

# **Betrayed, Deceived and Violated: A Critical Feminist Analysis of the *R v Lawrence* Judgment**

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## **Abstract**

This article considers the judgment in the case of *R v Lawrence* from a feminist perspective. Currently, scholarly discussion of the judgment highlights several key issues, including the court's failure to recognise pregnancy risks as being closely related to sexual intercourse and the importance of conditional consent in sexual relations. There is a lack of feminist analysis of the judgment in existing scholarship and to fill this gap, this article will first review feminist literature on the notion of consent, discuss a wide range of views in relation to women's capacity and agency to consent, and highlight how sexual relations have always been considered from a male perspective. Then, this article will further explore women's views on the notion of consent and the specific concerns raised in the *R v Lawrence* case through empirical research, findings of which show that women are overwhelmingly uncomfortable with the situation that has arisen in the case and that the majority of women believe that there should be criminal punishment for those who are deceitful in attempts to have unprotected sex. This article will argue that from a critical feminist perspective, the judgment in *R v Lawrence* has failed to justly and fairly assess the consequences closely connected to sexual acts, recognise the conditional consent that was present in this case, and consider women's concerns when consenting to sex.

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# 1 Introduction

Sexual assault is a crime that impacts many women across the UK with statistics showing that one in four women will suffer some sort of sexual assault or abuse in their lifetime.<sup>1</sup> Such crimes are among some of the hardest to prosecute, with only two in a hundred accused rapes resulting in a charge.<sup>2</sup>

*R v Lawrence*<sup>3</sup> is a case which has brought into question how effective the sexual offences legislation is on managing deceit, especially in relation to the notion of conditional consent. In the case, the defendant lied about having a vasectomy and had sexual intercourse with the complainant, who only agreed to have sex on the basis of the defendant's claims of infertility. The court ruled that this type of deceit did not negate the consent of the complainant. The outcome of this case now sits in case law with discomfort and leaves the position of women's concerns when consenting to sexual acts undetermined.

Legal scholars have questioned the court's failure to consider the deceit involved in the case, the notion of conditional consent, and the close connection between sexual acts and pregnancy risks. Despite the scholarly debate so far, there is a lack of feminist analysis of the judgment in current literature, even though the outcome of the case would significantly affect women if they happen to unfortunately be caught in a similar scenario.

This article seeks to contribute to the current scholarship by providing a critical feminist analysis of the judgment which is missing in existing scholarship. This article will focus on exploring the following questions: What does feminist literature think about consent? To what extent do women consider pregnancy risks when consenting to sexual intercourse? Do women believe that deceit over vasectomy status negates consent? To what extent should the creation of significant risk through the non-disclosure of information impact criminal liability, if at all?

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<sup>1</sup> 'Rape, Sexual Assault and Child Sexual Abuse Statistics' (*Rape Crisis England & Wales*, 2023) <<https://rapecrisis.org.uk/search/?query=Rape%2C+Sexual+Assault+and+Child+Sexual+Abuse+Statistics>> accessed 1 September 2023.

<sup>2</sup> Ibid.

<sup>3</sup> *R v Lawrence* [2020] EWCA Crim 971.

To answer these questions and consider whether the court judgment is fair and just from a feminist perspective, this article will first review the facts, arguments and judgment of the case and consider scholarly commentary on this topic. Second, to ground the feminist analysis, this article will review feminist literature and discuss the wide range of feminist views on the notion of consent in sexual relations. This article will highlight the dominance of patriarchal perspectives and how women's views are excluded. Third, this article will explore women's views on the notion of consent through empirical research. Finally, this article will combine findings from the feminist literature review and empirical research to make two arguments: first, the court judgment fails to consider women's perspectives on consent within sexual relations and second, the notions of deceit and conditional consent need to be reassessed in the court ruling and within the broader legal framework to level the playing field between the parties consenting to sexual acts.

## **2 What is so Controversial about *R v Lawrence*?**

To understand why the *R v Lawrence* case is so controversial, an understanding of consent within current legislation and case law is needed. This section will then consider the facts of the case and the arguments presented by the prosecution and defence before going on to detail the reasoning behind the appeal court's decision. Finally, this section shall discuss the commentary following this case on why the court's decision is contentious.

### **2.1 What does Consent mean and when can it be Negated? A Review of Current Legislation and Case Law**

The Sexual Offences Act 2003 describes consent as follows: 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice'<sup>4</sup>

Consent is the most fundamental aspect of deciding whether what took place was sex between consenting adults or rape (or another sexual offence). The absence of consent determines whether a wrong, and a crime, has been committed.

Within the legal framework and subsequent case law, consent can be negated on several grounds. For example, for any sexual activity with a child under the age of 13, consent does

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<sup>4</sup> Sexual Offences Act 2003 s74.

not need to be established as children are considered not to have the capacity to consent to such acts.<sup>5</sup> Case law has determined various other incidences when consent is negated, for example if a condom was removed without the knowledge of the other person.<sup>6</sup>

In addition, section 76 of the 2003 Act establishes that a complainant did not consent, and the defendant did not believe that the complainant consented when:

*'(a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;*

*(b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant'*<sup>7</sup>

This section establishes that deceit by a defendant can negate the consent of a complainant in so far as the court can recognise that the deceit was related to the nature and purpose of the act. Additionally, it establishes that the defendant in such cases cannot believe the complainant has consented. It is the court's application of this provision that is pertinent to the debates around the *R v Lawrence* case.

## **2.2 What is *R v Lawrence* about?**

The facts of the *R v Lawrence* case are as follows: The complainant (R) and the defendant (Lawrence) met using an online dating site in 2014. Their messages and phone calls later became sexually explicit. The pair discussed a sexual encounter that R had with another man. Lawrence asked whether the man used a condom. R replied that the man did not wear a condom as 'he had the snip years ago'. Lawrence replied, 'so have I'. Later in July 2014, the pair met in person, spent the evening together, and then returned to R's home. In the evidence submitted to the court, R stated that she made it clear to Lawrence that she did not want to risk becoming pregnant and sought assurances from Lawrence that he had had a vasectomy. Lawrence gave assurances and the pair had sexual intercourse on two occasions without the use of any contraception. Lawrence left during the night and in the morning sent messages to R, stating 'I

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<sup>5</sup> Incidents of sexual nature with children under the age of 13 is detailed in the Sexual Offences Act 2003 from ss 5 to 19 as well as Familial child sex offences in ss 25 to 26.

