An analysis of the treatment of incapacitated rape complainants: the potential of vulnerability as a new foundation for legal reform.

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AN ANALYSIS OF THE TREATMENT OF INCAPACITATED RAPE COMPLAINANTS: THE POTENTIAL OF VULNERABILITY AS A NEW FOUNDATION FOR LEGAL REFORM.

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Abstract

AN ANALYSIS OF THE TREATMENT OF INCAPACITATED RAPE COMPLAINANTS: THE POTENTIAL OF VULNERABILITY AS A NEW FOUNDATION FOR LEGAL REFORM

This thesis critically analyses the legal treatment of incapacitated rape complainants in England and Wales suggesting the need for reform. Recent statistics have identified a substantial drop in the rate of convictions for rape and sexual assault, indicating the need for substantial change to the criminal justice system. With a particular focus on incapacitated complainants, this thesis seeks to critically evaluate the failures of the current law. It will use a theory of vulnerability to suggest that the current conceptual underpinning of the law-autonomy, is at the core of the problematic response to sexual assault. In particular, it will argue that an autonomy-based approach has led to responsibilise complainants and develop a hierarchy of protections for incapacities. These issues, together with the inadequacy of a consent model, place undue focus on complainant's behaviour thereby distracting from the defendant's actions. After identifying the problems with an autonomy-based approach, this thesis will suggest a new legal offence drawing from Martha Fineman's theory of vulnerability. Titled 'unjustified sexual relations' the offence will expand upon Jonathan Herring and Michelle Madden Dempsey's argument that sexual penetration requires justification. This new offence will remove the focus from consent to a more robust requirement of justification. To demonstrate justification, a defendant must show that they did not exploit the vulnerability of the complainant. This theoretical shift will encourage a move away from the individual responsibility to avoid harm that an autonomy approach carries, to a duty placed on everyone not to exploit each other's vulnerability. This thesis acknowledges the powerful but limited role of the law. Therefore, it will be argued that a theory of vulnerability should be used to demand a responsive State to transform the societal response to sexual assault complainants requiring widespread and systemic change.

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STATEMENT OF COPYRIGHT

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INTRODUCTION

1. THE JUSTICE GAP

The criminal justice system is failing sexual assault complainants. Despite legislative reforms and procedural changes, rates of reporting and convictions for rape and sexual assaults have remained low for many years.[1] As Temkin and Krahe have coined, there is arguably a significant 'justice gap.'[2] The 'justice gap'[3] refers to the difference between the estimated rapes and sexual assaults perpetrated and the number of cases resulting in conviction. According to the 2018 ONS report on victimisation, the majority of victims of sexual assault are female.[4] The report states that 560,000 victims were female with 140,000 male victims, noting that women were four times as likely to have experienced sexual assault in 2017.[5] The most recent report from the Crown Prosecution Service on Violence Against Women and Girls has revealed alarming statistics. In particular, the conviction rates dropped by 26.9% from 2,635 convictions in 2017-2018 to 1,925 in 2018-2019.[6] This report, focussing on female victims, also noted that almost all the defendants were male.[7] According to the Home Office and Office for National Statistics (ONS) reports, the police recorded an increase of 11%[8] in the number of rape claims reported, just 1.7% were of

[1] 561,000 female and 143,000 male victims of sexual assault were recorded between March 2016 and March 2018, yet the CPS recorded a 10% decrease in convictions and charges in the last year with just 6% offences resulting in a charge or summons see Ministry for Justice, *Criminal Justice statistics quarterly.* England and Wales [2017] 15

[2] Temkin, J., and Krahé, B., *Sexual Assault and the Justice Gap: A question of Attitude* (Hart publishing, 2008)

[3] Ibid.

[4] Home Office, Ministry of Justice & the Office for National Statistics, 'Sexual offending: victimisation and the path through the criminal justice system' [2018] https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffendingvictimisationandthepaththroughthecriminaljusticesystem/2018-12-13

[5] Ibid.

[6] Crown Prosecution Service, Violence against Women and Girls Report 2018-2019, available at https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2019.pdf According to the report, almost all defendants prosecuted were male.

[7] Ibid.

[8] Home Office, Ministry of Justice & the Office for National Statistics, 'An Overview of Sexual Offending in England and Wales' January 2017

claims prosecuted.[9] These figures include both male and female victims. Traditionally, rape is viewed as a heteronormative issue, where the response tends to focus on female victims and male perpetrators. This thesis does not distinguish between male and female victim-survivors, and instead takes a gender-neutral approach to sexual assault. Indeed, in the concluding chapters, a sex-neutral offence will be suggested as an alternative to the current gender-specific approach of the law.[10]

Research has also revealed a lack of confidence in the justice system. It was recorded that between one half and two thirds of complainants withdraw from the judicial process before they are referred to the CPS.[11] It appears that this low confidence in authorities has remained rife, as the 2018 ONS revealed similar results. The report showed that nearly one third of victim-survivors did not tell anyone about their assault, with just 17% reporting to the police.[12] Some reasons given for not informing the police included embarrassment and that they didn't think they could help.[13] A significant 27.7% stated that they did not tell the police as they thought they would not be believed. Furthermore, 20% of women who had been assaulted suggested their attack was too trivial to report.[14] This might also suggest the impact rape myths might have on complainants themselves, denying or downplaying their own experience as explored in Chapter 2.

The above figures are important for this thesis as they identify a justice gap, suggesting a need for reform to policies, practice and the law. Although this thesis acknowledges that increasing conviction rates should not be a primary aim for legal reform,[15] these figures are still noteworthy as they highlight the existence of deep-rooted issues within our legal and societal response to sexual assault. The purpose of this thesis is to identify that the reliance on autonomy may be one of the issues contributing to this ever-widening justice gap by critically analysing the treatment of incapacitated complainants. Moreover, it will be

https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingdecember2018

[9] Ibid.

[10] Throughout this thesis victim-survivors and complainants are used interchangeably. The terminology used in mostly non-gender specific. However, the pronoun she is used at times, however it should be noted that this analysis does encompass and acknowledge male victim-survivors.

[11] Lucy Maddox, Deborah Lee & Chris Barker, 'Police empathy and victim PTSD as potential factors in rape case attrition' [2011] 26 *Journal of Police Criminal Psychology* 112-117, 112

[12] ONS (n 4).

[13] Ibid.

[14] Ibid.

[15] Wendy Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' [2011] 19 *Feminist Legal Studies* 27-45, 27

argued that repeatedly reforming the law based on the same concept of autonomy will lead to similar unsatisfactory results. Therefore, this thesis will use a theory of vulnerability to suggest legal reforms.

At the heart of sexual interactions in both law and society lies our understanding of the autonomous liberal legal subject.[16] *'He'* pervades our appreciation and vision of sexual relationships, of *how* victims should respond, of *who* deserves to be protected and of *how* we should protect those deserved. We strive to be autonomous, capable and independent individuals. We desire to be free, free from the State and free from any constraints on our choices. Yet such an understanding of our ontological existence is too simplistic, it is not nuanced, it is merely binary. We are categorised: you are capable, or you are not; you are free, or you are controlled; you can, or you cannot, you are normal or you are the 'others.' Reforming and implementing the law in such a light, however appealing due to its simplicity, has arguably led to inadequacies in the treatment of rape complainants. Such an approach ignores the reality of the human condition as we and our circumstances and environment are ever changing. As ever- fluctuating human beings we are constantly at risk of harm, therefore, we are never wholly independent. Rather, by our very nature, we are very dependent and reliant on both relationships and institutions. It is the theory of vulnerability that acknowledges this reality of our existence;[17] it offers us a unique opportunity to scrutinize our current response to victim-survivors of sexual offences together with a prospect to harbour future reforms with vulnerability at its core.

Whilst there is some literature using a theory of vulnerability in relation to sexual offences,[18] there is yet to be a full exploration of the potential of the theory as a new legal foundation. This thesis therefore seeks to fill a significant gap in the literature. It will use the theory of vulnerability to challenge our societal and legal norms and posit difficult questions regarding state and individual relationships and suggest how we might reimagine a legal framework with a conceptual foundation of vulnerability.

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[16] Martha Albertson Fineman, 'Cracking the Foundational Myth: Independence, Autonomy and Self Sufficiency' [2000] 13(8) *Journal of Gender, Social Policy and the Law* 13- 29, 15

[17] Martha Albertson Fineman, 'Elderly as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' [2012] 20 (2) *The Elder law Journal* 101-141, 101

[18] Vanessa E. Munro, 'Shifting Sands? Consent, Context and Vulnerability in Contemporary Sexual Offences Policy in England and Wales' [2017] 26(4) *Social and Legal Studies* 417-440; Stu Marvel, 'Response to Tuerkheimer – rape on and off campus the vulnerable subject of rape law: rethinking agency and consent' [2016] 65 *Emory Law Journal Online,* 2035- 2049; Herring, J., *Vulnerable Adults and the law* (Oxford University Press: 2016) ch 7

Martha Fineman has been developing the theory of vulnerability for over a decade since it was first proffered in 2008.[19] The Vulnerability and Human Condition Initiative was developed as an 'academic space within which scholars can imagine models of State responsibility.'[20] In recent years the theory has gained much momentum with most academic literature exploring the theory in detail,[21] other academics have sought to utilise the theory within their discipline ranging from for example, bioethics,[22] analysing vulnerability of children,[23] disability law,[24] workfare law,[25] sex work,[26] marriage[27] to the elderly.[28] More recently, in 2018 the UNSW Law Journal published a thematic issue on vulnerability and the law. This special issue particularly refers to Martha Fineman's theory of vulnerability. [29] In Jonathan Herring's forward of the issue, he succinctly summarises how the vulnerability theory have been utilised in each of the articles. The issue focusses on the pragmatic uses of vulnerability moving on from much of the literature that has

[19] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1-23, 12

[20] http://web.gs.emory.edu/vulnerability/about/index.html Throughout this thesis the term State will be used to refer to the government and its institutions. The term Responsive State comes from Martha Fineman's literature. It is used to refer to all state institutions including, but not limited to, the law, CPS, the police, institutions of the criminal justice system, educative institutions, health care, social care etc.

[21]Martha Fineman, 'Vulnerability and Inevitable inequality' [2017] *Oslo Law Review* 133-149; Martha Albertson Fineman, 'Equality and Difference- the Restrained State' [2014-2015] 66(3) *Alabama Law Review* 609-626; Biggs, H and Jones, C (2014) Legally vulnerable: what is vulnerability and who is vulnerable? In Freeman, M, Hawkes, S and Bennett,B (eds), *Law and Global Health (Current Legal Issues, Vol. 16)*. Oxford: Oxford University Press, pp. 133–148; Pamela Sue Anderson, 'Autonomy, Vulnerability and Gender' [2003] 4(2) *Feminist Theory* 149-164; Martha Fineman, ' The vulnerable Subject and the Responsive State' [2010-2011] 60 *Emory Law Journal* 251- 274; Kohn (n 194), Marie A. Failinger, 'The Paradox in madness: Vulnerability Confronts the Law' [2012] 1 *Mental Health Law & Policy Journal* 127-150, Frank Rudy Cooper, 'Always already Suspect: Revising Vulnerability Theory' [2015] 93 *North Carolina Law Review* 1339-1380, Beverley Clough, 'Vulnerability and capacity to consent to sex – asking the right questions?' [2014]26(4) *Child and Family Law Quarterly* 371-396, Kate Kaul, 'Vulnerability for example: Disability theory as Extraordinary demand' [2013] 25(1) *Canadian Journal of Women and the law* 81-110, Pamela Sue Anderson, 'Autonomy, Vulnerability and Gender' [2003] 4(2) *Feminist Theory* 149-164, Bruenlla Cassalini, (2016). Politics, Justice and the Vulnerable Subject: The Contribution of Feminist Thought. Gênero & Direito. 5. 15-29; Fineman (n 19).

[22] Michael Thomson, 'Bioethics and Vulnerability: Recasting the Objects of Ethical Concern' [2018] 67 *Emory Law Journal* 1207-1233.

[23] Herring, J., *Vulnerability, Childhood and the Law* (Springer Briefs in Law: 2018)

[24] Beverley Clough, 'Disability and Vulnerability: Challenging the Capacity/Incapacity Binary' [2017] 6(3) *Social Policy and Society*, 469-481, 477

[25] Jydbejerg, C.S., 'Vulnerability, Workfare law and Resilient Social Justice' 111 in Martha Fineman & Jonathan Fineman (eds) *Vulnerability and the Legal Organization of Work* (Routledge: New York 2018)

[26] Vanessa Munro and Jane Scoular 'Abusing vulnerability? Contemporary law and policy responses to sex work and sex trafficking in the UK' 20(3) [2012] *Feminist Legal Studies* 189-206.

[27] Martha Albertson Fineman, 'Vulnerability and the Institution of Marriage' [2015] 64 *Emory Law Journal* 2089-2091, 2091

[28] Fineman (n 16).

[29] The thematic issue attempted to reveal the potential practical value the vulnerability theory may have, exploring many disciplines and issues such as policing and criminal justice, mental health law, workplace and disability law, working women undergoing IVF, forced marriage, and refugee law.

utilised vulnerability in an 'abstract way.'[30] Indeed, one of the vulnerability theories key criticisms is its lack of pragmatic value.[31] This thesis seeks to address this criticism by using vulnerability in two pragmatic ways. Firstly, this thesis will use the vulnerability theory as a tool to critique and challenge the current legal response to sexual assaults. It will challenge our accepted norms and ask difficult questions of responsibility allocation and the role of the State. It will also be used to develop and mould a new legal response to sexual offences that will address the key problems as identified by a critical analysis of our current response. Below is a detailed outline of the chapters of this thesis.

2. CHAPTER OUTLINES

Chapter 1 of this thesis will critically explore the theoretical underpinnings of the current autonomy-based approach to sexual offences. It will analyse the key elements of an autonomy-based approach. It will also explore the connections between autonomy and the consent model, revealing their problematic ties. This chapter will also outline the coercion theory as a potential alternative approach to an autonomy-based model. It will then detail a vulnerability theory. It will highlight and examine the key concepts that underpin a vulnerability theory. Although Munro sees some benefits of a vulnerability approach, she warns of the potential issues that may arise from its use.[32] This chapter acknowledges that vulnerability is not without its flaws, however after an in-depth exploration and critique of the current liberal legal autonomous approach through vulnerability, the reality of responsibilisation and State failure that permeates our laws and society will be highlighted. Moreover, it will be argued that a vulnerability theory can be used as a tool to challenge our traditional understandings of our existence, and to tackle the expectations and responsibilisation that comes with an autonomy-based approach. This chapter will provide

[30] Jonathan Herring, 'Vulnerability and the Law: Forward' [2018] 41(3) *UNSW Law Journal* 626

[31] Haas argues that the theory has many limitations highlighting the need for recognition of its strengths and downturns Nayeli Urquiza Haas, 'Book review: M. A. Fineman and A. Grear (eds.): Vulnerability: Reflections on a New Ethical Foundation for Law and Politics Ashgate, 2013,' [2014] 22 *Feminist legal studies* 335-339, 335; Kohn and Eichner have identified that Fineman's theory needs refinement and revision. Kohn also labelled the theory as relatively abstract see Nina A Kohn, 'Vulnerability Theory and the Role of the Government' [2014] 26(1) *Yale Journal of Law and Feminism* 1-27, 8; Maxine Eichner, 'Dependency and the Liberal Polity: on Martha Fineman's Autonomy myth' [2005] 93(4) *California Law Review* 1285-1321, 1287; whereas Fallinger's analysis portrays how the theory of vulnerability can be used as both a shield and a sword, protecting those who need it and promoting the personal rights of those who at that particular time do not need extra protection Marie A. Failinger, 'The Paradox in madness: Vulnerability Confronts the Law' [2012] 1 *Mental Health Law & Policy Journal* 127-150, 146.

[32] For an exploration of the critiques of vulnerability and responses see chapter 1

us with the tools to move forward and unpick the societal and legal response to sexual assault complainants.

Chapter 2 will develop this argument further by exploring the treatment of sexual assault complainants in law and society. Many academics have identified attitudes as the source of the justice gap. As Dripps argues there is a problem of attitudes for which he suggests that we bypass the jury.[33] Temkin and Krahe also identify the problem of attitudes and similarly suggest abolishing the jury in sexual assault cases. [34] Moreover, as Anna Cossins suggests 'the only feasible explanation'[35] for low conviction rates in sexual assault trials, is the misconceptions and myths and that affect jury decisions. [36] Although a potential explanation for low convictions, this fails to address the inefficiency of the formation of the legal response to sexual assault. Moreover, they do not identify how an autonomy approach has shaped these attitudes. Cossins suggests expert evidence should be provided that summarises the psychological impact of sexual assault on victims,[37] and/ or a judicial direction containing the same information.[38] Temkin and Krahé also suggest further educative measures including screening and selecting jurors,[39] assisting jurors with written materials,[40] giving reasons for verdicts[41] and training judges and lawyers.[42] However, these suggestions focus on attitudes and myths and fail to identify the conceptual underpinnings of these problematic expectations that are placed on complainants. Although commendable, it will be argued that these reforms alone, are not enough to tackle the deep-rooted issues. Instead, this chapter will argue that blame and responsibility is attributed to many complainants of sexual assault because of the current autonomy approach. It will argue that a more nuanced vulnerability analysis will allow us to shift our focus away from the complainant's behaviour, onto the exploitative actions of the defendant.

Chapter 3 will then critically analyse the current legal response to sexual assault complainants with a particular focus on intoxicated complainants. Other academics have

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[33] Donald Dripps, 'After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault' [2008] 41 *Akron Law Review* 957-980, 960. Dripps also suggests, in a US context, to develop a special crimes court see pp 979.
[34] Temkin & Krahe, (n 2) 177.
[35] Anna Cossins, 'Expert witness Evidence in Sexual Assault trials: questions answers and law reforms in Australia and England' [2013] 17 *The International Journal of Evidence and Proof* 74-113, 77
[36] Ibid.
[37] Cossins (n 35) 111.
[38] Ibid.
[39] Temkin & Krahe (n 2) 180.
[40] Ibid 181.
[41] Ibid 186.
[42] Ibid 188.

identified the problems with the current legal response, yet the solutions offered fail to tackle the conceptual underpinnings of the legislation. Sharon Cowan rightly identifies, the legal protections for voluntary and involuntary intoxicated complainants as hierarchal.[43] However, this thesis goes further by including mentally incapacitated complainants in this comparison, arguing that all complainants are incapacitated at the time of offence and are therefore deserved of equal protection. She also recognises that we need to address the issue of responsibility for sexual activity[44] calling for 'social change regarding gendered expectations of appropriate sexual activity and beliefs about responsibility for sexual assault.'[45] She suggests an exploration into the socio-sexual behaviour of men and women to attempt to shift prejudices.[46] Cowan suggests these together with legal reform, including 'a statutory based test and guidance on capacity, more education and training for judges and potentially also juries.' [47] These suggested reforms have potential to address some of the issues that incapacitated complainants face. This chapter builds on these arguments. It will explore how the determination of capacity and consent came into being by analysing the discussions prior to the introduction of the Sexual Offences Act 2003. It will then explore how these concepts, and the legal presumptions are interpreted and applied through an analysis of the key case law. This chapter will contribute to the overall thesis by arguing that because of the conceptual underpinnings of autonomy, complainants, particularly those who were voluntarily intoxicated, are responsibilised and afforded protections in accordance with their apparent blameworthiness. This chapter identifies there is undue focus on the complainant's behaviour because of the autonomy approach which in turn contributes to the problematic legal and societal response to sexual assault.

Building on these points, chapter 4 explores the current and historical treatment of sexual assault complainants who have a 'mental disorder'. This chapter will further strengthen the argument that an autonomy-based approach is at the heart of the problematic legal response. It will argue that because of autonomy, those with a mental disorder have typically been *othered* from society, segregated and treated different on the basis of the existence of particular characteristics. Whilst identifying this, this chapter will also

[43] Sharon Cowan, 'The Trouble with Drink: Intoxication, (In)Capacity, and the Evaporation of Consent to Sex' [2008] 41 *Akron Law Review* 899-922, 921
[44] Ibid 922.
[45] Ibid.
[46] Ibid.
[47] Ibid 921.

critically analyse section 30 of the Sexual Offences Act 2003, which demonstrates a genuine attempt at balancing autonomy and protection. It will also look to the civil law approach for determining capacity. It will be asked whether there are any lessons to learned from this legal response when moving forward to suggesting alternative legal reforms based on a theory of vulnerability.

Through the analysis of the current legal response in England and Wales, the determination of capacity and consent will have been identified as problematic. Before suggesting an uprooting of the theoretical foundations, chapter 5 will explore alternative reforms that are based on autonomy. For this, we look to the Canadian approach, where an affirmative consent model and a capacity umbrella approach have been implemented. The affirmative consent model will be critically analysed to determine whether a yes means yes model is sufficient to alleviate the concerns of an autonomy-based approach. Moreover, it will explore whether the removal of the types of incapacity from legislation has amounted to equal protection for incapacitated complainants. It will ask whether this approach can significantly improve the treatment of incapacitated complainants whilst still informed through an autonomy lens.

The final substantive chapter will explore how a vulnerability theory might shape our legal response to sexual offences. Tadros identifies the problems with a consent model which focusses on the complainant by putting the victim on trial and subject to manipulation by defence counsel.[48] Moreover he rightly identifies that defining rape 'around the will of the victim tends to encourage criminal trials to focus problematically on the conduct and sexual history of the complainant rather than the conduct of the accused.'[49] This chapter also seeks to argue that consent is too malleable and inadequate a concept which encourages undue focus on the complainant's behaviour. This chapter further identifies the undue focus on the complainant's behaviour as part of the problematic legal and societal response to sexual assault. However, although Tadros suggests the removal of consent as a central concept[50] of sexual offences, he instead suggests a differentiated offence of rape which can be perpetrated in different ways.[51] Unfortunately, as he acknowledges, he does not explore the theoretical underpinnings of the legal response,[52]

[48] Victor Tadros, 'Rape without Consent' [2006] 26(3) *Oxford Journal of Legal Studies,* 515-543, 517
[49] Ibid 516.
[50] Ibid 518.
[51] Ibid 541.
[52] Ibid 519.

and his suggested reforms are therefore limited as they are based on autonomy.[53] Instead, this chapter will build on Herring and Dempsey's argument that sexual penetration requires justification that is more than just consent.[54] It will explore and expand on Herring and Dempsey's concepts through a vulnerability lens. Through a critical analysis and expansion of Herring and Dempsey's arguments a new offence titled 'unjustified sexual activity' will be suggested. This chapter will argue that this new offence would help to alleviate the concerns with the current legal response to sexual assault.

The concluding chapter will explore how a theory of vulnerability would be used to shape the societal response to sexual assault complainants, detailing the need for widespread systemic change. This chapter will explore the need for an active and responsive State. Academics like Kelly, Lovett and Regan suggest 'a shift within the CJS from a focus on the discreditability of complainants to enhanced evidence gathering and case-building.'[55] These suggestions can be informed through a theory of vulnerability. Indeed, this chapter will detail how a vulnerability theory could help inform education policies, judicial directions and widespread systemic change to our attitudes and expectations placed on complainants. Overall, it will be argued that an autonomy-based approach is inadequate as it responsibilises individuals and fails to adequately and equally protect complainants. What is required is a complete overhaul of the conceptual and theoretical foundations of our legal and societal response to sexual assault complainants.

[53] Ibid 543.
[54] Michelle Madden Dempsey and Jonathan Herring, 'Why Sexual Penetration Requires Justification' [2007] 27 (3) *Oxford Journal of Legal Studies* 467-491
[55] Kelly, Liz, Jo Lovett, and Linda Regan, 'A gap or a chasm? Attrition in reported rape cases (Home Office Research Study 293)' [2005] London: Home Office Research, Development and Statistics Directorate. xii

Chapter 1

CHALLENGING AUTONOMY: THE POTENTIAL OF VULNERABILITY

1. INTRODUCTION

The area of sexual assault law reform has been dominated by the theory of autonomy. Reforms have been repeatedly suggested and implemented based on these overarching notions which are underpinned by the idea of the 'liberal legal subject.'[56] As it will be analysed throughout this thesis, there are many issues with assuming the existence of a liberal legal subject.[57] The aim of this chapter is to highlight the inadequacies of the concept of the liberal legal subject, exposing the flaws of an autonomy approach, and to reveal the shortfalls of the alternative theory of coercion. This will be analysed in section 1.1 and section 2. To challenge our understanding of the human condition the theory of vulnerability will be detailed in section 3. In this section, the key components of the vulnerability theory will be critically explored to provide a comprehensive understanding of its uniqueness and alternative narratives of the legal subject. In section 3.3 it will be argued vulnerability is rooted within a richer understanding of our ontological existence that calls for the State to respond to all subjects equally. As explored in section 3.5 it seeks to challenge the 'othering' of vulnerable groups and demands a shift in our perspective. Vulnerability is a novel theory that helps shape our understanding of our ontological and societal existence. The theory of vulnerability has a wide and vast scope. This thesis will

[56] The liberal legal subject is based on the freedom of choice and autonomy. As Rosemary Hunter described 'The legal person envisaged by liberal legalism is rational, autonomous, self-contained, self-possessed, self-sufficient and formally equal before the law. see 'Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism' In: Davies, Margaret and Munro, Vanessa, eds. The Ashgate Research Companion to Feminist Legal Theory. Ashgate, Farnham,13-30, 13 also referencing Ann Scales definition of the liberal subject 'as individuals are rational and self-interested and use their rationality to achieve their needs and desires' Scales, A., *Legal Feminism: Activism, Lawyering and Legal Theory* (New York: University Press) 60.

[57] Hunter also notes feminist critique of the liberal legal subject as inherently masculine, referring to how privileged white men have populated law and shaped it to their own image 'and instated their experience and view of the world as the legal norm'. She refers to the existence of this masculine norm in many areas of law including that of the reasonable man in tort and the responsible person criminal law. She cites Naffine's analysis which states it is difficult to see these legal persons who act autonomously in the public sphere, changing nappies, cuddling children or breastfeeding. Naffine, N. 'Can women be legal persons?' in S. James & S Palmer (eds.) *Visible Women: Essays on Feminist Legal Theory and Political Philosophy*, (Oxford: Hart Publishing, 2002) 81. See also Ibid 13.

contribute to the developing literature by uniquely addressing its applicability and pragmatic value to sexual assault law reform. It will be used as a tool to challenge the current conceptual underpinnings of autonomy and it will be expanded and developed to suggest legislative reforms moving forward. Suggested legal reforms borne out of these philosophies provide the opportunity to develop an improved and enriched response to incapacitated victim-survivors of sexual assault. As earlier noted, the theory of vulnerability has yet to be fully explored in relation to sexual offence law, a gap which this thesis seeks to fill. Firstly, we must explore why the competing theories of autonomy and coercion are inadequate both generally, and in relation to addressing sexual offences.

1.1 THE 'MYTH' OF AUTONOMY AND THE PITFALLS OF THE 'LIBERAL LEGAL SUBJECT'

Martha Fineman labelled autonomy as a myth in 2004,[58] stating that autonomy is in fact unattainable, and has been used to create a 'public-private divide.'[59] More recently Fineman has stated that the autonomous and independent legal subject is a 'static figment of the liberal imagination.'[60] Through an analysis of the key values of the liberal legal subject, the shortfalls of the autonomous liberal legal framework will be argued.

The 'liberal subject' is the dominant legal subject who seeks from the State the facilities to assist in the exercise of autonomy.[61] The approach pursues a distinctive line dividing the public and private sphere.[62] In particular, the liberal legal subject is concerned with the State's interference in the private sphere which risks preventing individuals' exercise of

[58] Fineman, M. *The autonomy myth. A theory of dependency* (New York/London: The New Press 2004); Fineman, M., 'Equality, Autonomy, and the Vulnerable Subject in Law and Politics' in Martha Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate, 2013) 13- 27; Fineman (n 16).
[59] Kerin,H., 'In the land of choice: Privatized reality and contractual vulnerability' in Martha Albertson Fineman, Titti Mattison & Urika Andersson *Privatization, Vulnerability, and Social Responsibility: A Comparative Perspective*, (Taylor & Francis: 2017) 61
[60] Fineman, M., Mattison, T., & Andersson, U., *Privatization, Vulnerability, and Social Responsibility: A Comparative Perspective*, (Taylor & Francis: 2017) introduction p. 3
[61] Fineman (n 16) 15.
[62] Ibid. There are many issues with this division. As Hunter (n 57) 20 cites 'Responsibility for individual welfare is less and less considered to be a matter of collective, social, or public obligation and is increasingly regarded as a private, individual or, at most, a family or charitable matter' see also Fudge & Crossman, 'Introduction: Privatization, law, and the challenge to Feminism', in *Privatization, Law, and the Challenge to Feminism*, (Toronto: University of Toronto Press) 3–37, 3

autonomy. The current autonomy approach rejects State action and labels it as a paternalistic interference with rights to freedom. [63]

Generally, the pursuit of this liberal legal subject suggests that autonomous individuals are capable, they have capacity to make decisions and live their own lives and as such, they do not need 'help' from others or the State. With that comes an understanding of the autonomous liberal legal subject as independent. As a liberal legal subject, their health and capabilities are presupposed where they can live independently of 'subventions and support from others.'[64] As Montero rightly states, 'this insistence on the desirability of autonomy (and the undesirability of vulnerability) reinforces the conception of the ideal of the human being as a finished, self-sufficient being.'[65] Similarly, Witmer-Rich refers to the classical liberal legal approach to decision making and self-government; he outlines J.S.Mill's dicta on the value of consent; that we place so much emphasis on consent because 'individuals are the best judge of their own interests.'[66] Moreover, he refers to Feinberg's arguments on the value of consent as a 'right to autonomy based on her intrinsic sovereignty of her own life.[67] To achieve such independence and self-sufficiency with decisions made free from any control or inferences, the liberal legal subject shuns State interference. At its core is the notion that individuals should be able to choose how they live their life however they so wish.[68] As McClusky suggests, the State is legitimate only when it acts to enable human autonomy and protect individual freedom.[69] Arguably then, preventative action by the State is construed as negative. As Brenkert argues 'people are unfree when they are constrained by others or institutions.'[70] Hence, liberal legal subjects often treat the State and its resources as a source of scepticism with which motives of action are scrutinized and regulations rejected.

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[63] Gilson, E., 'Entrepreneurial subjectivity, the privatization of risks and the ethics of vulnerability' in Martha Albertson Fineman, Titti Mattison & Urika Andersson *Privatization, Vulnerability, and Social Responsibility: A Comparative Perspective*, (Taylor & Francis: 2017) 90

[64] Katzin, M., 'Freedom of Choice over equality as objective for the Swedish welfare state? The latest debate on choice in education' in Martha Albertson Fineman, Titti Mattison & Urika Andersson *Privatization, Vulnerability, and Social Responsibility: A Comparative Perspective*, (Taylor & Francis: 2017) 172

[65] Carolina Montero, 'Autonomy, Vulnerability, Dichotomy or continuum?' (A workshop on Vulnerability conference, Emory University, February 2018)

[66] Jonathan Witmer-Rich, 'It's Good to be Autonomous: Prospective Consent, Retrospective Consent, and the Foundation of Consent in the Criminal Law' [2011] 5 *Criminal Law and Philosophy* 377-398, 377

[67] Ibid.

[68] Herring, J., 'Relational Autonomy and Rape' in Shelley Day Sclater, Fatemeh Ebtehaj, Emily Jackson & Martin Richards (eds) *Regulating Autonomy: Sex Reproduction and Family* (Oxford and Portland, Oregon Hart Publishing, 2009) 54

[69] Martha T McCluskey, 'Responsiveness and Resilience Beyond Neo-Liberal Autonomy' conference paper 'A workshop on Vulnerability' Emory University February 2018.

