

## SHOULD A LIE ABOUT FERTILITY VITIATE CONSENT TO SEX?

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## A. INTRODUCTION

This paper contends that a lie about fertility should vitiate consent because it undermines the legitimacy of the consent given and thus restricts the ability of those involved to exercise their sexual autonomy freely. The crux of this analysis is that the Sexual Offences Act 2003 fails to adequately protect those who are induced into sexual activity by deception. Thus, it falls short of its aim to ensure the protection of sexual autonomy.<sup>1</sup> Therefore, there is a demand for reform to protect future victims.

To conclude that a lie about fertility should vitiate consent to sex, the importance of sexual autonomy must first be established. Thereafter, consent and its significance to sexual intercourse will be discussed, noting previous instances where the victim's consent was vitiated and how these cases correlate to the deceit within the question posed. This will warrant an exploration of *R v Lawrance*,<sup>2</sup> the principal authority involving a fertility lie. An analysis of both the first instance and appeal will be considered, focusing on the latter.

Additionally, the pros and cons of the judgment will be balanced, anticipating what this means for the future of criminal law if a similar case were to arise. Finally, it will be suggested, having examined the relative sections of the Sexual Offences Act 2003 throughout, that the best course of action to take to truly protect the sexual autonomy of the complainer in cases of deception is to reform the current legislation. That way, if similar cases were to end up in court in the future, there would be a more equitable outcome. Before concluding, both the risk of overcriminalisation and the difference between legal and moral harm will be evaluated and rebutted to conclude that a lie about fertility should vitiate consent to sex. In advocating for reform, the basis of the analysis will slightly shift to demonstrate that by changing the law, a lie about fertility would, and should, vitiate consent to sex.

## B. SEXUAL AUTONOMY

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<sup>1</sup> Home Office, *Setting the boundaries: Reforming the law on sex offences* (vol 1, July 2000), para 2.7.2.

<sup>2</sup> *R v Lawrance* [2020] EWCA Crim 971.

The right to sexual autonomy is individualistic.<sup>3</sup> This implies that individuals have the freedom to make their own decisions about their sexual activity. Thus, to force another person to engage in sexual activity without their consent is to infringe upon their personal autonomy and human dignity,<sup>4</sup> exemplifying a violation of both legal and moral norms where A fails to respect B's personal autonomy.<sup>5</sup> Sexual autonomy is the freedom to choose what sexual activity you engage in - When? Where? Who? The choice is yours.

O'Malley and Hoven express that everyone has a fundamental right to refuse or engage in sexual activity with a specific person or under specific circumstances.<sup>6</sup> This suggests, as they also go on to state, that the right to sexual autonomy is comprised of both a negative and positive dimension: the freedom to refuse and the freedom to choose.<sup>7</sup> Thus, if D (the defendant) intentionally lies to V (the victim) about his fertility status, knowing her consent is dependent on him being infertile, D is depriving V of exercising both her positive and negative sexual autonomy. This is because V cannot choose nor refuse to engage in the act as she is unaware of all the facts under D's deception.

### C. THE IMPORTANCE OF CONSENT

Consent has a transformative nature<sup>8</sup> and its absence is one of the things that can render sexual activity criminal.<sup>9</sup> Therefore, being able to identify when consent is absent in sexual intercourse is essential. When a case is brought to the court under sexual offences, the prosecution must establish the absence of consent. To do so, they must be able to decipher when consent is and is not present, as well as the factors negating it. Therefore, the law governing this area must be explicit.

The statutory definition of consent is stated under Section 74 of the Sexual Offences Act 2003, "... a person consents if he agrees by choice and has the freedom and capacity to make that choice."<sup>10</sup> The ambiguity around what exactly this "free and voluntary agreement" pertains to is just one of the many criticisms of the 2003 Act.<sup>11</sup> However, notwithstanding its obscurity, there are two stand-out concepts when

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<sup>3</sup> Rachel Clement Tolley, 'Deception Mistake and Difficult Decisions' in *Reforming the Relationship between Sexual Consent, Deception and Mistake* (Criminal Law Reform Now Network Report, 2023) 94.

<sup>4</sup> Tom O'Malley and Elisa Hoven, 'Consent in the Law Relating to Sexual Offences' in Kai Ambos, Antony Duff, Julian Roberts, Thomas Weigend and Alexander Heinze (eds), *Core Concepts in Criminal Law and Criminal Justice* (CUP 2020) 136.

<sup>5</sup> *ibid* 139.

<sup>6</sup> *ibid* 138.

