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## **Under the Covers: Covert Policing and Intimate Relationships**

### *Abstract*

*The operations of undercover police in England and Wales during the 1980s and 1990s in particular, are now subject to an official inquiry. Reports of police officers committing crimes and taking on the identities of dead children have been controversial, but so too the engagement of officers in intimate (sexual) relations while undercover. This raises difficult moral and ethical questions, but we argue, also questions of the legality of such behaviour. In spite of the inclusion of a definition of ‘consent’ in the Sexual Offences Act 2003, the courts in England and Wales are still regularly required to deal with questions of interpretation, as might be expected when there are diverse social understandings of the parameters of ‘acceptable’ sexual conduct. In this paper, we look at a possible legal approach to sexual relationships that police officers have embarked on while undercover. Could sexual intercourse while undercover be considered rape? In order to answer this question, we examine the 2003 Act and the preceding 1956 Sexual Offences Act, which was in force during much of the time of the undercover relationships that are now under scrutiny. We consider recent interpretations of the legal definition of consent and deliberate on whether undercover officers could be liable for rape, on the basis that the consent of their partners was vitiated by their deceit. We conclude that developments surrounding consent and deception make it possible to charge undercover officers with sexual offences.*

Following a plethora of reports, publicity campaigns, petitions and debates in Parliament, in March 2015 the Home Secretary announced an inquiry into undercover policing since 1968 in England and Wales, tasked with investigating the role of undercover operations, as well as their scope and impact upon individuals and the public in general.<sup>1</sup> The exposure of operations that took place during the early 1980s revealed that undercover officers (UCOs) had not only been involved in criminal activities, but had “intimate relationships with a number of people while undercover, and in doing so encroached very significantly into their lives.”<sup>2</sup> UCOs created a ‘legend’: a personal history and complete, but entirely fictitious, background, sometimes using the names of deceased children. When deployed to infiltrate social and environmental justice campaigns and political activist groups (typically for five years but often longer), some UCOs deceived women into long-term intimate relationships. They also committed crimes whilst undercover.<sup>3</sup> In some

<sup>1</sup> Secretary of State for the Home Department (Mrs Teresa May), *Undercover Policing* (House of Commons: Written Statement (HCWS115), 16 July 2015).

<sup>2</sup> Her Majesty’s Inspectorate of Constabulary, *A review of national police units which provide intelligence on criminality associated with protest* (HMIC, 2012) 8.

<sup>3</sup> Leading to an inquiry into potential miscarriages of justice led by Mark Ellison QC and Alison Morgan. Subsequently, at least 57 convictions of environmental protestors have been overturned, see: *Review of Possible Miscarriages of Justice: Impact of Undisclosed Undercover Police Activity on the Safety of Convictions*, Report to the Attorney General, House of Commons, HC 291, 16 July 2015. available at:

instances they took leading roles in staging events, for example by providing critical equipment and transport.<sup>4</sup> An inquiry into possible miscarriages of justice revealed that UCOs gave evidence using fake identities, deceived legal professionals and permitted false evidence to be adduced in court.<sup>5</sup> Women who have spoken publicly since learning they were involved with UCOs describe committed and supposedly ‘monogamous’ relationships with people they were led to believe shared their political beliefs and outlook on life. This included living together, planning families and, in some cases, parenting children. ‘Rosa’, who had a nine-year relationship with one UCO, explained,

my life partner was fabricated by the state. He never existed. I … bore children by the actor, a random police officer, who had played my partner … He used his professional skills of deception and manipulation to try to control my feelings and actions.

‘Lisa’ added:

This is not simply about a man lying in a relationship, it was a deception perpetrated, overseen and supervised by the state… There were employers instructing and supporting his deception with fake I.D. and overtime paid.<sup>6</sup>

The women have reported feeling violated, and suffering long-term significant psychological damage and trauma as a result.<sup>7</sup>

In October 2011 and January 2012, five such women (and one man whose partner had been in a relationship with an UCO) brought claims in the High Court against the Association of Chief Police Officers (ACPO), the Metropolitan Police Commissioner and the Chief Constable of South Wales Police.<sup>8</sup> They invoked Articles 3 and 8 of the European Convention on Human Rights, alleging that the conduct of the UCOs in establishing and maintaining sexual relationships by deception interfered with their right to respect for their private lives (Art 8) and amounted to degrading treatment (Art 3).<sup>9</sup> They also claimed deceit, assault, negligence and misfeasance in

<sup>4</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/445551/2015-07-16\\_HC\\_291\\_Possible\\_miscarriages\\_of\\_justice\\_-\\_Web\\_Accessible\\_-\\_FINAL.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445551/2015-07-16_HC_291_Possible_miscarriages_of_justice_-_Web_Accessible_-_FINAL.pdf)

<sup>5</sup> R. Evans and P. Lewis, *Undercover: The True Story of Britain’s Secret Police* (London: Faber and Faber, 2013).

<sup>6</sup> *Ibid.*

<sup>7</sup> The statements of eight women who commenced claims in the civil courts available at:

<https://policespiesoutoflives.org.uk/individual-statements-from-women/>

<sup>8</sup> *Ibid.*, and also evidence given by witnesses to the Home Affairs Select Committee inquiry on Tuesday 5 February 2013, and reported in: Home Affairs Committee, Thirteenth Report, *Undercover Policing: Interim Report* (26th February 2013) 6-7 <<https://www.publications.parliament.uk/pa/cm201213/cmselect/cmhaff/837/83702.htm>> accessed 28 April 2017

<sup>9</sup> *AJA and others v Commissioner of Police of the Metropolis* [2013] EWHC 32 (QB). The Police Act 1996, s.88 provides that the chief officer of police for a police area shall be liable in respect of any unlawful conduct of constables under his direction and control in the performance or purported performance of their functions.

<sup>9</sup> “These relationships caused serious long-term harm and psychological trauma to the victims and others close to them. This, and the nature of the deception involved, mean they were violations of Article 3. Intimate and sexual relationships by undercover officers concealing their real identity from the other person/s in the relationship/s represent a clear violation of the right to respect for private and family life. These relationships involved intrusion

public office at common law between 1987 and 2007.<sup>10</sup> In January 2013, their claims under the Human Rights Act 1998 were struck out. Tugenhadt J ruled that these claims fell within the jurisdiction of the Investigatory Powers Tribunal (IPT) and that the establishment or maintenance by an undercover police officer of an intimate sexual relationship for the purposes of obtaining information was within the scope of ‘personal or other relationship with a person’ in s.26(8)(a) of the Regulation of Investigatory Powers Act 2000 (‘RIPA’) and was capable of being authorised. The IPT therefore had exclusive jurisdiction over the claim by virtue of RIPA, s.65. The remaining claims for damages at common law were stayed.<sup>11</sup> In November 2013, the Court of Appeal lifted the stay of the tort claims but agreed that the IPT was the appropriate venue for litigating the human rights claims, stating:

[T]he establishing and/or maintaining of an intimate sexual relationship for the covert purpose of obtaining intelligence is a seriously intrusive form of investigatory technique. We do not think that it is in issue that it amounts to an invasion of an individual’s common law right to personal security and of a most intimate aspect of the right to privacy under Article 8 of the Convention.<sup>12</sup>

The Court of Appeal’s observations chimed with the conclusions of Chief Constable Mick Creedon, independent lead for Operation Herne, which was set up to investigate the activities of one MPS covert unit:<sup>13</sup>

[T]here are and never have been any circumstances where it would be appropriate for ... covertly deployed officers to engage in intimate sexual relationships with those they are employed to infiltrate and target. Such an activity can only be seen as an abject failure of

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into people’s families, with some officers attending family funerals, and helping women through the grieving process. In their Apology, the Met Police admitted it was a “gross violation” of the women’s privacy.” From <https://policespiesoutoflives.org.uk/the-case-overview/legal-battles/two-different-kinds-of-law/human-rights-claims/>

<sup>10</sup> Five more women subsequently brought claims for damages at common law: *DIL and others v Commissioner of Police for the Metropolis* [2014] EWHC 2184 (QB). The High Court’s decision in the latter case largely focussed on the question of whether the Chief Constable could avoid pleading a detailed response to the claims by asserting the established policy that the police will neither confirm nor deny (NCND) the identity of an undercover officer or other covert human intelligence source (CHIS).