[70] George G Brenkert, 'Self Ownership, Freedom and Autonomy' [1998] 2 *The Journal of Ethics* 27-55, 27

Although these above-mentioned elements of the autonomy approach could be dealt with in detail in turn, they are somewhat overlapping. The core concepts of the liberal legal subject can be surmised as a free capable individual who exercises their rights to act in their own bests interests free from any paternalistic interventions.[71] With regards to sexual autonomy the same values are evident, as sexual autonomy rights are seen as a subset of autonomy rather than a distinctive category.[72] As Schulhofer explains, sexual autonomy has three components: 'an internal capacity to make mature and rational choices…an external freedom from impermissible pressures and constraints, and the bodily integrity of the individual.'[73] The focus remains on the importance of individual choice and of informed consent to sexual activities.[74]

As a result, the foundations of the legislation appear to be based on this desire for freedom, this assertion of a right to be free from external pressures and this presumption that individuals are capable to make choices. This is problematic for a number of reasons. Simply asserting that there is a right to be free from external pressures, does nothing to address the presence of such pressures. It does not address the impact that such external pressures have on the validity of these choices. It is merely a proclamation, that ignores the stark reality that choices, particularly sexual choices, are not made in a vacuum. These decisions are not merely an assertion of freedom but are difficult complex choices that interrelate to the individual and their position, their situation and their environment. Sexual autonomy, and the assertion of its associated rights, fails to acknowledge and address the realities in which we live and make sexual decisions. The approach is further complicated where an individual is perceived not to have capacity to consent as explored below.

[71] Hunter (n 57) 13.
[72] Stephen Knight, 'Libertarian critiques of consent in sexual offences' [2012] *UCL Journal of Law and Jurisprudence*, 103-165, 140
[73] Schulhofer, S., *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Cambridge, Mass.: Harvard University Press 1998)
[74] Knight (n 72) 137.

1.2 AUTONOMY, CAPACITY AND *OTHERING*

A key element of the autonomy theory is its links with the presumption of capacity. Autonomy, unlike vulnerability, 'is not an inherent human characteristic.'[75] Politically, autonomy is based on keeping the State out of the way to allow individuals to make their own private decisions.[76] Its liberal interpretation focuses on choice and disapproves of restrictions of that freedom.[77] As the autonomous liberal legal subject puts substantial emphasis on independence and capabilities of individuals this then creates a distinctive line between those who have capacity and those who do not. Moreover, a foundation that is based on autonomy, and therefore presumption of capacity is problematic for sexual relations. If we start from a point where we presume everyone is capable, it is unsurprising that the burden to prove otherwise rests with that individual. In other words, because of this acceptance, and arguably the insistence if capacity, defendants' wilful blindness as to their incapacity, may well be accepted. Moreover, a foundation based on capacity contributes to the creation of a norm. It presumes individuals are capable and independent, unless they have a particular characteristic to suggest otherwise. If you do not meet this expected standard of capable, you are othered. This in essence fuels the grouping of the so-called *others* who fail to fulfil the capable characteristics of the autonomous liberal legal subject. Such 'othering' then leads to distinctive treatment of these individuals. They are separated into groups with like characteristics and afforded certain protections because of their apparent dependency. In other words, the liberal subject fails to consider the frailty of the human condition holistically. Considering that a liberal subject is based on a fully autonomous individual, arguably those who do not fall into that category are characterised as 'incapable' individuals. This can result in differential treatment; in particular their rights to decision making can be restricted and protections may be unequally distributed.

This creates, as Clough refers to, *binaries* between capacity/incapacity and vulnerable/invulnerable[78] and with this follows the stereotypical attitudes and myths that relate to those who do not fulfil this 'ideal type' subject criteria. This is of particular concern when we explore how this approach affects the treatment of incapacitated rape complainants.[79] This is similarly echoed in the approach to State interventions. There are

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[75] Martha Fineman, 'The Vulnerable Subject and the Responsive State' [2010] *The Emory Law Journal* 251–275, 260.

[76] http://www.oxforddictionaries.com/us/definition/american_english/autonomy

[77] Herring (n 68) 59.

[78] Clough (n 21) 470.

[79] As we will be discussing in the below section this othering of groups in something which the vulnerability theory seeks to avoid and eradicate.

many critiques to the rejection of the State. In particular, as Brenkert rightly recognises, individuals start with different levels of 'abilities, talents, energy and resources.'[80] Such a libertarian approach to freedom and state interferences may mean that people will accumulate different levels of resources where 'any coercive redistributive efforts would reduce their freedom…'[81] Moreover, what appears not to be recognised through this approach is that the State is ever present and is constantly acting. Rejecting State action to *protect* autonomy fails to acknowledge the State as a constant cog which regulates our everyday lives. The roles and responsibilities which it chooses to accept and adopt vary because of the way in which we have accepted our individual responsibility. The more the State is rejected, the more *autonomy* we perceive to have. As Kozel states 'autonomy is a striking and powerful word,'[82] which carries with it many connotations. With autonomy, comes responsibilisation- by welcoming self-regulation and shunning state action, we become responsible for any failures or indeed harm that may result.

This section has begun to argue that there are inherent issues within the autonomous liberal legal subject. Throughout this thesis, Martha Fineman's claim that autonomy is a myth[83] will become more apparent when we examine our societal attitudes towards rape complainants and the current legislative approach to incapacities. Many scholars will be reluctant to accept this rejection. Indeed, Satz in particular, disagrees with Fineman's rejection of the liberal subject.[84] She states that she does not see the need for legal structures to be shaped exclusively around one or the other.[85] Moreover, some academics have accepted the problems with this approach and have instead attempted to reconceptualise autonomy[86] through a feminist lens with the term 'relational autonomy.'[87]

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[80] Brenkert (n 70) 27.
[81] Ibid.
[82] Randy J. Kozel,' Institutional Autonomy and Constitutional Structure' [2014] *Michigan Law Review,* 957-978, 963.
[83] Fineman (n 16) 24.
[84] Ani B. Satz, 'Disability, vulnerability, and the limits of antidiscrimination' [2008] 83 *Washington Law Review* 513-567, 551
[85] Ibid.
[86] Stoljar, Natalie, 'Feminist Perspectives on Autonomy', in Edward N. Zalta (ed.) *The Stanford Encyclopaedia of Philosophy* (Winter 2018 Edition), <https://plato.stanford.edu/archives/win2018/entries/feminism-autonomy/>.
[87] See Catriona MacKenzie, 'The importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability' in Catriona Mackenzie, Wendy Rogers & Susan Dodds *(*eds) *Vulnerability, New Essays in Ethics and Feminist Philosophy,* (New York: Oxford University Press 2014); Herring (n 64) ; Susan Dodds, 'Depending on care: Recognition of vulnerability and the social constructs of care provision' [2007] 21(9) *Bioethics* 500-510; Elizabeth Ben-Ishai, 'The Autonomy-Fostering State: 'Coordinated Fragmentation' and Domestic Violence Services' [2008] 17 *Journal of Political Philosophy* 307-331; Braudo-Bahat, Yael, 'Towards a Relational Conceptualization of the Right to Personal Autonomy' [2017] 25(2) *American University Journal of Gender, Social Policy the Law,* 111-154

A relational autonomy approach attempts to move away from the individualistic traditional understanding of autonomy, towards an understanding of the individual identities are formed in the context of their social relationships.[88] It acknowledges the vulnerability of individuals, where decisions are made in context as embedded beings.[89] Relational autonomy accepts our dependency and acknowledges that 'social institutions and structures protect us against some vulnerabilities, while others expose us to risk.'[90] As Delgado states human beings are always involved in relationships and sit within a network of social relations.[91] Indeed she explores the connection and overlap between Fineman's vulnerability theory and relational autonomy, arguing the promotion of relational autonomy through a vulnerability lens.[92] Although not within the scope of this thesis to fully explore, it is argued that a relational autonomy approach would not address the problematic response to sexual assault complainants. As will be argued throughout, the autonomy focus is still structured on the individual. The concept of relational autonomy is merely derivative of autonomy and cannot address the issues that will be identified in this thesis. As Westlund suggest 'it is not always clear whether relational theorists are offering a fundamentally different approach to autonomy.'[93] Although we need to recognise our position in society and how we live our lives in a web of relationships,[94] we need to move away from an individualistic response towards a more holistic theory of vulnerability. Moreover, with the foundations of sexual offences based on autonomy, the violation of a same is proceeding to have sex without her consent.[95] This inextricable link with the complex and vague concept of consent creates further issues for sexual offences.

[88] Mackenzie, C & Stoljar, N, 'Autonomy refigured' In Ed Mackenzie & Stoljar (eds) *Relational Autonomy* (Oxford University Press, Oxford, 2000) 4
[89] Dodds (n 87) 506.
[90] Ibid 507.
[91] Janet Delgado, 'Re-thinking relational autonomy: Challenging the triumph of autonomy through vulnerability' [2019] 5 *Bioethics* 50-65, 52
[92] Ibid.
[93] Andrea C Westlund, 'Rethinking Relational Autonomy' [2009] 24(4) *Hypatia* 26-49, 26.
[94] Herring (n 68) ch.4.
[95] Schulhofer (n 73) 268-272.

1.3 THE PROBLEMS WITH CONSENT.

MacKinnon in particular notes that that consent misdiagnoses the problem.[96] Estrich too recognises that the 'definition makes all too plain that the purpose of the consent rule is not to protect female autonomy and freedom of choice, but to assure men the broadest sexual access to women.'[97] Indeed this thesis will argue that consent is problematic,[98] in that through the guise of promoting and respecting autonomy we responsibilise complainants and excessively focus on how her actions contributed to the assault. Consent, as an inherently subjective concept, fails to address the contextual and situational factors in which decision are made. Using a complex, subjective concept such as consent to differentiate between permissible and criminal acts is likely to lead to inadequate responses. Moreover, as detailed in chapter 6, consent lacks normative force. As Herring and Dempsey refer discuss, consent merely provides a defendant with exclusionary permission to not consider reasons against penetration.[99] Although autonomy underpins consent, consent is also inextricably linked to autonomy. To give valid consent you must be autonomous, which, as this thesis will argue, is in fact unachievable.
From a vulnerability perspective, consent is problematic *because* it promotes autonomy, it hides responsibilisation with a guise of freedom and fails to adequately address the situational and particular vulnerabilities of the complainant. Therefore, it is the underpinning theory of autonomy that appears to cause of the many issues with the treatment of sexual assault complainants.

As will be explored below, the coercive model through MacKinnon's perception of gender inequality, assumes that such inequality pervades every sexual relationship. Vulnerability, however, does acknowledge that we are all vulnerable, both because of our embodiment but also because of our embedded nature- how we interact with the State and others. Vulnerability posits a more nuanced understanding of our relationships and does not assume the mere differing in gender automatically equates to unequal sex. Instead we can use the lens of vulnerability to critically analyse the particular and situational factors whilst

[96] MacKinnon, C., 'Rape: on Coercion and consent' in Lori Gruen & George E. Panichas (eds.) *Sex Morality and the law* (New York and London, Routledge, 1997) 436
[97] Susan Estrich, 'Rape' [1986] 95 *Yale Law Journal* 1087-1184, 1087
[98] When analysing the legislation in chapter 3.
[99] Herring J., & Dempsey M., 'Rethinking the criminal law's response to sexual penetration' in Clare Mc Glynn & Vanessa E. Munro *Rethinking Rape law, International and Comparative Perspectives* (Oxon, Routledge, 2016) 33

also shifting our perspective from the individual onto the State. Moreover, the vulnerability focus allows us to challenge autonomy, something which coercion continues to support despite, as will be further detailed below, the hidden implications. Before we explore the potential of vulnerability, the merits of the theory of coercion must be explored to determine whether there is potential in the alternative approach.

2. THE APPROACH OF MACKINNON'S COERCION

The above section has started to reveal some of the many issues within the autonomy and consent paradigm for sexual offences. Indeed, it is because of the difficulties in conceptualising and regulating consent that many feminists have favoured an approach based on coercion. Coercion from Mackinnon's perspective is understood to be some form of pressure, duress or fear that results in so called consent to sex.[100] Many feminists have different views on how coercion is or should be framed, below is a brief exploration of some the key literature. Coercion is a popular approach to sexual offences by many feminists, we must therefore consider its merits before suggesting an alternative approach through a vulnerability theory.

2.1 RAPE AS VIOLENCE

One such understanding of coercion is based on the historical view that rape was not an offence against a woman, rather women were seen as property belonging to a man. In Susan Brownmiller's *Against our Will*, the history and development of rape was fully explored.[101] She details a historical account of rape as a weapon of war used against

[100] There appears not to be a single accepted definition of coercion. Pugh and Becker explore the definitions in their recent article and note the following. 'Many scholars use the terms sexual coercion and sexual assault interchangeably or that sexual coercion encompasses all types of perpetration tactics that lead to sexual assault…' and 'Feminist scholars argue that verbal sexual coercion is fuelled by invisible power dynamics that justify men's use of coercive tactics, prohibit women from making free and autonomous decisions on when, how, and where to engage in sexual activity, or utterly obscure the process by considering it to be a normal part of heterosexual relations'. Citing physical force, a continuum of rape and unwanted sexual activity consented through compliance or acquiescence as some understandings of coercion. See Pugh, B., & Becker, P. 'Exploring Definitions and Prevalence of Verbal Sexual Coercion and Its Relationship to Consent to Unwanted Sex: Implications for Affirmative Consent Standards on College Campuses' [2018] 8(8) *Behavioral sciences* 69, (2.1)

[101] Brownmiller, S., *Against our Will: Men, Women and Rape* (Pelican Books, 1986)

enemies.[102] In essence, Brownmiller recounts rape throughout the years and concludes that, rape is an act of power and dominance used by men to instil fear in their victims.[103] She uses the theory of coercion to argue that rape is not sexual desire or uncontrollable passion but instead an act of violence used by men to control women.[104] She suggests that threat of rape benefits all men.[105]

Arguably, Brownmiller's failing is her excessive reliance on examples of rape during times of hostility. She explores rape by men during war, in prison and riots but rarely 'by men as men.'[106] However, there may be some merit in the coercive model in the international criminal law context;[107] particularly when rape is perceived as violence.[108] Although this too has been the subject to much criticism and debate, of which this thesis does not have the capacity to engage with,[109] considering rape in an international criminal law setting is often perpetrated by men at a time of war and hostility, this model might serve as an accurate reflection of the coercive nature of sexual offences committed. However, as aforementioned, equating rape at war time to acts of genocide has been subject to much debate.[110] Therefore, there may be some strength in her proposal that victims submit to coerced sex at times of war/hostility because of this threat of violence; but it is difficult to envisage how such a theory could accurately reflect the wide-range of sexual relations in normal day-to-day life. As Conaghan argues, by placing rape as an act of violence, it fails to acknowledge the particular wrong of rape and fails to identify why it 'should be distinctly wrongful.'[111] Comparing rape to other acts of violence, as Conaghan suggest, makes rape 'indistinguishable' whilst failing to identify why it deserves our special

[102] Ibid 31.
[103] Ibid.
[104] Ibid 153.
[105] Ibid 15.
[106] MacKinnon (n 96)
[107] Munro, V.E., 'From Consent to Coercion', in Mc Glynn, C., & Munro, V.E., (eds.) *Rethinking Rape Law, International and Comparative Perspectives* (Oxon, Routledge, 2016) 18
[108] Catherine A MacKinnon, 'Towards a Feminist Theory of the State' (*London Harvard University Press* 1991) 134
[109] Susan Engle, 'Feminism and its (dis)contents: Criminalizing wartime rape in Bosnia and Herzegovina' [2005] 99 *The American Journal of International law* 779-816, 786
[110] Ibid.
[111] Joanne Conaghan, 'The essence of rape' [2019] 39(1) *Oxford Journal of Legal Studies*, 151–182, 166; see also John Gardner on his discussion on the wrongness of rape, identifying the wrongness of rape. He argues that the wrongness is not the bad experience of rape, or the denial of ownerships rights of the body, but rather the sheer use of another human being and the objectification of that individual. Gardner, J., 'The wrongness of rape' in John Gardner (ed) *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford Scholarship Online, 2009) and John Gardner, 'Reasonable Reactions to the Wrongness of Rape' [2017] 29 *The Denning Law Journal* 3-16.

attention.[112] For instance, the rape of an intoxicated victim for the perpetrator's sexual gain would more accurately be described as the exploitation of a vulnerable subject's inability to refuse sexual advances rather than an act of violence. Undoubtedly, some rapes will have (and will continue to) be fuelled by violent motivations; yet it is not a true and all-encompassing reflection to posit that all rapes are just an act of violence. Although violence can be defined and conceived through different lenses, if we take the term in its ordinary meaning, we can challenge this idea. As Cahill observes, 'few women would agree that being raped is essentially equivalent to being hit in the face.'[113] Similarly, as Conaghan states 'conceived narrowly and traditionally in terms of physical force, coercion yields an understanding of rape that excludes many non-consensual sexual encounters… a consent-based model is obviously more expansive than a force- or coercion-based one.'[114] Therefore, this understanding of rape arguably reflects one particular type of rape and fails to reflect different experiences of sexual assault. However, there are other interpretations of the theory of coercion that in fact reject Brownmiller's understanding of rape as violence and instead rely on coercion to posit that rape is about power. In particular, MacKinnon's view is a dominant interpretation of the coercion theory which suggests that gender inequality is at the heart of sexual assault.[115]

2.2 RAPE AS POWER IMBALANCE

It is acknowledged that some instances of rape may well reflect Brownmiller's interpretation of rape as violence, however this account cannot accurately reflect the realities and particularities of rape. Instead, we can look to MacKinnon's interpretation of the coercion approach which places power imbalances and gender inequality at the heart of sexual offences. As MacKinnon suggests, the consent model fails to acknowledge coercion and the coercive circumstances that permeate our lives and society.[116] MacKinnon's interpretation of coercion centres on notions of gender-inequality.[117] She argues that consent can never be sufficient or meaningful when both parties have unequal starting

[112] Ibid.
[113] Cahill, A, *Rethinking Rape* (Ithaca NY: Cornell University Press 2001) 3
[114] Conaghan (n 111) 161.
[115] Catherine MacKinnon, 'Rape Redefined' (2016) 10(2) *Harvard Law and Policy Review*, 431-477,469-470.
[116] MacKinnon (n 108) 127.
[117] MacKinnon (n 108) 441.

points.[118] In particular she argues consent is inadequate considering its definition and understanding is based on men's perceptions.[119] With some arguing that her position suggests 'all sex is rape';[120] more accurately MacKinnon believes there is great difficulty in distinguishing between sex and rape.[121] She suggests that dominating power over the powerless is characteristically sexual in society[122] and to suggest it is merely violence acts only to validate 'heterosexual sex.'[123] She suggests that the demonising and humiliation of women is perceived as inherently sexual;[124] women fulfil their gender roles by submitting to the coercive male's sexual desires.

Arguably, this approach seems to suggest that no woman freely engages in sex and that they only do so to please men and fulfil their gender roles.[125] When MacKinnon refers to consenting women, she claims such consent is linked to the societal eroticisation of male supremacy.[126] Moreover she suggests that no such decision to engage in sex is free as these decisions are shaped in the context of gender inequality. However, this approach can be challenged. It fails to identify the particular wrongness of rape or distinguish sex from rape. Similarly, the assertion that implies all men eroticise submission to their dominance[127] unjustly labels all men as sexually coercive and inaccurately reflects a society where male dominance is not always necessarily seen as desirable. As Hoffman articulates in her review of Grauerholz & Korelewski on *Sexual Coercion*, 'eager to

[118] MacKinnon (n 115) 476. As will be discussed below and in further chapters of this thesis, for the vulnerability theory though it is not because we fall into one particular group that we are 'vulnerable'. It is far more to do with our embodiment and our embedded position in society. It is the unequal distribution of resilience by the state that is at the heart of this. The current social imbalances that the coercion theory refers to are worsened because of the underpinnings of autonomy. Autonomy responsibilises individuals, shunning state action whilst affording unequal protections, suggesting some people are more vulnerable through no fault of their own deserve more protection. We need to fully understand our human existence to adequately respond to sexual violence, autonomy mask this reality.
[119] MacKinnon (n 115) 443.
[120] Susan Estrich, 'Teaching Rape Law' [1992] 102 *Yale Law Journal* 509, 512 citing Catherine A. MacKinnon 'Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence' [1983] 8 *Signs* 635-658, 646-655
[121] MacKinnon (n 96) 443.
[122] MacKinnon (n 115) 461.
[123] MacKinnon (n 115) 446.
[124] MacKinnon (n 115) 461.
[125] MacKinnon (n 108) 113.
[126] Ibid 177.
[127] Ibid 113.

explain its relevance- no author asks the opposite question- how do we account for the facts that the majority of men do not engage in sexually coercive behaviour.'[128] Moreover, arguably this theory of coercion is heteronormative. It is based on the normative presumption that men are sexual aggressors and women are passive and submissive. Arguably, it is linked with the presumption of heterosexuality whilst adhering to a strict gender binary and reinforcing stereotypical gender roles. This approach fails to encapsulate the wide and varying range of sexual relationships, and ways and means by which sexual exploitation can be manifested. The theory fails to appropriately and adequately reflect the reality of the varying range of possible sexual encounters; as 'the insight of MacKinnon's question is that women experience commonalities between what is legally defined as rape and what is considered normal sex.'[129] This leads us on to consider what is actually the essence of rape? Once we begin to properly understand what rape is, we can mould and adopt our approach to reflect this.

2.3 THE (IN)ADEQUACY OF COERCION

In order to determine the most appropriate legal and societal response to sexual offences the essence of rape must be considered. We must explore whether a coercion approach can fully address the different contexts in which rape arise. Moreover, we must determine whether the aims and potential remedies of a coercion approach are productive.

2.4 THE ESSENCE OF RAPE: IS COERCION TOO NARROW A CONCEPT?

What is the essence of rape? It is a very difficult question to answer. In Conaghan's most recent article, she grapples with this difficult conceptualisation.[130] She acknowledges that rape is a vile and heinous crime but posits why it is positioned as such 'now that the older feminine-purity premises are no longer available.'[131] She cites differing positions on the

[128] Frances L Hoffman, 'Review of Sexual Coercion: A Sourcebook on its Nature, Causes, and Prevention' [1992] 21(2) *Journal Contemporary Sociology*, 236-237, 237; Elizabeth Grauerholz, Mary A. Korelewski (eds.*) Sexual Coercion: A Sourcebook on its Nature, Causes, and Prevention* (Lexington Books, 1991)
[129] Dorothy E. Roberts, 'Rape Violence and Women's Autonomy' [1993] 69 *Chi.-Kent L. Rev*, 359-388, 370
[130] Conaghan (n 111).
[131] Ibid 180.

essence of rape, referring to penetration, intent and the violation of autonomy as some of the main perceptions.[132]

She explores whether the essence of rape is as simple as what the law states it is;[133] this is quickly disregarded as juries are too influenced outside and beyond formal doctrines to make such a suggestion. If the law then is so entangled with society that they both reflect one another, how might we frame the essence of rape? Perhaps it is therefore consent, or lack thereof, that could be the essence of rape. She concludes that it is not often the presence or absence of consent that is at the heart, but rather how the defendant perceives its existence.[134]

Conaghan concludes that there is no core 'essence' of rape, beyond stranger rape, despite analysing many academic suggestions.[135] We can gain insight from Fitzgerald's suggestion of taking sexual liberties[136] as a potential aspect of rape. As explained by Conaghan, Fitzgerald removes the violence and sexual nature from rape to and relabels it as an issue of morality.[137] Fitzgerald seems to suggest that the sexual nature of rape is almost incidental,[138] which differs greatly from some coercion theorists. Instead he suggests the wrongness of rape is in its violation of moral order and its apprehension and perception of rape depends on the cultural understandings of rape.[139] However, arguably, the essence of rape lies much deeper than a violation of moral and social order. Indeed, as Conaghan recognises, rape is a 'remarkedly fluid concept',[140] which arguably therefore demands a flexible and fluid response. It is a very difficult task to pinpoint the exact harm of rape, as rape can occur in so many different circumstances resulting in many different harms. As rape is such a fluid concept, we cannot suggest that the essence of rape is harm to

[132] 'According to the Home Office, 'Setting the Boundaries Reforming the law on Sex Offences'. July 2000 [2.8], 'the essence of rape' is 'the sexual penetration of a person ...without consent'. For Nicola Lacey, 'its essence lies in the violation of sexual autonomy'. John Bogart invokes 'the essential harm' of rape, while Louise du Toit refers to the 'damage' and George Panichas to the 'wrong' of rape in expressly essentialist terms. Judges, too, often talk about rape—indeed, about legal categories in general—in terms of essence: in DPP v Morgan, Lord Hailsham identifies intent as an 'essential ingredient' of rape, while, in R v Miller, Lynskey J describes consent in similar terms.' see Conaghan (n 111) 157.
[133] Conaghan (n 111) 153.
[134] Ibid 160.
[135] Ibid 177.
[136] Fitzgerald, P.J., *Criminal Law and Punishment* (Oxford University Publications, 1962) 74.
[137] Conaghan (n 111) 167
[138] Ibid.
[139] Ibid.
[140] Ibid 178.

autonomy. Coercion, like autonomy, is similarly based on a liberal framework. The coercion approach magnifies the issues of coercive relationships and issues with power imbalances. Yet this is framed as an offence against someone's autonomy. The remedies suggested through a coercion approach are framed through a focus of reenabling an individual's autonomy. The coercive framework fails to consider the broader structural and legal change because of its liberal individualistic foundations. It can therefore be argued that the coercive approach is linked with an autonomy lens which is arguably inadequate. Instead, we require a fluid and mouldable response that accurately reflects the different situational circumstances of rape.

If we agree there is perhaps no essence to rape, perhaps the theory of vulnerability might instead reflect the reality of rape. We could articulate rape as not the denial or harm to autonomy as coercion does, but instead as *exploitation of vulnerability.*[141] If we accept that the essence of rape is not the denial of autonomy then a coercion approach is unlikely to be sufficient.

Therefore, the coercive model must be rejected; the regulation of sexual offending ought not to focus merely on particular instances of rape, i.e. rape as power/violence. [142] It is therefore suggested that coercion alone is not sufficient. However, the theory of vulnerability offers us a more extensive approach under one theoretical umbrella; it encapsulates a more nuanced understanding of sexual encounters that considers our positions in society, our shared characteristics, our abilities to choose and refuse, power imbalances and the need for State response. Arguably, coercion can be interpreted as too restrictive, creating an essentially force-based framework.[143] Although coercion can be argued in many circumstances, those relating to intoxicated complainants do not fit so neatly. As Munro posits, such wrongdoing 'is [the offender's] disregard of [the complainant's] entitlement (as a moral and legal agent) to make a choice;' and coercive factors lay merely in the background.[144] Although such circumstances could be moulded to

[141] Chapter 6 explores the reimagination of harm through a theory of vulnerability. The purpose of this point here is to address that a coercion approach will be insufficient as the model views coercion as a denial of autonomy. Moreover, it seeks remedies based on reenabling autonomy. When we look to the essence of rape however, we cannot suggest that the denial of autonomy is at the core. Therefore, the coercion approach does not address the substantive issues with the conceptual underpinnings of autonomy.
[142] Tadros (n 48) 514.
[143] Munro (n 107) 21.
[144] Ibid 25.

fit within the coercion model, the theory of vulnerability offers a more expansive approach that has the potential to cover a vast range of encounters, particularly where complainants are intoxicated.

Moreover, there are conflicting views on what coercion means, whether it be framed as violence, sexual desire, power or whether issues of deception should be covered. If we were to implement a coercive model, this could arguably create further issues with scripts and how rape encounters are perceived, making them in some instances over and under inclusive. For example, if we perceive sex between an employer and employee inherently coercive, the approach may be overly inclusive. Coercive relationships that do not fall into particularly scripts may be overlooked and thereby under-inclusive. As Conaghan argues, for coercion it is often from as sex-versus-violence perspective or presented 'as an 'either/or' situation; despite Mackinnon's attempt to combine sexual and violence for coercion, one generally trumps the other.[145]

Moreover, where the vulnerability theory and coercion disagree is with regards to the role of autonomy. As Roberts cited in her introduction, Estrich suggests that the object of modern rape law be a 'celebration of our autonomy.'[146] These suggestions are still based on framing consent through autonomy or indeed promoting autonomy in any other way. As she states, '[w]e could prohibit the use of force and threats and coercion in sex, regardless of 'consent.' We could define consent in a way that respected the autonomy of women.'[147] Basing a new legislative response, on the same foundations of autonomy, will unlikely achieve any substantive change. Indeed, similar foundations may create similar underpinning issues such as a hierarchy of protections and issues of responsibilisation of victim-survivors. The coercive approach is therefore inadequate because of its links to autonomy and its shortfalls earlier explored.

Coercion is therefore not the most appropriate or indeed robust response to addressing the issues revealed within the current legal framework. This is not least because of its similarities with autonomy, which, as is detailed below, vulnerability seeks to challenge. Jed Rubenfeld supports this argument suggesting that coercion and consent are quite

[145] Conaghan (n 111) 177.
[146] Roberts (n 129) 359 citing Estrich, S., *Real Rape* (Cambridge: Harvard university Press, 1987) 102
[147] Estrich (n 97) 1095.

closely linked considering they are both designed protect sexual autonomy. [148] As above mentioned, and as will be discussed in further detail in chapter 3 and 6, the legal framework concerning consent is problematic. The coercion theory and the vulnerability theory acknowledge consent as a key issue to addressing sexual assault, but for differing reasons.[149] We must therefore seek to reimagine our approach; this requires not only a reform to the law but to look to a different theoretical understanding of our existence to begin to reinvent our response to sexual assault. It is the theory of vulnerability as will be explored below, that offers us that opportunity.

3. FROM AUTONOMY TO VULNERABILITY

This section provides a general overview of the key components of the theory of vulnerability, whilst touching on the potential in relation to sexual offences. This is not meant to be a complete analysis. The vulnerability theory will be applied throughout the remaining chapters, and the last chapter will discuss how vulnerability can be used a potential for legal reform in depth. This section aims to explore the key components of the theory of vulnerability. The universality and particularity of vulnerability will first be explored. Then we will detail how the vulnerability theory demands an active and responsive State. Considering this, the demands for resilience and a shift away from individual responsibility rejecting the 'othering' approach will follow. These sections will highlight the potential use of vulnerability as a tool to challenge our understandings based on an autonomy approach before briefly exploring how we might reframe our response to sexual offences.

We have identified the inadequacies of a coercion approach, and the responsibilisation and othering effect of an autonomy approach. Therefore, this section looks towards vulnerability as both a potential replacement but also as a tool to further unmask the realities of an autonomy-based approach. Our focus is on a theory of vulnerability as developed by Martha Fineman. It was first advanced by Fineman in 2008 and has since been developed and expanded by others across a range of disciplines. It will be argued that Fineman's theory of vulnerability offers a rich and nuanced understanding of universal

[148] Jed Rubenfeld, 'The Riddle of Rape by Deception and the Myth of Sexual Autonomy,' [2013] 122 *Yale Law Journal* 1372–1442, 1388
[149] Mackinnon (n 115) 436; & Mackinnon (n 108) 656 'consent can be presumed unless disproven.'

vulnerability calls for the State to respond and offer equal protection to all. Moreover, this thesis will offer a fresh and unique examination of the current disparate responses to incapacitated victims of sexual assault, offers a mechanism to challenge stereotypes, demand State intervention and propose practical legal reforms to assist in the reduction of the ever-widening justice gap. The purpose of this section is to set out the key components of the theory in more general terms, with application to specific legal issues, the critiques of the theory are considered in depth in chapter 6 before the vulnerability theory is suggested as a new foundation for legal reform.