<sup>7</sup> *ibid*.

<sup>8</sup> *ibid* 136.

<sup>9</sup> Matthew Gibson, 'Deception, Consent and the Right to Sexual Autonomy' (n 3) 51.

<sup>10</sup> Sexual Offences Act 2003, s 74.

<sup>11</sup> O'Malley and Hoven (n 4) 155.

analysing consent in this area: agreement and choice.<sup>12</sup> It could be said, under this definition, one consents to have sex when they choose to have sex, and one consents to have sex when they agree to have sex.<sup>13</sup> However, not only is it important that V chose to engage in the sexual act, but how V reached that choice should also be a factor.<sup>14</sup> Debates are common between academics about when consent is invalid - specifically, what circumstances do and should vitiate one's consent to engage in sexual activity?<sup>15</sup> However, if there is one thing they agree on, it is that consent is paramount to engaging in sexual intercourse.

### **(1) Conditional Consent**

In exercising sexual autonomy, everyone should be able to choose what happens to their body. Therefore, it is common for people to place conditions on their agreement to engage in sexual conduct. This is known as conditional consent: when consent is provided under certain conditions, and if these are not met, the act is non-consensual.<sup>16</sup> Noted above, Section 74 of the Sexual Offences Act 2003 states that a person consents if he, "has the freedom and capacity."<sup>17</sup> Therefore, if either of these are absent, so is the consent. For this reason, if sexual autonomy is truly important, V then gets to choose the conditions under which she consents to sex.<sup>18</sup>

Consent is required for every sexual act. For instance, if the condition upon which V consented to have sex with D — say, condom usage — is then ignored by D, it therefore cannot be said that V's consent remains valid for sex without the condition.<sup>19</sup> Just because V consented to act A does not mean V also consents to act B despite how similar they may be, if at all. V is deprived of her ability to make a full and free choice if D violates the condition upon which V initially agreed, thus preventing her from fully exercising her sexual autonomy. Perhaps V would not have otherwise consented to the act had she known all the facts and instead refused to engage. Indeed, V would be deprived of exercising her freedom to refuse if so. Therefore, the removal/absence of any agreed protection or contraception during sexual activity

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<sup>12</sup> Chloe Kennedy, 'Sex, selfhood and deception' (n 3) 63.

<sup>13</sup> *ibid.*

<sup>14</sup> *ibid.*

<sup>15</sup> Beatrice Krebs, 'Rape, Consent and a Lie about Fertility: R v Lawrance [2020] EWCA Crim 971' (2020) 84 *The Journal of Criminal Law* 622-5, 622.

<sup>16</sup> Gavin Doig and Natalie Wortley, 'Conditional consent? An emerging concept in the law of rape' (2013) 77 *The Journal of Criminal Law* 286-291, 286.

<sup>17</sup> Sexual Offences Act 2003, s 74.

<sup>18</sup> UCL Laws, 'Consent to Sex, Deception and R v. Lawrance' (14 August 2020)

<<https://www.youtube.com/watch?v=TBR3jIWR69Y>> accessed 29 November 2024.

<sup>19</sup> *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin).

renders the act non-consensual and provokes discussions around conditional consent. If this is the case, then it is nonsensical that a lie about one's fertility status does not generate the same outcome.<sup>20</sup>

## D. FACTORS VITIATING CONSENT

There are multiple circumstances where someone can be deceived, though every deception negates consent to sex. There exists much academic discourse about when consent to sex is and should be vitiated.

Following a variety of cases involving deception,<sup>21</sup> Section 76(2) of the Sexual Offences Act 2003 sought to put two well-established common law grounds where deceit and fraud negate one's consent to sex into statute. However, as noted by Krebs, case precedent has demonstrated that consent-vitiating deceptions are not restricted to those within this section.<sup>22</sup> Nonetheless, Section 76 sets out conclusive presumptions about consent, including (a) being intentionally deceived by D as to the "nature or purpose" of the act,<sup>23</sup> and (b) being intentionally induced by D to consent to the act by impersonating someone known to V.<sup>24</sup> If it were applied, a fertility lie would come under the "nature or purpose" of the act rather than impersonation. However, it did not and thus, the former warrants further exploration.

### (1) Nature or Purpose

Notably, two examples where Section 76(2) was applied and proven include: (a) D deceiving V into thinking he was going to wear a condom, but D desists,<sup>25</sup> and (b) D is a different gender than what was believed by V.<sup>26</sup> In both instances, the court ruled that the complainant was deceived about the nature or purpose of the act, and thus, her consent to it was vitiated, resulting in sexual assault charges.

