

# *Why Sexual Penetration Requires Justification*

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## 1. *Introduction*

This article defends the claim that a man who penetrates the vagina or anus of a woman with his penis has committed a prima facie wrong.<sup>1</sup> In other words, sexual penetration requires justification. The question of whether sexual penetration is wrongful in the sense we consider here has received little detailed attention in the criminal and philosophical literature. It must be emphasized, however, that this question leaves many further issues to be addressed before a proper evaluation of the criminal law's response to sexual penetration can be completed. As such, this article forms a preliminary part of a larger project. Here, we are not directly concerned with questions of criminalization; we aim simply to map the moral landscape of sexual penetration. If we are right that sexual penetration calls for justification, we must then address the question of how and when it may be justified: for if an act is justified then it should not be prohibited by the criminal law. Moreover, even if an act is morally unjustified, it may nonetheless be an improper target for criminal sanction, since the criminal law is not properly concerned with all morally unjustified conduct.<sup>2</sup>

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<sup>1</sup> For simplicity, we will refer to this type of penetration as 'sexual penetration'. In order to limit the scope of our inquiry, we do not consider the issue of same-sex penetration, oral penetration, or penetration with object(s) or body part (s) other than a penis. Rather, our claim is limited to penile penetration of the female vagina or anus. We note that our use of the term sexual penetration therefore differs from its meaning under the Sexual Offences Act 2003, s 1.

<sup>2</sup> Contra, R. George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford: Oxford University Press, 1993).

## 2. *Two Views of Sexual Penetration*

The claim that sexual penetration itself calls for justification, as opposed to, say, sexual penetration without consent, will undoubtedly strike many as counterintuitive. Admittedly, our claim is a minority view in the literature; but it is not without its supporters. This section provides a review of the academic literature regarding the moral status of sexual penetration and describes the contrast between those who resist our conclusion (the orthodox view) and those who endorse our conclusion (the alternative view).

### A. *The Orthodox View*

The orthodox view claims that sexual penetration is not wrongful in itself and thus does not require justification. Accordingly, a further condition must be present before the penetrator has a reason to justify his conduct. The orthodox view is well-captured in Stephen Shute's claim that '[w]e simply do not think that there is always a reason against sexual intercourse'.<sup>3</sup> Of course, in a trivial sense, there is always a reason against engaging in sexual intercourse (and virtually every other activity for that matter), insofar as one's time and energy might be spent engaged in valuable activity elsewhere.<sup>4</sup> At any given time, the reasons we have to engage in other activities might count as reasons against sexual intercourse; but this is a trivial point which would not ground its *prima facie* wrongfulness. Therefore, we take Shute and other advocates of the orthodox view to be making a somewhat different point: that there is no general moral *duty* not to engage in sexual intercourse.

The orthodox view has an impressive list of supporters. John Gardner, developing a point made in an article by Kenneth Campbell, defends the orthodox view by way of contrasting sexual penetration with the occasioning of actual bodily harm:

... [T]here is no general reason not to have sexual intercourse, whereas there is a general reason not to occasion actual bodily harm. 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 becomes one by virtue of being non-consensual.<sup>5</sup>

In a similar vein, Victor Tadros adopts the orthodox view when he argues:

... '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

<sup>3</sup> S. Shute 'Second Law Commission Consultation Paper On Consent: (1) Something Old, Something New, Something Borrowed: Three Aspects Of The Project' [1996] *Crim LR* 684 at 690.

<sup>4</sup> On the relationship between value and reason see J. Gardner and T. Macklem, 'Reasons' in J. Coleman, S. Shapiro and K. Himma (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002).

<sup>5</sup> J. Gardner, 'Fletcher on Offences and Defences' (2004) 39 *Tulsa Law Review* 817 at 820.

intercourse has been *balanced* or *outweighed* by the fact that it was consensual. There is no such *prima facie* reason at all.<sup>6</sup>

We take the above claims to be defending roughly the same point. When Campbell and Gardner claim that ‘there is no general reason not to have sexual intercourse’ and Tadros claims that there is no *prima facie* reason against having intercourse which calls to be balanced or outweighed by some justifying condition, we understand these authors to be claiming that sexual penetration *per se* is not even *prima facie* wrongful. In other words, according to the orthodox view, sexual penetration itself simply does not call for any justification whatsoever.

### B. *The Alternative View*

The alternative view claims that sexual penetration does call for justification. In other words, if a man penetrates the vagina or anus of a woman with his penis, he should do so for good reason.<sup>7</sup> George Fletcher advanced such a view in his 1978 treatise, *Rethinking Criminal Law*.<sup>8</sup> Indeed, Fletcher went even further than the claim we advance, by arguing that *all* ‘[i]ntimate touching of the genitals...requires a good reason’.<sup>9</sup> (Our claim is limited to sexual penetration rather than all sexual touching.) Sexual touching of the genitals, claimed Fletcher, fulfils the ‘minimal set of elements necessary to incriminate the actor’.<sup>10</sup> In reaching this conclusion, he compared a variety of touchings ‘arranged in order of ascending incrimination’:

- (1) touching,
- (2) sexual contact,
- (3) forcible sexual contact
- (4) non-consensual, forcible sexual contact.

While it is clear that Fletcher chose to draw the line identifying what type of conduct calls for justification at the point of sexual touching, his reasons for drawing the line at that particular point are less clear. In comparing sexual touching to ‘mere touching’, Fletcher noted, ‘[s]exual contact is obviously different. Intimate touching of the genitals is hardly routine, the touching requires a good reason’.<sup>11</sup> It is not entirely clear to us what Fletcher means by ‘routine’, but we take him to be referring to the frequency with which such

<sup>6</sup> V. Tadros, *Criminal Responsibility* (Oxford: Oxford University Press, 2005) at 106.

<sup>7</sup> In other words, his explanatory reasons should correspond to the guiding reasons that justify sexual penetration. J. Gardner ‘Justifications and Reasons’ in A. Simester and A.T.H. Smith (eds), *Harm and Culpability* (1996, Oxford: Oxford University Press).

<sup>8</sup> G. Fletcher, *Rethinking Criminal Law* (Boston: Little Brown, 1978).

<sup>9</sup> *Ibid* at 707.

<sup>10</sup> *Ibid*.

<sup>11</sup> *Ibid*.

contact occurs in the normal course of social interaction.<sup>12</sup> From this we may conclude that it is the relative rarity of sexual touching of the genitals that provided the basis for Fletcher's conclusion that such conduct requires justification.<sup>13</sup>

We are more convinced by Fletcher's conclusion than by his reasoning: unlike Fletcher we do not put much stock in the frequency with which conduct occurs. This consideration may prove relevant down the line in determining issues of criminalization, but we do not view the frequency or infrequency of conduct as sufficient grounds upon which to conclude that the conduct itself requires justification. Notably, Fletcher's principal concern was the definition of offence elements in the criminal law, which might explain his concern with the infrequency of sexual touching as compared to mere touching. This point marks our second (and more fundamental) departure from Fletcher's work. We believe that the project of properly defining criminal offences must begin with a moral account of the conduct at issue: does the conduct require justification and, if so, what justification will suffice? Only after answering these questions should we turn our attention directly to the question of criminalization, at which point questions of the frequency of the conduct and its justification in practice may become relevant.

In some respects, however, we do share Fletcher's methodology insofar as we take the relevant object of inquiry to be a physiological action type: namely sexual penetration, rather than a more fully specified moral action type such as rape or sexual assault. We believe that focusing on the action of sexual penetration provides a fruitful first step in a tripartite analysis which enables us to identify which kinds of sexual penetration call for justification; to identify from amongst those actions which are morally unjustified; and ultimately to identify from amongst those unjustified actions which may properly be criminalized.

Our approach, of course, is not the only plausible methodology for addressing the questions raised by sexual offences. A popular alternative approach would begin at the other end: by taking the relevant object of inquiry to be those kinds of sexual penetration which almost everyone agrees are properly criminalized, such as rape or sexual assault.<sup>14</sup> It has been suggested to us that our approach is somewhat reductivist, insofar as it conceptualizes the act of sexual penetration as a mere physiological action type.<sup>15</sup> And so it does.

<sup>12</sup> It has been suggested to us that Fletcher's use of 'routine' is meant to imply that the conduct at issue is customary rather than merely frequent. However, it is not clear to us how this interpretation of 'routine' adds clarity to Fletcher's point. That conduct is customary might be thought to mean that engaging in such conduct does not require a good reason: but this interpretation reduces Fletcher's point to a tautology.

<sup>13</sup> While we are attracted to Fletcher's conclusion that sexual penetration requires justification, we do not seek to defend his stronger claim that all sexual touching of the genitals requires justification.