Fineman's approach to vulnerability is based on the concept that all humans are inherently vulnerable.[150] As explained the concept of vulnerability reflects the reality of life in that we are 'all born, live and die within a fragile materiality that renders us all constantly susceptible to destructive external forces and internal disintegration.'[151] Typically, the term 'vulnerable' has been is burdened by connotations that someone is feeble or reliant on others for protections. Drawing on Fineman's theory of vulnerability, this thesis seeks to develop this approach in relation to sexual offences and in particular the treatment of incapacitated complainants. Vulnerability should be accepted and welcomed; it should be understood as the 'primary human condition' rather than simply susceptibility to harm. To do this, we must first acknowledge that we are all vulnerable.

3.1 THE UNIVERSALITY OF VULNERABILITY

Fineman's theory of vulnerability encompasses several specific underlying characteristics. It attempts to reflect the reality of life.[152] The first key aspect is that vulnerability is universal and is at the core of what it means to be human.[153] As Fineman and Grear argue, vulnerability is inevitable and unavoidable.[154] Secondly, vulnerability is constantly present in that it comes from our embodiment as humans and presents an 'imminent ever present possibility of harm, injury and misfortune.'[155] These harms can take many forms to which Fineman suggests we are all susceptible at any given time; these harms can be economic,

[150] Fineman (n 21); Fineman, Mattison & Andersson (n 60).
[151] Fineman (n 21).
[152] Fineman (n 21).
[153] Fineman & Grear (n 54) 21.
[154] Ibid.
[155] Ibid.

social, financial or health related.[156] Moreover, these harms are often beyond human control, suggesting the inescapable nature of our frailty. Fineman argues that we cannot eradicate our vulnerability, in other words there is no concept of *invulnerability*. However, we can take steps to reduce the possibility of harm by building resilience.[157] She suggests things like health care, housing and financial support as means of addressing our vulnerability. As will be discussed in section 5, it is argued that the State has a duty in assisting and promoting this resilience.[158] It can provide different means of resilience and, it can offer protection through law and policy. It is rightly argued by Fineman that the State has an inherent duty to protect its citizens and this can be done through legal reforms that recognise the constant nature of vulnerability. Although, the theory of vulnerability is based on the universal nature of vulnerability, it is also acknowledged that everyone's experience of vulnerability is different and particular, as discussed further below.

3.2 BUT VULNERABILITY IS ALSO PARTICULAR

Although we are always susceptible to harms, some may experience their vulnerability more often. In regard to minority groups and poorer populations, for example, it is acknowledged that such individuals are often exposed more regularly to their vulnerability due to lack of resilience available to them. For example, a recent report covering 3 years detailed that disabled women were almost twice as likely to have experienced any sexual assault than non- disabled women.[159] Moreover, a report in 2016 exploring the experience of crime of the homeless revealed 30% of participants had been physically assaulted in the previous 6 months, and 6% had been sexually assaulted in the previous year.[160] A US study on black women's experience of rape and sexual assault, found that around 35% of black women will some form of sexual violence in their life time.[161] These statistics might

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[156] Fineman [2014-2015] (n 21) 614.
[157] Martha Albertson Fineman, 'Vulnerability, Resilience and LGBT Youth' [2013-2014] 23 2 *Temple Political and Civil Rights Law* 307- 329, 312
[158] Fineman [2014-2015] (n17) 614.
[159] Home Office, Office for National Statistics, 'Disability and Crime, An overview of published data on disability and crime in the UK and analysis of the experiences of domestic abuse and sexual assault for disabled adults aged 16 to 59 years in England and Wales' [2019] available at https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/disability/bulletins/disabilityanddcrimeuk/2019
[160] Sanders, B. & Albanese, F. '*"It's no life at all": Rough sleepers' experiences of violence and abuse on the streets of England and Wales'*. (London: Crisis, 2016)
[161] The National Center on violence against women in the Black community, 'Black Women and Sexual Assault' *Statistics of Black Women and Sexual Assault* [2018] available at https://ujimacommunity.org/wp-content/uploads/2018/12/Ujima-Womens-Violence-Stats-v7.4-1.pdf

therefore substantiate an argument to recommend particular protections for the homeless, for women with disabilities and for black women. However, through a theory of vulnerability, a different approach is proffered. Rather than focussing on characteristics, or particular groups of individuals who have been labelled as particularly vulnerable, we instead need to ask more difficult questions. Rather than assume it is the characteristic that makes individuals vulnerable, we ask questions that explore the root of that vulnerability. Why have they experience sexual violence? It is not merely the existence of a characteristic that *makes* such individuals vulnerable. Instead as Fineman recognises, vulnerability fluctuates depending on their positioning in society.[162] Instead we focus on the particular rather than groups.

Traditional users of vulnerability perceive certain groups as constantly or inherently vulnerable. Fineman does not acknowledge that some individuals are 'more vulnerable' than others, rather the suggestion is that they are positioned differently and lacking resilience.[163] Basically, having less resilience equates to less access to societal protective factors e.g. financial circumstances, homelessness, access to health care and education etc. However, it could be suggested that some individuals may appear more vulnerable than others due to a particular characteristic, but due to protective factors in place their vulnerability is not realised. For example, it is arguable that all women are vulnerable to sexual assault. However, that vulnerability does depend on many embedded characteristics, such as social and financial status, our employment and our relationships with each other. In contrast to Fineman, it is suggested that is possible for someone to be more vulnerable than others in considering the ever-fluctuating nature of our vulnerability, in the sense that they experience a heightened sense of their vulnerability. This is not to argue that someone is constantly more vulnerable; instead, it is to suggest that there are moments in time when that vulnerability is realised making them more vulnerable at that instant. In that sense, different situational and environmental factors need to be considered when addressing and considering the extent of their vulnerability.

[162] Martha Albertson Fineman, 'Injury in the Unresponsive State: Writing the Vulnerable Subject into Neo-Liberal Legal Culture' [March 8, 2018], *Emory Legal Studies Research Paper* Forthcoming in Injury and Injustice: The Cultural Politics of Harm and Redress, Bloom, Engel, and McCann Eds., Cambridge Studies in Law and Society 2018. Available at SSRN: https://ssrn.com/abstract=3175436
[163] Fineman (n 21) [3].

As Fineman suggests, vulnerability can morph into many forms, including physical or mental and it can be socially constructed because of economic relationships. Therefore, an individual's vulnerability varies over a lifetime and in accordance with particular situational factors. The balance of interactions should be considered in light of protective factors when determining one's vulnerability on a particular occasion; hence both the susceptibility to harm and environmental protections should be considered simultaneously. In other words, the level of both resilience and vulnerability may often mirror each other. For example, on one day someone may be seen as a fully functional adult living 'autonomously' with capacity to make choices. On another day, that same individual may be struck with a life-threatening disease or suffer severe economic loss rendering them dependent and vulnerable. The constant yet transient and fluctuating state of vulnerability is dependent on the person's particular circumstances, encounters and access to adequate protections.

It is thus argued that depending on the situation involved at a particular time and place, some people may be in fact more vulnerable than others; however, it is submitted that this does not diminish the notion of universal vulnerability. But what can be done to address this particular experience of vulnerability is to look to the State to act responsibly and respond accordingly to all of its subjects. Arguably, the State could respond through legislation that recognised this theory and afford appropriate protections dependent upon individuals' particular experience of their own vulnerabilities.

As will now be discussed in detail, Fineman claims autonomy is a myth that is used by the State to mask their responsibilities for individual's well-being. She rightly argues that a focus on autonomy and individual responsibility leads to individuals being blamed for so called 'private acts' outside the realm of State responsibility. A shift in focus to the theory of vulnerability may in fact lead to a more proactive responsive State. As Rich rightly states the 'vulnerability theory justifies the call for increased government intervention through a rejection of the traditional liberal subject.'[164] Different people experience their vulnerabilities in different lights due to their position in society and the resilience offered by the State. A realisation that our vulnerability in essence fluctuates depending on the actions of the State, calls for a promotion of State responsibility that spans both the public and private spheres which is explored below.

[164] Phillip Rich, 'What can we learn from the vulnerability theory' [2018] 4 *Honours Projects* 4-30, 20

3.3 A NEED FOR STATE RESPONSIBILITY

We have now established that our vulnerability is embodied, universal and constant. We accept that vulnerability can also be particular. Having acknowledged these key factors of the human condition, we now must explore, in the next section, how our particular vulnerabilities are and should be addressed by the State.

The vulnerability theory scrutinizes the relationship between the State and its individuals. The nature of the theory 'forms the basis for the claim that the State must be more responsive to that vulnerability.'[165] As earlier noted, vulnerability cannot be eradicated.[166] However, Fineman argues that the State, through its societal institutions can and does create opportunities to address and promote resilience to human vulnerability.[167] It allows us to critically explore the current distribution of resilience to reveal the privileges that are afforded to the few. As Fineman notes and is discussed below 'individuals are positioned differently within society; some are more privileged, and others are relatively disadvantaged.'[168]

Fineman contends that in order for equality to achieve more than simply 'sameness of treatment' the State must be more responsive to vulnerability.[169] The continual promotion of the liberal subject and the idolisation of autonomy is drawing the State intervention line far outside the private realm.[170] In other words, promoting autonomy in essence reduces the State's responsibility for both private and public acts. Autonomy ignores our inherent vulnerabilities and inevitable dependencies.

Technically one could argue that this is the correct and ideal approach to be fully independent without any need for dependencies; however, upon further evaluation it appears the fully autonomous individual does not exist. We cannot self-govern due to our inherent dependent and vulnerable nature. Vulnerability demands an involved State that provides resources such as health, education and residential care. As Fineman suggests, it needs to be recognised that no one person is fully independent and autonomous.[171] The

[165] Fineman (n 75) 9.
[166] Fineman & Grear (n 58) 22.
[167] Fineman (n 21) 102.
[168] Fineman (n 19) 15.
[169] Fineman [2014-2015] (n 21) 612.
[170] Fineman (n 16) 24.
[171] Fineman (n 75) 39.

capacity threshold is the test that an individual must pass before being determined as 'autonomous'. Those who fulfil the threshold are deemed fully capable functioning adults-making them fully responsible for their own actions. However, those who fall outside this remit can never make autonomous choices.[172] This approach is very black and white with little room for uncertainties. It fails to recognise those grey areas where capacity and vulnerability are ever fluctuating. It is important to note that Fineman and the theory of vulnerability do not reject autonomy totally;[173] it is merely suggested that autonomy can only exist in the shadow and experience of vulnerability. Vulnerability requires us to simply 're-think autonomy.' [174] Fineman merely argues for the focus to be removed from achieving autonomy to recognising vulnerability.[175] This would mean we would no longer responsibilise certain groups who have traditionally been labelled fully 'autonomous'.

These themes are exemplified when we consider the concept of the 'family'. The 'family' is once such unit constructed as a separate entity labelled as an 'autonomous institution.'[176] Within this construct the State designates the responsibility for any private acts and dependency issues. The public and private spheres are distinct 'separate pillars' of society. Therefore, the State refuses to take responsibility for dependency on the pretence that it is not a 'public problem.'[177] Dependency, Fineman argues, is an inevitable process that occurs at different stages of life.[178] The family is assigned as the institution for caretaking with little or no State support. Like vulnerability, Fineman argues that dependency should not be shunned but should be accepted as a natural part of the human development.[179] She argues all of us 'were dependent as children and all of us will become dependent again with old age and or suffer disabilities.'[180] Fineman argues that the construct of the family is a method by which the State masks its duties to protect such vulnerabilities and dependencies.[181]

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[172] Margaret Elizabeth Hall, 'Mental Capacity in the (Civil) Law: Capacity, Autonomy and Vulnerability' [2012] 58(1) *McGill Law Journal* 61-94, 66.
[173] Fineman (n 16) 16.
[174] Beverley Clough, 'Vulnerability and capacity to consent to sex – asking the right questions?' [2014] 26(4) *Child and Family Law Quarterly* 371-396, 382
[175] As will be discussed in further in chapter 6
[176] Fineman (n 16) 25.
[177] Ibid.
[178] Fineman (n 21) 102.
[179] Fineman (n 16) 18.
[180] Ibid.
[181] Ibid 24.

It could be suggested that the State intentionally creates that divide by promoting unrealistic autonomy goals by assuring individuals it is for their benefit to have control over their own 'private acts'. She therefore contends that *private acts* fall within the realm 'individual responsibility'. This term is used to describe how we are morally responsible for our own private actions that lead to harm. In that sense the State passes unwanted accountability to the individual to accept harm caused due to foolishness and individual moral failures. In other words, those who have engaged in unwise decisions are cast to the realm of individual responsibility. Arguably, those who become victims of sexual assault fall with this category. Often, the State, and its institutions, focus on the actions of victims that led to the harm- rather than preventing attackers. Hence, the State attempts to assign the individual their responsibility to not only protect themselves from harm but to avoid actions which could lead to exploitation. A re-invigoration of the State's role through a lens of a vulnerability theory could encourage a shift in focus from the victim onto the accused.

Considering this, it is argued that we cannot escape vulnerability[182] but resilience can help confront it, as Fineman recites 'it is the particularity of the manifestations of vulnerability and the nature of resilience that are of ultimate interest. Resilience is the critical, yet incomplete, solution to our vulnerability'[183] As Lewis and Thomson state that

> 'acknowledging universal vulnerability - and the universal vulnerable subject it implies the focus becomes resilience and the duty of the State is to provide us with the assets or tools to be resilient when our vulnerability is made manifest.'[184]

She suggests the need for a responsive State to help build this resilience. The Responsive State would see a shift in focus from the promotion of autonomy to the acceptance of universal vulnerability. As will be explored in more detail in the concluding chapter, Martha Fineman proposes this idea of a Responsive State, responsible for providing us with the assets and tools to be 'resilient' when we experience our vulnerabilities in different lights. The concept of a Responsive State is intriguing and indeed a crucial component of the vulnerability theory; it demands that the State give equal regard to the shared vulnerability of all individuals, abandoning the traditional identity-based approach

[182] Fineman (n 19) 10.
[183] Fineman (n 21) 146.
[184] Lewis S and Thomson M 'Social Bodies and Social Justice' [2019] *International Journal of Criminal law in Context* (in press) http://eprints.whiterose.ac.uk/140671/3/Social%20bodies%20%20social%20justice%20-%2014%20November%20FINAL.pdf

and recognising that the State must play an essential role in protecting against discrimination.[185]

Resilience is how we are protected from harm. Unlike vulnerability and dependency, we are not born with resilience, but we accumulate it 'over the course of our lifetimes through an array of social structures.'[186] It is the role of the Responsive State to provide us with access to resilience. It can be gathered through personal relationships and societal institutions such as education.[187] Some persons may be more privileged than others,[188] and therefore provided with more resilience hence reducing their experience of their vulnerability. Resilience is obtained and gathered throughout one's lifetime. It is particularly important to be resilient to sexual assault.

3.4 SEXUAL ASSAULT, RESILIENCE AND INDIVIDUAL RESPONSIBILITY

Beverley Clough has recently written about how resilience can be key to individuals' experience of their vulnerability to sexual assault. She suggests most sex education is gathered in a societal context and through personal experience.[189] If perhaps someone suffers from a mental illness, it is unlikely that they would be exposed to similar social encounters and receive the same education as those who do not have a mental illness.[190] Such persons may often be sheltered from normal environments where they could build their social education. Fuelled through a motivation to protect such groups, the State and society inadvertently leave such persons less able to realise danger and hence less resilient. This 'paradoxical'[191] approach may leave such individuals open to a higher risk of harm; the State must then intervene and provide more encroaching protective measures to ensure their vulnerabilities are not exploited. Hence, as suggested by MacKenzie, although someone may have an inherent condition placing them at an increased risk of harm, their

[185] Fineman (n 19) 20.
[186] Fineman [2014-2015] (n 21) 623.
[187] Ibid.
[188] For example, some people may be born into prosperous families offering easier access to protective institutions.
[189] Clough (n 174) 377.
[190] Ibid.
[191] Ibid.

vulnerability may never be experienced due to resources and access to materials that promote resilience.[192]

We must therefore examine how the State might be active and promote resilience through a vulnerability theory. Whilst nevertheless endorsing this theory, it must be considered where the line should be drawn. There is no doubt that our vulnerability calls for a proactive State that accepts responsibility for its subjects; however where should individual responsibility lie. It is argued that there must be some element of individual responsibility for personal actions as otherwise we would be left as overly reliant with no sense of accountability. Instead we could possibly move towards a duty owed to each other not to exploit one another's vulnerability.[193] It is therefore submitted that we must retain our sense of individualism whilst acknowledging our universality and affording the State effective responsibility which is not overly paternalistic.[194] Yet it must be acknowledged that autonomy 'is meaningless and unattainable without an underlying provision of substantial support from society and its institutions.'[195]

The question must then be how might the theory of vulnerability change our current legislation; how would your perspective change, can we really uproot the current liberal legal foundations of the law? If it is possible, is it the best solution? This is something which will be explored and analysed throughout this thesis, through a critical evaluation of societal attitudes, the current legislative framework and the potential of suggested reforms.

This section has begun to challenge the liberal divisions between those who are vulnerable and those who are not by highlighting that vulnerability is in fact universal and indeed particular. Now that we have recognised the State's role in promoting resilience, we need to address the current segregation of the so-called 'vulnerable populations,' The theory of vulnerability seeks to challenge these groups, and instead demand that *our* universal and shared vulnerability is recognised and reflected by legislation and societal institutions. It is through this acceptance of our shared universal vulnerability, and the demand for State action, that we can begin the first step in demanding adequate protections for all by challenging and rejecting *othering.*

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[192] MacKenzie (n 88) 46.
[193] This is explored in detail in chapter 6
[194] This will be explored in more detail when considering the implications of using vulnerability as a foundation for legal reform in chapter 6.
[195] Fineman (n 75).

3.5 THE REJECTION OF 'OTHERING'

With the knowledge and acceptance that everyone is vulnerable, and that vulnerability fluctuates and can be affected by the resilience offered by the State, we can now use that understanding to challenge and critically analyse the treatment of those who are traditionally perceived as *more* vulnerable.

In Fineman's analysis of vulnerability, she highlights that there are currently sections of people grouped together and designated as 'vulnerable populations.'[196] She highlights the elderly, the poor and the disabled as likely to be labelled as a 'vulnerable population'. Their vulnerability is positioned by a shared characteristic such as old age or mental illness. Fineman argues against this segregation of society, as such a differentiation from the *norm*, ignores the inherent vulnerability of human kind.[197] Moreover, she rightly argues that such a separation of 'vulnerable populations' leads to different categories of 'vulnerable people' battling for the most protection and access to services.[198] Groups are pitted against each other to determine who deserves the most benefits/protections.[199] In an effort to safeguard, groups have been delineated as incapable due to an embodied difference that assigns them to a designation of a vulnerable group in need of protection. Arguably, this categorisation of particular individuals arises from our notions of autonomy and the liberal self. If society deems a group of persons as not fully autonomous, they tend to be labelled as dependent, decisions are often made on their behalf, with society perceiving such individuals through a stereotypical lens.[200]

Arguably, these groupings and designation of populations leads to the unequal and discriminatory distribution of resilience. Indeed, there has been much literature surrounding the dangers of labelling particular groups as inherently vulnerable. Indeed, as Stanley has argued, state intervention into vulnerable groups can 'worsen vulnerabilities.'[201] She states that identifying groups as particular groups of children as vulnerable can lead to 'contradictory discourses' and more 'harmful experiences.'[202]

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[196] Fineman [2014-2015] (n 21) 619.
[197] Fineman & Grear (n 58) 16.
[198] Fineman (n 75) 5.
[199] Ibid.
[200] Chapter 2 explores rape myths, with a particular focus on myths of incapacitated individuals.
[201] Stanley, E., 'Child victims of human rights violations', 136 ch 6 in Walklate, S., *Handbook of Victims & Victimology* (Routeledge, 2017)
[202] Ibid.

Fineman does, however, recognise that there are some benefits from this intentional divide. In particular, she recognises the heightened access to benefits and care facilities available to 'vulnerable populations.' Conversely, those who are segregated into such populations often face stigmatisation and stereotypical myths as to their capabilities.[203] They often suffer from assumptions of incapacity and endure a paternalistic approach to their life and decision making abilities.[204] As Karpin writes 'the closer individual embodiment approximates normative expectations, the more likely that particular embodied subject will be constituted as an impenetrable, autonomous, independent, rights-bearing legal subject.'[205] Hence, Fineman seeks to move away from the characterisation of certain populations as 'vulnerable' by stripping the notion that a shared characteristic deems you vulnerable or *in-vulnerable;* instead moving towards the idea that we are all vulnerable and deserving of equal protection. However, despite Fineman's assertation that vulnerable groups should be avoided, as Kohn notes, she has succumbed to targeting groups in her discussion of the theory in relation to elderly laws.[206] Kohn notes that Fineman uses the vulnerability theory to target older adults for particular protections on the basis of age.[207]

It is acknowledged that the vulnerability theory indeed would be limited if it were used to target particular groups. There is of course a concern that failing to rely on the core values of the theory will lead to inadequacies. It is therefore imperative that these failures are not realised. Indeed, at the heart of the vulnerability theory, Fineman seeks for universality to be recognised together with a particular focus on individuals' experiences. For the theory to realise its full potential as a prescriptive tool, these underpinning values must be upheld. As Clough posits 'the vulnerability thesis draws attention to the experience of

[203] As discussed in the chapter on rape myths. Mentally disordered complainants can be stereotyped as giving into their animal instincts and intoxicated victims can be blamed for their attack.
[204] Fineman (n 21) 102. Interestingly, these stigmatizations associated with the disabled population may relate to their historical treatment in law. Prior to the introduction of s30 SOA 2003, the law had taken the approach of assuming certain mentally disable individuals were unable to consent to sexual activity. An interpretation of the latest legislation asserts that those with a mental disorder may be capable of consenting to sexual activity; however, there may also be times where their disorder will affect them in such a way that will render then unable to refuse. Although this is perhaps an advancement in the treatment of mentally incapacitated victims, many problems have not been unearthed including stereotypes and access to justice, the use and benefits of s.30 SOA 2003, the differential treatment of incapacitated victims as will be discussed in detail in chapter 3.
[205] Isobel Karpin, 'Vulnerability and the Intergenerational Transmission of Psychological Harm' [2018] 67(6) *Emory Law Journal* 1115-1134, 1118.
[206] Nina A Kohn, 'Vulnerability Theory and the Role of the Government' [2014] 26(1) *Yale Journal of Law and Feminism* 1-27, 11.
[207] Ibid 11

vulnerability, rather than the presence of a particular condition.'[208] By doing so, the stigma associated with vulnerability would be eliminated and replaced by a collective acceptance of our human frailty. The above sections have highlighted the universality and particularity of vulnerability whilst rejecting the othering approach an autonomy lens provides.

The above sections have provided an overview of the key components of the vulnerability theory. It has highlighted the potential of this theory. As will be seen in the following chapters, the theory of vulnerability is an important and useful tool that we can use as a lens to challenge our traditional norms. Moreover, as we move throughout the remaining chapters, the concept of vulnerability will be explored in the context of sexual offences, helping us to challenge the current approaches and offer potential solutions to current problems and concerns. Firstly, concerns raised by other academics as to the potential of vulnerability must be considered.

4. THE CRITIQUES

Before considering how a legal response might be framed through a theory of vulnerability, the critiques must be explored. As alluded to above, the theory of vulnerability has been subject to substantial criticism for various reasons including the consequences of the rejection of an autonomy approach. Likewise, as identified in the introduction, the theory has been criticised for its vagueness and abstract nature.[209] The potential of a theory of vulnerability will be realised through the critical analysis of the law, and through the informing of legislative reforms. The below outlines other concerns and criticisms and addresses how these potential pitfalls can be overcome.

(a) The term 'vulnerable'

The first criticism that must be explored is a linguistic concern. The use of the term 'vulnerability' itself has been denounced by some academics due to its perceived negative connotations[210] and even so far as to be described as a 'sexy'[211] trait in women. In particular, Fitzgearld and Munro state that using the term 'vulnerable' seems 'to suggest

[208] Clough (n 174) 375.
[209] Nina A Kohn, 'Vulnerability Theory and the Role of the Government' [2014] 26(1) *Yale Journal of Law and Feminism* 1-27, 8.
[210] Kate Kaul, 'Vulnerability for example: Disability theory as Extraordinary demand' [2013] 25(1) *Canadian Journal of Women and the law* 81-110, 109
[211] Herring (n 68) 63 and Ibid 109.

that there is something wrong, less-than desirable, about being a vulnerable person.'[212] It is acknowledged by Fineman that the term carries with it a derogatory air and has negative associations.[213] Arguably, many people may associate the term with weakness and helplessness; the term may then linked with stereotypes regarding capacity and autonomy, hence the negative connotations.[214] However, Fineman and this thesis seeks to reclaim[215] the term 'vulnerable' through the demand for State responsibility. Kaul however, argues that simply removing the term from its normative context will only make it 'imaginable' and not accomplish its aims.[216] On the other hand, Satz endorses Fineman's position by suggesting that its aims can be achieved by 'appealing to universal vulnerabilities which removes the stigma of needing assistance and improves protections for all, eliminating backlash by those who would otherwise fail to receive protections.'[217] Despite the current connotations with the term vulnerability, it is argued that this perception is not so grounded in our culture that it is not susceptible to change. Arguably then, it is possible to reclaim vulnerability and alter societal understanding of the term, re-imagining it through careful adaptation and explanation of what it truly means to be vulnerable.

(b) Rejecting the identity-based approach

Although other academics somewhat agree with Fineman's recommendations, the finer details of the theory appear to still be criticised. As MacDowell argues, Fineman's vulnerability theory does not 'tell us how to prioritize vulnerabilities' or how the State should respond to vulnerabilities.[218] Indeed, arguably Fineman's theory intentionally avoids such a suggestion, as privileging one vulnerability over another may lead to the unequal distribution of resilience and produce further inequalities and privileges. Cooper

[212] Sharron A. FitzGerald & Vanessa E. Munro, 'Sex Work and the Regulation of Vulnerability(ies): Introduction' [2012] 20 *Feminist Legal Studies* 183-188, 185
[213] Fineman (n 19) 21.
[214] Hall (n 172) 85.
[215] See for example the term queer being reclaimed Judith Butler, 'Critically Queer' [1993] 1 *Journal of Lesbian and Gay Studies* 17-32, 18;
[215]. The term queer was Historically understood to mean deviance and used as a form of insult. It has since been reclaimed by the LGBTQ movement as a term of self-identification. Those who believed that the term queer could have been reclaimed emphasized that the 'pejorative nature of the word [could] be neutralized and even made positive by embracing the word as one of pride' Diane L Zosky, 'What's in a name? Exploring the use of the word queer as a term of identification within the college-aged LGBT community' [2016] 26 *Journal of Human Behaviour in the Social Environment* 597-697, 601.
[216] Kaul (n 210) 109.
[217] Satz (n 84) 531.
[218] Elizabeth L MacDowell, 'Vulnerability, Access to Justice and the Fragmented State' [2017] 23 *Mich. J. Race & Law* 51-104, 78

approves of the necessity for a strong State that provides resilience to its subjects.[219] However, he disagrees with other aspects of the theory on the basis that it apparently 'ignores race'. He argues that the vulnerability theory should be revised to explore racial profiling and how privileges have been conferred on the white heterosexual male.[220] Moreover, MacDowell suggests that to take privilege seriously requires an analysis of vulnerability in a context-specific manner.[221] She continues and argues this 'specificity should include the value of autonomy for individuals and groups, especially those for whom autonomy has historically been limited.'[222] Perhaps Cooper and MacDowell's critiques suggest a stronger focus on privilege to eradicate racial profiling; however, arguably Fineman's suggestions appear to encompass this too. She merely suggests that an identity-based approach to vulnerability fails to recognise the core actualities of the human experience. Rather than focus on identity-based vulnerabilities she suggests we examine 'the institutional practices that produce the identities and inequalities in the first place.'[223] Similarly, she simply contends that focusing on groups distorts individual's particular experience of their vulnerability. Segregating classes of people based on their underlying characteristics has itself led to unequal treatment where groups of less privileged individuals compete against each other for extra protections. Kohn endorses this approach stating this new interpretation as progressive with real potential for reform.[224]

Arguably, Fineman is suggesting that all individuals should have similar access to resilience as someone who may be deemed as 'less vulnerable' may pragmatically be more vulnerable in a particular circumstance. She is therefore simply arguing the removal of these presumptions to afford greater uniform access to resilience to address everyone's vulnerability to harm. Moreover, as will be argued in chapters 3 and 4, it is not necessarily positive when groups are assigned protections. Stereotypical attitudes, expectations and myths permeate the response to such groups. Indeed, when certain groups of individuals are identified as particularly vulnerable, they are often pitted against others to determine who *deserves* the most protection. By removing this segregation, we can demand a response that is tailored to the need of each individual.

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[219] Frank Rudy Cooper, 'Always already Suspect: Revising Vulnerability Theory' [2015] 93 *North Carolina Law Review* 1339-1380, 1345
[220] Ibid.
[221] MacDowell (n 218) 81.
[222] MacDowell (n 218) 81.
[223] Fineman (n 19) 16.
[224] Kohn (n 206) 8. Although her suggestions include the preservation of autonomy.

Despite these criticisms, it will be argued that the theory has potential to be a foundation for sexual offences law. The theory offers us a unique opportunity to scrutinize the somewhat overlooked situational factors of sexual relations and allows us to critically consider encounters which might normally have been disregarded and considered autonomous decision making.

MacKenzie argues that vulnerability theorists 'need to be alert to the dangers of vulnerability'.[225] She argues that historically theories of vulnerability have been used to justify coercive or paternalistic social relations policies and institutions which often compounds into groups.[226] However, this is the traditional understanding of the concept of vulnerability. The new conceptual understanding of vulnerability challenges these notions and the use of vulnerability as a tool of inferiroisation. With autonomy on a pedestal, vulnerability was positioned as a weakness and therefore those identified as 'less than' are grouped together as 'others'. If we change our approach and universally acknowledge our vulnerability, we can avoid the risk of othering and grouping and instead shift from identity-based approach to universal and particular understanding of our vulnerability.

5. THE POTENTIAL OF THE THEORY OF VULNERABILITY AS A FOUNDATION FOR LEGAL REFORM

We have now examined and revealed some of the key problems with an autonomy-based approach. Moreover, the pitfalls of coercion have been revealed and instead we looked towards vulnerability as a lens through which we can view our lived experience. We have begun to see how an autonomy and coercion focus is problematic in the context of te current law regarding sexual offences.[227] Therefore, the purpose of this section is to briefly explore how the characteristics highlighted in the above sections, come together as the vulnerability theory and may act as a potential foundation for sexual assault legal reform. Vulnerability offers us a unique nuanced lens to critically evaluate both how and why the current is failing to equally and adequately protect individuals.

