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Citation: Clough, Amanda (2018) Conditional Consent and Purposeful Deception. The Journal of Criminal Law, 82 (2). pp. 178-190. ISSN 0022-0183

Published by: Sage

URL: <http://dx.doi.org/10.1177/0022018318761687>  
<<http://dx.doi.org/10.1177/0022018318761687>>

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## Conditional Consent and Purposeful Deception

Dr Amanda Clough

**Key Words:** consent, rape, deception, sexual offences act 2003

**Abstract:** The media has recently give much attention of the 'stealth' trend; undisclosed condom removal during sex, and how this may affect consent to sexual activity. This paper seeks to discuss where situations like this sit within the Sexual Offences Act 2003, and how it may compare to other instances of consent gained in deceitful circumstances.

### Introduction

The Sexual Offences Act 2003 offered transformation rather than mere reform of the rules regarding consent. The foundations of such change lay with a desire to give a clear and unambiguous interpretation of the very core of sexual offences. The law in England and Wales interprets rape as a crime of violation of autonomy rather than violence. However, without force it is much harder to prove, leaving a gap between principle and practice,<sup>1</sup> where physical evidence appears to be vital.<sup>2</sup> Jurors expect to see evidence of a struggle, based upon rape myths perpetuated by the 'stranger danger' lesson most learn as children.<sup>3</sup> This may account for the spectacularly low conviction rate,<sup>4</sup> described as 'unjustifiably low',<sup>5</sup> which is not unique to England and Wales.<sup>6</sup>

In reality, the cases featuring circumstances of the s75 provisions<sup>7</sup> are much more obvious to the lay person as rape – a person tied up, threatened with force, or unconscious. The real problems of legal discourse surround cases of consent given in uninformed circumstances. If one party deceives the other about a particular circumstance or detail, does this negate consent, and does the same apply for withheld information? In the twenty first century, we have come to presume that modern sexual relationships should be founded on mutual respect and understanding.<sup>8</sup> How is this possible without the truth? The difference between a legal act and one that carries a very serious custodial sentence is this one single concept; a line drawn between legal and illegal, the moral and the immoral.<sup>9</sup> Consent takes centre stage.<sup>10</sup> What is less clear about the concept of consent is the information needed to make a decision with the 'freedom and capacity' section 74 refers to.<sup>11</sup>

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<sup>1</sup> Leahy, S, "'No Means No'", But Where's The Force? Addressing The Challenges Of Formally Recognising Non-Violent Sexual Coercion As A Serious Criminal Offence', (2014) 78(4) Journal of Criminal Law 309-325, 309

<sup>2</sup> Munro, VE, 'An Holy Trinity? Non-Consent, Coercion and Exploitation in Contemporary Legal Responses to Sexual Violence in England and Wales', (2010) 63 Current Legal Problems 45, 54

<sup>3</sup> Ellison, L, and Munro, VE, 'Jury Deliberation and Complainant Credibility in Rape Trials', in McGlynn, C and Munro VE, *Rethinking Rape Law: International and Comparative Perspectives* (2010, Oxford, Routledge) 285

<sup>4</sup> Rape conviction 6% statistic

<sup>5</sup> McGlynn, C, 'Feminist Activism and Rape Law Reform in England and Wales: A Sisyphean Struggle?' in McGlynn, C and Munro, VE, *Rethinking Rape Law: International and Comparative Perspectives* (210, Oxon, Routledge)

<sup>6</sup> Scotland's conviction rate is similarly low at 3.9% - see Ferguson, P, 'Reforming Rape And Other Sexual Offences', (2008), 12(2) Edinburgh Law Review, 302-307, 303

<sup>7</sup> Sexual Offences Act 2003, s75 (a-f)

<sup>8</sup> Home Office Report *Setting the boundaries* (2000) Para 2.7.2

<sup>9</sup> Knight, S, 'Libertarian Critiques Of Consent In Sexual Offences', (2012) 1(1) UCL Journal of Law and Jurisprudence, 137-165, 138

<sup>10</sup> Stannard, J E, 'The Emotional Dynamics of Consent', (2015) 79(6) Journal of Criminal Law, 422-436, 425

<sup>11</sup> Sexual Offences Act 2003, s74

It is speculated that who the person is, what the act is, and the consequences of the act are the essential ingredients to informed consent.<sup>12</sup> For this reason, we have conclusive presumptions that vitiate consent in such circumstances, contained within section 76. If you are impersonating a person known to the victim, or deceitful as to the nature or purpose of the act, any consent gained under such circumstances is not valid in law, and without defence. If any of these 'ingredients' are withheld purposely by the accused for the purpose of obtaining consent to a sexual act, this is a very active deception.<sup>13</sup> Herring advanced a very robust idea for moving forward in this area, asking if the accused's act was that which the victim consented to, rather than if the victim's mistake vitiated consent. Essentially, did the victim know what they were consenting to, rather than did they say yes.<sup>14</sup> This framework would certainly see the 'stealthing' cases prosecuted, where the victim does not know that they are involved in an act of unprotected sex. This new 'sex trend' has had widespread media attention in recent months.<sup>15</sup> One victim of an act of stealthing called the activity that took place "such a blatant violation of what we'd agreed to" in that it had broken the boundary that she had set.<sup>16</sup> Without Herring's legal ideals, this is not a section 76 act of deception, but a possible removal of the victim's freedom and capacity to choose whether to consent. Brodsky argues that those accused of stealthing are acting from the ideology that male supremacy and violence are a man's 'natural right',<sup>17</sup> unaware that this new 'sex trend' is actually sexual assault.<sup>18</sup> Unfortunately, it appears not everyone without the criminal justice process may be on the same page when it comes to valid consent in such situations, with one victim referring to the police asking if they could bring in the man to 'give him a scare' rather than press charges which might ruin his life, a possible result of those ever-present rape myths contaminating law enforcement officials.<sup>19</sup>

Herring likens deceit to violence, in that it manipulates the victim into acting against their will by restricting the viable options available.<sup>20</sup> It is true that in law, force and fraud are generally treated as equivalents (in property offences, for instance).<sup>21</sup> Stannard summed up the difference between the two:

*"Where consent is obtained by threats, we are in the emotional realm of fear: where it is obtained by inducements, we are in the emotional realm of hope".<sup>22</sup>*

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<sup>12</sup> Knight n(9) 150

<sup>13</sup> See McCartney, C, and Wortley, N, 'Raped By The State', (2014) 78(1) Journal of Criminal Law 1-3, where undercover agents created fictional characters and had sexual relationships with targets, the victims later claiming this was a false relationship involving active deception.

