

Deception, mistake and non-disclosure: challenging the current approach to protecting sexual autonomy

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Abstract

English criminal law appears reluctant to criminalise deceptive sexual behaviour. It currently does so only in circumstances where the defendant has actively lied to the complainant regarding a fact recognised by law as crucial to consent. This restrictive approach arguably fails in many cases to protect the complainant's sexual autonomy. The central argument presented in this article is that all forms of deception, including non-disclosure, a false promise and mistake as to a material fact, may distort the complainant's decision-making process and undermine her ability to make an informed choice. A material fact is one which plays a significant role in a person's decision to engage in sex. This article advocates that the law of rape should be widened to include mistake on the part of the complainant and non-disclosure by the defendant.

Keywords: autonomy; consent; deception; lying; rape; sexual offences; undercover police

Introduction

In this article, I will argue that a complainant (C) should be deemed not to have consented to sexual activity in cases where any ostensible consent arises from deception¹ or misunderstanding, such as C's mistake, relating to a material fact. A material fact is one which plays a significant role in C's decision to permit or engage in sexual activity;² and it may be material to her, whether it would be material to someone else. A commitment to protecting sexual autonomy entails recognising that individuals are worthy of respect and, therefore, owed a duty not to have their sexual autonomy violated.³

Despite the self-evident value of sexual autonomy, the philosophical boundaries of acceptable behaviour have proven difficult to determine. Many definitions are reliant upon notions of 'consent', yet it is widely recognised that this term is fraught with

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1 For present purposes, 'deception' is synonymous with fraud, non-disclosure, false promise, mistake and misrepresentation.

2 David Archard, *Sexual Consent* (Perseus 1997) 46; Jonathan Herring, 'Mistaken Sex' [2005] *Criminal Law Review* 511, 518.

3 Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* vol 1 (Home Office 2000) paras 0.3–0.4.

conceptual ambiguity.⁴ The current law of sexual offences only permits narrow forms of deception to negate consent; the defendant (D) must have ‘actively’ or ‘deliberately’ deceived C.⁵ Section 76 of the Sexual Offences Act 2003 (the Act), allows for deception to negate consent in only two circumstances. Consent will be deemed to be absent where D ‘intentionally deceived’ C as to the nature or purpose of the relevant act,⁶ or where C ‘was intentionally induced’ to consent by D impersonating a person known personally to her.⁷ Deceptions falling outside these two categories may not negate consent. It is doubtful whether broader notions of deception, such as taking advantage of C’s mistake or non-disclosure of a material fact, will be allowed to vitiate consent under s 74 of the Act. A person consents under s 74 ‘if he agrees by choice and has the freedom and capacity to make that choice’. Although courts use the term ‘active deception’, ‘lying’ is the more accurate term, as it involves making an assertion which D knows is false. Moreover, in *R v B*,⁸ the Court of Appeal refused to hold that deception was analogous to non-disclosure.

It will be argued that, although lying and deceiving are philosophically distinct concepts, maintaining this distinction in the criminal law results in a failure to adequately protect sexual autonomy. Both lying and deceiving result in manipulating an individual’s sexual choice by limiting the options available and preventing her from acting according to her own standards. The central argument in this paper is that the law of sexual offences should allow for all lies, deceptions, mistakes and non-disclosure relating to a material fact⁹ to negate consent. Since the Act, undue rigidity has been applied by the courts in terms of the categories which negate consent. This suggests that the *R v Olugboja*¹⁰ approach is preferable because it permitted the jury to decide in each case whether consent was present. This article will chart the unjustifiable approach to protecting autonomy.

The first section of this article addresses the relationship between sexual autonomy and non-consensual sexual offences, specifically the offence of rape, to show that it only permits narrow forms of deception to negate consent. The distinction between lying and deceiving will be examined to show that both concepts, while philosophically distinct, can violate sexual autonomy. It will then be argued that English law should allow broader notions of deception, such as mistake and non-disclosure, to vitiate consent. The article will conclude by arguing that the proposal can be accommodated within the existing law of sexual offences.

The current law of sexual offences

The origins of the Act lie in the recommendations of a Home Office review completed in July 2000. The focus of the review’s recommendations was on personal autonomy, the prevention of sexual abuse or exploitation and the removal of discrimination in sex offences law.¹¹ Despite emphasising the importance of sexual autonomy, the review did not define this concept. This omission could be due to the fact that autonomy has been

4 Jennifer Temkin and Andrew Ashworth, ‘The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent’ [2004] *Criminal Law Review* 328, 328; Victor Tadros, ‘Rape without Consent’ (2006) 26 *Oxford Journal of Legal Studies* 515, 521.

5 *Assange v Sweden* [2011] EWHC 2849 (Admin) [102]; *R v McNally (Justine)* [2013] 2 Cr App R 28 [21].

6 Sexual Offences Act, s 76(2)(a).

7 *Ibid* s 76(2)(b).

8 *R v B* [2006] EWCA Crim 2945, [21].

9 Archard (n 2) 46; Herring (n 2) 518.

10 *R v Olugboja* [1982] QB 320.

11 Home Office (n 3) paras 0.3–0.4.

described as a spacious word, capable of containing a variety of philosophical implications.¹² A common element exists amongst the various definitions; the emphasis on freedom of the individual. The review concluded that there should be a statutory definition of consent for the purposes of any non-consensual sexual offence. The definition of consent found in s 74 of the Act has been supplemented in certain circumstances by 'evidential' and 'conclusive' presumptions contained in ss 75 and 76. The review recommended that consent should be defined as 'free agreement'.¹³ The Home Office review noted that the *Oxford English Dictionary* defines the verb 'to consent' as 'to acquiesce, or agree' and the noun 'consent' as 'voluntary agreement, compliance or permission'.¹⁴ It recognised that these definitions cover a range of behaviour from whole-hearted enthusiastic agreement to reluctant acquiescence. However, in the context of sexual relationships, the core element is an agreement between two people to engage in sex.¹⁵ By focusing on active deception, the current law fails to recognise the wide range of behaviours that are capable of negating consent.

