Conditional Consent and Sexual Crime: Time for Reform?

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Abstract
Statistics published by the government in 2021 highlight serious problems in England and Wales with a drop in prosecutions of sexual crimes. Part of this issue is attributed to the complexities around sexual consent and public understanding of it. This article highlights a particular problem in the law around conditional consent. It shows that the law on conditional consent is completely incoherent, complicating efforts to increase public education on the matter. The law is also limited in its protection of sexual autonomy of victims, as well in its protection of victims against pregnancy. Critics of reform warn against overcriminalisation of rape, and against imposing morals on society. However, it is argued that given the current reality of how rape is dealt with in England and Wales, these concerns should not prevent reform to the law of conditional consent. The article ends by arguing that reform should be carried out to make the law on conditional consent more coherent and to take account of pregnancy as a consequence of sexual intercourse.

Keywords
Consent, deception, rape, sexual offences, sexual autonomy, non-disclosure, pregnancy.

Introduction
In 2021, Everyone’s Invited collected thousands of testimonies of sexual abuse, assault, and rape at schools and universities. The website adopts a wholly victim-centric approach—highlighting their guilt, embarrassment, helplessness, and fear. That they should feel this way reflects societal issues such as victim-shaming beyond the scope of this article. A number of victims, however, state that they only realised that what had happened was wrong years after the incident. This is not a problem exclusive to schools and university. The government’s rape review report found that ‘Prosecutions and convictions for adult rape have also fallen, by 59% and 47% respectively since 2015/16’, although the prevalence of rape and sexual violence has not changed in that time.

1. Everyone’s Invited (2021) <https://www.everyonesinvited.uk/> accessed 18 April 2021.
2. HM Government, The end-to-end rape review report on findings and actions (June 2021), 4.
report points out that ‘Rape is undoubtedly a difficult crime to prosecute, often resting on the issue of consent rather than the act itself being disputed’, and that prevention, including increased education in schools, is crucial to reducing the number of sexual violence offences. Indeed, it was suggested that juries receive more education on rape myths, consent, biases, and rape trauma. However, it is difficult to see how education on consent can be perfected when the law is so unclear.

This article will focus on consent in the sexual crime of rape, as defined by s.1 Sexual Offences Act 2003 (SOA), and court cases on rape. This is a result of both space constraints but also of the seriousness of rape. Of course, the subject area of consent is nevertheless essential and replicated across other sexual crimes.

Conditional consent is unsurprisingly defined by the Crown Prosecution Service as a condition imposed on the giving of consent by the victim. Two limbs from conditional consent will be considered: consent with a condition as to the physical act, and consent to conduct that act with a condition as to a specific characteristic of the person with whom they are undertaking sexual intercourse. These two limbs are not totally separate categories. Indeed, it is in situations where both limbs are equally and particularly relevant that the law on consent becomes especially incoherent. As will be shown below, this has been highlighted by the Lawrance case.

This article will begin by outlining the law in both of these strands of conditional consent. The main problems with the law will then be raised, with a particular focus on its incoherence as highlighted in Lawrance, to show that reform is necessary. Arguments against reform will then be dealt with, before concluding remarks on the type of reform that might be developed. Ultimately, reform is undoubtedly required in what is currently a puzzling area of the law. This is all the more necessary for its important societal ramifications. When thousands of schoolkids and students share stories of sexual violence and are still thought only to be a fraction of the real number, the case for reform in the law becomes ever-more pressing as a way to change societal attitudes.

The Current Law

The law on consent is currently governed by ss.74-76 of the SOA 2003. It replaced the Sexual Offences Act 1956, following a government White Paper. The law on sexual crimes was said to be ‘archaic, incoherent, and discriminatory’ and not to ‘reflect the changes in society and social attitudes that have taken place since the [1956] Act’. The 1956 Act was ‘widely considered to be inadequate and out of date’. The SOA 2003 therefore introduced sections specifically seeking to define consent– ss.74–76.