<sup>14</sup> Herring, J, 'Mistaken Sex', (2005) 7 Criminal Law Review 511-524, 514

<sup>15</sup> See 'Stealthing – What You Need To Know' [bbc.co.uk](http://bbc.co.uk) 25<sup>th</sup> April 2017, 'California Bill Seeks To Add Stealthing To Rape Definition' [washingtontimes.com](http://washingtontimes.com) 17<sup>th</sup> May 2017, 'Stealthing: Man Explains Why He Takes Off Condom During Sex' [independent.co.uk](http://independent.co.uk) 17<sup>th</sup> May 2017, 'Stealthing Isn't a Sex Trend. It's Sexual Assault – And It Happened To Me' [theguardian.com](http://theguardian.com) 22<sup>nd</sup> May 2017

<sup>16</sup> Brodsky, A, 'Rape Adjacent: Imagining Legal Responses To Nonconsensual Condom Removal', (2017) 32(2) Columbia Journal Of Gender And Law 183-210, 187

<sup>17</sup> Ibid 189

<sup>18</sup> 'Stealthing Isn't a Sex Trend. It's Sexual Assault – And It Happened To Me' [theguardian.com](http://theguardian.com) 22<sup>nd</sup> May 2017, accessed 1<sup>st</sup> December 2017

<sup>19</sup> Ibid

<sup>20</sup> Herring n(14) 515

<sup>21</sup> Spencer, J R, 'Sex By Deception', (2013) 9 Arch Rev 6-9, 6

<sup>22</sup> Stannard n(10) 432

Herring's idea has not been without criticism,<sup>23</sup> with Gross conversing that section 76 was never meant to cover cases of misrepresentation of feelings or small lies as part of persuasion and 'gambits in a game of seduction'.<sup>24</sup> How this fits with rape's simplistic idea of 'non-consensual penetration' is unclear.<sup>25</sup> Essentially, the harm caused by breaking the boundaries of any consent given to a sexual act is an abuse of trust, which proves to be disempowering and demeaning to the victim,<sup>26</sup> with one partner violating the rights of the other.<sup>27</sup> As Schulhofer has shrewdly observed:

*"Sexual autonomy, like every other freedom, is necessarily limited by the rights of others".<sup>28</sup>*

We have the right to have sexual relations with a partner, and we have the right to refuse. Nevertheless, we must counter the culture of 'no means no' by also recognising that 'yes means yes'.<sup>29</sup>

### **Sexual Offences Act 2003**

The Sexual Offences Act 2003 gave new life to our piecemeal combination of common law and statute to some of the most heinous crimes a person can commit. For consent, no longer could the accused rely on an honest but unreasonable belief that their victim consented. Instead, we have a law that requires a person has freedom and capacity to make a choice, with the accused having a defence only if they had a reasonable belief that their victim consented, and had taken all steps<sup>30</sup> necessary to ascertain this. Along with this, an exhaustive list of rebuttable presumptions is given as to situations where consent will be presumed to be absent or invalid. Lastly, the evasive conclusive presumptions, which appear to be rarely satisfied.<sup>31</sup> Why any of these presumptions about consent were needed is a mystery, as it is unlikely judge and jury would find valid consent in a situation where a person was subject to violence, drugged, threatened, falsely imprisoned, or lied to about the nature of the act. Inclusive conduct models can be troublesome, which Scotland recognised by giving a non-exhaustive list of compromised free agreement situations.<sup>32</sup> However, Gross referred to the need for such descriptive provisions stemming from finding a balance between protecting women and not 'interfering with harmless pleasures'.<sup>33</sup>

With the new structured model for consent, the move toward the law encompassing respect for an individual's decision to withhold sexual activity seems to have been realised.<sup>34</sup> After all, the right to consent to something is redundant without the right to refuse, for any reason or even for none at all.<sup>35</sup> Though the law is expected to be a realm of reason, the emotions influencing human behaviour

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<sup>23</sup> Gross, H, 'Rape, Moralism, And Human Rights', (2007) 3 Criminal Law Review 220-227, 222

<sup>24</sup> *ibid*

<sup>25</sup> Slater, J, 'HIV, Trust And The Criminal Law', (2011) 75(4) Journal Of Criminal Law 309-335, 312

<sup>26</sup> 'Stealth: What You Need To Know' Bbc.co.uk 23<sup>rd</sup> May 2017, accessed 1<sup>st</sup> December 2017

<sup>27</sup> 'Stealth: Man Explains Why He Takes Off Condom During Sex' independent.co.uk 17<sup>th</sup> May 2017, accessed 1<sup>st</sup> December 2017

<sup>28</sup> Schulhofer, SJ, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (1998, London, Harvard University Press) 99

<sup>29</sup> Gross n(23) 223

<sup>30</sup> Sexual Offences Act 2003, s74

<sup>31</sup> *Jheeta* (2007) 2 Cr App R 34, R (on application of F) v DPP [2013] EWHC 945 (admin), *Assange v Swedish Prosecution Authority* [2011] EWHC 2489 (admin)

<sup>32</sup> Miles, J, 'Sexual Offences: Consent, Capacity and Children', (2008) 10 Arch News 6-9, 6