[225] MacKenzie (n 88) 34.
[226] Ibid.
[227] The problems with the current legal approach with its focus on autonomy will be revealed further throughout the remainder of the chapters

5.1 THE POTENTIAL OF VULNERABILITY IN CIVIL LAW

It is useful to consider how the vulnerability theory has been used to suggest reforms to civil law. This can provide us with an insight into the potential for reform to the criminal law through a theory of vulnerability. Indeed, Beverley Clough has written on the potential value that this theory could have in regard to reforming the concept of capacity in civil law.[228] Her examination is an excellent example of the practical application the theory of vulnerability. Moreover, she offers a detailed analysis of capacity and vulnerability in which key comparisons can be made with the criminal law. In particular, she argues that the theory provides a different aspect in which capacity and autonomy can be analysed and discuss how the current approach obscures many key considerations.[229] Interestingly, she suggests that theorists could use the theory to elucidate concerns regarding issues of consent and capacity.[230] This highlights the practical effect the vulnerability theory can have. As part of her analysis, Clough explores the current 'act specific' nature of the capacity test for sexual activity. She suggests that currently, the 'State attempts to protect the vulnerable can simply exacerbate powerlessness.'[231] It is claimed that this is due to the promotion of autonomy and rejection of State interference.[232] Arguably, this interpretation suggests how the current law fails to recognise universal vulnerability. Moreover, it shows how vulnerability is used as a derogatory term that is only applicable to a certain group of 'dependent individuals.' This suggests that vulnerability has been associated with people who apparently drain the State, rather than a communal term that reflects our inherent characteristics and the promotion of State intervention and dependency. Drawing on Fineman's theory, she posits that without resilience and acknowledgement of vulnerability 'autonomy and capabilities are an illusion.'[233] She rightly suggests that a vulnerability lens could reform the current test for capacity with a move from 'assumptions about the sexual vulnerability of people with cognitive impairments' to paying attention to the situational aspects of the decision.[234] In light of this, it is suggested that if such an approach was implemented, the attention would be shifted from the vulnerable victim-survivor's actions on to the situational factors including the exploitative nature of the defendant's behaviour.

[228] Clough (n 174) 395.
[229] Clough (n 174) 395.
[230] Ibid 373.
[231] Ibid 375.
[232] Ibid 387.
[233] Ibid 387.
[234] Ibid 376.

This section has highlighted the potential of the vulnerability theory for reform in civil law and therefore its potential as a theoretical foundation for reforms to sexual assault law. Later in chapter 6, we will delve further into the possibilities and opportunities that a vulnerability lens can bring for reforms to criminal sexual assault law.

6. THE TOOLS TO MOVE FORWARD

This chapter has outlined the key values and underpinning concepts of the liberal legal autonomous subject, highlighting some of its merits and identifying some of its weaknesses. Throughout this thesis these values and understanding of our ontological existence will be further revealed. This will aid us in our understanding of how and why society and the State respond to victims of sexual assault inadequately.

This chapter also examined Fineman's theory of vulnerability; with particular reference to its key underpinning values whilst also identifying how the theory might challenge some of the traditional norms we understand as a result of the long-standing emphasis on the liberal legal autonomous subject. By shifting our focus onto vulnerability theory as a more suitable understanding of our existence and our interactions with others and institutions, a vulnerability theory can expose some of the elements of autonomy as myths and in essence unattainable goals.

Once we reveal that autonomy is in fact a myth, we can challenge our preconceived notions and expectations that we place on individuals, especially with regards to sexual relations. We can use the above-mentioned key concepts of the vulnerability theory as helpful tools to unpick unfavourable societal attitudes towards complainants of sexual assault. Therefore, the following chapter, with such tools in hand, explores the prevalence of rape myths in society. It will detail rape myths and stereotypical attitudes that permeate society and suggest that their prevalence is closely linked with the autonomy approach. With this background knowledge of a vulnerability theory, we can challenge the concepts of the 'ideal' victim,[235] and challenge how and what is expected of the autonomous liberal legal subject. This will be the first step in revealing how the promotion of autonomy has resulted in the unfair and unequal treatment of victims of sexual assault.

[235] Olivia Smith & Tina Skinner, 'How rape myths are used and challenged in Rape and Sexual Assault trials' [2017] 26(4) *Social & Legal Studies* 441-466, 458

Chapter 2

Rape myths and attitudes- the impact of autonomy

1. INTRODUCTION

The previous chapter argued that the core problem with the current response to sexual assault complainants lies within the autonomy approach. This chapter will strengthen this argument by suggesting that rape myths, stereotypical attitudes and expectations placed on complainants are also closely linked to, and shaped by, this autonomy approach

Rape myths and stereotypes are commonly understood as 'descriptive or prescriptive beliefs about rape that serve to deny downplay or justify sexual violence that men commit against women.'[236] The fundamental problem with rape myths is the fact that they are myths and or 'genalizations about all rapes.'[237] Moreover, they remove the attention from the perpetrator on to the behaviour of the victim. Myths appear to distort the wrongdoing and emphasise either why she supposedly deserved the attack, that it did not happen or that she failed to communicate her resistance clearly. Stereotypical views on rape cannot be listed exhaustively.[238] Myths are constantly evolving with society, yet at their core, myths have remained as a means of shifting blame from the assailant onto the complainant. These expectations of behaviour are informed through a lens of autonomy. As most individuals are presumed capable of resisting sexual assault, there is arguably an expectation of resistance and rational behaviour which can lead to victim-blame. As will be explored below, complainants of sexual assault are typically blamed through myths and attitudes for failing to avoid harm as a result of our understanding and presumption of the autonomous

[236] Heike Gerger, Hanna Kley, Gerd Bohner, & Frank Siebler, 'The Acceptance of Modern Myths about Sexual Aggression (AMMSA) Scale: Development and Validation in German and English' [2007] 33 *Aggressive Behaviour* 422-440, 423

[237] Jennifer Temkin, Jacqueline M. Gray & Jastine Barrett, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' [2018] 13(2) *Feminist Criminology* 205-226, 206

[238] Indeed, the main attitudes explored in this chapter relate primarily to intoxicated complainants but are equally noteworthy in other circumstances.

liberal legal subject. This responsibilisation is then manifested in legalisation,[239] and within general societal, political and judicial attitudes towards treatment of rape complainants.

It will be argued that the conceptual underpinnings of our societal and legal response to sexual assault complainants requires a complete overhaul. It will also be argued that myths and adverse attitudes have the potential to substantially and adversely impact a complainant at every stage of the criminal justice system, therefore significantly effecting their access to justice and experience post-assault. Moreover, these myths and attitudes impact and inform the legal response, particularly to intoxicated complainants, and therefore need to be addressed.

To achieve this, many of the key myths and attitudes will be critically evaluated to determine their links with an autonomy approach. Section 1.1 will explore false allegations and how an autonomy approach leads individuals to deny or downplay the existence of rape. Section 1.2 will examine how intoxication effects the treatment of complainants, arguing that the autonomous choice to become intoxicated often carries the burden of responsibility to avoid assault. Section 1.3 will build on this point with reference to so-called *provocative clothing*. Section 1.4 will explore the existence of the expectation of complainants to resist sexual assaults, arguing its existence may be linked to the autonomy approach. Section 2 will evaluate how these attitudes and myths are being manipulated by legal professionals to distract jurors from the defendant's exploitative behaviour and instead criticising and responsibilising the complainant. Before concluding, section 3 will detail how a vulnerability theory might challenge these preconceived ideas and expectations placed on complainants. It will be argued that we require a systemic change to attitudes and the law to substantively and successfully reform the inadequate response to sexual assault complainants.

[239] As will be explored in Chapter 3

1.1 FALSE ALLEGATIONS

> 'The fear of false allegations has been used to justify evidential rules in cases… and continues to influence police and prosecutorial decision making.'[240]

The belief that there is a high incidence of false allegations is a myth that is widely accepted/speculated amongst the public.[241] It appears most other myths stem from the belief in the prevalence of false allegations- in that they often serve to deny the occurrence of rape. This section will briefly outline and challenge the myth that the level of false allegations is high. It will seek to reveal the connection between the autonomy approach and the unequal distribution of resilience with the endorsement of this inaccurate belief.

There is evidence of this belief in the bible and in Greek mythology. According to the biblical story, Potiphars' wife attempted to seduce Joseph who refused her advances.[242] The story says that Joseph fled after she then claimed he had raped her.[243] He was imprisoned but eventually got a full pardon and became prime minister.[244] The moral is that if a woman cries rape she can get a good man into trouble.[245] Similarly, the Greek myth of Hippolyphus and Phaedra mirrors this story.[246] When the woman's advances were rejected, she claimed she had been raped. The myth that women can often falsely claim rape has developed throughout history. Famously, in the 17th century judge Sir Matthew Hale orated that rape is 'an accusation easily to be made, hard to be proved and harder to be defended by the party accused never so innocent.'[247] This quote has been echoed in many courtrooms since it was first spoken especially when issuing a corroboration warning to juries.[248] As Justice Sutcliffe said in 1976: 'it is well known that women in particular… are liable to be untruthful and invent stories.'[249] These statements wrongly suggests that rape is very difficult to defend even where untrue. This suggests that women can easily falsify rape claims and secure convictions. Yet as will be discussed below, statistics have

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[240] Phillip N.S Rumney, 'False Allegations of Rape' March [2006] 65(1) *Cambridge Law Journal* 128-158, 128
[241] Temkin, Gray & Barrett (n 237) 212.
[242] Brownmiller (n 101) 22.
[243] Ibid.
[244] Ibid.
[245] Ibid.
[246] Katie M. Edwards, Jessica A. Turchilk, Christina M. Dodds et al, 'Rape Myths: Historically Individual and Institutional Level Presence and implications for change' [2011] 65 *Sex Roles* 761-773, 768
[247] M. Hale, *History of the Pleas of the Crown* (London 1971) 635, cited in Rumney (n 240) 128.
[248] Rumney (n 240) 129.
[249] Jan Jordan, 'Beyond Belief? Police, Rape and Women's Credibility' *Criminal Justice* [2004] 4(1), 29-59, 31

revealed low levels of convictions for rape and sexual assault with a substantial number of allegations not proceeding to trial.[250] It could be argued that traditionally, the belief that women falsely claimed rape was endorsed as a means of protecting men from criminalisation. This is one means of distributing resilience.[251] In other words, as the legal response treated women's claims of rape with scepticism, the law was affording resilience to defendants rather than protecting complainants.

Although statistics cannot accurately account for false allegations, it has not been proven that false allegations of rape are more common than false claims of other crimes.[252] It is speculated that the correct figure is around 3%.[253] Saunders suggested that the percentages of apparent false allegations vary across studies.[254] It was suggested that this might be because of differing definitions as what amounts to false.[255] In 2012/2013 statistics showed how rape was 'no crimed'[256] six times more than other victim based crimes.[257] Other research previously showed the decrease in the use of no-crime has been replaced by No further Action (NFA's).[258] It was found that around 56% of allegations were either labelled as no crime or NFA.[259] Yet some police officers still maintain that 'a good half', 'a lot' and even 'most' rape cases are false.[260] As Munro and Kelly argue, many police officers

[250] Home Office, Ministry of Justice & the Office for National Statistics, 'An Overview of Sexual Offending in England and Wales' January 2013 & see ONS (n 4).
[251] Challenging the unequal distribution of resilience is at the heart of the vulnerability theory which is discussed in more detail in chapter 1 and chapter 6.
[252] Helen Reece, 'Rape myths: Is the Elite Opinion right and popular opinion wrong' [2013] 33 (3) *Oxford Journal of Legal studies* 445-473,459
[253] Candida L. Saunders, 'The truth, the half truth and nothing like the truth' [2012] 52 *British Journal of Criminology* 1152-1171, 1152
[254] Ibid 1153.
[255] Ibid.
[256] Academics interpret this to mean, generally, the complainant knew the alleged wrong never occurred. Accurate recording of false allegations by police officers has been a problem for many years. Despite attempts by the Home Office to dissuade the use of no criming, police still use this method even where a retraction does not meet the criteria to be labelled as a "no crime". For this classification the complaint must be retracted *and* a complainant must admit fabrication. If the complaint is simply retracted and therefore unsubstantiated it should remain as a recorded crime see Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A question of Attitude* (Hart publishing, 2008) 17
[257] Home Office Counting Rules for Recorded Crime – Sexual Offences. London: Home Office. [2014] https://www.gov.uk/government/ uploads/ system/uploads/attachment_data/file/299319/count-sexual-april-2014.pdf.
[258] J. Harris and S. Grace, A Question of Evidence? Investigating and Prosecuting Rape in the1990s (Home Office Research study 196) (London 1999) 14
[259] Ibid.
[260] Saunders (n 253) 1153.

predict how juries will perceive a complainant, hence endorsing rape myths and doubting allegations, making the problem 'compounded by a vicious cycle of attrition.'[261]
There have been many studies that have highlighted the scepticism of jurors towards rape complaints. In one study by Ellison and Munro mock jurors appeared to be preoccupied with false allegations. In the initial questionnaires, participants were ambivalent to the statements like 'rape accusations are often used as a way of getting back at men.'[262] However, when put under the pressure of reaching a unanimous verdict in jury deliberations participants relied on the fact that 'false allegations are routinely made.'[263] Moreover, it appears that many people downplay or deny rape where the complainant was intoxicated. One study suggested that the individual concerned may have engaged in sex and later regretted her drunken behaviour and then claimed rape.[264] This association leads people to believe that intoxicated acquaintance rape is simply drunken sex and not rape as legally defined. [265]

A combination of these together with the promotion of autonomy may impact a complainant's chance at justice. For example, through an autonomy lens, many individuals may seek to deny or downplay the existence of rape and other forms of sexual assault. If we understand that we are all independent and capable of resisting sexual assault, jurors may deny the complainants experience. Indeed, the AVA report referred to a study which suggested complainants who had been intoxicated at the time of the offence had a greater sense of self blame.[266]

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[261] Munro, V.E., & Kelly, L., "A vicious cycle? Attrition and conviction patterns in contemporary rape cases in England and Wales in Hovarth M, Brown J (eds.) Rape: *Challenging Contemporary Thinking* (Cullompton: Willan Publishing 2013) 99–123; as cited in Katrin Hohl & Elizabeth A Stanko, 'Complaints of rape and the criminal justice system: Fresh Evidence on the attrition problem in England and Wales' [2015] 12 (3) *European Journal of Criminology* 324- 341, 328
[262] Louise Ellison & Vanessa E. Munro, 'A stranger in the Bushes, or an Elephant in the Room? Critical reflections upon received rape myth wisdom in the context of a mock jury study', Fall [2010] 13(4) *New Criminal Law Review* 781-801, 794
[263] Ibid 795.
[264] Clare Gunby & Anna Carline & Caryl Beynon, 'Regretting it After? Focus Group Perspectives on Alcohol Consumption, non-consensual sex and false allegations of rape' [2012] 22(1) *Social & Legal Studies* 87-106
[265] Ibid 88.
[266] Against Violence and Abuse 'Not worth reporting: women's experiences of alcohol, drugs and sexual violence' 2014 available at https://avaproject.org.uk/wp-content/uploads/2016/03/Not-worth-reporting-Full-report.pdf citing Sarah Ullman, 'A 10-Year Update of "Review and Critique of Empirical Studies of Rape Avoidance' [2007] 34 *Criminal Justice and Behavior* 411-429

From the aforementioned studies, it would appear that some may believe that many women falsely claim they have been raped or sexually assaulted. Arguably the existence of such beliefs may have a direct impact on a complainant's access to both support from society at large and indeed to securing justice. The endorsement of such beliefs may also inhibit complainants from reporting their assault; as previously mentioned 27.7% number of victim-survivors failed to inform the police due to fear of not being believed.[267] This therefore contributes to the ever-widening justice gap and ill treatment of complainants in both law and society. It appears that assumptions of the prevalence of false allegations are so strong that it may have affected policy. For example, Parliaments' reluctance [268] to alter the law on rape may be based on 'untested assumptions on the frequency of false allegations.'[269]

As will be argued throughout, it is in fact because of this focus on autonomy that many rely on myths and stereotypical attitudes towards rape complaints to justify or excuse rape. With the belief that all individuals are free independent and capable at the core of our understanding of our ontological existence, more myths and attitudes surface to justify or downplay any alleged harm. This is manifested in many ways, particularly when complainants are intoxicated. For example, from a recent studies it was shown that around 'one in 10 are unsure or think it's usually not rape to have sex with a woman who is asleep or too drunk to consent.'[270] The autonomous decision to consume alcohol tends to be perceived as an acceptance of the risks attached to drinking excessively, thereby burdening individuals with responsibility to avoid sexual assault.

[267] ONS (n 4).
[268] Phillip N.S Rumney & Anne R. Fenton, 'Intoxicated consent in Rape: Bree and juror Decision Making' [2009] 71(2) *Modern Law Review* 279-290, 302
[269] Rumney (n 240) 129.
[270] End Violence Against Women Coalition, 'Attitudes to Sexual Consent' December 2018 available at https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/1-Attitudes-to-sexual-consent-Research-findings-FINAL.pdf

1.2 THE RESPONSIBILISATION OF INTOXICATION

> 'If recreational drugs were tools, alcohol would be a sledgehammer. Few cognitive functions or behaviours escape the impact of alcohol, a fact that has been long recognised in literature.'[271]

Closely linked with the idea that many rape complaints are false, is the denial of rape where a complainant was intoxicated. This section will explore how the autonomy approach has led to the responsibilsation of complainants where they were voluntarily intoxicated at the time of the offence. This section will argue that there is a link between the conceptual underpinnings of autonomous choice and attributing blame to the complainant. The further individuals deviate from the 'ideal victim' who is rationale and self-preserving, the more likely a societal response will attribute blame to them.

Alcohol plays a very prominent role in society, carrying many connotations including an association with the desire to get 'loose', 'disinhibited'[272] and be sociable.[273] It has been suggested that alcohol is also thought to be a social medium for communicating sexual interest.[274] With that, comes a series of complications considering 38% of rape complainants reported that they and the assailant were under the influence of alcohol at the time of the offence.[275] Moreover, studies have shown the prevalence of a binge-drinking culture,[276] and some studies have suggested that women are more likely to be 'victimised' when intoxicated.[277] According to a Home Office study, women who went to a pub once a week or a night club three times a week were at a higher risk of sexual victimization.[278]

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[271] Aaron M. White, 'What happened? Alcohol, Memory blackouts and the Brain' [2003] 27(2) *Alcohol Research and Health* 186-196,186

[272] Paul Norman, Mark T. Connor, & Chris B. Shide, 'Reasons for Binge Drinking among undergraduate students: an application of behavioural reasoning theory' [2012] *British Journal of Health Psychology* 682-698, 686

[273] Ibid.

[274] Emily Finch. & Vanessa Munro, 'The Demon Drink and the Demonized Woman: Socio Sexual Stereotypes and Responsibility Attribution in Rape trials involving intoxicants' [2007] 16(4) *Socio Legal Studies* 591-614, 603

[275] ONS (n 4).

[276] National Union of Students, Press Release: New Survey shows trends in student drinking, 24th September 2018 accessed via https://www.nus.org.uk/en/news/press-releases/new-survey-shows-trends-in-student-drinking/

[277] Brad J. Bushman & Harris M. Cooper,' Effects of Alcohol on Human Aggression' [1990] 107(3) *Psychological Bulletin* 341-354, 341 and see Maria Testa and Jennifer A. Livingston, 'Alcohol Consumption and Women's Vulnerability to Sexual Victimization: Can Reducing Women's Drinking Prevent Rape?' [2009] 44(9-10) *Substance use & misuse* 1349–1376, 1349.

[278] ONS (n 4).

While, those who go to a nightclub at least 4 times a month are at the highest risk of sexual victimization.[279] The situational factor with intoxicated individuals may contribute to victimization.[280] However, it would appear that society's response to such exploitation is to victim-blame rather than denouncing the actions of the defendant. Arguably this is as a result of our emphasis on autonomy and therefore responsibility.

Instead of preventing rape, it appears women are told to act more 'responsible' and 'careful' by not becoming intoxicated and therefore susceptible to predators. It appears that those who apparently *chose* to become incapacitated at the time of the offence are deemed to have contributed to their exploitation. Equally, many public campaigns 'to protect' women appear to have a similar message underpinned by autonomy and responsibilisation. Campaigns encourage women to avoid harm by avoiding so called risky situations and to take responsibility for themselves. For example, Munro references several different campaigns that highlight this responsibilisation. In particular Sussex Police's poster campaign questioned 'which one of your friends is most vulnerable'? Followed by the answer 'the one you leave behind'; the use of 'vulnerable' here is applied 'simply by consequence of their being female and out in public.'[281] In 2018, Devon and Cornwall police launched a #spike aware campaign, introducing drink spiking kits into bars and night clubs. Although a positive step to help identify the symptoms of drink spiking, the posters associated with the campaign have clear connotations of responsibilsation. For example, one such poster states '[d]rink spiking can lead to drowsiness, confusion and vulnerability- don't be a victim!.'[282] The wording of this poster suggests that women have a choice or not whether to be 'victimised'. Similarly, in 2012, West Mercia police launched a poster campaign, communicating that intoxication makes young women vulnerable to rape, and also that the victim's contributory responsibility in getting drunk before any sexual attack should occasion retrospective regret.[283] Meanwhile, this instilled fear of women's perpetual risk of sexual assault ensures a vulnerable condition that must be managed diligently – by not drinking and limiting social activities – if she is to avoid

[279] Ibid.
[280] Maria Testa & Kathleen Parks, 'The role of womens' alcohol consumption in Sexual Victimization' [1996] 1(3) *Aggression and Violent Behaviour* 217-234, 217.
[281] Munro (n 18) 426.
[282] https://safercornwall.co.uk/drink-spiking/ and https://www.devon-cornwall.police.uk/spiking
[283] As cited by Munro (n 18) 426. West Mercia Police later apologised see: https://www.bbc.com/news/uk-england-hereford-worcester-19091566

condemnation for a contributory role in her victimization.[284] The reiteration of the need to stay safe keeps women in a 'constant state of fear'[285] and has been argued as a 'weapon men use to perpetuate their dominance of women.'[286] Hence, any sign of 'independence by women is often interpreted as asking to be raped'; [287] similarly it is often endorsed that if a 'man wanted her she must have wanted him.'[288] Similar messages have been shared in Canada. For example, a police force released a statement encouraging women to 'avoid dressing like sluts in order not to be victimised.'[289] As Don McPherson states: 'we raise women to survive in a rape culture… yet we do nothing to talk to men about not raping.'[290] Moreover, as Munro rightly contends, such campaigns and beliefs are based on gender stereotypes of women as sexual gatekeepers and men as sexual predators with the responsibility of avoiding sexual assault 'borne heavily by the woman.'[291]

Indeed, studies have shown the effect alcohol can have on the outcome of a case. It seems from research that women who are drunk at the time of the assault are held more responsible and blameworthy.[292] If a woman cannot control her actions, she tends to be viewed in a derogatory way.[293] Her character is viewed less favourably, less credible[294] and she appears to be assigned more responsibility for her behaviour.[295] For instance, in another study by Munro and Ellison, they tested the attribution of blame to an intoxicated victim.[296] The lessons learned from this study are quite shocking. It appears that where a woman is drunk her expected behaviour and responsibility for herself are extraordinarily

[284] Munro (n 18) 430.
[285] Brownmiller (n 101) 15.
[286] Ronald Frey & Peter Douglas, 'What is it that makes men do the things they do. Without Consent' [1992] *Confronting Adult Sexual Violence* 241-251, 245
[287] Ibid 246.
[288] Catherine A. MacKinnon, 'Sexuality, Pornography and Method: Pleasure under Patriarchy' [1989] 99 (2) *Ethics* 314-346, 330
[289] Melissa Savauger et al, 'No stranger in the bushes: The ambiguity of Consent and Rape in hook up Culture' [2013] 68 *Sex Roles* 629-633, 631
[290] Ibid 629.
[291] Munro (n 18) 426.
[292] Calvin M. Sims, Nora E. Noel & Stephen E. Maisto, 'Rape blame as a function of alcohol presence and resistance type' [2007] 32 *Addictive Behaviours* 2766-2775, 2766
[293] Deborah Richardson & Jennifer L. Campbell, 'Alcohol and Rape: The effect of alcohol on Attributions of Blame for Rape' [1982] 8 (3) *Personal & Social Psychology Bulletin* 468, 476.
[294] Studies found that police members were less likely to believe drunken victims: Regina Schuller, & Anne Stewart, 'Police Responses to sexual assault complaints. The role of perpetrator/complainant intoxication' October [2000] 24(5) *Law and Human Behaviour* 535-551, 535
[295] Louise Ellison & Vanessa Munro, 'Of Normal Sex and Real Rape: Exploring the Use of Socio-Sexual Scripts in (mock) Jury Deliberations' [2009] 18(3) *Socio & Legal Studies* 291-312.
[296] Ibid 310.

high.[297] In the Wake up to the Research Report, 64% of people thought that victims who drank to excess prior to the assault should accept responsibility for being raped.[298] Arguably, this responsibilsation is because of our autonomy approach and the expectations placed on complainants to conform to the ideal victim. Conversely, male perpetrators appears to be blamed less if he is intoxicated at the time of the assault,[299] as he is perceived to be unable to control his actions.[300] It seems that no matter whether a man is drunk (too intoxicated to be blameworthy) or tipsy (blame the woman for being seductive) or sober (more credible) there is always some excuse available from society to accept his behaviour.[301] He is therefore viewed more favourably and less responsible.[302] This could arguably be informed by how our current legal response lends us to scrutinize the complainant's behaviour rather than the defendant's exploitative actions.[303] With autonomy promoted as a progressive step towards gender equality, the realities of responsibilisation are masked. Arguably, autonomy has acted as a mask that protects men from allegations, blaming victims from contributing to or causing their harm through *unwise* choices.

One aspect that the vulnerability theory attempts to challenge is the unequal distribution of resilience which is, as Fineman states, at the heart of inequality. It would appear, as will be discussed in more detail later, that our laws and therefore our societal attitudes are carved out of a need to protect men from 'false' or unwarranted allegations of sexual assault.[304] This section has demonstrated that individuals who are voluntarily intoxicated at the time of the assault are perceived to have contributed to their harm and are responsibilised. The autonomous choice to become intoxicated is perceived as risky behaviour and the burden of responsibility to avoid being raped is therefore placed on the individual. Likewise, other socio-legal studies have evidenced the reliance on these attitudes. It appears that provocative behaviour, *seductive clothing,* and lack of resistance can be relied on by jurors, the judiciary and the police to disbelieve or discontinue a complaint.

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[297] Ibid.
[298] The Havens Wake up to Research Report, Opinion Matters p9 http://policeauthority.org/metropolitan/publications/briefings/2010/1004/index.html
[299] Paul Pollard, 'Judgments about victims and attackers in depicted rapes: a review' [1992] 31(4) *British Journal of Social Psychology* 307-326, 307
[300] Ibid.
[301] Ellison & Munro (n 295) 309.
[302] Pollard (n 299) 326.
[303] As will be explored in the next chapter
[304] Marvel (n 18) 2042.

1.3 B(E)ARING RESPONSIBILITY FOR WHAT YOUR WEAR

> 'Men control the whole situation from the physical rape itself, to the way society perceives the act, to the final judgment'.[305]

Although this quote is from 1975, much of the essence remains the same. It appears that rape myths and stereotypical attitudes about rape are held by the public, victims, police and indeed other members of the justice system.[306] This section will outline the attitudes that suggest a complainant is to blame for contributing to their assault if they wear provocative clothing or behave in a provocative manner. It will be argued that through an autonomy lens, individuals are responsibilised for acting or wearing provocative clothing, a belief which appears to be permeate many stages of the justice system.

UK studies have revealed that some police endorse myths or aware of societies attitudes towards rape complainants which then have an impact on their decisions with regards to case progression.[307] Moreover, some police officers' attitudes are effected by what clothing the complainant was wearing at the time of the attack. According to one particular study, it was recorded that if a victim was wearing provocative clothing she was viewed as less credible.[308] This highlights that rape myths and stereotypical attitudes can affect complainants at the earliest stage of their complaint. It has recently been announced that complainants of sexual assault may now be required to submit their phones and other smart technology to the police for investigation.[309] Although the article stated that such measures would only be taken where the line of enquiry was 'reasonable', it is arguably likely that such efforts will be relied upon by the police regularly, especially where the police doubt their credibility due to myths and stereotypes.[310] This may leave many complainants feeling victimised and interrogated whilst also potentially dissuading legitimate complaints

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[305] Rhodes, D. & McNeill, S. (eds) *Women Against Violence Against Women* (Only woman Press, London 1985) 39 as cited in Frey & Douglas (n 286) 246.
[306] Munro & Kelly (n 261)
[307] As earlier discussed
[308] Kelly Graham & Jane Goodman-Delahunty, 'The Influence of Victim Intoxication and Victim Attire on Police responses to Sexual Assault', [2011] 8(1) *Journal of Investigative Psychology and Offender Profiling*, 22-40, 36
[309] 'Rape victims among those to be asked to hand phones to police', 29th April 2019 *BBC News* https://www.bbc.co.uk/news/uk-48086244
[310] Rachel Krys, 'The CPS is denying justice to thousands by secretly changing rape prosecution rules' 10 June 2019 *The Guardian* https://www.theguardian.com/commentisfree/2019/jun/10/cps-rape-victims-legal-action; Julie Bindel, 'Rape is becoming decriminalised. It is a shocking betrayal of vulnerable women' 12th September 2019 *The Guardian* https://www.theguardian.com/commentisfree/2019/sep/12/rape-decriminalised-vulnerable-women-convictions-cps

from being reported. This may further fuel a culture where complainants' credibility, rather than the defendant's behaviour, is the subject of interrogation. Such police decisions may be influenced by the public's scrutiny of complainants' behaviour.

For instance, in the 2010 Havens Report 28% of people thought a victim should be responsible where she dressed provocatively.[311] Similarly 21% thought so if she acted flirtatiously and 22% agreed where she was dancing in a sexy way with her attacker.[312] This report received significant public attention, with many organisations and media outlet reporting the concerning findings.[313] Amnesty International conducted a national telephone survey in 2005, it has since received much academic attention,[314] as cited by Reece.[315] The study recorded that 34% of people believed that a victim was totally or partially responsible for her attack if she acted promiscuously; and a further 26% believed so if she was wearing provocative clothing.[316] Arguably, this suggests that 1 in 3 persons believe a woman precipitated rape perhaps because she chose to wear clothes that might put her at risk of sexual assault. It is this concept that appears to be endorsed by some, where a woman exercises her autonomous right to wear any clothing, she must then take responsibility for any potential *repercussions* of such a choice.

Other studies have also revealed the prevalence of similar attitudes. In Westmarland & Grahams' internet based study, posters discussed the high heels worn by the victim.[317] One poster commented 'well if she was wearing those…'[318] and she should be careful not to give the wrong impression.'[319] Similarly 'wearing provocative clothing'[320] can be seen as

[311] Havens (n 298).
[312] Ibid.
[313] For example see The Campaign-Not ever http://www.notever.co.uk/the-campaign/ ; Women's grid http://www.womensgrid.org.uk/archive/2010/02/21/wake-up-to-rape-research-summary-report-of-haven-commissioned-survey/;
[314] Oona Brooks,'Guys! Stop Doing it!: Young Women's Adoption and Rejection of Safety Advice when Socializing in Bars, Pubs and Clubs' [2011] 51 *British Journal of Criminology* 635-651,647; Louise Ellison and Vanessa Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' [2009] 49 *British Journal of Criminology* 202-219, 203; Krahe, J Temkin and S Bieneck, 'Schema-driven Information Processing in Judgements about Rape' [2007] 21 Applied Cognitive Psych 601, 601
[315] Reece (n 252) 468.
[316] Amnesty International/ICM [2005] *Sexual Assault Research Summary Report.* London.
[317] Nicole Westmarland & Laura Graham, 'The promotion and resistance of rape myths in an internet discussion forum' [2010] 1(2) *Journal of Social Criminology* 80-104
[318] Ibid 92.
[319] Ibid.
[320] Amy Grubb & Emily Turner, 'Attribution of Blame in rape cases: a review of the impact of rape myth acceptance, gender role conformity and substance use on victim blaming' (2012) 17 *Aggressive and Violent Behaviour* 443-452, 452.

a distinguishing feature of onlookers who attempt to source why she deserved the attack. A recent study found that at least 20% of students agreed 'a woman who dresses in skimpy clothes shouldn't be surprised if a man tries to have sex with her.'[321] Moreover, Amnesty International conducted a national telephone survey in 2005, which showed that 34% of people believed that a victim was totally or partially responsible for her attack if she acted promiscuously.[322] A further 22% believed she was totally or partially responsible where she had several previous sexual partners.[323] In the Havens Report 18% of respondents agreed that most claims of rape are false. 21% endorsed the myth that a victim is responsible if she flirted with the perpetrator. Similarly, 29% agreed she was responsible if she went back to the perpetrators house while 66% agreed so if she went into his bed. These results reveal the expected standard of behaviour borne by women, both to avoid sexual assault and to avoid instigating sexual interest; women appear to be responsibilised, told to act with caution to avoid signalling sexual interest and to avoid the dressing *provocatively* to prevent inferred meanings. Arguably, through the expectation that individuals are autonomous and self-governing, they are expected to act in a particular way. Therefore, when an individual is harmed, through this privatisation of the right to choose, they bear the burden of responsibility for any harm endured as a result of their actions. This highlights the focus on and scrutiny of complainants' behaviour, especially where the assault doesn't fir the traditional 'real rape' script.