How, then, should the law conceptualise the position of the victim deceived as to her partner's fertility status? Such deception bears a close resemblance with the facts of *Assange*,<sup>27</sup> where consent was conditional upon D's use of a condom which he removed. However, this analogy was rejected by the Court

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<sup>20</sup> *Lawrance* (n 2). Evident in the quashed conviction.

<sup>21</sup> *R v Linekar* [1995] 3 All ER 69 73; *R v Elbekkay* [1994] EWCA Crim 1.

<sup>22</sup> Krebs (n 15) 622.

<sup>23</sup> Sexual Offences Act 2003, s 76(2)(a).

<sup>24</sup> *ibid* s 76(2)(b).

<sup>25</sup> *Assange* (n 19).

<sup>26</sup> *R v McNally* [2013] EWCA Crim 1051.

<sup>27</sup> *Assange* (n 19).

of Appeal in *Lawrance*,<sup>28</sup> where the facts were held to fall outside the scope of s 76(2).<sup>29</sup> This decision is difficult to reconcile with prior case law.

### **E. *R v LAWRENCE***

Jason Lawrance (D) was convicted of two counts of raping a woman (V) in the first instance. D and V met on a dating website and began exchanging sexually charged messages. As the conversation progressed, the pair discussed the use of contraception, where D asked V if her previous partner had used any protection, to which she informed him this was not needed as he had a vasectomy. In response, D then claimed he too had undergone this procedure and thus was infertile. Upon arriving at her home, V sought further assurance twice more from D that he was infertile and expressed she did not want to get pregnant. D reassured V he had a vasectomy, and the two then had unprotected sexual intercourse. Unbeknownst to V, D had not undergone a vasectomy and had lied to her. The next day, D texted V, confessing he was still fertile. Consequently, V underwent an abortion after realising she was pregnant.

D appealed his charge on the basis that V had consented to the intercourse, and thus, he could not be guilty of rape.<sup>30</sup> His defence also claimed V's account was challengeable in cross-examination as the two had not engaged in further discussion regarding the vasectomy upon his arrival at her flat.<sup>31</sup> Contrastingly, the prosecution argued the deception of the appellant vitiated V's consent.<sup>32</sup> The latter claim from the trial has been a key focal point for a lot of criminal academics and sexual offending more generally.

### **F. ANALYSING *R v LAWRENCE***

Notwithstanding many claims that *Lawrance* is “seriously flawed,”<sup>33</sup> it should be noted that the judgment also has some merits:

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<sup>28</sup> *Lawrance* (n 2) [43]. Conviction quashed.

<sup>29</sup> *ibid* [27].

<sup>30</sup> *ibid* [7].

<sup>31</sup> *ibid*.

<sup>32</sup> *ibid* [6].

<sup>33</sup> Mark Dsouza, ‘Deception, Consent to Sex, and *R v Lawrance* [Part 2]’ (UCL Discovery, 6 August 2020) <[https://discovery.ucl.ac.uk/id/eprint/10158186/1/blogpost\\_part\\_2.pdf](https://discovery.ucl.ac.uk/id/eprint/10158186/1/blogpost_part_2.pdf)> accessed 29 November 2024.

## (1) Pros

### (a) *Removes the distinction between active deception and non-disclosure*

A change warmly welcomed, Krebs notes that *Lawrance* removes the distinction between active deceptions and non-disclosures.<sup>34</sup> This distinction was unsatisfactory and lacked logical routes within the Sexual Offences Act 2003.<sup>35</sup> The removal is evident at the end of the judgment, where the court described deceit and deception as “slippery concepts,”<sup>36</sup> between which it is hard to distinguish one from the other.<sup>37</sup> The court then stated it makes no difference to the issue of consent whether the deception was expressed, as it was here, or implied, like in *R v B*.<sup>38</sup>

The central issue is whether the deceit mattered to V. According to the court, this is so where it is “closely connected to the performance of the act, rather than the broad circumstances surrounding it.”<sup>39</sup> The distinction was hard to decipher in practice, and thus, it is better to be removed. Furthermore, it simplifies the law. If the court is not concerned with whether the deception was expressed or implied, they can devote more time to the questions that matter.<sup>40</sup> For example, whether V consented and whether her consent depended on D’s deception. This would result in more effective adjudication as the court would not linger on fruitless distinctions. Suppose a case with the same facts arose in the future; the court’s focus would instead be whether D’s fertility lie mattered to V’s exercise of her sexual autonomy in choosing to engage with him, and if so, whether her consent should be vitiated.