The Home Office review recognised that:

People have devised a complex set of messages to convey agreement and lack of it – agreement is not necessarily verbal, but it must be understood by both parties. Each must respect the right of the other to say 'no' – and mean it.¹⁶

The Law Commission had suggested that an apparent agreement should not count as consent unless it is a 'free and genuine agreement'.¹⁷ It suggested that consent should be defined as 'subsisting, free and genuine agreement'.¹⁸ This was rejected by the Home Office review as being too complex and introducing an unnecessary semi-contractual obligation complication into consent.¹⁹ Instead, it recommended a definition based on 'free agreement' because of its simplicity and clarity. This, however, does not resolve the issue that 'freedom' and 'agreement' are ambiguous and complex concepts, which defy precise definition.²⁰

Section 74 comes close to the definition proposed by the review by assuming that 'agreement by choice' cannot exist in the absence of freedom and capacity to make that choice.²¹ To protect sexual autonomy in cases involving deception, the focus should be on whether the agreement was made as a result of manipulating C's decision to agree to sex. A person is unable to make an informed choice when her options are limited by deception. Thus, 'freedom' should inform 'choice'.

12 Richard Stanley Peters, 'Reason and Passion' in R F Dearden, P H Hirst and R S Peters (eds), *Education and the Development of Reason* (Routledge 2010) 161; D Pole, 'The Concept of Reason' in *ibid* 130; R P Wolff, *In Defence of Anarchism* (Harper & Row 1970) 14.

13 Home Office (n 3) para 2.10.5.

14 *Ibid* para 2.10.4.

15 *Ibid* para 2.10.5.

16 *Ibid*.

17 Law Commission, 'Consent to Sex' in Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* vol 2 (Home Office 2000) para 2.10.

18 *Ibid* para 5.1.

19 Home Office (n 3) para 2.10.5

20 Richard Card, Alisdair A Gillespie and Michael Hirst, *Sexual Offences* (Jordans 2008) 49.

21 *Ibid*.

CRIMINALISING DECEPTION, MISTAKE AND NON-DISCLOSURE

Liberal retributive principles require that only conduct which is blameworthy can legitimately be subject to state punishment.²² Blameworthiness requires D to possess capacity for responsible agency. In other words, D knew what he was doing when he committed the offence, and exercised choice and a sufficient degree of control in doing so.²³ Blameworthiness, in the context of deception, is analysed in terms of the harm caused to C and the wrongfulness of obtaining sex by deception, non-disclosure or mistake. Harm deals with the degree to which the deceptive conduct causes, or risks causing a 'significant setback to another's interests'.²⁴ Determining wrongfulness involves examining the extent to which the criminal act involves the violation of a moral norm.²⁵ In the context of sex by deception, it is possible to violate C's sexual autonomy (wrongfulness) without causing her any harm.²⁶ It is argued that the wrongfulness of deception is that it may lead to a violation of sexual autonomy. The argument in favour of expanding the types of deception which negate consent is that rape should be understood as involving a violation of C's sexual autonomy.²⁷

Sexual autonomy and the law of rape

Prior to the Act, the common law recognised only two types of deceptions which were capable of negating C's apparent consent: mistake as to the nature of the act²⁸ and mistake as to D's identity.²⁹ Mistakes falling outside these two fixed categories did not negate consent. The narrow approach of the common law is demonstrated in the case of *R v Linekar*.³⁰ C, a prostitute, agreed to sex with D on the understating that she would be paid £25. He in fact never paid and never intended to pay. D's conviction for rape was quashed. In *Linekar*, and other similar cases,³¹ the evidence suggests that had C known the truth she would not have agreed to the sexual act, and in each case D had knowledge of this. Although these cases were correctly decided, in terms of the application of the law, it will be argued that in such cases, a duty of care ought to exist in sexual relationships and individuals owe a duty of responsibility when it comes to information regarding a material fact.

22 Stuart P Green, 'Lies, Rape, and Statutory Rape' in Austin Sarat (ed), *Law and Lies: Deception and Truth-Telling in the American Legal System* (Cambridge University Press 2015) 205.

23 Nicola Lacey and Hanna Packard, 'To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice' (2015) 35 *Oxford Journal of Legal Studies* 665.

24 Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (Oxford University Press 1984) 31–36.

25 Green (n 22) 205.

26 John Gardner and Stephen Shute, 'The Wrongness of Rape' in J Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2007) 16.

27 Joan McGregor, 'Force, Consent, and the Reasonable Woman' in J Coleman and A Buchanan (eds), *Harm's Way: Essays in Honour of Joel Feinberg* (Cambridge University Press 1994) 231.

28 *R v Flattery* (1876–77) LR 2 QBD 410; *R v Williams* [1923] 1 KB 340.

29 *R v Elbekkay* [1995] Crim LR 163.

30 *R v Linekar* [1995] QB 250.

31 *Papadimitropoulos v The Queen* (1957) 98 CLR 249; *Bolduc and Bird v The Queen* (1967) 63 DLR (2d) 82.

SEXUAL AUTONOMY

Both English law³² and international law³³ recognise that rape is a violation of sexual autonomy. The next step is to determine whether deception relating to a material fact should constitute a violation of sexual autonomy which results in negating consent. The deception must have been 'material'. As Jonathan Herring rightly argues, 'she should not fall outside the law's protection simply because others do not agree with the reasons behind her sexual decisions'.³⁴ Rape law recognises the concept of autonomy in sexual relationships. However, the courts have yet to provide a definition of sexual autonomy. Jennifer Temkin argues that the overriding objective of the law of rape should be the protection of 'sexual choice', the individual's right to choose when and with whom to engage in sexual activity.³⁵ Anderson makes a similar argument by contending that sexual autonomy involves 'freedom from undesired sexual activity and freedom to engage in desired sexual activity'.³⁶

To argue that deception relating to a material fact violates sexual autonomy and negates consent, it is important to highlight the value of sexual autonomy and the problems caused by its erosion. Sexual autonomy is limited by the rights of others and, as a result, it cannot entail the freedom to have sex whenever and with whomever one chooses.³⁷ It has been described as vital to the goals of securing women's equality with men and promoting a more general form of autonomy for women.³⁸ Thus, a special type of autonomy should be afforded to individuals in relation to their sexual activity.³⁹ It is argued that autonomy should refer to self-direction rather than to self-sufficiency.⁴⁰ The current law of rape does not allow individuals to achieve self-direction where their decision to agree to sex has been manipulated by deception. Deceptive conduct, relating to a material fact, influences an individual's agreement to sex by limiting the options available to her.

Autonomy has been described as comprising of two aspects: positive and negative.⁴¹ Positive autonomy relates to an individual's right to decide when and with whom to engage in sex, whilst negative autonomy involves the right to refuse relations with others and have effect given to that refusal.⁴² This description is misleading because of the tension between them. It is impossible to reconcile both positive and negative autonomy. While positive autonomy deals with an individual's right to choose, and the latter involves the right to refuse, the right to refuse should be the dominant aspect. However, this does

32 *R v Konzani* [2005] EWCA CRIM 706, [42].

