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‘Oh, What a Tangled Web we Weave’ : "The English and Welsh Law on Deceit Vitiating Consent in Sexual Crimes"

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**‘Oh, What a Tangled Web we Weave’<sup>1</sup> : “The English and Welsh Law  
on Deceit Vitiating Consent in Sexual Crimes”**

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Supervised by Professor Phillip LANDOLT  
Mémoire de master hors séminaire

Eilish Holly Lee

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<sup>1</sup> Walter Scott, *Marmion* (1808).

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## **1. Introduction**

The laws governing sexual assault and rape in the English and Welsh legal institution is characterised by complexity and practical frustration. There is a discernible discord between the legal interpretation of sexual offences and the collective lay understanding of what conduct constitutes criminally culpable behaviour<sup>2</sup>. The 2003 Sexual Offences Act (SOA 2003) was implemented by Parliament in an attempt to overhaul the previous sexual offences legislation. The 1956 sexual offences act was relegated, by the SOA 2003, legislating the new guiding principles, consent and sexual autonomy. The SOA 2003 aimed to produce coherence and eradicate the ambiguity embedded within the previous statute. The Home Office indicated, in an extensive 2000 review paper called 'Setting the Boundaries', that the 1956 act was a "patchwork quilt of provisions both ancient and modern"<sup>3</sup>. The Home Office concluded that "rape law must reflect the new society"<sup>4</sup> and prioritise reform. The 'criminal law now network' indicate that the 2003 SOA has been unsuccessful in its purpose to increase transparency and cohesion within sexual offences<sup>5</sup>, denoting its most significant failure to the anaemic state of deceptive sexual offences.

Deception within sexual offences is underpinned by a general lack of coherence and piecemeal case law; differentiated by superficial subtleties, that arguably only encourage continued legal inconsistencies. Deception both "undermines the legitimacy of consent" and fails to preserve the fundamental principle of sexual autonomy<sup>6</sup>. Deceit is legally and morally inadmissible, subverting the "voluntariness of an agents actions" on the premise of flawed knowledge, preventing individuals from "determining their own course of action"<sup>7</sup>. However, despite broad agreement that deception undoubtably renders sexual conduct non consensual, it is not obvious as to when and under what circumstances consent will be vitiated<sup>8</sup>. How does one differentiate the "swindler from the artful seducer"<sup>9</sup>? Or a rake from a romancer? There seems to be no obvious boundaries within the canon of case law on where and how to delimit distinctions in deceptive sex<sup>10</sup>. Cooper and Reid assert that current law is "delineated more by mud than crystal" and the "successful prediction of legate

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<sup>2</sup> Home Office, 'Setting The Boundaries : Reforming The Law Sex Offences' (Home Office Communication Directorate 2000).

<sup>3</sup> Home Office, 'Setting The Boundaries : Reforming The Law Sex Offences' (Home Office Communication Directorate 2000).

<sup>4</sup> Home Office, 'Setting The Boundaries : Reforming The Law Sex Offences' (Home Office Communication Directorate 2000).

<sup>5</sup> Mark Dsouza, 'False Beliefs And Consent To Sex' [2021] Criminal Law Reform Now Network.

<sup>6</sup> Rebecca Williams, 'Deception, Mistake And Vitiating Of The Victim's Consent' (2007) 124 Law Quarterly Review.

<sup>7</sup> Rebecca Williams, 'Deception, Mistake And Vitiating Of The Victim's Consent' (2007) 124 Law Quarterly Review.

<sup>8</sup> Matthew Gibson, 'Deception, Consent And The Right To Sexual Autonomy' [2021] Criminal Law Reform Now Network.

<sup>9</sup> Hyman Gross, 'Rape, Moralism And Human Rights' [2007] The Criminal law review.

<sup>10</sup> Beatrice Krebs, 'Rape, Consent And A Lie About Fertility: R V Lawrance [2020] EWCA Crim 971' (2020) 84 The Journal of Criminal Law.

principles remains as likely as tattooing soap bubbles”<sup>11</sup>. This troubling synopsis of current case law does not paint an optimistic picture for subsequent convictions. “Inconsistent interpretation of the legal concepts”<sup>12</sup> and ad hoc case law predicts a precarious future for consent and sexual deception as workable principles within the English and Welsh criminal systems’.

In order to successfully critique deceptive sexual crimes, this paper will firstly present the current status of English and Welsh law. I will undertake an in-depth assessment of sections 74 and 76 of the 2003 SOA and review their importance in consideration to four fundamental deception sexual offence cases : *Assange v Swedish Prosecution Authority*<sup>13</sup>, *R (on the application of F) v DPP*<sup>14</sup>, *R v McNally*<sup>15</sup> and *R v Lawrence*<sup>16</sup>. These cases will be assessed chronologically. Secondly, I will determine three premises’ that enable the continued incoherence.

- a. The overly vague statutory terminology illustrated within section 74, does not facilitate easy delineations within deceptive sexual offences.
- b. McNally’s advantageous decision positively contributes to the development of deceptive sexual offences, supporting the concept of conditional consent.
- c. In the adoption of unconvincing rationale, the intervention of *R v Lawrence* is detrimental to the developing coherence of deceptive sexual offences.

Thirdly, I will present the current condition of Swiss law, acting as a comparative source, to broaden the scope of this analysis. Lastly, I will identify two solutions for the amelioration of English and Welsh law: the conceptualisation of a minor charge for rape convictions and the repeal of *R v Lawrence*.

## **2. The Legal Problem**

This dissertation has identified the current legal problem as the confused state of deceptive sexual offences in English and Welsh criminal law. Contradictory case law and vague statutory terms has rendered governable principles inaccessible. The root of dubiety stems from the dissatisfying intervention of *R v Lawrence* combined with the unease depicted in the practical interaction between the SOA 2003 statutes section 74 and 76. The ambiguity registering in the current case law on deceptive sexual offences is problematic. The court’s arbitrary differentiations combined with the uncertainties entrenched within the 2003 SOA has debilitated valid prosecutions, ultimately leading to

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<sup>11</sup> Simon Cooper and Alan Reed, 'Informed Consent And The Transmission Of Sexual Disease: Dadson Revivified' (2007) 71 *The Journal of Criminal Law*.

<sup>12</sup> Catherine Elliott and Claire de Than, 'The Case For A Rational Reconstruction Of Consent In Criminal Law' (2007) 70 *Modern Law Review*.

<sup>13</sup> *Assange v Swedish Prosecution Authority* [2011] EWHC 2849.

<sup>14</sup> *R v McNally* [2013] EWCA Crim 1051.

<sup>15</sup> *R (on the application of F) v The Director of Public Prosecutions* [2014] QB 581.

<sup>16</sup> *R v Lawrence* [2020] EWCA Crim 971.

the legal institutions failure in its enshrined purpose to protect vulnerable individuals. The continued fragility of court decisions has disillusioned victims and hindered the layman's ability to self determine legitimate conduct. The 2021 government 'end to end' rape review report findings demonstrated that rape convictions have declined by 59% since 2015, where only 1.6% of reported rapes result in charges<sup>17</sup>. The present criminalisation of sexual offences is a disappointing reality and highly concerning. The subjective nature of deception as a sexual offence only increases the courts frustration in prescribing coherent precedents and furthers the befuddlement encompassing the determination of non consensual acts through deceit. Such subjectivity does not aid the successful identification of what sexual deceptions vitiate consent, nor allows the development of harmonised principles. The courts difficulties in producing consistently coherent decisions is actively reflected through the incompatible case law. Balancing the seriousness of harm involved in a deception against the trivialisation of sexual offences perturbs the courts. A necessary review of leading case law and academic literature will determine the dominant and repeating principles within this field of sexual offences. A comprehensive analysis of the prominent authorities in the field of deceptive sexual offences will ascertain the meritorious contributions registering within the English and Welsh law from the detrimental legal interventions. This paper will attempt to pinpoint the factors enabling the continued unsystematised decisions characterising the sphere of deceptive sexual offences and establish constructive recommendations for the amelioration of English and Welsh law.

### **3. The Current Status of English and Welsh Law**

#### **3.1 Section 76 of the SOA 2003**

Section 76 provides irrebuttable presumptions, where in the absence of consent, a conviction will autonomically follow<sup>18</sup>. In order to convict under section 76, the 'prosecution must show that the defendant did the relevant act and that any of the circumstances specified in subsection (2) existed'<sup>19</sup>. Subsection 2 of section 76 maintains that :

(2) the circumstances are that -

- (a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;
- (b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.<sup>20</sup>

The key terms that must be explored within s76 2 (a) is both 'nature' and 'purpose'. 'Nature' is taken in its ordinary meaning where the very essence of the act is fraudulent. 'Purpose' is defined as the

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<sup>17</sup> HM Government, 'The End-To-End Rape Review Report On Findings And Actions' (The Controller of Her Majesty's Stationery Office 2021).

<sup>18</sup> Sharon Cowan, 'The Heart Of The Matter: Criminalising Fraudulent Consent To Sex' [2019] Edinburgh School of Law Research Paper.

<sup>19</sup> Sexual Offences Act 2003 2003.

<sup>20</sup> Sexual Offences Act 2003 2003.

grounds or the motivation for which something is done<sup>21</sup>. Taking these two notions collectively, it is interpreted that consent is vitiated in deceptions where the victim is unaware that the nature of the act is sexual or when they have “mistakenly understand the purpose to be non sexual”<sup>22</sup>. These are the unambiguous instances of sex obtained by deception. This is evidenced in *R v Williams*<sup>23</sup>, where a singing coach told his student he needed to perform “an act to open their air passages” but instead had sexual intercourse with her<sup>24</sup>. *R v Flattery*<sup>25</sup> further illustrates the obvious context of sexual deception where a “doctor surreptitiously replaced a medical instrument with his penis during an intimate examination”<sup>26</sup>. Consent had been vitiated by deception as to the nature and purpose of the act, where the victim has been deceived into thinking that there is no sexual intent behind the assault. This demonstrates that deception is contingent on the intention of the act. If the victim is misled over the circumstances or reasoning encompassing the performance, consent is absent.

The term ‘impersonation’ in s 76 (2) (b) is interpreted in its conventional meaning. *R v Elbekkay*<sup>27</sup> evidences an example of impersonation in inducing sexual intercourse. The defendant was convicted of rape, when he knowingly misled the victim into believing she was having sexual intercourse with her boyfriend. The victim's consent was not valid, as she was under the “misapprehension that she was consenting to another party”<sup>28</sup>. “The identity of the party was intrinsic to the performance”<sup>29</sup> and materially important to her consent. *R v Dee*<sup>30</sup> is a similar case where the victim was deceived into thinking she was having sex with her husband. Justice Mary CJ asserted that “the act permitted cannot properly be regarded as the real act that took place”<sup>31</sup>. Without any fraudulent inducement, the victim would never have agreed to sex with the defendant. Justice Murphy further reinforces that “if a party agrees to act with X, then in the dark, Y takes X’s place, it cannot be said that consent given to X extended to Y”<sup>32</sup>. The law is clear that instances of impersonation will negate consent.

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<sup>21</sup> J. A. Simpson and E. S. C. Weiner: ‘purpose’.

<sup>22</sup> Victoria Brooks and Jack Clayton Thompson, ‘Dude Looks Like A Lady: Gender Deception, Consent And Ethics’ (2019) 83 *The Journal of Criminal Law*.

<sup>23</sup> *R v Williams* [1923] 1 KB 340.

<sup>24</sup> *R v Williams* [1923] 1 KB 340.

<sup>25</sup> *R v Flattery* [1877] 2 QBD, 410.

<sup>26</sup> *R v Flattery* [1877] 410 (2 QBD).

<sup>27</sup> *R v Elbekkay* [1995] Crim LP 163.

<sup>28</sup> Jocelynn Scutt, ‘Fraudulent Impersonation And Consent In Rape’ (1975) 9 *The University of Queensland Law Journal*.

<sup>29</sup> Jocelynn Scutt, ‘Fraudulent Impersonation And Consent In Rape’ (1975) 9 *The University of Queensland Law Journal*.

<sup>30</sup> *R v Dee* [1884] 14 LR Ir 468.

<sup>31</sup> Jocelynn Scutt, ‘Fraudulent Impersonation And Consent In Rape’ (1975) 9 *The University of Queensland Law Journal*.

<sup>32</sup> Jocelynn Scutt, ‘Fraudulent Impersonation And Consent In Rape’ (1975) 9 *The University of Queensland Law Journal*.

Deceptions established through section 76 generate little confusion in procuring convictions. An offence is easily established when the victim is unaware that the interaction is of a sexual nature. Section 76 is well reconciled and rarely causes controversy within English and Welsh law. When victims have been “deceived into thinking there is no sexual intent behind the act”<sup>33</sup>, court decisions have been ironclad in concluding that consent has been vitiated. Gibson asserts that it is obvious that the defendants actions were non consensual and deceptive in the “extreme scenarios where the victim is unaware that intercourse is taking place”<sup>34</sup>. Case law in these instances is both consistent and compatible, where the courts have no issue in producing accordant principles. Due to this general consensus, this settled area of the law needs no further examination.

### 3.2 . The restrictive application of s.76

While it seems that both components in section 76 (2) are extensive in their potential applicability; in reality, the courts have been highly restrictive in its employment. *R v Bingham*<sup>35</sup> asserts that s.76 must be “strictly construed” as it “removes the only line of defence to a criminal charge”<sup>36</sup>. Once consent is proven absent, a “conviction will automatically follow”<sup>37</sup>. An expansive application of s.76 would be unduly harsh in its operation. No evidence can refute conclusive presumptions, so s.76 must be applied scrupulously, to ensure that individuals deceiving in negligible matters are not unfairly prosecuted. Conclusive presumptions should only be used for the most serious of offences. Expanding the scope of section 76 could limit personal freedoms and liberties beyond reasonableness. Section 76 is restrictively applied.