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3. HM Government, The end-to-end rape review report on findings and actions (June 2021), 3-4.
4. Rachel George (Home Office) and Sophie Ferguson (Ministry of Justice), Review into the Criminal Justice System response to adult rape and serious sexual offences across England and Wales: Research Report (June 2021), 63.
5. Sexual Offences Act 2003, s.1.
6. This article also refers to victims using the female she/her pronouns, whilst referring to perpetrators using the male he/him pronouns. This is not to undermine male victims of sexual violence, but rather to reflect what is the more common state of affairs.
7. Examples of other sexual crimes for which conditional consent discussions will also be relevant include assault by penetration (s.2 SOA 2003) and sexual assault (s.3 SOA 2003).
8. ‘Rape and Sexual Offences - Chapter 6: Consent’ (CPS, 19 October 2020) <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent/> accessed 18 April 2021.
9. See also ss.74-76 SOA 2003.
10. R v Lawrance (2020) EWCA Crim 971.
11. Rebecca Williams, ‘A further case on obtaining sex by deception’ 183 (2021) LQR 188.
12. Sexual Offences Act 2003.
13. Home Office, Protecting the Public: strengthening protection against sex offenders and reforming the law on sexual offences (White Paper, Cm 5668, 2002).
14. Ibid., p.9.
15. Ibid.
16. SOA 2003.
On conclusive presumptions about consent, s.76 states that deception ‘as to the nature or purpose of the relevant act’ negates consent, as does ‘intentionally inducing the complainant to consent to the relevant act by impersonating a person known personally to the complainant.’ Meanwhile, s.74 reads: ‘a person consents if he agrees by choice, and has the freedom and capacity to make that choice.’

As shown in *R(F) v DPP*, just because the deception is not covered in s.76 does not mean that s.74 cannot still be used by itself. In analysing the law on conditional consent, it is not beneficial just to focus on one of these two sections. Cases do in fact consider them together. The pressing questions of conditional consent at hand for this article are, firstly, whether a victim can give her consent with a condition as to the specific physical act of sexual intercourse, and secondly whether a victim can give her consent to conduct that act with conditions on the specific characteristics of the other person.

**First Limb**

There are two recent cases which, when taken together are compatible. However, when they are compared to *Lawrance*, they demonstrate that the law is incoherent on whether a victim’s consent can be upheld if it is given with a condition as to the specific physical act.

The first of these cases is *Assange*. *Assange*, aware of the fact that the victim did not want to engage in sexual intercourse without a condom, did so anyway. The court found that the case did not fall within s.76-type deception, as it did not relate to the ‘nature or quality of the act’ but admitted that intercourse with and without a condom were different as a result of the condom being a ‘physical barrier’. The Court therefore relied on s.74 of the SOA 2003, as deception in relation to the use of a condom removed the ability for the victim to make a ‘free’ choice. The consent of the victim was considered to be vitiated as her condition that a condom be used was ignored.

The second of these cases is *R(F)*. The perpetrator ejaculated within the victim’s vagina, knowing that she did not consent to him doing so and would not have consented to the original penetration if she knew that he would do so. The court, relying on *Assange* and s.74 of the SOA 2003, said that the victim was therefore deprived of a free choice and her consent was negated. When her condition that the perpetrator withdraw before ejaculation was broken, her consent was vitiated.

These cases are clearly consistent with each other. Before *Lawrance*, it seemed that the victim could indeed impose a condition on her consent to the act of sexual intercourse. We see that s.74 of the SOA has been relied on when the victim imposes a condition as to the physical act.

**Second Limb**

Though overlapping with the first limb, the second set of cases concern where a victim has placed, or perhaps would have placed, a condition on the characteristics of the other person with whom they are engaging in sexual intercourse. The law here was already incoherent before *Lawrance*. Contrary to the first limb, it was not clear that a condition could be imposed on sexual consent. Three cases will be considered here.

17. SOA 2003, s.76.
18. SOA 2003 s.74.
19. *R(F) v Director of Public Prosecutions* [2013] EWHC 945 (Admin) [26]. See also: *Assange v Sweden* [2011] EWHC 2849 (Admin); *R v Jheeta* [2007] 2 Cr App R 34.
20. *Assange v Sweden* [2011] EWHC 2849 (Admin).
21. *Assange v Sweden* [2011] EWHC 2849 (Admin) [87].
22. *Assange v Sweden* [2011] EWHC 2849 (Admin) [86].
23. *R(F) v Director of Public Prosecutions* [2013] EWHC 945 (Admin).
24. *R(F) v Director of Public Prosecutions* [2013] EWHC 945 (Admin) [26].
In *R v B*, the perpetrator did not reveal to the victim that he was HIV-positive.\(^{25}\) The condition on consent to sexual activity, had the victim been made aware, would presumably be that the perpetrator’s characteristics did not include being HIV-positive. The court felt that his failure to disclose this information did not fall within deception as defined by s.76 of the SOA 2003, and nor was it ‘relevant’ to her consent as per s.74 of the SOA 2003.\(^ {26}\)