33 *Prosecutor v Kunarac*, Case No IT-96-23-T & IT-96-23/1-T (International Criminal Tribunal for the Former Yugoslavia 22 February 2002) [440].

34 Jonathan Herring, *Criminal Law* (3rd edn, Palgrave 2015) 110.

35 Jennifer Temkin, 'Towards a Modern Law of Rape' (1982) 45 *Modern Law Review* 399, 401; see also Nicola Lacey where she provides a similar definition of sexual autonomy in 'Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law' (1998) 11 *Canadian Journal of Law Jurisprudence* 47, 52.

36 Scott Anderson, 'On Sexual Obligation and Sexual Autonomy' (2013) 28 *Hypatia* 122, 133.

37 Vanessa E Munro, 'Sexual Autonomy' in M D Dubber and T Hornle (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press 2014) 745.

38 Scott A Anderson, 'Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution' (2002) 112 *Ethics* 748, 750-51.

39 *Ibid* 770.

40 *Ibid*.

41 Catherine Elliott and Claire de Than, 'The Case for a Rational Reconstruction of Consent in Criminal Law' (2007) 70(2) *Modern Law Review* 22, 231.

42 See Isaiah Berlin, 'Two Concepts of Liberty' (originally published in 1958) in I Berlin, *Four Essays on Liberty* (Oxford University Press 1969).

not assist in resolving the issue of why inducing by lying about the fact that they were to have sex⁴³ or about D's identity negate consent whereas other deceptions, such as marital status, using birth control, carrying a sexually transmitted disease, or making false promises, such as D's commitment to entering into a long-term relationship, are not considered sufficiently serious to violate autonomy and negate consent. What it does show is that sexual autonomy is composed of a 'complex, multifarious collection of rights'⁴⁴ and that C's choice to refuse sex, based on a material fact, might be removed where her agreement is procured by deception, mistake or non-disclosure.

Choice and consent

Commentators such as Herring,⁴⁵ Vanessa Munro,⁴⁶ and Stephen Schulhofer⁴⁷ highlight the importance of treating sexual autonomy as a central principle. Lying and deceiving undermine sexual autonomy in a similar manner to force or the threat of force by limiting the options available to an individual.

The concept of choice, which forms part of the definition of consent in s 74, relates to notions of autonomy, liberty and responsibility.⁴⁸ In *R (on the application of F) v Director of Public Prosecutions*, Lord Judge CJ held that, 'choice' is crucial to the issue of 'consent'.⁴⁹ Unfortunately, his Lordship stated that the evidence relating to choice and freedom to make a choice should be approached in a 'broad common sense way'.⁵⁰ This dictum is similar to the direction in *Olugboja*,⁵¹ which held that juries should '[apply] their combined good sense, experience and knowledge of human behaviour to all the relevant facts of that case', when distinguishing between consent and submission.⁵² The *Olugboja* direction was criticised by the Home Office review for giving rise to confusion and uncertainty,⁵³ despite the fact that it removed the fixed category of circumstances which negated consent, and allowed individuals to set their own standards.⁵⁴ This can be contrasted with the current approach which fails to recognise an individual's own perceptions of her interests.

If choice presupposes that an individual has alternatives, her decision should be made on the basis of adequate information about each in order for that choice to be informed.⁵⁵ Choice presupposes two linked capabilities.⁵⁶ First, it involves a sense of self-awareness, whereby individuals are able to decide 'which of the accessible options will best realise [their] ideal, and thus suit [them]'.⁵⁷ This suggests that choice is a subjective

43 For example, fraudulent medical procedures.

44 Green (n 22) 205.

45 Jonathan Herring, 'Rape and the Definition of Consent' (2014) 26 National Law School of Indiana Review 6.

46 Vanessa E Munro, 'Constructing Consent: Legislating Freedom and Legitimizing Constraints in the Expression of Sexual Autonomy' (2008) 41 Akron Law Review 923.

47 Stephen J Schulhofer, *Unwanted Sex: Culture of Intimidation and Failure of Law* (Harvard University Press 2000).

48 Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press 1988) 61.

49 *R (on the application of F) v Director of Public Prosecutions* [2013] EWHC 945 (Admin); [2014] QB 581; [2014] 2 WLR 190, [26].

50 *Ibid* [26].

51 *R v Olugboja* [1982] QB 320.

52 *Ibid* 332.

53 Home Office (n 3) para 2.2.3.

54 Simon Gardner, 'Appreciating *Olugboja*' (1996) 16(3) Legal Studies 275, 287.

55 David Ormerod, *Smith and Hogan's Criminal Law* (14th edn, Oxford University Press 2015) 823.

56 David Levine, *Wealth and Freedom: An Introduction to Political Economy* (Cambridge University Press 1995) 28.

57 *Ibid*.

state of mind. Applying this subjective facet to sexual autonomy implies that individuals are able to choose between the alternatives available and to distinguish between them based on preferences. For some it may be their preference to only have sexual relationships with those from a particular religious or socio-economic group. The second element of choice is autonomy, 'the sense of having an inner core capable of identifying wants and pursuing their satisfaction'.⁵⁸ The relationship between self-awareness and autonomy is best articulated by Robert Lindley who suggests that autonomy consists of two elements. Firstly, it involves an individual acting on reasons based on her own goals and purposes.⁵⁹ The second element requires freedom from external constraints such as being manipulated by others to do their will.⁶⁰ To protect sexual autonomy, the law of rape should safeguard an individual's right not to be manipulated by lies or deception. Deceiving another into agreeing to sex is an affront to autonomy.⁶¹

THE IMPACT OF DECEPTION ON SEXUAL AUTONOMY

Although moral philosophers tend to distinguish between lying and deceiving,⁶² the courts distinguish between active deception,⁶³ non-disclosure⁶⁴ and mistake.⁶⁵ Here, it will be argued that a more holistic concept of deception is preferable, because it addresses whether the deception employed impacted on another's decision to agree to sex. The selectivity associated with the current approach has resulted in inconsistency and fails in its primary purpose of protecting sexual autonomy.⁶⁶

Deception encompasses an unlimited variety of methods by which the deceiver creates false impressions in another's mind.⁶⁷ The term is used in this article to refer to the communication⁶⁸ of a message⁶⁹ that is intended to mislead.⁷⁰ Deception, unlike lying, need not be directed at a specific individual. Examples of indirect deceptions include where D removes his wedding ring to mislead others about his marital status or where he gives the impression that he is a footballer or film producer.⁷¹ Deception includes actions, omissions, words and strategic silences.⁷² It is recognised that deception is an element of many forms of acceptable social behaviours, such as tact, politeness or evasion.⁷³ In the context of sexual relationships, parties rarely disclose every potentially