<sup>14</sup> An example of this alternative methodology is found in J. Gardner and S. Shute, 'The Wrongness of Rape' in J. Horder (ed.), *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 4th edn, 2000) and V. Tadros, 'Rape and Wrongdoing' (forthcoming, on file with the author).

<sup>15</sup> We thank John Gardner for pressing us on this point, despite our refusal to budge.

However, we believe a certain degree of reductivism in this context is justified on two grounds.<sup>16</sup> First, by focussing on the physiological action type of sexual penetration, we are in a better position to consider whether some forms of this action, which have not traditionally been recognized as *prima facie* wrongful, ought to be so recognized. The alternative methodology, we believe, has a tendency to limit one's ability to consider whether our traditional understandings of what counts as rape or sexual assault have been drawn too narrowly. Second, our methodology corresponds to the law's characterization of sexual penetration as a physiological action type.<sup>17</sup> Statutes prohibiting sexual offences are not defined in terms of their context; instead the law defines prohibited conduct in terms of physiological action types.<sup>18</sup> Thus, although we do not take up the issue of criminalization in this article, by taking the object of inquiry in terms that are consistent with its conceptualization under law, the method we adopt positions us well to address such issues in the future. None of this is to say that we believe accounts which are grounded in the alternative methodology are unjustifiable or unhelpful; indeed we have found such offerings extremely fruitful in understanding the wrongness of rape and its related concepts.<sup>19</sup> Rather, our adoption of Fletcher's methodology merely reflects our belief that there is more than one way to skin this cat, and that a variety of approaches may better illuminate new perspectives on these issues.

### 3. *Two Kinds of Wrongdoing*

Before defending this article's central thesis, it may prove useful to draw some distinctions regarding wrongdoing, so as more clearly to delineate our precise claim about sexual penetration. This section explains and illustrates distinctions between two different senses in which conduct may be deemed wrongful: *prima facie* wrongfulness and *all-things-considered* wrongfulness.

The claim that 'X is wrong' is vague. It could mean that X is *prima facie* wrong or that X is *all-things-considered* wrong.<sup>20</sup> The determination that X is *prima facie* wrong is merely preliminary; which is to say that once all things

<sup>16</sup> Note further that the quotations from Gardner and Tadros, above n 5–6 may be read as conceptualizing sexual intercourse as a mere physiological action type, insofar as Gardner refers to 'sexual intercourse... *per se*' and Tadros implicitly refers to an act of sexual intercourse apart from any consideration of whether the act is consensual.

<sup>17</sup> See J. Herring 'Mistaken Sex' [2005] *Crim LR* 511, 513–514 for further discussion of this issue.

<sup>18</sup> Eg Sexual Offences Act 2003 s 79(2).

<sup>19</sup> Eg Gardner and Shute, above n 14 and Tadros, above n 14.

<sup>20</sup> This use of *prima facie* roughly corresponds to that found in W.D. Ross, *The Right and the Good* (Oxford: Clarendon Press, 1930). For further discussion, see R. Audi, *The Good in the Right* (Princeton: Princeton University Press, 2004) at 22–25. Our use of *prima facie* bears resemblances to Shelly Kagan's use of the term 'pro tanto', insofar as we claim that a *prima facie* wrong is a genuine wrong, rather than merely appearing to be wrong at first glance. On the distinction between *prima facie* and *pro tanto*, see S. Kagan, *The Limits of Morality* (Oxford: Oxford University Press, 1991) at 17, and Audi above, at 206 fn 25. For simplicity, we will stick with the language of *prima facie* wrongdoing to refer to genuine but defeasible wrongs.

have been considered, one may determine that X is either justified or unjustified.<sup>21</sup> It is tempting to elide this distinction and simply say that if the conduct is justified then it is not wrong, but this temptation should be avoided. For, if the evaluator's preliminary determination of prima facie wrongdoing was accurate, and the conduct is justified, then the proper conclusion to reach is that the conduct is a *justified prima facie wrong*.<sup>22</sup>

For criminal lawyers, the distinction between prima facie wrongs and all-things-considered wrongs may appear to track the offence-defence distinction: the difference between committing the definitional elements of the offence and committing an offence without any defence. In Fletcher's terminology, the offence elements establish the 'minimal set of elements necessary to incriminate the actor'.<sup>23</sup> Prima facie wrongdoing is similar insofar as it implicates the actor's basic responsibility, thereby calling for a justification or excuse.<sup>24</sup> However, this point is not meant to suggest that mere prima facie wrongdoing is sufficient to establish the elements of a criminal offence. Rather, our claim is that prima facie wrongdoing is sufficient only to establish the need for moral justification or excuse.

The distinction between prima facie wrongs and all-things-considered wrongs is helpful insofar as it clarifies the precise claim we advance in respect of sexual penetration. Our concern in this article is to defend the claim that sexual penetration is a prima facie wrong, not an all-things-considered wrong. In other words, we merely claim that sexual penetration calls for justification; not that the proffered justification has been considered and found lacking.

#### 4. *Sexual Penetration: A Prima facie Wrong*

Thus far, we have endorsed Fletcher's conclusion that sexual penetration calls for justification, but we have resisted the reasoning he offered in support of this conclusion. In this section, we advance our own reasons for concluding that sexual penetration is a prima facie wrong. We proceed in each section as follows. First, we stipulate what we take to be an ecumenical account of prima facie wrongdoing. We then compare each basic account of prima facie wrongdoing to sexual penetration and thereby elaborate various reasons supporting our conclusion that penile penetration of a woman's vagina or

<sup>21</sup> Our distinction between prima facie and all-things-considered wrongs is very similar—indeed perhaps for all intents and purposes identical—to Gardner, above n 7. The only relevant difference we note is that Gardner characterized the distinction as one between different types of wrongs, while we think this distinction is better understood as one between different perspectives from which we determine a wrong: either preliminarily (i.e. without considering all of the reasons) or all-things-considered (i.e. considering all of those reasons).

<sup>22</sup> In Section 5, we consider the 'moral residue' left behind by justified prima facie wrongs.

<sup>23</sup> Fletcher, above n 8.

<sup>24</sup> J. Gardner 'The Mark of Responsibility' (2003) 23 *OJLS* 15. We remain agnostic as to whether such an account is owed simply in virtue of the actor's basic (non-relational) responsibility, as Gardner has argued; or whether an account is owed only to those with standing to call for such an account, as Antony Duff has argued. R.A. Duff 'Who is Responsible, For What, To Whom?' (2005) 2 *Ohio State Criminal Law Review* 441.

anus calls for justification. Where relevant, we identify potential exceptions to the generality of our thesis. It should be noted however that these exceptions are cumulative: in order to avoid *prima facie* wrongdoing, a man engaging in sexual penetration must satisfy each and every potential exception identified below. If any exception fails to be satisfied, then his conduct calls for justification.<sup>25</sup>

### A. *Physiology and Force*

The use of physical force on another person is a *prima facie* wrong. It may of course be easy to justify many uses of physical force on another person. For example, a mother may forcefully grab her child's arm to prevent him from running in front of a car, and such use of force is amply justified by reasons generated from the value of the child's life and well-being. But our point here is that the use of force calls for justification: it is *prima facie* wrong. Moreover, even where the force is justified, its use is none the less to be regretted. This moral residue generates reasons to prefer less wrongful alternatives to securing the values which justify the mother's conduct. So, for example, if a mother can effectively prevent her child from running in front of cars by employing less forceful means (e.g. by asking an older child to step back from the street), such means should generally be preferred to using force against the child.<sup>26</sup>

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 such penetration. An important difference exists between mere touching and sexual penetration due to the physical structure of the vagina and anus: a penis does not simply fall into a vagina, nor is it enveloped by an anus. Rather, if a penis is to achieve penetration, it must push through muscled walls into the vagina or anus. It was suggested to us by one colleague that sexual penetration is analogous to putting one's hand into a glove, and so cannot be said to involve the use of 'force'. We believe the proposed analogy breaks down, however, on two grounds. First, a glove consists of an empty cavity in the shape of a hand; whereas vaginas and anuses contain no such cavity, penis-shaped or otherwise: they are instead sphincteric muscles which can only be penetrated upon being pushed-apart. Second, whilst some types of gloves, say latex gloves for example, do seem to require something akin to the use of force, it has been suggested to us that the word force is inappropriate here. However, whatever awkwardness may exist in characterizing one's actions as 'forceful' when wriggling one's hand into a latex glove, we believe this

<sup>25</sup> Ultimately, in Section 4.C below, we conclude that the social meaning exception cannot be satisfied under current social conditions. As such our claim survives intact as a plausible general account of the moral status of sexual penetration.

