (ed) *Foucault Live Semiotext(e)* Columbia University Press New York 1989 p 233 at 252. [↑](#footnote-ref-78)
79. Wilchins Riki Anne ‘What Does it Cost to Tell the Truth?’ in Stryker S and Whittle S as above note 74 p 547 at 551. [↑](#footnote-ref-79)
80. Serano as above note 12. [↑](#footnote-ref-80)
81. Dean, Tim ‘Homosexuality and the Problem of Otherness’ in Dean T and Lane C (eds) *Homosexuality and Psychoanalysis* Chicago University Press Chicago 2001 p 120 at 131. [↑](#footnote-ref-81)
82. Sedgwick (1993) as above note 14 at 10. [↑](#footnote-ref-82)
83. Serano as above note 2 at 92. [↑](#footnote-ref-83)
84. Serano as above note 12 at 259. [↑](#footnote-ref-84)
85. As above. [↑](#footnote-ref-85)
86. As above. [↑](#footnote-ref-86)
87. Serano as above note 2 at 113. [↑](#footnote-ref-87)
88. Sedgwick (1988) as above note 14 at 121. [↑](#footnote-ref-88)
89. Cahill Ann J *Overcoming Objectification: A Carnal Ethics* Routledge New York 2011. [↑](#footnote-ref-89)
90. Parker Emily Ann ‘Sexual Violence as Derivatization’ in Foster G (ed) *Desire, Love, & Identity:* *A Textbook for the Philosophy of Sex and Love* Oxford University Press Don Mills Toronto 2017 p 113. [↑](#footnote-ref-90)
91. Butler Judith *Undoing Gender* Routledge New York 2004 p 35. [↑](#footnote-ref-91)
92. As above. [↑](#footnote-ref-92)
93. Cavarero Adriana *Relating Narratives: Storytelling and Selfhood* (trans. P. A. Kottman) Routledge London 2000. [↑](#footnote-ref-93)
94. Butler as above note 91. [↑](#footnote-ref-94)
95. As above. [↑](#footnote-ref-95)
96. *Newland* 15/9/15 above note 3. [↑](#footnote-ref-96)
97. Humphries as above note 4. [↑](#footnote-ref-97)