<sup>33</sup> Gross n(23) 221

<sup>34</sup> Home Office n(8) para 0.8

<sup>35</sup> *Knight* n(9) 139

are of equal importance.<sup>36</sup> What must be distinguished is regrettable consent, as repentant feelings towards a decision made does not negate the reason for the decision at the time. As Stannard states:

*“Emotions have a number of dimensions to them, including those of temporal duration”.*<sup>37</sup>

The difference lies between a person who regrets consenting the next day as to spur of the moment emotions which were, in retrospect, regrettable, and the person who would not have consented in the first instance had the true facts of the situation been disclosed to them. These two state of affairs must be distinguished, in order to avoid over-criminalising for the sake of preservation of sexual autonomy.<sup>38</sup> Persuasion even is perfectly acceptable, as long as it can be set apart from coercion or active deception.<sup>39</sup> We know which deceptions are declared as negating consent, but which might also lose the battle under section 74?<sup>40</sup> How much truthfulness is needed for a genuine and valid consent? Herring argued that this should be a very high threshold:

*“Agreement obtained by deception is woefully insufficient. If a legal system is to rely on consent as a justification for what would otherwise be a grave wrong, it must demand consent in a rich sense: with full truthful understanding of what is involved and free from legitimate pressures”.*<sup>41</sup>

However, the very fact that we now demand reasonable belief in consent, an objective measure, is already a higher threshold than the common law had required prior to the 2003 Act.<sup>42</sup> This move towards recognising the importance of free agreement and the harms of abuse of trust has been applauded,<sup>43</sup> without the need for further criminalisation based on divulging true feelings and intentions. This would be so far within the domain of personal relationships that the criminal law would have no legitimate role.<sup>44</sup> Nevertheless, there is a question over how much you can withhold information from a sexual partner, and still claim to have reasonable belief that they are consenting to the act, without the knowledge to make an informed decision. Whether it is the use of protection, the possible transmission of a sexually transmitted disease, or biological gender at the time of the act, how much information is needed for valid consent? Does a transsexual who has not yet undergone a reassignment surgery, or a person infected with HIV, bear the burden of disclosure wholly because he has the most information in the situation?<sup>45</sup>

### **Changes to Consent and the Conclusive Presumptions**

When we consider the change from an honest belief in consent that may be unreasonable, as per the Morgan precedent,<sup>46</sup> to a reasonably held belief, we must also ask if this may fundamentally clash with deception on behalf of the accused. Deciding on belief in consent under section 74 includes consideration of any steps taken by the accused to ascertain if the victim consents. If the

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<sup>36</sup> Stannard n(10) 423

<sup>37</sup> Stannard n(10) 430

<sup>38</sup> *ibid* 432

<sup>39</sup> Gross n(23) 221

<sup>40</sup> Sexual Offences Act 2003, s74

<sup>41</sup> Herring, J, ‘Human Rights And Rape: A Reply To Hyman Gross’, (2007) 3 Criminal Law Review 228-231, 229

<sup>42</sup> Selfe, D W, ‘Rape: Mens Rea And Reasonable Belief’, (2013) Criminal Law Review 3-4, 4

<sup>43</sup> Lacey, N, ‘Beset By Boundaries: The Home Office Review Of Sex Offences’, (2001) 1 Criminal Law Review 3-14, 13

<sup>44</sup> Slater n(25) 321

<sup>45</sup> Cornnett, M, ‘Criminalisation of the Intended Transmission or Knowing Non-Disclosure of HIV in Canada’, (2011) 5(1) McGill Journal of Law and Health 61, 66

<sup>46</sup> Morgan v DPP (1975) 2 All ER 347

accused knows that the victim is not fully aware of what they are consenting to, or an aspect of the situation, and continues to withhold that information, then how can they be said to have taken the steps necessary to obtain a genuine consent from the victim?<sup>47</sup> This idea of 'informed consent' is rooted in the law of medical situations, but how far must it extend to sexual offenses?<sup>48</sup> In stealthing cases, for example, the accused knows the victim may withdraw consent should they find out that the condom has been removed, so they withhold the information, to continue on the basis of an already obtained consent, now tainted by purposeful deception. It is obviously also questionable as to how a person in this situation has the freedom and the capacity to give consent, if they are unaware that they are consenting to unprotected sex. Austin described a person acting 'freely' as only that they had not acted 'unfreely',<sup>49</sup> in that it merely rules out the suggestion of a pressure like duress. It is also difficult to say a person acts freely if they are lulled into a false sense of security about the act they are involved in, through a coercion they are not conscious of. The courts must decide if this is regrettable consent due to a change in the circumstances and facts of the act, or consent that is legally negated.<sup>50</sup> Gross described section 76 as not being to 'punish men's deception' but to protect women 'when sex for a purpose is proposed',<sup>51</sup> though not to protect against any humiliation or disappointment suffered because of bad judgment.<sup>52</sup>

Reasonable belief must also be viewed in all of the circumstances, which leaves the possibility of scrutinising the victim's behaviour that may have led to the belief held by the accused.<sup>53</sup> Do they often partake in unprotected sex, for example? This fails to recognise that an important aspect of sexual autonomy is acknowledging saying yes to one act does not mean saying yes to all. The circumstances in which we view consent certainly get much more complicated when limited information, coupled with the accused's awareness, is involved.<sup>54</sup> The libertarian view that consent must be fully informed to be valid, rather than a consent to the physical act alone that coincides that act, seems to be the least morally repugnant of the views. However, it is also a very high threshold not easily obtained, and crosses a line over having to disclose information which might be worthy as equal protection of sexual autonomy. For example, a transgender person having to disclose their biological sex at birth to any potential sexual partners and the point at which they have reached on their journey, would be criticised for promoting intolerance of transgender individuals.<sup>55</sup> Since the case of McNally,<sup>56</sup> deception as to gender has created much academic debate, whether this is a case for section 76 deception, or merely affects the victim's freedom to choose their sexual partner by gender,<sup>57</sup> or choose their partner on any basis. As Spencer has described:

*"Even racists, surely, are entitled to make their own decisions as to those to whom they wish to give themselves in sex".<sup>58</sup>*

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<sup>47</sup> Sharpe, A, 'Criminalising Sexual Intimacy: Transgender Defendants And The Legal Construction Of Non-Consent', (2014) 3 Criminal Law Review 207-223, 221

<sup>48</sup> Stannard n(10) 424

<sup>49</sup> Austin, JL, 'A Plea for Excuses' in Morris H, *Freedom and Responsibility*, (1961) 8

<sup>50</sup> McCartney and Wortley n(13) 3

<sup>51</sup> Gross n(23) 223

<sup>52</sup> *ibid* 225

<sup>53</sup> Ashworth, A, and Tempkin, J, 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults And The Problems Of Consent', (2004)5 Criminal Law Review, 328-346, 342

<sup>54</sup> Knight n(9) 140

<sup>55</sup> Sharpe n(47) 211

<sup>56</sup> R v McNally (Justine) [2013] EWCA Crim 1051

<sup>57</sup> McCartney and Wortley n(13) 3

<sup>58</sup> Spencer n(21) 8

Section 76 seems to be at the top of the hierarchy of the new consent rules,<sup>59</sup> being the most heinous way of carrying out sexual relations which has no defence. Though it has been referred to as a 'draconian provision',<sup>60</sup> perhaps it is paramount because it uses the victim's own decision-making powers against them.<sup>61</sup> However, proving fraud or deception is only one aspect – as the Law Commission have noted, the prosecution need establish only non-consent, without the addition of evidencing fear, force or fraud.<sup>62</sup>

### Conditional Consent and Deception

As discussed, the presence of a lie or undisclosed circumstance in an allegation of rape will rarely meet the threshold of section 76 deception, in that it is limited to the act to which it was said to apply.<sup>63</sup> Though cases like *Devonald* have been helpful,<sup>64</sup> the interpretation of 'nature or purpose' is still vague. For example, does it cover the woman who tells her sexual partner she takes the contraceptive pill, but in fact does not, for the purpose of conceiving a child? If Gross's description of purpose is accurate, it may well be included:

*"The Purpose of an activity is determined by what the person engaging in it intends to accomplish by it".*<sup>65</sup>

This can be read as a reference to the consequences of an act.<sup>66</sup> Was the act for pregnancy, promotion, payment or perhaps merely gratification? Consummation of marriage could be interpreted as giving sex a purpose, but the common law approach to this excluded such deception.<sup>67</sup> Is it questionable as to whether this precedent continues under the Sexual Offences Act 2003. It may be that this is considered a religious 'purpose' rather than a sexual one.

Were nature and purpose singled out as lies that are more heinous because the act consented to is not the act done?<sup>68</sup> Embellishing the truth to tempt others into sexual liaisons is certainly no new concept.<sup>69</sup> The common law approach included mistake as to nature, but not mistake as to what would happen after the sexual act.<sup>70</sup> If we continue with this precedent today, it seems that deception by one individual to another about feelings, emotions, or willingness to enter a relationship is certainly ruled out. What is even less clear is the operation of deception under section 74, and which deceptions might affect a victim's freedom and capacity to choose whether or not to engage in sexual relations. Section 76 asks for intentional deception, so if a deception is instead considered under section 74, does this mean it does not have to be intentional? For a piece of legislation that was enacted to give clarity,<sup>71</sup> we are still asking many questions. Are we to ask a 'but for' test; but for the purposeful deception of the accused, the victim would not have consented?<sup>72</sup>

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<sup>59</sup> Ashworth and Tempkin n(53) 336

<sup>60</sup> Freer, E, 'Yes, No, Maybe – Recent Cases On Consent And Freedom To Choose', (2016) Arch Rev 6-9, 6

<sup>61</sup> Herring n(14) 515

<sup>62</sup> Law Commission Report, *Consent In The Criminal Law* (No 139, 2000) Para 6.2

<sup>63</sup> Jheeta (2007) EWCA Crim 3098, para 24 Sir Igor Judge P

<sup>64</sup> R v *Devonald* [2008] EWCA Crim 527

<sup>65</sup> Gross n(23) 223

<sup>66</sup> Slater n(25) 314

<sup>67</sup> *Papadimitropolis* (1957) 98 CLR 249

<sup>68</sup> Laird, K, 'Rapist or Rogue? Deception, Consent And The Sexual Offences Act 2003', (2014), 7 *Criminal Law Review* 492-510, 495

<sup>69</sup> Herring n(14) 511

<sup>70</sup> Linekar case

<sup>71</sup> Home Office White Paper *Protecting the Public* (2002) para 28

<sup>72</sup> Miles n(32) 6

Deception as to gender is said to change the 'nature' of the act done, and if the act done is a facsimile of penile penetration, rightly so. However, it is questionable as to the extent this changes the nature of any other sexual acts between the accused and the victim, such as oral or digital penetration. This may be the point at which we refer back to section 74 and the failsafe of 'freedom to choose' when section 76 is not satisfied. However, if a victim in this situation is bisexual, it is questionable if the same infringement of freedom to choose will be applied.<sup>73</sup> What other things might equally change the 'nature' of the act? Stealthing changes the level of physical intimacy between two individuals, but does this discrepancy between the act consented to and the act done change the 'nature' of the act? Slater has suggested that nature should be limited to the physical, so the only two situations that would qualify are lack of a penis for penile penetration, or a naïve victim who believes penetration is for a non-sexual purpose.<sup>74</sup>

There are other ways to define 'nature'. We might also consider the level of harm done because of the change in the nature of the act. For a case of gender deception, this might be a great deal of psychological harm. For a case of stealthing, there are several physical outcomes that a victim may experience, including pregnancy and sexually transmitted infection.