<sup>26</sup> See for further discussion Section 5 below.

awkwardness evaporates once we recall that we are considering the penetration of a human body, not an inanimate object. If the type of physical effort used to insert one's hand into a latex glove were used in order to penetrate another person's body, we believe there would be no linguistic awkwardness in charactering this conduct as forceful.

For Andrea Dworkin, the physiological fact of the vagina's muscled walls has significant normative implications:

The vagina itself is muscled and the muscles have to be pushed apart. The thrusting is persistent invasion. She is opened up, split down the center. She is occupied – physically, internally...<sup>27</sup>

In similar terms Ngaire Naffine sees heterosexual sexual intercourse as in its nature about the possession of the woman by the man.<sup>28</sup> We do not take a position as to whether penetration into muscled bodily cavities is best understood as invasion, possession or occupation; but simply note that penile penetration of the vagina or anus does require physical force and for that reason calls for justification.

Where a man engages in pushing movements to achieve initial penetration or thrusting movements during intercourse, even where he is positioned underneath his partner, such actions constitute the use of force. It is this use of physical force—the penetration of the musculature of the vagina or anus and/or the thrusting into this musculature—which we claim is *prima facie* wrongful *qua* an instance of the use of physical force.<sup>29</sup> It is of course plausible to conceive of a circumstance in which sexual intercourse is accomplished without the use of force by the male. For example, the man may be completely immobile during the penetration and the female may engage in any and all movements necessary to accomplish penetration. Such circumstances will admittedly not fulfil the contingency required to render the man's conduct *prima facie* wrongful for the reasons outlined above.<sup>30</sup> And so we arrive at an exceptional case of sexual penetration which would not be *prima facie* wrongful under our first argument: A man who penetrates the vagina or anus of a woman with his penis commits a *prima facie* wrong in virtue of the use of physical force, but where the male employs no such force (e.g. he is immobile during penetration), he does not commit a *prima facie* wrong grounded on the use of force.<sup>31</sup>

<sup>27</sup> A. Dworkin, *Intercourse* (New York: Basic Books, 20th anniversary edn, 2007) at 122.

<sup>28</sup> N. Naffine 'Possession: Erotic Love in the Law of Rape' (1994) 57 *MLR* 10 at 35.

<sup>29</sup> There is admittedly some ambiguity between what we refer to as sexual penetration and sexual thrusting; but for the sake of simplicity, we will stick with the terminology of sexual penetration. We thank Marcia Baron for bringing the ambiguity to our attention.

<sup>30</sup> Indeed, where the man engages in no physical movements whatsoever, it may not even be appropriate to characterize his conduct as sexual penetration, and in such cases the issue of whether he commits a *prima facie* wrong in virtue of having engaged in sexual penetration evaporates.

<sup>31</sup> He may, of course, commit a *prima facie* wrong in virtue of engaging in sexual penetration insofar as the *prima facie* wrongfulness of his action is grounded on some other reason(s), as considered below.



## B. *Risks of Harm*

To cause someone harm requires a justification. Not only that, but posing a non-trivial risk of significant harm to another person is a *prima facie* wrong.<sup>32</sup> Of course, in many things we do relative to other people, we risk setting-back their interests. This observation may be thought to cut against the conclusion that risking harm gives rise to any kind of wrongdoing, but we think it merely suggests that our conduct often calls for justification. That such justification is called for rather more frequently than we typically wish to believe is (in our view) no reason to deny that it is due. But can the fact that an act creates a risk of harm make an act *prima facie* wrongful? We believe that it can. It is not possible here to go into detail on the debates over whether an act which endangers others can be properly criminalized even if the injury to the victim does not materialize. However, we note the existence of a respectable body of academic opinion supporting the appropriateness of rendering acts illegal based on their endangering qualities.<sup>33</sup> Antony Duff writes:

[T]he fact that a contemplated action might well injure others' interests is, normally, a good reason against undertaking that action, or for taking precautions against the prospective harm; and it often provides conclusive reasons against the action. If we act, without justification, in a way that we realise might harm others, when the prospective harm provides a conclusive reason against acting thus, we do wrong; we do wrong to those whom we thus endanger.<sup>34</sup>

It might be argued that if an act endangers another but the feared injury does not materialize then there is no harm. However, that would be to adopt too narrow an understanding of harm. It is a set-back to an individual's interests to be exposed to a risk, even if that risk does not materialize. And that is true even if the victims are unaware of the risk to which they are exposed. Clare Finkelstein makes the point by way of this example:

Exposure to a risk of developing cancer, for example, diminishes a person's welfare because he now belongs to a class in which the relative frequency of developing cancer is greater than the relevant class of persons to which he belonged prior to that exposure. And a person has a legitimate interest in being in the class of persons with

<sup>32</sup> Following Feinberg, we define harm as a set-back to one's interests; although, pace Feinberg, we include the experience of pain as a set-back to interests. Joel Feinberg, *Harm to Others* (Oxford: Oxford University Press, 1986).

<sup>33</sup> The arguments are discussed in R. A. Duff 'Criminalizing Endangerment' in R. A. Duff and S. Green (eds), *Defining Crimes* (Oxford, Oxford University Press 2005); C. Finkelstein, 'Is Risk a Harm?' (2003) 151 *University of Pennsylvania Law Review* 963; A. Von Hirsch, 'Extending the Harm Principle: "Remote" Harms and Fair Imputation' in A. Simester and A. Smith (eds), *Harm and Culpability* (Oxford: Oxford University Press, 1996); C. Schroeder, 'Corrective Justice and Liability for Increasing Risks' (1990) 37 *UCLA Law Review* 439, at 442; K. Simons, 'Corrective Justice and Liability for Risk-Creation: A Comment' (1990) 38 *UCLA Law Review* 113; C. Schroeder 'Corrective Justice, Liability for Risks, and Tort Law' (1990) 38 *UCLA Law Review* 143 at 160; J. Coleman, *Risks and Wrongs* (Oxford: Oxford University Press, 1992) at 361-385; D. Husak 'The Nature and Justifiability of Non-Consummate Offenses' (1995) 37 *Arizona Law Review* 151.

<sup>34</sup> Duff, above n 33 at 53.

a lower chance of developing cancer, since to be in the class of persons with a higher chance of developing cancer is to be doing substantially less well in life.<sup>35</sup>

There is, however, some minimal level of risk and harm below which conduct will not constitute even a *prima facie* wrong. In order for conduct to be properly considered *prima facie* wrongful due to the risk of harm it poses, the harm risked must be sufficiently likely to occur and/or sufficiently serious in nature. For example, we risk bumping into other people when we walk down the street, and through bumping into someone, we risk setting back her interests by causing her pain or simply making her arrive late for a meeting.<sup>36</sup> The risk posed, however, is small and the potential harm is not significant. We might imagine that the harm at issue is much more significant; for example, if the person we approach on the street has an egg-shell skull and knocking her to the ground may cause her death. Does this risk mean that every act of walking down the street calls for justification in virtue of the contingency that we might knock down a person with an egg-shell skull? No. We concede that such conduct does not call for a justification. Rather, *prima facie* wrongdoing grounded in causing a risk of harm to another person is a threshold concept—it demands a combined degree of risk and harm that exceeds the trivial. In the first hypothetical, the risk (bumping into someone) was small and the harm (causing slight pain or delay) was insignificant. In our view, posing such a risk of harm does not rise to the level of *prima facie* wrongdoing. In the second hypothetical, the risk (knocking someone to the ground) was infinitesimally small, albeit the harm (death) was extreme. In our view, posing an infinitesimally small risk of even an extreme harm does not rise to the level of *prima facie* wrongdoing. From this we conclude that walking down the street, generally, does not constitute a *prima facie* wrong, despite the contingent risk of harm it poses.<sup>37</sup> In comparison, sexual penetration often does present a non-trivial risk of significant harm and thus does call for justification.

### (i) *Risk of physical harm*

We argue that there are three risks of physical harm that attach to sexual penetration which can render the action *prima facie* wrongful. First, sexual penetration carries the risk of causing serious harm in the form of sexually transmitted diseases (STDs).<sup>38</sup> Second, (in the case of vaginal penetration), there is the risk of unwanted pregnancy. Both of these are,

<sup>35</sup> Finkelstein, above n 33 at 973.

<sup>36</sup> If due to our bump, for example, she drops what she is carrying and must stop to collect her things before proceeding.

<sup>37</sup> If, however, one is particularly clumsy and susceptible to slamming into others whilst walking down the street, then perhaps walking down a pavement surrounded by people who possess egg-shell skulls would indeed call for justification in virtue of the greater risk of harm presented.