<sup>11</sup> Pending the outcome of proceedings in the IPT: *AJA and others v Commissioner of Police of the Metropolis* [2013] EWHC 32 (QB).

<sup>12</sup> *AJA and others v Commissioner of Police of the Metropolis* [2013] EWCA Civ 1342, 22.

<sup>13</sup> Operation Herne was set up to investigate the activities of the Special Demonstration Squad, a Metropolitan Police Special Branch undercover unit operating between 1968 and 2008.

the deployment, a gross abuse of [the UCO's] role and their position as a police officer and an individual and organisational failing.<sup>14</sup>

Although declining to comment on the “lawfulness or otherwise” of UCOs’ actions, the Home Affairs Committee acknowledged the “terrible impact on the lives of those women who had relationships with undercover officers”, adding that the officers themselves were “not unaffected” by these relationships, which caused “psychological damage on both sides”.<sup>15</sup>

In 2015, after mediation with seven women, the Metropolitan Police Service (MPS) admitted that officers “acting undercover whilst seeking to infiltrate protest groups, had entered into long-term intimate sexual relationships with women which were abusive, deceitful, manipulative and wrong”. Assistant Police Commissioner Martin Hewitt issued an apology, accepting that the relationships were “a violation of the women’s human rights, an abuse of police power and caused significant trauma”.<sup>16</sup> The apology continued:

Most importantly, relationships like these should never have happened. They were wrong and were a gross violation of personal dignity and integrity... none of the women with whom the undercover officers had a relationship brought it on themselves. They were deceived pure and simple... it is apparent that some officers may have preyed on the women’s good nature and had manipulated their emotions to a gratuitous extent.<sup>17</sup>

Commissioner Hewitt made clear that an undercover sexual relationship must not be approved by a supervising officer:

The forming of a sexual relationship by an undercover officer would never be authorized in advance nor indeed used as a tactic of a deployment. If an officer did have a sexual relationship despite this (for example if it was a matter of life or death) then he would be required to report this in order that the circumstances could be investigated for potential criminality and/or misconduct.

Further to this apology, in January 2016, judgment was entered against the MPS in relation to civil claims by one woman, relating to deceit, assault and battery, misfeasance in public office, and

<sup>14</sup> Mick Creedon, Chief Constable of Derbyshire, *Operation Herne, Report 2: Allegations of Peter Francis* (March 2014) 16.2 <<http://www.derbyshire.police.uk/Documents/About-Us/Herne/Operation-Herne---Report-2---Allegations-of-Peter-Francis.pdf>> accessed 28 April 2017.

<sup>15</sup> Home Affairs Committee, *Thirteenth Report, Undercover Policing: Interim Report* (26<sup>th</sup> February 2013) 6-7 <<https://www.publications.parliament.uk/pa/cm201213/cmselect/cmhaff/837/83702.htm>> accessed 28 April 2017.

<sup>16</sup> Full text of apology available at: <http://news.met.police.uk/news/claimants-in-civil-cases-receive-mps-apology-138574>

<sup>17</sup> Full text of apology available at: <http://news.met.police.uk/news/claimants-in-civil-cases-receive-mps-apology-138574>

negligence.<sup>18</sup> The MPS had admitted that superior officers knew the UCO was “abusing his power” and either expressly or tacitly permitted this, by failing to act upon this knowledge throughout his two-year relationship.<sup>19</sup>

## Police Attitudes to Undercover Sexual Relations

One former UCO has publicly stated that “[s]ex was a tool to help officers blend in … and was widely used as a technique to glean intelligence.”<sup>20</sup> Following requests under the Freedom of Information Act 2000, in 2015 the MPS published a heavily redacted version of a ‘Tradecraft Manual’, designed for use by members of a covert unit.<sup>21</sup> This document stated that, if UCOs had “no other option” they “should try to have fleeting, disastrous relationships with individuals who [were] not important to [their] sources of information”.<sup>22</sup>

Prior to publishing his Operation Herne reports, Chief Constable Mick Creedon, stated that the actions of some UCOs had been “completely abhorrent… [and] should not have happened”.<sup>23</sup> However, Creedon added the caveat that police use of deception should be understood in a wider context: “Around the country there are many people involved in sexual relationships who lie about their status… There are many people who say they’re not married when they are married. It happens.”<sup>24</sup> It may well be considered that there is no real problem with UCOs having sexual relationships while undercover. After all, people have always lied and deceived each other in relationships. In *AJA & Others*,<sup>25</sup> Tugendhat J noted that the activities of fictional spy, James Bond,

… lend credence to the view that the intelligence and police services have for many years deployed both men and women officers to form personal relationships of an intimate sexual nature… in order to obtain information or access.

<sup>18</sup> See <https://policespiesoutoflives.org.uk/new-met-apology/withdraw-defence/>

<sup>19</sup> ‘Woman wins undercover officer case against Met Police’, BBC News, 19<sup>th</sup> January 2016  
<http://www.bbc.co.uk/news/uk-35350095> accessed 20 November 2017

<sup>20</sup> Mark Townsend and Tony Thompson, ‘Undercover police cleared ‘to have sex with activists’ *The Guardian* (22 January 2011) <<https://www.theguardian.com/uk/2011/jan/22/undercover-police-cleared-sex-activists>> accessed 28 April 2017.

<sup>21</sup> The *Tradecraft Manual* provided guidance to members of the Special Demonstration Squad (SDS). See Mick Creedon, Chief Constable of Derbyshire, *Operation Herne, Report 1: Use of Covert Identities* (July 2013) 1 <<http://www.derbyshire.police.uk/Documents/About-Us/Herne/Operation-Herne---Report-1---Covert-Identities.pdf>> accessed 28 April 2017.

<sup>22</sup> Special Demonstration Squad, *Tradecraft Manual* (February 1995) 28 <[http://www.met.police.uk/foi/pdfs/priorities\\_and\\_how\\_we\\_are\\_doing/corporate/operation\\_herne\\_sds\\_tradecraft\\_manual.pdf](http://www.met.police.uk/foi/pdfs/priorities_and_how_we_are_doing/corporate/operation_herne_sds_tradecraft_manual.pdf)> accessed 1 August 2016.

<sup>23</sup> Paul Lewis and Rob Evans, ‘Dozens of undercover officers could face prosecution, says police chief’ *The Guardian* (24 June 2013) <<https://www.theguardian.com/uk/2013/jun/24/undercover-officers-police-chief>> accessed 28 April 2017.

<sup>24</sup> Paul Lewis and Rob Evans, ‘Dozens of undercover officers could face prosecution, says police chief’ *The Guardian* (24 June 2013) <<https://www.theguardian.com/uk/2013/jun/24/undercover-officers-police-chief-met>> accessed 28 April 2017.

<sup>25</sup> [2013] EWHC 32 (QB).

However, the Home Affairs Committee was of the view that,

restrictions on the actions of state agents are an essential element of a free society governed by the rule of law. ...[O]fficers should [not] enter into intimate, physical sexual relationships while using their false identities undercover without clear, prior authorisation, which should only be given in the most exceptional circumstances.<sup>26</sup>

In June 2012, Nick Herbert MP (then Minister for Policing) was not persuaded that it would be appropriate to issue explicit guidance forbidding undercover officers from entering into relationships, as this “would provide a ready-made test for the targeted criminal group to find out whether an undercover officer was deployed among them.”<sup>27</sup> In 2016, the College of Policing consulted on draft guidance for UCOs, which states that it is “never acceptable” to form an intimate relationship while deployed and will never be authorised.<sup>28</sup> The guidance accepts, however, that such conduct may sometimes occur and may even be justified if an officer perceives “an immediate threat to themselves and/or others if they do not do so” albeit the activity should be “restricted to the minimum ... necessary to mitigate the threat.”<sup>29</sup>

Both the Home Affairs Committee and the College of Policing therefore suggest that ‘deceptive sex’ may be a permissible tactic by UCOs in “exceptional circumstances”, without indicating what those circumstances might be. In *DIL and others v Commissioner of Police for the Metropolis*, leading counsel for the respondent suggested, “it might be legitimate for an officer to sleep with someone on a single occasion in order to obtain information about an imminent terrorist act”.<sup>30</sup> This scenario was “so far from the present case” of women deceived into long term relationships that Bean J declined to consider it further.<sup>31</sup>

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<sup>26</sup> Home Affairs Committee, *Thirteenth Report, Undercover Policing: Interim Report* (26<sup>th</sup> February 2013) 12 <<https://www.publications.parliament.uk/pa/cm201213/cmselect/cmhaff/837/83702.htm>> accessed 28 April 2017.