Does it matter if the deception is active or passive? Though it is speculated that only active deceptions have liability,<sup>75</sup> whether the accused verbally lies or withholds information, there is equally a purpose. That purpose is to gain the consent of their sexual partner without knowledge that might affect that decision. A person need not know every detail about a person, or an encounter, but they do need to know that which is important to them in making their decision.<sup>76</sup> If an individual specifies a condition to their involvement to sexual activity, and this is deceitfully agreed to by the other, we might ask if that is conditional consent or deception.

Choice indicates options from which one may choose, and it is not possible to make an informed choice without information vital to the decision.<sup>77</sup> The Law Commission commented that if an accused knows the victim has made a mistake, and he does not correct this, he cannot rely on consent as a defence.<sup>78</sup>

#### **Failed Cases and the Reliance on s74**

Although the conclusive presumptions about consent exist in theory, in reality cases involving deception often find convictions under the basic section 74 definition of consent. Perhaps this is a more preferable way of achieving justice, since the defendant has the opportunity to offer a defence that section 76 denies, as concurred by Hallet LJ in the case of Bingham.<sup>79</sup> However, this overreliance may have an effect elsewhere, such as a reduction in judicial guidance for juries,<sup>80</sup> or an abundance of appeals.<sup>81</sup> If this is true, we might ask why section 76 is needed at all, other than to remind us of

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<sup>73</sup> Doig, G A, 'Deception As To Gender Vitiates Consent', (2013) 77(6) Journal Of Criminal Law 464-468, 467

<sup>74</sup> Slater n(25) 312

<sup>75</sup> Sharpe, A, 'Expanding Liability For Sexual Fraud Through The Concept Of "Active Deception": A Flawed Approach', (2016) 80(1) Journal Of Criminal Law 28-44, 29

<sup>76</sup> Archard, D, *Sexual Consent*, (1998, Westview) 46

<sup>77</sup> Simpson, B, 'Why Has The Concept Of Consent Proven So Difficult To Clarify?', (2016) 80(2) Journal Of Criminal Law 97-123, 101

<sup>78</sup> Law Commission n(62) Para 6.25(2)

<sup>79</sup> Bingham (2013) EWCA Crim 823 (CA) 2c

<sup>80</sup> Sjolín, C, 'Ten Years On: Consent Under The Sexual Offences Act 2003', (2015) 79(1) Journal Of Criminal Law, 20-35, 27

<sup>81</sup> Ibid 29

which situations are most dire when it comes to genuinely given consent and the state of mind of the accused. Legal discourse certainly leans toward there being no compelling reason for either section 75 or 76.<sup>82</sup>

A law student will learn of cases like *Jheeta*,<sup>83</sup> *F*,<sup>84</sup> *Bingham*<sup>85</sup> and *Assange*<sup>86</sup> when studying this area of law, all of which were eventually convicted using section 74. This is not to say it has not been useful in other cases such as *Devonald*<sup>87</sup> and *McNally*,<sup>88</sup> but it is arguable that these cases would have found conviction under s74 regardless. Perhaps cases like these, where a deception prevents an informed decision, are exactly the type of case section 74 was intend to cover, and so reliance on section 76 is no wholly necessary.<sup>89</sup> They deprive the victim of choice if the aspect of deceit is crucial to the act itself, or if it creates a fantasy that the victim believes.<sup>90</sup> Despite that, there is a difference between believing a lie and relying on it to choose a course of conduct, and it is the latter situation that is problematic. Without this, it is hard to say a victim's sexual autonomy is truly compromised.<sup>91</sup> In these cases, a defendant is not deceptive under section 76, but the victim is 'not consenting for the purpose of section 74'.<sup>92</sup> It marks the difference between fundamental and non-fundamental mistakes making a moral contribution to the choice made.<sup>93</sup>

### **Is Biological Deception About Nature and Purpose? Emotional Harm and the Freedom to Choose**

Much academic commentary seeks to distinguish between active deception,<sup>94</sup> which is able to negate consent (at least under section 74) and non-disclosure, which is a much more slippery concept. For example, in the case *R v B*,<sup>95</sup> the court noted in a HIV transmission case that it was one of non-disclosure rather than an outright lie, perhaps suggesting that the case may have been decided differently in other circumstances.<sup>96</sup> In either situation, there seems to be a certain amount of deceptive behaviour on part of the accused, in that he is purposeful of his selective truth telling in order to achieve the outcome he wants. Perhaps it is mere luck as to whether he is asked about the particular circumstance and must lie about it.

Cases of deception as to a person's biological sex are particularly difficult. Sharpe has concluded that classifying such cases as *McNally*<sup>97</sup> as obtaining consent to sexual activity by fraud is a violation of Article 8.<sup>98</sup> If the accused, in particular a young person, is confused as to gender or identifies as transgender, it is difficult to balance this with the rights of the victim to choose with whom they are

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<sup>82</sup> *ibid* 29

<sup>83</sup> *Jheeta* (2007) 2 Cr App R 34

<sup>84</sup> *R* (on application of *F*) v DPP [2013] EWHC 945 (admin)

<sup>85</sup> *Bingham* (2013) EWCA Crim 823 (CA) 2c

<sup>86</sup> *Assange v Swedish Prosecution Authority* [2011] EWHC 2489 (admin)

<sup>87</sup> *R v Devonald* [2008] EWCA Crim 527

<sup>88</sup> *R v McNally (Justine)* [2013] EWCA Crim 1051

<sup>89</sup> *Simpson n(77)* 108

<sup>90</sup> *Selfe, D W*, 'The Meaning Of Consent Within The Sexual Offences Act 2003', (2008) *Criminal Law Review* 3-5, 4

<sup>91</sup> *Rogers, J*, 'Further Developments Under The Sexual Offences Act', (2013) 7 *Arch Rev*, 7-9, 9

<sup>92</sup> *Selfe n(90)* 4

<sup>93</sup> *Simpson n(77)* 101

<sup>94</sup> For example, See *Sharpe n(47)*, describing non-disclosure as a moral wrong without genuine harm

<sup>95</sup> *R v B* (2013) 2 Cr App R 29, see *Laird n(68)* 501

<sup>96</sup> Such cases are generally regarded as s20 Offences Against the Person Act 1861 rather than rape, as the victim consents to the intercourse but not the infection.