### (b) *Removes “common sense” approach*

A second asset from the *Lawrance* judgment is that it removes the common-sense approach and instead focuses on legal principles,<sup>41</sup> distinguishing it from previous case decisions.

Evidence of the common-sense approach is notable in *Monica*,<sup>42</sup> where Lord Judge CJ claimed the evidence pertaining to the “choice” and “freedom” to decide was to be approached in a “common-sense way.”<sup>43</sup> This was also evident in *McNally*,<sup>44</sup> where Sir Brian Leveson P expressed that the facts were to be

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<sup>34</sup> Krebs (n 15) 622.

<sup>35</sup> UCL Laws (n 18) 57.03.

<sup>36</sup> *Lawrance* (n 2) [40].

<sup>37</sup> *ibid*.

<sup>38</sup> *R v B* [2007] 1 WLR 1567.

<sup>39</sup> *Lawrance* (n 2) [41].

<sup>40</sup> UCL Laws (n 18) 57.07.

<sup>41</sup> Krebs (n 15) 623.

<sup>42</sup> *R (Monica) v DPP* [2018] EWHC 3508 (Admin).

<sup>43</sup> *ibid* [26].

<sup>44</sup> *McNally* (n 26).

dealt with using a “common sense” view.<sup>45</sup> Departing from this approach, the COA in *Lawrance* noted this should instead turn to governing principles.<sup>46</sup> Recognised by Krebs, this approach demonstrated minor merit in calculating whether one’s consent had been vitiated.<sup>47</sup> This is because facts around sexual offending are far from “common sense,” and thus should not be dealt with as such. Without a justifying rationale, this common-sense approach swerved the law in error of producing unpredictable results,<sup>48</sup> and therefore, it suffices that the *Lawrance* judgment parted from it. Likewise, if similar facts were to arise in the future, it is good practice knowing they would not be approached in a common-sense manner.

## (2) Cons

### (a) *Wrongly distinguishes Lawrance from Assange and R(F)*

The first flaw of *Lawrance* is that it wrongfully distinguishes the facts at issue from those in *Assange*<sup>49</sup> and *R(F)*.<sup>50</sup> This is evident in the judgment, where it states the court considers a lie about fertility different than a lie about condom usage or intended withdrawal.<sup>51</sup> This distinction is mistaken. Comparing the facts at hand to the cases prior, Mr. Emanuel QC claimed, unlike *Assange* and *R(F)*, V in *Lawrance* had, “consented to every aspect of the physical act,”<sup>52</sup> having “imposed no physical restrictions.”<sup>53</sup> This is not correct. None of the victims in *Lawrance*, *Assange*, or *R(F)* had consented to every aspect of the physical act and had all imposed physical restrictions, which evidence provided by Williams supports.<sup>54</sup> For instance, in both *Assange* and *R(F)*, V had not consented to semen, including sperm, and in *Lawrance*, V had consented to semen but not sperm. Thus, the court’s claim that V did not impose any physical restrictions on the act is unsound.

Additionally, *R v B*<sup>55</sup> is another example of an imposed physical restriction where V had consented to semen, including sperm, but not to the HIV they later contracted. In every case, V lacked consent to the presence of a specific physical entity.<sup>56</sup> Thus, they lacked consent to part of the act, demonstrating a lack of distinction between the cases as incorrectly implied by the court. Moreover, when measured against the

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<sup>45</sup> *ibid* [26].

<sup>46</sup> *Lawrance* (n 2) [33].

<sup>47</sup> Krebs (n 15) 623.

<sup>48</sup> *ibid*.

<sup>49</sup> *Assange* (n 19).

<sup>50</sup> *R (F) v DPP* [2013] EWHC 945 (Admin).

<sup>51</sup> *Lawrance* (n 2) [36].

<sup>52</sup> *ibid* [20].

<sup>53</sup> *ibid* [37].

<sup>54</sup> UCL Laws (n 18) 57.46.

<sup>55</sup> [2006] EWCA Crim 2945; [2007] 1 WLR 1567.

<sup>56</sup> UCL Laws (n 18) 58.04.

facts of *McNally*,<sup>57</sup> V, in this case, consented to digital penetration which took place, the difference being the birth-gender of the person digitally penetrating V. Therefore, as suggested by Williams, if there is a distinction to be made, it is with *McNally*, not *Lawrance*.<sup>58</sup> Hence, like in the cases involving lies about condom usage or intended withdrawal, so too should a lie about fertility vitiate V's consent to sex.