<sup>26</sup> Mark Townsend and Tony Thompson, ‘Undercover police cleared 'to have sex with activists' *The Guardian* (22 January 2011) <<https://www.theguardian.com/uk/2011/jan/22/undercover-police-cleared-sex-activists>> accessed 28 April 2017.

<sup>27</sup> HC Deb 13 June 2012 Col 104WH

<sup>28</sup> College of Policing, *Undercover Policing: Authorised Professional Practice* (29 June 2016) <[https://www.app.college.police.uk/wp-content/uploads/2016/06/UCAPP\\_consultation-draft-CLOSED.pdf](https://www.app.college.police.uk/wp-content/uploads/2016/06/UCAPP_consultation-draft-CLOSED.pdf)> accessed 28 April 2017.

<sup>29</sup> College of Policing, *Undercover Policing: Authorised Professional Practice* (29 June 2016) <[https://www.app.college.police.uk/wp-content/uploads/2016/06/UCAPP\\_consultation-draft-CLOSED.pdf](https://www.app.college.police.uk/wp-content/uploads/2016/06/UCAPP_consultation-draft-CLOSED.pdf)> accessed 28 April 2017.

<sup>30</sup> [2014] EWHC 2184 (QB) [9]

<sup>31</sup> [2014] EWHC 2184 (QB) [9]

When asked whether any of the UCOs who engaged in sexual relationships could be prosecuted, Chief Constable Creedon admitted “[i]t’s a possibility, yes”.<sup>32</sup> An investigation into potential offences committed by officers from the MPS’s Special Demonstration Squad (SDS) was undertaken and the CPS was invited to consider charges under the Sexual Offences Acts of 1956 and 2003, misconduct in public office at common law, and breaches of the Official Secrets Act. In 2014 the CPS concluded there was insufficient evidence of rape because there was no realistic prospect of proving that the women did not consent. They also declined to prosecute any UCOs for misconduct in public office. We now explain why we believe the decision not to prosecute for sexual offences was flawed having regard to recent jurisprudence concerning the meaning of ‘consent’, discussing the relevance of deception to the “free choice” required by the 2003 Act.

### **The Criminal Law and ‘Deceptive’ Sex**

It is well established that consent to sexual activity will be vitiated if a complainant lacked the capacity to consent (for example, due to intoxication) or if there was abuse, domination and/or control to the extent that their consent can be deemed invalid.<sup>33</sup> In the context of ‘capacity’ to consent, the House of Lords observed,

it is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place. Autonomy entails the freedom and the capacity to make a choice of whether or not to do so.<sup>34</sup>

Accordingly, there must be the possibility that consent may be vitiated after the event by the discovery of a deception that deprived the complainant of the freedom to choose whether to engage in sexual activity on the particular occasion and/or with the particular person in question. In this instance, one woman who had a child with an undercover officer told The Guardian newspaper that she did not consider that she had consented to sexual intercourse with the officer because she did not know who he really was. She felt she had been ‘raped by the state’.<sup>35</sup>

Historically, the English and Welsh courts took an exclusionary approach to the relevance of deception or fraud in the context of rape. As Herring states, “[t]hroughout history, people have used all manner of deceptions to persuade others to have sex with them.... Yet the law has traditionally been reluctant to criminalise the use of deception in sexual relations.”<sup>36</sup> The reluctance

<sup>32</sup> Paul Lewis and Rob Evans, ‘Dozens of undercover officers could face prosecution, says police chief’ *The Guardian* (24 June 2013) <<https://www.theguardian.com/uk/2013/jun/24/undercover-officers-police-chief-met>> accessed 28 April 2017.

<sup>33</sup> Sexual Offences Act 2003, s.74. See, for example, *R v Bree* [2007] EWCA Crim 804 ; *R v AC* [2012] EWCA Crim 2034.

<sup>34</sup> *R v C* [2009] UKHL 42 [27].

<sup>35</sup> ‘Trauma of spy’s girlfriend: “like being raped by the state” ’, *Guardian*, 24 June 2013, available at <http://www.theguardian.com/uk/2013/jun/24/undercover-police-spy-girlfriend-child?guni=Article:in%20body%20link>, accessed 13 December 2013.

<sup>36</sup> J. Herring, ‘Mistaken Sex’ [2005] Crim LR 511, 511

of the courts to intervene may be because, as Wertheimer posits, “[w]e may think it sleazy if a male lies about his marital status, affections or intentions in order to get a particular woman into bed, but many do not think that this is a particularly serious matter”.<sup>37</sup> More recently, in Canada the Supreme Court has accepted that some deceptions negate consent, such as sabotaging a condom to get a girlfriend pregnant against her express wishes,<sup>38</sup> but that court has also stated:

Deceptions, small and sometimes large, have from time immemorial been the by-product of romance and sexual encounters. They often carry the risk of harm to the deceived party. Thus far in the history of civilization, these deceptions, however sad, have been left to the domain of song, verse and social censure.<sup>39</sup>

In England and Wales, the circumstances in which deception would negate consent were heavily circumscribed. At common law, deception potentially vitiated apparent consent to sexual intercourse in two situations: deception as to the identity of the perpetrator, or deception as to the nature (or quality) of the act.<sup>40</sup> Other deceptions, such as to marital status, wealth or love for example, have never been sufficient to negate consent. Consent is now defined in s.74 of the 2003 Act, which provides that “a person consents if he agrees by choice, and has the freedom and capacity to make that choice”. The terms ‘choice’, ‘freedom’ and ‘capacity’ are not defined. Section 75 introduces evidential presumptions relating to consent, none of which are relevant for our purposes.<sup>41</sup> Of significance, is s.76(2), which sets out two situations in which it will be conclusively presumed both that the complainant did not consent to the relevant sexual activity and that the defendant did not reasonably believe the complainant was consenting, namely:

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

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<sup>37</sup> A. Wertheimer, *Consent to Sexual Relations* (Cambridge: Cambridge University Press, 2003) 193.

<sup>38</sup> *Hutchinson* [2014] 1 SCR 346

<sup>39</sup> *Cuerrier* [1998] 2 SCR 371 [47]

<sup>40</sup> *Clarence* [1888] 22 QBD 23, 44. The idea that deception as to the quality of the act would also vitiate consent came later – see *Richardson* [1998] 3 WLR 1291; *Tabassum* [2000] 2 Cr App R 328, 337. The Sexual Offences Act 2003 replaced the term ‘quality’ with ‘purpose’, so that there is now a conclusive presumption of non-consent where the defendant deceived the complainant as to the nature or purpose of the relevant act.

<sup>41</sup> Section 75 provides that, if it can be proved that the defendant did the act required to establish the offence, and that any of the circumstances in s.75(2) existed and the defendant knew they existed, it will be presumed that the complainant was not consenting to the sexual activity and that the defendant did not reasonably believe the complainant to be consenting. The circumstances in s.75(2) include the complainant being asleep or unlawfully detained at the time of the relevant act, and the use or threat of violence against the complainant or another person.

The presumptions have been “strictly construed” because they “effectively remove … from an accused his only line of defence.”<sup>42</sup> As Ormerod and Laird point out, if it can be proved that the defendant did the relevant act and that either of the above circumstances existed, “[the defendant] is conclusively proved to be a sex offender”.<sup>43</sup> The s.76 circumstances are not determinative of consent where deception is involved, however. A deception that does not fall within the narrow scope of s.76 may nevertheless vitiate consent if it deprived the complainant of the freedom to choose whether to consent under s.74 of the Act.