### 3.3 Section 74 of the SOA 2003

The courts have been routinely reluctant to expand the scope of deception beyond the traditional types of cases established within section 76. However, in response to section 76’s increasingly restrictive approach, the applicability of section 74 has progressively widened; the reasons for which will be demonstrated within section 4. Section 76 limits convictions as it requires “intentional deception”<sup>38</sup>, yet section 74 is not laden by the same constraints<sup>39</sup>. Section 74 holds the statutory definition of consent within the SOA 2003, as :

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<sup>33</sup> Ticiana Alencar, 'Conditional Consent And Sexual Crime: Time For Reform?' (2021) 85 The Journal of Criminal Law.

<sup>34</sup> Matthew Gibson, 'Deceptive Sexual Relations: A Theory Of Criminal Liability' (2019) 40 Oxford Journal of Legal Studies.

<sup>35</sup> *R v Bingham* [1991] Crim LR 43.

<sup>36</sup> Will Chen, 'R V Bingham [2013] EWCA Crim 823, [2013] 2 Cr. App. R. 29 - Case Summary' (*lawprof.co*, 2021) <<https://lawprof.co/criminal-law/sexual-offences-cases/r-v-bingham-2013-ewca-crim-823-2013-2-cr-app-r-29/>> accessed 2 April 2022.

<sup>37</sup> Sharon Cowan, 'The Heart Of The Matter: Criminalising Fraudulent Consent To Sex' [2019] Edinburgh School of Law Research Paper.

<sup>38</sup> Karl Laird, 'Rapist Or Rogue? Deception, Consent And The Sexual Offences Act 2003' [2014] Criminal Law Review.

<sup>39</sup> Karl Laird, 'Rapist Or Rogue? Deception, Consent And The Sexual Offences Act 2003' [2014] Criminal Law Review.



“A person consents if he agrees by choice, and has the freedom and capacity to make that choice”<sup>40</sup>.

‘Choice’ is a pivotal component of section 74, committed to the fulfilment of sexual autonomy<sup>41</sup>. O’Neil determines that manipulation and deception “interfere with the ability to exercise autonomous choice”<sup>42</sup>. Any false misrepresentation distorts authentic and legitimate decision making capacity. Deception is held to be incompatible with choice, as it constrains an individual’s ability to “act on reasons based on their own goals”<sup>43</sup>. ‘Freedom’ is determined as “the power or right to act, speak or think as one wants without being controlled or limited”<sup>44</sup>. The notion of freedom is both diminished and constrained in the face of deception, as it is incongruent with restrictions on individual sovereignty. Choice and freedom allows one to self govern in order to advance ones own aims and objectives. Such extensive concepts are highly advantageous in ensuing extensive sexual autonomy protection.

### 3.4 An omitted consideration in the current statute

With acknowledgement to the purpose of the positions identified by section 74 and section 76, deceptive sexual offences should be understood within a spectrum. To the left, clear and undeniable consent to sexual activity is without issue, completely safeguarded by section 74. To the right, the law has little difficulty in convicting deceptive sex when the victim is unaware that sexual activity is taking place, validated by section 76. These two areas of the spectrum seem almost black and white in their simplicity. English and Welsh law is generally settled on these grounds, where the dispatch of legal protection is almost template in its enactment facility. However, it is the middle ground between absolute consent and complete deceit in sexual activity that has stumped the courts. The confusion presented within deceptive sexual crimes encompass instances where the claimant has consented to sexual activity, yet has been deceived as too a “physical aspect of the encounter”<sup>45</sup> conditional to their consent. Examples of these deceptions could be determined as gender, condom use, marital status, ethnicity, age or religious background<sup>46</sup>. This grey area begs the question, as to whether the consent given, was true consent<sup>47</sup>. These are determined as material deceptions, where the “suspect failed to

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<sup>40</sup> Sexual Offences Act 2003 2003.

<sup>41</sup> Michael Bohlander, 'Mistaken Consent To Sex, Political Correctness And Correct Policy' (2007) 71 The Journal of Criminal Law.

<sup>42</sup> Sarah Buss, 'Valuing Autonomy And Respecting Persons: Manipulation, Seduction, And The Basis Of Moral Constraints' (2005) 115 Ethics.

<sup>43</sup> Omar Madhloom, 'Deception, Mistake And Non-Disclosure: Challenging The Current Approach To Protecting Sexual Autonomy' (2019) 70 Northern Ireland Legal Quarterly.

<sup>44</sup> J. A. Simpson and E. S. C. Weiner. 'Freedom.

<sup>45</sup> Ticiana Alencar, 'Conditional Consent And Sexual Crime: Time For Reform?' (2021) 85 The Journal of Criminal Law.

<sup>46</sup> Ticiana Alencar, 'Conditional Consent And Sexual Crime: Time For Reform?' (2021) 85 The Journal of Criminal Law.

<sup>47</sup> 'Rape And Sexual Offences - Chapter 6: Consent | The Crown Prosecution Service' (Cps.gov.uk, 2021) <<https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent>> accessed 17 June 2022.

comply with a condition which the complaint imposed on the giving of their consent”<sup>48</sup>. Absolute consent must be preserved and any deception relating to the “material fact relied upon by the claimant” is not compatible with sexual autonomy<sup>49</sup>. However, this must be balanced against over criminalisation. If every type of misrepresentation had the ability to vitiate consent, it would “expand the scope of rape and sexual offences too far, encompassing seductions that the majority’s collective intuition told them ought not to be rape”<sup>50</sup>. There are no obvious delineations and the law has struggled to produce comprehensive rationale within such ambiguous territory. Case law seems to be scrambling to stay relevant amongst societies rapidly changing norms. Section 74 and 76 does not mention or direct the courts in deceptions occurring in occasions of consensual and desired sex. This area of the law currently remains extremely ambiguous, lacking in both explanation and insight. These types of deceptions are those that will be primarily dealt with throughout the course of this paper.

### 3.5 Deception and non disclosure within English and Welsh law

The general concept of deception is a well established legal principle, where deceit renders interactions null and void. There is limited confusion surrounding the criminalisation of deception when involving common offences. Fraud by false representation<sup>51</sup>, tortious deceit, obtaining property or services through false pretence, the law of perjury<sup>52</sup> and forgery<sup>53</sup> are a few examples addressing the illegality of deception. Misrepresentation obstructs clear and irrevocable consent, “influencing behaviour and denying autonomy”<sup>54</sup>. English and Welsh law commit to the importance of informed decisions, establishing a general rule in tort that “consent obtained on the basis of deception is no consent at all”<sup>55</sup>. The complete disregard for an individuals autonomy through deception is not only self serving but a considerable transgression and major abuse of trust. The two main remedies in civil and commercial legal deceptions are : “compensatory damages in respect to the loss sustained by reason of the deceit and the avoidance or rescission of the contract”<sup>56</sup>. Remedies involving tortious deceit are easily identified and are almost template solutions. Tort deception remedies provide elementary resolutions. Legal sanction imposed on the basis of deception is well documented, where the English and Welsh legal institution demonstrate collective coherence in criminalising deceit. Yet,

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<sup>48</sup> 'Rape And Sexual Offences - Chapter 6: Consent | The Crown Prosecution Service' (*Cps.gov.uk*, 2021) <<https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent>> accessed 17 June 2022.

<sup>49</sup> Sharon Cowan, 'The Heart Of The Matter: Criminalising Fraudulent Consent To Sex' [2019] Edinburgh School of Law Research Paper.

<sup>50</sup> Karl Laird, 'Rapist Or Rogue? Deception, Consent And The Sexual Offences Act 2003' [2014] Criminal Law Review.

<sup>51</sup> Fraud Act 2006 2006.

<sup>52</sup> Gregory Klass, 'The Law Of Deception: A Research Agenda' [2018] Georgetown University Law Center.

<sup>53</sup> Larry Alexander and Emily Sherwin, 'Deception In Morality And Law' (2003) 22 Law and Philosophy.

<sup>54</sup> Gregory Klass, 'The Law Of Deception: A Research Agenda' [2018] Georgetown University Law Center.

<sup>55</sup> Gregory Klass, 'The Law Of Deception: A Research Agenda' [2018] Georgetown University Law Center.

<sup>56</sup> Peter Eggers, 'Deceit - The Lie Of The Law' (*I-law.com*, 2021) <<https://www.i-law.com/ilaw/doc/view.htm?id=222794>> accessed 17 June 2022.

the clarity encompassing general fraudulent misrepresentation does not extend to criminal deception within sexual offences.

It must be recognised that many deceptions involved in the field of sexual activity are too minor to warrant legal scrutiny. Deception is a beneficial social norm where it has been proven that on average, individuals on “dating websites claim to be two inches taller” and earn a higher income than in actuality<sup>57</sup>. These instances of “minor fraudulent misrepresentation”<sup>58</sup> do not merit criminal action. The Canadian supreme court in *R v Cuerrier*<sup>59</sup> asserted that “deceptions small and sometimes large, have from time immemorial been the byproduct of romance and sexual encounters”<sup>60</sup>. Seduction is the “accepted archetype for normal sexual behaviour”<sup>61</sup>, where it is deemed a necessary “ritual in escalating erotic fascination”<sup>62</sup>. The enterprise of romance is characterised by tacit falsehoods<sup>63</sup>, where “clothing falsifies, hair dye deceives and cosmetics misrepresent”<sup>64</sup>. It would be senseless to suggest that these instances warrant prosecution, as criminal sanction would instead trivialise the seriousness of sexual assault and undermine the established legal protection. English and Welsh law remains uncertain in delineating clear principled lines in determining when deceit vitiates consent in sexual activity. The absence of transparent boundaries leaves individuals futilely struggling to ascertain conduct amounting to criminal sanction. The courts foreseeable attempts to rectify previously misguided decisions through crude differentiations will convolute the law on deceptive sexual offences, leaving legal professionals scrambling to create consistent verdicts from an increasingly piecemeal canon of case law.

The English and Welsh legal position on disclosure within sexual activity indicates that non disclosure will not vitiate consent. The authority *R v B*<sup>65</sup> demonstrates that a failure to disclose a positive HIV status is inconsequential to consent. The courts rejected the application of section 74 SOA 2003 asserting that the non disclosure of sexually transmitted diseases “was not relevant to the issue of consent”<sup>66</sup>. The question for the courts was to determine whether the victim had consented to the act of sex not “whether she consented to intercourse with a person suffering from a sexually transmitted

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<sup>57</sup> Tom Dougherty, 'Sex, Lies, And Consent' (2013) 123 Ethics.

<sup>58</sup> Tom Dougherty, 'Sex, Lies, And Consent' (2013) 123 Ethics.

<sup>59</sup> *R v Cuerrier* [1998] [1998] 2 SCR 371.

<sup>60</sup> *R v Cuerrier* [1998] [1998] 2 SCR 371.

<sup>61</sup> Ben. A McJunkin, 'Deconstructing Rape By Fraud' (2014) 28 Columbia Journal of Gender and Law.

<sup>62</sup> Ben. A McJunkin, 'Deconstructing Rape By Fraud' (2014) 28 Columbia Journal of Gender and Law.

<sup>63</sup> Jed Rubenfeld, 'The Riddle Of Rape By Deception And Myth Of Sexual Autonomy' (2012) 122 The Yale Law Journal.

<sup>64</sup> Jed Rubenfeld, 'The Riddle Of Rape By Deception And Myth Of Sexual Autonomy' (2012) 122 The Yale Law Journal.

<sup>65</sup> *R v B* [2007] 1 WLR 1567.

<sup>66</sup> *R v B* [2007] 1 WLR 1567.

disease”<sup>67</sup>. Furthermore, section 76 is an inappropriate provision as it is unconcerned with “implied deceptions”<sup>68</sup>. LJ Latham reinforced the inapplicability of the SOA 2003 as it does not “expressly concern itself with the full range of deceptions (...) let alone implied deceptions”<sup>69</sup>. This case confirms that tacit deception will not lead to a conviction and non disclosure will not vitiate consent. Through the application of *R v B* the courts have determined that in order to negate consent, some form of positive performance is required to denote deceptive sexual activity. The absence of criminal sanction on the basis of implied deceptions within sexual offences is consistent with the underlying principle demonstrated throughout English and Welsh law. Customarily, there is never a general duty to disclose. Within contract law the parties “need not disclose important details about the transaction (...) and there is no liability for such omissions”<sup>70</sup>. The English and Welsh courts blanket rejection of a duty to disclose fully protects an individuals right to privacy and medical confidentiality. The lack of criminal sanction for non disclosure within sexual activity is consistent with English and Welsh legal authority. While this position may be unpalatable to individuals desiring completely informed consent prior to sexual intercourse, legally this principle remains settled and consistent.

However, the case of *R v B* refused to consider under what condition non disclosure would “be elevated to active deception”<sup>71</sup>. Douglas asserts that the “dividing line between active deception and non disclosure is notoriously murky”<sup>72</sup>. LJ Latham briefly considered the uncertainty encompassing the question of whether false assurances of a negative HIV status would amount to active deception. The law commission admitted that the implementation of a blanket duty to disclose was a “delicate matter requiring expertise in public health and social policy”<sup>73</sup>. The implication of such indecisive delineations leaves the law uncertain as to what point positive concealment extends to active deception. The courts refusal to answer this imperative question is irresponsible, diminishing the authority and clarity of deceptive sexual offences as a coherent body of law. The lack of duty to disclose does not allow parties to take measured precautions to mitigate risk of harm. It is only upon informed decisions that individuals can accept the possible harm innate in a STD transmission. The principle of consent outlined within section 74 is analogous with a duty to disclose a positive HIV diagnosis prior to sexual intercourse; facilitating autonomous choice. It is for this reason that a general duty to disclose could potentially be beneficial.

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<sup>67</sup> *R v B* [2007] 1 WLR 1567.

<sup>68</sup> *R v B* [2007] 1 WLR 1567.

<sup>69</sup> *R v B* [2007] 1 WLR 1567.