58 Ibid.

59 Robert Lindley, *Autonomy (Issues in Political Theory)* (Palgrave Macmillan 1986) 6.

60 Ibid.

61 Larry Alexander and Emily Sherwin, 'Deception in Morality and Law' (2003) 22 *Law and Philosophy* 393, 432.

62 Immanuel Kant, 'Ethical Duties towards Others: Truthfulness' in *Lectures on Ethics*, L Infield (trans) (Harper Row 1963) 266; Sissela Bok, *Lying: Moral Choice in Public and Private Life* (Random House 1978); Albert Vrij, *Detecting Lies and Deceit: Pitfalls and Opportunities* (Wiley 2000); D Fallis, 'What is Lying?' (2009) 106 *Journal of Philosophy* 29.

63 *McNally (Justine)* (n 5).

64 *R v B* [2006] EWCA Crim 2945.

65 *Linekar* (n 30).

66 Home Office (n 3) para 2.10.4.

67 Alexander and Sherwin (n 61) 400.

68 'Communication' can be direct or indirect.

69 Words and conduct.

70 Stuart P Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press 2007) 76.

71 *R v Melitti* [2001] EWCA Crim 1563.

72 Alexander and Sherwin (n 61) 400.

73 Jonathan E Adler, 'Lying Deceiving, or Falsely Implicating' (1997) 94 *Journal of Philosophy* 435, 435.

relevant detail.⁷⁴ There are a variety of methods by which one can tacitly mislead. Examples include clothing, cosmetics, religious symbols and removing one's wedding ring. Sexual autonomy is violated where an individual resorts to such deceptions to procure sex, knowing that his deception relates to a material fact. According to Adler, 'deception need not be intentional or voluntary, as lying must'.⁷⁵ However, he concedes that both lying and deception aim for the victim to believe falsely.⁷⁶ Thus, sexual autonomy should be deemed to have been violated where a lie or deception might cause another to be misled and results in her agreement to sex, provided this deception related to a material fact.

Where D intentionally misleads C about a material fact and manipulates her agreement to sex, despite being aware of C's mistake, C's consent should be vitiated by the deception. Applying the concept of relational autonomy, a duty must be imposed on individuals to disclose a fact which they know is material to others or correct mistakes relating to a material fact. The relevance of relational autonomy is that it recognises the importance of relational obligations and responsibilities⁷⁷ which are vital in the context of sexual activity.

THE IMPACT OF LYING ON SEXUAL AUTONOMY

Although a universally accepted definition of lying does not exist, it has been defined as a 'statement made by one who does not believe it with the intention that someone else shall be led to believe it'.⁷⁸ This definition requires further clarification to fully distinguish it from deception. Lying involves a much narrower range of behaviours than deception generally.⁷⁹ Deception, as shown above, includes a variety of methods by which the deceiver produces false impressions in another's mind.⁸⁰ Unlike deceptions, lies require an assertion that 'we present ourselves as believing something while and through invoking (although not necessarily gaining) the trust of the one' to whom we assert.⁸¹

Lying is viewed as wrong for various reasons. Thomas Aquinas maintained that lying is contrary to the law of nature.⁸² Immanuel Kant also viewed lying, which he defined as 'false assertion', to be 'directly opposed to the natural purposiveness of the speaker's capacity to communicate his thoughts', and the liar 'throws away and, as it were, annihilates his dignity as a human being'.⁸³ Kant illustrates the absolute character of the moral imperative not to lie by giving the example of lying to the murderer at the door who asks about the whereabouts of his intended victim.⁸⁴ Lying is wrong because it

74 Jed Rubenfeld, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2013) 122 *Yale Law Journal* 1372, 1372.

75 Adler (n 73) 435.

76 Ibid.

77 Jonathan Herring, 'Relational Autonomy and Consent' in Alan Reed and Michael Bohlander (eds), *Consent: Domestic and Comparative Perspectives* (Routledge 2017) 27.

78 Arnold Isenberg, 'Deontology and the Ethics of Lying' in William Callaghan, Leigh Cauman, Sidney Mothersill et al (eds), *Aesthetics and Theory of Criticism: Selected Essays of Arnold Isenberg* (University of Chicago Press 1973) 248; for an alternative definition see Alexander and Sherwin (n 61).

79 Green (n 70) 77.

80 Alexander and Sherwin (n 61) 400.

81 D Simpson 'Lying, Liars and Language' (1992) 52 *Philosophy and Phenomenological Research* 623, 625.

82 Thomas Aquinas, *Summa Theologiae* vol 4 (McGraw-Hill 1972).

83 Immanuel Kant, *The Metaphysics of Morals*, Mary Gregor (trans) (Cambridge University Press 1996) 182.

84 Immanuel Kant, 'On Supposed Right to Tell Lies from Benevolent Motives' in T K Abbott (ed and trans), *Kant's Critique of Practical Reason and Other Works on the Theory of Ethics* (Dover Publications 1989) 36.

violates autonomy by forcing an individual to pursue the speaker's objectives, rather than her own preferences.⁸⁵

Lying asserts what D believes to be false.⁸⁶ Deceptions, on the other hand, are invitations by D to accept as true his deceptive behaviour.⁸⁷ In his treatment of the false promise case, under the Formula of Humanity, Kant explained that the victim of the lie would not agree to being used to the advantage of the false promisor and 'cannot contain the end of this action in himself'.⁸⁸ Kant's treatment of the false promisor can be equally applied to all forms of deception, including Herring's example of the rogue who falsely proclaims his love,⁸⁹ to show that deceptions violate sexual autonomy. Consent should be deemed to be absent where an individual is deceived in relation to a material fact and agrees to sex because of that deception. Sexual autonomy is violated because there is lack of reciprocity between the parties. But for D's deception, C would not have agreed to sex. Applying an autonomy-based argument, which focuses on protecting the individual's ability to choose from a set of options, suggests that a successful lie or deception distorts the reasoning process of the individual deceived. It displaces her will and manipulates her action for the speaker's end.⁹⁰