(b) *Focusing on the physical act rather than emotional harm*

Akin to the preceding point, a second notable flaw in the *Lawrance* judgment is its focus on the “physical act” rather than the emotional harm it caused the victim. In the *Lawrance* judgment, the court failed to show compassion for the victim's sexual autonomy. This is evidenced when they expressed D's lie about his fertility status did not deprive V of her sexual autonomy, the freedom to choose whether to engage in the sexual intercourse as per the Section 74 definition of consent.<sup>59</sup> Similarly, this fact is also incorrect. If D intentionally lied to V, having claimed he had undergone a procedure he had not and was infertile as a result, she was indeed deprived of her freedom to choose. This is because she is deprived of her ability to exercise her sexual autonomy in making a free choice if she is not aware of all the facts. This reinforces the importance of sexual autonomy.

Instead of considering what emotional harm the act may have caused the victim, the court instead focuses on their claim that V consented to every aspect of the physical act.<sup>60</sup> Based on the findings noted above under “conditional consent,” consent is absent outside the conditions set out by the complainer. Applicable here, V's consent to have intercourse with D in *Lawrance* was conditional on the fact he was infertile.<sup>61</sup> Thus, it is argued that she may have consented to the physical act, though not every part.<sup>62</sup> Nonetheless, the court errs in failing to express its compassion for the lasting effects sexual violation has on victims. Applying the autonomy-oriented position noted above, like V's counsel in *Monica*,<sup>63</sup> here the jury should consider whether D's deceit mattered to V's state of affairs prior to the sexual act.<sup>64</sup> If considered, it would be clear, as concluded by the jury, that V would have not otherwise consented to the act as she relied upon D's deception.<sup>65</sup> Therefore, her consent should be vitiated by D's fertility lie as she was unable to exercise her sexual autonomy freely.

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<sup>57</sup> *McNally* (n 26).

<sup>58</sup> UCL Laws (n 18) 58.47.

<sup>59</sup> *Lawrance* (n 2) [38].

<sup>60</sup> *ibid* [20].

<sup>61</sup> *ibid*.

<sup>62</sup> *ibid* [34].

<sup>63</sup> R (*Monica*) (n 42).

<sup>64</sup> Chloe Kennedy, ‘Sex, Identity and Recognition: Rethinking rape and deception’ (Inherently Human: Critical perspectives on Law, Gender and Sexuality, 7 February 2019) <<https://inherentlyhuman.wordpress.com/2019/02/07/sex-identity-and-recognition-re-thinking-rape-by-deception/>> accessed 3 December 2024.

<sup>65</sup> *Lawrance* (n 2) [34].

## G. GOVERNING LEGISLATION

“A major piece of law reform,” two aims of the Sexual Offences Act 2003 included creating coherent and clear sexual offences and protecting sexual autonomy.<sup>66</sup> Prior to the Sexual Offences Act 2003, English law lacked a statutory definition of consent. Instead, this was left to the common law. There are multiple flaws in the legislation: length, placement, and wording. For these reasons, it is not surprising that there are so many advocates for reform.<sup>67</sup> Many of those favouring reform are eager to reduce the focus on complainers at trial, instead, focusing on the defendant and their conduct.<sup>68</sup> This approach would be more mindful of the complainer’s dignity in an already distressing situation. Accordingly, Williams, amongst others, believes the solution to some of the problems with the Sexual Offences Act 2003 rests in reforming primary legislation.<sup>69</sup>

### (1) Sexual Offences Act 2003

Dsouza notes that the Home Office 2000 Report, ‘Setting the Boundaries: Reforming the law on sex offences’ clarified that the protection of sexual autonomy was fundamental to the Sexual Offences Act 2003.<sup>70</sup> Although this may have plausible grounding, the Sexual Offences Act 2003 is unsatisfactory.

Among its criticisms is the claim that the Sexual Offences Act 2003 does not adequately account for sexual activity induced by deception. Therefore, it cannot truly be said to protect the sexual autonomy of those subject to such deceit. An examination of the current legislation reveals the Sexual Offences Act 2003 should be reformed by amending its section related explicitly to deception-induced sexual activity. Referring back to the *Lawrance* judgment, if D’s vasectomy lie did not vitiate V’s consent to have sex with him, and thus his rape conviction was quashed, he faced no legal consequence for his deceit.<sup>71</sup> *Lawrance*’s rape conviction was overturned as his fertility lie was not capable of negating consent under the Sexual Offences Act 2003.<sup>72</sup> Is this satisfactory? What about the psychological harm his deception caused V?