<sup>70</sup> Mindy Chen-Wishart, 'Misrepresentation And Non-Disclosure' [2018] Law Trove.

<sup>71</sup> Laura- Anne Douglas, "The Criminalisation Of Transgender-Cisgender Sexual Relations: "Gender Fraud" Or Compulsory Cisnormativity? Assessing The Meaning Of Consent In Sexual Offences For Transgender Defendants" (2017) 161 *Jursiprudence Review*.

<sup>72</sup> Laura- Anne Douglas, "The Criminalisation Of Transgender-Cisgender Sexual Relations: "Gender Fraud" Or Compulsory Cisnormativity? Assessing The Meaning Of Consent In Sexual Offences For Transgender Defendants" (2017) 161 *Jursiprudence Review*.

<sup>73</sup> *R v B* [2007] 1 WLR 1567.

### 3.6 Current legal position illustrated by case law

Deceptive sexual offences case law has developed chronologically, where the first authority in the post 2003 SOA era dealt with deceit in relation to contraception. The emergence of the 2012 decision, *Assange v Swedish prosecution services*<sup>74</sup>, confirmed for the first time in English and Welsh law, the legal enforceability of conditional consent<sup>75</sup>. Assange was convicted of rape as he was aware of the victims prerequisite condition on using a condom for sex. In removing the condom during intercourse without the victims knowledge, Assange violated her “sexual integrity” and vitiated her consent<sup>76</sup>. This act is colloquially known as ‘stealthing’. The courts underlined, through section 74, that “choice” is crucial to the issue of “consent”<sup>77</sup> and common sense will ascertain whether the right to choice and freedom has been deprived<sup>78</sup>. Judge Thomas used a ‘broad common sense approach’ to determine the illegality of Assange’s conduct. The removal of the condom “in the circumstances where the victim made it clear she would only have sexual intercourse if he used a condom” amounts to a sexual offence<sup>79</sup>. Common sense denotes that the victims choice had been undermined and her consent negated, as she was explicit in her assertion that she “would not have consented without a condom”<sup>80</sup>. Clough asserts that deceiving a partner in relation to the use of protection “is a blatant violation of what was agreed and breaks every boundary set”<sup>81</sup>. The courts further asserted that Assange’s actions amounted to deceptive sex, as protected sex fundamentally differs from unprotected sex. It was alleged that the “physical barrier” created by a condom changes the “degree of intimacy, the risks of disease and the prevention of a pregnancy”<sup>82</sup>. The physical obstruction imposed by a condom changes the sexual nature of the act, where its tangible restriction sterilises the extent of intimacy. A condom changes the purpose and nature of sex. It was determined that deceptions involving physical restrictions formatively imposed by the victim would amount to a sexual offence conviction.

The employment of the broad common sense approach was confirmed through the decision undertaken in the 2013 gender fraud case, *R v McNally*<sup>83</sup>. It was affirmed that gender was a condition of consent, where deception as to gender renders sexual activity non consensual. The appellant met the

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<sup>74</sup> *Assange v Swedish Prosecution Authority* [2011] EWHC 2849.

<sup>75</sup> “Stealthing” Conviction Brings Conditional Consent Out In The Open | Criminal Law Blog | Kingsley Napley’ (*Kingsleynapley.co.uk*, 2019) <<https://www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/stealthing-conviction-brings-conditional-consent-out-in-the-open>> accessed 17 June 2022.

<sup>76</sup> *Assange v Swedish Prosecution Authority* [2011] EWHC 2849.

<sup>77</sup> *R (on the application of F) v The Director of Public Prosecutions* [2014] QB 581.

<sup>78</sup> *Assange v Swedish Prosecution Authority* [2011] EWHC 2849.

<sup>79</sup> *Assange v Swedish Prosecution Authority* [2011] EWHC 2849.

<sup>80</sup> *Assange v Swedish Prosecution Authority* [2011] EWHC 2849.

<sup>81</sup> Amanda Clough, ‘Conditional Consent And Purposeful Deception’ (2018) 82 *The Journal of Criminal Law*.

<sup>82</sup> *Assange v Swedish Prosecution Authority* [2011] EWHC 2849.

<sup>83</sup> *R v McNally* [2013] EWCA Crim 1051.

complainant on a social networking game at the ages 13 and 12 respectively<sup>84</sup>. Using a male avatar ‘Scott Hill’, the appellant claimed to be male<sup>85</sup>. Over four years the online exchanges evolved into an exclusive romantic relationship. At the ages 17 and 16, the individuals met on four separate occasions involving “numerous instances of oral and digital penetration”<sup>86</sup>. The complaint asserted that, had she known McNally was female she would not have consented to any sexual activity. Lord Judge Leveson asserted that while some deceptions would “obviously not vitiate consent”, he emphasised the need for a ‘broad common sense approach’<sup>87</sup>. He indicated that while physically, assault involving vaginal penetration by a male or female is the same act, “the sexual nature of the acts, is different where the complainant was deliberately deceived by a defendant into believing that the latter is a male”<sup>88</sup>. LJ Leveson applied section 74 as McNally had interfered with both choice and freedom. The complainant consented to sexual encounters with a boy, “and her preference (her freedom to choose whether or not to have sexual encounter with a girl) was removed by the appellants deception”<sup>89</sup>. The victims consent had not be freely obtained; McNally’s continued falsification of gender, acted as a distorting influence, impeding the claimants capacity to reason and self govern. The complainants sexual autonomy was completely undermined by McNally’s fraudulent misrepresentation, breaching a deal breaking condition of her consent. The McNally decision implemented an additional criteria highlighting the importance of an active element of deception in ensuing the successful prosecution of a sexual offence charge. Conduct must be show to be deceptive through “words or deeds”<sup>90</sup>. McNally both expanded and substantiated the broad common sense approach taken within Assange. McNally confirmed the Assange stance and extended the scope of conditional consent to include gender, not simply requisites on contraception.

The concept of conditional consent was seemingly well-established, its convincing rationale again demonstrated within the 2014 case *R (on the application of F) v DPP*<sup>91</sup>. This case concerned consent to sex on the condition that the defendant withdrew prior to ejaculation. The complainant consented to sexual activity on the “clear understanding that the defendant would not ejaculate within her vagina”<sup>92</sup>, utilising the withdrawal method. While the penetration was consensual, it is evidenced that the

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<sup>84</sup> *R v McNally* [2013] EWCA Crim 1051.

<sup>85</sup> *R v McNally* [2013] EWCA Crim 1051.

<sup>86</sup> *R v McNally* [2013] EWCA Crim 1051.

<sup>87</sup> *R v McNally* [2013] EWCA Crim 1051.

<sup>88</sup> *R v McNally* [2013] EWCA Crim 1051.

<sup>89</sup> *R v McNally* [2013] EWCA Crim 1051.

<sup>90</sup> Alex Sharpe, ‘Expanding Liability For Sexual Fraud Through The Concept Of ‘Active Deception’’ (2016) 80 *The Journal of Criminal Law*.

<sup>91</sup> *R (on the application of F) v The Director of Public Prosecutions* [2014] QB 581.

<sup>92</sup> *R (on the application of F) v The Director of Public Prosecutions* [2014] QB 581.

defendant “deliberately ignored the basis of her consent as a manifestation of his control over her”<sup>93</sup>. Provided by section 74, the defendant's refusal to abide by the conditions established by the complainant was a means to assert dominance, removing the victim's freedom and choice, discarding “a crucial feature on which her original consent to sexual intercourse was based”<sup>94</sup>. The dismissal of the victim's freedom to choose creates subjection through humiliation and oppression. The defendant aimed to remove the victim's choice, in an attempt to prove her subservience. The failure to abide by the victim's demanded condition of the withdrawal method amounts to statutory rape by virtue of a deceptive sexual offence.

These cases evidence deceptive sexual relations in instances where consent was falsely procured. The perpetrators all failed to “comply with a condition which the complainant imposed in the giving of their consent”<sup>95</sup>, violating the victim's right to free consent on the foundation of section 74 SOA 2003. By implication of these three cases, the High Court and Court of Appeal confirmed the emerging concept of conditional consent. A broad common sense approach enables a case by case assessment, developing decisions on factual circumstances<sup>96</sup>. If a sexual act has taken place contrary to the desires of an individual, consent will be negated. The aforementioned cases advanced two solid principles. Firstly, it was affirmed that conditional consent is valid and legally enforceable. Any dishonoured requirement established prior to intercourse will amount to deception for the purposes of sexual activity. Application of section 74 demonstrates the courts' strong adherence to the notion of ‘choice and freedom’, foundational in all sexual offence prosecutions. If the prerequisite condition of material consent is ignored then a sexual assault has taken place. Secondly, the English and Welsh courts seemed settled in the implementation of a ‘broad common sense approach’. The lens of common sense produced congruent decisions, where each judgement coincided.

However, the accepted broad common sense approach adhered to previously, was substituted by the ‘closely connected test’ by implication of *R v Lawrence*<sup>97</sup> in 2020, where the developing principle of conditional consent was restricted. The decisions in *Assange* and *McNally* were distinguished from *Lawrence* on the basis of physical restrictions. The defendant deceived the complainant by lying about having a vasectomy. The defendant falsely assured the complainant on numerous occasions that he had undergone the procedure. He later admitted his falsehood, where the complainant claimed sexual assault, as her condition of agreement to sexual activity had been breached, where the lie relating to a

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<sup>93</sup> *R (on the application of F) v The Director of Public Prosecutions* [2014] QB 581.

<sup>94</sup> *R (on the application of F) v The Director of Public Prosecutions* [2014] QB 581.

<sup>95</sup> ‘Rape And Sexual Offences - Chapter 6: Consent | The Crown Prosecution Service’ (*Cps.gov.uk*, 2021) <<https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent>> accessed 17 June 2022.

<sup>96</sup> ‘Rape And Sexual Offences - Chapter 6: Consent | The Crown Prosecution Service’ (*Cps.gov.uk*, 2021) <<https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent>> accessed 17 June 2022.

<sup>97</sup> *R v Lawrence* [2020] EWCA Crim 971.

vasectomy negated her consent<sup>98</sup>. On appeal, the courts held that a lie about fertility cannot vitiate consent, as it amounts to the “broader circumstances” of sexual intercourse. Fertility is not “closely connected to the nature or purpose of sexual intercourse”<sup>99</sup>. This test was created by *R (Monica) v DPP*<sup>100</sup> in 2018 where an environmental activist held that an undercover police officer had obtained sex through deceit. While the complainant asserted that she would not have consented to intercourse had she know his profession prior to sexual relations, the courts alleged that the deception was not so “closely connected to the performance of the sexual act”<sup>101</sup> and would not amount to a sexual offence for the purposes of section 74 SOA 2003.

The courts asserted that the case of *Lawrence* differed significantly from previous case law relating to the victims material condition of consent. Both *Assange* and *R(F)* was inapplicable, as the complainant in *Lawrence* consented to sexual intercourse without the requirement of a “physical barrier”<sup>102</sup>. The complainant consented to “every aspect of the physical act”, agreeing to both vaginal penetration and ejaculation without the protection of a condom<sup>103</sup>. It was determined that the physical act of sexual intercourse concerns two fundamental features, identified as: penetration and ejaculation<sup>104</sup>. The complainant only sought to avoid the acquisition of sperm not the seminal fluid<sup>105</sup>. The rejection of a condom confirms that the victim consented to every physical aspect of sexual intercourse and the prerequisite of infertile ejaculate cannot be a legally enforceable condition for the purpose of the sexual offences act 2003<sup>106</sup>. This distinction asserts that the complainant was only deceived in relation to the “nature and quality of the ejaculate” where the “deception was one which related not to the physical performance of the sexual act but to risks or consequences associated with it”<sup>107</sup>. The issue of fertility is not closely connected to the nature or purpose of the performance of sexual activity. Section 74 is inapplicable as the complainant exercised complete freedom and choice in consenting to sexual intercourse. Reliance on the ‘closely connected test’ evidences how the appeal was successful, where its future application necessitates a narrow interpretation. The precise and limited ambit of the ‘closely connected test’ considerably diminishes the previous steadily augmenting breadth of deceptive sexual offences, removing section 74’s applicability within the ‘broader circumstances’, characterising

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<sup>98</sup> *R v Lawrence* [2020] EWCA Crim 971.

<sup>99</sup> *R v Lawrence* [2020] EWCA Crim 971.

<sup>100</sup> *R (Monica) v DPP* [2018] EWHC 3508 (QB).

<sup>101</sup> *R (Monica) v DPP* [2018] EWHC 3508 (QB).

<sup>102</sup> *R v Lawrence* [2020] EWCA Crim 971.

<sup>103</sup> *R v Lawrence* [2020] EWCA Crim 971.

<sup>104</sup> Beatrice Krebs, 'Rape, Consent And A Lie About Fertility: *R V Lawrence* [2020] EWCA Crim 971' (2020) 84 *The Journal of Criminal Law*.

<sup>105</sup> 'Male Vasectomy Procedure | What Is A Vasectomy?' (*Plannedparenthood.org*, 2022) <<https://www.plannedparenthood.org/learn/birth-control/vasectomy>> accessed 18 June 2022.

<sup>106</sup> *R v Lawrence* [2020] EWCA Crim 971.

<sup>107</sup> *R v Lawrence* [2020] EWCA Crim 971.



conditional consent. While *Assange* remains authoritatively relevant in factually similar cases, the closely connected test has become the guiding principle of English and Welsh law for subsequent deceptive sexual offence cases.