Deception and the current law of sexual offences

To illustrate the deficiency of the law of non-consensual sex in cases involving lying and deceiving, it is illuminating to consider the decision of the Crown Prosecution Service (CPS) not to prosecute undercover police officers who engaged in sexual relations with women. In *AJA & Others v Commissioner of Police for the Metropolis*,⁹¹ the CPS halted criminal proceedings against six defendants who had been due to stand trial at Nottingham Crown Court on charges related to a conspiracy to sabotage a coal-fired power station at Ratcliffe-on-Soar. The CPS was concerned that Nottinghamshire Police had failed to comply with its pre-trial disclosure obligations relating mainly to the work of undercover police officer Mark Kennedy.⁹² It later emerged that PC Kennedy had had at least one long-term, intimate sexual relationship with a woman involved with one of the groups he had infiltrated. Following this discovery, allegations concerning undercover police officers acting beyond their authorisation, or taking action which was authorised but should not have been, were reported in the media. It was claimed that several officers had intimate relationships with members of the groups they had infiltrated. One officer was said to have fathered a child in such a relationship before disappearing.⁹³

In February 2013, the Home Affairs Committee invited the women involved to give evidence. One witness explained that:

85 D A Strauss, 'Persuasion, Autonomy, and Freedom of Expression' (1991) 91 *Columbia Law Review* 334, 355.

86 F A Siegler, 'Lying' (1966) 3 *American Philosophical Quarterly* 128, 130.

87 Green (n 70) 77.

88 Immanuel Kant, *The Moral Law*, H J Paton (trans) (Hutchinson & Co 1969) 91.

89 Herring (n 2) 511.

90 Kant (n 62); Alexander and Sherwin (n 61) 397; P J Griffiths, *Lying: An Augustinian Theology of Duplicity* (Brazos Press 2004); J E Mahon, 'A Definition of Deceiving' (2007) 21 *International Journal of Applied Philosophy* 181.

91 *AJA & Others v Commissioner of Police for the Metropolis* [2013] EWCA Civ 1342; [2014] 1 WLR 285.

92 *Ratcliffe-on-Soar Power Station (Operation Aeroscope) Disclosure* (Reference: 2011/000464, Final Report of an Independent Investigation by the Independent Police Complaints Commission 2012).

93 P Lewis, R Evans and S Pollack, 'Trauma of Spy's Girlfriend: "Like being Raped by the State"' *The Guardian* (London, 24 June 2013) <www.theguardian.com/uk/2013/jun/24/undercover-police-spy-girlfriend-child>.

How it feels to me is that it is not having found out that your partner was lying about who they are; it is finding out that your most personal relationship was being controlled by the state without your knowledge.⁹⁴

Another woman who had a child with an undercover police officer stated:

We are psychologically damaged; it is like being raped by the state. We feel that we were sexually abused because none of us gave consent.⁹⁵

It is, therefore, clear that the complainants would not have engaged in sex with the undercover police officers had they known their true identities. The conduct of the undercover police officers, with which the Home Affairs Committee⁹⁶ concerns itself, appear to both pre-date⁹⁷ and post-date the Act.⁹⁸ The CPS examined various leading authorities on the meaning of consent, as set out in the Act, and concluded that, in accordance with the principles established by case law, there was insufficient evidence to prosecute for rape because ‘any deceptions in the circumstances of this case were not such as to vitiate consent’.⁹⁹

The first case to be considered by the CPS was that of *Assange v Sweden*.¹⁰⁰ The Divisional Court was asked to determine, inter alia, whether the principle of dual criminality was met on the facts of the case. It was alleged that Assange had intercourse with C after deliberately creating a tear in the condom, or that he had removed it, knowing that C had only consented to sex on the condition that he wore a condom. According to the court, C was not deceived as to the ‘nature or purpose of the act’ as set out in s 76(2)(a) of the Act. In emphasising the limited scope of s 76, the court stated:

[Section 76] deals simply with a conclusive presumption in the very limited circumstances to which it applies. If the conduct of the defendant is not within s 76, that may not preclude reliance on s 74. *R. v B* goes no further than deciding that failure to disclose HIV infection is not of itself relevant to consent under s 4.¹⁰¹

The issue of non-disclosure, which is a form of deception, was discussed in *B*:

[The] fact that the defendant may not have disclosed his HIV status is not a matter which could in any way be relevant to the issue of consent under section 74 in relation to the sexual activity in this case.¹⁰²

Thus, active non-disclosure of HIV does not vitiate consent. It is difficult to justify this position given the fact that D’s HIV-positive status was a material fact in terms of C’s decision to agree to sex.

94 House of Commons – Home Affairs Committee, *Undercover Policing: Interim Report* (HC 837, Thirteenth Report of Session 2012–13, TSO 2013) <<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmhaff/837/83702.htm>>.

95 Ibid.

96 Ibid.

97 Mark Kennedy met Anna in 2005, when she was 21 years old.

98 Robert Lambert, using the undercover persona of Mark ‘Bob’ Robinson, formed a sexual relationship with a woman, who was unaware of his true identity at the time.

99 Crown Prosecution Service, ‘Charging Decision Concerning MPS Special Demonstration Squad’ (*Blog of the Crown Prosecution Service*, 21 August 2014) <<http://blog.cps.gov.uk/2014/08/charging-decision-concerning-mps-special-demonstration-squad.html>>.

100 *Assange* (n 5).

101 Ibid [90].

102 *R v B* (n 8) [21].

The second case considered was *R (on the application of F)*.¹⁰³ The facts of this case were similar to those of *Assange*, in that C, who did not wish to become pregnant, consented to sex with her husband on the condition that he would withdraw his penis before ejaculating within her vagina. During intercourse, shortly after penetration, D informed her that he would be ejaculating within her vagina 'because you are my wife and I'll do it if I want'.¹⁰⁴ He ejaculated before she could say or do anything about it. The CPS decided not to prosecute D for rape because the evidence would be insufficient to establish a realistic prospect of conviction. C sought judicial review of that decision. Lord Judge CJ stated that, at the time of reaching the decision not to prosecute, the Crown Prosecutor had not had the benefit of the decision of the Divisional Court in *Assange*:

What the *Assange* case underlines is that 'choice' is crucial to the issue of 'consent' ... The evidence relating to 'choice' and the 'freedom' to make any particular choice must be approached in a broad common sense way. If before penetration began the interested party had made up his mind that he would penetrate and ejaculate within the claimant's vagina, or even, because 'penetration is a continuing act from entry to withdrawal' (see section 79(2) of the 2003 Act) he decided that he would not withdraw at all, just because he deemed the claimant subservient to his control, she was deprived of choice relating to the crucial feature on which her original consent to sexual intercourse was based. Accordingly, her consent was negated. Contrary to her wishes, and knowing that she would not have consented, and did not consent to penetration or the continuation of penetration if she had any inkling of his intention, he deliberately ejaculated within her vagina. In law, this combination of circumstances falls within the statutory definition of rape.¹⁰⁵

It is important to note that in *Assange* and *R (on the application of F)*, the agreement to sex was based on a stipulated condition. Rogers criticises *Assange* because liability for rape and other non-consensual sexual offences should only arise where C has not been willing 'to be used for the sexual gratification of another in a way that shows regard to one's own sexual preferences'.¹⁰⁶ This analysis endorses the fact that a commitment to sexual autonomy should take into account the significance of the sexual act for C, and her state of mind at the time of agreeing to engage in sex.