<sup>97</sup> *R v McNally (Justine)* [2013] EWCA Crim 1051

<sup>98</sup> Article 8 Right to Family and Private Life, see *Sharpe n(47)* 209

sexually intimate. If the accused identifies as the opposite sex to that which they were assigned at birth, and having been living their life in line with that decision, is that evidence of lack of deception? If the court can establish that the accused person was aware the victim thought they were a different biological gender as to how they expressed themselves, and continued without correcting them, this will be proof enough to negate consent. The important question is, does this biological fraud really deceive the victim as to the nature of the act, or merely affect their ability to choose freely? This may depend on the act that takes place. When is disclosure mandatory, so as not to count as deception? There is little desire in such cases to humiliate the way the defendant in *Devonald* did,<sup>99</sup> but does this make the defendant less culpable?<sup>100</sup>

In the case of *McNally*, Justice Patrick said non-disclosure was a selfish abuse of trust.<sup>101</sup> He has a point. It is for the accused's gain, and only their gain, if the reason for non-disclosure is that they are fully aware that the victim would be unlikely to consent if they knew the truth. The victim in *McNally* was heterosexual, and she wished to have a heterosexual encounter. *McNally* removed her authority to make that choice.<sup>102</sup> However, *McNally* identified as male and indicated a wish to have surgery to reassign her biological sex, and may not have considered this as a fabrication at all until penile penetration was an issue. Much was made of the fact that *McNally* bought condoms, which indicated a purposeful and active deception on her part to trick the victim into believing she was biologically male. Sharpe has pointed out that this confuses the fundamental difference between impersonation and transgender,<sup>103</sup> and in such cases active and passive deceptions must be distinguished in the interests of justice.<sup>104</sup> Otherwise, we are punishing omissions without a legal duty to act though it does not live up to obligations of social responsibility.<sup>105</sup> Nevertheless, the victim will feel equally violated whether the deception was active or passive,<sup>106</sup> because it was knowing and purposeful. Both involve an awareness on the part of the accused.

It is questionable if these legal rules are incompatible with recognised medical conditions such as body dysmorphia. Unfortunately, there is a real possibility of psychological harm for both the accused, by having to reveal they are transgender, and the victim's distress in discovering the truth after intimate encounters incongruous to their sexual orientation.<sup>107</sup> Since surgery is not a condition for legal recognition of gender identity, but the Law Commission request surgery in order for there to be no deception, the water is muddied even more so.<sup>108</sup> It is difficult to decide where we draw the line between gender fluid, identity confusion, and purposeful deceit. Should the assumptions of the heterosexual lead to convictions of the transgender? In an ideal world, everyone would be truthful about important aspects pertaining to sexual activity, but social preconceptions prevent much of this from being an easy task.<sup>109</sup> Duty to disclose must be weighed against disproportionate interference

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<sup>99</sup> *R v Devonald* [2008] EWCA Crim 527

<sup>100</sup> Sharpe n(47) 214

<sup>101</sup> *R v McNally (Justine)* [2013] EWCA Crim 1051

<sup>102</sup> Rogers n(91) 7

<sup>103</sup> Sharpe n(47) 214

<sup>104</sup> Sharpe, A, 'Expanding Liability For Sexual Fraud Through The Concept Of "Active Deception": A Flawed Approach', (2016) 80(1) *Journal Of Criminal Law* 28-44, 31

<sup>105</sup> *ibid* 32

<sup>106</sup> Wilkinson, S, 'Why Lying is Worse Than Merely Misleading', (2000) 13 *Philosophy Today* 6, 7

<sup>107</sup> Sharpe has referred to this as offence rather than harm – n(47) 221

<sup>108</sup> Gender Recognition Act 2004, s3 Law Commission n(62) para 5.33

<sup>109</sup> Harker, K and Wright, E, 'The HIV Stigma: Duty Or Defence?', (2015) 5(1) *UCL Journal Of Law And Jurisprudence* 55-75, 72

into the accused's private life,<sup>110</sup> but legal safeguards for emotional vulnerability and physical danger in sexual encounters are of equal importance.<sup>111</sup>

### **Conditional Consent and the Risk of Physical Harm**

It is clear that frauds of nature are contrasted to frauds in inducement.<sup>112</sup> In the first situation, meeting the criteria is factually impossible. Gender is therefore a characteristic that can negate consent.<sup>113</sup> In the latter, it is not, but the accused makes it so. For example, promising a promotion. Does this also cover an agreement to use protection? The difference is that of additional intimacy and physical risk. Does the dishonesty in such situations, coupled with the risk to physical health, negate the possibility of reasonable belief in consent for stealthing cases? The deception makes the victim ignorant as to the risk of sexually transmitted disease and pregnancy (if the victim is female), and also creates a situation where there is more intimacy and skin-to-skin contact than the victim has authorised as part of the sexual encounter. In cases of transmission of HIV, grievous bodily harm is deemed the appropriate avenue for prosecution,<sup>114</sup> but it is questionable if damage to health through purposeful deception in order to have consensual sexual intercourse should always be dealt with in this manner.

While we may not be able to force someone to disclose such status for human rights issues,<sup>115</sup> we ask that they deal with the consequences of their voluntary actions, knowing the possible consequences. Forced disclosure about the use of protection is much different a matter. How can one consent to a level of intimacy and risk of which one is unaware?<sup>116</sup> If we hold someone accused of stealthing responsible only when they transmit a disease or cause pregnancy, this does not set a legal standard based on anything other than good or bad fortune.