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<sup>66</sup> Jeremy Horder, *Ashworth’s Principles of Criminal Law* (10<sup>th</sup> ed, OUP 2022) 345.

<sup>67</sup> Clement Tolley (n 3) 94.

<sup>68</sup> Kennedy (n 12) 64.

<sup>69</sup> UCL Laws (n 18) 56.21.

<sup>70</sup> Dsouza (n 33).

<sup>71</sup> *Lawrance* (n 2) [43].

<sup>72</sup> Sandra Paul, ‘Law regarding consent is not confused, wrong or unfair - Sandra Paul writes for the Law Society Gazette’ (*Kingsley Napley*, 26 August 2020) <<https://www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/law-regarding-consent-is-not-confused-wrong-or-unfair-sandra-paul-writes-for-the-law-society-gazette>> accessed 9 December 2024.

Sexual offences often have long-lasting psychological consequences impacting the victim's quality of life.<sup>73</sup> Therefore, this should not just be a physical consideration.<sup>74</sup> Despite having this conviction quashed,<sup>75</sup> *Lawrance's* lie is morally reprehensible and thus should be criminalised. Sandra Paul claimed if this change were to occur, this would be best achieved through legislation rather than case precedent.<sup>76</sup>

## H. ADVOCATING FOR REFORM

Prior to the Sexual Offences Act 2003, Section 3(1) of the Sexual Offences Act 1956, titled 'Procurement of woman by false pretences,' stated it was, "an offence for a person to procure a woman, by false pretences or false representations, to have unlawful sexual intercourse."<sup>77</sup> Upon the passing of the Sexual Offences Act 2003, there is currently no Parliamentary legislation replicating this offence. However, the Sexual Offences Act 2003 includes both evidential and conclusive presumptions about consent instead. These are found in Section 75<sup>78</sup> & Section 76 of the Sexual Offences Act 2003 and are as close as the current law gets to replicating Section 3(1) of the Sexual Offences Act 1956. Noted above, Section 76 provides B's consent to sexual intercourse with A is only vitiated by deception on two grounds: (a) the nature or purpose of the relevant act;<sup>79</sup> (b) impersonating a person known to V.<sup>80</sup> Therefore, under this section, as was claimed by the judges in the *Lawrance* appeal, a lie about fertility does not vitiate the complainer's consent to sex as per this criterion. The absence of such an offence is just one of the factors proving the Act inadequate. Therefore, it is logical to suggest legislative reform in this area. To test this, below is part of a suggested reform of the Sexual Offences Act 2003 provided by Rogers, Child & Jarvis that adheres to sex induced by deception and thus better protects the victim's sexual autonomy as the Sexual Offences Act 2003 was originally intended.<sup>81</sup>

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<sup>73</sup> Horder (n 66) 345.

<sup>74</sup> Krebs (n 15) 625.

<sup>75</sup> *Lawrance* (n 2) [43].

<sup>76</sup> Paul (n 72).

<sup>77</sup> Sexual Offences Act 1956, s 3(1).

<sup>78</sup> s 75 of the Sexual Offences Act 2003 sets out the evidential presumptions about consent. This section provides the circumstances under which a complainer is taken to not have consented and include threats of violence (s 75(2)(a)); unconsciousness (s 75(2)(c)) and others. Though these sections discuss where consent is not present, focusing on s 76 bears more relevance to the discussion about a fertility lie and thus is examined further.

<sup>79</sup> Sexual Offences Act 2003, s 76(2)(a).

<sup>80</sup> *ibid* s 76(2)(b).

<sup>81</sup> Jonathan Rogers, John Child and Paul Jarvis, 'A gap in the law: sexual activity by deception' (*Counsel*, 10 July 2023)

<[https://www.counselmagazine.co.uk/articles/a-gap-in-the-law-sexual-activity-by-deception#:~:text=Under%20s%2076\(2\),that%20believed%20by%20the%20complainer.>](https://www.counselmagazine.co.uk/articles/a-gap-in-the-law-sexual-activity-by-deception#:~:text=Under%20s%2076(2),that%20believed%20by%20the%20complainer.>) accessed 4 December 2024.