The final case considered was *R v McNally*,¹⁰⁷ in which D, a female who posed as a boy called 'Scott' on an online social media site, deceived C as to her gender. D pleaded guilty to six counts of assault by penetration, contrary to s 2 of the Act. D appealed on the grounds that she should not have been convicted at trial because the elements of the offence had not been made out. She argued that deception as to gender could not vitiate consent, being deception as to a quality or attribute, as stated in *B*.¹⁰⁸ D contended that she had not been advised as to the relevant legal elements when deciding to plead guilty. D also appealed against sentence. The Court of Appeal dismissed her appeal against conviction but allowed her appeal against sentence.

In relation to the first ground for appeal, the court held that 'some deceptions (such as, for example, in relation to wealth) will obviously not be sufficient to vitiate

103 *R (on the application of F) v DPP* [2013] EWHC 945 (Admin).

104 *Ibid*.

105 *R (on the application of F)* (n 103) [26].

106 Jonathan Rogers, 'The Effect of "Deception" in the Sexual Offences Act 2003' (2013) 4 *Archbold Review* 7.

107 *R v McNally (Justine)* (n 5)

108 *R (on the application of F)* (n 103).

consent'.¹⁰⁹ Thus, it is settled law that not all deceptions will negate consent. It is unclear whether this dictum provides any indication as to the scope of s 74.¹¹⁰

Two issues stem from the court's decision to limit the types of deceptions which negate consent. Firstly, the court has failed to recognise the importance of a material fact to the individual complainant. For some it is important that their sexual partner is of a certain religion or free from HIV, while the same facts might not be relevant to others. The concern with framing D's liability in terms of 'active deception' is that consent under s 74 would only be vitiated where D lied to C about a fact recognised by the courts. Consent will not be negated where D withholds a material fact or where he takes advantage of a mistake, despite the fact that C would not have agreed had she known the truth. Secondly, the court did not provide an explanation as to why only gender deception could negate consent, while other categories such as wealth would not vitiate consent. The danger of this approach is that it considers certain deceptions as too trivial, irrespective of their importance to the individual and risks giving rise to discrimination.¹¹¹

Returning to the case of the undercover police officers, the officers withheld a material fact relevant to the complainants, namely that they were undercover police officers. Although, under the current law, non-disclosure, a form of deception, may not negate consent, the undercover officers, to perpetuate their tacit deception, would undoubtedly have had to engage in active deception or lying. Thus, in some cases which appear to involve only tacit deception, D might have also resorted to lying to maintain the deception. This analysis does not suggest that being a police officer is akin to gender. The argument put forward in this article is that deception relating to any material fact, whether it involves religion, gender or wealth, could negate consent.

The current distinction between lying and deceiving is applied without justification and results in the failure of the law to provide an effective framework for the protection of sexual autonomy. While it is accepted that in the context of the criminal law in practice, individuals may be prevented from setting their own boundaries of acceptability, an autonomous individual should be 'exempt from arbitrary control, un-coerced and unrestricted'.¹¹² Individuals should be directed by considerations, desires, conditions and characteristics that are not simply imposed externally upon them.¹¹³

Proposal for reform: removing the distinction between lying and deceiving

A tradition in ethics maintains that lying is a significantly worse form of behaviour than deception.¹¹⁴ A sharp distinction between lying and deception is drawn by deontological theorists such as Kant, who focused on the nature of false assertions. Hence, there is no

¹⁰⁹ *R v McNally (Justine)* (n 5) [25].

¹¹⁰ Karl Laird, 'Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003' [2014] *Criminal Law Review* 492, 506.

¹¹¹ Gender fraud cases include *R v Barker (Gemma Louise)* [2012] EWCA Crim 1593; *R v Chris Wilson* [2013] unreported; *R v Kyran Lee (Mason)* [2015] unreported; *R v Gayle Newland* [2017] unreported (the defendant's actual name is Gail, but due to a typographical error in a court report she has always been referred to as Gayle); for a detailed critique of the court's decision in *R v McNally (Justine)* (n 5), see Alex Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-consent' [2014] *Criminal Law Review* 207.

¹¹² Matti Wiberg, 'Political Autonomy: Ambiguities and Clarifications' in M Suksi (ed), *Autonomy: Applications and Implications* (Kluwer Law International 1998) 44.

¹¹³ John Christman, 'Constructing the Inner Citadel: Recent Work on the Concept of Autonomy' (1988) 99(1) *Ethics* 109, 114.

¹¹⁴ Adler (n 73) 435.

wrong in the act of packing luggage in the presence of others to create the impression that one is about to leave town.¹¹⁵ While those who observe this conduct may form a false belief, they 'have no right to expect that my action will express my real mind'.¹¹⁶ Although the deceiver has succeeded in deceiving others, Kant insisted that: 'I have not lied to them, for I have not expressed an opinion.'¹¹⁷ It is submitted that Kant's analysis of his example should not apply to sexual offences as the act of packing was intended to create a false belief that he was embarking on a journey. By making a false statement, the liar is indicating that he is expressing an opinion.¹¹⁸ This form of deception, which involves taking advantage of another's mistake, is capable of violating sexual autonomy if an individual is mistaken about a material fact and the deceiver, rather than correcting the mistake, takes advantage of this and uses C for his own gratification.