In *McNally*, the offence was not rape but assault by penetration. The defendant, who was biologically female, developed a relationship, including sexual penetration, as a boy with another teenage girl.\(^ {27}\) When it emerged that the defendant was biologically female, the defendant was charged with assault by penetration contrary to s.2 of the SOA 2003.\(^ {28}\) The condition on the victim’s consent was that the person with whom she was engaging in sexual activity be male. Leveson LJ deployed ss.74 and 76 of the SOA 2003, and referred to *Assange* and ‘active deception’ to say that the victim’s consent was vitiated.\(^ {29}\) Therefore, though HIV status in *R v B* was not sufficient to vitiate consent, the biological sex of the person was.\(^ {30}\)

The most recent of the cases to be considered in this set is *R (Monica) v DPP*.\(^ {31}\) The victim, an environmental activist, engaged in sexual intercourse with a policeman whom she believed to be an environmental protester as well, as he deliberately concealed his occupation from her. The victim’s condition for sexual intercourse with the defendant therefore would have been that he not be a policeman. Pointing to Leveson LJ’s dicta from *McNally* that some deceptions would ‘obviously not be sufficient to vitiate consent’, the Court found that this lie did not negate her because it was ‘not closely connected to the performance of the sexual act’.\(^ {32}\)

The law on the second limb was therefore already nebulous before *Lawrance*, in contrast to the law on conditions on the physical act. A deception as to biological sex did vitiate consent, but not as to being HIV-positive or a different occupation— even though an HIV-positive sexual partner may pose a much larger risk to the victim than the sex of the perpetrator. It is hard to see why some deceptions ‘obviously’ would not vitiate consent whilst others would.\(^ {33}\)

**Lawrance and the Law as It Stands**\(^ {34}\)

By constituting a factual circumstance which brought together both limbs of conditional consent, *Lawrance* has highlighted the incoherence and difficulty with this area of law. The complainant had been told twice by the perpetrator that he had had a vasectomy and, on this condition, she agreed to sexual intercourse without contraception. The victim was later told that he had lied, found out that she was pregnant, and terminated her pregnancy. The court found that the lie was not ‘sufficiently closely connected to the performance of the sexual act’ and the victim’s consent was not vitiated.\(^ {35}\)

This case fits into both limbs of conditional consent. It firstly concerns the victim’s condition that fertile sperm not be ejaculated within her vagina during the act of sexual intercourse. Secondly, it concerns her condition that the person with whom she is engaging in the act be infertile. This case therefore

\(^{25}\) *R v B* [2007] 1 WLR 1567.

\(^{26}\) *R v B* [2007] 1 WLR 1567 [19], [21].

\(^{27}\) *R v McNally* [2014] Q.B. 593.

\(^{28}\) Sexual Offences Act 2003.

\(^{29}\) *R v McNally* [2014] Q.B. 593 [21], [25] (Leveson LJ).

\(^{30}\) An in-depth discussion on transphobia in the criminal law of England and Wales is beyond the constraints of this article.

\(^{31}\) *R (on application of Monica) v Director of Public Prosecutions* [2018] EWHC 3508 (Admin).

\(^{32}\) *R (Monica) v DPP* [2018] EWHC 3508 (Admin) [75]-[87].

\(^{33}\) *R v McNally* [2014] Q.B. 593 [25] (Leveson LJ).

\(^{34}\) *R v Lawrance* [2020] EWCA Crim 971.

\(^{35}\) *R v Lawrance* [2020] EWCA Crim 971 [41].
sets out factual circumstances in which the two limbs of sexual consent are at the forefront of discussion.\textsuperscript{36}

The necessary implication of \textit{Lawrance} is that, as regards the condition on the physical act: ‘it can be rape if a condom is stealthily removed (\textit{Assange});… it can be rape if A promised B to withdraw before ejaculation, wherefore no condom is requested by B, and A does not do so and, crucially, never intended to (\textit{R(F)}); but it cannot be rape if A deceitfully led B to believe that a condom is not needed in the first place (\textit{Lawrance}).\textsuperscript{37}

The implication of \textit{Lawrance} as to conditions on the characteristics of the person with whom the victim is engaging in sexual activity is that it cannot be rape if A lies about his profession (\textit{Monica}); it is not rape if A omits that he is HIV-positive (\textit{RvB}); it is rape if A deceives as to his gender (\textit{McNally}); but it is not rape if A lies to B about characteristics which are essential to B’s decision to engage in sexual intercourse in the manner that B did (\textit{Lawrance}).\textsuperscript{38}

\textbf{Problems with the Current Law}

\textit{Incoherence}

As alluded to above, both limbs have since \textit{Lawrance} become or increased in incoherence. This is, practically, of utmost concern, making prosecutions on rape difficult and the outcomes of court cases unpredictable. In addition, it complicates attempts to educate the public on what constitutes consent.\textsuperscript{39}