1.4 EXPECTATION OF RESISTANCE

Stranger rape or 'real rape' is typically perpetrated by a crazed male outdoors, late at night with violence and surprise.[324] This stereotype is usually depicted when people are asked to define rape.[325] Despite this, the reality is that around 87% of the victims of serious sexual assault knew their perpetrator.[326] Similarly, 45% of the attackers were current or previous partners of the victim.[327] The notion that rapists are sex starved or insane supports stranger

[321] Donna M. Vandiver & Jessica R. Dupalo, 'Factors that affect college students' perceptions of rape: what is the role of gender and other situational factors' [2013] 57 *International Journal Offender therapy and comparative criminology* 592- 612, 601
[322] Amnesty (n 316).
[323] Ibid.
[324] Reece (n 252) 456.
[325] Kathyrn M. Ryan, 'The Relationship between rape myths and Sexual Scripts: The Social Construction of Rape' [2011] 65 *Sex Roles* 774-782,775
[326] ONS (n 4).
[327] Ibid.

rape attitudes.[328] Although it has been recently shown that the 'real rape' stereotype has fallen out of favour[329] as the *only* rape these studies show how people's views are still biased against other types of rape with expectations of resistance/injury still rife.[330] This expectation of resistance may have a particular impact on intoxicated complainants. Studies have revealed that intoxicants may affect the ability to resist.[331] This suggests that many intoxicated complainants may not be capable of physically resisting and therefore may be perceived as less credible for failing to do so. Many mock juror studies have noted this expectation of resistance.

For example, in one study, participants argued that the woman had a 'civic duty… to fight back and hopefully gain enough of an injury to have hard evidence…'[332] In a 2010 study,[333] 60% of jurors strongly disagreed with questionnaire statements like 'if a woman doesn't fight back you *can't* really say it was rape.'[334] Yet, the majority of participants 'strongly defended' that a complainant would resist physically and verbally, the unwanted advances of the defendant.[335] Although many were aware that most rapes are not committed by strangers but by acquaintances,[336] they believed that a complainant would 'done her utmost to avoid the assault by issuing strong verbal protests and fighting back.'[337] Similarly, some believed that a victim of acquaintance rape would have sustained physical injuries.[338] This is despite the fact that force or violence are not a legal requirement for the legal definition of rape.[339] Even where the victim of an acquaintance rape had sustained injuries participants somehow concocted an unsupported scenario that

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[328] Martha R. Burt, 'Cultural Myths and Supports for Rape' [1980] Vol. 38 No 2 *Journal of Personality and Social Psychology* 217, 217.
[329] Louise Ellison & Vanessa E. Munro, 'A stranger in the Bushes, or an Elephant in the Room? Critical reflections upon received rape myth wisdom in the context of a mock jury study', Fall [2010] 13(4) *New Criminal Law Review* 781-801, 789
[330] Ibid 790.
[331] Bushman & Cooper (n 277) 341 see also Antonia Abbey, Tina Zawacki, Philip O. Buck, A. Monique Clinton, & Pam McAuslan, ' Alcohol and Sexual assault'[2001] 25(1) Alcohol Research & Health 43-51 which found 'alcohol's motor impairments reduce ability to resist [sexual assault] effectively'. AVA (n 251) 'intoxicated victims are less physically able to resist assault' citing Testa, M., Livingston, J.A. & Collins, R.L., 'The role of women's alcohol consumption in evaluation of vulnerability to sexual aggression' [2000] 8 *Experimental and Clinical Psychopharmacology* 185-191
[332] Westmarland & Grham (n 317) 94.
[333] Ellison & Munro (n 247).
[334] Ibid 790.
[335] Ibid 791.
[336] Ibid 789.
[337] Ibid 790.
[338] Ibid 790.
[339] Kathyrn M. Ryan, 'The Relationship between rape myths and Sexual Scripts: The Social Construction of Rape' [2011] 65 *Sex Roles* 774-782,777

the couple had been engaging in 'kinky' 'rough' sex.[340] It appears that many individuals responsibilise women to fight an acquaintance, they imagine she would sustain physical injuries and they presume she would report it immediately. However, research has shown that victims react in many different ways, which will arguably require a more nuanced response.[341] Some freeze, some cooperate and others resist.[342] Moreover, where a complainant is intoxicated, due to the effect of alcohol on their ability to resist, it is likely this attitude will have a particular impact on such complainants. Moreover, this inaccurate belief is of particular concern as victims of acquaintance rape are less likely to define their own experience as rape.[343] If they haven't been injured they presume they haven't technically been raped.[344] This leads the victims to also blame themselves taking responsibility for failing to engage their negative autonomy rights clearly. Although it may not be overly relied upon its historical endorsement may well still have ramifications for rape complainants.

Despite the conclusion that real rape myth is no longer widely endorsed, this does not take away from the prevalence and widespread nature of the aforementioned attitudes towards rape complainants. Despite Reece's claim that the existence of myths is in fact itself a myth or as she states we have created 'myths about myths'[345] it does appear from mock juror studies particularly Finch and Munro's work,[346] together with reports and other research conducted that there is an endorsement of these common misconceptions. One reason Reece suggests caution when accepting the existence of such attitudes lays within the wording of the questions posed by the Amnesty Research and the Wake up to research report. She places substantial emphasis on the fact that neither report use the word 'blame' and instead 'responsible' is referred to throughout.[347] She suggests that the term

[340] Louise Ellison & Vanessa E. Munro, 'Better the Devil you know? "Real Rape" stereotypes and relevance of previous relationship in (mock) juror deliberations' [2013] 17(4) *International Journal of Evidence & Proof* 299-322, 320
[341] Dr. Nina Burrowes, 'Responding to the challenge of rape myths in court, A guide for Prosecutors' March [2013] NB research: London 1- 30, 19. Accessed online at http://nb-research.co.uk/wp-content/uploads/2013/04/Responding-to-the-challenge-of-rape-myths-in-court_Nina-Burrowes.pdf
[342] Ibid.
[343] Kathyrn M. Ryan, 'The Relationship between rape myths and Sexual Scripts: The Social Construction of Rape' [2011] 65 *Sex Roles* 774-782,777
[344] Ibid 776.
[345] Reece (n 252) 445.
[346] Ellison & Munro, (n 329).; Ellison & Munro (n 295); Finch & Munro (n 274); Munro, V. & Finch E., 'Juror Stereotypes and Blame attribution in rape cases involving intoxicants' [2005] 45 *British Journal of Criminology* 25-38; Ellison & Munro (n 340).
[347] Reece (n 252) 468.

responsible carries with it many connotations including 'accountable; in control; causally implicated; and of course blameworthy.'[348] Reece argues that respondents didn't mean 'blame' when recording their answers, and instead suggests perhaps 'causal connection' may more accurately reflect their thought process. For example, she argues that respondents may have felt the victims dress or intoxication was causally connected to their assault thereby increasing their risk of harm.[349]

Arguably as Reece herself states, responsible carries notions of blame within it. It is very difficult to accept Reece's argument as it is almost impossible to detach responsibility from blame. Moreover, the two other terms Reece cites as a primary explanation of responsibility namely *in control and accountable* would both be understood by lay persons as inferring blame. Perhaps a very small percentage of respondents may have perceived the question and their response in the manner Reece suggests. However, it is highly unlikely that 34% of people answered a woman was responsible for their assault because they acted promiscuously but really meaning a 'causal link' existed. Even if a very small selection of respondents did happen to interpret the meaning of responsible in this non-conventional way, it is quite unlikely that there would be a substantial change to the statistics.

Unfortunately, there is far too much evidence to suggest that myths and stereotypical attitudes exist, are endorsed and adversely affect sexual assault complainants. This includes research which has shown how barristers have exploited societal beliefs to undermine the credibility of complainants.

2. THE EXPLOITATION OF MYTHS

The above sections have outlined the most prominent and widely endorsed attitudes regarding complainants of sexual assaults. This section will now seek to analyse how barristers have used rape myths at trial to undermine the credibility of the complainant. This section will reveal how the use of these myths at trial compounds the 'cycle of attrition'.[350] This section will highlight the link between these stereotypical attitudes and expectations and how they inform legal decisions.

[348] Ibid 469.
[349] Ibid.
[350] Munro & Kelly (n 261).

Studies have revealed that some defence counsel rely on rape myths to change the focus from the defendant on to the complainant.[351] Temkin notes that there has been no research done to calculate how often myths are used by defence counsel.[352] However, in her and Krahé's book *Sexual Assault and the Justice Gap* they interviewed barristers and judges who commented on the poor practices of defence counsel in rape cases.[353] They said that defence counsel intentionally exploit stereotypical rape myths and attempt to undermine her character.[354] One said, 'there are barristers who… want to destroy a complainant.'[355] Another said how the battle is very unfair;[356] a well experienced barrister in his/her comfort zone versus an already scared 'highly emotional'[357] complainant. A more recent rape trial study undertaken by Temkin et al revealed that the use of myths by defence barristers is still 'well-entrenched.'[358] This is a major problem in the justice system. The myths used by barristers detract from the exploitative actions of the defendant and may deny complainants access to justice.

The Court process has notoriously been likened to 'being raped all over again.'[359] Perhaps a reason for this 'secondary victimisation'[360] may be because the CPS barrister is a representative of the state and the public and is technically not the victim's lawyer;[361] the Stern Review also revealed that many cases 'were not properly prepared.'[362] Similarly, in an interview based study barristers and judges noted the poor standard of prosecution.[363] More recently, Smith and Skinner conducted court evaluations over a period of ten months in 2012.[364] It was found that myths were often invoked to scrutinize complainants' behaviour and cast doubt in jurors' minds. Findings revealed barristers used myths to oversimplify the offence,[365] relying on complainants delayed reporting,[366] lack of physical

[351] Jennifer Temkin, 'And always keep a hold of nurse, for fear of finding something worse: challenging rape myths in the courtroom' [2010] 13(4) *New Criminal Law Review* 710-734, 719
[352] Ibid.
[353] Temkin & Krahé (n 2) 129.
[354] Ibid.
[355] Ibid.
[356] Ibid.
[357] Ibid.
[358] Temkin, Gray & Barrett (n 237) 222.
[359] Home Office, The Stern Review, [2010] 15 https://www.sericc.org.uk/pdfs/5801_sternreview201003.pdf
[360] Julia R. Schwendinger and Herman Schwendinger, 'Rape myths in legal, Theoretical and Everyday Practice' (Spring- summer) [1974] *Crime and Justice* 18-26, 18
[361] Stern Review (n 374smith).
[362] Ibid 16.
[363] Temkin & Krahé (n 2) 130.
[364] Smith & Skinner (n 235) 448.
[365] Ibid 451.
[366] Ibid.

resistance.[367] These myths appear to be used to distinguish the complainants' behaviour from what is perceived to be rational decision making. In this study, barristers attempted to reveal inconsistencies in complainants' statements and actions before and during the assault.[368] Such inconsistencies included examples given where a complainant was once described as being assertive and then later stating they were too scared to resist.[369] These efforts attempt to undermine complainants credibility and in essence, oversimplify how individuals might respond to an assault. By focusing on rational reactions and consistent approaches that in fact ignore the nuanced and situational variables of a sexual assault, complainants' responses are undermined. As Smith and Skinner state myths are used as a form of 'rational ideal.'[370] Through the development of this expectation, with the autonomous rational decision maker complainant at its core, any departure from expected behaviour that appears inconsistent with a rational response is scrutinized and thereby undermined. It would therefore seem that the cycle of attrition[371] is complete. A substantial proportion of mock jurors, the general public, police, barristers and judges appear to endorse these attitudes which adversely affect rape complainants.

Now consider the process involved after a sexual assault. The first stage may see complainants blaming themselves, questioning their own actions, what they did or didn't do to avoid the assault and potentially trivialising or disregarding their own experience. Later if a complainant accepts their assaulted, they may fear they will be judged, preventing them from reporting or confiding in another person. If complainants do report their assault to the police they may then be met by suspicion from investigators, critically analysing their behaviour, clothing and scrutinizing whether their response was *rational*. If their case happens to be one of the few[372] that does go to Court, complainants may be subject to further scrutiny where barristers, judges and jurors may rely on preconceived ideas of what rape is and how a *normal* person might respond. We therefore can conclude that myths and adverse attitudes have the potential to substantially and adversely impact a complainant at every stage, therefore significantly contributing to the justice gap.

[367] Ibid.
[368] Ibid 452.
[369] Ibid 453.
[370] Ibid 458.
[371] Munro & Kelly (n 261)
[372] See the introduction for prosecution statistics

Moreover, as will be argued in the next chapter, these myths and attitudes are then manifested in the hierarchal protections afforded to different complainants.

Substantial and systemic change us required to address societal attitudes and legal reform. It must therefore be asked what can be done to change these routinely used myths and conceptualisations of expected behaviour to achieve systemic and institutional change. Firstly, we must explore alternative suggestions as to how myths can be tackled from a procedural lens.

3. USING VULNERABILITY TO CHALLENGE EXPECTATIONS AND MYTHS.

As outlined in Chapter 1 at the heart of the theory of vulnerability is the notion that we are all vulnerable. We can all be harmed at any moment in our lives due to our 'fleshiness' or human embodiment. The acknowledgement that we are all vulnerable allows us to challenge notions of autonomy that suggest we are all capable and free agents unless otherwise assigned. Once we accept our vulnerability, we can challenge the responsibilisation that comes with the realities of a liberal subject. The theory also acknowledges that our vulnerability is embedded. It is constant but fluid and ever-fluctuating state of being that varies depending on our situational circumstances and our access to resilience. Through a lens of vulnerability, we can challenge this distribution of resilience. We question who is protected and why, we recognise and ask why privileges are unequally distributed. We reveal that resilience has been afforded to men through the articulation of policies, sexual scripts and expectations. Such an unequal distribution has compounded the myths and attitudes. We demand that the shift in our focus change from the protection of men from false allegations and instead to the protection of all from exploitation. If we acknowledge that our attitudes are framed through this unequal distribution of resilience, hidden by a mask of 'autonomous choice', we can demand this transformation of attitude.

If we challenge such pre-conditions, we challenge the heart of myths, we challenge the responsibilities assigned to women to avoid assault; we challenge the expectations set on 'autonomous' individuals, particularly how they should act and respond to sexual assault. We confront and tackle the attitude that someone was assaulted because of what she wore, because she didn't physically resist or because she flirted. Vulnerability allows us to

refocus, it encourages us to shift our perspective; we remove our emphasis from what the victim-survivor did to be harmed onto what the defendant did to exploit her vulnerability. A vulnerability lens encourages a shift away from individuals onto the State. Rather than placing responsibility on an individual to avoid harm, we welcome and accept our inherent and fluctuating vulnerabilities. The onus is then shifted elsewhere, we demand a state that protects everyone equally. We can also put an expectation on individuals, not to avoid assault but to not exploit each-others vulnerability. The duty is not one of individual responsibility but instead one to not wrong each other. In doing this, we are refocusing our attention onto the exploitative actions of the defendant rather than examining the complainant's actions, and therefore invoking myths and expectations about their behaviour. For example, if a complainant is intoxicated, a vulnerability lens might, depending on the circumstances, acknowledge that a complainant is experiencing a heightened sense of vulnerability. We would not link the choice to consume alcohol with the onus of avoiding an assault. Instead, we would recognise that individuals should be aware of their particular vulnerabilities and to take extra precautions not to exploit them at that particular time. Through this theory myths and stereotypical attitudes can be challenged and instead shift our focus away from scrutinizing sexual assault complainants.

Once our expectations are set, we ask how to implement these systemic changes. We can ask difficult questions of the State and its institutions. We can make difficult demands to create radical shifts in procedures, polices, attitudes and education.[373] Currently as autonomous liberal legal agents we are told we are free to make our own choices, we are particularly free to choose how to act in the so called 'private realm'; but because of those choices made our behaviour is scrutinized and entangled with myths and expectations. Instead we must demand protection from social institutions and the State, to recognise and protect our inherent and constant vulnerability regardless of our own actions or choices. The existence of myths and these stereotypical attitudes that pervade a victim-survivors experience need to be tackled. The only way this can be achieved is through systemic overhaul of our understanding of the lived human experience. Once we have tackled our attitudes and unwoven the autonomous liberal legal subject from our understanding of sexual relations, we can then start to reinvent and recalibrate legal reforms through a theory of vulnerability. This chapter has argued that because of the current autonomy

[373] As explored in the conclusion chapter

approach, sexual assault complainants are responsbilised and attributed blame through myths and attitudes that place undue expectations on their behaviour. Arguably these stereotypical attitudes and expectations through an autonomy lens have informed and shaped the legal response to sexual offences which has resulted in inadequate and hierarchal protections. To argue this, the following chapter will critically analyse the development and implementation of the Sexual Offences Act 2003.

Chapter 3

THE PROBLEMS WITH AN AUTONOMY APPROACH, INTOXICATION, INCAPACITATION AND CONSENT.

1. INTRODUCTION

The previous chapter argued that problematic attitudes towards rape complainants are prevalent and widely endorsed as a result of the conceptual underpinnings of autonomy. This chapter will argue how this autonomy approach has been manifested in the drafting and interpretation of sexual offences legislation. This chapter will argue that through this autonomy approach individuals are responsibilised. Through a focus on the determination of capacity with reference to voluntary and involuntarily intoxicated complainants, it will be argued that different incapacitated victims are protected in accordance with their apparent blameworthiness. This chapter will suggest how a vulnerability theory might challenge this unequal distribution of resilience and demand a responsive State which provides equal and adequate protection to all through legislation. Moreover, this chapter will contribute to the overall thesis argument that the autonomy approach is at the core of the problem with the current legal and societal response to complainants of sexual assault.

Prior to the introduction of the Sexual Offences Act 2003 the law of rape was considered 'archaic'[374] and 'incoherent.'[375] The Sexual Offences (Amendment) Act 1976 introduced a new definition of rape concerning the consent of the victim, which removed the need to prove fear fraud[376] or force for rape; [377] but it had failed to 'delineate between consent and non-consent.'[378] Following much debate,[379] the Sexual Offences Act 2003 attempted to

[374] *Protecting the Public: Strengthening protection against sex offenders and reforming the law on sexual offences,* [2002] White Paper Cm 5668, Home Office Found at http://www.parliament.the-stationeryoffice.co.uk/pa/cm200203/cmhansrd/vo021119/debtext/21119-05.htm
[375] Ibid [505]
[376] David Selfe, 'The meaning of consent within the Sexual Offences Act 2003' [2008] 178 *The Criminal Lawyer* 3-5, 4
[377] Sexual Offences (Amendment) Act 1976 s.1
[378] Emily Finch and Vanessa Munro, 'The Sexual Offences Act 2003: intoxicated consent and drug assisted rape revisited' [2004] Oct *Criminal Law Review* 789-802, 793
[379] For a discussion see, Jacqueline Scott, 'The concept of Consent under the Sexual Offences Act 2003' [2010] 1 *Plymouth Law Review* 22-41, 22

address the inadequacies left by the 1976 legislation. The Act provides a definition of consent and lists certain circumstances (rebuttable and conclusive) whereby consent will be presumed to be absent including those situations relating to incapacity.[380] The question must therefore be asked as to whether or not these changes have been effective in addressing previous failures. The White Paper[381] 'Protecting the Public, Strengthening Protection against Sex Offenders and Reforming the Law on Sexual Offences' and later the Home office[382] recognised that the protection of autonomy was one of the most serious concerns for the new legislation. They were 'determined to ensure the definitions [of capacity and consent] adopted were appropriate for use in the criminal law… these should enable the law to deliver effective protection while preserving sexual autonomy.'[383] It must therefore be determined whether this autonomy approach has been effective or created more problems with the response to sexual assault complainants, with a particular focus on the determination of capacity and consent.

The first section of this chapter will briefly outline the responsibilisation that an autonomy approach carries.[384] Section 2 will explore the concepts of capacity, the presumptions and consent. Before examining the detail of the legislation each section will outline the discussions that helped inform their drafting. Firstly, the issue of 'capacity' will be explored to suggest how the law determines when an individual retains or loses their capacity. Linked to this, the following section looks at the protections provided to specific complainants,[385] whereby the law either conclusively or rebuttably presumes the complainant did not consent.[386] It will then continue by examining the section 75 rebuttable presumptions,[387] focussing on the issues of voluntary intoxication and incapacity through unconsciousness. It will ask, whether these presumptions offer protection and how they are interpreted in relation to voluntarily intoxicated victims. The definition of consent and its apparent downfalls will then be examined. Following this, section 3 will analyse the case law to determine how consent and capacity is being interpreted and defined in relation

[380] Sexual Offences Act 2003 s.75
[381] Protecting the Public (n 374) [510].
[382] Setting the Boundaries (n 132).
[383] Ibid [4.5.7].
[384] A full discussion of autonomy and vulnerability can be found in chapter 2
[385] Whose consent has been obtained through fraud or deceit.
[386] As referred to above
[387] This is an exhaustive list of situations where the law will presume that the complainant did not consent unless proved otherwise. There will be a particular focus on s75(2)d and (f)

to voluntarily intoxicated complainants. Before concluding, section 4 will explore the defence of reasonable belief in consent.

Overall, it will be argued that consent is vague and inadequately defined; the presumptions are hierarchically framed to exclude many instances of voluntarily intoxicated victims, and 'capacity' fails to acknowledge our vulnerabilities because of the conceptual underpinnings of autonomy. In essence, it will be argued that in light of the detailed analysis, the current law is unsatisfactory as it is underpinned by the liberal legal autonomous subject, responsibilising individuals, and failing to adequately and equally protect victims of sexual assault.

1.1 A REMINDER- THE RESPONIBILISATION OF AUTONOMY

As explored in Chapter 1, the vulnerability theory has the potential to offer us a unique and nuanced lens to challenge our traditional norms. Before critically evaluating the law, this section will briefly set out how an autonomy approach in sexual offences causes an unequal distribution of resilience and responisbilises complainants. This section will act as a brief reminder of the key elements of an approach with autonomy underpinning the legal response to sexual offences.

It will also be argued that the current law takes an unsatisfactory approach to sexual autonomy. As Munro has rightly stated in her analysis of consent, 'simply asserting that a complainant should have the freedom to make a choice tells us little about what sort of level of freedom suffices.'[388] It will be argued that the law is drafted in such a way as to avoid interfering with a person's rights to autonomy. It must be asked whether this approach is acceptable. Although attractive in theory, the promotion of self-government and idealisation of independence is a tool used for inaction, the divisive line between public and private lives helps to justify this retrogression. Currently, there is an apparent integral battle between the law's protection of both aspects of sexual autonomy; the right to choose and the right to refuse. It is an impossible balance to strike as we 'respect an agent's negative autonomy when we protect her from intentions by others that do not reflect her will…[and] we respect her positive autonomy when we allow her to render it permissible for others to engage in relationships with her.'[389] Arguably the law 'currently

[388] Vanessa Munro, 'An Unholy Trinity? Non-consent, Coercion and Exploitation in Contemporary Legal Responses to Sexual Violence in England and Wales' [2010] 63(1) *Current Legal Problems* 45-71, 52
[389] Alan Wertheimer, 'Intoxicated Consent to Sexual Relations' [2001] *Law and Philosophy* 373-401, 376

operates in favour of capacity'[390]; in that people are generally presumed capable of their own decision-making. It is usually presumed that an agent retains capacity unless there is significant evidence to the contrary. As will be exposed below, such a balance in favour of both capacity and consent creates further barriers for complainants leaving them with insufficient protection.

As Fineman contends, the theory of autonomy, and the focus our society currently has on this, is a myth that is used by the State to mask their responsibilities for individuals' well-being. As Fineman rightly argues, a focus on autonomy and individual responsibility leads to individuals being blamed for so called 'private acts' outside the realm of State responsibility. As will be referred to throughout this chapter, the current conceptual underpinnings of autonomy leads to the responsibilisation of individuals. As Gotell explains many feminists 'have emphasized how privacy reinforces the idea that the personal and private are distinct from the social and political.'[391] Moreover, as explained by Randall, this responsibilsation forms victim-blaming that 'deviates away from recognizing public responsibility for social problems such as violence against women and, instead, endorses a radically decontextualized, de-gendered focus on "problematic" individual.' [392] It is through the conceptual underpinnings of autonomy and privitisation that the State denies their responsibility and burdens individuals to avoid harm. As Cormack and Peter articulate 'individuals are encouraged to see themselves as active subjects responsible for enhancing their own well-being'…[393] they go on to rightly argue that 'responsibilization slips too easily into "blaming the victim" for all that has happened to her.'[394] This responsibility to avoid harm and play the 'ideal victim' who as Gotell states is 'valorized victim is a responsible, security conscious, crime preventing subject who acts to minimize her own sexual risk'[395] is further complicated through intoxication. Nils Christie first referred to this concept of the ideal victim in 1986. Christie refers to the portrayal of an idealised socially constructed concept of victims. He originally described

[390] Gareth S Owen *et al,* 'Mental Capacity and Decisional Autonomy: An Interdisciplinary Challenge' [2009] 52(1) *An Interdisciplinary Journal of Philosophy* 79-107, 90
[391] Lise Gotell, 'When Privacy is not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records' [2005-2006] 43 *Atlanta Law Review* 743-778, 750.
[392] Melanie Randall, 'Sexual Assault Law, Credibility, and "Ideal Victims": Consent, Resistance, and Victim Blaming' [2010] 22 *Canadian Journal of Women and the law* 397-433, 409
[393] Elizabeth Cormack & Tracey Peter, 'How the Criminal Justice System Responds to Sexual Assault Survivors: The Slippage between Responsibilization and Blaming the Victim' [2005] 17(2) *Canadian Journal of Women & the Law* 283-309, 285
[394] Ibid 305.
[395] Lise Gotell, 'Rethinking Affirmative Consent in Canadian Sexual Assault law: neoliberal sexual subjects and risky women' [2008] 41(4) *Akron Law Review* 865-898, 879

the ideal victim as a person 'who when hit by crime- are given the complete and legitimate status of being a victim'.[396] Such idealised victims are as perceived as traditionally vulnerable and innocent, 'defenceless, innocent'[397] and worthy of 'sympathy and compassion'.[398] Indeed in Davies, Francis & Greer's exploration of the ideal victim, they compare the disparate media attention received in two similar missing persons cases, demonstrating the impact background, class and previous behaviour has on worthy victimhood status.[399] As Nils suggests, 'virgins walking home from caring for others'[400] are ideal victims as innocent and defenceless individuals. The ideal victim is one who cannot be said to be responsible for their harm. As Christie further argues, the more independent a woman becomes or is perceived, the more likely she should have known better and cannot rely on the lack of possibilities for self-protection.[401] This ideal victim, thereby creates a 'hierarchy of victimisation'[402]- delineating between those who are deserving or not.

In particular, self-induced intoxication 'marks a critical deviation from the rationalized and responsibilized norms of the explicit consent standard. Intoxicated complainants can be constructed as defying standards of sexual safekeeping by placing themselves at risk.' [403] Through the below analysis of the treatment of incapacitated complainants, especially where they are voluntarily intoxicated, we can reveal this responsibilsation as a result of an autonomy approach where 'vulnerability [is] reconstructed as an individual problem and an effect of risk-taking.'[404]

[396] Christie N., The Ideal Victim. In: Fattah E.A. (eds) *From Crime Policy to Victim Policy* (Palgrave Macmillan, London, 1986) 18
[397] Davies P., Francis,P., Greer C., *Victims, Crime and Society: An Introduction* (Sage Publications, 2017) 49
[398] Ibid
[399] Ibid 50
[400] Christie (n 396) 14.
[401] Duggan M., *Revisiting the ideal victim, Developments in Critical Victimology* (Policy Press, Bristol: 2018) 14
[402] Davies, Francis & Greer (n 397) *44*
[403] Ibid 886.
[404] Ibid 884.

2. THE ROAD TO REFORMS- CAPACITY, THE PRESUMPTIONS AND THE CONSENT DEFINITION.

As previously mentioned the law of rape pre-2003 was in need of 'modernisation'[405] and was not suitable for the 21st Century.[406] It was old fashioned 'confusing' and was 'contributing to the low conviction rates.'[407] The law was mostly governed by the provisions of the Sexual Offences Act 1956 which lacked a definition of consent and unnecessarily focused on fear fraud and force; thereby ignoring the will of the woman. The Sexual Offences act was drafted in response to outcry from feminists to adequately reflect the role of women in sexual encounters, and in particular to afford women the freedom and autonomy to make choices and reflect that freedom in the legislation. As Rumney noted, part of the emphasis appeared to be on communication in an effort to promote sexual self-determination; reflecting that there are two actors in a sexual encounter, and communication between both is key.[408]

Before exploring their interpretation and application through a case law analysis, this section will critically analyse how and why the Sexual Offences Act 2003 was drafted with a particular focus on capacity, the presumptions and the definition of consent. It will evaluate the discussions surrounding the drafting of the legislation and analyse the motivations and the conceptual underpinning the aims of the law. It will be argued that that the legislation was drafted with a foundation of autonomy.

2.1 CAPACITY AND INTOXICATION

Capacity to consent was considered in depth before the legislative reforms in 2003. In 2000, both the Law Commission and the Home Office published reviews that informed these discussions. The purpose of these papers was to examine the law on sexual offences and recommend suggestions for reform.[409] This section will examine how self-induced

[405] Jennifer Temkin and Andrew Ashworth, 'The Sexual Offences Act 2003: Rape, Sexual assaults and the problems of consent' [2004] *Criminal Law Review* 328- 346, 328
[406] Protecting the Public (n 374) [4].
[407] Clare McGlynn, 'Feminist activism and rape law reform in England and Wales. A Sisyphean struggle?' in Clare McGlynn & Vanessa Munro (eds) *Rethinking Rape Law International and Comparative Perspectives* (Routledge: 2010) 147.
[408] Phillip N.S. Rumney, 'The Review of Sex Offences and Rape law reform: Another false down?' [2001] 64 *Modern Law Review* 890-910. 899
[409] Setting the Boundaries (n 132) ch 2 Amongst other issues It rejected proposals (inter alia) that rape should be divided into lesser different forms of rape, i.e. 'date rape', and suggested that the definition of rape

intoxication was deemed to effect an individual's capacity to consent, and therefore how a legislative response might be drafted where the individuals incapacity was self-inflicted. It will be argued that because of the conceptual underpinnings of the suggested reforms, the Law Commission's and the Home Office's suggestions were ignored and instead voluntarily intoxicated individuals were/are responsibilised.