Roderick Chisholm and Thomas Feehan ask, 'why is lying thought to be worse . . . than other types of intended deception?'¹¹⁹ The authors' answer is that only lying involves assertion and 'lying, unlike the other types of intended deception, is essentially a breach of faith'.¹²⁰ Applying this reasoning to Kant's example of the packed bags, the authors argue that he has not invited his friends to assume that he is about to make a journey.¹²¹ Chisholm and Feehan (as well as Kant) fail to take into account the impact of deception on the individual's decision, as well as the fact that the deceiver has deliberately packed the bags for the purpose of misleading his friends. Deceptions may not involve an assertion, but they can amount to a breach of faith where the deceiver acts on the other's mistake. A prostitute who agrees to sex in the mistaken belief that she will be paid has had her decision manipulated by this deception.¹²² While it is true that she has agreed to sex and has not been misled as to the mechanics of the act, her agreement is based on the understanding that she would be paid for sex. Had she known the truth she would not have agreed to sex. Deception, therefore, uses an individual's own decision-making powers against them.¹²³ Alan Wertheimer notes that 'current social norms may understate the seriousness of sexual deception'.¹²⁴ He suggests that sexual consent may be vitiated by deception about one's marital status, an affair with a partner's sister, one's views on contentious moral issues like abortion, one's feelings, or one's intentions to marry.¹²⁵

Failure to protect sexual autonomy in cases involving mistake on C's part appears to hold individuals responsible for making an inference resulting from another's actions. This appears analogous to the concept of contributory negligence. The individual's ability to exercise self-determination in pursuing her own interests implies that others have a duty to honour this attempt, as she must honour that of others. Taking advantage of another's mistake, or deliberately engineering or procuring that mistake, is a violation of sexual autonomy because the person's decision to engage in sex has been influenced by the conduct of the deceiver. Kant's distinction between lying and deceiving is presumably

115 Kant (n 62) 226.

116 Ibid.

117 Ibid.

118 Roderick M Chisholm and Thomas D Feehan, 'The Intent to Deceive' (1977) 74 *Journal of Philosophy* 143, 149.

119 Ibid 153.

120 Ibid.

121 Ibid.

122 *Linekar* (n 30).

123 Herring (n 2).

124 Alan Wertheimer, *Consent to Sexual Relations* (Cambridge University Press 2003) 199.

125 Ibid.

based on the idea that individuals are rational, autonomous beings and ultimately responsible for their inferences.¹²⁶ However, the distinction cannot be justified where the end result is obtaining sex. Whether sex is obtained by lying or deceiving, sexual autonomy has been violated.

Returning to the case of the undercover police officers, it is irrelevant whether the deception as to their true identity was active or tacit. The issue for the courts should be whether withholding information manipulated C's sexual decision. Given the complainants' evidence to the Home Affairs Committee, it is doubtful they would have agreed to sex with police officers.

Non-disclosure and mistake should nullify consent because it prevents individuals from setting their own standards with regards to the characteristics of their sexual partners. Consent should be deemed valid where C is mistaken about D's attributes, such as his marital status, religious affiliations and wealth. Where D withholds information relating to a material fact, and he does so for the purpose of manipulating her decision to have sex, C's consent should be considered to have been vitiated by his non-disclosure. The focus should be on the impact the deceptive conduct had on the individual's choice. In *R v Cuerrier*,¹²⁷ the Supreme Court of Canada held that '[t]he dishonest action or behaviour must be related to the obtaining of consent to engage in sexual intercourse'.¹²⁸ This should consist of either deliberate deceit regarding D's HIV status or non-disclosure of that status.¹²⁹ Thus, without disclosure of HIV status, consent cannot be freely given. According to the court, 'consent cannot be simply to have sexual intercourse . . . it must be to have intercourse with a partner who is HIV-positive'.¹³⁰ This reasoning can be applied to any material fact. The issue is whether D manipulated C's sexual choice by taking advantage of her mistake.

A more recent Canadian case, with facts similar to *Assange*, is *R v Hutchinson*.¹³¹ C agreed to sexual activity with D, insisting that he use a condom to prevent conception. D deliberately poked holes in the condoms to get C pregnant without her permission. He succeeded in getting C pregnant, and this resulted in her having an abortion, which gave rise to complications. The trial judge found that the complainant had not consented to unprotected sex and convicted H of sexual assault. On appeal, the majority upheld the conviction on the basis that condom protection was an 'essential feature' of the sexual activity, and therefore the complainant did not consent to the 'sexual activity in question'. In relation to the concept of 'harm' caused by D's deception, the court concluded that:

'[H]arm' does not encompass only bodily harm in the traditional sense of that term; it includes at least the sorts of profound changes in a woman's body – changes that may be welcomed or changes that a woman may choose not to accept – resulting from pregnancy. Depriving a woman of the choice whether to become pregnant or increasing the risk of pregnancy is equally serious as a 'significant risk of serious bodily harm' within the meaning of *Cuerrier*, and therefore suffices to establish fraud vitiating consent.¹³²

126 Adler (n 73) 444.

127 *R v Cuerrier* [1998] 2 SCR 371.

128 *Ibid.*

129 *Ibid.*

130 *Ibid.*

131 *R v Hutchinson* (2013) 105 WCB (2d) 806 (a decision of the Nova Scotia Court of Appeal).

132 *Ibid* [70].

Hutchinson both actively deceived C and took advantage of her mistake relating to a material fact, namely, that he would use a condom to avoid an unwanted pregnancy. The court held that there was no consent because protected sex was an essential feature of the proposed sexual activity and not a separate component from what C was consenting to.¹³³ A fact which is material to C should, therefore, be an essential feature of the sexual activity.

The law's deficiency and inconsistent approach to responding adequately in cases involving non-disclosure of a material fact can be illustrated by using two examples¹³⁴ in which deception was used. In *R v Richardson*,¹³⁵ it was held that a dentist had not assaulted her patients merely because she treated them whilst suspended from practice. Allowing the appeal, it was held that an assault could only occur where consent was given in the mistaken belief that the dentist was other than she truly was. Although the complainants were unaware that D was no longer qualified to practise, they were fully aware of her identity. D's non-disclosure, about a material fact such as medical qualifications, would not go to the nature or purpose of the act. A different outcome was reached in *R v Tabassum*,¹³⁶ where several complainants allowed D to examine their breasts on the basis of a false representation that he was medically qualified and conducting a survey into breast cancer. The evidence showed that, in fact, he was attempting to develop software to increase his chances of being accepted into a medical school. In dismissing his appeal, the court concentrated on the fact that D had deceived the complainants as to his medical qualifications.¹³⁷

While both the above cases concern D's lack of medical qualifications, a distinction can be drawn: the complainants in *Richardson* were mistaken due to D's deliberate non-disclosure, whereas *Tabassum* actively deceived the complainants. In both cases, the defendants carried out deception in order to use the complainants for their own gain; *Richardson* so that she could continue to practise as a dentist, and *Tabassum* so that he could develop his software. The argument made in this paper is that this distinction is arbitrary, ethically suspect, has no regard for personal autonomy and should not form the basis of sexual offence laws.