<sup>6</sup> *Assange v Swedish Prosecution Authority* [2011] EWHC 2849; as well as *R (F) v DPP* [2014] QB 581; [2013] EWHC 945 for agreement to withdraw that did not happen.

<sup>7</sup> Sexual Offences Act 2003 s 76.

have a confession. I am still fertile. Sorry.’ R read these messages and later found out she was pregnant and underwent a pregnancy termination procedure.<sup>8</sup>

The case was initially heard at the Nottingham Crown Court in 2019, where the jury convicted the defendant to two counts of rape for falsely representing that he had a vasectomy,<sup>9</sup> among other sexual offences against other complainants within the same case. The defendant appealed the counts of rape and took the case to the Court of Appeal in 2020, where the court decided to overturn the previous ruling. The court ruled that the actions of the defendant did not constitute rape and that his false representations did not negate the consent of the complainant. This article discusses the ruling of the case at the Court of Appeal.

### **2.3 What were the Arguments of the Case?**

The prosecution argued that the complainant’s consent was vitiated by the defendant’s deception as to his fertility status. This relates to section 76 Sexual Offences Act 2003, which highlights that the complainant did not consent when ‘the defendant intentionally deceived the complainant as to the nature and purpose of the relevant act’.<sup>10</sup> Prosecutors argued that the defendant’s deceit was sufficiently closely connected as part of the act of sexual intercourse. This was because one of the fundamental purposes of sexual intercourse is the ‘procreation of children’.<sup>11</sup> The prosecution argued that the deceit should negate the complainant’s consent. In essence, the prosecution argued that the complainant’s consent was conditional on the defendant not being fertile. The prosecution argued that even if the defendant believed that the complainant was consenting, this was an unreasonable belief given the prior conversations which took place around the subject matter.<sup>12</sup> This links to section 76 of the 2003 Act again, which states that the defendant cannot believe that a complainant consented when they are intentionally deceived.

The defence on the other hand argued that the deceit went towards the *consequences* of the sexual act—namely that there was a risk of pregnancy—rather than to the act itself. They argued that the pregnancy risk was not sufficiently connected with the sexual act. The defence

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<sup>8</sup> Full details of the facts can be found in the case transcription: *R v Lawrence* (n 3) [3]–[7].

<sup>9</sup> *R v Lawrence* (n 3) [1].

<sup>10</sup> Sexual Offences Act 2003 s 76.

<sup>11</sup> *R v Lawrence* (n 3) [14].

<sup>12</sup> *Ibid* [6].

argued that ejaculation entering the vagina was related to an integral part of the sexual act but that the consequence of this ejaculation was not. As the deception went not to the physical act itself, but to the ‘quality of the ejaculate and the potential consequences and risks associated with it’,<sup>13</sup> the defence argued that the complainant had consented to every aspect of the physical act.<sup>14</sup> The defence cited *Assange*<sup>15</sup> and *R(F) v DPP*,<sup>16</sup> in which consent was on the basis that ejaculate would not enter into the complainant’s vagina, and argued that in this case, the ejaculate was ‘not sought to be avoided’.<sup>17</sup>

## 2.4 What was the Court Ruling?

The Court of Appeal accepted the appeal and quashed the defendant’s convictions of two counts of rape. The court stated that the deception regarding fertility was not capable of negating consent.<sup>18</sup> The judgment outlined that a lie about fertility was different to lying in regard to wearing a condom or engaging in intercourse not intending to withdraw despite having promised to do so.<sup>19</sup> The court did not believe that the defendant’s deception was closely connected to sexual act.<sup>20</sup> Important to the court’s reasoning was that the complainant did not impose any physical restrictions to the sexual intercourse.<sup>21</sup> Specifically, the court stated:

*‘she was deceived about the nature or quality of the ejaculate and therefore of the risks and possible consequences of unprotected intercourse. The deception was one which related not to the physical performance of the sexual act but to risks or consequences associated with it.’*<sup>22</sup>

In other words, the court was not convinced that fertility status is related closely enough to the sexual act in order to negate consent and ruled that the incidents that took place were not rape.

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<sup>13</sup> Ibid [19].

<sup>14</sup> Ibid [20].

<sup>15</sup> *Assange v Swedish Prosecution Authority* (n 6)—complainant agreed to sexual intercourse only if Assange wore a condom, but he did not do so or removed it during intercourse.

<sup>16</sup> *R (F) v DPP* (n 6)—complainant consented to intercourse only on the basis that the defendant would withdraw before ejaculation but he never intended to comply with that condition and did not do so.

<sup>17</sup> *R v Lawrence* (n 3) [11].

<sup>18</sup> Ibid [43].

<sup>19</sup> Ibid [36]; *Assange v Swedish Prosecution Authority* (n 6).

<sup>20</sup> *R v Lawrence* (n 3) [35]–[37].

<sup>21</sup> Ibid 37.

<sup>22</sup> Ibid.

## 2.5 How did Legal Scholars react to the Judgment?

Scholarly discussion around the case has centred around the connection between sexual acts and pregnancy risks and the notion of conditional consent in sexual relations.

In relation to the risk of pregnancy resulting from sexual acts, it has been argued that the ‘vasectomy versus condom’ distinction arising from the case is merely an artificial one as both are measures to protect against the same potential consequence, namely pregnancy.

Dyson argued the case’s discussion of sex and pregnancy as:

*‘creating the untenable claim that ejaculate containing fertile sperm is not physically different than ejaculate without it ... focuses only on physical elements of the conduct, ignoring all other things which a reasonable person might say were related to sex.’<sup>23</sup>*

The court’s statement that it considered pregnancy as not ‘closely connected to the nature or purpose of sexual intercourse’ and instead as connected to the ‘risks or consequences associated with it’ has been confusing to scholars, who find the reasoning ‘probably hard to follow’.<sup>24</sup> Dyson argues that for a great number of people, the very purpose of sex is to reproduce and become pregnant. The idea that pregnancy is not closely connected to the nature or purpose of sexual intercourse is certainly an idea that leads to confusion and leaves the case sitting uncomfortably in the legal framework.