In determining who has and has not retained capacity, the Law Commission suggested that persons with a mental disability should be presumed not to have the capacity to consent to sexual activity if they were unable to 'understand or retain the information relevant to the decision.'[410] However, they extended this line of reasoning to include persons who were unable to communicate consent because of unconsciousness for any reason.[411] The paper went on to rightly recommend that intoxicated victims, voluntarily or otherwise, should be afforded this protection under the law if it is proved they could not communicate their consent or were incapable of giving valid consent.[412] Their suggestion would therefore not include any unnecessary distinction that implicitly suggests that voluntarily intoxicated victims are blameworthy. Providing involuntarily intoxicated victims with extra protection suggests a hierarchy of offences. It suggests that exploiting a complainant who voluntarily became intoxicated is less serious than a victim who became so through no fault of their own. It is the state of vulnerability and how the complainant is experiencing their environment that should be considered. Both victims are experiencing their vulnerability in a similar light and the law should instead focus on the defendant's exploitation of their incapacity: As the Law Commission right stated:

> 'We believe that if a person is so drunk or drugged as to be incapable of giving a valid consent, and the fact finding tribunal is sure that the defendant was aware of this (or was reckless as to the matter) at the relevant time, then there is no reason why the criminal law should not extend the protection to that person and such an incapacity would be recognised under our definition.'[413]

Through the analysis below it will be revealed that the Government did not draw on these suggestions. It is noteworthy that the Law Commission suggested that voluntarily intoxicated victims be protected. They justly did not distinguish between the means by

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should include penetration of the mouth, vagina or anus. This was rejected on the basis that all rape offences should be treated as serious as one another.

[410] The Law Commission 'Consent in Sexual Offences: a report to the Home Office Sex Offences Review' [2000] at para 4.29

[411] Ibid 4.33.

[412] Ibid 4.53.

[413] Ibid.

which the person was rendered intoxicated, moreover the focus was on their ability to communicate their consent. Such a recognition suggests the reality that intoxicated victims may experience a sense of heightened vulnerability, hence more likely to be assaulted and therefore in need of greater protection from sexual exploitation.[414] This is true as far as voluntarily intoxicated victims may be inhibited from refusing sexual advances due to their incapacity; moreover, these victims also face stereotypical attitudes and myths from society[415] hence become at risk of criticisms from the public.

Moreover, in 2002, Home Office released a white paper called '*Protecting the Public: strengthening protection against sex offenders and reforming the law on sexual offences'* suggesting and discussing potential reforms to the law of rape. It suggested that those with a mental disorder should be given protection, as they referred to their particular vulnerability to rape. On that basis, they suggested that 'a new offence of sex acts with a person who could not have had the capacity to consent'[416] should be introduced.[417] Such a reform could potentially reflect the theory of vulnerability, affording all incapacitated complainants equal protection. Although not recognised, this offence could have encapsulated all individuals irrelevant of the existence of a mental disorder. However, this approach was not implemented.

The sensible suggestions made that a person should be deemed incapable of consenting where they had been too affected by drink or drugs to freely agree, was not followed by Parliament. The Home Secretary stated:

> 'it is worth making it clear that I have rejected the suggestion that someone inebriated could claim that they were unable to give consent—as opposed to someone who was unconscious for whatever reason, including because of alcohol, and was therefore unable to do so—on the ground that we do not want mischievous accusations in circumstances where someone genuinely had reasonable and honest belief of consent.'[418]

Therefore, although Parliament had recognised the vulnerability of those who do not have (or are close to losing) the capacity to consent, the Law Commissions suggestions to include individuals who retained consciousness but were incapable of consenting was not

[414] Almost one in three victims (32%) said they 'were under the influence of alcohol and 3% were under the influence of drugs' at the time of the assault Crime Survey England and Wales, 'Focus on: violent crimes and Sexual offences 2011/2012' [2013] *Statistical bulletin* 63
[415] Havens (n 298).
[416] Protecting the Public (n 374) [510]; a discussion of a similar approach in Canada is contained within chapter 5
[417] As will be discussed in detail in the following chapter.
[418] Protecting the Public (n 374) [512].

followed. The above statement is ill founded as it assumes that individuals who are substantially intoxicated will always have the capacity to consent if they remain conscious. Moreover, it ignores the realities and the vulnerabilities of individuals who retain consciousness but are more likely to be exploited because of their inability to refuse unwanted advances. It fails to reflect the stereotypical attitudes and expectations burdened by women and instead inadvertently supports the idea that drunk women are more sexually available and more likely to false claim rape. Moreover, it could be suggested that these proposals were not adopted because of responsibilisation. Arguably, as these reforms were informed through an autonomy lens the focus on prioritisation is on 'choice' and self-determination shaping the legislative reforms. Therefore, the choice of becoming voluntarily intoxicated carries with it the responsibility of avoiding any harm that might result from the exploitation of that vulnerability. As we will discuss in detail below, the State has opted to unequally distribute resilience here by failing to follow proposals that would offer equal protection to all and instead favour a hierarchal approach which differentiates protections for incapacities. The actual determination of capacity must now be considered.

Capacity is an 'integral element'[419] of consent; and consent itself is a very complex notion. As will be discussed in detail below, in order to ascertain whether there was valid consent to sexual relations it must be shown that the complainant had the capacity to consent. If the complainant is deemed not to have had the capacity to agree or disagree to sexual activity at the time of the offence, they will be deemed to not have consented.[420] The focus of the legislation is therefore on two (or more) capable autonomous individuals exercising their rights and abilities to engage in wanted sexual activity.

The meaning and understanding of capacity have 'been the subject of argument and criticism'[421] since the introduction of the 2003 Act. The definition of consent contains the phrase 'capacity to agree by choice'; this in essence means the ability to communicate through words or otherwise their decision. The Sexual Offences Act 2003 is 'vague'[422] as it contains no definition of capacity. Instead its meaning is left open to the interpretation of

[419] LH Leigh, 'Case comment: Two cases on consent in rape' [2007] 5 *Archbold News* 6-9, 7
[420] Witmer- Rich (n 66) 377.
[421] Damian Warburton, 'Court of Appeal: Rape: Consent and Capacity' [2007] 71(5) *Journal of Criminal Law* 1-3,2
[422] Andrew Ashworth, 'Case comment: rape consent- intoxication' [2007] Nov *Criminal Law Review* 901-903, 902

the jury on a case by case basis with judicial and case law guidance.[423] The concept is therefore malleable and confusing, which is arguably worsened where intoxication is the basis of questioning capacity.

As Cowan argues, excessive alcohol/drug ingestion may affect the motor and mental skills of a person[424] potentially 'render[ing] consent obscure.'[425] As mentioned, if a voluntarily intoxicated victim-survivor becomes so intoxicated that she falls unconscious the law will presume she did not consent. However, where he or she is so affected by alcohol/drugs yet remains conscious it will be open to the prosecution to claim that she was incapable of consenting because of intoxication.[426] As will be analysed below it appears the law presumes capacity is retained despite the obvious vulnerable circumstances.

The grey areas of capacity do not appear to be dealt with appropriately by case law. It also seems that where complainants are deemed to have individuals who are substantially intoxicated should not be perceived as having retained capacity. As will be revealed below, the law appears more concerned with the autonomous decision of the person to become intoxicated rather than their obvious vulnerable state. It seems to preserve autonomy and assume the woman consented in the incident. There are some situations where it can be presumed that the complainant did not have the capacity to consent because of the situational circumstances of the encounter. These are known as rebuttable and conclusive presumptions contained within s75 of the Sexual Offences Act 2003 which are explored below.

2.2 THE (HIERARCHAL) PRESUMPTIONS

Although the Law Commissions suggestions to include voluntarily intoxicated complainants within the capacity definition was not followed, their recommendations did not go unheard. This section will outline the presumptions of non-consent that were initially suggested. However, it will be argued that because of the conceptual underpinnings of autonomy, the drafting of these presumptions implied a hierarchy of protections.

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[423] See section below for a discussion on capacity in practice.
[424] Bushman & Cooper (n 277) 341.
[425] Cowan (n 43) 904.
[426] Office for Criminal Justice reform, 'Convicting rapists and protecting victims- Justice for victims of rape' [2006] Consultation paper 1-45, 13

In a similar vein to the Law Commissions position, the Home Office Review suggested that a non-exhaustive list of circumstances should be made where the law should presume the person did not consent.[427] The suggested list included situations concerning deception, unlawful detention, unable to understand fear fraud or force, threats to themselves or others and most importantly *was asleep, unconscious or too affected by alcohol or drugs to give free agreement.*[428] The italicised point is noteworthy. Arguably, both voluntarily and involuntarily intoxicated persons fall within this category. This suggestion is in accordance with the Law Commissions' recommendations. Such a recognition highlights the vulnerability of all intoxicated victims. The focus is removed from the cause of the incapacitation and intoxication hence affording equal protection, avoiding the attribution of blame on individuals.[429] Although this suggestion was not followed, a slightly different approach was instead implemented. Although a minor amendment, it arguably has substantial implications for the treatment of intoxicated complainants.

In line with the suggestions made by the Home Office[430] and the Law Commission[431] the Sexual Offences Act contains two sections with a list of presumptions whereby consent or capacity to consent will be deemed absent (rebuttable and conclusive presumptions). We must now explore the wording of the legislation and argue that different protections have been allocated to different victims because of the role they played in contributing to their harm. The law has failed to address the obvious vulnerability of voluntarily intoxicated victims and instead chosen an autonomy-based approach that examines the cause of the incapacitation and the blameworthiness of the victim. It has not provided voluntarily intoxicated victims with equal protection and has explicitly distinguished them from involuntarily intoxicated victims because of their role in exercising their free choice.

Section 76 of the Sexual Offences Act 2003 contains conclusive presumptions which refer to the evidence of deception, fraud and impersonation. If evidence is adduced to prove that there had been deception fraud or impersonation it will be conclusive that the complainant could not and therefore did not give consent. The primary focus is on the rebuttable

[427] Setting the Boundaries (n 132).
[428] Ibid [xii].
[429] That said, even if this had been implemented the focus remains unsatisfactorily upon the victims' ability to agree and therefore her sexual autonomy. If the wording reflected an inability to refuse unwanted advances, the victims' vulnerability and defendants' exploitative actions would be highlighted; hence potentially altering the perspective of jurors.
[430] Protecting the Public (n 374).
[431] The Law Commission (n 410).

presumptions. Section 75 is central to the analysis of the treatment of voluntarily intoxicated victims. This section sets out a number of instances where the defendant has the burden of adducing some evidence that the complainant consented to the sexual activity.[432] If any of the circumstances listed within s75 exist at the time of the offence, it will be presumed that the complainant could not and therefore did not give free consent. The issue will then revert to consent and his reasonable belief in consent.

These presumptions were introduced to[433] help increase prosecution rates in aiding the definition of consent. This section contains a list of evidential presumptions. It is then open to the defence to rebut the existence of such a situation and provide evidence that there was consent.[434] The situations of particular interest[435] are:

> '(2)…
>
> (d)the complainant was asleep or otherwise unconscious at the time of the relevant act;
>
> (f)any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.'[436]

The two presumptions that will be analysed are 2(d) the complainant was unconscious at the time and 2(f) that the complainant was involuntarily intoxicated at the time of the offence. These sections are important for the overall argument of this chapter and thesis, in that the law provides different treatment to individuals depending on how blameworthy they are perceived to be.

Section 75(2)(d) protects those who are vulnerable to rape because of 'unconsciousness'. This is therefore interpreted as protecting both voluntary and involuntary intoxicated complainants where they are so drunk/affected by drugs that they fall unconscious. Arguably, this suggests that if you retain consciousness you retain capacity which

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[432] Jenny Mc Ewan, 'Proving consent in sexual cases: Legislative change and cultural revolution' [2005] 9 (1) *International Journal of Evidence and proof* 1-23, 3

[433] Clare Gunby, Anna Carline Caryl Beynon, 'Alcohol related rape cases: Barristers perspectives on the Sexual Offences Act 2003 and its impact on practice' [2010] 74(6) *Journal of Criminal Law* 579-600, 583

[434] Tadros (n 48) 525.

[435] Other presumptions can be found in s75 of SOA 2003, including the threat or use of violence to the complainant or another; where the complainant was the defendant was not unlawfully detained and; where the complainant was suffering from a physical disability which rendered them incapable of communicating consent or non-consent.

[436] Sexual Offences Act 2003 s75(2)

oversimplifies the situation. It has since been recognised in the appeal of *R v Bree*[437] that voluntarily intoxicated victims may lose their ability to consent before falling unconscious.[438] However, the benchmark to which this applies appears to be extremely high.[439]

Section 75(2)(f) covers complainants who were incapacitated at the time of their assault due to involuntarily becoming intoxicated. This section covers those victims who have been spiked through drink or drugs or tricked somehow into consumption, rendering them 'stupified' or over-powered by the substance taken. In order to rely on this section then it is not necessary for the involuntarily intoxicated complainant to be totally incapacitated. It is enough to show that the substance taken has overpowered them in such a way rendering them incapable of consenting. Moreover, the wording of this section suggests that the administrator of the substance need not be the perpetrator of the assault. Therefore, it is possible for someone to rely on this presumption where through drugging by one person they become intoxicated and later be sexual assaulted by another. The latter person need not have any knowledge that they were involuntarily intoxicated, it is enough that they were overpowered by the substance administered to them. For comparison, we must look at how complainants who were intoxicated voluntarily at the time of the assault are covered in the legislation.

As earlier mentioned despite suggestions to include voluntarily intoxicated victims within these presumptions, the law does not provide such persons with extra legislative protections. Complainants who chose to become intoxicated and were later assaulted do not fall within the rebuttable presumptions contained within s75. They do however receive protection where they are deemed to have fallen unconscious at the time, however as aforementioned this causes evidential difficulties. Despite both voluntary and involuntarily intoxicated victims are both over-powered by a substance at the time of the offence, they are offered different protections, arguably because of the idea autonomy and responsibilisation.

[437] [2007] EWCA 804
[438] A detailed discussion of the interpretation and application of the law follows below with a critical analysis of the key case law.
[439] This will be discussed fully in the next section on capacity in practice.

As Khan states 'the Act is silent about the impact of excessive but voluntary alcohol consumption on the ability to give consent to intercourse, or indeed to consent generally.[440] This reasoning may be due to the notion of prior fault. The exclusion of such victims may indirectly support rape myths such as 'she was asking for it.'[441] This appears to support the assumption that women are responsible for avoiding rape;[442] and that they should avoid becoming vulnerable to attacks. Masked behind the notions of autonomy, such statements reinforce the stereotypical 'victim-blame' attitudes of 'individual responsibility.'[443]

By passing the responsibility to the victim, the State reduces their resilience by heightening their vulnerability to scrutiny hence simultaneously reducing their credibility. Thankfully, the CICS decision was reversed due to public outcry;[444] however, as Temkin notes 'it was not without its supporters.'[445] For instance, in a study by Munro and Ellison they tested the attribution of blame to an intoxicated victim.[446] The lessons learned from this study are quite shocking. It appears that where a woman is drunk or sober her expected behaviour and responsibility for herself are extraordinarily high.[447] In the Wake up to the Research Report 64% of people thought that victims who drank to excess prior to the assault should accept responsibility for being raped.[448] Conversely, it appears that some people blame a man is less if he is intoxicated at the time of the assault. His behaviour is usually forgiven due to his 'unintentional behaviour'; he is so intoxicated he is unable to control his actions.[449] It seems that no matter whether a man is drunk (too intoxicated to be blameworthy) or tipsy (blame the woman for being seductive) or sober (more credible) there is always some excuse available from society to accept his behaviour.[450] He is

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[440] Tahir Khan, 'Voluntary intoxication and Consent in cases of Rape' [2013] 8 February *Criminal Law and Justice Weekly* 114, 114
[441] Frey & Douglas (n 286) 246.
[442] Helen A. Stuggart, 'The missing text: Rape and Women's sexuality' [1994] 17(1) *Women and Language* 12-28, 18
[443] As explored in chapter 2 on Rape myths. Although since amended, the Criminal Injuries Compensation Scheme ruled that awards to drunken rape victims should be reduced as 'alcohol was a contributing factor to the incident'. This is an example of the State failing to take responsibility for vulnerable victims. Attempting to reduce compensation awards for intoxicated victims highlights the State's attempts to further draw distinctions between the public and private sphere see Temkin (n 237) 717; and UK Legal News Analysis, *Rape victim wins back full compensation reward* 28th August 2008.
[444] Temkin (n 351) 717.
[445] Ibid.
[446] Ellison & Munro (n 295) 310.
[447] Ibid.
[448] Havens (n 298) and more recently 'A third of men think if a woman has flirted on a date it generally wouldn't be rape, even if she hasn't consented to sex (21% of women believe this)' see YouGov (n 255).
[449] Pollard (n 299).
[450] Ellison & Munro (n 295) 309.

therefore viewed more favourably and less responsible.[451] It therefore appears there is a general reluctance to label intoxicated non-consensual cases as rape.[452] This attitude creates a 'double standard' whereby 'women are blamed more for a sexual assault offence when they have consumed alcohol ... and the defendants are viewed less likely to have perpetrated the crime.'[453]

According to a study conducted by Anna Carline and Clare Gunby the section 75 presumptions have not been effective.[454] They refer to the fact that the burden on the defendant to rebut the presumption is not onerous and all that is required is for a defendant to 'convince the judge there is an issue with regard to consent.'[455] They conducted a qualitative study interviewing barristers as to their use and impact at trial. Overall the general opinion appeared to be that the presumptions have been 'overwhelming unsuccessful.'[456] Similarly, the Consultation paper *Convicting Rapists and protecting victims* [2006] has said the presumptions have 'not enjoyed great usage.'[457] The 'sufficient evidence' required by a defendant to rebut the existence of a circumstance listed in section 75 is quite a 'minimal standard' [458] and as the consultation paper notes this standard is not particularly 'onerous'[459] suggesting it would be easily disengaged.[460] As said in the case of *R* v *Ciccarelli*[461] 'some evidence beyond the fanciful or speculative had to be adduced to support the reasonableness of his belief.'[462] In that case where the presumption was introduced the court held that the defendant must adduce evidence rather than his own asserted belief as to consent.

This suggests a higher burden than the aforementioned studies refer to, which if enforced consistently, might increase reliance on presumptions. Perhaps a more robust approach would be to remove any differentiation between incapacities. A theory of vulnerability

[451] Pollard (n 299).
[452] Discussed further in rape myth chapter
[453] Clare Gunby, Anna Carline, Mark A Bellis & Carly Beynon, 'Gender differences in alcohol related non-consensual sex' [2012] *BMC Public health* available at http://www.biomedcentral.com/1471-2458/12/216
[454] Anna Carline and Clare Gunby, 'Barristers perspectives on Rape and the Sexual Offences Act 2003' [2010] 31 *Criminal Law and Justice Weekly* 579-600, 593
[455] Ibid.
[456] Ibid.
[457] Office for Criminal Justice reform (n 426) 15.
[458] Finch & Munro (n 378) 793.
[459] Office for Criminal Justice reform (n 426) 15.
[460] A full exploration of the treatment of involuntarily intoxicated victims is found in the next chapter.
[461] [2011] EWCA Crim 2665 at 18
[462] Ibid.

suggests that we are all inherently, unavoidably vulnerable subjects. Firstly, it must therefore be asked whether the law should distinguish between different means of incapacity? As Elliot and De Than argue 'there is no need for the law to distinguish between different reasons for incapacity including age, mental disorder and incapacity. A single test should be adopted which would apply to all offences and to all causes of incapacity'[463] Potential suggested reforms such as this will be explored in chapter 6 on reforms.

This section has revealed that the State and its institutions do not sufficiently protect those who are exploited because they voluntarily became intoxicated. Because of the conceptual underpinning of autonomy, this may inadvertently suggest that those who were intoxicated voluntarily at the time of their assault were partly responsible for their harm and should therefore bear some responsibility. This allows the State to draw a line between private and public acts, shifting their burden by affording every individual responsibility for their own actions/safety. As we have seen those victims who become involuntarily intoxicated are given certain protections; yet those voluntarily intoxicated victims who are just as vulnerable receive no such separate protection. The focus appears to be somewhat on the administration of the substance rather than the effect of the drugs/alcohol on the capacity of the victim.[464] This may be illogical as the law now says that the person who administers the substance to the victim does not have to be the person who takes advantage of her intoxicated state.[465] Therefore, the law appears to place an unjustifiably high burden on the victim suggesting those who become voluntarily intoxicated put themselves at risk of rape. Perhaps it was felt that consent and capacity alone would sufficiently address the issue of voluntarily intoxicated victims. However, it appears that leaving voluntarily intoxicated victims unprotected in essence promotes rape myths and stereotypes and leaves victims less clearly protected.

When voluntarily intoxicated complainants retain consciousness and capacity, or if a defendant adduced evidence to rebut the circumstances listed within s 75, the issue then falls to whether consent was given freely and voluntarily. We must therefore consider the adequacy of the definition of consent.

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[463] Catherine Elliot and Claire de Than, 'The case for a rational reconstruction of consent in criminal law' [2007] 70(2) *Modern Law Review* 225-249, 241.
[464] As will be further revealed in section x below.
[465] S75(2)(f) SOA 2003

2.3 CONSENT: ONE STEP FORWARD TWO STEPS BACK?

As earlier stated, consent is a term that only entered into legislation in 1976. The focus before the statutory definition of consent was introduced was whether the woman had rejected and resisted her attacker. The meaning of consent and its understanding was developed through common law,[466] which arguably has been formulated around the concept of positive sexual autonomy. As previously mentioned, it has evolved since the early case of *R v Camplin.*[467] In essence, consent is critical as it differentiates 'between rape and permissible sexual intercourse.'[468] Rape cases often have no separate evidence and may often rely on the complainant's testimony alone.[469] The notion later evolved in *R v Olujobja*[470] whereby it was held consent is a state of mind. After this decision, it was decided that a jury should be directed to understand consent 'in its ordinary meaning.'[471] However, this approach was unsatisfactory as it lacked certainty and clarity; leaving juries with little direction and confused as to it meaning, thereby creating a demand for clarity through legal reform.

The Law Commission published a paper in 2000.[472] They suggested that the term consent be defined using the terms free, genuine and agreement.[473] Following the Law Commission's review, in 2000 the Home Office published 'Setting the Boundaries: Reforming the law on Sex Offences.' The Home Office suggested that there should be a statutory definition of consent to sexual activity. It rejected the definition proposed by The Law Commission suggesting it was too complex instead opting for 'free agreement.'[474] The paper reasoned that this definition encapsulates the term 'genuine'. Including the term 'free' is important as freedom is often linked to the concept of autonomy. They suggested that this potentially clearer definition would eliminate any confusion surrounding the issue of consent. It posited that detailed definition together with accurate guidance could potentially provide juries with a more meaningful understanding of consent. thereby

[466] Gunby, Carline & Beynon (n 433) 580.
[467] [1845] 9 JP 424
[468] Kimberly Kessler Ferzan, 'Clarifying consent: Peter Westen's the Logic of Consent' [2006] 25 *Law and Philosophy* 193-217, 214
[469] Office for Criminal Justice Reform (n 426) 15.
[470] [1982] 1 QB
[471] Ibid.
[472] The Law Commission (n 410).
[473] Protecting the Public (n 132) 2.10.
[474] Ibid (v)

potentially reaching more reliable verdicts. However, it appears that the chosen definition lacked clarity and has instead served to provide more confusion rather than certainty.[475] Such uncertainty appears not to have protected rape complainants leaving jurors reliant on potentially stereotypical attitudes and expectations. Therefore, we must consider how the legislator drafted the definition to determine its conceptual underpinnings.

As aforementioned if the presumptions are not applicable or have been successfully rebutted by the defence, the focus then shifts onto the definition of consent within s74.[476] This section will therefore critically analyse the wording of the legislation and ask whether on paper the reforms and introduction of a definition has adequately protected individuals or whether through an autonomy approach has resulted in responsibilisation.

As consent is at the heart of the offence[477] it is essential that the law is as clear and unambiguous with its definition. For these reasons, in 2003 it was found that this ad-hoc approach was no longer appropriate. A new more precise definition was required to help juries understand consent. Where the facts do not 'fall squarely'[478] within the presumptions of section 75 and 76,[479] section 74 will apply; defining consent as:

> 'For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice'[480]

This definition appears to have complicated the notion of consent by using the terms freedom and capacity to define consent yet failing to provide definition or direction as to their meaning. Assigning undefined terms to a word in order to explain its meaning, does not clarify the original words actual definition. As was rightly argued by Temkin and Ashworth, the definition has complex 'philosophical issues as to freedom and choice.'[481] Similarly, Temkin and Ashworth have noted the deep philosophical issues with the definition.[482] They have also commented;

> 'Insofar as the definition of 'consent' is a pivotal element in the new law on adult sex offences, we have seen that s.74 is vague in its terms and that a large part of the new law is left to the interpretation of juries, under the guidance of model directions prepared by the Judicial Studies Board. Even as a residual definition,

[475] As is discussed in the following sections
[476] Sexual Offences Act, 2003
[477] Professor John Cooper, 'Consent- How to prove?' [2011] 23 *Criminal Law and Justice weekly* 330, 330
[478] Temkin & Ashworth (n 405) 336.
[479] Which will be discussed in the next section
[480] Sexual Offences Act 2003 s.74
[481] Ashworth (n 422) 902.
[482] Temkin & Ashworth (n 405) 336.

> s.74 leaves too much uncertainty in the application of the law to a whole range of familiar situations.[483]

It would therefore appear at a first glance that the definition has not fully met its aims and has not in fact clearly defined consent. It attempts to recognise the autonomy of complainants, yet the terms 'freedom' and 'capacity' remain vague and undefined. However, it must be asked what this definition means and the ramifications of its interpretation. As Rumney rightly recognises, the term 'free agreement' suggests a 'two-way process of communication or exchange,[484] whilst 'challenging the assumption that a woman is available for intercourse when she is in no position to choose.'[485]Arguably this emphasis on communication may have been in an effort to recognise the active role women do and should have in sexual activity. Moreover, the review referred to the responsibility of each party for their own actions; arguably again as it has been informed by the liberal legal autonomous subject. As Rumney accurately articulates, in light of the prevalence of rape myths and victim blame, it is highly likely that the responsibility to communicate agreement 'may disproportionately fall upon rape complainants.'[486] The expectation that all individuals are free and independent, capable of making decision free from outside inferences, appears to have informed this definition of consent. Where individuals fall short of this rational subject decision maker, failing to adhere to expected norms, they are responsibilised and in essence blamed for contributing to the harm caused.

However, as Tadros acknowledges, the law now recognises 'the possibility that yes does not always mean yes.'[487] The concept of consent must therefore be scrutinized. As Wallerstein explains, consent is broken into both legal and factual consent.[488] He says that the definition clearly requires legal consent. Factual consent is that a person agrees by choice; this is an essential element of legal consent but is insufficient on its own.[489] He says two more conditions must be satisfied for a valid legal consent: a person must be free to agree and have the capacity to agree.[490] Therefore, there are three integral elements of consent. None of these elements will be sufficient on their own as someone may agree by

[483] Ibid.
[484] Rumney (n 408).
[485] Ibid. Also see chapter 5 for a discussion on the affirmative consent model.
[486] Ibid 899.
[487] Tadros (n 48) 520.
[488] Shlomit Wallerstein, 'A drunken consent is still consent- or is it? A critical analysis of the law on drunken consent to sex following Bree' [2009] 73 *Journal of Criminal Law* 318-344, 320
[489] Ibid.
[490] Ibid.

choice to sex but this agreement might be made out of fear or they may not understand what they are agreeing to. Tadros rightly argues that consent is complex. and it is unclear how a jury is to determine its existence;

> '[a]re the jury to determine whether the complainant agreed by choice first and then determine whether she had the relevant capacity and freedom? Or are they to address the question of capacity and freedom first … and conclude she did not agree by choice?'[491]

It appears that the definition of consent may be too complex for juries to understand leaving them 'confused'[492] and its meaning open to potential influence from stereotypical views.[493] As one barrister said, 'despite the existence of the statutory definition, juries frequently relied upon their own personal definitions and understandings of consent to sexual activity to draw conclusions in rape cases.'[494] Hence, it could be suggested that this definition is not as unambiguous as envisioned, instead it iss complex and philosophical. However, even if the definition was precise and accessible, if underpinned by an autonomy lens the outcome would be similar, with barristers and jurors interpreting and manipulating the law to responsibilise complainants.

Anna Carline and Clare Gunby conducted a study examining barristers perspectives of the new legislation.[495] One quote from a barrister who commented on the definition of consent stated '[h]ow an ordinary jury makes sense of it is a mystery.'[496] Arguably, considering the complexity of the definition and lack of clear directions, there is a risk that jurors may ignore the law and revert to pre-conceived notions of victim blame. The consensus appeared to be that the definition was more helpful to lawyers rather than jurors as intended.[497] As Tadros potently suggested, it is very easy to imagine defence barristers exploiting the ambivalence of consent 'which could come to be distracted from the central question of whether the complainant engaged in intercourse freely by focusing on whether her words or actions indicated agreement.'[498] The recommendation of statutory judicial directions as to the meaning of consent was rejected by Government of the time who have

[491] Tadros (n 48) 520.
[492] Anna Carline and Clare Gunby, ''How an ordinary jury makes sense of it is a mystery': Barristers' perspectives on rape, consent and the sexual offences act 2003' [2011] 32 *Liverpool Law Review* 237-250, 241
[493] As is discussed in Chapter 2 on rape myths and stereotypical societal attitudes
[494] Carline & Gunby (n 492).
[495] Ibid.
[496] Ibid 240.
[497] Ibid 241.
[498] Tadros (n 48) 522.

instead opted for a standard direction to be developed by the Judicial Studies Board and the Court of Appeal which could then be tailored to every case.[499]

In March 2010, the Judicial Studies Board published jury directions on the meaning of capacity, consent and voluntary intoxication.[500] The main purpose of these directions is to reiterate that the law should be interpreted on the facts of the case and it is 'not just an abstract concept of consent.'[501] It provides scenarios and detailed examples of a how a jury might answer the questions of intoxicated capacity to consent to sex.[502] One such direction states that alcohol may make a person inhibited than s/he might be when sober. The articulation of this direction appears to be yet another manifestation of autonomy, reiterating and reinforcing the responsibility of complainants to avoid harm. The updated guidance instead details an example of a jury direction detailing that just because a complainant got intoxicated does not mean they wanted to have sex. However, it also states that 'consumption of alcohol or drugs may cause someone to become disinhibited and behave differently.'[503]

Instead, perhaps the guidance should refocus, and rephrase, the direction to reflect the increased likelihood of exploitation when intoxicated. It appears that the State has passed its responsibility to protect individuals onto the individual. Through this promotion of autonomous choice individuals are led to believe that the State are acting in our best interests, however upon reflection it appears the State has merely masked its responsibilities. Although the directions are optional guidance for judges to employ, it would appear from other jurisdictions that implementing same into legislation does little to alleviate stereotypical attitudes.[504]

For example, in the Australian territory Victoria, jury directions on consent have been introduced in legislation. These directions are issued to help juries and to 'address

[499] Temkin & Ashworth (n 405) 337.
[500] Judicial studies Board 'Directing the Jury' March [2010] *Crown Court Bench Book*,371
[501] Ibid.
[502] Ibid 373.
[503] Judicial Studies Board Maddison, Ormerod, Tonking & Wait, *The Crown Court Bench Book: Part 1: Jury and Trial Management and Summing Up* (Judicial Studies Board: London, 2016) 20-4; 20-19
[504] Scotland is the latest jurisdiction to implement judicial guidelines into legislation. These regard communication of the offence and the absence of physical force. There has yet to be substantive research into its effectiveness. See Sections 288DA & 288DB of Criminal Procedure (Scotland) Act 1995 as amended by the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (asp 22), ss. 6**,** 45(2)(3)

stereotypical views.'[505] These directions specifically detail common stereotypes to juries and strongly state that these cannot be relied upon as proof of consent. It attempts to minimise any myths and preconceptions that jurors may have and encourages them to base their decisions on the facts and law alone. As Scott said '[a]cademics agree that trial judges need to provide sufficient guidance to remove such preconceptions held by jurors.'[506] But Flynn & Henry have argued that these directions have merely served to confuse juries with many convictions overturned because of judicial mis-directions.[507] It would therefore appear that the direction applied were too complex for juries to comprehend lending them to rely on preconceived ideas about rape and consent.[508]

It would therefore appear that the promotion of autonomy and the terminology used to underpin consent is a cause for concern. It is too malleable, open to manipulation and subjective of a concept. As will be explored in more detail in chapter 6, consent alone is inadequate and needs to be reformed in light of a vulnerability theory. Firstly though, the implications of this must now be considered through an examination of the determination of consent, capacity and the presumptions in case law. Considering the significant overlap between consent capacity and the rebuttable presumptions, the following section will analyse each of these concepts together, unpicking their interpretation and significance in case law.