As regards conditions on consent to the physical act, the practical repercussions of \textit{Lawrance} are that women have varying degrees of power to make an informed decision on the act being conducted. For example, as per \textit{Assange}, a woman requiring a physical barrier in the form of a condom is a condition was capable of vitiating consent if broken. In \textit{R(F)}, a woman requiring that the man not ejaculate in her vagina is also capable of vitiating consent if the man does not withdraw. But since \textit{Lawrance}, a woman requiring solely non-fertile sperm to be ejaculated within her vagina is not capable of vitiating consent. It is not right for a woman to have varying amounts of control over the physical act of sexual intercourse– for example, regarding whether and what sperm can be ejaculated within her vagina– depending not on the viability of her requirements or her actions, but on the characteristics of her partner. The argument made in \textit{Lawrance} that the lie was not ‘sufficiently closely connected to the performance of the sexual act’ is therefore unconvincing, because it necessarily is about what is entering the victim’s body.\textsuperscript{40} Even if one were to say that ejaculation is not in the definition of rape in s.1 SOA 2003, this argument does little to explain why it does not fit into s.2 of SOA 2003– assault by penetration ‘with a part of [a] body or anything else.’\textsuperscript{41}

On conditions as to the partner with whom sexual intercourse is being conducted, the law even before \textit{Lawrance} was already unclear as to what characteristics a woman could require of her sexual partner. \textit{R v B} does not require someone who is HIV-positive to reveal this to their sexual partners. But it is unclear whether, if a woman is explicitly assured as to the opposite and chooses to proceed with sexual

\textsuperscript{36} NB: it might be argued that \textit{R v B} is similar to \textit{Lawrance} in the way that it spans both limbs. However, this article focuses on \textit{Lawrance} as a clearer and more recent discussion relating to both limbs. As will be shown later in this article, \textit{Lawrance} warrants extra attention as it concerns pregnancy.

\textsuperscript{37} Beatrice Krebs, ‘Rape, consent, and a lie about fertility’ (2020) J Crim L 622.

\textsuperscript{38} Note that it in \textit{McNally}, Leveson LJ [24] leaves open the question of whether consent would be vitiated if the victim had been positively assured in \textit{R v B} that the defendant was HIV-negative.

\textsuperscript{39} This is not to say that the public should be taught to toe the line on what is sexual consent. Rather, there should be greater education of sexual consent in order to reduce the number of incidents occurring in the first place. The grey area of the law is currently too large to facilitate this task.

\textsuperscript{40} \textit{R v Lawrance} [2020] EWCA Crim 971 [41].

\textsuperscript{41} Emphasis added. Sexual Offences Act 2003 ss.1-2.
intercourse on this information, her consent would be vitiated. Given that the victim in Lawrance did ask, one might guess that it would not be a condition capable of vitiating consent. However, in McNally a deception as to the sex of the partner, even though less dangerous to the victim than HIV-status, was capable of vitiating consent. This is incoherent and does not account for the repercussions of intercourse for the woman, including reasons why she might impose such conditions on the characteristics of her partner. It has been argued that McNally is essentially an anomaly and should be decided differently if a case with similar facts were to arise. Alongside this, one might say that the Lawrance judgment went some way to streamlining the law after McNally, making the law more ‘principled’. However, even if one were to argue this, it would be necessary to take account of s.76 of the SOA 2003, and cases for which the door might still be open for a woman to impose conditions on the characteristics of her partner.

In addition, the fact that the law is incoherent not just within each limb but also between each limb is problematic. This means that even without McNally the law would not be coherent. This is highlighted by Lawrance as a factual situation in which the characteristics of the partner affect the way in which sexual intercourse is carried out. In Lawrance, his fertility affected what entered the victim’s body— that is to say fertile sperm as opposed to infertile sperm. It is therefore currently difficult for judges to combine these two limbs and apply a coherent law to questions of conditional consent.

**Active or Passive Deception?**

English and Welsh law has still not dealt satisfactorily with the question of the difference between active and passive deception in cases of sexual crimes. As mentioned above, R v B concerned a case where the defendant omitted the fact that he was HIV positive. Notably, the fact that this was an omission was acknowledged by the judge. Meanwhile, in Lawrance, despite the victim explicitly asking the defendant about a vasectomy, there was no consideration of the difference between active and passive deception in the judgment.

One might say that this oversight in Lawrance simplifies the law by making it less likely that England and Wales will develop a distinction between active and passive deception in sexual consent. The idea that this would be a ‘simplification’ of course relies on the argument that a distinction is undesirable. However, there are reasons to favour such a distinction in the case of HIV + transmission. Moreover, the fact that neither statute nor caselaw explicitly addresses this distinction in sexual consent only serves to decrease clarity. As has already been emphasised, unclarity in the law does nothing to facilitate public education around sexual consent.