A potential objection to this proposal might be that it requires individuals from a sexual minority to disclose intimate personal details regarding their sexual past or sexual orientation. For example, a bisexual man who does not disclose his sexual orientation could be criminalised under the proposed recommendation. Similarly, a post-operative transsexual who fails to disclose this fact could also be criminally liable. It could be argued that on policy grounds non-disclosure of these facts should constitute an exception to the proposal advanced in this article. However, if the primary aim is the protection of sexual autonomy, as this article has argued, distinctions should not be made between different material facts.

Practical steps to protecting sexual autonomy

It has been argued that in protecting sexual autonomy where C's agreement is obtained by deception, active or tacit, criminal law should allow for the potential that any material fact may negate consent by removing the distinction between lying and deceiving. The

133 Ibid [98].

134 It is acknowledged that neither case deals with the Sexual Offences Act 2003.

135 *R v Richardson* [1999] QB 444.

136 *R v Tabassum* [2000] 2 Cr App R 328.

137 Ibid.

deception, lie or mistake must relate to a material fact¹³⁸ and must have induced C to agree to sex. However, the deception need not be directed at C. Similarly, C's mistake in relation to a material fact about D need not be created by D. Since the sheer use of another is morally wrong, D must not only respect C's autonomy but must also take reasonable steps to allow C to exercise her autonomy and ensure that C is free from deceptions and manipulation to provide consent.¹³⁹ An example of a deception which is not specifically aimed at a complainant is where D, who is married, creates a profile on an online-dating website. He 'meets' with C online who explains that she is seeking a long-term relationship and that she does not wish to engage in relationships with married men. They decide to meet in person and, prior to their meeting, D removes his wedding ring. If C agrees to sex, her consent is vitiated by D's deception due to various factors. First, D's representation about his marital status is false and he knows that it is false. Secondly, the deception can take the form of conduct or omission. An omission occurs where D fails to correct C's mistake about a material fact. Thirdly, D's deception, or lie, must be one 'of fact'.¹⁴⁰ This requirement also covers promises made by D which invite reliance upon and which are made in order to induce C into agreeing to sex.¹⁴¹ Fourthly, the deception, unlike a lie, need not be directed at C. This can be achieved either directly or indirectly. An example of indirect deception is where D conveys information to a third party with the intention that the third party will convey the information to C.¹⁴² Fifthly, the deception, lie or mistake must have induced C's agreement. To cover situations where the deception was an inducement which was not actively present in C's mind at the time at which she agreed to sex,¹⁴³ inducement includes circumstances where D deliberately withheld a fact which may be material to C. This requirement imposes a duty on D to disclose information which is material if he reasonably believes that it will influence her agreement.¹⁴⁴ In the context of contract law, English law does not require the representation to take the form of words.¹⁴⁵ Representation can be made by conduct or can be inferred from the facts and circumstances of the case. In sexual relationships, information can be conveyed as much by conduct as by words. Thus, removal of a wedding ring or wearing religious symbols ought to be used as evidence that C was induced by D's deception. Similarly, active concealment or non-disclosure of a material fact ought to negate consent. If a relationship with an insurance company gives rise to *uberrimae fidei*,¹⁴⁶ it seems extraordinary that sexual relationships are prevented from being granted similar status.¹⁴⁷ Criminal law does recognise liability for non-disclosure in the context of fraud, which imposes a duty to 'disclose to another person information which he is under a legal duty to disclose'.¹⁴⁸ No such duty exists in relation to sexual activity between adults of sound mind.¹⁴⁹ Imposing a duty of disclosure and not taking

138 According to the individual complainant, is an essential feature of the sexual activity.

139 Herring (n 77) 32.

140 *People v Evans* (1975) 85 Misc 2d 1088.

141 *Linekar* (n 30).

142 *Commercial Banking of Sydney v RH Brown and Co* [1972] 2 Lloyd's Rep 360.

143 *Horsfall v Thomas* (1862) 1 H & C 90.

144 The *mens rea* requirement for non-consensual sexual offences ensures that D will not be prosecuted when he did not know that C would regard a particular fact fundamental to her consent.

145 *Spice Girls Ltd v Aprilia World Service BV* [2000] EWHC Ch 140.

146 Utmost good faith.

147 Peter Alldridge, 'Sex, Lies and the Criminal Law' (1993) 44(3) Northern Ireland Legal Quarterly 250, 261.

148 S 3 of the Fraud Act 2006.

149 S 34 of the Sexual Offences Act 2003 deals with procuring sexual activity by inducement, threat or deception with a person with a mental disorder.

advantage of C's autonomy in sexual relationships requires accepting that individuals are entitled to engage in a cooperative and mutually beneficial relationship.¹⁵⁰

Conclusion

As shown by the court decisions above, the law does not allow individuals the freedom to act according to their own sexual preferences. The criminal law should protect the right to sexual autonomy and sexual integrity.¹⁵¹ Lying and the broader concept of deceiving have the same potential to negative consent. The method of deception employed should thus be irrelevant, provided the deception or lie relates to a material fact and results in manipulating another's sexual choice. Both lying and deceiving negatively impact on sexual autonomy by limiting options with the consequence that an individual cannot be said to have consented to sex. The issue of materiality is significant, but is essentially a question of fact to be determined in each case as opposed to a generic question of law.

Although this proposal may seem radical, it could in fact be accommodated within the existing law of sexual offences as it does not entail rejecting the definition of consent in s 74 of the Act. Any suggestion to introduce a lesser, distinct offence designed to capture deceptive forms of sexual coercion should be resisted as this obscures a vital principle: a lesser offence ignores the fact that deception intended to limit sexual choice negates consent. The proposed approach is akin to the *Olugboja* direction in that the jury would be required to focus on the state of mind of the individual. Widening the law in the manner suggested surely recognises that all forms of deception have the potential to violate sexual autonomy. Whether any given fact or factor is material is case-specific; so too is the reason why the defendant behaved as he did. It should not be forgotten that the defendant would also have to satisfy the *mens rea* of the offence. Complete autonomy is impossible. However, the concept developed in this article involves recognising that individuals are autonomous beings worthy of respect. Implicit in this is the right not to be deceived. This concept is based on the premise that individuals have legitimate interests capable of being pursued, which others should respect and which the criminal law should protect.

150 Herring (n 77) 32.

151 The difference between the right to sexual autonomy and to sexual integrity is discussed in Lacey (n 35).