We now turn to the question of whether a UCO undertaking a sexual relationship is engaging in fraud as to his identity, or as to the quality or purpose of the act of sexual intercourse so that consent is negated at common law or under s.76 of the SOA 2003. We then consider whether the UCOs’ deceptions deprived their sexual partners of the ‘freedom to choose’ under s.74.

### ***Deception as to identity at common law***

At common law, ‘husband impersonation cases’ were not initially regarded as rape, even though consent was obtained by fraud.<sup>44</sup> However, in *Dee*, the Irish Court for Crown Cases Reserved held that a defendant was guilty of rape when a married woman consented to intercourse with him in the belief that he was her husband, as: “[t]he person by whom the act was to be performed was part of its essence”.<sup>45</sup> The Criminal Law Amendment Act 1885 clarified that “a man who induces a married woman to permit him to have connexion with her by personating her husband … shall be deemed guilty of rape”.<sup>46</sup> A similar provision appeared in the SOA 1956,<sup>47</sup> and the Court of Appeal extended the principle to encompass the impersonation of unmarried partners.<sup>48</sup> Commenting in 1995, Professor John Smith observed that “sexual intercourse is a relationship in which *personality is supremely important* and consent to have intercourse with A is not, and should not be held to be, consent to have intercourse with B” (emphasis added).<sup>49</sup> Although the women who had sexual intercourse with UCOs were unaware of their true ‘personalities’, it is unlikely that the courts would conclude this negated their consent. The UCOs were not pretending to be a spouse or partner, or indeed any living individual. There is no authority to support the contention that the identity doctrine is applicable when a person adopts a fictional persona.

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<sup>42</sup> *Bingham* [2013] EWCA Crim 823 [20]. See also *Jheetा* [2007] EWCA Crim 1699 [24] and *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) [87].

<sup>43</sup> D. Ormerod and K. Laird, *Smith and Hogan’s Criminal Law*, 14th edn (Oxford: Oxford University Press, 2015) 837.

<sup>44</sup> *Barrow* (1868) LR 1 CCR 156.

<sup>45</sup> *R v Dee* (1884) 15 Cox CC 579.

<sup>46</sup> S.4.

<sup>47</sup> Sexual Offences Act 19656, s.1(2).

<sup>48</sup> *Elbekkay* [1994] EWCA Crim 1.

<sup>49</sup> [1995] Crim LR 163.

### ***Deception as to identity under the SOA 2003***

Section 76(2)(b) focuses on the nature of the relationship between the complainant and the individual the defendant is impersonating “and the significance of that relationship for the validity of consent.”<sup>50</sup> Fitzpatrick has speculated that s.76(2)(b) might apply where a defendant developed a “relationship of trust” with a complainant online, before inducing them to engage in sexual activity.<sup>51</sup> Applying this argument to the UCO who impersonates an activist, the fake ‘activist’ is personally known to the complainant. It is arguable that consent to sexual relations under such pretences ought to be considered invalid. Herring suggests that the value the SOA 2003 seeks to protect is sexual autonomy, and this encompasses the right of an individual to choose, whilst in possession of all of the facts that *they* consider material.<sup>52</sup> Herring’s approach requires defendants to predict which factors will be regarded by their partner as material, but this may be less problematic in the case of the UCOs. Most of the women targeted were committed activists and the UCOs must have known their deceptions went to matters these women would regard as important. Nevertheless, we acknowledge that s.76(2)(b) has never been used where a defendant has impersonated someone who does not in fact exist. None of the UCOs impersonated a living adult, but rather used the ‘cover’ of either a deceased child or a made-up name to maintain an entirely fictitious ‘legend’, so we now consider the concept of deception as to the nature or quality of sexual acts.

### ***Deception as to nature or quality at common law***

The courts have long accepted that fraud or deception (perhaps even mistake)<sup>53</sup> as to the nature or quality of the act of sexual intercourse may vitiate apparent consent. Examples of deception as to the nature of the act vitiating consent are confined to cases in which defendants obtained consent to sexual activity by pretending to be carrying out a medical procedure.<sup>54</sup> That this category of case should amount to rape (or another sexual offence, depending on the conduct) is uncontroversial, as the act done differs from that consented to.<sup>55</sup> In 1999, after considering two cases decided by the Supreme Court of Canada, the English Court of Appeal suggested that deception as to the nature or *quality* of the act was capable of vitiating consent, albeit in the context of a non-sexual offence.<sup>56</sup> A year later, in *Tabassum*, that Court accepted that there was deception

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<sup>50</sup> B. Fitzpatrick, ‘Rape: Consent’ (2008) 72(1) J Crim L 11, 13.

<sup>51</sup> B. Fitzpatrick, ‘Rape: Consent’ (2008) 72(1) J Crim L 11, 13.

<sup>52</sup> Herring, ‘Mistaken Sex’ [2005] Crim LR 511.

<sup>53</sup> The courts have never properly engaged with the question of whether the consent exceptions are defendant-centric or victim-centric. If the latter, a mistake by the victim could vitiate consent even if the defendant was unaware of the mistake. In *Richardson* [1999] QB 444, the Court of Appeal suggested that mistake would suffice, but that case took a narrow approach to the circumstances that could vitiate consent. In other cases the courts have referred to ‘deception’ or ‘fraud’ by the defendant being required for consent to be negated.

<sup>54</sup> *Case* (1850) 169 ER 381; *Flattery* [1877] 2 QBD 410; *Williams* [1923] 1 KB 340

<sup>55</sup> Wilde CJ explained in *Case* that the complainant ‘consented to one thing, [the defendant] did another materially different, on which she had been prevented by his fraud from exercising her judgement and will’ *Case* (1850) 169 ER 381.

<sup>56</sup> *Richardson* [1999] QB 444, 448.

as to the *quality* of the act, when the defendant touched the breasts of three women after gaining their agreement to take part in a breast cancer survey by giving the (false) impression that he was medically qualified: “They were consenting to touching for medical purposes, not to indecent behaviour, that is, there was consent to the nature of the act but not its quality.”<sup>57</sup>

Like the identity doctrine, the rule that deception as to the nature or quality of the act may vitiate consent was construed narrowly by the English courts. In *Linekar*, the Court of Appeal held that there was no relevant deception as to the nature of the act where a defendant deceived a woman into believing he would pay for sexual intercourse when he had no intention of doing so.<sup>58</sup> Other jurisdictions have similarly interpreted ‘relevant’ deceptions restrictively. In the Australian case of *Papadimitropoulos*,<sup>59</sup> the complainant, believing she was married to the defendant, consented to sexual intercourse. The defendant knew the marriage was invalid, but this deception did not invalidate the complainant’s consent. The High Court of Australia declined to expand the ‘nature’ of a sexual act to include an “antecedent inducing cause”.<sup>60</sup> In *Bolduc & Bird*,<sup>61</sup> the first defendant, a physician, falsely and fraudulently presented the second defendant as a medical student, thereby obtaining the complainant’s consent to allow the second defendant to observe a vaginal examination. The Supreme Court of Canada ruled that “[the complainant’s] consent to the examination and treatment was real and comprehending and it cannot, therefore, be said that her consent was obtained by false or fraudulent representations as to the nature and quality of the act to be done, for that was not the fraud practised on her.”<sup>62</sup>

### ***Deception as to nature or purpose under the SOA 2003***

In the SOA 2003, the terms ‘nature’ and ‘quality’ became ‘nature or purpose’, but the courts have largely followed prior case law. In *Jheeta*,<sup>63</sup> it was held that there was no deception as to purpose where the defendant impersonated police officers in order to persuade the complainant to have sexual intercourse with him. He accepted that the complainant’s consent had not been real and pleaded guilty after being advised that s.76(2)(a) was engaged. On appeal, Sir Igor Judge P explained that deception as to “peripheral matters” does not activate s.76(2)(a):

No conclusive presumptions arise merely because the complainant was deceived in some way or other by disingenuous blandishments of or common or garden lies by the

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<sup>57</sup> [2000] 2 Cr App R 328, 337. See also *R v Green* [2002] EWCA Crim 2151.