## **(1) Proposed legislation**

*Section 4A. Inducing a person to engage in sexual activity by deception*

*(1) A person commits this offence if—*

*(a) A deceives B*

*(b) A intends to deceive B*

*(c) B engages in sexual activity*

*(d) B's decision to engage in the sexual activity is induced by A's deception*

*(e) A has no excuse for deceiving B*

*(2) A will deceive B under subsection (1) whenever:*

*(a) A knowingly makes a false representation to B about something A knows is important to B's decision to engage in the sexual act; or*

*(b) A intentionally fails to disclose information A knows would be or believes would be important to B's decision to engage in the sexual act.<sup>82</sup>*

Supporting this proposed legislative reform, it is clear this would provide better protection of a victim's sexual autonomy in cases of deception. If reformed like this, the *Lawrance* case and others alike would have had a different outcome. To test this, it is worth applying the facts of *Lawrance* to the proposed legislation.

## **(2) Applying Section 4A to *Lawrance***

Unbeknownst to everyone apart from him, it is unclear what D's true intentions were when lying to V (perhaps *inter alia* dominance, misogyny, contempt). Regardless, what can be inferred, as correctly stated by the prosecution at appeal, is that even if D honestly believed V was consenting, such belief was unreasonable.<sup>83</sup> This is evident as he knew he was lying to her and thus intended to deceive her into sex, satisfying Section 4A(1)(b). As for Section 4A(1)(e), D had no reasonable excuse to lie to V. Perhaps it

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<sup>82</sup> *ibid.*

<sup>83</sup> *Lawrance* (n 2) [6].

could be argued that he omitted telling V about his fertility status because he did not want to worry her. However, if he were genuinely motivated by concern for her wellbeing, he would have sought the use of protection or eschewed the act entirely, which he did not. Thus, satisfying Section 4A(1)(e).

It makes no difference how deception is communicated as the nub of the matter is whether this mattered to V's consent.<sup>84</sup> Without rigorous explanation, it is clear that both Section 4A(1)(a) and (c) are satisfied by the facts as D deceived V and the two had sex. Likewise, the threshold for both Section 4A(2)(a) and (b) are fulfilled where: (a) D made a false representation to V about his apparent vasectomy, implying he was infertile,<sup>85</sup> and (b) D intentionally failed to disclose that he had not had a vasectomy and was fertile, knowing, as expressed by V,<sup>86</sup> that this was paramount to her consent due to unwanted pregnancy.<sup>87</sup> Therefore, it is clear that if the Sexual Offences Act 2003 were to include Section 4A, the judges in *Lawrance* could not possibly come to the same conclusion — a quashed conviction<sup>88</sup> — if the criterion set out in Section 4A is satisfied by D. This demonstrates the need for legislative reform in this area to sufficiently protect the sexual autonomy of those who are deceived into sexual activity through lies, such as one's fertility status.

### **(3) Changing the Definition in Section 74**

A second reform considered here is the current definition of consent set out in Section 74. As established, the definition of consent stated in the Sexual Offences Act 2003 is rife with ambiguity and accompanying criticism, and the *Lawrance* appeal shed a light on the consent definition stated in the Sexual Offences Act 2003.<sup>89</sup> There are long-standing problems in distinguishing consent from non-consent.<sup>90</sup> Therefore, suggesting legislative reform is entirely rational. This is particularly true in instances involving consent given under deception, as Section 76 of the Sexual Offences Act 2003 fails to cover adequate ground as far as deceptions go.

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<sup>84</sup> Krebs (n 15) 624.

<sup>85</sup> *Lawrance* (n 2) [3].

<sup>86</sup> *ibid* [4].

<sup>87</sup> *ibid* [4].

<sup>88</sup> *ibid* [43].

<sup>89</sup> *Lawrance* (n 2) [1].

<sup>90</sup> Horder (n 66) 346.

Provided by Matthew Dyson, a proposed reformation of the consent definition:

Section 74. “Consent”

*‘... a person consents when a free, informed and deliberate agreement is made.’<sup>91</sup>*

The key word in this proposed legislation is “informed.” As expressed by Dyson, if D deceives V about something which would have otherwise changed V’s decision to engage with D, then her consent was not informed and thus immediately vitiated.<sup>92</sup>

Referring to the discussion on both sexual autonomy and conditional consent, Dyson’s proposed definition would better define the importance of respecting sexual autonomy. This would require the prosecution to prove that the consent given by V was informed - which, in cases involving deceit and lies, cannot be proven. This is because V is not fully informed if she is lied to, and thus her consent should be vitiated. Therefore, adopting this approach would provide further safeguarding for the deceived. If indeed people have a fundamental right to sexual autonomy, whereby they choose when and with whom they have sex, then providing informed consent cannot depend on D’s deception.<sup>93</sup> This is because V’s decision to consent is restricted by their ignorance of the full facts.

