Conditional consent and sexual offences: revisiting the Sexual Offences Act 2003 after *Lawrance*

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ABSTRACT

Critically examines the law relating to sexual consent in cases of deception/mistake, and the developing judicial approach to s74 Sexual Offences Act (SOA) 2003. Reflects on the significance of the most recent Court of Appeal judgment in Lawrance as authority for a restrictive approach to which unfulfilled premises can vitiate a complainant's consent. Contends that this marks a legal wrong turn. The Court of Appeal's approval and application of the CPS's 'closely connected' test is based on dubious foundations: it is the result of a chain of misinterpretations of previous case law, and, most troublingly, of the effect of s74. On this basis, suggests that Lawrance ought to be reconsidered. Sets out an argument as to the doctrinally-correct interpretation of the post-2003 law – an 'expansive' approach to choice and sexual consent. This approach leaves open the factors on which an individual can base their sexual consent in law. Argues that this reflects the enacted and underlying intention of Parliament in the SOA, and until Lawrance, the relevant case law. This is supported via an original analysis of s74, its place in the SOA, and key values underlying the reform process – sexual autonomy and choice. Considers the consequences of these arguments for the future direction of the law.

1. Introduction

What premises matter for sexual consent? Which deceptions or mistakes are capable of vitiating consent for the purpose of sexual offences? What approach does the law take to these questions? This article explores recent developments on these issues, through a close analysis of judicial approaches to the Sexual Offences Act 2003 (SOA) in cases where a complainant has premised their consent on a particular fact or condition ('conditional consent').

This raises significant issues concerning the scope of sexual offences – issues which have recently been gathering public attention following the latest appellate case of *Lawrance.*[1] The Court of Appeal overturned Lawrance's conviction for rape where he had repeatedly, and falsely, assured the

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[1] *R v Lawrance (Jason)* [2020] EWCA Crim 971; [2020] 1 WLR 5025. See C Lowbridge, 'Jason Lawrance appeals against vasectomy lie rape convictions' *BBC News* (Leicester, 19 September 2019), *https://www.bbc.com/news/uk-england-leicestershire-49734484* [Accessed 17 June 2020]; 'Jason Lawrance appeal: lying about fertility is not rape, say judges' *BBC News* (Leicester, 23 July 2020), https://www.bbc.co.uk/news/uk-england-leicestershire-53511729 [Accessed: 24 July 2020].

complainant he had undergone a vasectomy. The complainant had made clear that she would only agree to unprotected sex on that basis, and Lawrance had been convicted accordingly. Although the crucial relevance of this assurance to the complainant's consent *in fact* was accepted, the Court of Appeal held that it was incapable of negating her consent *in law.*

In coming to this conclusion, the court approved and applied what we will term the 'closely connected' test. On this test, the key question is whether the matter at hand is, in the court's view, "closely connected to the performance of the sexual act".[2] It was found that lying about having a vasectomy was not related to the "physical performance of the sexual act" – penetrative intercourse – "but to risks or consequences associated with it" – pregnancy.[3] The complainant was therefore "not deprived…of the freedom to choose whether to have the sexual intercourse which occurred".[4] Clearly, under this test, the premises which may undermine an individual's consent in law are sharply limited, aside from their importance to that individual's consent in fact.

As things stand, it is this test which will be applied in future. Indeed, it is notable that the 'closely connected' test was accepted by all parties to the dispute, at all stages. It was applied by the judge at first instance in rejecting a pre-arraignment appeal to dismiss, concluding that, even under this test, the distinction between the "consequences of the act of intercourse and the nature of the act itself" – relied on by the defence – was "artificial".[5] The issue was left to the jury on that basis. The disagreement on appeal was likewise framed by both sides in terms of how 'closely connected' the vasectomy was to the sexual act, rather than its "surrounding circumstances".[6]

While the 'closely connected' test is widely accepted, however, the core argument of this article is that it is incorrect, and that *Lawrance* is bad law. An examination of the test's nature and roots reveals that it is based on an unfortunate web of misinterpretations, which have led the court in *Lawrance* to a position which conflicts with previous case law, and most problematically, the intention of Parliament in the 2003 Act.

Building on this argument, the article sets out a more tenable, expansive interpretation of the post-2003 law. This expansive approach leaves open the factors on which an individual can base their consent: the legal principle is that, where an individual premises their consent on a particular matter, which turns out not to be the case, their consent is vitiated in law. Subject to the other elements being made out – crucially, the defendant's lack of reasonable belief in consent – a sexual offence will thereby be committed.

[2] *Lawrance* [2020] 1 WLR 5025 at [35].
[3] *Lawrance* [2020] 1 WLR 5025 at [37].
[4] *Lawrance* [2020] 1 WLR 5025 at [38].
[5] *Lawrance* [2020] 1 WLR 5025 at [14].
[6] See the summary of Lawrance's argument at [19], and the Crown's at [22].

We argue that this approach is derived from the correct interpretation of the SOA 2003, and, until *Lawrance*, the case law. This conclusion is significant not only for the authority of *Lawrance* and the 'closely connected' test, but for *any* approach which places substantive limits on the factors on which an individual may base their consent.

The argument proceeds as follows. We begin with a brief background on the courts' approach to sexual consent and deception. **Section 2** traces the move from the historically narrow 'nature' or 'identity' approach to vitiation of consent in common law, to an apparently more inclusive one in an initial line of cases under the 2003 Act. These cases were based on the principle of 'choice' in s74, which, for the first time, provides a statutory definition of consent for sexual offences. The question is how far this principle extends. Triggered by some influential judicial comments that this matter must be approached with 'common sense', **section 3** considers two broad approaches to what this might mean in practice. The 'restrictive' and 'expansive' approaches sketched here frame the article's analysis.

Section 4 explores the recent derivation of the 'closely connected' test – a version of the restrictive approach – based on a reading of the post-2003 case law and informed by an interpretation of s74's effect. **Section 5** challenges that basis, finding that the test is grounded in a strained – often contradicted – reading of the case law.

A key point of contention is the extent to which s74 was intended to shift away from the restrictive common law approach. We argue that the court's view, that s74 was intended to simply restate this pre-existing approach to consent and deception, is misguided. This is supported with a close examination of s74, its place in the 2003 Act, and its underlying policy intentions.

Instead, we argue, the 2003 legislative reform was intended to move beyond the historically-narrow approach, and towards a heightened role for individual choice and sexual autonomy. To the extent that the restrictive common law approach *does* live on in the 2003 Act, it is in the conclusive presumptions of s76, *not* the principle of 'choice' in s74. As such, the 'closely connected' approach to s74 conflicts with both the enacted, and underlying intention of Parliament.

We conclude (**sections 6** and **7**) by considering the wider significance of these arguments, and the future direction of the law.