Consent must be both reasonably informed, and reasonably believed. If sex is for the purpose of gratification and enjoyment only, then a risk of procreation is outside the boundaries of the purpose of intercourse.<sup>117</sup> This may not fit within purpose for section 76,<sup>118</sup> but it may be enough to negate what the defendant could reasonably believe in circumstances where they kept their victim in the dark. An awareness of having protected sex is fundamentally different to an awareness of intercourse that is considered risky behaviour. It is correct to say this will continue outside of section 76, presumptions built to protect sexual autonomy rather than the victim's health and selectiveness as to procreation.<sup>119</sup>

Slater has proposed a new offence of non-disclosure, covering cases where there is non-disclosure of a material fact which includes risk of infection or the victim's health would be seriously affected, that the accused is aware of and the victim is not.<sup>120</sup> This a step further than use of section 20 bodily

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<sup>110</sup> Ryan, S, 'Disclosure And HIV Transmission', (2015) 79(6) Journal Of Criminal Law 395-410, 401

<sup>111</sup> Schulhofer, SJ, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, (1998, London, Harvard Uni Press)

<sup>112</sup> Slater n(25) 313

<sup>113</sup> Doig n(73) 467

<sup>114</sup> R v Dica (2004) 3 All ER 593, R v Konzani [2005] EWCA Crim 706

<sup>115</sup> Article 8 Right to Family and Private Life

<sup>116</sup> Stannard n(10) 424

<sup>117</sup> Selfe n(90) 5

<sup>118</sup> Assange v Swedish Prosecution Authority [2011] EWHC 2489 (admin)

<sup>119</sup> Rogers n(91) 7

<sup>120</sup> Slater n(25) 336

harm<sup>121</sup>, as it finds culpable the risk taker without the need for physical harm. Though this was primarily aimed at HIV cases, a similar principle might be extended to stealthing cases.

How does this relate to women who are fraudulent as to the use of the contraceptive pill? It seems to be deception as to the 'purpose' of intercourse, but this is a decision that relates only to pregnancy, rather than a risk to infection and a heightened level of contact and intimacy, as those risks have already been agreed to be taken. While we might call this reproduction without consent,<sup>122</sup> and hold the father accountable for the child financially,<sup>123</sup> the female's word seems to be a risk they are willing to take rather than use of sheath protection to be sure.

Consent continues to cover cases of recklessness, where a defendant is reckless as to if the victim consents to the act or not. If a defendant removes the condom during the act, without ascertaining their partner's wishes, he is reckless as to this. With the continuing act also being capable of resulting in rape,<sup>124</sup> this could be the point at which necessary mens rea is informed, and reasonable belief in consent is negated, even if such an act as removal had not been planned. At this point the risk of exposure to infection, pregnancy, violation of bodily autonomy and trust all become real.<sup>125</sup> When you commit a sexual act, you balance "the benefits and risks of that behaviour".<sup>126</sup> It is impossible to do so if you are ignorant as to some of the information vital to the decision.

### **The Removal of s3**

The Sexual Offences Act 2003 clearly brought about some welcome changes in regards to consent. However, other changes were made, including the removal of section 3 Sexual Offences Act 1956.<sup>127</sup> This section covered the procurement of a woman under false pretences or representations in order to have sexual intercourse. This covered cases such as Williams, where the defendant was a married man, but told the victim he was single and free to marry her.<sup>128</sup> In its absence, it has been said that the saviour of this is the broadness of section 74.<sup>129</sup>

The Criminal Law Revision Committee had commented though section 3 was rarely used, it was very useful for situations where criminal liability was warranted, although not necessarily grave enough for rape.<sup>130</sup> Under section 74, an accused would either have committed grave enough deceit as to have affected the victim's freedom and capacity to consent, or fall short of the legal boundaries altogether and avoid any culpability. With this in mind, retaining the offence may have had some uses. Without it, deciding which cases of deception vitiate consent has become spectacularly important.<sup>131</sup> The Law Commission had recommended continuing with its inclusion in the provisions, to avoid creating a lacuna,<sup>132</sup> leaving the possibility of convicting and punishing less serious cases of deception. Is there where stealthing should fit?

### **Conclusion**

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<sup>121</sup> Offences Against Person Act 1861, s20

<sup>122</sup> Spencer n(21) 8

<sup>123</sup> Rogers n(91) 8

<sup>124</sup> Sexual Offences Act 2003, s79(2)

<sup>125</sup> Brodsky n(16) 186

<sup>126</sup> Brodsky n(16) 191

<sup>127</sup> Sexual Offences Act s3(1), replacing s3(2) Criminal Law Amendment Act 1885

<sup>128</sup> Williams (1898) 62 JP 310

<sup>129</sup> Sjolín n(80) 30

<sup>130</sup> Criminal Law Revision Committee 15<sup>th</sup> Report, *Sexual Offences* (Cmnd 1213 1984) Para 3.2

<sup>131</sup> Rogers n(91) 7

<sup>132</sup> Law Commission n(62) Para 5.21

The area of consent becomes much less black and white where a lack of information is concerned, which the accused could provide to the victim, but does not. It remains a controversial issue.<sup>133</sup> The recent media hype over this 'stealth' trend has added to the debate. There are even websites dedicated to explaining to men how this can be done without their partner's awareness. In California, this has been added to the definition of rape,<sup>134</sup> which certainly sends a message to men about entitlement and sexual autonomy. Herring's progressive recommendations had a very clear meaning; the law must require genuine and morally significant consent to truly protect sexual autonomy, which he termed as requiring consent "in a rich sense".<sup>135</sup> This is needed for consent to be seen as an agreement between equals.