While *Lawrence* demonstrates modest clarity, the courts failed to fully address the matter of sexual autonomy. *Lawrence* restricts the application of section 74, where the interpreted notions of freedom and choice in unprotected sex, relied upon in *Assange* and *R (on the application of F) v DPP*, have been undermined<sup>108</sup>. *Lawrence* discusses in immense detail the physical differences relating to condom use and vasectomy mechanisms, yet, the courts failed to explain why the lie relating to the “vasectomy did not deprive the complaint of her section 74 statutory protection”<sup>109</sup>. *Lawrence* was enacted as the guiding principle without commentary on the notions, freedom and choice. The protection deriving from *Assange* and *R (on the application of F) v DPP* was deprived, “leaving open a yawning backdoor”<sup>110</sup>. *Lawrence* infers that if the defendant “convinces a partner to forgo the assistance of a condom, then the violation of sexual autonomy occurs with impunity”<sup>111</sup>. The courts evasion regarding the dissimilitude of sexual autonomy protection is both ominous and disquieting. The refusal to address the inconsistency relating to the applicability of choice and freedom, combined with the uncertain status of section 74 with deceptive sexual offences has depreciated the potential value of the *Lawrence* authority. By implication, *Lawrence* has created a sexual autonomy vacuum, shrouding the field of deceptive sexual offences in darkness.

Furthermore, the *McNally* authority dictates that active deceptions used to induce sexual activity amount to sexual offences. Yet, the courts failed to communicate why *Lawrence*’s express lie, in having the “the snip”<sup>112</sup>, differed from the active deception principle illustrated within *McNally*<sup>113</sup>. The courts approach within *Lawrence* does not coincide with the *McNally* rationale, advancing two fundamentally conflicting positions. The shaky foundations upon which *Lawrence* has been graphed does not allow for legal predictability or certainty.

The current status of English and Welsh law on deceptive sexual relations notes the progressively widening scope of section 74 in, by consequence of section 76’s restrictive approach. The ‘broad common sense approach’ utilised within *Assange*, *R (on the application of F) v DPP* and *McNally* demonstrate the emerging status of conditional consent. Deceptions relating to condom use, withdrawal method and gender are sufficient in vitiating consent to sexual activity. These three decisions remain judicially active in England and Wales. *Lawrence* is the guiding principle in

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<sup>108</sup> Rachel Clement Tolley, 'Deception, Mistake And Difficult Decisions' [2021] Criminal Law Now Network.

<sup>109</sup> Rachel Clement Tolley, 'Deception, Mistake And Difficult Decisions' [2021] Criminal Law Now Network.

<sup>110</sup> Rachel Clement Tolley, 'Deception, Mistake And Difficult Decisions' [2021] Criminal Law Now Network.

<sup>111</sup> Rachel Clement Tolley, 'Deception, Mistake And Difficult Decisions' [2021] Criminal Law Now Network.

<sup>112</sup> *R v Lawrence* [2020] EWCA Crim 971.

<sup>113</sup> Rachel Clement Tolley, 'Deception, Mistake And Difficult Decisions' [2021] Criminal Law Now Network.

deceptive sexual offences, advancing the ‘closely connected test’ in lieu of the ‘broad common sense approach’. It is determined that future decisions will rely on the Lawrence test.

#### **4. Detailed Assessment and Criticism of Current English and Welsh Law**

##### **4.1. The limitless application of section 74**

Section 74 is an imprecise and overly broad statutory instrument. The unlimited parameters set by the vast notions of ‘choice and freedom’ are detrimental to the efficiency of deceptive sexual offence law. By consequence of such vague concepts it would be unreasonable to expect the courts to draw robust delineations. Section 76's restrictive approach provokes section 74's overcompensation in the attempt to rectify the legal cavities in the safeguarding of sexual autonomy. The dangers involved in the careless application of section 76's irrebuttable justifies and legitimises section 74's sweeping and expansive employment. The statutory definition of consent is so inclusive, it counterintuitively creates obscurity. Elliot and Than indicate that while a statutory act emphasising sexual autonomy is necessary, “the ambiguous concepts of freedom and choice leaves the definition extremely vague” highlighting an inadequate “balance between simple, clear language and precise definition”<sup>114</sup>. A broad notion of consent impedes the courts ability to determine when consent will be vitiated, extending the scope of deception within sexual offences beyond what the law envisioned. By relying on such a broad definition, it seems almost unreasonable to expect the courts to construct robust principles that can predict every instance of deception. The general definition of section 74 is too unlimited to quantify “how much truthfulness is needed for genuine and valid consent”<sup>115</sup>. Section 74 is unable to produce precise boundaries where the potentially inexhaustible interpretations constrains legal predicability and certainty<sup>116</sup>. Parliaments clumsy statutory conceptualisation, so immeasurably vague in its nature, has unfairly encumbered the courts with full interpretative responsibility. Such a boundless definition of consent combined with the failure to implement a precise statute dealing with deceptions outside the realm of section 76, suggests that Parliament promoted a one stop shop approach in the criminalisation of sexual assault. The complete lack of guidance and unqualified intentions has burdened the courts with a challenging task. Deceptive sexual offences will unsurprisingly develop into piecemeal case law when governed by such unlimited notions. The inability to produce coherent and predictable boundaries in the field of deceptive sexual offences to ensure that “criminally culpable behaviour is well understood (...) in the most private and difficult ares of sexual relationships”<sup>117</sup> prohibits the future success of English and Welsh law in promoting coherence.

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<sup>114</sup> Catherine Elliott and Claire de Than, 'The Case For A Rational Reconstruction Of Consent In Criminal Law' (2007) 70 Modern Law Review.

<sup>115</sup> Amanda Clough, 'Conditional Consent And Purposeful Deception' (2018) 82 The Journal of Criminal Law.

<sup>116</sup> Rachel Clement Tolley, 'Deception, Mistake And Difficult Decisions' [2021] Criminal Law Now Network.

<sup>117</sup> Home Office, 'Setting The Boundaries : Reforming The Law Sex Offences' (Home Office Communication Directorate 2000).

The infinite application of section 74 is the foundation for Herring's proposal in determining deceptive sexual offences. Herring, both a prominent and controversial figure in the legal field of deceptive sexual offences interprets section 74 by its literal and natural meaning. He prescribes to the idea that sexual autonomy should be completely unlimited, surpassing all other rights. All deceptions involving characteristics conditional to the deceived's consent should be criminalised. Dismissing accusations of triviality, freedom and choice is prioritised. The broad construction of consent developed under section 74, denotes Herring's proposal as feasible and distressingly attainable. This theory is solely concerned with the plain grammatical wording of the statute, advancing complete protection for the rights of victims and removing any ambiguity relating to what deceptions vitiate consent. However, Herring's conceptualisation of deceptive sexual offences is too unrealistic to produce a workable legal doctrine. It demonstrates parliament's unreasonableness in expecting the courts to infer precise law in the literal interpretation of section 74. Unquestioned convictions of sexual deception is highly unreasonable and was not parliament's intention in the construction of section 74. Attempting to convict every instance of deception preceding or during sexual activity, no matter how arbitrary, is unjustifiable. Gross asserts that Herring's proposal is "frightening in its ramifications"<sup>118</sup> promoting "attitudes of social intolerance and discrimination"<sup>119</sup>. Exercising caution in the prosecution of deceptive sexual offences is necessary, where over criminalisation would lessen the impact of a sexual offence charge and trivialise section 74. Herring's proposal cannot be taken as a viable solution in determining non consensual deceptive sexual interactions. The achievable reality of Herring's unjustifiable proposal demonstrates section 74's imprecision and impracticality, hindering the future predictably of the deceptive sexual offences.

Section 74 fails to address the impact of both express and implied deceptions, as it was not constructed with this purpose. Section 74 acts as a one size fits all statutory tool, recklessly brandished within unexpected spheres of sexual offences<sup>120</sup>. The surprising reach of section 74 is again evidenced by its in cases relating to the "impact of grooming upon the young and vulnerable"<sup>121</sup>. Parliament's 2003 SOA left the law unsatisfied, forcing the courts to intervene, with little guidance to ensure interpretive consistency. Section 74 is not fit for purpose in relation to deceptive sexual offences. The absence of a precise legislative tool explicitly managing deceptive sexual offences in consensual sex has created a "sub ideal compromise" between protecting sexual autonomy, ensuring legal certainty, furthering predicability and reducing criminal overreach<sup>122</sup>. Section 74 needs careful reform and attentive reevaluation for the desired coherent development of deceptive sexual offences.

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<sup>118</sup> Alex Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants And The Legal Construction Of Non-Consent' [2014] Criminal Law Review.

<sup>119</sup> Alex Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants And The Legal Construction Of Non-Consent' [2014] Criminal Law Review.

<sup>120</sup> Rachel Clement Tolley, 'Deception, Mistake And Difficult Decisions' [2021] Criminal Law Now Network.

<sup>121</sup> Peter Rook, 'Reforming The Relationship Between Sexual Consent, Deception And Mistake' [2021] Criminal Law Reform Now Network.

<sup>122</sup> Rachel Clement Tolley, 'Deception, Mistake And Difficult Decisions' [2021] Criminal Law Now Network.

#### 4.2. Gender fraud is a valid decision

The fundamental feature of McNally's conviction hinged upon the notion of active deception. McNally's non disclosure of her biological sex, amounted to deception through the use of intentional "words and deeds"<sup>123</sup>. The prosecution highlighted numerous instances of active deception within various interactions between the appellant and the claimant. The defendant furthered her gender misrepresentation by wearing a strap of dildo beneath her clothes, refusing to remove her clothes during sexual interactions and insisted that the room remain dark<sup>124</sup>. These instances of positive concealment demonstrate that McNally purposefully mislead, using calculated measures to manipulate the complainants understanding of the truth. The court identified three major instances of deception as the decisive components affirming McNally's conviction. These were held as : discussions involving the subject of marriage and having children, the purchase of condoms in the aim to mislead regarding genitalia and a statement made during phone sex where in discussing "what they wanted to do to each other", McNally spoke of "putting it in"<sup>125</sup>. It would be difficult to suggest that these misrepresentations did not aid the duplicity. These acts of positive performance were instrumental in McNally's deceit. The blatant use of terminology normatively associated with males, highlights intention and premeditation. The express phrase "putting it in" combined with the purchase of condoms cannot be construed as anything but McNally's intention to further her gender fraud. Careful wording and deliberate actions removes the possibility of gender non disclosure and affirms McNally deceit. McNally did not simply ignore a misunderstanding but perpetuated the misconception, creating persuasive imposturing. This falsehood was further sustained with consideration to the defendants mens rea. The courts proved that beyond all reasonable doubt McNally had knowledge of the wrongdoing; where she admitted to knowing the extent of her deception by recognising that the complainant did not "did not realise I was a girl not a boy"<sup>126</sup>. McNally's understanding of the victims ignorance combined with purposeful conduct confirms that sexual activity was obtained through deception. The courts have determined that gender fraud, when proven intentional, will vitiate consent.

However, Sharpe massively contests to the accusation that McNally engaged in active deception, finding contempt in the criminalisation of individuals who are simply adjusting "towards the adoption of an authentic transgender identity"<sup>127</sup>. The courts classification of transgender identity and "its outward presentation as active deception"<sup>128</sup> is highly problematic and demonstrates a lack of

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<sup>123</sup> Alex Sharpe, 'Expanding Liability For Sexual Fraud Through The Concept Of 'Active Deception'' (2016) 80 The Journal of Criminal Law.

<sup>124</sup> *R v McNally* [2013] EWCA Crim 1051.

<sup>125</sup> *R v McNally* [2013] EWCA Crim 1051.

<sup>126</sup> *R v McNally* [2013] EWCA Crim 1051.

<sup>127</sup> Matthew Gibson, 'Deceptive Sexual Relations: A Theory Of Criminal Liability' (2019) 40 Oxford Journal of Legal Studies.

<sup>128</sup> Matthew Gibson, 'Deceptive Sexual Relations: A Theory Of Criminal Liability' (2019) 40 Oxford Journal of Legal Studies.

understanding regarding the “transgender phenomenon”<sup>129</sup>. Transgender individuals cannot pursue their authentic sense of self when “every word, every gesture, every mannerism no matter how consistent” would be considered a deliberate attempt to deceive and manipulate<sup>130</sup>. This is a truly unfair infringement upon an individual’s right to autonomously determine their selfhood. Sharpe indicates that the statement “putting it in” is indicative of male transgender behaviour, where the courts failed to acknowledge that transgender men often “consider prosthetic devices to be their penis”<sup>131</sup>. She further asserts that the purchase of condoms could have been for hygiene purposes, the actualisation of children is possible with the aid of IVF and the confusion regarding her pronouns is analogous with an individual struggling with their gender identity<sup>132</sup>. The McNally decision has implied that transgender individuals are calculated deceivers acting with “pretence and disguise”<sup>133</sup>. This is a truly harmful slur to attach to a vulnerable group of society that are already highly stigmatised and marginalised. The UK 2017 trans reports indicated that 43% of employers were unlikely to recruit a transgender worker<sup>134</sup> and 41% of trans people had been victims of hate crimes<sup>135</sup>. The statistics highlight the rampant transphobia prevalent amongst society and criminalisation of transgender individuals on the basis of gender fraud will only perpetuate the stigma. The courts have potentially enacted a precedent that undermines the fortitude and determination necessary to change gender within a cisnormative society. The charge of deceptive sex under section 74 SOA 2003 for individuals who are simply living their authentic self is not aligned with today’s egalitarian values. The 2004 Gender Recognition Act has confirmed that gender reassignment surgery is no longer a necessary requirement for the “legal recognition of gender identity within the United Kingdom”<sup>136</sup>. However, the law commission has counterproductively asserted that only surgery will completely eliminate the possible conviction for deception within sexual activity for trans individuals<sup>137</sup>. These contrary assertions have not clarified when a transgender identity will amount to active deception, sufficient in vitiating consent. How far along the gender transformation journey will the courts recognise an authentic transgender identity? The case of McNally conveniently avoided this question. It could be argued that charging McNally with

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<sup>129</sup> Alex Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants And The Legal Construction Of Non-Consent' [2014] Criminal Law Review.

<sup>130</sup> Matthew Gibson, 'Deceptive Sexual Relations: A Theory Of Criminal Liability' (2019) 40 Oxford Journal of Legal Studies.