2. Deception and sexual consent: from common law to 'choice' under s74

Pre-SOA 2003, the common law took a narrow approach to deception and consent.[7] Only two strictly defined categories were capable of vitiating consent: first, deception as to the 'nature' of the act – for example, falsely presenting sexual acts as medical procedures;[8] and second, deception as to the

[7] For a famous example, see *Linekar* [1995] QB 250 (non-payment of a prostitute).
[8] See *R v Flattery* (1877) 2 QBD 410; *R v Williams* [1923] 1 KB 340.

'identity' of the defendant – initially covering only impersonation of the complainant's husband,[9] but later extended to non-married partners.[10] These categories are now reflected in ss76(2)(a) and (b) SOA.

Section 74 SOA introduced a statutory definition of consent: "a person consents if he agrees by choice, and has the freedom and capacity to make that choice". Under this definition, several judgments seemed to widen the approach to deceptive sex from that seen at common law. Thus, the courts found that the non-wearing/removal of a condom would be capable of vitiating consent, where the complainant had agreed to sex on the basis that one be worn.[11] A deliberate failure to withdraw before ejaculation, where the complainant had agreed to sex on this basis, is also capable of vitiating consent.[12] Likewise, deception as to gender may undermine consent.[13]

These judgments emphasised the idea of 'choice' under s74.[14] They have in common a premise of the complainant's consent, which was knowingly and deliberately violated by the defendant. Indeed, as the Court of Appeal in *McNally* summarises, in all these cases "the alleged victim had consented on the basis of a premise that, at the time of the consent, was false".[15] Stated in those general terms, there would not appear to be any specific restrictions on *which* premises can form the basis of consent in law. This article argues that this expansive approach is the legally correct one. However, as we will see, the proper interpretation of these judgments is a key battleground, central to the argument over the current state of the law.

One exception should be noted from the outset. In an earlier decision – *R v B*[16] – the Court of Appeal held that non-disclosure of HIV status "is not a matter which could in any way be relevant to the issue of consent under section 74 of the 2003 Act".[17] HIV non-disclosure was not capable of vitiating sexual consent (although it could vitiate consent for the purposes of an offence against the person). It will be argued below that this case is best seen as a specific exception to the trend of the pre-*Lawrance* 2003 Act cases – it was based on policy issues arising from the delicate subject of HIV and public health concerns, rather than wider principles.[18]

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[9] See *Dee* (1884) 15 Cox CC 579, reflected in s4, Criminal Law Amendment Act 1885; s1(2) SOA 1956 and s142 Criminal Justice and Public Order Act 1994.
[10] *R v Elbekkay* [1995] Crim LR 163.
[11] *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin); [2011] 11 WLUK 63.
[12] *R (F) v DPP* [2013] EWHC 945 (Admin); [2014] QB 581
[13] *R v McNally (Justine)* [2013] EWCA Crim 1051; [2014] QB 593.
[14] (*F)* [2014] QB 581 at [26]. See also *Assange* [2011] 11 WLUK 63 at [81] and [86]; *McNally* [2014] QB 593 at [26].
[15] *McNally* [2014] QB 593 at [24].
[16] [2006] EWCA Crim 2945; [2007] 1 WLR 1567.
[17] *R v B* [2007] 1 WLR 1567 at [21].
[18] See **section 6a**, below.

3. 'Common sense': the seeds of a restrictive approach

An influential suggestion that there will, in practice, be limits on which deceptions will vitiate consent under s74 can be found in some oft-quoted comments from *McNally*. Leveson LJ suggested that, "[i]n reality, some deceptions (such as, for example, in relation to wealth) will obviously not be sufficient to vitiate consent" to sexual activity.[19] Relying on earlier comments from Lord Judge CJ in *F*, he indicated that this is a matter of 'common sense':

> "In our judgment, Lord Judge CJ's observation that 'the evidence relating to "choice" and the "freedom" to make any particular choice must be approached *in a broad commonsense way*' identifies the route through the dilemma."[20]

As we trace below, this quick reference to 'common sense' limits on what will vitiate consent was key to sparking the development of the 'closely connected' test adopted in *Lawrance*. First, however, it is worth reflecting briefly on the broad approaches which may be taken to consent-vitiation, as this will frame what follows.

a. *A restrictive approach to 'choice'*

On what we call the 'restrictive' approach, the law limits, by content, which premises are capable of undermining choice. Various standards may be suggested for drawing these lines. The pre-2003 common law approach is one example: only deceptions which altered the 'nature' of the act, or amount to specific impersonations, would do. Another way may be to look at the relevance of the matter to the sexual acts in question from a 'common sense' view (namely, what most people might think): for example, it might be suggested that someone's wealth is not, on any 'common sense' view, relevant to sexual activity, and, accordingly, lying about one's fortunes to obtain sex would not vitiate consent in the eyes of the law. As will be seen, Leveson LJ's references to 'common sense' have indeed been widely taken in this restrictive way.

For this approach, it is crucial to note that the actual choices of the complainant are not wholly decisive as to whether they have consented in law. There will be some false premises which can never suffice to legally negate sexual consent, regardless of their importance to the complainant.

b. *An expansive approach to 'choice'*

A second – 'expansive' – approach focusses on the premises actually operative in the choice of the complainant. In principle, what this specific premise may be is left open: the law concerns itself with the choices *in fact* made by the complainant. If the complainant has in fact based their consent on a premise which turns out to be false, their consent is negated in law. Subject to the other elements being

[19] *McNally* [2014] QB 593 at [25].
[20] *McNally* [2014] QB 593 at [25], quoting *(F)* [2014] QB 581 at [26] [our emphasis].

satisfied – including, importantly, a defendant's lack of reasonable belief – a sexual offence will thereby be committed.

The only general restriction would arise from what the evidence can reasonably be taken to establish. On this line, the direction from Lord Judge CJ that the 'evidence' must be 'approached in a broad commonsense way' is merely a reminder of the usual evidential tests which apply in bringing a criminal charge, and directing a jury.[21] Of course, the more obscure the basis of an individual's choice, the more difficult it may be to convince a jury of its factual relevance. 'Common sense' may also be used in assessing whether the defendant had a *reasonable* belief in consent. For example, it might be thought that the more obscure the condition, the less reasonable it is to expect the defendant to have realised its importance to the complainant.

In practice, therefore, 'common sense' – what a jury believes most people would find relevant – may already be a significant limiting factor, in the absence of some particularly compelling evidence. However, what is crucial to note about this approach, is that it leaves the door open for idiosyncratic, perhaps even counter-intuitive, claims about someone's consent – *if* the evidential threshold can be met.