In relation to conditional consent, Dyson further argues that to decide the nature of the sexual activity, one has to look at the terms the parties participating in the sexual act have agreed to.<sup>25</sup> The defendant and the complainant in the *R v Lawrence* case agreed to unprotected sex with certain conditions, but the complainant did not know that the conditions were not being met. Dyson states ‘[t]he sperm created a factually relevant risk and one the parties agreed to exclude’,<sup>26</sup> highlighting the pair in the case had agreed to sex and the consent was conditional on the exclusion of this risk.

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<sup>23</sup> Matthew Dyson, ‘Redefining Sexual Conditions’ (Criminal Law Reform Now Network Report, 2023) 39 <<http://www.clrmn.co.uk/media/1031/clrmn3-deception-report.pdf>> accessed 7 June 2023.

<sup>24</sup> Ibid 40.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

Buxton in his analysis further explores conditional consent, arguing that:

*‘Any condition whatsoever, if found to have been seriously intended as a precondition to intercourse, should vitiate consent if deception is practised by the defendant to create the false impression that the precondition is fulfilled.’<sup>27</sup>*

What the deception was about has been given more weight than the very fact that there was a deception in this case. If it was not for Lawrence’s claim of infertility, the complainant would not have consented to sexual intercourse. Herring raises this issue further, stating:

*‘if a condition is put on consent then the consent is only effective if that condition is met, regardless of the triviality of the condition.’<sup>28</sup>*

The condition in this case was that the complainant did not wish to be exposed to the risk of pregnancy as an outcome to sex.

Within the broader legal framework, the case of *R v Lawrence* has raised questions on how the 2003 Act deals with deceptions in sexual offences. Dsouza highlights that within the 2003 Act, there has been an unexplained failure by the Parliament to include a provision similar to section 3 of the Sexual Offence Act 1956, which previously criminalised obtaining consent by deception, reading as:

*‘It is an offence for a person to procure a woman, by false pretences or false representations, to have unlawful sexual intercourse in any part of the world.’<sup>29</sup>*

In comparison to the 2003 Act, the 1956 Act is far more open to interpretation and the circumstances that fall under it as a result. The idea that the Parliament intended to decriminalise deceiving people to obtain consent is certainly odd. Leaving deceptions to be dealt with through section 76 of the 2003 Act has placed an onerous reliance on the nature and

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<sup>27</sup> Richard Buxton, ‘Consent in Rape: Fact, Not Law’ (2020) 79 CLJ 391.

<sup>28</sup> Jonathan Herring, ‘Consent Mistaken’ (Criminal Law Reform Now Network Report, 2023) 56–57 <<http://www.clrn.co.uk/media/1031/clrn3-deception-report.pdf>> accessed 7 June 2023.

<sup>29</sup> Sexual Offences Act 1956 s 3; Karl Laird, ‘Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003’ (2014) 7 Crim LR 492 at 499–500.



purpose of the act, which has been left to the courts to navigate. When the court does decide on the nature and purpose of the sexual act in relation to consent and deception, its reasoning could lead to confusion, as in the case of *R v Lawrence*.

## 2.6 Why is a Feminist Analysis of the Case Needed?

Despite the keen scholarly debate on the *R v Lawrence* case, there has been no feminist analysis of the judgment thus far. Such a lack of feminist analysis is at odds with a wider movement, which reconsiders judgments from feminist perspectives due to many holding the view that the law is built upon and facilitates the continuation of patriarchal perspectives. One telling example is the Feminist Judgments Project across the globe which aim to create judgments which are fairer and just from feminist perspectives, considering the impacts of patriarchy on the society.<sup>30</sup> Given its impacts on women, reconsidering *R v Lawrence* from a feminist perspective is a useful exercise to analyse the case outcome. Besides, as Lather describes, adopting a feminist methodology would ensure it overcomes the invisibility or distortion of the female experience.<sup>31</sup> Feminist research is a transformative methodology as it attempts to ‘redress the power imbalance between the sexes’<sup>32</sup> which is closely aligned with social justice and attempts to reduce power imbalance.<sup>33</sup> A feminist methodology is embedded in the review of feminist literature in Section 3, as well as in the empirical research components, which will be detailed in Section 4 to help thoroughly reconsider the outcome of *R v Lawrence* from a feminist perspective.

## 3 Feminist Perspectives on Consent

Consent is the most fundamental issue when distinguishing between sex and rape. To analyse *R v Lawrence* from a critical feminist perspective, feminist views on consent will be explored. It must be noted that feminism is not singular—it is a wide- and far-reaching movement with a range of views. From radical feminist Catherine MacKinnon and liberal feminist Katie

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<sup>30</sup> Rosemary Hunter, ‘The Feminist Judgements Project’ (*UKSCBlog*, 17 January 2010) <<https://uksblog.com/the-feminist-judgments-project/>> accessed 17 July 2023.

<sup>31</sup> Patti Lather, ‘Feminist Perspective on Empowering Research Methodologies’ (1988) 11 *Women’s Studies International Forum* 569.

<sup>32</sup> Helen Kara, *Research and Evaluation for Busy Practitioners: a Time-Saving Guide* (Policy Press 2012) 238.

<sup>33</sup> Helen Kara, *Creative Research Methods in the Social Sciences: A Practical Guide* (Policy Press 2015) 38; Kara (n 32) 46.

Roiphe to those sitting within the middle ground like Sylvia Walby and Lois Pineau, this section will navigate the landscape of feminist movement and their perceptions of consent.

### 3.1 Radical Feminism: All Penetrative Sex is Rape ...?

MacKinnon, a radical feminist, has often been misunderstood to have believed that all penetrative sex is rape.<sup>34</sup> This misunderstanding was a result of MacKinnon, like others such as Carole Pateman, sharing in their criticism of women's capacities to consent under the social contract. After all, 'if the accused knows us, consent is inferred.'<sup>35</sup>

Pateman poignantly describes this in her work, 'Women and Consent', that '[o]nly if women are seen as "free and equal individuals" is their consent relevant at all'.<sup>36</sup> MacKinnon echoed similar views throughout her works. These views stemmed from women lacking the power and ability to consent historically, resulting in a flawed assumption of consent within relations (such as husband and wife relations). This view lends itself to a belief that all penetrative sex is rape. If women are not free and equal individuals, which they cannot be under the patriarchal system, women cannot consent at all. The lines between rape or sexual assault and consensual sex are blurred as a result.<sup>37</sup>

MacKinnon did not believe that all penetrative sex was rape, but rather that in a world constructed by sex inequality with all-encompassing gender norms, we must question 'the supreme transformative power we assign to consent'.<sup>38</sup> As MacKinnon writes:

*'If sex is normally something men do to women, the issue is less whether there was force and more whether consent is a meaningful concept.'*<sup>39</sup>

Central to radical feminism the idea that men and women can consent on an equal footing is false. Rape to MacKinnon is defined in male sexual terms and the law adjudicates the

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<sup>34</sup> Joseph J Fischel, *Screw Consent* (1st edn, University of California Press 2019) 13.