<sup>38</sup> For example, it has been estimated that world-wide 39.5 million people are HIV-positive: UNAIDS, *AIDS Epidemic Update* (2006, Geneva, UNAIDS) at 1.

of course, serious harms.<sup>39</sup> Indeed, even where pregnancy is desired by the woman, it brings with it a host of physical complaints, discomforts and complications ranging from fatigue, nausea, headaches, varicose veins, incontinence, muscle cramping and finally at the time of delivery the overwhelming likelihood of wounding either through laceration of the perineal (in a vaginal birth) or the abdomen (in a caesarean birth).<sup>40</sup> Third, and about this we are more hesitant, there are injuries that can arise during sexual penetration which may ground its prima facie wrongfulness, insofar as sexual penetration often involves a degree of abrasion to the vagina or anus. Even in non-rough sex, women often experience slight tearing or chaffing to the delicate tissues of the vagina. Moreover, there is ample evidence that sexual penetration can cause more serious harm.<sup>41</sup> Empirical medical research has documented the physiological fact that vaginal laceration (far more serious than mere abrasion) during intercourse (even consensual intercourse) is, in fact, 'not uncommon'.<sup>42</sup> Moreover, particular dangers are present where intercourse takes place while the woman suffers from a vaginal infection;<sup>43</sup> or where the penetration is 'rough'.<sup>44</sup> Injuries suffered during vaginal intercourse can even lead to death.<sup>45</sup> Given the less pliable and accommodating nature of the musculature of the anus, trauma to the rectal opening and anus is even more common in cases of penile-anal penetration.<sup>46</sup>

The question we are left with is how great the risk and how grave the harm must be to render the act prima facie wrongful. As noted earlier, this will, of course, depend both on the degree of risk and degree of harm at issue. Suffice it to say that we regard STDs, unwanted pregnancies, and serious internal injuries as serious harms, and so we conclude that conduct which poses even a small risk of such consequences is properly deemed prima facie wrongful in virtue of the risk of physical harm posed. In contrast, we regard the risk of abrasion during sexual penetration as a much less serious harm, but as the risk is quite high, it may ground the prima facie wrongfulness of sexual penetration. However, we accept that it may be that the harm here is so minor that even a high risk of it is insufficient to render the act wrongful.

<sup>39</sup> See *R v Dica* [2004] EWCA Crim 1103, where the Court of Appeal accepted that becoming HIV positive was to suffer grievous bodily harm.

<sup>40</sup> Such experiences easily satisfy the test for 'actual bodily harm', that the harm must be more than transient and trifling: *DPP v Smith* [2006] EWHC 94 (Admin).

<sup>41</sup> C. Cisse, P. Dionne, A. Cathy, V. Mendes, F. Diadhio, P. Ndiaye 'Vaginal Injuries During Coitus' (1998) 43 *Dakar Medicine* 135.

<sup>42</sup> R. Hoffman and S. Ganti, 'Vaginal Laceration and Perforation Resulting from First Coitus' (2001) 17 *Pediatric Emergency Care* 113; E. Ahmed, S. Syed, N. Parveen, 'Female Consensual Coital Injuries' (2006) 16 *Journal of College Physicians* 333.

<sup>43</sup> *Ibid.*

<sup>44</sup> M. Anate, 'Vaginal Trauma at Sexual Intercourse in Ilorin, Nigeria. An Analysis of 36 Cases' (1989) 8 *West African Journal of Medicine* 217.

<sup>45</sup> A. Abasiattai, S. Etuk, E. Bassey, E. Asuquo 'Vaginal Injuries During Coitus in Calabar: a 10 Year Review' (2005) 12 *Niger Postgraduate Medical Journal* 140.

<sup>46</sup> J. Auerbach, C. Wypijewska, K. Brodie, *Aids and Behaviour, An Integrated Approach* (Washington DC, National Academies Press 1994) at 48.

Of course, it is plausible to conceive of an act of sexual penetration that does not pose a risk of physical harm significant enough to constitute a *prima facie* wrong. First let us consider the risk of pregnancy. Some instances of sexual penetration may pose no risk of pregnancy. In anal sex, for example, or even in vaginal sex, if the man and/or woman are entirely infertile (e.g. he lacks testicles and she lacks ovaries and/or a uterus), we concede that there is no risk of pregnancy. If any of these circumstances exist relative to the sexual penetration in question, then we have identified the second potential exception to our thesis: A fertile man who penetrates the vagina of a fertile woman with his penis commits a *prima facie* wrong in virtue of placing the woman at risk of pregnancy; but a man who penetrates the anus of a woman with his penis or a man who penetrates the vagina of a woman with his penis where either the man and/or woman are infertile does not commit a *prima facie* wrong grounded on posing a risk of pregnancy.<sup>47</sup>

Second, it is plausible to conceive of sexual penetration that does not pose a risk of STD. The man may in fact be entirely disease-free at the time of penetration, or the woman may share precisely the same strain of STD, thus posing no risk of infecting her with any disease whatsoever. If so, then we have identified a third potential exception to our thesis: A STD-carrying man who penetrates the vagina or anus of a woman with his penis when the woman is not infected with an identical strain of the STD commits a *prima facie* wrong in virtue of placing the woman at risk of STD; but a disease-free man who penetrates the vagina or anus of a woman with his penis, or an STD-carrying man who penetrates the vagina or anus of a woman with his penis when the woman is infected with an identical strain of the STD, does not commit a *prima facie* wrong grounded on posing the risk of STD.<sup>48</sup>

Finally, it is possible to conceive of sexual penetration that does not pose a risk of physical harm in the form of abrasion, chaffing or tearing significant enough to constitute a *prima facie* wrong. This scenario is perhaps easier to imagine in the case of vaginal penetration. We can conceive of a man whose penis is so small relative to the pliability of the woman's vaginal muscled walls that penile-vaginal penetration poses a relatively small risk of abrasion upon entry, and through adequate lubrication, the risk can be reduced further so as to fall below the threshold of risk required to constitute a *prima facie* wrong. Due to the different physical structure of the anus (which makes it significantly less accommodating than the vagina) we are less confident that this risk of abrasion and tearing can be reduced below the relevant threshold in the case of penile-anal penetration, but we concede that it may do so. With respect to some incidents of sexual penetration, therefore, we can identify a fourth

<sup>47</sup> He may, of course, commit a *prima facie* wrong grounded on some other reason(s), such as the use of force, risk of STD, risk of abrasion or tearing or further reasons discussed below.

<sup>48</sup> He may, of course, commit a *prima facie* wrong grounded on some other reason(s), such as the use of force, risk of pregnancy, risk of abrasion or tearing or further reasons discussed below.

potential exception to our thesis: A man who penetrates the vagina or anus of a woman with his penis commits a prima facie wrong in virtue of the risk of causing abrasion, tearing, or more serious injury; but in the case of penetration where the man's penis is sufficiently small relative to the pliability of the woman's sphincteric musculature, and where adequate lubrication is present so as to reduce the risk of injury below the relevant threshold, he does not commit a prima facie wrong grounded on posing a risk of abrasion, tearing, or more serious injury.<sup>49</sup>

(ii) *Risk of psychological harm*

Engaging in conduct which poses a nontrivial risk of causing someone significant psychological harm is prima facie wrongful.<sup>50</sup> Sexual penetration can risk such harm for a number of reasons. As Jean Hampton has noted,

[O]ne's humanity is perhaps never more engaged than in the sexual act. But it is not only present in the experience; more important, it is 'at stake'...<sup>51</sup>

Given current social conditions, women are often in a position where being sexually penetrated places their humanity 'at stake' and poses attendant risks of psychological harm. This risk of harm may be explained at least in part by the social meaning of being sexually penetrated, which we will discuss below. Alternatively, it can be explained by reference to the frequency with which women and girls are subjected to actual and threatened sexual abuse under current social conditions.<sup>52</sup>

The reality of sexual violation in our society functions at two levels to generate a risk of psychological harm to women during sexual penetration. The first involves cases where the particular woman being sexually penetrated has personally suffered previous rape or sexual assault by penetration. In such cases, it is common to experience lingering psychological trauma upon being sexually penetrated subsequently, even when these subsequent experiences are consensual.<sup>53</sup> Dr Judith Herman has documented one set of phenomena within this genre, whereby sexual abuse survivors often psychologically split-off during sex and/or self-medicate with intoxicants to numb themselves during

<sup>49</sup> He may, of course, commit a prima facie wrong grounded on some other reason(s), such as the use of force, risk of STD or pregnancy or further reasons discussed below.