4. From 'common sense' to 'close connection': the current restrictive approach

It can now be seen that, through the 'closely connected' test, it is the legally 'restrictive' approach that has taken hold in *Lawrance*. Recall that under this test, for consent to be vitiated by a false premise, that premise must relate to a matter "closely connected to the performance of the sexual act".[22]

This standard's restrictive nature is captured well in the Court of Appeal's rejection of the "but for" test which, it suggested, had moved the jury to convict at first instance.[23] In the court's view, it is insufficient that the complainant is "deceived as to a matter which is central to [their] choice to have sexual intercourse", or even that they would not have consented to sex had they known the truth of the matter.[24] In other words, the crucial relevance of a premise to the individual's choice to engage in sexual activity *in fact* does not determine whether they consented *in law*. Rather, it is essential, first, that the matter be one that is "capable of negating consent"[25] – a legal matter to be determined by the courts using this test.

However, while this test now has Court of Appeal authority, and will therefore likely be applied in future, we argue in the following sections that its legal basis is highly questionable. To set up that argument, it is necessary first to analyse in more detail the purported legal foundation for this approach.

[21] See *R v Galbraith* [1981] 2 All ER 1060.
[22] *Lawrance* [2020] 1 WLR 5025 at [35].
[23] *Lawrance* [2020] 1 WLR 5025 at [34].
[24] *Lawrance* [2020] 1 WLR 5025 at [34].
[25] *Lawrance* [2020] 1 WLR 5025 at [35].

a. *The emergence of the 'closely connected' test*

The 'closely connected' test first found its way into the case law in *Monica*.[26] This was a judicial review of a CPS decision not to prosecute an undercover police officer who had, under a false identity as an environmental activist, formed a sexual relationship with the complainant. While it was accepted that the complainant would not have entered a sexual relationship had she known the officer's true identity, the CPS concluded that his deception was not capable of vitiating her consent. The Divisional Court upheld this decision.

i. *The derivation of the test: interpreting the s74 case law*

The CPS had based its decision on a restrictive charging approach it had derived from Leveson LJ's 'common sense' comments in *McNally*. According to their prosecution guidance at the time, those comments were significant in "[d]emonstrating that the circumstances in which consent may be vitiated are not limitless", and that prosecutors should therefore "focus on the relevance of any condition to the nature of the activity" when deciding whether to bring charges.[27] 'Common sense' was thus taken in the restrictive sense outlined earlier, and *McNally* as authority for that approach.[28]

Giving this approach greater specificity, the CPS looked to the relevant post-2003 Act case law and found that the deception in question was not comparable: it was not "directly related to the sexual act", did not "put the victim's health at risk", nor "related to a fundamental aspect of the identity of the perpetrator".[29] It was therefore incapable of vitiating consent in law.

While the events of *Monica* occurred in 1997, and so involved the pre-2003 law (the relevant charge was rape under s1 SOA 1956), the CPS had looked to the post-2003 case law on s74 with the view that it might "assist the claimant's case in…a wider or indirect way".[30] The Divisional Court took this opportunity to comment substantially – *obiter* – on this case law.

The court agreed with the CPS that a vitiation of consent

> "has never been applied to deceptions which are not closely related to the performance of the sexual act, or are intrinsically so fundamental, owing to that connection, that they can be treated as cases of impersonation."[31]

[26] *R (Monica) v DPP* [2018] EWHC 3508 (Admin); [2019] 2 WLR 722.

[27] Crown Prosecution Service Legal Guidance, *Rape and Sexual offences – Chapter 3: Consent, https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-3-consent* (version last updated 18 March 2019) [Accessed 17 June 2020].

[28] We argue below that this was a misinterpretation of those 'common sense' comments, and the beginning of the legal wrong turn we trace. See **section 6a.**

[29] *Monica* [2019] 2 WLR 722 at [78].

[30] *Monica* [2019] 2 WLR 722 at [48].

[31] *Monica* [2019] 2 WLR 722 at [80].

To demonstrate this, the court offered an interpretation of each of the post-2003 cases in which it was found that a deception was capable of vitiating consent under s74, emphasising how 'closely connected' the subject of the deception was to the sexual act.

Thus, *Assange* – non-wearing/removal of a condom – was said to establish that

> "deception which is closely connected with the 'nature or purpose of the act', *because it relates to sexual intercourse itself rather than the broad circumstances surrounding it*, is capable of negating a complainant's free exercise of choice for the purposes of section 74 of the 2003 Act."[32]

F v DPP – violation of an agreement to withdraw before ejaculation – was explained in a similar way: "[a]lthough there was no deception as to the nature and purpose of the sexual act [such that s76(2)(a) would apply], *the deception was closely connected with it*."[33]

Finally, on the court's reading of *McNally* – deception as to gender – the *ratio* of the decision was that, "as a matter of common sense, there was all the difference in the world between sexual activity with a boy and similar activity with a girl."[34] In applying the 'common sense' approach, the Divisional Court thought it "clear that the [Court of Appeal] was holding that the deception did not relate to the nature or purpose of the act…*but did relate to the sexual nature of this activity."*[35] 'Common sense' was thus taken to mean: assessing the connection of the premise to the 'sexual nature' of the act – a matter which does not depend on the role it in fact played in the complainant's choice.

ii. *Key premise: a conditional approach to s74*

Monica was widely taken as confirming a restrictive direction for the law. For example, Laird commented that the "importance of this case lies in confirming that, for the purposes of sexual offences, there are some deceptions that are incapable of negating consent."[36] *Halsbury's Laws* cited it as authority for the proposition that "[o]nly two frauds are capable of vitiating consent" under s74: "fraud as to the nature of the sexual act and fraud as to the identity of the perpetrator".[37] Indeed, as seen earlier, the test set out in *Monica* was universally taken in *Lawrance* to determine the case.

However, those interpretations neglected the conditional and equivocal nature of the Divisional Court's comments. As the events of *Monica* took place in 1997, the court was in the peculiar position of commenting on the post-2003 Act case law as an indication of the correct approach to take to the law

[32] *Monica* [2019] 2 WLR 722 at [72] [emphasis added].
[33] *Monica* [2019] 2 WLR 722 at [74] [emphasis added].
[34] *Monica* [2019] 2 WLR 722 at [81].
[35] *Monica* [2019] 2 WLR 722 at [76] [emphasis added].
[36] K Laird, 'Deception vitiating consent in rape: *R (on the application of Monica) v Director of Public Prosecutions*' [2019] Crim LR 532, 534.
[37] *Halsbury's Laws, Criminal Law* (Vol 25, 2016, as updated), para.198, n2 [Accessed: 17 June 2020].

before that reform. In doing so, they were following the approach of the CPS. For this approach to work, however – indeed for it to make sense – the court noted that it needed to be assumed that the 2003 Act "did no more than restate and clarify the meaning of 'consent' rather than alter or advance it" from the pre-2003 position.[38] This context is important: the court's comments on s74 and the related case law were contingent upon the assumption that s74 did not alter the pre-existing common law approach to consent.