<sup>35</sup> Catherine MacKinnon, 'Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence' (1983) 8 *Signs* 635, 648.

<sup>36</sup> Carole Pateman, 'Women and Consent' (1980) 8 *Political Theory* 149, 152.

<sup>37</sup> Allison Moore and Paul Reynolds, 'Feminist Approaches to Sexual Consent' in M Cowling and P Reynolds (eds), *Making Sense of Sexual* (Ashgate 2004) 33; Moore and Reynold raise that this theory 'effectively reduce all heterosexual sex to an act of rape'.

<sup>38</sup> Fischel (n 34) 14.

<sup>39</sup> MacKinnon (n 35) 650.

level of acceptable force from the level of normal male sexual behaviour, rather than from the victims', or women's, point of view.<sup>40</sup> Force, despite not being a requirement for rape since 1841 in the UK,<sup>41</sup> has remained a huge rape myth<sup>42</sup> and is still included in the rape legislation in many other countries.<sup>43</sup> When force as a requirement for rape is within public consciousness, it is unsurprising that other male behaviour to procure sex without the use of physical force was seen as acceptable. MacKinnon, in her work 'Privacy and Equality', highlights this point, stating:

*'it cannot be so presumed under the conditions of inequality, because what one lets happen under unequal conditions may not be the same as what one wants.'*<sup>44</sup>

When inequalities exist, it must be recognised what happens under this condition may not be clear. One may tolerate behaviour out of fear or lack of choice, for example. Lack of violence does not mean that the actions were consensual.

Feminists who raise these larger philosophical questions over women's capacities to consent could be coined with being on the more extreme sides of the feminist spectrum. In doing so, they raise key questions about our society which allow us to think more critically. MacKinnon has highlighted the idea that sex has been and still is determined through a male perspective.

## 3.2 Liberal Feminism

The idea that all feminists believe that women have absolutely no control would be naïve. There are feminists who would argue that feminism has gone too far by the arguments that radical feminism raises. For example, Moore and Reynold, in *Making Sense of Sexual Consent*, criticise the analysis of radical feminism as denying the possibility of consent as it 'takes away

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<sup>40</sup> Ibid 649.

<sup>41</sup> Carolyn A Conley, 'Rape and Justice in Victorian England' (1986) 29 *Victorian Studies* 519, 520.

<sup>42</sup> Rape Myths are gendered stereotypes of what constitutes rape, or is a requirement of rape, which often place the victim at fault of their assaults. 'Rape and Sexual Offences—Annex A: Tackling Rape Myths and Stereotypes' (*The Crown Prosecution Service*, 2021) <[www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-annex-tackling-rape-myths-and-stereotypes](http://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-annex-tackling-rape-myths-and-stereotypes)> accessed 17 August 2023.

<sup>43</sup> For more details in Europe see Amnesty Report that discusses the 23 European countries that have legal definitions based on force, threat of force or coercion and not on lack of consent: 'Europe: Right to Be Free from Rape—Overview of Legislation and State of Play in Europe and International Human Rights Standards' (*Amnesty International*, 1 June 2021) 12 <[www.amnesty.org/en/documents/eur01/9452/2018/en/](http://www.amnesty.org/en/documents/eur01/9452/2018/en/)> accessed 17 July 2023.

<sup>44</sup> Catherine MacKinnon, 'Privacy and Equality: Notes on Their Tension' (2000) 21 *The Tocqueville Review* 77, 83.

the sexuality of those women who give positive accounts of sexual relations'.<sup>45</sup> It is not just positive accounts of feminism though, as there are feminists who place significant responsibility on women within sexual relations.

Katie Roiphe, in response to the discussion around sexual harassment policy across American college campuses, wrote her infamous book *The Morning After: Fear, Sex and Feminism*.<sup>46</sup> In her book, she argued that women's freedom is curtailed by feminists<sup>47</sup> and believed that women are responsible for their own actions. Roiphe argued that women, specifically students on college campuses in the US, were being conditioned to victimhood and refusing to acknowledge their own responsibilities. Women were not just able to make their own decisions, but also, in Roiphe's view, they should withstand pressures.<sup>48</sup> So far that coercion and manipulation would not negate consent,<sup>49</sup> Roiphe would consider it 'problematic' to call an encounter rape when a woman was given drugs or alcohol, as that woman has free choice whether to take it.<sup>50</sup> Roiphe believed the idea that women can be coerced 'portrays women as mentally and emotionally weak and effectively infantilises them'.<sup>51</sup> Roiphe placed significantly more responsibility onto women within sexual encounters, which has resulted in a great amount of criticism for her views.

Pollitt criticises that Roiphe 'wants women to be more vocal about sex, yet here she is dismissive of the suggestion that men ought to listen'.<sup>52</sup> Moore and Reynolds, likewise to Pollitt in her article, highlight the lack of empirical evidence to support the statements Roiphe raises,<sup>53</sup> as she writes from personal experience<sup>54</sup> rather than an expression of women's views as a whole. Moore and Reynolds additionally raise that Roiphe believes verbal coercion is able to negate consent, which could open any form of sexual intercourse to be considered rape should a woman regret it down the line.<sup>55</sup> Looking at the liberal movement, arguably too much emphasis is placed on a women's agency that harassment against women becomes the women's

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<sup>45</sup> Moore and Reynolds (n 37) 33.

<sup>46</sup> Katie Roiphe, *The Morning After: Sex, Fear and Feminism* (Hamish Hamilton 1993).