**Victim Autonomy**

Debates on the law of sexual consent often hinge around how much sexual autonomy should be afforded to women or the victim. Herring argues for absolute sexual autonomy for the victim— that is to say, that
any condition should be capable of vitiating consent.\textsuperscript{52} This is the argument that any form of deceit necessarily restricts the options available to the victim, which also restricts her freedom of choice. If consent is purely based upon freedom of choice, then any form of deception should be sufficient to vitiate consent.\textsuperscript{53}

Moreover, instead of asking whether sufficient information was made available to the victim for her to make a fully-informed decision, the law currently asks whether her conditions were sufficient to vitiate consent. Sexual intercourse is viewed by courts as closer to an exchange between two equal parties, rather than as an act being done to the victim. Of course, in the majority of scenarios, the former would hopefully be an appropriate classification, but surely not when considering a potentially criminal scenario. This view of the courts is particularly demonstrated by the cases concerning consent as to the characteristic of the other party. For example, in \textit{Monica}, the court asks whether the deception was closely connected to the sexual act.\textsuperscript{54} Instead, the law should be shifted so as to ask whether the victim was wholly aware of the situation into which she was entering by engaging in sexual relations with the policeman. A clear problem with the law only affording limited autonomy to the victim is to make it more difficult for victims to come forward. It contributes to the frustration and even trauma of rape trials for victims by not sufficiently considering the subjective point of view of the victim.

As will be alluded to below, there is an issue in the law of sexual relations of balancing the rights of the victim against the rights of the defendant.\textsuperscript{55} This means that the more that the sexual autonomy of the victim is prioritised, the more that this will bring the right to privacy of the defendant into question: for example, of hiding his HIV status, occupation, or other characteristics. In answer to this, one might simply say that a victim’s right to control what is done to her body is more important than the right to privacy of the defendant.\textsuperscript{56}

It is nevertheless acknowledged below that some potentially problematic scenarios might occur if Herring’s proposals were completely adopted. This article therefore stops short of advocating for a complete adoption of his proposals. However, it is important to emphasise that the law as it stands is too favourable to the defendant. If favouring sexual autonomy more even if not absolutely means that there will be greater coherence, then it is surely to be desired to facilitate public education and adherence to the law of sexual consent.

\textbf{Pregnancy}

That the law does not protect a victim’s sexual autonomy is further highlighted by the fact that both limbs of conditional consent consider sexual intercourse independently of the biological consequences of the act— including pregnancy. In \textit{Lawrance}, the Court stated that ‘the deception was one which related not to the physical performance of the sexual act but to risks or consequences associated with it.’\textsuperscript{57} As argued above and with respect to the Court, the deception in \textit{Lawrance} was also related to the physical performance. In addition, for the courts to analyse sexual intercourse wholly separately to the risks and consequences of it is problematic. By way of analogy, the Court points to \textit{R v B} and the risk of HIV in sexual intercourse as separate to the performance of the intercourse itself.\textsuperscript{58} However, to say that pregnancy is a risk or consequence similar to HIV is to ignore a principal biological point of sexual intercourse— procreation. It is instrumental in a woman’s decision as to how to conduct the physical act— for example, whether to require a condom as in \textit{Assange}. Indeed, as Krebs has noted, in \textit{Assange}, \textit{R(F)}, and \textit{Lawrance} all the women were exactly aiming to prevent unwanted

\textsuperscript{52} Jonathan Herring, ‘Mistaken Sex’ (2005) Crim L R 511.
\textsuperscript{53} Jed Rubenfeld, ‘The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy’ (2013) 122 Yale L J 1372.
\textsuperscript{54} \textit{R (Monica) v DPP} [2018] EWHC 3508 (Admin).
\textsuperscript{55} Rebecca Williams, ‘Deception, mistake and vitiation of the victim’s consent’ (2008) LQR 132.
\textsuperscript{56} Jonathan Herring, ‘Mistaken Sex’ (2005) Crim L R 511.
\textsuperscript{57} \textit{R v Lawrance} [2020] EWCA Crim 971 [36].
\textsuperscript{58} \textit{R v Lawrance} [2020] EWCA Crim 971 [39].
pregnancy.\textsuperscript{59} Of course, with this really being a problem for women, the implication is that the law is balanced away from them.\textsuperscript{60}

\textbf{Not Fit for Purpose}

As noted earlier, the government stated in its White Paper which led to the SOA 2003 that the old law was ‘inadequate and out of date’.\textsuperscript{61} It did not ‘reflect the changes in society and social attitudes that have taken place since the \textsuperscript{[1956]} Act’.\textsuperscript{62}