3. CONSENT, CAPACITY AND THE PRESUMPTIONS: OPERATION IN PRACTICE.

The clarity of the terms consent and capacity consent remain in dispute since their introduction in 2003. Once they are coupled with excessive alcohol and/or drugs consumption their application becomes even hazier with complicated evidential rules. As this section will go on to analyse, the interpretation in practice of capacity, consent and the

[505] Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [7.3] states '(d) that the fact that the person did not say or do anything to indicate free agreement to a sexual act at the time which the act took place is enough to show that the act took place without that person's free agreement;
e) that the jury is not to regard a person as having freely agreed to a sexual act just because—
(i) she or he did not protest or physically resist; or
(ii) she or he did not sustain physical injury; or
(iii) on that or an earlier occasion, she or he freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person)'
[506] Scott (n 379) 33.
[507] Asher Flynn & Nicole Henry, 'Disputing Consent: The Role of Jury Directions in Victoria' [2012] 24(2) *Current Issues in Criminal Justice* 167-183, 168
[508] Ibid.

presumptions is problematic. The legislative reforms, as informed by an autonomous lens, appear to be interpreted and manipulated in such a way as to heighten the burdens on complainants to avoid harm or communicate non-consent, thereby failing to afford adequate and equal protection.

One of the first and well renowned cases that attempted to decipher their meaning in relation to intoxication was *R v Dougal.*[509] In that case, the complainant was so intoxicated that she could not exactly remember whether she consented or not.[510] The prosecution deemed that this was fatal to their case and withdrew. It would therefore appear that the failure of this case was therefore due to the incorrect understanding of the law on consent. It could be argued that the prosecution did not understand the definition hence ignoring the question of capacity. Moreover, this case is most known for Judge Roderick Evans infamous utterance 'drunken consent is still consent.'[511] This famous statement also highlights the misinterpretation of the law as it fails to recognise the effect of alcohol on capacity to consent. It could have been possible for the prosecution to argue that the complainant did not have the capacity to consent. It appears this issue was ignored, and the sole focus of the case was consent. This highlights the failure of both the prosecution and the judge to recognise the complainant's vulnerability and defendant's potentially exploitative actions. It appears that the assumption is if a woman remains conscious, she retains the capacity to consent.[512] The resilience of her and her environment appear to have been ignored. She was clearly experiencing a heightened state of vulnerability through her intoxication. Yet instead, the link between disinhibition and alcohol appears to suggest that drunken women are almost presumed to have consented to intoxicated sexual relations when conscious. As Vera Baird states it 'seems to reverse the burden of proof, requiring her to show she didn't say yes.'[513] This reveals how the law appears to presume consent, that the law is framed in such a way as to protect men from allegations rather than protect individuals from sexual assault. This represents the unequal distribution of resilience. However, it is worth noting that the judicial guidelines have since directed judges away from relying on the phrase 'drunken consent is still consent' to avoid distress.[514] *Dougal*

[509] Swansea Crown Court [2005] (unreported)
[510] BBC News 'Rape case collapses over consent' Thursday 24th November 2005
[511] The Independent, 'Drunken consent is still consent, judge rules' Thursday 24th November 2005 available at http://www.independent.co.uk/news/uk/crime/drunken-consent-to-sex-is-still-consent-judge-rules-516722.html
[512] McGlynn (n 407) 148.
[513] McGlynn (n 407).
[514] Judicial Studies Board [2016] (n 500) [20-20].

was the first case faced with the effect of intoxication on consent, which arguably did not interpret the law in accordance with its aims; excessively focusing on the complainant's behaviour and ignoring the issue of capacity.

Similarly, the case of *R v Gardner*[515] overlooked the issue of capacity when considering whether an underage girl consented to being digitally penetrated whilst she vomited.[516] In sentencing, it was concluded that she had consented despite her intoxicated state and the defendants' obvious awareness of this state.[517] The decision failed to fully explore the effect of her intoxication on her capacity to consent. The judge said, 'what the defendant did was consensual, despite the fact it was drunken consent and despite that the young woman was taken advantage of.'[518] The latter part of that statement is the most concerning. To state that a young girl can give 'free agreement' despite her obvious intoxicated state and whilst acknowledging the exploitative actions of the defendant, is very concerning. This further exposes what an undue focus on autonomy produces; reinforcing stereotypical attitudes and myths whilst responsibilising the victim and ignoring the predatory actions of the defendant.

R v Bree[519] was the next notorious case that dealt with the complex web of intoxication capacity and consent. This case concerned a rape of a complainant who had been vomiting because of her intoxicated state.[520] Originally the prosecution had claimed that the complainant was unconscious throughout the majority of the incident and could not therefore have consented as she lacked capacity as per the rebuttable presumption contained in s75(2)d of SOA 2003.[521] Later in the case, it was conceded by the complainant and the prosecution, that the memory blackouts of the incident may have been caused by the effect of alcohol rather than unconsciousness.[522] The prosecution then decided to argue that the complainant did not consent.[523] The judge failed to advise the jury of this change in the prosecution's case.[524] It had been open to the prosecution to argue that she lacked capacity to consent and that these blackouts were evidence of incapacity.

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[515] [2005] EWCA 1399
[516] Ibid [18]
[517] Ibid [15]
[518] [2005] EWCA 1399
[519] [2007] All ER 412
[520] Ibid.
[521] [2007] EWCA Crim 804 at 131
[522] Ibid [141].
[523] Ibid [131].
[524] Jane Creaton, 'Case comment: Intoxicated consent' [2007] 80(2) *Police Journal* 170-173, 170

Similarly, she had testified that 'I felt as if I wasn't in my body…I knew I didn't want this but I didn't know how to go about stopping it.'[525] Such evidence would suggest that the complainant was so intoxicated she was incapable of resisting; she was experiencing a heightened state of vulnerability with little or no resilience. Moreover, this suggests she was incapacitated and this argument should have been put forward by prosecution. The failure to do so reflects the treatment of capacity as an 'all or nothing issue.'[526] Interestingly, the defendant testified that the complainant welcomed his advances and 'did nothing to stop him.'[527] This again suggests a reliance on the myth that a complainant must resist advances. It would appear from the complainant's evidence that she was too intoxicated to resist therefore suggesting the defendants' exploitation of her vulnerability. Furthermore, the judge did not refer to the effect of alcohol on the complainant and on her capacity to consent[528] and hence her experience of her vulnerability. Frustratingly, the Judge briefly mentioned that intoxication may affect her credibility. Once again, promoting the stereotypical myths associated with drunken rape victims. On another note, it appears that both the prosecution and the judge sidestepped the issue of capacity. Unsurprisingly, it was because of these poor guidelines that the case was overturned and deemed unsafe, stating:[529]

> 'If, through drink, or for any other reason, a complainant had temporarily lost her capacity to choose whether to have sexual intercourse, she was not consenting, and subject to the defendant's state of mind, if intercourse took place, that would be rape. However, where a complainant had voluntarily consumed substantial quantities of alcohol, but nevertheless remained capable of choosing whether to have intercourse, and agreed to do so, that would not be rape'[530]

It would appear that autonomy has been used as a guise here to responsibilise the complainant, as Sir Igor P stated that 'both were adults, neither acted unlawfully in drinking to excess… free to choose how much to drink and with whom… free to have intercourse with each other.'[531] The focus again is on the positive aspects of autonomy- the right to have drunken sexual intercourse and shunning any state intervention. In giving

[525] [2007] All ER 412 at 8
[526] Janine Benedet & Isobel Grant,' Sexual Assault of Women with Mental Disabilities: A Canadian Perspective' in Clare Mc Glynn & Vanessa Munro (eds.) *Rethinking Rape Law International and Comparative Perspectives* (Routledge: 2010) 332.
[527] [2007] All ER 412 at 16
[528] Rumney & Fenton (n 268) 281.
[529] Alan Reed, 'Case comment: Rape and drunken consent' [2007] *Criminal Lawyer* 3-4, 3
[530] [2007] EWCA Crim 804 at 140
[531] Ibid.

judgment, the Court of Appeal briefly referred to the case of *R v Malone*[532] that said '[s]ubmitting to an act of sexual intercourse, because through drink she was unable physically to resist, though she wished to, is not consent.'[533] Sir Igor P also clarified the statement 'drunken consent is still consent' in that it is 'broadly true'[534] as it is a 'useful shorthand accurately encapsulating the legal position.' Though he went onto state that 'as a matter of practical reality, capacity to consent may evaporate well before a complainant becomes unconscious.' Although recognising this, the point at which capacity may evaporate was not detailed; i.e. how and when can 'well before'[535] be determined? How might we determine when someone loses capacity? Perhaps evidence of blackouts from the complainant should be interpreted as evidence of incapacity? Or we might change our perspective completely. Instead of asking the complainant whether they had the capacity to consent, considering the evidentially difficulties in proving so because of its nature, we might instead revert to the defendant and ask his knowledge of her capacity at the time of the offence.[536]

Despite these apparent qualifying comments, it is argued that the alleged '*useful* shorthand'[537] will be what is remembered and relied upon. Of course, media headlines were based on the slogan from the case of *Dougal*, [538] hence acting to distort the reality of intoxication and sexual encounters. To state 'drunken consent is still consent' is misleading as it suggests that, in more cases than not, an incapacitated complainant can (and does) consent to sex thereby reinforcing expectations and stereotypical attitudes. Moreover, the shorthand carries theoretical concerns as it connotes an unequal balance favouring the presumption of consent, creating further barriers for complainants who must demonstrate non-consent to secure justice. It completely ignores the particulars of each case and the obvious heightened vulnerability of complainants in sexual exchanges. This statement overlooks the power imbalance between drunken and sober capacities; similarly, it disregards the potential for exploitation of a drunken victim. Likewise, should both be

[532] [1998] 2 Cr Appeal R 447
[533] Ibid [27].
[534] J.R Spencer, 'Three new cases on consent' [2007] 66(3) *Cambridge Law Journal* 490-493, 491
[535] Warburton (n 421) 2.
[536] This will be explored in detail in chapter 6 on reforms.
[537] Joe Stone, 'Rape, Consent and Intoxication: A Legal Practitioners Perspective' [2013] 48(4) *Alcohol and Alcoholism* 384-385, 385
[538] Geneviéve Roberts 'Drunken consent to sex is still consent, judge rules', 24th November 2005 *The Independent* http://www.independent.co.uk/news/uk/crime/drunken-consent-to-sex-is-still-consent-judge-rules-516722.html; 'Drunken consent 'is still consent to sex'', 24th November 2005 *The Telegraph* http://www.telegraph.co.uk/news/uknews/1503792/Drunken-consent-is-still-consent-to-sex.html;

intoxicated at the time of the assault, it responsibilises the complainant to demonstrate (arguably quite vehemently for evidential purposes) their non-consent. Moreover, it arguably overlooks the defendant's role and responsibility to obtain valid free agreement and indeed reinforces their belief in consent as *reasonable* because of the complainant's intoxication.

It appears that the prosecution in both *Bree and Dougal* failed because poor judicial directions,[539] and more so because of the interpretation and application of the law through an autonomy lens. The law is currently too concerned with recognising autonomy that it fails to protect those who are vulnerable to exploitation. In essence, this focus shifts the burden from the State onto the individual. We are drawn to the autonomy myth; led to believe it is for our benefit that we self-govern when in reality we have less access to resilience and are more likely to be exploited. Persistently, cases like the aforementioned return unsatisfactory verdicts reinforcing individual responsibility and stereotypical myths. Although there have been some steps to address this unsatisfactory shorthand, the interpretation of the law and its application appears to still unjustly favour the defendant.

Leaving every case to be decided on its facts 'creates a malleable and unpredictable legal test.'[540] Perhaps, if judicial guidelines had been legislated, these cases would have not collapsed, however the accuracy and effectiveness of such guidelines are debatable. The law on capacity to consent may have been clearer thus encouraging the prosecution to argue incapacity to consent. The government of the time proposed a number of measures[541] to help increase convictions rates of 'intoxicated rapes' that were rejected by the Council of Circuit Judges.[542] These measures included a new definition of capacity, use of expert witnesses to dispel rape myths and the introduction of videotaped initial interviews with the complainant.[543] The Council rejected these proposals insisting amongst other oppositions that such complications were unnecessary and the common sense of jurors should suffice.[544] Such directions might also have helped the jury and prevented stereotypical attitudes from affecting their decision. Realistically, it is likely that such

[539] Rumney & Fenton (n 268) 276.
[540] Emily Finch and Vanessa Munro, 'Breaking Boundaries? Sexual Consent in the jury room' [2006] 26(3) *Legal Studies* 303-320, 315
[541] After the controversial decision of *Dougal*
[542] Clare Dyer, 'Judges try to block rape trial reforms' *The Guardian* 23rd January 2007. http://www.theguardian.com/politics/2007/jan/23/ukcrime.prisonsandprobation
[543] Ibid.
[544] Ibid.

directions would be drafted on a foundation of autonomy, focussing far too much on the complainants' actions and far too little on the exploitative actions of the defendant.

3.1 POST *DOUGAL* AND *BREE*

In *R v Hysa*[545] a 16-year-old girl claimed she had been raped by a stranger in the back of a car, moments after meeting him. She had smoked a substantial amount of cannabis and drank alcohol to excess.[546] After admitting that he could not be sure whether she said no at the time of penetration, the defence submitted that there was no case to answer on these grounds.[547] The judge dismissed the case but on appeal, Lady Justice Hallet said the fact that she could not remember saying no at the point of penetration was not fatal to the prosecution's case.[548] The judge had trespassed into the jury's territory and there was other substantial evidence that could have been left to the jury to decide whether she consented or whether she had the capacity to consent. Lady Justice Hallet said the defence could not rely on the notion that because she cannot remember if she consented or not (as in *Bree*) the case should be dismissed because this had been 'expressly disavowed' by the Court in *Bree*. This case makes progress in acknowledging that lack of memory as to consent does not equate with consent. Although this is a significant step forward, it could be argued that perhaps the court could have been more progressive to interpret memory blackouts as lack of capacity to consent,[549] and as a factor contributing to vulnerability. [550]

More recently, the judgment in *R v Gael Tameu Kamki*[551] showed significant progression in jury directions as to the meaning of capacity. This was an appeal against a rape conviction where the complainant was severely intoxicated and the evidence showed that she had vomited on herself as a result.[552] She stated that she did not recall a lot of the incident. The defendant had however admitted to touching the complainant sexually whilst she was asleep. The prosecution had always argued that she had not the capacity to

[545] [2007] EWCA 2046
[546] Ibid 1.
[547] Ibid 3.
[548] Ibid 6.
[549] As have some Canadian cases R. v. B.S.B., 2008 BCSC 917 (blackout is some circumstantial evidence of incapacity); R. v. Chahal, 2002 BCPC 98 (lack of recollection is evidence of incapacity) found in footnote 70 of Janine Benedet, 'The Sexual Assault of Intoxicated Women' [2010] 22(2) *Canadian Journal of Women and the Law* 435-462
[550] As explored in chapter 5.
[551] [2013] EWCA Crim 2335
[552] Ibid 1.

consent because she was either unconscious or close to that state throughout, [553] which arguably would have been obvious to the defendant. Rather than reiterating 'drunken consent is still consent' and thereby insinuating a retention of capacity would equate to consent, the Judge directed the jury to focus on issues of capacity.

The sole ground of the appeal was that the judge had failed to properly direct the jury on the issue of capacity to consent and the difference between capacity and consent.[554] The appeal was dismissed as clear directions were given- the judge discussed various stages of consciousness and stated, 'through intoxication if a woman loses her capacity to consent she would then not be consenting.' He detailed from being wide-awake to a state of dim and drunken awareness they may not be in a condition in which they are capable of making a choice one way or another.[555] He directed the jury to decide on the state of consciousness of the complainant and whether she was capable of consenting 'if you are sure she was not [capable] then she was obviously not consenting.'[556] As Warburton rightly argues, the prosecutors had their case already made for them and that 'prosecutors should give thought to making use of the provisions when appropriate.'[557] This appears to be a reoccurring theme in intoxicated rape cases. Prosecutors are failing to recognise appropriate arguments and seem to misunderstand the purpose of the section 75 and 76 presumptions. However, the unconscious presumption contained within s75(2)d may not have been the most appropriate argument here, considering the complainant could not recall whether her memory was distorted through intoxication or through unconsciousness.

This impressive judgment clearly outlined the issue of capacity to the jury. It also refers to the defendant's awareness of the complainant's intoxication; which shifted the focus from the complainant's behaviour onto the defendant's predatory actions. However, in this particular case the complainant was 'in and out of consciousness' which seems to suggest that this is the standard required. It is argued however, that those victims who remain conscious yet incapacitated should be similarly protected from sexual exploitation. Severe impediments of mobility and speech should be considered as factors heightening the

[553] Ibid.
[554] [2013] EWCA Crim 2335 at pg 3
[555] Ibid.
[556] Ibid.
[557] Damian Warburton, 'Intoxication and consent in sexual offences' [2014] 78(3) *Journal of Criminal Law* 207-210, 209

complainant's vulnerability; evidence of unconsciousness could be listed as circumstances to doubt the defendant's belief in capacity and consent.

R v Tambedou[558] mirrors the above judgment of *R v Hysa*. The complainant said that she had little memory of the events. The defence argued no case to answer but the judge said sufficient evidence should be left to the jury to decide on consent.[559] The appeal was dismissed; it was held that the jury had been entitled to consider the issue of absence of consent and to distinguish it from absence of memory.[560] In any event, evidence of blackouts should not go against the credibility of the complainant but instead it should strengthen the argument that she was too intoxicated to consent.

Some might argue that the law has a come a long way since *R v Dougal*. For example, in 2008 Miles argued that 'the law on this is now probably as clear as it can be' given the complexities of the concept of capacity.[561] However, has much really changed since 2008? It appears that the law still does not provide clear directions or a definition as to the meaning of capacity and freedom. As Temkin and Krahé argue, this approach is inconsistent, hence a clear universal definition of capacity and directions to juries need to be established.[562] The Office for Criminal Justice Reform's consultation document recognized that this use of the term 'capacity' raised some difficulties as regards the validity of drunken consent;[563] and that the term needs a clear definition.[564] In response to this consultation paper, a submission from Kent University supported the introduction of a definition of capacity;[565] and the organisation Justice responded saying such a definition is essential as the current practice 'compromises legal certainty.'[566] The Mental Capacity Act 2005[567] provides a clear definition of people who lack capacity[568] and perhaps this could be a useful starting point to the complex cases of voluntary intoxication. Currently, capacity remains guided by the Judicial Bench book.[569] Prior to 2016 the judicial studies board

[558] [2014] EWCA 954
[559] Ibid 1.
[560] Ibid 5.
[561] Jo Miles, 'Sexual offences: consent, capacity and children' [2008] 10 *Archbold News* 6-9, 8
[562] Temkin & Krahé (n 2) 173
[563] Cowan (n 43) 907.
[564] Office for Criminal Justice Reform (n 426) 15.
[565] Centre for Law Gender and Sexuality, 'Response to the Office for criminal justice reform's consultation paper: convicting rapists, protecting victims of rape – justice for victims of rape' July 2006 1- 14, 7
[566] Ibid 4.
[567] Section 2 and 3
[568] Centre for Law Gender and Sexuality (n 565) 8.
[569] 'The complainant had voluntarily consumed alcohol/ taken drugs during the evening in question. You will know from your own experience of life that alcohol/drugs can affect a person's ability to make decisions and can make them act in a disinhibited manner and differently for their normal behaviour. If through the

guidance had merely ‘replicated the wording of the section in stating that '[a] person consents only if he/she agrees by choice and has the freedom and capacity to make that choice.'[570] As earlier mentioned, the most recent edition provided the latest interpretations of consent and capacity, including some directions as to evidence of non-consent which are not a significant departure from the legislation.[571] Moreover, the Court of Appeal has offered no further explanation or directions that could clarify the position holistically.[572] Yet it is unclear whether any of these suggestions would significantly alter the position. It is likely that any definition of capacity and/or jury directions would be framed by autonomy; hence it is likely that the same outcome would be reached. To challenge the core of how we understand rape and victims experience of rape, these provisions would need to be drafted on a foundation of vulnerability.

Despite both voluntarily and involuntarily intoxicated victims being in the same state of mind the law fails to adequately protect those who caused themselves to be intoxicated. Perhaps the law is merely reflecting the public’s perceptions of victims. This is not an acceptable approach as the law should be aiming to eradicate unwanted stereotypes and protect the vulnerable.[573] However, it is unlikely that public perception will be changed without State involvement. Conversely, the State would need to completely transform its current position that overly relies on notions of autonomy. For effective protection, the State would need to reform its practices through a theory of vulnerability by accepting its duty to protect complainants and offering resilience through State intervention. We need to shift our focus from the promotion of the unachievable liberal legal autonomous subject to a realisation and acceptance of vulnerability.

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consumption of drink/drugs the complainant was so intoxicated that he/she did not have the capacity to agree by choice to sexual intercourse/sexual activity, then he/she did not consent.
If however, X was aware of what was happening, and he/she still consented, no matter whether he/she may not have consented had he/she been sober, or no matter how much he/she may have regretted his/her actions later, it was a consent. A drunken consent is still a consent, provided X had the capacity to make the decision to consent’, see Judicial Studies Board (n 500).

[570] Jesse Elvin, ‘The concept of consent under the sexual offences act 2003’ [2008] 72 *Journal of Criminal Law* 519-536, 523

[571] Judicial Studies Board [2016] (n 500) [20-4]; including the direction ‘An absence of consent can therefore arise by reason of mere lack of agreement as well as by force, threat of force, fear of force, a lack of capacity owing to unconsciousness,780 sleep,781 drink or drugs: for capacity and voluntary intoxication’.

[572] Elvin (n 570) 523.

[573] Wallerstein (n 488) 329.

From the above analysis it can be argued that the drafting of the legislation and the liberal legal autonomous interpretation of the law makes it very difficult for voluntarily intoxicated victims to fall into a rebuttable presumption or sufficiently evidence their incapacity. Moreover, it can be argued that the law and its application have furthered the burdens on victim-survivors. The above analysis reveals that the law responsibilises individuals to avoid sexual assault reinforcing societal attitudes and expectations; affording different protections depending on their role, thereby placing an excessive focus on the complainant and what they did to contribute to their harm which in essence encourages us to overlook the potentially predatory behaviour of the defendant. Equally, the interpretation of the law responsibilises individuals to demonstrate their non-consent in such a manner that can be used as evidence at trial, a threshold which is arguably incapable of being met. Additionally, even where a complainant acts accordingly, the threshold of 'reasonable belief' in consent appears to be easily surpassed. Considering the balance of the law appears to lean towards a presumption of consent, it is unsurprising that a defendant's belief in consent will often satisfy the criteria to be deemed *reasonable*.

4. REASONABLE BELIEF IN CONSENT

The drafting and interpretation of consent, capacity and the treatment of intoxicated complainants through the rebuttable presumptions has been examined. It has been argued that the legislation is drafted and interpreted so as to promote autonomy thereby responsibilising complainants to avoid harm. If a complainant denies consent, or capacity to consent, the focus shifts onto the defendant's belief as to its existence. Therefore, we must now be critically analyse how the reasonableness of a defendants belief in consent is determined. This section will evaluate the legislative approach to these issues to determine whether, through the conceptual underpinnings of autonomy, the legal response acts not to protect individuals from harm but instead to favour a defendant's belief in the existence of consent.

Prior to the introduction of the Sexual offences Act 2003 a defendant's subjective belief in consent was a defence to a charge of rape. The House of Lords maintained in *DPP v Morgan*[574] that a defendant could not be convicted, if he honestly believed the complainant was consenting, despite the unreasonableness of this belief. Section 1(1)(c) of the Act

[574] [1976] AC 182

abolishes this 'Morgan' subjective test and now says the prosecution must prove the defendant did not 'reasonably believe' that s/he was consenting.[575] The original *Setting the Boundaries* Report advocated for *Morgan* to be overturned to avoid situations where a defendant could hold an honest but irrational belief in consent.[576] To do so would have serious social policy issues including victims who felt violated having their experience ignored; moreover, this approach attempts to challenge male assumptions about the presumption of consent without validation.[577] Another reason cited for avoiding a wholly subjective approach was that it would 'undermine the fundamental concept of sexual autonomy'[578]. We can therefore see that the autonomy of the complainant also informed the drafting of the defence of reasonable belief in consent. However, its interpretation, coupled with the assumptions of consent, appears to in fact protect defendants from allegations of assault, rather than protect complainants' sexual autonomy.

In the context of a trial, a complainant may first rely on either a presumption or their lack of capacity (if the circumstances allow). If not proven, or if some evidence is adduced by the defendant to the contrary, the issue then goes to whether the act was done with or without consent. If a complainant alleges that they did not consent, then the defendant's belief in consent must be explored. Therefore, part of the mens rea of the offence is that the defendant did not reasonably believe that the complainant consented.[579] The reasonableness of his belief will depend on all the circumstances of the case and the steps taken by the defendant.[580] The test however, combines both subjective and objective elements. The caveat of 'all circumstances' and steps taken suggest that there is also a subjective element to the reasonableness of this belief. Such an approach directly 'invites jury scrutiny of the complainant's behaviour.'[581] There are no guidelines as what amounts to a reasonable belief or what does not; therefore, the law appears vague and open to interpretation. The suggestions by the Setting the Boundaries report that the defence refer to an honest belief that should not be available where it is informed through self-induced intoxication, recklessness or where all steps were not taken to ascertain consent appear to have been ignored. This suggestion seems to have been based on the Canadian criminal

[575] Cooper (n 477) 330.
[576] Setting the Boundaries (n 132) 24
[577] Ibid.
[578] Ibid 26.
[579] Sexual Offences Act 2003 s1(1)(c)
[580] Ibid.
[581] McGlynn (n 407) 144.

code which lists situations whereby a defendant will not be allowed to rely on the defence of honest belief- most notably where the belief arose from his own intoxication:

> **'273.2** It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
>
> (a) the accused's belief arose from the accused's
>
> (i) self-induced intoxication'

Arguably, these suggestions were not followed and instead an objective element of reasonableness was included. Arguably, the directions that a belief cannot be reasonable if it arose from self-induced intoxication should also have been included in the legislation. The objective element of the defence appears to be somewhat ignored and the Sexual Offences Act contains no such directions, as the focus remains on the 'reasonableness' of such a belief. There is no guidance as what counts as a 'reasonable belief' and at what standard that must be shown. Arguably this may allow defendants to rely on stereotypical attitudes and expectations of sexual behaviour to inform their belief. The recent case of *R v Grewal*[582] found that a defendant's drunkenness 'may be relevant to whether the defendant believed she was consenting'[583] but cannot be taken into account when determining the reasonableness of his belief. As Warburton recognises 'an accused's belief in a complainant's consent cannot be reasonable if it is not honest, but that is the limit of relevance in the subjective aspect.'[584] However, it appears that the subjective element of the belief plays a far more significant role than initially intended.

It is argued that there are different implications interpreted when determining the effect of alcohol on the complainant and the defendant. For example, in *Bree*[585] the only mention of intoxication was the potential effect on the credibility of the complainant. The effect on the reasonableness of the defendant's belief in consent (and indeed his credibility) was not explored despite admitting having consumed a substantial amount of alcohol. As the Judicial Studies Board has advised, a defendant's intoxication has no bearing on his belief and he is to be judged as if he were sober.[586] Yet it is noted in the Judicial Studies Board

[582] [2010] EWCA Crim 2448
[583] Natalie Wortley,' Reasonable belief in consent under the Sexual Offences Act 2003' [2013] 77(3) *Journal of Criminal Law* 184-187, 186
[584] Warburton (n 536).
[585] R v Bree [2007] All ER 412
[586] Judicial Studies Board (n 500).

directions that 'alcohol or drugs may have a disinhibiting effect on the complainant.'[587] Therefore, although the law appears clear in this regard, it remains unsatisfactory that a complainant's intoxication may affect her credibility but a defendant's intoxication does not act to undermine the reasonableness of his belief. In other words, there is no guidance to suggest that the defendant's intoxication may make him less likely to have regard to the consent of the complainant. This may be very significant in cases where both parties were significantly intoxicated yet not satisfying the criteria contained in the section 75 presumptions. If a complainant's credibility as to consent can be doubted because of alcohol, then perhaps a defendant's belief in consent and or disinhibited actions (more likely to disregard non-consent whilst drunk) should also be considered to determine the unreasonableness of his belief. It could be argued that the burden of proving a reasonable belief in not overly cumbersome. It would appear that the expectations and responsibilsation placed on individuals to avoid harm carries greater significance. The wording and interpretation of the legislation leads to a focus on the complainant actions in what they did not contribute to their harm. Instead, we require a complete shift in our focus, rather than looking to what a defendant did or knew as a part of a defence to sexual assault, we should examine their knowledge as part of the offence of sexual assault. This would help alter our perspectives and challenge the stereotypical attitudes and expectations that are placed on complainants.

5. CONCLUSION

It is therefore argued that despite law reform, victims of sexual assault remain unsatisfactorily protected. Arguably, this failure to protect voluntarily intoxicated victims inadvertently supports stereotypes and a hierarchy of offences. From the above analysis, it can be concluded that the law is unsatisfactory, especially in relation to capacity. At a minimum, 'capacity' desperately needs to be defined and clear directions need to be given as to its meaning in order to ensure coherent universal application. However, this alone would not result is any substantive change.

The effect of intoxication on capacity should be considered in all cases even where it has been determined the complainant was able to consent. The mental effect of intoxication,

[587] Ibid 372.

'the voluntariness of consent and the balance of power between the parties'[588] should be factors that the court considers. As McGlynn correctly argues 'there is… a far greater danger in assuming that women in extreme states of drunkenness retain capacity.'[589] This leaves such victims more likely to be exploited and less likely to achieve justice. This precautionary argument would justify a vulnerability approach.

Consent has been determined on a case-by-case basis and has failed to protect complainants consistently. Moreover, the effect that intoxication has on consent and one's capacity to consent appears to be sidestepped. This suggests that the definition is futile in that capacity seems to be ignored. The reality is that one may reform the law every year in a hope for a better outcome; however, different results will only ever be achieved once the basis for reformation has itself changed. In other words, amending legislation on the notions of autonomy, that seemingly promote self-responsibility, will not appropriately protect rape complainants. To achieve a different outcome the very foundation of the law needs to be uprooted and replanted. The theory of vulnerability offers us that opportunity to reconstruct the law and potentially reduce the ever-growing 'justice gap'[590] and equally protect all individuals. It is clear from the above analysis that the law is inadequate and in need of imminent reform. The autonomy-based consent model is failing victims of sexual assault, especially those voluntarily intoxicated complainants. Therefore, what is required is a complete overhaul in legislation, revisiting how we perceive sexual encounters both in law and society through a theory of vulnerability.