<sup>47</sup> Katha Pollitt, 'Not Just Bad Sex' (*The New Yorker*, 1993) <[www.newyorker.com/magazine/1993/10/04/not-just-bad-sex](http://www.newyorker.com/magazine/1993/10/04/not-just-bad-sex)> accessed 17 July 2023.

<sup>48</sup> Roiphe (n 46) 68

<sup>49</sup> Moore and Reynolds (n 37) 35

<sup>50</sup> Roiphe (n 46) 53

<sup>51</sup> Ibid 67

<sup>52</sup> Pollitt (n 47).

<sup>53</sup> Moore and Reynolds (n 37) 35; Pollitt (n 47).

<sup>54</sup> Moore and Reynolds (n 37) 36; Pollitt (n 47).

<sup>55</sup> Moore and Reynolds (n 37) 35.

problem to avoid rather than at the fault of men's inappropriate behaviour. Moreover, this view fails to recognise the gendered lens which can impact a women's ability to consent that radical feminism tried so desperately to bring to light.

### 3.3 The Middle Ground and 'risky' Women

In 'Date Rape', Lois Pineau discusses the idea of 'risky' women, arguing that there is a 'belief that a woman generates some sort of contractual obligation whenever her behaviour is interpreted as seductive'.<sup>56</sup> Estrich further believes there has been a focus on the behaviour of a victim throughout decisions by the courts and resistance to force has previously been used as an indicator of whether a male's behaviour is non-consensual.<sup>57</sup> In addition, Estrich raises a common belief that women who put themselves into certain situations, such as behaving in sexually provocative ways, 'shouldn't complain when they are compromised'.<sup>58</sup>

Scholars show that it is increasingly common for women to be held to higher levels of responsibility and told that they should have never put themselves into situations which may lead to risks. Malloch echoes this, stating that 'victim status is often a status that needs to be earned'<sup>59</sup> and women are expected to implement strategies to avoid being harmed. Force may not be a legal requirement now,<sup>60</sup> but it hasn't left the public consciousness still as a rape myth.<sup>61</sup> Problematically, this shifts blame from the perpetrator to the victim, holding women responsible for being sexually assaulted. Additionally, the feminist perspective highlights that the ignorance of male behaviour and over-analysis of women's behaviour continue the thesis that sexual relations is considered from a male perspective.

Walby highlights the importance of a middle ground in viewing the notion of consent, arguing that, '[women are] engaging in sexual relations on what might be regarded as an "uneven playing field" but they are still "playing."' <sup>62</sup>

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<sup>56</sup> Lou Pineau, 'Date Rape: A Feminist Analysis' (1989) 8 *Law and Philosophy* 217, 229–230.

<sup>57</sup> Susan Estrich, *Real Rape* (Harvard University Press 1987) 29–41.

<sup>58</sup> Susan Estrich, 'Palm Beach Stories' (1992) 11 *Law and Philosophy* 5, 10.

<sup>59</sup> Margaret S Malloch, "'Risky' Women, Sexual Consent and Criminal "Justice"" in Cowling and Reynolds (n 37) 112.

<sup>60</sup> Force is no longer a requirement for rape in UK sexual offence law—see (n 41).

<sup>61</sup> See (n 42).

<sup>62</sup> Moore and Reynolds (n 37) 37.

Walby's assessment attempts to recognise the impacts of patriarchy on women's experiences while not reducing them to being unable to consent or placing an over emphasis on their agency. Such a middle-ground view has been echoed by more contemporary feminist scholars, such as Aria Srinivasan who famously wrote,

*'We want feminism to be able to interrogate the grounds of desire, but without slut shaming, prudery or self-denial: without telling individual women that they don't really know what they want, or can't enjoy what they do in fact want, within the bounds of consent.'*<sup>63</sup>

Middle-ground perspectives recognise that women can want to have sex, but the all-encompassing, sometimes coercive, harassing and violent methods to procure sex which sadly take place in society must be taken into account.

Despite the variance in their views on consent, different schools of feminism do share one argument in common, namely that the male perspective has been the overarching and normative perspective in society. As Moore and Reynolds argue, 'Sexuality is determined by and characterised through a male referent, predicated on male desire, pleasure, fantasy and power.'<sup>64</sup>

Given the patriarchal norms of the society, it must be noted that perspectives on consent have been developed persistently from a male perspective. The rape myth that force is a requirement for an act to be considered rape confirms that a patriarchal view of sex prevails. As Srinivasan asserts, 'it is patriarchy that makes sex, as we know it, what it is'.<sup>65</sup> To balance the playing field, and consider the *R v Lawrence* case from a critical feminist perspective, we must consider consent from a women's perspective and adapt accordingly.

The discussion on the merits and pitfalls of various feminist views on the issue of consent is important for developing a feminist understanding of consent and exploring how best to approach consent in the context of analysing the *R v Lawrence* case from a feminist perspective, given the lack of feminist analysis on this case so far. Feminists have importantly recognised

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<sup>63</sup> Aria Srinivasan, *The Right to Sex: Feminism in the Twenty-First Century* (Bloomsbury 2022) 86.

<sup>64</sup> Moore and Reynolds (n 37) 31.

<sup>65</sup> Srinivasan (n 63) 77.

that women can want to have sex, but that does not mean they should be blamed for sexual acts of which consent is questionable. They also recognise that historically and continuously, perceptions of sexual relations have been dominated by male perspectives. When looking at the case of *R v Lawrence*, it is appropriate to take on a more middle-ground approach which attempts to balance the playing field between sexual partners. After considering the feminist literature in this section, it is now important to consider women's views on the notion of conditional consent within sexual relations and how they would be impacted by the deception that took place in the *R v Lawrence* case through empirical research.

## **4 Empirical Research: What Do Women Think about Consent in Sexual Relations?**

### **4.1 Methodology**

To understand women's views on the notion of consent and the issues arising from the *R v Lawrence* case, semi-structured interviews and surveys were undertaken. For semi-structured interviews, invitations were sent via email to over 20 women's organisations from various communities, such as organisations that support women with experience of sexual assault and women's religious groups. After participants expressed an interest to participate, the participant information sheet and consent form were sent to them prior to the interview. Two interviewees participated in the semi-structured interviews. To collect opinions from the wider public and to understand women's views on consent, the risk of pregnancy when consenting to sex, and their opinions on the issues arising from *R v Lawrence*, an anonymised survey was launched. The survey was designed through a Google Form using the University of York's secure server. It was then distributed to all the women's groups contacted for an interview and through the author's own social media. Fifty-five respondents completed the survey.