<sup>50</sup> It was suggested to us by Victor Tadros that this point can be challenged by the following example: 'A tells B that she is no longer in love with him. He is devastated by it and falls into depression'. For Tadros, although A has psychologically harmed B, she has done nothing that calls for justification. We disagree. Instead, we consider A's conduct to be prima facie wrongful but, in all likelihood, justified by reasons grounded in (amongst other things) the intrinsic value of A telling B the truth about her feelings, the consequential value of moving on after a failed relationship, etc.

<sup>51</sup> J. Hampton, 'Defining Wrong and Defining Rape' in K. Burgess-Jackson (ed.), *A Most Detestable Crime: New Philosophical Essays on Rape* (Oxford: Oxford University Press, 1999) 118 at 147.

<sup>52</sup> P. Pinheiro, *World Report on Violence Against Children* (Geneva: United Nations, 2006); S. Walby and J. Allen, *Domestic Violence, Sexual Assault and Stalking* (London: Home Office, 2004).

<sup>53</sup> See e.g. the evidence cited in S. Pillsbury 'Crimes against the Heart: Recognising the Wrongs of Forced Sex' (2002) 35 *Loyola of Los Angeles Law Review* 845.

subsequent sexual experiences, so as to distance themselves from the emotional pain associated with being sexually penetrated, even where these subsequent experiences are consensual.<sup>54</sup> In a second set of cases, the particular woman at issue has not personally suffered previous rape or sexual assault, yet sexual penetration may none the less pose a risk of psychological harm simply in virtue of the fact that such penetration occurs within the context of what has been (correctly, we believe) identified as a 'rape culture': 'a culture that implicitly sanctions frequent male indifference to a woman's desires and a significant degree of male violence in sexual encounters'.<sup>55</sup> Sexual objectification of women is a key element of a rape culture, and such objectification affects every woman, irrespective of whether she has previously been subjected to sexual abuse. As Catharine MacKinnon has observed:

All women live in sexual objectification the way fish live in water. Given the statistical realities, all women live all the time under the shadow of the threat of sexual abuse. The question is, what can life as a woman mean, what can sex mean, to targeted survivors in a rape culture?<sup>56</sup>

The answer, we suggest, is that the existence of a rape culture means that sexual penetration, even when consented to, poses a risk of psychological harm to women. The extent of this risk in any given incidence is difficult to quantify, but the existence of the risk is inescapable. As Taslitz has noted, 'no individual member of the public can escape the negative ramifications of living in a society dominated by a rape culture'.<sup>57</sup>

Whilst attitudes towards sex have undoubtedly changed over the years, 'liberating' sexuality, this change has not eliminated the rape culture. The so-called sexual liberation of the 1960s led to remarkable changes in attitudes towards sex and sexual practices. To some it was hoped that this would lead to sexual liberation for women. Germaine Greer in *The Female Eunuch* wrote:

Sex must be rescued from the traffic between powerful and powerless, masterful and mastered, sexual and neutral, to become a form of communication between potent, gentle, tender people, which cannot be accomplished by denial of heterosexual contact.<sup>58</sup>

<sup>54</sup> J. Herman, *Trauma and Recovery* (New York: Basic Books, 2nd edn 1997). See also, C. A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989) at 147–148.

<sup>55</sup> A. Taslitz, 'Willfully Blinded: On Date Rape and Self-Deception' (2005) 28 *Harvard Journal of Law & Gender* 381 at 385; citing E. Buchwald, P. Fletcher, M. Roth (eds), *Transforming a Rape Culture* (Minneapolis: Milkweed, 2nd edn 1994). See also, C. Card, 'Rape as a Terrorist Institution' in R. Frey and C. Morris (eds) *Violence, Terrorism and Justice* (Cambridge: Cambridge University Press, 1991); D. Herman, 'The Rape Culture' in J. Freeman, *Women: A Feminist Perspective* (Mountain View, CA: Mayfield, 4th edn 1989).

<sup>56</sup> MacKinnon, above n 54 at 149.

<sup>57</sup> Taslitz, above n 55 at fn 18, citing Buchwald, above n 55.

<sup>58</sup> G. Greer, *The Female Eunuch* (New York: McGraw-Hill Book, 1970), at 8. For a more modern work seeking to acknowledge that women are actively and enthusiastically seeking sex, see K. Albury, *Yes Means Yes: Getting Explicit about Heterosex* (Crows Rest, NSW: Allen & Unwin, 2003).

Unfortunately, despite the hoped-for changes in sexual practices, the rape culture remains persistent. Increased rates of sexual activity have not led to decreased rates of unwanted sexual activity. Studies consistently show high rates of unwanted sexual contact.<sup>59</sup> In a recent survey of sexually active young women in the United States (average age 15.9 years), 40.9% had reported unwanted sex in the previous three months.<sup>60</sup> In 36.7% of cases the women had agreed to have sex for fear that otherwise their partner would get angry.<sup>61</sup> A recent survey of English teenagers found that 45% had experienced unwanted sexual touching.<sup>62</sup>

Despite all of this, however, it is possible that the risk of psychological harm can be eliminated so that a given instance of sexual penetration would not pose a significant risk of psychological harm. Given the difficulty of ascertaining when this risk might be eliminated or sufficiently diminished, however, it may be argued that an act of sexual penetration constitutes a prima facie wrong in the nature of abstract endangerment, even where the woman does not suffer harm in the event.<sup>63</sup> We concede however, that it may be possible to ascertain whether the risk of psychological harm has been sufficiently eliminated so as to avoid any prima facie wrongdoing grounded on this risk of harm. Thus we can identify a fifth potential exception to our thesis: a man who penetrates the vagina or anus of a woman with his penis commits a prima facie wrong in virtue of the risk of causing the woman psychological harm; but in the case of sexual penetration where the risk of psychological harm falls below the relevant threshold, he does not commit a prima facie wrong grounded on posing a risk of psychological harm.<sup>64</sup>

### C. Social Meaning

The prima facie wrongfulness of conduct can be grounded in the negative social meaning of the conduct. For example, displaying the Confederate flag of the southern United States and raising one's middle finger both have social meanings in Anglo-American societies which render them prima facie wrongful.<sup>65</sup>

<sup>59</sup> In B. Fisher, F. Cullen and M. Turner, *The Sexual Victimization of Women* (Washington DC: US Department of Justice, 2000) which found that 10.1% of young American women had suffered rape; a further 10.9% attempted rape and a further 35.5% non-consensual sexual touching.

<sup>60</sup> B. Blythe, D. Fortenberry, M. M'Hamed Temkit, T. Wanzhu and O. Donald 'Incidence and Correlates of Unwanted Sex in Relationships of Middle and Late Adolescent Women' (2006) 160 *Archives of Pediatric Adolescent Medicine* 591.

<sup>61</sup> *Ibid.*

<sup>62</sup> NSPCC, *Teenage Girls Reveal Unwanted Sexual Experiences* (London: NSPCC, 2006).

<sup>63</sup> On abstract endangerment, see A. von Hirsch, above n 33. For application of abstract endangerment theory to the case of prostitute-use, see M. Madden Dempsey, 'Rethinking Wolfenden: Prostitute-Use, Criminal Law and Remote Harm' [2005] *Crim LR* 444.

<sup>64</sup> He may, of course, commit a prima facie wrong grounded on some other reason(s), such as the use of force, risk of STD or pregnancy, risk of physical harm, or further reasons discussed below.

<sup>65</sup> We borrow the Confederate flag example from S. Blackburn 'Group Minds and Expressive Harms' (2001) 60 *Maryland Law Review* 467, discussed in detail below.

Of course, one may be justified in committing such acts; the fact that their social meaning renders them *prima facie* wrongful does not imply that the acts are unjustifiable. Displaying the Confederate flag in a museum of US history, for example, may constitute justifiable conduct if the reasons generated by the educational value of the flag outweigh the reasons against its display; but justification does not eliminate the *prima facie* wrongfulness of displaying this flag. It is tempting to say that if a *prima facie* wrong is justified then it is not wrong; but again this temptation should be avoided. If the conduct is justified, then the proper conclusion to reach is that the conduct is a justified *prima facie* wrong—which leaves a moral residue of regret despite its being justified.<sup>66</sup> So whilst displaying the Confederate flag can be justified, it is nonetheless to be regretted.