<sup>58</sup> [1995] QB 250. The judgment in *Linekar* was confined to the issue of deception as to the nature of the act. However, in *Jheeta* [2007] EWCA Crim 1699, the Court of Appeal stated there would be no deception as to purpose under the SOA 2003 on these facts.

<sup>59</sup> [1957] HCA 74.

<sup>60</sup> [1957] HCA 74.

<sup>61</sup> [1967] SCR 677.

<sup>62</sup> [1967] SCR 677 [6].

<sup>63</sup> [2007] EWCA Crim 3098.

defendant. These may well be deceptive and persuasive, but they will rarely go to the nature or purpose of intercourse.<sup>64</sup>

Jheeta's appeal was nevertheless dismissed on the basis that his conduct deprived the complainant of the freedom to choose under s.74 of the 2003 Act. We explore the application of s.74 below.

The Divisional Court emphasised in *Assange v Swedish Prosecution Authority* that "s.76 should be given a stringent construction".<sup>65</sup> There is no deception as to nature or purpose where a man has sexual intercourse after removing or tearing a condom contrary to his partner's express wishes (although such conduct deprives his partner of the freedom to choose under s.74, so would nevertheless constitute rape). Similarly, in *R(F) v DPP & A*,<sup>66</sup> the Divisional Court held that, where a woman expressly states that she does not wish her partner to ejaculate inside her, a deliberate decision by him to ejaculate is not deception as to the purpose of sex (although, again, consent would be vitiated applying s.74 of the SOA 2003).

These cases can be contrasted with the inclusionary approach taken in *Devonauld*.<sup>67</sup> The complainant, a 16-year-old boy, had ended his relationship with the defendant's teenage daughter. Pretending to be a young woman called Cassey, the defendant corresponded with the boy online, and encouraged him to masturbate in front of a webcam. The complainant believed that he was performing this activity for the sexual gratification of 'Cassey', whereas the defendant's purpose was to humiliate the complainant and "teach him a lesson". Devonauld was charged with intentionally causing a person to engage in sexual activity without consent under s.4 of the SOA 2003. The trial judge ruled that the jury could find the defendant had deceived the complainant as to the purpose of the sexual activity, triggering s.76(2)(a). The defendant's application for leave to appeal was dismissed on the ground that, although there was no deception as to the nature of the sexual act, there was deception as to the 'purpose'.<sup>68</sup>

The decisions in *Jheeta* and *Devonauld* were viewed as "out of step",<sup>69</sup> and the Court of Appeal was called upon to resolve this tension in *Bingham*.<sup>70</sup> Bingham, like Devonauld, adopted fake identities to communicate with the complainant via social media. Bingham was in a relationship with the complainant when, using two false names, he contacted her, persuading her to send him sexually explicit photographs of herself. He subsequently used the photographs to coerce her into performing sexually degrading acts online. The prosecution claimed that the defendant had been motivated by a desire to obtain sexual gratification, possibly coupled with a "power trip". The trial judge ruled that this amounted to deceit as to purpose and the defendant was convicted of offences contrary to s.4 of the SOA 2003. On appeal, the Court held that the

<sup>64</sup> [2007] EWCA Crim 3098 [23]-[24].

<sup>65</sup> [2011] EWHC 2849 (Admin) [87].

<sup>66</sup> [2013] EWHC 945 (Admin).

<sup>67</sup> [2008] EWCA Crim 527.

<sup>68</sup> [2008] EWCA Crim 527 [7].

<sup>69</sup> D. Ormerod, *Smith and Hogan's Criminal Law*, 13th edn (Oxford: Oxford University Press, 2011) 734. See also J. Rogers, 'Sexual offences: Consent; "purpose" of defendant' (2008) 72(4) J Crim L 280.

<sup>70</sup> [2013] EWCA Crim 823.

defendant's purpose was clearly sexual, despite the other operative deceptions, and the prosecution's reliance on s.76(2)(a) was "misplaced";<sup>71</sup> the presumption did not apply because "the defendant's motive was at least in part sexual gratification".<sup>72</sup>

The equating of 'purpose' with the defendant's 'motive' has important implications for UCOs. The effect of *Jheeta* and *Bingham* appears to be that s.76(2)(a) is confined to situations where a defendant induces a person to engage in sexual activity by deceiving them into believing they are being subjected to a medical procedure, or assisting with scientific training or research. However, neither the Divisional Court nor the Court of Appeal has gone so far as to say that *Devonauld* was wrongly decided; merely that, to the extent that there is any inconsistency between *Jheeta* and *Devonauld*, the former should be followed.<sup>73</sup> This leaves room to argue that *Devonauld* is one of those "rare cases"<sup>74</sup> in which the presumption applied because, although the complainant was deceived into believing he was performing sexual acts for the sexual gratification of the viewer, this was simply not one of the defendant's purposes *at all*. In their civil claims against the police, three women alleged that UCOs used sexual relationships "to enable [them] to gather intelligence and/or for personal gratification".<sup>75</sup> Where sexual gratification is a purpose, albeit not the sole purpose, then s.76(2)(a) is not engaged following *Bingham*.

The latest guidance for UCOs states that intimate sexual relationships must never be authorised, nor used as a tactic unless there is an 'immediate threat'. Thus, to the extent that UCOs engage in sexual activity whilst on duty for their own sexual gratification, they are acting unlawfully. If engaging in sexual activity solely to maintain their cover, they are deceiving their sexual partner as to their purpose and a s.76(2)(a) presumption is applicable.

Oddly, in explaining its decision not to charge UCOs, the CPS did not mention deception as to 'quality' or 'purpose', suggesting perhaps that these issues were not considered when applying the evidential threshold. The published decision states,

consent can be negated if there has been a deception as to the nature of the act (for example where consent was induced by the pretence that the act of intercourse was for medical treatment) or where there has been deception as to the identity of the suspect.<sup>76</sup>

Had the CPS given full consideration to deception as to quality (in relation to sexual activity before the SOA 2003 came into force) or purpose (in relation to conduct after 1<sup>st</sup> May 2004), we suggest that a different decision might have been reached. Former UCOs have referred to using sex as a

<sup>71</sup> [2013] EWCA Crim 823 [24].

<sup>72</sup> [2013] EWCA Crim 823 [22].

<sup>73</sup> [2013] EWCA Crim 823 [20].

<sup>74</sup> [2013] EWCA Crim 823 [20].

<sup>75</sup> *AJA and others v Commissioner of Police of the Metropolis* [2013] EWHC 32 (QB) [20].

<sup>76</sup> Crown Prosecution Service, *Charging decision concerning MPS Special Demonstration Squad* (21 August 2014) <[http://www.cps.gov.uk/news/latest\\_news/charging\\_decision\\_concerning\\_mps\\_special\\_demonstration\\_squad/](http://www.cps.gov.uk/news/latest_news/charging_decision_concerning_mps_special_demonstration_squad/)> accessed 28 April 2017.

“tool”, a “technique”<sup>77</sup> and a “tactic in their repertoire”.<sup>78</sup> We therefore suggest that there is a realistic prospect of a jury concluding that the officers’ sole purpose was to maintain their cover and, accordingly, this is a situation in which deception automatically negates consent. Alternatively, if a jury was to conclude that sexual gratification was a purpose of the officers concerned, we submit there is a clear case for misconduct in public office (discussed later), as such activity plainly violated even the controversial *Tradecraft Manual*, which included the proviso that such activity should only take place if an officer “ha[d] no other option”. There is nothing in publicly available materials to suggest that any of the officers involved had no other options. Although rejecting s.76 as a potential route to conviction of UCOs, the CPS decision does consider the applicability of the general definition of consent in s.74, and it is to this issue that we now turn.