<sup>131</sup> Alex Sharpe, 'Expanding Liability For Sexual Fraud Through The Concept Of 'Active Deception'' (2016) 80 The Journal of Criminal Law.

<sup>132</sup> Alex Sharpe, 'Expanding Liability For Sexual Fraud Through The Concept Of 'Active Deception'' (2016) 80 The Journal of Criminal Law.

<sup>133</sup> Matthew Gibson, 'Deceptive Sexual Relations: A Theory Of Criminal Liability' (2019) 40 Oxford Journal of Legal Studies.

<sup>134</sup> 'Transphobia Rife Among UK Employers As 1 In 3 Won't Hire A Transgender Person - Crossland Employment Solicitors' (Crossland Solicitors, 2018) <<https://www.crosslandsolicitors.com/site/hr-hub/transgender-discrimination-in-UK-workplaces>> accessed 18 June 2022.

<sup>135</sup> Chaka L. Bachmann, 'LGBT In Britain : Trans Report' (Stonewall : acceptance without exception 2019).

<sup>136</sup> Alex Sharpe, 'Expanding Liability For Sexual Fraud Through The Concept Of 'Active Deception'' (2016) 80 The Journal of Criminal Law.

<sup>137</sup> Alex Sharpe, 'Expanding Liability For Sexual Fraud Through The Concept Of 'Active Deception'' (2016) 80 The Journal of Criminal Law.

active deception “establishes a dangerous precedent, where many transgender man are at risk of having their behaviour subject to criminal law by setting an unclear threshold of gender determination”<sup>138</sup>.

The success of the *McNally* decision must be assessed in relation to the harm caused in gender fraud. Mill’s harm principle indicates that individuals should be free to act autonomously unless their actions cause harm to others<sup>139</sup>. The non disclosure of HIV will not vitiate consent, yet objectively, the transmission of an STD is normatively more harmful than deception regarding gender. It is suggested that the perceived harm arising from gender fraud stems from prejudice. Previous case law has documented attitudes of both transphobia and homophobia<sup>140</sup>. In a similar gender deception case, *R v Saunders*<sup>141</sup>, the trial judge exposed his outdated view stating that he suspected that “both girls would rather have been actually raped by young men”<sup>142</sup>. This trivialisation of rape combined with the unacceptable transphobic reaction is a disappointing reality in the English and Welsh legal institution. Sharpe depicts a highly insightful scenario exhibiting the prejudice entrenched within the contemporary decisions involving gender fraud :

“A white women and a man of mixed race who outwardly appears white meet in a wine bar. They flirt and the women invites the man back to her flat where mutually satisfying sex takes place. Subsequently, the women discovers the mixed race background of the man and claims to feel violated. She reports the matter to the police and requests that the man be charged with rape on the basis of his failure to disclose his racial background”<sup>143</sup>.

If a common sense approach is taken as outlined by LJ Leveson in *McNally*, it is apparent that the presumed harm is rooted in the victims own racial intolerance<sup>144</sup>. The prospect of convicting the man of mixed race for rape is inconceivable, where prosecution would be considered xenophobia and discriminatory. Equating gender to race as an unchangeable characteristic of an individual’s identity illustrates that “transgender fraud cases are a transphobic reaction to gender variance”<sup>145</sup>. Dismissing this comparison suggests that transphobia is not as serious as racism<sup>146</sup> and is not deserving of the same protection. The perceived harm attributed to gender fraud is not congruent within an egalitarian,

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<sup>138</sup> Laura- Anne Douglas, 'The Criminalisation Of Transgender-Cisgender Sexual Relations: "Gender Fraud" Or Compulsory Cisnormativity? Assessing The Meaning Of Consent In Sexual Offences For Transgender Defendants' (2017) 161 *Jurisprudence Review*.

<sup>139</sup> 'What Is The Harm Principle? Ethics Explainer By The Ethics Centre' (*Ethics.org.au*, 2022) <<https://ethics.org.au/ethics-explainer-the-harm-principle/>> accessed 18 June 2022.

<sup>140</sup> Sharon Cowan, 'The Heart Of The Matter: Criminalising Fraudulent Consent To Sex' [2019] *Edinburgh School of Law Research Paper*.

<sup>141</sup> *R v Saunders* [1991] (Unreported, Guildford Crown Court, Judge Moss).

<sup>142</sup> *R v Saunders* [1991] (Unreported, Guildford Crown Court, Judge Moss).

<sup>143</sup> Alex Sharpe, 'Sexual Intimacy, Gender Variance, And Criminal Law' (2015) 33 *Nordic Journal of Human Rights*.

<sup>144</sup> *R v McNally* [2013] EWCA Crim 1051.

<sup>145</sup> Alex Sharpe, 'Sexual Intimacy, Gender Variance, And Criminal Law' (2015) 33 *Nordic Journal of Human Rights*.

<sup>146</sup> Alex Sharpe, 'Sexual Intimacy, Gender Variance, And Criminal Law' (2015) 33 *Nordic Journal of Human Rights*.

liberal society. Upon this assessment, ethnicity is no different from gender, therefore conviction upon gender deception is not permissible and should not vitiate consent to sexual activity.

While transphobia is undeniably unacceptable, gender significantly differs from race within sexual activity. Gender is an essential characteristic of attraction and the underlying principle encompassing most sexual encounters. Cowan asserts that “gender is so fundamental to a persons choice of sexual partner that any deception regarding gender is deeply harmful and invalidates sexual consent”<sup>147</sup>. Gender fraud causes psychological harm and post stress trauma, where victims attest too feelings of violation and repulsion. The complainant within McNally testified to feeling “physically sick” upon the discovery of McNally’s deception<sup>148</sup>. Psychological harm is just as valid as physical injury. Yet, the law has not shown it the same regard. The field of psychological damage does not include mental distress without recognition of a psychiatric illness in the “fear that it would open the floodgates to litigation”<sup>149</sup>. It categorically asserts that ‘mere emotions’ will not amount to psychological harm. Without proof of a physical affliction, sentencing is challenging. Empirical evidence regarding mental injury is decidedly difficult, where the extent of harm is not easily measured. Orr asserts that UK criminal law has been extremely reluctant to “to engage with, or criminalise, behaviour that inflicts psychological harm on a victim without some accompanying physical injury”<sup>150</sup>. The impact of emotional or psychological trauma cannot be underestimated. Psychological harm isolates its victims, “shattering their sense of security”<sup>151</sup> causing feelings of powerlessness and self loathing<sup>152</sup>. The feelings of violation and defilement testified by victims within gender deception cases is consistent with psychological harm. Sexual autonomy was eroded by McNally's active deception, where the gender fraud arguably caused significant mental injury to the complainant. Not only was the victim’s consent vitiated but she was harmed through the deception. It would be difficult to suggest that the victim is not entitled to feelings of abuse through the exploitation of their trust and confidence. The gender fraud decisions have been interwoven with discriminatory attitudes, yet it must be acknowledged that the law has to reflect the contemporary understanding of genders importance to sexual relations. Society is still evolving gender fluidity norms. It would be unreasonable to expect the courts to implement precedents before society has naturally clarified gender delineations within the

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<sup>147</sup> Sharon Cowan, 'The Heart Of The Matter: Criminalising Fraudulent Consent To Sex' [2019] Edinburgh School of Law Research Paper.

<sup>148</sup> *R v McNally* [2013] EWCA Crim 1051.

<sup>149</sup> Ian Freckelton and Tina Popac, 'Recognisable Psychiatric Injury' And Tortious Compensability For Pure Mental Harm Claims In *Negligencesaadati V Moorhead* [2017] 1 SCR 543(Mclachlin CJ And Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown And Rowe JJ)' (2018) 25 *Psychiatr Psychol Law*.

<sup>150</sup> Russell Orr, 'Speaking With Different Voices: The Problems With English Law And Psychiatric Injury' (2016) 36 *Legal Studies*.

<sup>151</sup> 'Emotional And Psychological Trauma - Helpguide.Org' (*HelpGuide.org*, 2021) <<https://www.helpguide.org/articles/ptsd-trauma/coping-with-emotional-and-psychological-trauma.htm>> accessed 18 June 2022.

<sup>152</sup> Samantha Gluck, 'Effects Of Rape: Psychological And Physical Effects Of Rape | Healthyplace' (*Healthyplace.com*, 2022) <<https://www.healthyplace.com/abuse/rape/effects-of-rape-psychological-and-physical-effects-of-rape>> accessed 18 June 2022.

subjective sphere of the gender transformation journey. Too radical or advanced decisions could threaten to isolate a large populations of society. Upon the contemporary understanding of gender, psychological injury is a significant factor in determining the seriousness of the harm caused. Gender fraud legitimately vitiates consent.

McNally's awareness regarding the active concealment of her gender combined with the psychological damage caused in the misrepresentation of her biological sex, validated and legitimised the courts rationale. Interference upon selfhood in trans cases must be prohibited, yet with reference to the contemporary importance placed upon gender in sex, the McNally decision is well reasoned. McNally echos section 74 and concurs with the majority of the case law.

#### 4.3 Evaluation of the Lawrence decision is unconvincing

##### 4.3.1 Merits of Lawrence

Lawrence has produced modest clarity, demonstrating the exhaustible list of deceptions vitiating consent. For conduct to amount to a deceptive sexual offence for the purpose of section 74, the relevant act must be understood as relating to the performance of the sexual activity. Risks or consequences associated with the act, such as sexually transmitted diseases or fertility, are analogous with the broader circumstances and are incapable of begetting a sexual offence charge. It could be argued that the closely connected test is a necessary addition to the English and Welsh legal system. This restrictive application is arguably more aligned with Parliaments intentions in the conception of consent in section 74. Through Lawrence the courts asserted that Parliament was not looking "for a sea change"<sup>153</sup> in relation to the interpretation of consent under section 74 and its statutory definition must continue to apply stringently. The complainant within Lawrence maintained her capacity to freely choose to engage in unprotected sexual intercourse, indicating that a sexual offence charge upon this interpretation would be both unreasonable and a miscarriage of justice.

The complaints in Assange and D(F) imposed a physical restriction of their consent, prohibiting ejaculation from entering their vagina. The complainant in Lawrence did not impose any condition in relation to a physical barrier prior to penetration, demonstrating that she fundamentally consented to the complete act of sexual intercourse. The principle determined by Lawrence is that deceit cannot go to the consequences of the sexual encounter limiting the possible allegations of deceptive sexual offences. The broad common sense approach is too discretionary to produce enduring principles and its subjective interpretation removes the possibility of constructing a stable foundation regarding delineations within deceptive sexual offences. The likelihood of the "law developing in an ad hoc and unpredictable manner, without a common justifying rationale"<sup>154</sup> was a possible reality. For a

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<sup>153</sup> *R v Lawrence* [2020] EWCA Crim 971.

<sup>154</sup> Beatrice Krebs, 'Rape, Consent And A Lie About Fertility: R V Lawrence [2020] EWCA Crim 971' (2020) 84 *The Journal of Criminal Law*.



deceptive sexual offence charge to apply, the deceit must go to the very purpose of the sexual encounter. By implication of *Lawrence* only a physical restriction changes the performative character of the sexual act itself. *Lawrence*'s restrictive application limits the scope of deceptive sexual offences. In contrast to the previous case law, *Lawrence*'s rigorous closely connected test may help provide greater predictability in challenging and unusual scenarios. *Lawrence*'s decision is validated in its ability to limit the range of deceptive sexual offences.

#### 4.3.2 The Detriment of *Lawrence*

However, it must be acknowledged that *Lawrence* contradicts all previous case law decisions. *Lawrence* is an inconsistency. Its attempt to clarify the law by producing a more rigorous test, has instead created greater consternation. *Lawrence*'s 'closely connected test' has been cast as both "unconvincing"<sup>155</sup> and a "bad law"<sup>156</sup>. Murray asserts that the *Lawrence* decision must be reconsidered, where the "application of the closely connected test is based on dubious foundations, resulting from a chain of misinterpretations of previous case law"<sup>157</sup>. It is difficult to see how *Lawrence*'s active deception differs from *McNally*. Both complaints went beyond the tacit misrepresentation, holding to active statements of deception. The principle determined by *McNally* and *R v B* highlighted that conduct pertaining to direct deceptions would vitiate consent and *Lawrence*'s numerous false verbal assurances affirming his vasectomy, can only be interpreted as an active deception. The victim had relied upon the falsehood and "would not have consented to unprotected sexual intercourse had she thought him to be fertile"<sup>158</sup>. The consistent decisions in *Assange* and *D(F)* demonstrate that individuals seem comfortable and accepting of the rationale involved in conditional consent. With reference to the *Lawrence* jury decision prior to and the outcomes of *Assange* and *D(F)*, the broad common sense test is legitimate, producing practical delineations within deceptive sexual offences. There is a consensus that a violation of a prerequisite condition to sexual intercourse could be determined as deceptive sexual assault. It seems that a common sense approach cultivates workable and viable principles. This consensus begs the question as to why the courts felt the need to change the legal position in *Lawrence*, creating removing predictably and legal certainty.

The distinction between *Lawrence*, *Assange* and *DPP*, is arbitrary. In the *Lawrence* decision prior to appeal, the judge indicated that "there was no material difference between the position of the

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<sup>155</sup> K. L. Murray and T Beattie, 'Conditional Consent And Sexual Offences : Revisiting The Sexual Offences Act 2003 After *Lawrence*' (2021) 7 Criminal Law Review.

<sup>156</sup> Laura- Anne Douglas, 'The Criminalisation Of Transgender-Cisgender Sexual Relations: "Gender Fraud" Or Compulsory Cisnormativity? Assessing The Meaning Of Consent In Sexual Offences For Transgender Defendants' (2017) 161 Jursiprudence Review.

<sup>157</sup> Laura- Anne Douglas, 'The Criminalisation Of Transgender-Cisgender Sexual Relations: "Gender Fraud" Or Compulsory Cisnormativity? Assessing The Meaning Of Consent In Sexual Offences For Transgender Defendants' (2017) 161 Jursiprudence Review.