The same is now true of the 2003 SOA Act. With continued incoherence and a lack in education of consent, the Act has not kept up with modern change. In \textit{R v B}, it was already said that consent regarding HIV-positive partners was a debate for beyond the courts of law, due to its social and public policy implications.\textsuperscript{63} Yet more than a decade later in \textit{Lawrance}, it was echoed once more that ‘debate as a matter of social and public policy’ was required on these issues.\textsuperscript{64}

Meanwhile, rape convictions fell to a ‘record low in England and Wales’ in 2019-20 to half the number of 2016-17, and the lowest since data started being gathered in 2009.\textsuperscript{65} Simultaneously, and as outlined at the start of this article, movements such as the one initiated by Everyone’s Invited have highlighted thousands of stories in which women have felt that they did not consent to sexual acts they experienced. Further, the government’s rape review acknowledged in 2021 the need for greater education of juries on rape and consent.\textsuperscript{66}

These movements and criticisms of cases such as \textit{Lawrance} show that the law has clearly not kept up with changes in attitude experienced by society. Statistics show that it is inadequate in either preventing or punishing perpetrators of rape. The incoherence in the law complicates wider attempts at resolving these issues, such as education or victim-support. Even if one argues that consent is a constantly changing concept and it would be difficult for any law to evolve at such a pace, when judges have been stating for over a decade that wider debate on the topic is needed, it is difficult to say that the current law does not need reform.

\textbf{Critics of Reform}

\textit{Imposing Morals on Society}

Critics, such as Gross, of proposals to give women greater autonomy in their consent regarding the characteristics of their sexual partners say that to change the law would be to impose arbitrary morals on members of society.\textsuperscript{67} Decisions on the part of the defendant to lie may be morally reprehensible but not serious enough to be a criminal offence.

However, the obvious response to this is that the potential victim’s autonomy over her own body is so necessary and fundamental that, if that requires morals to be imposed on society, then it is worth it. As shown by the deficit between prosecuted cases and uncovered testimonies, it appears that it would be difficult to ‘over-criminalise’ this area. These critics also overlook the fact that many people may suffer

\begin{itemize}
\item \textsuperscript{59} Beatrice Krebs, ‘Rape, consent, and a lie about fertility’ (2020) J Crim L, 622.
\item \textsuperscript{60} This is not to say that men do not care at all if women become pregnant. Clearly, however, it is a greater concern for women.
\item \textsuperscript{61} Home Office, \textit{Protecting the Public: strengthening protection against sex offenders and reforming the law on sexual offences} (White Paper, Cm 5668, 2002).
\item \textsuperscript{62} Ibid., p.9.
\item \textsuperscript{63} \textit{R v B} [2007] 1 WLR 1567 [20].
\item \textsuperscript{64} \textit{R v Lawrance} [2020] EWCA Crim 971 [42].
\item \textsuperscript{65} Danny Shaw, ‘Rape convictions fall to record low in England and Wales’ (BBC, 30 July 2020) <https://www.bbc.co.uk/news/uk-53588705/> accessed 18 April 2021.
\item \textsuperscript{66} Rachel George (Home Office) and Sophie Ferguson (Ministry of Justice), \textit{Review into the Criminal Justice System response to adult rape and serious sexual offences across England and Wales: Research Report} (June 2021), 63.
\item \textsuperscript{67} Hyman Gross, ‘Rape, moralism, and human rights’ (2007) Crim L R 220.
\end{itemize}
psychological harm if they feel that they are tricked into sexual intercourse.\(^{68}\) Indeed, as Herring himself states in his reply to Gross, even in cases about what one might consider trivial lies, there exists a ‘real and serious harm to the victim’.\(^{69}\) If one acknowledges that breaking a woman’s condition on her consent may be very traumatising, then efforts to increase a victim’s sexual autonomy do not impose ‘arbitrary’ morals, but instead protect those victims. Certainly, in the case of Lawrance and R v B, the women ran risks of potentially serious consequences to their lives.

**Not All Men…**

Criticisms of reforming the law on consent often appears to come from a fear that it might become too easy to prosecute men accused of rape—i.e., that ‘not all men’ are rapists. That is to say that it runs the risk of destigmatising rape by potentially equating large numbers of merely fibbing men with what society considers to be more serious cases of rape.\(^{70}\) For example, it has been argued that rape is about a woman being *forced* to endure sexual intercourse, not just a woman believing a lie.\(^{71}\) Proponents of such an argument such as Bohlander say that women are not so naïve as to believe anything that a man would say anyway, and accept certain risks in return for a pleasurable act. It would follow that the harm is not in the act, but simply in the lie told by the man.\(^{72}\) This, it is argued, ‘demeans the substance of what rape is about’.\(^{73}\)

Relatedly, Rubenfeld has conceded that for as long as rape is defined in the parameters of consent, then deception does indeed constitute rape, but has argued that rape should therefore be redefined within the parameters of slave and torture.\(^{74}\) This proposal would exclude from criminality the deception cases criticised by Bohlander.