In this section we argue that penile sexual penetration of a woman's vagina or anus calls for justification in virtue of its negative social meaning relative to the value of women. In other words, the social meaning of sexual penetration renders it *prima facie* wrongful. Thus, contrary to Stephen Shute's pronouncement discussed above, we *do* think that there is always a reason against sexual intercourse, at least when it involves a man penetrating a woman's vagina or anus in the context of current social meanings regarding this conduct. Notably, we also think this general reason against sexual penetration can be outweighed—in other words, sexual penetration can be justifiable, even under current social conditions<sup>67</sup>—but so long as the negative social meaning of sexual penetration remains in place, it remains *prima facie* wrongful.

(i) *The meaning of social meaning*

It is a trite observation that an act can acquire part, or all, of its meaning from a wider social context, but what precisely does it mean to claim that an act has a social meaning? For our purpose, we mean simply that the act expresses something normatively meaningful. This claim is grounded in a growing literature of expressive theories of practical reason, morality, and law which '[a]t the most general level...tell actors...to act in ways that express appropriate attitudes toward various substantive values'.<sup>68</sup> Expressivism of this sort is not a 'radically new theory of morality and law' but rather is grounded in the simple claim that, *ceteris paribus*, 'the more perspicaciously we

<sup>66</sup> See section 5 below.

<sup>67</sup> See M. Madden Dempsey and J. Herring, 'What Justifies Sex?' (forthcoming, on file with the authors).

<sup>68</sup> E. Anderson and R. Pildes, 'Expressive Theories of Law: A General Restatement' (2000) 148 *University of Pennsylvania Law Review* 1503 at 1504; cf H. Hurd, 'Expressing Doubts About Expressivism' (2005) *University of Chicago Legal Forum* 405 at 405, in which Hurd claims that expressivism in criminal law theory commits one to the joint propositions that 'punishment [is] a promising means of contradicting social meanings of crimes' and that 'the communicative function [is] the highest and best goal of the justice system'. We endorse neither of these propositions here.



can grasp the expressive structure of action, the more we can improve our evaluative practices'.<sup>69</sup>

We fear that the close relationship between expressive theories and claims about social meaning may give rise to some confusion. Specifically, our claim that sexual penetration has a negative social meaning may easily be confused with the following claims relating to expressivism which we do not endorse:

- (i) Men intend to express something negative about women when they sexually penetrate them;
- (ii) Women perceive men as expressing something negative about women when men sexually penetrate them.
- (iii) Women perceive themselves in a negative way when men sexually penetrate them.
- (iv) People in our society generally perceive men as expressing something negative about women when men sexually penetrate them.
- (v) People in our society generally perceive women in a negative way when men sexually penetrate them.

It may of course be the case that one or more of the above propositions is true with respect to any given act of sexual penetration; but the negative social meaning of the penetration does not depend on the truth of any of these propositions. The first claim depends on the expressive agent having a harmful intention or purpose.<sup>70</sup> In our view the social meaning of conduct does not require any intention or purpose. Indeed, to continue with the Confederate flag example, a person may intend to express a wholly positive message by flying the flag (e.g. community pride) and may not intended to express any negative messages by so doing (e.g. racism, support for slavery); but these good intentions will not prevent the act from having a racist social meaning. The second proposition depends on the victim 'register[ing] the negative or inappropriate attitude expressed'.<sup>71</sup> Our view is that the negative social meaning of sexual penetration does not stand or fall on the basis of whether the victim registers this meaning.<sup>72</sup> Again by way of analogy, the negative social meaning of displaying the Confederate flag does not depend on whether African Americans perceive the racist expression conveyed by the display. The third proposition depends on the victim subjectively experiencing an element of harm due to the negative expression.<sup>73</sup> Like most advocates of

<sup>69</sup> Anderson and Pildes, above n 68 at 1504.

<sup>70</sup> Blackburn, above n 65 at 469.

<sup>71</sup> Blackburn, above n 65 at 470.

<sup>72</sup> Although, of course, it does not fail to register with many women that they are, both in sexual penetration and in society more generally, being fucked.

<sup>73</sup> On our view, if such harm is subjectively experienced by the victim, this would constitute psychological harm which may be sufficient in itself to ground the prima facie wrongfulness of sexual penetration. See section 4.B (i) above.

expressive harm theories, we deny that this element is necessary for the identification of expressive harms, since it makes ‘the issue of harm hostage to, on the one hand, the blithe insensitivity of the target, or on the other hand, hypersensitivity, whereby distress results from actions that do not in fact express negative or inappropriate attitudes’.<sup>74</sup>

The fourth and fifth claims reflect what Margaret Gilbert has coined a ‘summative’ account of group belief, whereby ‘a group can be said to have a belief only if a sufficient majority of individual members of the group have the belief’.<sup>75</sup> Again, we do not view this condition as necessary to understanding the social meaning of action. For example, whilst it may be the case that most people in Anglo-American society generally perceive those who display the Confederate flag to be expressing racism, the social meaning of conduct does not depend on the socio-psychological facts of what beliefs people consciously hold within a group regarding the social meaning of that conduct. In other words, people can be wrong in perceiving the social meaning of conduct.

We must therefore return to our previous question: if the claim that sexual penetration has negative social meaning does not depend on the truth of any of the above propositions, then *what precisely does it mean* to claim that sexual penetration has a negative social meaning? Is expressivism a licence to characterize the social meaning of any action however one wishes in order to make a point? Does it, as Simon Blackburn has warned, lead to a ‘landscape where anything goes’?<sup>76</sup> In a word: no. Indeed, Blackburn’s own credibility principle provides a plausible sense in which we can understand the claim that actions have social meanings.<sup>77</sup> For this reason, we endorse a version of Blackburn’s credibility principle in identifying the social meaning of actions.

Identifying the social meaning of an act requires us to determine, as a preliminary matter, what it means for a society to hold a belief. According to the credibility principle:

A group may be said to [be] committed to a belief . . . if there is no way – no credible way – that the group could rationally sustain their open affirmations were they not also prepared to stand by the belief . . . The proof would be that there is no way to make sense of the explicit statements of the body, unless they were also committed to the implicit principle or premise teased out this way.<sup>78</sup>

Where the credibility principle is satisfied, it makes sense to think in terms of social meaning. Simply put, ‘one thing means another if it is a sure enough

<sup>74</sup> Blackburn, above n 65 at 470.

<sup>75</sup> Margaret Gilbert’s *On Social Facts* (Princeton: Princeton University Press, 1989), discussed at Blackburn, above n 65 at 472–473.

<sup>76</sup> Blackburn, above n 65 at 479.

<sup>77</sup> See Hurd, above n 68 at 425, conceding that Blackburn’s credibility principle ‘holds out the promise of giving the concept [of social meaning] sufficient content that it avoids what Blackburn rightfully fears for it, namely, that ‘anything goes’ for expressivists who assign social meanings to various actions’.

<sup>78</sup> Blackburn, above n 65 at 483.

indication of it'.<sup>79</sup> Blackburn illustrates his credibility principle with the following example:

Suppose a club makes an open affirmation to bar from membership all those living south of the river. And suppose the only salient common factor is that those living north of the river are white and those living south are black. Even though the issue was never raised (never breathed, one might say), [the] credibility [principle] could sustain the view that this decision was racially motivated.<sup>80</sup>

We believe Blackburn's credibility principle works well in identifying the social meaning of sexual penetration. We concede the obvious point that conduct may have multiple and even conflicting social meanings and we agree that sexual penetration can have positive social meanings as well.<sup>81</sup> Our point, explained more fully below, is simply that *one* of the current social meanings of penile sexual penetration under current social conditions can only *credibly* be explained as devaluing women *qua* women and disrespecting women's humanity, which we take to be a sufficiently negative social meaning to ground its *prima facie* wrongfulness. Our society could not use, depict and describe penile sexual penetration of women's vaginas and anuses the way it does if the social meaning of such conduct were not at least in part a way of devaluing women *qua* women and disrespecting women's humanity. The only credible explanation for many of the uses, depictions and descriptions of sexual penetration in our society is that the social meaning of such conduct entails at least in part the devaluation and disrespect of women. We will defend this application of Blackburn's credibility principle to the interpretation of the social meaning of sexual penetration below by exploring the ways in which our society uses, depicts and describes sexual penetration.

### (iii) *The social meaning of sexual penetration*

One current social meaning of penile penetration of a woman's vagina or anus is that such conduct constitutes a violation of the woman: it is an act through which she is rendered less powerful, less human, whilst the male is rendered more powerful and more human. The language we use to describe the act of sexual penetration betrays this social meaning: fuck, bang, screw, rail, drill, smash, hit it, hump, let her have it, poke, shaft, slay, etc.<sup>82</sup> The grammatical structure of our language is such that these verbs feature in sentences which

<sup>79</sup> Blackburn, above n 65 at 484.