### **Section 74 and Deception**

*Jheeta, Assange, R(F) v DPP and A and Bingham*, discussed above, confirm that where deceptive conduct does not fall within s.76(2), it may still vitiate consent if it deprives the complainant of the freedom to choose to engage in sexual activity. In contrast to the conclusive presumptions, the courts have adopted a broad, inclusionary approach to the concept of free choice enshrined in s.74.<sup>79</sup> The Court of Appeal’s comments in *Jheeta* about distinguishing “disingenuous blandishments... or common or garden lies”<sup>80</sup> and “peripheral matters”<sup>81</sup> from matters that are central to consent related to whether a conclusive presumption was applicable. The court did not attempt to disentangle the various types of deception that might render consent invalid in the context of s.74.

We identify three categories of case in which the courts have accepted that deception deprived the complainant of the ‘freedom to choose’. Cases in the first category involve the emergent concept of ‘conditional consent’, seen in both *Assange* and *R(F) v DPP and A*. In the former case, the complainant’s consent to sexual intercourse was conditional upon her partner wearing a condom. If he deliberately removed or tore the condom, her consent was negated.<sup>82</sup> In *R(F) v DPP and A*, when the defendant “deliberately ignored the basis of [the complainant’s] consent”, this fell within the statutory definition of rape.<sup>83</sup> It remains, as yet, unclear whether the courts will seek to limit the conditions that an individual may place on their consent. Presumably

<sup>77</sup> Mark Townsend and Tony Thompson, ‘Undercover police cleared ‘to have sex with activists’ *The Guardian* (22 January 2011) <<https://www.theguardian.com/uk/2011/jan/22/undercover-police-cleared-sex-activists>> accessed 28 April 2017.

<sup>78</sup> R. Evans and P. Lewis, *Undercover: The True Story of Britain’s Secret Police* (London, Faber and Faber, 2013), 142.

<sup>79</sup> [2007] EWCA Crim 3098 [28]-[29].

<sup>80</sup> [2007] EWCA Crim 3098 [24].

<sup>81</sup> D. Ormerod, *Smith and Hogan’s Criminal Law*, 13th edn (Oxford: Oxford University Press, 2011) 734; *Bingham* [2013] EWCA Crim 823 [23].

<sup>82</sup> [2011] EWHC 2849 (Admin).

<sup>83</sup> [2013] EWHC 945 (Admin) [24]-[25].

they would not recognise that consent was conditional if a woman was to say “I will have sexual intercourse with you on condition that you are not an undercover police officer”, and there is also no indication that a breach of an implied condition, for example as to identity, will vitiate consent.<sup>84</sup>

The second category of cases in which the courts have held that consent was negated under s.74 involves the use of deception to pressurise complainants, thereby removing their freedom to choose whether to engage in sexual intercourse. In *Jheeta*, the complainant did not have a free choice due to the “pressures imposed on her by the complicated and unpleasant scheme which [the defendant] had fabricated”.<sup>85</sup> In *Bingham*, “if the complainant only complied because she was being blackmailed … she did not agree by choice”.<sup>86</sup> The principle established by these cases would only apply to UCOs if, in order to maintain their cover, they pressurised an individual to engage in sexual activity. In their detailed expose of undercover policing, Evans and Lewis describe how UCOs would ‘target’ single, more vulnerable women in the groups they infiltrated.<sup>87</sup> A former UCO explained that the “unofficial motto” of the Special Demonstration Squad was “By Any Means Necessary”.<sup>88</sup> Many women talk of sexual encounters being ‘instigated’ by the officers, and them being ‘insistent’, and the MPS have admitted that the relationships were ‘abusive’ and the women were ‘manipulated’. ‘Rosa’ describes living in an abusive relationship with a UCO with whom she had two children before escaping to a refuge. However, in publicly available materials, there are no further allegations of UCOs engaging in violence, abuse or threats to maintain sexual relationships with members of the public.

The third category we identify includes cases in which deception results in harm to the complainant. In the Canadian case of *Hutchinson*, the defendant sabotaged his girlfriend’s condoms so that she became pregnant. His conviction for sexual assault was upheld, the majority of the Supreme Court relying on the principle that fraud accompanied by “a significant risk of serious bodily harm” will negate consent.<sup>89</sup> Conceptualising pregnancy as ‘harm’ is, as the minority recognised, “problematic”.<sup>90</sup> In the English cases of *Assange* and *R(F) v DPP and A*, the defendants’ deceptions increased the risks of unwanted pregnancy and transmission of sexual infection, but the English courts did not refer to the risk of harm in deciding these cases. Indeed, in *R v B*,<sup>91</sup> the Court of Appeal held that the complainant’s lack of knowledge of the defendant’s HIV positive status, and the consequent risk of serious harm by HIV transmission, would not

<sup>84</sup> It has not been suggested that the controversial convictions of transgender defendants for sexual offences were based upon implied conditions as to gender. The issue of consent in these cases has instead been resolved by the use of the concept of ‘active deception’, which is discussed further below. See *McNally* [2013] EWCA Crim 1051.

<sup>85</sup> [2007] EWCA Crim 3098 [29].

<sup>86</sup> [2013] EWCA Crim 823 [24].

<sup>87</sup> R. Evans and P. Lewis, *Undercover: The True Story of Britain’s Secret Police* (London, Faber and Faber, 2013).

<sup>88</sup> R. Evans and P. Lewis, *Undercover: The True Story of Britain’s Secret Police* (London, Faber and Faber, 2013), 142.

<sup>89</sup> [2014] 1 SCR 346 [70]-[71].

<sup>90</sup> [2014] 1 SCR 346 [98].

<sup>91</sup> [2006] EWCA Crim 2945.

negate her consent for the purposes of offences under the SOA 2003.<sup>92</sup> If the courts in England and Wales were to acknowledge that deception accompanied by harm or the risk of harm vitiates consent, the UCOs would be in difficulties. Several women became pregnant and had children with UCOs, but the problems identified by the minority in *Hutchinson* are amplified when a pregnancy is wanted, for how can it then be said to constitute harm? Pregnancy aside, in many cases the women who were deceived undoubtedly suffered harm in the form of psychiatric illness.<sup>93</sup>

We suggest that most cases involving deception have been resolved having regard to the above three categories. In each category, the deception relates to the physical act of intercourse itself. The ‘gender deception’ cases are more difficult to categorise because they sometimes lack this feature. In *McNally*, a transgender defendant who identified as female at the time of her trial, but identified as male at the time of the conduct subject to criminal charges, engaged in penetrative sexual activity with a sixteen-year-old girl. McNally was alleged to have concealed her biological gender when, identifying herself as “Scott”, she made contact with the complainant via social media. They developed a relationship online and the complainant began to refer to McNally as her “boyfriend”. The relationship was maintained over three-and-a-half years before they eventually arranged to meet in person. The defendant “presented as a boy”<sup>94</sup> and digital penetration took place. McNally pleaded guilty to six counts of sexual assault by penetration and her appeal against conviction was dismissed.

In a similar case in 2015, Gayle Newland, was found guilty at trial of three counts of sexual assault by penetration. The prosecution claimed that Newland had used a prosthetic penis to engage in intercourse with a woman after convincing her to wear a blindfold. Newland admitted using a male alter-ego called Kye Fortune to commence and engage in a sexual relationship, but claimed that her accuser had always known that this was a pretence as they engaged in role-play while both struggled with their sexuality. Newland’s conviction was quashed on appeal but she was later re-convicted after a re-trial. The Court of Appeal’s judgment on the original appeal has not yet been published and the basis for quashing the first conviction is unknown.

These (and other) ‘gender deception’ cases do not fall squarely into the three categories identified above. In *Newland*, the physical nature of the act was altered in that the complainant was penetrated by a prosthetic penis rather than an actual penis. Conversely, *McNally* involved digital penetration and the Court of Appeal accepted that “in a physical sense, the acts of assault by penetration of the vagina are the same whether perpetrated by a male or a female”<sup>95</sup> Leveson

<sup>92</sup> In *McNally* [2013] EWCA Crim 1051, the Court of Appeal suggested that deception as to HIV status might negate consent in an appropriate case ‘if, for example, the complainant had been positively assured that the defendant was not HIV positive’ [24].