The following examples from *Monica* illustrate this. Firstly, the court noted two possible ways of explaining *Assange*: either "that section 74 of the 2003 Act changed the law", or "that the underlying common law understanding of the nature of consent has continued to develop",[39] such that *Assange* can represent, at most, a modest increase in the scope of deceptions capable of vitiating consent.[40] The court refrained from giving a firm conclusion either way because, it noted, the claimant's case – also drawing on the post-2003 jurisprudence – was "predicated on the premise" that s74 did *not* change the law.[41] If it had, these cases would be irrelevant to the pre-2003 issues at hand.

Likewise, the court noted that the premise of *F* was, arguably, "that section 74 brought about a change in the law, *but on the footing that it did not"*, it was read as a case involving deception "closely connected" with the nature and purpose of the sexual act.[42] This rider was also attached to its interpretation of *McNally*. After referring to the Court of Appeal's 'common sense' approach – interpreted in the legally restrictive sense – the Divisional Court found that *"[t]o the extent, therefore, that the common law was being extended* [in *McNally*] *(rather than section 74 being interpreted),* that extension was modest."[43]

It can therefore be seen that the Divisional Court's support for the CPS's 'closely connected' test was explicitly premised on the assumption that s74 did not alter the law, such that the post-2003 cases should be interpreted as modest extensions of the previous common law approach to sexual fraud.

The significance is that, if this assumption does *not* hold, the interpretations offered in this case – along with the 'closely connected' test they gave rise to – are unsupported, and unjustifiably strained. It will be argued in full below that this is the case.[44]

It is immediately worth noting, however, that the court in *Monica itself* expressed reservations about this assumption, which appears to have been granted purely for the sake of argument. As is clear from its comments on *Assange* and *F*, the court refrained from deciding the matter either way. However, after

[38] *Monica* [2019] 2 WLR 722 at [48].
[39] *Monica* [2019] 2 WLR 722 at [71].
[40] *Monica* [2019] 2 WLR 722 at [72].
[41] *Monica* [2019] 2 WLR 722 at [72]. See also [18].
[42] *Monica* [2019] 2 WLR 722 at [74] [emphasis added].
[43] *Monica* [2019] 2 WLR 722 at [76] [emphasis added].
[44] See **section 6b,** below.

summarising the CPS's approach, the court did immediately express misgivings that it may have been "unduly favourable" to the claimant.[45] This is again contrary to how the case was taken at the time.[46]

The court noted that there "is no decided case" which holds that the 2003 Act "has made no difference to the notion of 'consent'".[47] They even drew attention to *dicta* from *Assange* as "a possible indication" that it *has*:[48] in particular, *Assange's* comments that the circumstances involved would amount to an offence "under the Sexual Offences Act 2003, *whatever the position may have been prior to that Act.*"[49]

Thus, while *Monica* was widely taken as confirming the CPS's restrictive approach to s74, in fact it provided, at best, *conditional, obiter* support. The crucial issue as to what extent s74 did or did not change the law, detaching it from incremental common law development, remained open.

b. Lawrance*: confirmation of the 'closely connected' test*

It was not until the Court of Appeal's judgment in *Lawrance* that these issues were decided, and the 'closely connected' test confirmed under s74. The *ratio* of *Lawrance* was that the lie as to having undergone a vasectomy "was not capable in law of negating consent",[50] because it did not relate to the "physical performance of the sexual act but to risks or consequences associated with it".[51]

As in *Monica*, the Court of Appeal in *Lawrance* purported to ground this approach in the previous post-2003 case law. It endorsed the overarching principle *Monica* had drawn from these cases: that consent is only vitiated in cases involving matters "closely connected to the performance of the sexual act".[52]

In support, the Court of Appeal explicitly aligned itself with *Monica*'s reading of the case law. Indeed, its reasoning often simply defers to direct quotations of that reading. For example, the Court of Appeal cited with approval *Monica's* restrictive interpretation of *Assange* as involving deception "closely connected with 'the nature or purpose of the act', because it relates to sexual intercourse itself rather than the broad circumstances surrounding it".[53] Similarly, the court emphasised the passage from *McNally* that "the nature of the sexual act was 'on any common-sense view, different'" because of the deception as to gender.[54] To this, the Court of Appeal added that, in *R v B* – rejecting the relevance of

[45] *Monica* [2019] 2 WLR 722 at [48].
[46] See, for example, the reading offered in Laird's commentary: that the Divisional Court approved the premise concerning s74 (Laird, 'Deception vitiating consent in rape', 534).
[47] *Monica* [2019] 2 WLR 722 at [48].
[48] *Monica* [2019] 2 WLR 722 at [48].
[49] *Assange* [2011] 11 WLUK 63 at [86] [our emphasis], referenced by *Monica* [2019] 2 WLR 722 at [48].
[50] *Lawrance* [2020] 1 WLR 5025 at [43].
[51] *Lawrance* [2020] 1 WLR 5025 at [37].
[52] *Monica* [2019] 2 WLR 722 at [80], cited by *Lawrance* [2020] 1 WLR 5025 at [33].
[53] *Lawrance* [2020] 1 WLR 5025 at [29], quoting *Monica* [2019] 2 WLR 722 at [72].
[54] *Lawrance* [2020] 1 WLR 5025 at [32], quoting *McNally* [2014] QB 593 at [26].

non-disclosure of HIV to sexual consent –"[t]he transmission of the disease through sexual intercourse was not part of the performance of the sexual act but a consequence of it".[55]

While this may appear to be a largely 'copy-paste' application of the reasoning already set out in *Monica*, the Court of Appeal in fact went further. While *Monica* was equivocal – even doubtful – as to the validity of the CPS's guiding premise that s74 had not advanced the meaning of consent from the pre-existing common law approach focussed on 'nature' or 'identity', the Court of Appeal in *Lawrance* expressed no such doubt.[56] It stated that "[t]here is no sign that Parliament intended a sea change in the meaning of consent when it legislated in 2003".[57]

Thus, *Lawrance*, for the first time, represents unequivocal authority for the idea that s74 was not intended to advance or change the approach to consent from the previous common law stance on sexual fraud. Given the significance of this premise for the grounding of the 'closely connected' test seen in *Monica*, and the call for further argument in that case, it is unfortunate that the Court of Appeal offered no more than this brief assertion regarding Parliament's intention. In the next section, we submit that this assertion, and the resulting reading of the case law, does not hold.