Similar to the other proposal, it is worth applying the facts of *Lawrance* to Dyson’s suggested reform, though this time, it is much simpler. The main question is, was V explicitly informed of D’s actual fertility status and sham vasectomy? No. Therefore, her consent would be vitiated. This ties in with the claim that the court in *Lawrance* erred in distinguishing the facts at hand with both *Assange* and *R(F)*. Hence, under this proposed definition of consent, a lie about fertility would, as it should, vitiate consent to sex.

## **I. RISK OF OVERCRIMINALISATION?**

It may be argued that employing both proposed reforms could lead to overcriminalisation. Given the severity of sexual offending, any reform must be made cautiously. However, to rebut this suggestion, it is important to consider the wording of Section 4A(1)(b) above. The key word here is “intends.” This implies

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<sup>91</sup> Matthew Dyson, ‘Redefining Sexual Conditions’ in ‘Reforming the Relationship between Sexual Consent, Deception and Mistake’ (n 3) 36.

<sup>92</sup> *ibid* 41.

<sup>93</sup> O’Malley and Hoven (n 4) 156.

someone plans or means to do something. Therefore, if the law requires D to have intended to deceive V, it is unlikely that this would lead to overcriminalisation as D would have satisfied the *mens rea* (intention) for the crime and thus should be punished. Paired with Section 4A(2)(b), D is required to fail “intentionally” to disclose information to V that is important to her decision-making. Therefore, if intention is required, this cannot be committed by accident and would unlikely lead to overcriminalisation. Additionally, the word “deliberate” also bears great importance in analysing Dyson’s proposed reform of Section 74.<sup>94</sup> That is because it requires V to have been informed of the relevant facts and still decide to engage.<sup>95</sup> This would also be less likely to lead to overcriminalisation as V would be required to make a deliberate decision. Hence, by reforming Section 74 and adding Section 4A to the Sexual Offences Act 2003 like so, a lie about fertility would, as it should, vitiate consent to sex.

## J. LEGAL HARM IS DIFFERENT FROM MORAL HARM

There are conflicting viewpoints about whether a lie about fertility should vitiate consent to sex, as expected with such a complex matter. One opposing perspective is of Sandra Paul who expresses there often exists a “world of difference” between legal wrongness and moral wrongness.<sup>96</sup> This implies that though something may be immoral, it does not necessarily mean it should be criminal. Whilst this has plausible grounding, it falls short of recognising the overlapping consequences between the two, especially in cases involving sexual deceit. For example, legal harm often arises by moral judgments made by society; thus, laws are often influenced by prevailing moral standards. Therefore, there is an intersection between both types of harm and their impact on individuals and society alike. Indeed, the two converge when considering sexual autonomy because if legislative frameworks fail to align with moral understandings of consent, one’s autonomy can be undermined as a result. For example, if the law fails to recognise some forms of deception as harmful (like in *Lawrance*), individuals are able to exercise their autonomy in morally questionable ways.

Conversely, if moral standards advocate for certain rights and protections, this can influence legal reforms that better protect one’s sexual autonomy. This highlights the demand for legislative reform and the overlap between law and morality in cases of deception. Indeed, a lie about one’s fertility status is immoral as it limits the other person’s ability to make informed decisions about their sexual activity, restricting them from exercising their sexual autonomy. Therefore, if the law were clearer about what does

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<sup>94</sup> Dyson (n 91) 42.

<sup>95</sup> *ibid.*

<sup>96</sup> Paul (n 72).

and does not spoil an individual's consent to sex, this would result in more equitable sentencing. Hence, a lie about fertility should vitiate consent to sex.

## K. CONCLUSION

Examining whether a lie about fertility should vitiate consent to sexual activity concerning the *R v Lawrance* judgment, it has been contended this should be the case. To reach this conclusion, the importance of sexual autonomy in consent was first evaluated. This then provided a backbone for the remainder of the argument, finding that where V is induced into sexual activity by D's deception, she is unable to exercise her sexual autonomy freely. This fact was then considered through an analysis of the definition of consent, instances where it has been vitiated and a look at the legislation governing this area of the law. In addition to this, legislative reform was also advocated for and applied to the facts of *Lawrance*, considering the possibility of a similar case arising in the future and how the changes suggested would hopefully provide a better outcome notwithstanding the danger of over-criminalisation. Finally, the claim that there exists a world of difference between legal harm and moral harm was considered and refuted to conclude that though they can differ, they also overlap in reference to sexual offending. Thus, there is little difference between the two. In summary of the findings, it can be concluded a lie about fertility should vitiate one's consent to sexual activity and that legislative reform is the best way forward.