<sup>93</sup> *AJA and others v Commissioner of Police of the Metropolis* [2013] EWHC 32 (QB) [12]. In addition, as two of the women bore children to the officers, application of the *Hutchinson* principle would suggest there was also, in some cases, physical harm.

<sup>94</sup> *McNally* [2013] EWCA Crim 1051, [7]

<sup>95</sup> *McNally* [2013] EWCA Crim 1051, [26]

LJ took the view that consent was vitiated because “the sexual nature of the acts is, on any common sense view, different where the complainant is deliberately deceived by a defendant into believing that the latter is a male”.<sup>96</sup> Although it may have been implicit, the Court of Appeal did not expressly state in *McNally* that the act was altered because it had been transformed from a heterosexual act into a homosexual act. Rather, the Court referred to the distinction drawn in *Assange* between ‘non-disclosure’ and ‘active deception’. The concept of ‘active deception’ assists if the courts wish to ensure that a person should not be liable for rape on the basis of failure to disclose a sexually transmitted disease (e.g. *R v B*),<sup>97</sup> as the mere failure by a defendant to reveal that he has a sexually transmissible disease would not negate consent to sexual intercourse. Conversely, active deception does encapsulate deception as to gender if one takes a narrow, traditional view of gender being assigned at birth, enabling the Court of Appeal to justify upholding the conviction in *McNally*.

Applying the concept of active deception to the conduct of the UCOs could result in liability for sexual offences. The UCOs, as explained, constructed a ‘legend’ and were active participants in the groups they were infiltrating, including committing crimes and instigating sexual relationships. However, liability on this basis is problematic. While the undercover police officers were clearly engaged in long term, elaborate deceptions, a person removing a wedding ring with the intention of creating the impression that they are not married may also be considered to be ‘actively’ deceiving, necessitating courts delineate the parameters of ‘active deception’, a task they may be reluctant to undertake but which, we suggest, is essential in order to guide future prosecutorial and judicial decision-making.

### **A Developing Conception of Consent?**

In 2006, Finch and Munro predicted that the SOA 2003 would “simply result in the proliferation of a new set of malleable legal tests and unpredictable legal outcomes”.<sup>98</sup> In relation to the conclusive presumptions, there has indeed been dispute as to the ambit of the “nature or purpose of the act” of sexual intercourse. The courts have also struggled to delineate which circumstances go to ‘purpose’, and which are “peripheral matters”. In relation to ‘freedom’ and ‘capacity’, the courts have not clarified which deceptions concern matters central to consent, and matters that may be considered incidental. Yet developments in the law governing consent certainly pose risks for UCOs.

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<sup>96</sup> Whether this is indeed a “common sense view” is controversial. It has been suggested that the decision in *McNally* actually reflects the Court’s heteronormative perspective and is problematic. See Alex Sharpe ‘Criminalising sexual intimacy: transgender defendants and the legal construction of non-consent’ [2014] Crim LR 207.

<sup>97</sup> *R v B* [2006] EWCA Crim 2945, CA.

<sup>98</sup> E Finch & V Munro, ‘Breaking Boundaries? Sexual Consent in the Jury Room’ (2006) 26(3) *Legal Studies* 303, 303

Laird<sup>99</sup> has posited that the law governing sexual offences may develop in four ways. The first: if a defendant deceives the complainant as to any ‘material fact’ then this vitiates consent. This would reflect a position where sexual autonomy is considered paramount. A second option would be for s.74 to be interpreted to encompass categories of deception, requiring a method for distinguishing deceptions that was sufficiently principled and not arbitrary. Alternatively, the Supreme Court could overrule *McNally* and state that, contrary to the ruling in *Assange*, s.76 is exhaustive. Lastly, Parliament could re-introduce a sexual offence directly relating to deception. Laird notes that, in 2000, the Home Office Sexual Offences Review<sup>100</sup> adopted the Law Commission’s earlier recommendation that a version of s.3 of the 1956 Act (procuring sexual intercourse by false pretences) was required,<sup>101</sup> but bizarrely, the offence of sex by deception was omitted altogether from the SOA 2003.

Recent cases have certainly demonstrated that the courts continue to struggle with concepts of deception that the s.76 presumptions do not cover, albeit the justifications for vitiating consent steer close to those presumptions – i.e. deception (simply to identity and not impersonation *per se*) and altering the nature of the act. The courts appear instead to be expanding s.74 and the concept of ‘free choice’. An alternative solution could be for Parliament to make s.75 a non-exhaustive list of evidential presumptions, permitting the attachment of ‘conditions’ to consent. This would avoid manipulating the meaning of consent under s.74 by allowing conditions attached to consent to become a consideration when looking for choice, freedom and/or capacity. However, as discussed above, the English courts currently seem to interpret s.74 in two ways, requiring active deceit to be coupled with some risk of physical harm, or requiring a fraud to be perpetrated, with some coercion or pressure before consent will be negated. In relation to ‘active deception’, we argue that the UCOs were ‘actively’ deceiving those under surveillance, not merely ‘failing to disclose’ their real identities and many victims have reported significant psychological injuries (which counts as ‘harm’). In the second category, the deception by the police officers as to their identity may, in some cases, have been coupled contemporaneously with coercion, threats and/or pressure to engage in sexual activity.

## Misconduct in Public Office

Falk<sup>102</sup> discusses how the law approaches individuals using positions of trust and/or authority to coerce or fraudulently obtain sex, including police officers. The discussion focusses on officers who abuse their position to obtain consent to sex, for example, by engaging in sexual activity with victims in their care or with suspects, by issuing threats or promising special treatment in return for their consent. Falk also discusses individuals who pretend to be police officers in

<sup>99</sup> Karl Laird, ‘Rapist or rogue? Deception, Consent and the Sexual Offences Act 2003’ [2014] *Criminal Law Review* 491.

<sup>100</sup> *Setting the Boundaries: Reforming the Law On Sex Offences* (Home Office, July 2000).

<sup>101</sup> Policy Paper, *Consent in Sex Offences* (Law Com., 2000)

<sup>102</sup> Falk, P. ‘Rape by Fraud and Rape by Coercion’, 64 *Brooklyn Law Review*, (1998): 39.

order to gain consent, again with threats/promises of special treatment. The UCOs do not fit into either scenario. The women who ‘consented’ to sexual relations with UCOs did so without knowing their true status; the ‘abuse of trust’ did not involve officers holding themselves out to be in positions of power, but rather pretending not to be in authority. They concealed their status as police officers and, importantly, this was not done in order (primarily) to obtain sex, albeit that was an obvious secondary benefit. Falk makes the point that people in ‘confidential’ positions (i.e. psychiatrists/medical practitioners etc.) are worthy of particular opprobrium when they use their role to obtain consent to sex because they have acted immorally and abused their position, but this again does not cover the UCOs because it is understood that they did not act immorally due to personal failings, but because their employer permitted, or even encouraged, this behaviour.

Prosecuting individual UCOs may be difficult when they were essentially ‘following orders’, albeit, the MPS have claimed that the individual UCOs were ‘abusing their power’. Yet if sexual gratification was a purpose of the officers, there could be a case for charging the officers with misconduct in public office. The MPS have already admitted the tort of misfeasance in public office, which applies where the defendant’s unlawfulness is grossly culpable at a moral level. The common law offence of Misconduct in Public Office may also be applicable. The Court of Appeal in *Attorney-General’s Reference (No. 3 of 2003)*<sup>103</sup> outlined the required elements of the offence as follows:

1. a public officer acting as such;
2. wilfully neglects to perform his duty and/or wilfully misconducts himself;
3. to such a degree as to amount to an abuse of the public’s trust in the office holder;
4. without reasonable excuse or justification.

UCOs were public officers and their engagement in sexual relationships while undercover violated even the controversial Tradecraft Manual. There is nothing to suggest that any of the officers involved in the various investigations and inquiries into undercover policing were in ‘life or death’ situations, or had ‘no other option’ but to engage in sexual relationships.