Yet this is exactly the problem with the current law— that it dissociates the harms of the act from the harms of the deception. As shown by Lawrance in particular, the repercussions should certainly not be separate. The consequence of pregnancy clearly follows from both the act and the deception. Moreover, it once more overlooks the fact that even deception can cause significant psychological harm to a victim.\(^{75}\) It is true that the psychological harm from a lie, such as the income of a partner, may be different from a woman contracting HIV or falling pregnant, or indeed from a woman subject to violence or fear.\(^{76}\) That is not to say that it is more or less severe— that would depend on a variety of factors and characteristics pertaining to the woman— but it certainly could be different. It would be possible for the law also to treat these harms separately. However, this emphasis in this article with reference to government statistics is that the law as it stands is unsatisfactory in its protection of women.

**Difficulties of Reform**

Given that one significant problem with the current law is that there is limited autonomy given to victims, Herring’s proposals are often referred to as a blueprint for a change in the law. This has led to various criticisms in which specific undesirable situations are highlighted. This includes, for example, the case of a Jewish man lying about his religion to an anti-Semitic woman.\(^{77}\) Sharpe has also challenged the

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68. Jonathan Herring, ‘Mistaken Sex’ (2005) 511 Crim L R 521.
69. Jonathan Herring, ‘Human rights and rape: a reply to Hyman Gross’ (2007) Crim L R 228.
70. Jonathan Herring, ‘Mistaken Sex’ (2005) 511 Crim L R 522.
71. Michael Bohlander, ‘Mistaken consent to sex, political correctness and correct policy’ (2007) 412 J Crim L 416.
72. Michael Bohlander, ‘Mistaken consent to sex, political correctness and correct policy’ (2007) 412 J Crim L 417.
73. Michael Bohlander, ‘Mistaken consent to sex, political correctness and correct policy’ (2007) 412 J Crim L 417.
74. Jed Rubenfeld, ‘The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy’ (2013) 122 Yale L J 1372.
75. Jonathan Herring, ‘Mistaken Sex’ (2005) 511 Crim L R 521.
76. Matthew Gibson, ‘Deceptive Sexual Relations: A Theory of Criminal Liability’ (2020) OJLS, 82.
77. Alex Sharpe, ‘Criminalising sexual intimacy: transgender defendants and the legal construction of non-consent’ (2014) 207 Crim L R 222.
desirability of prosecuting transgender people if they do not disclose their gender history in such situations. Sharpe has argued that the sexual autonomy of a cisgender victim should not be so unlimited as to trump the potential harm of a transgender person forced to disclose their gender history.78

These situations are certainly noteworthy and should be avoided in reform. Indeed, this article has fallen short of arguing for Herring’s proposals, instead pointing out that the law as it stands is incoherent and does not do enough for victim autonomy. These examples do not take away from the fact that there are significant issues with the current law on sexual consent. Indeed, Sharpe criticises the judgment in McNally.79 Moreover, there may be legislative solutions to mitigate against certain concerns, protecting against cases of racism, transphobia, or other discrimination. Ultimately, however, the law is currently unsatisfactory. The danger of focussing on very specific undesirable hypothetical situations is that the risk of overcriminalisation of rape is overstated. As highlighted by government statistics at the start of this article, over-prosecution is far from the current reality.

What Kind of Reform?

There is undoubtedly, then, a need for reform in the law of sexual consent. Yet, there is also no question about this being an immensely complex area of the law to reform. Though a Law Commission Review may indeed be necessary, this takes much time– during which period the law remains unsatisfactory, with negative implications for victims of sexual violence.80 Any reform would ideally be introduced as soon as yesterday.

Much has been written about the difficulty in finding a balance between the sexual autonomy of the victim and not being overly harsh on the defendant.81 This article will stop short of outlining exactly where reform in the law should lie on this spectrum, and what the exact form of new laws would be. It will instead outline certain gaps already alluded to, and emphasise that the law as it stands is too pro-defendant.