<sup>158</sup> *R v Lawrence* [2020] EWCA Crim 971.

complainant in Assange and R (F) to Lawrence, who all sought to avoid the risks of pregnancy”<sup>159</sup>. The judge further concluded that the acquisition of ejaculate within Lawrence is of ‘marginal relevance’ when contrasted against Assange and R (F)<sup>160</sup>. It was suggested that the fundamental objective of these contraceptive methods “either by way of vasectomy, the wearing of a condom or by the withdrawal method is to prevent pregnancy”<sup>161</sup>. All three complainants primary purpose was to prevent pregnancy and only the method used to prevent conception differed. Assange’s victim relied upon the use of a condom, the plaintiff in R (F) trusted the withdrawal technique and Lawrence’s complainant requested the removal of sperm for the seminal fluid. Williams asserts that it is necessary to view these three contraceptive mechanisms on a medical basis; where essentially “none of the victims consented to sperm inside their bodies”<sup>162</sup>. Upon a medical perspective, it must be acknowledged that the complainant in Lawrence did not consent to every aspect of the physical act. She categorically prohibited the presence of sperm inside her vagina, which is arguably “the most integral part of sexual intercourse in the most natural form”<sup>163</sup>. Glendinning stresses that a vasectomy’s internal physical obstruction serves the same purpose as a condom<sup>164</sup>. Medically, the procedure involves “cutting, sealing or blocking the tubes that carry sperm from a man’s testicles to the penis”<sup>165</sup>, which could be interpreted as an internal physical barrier. Upon a medical assessment the distinctions between these three cases holds flawed logic. Lawrence’s reliance on such a subtle triviality has arguably produced an unconvincing law. Such an artificial distinction should not be the rationale used to overhaul the developing principles in the realm of deceptive sexual offences. The courts fear in producing an unreasonable range of deceptive sexual charges has instead produced greater inconsistencies. The rationale encompassing Lawrence is ultimately wrong and a hinderance to the law.

It could be suggested that the contentious decision upheld within Lawrence was the courts attempt to mitigate the potential expansion of deceptive sexual offences. The Lawrence judgement was the laws attempt to “row back” and limit the expanding development of conditional consent<sup>166</sup>. Lawrence’s factually paralleling conduct to previous cases had to be distinguished, by implication of an excessive and disproportionate charge of rape. The SOA 2003 details four primary sexual offences, depicted as :

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<sup>159</sup> *R v Lawrence* [2020] EWCA Crim 971.

<sup>160</sup> *R v Lawrence* [2020] EWCA Crim 971.

<sup>161</sup> *R v Lawrence* [2020] EWCA Crim 971.

<sup>162</sup> Beatrice Krebs, 'Rape, Consent And A Lie About Fertility: R V Lawrence [2020] EWCA Crim 971' (2020) 84 *The Journal of Criminal Law*.

<sup>163</sup> Beatrice Krebs, 'Rape, Consent And A Lie About Fertility: R V Lawrence [2020] EWCA Crim 971' (2020) 84 *The Journal of Criminal Law*.

<sup>164</sup> Isabella Glendinning, 'Should Mistaken Consent Still Be Consent? In Defence Of An Incremental Understanding Of Consent In The Sexual Offences Act 2003' (2021) 85 *The Journal of Criminal Law*.

<sup>165</sup> Isabella Glendinning, 'Should Mistaken Consent Still Be Consent? In Defence Of An Incremental Understanding Of Consent In The Sexual Offences Act 2003' (2021) 85 *The Journal of Criminal Law*.

<sup>166</sup> Rachel Clement Tolley, 'Deception, Mistake And Difficult Decisions' [2021] *Criminal Law Now Network*.

rape, assault by penetration, sexual assault and causing nonconsensual sexual activity<sup>167</sup>. Rape within England and Wales is defined by section 1 (a) of the SOA 2003, where ‘A person (A) commits an offence if—:

‘he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis’<sup>168</sup>

Lawrence’s offence would have corresponded to statutory rape upon a guilty verdict, as he had vaginally penetrated the claimant with his penis. All instances of penile penetration in non consensual sexual activity are uncompromising charged as rape within English and Welsh law. A rape conviction has a justifiably formidable stigmatising effect, where in the United Kingdom it is considered the “most serious crime after murder”<sup>169</sup>. All discussed complaints agreed to the actual performative element of sexual intercourse, where only upon the discovery of the deception was consent understood to be vitiated. Gibson asserts that “deceptive sexual relations represent a different wrong to the relations proscribed by the principal sexual offences”, where the distinction “merits separate criminalisation”<sup>170</sup>. The primary sexual offences involve harm both during and post the performance of the sexual act. However, instances of deceptive sexual offences are categorised by retrospective harm, where only upon revelation does injury occur. Arguably, the conviction of rape in both Assange and D(F) was disproportionate and unfairly labelled, where contextually the act of penetration was consensual. The binary reality of rape convictions suggests that unqualified rape charges does not allow for accurate or precise verdicts, failing to provide suitable provisions. While Lawrence’s conduct necessitates censure, the statutory definition of rape was too blunt a tool to deal with the factual intricacies required within such an instance of a deceptive sexual offences. By implication of previous case law, Lawrence’s conduct should be a deceptive sexual offence and the lack of precise statutory instruments should not pardon the culpability. A statutory failing should not be the reason for unpunished deceptive sexual acts. The complaints sexual autonomy within Lawrence was violated, her right to section 74 dishonoured and justice unserved. The courts weak and arbitrary distinctions were employed to rationalise and conceal the underlying issue relating to the vulnerabilities of the SOA 2003, masking the troubling reality of the limited available sexual offence designations.

The lack of precision outlined within the SOA 2003, resulting in the improvised Lawrence decision, constitutes a fair labelling issue. Ashworth asserts that accurate labelling “ensures that (...) distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law (...) that offences (...) are subdivided to represent fairly the nature and magnitude of the law-breaking”<sup>171</sup>. Fair

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<sup>167</sup> Sexual Offences Act 2003 2003.

<sup>168</sup> Sexual Offences Act 2003 2003.

<sup>169</sup> Matthew Gibson, 'Deceptive Sexual Relations: A Theory Of Criminal Liability' (2019) 40 Oxford Journal of Legal Studies.

<sup>170</sup> Matthew Gibson, 'Deceptive Sexual Relations: A Theory Of Criminal Liability' (2019) 40 Oxford Journal of Legal Studies.

<sup>171</sup> Matthew Gibson, 'Deceptive Sexual Relations: A Theory Of Criminal Liability' (2019) 40 Oxford Journal of Legal Studies.

labelling ensures the unambiguous communication of specific crimes. The utilisation of primary sexual offences in deceptive sexual cases “misrepresents the wrongfulness of the defendants conduct”, where a bespoke deceptive sexual sentencing regime is necessary<sup>172</sup>. “The tailored criminalisation of deceptive sexual offences” would provide guidance for individuals, producing clarity and fair notice ‘of the nature of allegations against them’<sup>173</sup>. An offence must “clearly and fairly represent the offenders wrongdoing”, exemplified by the murder and manslaughter distinction<sup>174</sup>. Individuals have the right to understand the criminality of their conduct, where the overly broad drafting of statutes enhances ambiguity. Lawrence’s comportment should have amounted to a deceptive sexual offence, yet the prescribed violation was performed with impunity due to the SOA 2003s deficiencies. The absence of adequate statutory construction should not be the deciding factor in verdicts and the law should repel such apathy. SOA 2003 failed in its purpose to protect sexual autonomy, and the complaint in Lawrence suffered the consequences. A distinguished rape charge for deceptive sexual offences must be created, if the courts desire subsequent legal predictably and fairness.

## **5. Comparison and Presentation of Swiss law**

Similarly to the English and Welsh legal institution, Switzerland is currently struggling to protect sexual assault victims, where the majority of sexual violations remain unreported. Swiss amnesty international have indicated that “only 8% of sexual violence victims file complaints”<sup>175</sup>, and in 2016 there was only 97 successful rape prosecutions out of 619 reported incidents<sup>176</sup>. These are distressing statistics and vastly disproportionate to the actual incidents of sexual assault. This data is particularly troubling when in the same year “3912 people consulted a victim assistance service for cases of sexual coercion or rape”<sup>177</sup>. Amnesty international has called for the complete redress of the legal instruments governing sexual offences in Switzerland. The Swiss sexual offence instrument is analogous with the old common law traditional in England and Wales, identified as a force requirement. Within England and Wales the force requirement has been replaced by an affirmative consent doctrine, convicting sexual assault upon testimony. Yet, force must be proven for a successful sexual offence conviction in Switzerland. Article 190 within the Swiss penal code defines rape as :

‘Anyone who, in particular by means of threats or violence, by exerting psychological pressure on his victim or by putting her in a state of incapacity to resist, forces a female person to undergo the sexual act, will be punished with a prison sentence of one to ten years’<sup>178</sup>.

<sup>172</sup> James Chalmers and Fiona Leverick, 'Fair Labelling In Criminal Law' (2008) 71 Modern Law Review.

<sup>173</sup> James Chalmers and Fiona Leverick, 'Fair Labelling In Criminal Law' (2008) 71 Modern Law Review.

<sup>174</sup> James Chalmers and Fiona Leverick, 'Fair Labelling In Criminal Law' (2008) 71 Modern Law Review.

<sup>175</sup> 'Sexuelle Gewalt In Der Schweiz' (*Cockpit gfs.bern AG*, 2022) <<https://cockpit.gfsbern.ch/de/cockpit/sexuelle-gewalt-in-der-schweiz/>> accessed 18 June 2022.

<sup>176</sup> Sylvia Revello, 'Plainte Pour Viol, Un Parcours Éprouvant' *Le Temps* (2018).

<sup>177</sup> Revello S, 'Plainte Pour Viol, Un Parcours Éprouvant' *Le Temps* (2018).

<sup>178</sup> Code pénal suisse 1937.

The force requirement is perceived as advantageous, as a lack of consent through violence is more obvious. Proving that the perpetrator used force to dominate their victim normatively holds a greater evidential character. The difficulties encompassing the arguably subjective approach associated with affirmative consent is contrasted against the objective standard of the force requirement. The transparent premise of conviction consequently facilitates greater efficiency in ensuring justice<sup>179</sup>. Kinports asserts that the use of force demonstrates “a culpable state of mind”<sup>180</sup>; the purposeful act of aggression removes the uncertainty regarding the mens rea. Furthermore, it is argued that consent defined rape is presumed to incentivise a higher degree of false accusations<sup>181</sup>. The Swiss legal institution questions the affirmative consent doctrine’s ability to ensure a harmonious balance between legal protection and justice, while preserving the seriousness of sexual assault allegations. However, the English and Welsh law has proven this to be untrue<sup>182</sup>. Tchen indicates that the rationale encompassing the false allegation fear is groundless<sup>183</sup>. There has been no dramatic increase in rape accusations in testimony based sexual offence constitutions<sup>184</sup>. The change in attitude towards women and their legitimacy as actors in society has altered the traditional courts’ perceptive that women’s attestations could not be trusted<sup>185</sup>. The underperforming law on sexual offence within Switzerland, recommends a needed reconstruction of sexual offence law.

Edwards indicates that the misunderstanding surrounding the actuality of sexual assault perpetuates the inclination towards the force requirement. Individuals maintain the misconception that the majority of rapes involve a ‘violent stranger’<sup>186</sup>, where force is ineluctable and inescapable. This is simply untrue. In reality 8 out of 10 rapes are committed by an individual known to the victim<sup>187</sup>. The majority of sexual assault holds force and violence as often irrelevant features in the actualisation of rape. Operating under the mistaken ‘violent stranger rape myth’, victims are deprived of adequate protection<sup>188</sup>. The force requirement is antiquated and cruel, where victims must endure physical

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<sup>179</sup>Kit Kinports, 'Rape And Force: The Forgotten Mens Rea' (2001) 4 Buffalo Criminal Law Review.

<sup>180</sup> Kit Kinports, 'Rape And Force: The Forgotten Mens Rea' (2001) 4 Buffalo Criminal Law Review.

<sup>181</sup> Anthony Anex, 'How A New Definition Of Rape Could Impact Swiss Law' *Swissinfo.ch* (2021).

<sup>182</sup> Kit Kinports, 'Rape And Force: The Forgotten Mens Rea' (2001) 4 Buffalo Criminal Law Review.

<sup>183</sup> Christina M. Tchen, 'Rape Reform And A Statutory Consent Defense' (1983) 74 *The Journal of Criminal Law and Criminology* (1973-).

<sup>184</sup> Christina M. Tchen, 'Rape Reform And A Statutory Consent Defense' (1983) 74 *The Journal of Criminal Law and Criminology* (1973-).

<sup>185</sup> Christina M. Tchen, 'Rape Reform And A Statutory Consent Defense' (1983) 74 *The Journal of Criminal Law and Criminology* (1973-).

<sup>186</sup> Christina M. Tchen, 'Rape Reform And A Statutory Consent Defense' (1983) 74 *The Journal of Criminal Law and Criminology* (1973-).

<sup>187</sup> 'Perpetrators Of Sexual Violence: Statistics | RAINN' (*Rainn.org*, 2022) <<https://www.rainn.org/statistics/perpetrators-sexual-violence>> accessed 18 June 2022.