Interviews were transcribed verbatim and anonymised. Thematic analysis was undertaken to analyse the transcripts. Thematic analysis is described as a 'matrix-based method for ordering and synthesising data'<sup>66</sup> which allows researchers to see patterns and themes. Undertaking thematic analysis meant themes were identified as they developed organically rather than

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<sup>66</sup> Jane Ritchie and Jane Lewis, *Qualitative Research Practice: a Guide for Social Science Students and Researchers* (Sage 2003) 219.

approaching the data with a pre-set framework. Thematic analysis was also undertaken to analyse the data collected through the open questions on the survey to identify reoccurring themes. The rest of the survey results are presented in graphs and charts for further analysis.

The key limitation of this research is the relatively small sample size. Due to the scope of the research and resource constraints, though the author intended to interview 10 to 12 people from various women's organisations, only two participants responded. Similarly, only 55 respondents completed the survey though the author aimed for a higher response rate. Nonetheless, the data collected in this research would still contribute to the discussion on the *R v Lawrence* case as well as wider discussion on the notion of conditional consent and deception, by providing an understanding on women's views on the issues at hand.

Besides, exercising reflexivity is important when conducting research. This is the ability of the researcher to consider their own bias as it may shape the study to fit their objectives, which would impact the validity of the research.<sup>67</sup> Throughout the research process, the author was fully aware of her feminist perspectives and constantly checked in on her own bias to ensure it was not pre-determining the research outcomes.

## **4.2 Findings**

Thematic analysis of the interview transcripts and the data collected from the survey reveals several clear reoccurring themes among participants in relation to women's views on the *R v Lawrence* case and wider issues concerning consent and deception. Notably, women throughout the empirical research process consistently expressed concerns over the scenario presented in *R v Lawrence*.

### **4.2.1 Pregnancy is within women's consciousness when consenting to sex**

In the survey, when asked about how much of a consideration there is to the risk of pregnancy when consenting to sex, only 25.9% (n=14) of women were never concerned about the risk of pregnancy. A total of 24.1% (n=13) responded it was 'always' on their mind and 50% (n=27) responded that they sometimes think about it. It is important to note that 54.7% (n=29) of

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<sup>67</sup> Alan Bryman, *Social Research Methods* (OUP 2008) 262.



participants stated that they use contraception all of the time when having intercourse and the vast majority of participants were in a relationship (n=37), which may impact participants' concerns over the risk of pregnancy. It can be deduced from these results that even when using contraception, some women are still concerned about pregnancy. Furthermore, interviewees highlighted that the 'onus and responsibility falls on the women to protect herself' from pregnancy, showing that the risk of pregnancy is always on women's mind when consenting to sex.

#### **4.2.2 Feeling 'betrayed', 'deceived' and 'violated' when being lied to**

When women were asked how they would feel if someone lied about their fertility status in an open question in the survey, what resulted was an overwhelming reoccurrence of similar phrases used by the participants. Words like 'betrayed', 'uncomfortable', 'assaulted', 'violated' and 'disrespected' were the most common responses. It was clear that the vast majority of women felt extremely uncomfortable and shared they may feel 'harmed' or 'assaulted' by such deceit. Women also felt that it was the 'withholding of information that could have altered my decision', which is particularly important considering the majority of women consider the risks of pregnancy sometimes, if not all the time, when consenting to sex.

Akin to the survey participants, interviewees brought up the impact of deceit on women's trust and emotions. Interviewee 2 raised that if a person has lied about his fertility status, 'then what else are they lying about'. Furthermore, when asked about the feelings of women who have been lied to about fertility status, Interviewee 1 stated:

*'oh pissed, you know to put it bluntly ... angry, you feel betrayed, deceived and especially about that case because I think if somebody's deliberately deceiving you'.*

Additionally, similar to the survey respondents, Interviewee 1 stated that someone lying about their fertility status is 'going to impact on the actions that she [the person lied to] may or may not take to prevent that or protect herself from that ... so again that the outcome of that has put the onus on the woman 'well you should have protected yourself'. Clear from these responses is that a woman's behaviour may have changed depending on what is said by a potential sexual partner and even if a woman is not fully informed, she can still be left with the onus of failing to have protected herself. Throughout the empirical research, many women have expressed an

extreme emotional response to the situation in which a woman is deceived. However, Interviewee 2 highlighted that ‘some women may feel that’s a violation and other women may not’, showing that there is some variance in women’s reactions to a situation when they are deceived.

### **4.2.3 Before reading the case: women were uncertain about criminalisation over deceit**

Women did not hold an overwhelming opinion one way or another when first asked if they believe that deceit regarding fertility status should be criminalised. A third, 33.3% (n=18) of women believed that it should be criminalised but nearly 43% (n=23) of participants were unsure on the matter. Considering the results of later questions in the survey following participants reading a scenario that mirrored *R v Lawrence*, this question initially may have been difficult to picture for participants. Those who at this point believed deception regarding fertility status should be criminalised had raised two key concerns: the validity of consent and the risk of pregnancy.

*‘They are not being given all of the information that they need to give informed consent ... I would view this as sexual assault and would then expect that criminal charges could ensue.’* (Survey response)

*‘Fear of pregnancy should not be minimised, invasion of women’s body and the deceit could be the difference between consent and not’* (Survey response)

*‘Pregnancy and childbirth are inherently risky situations, which can result in death or lifelong disability. Even putting this aside, the long-term physical, psychological, financial and practical implications of pregnancy, abortion or childbirth and motherhood are so profound that if a male were to deceive a female regarding his fertility, it would be tantamount to forcing that life and those risks on her without her consent.’* (Survey response)

Women’s responses assumed that the consent given under these circumstances is invalid or believe that it shouldn’t be considered valid. Further, despite not being prompted to discuss

pregnancy, responses show that women automatically consider pregnancy to be linked with the potential to impact a woman's life physically, mentally and financially. Interviewees echoed the concerns of survey participants, highlighting the risks associated with pregnancy and the difficult choice of terminating pregnancy, which can 'traumatise her'. Moreover, interviewees highlighted that she may feel 'forced to maybe try and have a long-term relationship with that individual'. Consistently through these responses, it was clear that there are potentially life changing consequences as an impact from non-consensual sex on women.