Though we have given statutory definition and more comprehension than the common law achieved, the broadness of section 74 has meant the jury retain a large amount of discretion.<sup>136</sup> It could be said that judicial flexibility is necessary when dealing with the most extreme human behaviours.<sup>137</sup> However, flexibility within consent and sexual offences may promote under-enforcement, which would certainly speak for the low conviction rates.<sup>138</sup> We may need a new version of the old section 3, which would assist juries in seeing the lack of informed consent in non-violent situations.<sup>139</sup> The danger is whether this would undermine the principle that sex without freely given consent is rape. It is also problematic from a labelling perspective, and could be seen the beginnings of gradation of non-consensual intercourse.<sup>140</sup> Is this better than no punishment at all? What should the label be? The wrongdoing must be communicated without undermining the fundamental principle of sexual offences.

### ***Deception and Conditional Consent***

Freedom to choose seems to be a decidedly flexible concept, which has also been deemed as "concerningly broad".<sup>141</sup> It does seem, at least from Assange, that in cases of deception that do not fit within section 76, the boundaries of liability are decided between lying and non-disclosure.<sup>142</sup> This seems an inadequate way to set parameters for criminal liability,<sup>143</sup> due to the role that luck plays. If a victim is very clear from the beginning of a sexual encounter as to the basis on which they are consenting, for example, using sheath protection, there is much to be said for this vitiating consent if it is a condition not complied with. Non-disclosure of removal during the act should not prevent conviction on the basis that the victim did not ask if the condom remained in place throughout penetration. After all, the active deception concept is flawed if the victim must first have known to ask the right question.<sup>144</sup>

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<sup>133</sup> Cherkassky, L, 'Being Informed: The Complexities of Knowledge, Deception And Consent When Transmitting HIV', (2010) 74(3) *Journal of Criminal Law*, 242-258, 251

<sup>134</sup> See n(15)

<sup>135</sup> Herring n(14) 516

<sup>136</sup> Simpson n(77) 99

<sup>137</sup> Sjolín n(80) 27

<sup>138</sup> Leahy n(1) 316

<sup>139</sup> Ormerod, D, *Smith and Hogan Criminal Law*, 13<sup>th</sup> Edition (2011, Oxford, Oxford University Press)

<sup>140</sup> Leahy n(1) 332

<sup>141</sup> Freer n(60) 7

<sup>142</sup> Sharpe n(47) 210

<sup>143</sup> Sharpe n(75) 28

<sup>144</sup> Doig n(73) 467

The relation of this to biological gender is less straightforward. Sharpe referred to the situation of how gender is to be determined for the purposes of deception as “remaining unclear”.<sup>145</sup> How would a victim know to question a person’s biological gender? The defendant takes advantage of the victim’s mistake. Though Herring’s ideas for moving forward in this area are progressive, this comment effectively sums up cases of gender deception:

*“Respecting a person’s sexual autonomy includes respecting that they are entitled to know the truth and to make an informed choice about whether to engage in sexual intercourse”.*<sup>146</sup>

Though this is difficult ground, perhaps we are looking at this through the wrong lens. Rather than being a case of deception as to biology, it may be viewed as implied conditional consent. The victim is consenting to what they think is a sexual encounter in line with their sexual orientation, and this is implicit. This requires their partner to meet the condition of being of a biological gender to fit with the victim’s sexual orientation. If these conditions are not met, and their partner does not disclose this information, allowing the victim to proceed upon facts the accused knows not to be true, there is no true consent.

This list of mistaken facts and non-disclosure in a sexual encounter could be endless.<sup>147</sup> We cannot criminalise every lie told in order to seduce and tempt. Although many things will have relevance to a person in choosing a partner, such as marital status and religion,<sup>148</sup> none more so than a gender that is compatible with their sexual orientation. Though we may make assumptions about the former, or even have expectations, for the latter it is implied that this is fundamental to a sexual encounter.

We have some sympathy for cases like McNally. Many teens suffer a confusing time in discovering who they truly are through adolescence, and for LGBT teens this may be accompanied by feelings of shame and guilt.<sup>149</sup> Unfortunately, this does not alter the fact that McNally knew her victim had made a presumption about biological sex that was essential to her agreement to engage in sexual intercourse. McNally being male was an implicit condition of the victim’s consent, and in such circumstances, of which McNally was aware, she could not have had reasonable belief that her victim was consenting to the act that took place. It directly infringes the victim’s right to choose their sexual preference, and so is in violation of section 74 consent – but at least using this clause, a defence can be argued. Biological gender is a material fact to consent, and it is difficult to argue a defendant took all reasonable steps to ascertain if the victim consented if they withheld such important information, but nevertheless a defence effort can be made under section 74. This is the reason why the Law Commission have speculated that consent would not be negated in the case of someone who has undergone gender reassignment surgery, as they now can biologically fit with the sexual orientation of their partner.<sup>150</sup>

### ***Guilty of Sexual Touching?***

Is protected sexual intercourse a material fact? For stealthing cases, moving forward is difficult, for an issue that is widespread and involves little evidence other than the victim’s own testimony. Should this deter criminalisation? As Herring states, sexual integrity should be protected even if

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<sup>145</sup> Sharpe n(75) 41

<sup>146</sup> Herring n(41) 231

<sup>147</sup> Cherkassky n(135) 244

<sup>148</sup> McCartney and Wortley n(13) 3

<sup>149</sup> Sharpe n(47) 209

<sup>150</sup> Law Commission n(62) Para 5.33

regularly violated.<sup>151</sup> If a matter is not only essential to someone giving consent, but may also have repercussions as to physical health, this must be taken seriously. It is not regrettable consent after it is revealed the victim did not partake in protected sex. It is sex that would not have taken place at all had the victim known the circumstances, in order to protect their physical health.

In addition to this, unprotected sex adds an additional amount of intimacy and skin-to-skin contact that the victim is unaware of. The Dica case proceeded as a section 20 offence because it was decided that the victim had consented to sex but not to contracting a disease.<sup>152</sup> At the very least, perhaps the stealthing trend should be guilty of sexual touching.

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<sup>151</sup> Herring n(14) 520

<sup>152</sup> R v Dica (2004) 3 All ER 593