<sup>188</sup> Shellie Patscheck, 'The Effects Of Acquaintance Versus Stranger Rape And Gender On Rape Myth Acceptance And Attitudes Toward Rape In College Students' (2008) 14 *Modern Psychological Studies*.

violence to secure a rape conviction, as rape will not be attributed to “the victim who did not put up a good fight”<sup>189</sup>. Sandoval asserts that victims face a catch-22 situation, deciding between “the nauseating choices of sustaining serious physical injury or letting their perpetrator go free without punishment”<sup>190</sup>. Force defined rape does not provide satisfactory protection for sexual assault by relatives or acquaintances, as “individuals may fear physical retaliation if they go beyond a mere verbal assertion of non consent”<sup>191</sup>. An affirmative consent based approach is the only mechanism that facilitates the preemptive protection of individuals from both rape and violence. Swiss criminal law must implement consent as the fundamental condition procuring successful sexual offence convictions. Committing to the construction of verbal resistance and consent based testimony is meritorious, as it is the only legal instrument that fully protects vulnerable individuals, ensuring the preservation of sexual integrity.

The Swiss sexual offence law is antiquated, as the contemporary importance of sexual autonomy remains absent from the sexual offence provisions. Schneidegger indicates that the current definition of rape endorsed in Switzerland is ‘too mild and imprecise’<sup>192</sup>. Article 190 holds that only women can be raped, where it is through the penetration of a ‘female person’ that fulfils the rape criteria. Switzerland’s inability to recognise male rape is both discouraging and inadmissible. Article 189 on sexual offences asserts that anal penetration or penetration by a foreign object will only amount to an instance of sexual assault<sup>193</sup>, differing from English and Welsh criminal law. Switzerland’s sexual offence law must undergo profound modernisation if it is to provide the necessary and expected protection. The force requirement limits the scope of sexual offences that can be prosecuted, where a deceptive sexual offence charge or intoxicated sex cannot be considered within Swiss sexual offences. A deceptive sexual offence charge hinges upon the victims broader condition of consent and whether permission was given to that particular scenario. Swiss laws force requirement is not concerned with the contextual details of a victims consent but simply whether they were forcibly overcome. Deceptive sexual offences are only relevant within consent based sexual offence constitutions. Switzerland practices an outdated sexual offence model, which is a disappointing reality for the protection of vulnerable individuals. The force requirement mechanism acts as a blunt tool lacking the sophistication needed to assess the intricate details typified within deceptive sexual offences.

The Swiss penal law on sexual offences cannot act as an alternative model for English and Welsh law. Instead, Switzerland should be considering the implementation of the consent based approach advanced by progressive legal institutions. The previously discussed issues within English and Welsh

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<sup>189</sup> Sophie Martin, 'Le Viol En Droit Suisse : Une Réforme Nécessaire' [2021] *Law Career Start*.

<sup>190</sup> Eric Sandoval, 'The Case For An Affirmative Consent Provision In Rape Law' (2019) 94 *North Dakota Law Review*.

<sup>191</sup> Matthew R. Lyon, 'No Means No?: Withdrawal Of Consent During Intercourse And The Continuing Evolution Of The Definition Of Rape' (2004) 95 *The Journal of Criminal Law and Criminology* (1973-).

<sup>192</sup> Anthony Anex, 'How A New Definition Of Rape Could Impact Swiss Law' *Swissinfo.ch* (2021).

<sup>193</sup> 'Special Rapporteur On Violence Against Women, Its Causes And Consequences' (United Nations 2021).

law cannot even be considered within Swiss law, as there is no parallel. Swiss law has not begun to consider the issue of deception in sexual offences. Switzerland is currently failing in its purpose to provide complete protection for victims of sexual assault and neglects sexual autonomy. Furthermore, in the adoption of the Istanbul convention, on the prevention and combating of violence against Women and Domestic Violence, Switzerland had failed to abide and conform to its ratified obligation. Without the adoption of a consent based approach, Switzerland will continue to fall short of its international commitment.

It must be acknowledged that in 2021 the Swiss federation created a proposal for the revision of sexual offences. The primary proposition detailed the desirability of a consent based approach to sexual offence prosecutions combined with the expansion of the rape definition<sup>194</sup>. With reference to the deceptive sexual offence outlined within Assange the 2021 federal review mentioned the issue of 'stealthing'. Considering the Aide Sida and the Pink Cross, the review recommended the implementation of a 'stealthing' offence, detailed as art 187a para 2, in consideration of the harmful risk associations with unprotected sex detailed as sexually transmitted diseases and unwanted pregnancies<sup>195</sup>. This suggestion was the only indication of the potential inclusion of deceptive sexual offences within the Swiss penal code. However, this recommendation was not well received and was determined as a legislation producing 'insoluble difficulties'<sup>196</sup>. It seems unlikely that a 'stealthing' provision will be implemented, with consideration to the receptive critique.

The future rape law in Switzerland is currently unknown, where deep scrutiny is required in order to parallel the progression in the English and Welsh legal system. Switzerland must conceive a rape definition that allows nuance and facilitates assessment into the circumstances encompassing sexual assault. It would be detrimental for England and Wales to reimplement a force requirement, as it removes necessary protection. Swiss sexual offence law does not produce insights and is not a beneficial or advantageous base of comparison in resolving the conflicts outlined within English and Welsh law.

## **6. Proposals for the English and Welsh Law**

### **6.1 Proposal 1 : distinguished deceptive rape charge**

It is understood that rape within deceptive sexual offences must be distinguished. The unqualified charge of rape is too harsh when considering the contextual understanding of deceptive sexual offences. A precise legislative tool is required for the future success and clarity of sentencing within

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<sup>194</sup> Domaine de direction Droit pénal, 'Loi Fédérale Portant Révision Du Droit Pénal En Matière Sexuelle' (Office fédéral de la justice OFJ 2021).

<sup>195</sup> Domaine de direction Droit pénal, 'Loi Fédérale Portant Révision Du Droit Pénal En Matière Sexuelle' (Office fédéral de la justice OFJ 2021).

<sup>196</sup> Loi fédérale portant révision du droit pénal en matière sexuelle  
Rapport sur les résultats de la consultation

deceptive sexual offences. Rape only involving retrospective harm must be distinguished. Lawrence should have been convicted of a minor offence of rape, diminished in its severity. A reduced charge in consideration to Assange, D(F) and McNally may have been more palatable and accurate, removing ambiguous discretionary sentencing. Sexual offences must move away from the current binary approach<sup>197</sup>. The single offences of rape and sexual assault should be replaced with a series of offences. Gibson suggests that 'a series of deceptive sexual offences mirroring the principle sexual offences in section 1-4 of the SOA' should be implemented<sup>198</sup>. He proposes that deceptive sexual offences should be characterised as :

2. 'Procuring sexual intercourse by deception' (mirroring 'rape' in the SOA, section 1(1)).
3. 'Procuring penetration by deception' (mirroring 'assault by penetration' in the SOA, section 2(1)).
4. 'Procuring sexual touching by deception' (mirroring 'sexual assault' in the SOA, section 3(1)).
5. 'Procuring non-consensual sexual activity with a person by deception' (mirroring 'causing a person to engage in sexual activity without consent' in the SOA, section 4(1))<sup>199</sup>.

These distinctions within sexual offences will promote increased legal certainty, predicability and justice. The enactment of this legislative instrument will ease the complexity characterising deceptive sexual offences, offering guidance to both individuals and the courts. The signposting will produce coherence, reducing the possibility of subsequent piecemeal sexual offence case law. The separate criminalisation creates acceptable delineations, helping draw boundaries as to when deceptive conduct amounts to a sexual offence. Distinguished offences will alleviate the dangers associated with section 74's indiscriminate application, as specific labelling will limit its inexhaustible ambit and will remove its burdensome responsibility. This dissertation strongly recommends the actualisation of Gibson's proposition, with an emphasis on the wrong relating to retrospective harm. A precise deceptive sexual offence legislative tool will pave the way for coherence, where fair labelling will inevitably produce predicability and guidance.

## 6.2 Proposal 2 : Repeal Lawrence

The decision in Lawrence is inconsistent and ultimately fails to protect sexual autonomy. Lawrence creates unnecessary practical difficulties for precise implementation and certainty in lower courts. As aforementioned, Lawrence convolutes the law and should be repealed as the guiding principle.

## **7. Conclusion**

In conclusion, the courts have been encumbered with the arduous task of delineating coherent boundaries within the highly subjective and complex sphere of deceptive sexual offences. The courts are failing in their duty to communicate criminally culpable behaviour within such a contentious area of the law and are diluting protection. The difficulties encompassing the criminalisation of sexual

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<sup>197</sup> Rebecca Wiilams, 'Economic And Sexual Autonomy' [2021] Criminal Law Reform Now Network.

<sup>198</sup> Matthew Gibson, 'Deceptive Sexual Relations: A Theory Of Criminal Liability' (2019) 40 Oxford Journal of Legal Studies.

<sup>199</sup> Matthew Gibson, 'Deceptive Sexual Relations: A Theory Of Criminal Liability' (2019) 40 Oxford Journal of Legal Studies.



offences is reflected in the distressing reality of reduced prosecutions. The law is fundamentally stumped when determining the vitiation of consent on material deceptions in instances where the sexual activity was desired. Case law has become contradictory and vague statutory terminology prohibits the facilitation of precise governable principles.

The current status of English and Welsh law identifies section 76 as the primary legislative tool governing deceptive sexual offences. Instances of impersonation and deceit regarding the sexual intent of the act are easily determined and well settled principles within English and Welsh law. The gaps left by the necessary restrictive approach of section 76 legitimises the indiscriminate application of section 74. Section 74 prioritises sexual autonomy, utilising the notions ‘choice’ and ‘freedom’, to uphold consent. The statutory territory of section 74 and 76 does not provide any guidance on deceptions involved in consensual sexual activity. The interaction between section’s 74 and 76 is lacklustre, reflected in the underwhelming practical workability. The status of deception as a general principle in English and Welsh law is universally accepted and embraced. Both the labelling of the offence and the possible remedies are template in their implementation. Yet, the clarity encompassing general fraudulent misrepresentation does not extend to deceptive sexual offences. The courts are struggling to consistently determine when deceptions should vitiate consent. The identified lack of clarity will lead to discordant decisions and piecemeal case law. The accepted status of blanket rejection to disclosure extends to non disclosure in instances of sexual activity. While this general principle may be ill advised and unpalatable in the inability to mitigate risks of harm, this is a settled and workable area of the law. *Assange, D(F)* and *McNally* confirm conditional consent as a legally enforceable and governable principle. Any dishonoured requirement relating to a material fact of consent, established prior to intercourse will amount to deception for the purposes of sexual activity. All three cases advance the unrestricted application of section 74 for absolute sexual integrity. The implementation of a ‘broad common sense approach’ seemed consistent and settled. *McNally*’s additional criteria stipulated that conditional consent must involve active deception. Prior to *Monica*, the English and Welsh law on deceptive sexual offences was developing harmoniously with consistent rationale. *Lawrence* replaced the accepted ‘broad common sense approach’ with the ‘closely connected test’, becoming the guiding principle. On appeal, the court held that the deception must be ‘closely connected to the nature or purpose of sexual intercourse’ and must not relate to the ‘broader circumstances’. Upon the subtlety of a ‘physical barrier’ rationale, the *Lawrence* decision was distinguished from all the previous case law. The closely connected test considerably limits the potential scope of deceptive sexual offences. However, the *Lawrence* decision failed to justify why the complainants right to freedom and choice was deprived with referenced to section 74’s unrestricted application in *Assange* and *R (on the application of F) v DPP*. The courts remain ambiguous on how *Lawrence*’s express lie differed from the accepted concept of active deception outlined within *McNally*.

A contributing issue to the incoherence encompassing deceptive sexual offences is the limitless application of section 74. The almost infinite ambit of possible interpretations conveyed by the notions of 'choice and freedom' complicates the courts ability to delineate permissible boundaries. Parliament must take responsibility for the clumsy statutory definition. Its faineant enactment lacks guidance, encumbering the courts with directionless interpretive responsibility. Herring's dangerous and unreasonable proposal while attainable, evidences the boundless scope of section 74. The comprehensive rationale upheld within *McNally* must be acknowledged. With emphasis on the notion of active deception, *McNally* found that gender fraud is sufficient to vitiate consent. Certain academic critique denotes this judgement as prejudicially founded, where the harm involved is rooted in cisnormative intolerance. It could be suggested that the courts have set a dangerous precedent in attributing the conduct of authentic trans conduct as deceptive manipulation. However, the harm encompassing gender fraud must not be underestimated, where deceptions relating to gender cause psychological harm and post stress trauma. The significance placed upon gender in quotidian sexual practice suggests that biological sex is inherent to the initiation of intercourse. Gender is an essential characteristic underlying most sexual encounters and therefore holds normatively higher significance. The *McNally* decision adequately reflects the contemporary understanding of genders importance in sexual relations. Commandeering the evolution of gender norms through precipitous precedents would encroach upon the territory public policy. While *Lawrence* has reduced the scope of deceptive sexual offences, it contradicts all previous case law decisions. The attempt to limit the scope of section 74 has unnecessarily cleaved the English and Welsh law. *Lawrence's* reasoning distinguishing itself from *Assange* and *DPP* is arbitrary. Such artificial differentiations should not be the rationale governing the reconstruction of the developing principles in the realm of deceptive sexual offences. The credible reasoning distinguishing *Lawrence* is a charade, where removing pretence evidences the *Lawrence* rationale as an attempt to prevent the unfair prosecution of an arguably minor crime, by consequence of inadequate legislative tools. Assessment of the force requirement as evidenced through Switzerland holds that a consent based sexual offence doctrine is more effective. The status of Swiss sexual offences cannot act as a reasonable comparative source. It holds no insight to help resolve the conflicts identified within English and Welsh deceptive sexual offence law.