<sup>80</sup> Blackburn, above n 65 at 484–485. We take Blackburn to mean 'the credibility principle could sustain the view that this decision has a racist social meaning', which is a claim we endorse. The phrasing of this point is unfortunate insofar as it suggests a requirement that the expressive agent have a harmful intention or purpose ('motive'); a requirement which Blackburn has explicitly disclaimed. Blackburn, above n 65.

<sup>81</sup> We consider such meanings, along with the other values of sexual penetration, in Dempsey and Herring, above n 67.

<sup>82</sup> Wikisaurus, 'sexual intercourse', [#Synonyms\\_.28non-slang.2C\\_non-euphemism.29](http://en.wiktionary.org/wiki/Wikisaurus:sexual_intercourse) (last visited 12 February, 2007). See also R. Baker, 'Pricks and Chicks: a Plea for Persons' in R. Baker and F. Elliston (eds), *Philosophy and Sex* (Buffalo, NY:Prometheus Books, 1984), at 263. Our thanks to Marcia Baron for directing us to this latter source.

take the form: 'subject-verb-object'. Notably, it is typically the person who plays the male role who is assigned as subject and the person who plays the female role who is assigned as object. Thus, as MacKinnon has observed, the language of sexual penetration follows a familiar and illuminating grammatical pattern: 'man fucks woman: subject-verb-object.'<sup>83</sup>

Moreover, as Robert Baker has explained, the passive constructions of verbs indicating penile sexual penetration are also typically used to indicate that a person is being harmed.<sup>84</sup> The lexical meaning of words such as 'fucked', 'screwed', 'shafted', etc. in sentences such as 'Bobbie fucked Marion' or 'Bobbie screwed Marion' are equivocal as between at least two possible meanings: (i) the literal meaning that Bobbie sexually penetrated Marion (who played the female role during penetration), or (ii) the metaphorical meaning that Marion was deceived, hurt, or taken advantage of by Bobbie.<sup>85</sup> Thus, Baker observes, 'we say such things as 'I've been screwed' ('fucked', 'had', 'taken', and so on) when we have been treated unfairly, been sold shoddy merchandise, or conned out of valuables'.<sup>86</sup> Given the meaning and gendered construction of our language regarding sexual penetration, Baker correctly concludes that 'we conceive of a person who plays the female sexual role as someone who is being harmed'.<sup>87</sup>

The devaluing and disrespecting of women through sexual penetration is a consistent theme in our language, as well as in our literature, film, advertising, television, pornography and internet depictions of sexual penetration. In recent years, this social meaning is perhaps conveyed most clearly in the way penile sexual penetration of the vagina and/or anus are discussed through spam email.

The credibility principle, when applied to interpret the meaning of the words we use to describe sexual penetration, their gendered function in our language and the depictions of sexual penetration in our literature, film, advertising, television, pornography and internet discourse, supports the conclusion that at least one of the social meanings of penile sexual penetration can only credibly be interpreted as a devaluation of women *qua* women and a disrespecting of women's humanity. The meaning becomes clear: that the penetrated woman is not an equal to the penetrating man, but is instead less of a person in virtue of having been fucked by him.

It is important to recall that our observations regarding the social meaning of sexual penetration do not imply that men have any conscious purpose to devalue or disrespect women through sexual penetration (although presumably some do). Rather, our point is simply that any credible interpretation of the

<sup>83</sup> MacKinnon, above n 54 at 128.

<sup>84</sup> Baker, above n 82 at 263.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.* See also, G. Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal about the Mind* (Chicago: University of Chicago Press, 1987), discussing the link between sex and violence at 409–415. We thank Catharine MacKinnon for directing our attention to this source.

practices of, language regarding, and depictions of sexual penetration in our culture betray a social meaning of sexual penetration which devalues women *qua* women and disrespects women's humanity to an extent which renders such conduct *prima facie* wrong.<sup>88</sup>

It is tempting to believe that an individual can escape *prima facie* wrongdoing through good intentions: that a man who engages in sexual penetration whilst intending to value and respect his sexual partner in the act of intercourse may thereby escape the taint of *prima facie* wrongdoing. This temptation is grounded in the entirely rational desire to believe that we, as moral agents, have not engaged in *prima facie* wrongdoing toward our sexual partners and/or that we have not been the object of such *prima facie* wrongdoing. We are highly motivated to believe that well-intentioned couples can transcend the negative social meaning of sexual penetration through their mutual respect and valuing of one another's humanity. However, we do not believe it is possible for individuals to transcend the social meaning of their conduct simply through their good intentions. Consider again the display of a Confederate flag. A museum curator may justifiably display the flag with the best intentions: to educate a new generation regarding the racist past of the American South, with the aim of signalling his own rejection of racism and encouraging others to reject racism. On our account, the curator is fully justified in displaying the flag in virtue of the fact that he is acting for reasons that justify its display, yet his conduct is none the less *prima facie* wrongful. To claim that his conduct is *prima facie* wrongful is first to claim that it requires justification: that he should not display the flag without good reasons of the sort that would outweigh the reasons against its display. As he has these reasons, his conduct constitutes *justified prima facie wrongdoing*. Second, as noted earlier, justified *prima facie* wrongdoing leaves a moral residue: a reason to regret the display of the flag, despite its justification.<sup>89</sup> Similarly, many of those who engage in penile sexual penetration may do so with the best intentions: to value and respect the humanity of their partner, thereby rejecting the negative social meaning of this conduct. Such conduct may of course be fully justified.<sup>90</sup> To claim that sexual penetration is *prima facie* wrongful on the basis of its negative social meaning is to claim both that it requires justification (that one should not engage in such conduct without reasons of the sort that would outweigh the negative social meaning of the conduct<sup>91</sup>) and that even where justified, it leaves a moral residue of regret.<sup>92</sup>

<sup>88</sup> It is consistent with our understanding of *prima facie* wrongdoing that one may be subjected to such wrongdoing without realizing it. Consider Finkelstein's example of those who are exposed to a higher risk of developing cancer, above n 33: on our account, these people are wronged irrespective of whether they realize what has happened to them or whether they conceive themselves as having been wronged.

<sup>89</sup> We will return to reasons to regret below in Section 5.

<sup>90</sup> We will turn to this question in Dempsey and Herring, above n 67.

<sup>91</sup> Reasons against sexual penetration may also derive from the earlier considerations discussed above regarding the physiology of penetration and the risk of physical or psychological harm.

<sup>92</sup> See Section 5 below.

Notably, at the end of this section, we do not need to identify any further exceptions to our thesis: a man who penetrates the vagina or anus of a woman with his penis commits a *prima facie* wrong in virtue of the negative social meaning of that conduct.<sup>93</sup> The only way to escape this conclusion is to transform the social meaning of sexual penetration in our culture.<sup>94</sup> We hope that there will be a time in the future when the social meaning of sexual penetration will have transformed to such a degree that our interpretation of its social meaning will no longer satisfy Blackburn's credibility principle. Perhaps in a post-patriarchal world, where the social meaning of sexual penetration has changed so radically, it will strain credibility to interpret the uses, depictions and descriptions of sexual penetration as conveying the devaluation or disrespect of women. When that day arrives, sexual penetration will no longer be a *prima facie* wrong in virtue of its social meaning and the generality of our thesis will be defeated. That day, however, has not yet arrived; thus the social meanings we discuss above remain very much part of the current meaning of sexual penetration in our culture and continue to ground its *prima facie* wrongfulness.

### 5. *On Regret: The Moral Residue of Justified Prima facie Wrongdoing*

Justified *prima facie* wrongdoing leaves a moral residue of regret.<sup>95</sup> But what is the rational force of regret? Principally, regret generates reason to prefer less wrongful alternatives to securing the values that justify the *prima facie* wrongful conduct.<sup>96</sup> This point is easily illustrated in the case of *prima facie* wrongdoing committed in medical operations. Surgical cutting into a patient's body is a *prima facie* wrong, but one that may be justified in virtue of reasons generated *inter alia* by the value of the patient's life and well-being. Despite its justification, however, cutting into a patient's body is still to be regretted. This regret generates reasons for medical personnel to seek less wrongful

<sup>93</sup> The *prima facie* wrongfulness of sexual penetration may also be grounded in any of the reasons discussed above (eg. force, harm, risk, etc.).

<sup>94</sup> By 'our culture' we refer to the US and UK. However, we do not base any exceptions on culturally relative social meanings, since the social meaning of sexual penetration at present seems problematic across all cultures in roughly similar ways to those discussed above.

<sup>95</sup> This claim reflects our understanding that the *prima facie* wrongfulness of sexual penetration is grounded in reasons which may be overridden but not cancelled. On the distinction between cancelling and overriding reasons, see J. Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1975) at 27, 180 fn 6. We revisit this issue in Dempsey and Herring, above n 67.