5. Challenging the 'closely connected' test

Having now traced the emergence of the 'closely connected' test given authority in *Lawrance*, this section offers two arguments against that development. Both challenge the reasoning from which it was derived, and, ultimately, its doctrinal basis.

a. *Argument 1: a strained interpretation of the s74 case law*

As seen, the 'closely connected' test was derived from a particular reading of the post-2003 case law. It was said to be crucial in each case that the premise was 'closely connected' to the performance of the sexual act, or 'related' to the sexual nature of the activity. This is, we argue, a strained reading of the case law. In fact, it is striking how little resemblance this bears to the reasoning in those cases.

Taking *Assange* first, the Divisional Court's focus was on the existence of a condition on the complainant's consent, which was (allegedly) deliberately violated by Assange. As the key passage explains:

> "It would plainly be open to a jury to hold that, *if AA had made clear that she would only consent to sexual intercourse if Mr Assange used a condom*, then there would be no consent if,

[55] *Lawrance* [2020] 1 WLR 5025 at [39].
[56] Interestingly, in both cases the judgment was led by Lord Burnett CJ. What explains the differences on this point by the time of *Lawrance* is not clear.
[57] *Lawrance* [2020] 1 WLR 5025 at [42].

> without her consent, he did not use a condom, or removed or tore the condom without her consent."[58]

Contrary to *Monica*/*Lawrance's* reading, the reasoning makes no mention of the 'close connection' or 'relatedness' between condom-use and the sexual act. In fact, the court in *Assange* came close to outrightly *rejecting* the significance of these factors in determining the legal relevance of Assange's deception: it dismissed the idea that "sexual intercourse without a condom is different to sexual intercourse with a condom", due to the presence or absence of a "physical barrier" or "a perceived difference in the degree of intimacy", for example.[59] While these comments were made in dismissing the applicability of the conclusive presumption in s76(2)(a) SOA (deception as to the "nature or purpose" of the act), the clear implication is that any possible connection of condom use to the physicality, or more general 'nature' of the sexual act, was not taken to be relevant. This does not sit well with the Court of Appeal in *Lawrance*'s distinction, between condom use in *Assange* and vasectomy-status, on the basis that in the former there was a "physical restriction" imposed.[60] That argument relies on a focus on physicality which was explicitly rejected in *Assange.*

The same can be said for *F*. The judgment is clear that the facts giving rise to the offence of rape were: sexual intercourse; the existence of a condition on the complainant's consent (withdrawal before ejaculation); the other party's knowledge that this was a crucial feature of the complainant's consent; and his deliberate determination not to withdraw. A 'common sense' view of the evidence reasonably indicated the presence of these facts.

"In law", the court explained, "this combination of circumstances falls within the statutory definition of rape".[61] This finding, that the failure to withdraw before ejaculation as agreed was capable of negating consent, was based on the principle of choice in s74, which the court emphasised is "crucial to the issue of 'consent'".[62] The legal principle was that the "claimant was deprived of choice relating to the crucial feature on which her original consent to sexual intercourse was based'.[63] "Accordingly", the court continued, "her consent was negated".[64] Thus, contrary to the reading in *Monica/Lawrance*, the idea that the issue of withdrawal is 'closely connected' or related to the 'physical performance' of the act was not central to this decision. The court made no reference to any factors other than the choice of the complainant, a premise which was, in fact, crucial to this choice, and the other party's deliberate and knowing violation of this premise.

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[58] *Assange* [2011] 11 WLUK 63 at [86] [emphasis added].
[59] *Assange* [2011] 11 WLUK 63 at [87].
[60] *Lawrance* [2020] 1 WLR 5025 at [37].
[61] *(F)* [2014] QB 581 at [26].
[62] *(F)* [2014] QB 581 at [26].
[63] *(F)* [2014] QB 581 at [26].
[64] *(F)* [2014] QB 581 at [26].

A strained interpretation can also be seen in the *Monica/Lawrence* reading of *McNally.* The error lies in taking Leveson LJ's reference to 'common sense' as implying an external restriction on the legal relevance of the choices made by the complainant: that, to be legally relevant, it was crucial that the basis of M's consent – gender – be, on a 'common sense' view, closely related to the sexual nature of the act.

We argue the court in *McNally* did not use any such 'common sense' restriction *as a matter of law*. Instead, they merely noted that "[i]n *reality*" – as opposed to abstract legal principle or theory – there are some deceptions which would be highly unlikely to undermine someone's consent.[65] This is an assumption of fact, not law. The issue in each case then becomes whether the deception undermined a choice made by the complainant, and whether the defendant had a reasonable belief as to consent. On that issue, the "*evidence* relating to 'choice' and the 'freedom' to make any particular choice must be approached in a broad commonsense way".[66] This makes clear that *McNally's* use of 'common sense' was, as in *F*, in assessing the facts of the case. This is merely an ordinary evidential test one might expect in any decision to charge, try, put to jury, and convict. It is not an additional legal obstacle to pass through based on the court's own view as to the relevance of the premise to sexual activity.

In fact, here again, the Court of Appeal explicitly *rejected* the restrictive reading taken up by the CPS and supported in *Monica/Lawrance. McNally* rejected the appellant's argument that there was a distinction between deceptions as to mere "qualities or attributes"– for example, gender, age, wealth, and HIV status (incapable of negating consent)[67] – and deceptions "as to the features of the act itself" (capable of negating consent).[68] It found this to be an unsustainable interpretation of the previous cases, which, in its view, instead turned on the fact that "the alleged victim had consented on the basis of a premise that, at the time of the consent, was false".[69] It is submitted that this is in fact the ratio of this line of case law. Thus, the *ratio* of *McNally* is *not* that there was a close connection between the condition for consent and the sexual nature of the act, but rather that "M chose to have sexual encounters with a boy and her…freedom to choose whether or not to have a sexual encounter with a girl…was removed by the defendant's deception".[70]

There is no mention of any substantive hurdle as a prerequisite of the legal test for consent in these cases. They are, rather, centred wholly on the crucial premises of the complainant's consent in fact, and the defendant's reasonable belief. As will be argued in the next section, this is the correct approach for the courts to have taken, in line with Parliamentary intent. To the extent that there is a conflict between

[65] *McNally* [2014] QB 593 at [25] [emphasis added].
[66] *McNally* [2014] QB 593 at [25], quoting *(F)* [2014] QB 581 at [26] [our emphasis].
[67] On HIV, contrast *Lawrance* [2020] 1 WLR 5025 at [39].
[68] *McNally* [2014] QB 593 at [23].
[69] *McNally* [2014] QB 593 at [24].
[70] *McNally* [2014] QB 593 at [26].

Lawrance and *McNally's* readings – both Court of Appeal judgments – therefore, *McNally* ought to be preferred.