Determining when and what deceptions will vitiate consent is an gruelling task. While all deceptions are morally wrong, not all violations caused by the deceit hold adequate foundations for criminalisation. The vague notions indicated within section 74 cannot dictate robust principles. Deceptive sexual offences cover such a large and socially changing field of behaviour, case law is challenged in its ability to pinpoint and preempt enduring precedents. The law must cater to the layman, allowing individuals to regulate conduct, to comport themselves in a manner mitigating criminal sanction. The legal perspective in *Lawrence* is arbitrary, serving only to confuse the public on issues that seemed to have been naturally developing into a coherent and workable doctrine. To except the courts to create immovable precedents on matters undetermined within a democratic society goes beyond its purpose. The only legal test allowing the law of sexual offences to evolve in parallel to

societies rapidly modernising interpretation of gender issues, bodily integrity and sexual autonomy is to maintain a broad common sense approach. Common sense while ambiguous, has proven practical. In order for the law to avoid over lapping cases, the courts must prevent constant distortion. The arbitrary decision in Lawrence could be determined as the beginning of piecemeal legislation, where its attempt to refine when deception will vitiate consent, condemned the states of previous decisions as anaemic and uncertain. The concept of conditional consent should remain the primary principle governing deceptive sexual offences. Conditional consent is the only convention that fully prioritises and defends sexual autonomy. In Lawrence the courts fundamentally failed in the primary purpose of protecting consent. With reference to the previous court decisions, the complainant in Lawrence was unfairly treated, where reparatory justice was pulled out from beneath her. Lawrence's legal chasm creates uncertainty, generating discord. To ensure future predicability a legislative instrument adding degrees to the primary sexual offence charges is recommended. The new offence is legitimised by the idea of retrospective harm. Parliamentary effort to ensure the fair labelling of deceptive sexual offences will clarify the boundaries of criminally culpable behaviour and correctly characterise wrongdoing. The current law on deceptive sexual offences is entrenched with contradictions and obscurity. The future success of a coherent body of law depends upon the intervention of a precise legislative tool. The sphere of deceptive sexual offences will undoubtedly develop ad hoc without intercession. Parliament and the courts must imminently act before extensive reformative measures need to be taken. The disappointing rape prosecution statistics cannot be swept under the carpet and the distressing reality of sexual offences must not be ignored. The future success of deceptive sexual offences depends upon legal and parliamentary preemptive resolutions. The field of deceptive sexual offences is in a critical state, craving prompt rectification.

**Bibliography****Cases**

Assange v Swedish Prosecution Authority [2011] EWHC 2849

R v B [2007] 1 WLR 1567

R v Cuerrier [1998] [1998] 2 SCR 371

R v Dee [1884] 14 LR Ir 468 (14 LR Ir 468)

R v Elbekkay [1995] Crim LP 163

R v Flattery [1877] 2 QBD, 410 (2 QBD)

R v Lawrence [2020] EWCA Crim 971

R v McNally [2013] EWCA Crim 1051

R (Monica) v DPP [2018] EWHC 3508 (QB)

R (on the application of F) v The Director of Public Prosecutions [2014] QB 581

R v Williams [1923] 1 KB 340

**Legislation**

Code pénal suisse 1937

Fraud Act 2006

Sexual Offences Act 2003

**Literature**

Alencar T, 'Conditional Consent And Sexual Crime: Time For Reform?' (2021) 85 The Journal of Criminal Law

Alexander L, and Sherwin E, 'Deception In Morality And Law' (2003) 22 Law and Philosophy

Anex A, 'How A New Definition Of Rape Could Impact Swiss Law' Swissinfo.ch (2021)

Bachmann C, 'LGBT In Britain : Trans Report' (Stonewall : acceptance without exception 2019)

Bettcher T, 'Evil Deceivers And Make-Believers: On Transphobic Violence And The Politics Of Illusion' (2007) 22 Hypatia

Bohlender M, 'Mistaken Consent To Sex, Political Correctness And Correct Policy' (2007) 71 The Journal of Criminal Law

Brooks V, and Thompson J, 'Dude Looks Like A Lady: Gender Deception, Consent And Ethics' (2019) 83 The Journal of Criminal Law

Buss S, 'Valuing Autonomy And Respecting Persons: Manipulation, Seduction, And The Basis Of Moral Constraints' (2005) 115 Ethics

Chalmers J, and Leverick F, 'Fair Labelling In Criminal Law' (2008) 71 Modern Law Review

Chen-Wishart M, 'Misrepresentation And Non-Disclosure' [2018] Law Trove

Chen W, 'R V Bingham [2013] EWCA Crim 823, [2013] 2 Cr. App. R. 29 - Case Summary' (lawprof.co, 2021) <<https://lawprof.co/criminal-law/sexual-offences-cases/r-v-bingham-2013-ewca-crim-823-2013-2-cr-app-r-29/>> accessed 2 April 2022

Childs P, 'Gender Fraud' Where Do We Go From Here?' (2016) 8 Plymouth Law and Criminal Justice Review

Clough A, 'Conditional Consent And Purposeful Deception' (2018) 82 The Journal of Criminal Law

Cooper S, and Reed A, 'Informed Consent And The Transmission Of Sexual Disease: Dadson Revivified' (2007) 71 The Journal of Criminal Law

Cowan S, 'The Heart Of The Matter: Criminalising Fraudulent Consent To Sex' [2019] Edinburgh School of Law Research Paper

Doig G, 'Deception As To Gender Vitiates Consent' (2013) 77 The Journal of Criminal Law

Domaine de direction Droit pénal, 'Loi Fédérale Portant Révision Du Droit Pénal En Matière Sexuelle' (Office fédéral de la justice OFJ 2021)

Dougherty T, 'Affirmative Consent And Due Diligence' (2018) 46 Philosophy & Public Affairs

Dougherty T, 'Deception And Consent' [2018] The Routledge Handbook of the Ethics of Consent

Dougherty T, 'Sex, Lies, And Consent' (2013) 123 Ethics

Douglas L, 'The Criminalisation Of Transgender-Cisgender Sexual Relations: "Gender Fraud" Or Compulsory Cisnormativity? Assessing The Meaning Of Consent In Sexual Offences For Transgender Defendants' (2017) 161 Jurisprudence Review

Dsouza M, 'False Beliefs And Consent To Sex' [2021] Criminal Law Reform Now Network

Eggers P, 'Deceit - The Lie Of The Law' (I-law.com, 2021) <<https://www.i-law.com/ilaw/doc/view.htm?id=222794>> accessed 17 June 2022

Elliott C, and de Than C, 'The Case For A Rational Reconstruction Of Consent In Criminal Law' (2007) 70 Modern Law Review

'Emotional And Psychological Trauma - Helpguide.Org' (HelpGuide.org, 2021) <<https://www.helpguide.org/articles/ptsd-trauma/coping-with-emotional-and-psychological-trauma.htm>> accessed 18 June 2022

Falk P, 'Rape By Fraud And Rape By Coercion' [1998] Brooklyn Law Review

Feinberg J, 'Victims' Excuses: The Case Of Fraudulently Procured Consent' (1986) 96 Ethics

Freckelton I, and Popac T, 'Recognisable Psychiatric Injury' And Tortious Compensability For Pure Mental Harm Claims In Negligencesaadatai V Moorhead [2017] 1 SCR 543(Mclachlin CJ And Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown And Rowe JJ)' (2018) 25 Psychiatr Psychol Law.

Gibson M, 'Deception, Consent And The Right To Sexual Autonomy' [2021] Criminal Law Reform Now Network

Gibson M, 'Deceptive Sexual Relations: A Theory Of Criminal Liability' (2019) 40 Oxford Journal of Legal Studies

Glendinning I, 'Should Mistaken Consent Still Be Consent? In Defence Of An Incremental Understanding Of Consent In The Sexual Offences Act 2003' (2021) 85 The Journal of Criminal Law

Gluck S, 'Effects Of Rape: Psychological And Physical Effects Of Rape | Healthyplace' (Healthyplace.com, 2022) <<https://www.healthyplace.com/abuse/rape/effects-of-rape-psychological-and-physical-effects-of-rape>> accessed 18 June 2022

Gross H, 'Rape, Moralism And Human Rights' [2007] The Criminal law review

Herring J, and Wall J, 'THE NATURE AND SIGNIFICANCE OF THE RIGHT TO BODILY INTEGRITY' (2017) 76 The Cambridge Law Journal

Herring J, 'Mistaken Sex' [2005] Criminal Law Review,

HM Government, 'The End-To-End Rape Review Report On Findings And Actions' (The Controller of Her Majesty's Stationery Office 2021)

Home Office, 'Setting The Boundaries : Reforming The Law Sex Offences' (Home Office Communication Directorate 2000)

Kaushik S, 'The Impossible Trinity Of Deception, Sex And Consent' (2021) 85 The Journal of Criminal Law

Kinports K, 'Rape And Force: The Forgotten Mens Rea' (2001) 4 Buffalo Criminal Law Review

Klass G, 'The Law Of Deception: A Research Agenda' [2018] Georgetown University Law Center

Krebs B, 'Rape, Consent And A Lie About Fertility: R V Lawrance [2020] EWCA Crim 971' (2020) 84 The Journal of Criminal Law

Laird K, 'Rapist Or Rogue? Deception, Consent And The Sexual Offences Act 2003' [2014] Criminal Law Review

Lyon M, 'No Means No?: Withdrawal Of Consent During Intercourse And The Continuing Evolution Of The Definition Of Rape' (2004) 95 The Journal of Criminal Law and Criminology (1973-)

Madhloom O, 'Deception, Mistake And Non-Disclosure: Challenging The Current Approach To Protecting Sexual Autonomy' (2019) 70 Northern Ireland Legal Quarterly

'Male Vasectomy Procedure | What Is A Vasectomy?' (Plannedparenthood.org, 2022) <<https://www.plannedparenthood.org/learn/birth-control/vasectomy>> accessed 18 June 2022

Martin S, 'Le Viol En Droit Suisse : Une Réforme Nécessaire' [2021] Law Career Start

McJunkin B, 'Deconstructing Rape By Fraud' (2014) 28 Columbia Journal of Gender and Law

Murray K, and Beattie T, 'Conditional Consent And Sexual Offences : Revisiting The Sexual Offences Act 2003 After Lawrence' (2021) 7 Criminal Law Review

Patscheck S, 'The Effects Of Acquaintance Versus Stranger Rape And Gender On Rape Myth Acceptance And Attitudes Toward Rape In College Students' (2008) 14 Modern Psychological Studies

'Perpetrators Of Sexual Violence: Statistics | RAINN' (Rainn.org, 2022) <<https://www.rainn.org/statistics/perpetrators-sexual-violence>> accessed 18 June 2022

'Rape And Sexual Offences - Chapter 6: Consent | The Crown Prosecution Service' (Cps.gov.uk, 2021) <<https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent>> accessed 17 June 2022

Revello S, 'Plainte Pour Viol, Un Parcours Éprouvant' Le Temps (2018)

Rogers J, 'The Effect Of Deception In The Sexual Offences Act 2003' [2013] The Journal of Criminal Law

Rook P, 'Reforming The Relationship Between Sexual Consent, Deception And Mistake' [2021] Criminal Law Reform Now Network

Rubinfeld J, 'The Riddle Of Rape By Deception And Myth Of Sexual Autonomy' (2012) 122 The Yale Law Journal

Russell Orr, 'Speaking With Different Voices: The Problems With English Law And Psychiatric Injury' (2016) 36 Legal Studies.

Ryan S, 'Active Deception' V Non-Disclosure: HIV Transmission, Non-Fatal Offences And Criminal Responsibility' (2019) 1 Criminal Law Review

Sandoval E, 'The Case For An Affirmative Consent Provision In Rape Law' (2019) 94 North Dakota Law Review

Schulhofer S, 'Taking Sexual Autonomy Seriously: Rape Law And Beyond' (1992) 11 Law and Philosophy

Scott W, Marmion (1808)

Scutt J, 'Fraudulent Impersonation And Consent In Rape' (1975) 9 The University of Queensland Law Journal

'Sexuelle Gewalt In Der Schweiz' (Cockpit gfs.bern AG, 2022) <<https://cockpit.gfsbern.ch/de/cockpit/sexuelle-gewalt-in-der-schweiz/>> accessed 18 June 2022

Sharpe A, 'Criminalising Sexual Intimacy: Transgender Defendants And The Legal Construction Of Non-Consent' [2014] Criminal Law Review

Sharpe A, 'Expanding Liability For Sexual Fraud Through The Concept Of ‘Active Deception’' (2016) 80 The Journal of Criminal Law

Sharpe A, 'Queering Judgment' (2017) 81 The Journal of Criminal Law

Sharpe A, 'Sexual Intimacy, Gender Variance, And Criminal Law' (2015) 33 Nordic Journal of Human Rights

Sjölin C, 'Ten Years On' (2015) 79 The Journal of Criminal Law

'Special Rapporteur On Violence Against Women, Its Causes And Consequences' (United Nations 2021)

"‘Stealththing’ Conviction Brings Conditional Consent Out In The Open | Criminal Law Blog | Kingsley Napley' (Kingsleynapley.co.uk, 2019) <<https://www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/stealththing-conviction-brings-conditional-consent-out-in-the-open>> accessed 17 June 2022

Stein M and others, 'Sexual Ethics' (1998) 158 Archives of Internal Medicine

Tchen C, 'Rape Reform And A Statutory Consent Defense' (1983) 74 The Journal of Criminal Law and Criminology (1973-)

Tolley R, 'Deception, Mistake And Difficult Decisions' [2021] Criminal Law Now Network

'Transphobia Rife Among UK Employers As 1 In 3 Won't Hire A Transgender Person - Crossland Employment Solicitors' (Crossland Solicitors, 2018) <<https://www.crosslandsolicitors.com/site/hr-hub/transgender-discrimination-in-UK-workplaces>> accessed 18 June 2022.

'What Is The Harm Principle? Ethics Explainer By The Ethics Centre' (Ethics.org.au, 2022) <<https://ethics.org.au/ethics-explainer-the-harm-principle/>> accessed 18 June 2022

Williams R, 'Deception, Mistake And Vitiating Of The Victim's Consent' (2007) 124 Law Quarterly Review

Williams R, 'Economic And Sexual Autonomy' [2021] Criminal Law Reform Now Network

Williams R, 'Deception, Mistake And Vitiating Of The Victim'S Consent' (2008) 124 Law Quarterly Review