<sup>96</sup> Depending on circumstances, regret may also generate reason to apologize, make amends, etc. for justified *prima facie* wrongdoing, but it need not do so. There is a dynamic aspect of regret just as there is a dynamic aspect of rights: a change of circumstance may generate new reasons for action based on an old regret; just as a 'change of circumstance may lead to the creation of new duties based on [an] old right'. J. Raz, 'On the Nature of Rights' (1984) 39 *Mind* 194, 200. So the question of whether a justified *prima facie* wrongdoer has reason to apologize, make amends, etc. depends on something more than whether his conduct leaves a moral residue of regret. We thank Victor Tadros, Marcia Baron and an anonymous reviewer for pressing us to clarify this point further.

alternatives to securing the values sought by the surgery. If, for example, the purpose of the cutting is to perform exploratory surgery in hopes of diagnosing a source of the patient's abdominal pain, it is rationally incumbent upon the surgeon to seek less wrongful alternatives to diagnosing the source of the pain before cutting into the patient's body. Options such as x-rays, blood tests, CAT scans, endoscopy, etc. should be considered before performing exploratory surgery, since each of these options may provide a less wrongful alternative to securing the same values which justify the surgery. The rational force of regret functions similarly in other cases of justified *prima facie* wrongdoing. Returning to the display of a Confederate flag in a US history museum, recall that we concluded the display may be justified but nonetheless regrettable; which is simply to say that if the same educational value could be served through alternative means (without displaying the flag) then there is reason for the museum curator to seek such alternatives.

When we claim that justified sexual penetration leaves a moral residue of regret, *what precisely* is to be regretted? Here we are left undecided between two options: either we are to regret the sexual penetration itself, or simply to regret the basis upon which the sexual penetration was deemed *prima facie* wrongful in the first place. If the latter is the case, then we must determine the basis of the sexual penetration's *prima facie* wrongfulness. So for example, where sexual penetration is wrongful in virtue of the physical force used, then the moral residue of regret generates reasons to prefer less forceful means of realizing the values of sexual penetration. Sex researcher Shere Hite has envisioned such an alternative, in which

thrusting would not be considered as necessary as it is now . . . [There might be] more mutual lying together in pleasure, penis-in-vagina, vagina-covering-penis, with female orgasm providing much of the stimulation necessary for male orgasm.<sup>97</sup>

Similarly, if the sexual penetration is *prima facie* wrongful in virtue of the risk of physical harm (e.g. the risk of STD or unwanted pregnancy), then regret may generate reasons to seek less wrongful (less risky) alternatives, such as using condoms. If the sexual penetration is *prima facie* wrongful in virtue of the risk of abrasion or tearing to the vaginal or anal opening, then regret may generate reasons to seek less wrongful (less risky) alternatives, such as ensuring that adequate lubrication is present prior to and throughout penetration. If the *prima facie* wrongfulness of the sexual penetration is grounded in the risk of psychological harm, then regret may generate reasons to be particularly sensitive and supportive to one's partner, so as to reduce this risk of harm sufficiently. In all instances where the *prima facie* wrongfulness of the sexual penetration is grounded in the posing of a risk, regret generates reasons

<sup>97</sup> S. Hite, *Hite Report* (New York: Macmillan, 1976) at 141, cited in Dworkin, above n 27 at 162–163. Hite's point implies that the values of sexual penetration can be realized without the use of force, but we take no position on that issue here.

to be astute to the existence and degree of such risks. If adequate measures cannot be taken to reduce the risk so as to ensure the justifiability of the penetration, then there will exist strong reasons not to engage in sexual penetration at that time. So for example, if the risk of STD transmission or unwanted pregnancy cannot be sufficiently reduced (e.g. if no condom is available), then alternatives to sexual penetration should be strongly considered.

Finally, if sexual penetration is not *prima facie* wrongful for any of the foregoing reasons, one must turn to the consideration of social meaning. If our previous argument holds, sexual penetration is *prima facie* wrongful under current social conditions in virtue of its negative social meaning. Thus, even when justified, sexual penetration leaves a moral residue of regret. This regret generates reasons to seek less wrongful alternatives, but what does this mean? For some, the rational force of regret generated by sexual penetration is taken as a reason to refuse heterosexual sexual intercourse altogether.<sup>98</sup> For others regret seems to generate affirmative reasons to engage in sexual penetration, albeit in ways which parody existing meanings.<sup>99</sup>

For yet others, the rational force of regret is taken to generate reasons to create a post-patriarchal society in which the social meaning of sexual penetration will be transformed. We take this last position to be reflected in the work of Catharine MacKinnon.<sup>100</sup> In a recent interview with MacKinnon published in the Guardian newspaper, the interviewer asks, 'Doesn't what you have said...make any heterosexual act problematic?' To which MacKinnon responds, 'It problematizes those that take place under conditions of sex inequality, yes.' The article continues:

But they all do, don't they? Certainly, according to MacKinnon's philosophy...Perhaps there's an innocent space, I ask hopefully, where men and women can...get it on in a beautiful non-patriarchal way - she interrupts: 'Yes! People work it out with great difficulty. But the first step is not to deny that it's there.'<sup>101</sup>

We doubt whether individual couples can overcome the negative social meaning of sexual penetration simply by their good intentions to 'get it on in a beautiful non-patriarchal way', but we agree that this is a step in the right direction. This means, at very least, that when people engage in sexual

<sup>98</sup> For a general discussion of political lesbian-feminist separatism, see K. Rudy, 'Radical Feminism, Lesbian Separatism, and Queer Theory' (2001) 27 *Feminist Studies* 190.

<sup>99</sup> J. Butler, *Gender Trouble: Feminism and the Subversion of Identity* (London: Routledge, 1990). Butler would not characterize the issue in terms of the moral residue of regret, nor does she think that such parodic performances can change social meaning. For Butler, it seems the best we can hope to do is mock such meanings, not change them. For a stinging and insightful critique of Butler, see M. Nussbaum, 'The Professor of Parody' *The New Republic* (22 February, 1999).

<sup>100</sup> Despite attributions to the contrary, MacKinnon has never claimed that all sex is rape. Rather, we take her work to be consistent with our account of sexual penetration as *prima facie* wrongful. 'Are Women Human?' *The Guardian* (12 April, 2006).

<sup>101</sup> *Ibid.*



penetration, they have reason to acknowledge and reject the negative social meaning discussed above. We believe that such acknowledgement and rejection is possible, even under current social conditions, and that people have reason to bring such acknowledgement and rejection into reality when they engage in sexual penetration.<sup>102</sup>

## 6. Conclusion

As Nicola Lacey points out, it is extraordinary how little the law and criminal law academics have to say about what is valuable about sexual activity.<sup>103</sup> The topic is so little discussed because of the widespread assumption that there is 'nothing wrong' with sexual penetration. The focus has traditionally been on what extra, special ingredient makes otherwise fine and dandy sexual penetration into wrongful sexual penetration. In this article we have argued that sexual penetration is itself a *prima facie* wrong: conduct that calls for justification. As we have been at pains to remind the reader throughout, our view is that sexual penetration can be justified, even under current social conditions which render it generally *prima facie* wrongful. Notably, we are not basing our view on any form of legal moralism or prudish attitudes towards sexual penetration.<sup>104</sup> Rather, our views are based on the account of *prima facie* wrongfulness identified above; grounded in the use of force, actual and risked harms, and negative social meaning of sexual penetration. The logical implications of our thesis in this article require us to take the next step and attend to the question of what justifies sexual penetration. This project will call for an examination of the issue Lacey notes: what is valuable about sexual activity? What, in other words, are the values of this conduct that might generate reasons strong enough to defeat the reason(s) against it? We will take up these questions in future work, where we will examine the many and varied values of sex and offer our thoughts regarding what justifies sexual penetration.<sup>105</sup>

<sup>102</sup> Importantly, however, whilst such acknowledgement and rejection of the negative social meaning of sexual penetration does not eliminate the *prima facie* wrongfulness of this conduct; it may provide a key to the normal justification of such conduct. See Dempsey and Herring, above n 67.

<sup>103</sup> N. Lacey, *Unspeakable Subjects* (Oxford: Hart, 1998) at 118–121.

<sup>104</sup> See eg H. Gross, 'Rape, Moralism and Human Rights' [2007] *Crim L R* 193, and J Herring 'Human Rights and Rape: A Reply to Gross' [2007] *Crim L R* 228.

<sup>105</sup> Dempsey and Herring, above n 67.