Some women, on the other hand, did not believe that it should be criminalised, mainly due to privacy reasons. Respondents stated that 'it's a personal preference not to disclose that information' and '[it's a] personal matter and should be solved personally', showing that some women do not wish this to enter the criminal realm.

#### **4.2.4 After reading the case: women felt overwhelming uncomfortable**

Following the participants reading the scenario mirroring the facts in the *R v Lawrence* case, their views did change. Participants were overwhelmingly uncomfortable with the scenario. All but one respondent were very or quite uncomfortable with the scenario.

Women were asked whether they believed the person who lied about their fertility status in the scenario deserves a form of criminal punishment. 69.1% of participants (n=38) believed this should be the case, which was a 35.8% increase as compared to the response before the scenario was presented. This is a significant increase showing women believing what happened in *R v Lawrence* is something they are greatly uncomfortable with.

**Table 1: Women’s views on whether deceit regarding fertility status should be criminalised before and after reading the R v Lawrence scenario**

|               | <b>Q1: Before the Scenario</b><br><b>Do you believe that deceit regarding fertility status should be criminalised?</b> | <b>Q2: After the Scenario</b><br><b>Do you believe that the person who lied about their fertility status deserves a form of criminal punishment?</b> |
|---------------|--|--|
| <b>Yes</b>    | 33.3% (n=18)   | 69.1% (n= 38)  |
| <b>No</b>     | 24.1% (n=13)   | 12.7% (n=7)  |
| <b>Unsure</b> | 42.6% (n=23)   | 18.2% (n=10)   |

#### **4.2.5 Deceit as rendering sex non-consensual**

When asked about their reasoning for supporting criminal punishment for the person deceiving the women in the scenario, a consistent theme was that women stated that they would feel this was conditional sex. As described by one of the survey respondents: ‘It can be seen as a breach on the conditions to the contract of consent’.

This respondent was not the only one who held such views, as persistently participants would describe the situation along the lines of:

*‘She gave consent under false pretences which means that she did not in fact give consent.’* (Survey respondent)

*‘If all information was given to the woman, she would have more of an informed choice in the matter.’* (Survey respondent)

*‘She consented to having unprotected sex on the basis that he was infertile. Therefore if he lied then this was unconsensual sex.’*(Survey respondent)

One participant even described this scenario to be ‘forced pregnancy without consent’. Through the participants’ responses, it is clear that they feel extremely uncomfortable with the scenario where there was deception about a person’s fertility status and they do not believe the consent given on such occasions is valid.

#### 4.2.6 ‘You need to protect yourself’

Some respondents did place an onus on the woman to have protected herself in the scenario, as described in the responses below:

*‘[H]e put at risk the physical and mental health of the woman, but it is also the women’s responsibility of ensuring the information provided by the man is true.’* (Survey respondent)

*‘She should have still used protection for the sake of catching any diseases or infection.’* (Survey respondent)

Some respondents place an emphasis on the woman in the scenario as having a responsibility to ensure the information provided is true. However, only a minority of participants held such beliefs (12.7%; n=7).

Through empirical research, it has become evident that women were widely uncomfortable with what happened in *R v Lawrence* and placed an emphasis on the concerns over pregnancy and conditional consent when consenting to sexual acts.

## 5 Discussion—Was it Rape?

This section will combine the feminist literature review on consent and the empirical research results to argue that from a critical feminist perspective, the judgment of *R v Lawrence* fails to consider the key concerns of women and fails to properly recognise the ways in which deceit invalidates consent.

### 5.1 The Danger of Treating Pregnancy with Triviality

Given that in *R v Lawrence*, the court ruled that the deception was ‘related not to the physical performance of the sexual act but to risks or consequences associated with it’,<sup>68</sup> it is important to compare the court ruling with the views discussed in feminist literature and identified in the empirical findings on this matter. Scholars as earlier discussed found the courts’ judgment

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<sup>68</sup> *R v Lawrence* (n 3) [37].

uncomfortable. Dyson found it an ‘untenable claim’<sup>69</sup> that ejaculate with sperm is not physically different to ejaculate without it and that the idea of pregnancy was not closely connected to sex is difficult to make sense of. While the feminist scholarship reviewed in this article did not directly discuss pregnancy, it did highlight an important point for understanding sexual relations, especially combined with the empirical research findings, namely that societal understanding of sex has been shaped from the male point of view.<sup>70</sup> Additionally, since pregnancy does not have the same direct impacts for men as it does for women, a distorted view that pregnancy does not relate to the sexual act arises. If we combine this with the comments of women in interviews and surveys, tension between the court reasoning and the views of women and feminists becomes more evident.

Consideration of the physical risks and mental impacts of possibly having a child, as well as the responsibilities and the financial burden incurred is core in a woman’s decision-making process when consenting to sex. A quarter of women surveyed said pregnancy was always on their mind when consenting to sex, with around half stating it was sometimes on their mind, showing the majority of women consider pregnancy risks when consenting to intercourse, despite the vast majority of them using contraception *all of the time* when having sex. It can be concluded that for these women, pregnancy is something which is closely connected to sex and is not just an unwanted outcome, as the court has ruled.

Women highlighted that lying about one’s fertility status was withholding information, which may alter a woman’s decision as it is pertinent information for the decision to consent to sexual relations. Some women even claimed that this would be ‘forced pregnancy without consent’. From this discussion, it can be concluded that pregnancy and sex are intrinsically linked from women’s perspectives and to treat these concerns as ‘triviality’ is evidence that consent in sexual relations is still shaped primarily and predominantly by male perspectives.

Herring believed that conditional consent is only effective when the pre-set condition is met—regardless of the condition.<sup>71</sup> Buxton, akin to Herring, believed if a precondition to intercourse was not fulfilled, it would invalidate the consent.<sup>72</sup> Further, feminist scholars questioned

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<sup>69</sup> Dyson (n 23) 39.

<sup>70</sup> Moore and Reynolds (n 37) 31.

<sup>71</sup> Herring (n 28) 56–57.