Pregnancy

Courts appear hesitant to change the law of sexual consent, instead calling it an issue for Parliament to resolve.82 This is particularly the case for the second limb of conditional consent. However, with regards to the first limb, it does not seem that it would have been difficult for the Court to extend what was considered to be ‘closely connected to the sexual act’ in Lawrance.83 Given that in Lawrance, Assange and R(F), all women sought to avoid pregnancy, if the Court had given more acknowledgment to pregnancy as part of the sexual act in itself, the law would already be more coherent.84

Procurement by False Representations

Notably, and much discussed, is the fact that not present in the SOA 2003 is the s.3 SOA 1956 offence of procurement of a women by false representations or false pretences to have sexual intercourse.85 This

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78. Alex Sharpe, ‘Criminalising sexual intimacy: transgender defendants and the legal construction of non-consent’ (2014) 207 Crim L R 221.
79. Alex Sharpe, ‘Criminalising sexual intimacy: transgender defendants and the legal construction of non-consent’ (2014) 207 Crim L R 209.
80. Karl Laird, ‘Rapist or rogue? Deception, consent and the Sexual Offences Act 2003’ (2014) Crim L R 492.
81. Rebecca Williams, ‘Deception, mistake and vitiation of the victim’s consent’ (2008) LQR 132.
82. R (Monica) v DPP [2018] EWHC 3508 (Admin); R v B [2007] 1 WLR 1567.
83. R v Lawrance [2020] EWCA Crim 971 [41].
84. Beatrice Krebs, ‘Rape, consent, and a lie about fertility’ (2020) J Crim L 622.
85. Karl Laird, ‘Rapist or rogue? Deception, consent and the Sexual Offences Act 2003’ (2014) Crim L R 492.
seems to have been removed with no real thought, reason, or indeed replacement offence.\(^\text{86}\) If interpreted to be included in the SOA 2003, or explicitly added in any future act, this would seemingly allow the courts to deal much more effectively with forms of conditional consent, even if only as a separate offence.

**Category Approach?**

As the basis of the court cases, it is clear that the SOA 2003 needs to be revisited in some way. Its inconsistent results as demonstrated by the cases examined in these articles complicate efforts to make it easier for the public to understand the law. Enacting different categories of rape— for example, rape by stealth, by deception, by force— may go some way to breaking down the fear of critics that violent rape will be equated to trivial lies, whilst still dealing with the different types of conditions placed on consent.\(^\text{87}\) This means that rape by force would be dealt with as a different harm to rape by deception.\(^\text{88}\) As opposed to the courts solely redefining what is closely connected to sexual act, these categories could also be a way of ensuring that both limbs of conditional consent are clearly dealt with. The precise form of these categories is, however, beyond the scope of this article.

**Conclusion**

This article has therefore shown that the current law on consent is far too incoherent and not fit for purpose. The law does not do enough to appreciate the implications of sexual intercourse for women— both in terms of considering the biological consequences of pregnancy, and limiting their autonomy. With the law being as incoherent as it currently is, the outcomes of cases are unpredictable and illogical.

This has serious ramifications for society: it makes it more difficult to generate meaningful conversations around consent and subsequently reduce the number of incidents of sexual crimes. As has been shown, there is a current deficit between prosecutions of rape and testimonies of sexual violence being revealed through social activist movements. A website collected over 15,000 testimonies of sexual violence from only a fraction of the national population of students at schools and universities over a few months.\(^\text{89}\) Meanwhile, the CPS stated that in the past year 1,439 suspects in cases of alleged rape were convicted.\(^\text{90}\) As pointed out at the start of this article, prosecutions for adult rape has fallen by 59\% since 2015/16, and convictions have fallen by 47\% despite the prevalence of rape not increasing in the same time.\(^\text{91}\) It is difficult to see how the law could possibly be fit for purpose.\(^\text{92}\)

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\(^{86}\) Karl Laird, ‘Rapist or rogue? Deception, consent and the Sexual Offences Act 2003’ (2014) Crim L R 492.

\(^{87}\) Rebecca Williams, ‘A further case on obtaining sex by deception’ (2021) LQR 183.

\(^{88}\) Matthew Gibson, ‘Deceptive Sexual Relations: A Theory of Criminal Liability’ (2020) OILS, 82.

\(^{89}\) Number accurate at the time of writing: Everyone’s Invited (2021) <https://www.everyonesinvited.uk/> accessed 18 April 2021.

\(^{90}\) Danny Shaw, ‘Rape convictions fall to record low in England and Wales’ (BBC, 30 July 2020) <https://www.bbc.co.uk/news/uk-53588705/> accessed 18 April 2021.

\(^{91}\) HM Government, The end-to-end rape review report on findings and actions (June 2021), 4.

\(^{92}\) It is acknowledged that there may be statistical inaccuracies— for example, the Everyone’s Invited testimonies do not solely include rape allegations. Nevertheless, the incredibly large difference between the two statistics as they are still highlight a deficit between the law and its effect on the understanding of sexual consent.