Finally, *Lawrance's* reading of *R v B* on HIV disclosure also bears little resemblance to the reasoning in that case. As the very passages quoted by *Lawrance* show,[71] the reasoning that non-disclosure of HIV status is not relevant to consent under s74 was based squarely on public policy concerns surrounding disclosure of HIV status. The Court of Appeal in *B* emphasised that this is a "delicate matter requiring expertise in public health and social policy rather than the law".[72] Whether non-disclosure of HIV status should be criminalised as rape was therefore "a matter properly for public debate".[73] The restriction in *B* therefore arose due to the public policy issues in the difficult area of HIV transmission, not, as *Lawrance* reads it, because HIV status is insufficiently 'connected' to the performance of the act.

Taken at face value, therefore, the interpretation of the post-2003 cases relied on for *Monica*/*Lawrance's* derivation of the 'closely connected' test is rather unconvincing. This case law does not support the current approach in the way claimed. Indeed, it often points *against* the restrictive line taken.

b. *Argument 2: to what extent did s74 change the law?*

That interpretive strain may be the symptom of another: the premise that s74 SOA was not intended to mark a change in the approach to be taken from the pre-existing common law focus on the 'nature' of the act, or 'identity' of the defendant. It was seen earlier that when the interpretations, taken up by the Court of Appeal in *Lawrance*, were first offered in *Monica*, they were explicitly conditioned on this premise. While less explicit, *Lawrance* also relied on this premise.

Yet the cases relied upon in *Monica/Lawrance* appeared to take a different view. As noted above,[74] *Monica* had already drawn attention to comments from *Assange* indicating that the 2003 Act *did* mark a change in the meaning of consent, and that the Divisional Court there viewed itself as moving away from the pre-2003 approach. *F* and *McNally* likewise do not appear to have proceeded on the basis that they were merely applying, or at most developing, the pre-existing common law categories via the 2003 Act. Indeed, both are notable for the absence of *any* mention of those pre-2003 cases in their judgments. The analysis was instead focussed on the wording of s74, and its reference to 'choice'.[75]

[71] *Lawrance* [2020] 1 WLR 5025 at [39].
[72] *R v B* [2007] 1 WLR 1567 at [19].
[73] *R v B* [2007] 1 WLR 1567 at [21].
[74] Above, **section 4a(ii).**
[75] See, especially, *(F)* [2014] QB 581 at [26]; *McNally* [2014] QB 593 at [16], [19], and [21].

Until *Monica/Lawrance*, then, the post-2003 case law had overwhelmingly proceeded on the footing that the issue of consent is one of statutory interpretation of s74, and that the pre-2003 fraud cases are of no substantive relevance to its content.

This difference of opinion regarding the effect of the 2003 Act may help to explain the conflicts noted above: in assuming that the 2003 Act was not intended to move away from the substance of the previous common law approach, *Monica* and *Lawrance* are assuming that the post-2003 cases must be interpreted with reference to the restrictive 'nature' and 'identity' tests found there. The interpretation open to a court taking this view of s74 as a mere codification of the common law approach is significantly constrained, perhaps to the extent that it would feel bound either to take such a restrictive but strained interpretation, or else find that those cases reached the wrong outcome. This guiding premise about s74 thus takes on a crucial importance for the grounding of the 'closely connected' test.

i. *Challenging the premise: s74 and Parliamentary intention*

In this section, we challenge that premise that the 2003 Act was intended merely to restate or clarify the pre-existing common law approach to consent in cases of deception/conditional consent. This has significant consequences not only for the derivation of the 'closely connected' test, but also for the correct direction of the law in future.

It is instructive to view s74 in the context of its place in the 2003 Act more generally. It is significant that s76 concerns itself with deceptions as to the "nature or purpose" of the act, and impersonation of someone known to the complainant.[76] It is significant because these categories broadly represent the historically-restrictive common law approach. It therefore seems that s76 was intended to reflect the pre-2003 restrictive approach to sexual fraud, and to transpose this into a conclusive presumption against consent and reasonable belief in consent.[77]

Further evidence for this intention can be found in Ministerial statements at the Committee stage of the section's passage through Parliament. Here, it was stated that the conclusive presumptions found in s76 "are based on existing statute and case law", and that one of the "policy intentions" of the clause is "to clarify existing case law and incorporate it into statute".[78]

To the extent, therefore, that the SOA 2003 *was* intended to restate the pre-existing common law approach to consent and deception, that purpose is served by s76, *not* s74. It follows that, while the pre-2003 case law may be instructive for the purposes of interpreting *s76*, it is of questionable relevance for

[76] Sections 76(2)(a) and (b), respectively.
[77] See also, *Monica* [2019] 2 WLR 722 at [71], and *Lawrance* [2020] 1 WLR 5025 at [27] – both of which accept this intention.
[78] Sexual Offences Bill (Lords) SC Deb (B) 9 September 2003, col 25. See also, Explanatory Notes to the Sexual Offences Act 2003, para 143, referring to examples found in the pre-2003 case law.

interpreting s74. Section 74 is left as a novel development, to be taken on its own terms quite aside from the pre-2003 common law categories of 'nature' or 'identity'.

Further, with that restrictive approach now codified in s76, the implication is that the newly-added s74 was intended to be of wider scope. This interpretation finds some indirect support in the Divisional Court's observations in *Assange*. The court rejected Assange's claim that, if the conduct did not fall under the restrictive 'nature or purpose' approach of s76(2)(a), it could not be considered under s74. The court reasoned it would "have been extraordinary if Parliament had legislated in terms that, if conduct that was not deceptive could be taken into account for the purposes of s.74, conduct that was deceptive could not be."[79] The logical implication of this is that s74 should be taken to cover a wider range of deceptions than s76, and to move beyond the concern with the sexual 'nature' of the act reflected in that section.[80]

The result of the above analysis is as follows: the restrictive common law approach taken by the courts pre-2003 is now covered by s76. Therefore, and in line with the initial cases following the 2003 Act, s74 ought to be taken as intending to go further than s76 – to go beyond the common law approach it embodies. The pre-2003 categories – 'nature' of the act or 'identity' of the defendant – are of doubtful relevance for interpreting s74. With this, the restrictive approach to the post-2003 case law approved in *Lawrance* unravels. Its premise concerning the effect of s74 does not hold, and the resulting focus on a 'close connection' to the 'nature' of the sexual act is misplaced. It also does nothing to justify the strained interpretations of the earlier, post-2003 case law, criticised above. This leaves the reasoning of *Lawrance*, and the 'closely connected' test, highly questionable.