<sup>72</sup> Buxton (n 27).

consent as a meaningful concept when power imbalances are at play. The withholding of information and deceit that took place in the *R v Lawrence* case has placed a power imbalance between the sexual partners and from a feminist perspective, it would impact the validity of the consent given. Survey results showed that women overwhelmingly did not believe that the consent in the case scenario was valid. Participants believed such a deceit would ‘constitute a form of violence or coercion’, and that there was a breach of the conditions placed on the intercourse, leading to non-consensual sex. Women did not believe the consent in this scenario was meaningful and the majority of women believed the person being deceitful should face criminal consequences.

## **5.2 ‘But she took a Risk and Should deal with the Consequences!’**

There was a group of women in feminist scholarship and empirical research that did believe women who take risks should have to deal with the consequences. Roiphe, for example, placed a lot of agency and responsibility on women in these situations. Roiphe, given her assessment of women who are put at risk in sexual relations, could have likely placed a lot of agency on the complainant in this case and expected her to deal with the consequences involved. A minority of women in the empirical research held similar views and despite sharing such an opinion, they still expressed discomfort with the scenario. Participants recognised the risk the deceitful person put upon the woman, but also believed that the woman has the responsibility for ensuring the information provided was true.

Scholars such as Estrich and Pineau highlight that women do want to participate in sexual relations, but that they are put on an uneven playing field. To set an expectation on the women to ensure the information provided by the man is true is a difficult one in this case. It places the women into a position of risk if they feel that the man could potentially be violent or otherwise harmful, for example, when the man could have been truthful in the first place and did not feel the need to use deceit to gain unfiltered access to the woman sexually. This discussion is particularly interesting when the right to privacy is considered.

## **5.3 The Right to Privacy**

Interesting comments arose that some women believed that the right to privacy should be prioritised as ‘it’s a personal preference not to disclose that information’. But where is the line

drawn to which a person's privacy can be overruled? How should one deal with such a case where it's difficult for a woman to easily 'fact check' the information provided by her sexual partner that can lead to serious consequences?

Gibson raises a persuasive argument over who should be prioritised in a scenario like this. Gibson argues that 'the harm which D's deception does to V's right to sexual autonomy justifies prioritising that right over D's right of non-disclosure',<sup>73</sup> meaning that priority should be placed upon the party who may be harmed over the right of the other party to withhold information. In other words, it is recognised that someone's right to privacy can be overruled when there is potential harm to the other person's sexual autonomy. This argument is relevant in the case of *R v Lawrence* as the defendant lied to the complainant in order to have unfiltered sexual access to her though the defendant understood the physical and mental harm that pregnancy could potentially cause to the complainant.

## **5.4 Should the Defendant have been Charged?**

The majority of women reacting to the case scenario in the empirical research felt that the person being deceitful should have received a criminal charge. Many of the women did not believe that the consent given was valid considering the deceit that took place. Though the case has not been discussed in the feminist literature reviewed, it could be safely assumed that the feminist perspectives discussed in this article would feel uncomfortable with the scenario. The actions of the defendant placed a power imbalance between the sexual partners and such deceit enabled him to gain sexual access that would have otherwise not been given. When combining the analysis of legal scholars, feminist views on consent and the overwhelming concerns by women in the empirical research, the consent given by the complainant in this case would not be considered valid and therefore, the act could be considered rape.

## **5.5 What about men who are lied to?**

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<sup>73</sup> Matthew Gibson 'Deception, Consent and the Right to Sexual Autonomy' (Criminal Law Reform Now Network Report, 2023) 51 < <http://www.clrnn.co.uk/media/1031/clrnn3-deception-report.pdf> > accessed 7 June 2023; Johnathan Herring, 'Mistaken Sex' (2005) Crim LR 511, 523.



What about if men are lied to? What about if a woman lies that she's on the pill? Would we hold the same levels of criticism against the man for not protecting himself, as many have claimed towards the woman in such a case scenario?

This article has evidenced the importance of recognising that deceit should negate consent, regardless of the gender of the subject. If something is conditional for sexual intercourse, it should be considered to invalidate the consent given if the conditions were not met. If a woman does similarly to a man, it should be assumed that they should be subject to the same consequences.

## 6 Conclusion

In order to consider *R v Lawrence* from a feminist perspective, scholarly commentary on the case, feminist literature on the notion of consent and results of the empirical research undertaken on this matter have been reviewed. Legal scholars commenting on the *R v Lawrence* outcome were quick to raise concerns over the court's reasoning in their assessment of what was 'closely related' to sex. A review and discussion of feminist perspectives on consent highlighted the need to ensure there is neither the invisibility nor the distortion of women's views in a society where views on sexual relations remain dominated by male perspectives. Empirical research highlighted that women stressed the importance of consent being valid and the concerns over pregnancy risks from sex should not be trivialised.

This article has evidenced that from a feminist perspective, the complainant in this case did not give valid consent. When the defendant was deceitful and did not meet the conditions that were set out by the complainant when consenting to sexual intercourse, the consent given was tainted. Commentators on this case have highlighted this, and feminist literature has stressed the importance of equality within sexual relationships, which was absent in this case, when considering the validity of consent.

Empirical evidence showed the majority of women felt uncomfortable with the deceit that took place in the case and questioned the validity of the complainant's consent under such circumstances. This research evidenced that women's concerns over pregnancy risks should not be ignored as this is intrinsically linked to their decision-making process when consenting to sex. It must be noted that there are feminist scholars who placed significant emphasis on the

agency of women, and this was echoed by a minority of women in the empirical research responses. Some scholars' views that it is important to ensure those who can be potentially harmed by deceitful behaviour should be prioritised over someone's right to non-disclosure, or ability to lie, should also be taken into consideration.

It is clear the judgment of *R v Lawrence* is neither fair nor just from a critical feminist perspective. Scholars have raised concerns over the court's assessment on what is closely connected to 'the nature or purpose of the relevant act'<sup>74</sup> that is involved in sexual acts. From a feminist perspective, women's views on consent have been ignored and the male perspective has continued to dominate societal understanding of sexual relations. The court's judgment failed to recognise the conditional nature of the consent given by the complainant and chose to focus on the subject matter of the deceit rather than recognising the invalidation of consent by the defendant's deceit. This case has highlighted that it is necessary for the legislative framework regarding deceit and conditional consent to be revisited to incorporate feminist perspectives on the subject matter.

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<sup>74</sup> Sexual Offences Act 2003 s 76.