In considering the gravity of the misconduct, there are two issues for a jury. First, whether the misconduct is worthy of condemnation and punishment and secondly, whether it has the effect of harming the public interest. The outcry surrounding the revelations about the relationships suggests there is a real prospect of a jury concluding that this is misconduct worthy of condemnation and punishment and, as the Home Secretary acknowledged, it “can easily undermine public confidence”.<sup>104</sup> The difficulty remains that to prosecute individual UCOs would

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<sup>103</sup> [2004] EWCA Crim 868

<sup>104</sup> Secretary of State for the Home Department (Mrs Teresa May), *Undercover Policing* (House of Commons: Written Statement (HCWS115), 16 July 2015).

be to hold them criminally liable for actions that their superiors knew of, and may have (implicitly if not explicitly) authorised, arguably creating a ‘reasonable excuse or justification’.

The CPS in announcing its decision not to prosecute stated that there was insufficient evidence that “an officer knowingly abused their position in order to bring a sexual relationship about, as opposed to having engaged in a sexual relationship whilst holding the position in question.”<sup>105</sup> But it is far from clear that the prosecution need prove that the abuse of position was ‘in order’ to bring the relationship about. This lack of precision and certainty pervades the law on misconduct in public office, with the Law Commission currently consulting on the topic due to the highly technical and complex nature of the offence, which has led to it provoking controversy.<sup>106</sup>

In addition, if taking this route to criminal liability, there is the issue of charging what is ostensibly a sexual offence as misconduct in public office. In a recent article, Sjolin & Edwards call for a new offence to be created, recognising a misconduct in public office sexual offence. They argue convincingly that this is more appropriate, particularly when people abusing their public office to commit sexual offences may receive a lesser penalty than ordinary citizens engaged in equivalent behaviours.<sup>107</sup> This new offence would have the potential to encompass the conduct of the UCOs, in that: they held a position of power and realised this (albeit the victim was unaware); they abused it; and a reasonable person would consider it an abuse.<sup>108</sup> However, the difficulty still arises that the UCOs may not have been using their power in such a way that satisfies the further requirement that the abuse was in order to gain a sexual advantage, “namely: (a) sexual contact with the victim; or (b) making non-physical contact with the victim for the defendant’s sexual gratification; or (c) sexual behaviour by the victim, whether alone or with another, for the defendant’s sexual gratification.”<sup>109</sup> As discussed above, the UCOs could argue that their sexual gratification was not an aim but, rather, was incidental to their role.

## Conclusion

The controversy surrounding UCOs engaging in sexual relationships brings to the fore issues surrounding deception and consent. This is not a novel debate, but legal conceptions of consent give rise to heightened concerns that the law is failing to keep pace with societal attitudes. In Canada and some US States (Tennessee and Idaho for example), laws including deception have

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<sup>105</sup> Crown Prosecution Service, *Charging decision concerning MPS Special Demonstration Squad* (21 August 2014) <[http://www.cps.gov.uk/news/latest\\_news/charging\\_decision\\_concerning\\_mps\\_special\\_demonstration\\_squad/](http://www.cps.gov.uk/news/latest_news/charging_decision_concerning_mps_special_demonstration_squad/)> accessed 28 April 2017.

<sup>106</sup> *Reforming Misconduct in Public Office: A Consultation Paper*, Law Com. No.229 (2016)

<sup>107</sup> Sjolin & Edwards. ‘When Misconduct in Public Office is Really a Sexual Offence’ (2017) 81(4) *Journal of Criminal Law* 1, 4.

<sup>108</sup> They suggest ‘position of power’ be defined as “holding a position in which the defendant can exert power over the victim’s liberty and/or health and/or the investigation/charge/ prosecution of a criminal offence which involves the victim and/or someone for whom the victim feels responsible...This limits the offence to those with real and meaningful power over or in relation to the victim without the need to look at whether the power is ‘public’. (p. 9).

<sup>109</sup> Sjolin & Edwards. ‘When Misconduct in Public Office is Really a Sexual Offence’ (2017) 81(4) *Journal of Criminal Law* 1, 49.

been deemed controversial for abandoning the definition of rape as being sex without consent.<sup>110</sup> Yet taking sexual autonomy seriously requires that attention be given to the fact that, in all other areas of law outside rape, fraud or deception vitiates consent, even where consent amounts to a defence. It may be argued that adults do not require ‘forensic cotton wool’<sup>111</sup> to protect them, but when adults lie to each other about issues such as their marital status, they do not ordinarily have the collusion and power of the State to assist them.

In the cases of the UCOs, there was clear ‘active deception’ that was prolonged and qualitatively different from a (perhaps fleeting) relationship with a married person. The lengths, and depths of the deceptions that the officers engaged in make this perhaps a special case, just as previously some cases have been set apart and prosecuted, when other cases involving deception have not. We argue that there are aggravating features to the deception in the case of undercover police operatives, which make it worthy of criminal censure. For example, for many of those involved in relationships, given their politics and personal beliefs, they in particular would never have consensually engaged in sexual relations with a police officer. This aversion would be heightened given the officers’ intention to sabotage their activism. The deception in these cases, we argue, was so prolonged and grave that it may have negated consent, and non-consensual sex is a criminal offence.

The CPS decision not to charge reflects the difficulties with the position of the UCOs and the relevance of ‘deception’ under the SOA 2003, albeit we believe, in contrast to the CPS decision, that the conduct in these cases warrants the instigation of criminal proceedings as the arguments, some of which we have posited here, have sufficient legal merit to provide at least a realistic prospect of conviction. We have sought to draw parallels between the case of the UCOs and other cases that have been put before juries where convictions have been secured. Similarly, we have articulated that there is difficulty with charging UCOs with misconduct in public office, as ultimately they were working with the implicit, or explicit authority of their superiors. The misconduct has thus arguably taken place at an institutional level. In any event, the sexual nature of the offending would not be properly reflected in a misconduct charge. This is further complicated by the fact that UCOs may not have been deceiving the women for the primary purpose of obtaining sexual gratification.

The question remains: if the courts in England and Wales are permitting some types of deception to vitiate consent, are they drawing the line in the right place? It may be more straightforward to extend the s.74 ‘freedom’ concept to include conditions placed on consent that dictate the nature of the act which, when altered, renders that consent invalid (for example, making

<sup>110</sup> E.g. see: Jed Rubenfeld, ‘The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy’ 122 *Yale Law Journal* 1372 (2013) p.1443.

<sup>111</sup> An expression used (and subsequently repeated, for example in *IM v LM & Ors* [2014] EWCA Civ 37 (23 January 2014)) by Hedley J in *A NHS Trust v P* [2013] EWHC 50 (COP) (which involved capacity to decide whether or not to continue with, or terminate, a pregnancy) (para. 10): “The intention of the Act is not to dress an incapacitous person in forensic cotton wool but to allow them as far as possible to make the same mistakes that all other human beings are at liberty to make and not infrequently do.”

it ‘risky’ sex). Competent adults should have the ‘freedom’ to choose what risks they want to take when having sexual intercourse. As the Supreme Court of New Jersey ruled: “Each person has the right not only to decide whether to engage in sexual contact with another, but also to control the circumstances and the character of that contact.”<sup>112</sup> Surely the circumstances and character of the sexual contact includes the true identity of the person with whom they have intercourse? Some may argue that this raises difficulties in ensuring consistency and fairness, thus the Courts will need to make clear where the boundaries of ‘conditional’ consent are to be drawn. As Munro states: “In a liberal society, the law’s regulation of sexual behaviour is – or at least should be – driven by a desire to strike an appropriate balance between the positive and negative aspects of sexual integrity.”<sup>113</sup> If the courts are to draw these necessary lines, they must do so on the basis of the cases that come before them. If cases like those of the UCOs are not prosecuted, then they will never be afforded the opportunity.

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<sup>112</sup> State *ex rel.* M.T.S., 609 A.2d 1266, 1278 (N.J.1992).

<sup>113</sup> Munro, V. ‘An Unholy Trinity? Non-Consent, Coercion and Exploitation in Contemporary Legal Responses to Sexual Violence in England and Wales.’ (2010) 63 *Current Legal Problems*, 45 45.