6. Wider ramifications: Parliamentary intention and an expansive approach to conditional consent

These arguments give us reason to doubt the legal authority of the 'closely connected' test applied in *Lawrance* – a specific version of the restrictive approach. But they also have a wider significance. More generally, they give us reason to doubt the legality of *any* substantive restriction on the premises capable of vitiating consent under s74, aside from its factual relevance to an individual's choice. Such restrictions would, we argue, conflict with Parliament's intention when passing the 2003 Act. On that basis, this section argues that it is an expansive approach to conditional consent, of the kind set out earlier,[81] that can be properly grounded in the SOA 2003.

[79] *Assange* [2011] 11 WLUK 63 at [88].

[80] See also *Monica* [2019] 2 WLR 722 at [48], observing that there is room for the "argument that the abolition of the offence of procurement may have widened the scope of the offence of rape." This may add to the case that s74 intended to widen the scope of non-consent in deception cases. See s3 SOA 1956, repealed by the 2003 Act. Unfortunately, this argument does not appear to have been considered further in *Lawrance.*

[81] See above, **section 3b**.

a. *Statutory interpretation*

It is noteworthy that s74 mentions no limitation as to which specific premises can be taken as relevant to consent. It states only that the issue of consent is to be determined through the idea of agreement to sexual contact 'by choice'. The focus is squarely on the choice of the complainant, with no prerequisites mentioned regarding the substance of that choice. Taken at face value, therefore, reading in such limits would run contrary to this section, and the enacted intention that an individual's 'choice' be central to consent.

Further support for this interpretation can be found by looking to the policy intention behind the 2003 reforms. In the consultation paper leading to those reforms, the Government set out its view that sexual offences are "primarily crimes against the sexual autonomy of others."[82] 'Sexual autonomy' – in their view – means that "[e]very adult has the right and responsibility to make decisions about their sexual conduct".[83] The reference to 'choice' should be read in this light: the concern for the freedom of an individual to make decisions about their sexual conduct would suggest that it is the *individual's* choices which should be decisive. This is required to fully respect their sexual autonomy. Setting substantive limits on these choices – external to the individual engaging in the sexual activity – does not sit well with the concern for sexual autonomy and the primacy of personal choice behind the 2003 Act, because it dictates the scope of that choice, and diminishes the individual's preferences.[84]

The immediate consequence is that, contrary to what was suggested in *Lawrance*, it is not an *expansive* approach to the conditions which can vitiate consent that conflicts with Parliamentary intention, but, rather, restrictive approaches of the kind deployed in that case.

b. *An expansive approach to conditional consent*

The wider consequences of our argument rejecting the restrictive approach would be as follows: where an individual chooses to engage in a sexual act, guided by a particular premise, and this premise turns out not to be the case, there is no consent under s74. Their freedom of choice has been violated. Where

[82] Home Office, *Setting the Boundaries: Reforming the law on sexual offences* (vol 1, 2000) at para. 2.7.2. Sexual autonomy is referred to extensively throughout the report.

[83] Home Office, *Setting the Boundaries* at para.2.7.2.

[84] Neither does Jonathan Rogers' view that consent is only undermined where a person is "clearly understood not to seek sexual stimulation from a particular activity nor wishes to do it to provide sexual stimulation to the other" (J Rogers, 'The Effect of "Deception" in the Sexual Offences Act 2003' (2013) 4 Archbold Review 7, 8). For Rogers, cases like *Assange* were wrongly decided because either way the complainant's sexual preferences – to give or receive "sexual stimulation through vaginal sex" – are respected regardless of factors like condom use. Rogers' restrictive interpretation of the law relies on a definition of 'sexual autonomy' as a "willingness" to receive "sexual gratification" or provide it to another. A full defence of the contrasting definition of sexual autonomy we take is outside the scope of this article. Doctrinally-speaking, it suffices to say that Rogers' 'sexual gratification' account does not accord with the definition behind the SOA 2003 reform, which as above, focusses on a richer right to make decisions about one's sexual conduct, not merely about whether to receive or give sexual gratification.

the other party knowingly and deliberately violates this premise, there is an argument that they do not have a reasonable belief in consent. 'Common sense', or other external standards, would be relevant, at most, to assessing whether the evidence suggests these facts exist. If there is sufficient evidence, then a sexual offence can be charged, and, at trial, the issue must be left to the jury.

In principle, therefore, this leaves the range of unfulfilled premises which can vitiate sexual consent under s74 unlimited. The key is whether an individual's consent was, in fact, premised on that factor. Provided the other elements of a sexual offence are made out, any unfulfilled condition could give rise to a sexual offence.[85]

This approach is exemplified by the pre-*Monica* 2003 Act case law – *Assange*, *F*, and *McNally*, interpreted in the way we have indicated. As noted, these cases depended on the principle that the complainant had consented on a premise which was false, and the defendant knew this. We argue that this was, and *is*, the correct approach.[86]

7. Conclusions: revisiting the scope of sexual consent

We have examined the developing approach to sexual fraud under the SOA 2003, focussing on the courts' approach to s74 in such cases. The key question is whether there are limits to the deceptions or mistakes which can vitiate sexual consent, and, if so, how these limits are defined.

The article critically examined the courts' current, restrictive answer to this question. According to the law as stated in *Lawrance,* for a false premise to be legally capable of negating consent, it must be 'closely connected' to the performance of the sexual act. This is something which will give rise to some fine distinctions – for example, as in that case, between the contraceptive methods of condom use, and

[85] There is room for the argument that, in exceptional cases, wider policy considerations might overcome the value of sexual autonomy. In such instances, a sexual offence will not be committed, although factual consent will have been vitiated. Some support might be found in the Court of Appeal's treatment of HIV non-disclosure in *R v B* [2007] 1 WLR 1567. As set out earlier, the court found that public debate is needed on the delicate matter of HIV non-disclosure and public health.

[86] On this interpretation, there is no requirement that the defendant's conduct be 'actively' deceptive. What is key is that there is a lack of consent, and a lack of reasonable belief in consent. Under s74, the complainant's choice is central to both issues. It is clearly possible for choice to be undermined in both deception and non-disclosure cases, because, in both, the premise of that choice is false. It is possible for a lack of reasonable belief to be established in both also, if the defendant realises the matter is a crucial premise of the complainant's choice. A distinction between deception and non-disclosure was also rejected in *Lawrance* [2020] 1 WLR 5025 at [41], albeit on different grounds.

vasectomies.[87] The clarity of this standard, and what falls within it, will likely be an issue in future cases.[88]

Aside from those internal difficulties, however, we have argued that the 'closely connected' test is a legal wrong turn. From its very beginning in the 'common sense' charging approach of the CPS, through to its confirmation and application in *Lawrance*, it has been based on a series of misinterpretations of the law. The Court of Appeal's support for this test was seen to be undermined by two interpretative flaws: first, the derivation of the test from the previous s74 cases relied on wholly unconvincing interpretations, often explicitly rejected in the reasoning of those very cases; and secondly, these interpretations were grounded in a further misinterpretation of the 2003 Act – specifically, the impact of s74.

This discussion led to the significant conclusion that s74 was intended to advance the law, away from the pre-existing common law approach – focussed on the 'nature of the act' or 'identity' of the defendant – and towards a greater role for sexual autonomy, focussed on the choice of the complainant. On this basis, the current approach of the courts conflicts with both previous case law and, more worryingly, Parliamentary intention.

As well as casting doubt on *Lawrance's* authority and the specific test it puts forward, this argument has wider significance. It suggests that *any* such restrictive approach to the factors on which an individual may premise their consent, requiring that they have a relevance other than its importance to that individual's choice to engage in the sexual activity, would be incorrect. It would conflict with what we argue is the correct interpretation of the SOA 2003.

Instead, we set out what the doctrinally-correct approach to cases of conditional consent looks like. This expansive approach could already be found in the pre-*Lawrance* case law under s74 of the 2003 Act. The key is the choice the complainant made in fact, and the premises of that choice. This is central to the validity of the complainant's consent and is relevant to assessing the defendant's reasonable belief.

In answer to the questions we raised at the outset, therefore, this leaves the specific premises on which an individual may base their consent substantively unlimited. Consent-vitiation is a matter of fact, to be assessed on ordinary evidential standards, as to what formed the basis of an individual's choice.[89] This

[87] See also the recent rape conviction of a man who poked holes in a condom, where the complainant had made clear she would only consent if a condom were used: S Greenway, 'Worcester man who raped woman by puncturing a hole in condom is jailed' *Worcester News* (Worcester, 3 October 2020), *https://www.worcesternews.co.uk/news/18767987.worcester-man-raped-woman-puncturing-hole-condom-jailed/* [Accessed 26 March 2021].

[88] For criticism see R Clement, 'Deception and Consent to Sex' (2019) 78(2) Cambridge Law Journal 264, 266.

[89] Precisely how 'weighty' this premise must be in the decision of the complainant is a matter which may, in some cases, be subject to disagreement. On one reading, 'crucial premise' – as referred to in *F* – may be taken to mean that the complainant *would not* have consented had they known the truth (a strict, counterfactual 'but for'

is in line with the principle of choice in s74, and the concern for sexual autonomy underlying the 2003 reforms.

The desirability of such an approach has been argued for by others.[90] It has also been the subject of trenchant criticism.[91] Commenting on the *desirability* of a broad regime of conditional consent is outside the scope of this article (although we have noted that it is attractive from the point of view of sexual autonomy). The significance of our argument is that this approach in fact represents the *doctrinally correct position* under s74 of the SOA 2003, consonant with its underlying principle, policy intention, and, until *Lawrance*, the relevant case law. Based on the arguments above, *Lawrance*, and the legally restrictive approach more generally, is therefore bad law and ought to be reconsidered.

How likely this is to happen, however, is another matter. In addition to the purported authority now given to the restrictive approach by *Lawrance*, there appears to be little appetite among the current judiciary for the approach we set out. One concern – raised in support of the *Lawrance* appeal[92] – is that an expansive approach would run contrary to the principle that new conduct should not be criminalised by judicial intervention, but rather by Parliament.[93]

However, if the argument of this article is correct, such concerns are misguided. On this view, rejecting the restrictive approach would not mean that a new 'type' of conduct is being criminalised by the courts. It would not amount to the creation of a new offence or structure of offences, but rather, the correct application of the SOA, *as intended by Parliament*. Indeed, the argument of this article leads to the inverse conclusion: it is the imposition of a *legally restrictive approach* which risks amounting to inappropriate intervention by the courts.

A future court may also be moved by the concern – recently aired in *Monica* – that an expansive approach would create difficulties of "where to draw lines and differentiate between deceptions which negate consent for these purposes and those which do not".[94] This concern is a longstanding one,

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principle). However, 'freedom of choice' – emphasised in *McNally* – may suggest that consent is vitiated because *they did not* consent, regardless of whether they *might have* even if they had not been mistaken. Either way, is it their *freedom of choice,* and *present* consent which has been violated. While further argument is possible, a pure reading of sexual autonomy, and s74, would seem to suggest the latter.

[90] See J Herring, 'Mistaken Sex' [2005] Crim LR 511. It should be noted that Herring's proposal was attached to s76, which would render a lack of consent and reasonable belief *conclusively* presumed. Our argument concerns the position under *s74,* which, in allowing the existence of consent and reasonable belief to be argued even where there is deception, is less extreme.

[91] See, for example, H Gross, 'Rape, Moralism and Human Rights' [2007] Crim LR 220; M Bohlander, 'Mistaken Consent to Sex, Political Correctness and Correct Policy' (2007) 71(5) Journal of Criminal Law 412.

[92] See *Lawrance* [2020] 1 WLR 5025 at [42]. See further, C Lowbridge, 'Jason Lawrance appeals against vasectomy lie rape convictions' *BBC News* (Leicester, 19 September 2019), *https://www.bbc.com/news/uk-england-leicestershire-49734484* [Accessed 17 June 2020].

[93] *R v Knuller (Publishing, Printing and Promotions) Ltd* [1973] AC 435 at 457 (Lord Reid). This view was given some sympathy in *Monica* [2019] 2 WLR 722 at [85]-[86].

[94] *Monica* [2019] 2 WLR 722 at [83].

traceable to the 19th Century.[95] It is nonetheless puzzling, however: pointing to the difficulty of drawing principled distinctions between matters which can and cannot negate consent, in order to support a restrictive approach, fails to appreciate that it is the restrictive approach *itself* that requires such lines to be drawn in the first place. The restrictive approach does not resolve this difficulty – it *creates* it. The subtle distinctions already being drawn through the 'closely connected' test demonstrate this well. Indeed, the expansive approach derived in this article actually circumvents this difficulty, because it is based on repudiating the troubling distinction between those deceptions/mistakes which are, in the abstract, capable of negating consent, and those which are not: instead, it simply depends on the choice of the complainant.

It is therefore hoped that an opportunity will arise for the courts to reconsider these issues, and, putting arguments of the kind we have criticised to one side, that they will recognise the expansive approach to conditional consent. This would reinstate the correct legal position. This could take the form of a Court of Appeal judgment – preferring the approach set out in *McNally* (and its reading of earlier cases) over *Lawrance.* However, in light of the current state of the case law in this area, which, as we have presented it, contains conflicting lines of reasoning (including Court of Appeal authorities), and is based on a considerable chain of errors, a Supreme Court ruling in this important area would be welcomed.

[95] See *R v Clarence* (1888) 22 QBD 23 at 29, per Wills J, referring to the "subtle metaphysical questions" that this would raise.