As Wallerstein said the law plays 'an important role in challenging existing unwelcome social norms which can cause harm.'[591] Therefore, it could be suggested that the law and therefore the State, has the ability to help diminish some of the stereotypical beliefs surrounding intoxicated victims should it wish to do so. The law does play a crucial symbolic role that helps inform ideas and attitudes and is therefore a key tool that can be utilised to challenge norms. However, the law on its own is not enough to challenge and eradicate our preconceived traditional understandings of sexual offences. As Rumney notes that focusing

> 'exclusively upon the revision of the legal definition of rape, the Review was unable to examine what is arguably the most important issue facing rape law today,

[588] Benedet (n 549) 461.
[589] McGlynn (n 407) 144.
[590] Temkin & Krahé (n 2).
[591] Wallerstein (n 488) 329.

> that is, how that legal definition of rape is interpreted and enforced by the criminal justice system. As with previous law reform efforts that have focused upon issues of 'black-letter' law.[592]

Therefore, what is required is a complete reimagination of the theoretical underpinnings of our legal and sociologically understanding of our existence and sexual relationships to achieve widespread and systemic change. This, as will be argued in chapter 6 in detail, can be achieved through a theory of vulnerability. The following chapter will explore how vulnerability has been traditionally understood through the exploration of the treatment of complainants who were suffering from a 'mental disorder' at the time of the offence. It will further suggest how the conceptual underpinnings of autonomy have manifested themselves through the othering of those with a mental disability. Moreover, this chapter will strengthen the argument raised here, that different victims are protected in accordance with their apparent 'blameworthiness' because of the autonomy approach.

[592] Rumney (n 408) 890.

Chapter 4

LEARNING LESSONS FROM LAWS ON MENTALLY DISORDERED COMPLAINANTS

1. INTRODUCTION

The previous chapter analysed the law of intoxicated complainants through a vulnerability lens, arguing that intoxicated complainants are responsibilised. Through this vulnerability lens, we can continue the analysis of the legal response to mentally disordered rape complainants. Despite both mentally 'disordered'[593] individuals and intoxicated complainants suffering from an incapacity at the time of the offence, the current law affords different protections. Moreover, in comparison to the previous chapter, we see that the protections afforded are greater to those with a mental disorder, as they are perceived as the *most* vulnerable and *least* blameworthy for their incapacity. This distinctive line between those who are capable and incapable, blameworthy or blameless, clouds the realities of our ontological existence. It oversimplifies capacities and fails to take into consideration the fluid nature of our vulnerability and the realities in which we exercise choice. It will be argued that this grouping, known as *othering* through a vulnerability lens,[594] has resulted in differential treatment of people with mental disabilities because of the conceptual underpinnings of autonomy.

Therefore, the aim of this chapter is to contribute to the critical analysis in this thesis that argues that the autonomy approach is at the core of the problematic response to complainants of sexual assault. This chapter will determine whether any lessons can be learned to help inform legal reforms that are based on a theory of vulnerability. To achieve this, it will firstly critically analyse the historic treatment of mentally disordered

[593] This terminology is taken directly from the Sexual Offences Act 2003. The author does not agree that this is the most appropriate language to use in referring to those with a mental disability, but for the sake of consistency this term will be sued throughout.
[594] As discussed in chapter 2.

complainants in section 1.1. It will suggest that an autonomy approach has historically categorised those with a mental disability as *less than*. The treatment and isolation of those with a mental disorder will be detailed to reveal how an autonomy approach had previously justified the denial of rights through a guise of protection.

Section 2 will discuss the internal battle between the need to protect those who are deemed vulnerable whilst affording them sexual autonomy.[595] It will explore how the law must 'strike a delicate balance'[596] in attempting to afford protection whilst avoiding being overly paternalistic. The discussions prior to the 2003 Act were informed by the concept that capacity fluctuates. These discussions began to accept that those with a mental disorder may have the ability to exercise their autonomy at particular times. Therefore, these discussions are valuable as they represent genuine efforts to attempt to promote choice and control for individuals whilst recognising their vulnerability.

Section 3 critically evaluates the culmination of these discussions through an analysis of the s30 offence which aims to protect the 'mentally disordered' from sexual exploitation. It aims to recognise that, generally, those who suffer from a 'mental disorder' do and can engage in consensual sexual activity. However, it also identifies their distinct 'vulnerability' and times where their disorder may prevent them from 'refusing'[597] sexual relations. Arguably, this is the first provision that has tried to balance autonomy with protection. Therefore, it must be asked whether any lessons can be learned from this approach and indeed, whether the response in s30 could be applicable to other sexual assault complainants. The interpretation, application and use of section 30 will be critically analysed to determine its worth and to consider whether there can be any lessons learned that might inform our suggested legal response through a vulnerability lens. Section 4 will then briefly examine the civil law approach to mental capacity to inform and shape the legal response through a vulnerability lens.

Through this critical exploration of the treatment of mentally disordered complainants, it will be argued that all individuals, because of our universal and inherent vulnerabilities,

[595] As explored in depth in chapter 1.
[596] Jonathan Herring, 'R v C: Sex and Mental disorder Case comment' [2010] 126 *Law Quarterly Review* 36-39, 36
[597] Sexual Offences Act 2003 s30

should be treated alike. It will be argued that we need to move away from identifying vulnerabilities and distributing protections based on the existence of particular characteristics. Instead we must accept and address our universal and inherent vulnerability and pose difficult questions around the source of that vulnerability.

1.1 THE DENIAL OF AUTONOMY: THE OTHERING OF THOSE WITH A MENTAL DISABILITY PRIOR TO 2003

To understand the treatment of people with a mental disability, we must look to the historical response to such sexual offences. This section will provide an overview of the historical legislative approach to sex with a person with a mental disability. In doing so, key cases will be analysed to reveal how those with a mental disability were unjustly segregated from society and *othered* because of an autonomy approach. It will also argue that the language used can segregate individuals, and therefore we must carefully consider the wording of future legislative reforms.

As Herring has stated, individuals with a mental disorder have had an 'unhappy history.'[598] They have been depicted as either as adult children with no sexual feelings or as 'driven by animal instincts' resulting in 'curtailing sexual freedom' or left 'unprotected from sexual abuse.' [599] The law surrounding sexual relations of mentally disordered persons was limited in focus prior to the introduction of the Sexual Offences Act 2003. A series of case law in the 19th Century accepted that 'mentally disordered' persons could consent to sexual activity through 'animal instincts.'[600] It was the law that no 'man' could engage in sexual intercourse with a woman who had a disorder. As section 7 of the Sexual Offences Act 1956 stated:

> '7. It is an offence for a man to have unlawful sexual intercourse with a woman whom he knows to be an idiot or imbecile.'

The language of the legislation is clearly problematic. Moreover, it would appear that the law in 1956 did not recognise the sexual autonomy of those who suffered from a mental

[598] Jonathan Herring, 'Mental Disability and Capacity to consent to sex: A local authority v H [2012] EWHC 49 (COP)' [2012] 34(4) *Journal of Social Welfare and Family Law* 471-478, 471
[599] Ibid.
[600] Tracey Elliot, 'Capacity, sex and the mentally disordered' [2008] *Archbold News* 6-9, 6; for a full discussion of the development of the animal instincts historical legislative approach see Ralph Sandland, 'Sex and Capacity: The Management of Monsters' [2013] 76(6) *Modern Law Review* 981-1009.

disability. The law was overly restrictive as it made it essentially impossible for a woman within the meaning of section 7 to engage in sexual relations. As Kurtis and Kelson suggest '[a defective] person was automatically assumed to lack capacity to consent to sexual activity.'[601] Therefore, it could be said that this section was both overly restrictive and under inclusive, acting to segregate those with a mental disorder from *normal* individuals. It could be argued that this approach claimed to protect the 'severely' disabled through a denial of autonomous choice. This is the first example of where an autonomy approach designated those who did not fulfil the criteria of the autonomous individual, were unjustly denied rights.

The law appeared to offer protection to those who were suffering from the most serious of mental disorders. It could be said that this approach was very problematic, not least because the term defective is 'demeaning and derogatory.'[602] Moreover, those who fell outside the remit of 'severe subnormality' were treated as any other victim and deemed capable of consenting. The assumption of incapacity for those with a severe subnormality within the meaning of the MHA denied those of their sexual autonomy. The law made it illegal for men to have sex with such 'defectives' thereby making it essentially illegal for 'defectives' to consensually engage in sexual relations. Moreover, the law afforded a defence of ignorance to be relied upon which arguably weakened the protection due to the inherently subjective nature of the test. As argued by Sandland, in discourses around mental deficiency 'the vulnerability of mentally defective females was seen to imply dangerousness, at least when their actions were understood as being driven by instinct.'[603] Rather than protect those with a 'defect', the law was instead framed in a defensive way to protect men from *dangerous* defective women, othering them as incapable individuals and justifying such intrusion. Arguably, the language used was therefore twofold, to segregate individuals with a disorder and to justify the denial of rights.

The law still failed to recognise the sexual autonomy of 'defective' women. Instead it appeared to automatically presume that 'defective' women did not have the capacity to engage in sexual relations. The definition was also amended with the terms 'idiot and

[601] Martin Curtice & Emma Kelson, 'The Sexual Offences Act 2003 and people with mental disorders' [2011] 35 *The Psychiatrist* 261-265, 261
[602] Setting the Boundaries (n 132) 63.
[603] Ralph Sandland, 'Sex and Capacity: The Management of Monsters' [2013] 76(6) *Modern Law Review* 981-1009, 983

imbecile' removed and replaced by the term 'defective' and the term 'severe subnormality' was introduced. It could be argued that the term defective is just as offensive as its predecessors. The Oxford English dictionary defines 'defective' as 'imperfect… lacking...deficient… faulty.'[604] These are very offensive and insensitive terms, arguably they imply the incompleteness of persons with a mental disability.

The 'defective' definition was later replaced by the Mental Health Amendment Act 1983 which removed the term defective and replaced its definition as 'a person suffering from a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning'. It could be argued that replacing the term 'severe sub-normality' with 'severe impairment' does not make any significant impact on the interpretation for the law. Yet the introduction of the term defective is problematic. To be defective suggests that you are incomplete, inadequate or incapable. Its symbolism is powerful suggesting those categorised as such are somehow different or less worthy than others. Arguably, by categorising those with a mental disability as different, they have been *othered,* justifying differential treatment because they have been depicted as *most* vulnerable. A further problem that this paper noted was that the offence of sexual activity with a 'defective' only carried a maximum 2-year penalty.[605] This obviously downgraded the seriousness of the offence and offered little protection to those apparently most vulnerable. Moreover, the disparity between the punishment for rape and intercourse with a defective, perhaps symbolised the trivial treatment of such an offence. The sentencing options available for this defence may support Sandland's argument that the vulnerability of the mentally defective was in fact dangerous,[606] and the law instead protected men from allegations rather than women from exploitation.

The case of *R v Jenkins*[607] caused 'outrage'[608] by referring to 'animal instincts'[609] and prompted the reforms to the law. As Sandland claims 'the mentally defective were a social, political, moral and economic problem at least as much if not more than a psychiatric problem.'[610] In this case a care worker was charged with raping a mentally disordered

[604] http://www.oxforddictionaries.com/definition/english/defective
[605] Setting the Boundaries (n 132) 63.
[606] Sandland (n 603).
[607] R v Jenkins Central Criminal Court, 10–12 January 2000
[608] Cowling M., & Reynolds P., *Making Sense of Sexual Consent* (Ashgate: 2004)
[609] Elliot (n 600).
[610] Sandland (n 603).

patient who was deemed to have a mental age of about 2 or 3 years old.[611] The complainant fell pregnant and the defendant was charged with rape rather than 'sexual intercourse with a woman who is defective' under the 1956 Sexual Offences Act.[612] An expert gave evidence as to how her capacity should be determined in accordance with law society guidelines.[613] Moreover, several experts gave evidence that the woman 'had no understanding of pregnancy or contraception.'[614] The prosecution attempted to change the charge to intercourse with a defective but the judge refused on the basis the defence had prepared for a charge of rape.[615] Judge Colart ignored this guidance and relied on a historic case from the 1800's determining she had consented through her 'animal instincts.'[616] The trial judge found the defendant not guilty on this basis stating that '[i]f consent can be given through animal instinct then understanding becomes irrelevant.'[617] The decision in *Jenkins* highlighted the need for a clear definition of capacity to consent to sexual relations and the need for adequate protection of so called vulnerable persons. Moreover, the analysis of this case reveals how the interpretation and application of the legislation reinforced the othering of individuals with a mental disorder. Using terminology such as animals or instincts suggests that such individuals were incapable of giving genuine consent, were different to other people, and would therefore need protection. It prompted the reform to provide a higher threshold than merely understanding the sexual act or the abhorrent notion of 'submitting to their animal instincts.'[618]

The reforms also attempted to widen that definition to include other persons who suffered from a mental disorder and to afford proper protection to those who are vulnerable to exploitation whilst promoting autonomy. The discussions prior to the introduction of the reforms are important to understand how the legislation was drafted to accept the autonomy of individuals with a mental disorder.

[611] Law Reform Commission Sexual Offences and Capacity to Consent 2013
[612] Clare Dyer, 'Care worker's release on rape charge prompts CPS to seek review of law' 24 January 2000 *The Guardian* https://www.theguardian.com/uk/2000/jan/24/claredyer
[613] Ibid.
[614] MENCAP 'Behind Closed Doors: preventing sexual abuse against adults with a learning disability' [2001] 21 found at https://www.mencap.org.uk/sites/default/files/documents/2008-03/behind_closed_doors.pdf
[615] Law Reform Commission (n 611) [3.10]
[616] The Law Commission (n 410) 66.
[617] MENCAP (n 614).
[618] Law Reform Commission (n 611) [3.11].

2. THE STRIVE FOR BALANCE

As above mentioned, the aim of legal reforms was to attempt to strike a delicate balance between promoting choice and sexual freedom and protection. This of course was an underpinning aim for all legislative reforms including intoxicated complainants. In addressing this delicate balance, the Sexual Offences Act 2003 attempted to draw to afford more protection to the vulnerable from exploitation, whilst recognising their autonomy.[619] As the Home Secretary Jack Straw stated, the new Act was created '[t]o provide coherent and clear sexual offences which protect individuals, especially children and the more vulnerable from exploitation.'[620] This section will explore this balancing act. As this section will argue, the focus on protection appears to be more evident than the previous chapter analysis of intoxicated complainants. Although there is an underpinning theme of autonomy, the discussions surrounding the legislation appear to be more concerned with the particular vulnerabilities of those with a mental disorder. However, an analysis of the below information is useful to reveal how discussions were informed by a genuine attempt to balance protection and autonomy. Moreover, it will be analysed whether, through a vulnerability lens, these discussions could equally apply to other individuals who were 'incapacitated' at the time of the offence.

The Sexual Offences Act 2003 was informed by consultation papers. The Consultation paper *Setting the Boundaries* produced in 2000 contained many suggested reforms to inform the drafting of the 2003 Act.[621] The Government also undertook a 'Review of Sex Offenders Act' and published a 'public consultation by the Home Office in July 2001.'[622] These reviews then led to the White Paper *Protecting the public* which helped develop the Sexual Offences Bill.[623] Discussions in the House of Commons surrounding the Bill raised many concerns and doubts regarding the new offences created by the Act.

Chapter 1 of Setting the Boundaries outlines the purpose of the paper was contributing towards the Home Offices aim of creating a society that is 'safe, just and tolerant.'[624] It

[619] Gavin Berman & Grahame Danby, 'The Sexual Offences Bill [HL]: Policy Background' [2003] *Home Affairs 03/61 Research Paper* 1-68, 3.
[620] House of Commons Debate 25th January 1999 as cited Ibid.
[621] Setting the Boundaries (n 132).
[622] Berman & Danby (n 619).
[623] Protecting the Public (n 374).
[624] Setting the Boundaries (n 132) 1.

noted that although society had undergone significant changes the law had not reflected this.[625] In particular, it stated the law does not permit a 'defective' to have sex, and in order to protect a victim-survivor, they must be proved to be a 'defective' in court.[626] The entirety of Chapter 4 deals with 'vulnerable people.'[627] Describing the mentally impaired as 'vulnerable people' it notes that they are easily suggestible and may 'not be able to resist inappropriate behaviour.'[628] Arguably this too could be said of many individuals, those who are intoxicated, those who are suggestible, those who are in a weak position professionally or economically. The categorisation of vulnerable people here could arguably be extended to most individuals in particular situations.
Although *Setting the Boundaries* notes the particular vulnerabilities of the mentally impaired, it also recognised their right to a private life. Moreover it recognised their right to a sexual private life, as protected by the European Convention of Human Rights.[629] As articulated by Munro and Stychin, with 'liberal credentials' underpinning suggested reforms, the boundaries requiring that the law not to infringe into the private sphere,[630] whilst affording appropriate protection, was a difficult balancing act to achieve.

From public analysis there seemed to be general support for more protection of the vulnerable,[631] recognising that the mentally impaired are 'easily influenced and easily tricked.'[632] The report rightly states that the complexities of capacity and consent, coupled with the problematic vulnerabilities of the mentally impaired create undeniable complications. The 'real tension'[633] between private life and the right to sexual life caused sincere difficulties when considering reform. This report noted that 'there were other and more effective ways for the law to provide increased protection for less severely disabled people.'[634]

Notably, MENCAP, Respond and Voice UK wrote a joint response to Setting the Boundaries with a focus on the mentally disabled. They suggested that everyone should

[625] Ibid 2.
[626] Ibid.
[627] Ibid ch 4.
[628] Ibid 61.
[629] Setting the Boundaries (n 132) 61.
[630] Munro, V., & Stychin C., *Sexuality and the law: Feminist engagements* (Routledge London: 2007) 3
[631] Setting the Boundaries (n 132) 64.
[632] Ibid.
[633] Ibid 70.
[634] Ibid 74.

have equal protection under the law and fair treatment in the criminal justice system.[635] Moreover, they mentioned the narrow definition of the law that only protected those with a 'severe mental impairment'[636] and did not extend to those with other more minor learning difficulties. They also suggested that capacity to consent should be defined in clear terms. They rightly argued that it can be even more difficult to establish a lack of consent when the complainant suffers from a mental impairment. They suggested a functional test [637] for capacity that would focus on 'whether an individual has the capacity to consent to a specific decision, in specific circumstances.'[638] This test requires an understanding of the nature or reasonably foreseeable consequences of the activity.[639] As Series explains, 'this 'functional' approach to mental capacity purports to focus on the *process* by which a person made a decision, not the outcome of that decision.'[640] Such a test would highlight the abovementioned transient nature of a person's capacity which arguably could apply to all individuals, not just those with a mental disorder. It was submitted that a definition of capacity should question the person's knowledge of sexual activity, the basic elements of sex and the reasonably foreseeable consequences of engaging in sexual activity. Although such suggestions may be beneficial for a test of capacity, it is submitted that such a test may set the standard too low. It could be argued if these were the three core elements of a capacity definition, protection would only be afforded to those with severe mental disabilities; despite that many individuals who may not have the capacity to consent at the particular time concerned. Moreover, although the paper recognised the transient state of capacity, it could be said that these suggestions do not recognise the complex nature of refusing intercourse. Instead it appears that the motives appeared to be to protect those who were categorised as *most* vulnerable rather than recognising universal vulnerability. This is unfortunate, as the government had the opportunity to widen the scope and applicability of these tests to protect all individuals equally.

[635] As a defendant wold be reasonably expected to know the victim had a mental disorder see MENCAP (n 614).
[636] Ibid.
[637] Approach to decision making discussed more below in civil law section.
[638] MENCAP (n 614).
[639] Anna Arstein-Kerslake,'Understanding sex: the right to legal capacity to consent to sex' [2015] 30(10) *Disability and Society* 1459-1473, 1466
[640] Lucy Series, 'The Use of Legal Capacity Legislation to Control the Sexuality of People with Intellectual Disabilities', in *Disability Research Today: International Perspectives*, Shakespeare T., (Ed) (Routledge 2015) 150.

The White Paper 'Protecting the Public'[641] was the culmination of Setting the Boundaries and its responses. It too recognised that those with a mental impairment or learning difficulty are particularly vulnerable to exploitation.[642] This 'presaged'[643] the Sexual Offences Bill 2003 which was introduced in the House of Lords in January 2003. The Governmental review provided a background and outlined the old legislation and areas where there was a need for reform.[644] Chapter 1(b) referred to the protection of vulnerable people. It raised major concerns with the legal response. It similarly highlighted the derogatory nature of the law and the interference with the right to a private life of such persons.[645] The underpinning aim of the bill was 'to protect the most vulnerable, can be lost in consideration of whether or not actively expressing sexuality was actually consent.'[646]

On the 18 June 2003, the Bill was introduced in the House of Commons. The report covered several issues including the protection of the vulnerable.[647] The design of offences relating to the mentally disordered was 'intentional' as it was worded to 'capture exploitative behaviour... by people who take advantage of an individual's incapacity to refuse or vulnerability.'[648] The paper clarified the government's position on use of the term refuse rather than unable to consent. It noted the Government's response to appeals to amend the term refuse by stating the definition of consent (which entails capacity) would make the definition circular.[649] Moreover, the Government recognised the concern that 'the test of capacity is set at such a level that those with a learning difficulty may be required to be more aware of the implication of sexual activity than others.'[650] The aim here is to capture exploitative behaviour, but there is a failure to recognise that in most sexual offences defendants exploit individual's vulnerability regardless of the existence of any disorder. Arguably, because of the autonomy approach, individuals who do not fall into a category of traditionally vulnerable, they are presumed capable and therefore capable of

[641] Protecting the Public (n 374) [506].
[642] Ibid.
[643] Berman & Danby (n 619).
[644] The Sexual Offences Bill [HL]: Policy Background' [2003] *Home Affairs 03/61 Research Paper at* 11
[645] The Sexual Offences Bill [HL]: Policy Background' [2003] *Home Affairs 03/61 Research Paper at* 11
[646] Ibid 12.
[647] House of Commons, *Sexual Offences Bill* Home Affairs Committee Fifth Report of Session 2002-2003
[648] Ibid 11.
[649] Ibid 38.
[650] HL Deb 9 June 2003 c51 quoted in House of Commons, *Sexual Offences Bill* Home Affairs Committee Fifth Report of Session 2002-2003

resisting exploitation. Yet this fails to recognise the realities of sexual relationships and our universal and particular vulnerability.

On the 10th April 2003, the House of Commons met and discussed the Sexual Offences Bill.[651] There was extensive commentary surrounding the working of section 30. The debate mainly concerned the use of the phrase 'unable to refuse' rather than 'unable to consent'. The Bill used the terms 'unable to refuse' and some Lords proposed amendments to replace this term with 'unable to consent.'[652] Lord Campbell could not see the distinction between the terms. Lord Falconer rightly recognises, the wording 'unable to refuse' highlights the vulnerability of the victim and highlights the exploitative nature of the defendant's actions. By removing the need to disprove consent, the focus is shifted from the complainant onto the defendant; arguably this may have a positive impact by refocussing jurors' minds on the exploitative actions of the defendant rather than attempting to attribute blame to the complainant. Moreover, the wording suggests that those with a 'disorder' may, in general, be capable of giving valid consent to sexual relations. This is a positive step towards recognising the autonomous decision-making powers of people with mental disabilities. It recognises that there may be times when a person would be unable to refuse because of their condition, but generally those with a mental disorder are in fact recognised as being able to consent despite having a mental disability. It identifies that disorders are often not permanent, and their effects may fluctuate. It is at that time when an individual's disorder impinges on them so much so that they are unable to resist unwanted advances that protection is required. However, as Keywood argued 'the proposals make no mention of the fact that capacity is not an immutable state of being for most people, dissociated from social relationships and environments.'[653]

The term 'mental disorder' was also extensively discussed at the debate. Lord Rix, amongst others, suggested that 'learning disability' be included alongside mental disorder.[654] It was later agreed that learning difficulties comes within the definition of

[651] House of Lords Debate, Sexual Offences Bill April 2003 Found at http://www.theyworkforyou.com/lords/?id=2003-04-10a.385.4#g396.1
[652] Ibid.
[653] Kirsty Keywood, 'Supported to be sexual? Developing Sexual Rights for People with Learning Disabilities' [2003] 8(3) *Learning Disability Review* 30-36, 33
[654] House of Lords Debate, Sexual Offences Bill April 2003 Found at http://www.theyworkforyou.com/lords/?id=2003-04-10a.385.4#g396.1

mental disorder and therefore 'does not need to be dealt with separately.'[655] Arguably this terminology in itself is quite derogatory.[656] The word 'disorder' connotes something quite severe and permanent. This is not the aim of the act as the definition was drawn to include those who suffer from permanent or transient defects that range from mild to severe. Despite the problematic terminology, the interpretation and the application of section 30 must be considered to determine its success and future potential.

3. SECTION 30- SEXUAL OFFENCES ACT 2003: ANY LESSONS TO BE LEARNED?

In light of the aforementioned debates that informed the drafting of the sexual offences act it must now be determined whether the legalisation has achieved its proposed aims. This section will set out the particulars of section 30, following this, the interpretation of the legislation in case law will be explored. It will be argued that this continued segregation of individuals deemed different does not serve to protect individuals, rather it instead acts to justify intrusive treatment. As Peter Barlett has argued the legal response is to attempt to 'maximise the amount of people who can consent to sex.'[657] However, there are some potential benefits to the section 30 approach that must be examined and may be useful to contribute to the suggested legal reforms in later chapters.

Section 30 has been introduced as a 'fail safe.'[658] There are a range of offences available to the CPS in determining the most appropriate charge. It is open to the prosecution to pursue an offence of rape contrary to section 1 of the Sexual Offences Act and argue that the sexual activity was non-consensual. Equally, it is possible to pursue s1 rape and argue that the complainant did not have the capacity to consent at the time of the offence and therefore did not consent. Alternatively, section 30 provides a distinct separate offence of 'engaging in sexual activity S with a person with a mental disorder impeding choice' which states:

> '(1)A person (A) commits an offence if—

[655] Ibid Lord Falconer of Thoroton.
[656] Ibid. In the debate Lord Falconer of Thoroton mentioned the problematic use of the term mental disorder. Although the Law Commission had suggested mental disability would be more appropriate, Lord Falconer suggested that the definition of mental disability had not been finalised for the Mental Health Bill and therefore suggested it would be unwise to adopt it.
[657] Peter Barlett, 'Sex, Dementia, Capacity and Care Homes' [2010] 31 *Liverpool Law Review* 137-154, 144
[658] Setting the Boundaries (n 132) 74.

(a)he intentionally touches another person (B),
(b)the touching is sexual,
(c)B is unable to refuse because of or for a reason related to a mental disorder, and
(d)A knows or could reasonably be expected to know that B has a mental disorder and that because of it or for a reason related to it B is likely to be unable to refuse.
(2)B is unable to refuse if—
(a)he lacks the capacity to choose whether to agree to the touching (whether because he lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason), or
(b)he is unable to communicate such a choice to A.'[659]

Section 30 therefore makes it an offence to engage in sexual activity with a person who, by reason of their disorder, is incapable of refusing sexual advances. As explained by Saunders, to fulfil this offence, the prosecution must prove in the first instance that sexual activity took place.[660] Therefore, if a defendant contends that sexual activity occurred, it might be difficult to rely on section 30 for evidential reasons.[661] Next it is for the prosecution to show that the complainant was 'unable to refuse because of or for a reason related to a mental disorder'. Following this, the prosecution must show that the defendant was aware or could reasonably be expected to be aware that the complainant was likely unable to refuse as a result.[662] With regard to the inability to refuse, this centres on the lack of capacity to choose, or being unable to communicate such a choice.[663] What is most noteworthy, as identified by Saunders is that 'it is not necessary for the prosecution to establish non-consent.[664] Instead the articulation focuses on the ability to refuse. As earlier mentioned, the aim of this section was to provide protection to the vulnerable and protect sexual autonomy.[665] The section reflects the suggestions of the Law Commission. In particular, the specific wording 'lacks sufficient understanding of the reasonably foreseeable consequences' was taken from the suggestions of the Law Commission and was placed directly into the legislation.[666] They may lack understanding 'for any other reason' which as Curtice and Mayo note, encompasses a 'wide range of circumstances in which a person's mental disorder may rob them of the ability to make an autonomous choice when they have sufficient understanding of the information

[659] Sexual Offences Act s30
[660] Candida Saunders, 'Making It Count: Sexual Offences, Evidential Sufficiency, and the Mentally Disordered Complainant' [2010] 31 *Liverpool Law Review* 177-206. 186
[661] Ibid.
[662] Ibid.
[663] S30(2) (a)
[664] Saunders (n 682).
[665] *Cooper* (n 682).
[666] Lord Falconor House of Lords Debate (n 651).

relevant to making it.'[667] This is a positive step towards recognising that people with a mental disorder do have the capacity to consent to sex. It is moving away from the historical approach of deeming those with a mental disorder as permanently incapable to consenting. Therefore, the law has attempted, as Maher suggests, to respect the autonomy of those with a mental disorder to engage in sexual activity.[668] The danger of course is restricting choice where decisions are free but seem unwise and the courts determine they lack capacity.

Moreover, there is a danger that the wording used may instead suggest a presumption of consent unless their mental disability affected their ability to refuse. Furthermore, it could be argued that the notion of refusal also carries responsibilisation. Therefore although this appears to be a positive step towards recognising the autonomy of those with a mental disorder, in fact through its wording there is arguably a responsibility placed on such individuals to demonstrate their refusal of sexual advances where their disorder is not impacting them at that moment in time. To examine the true effectiveness of section 30, its practical application and interpretation must now be assessed.

3.1 THE APPLICATION OF S30

The first case to deal with this new legislation was in 2006.[669] *Hulme v DPP* [670] explored the use of section 30. The focus appeared to be on the inability to refuse and the expectation placed on the requirement to say no. The absence of 'no' in this instance appeared to be interpreted as an inability to refuse because of her mental disorder. In this case, the complainant had cerebral palsy.[671] The defendant denied the accusation that he placed her hand on his soft penis.[672] In the complainant's evidence, she explained that she did not want him to touch her and she pulled her hand away; she said it made her feel 'sad, hurt and upset.'[673] It was found on the facts that the defendant did touch her and the complainant wanted to stop him but did not know what to do.[674] Initially, the magistrates

[667] Martin Curtice and Jonathon Mayo, 'Consent and sex invulnerable adults: a review of the case law' [2012] 41 *British Journal of Learning Disabilities* 280-287. 283
[668] Gerry Maher, Rape and other things: Sexual Offences and People with a Mental Disorder' [2010] *Edinburgh Law Review* 129-133, 131
[669] *Hulme v DPP* [2006] EWHC 1347 (Queens Bench Division)
[670] Ibid.
[671] Ibid.
[672] Ibid.
[673] Ibid.
[674] Ibid.

held that due to her disability she was incapable of stopping him. As rightly argued by Saunders, however, often it is someone 'bigger and stronger engaging in sexual activity which may make anyone physically incapable of stopping the activity—regardless of their desire (or otherwise) to do so.'[675] Why then it is asked, was it not argued that she merely did not consent? Arguably, her mental disability was not relevant at the time and therefore logically the judgment should have been the same regardless. As Saunders suggests s30 may have been misused here as this was not necessarily a case of incapacity to refuse, rather an absence of consent. [676] As noted by Curtice and Kelson, the importance was placed on her ability to say 'no.'[677] It was held that although she understood the nature of the acts, she did not have the capacity to understand she could refuse to be touched sexually.[678] The Justices had determined that the complainant had not been able to communicate her lack of consent.[679] Despite the complainant in this case not consenting, the focus appeared to be on her mental disorder. Perhaps the reliance on the existence of her mental disorder was used to justify the conviction and protection.

The Court of Appeal in this case accepted the magistrates' decision despite the fact they had not delved deep into the reasons for lack of communication. The exploitative nature of the defendant's actions was also referred to which reflects a positive refocus from the acts of the complainant. The Magistrates referred to the defendant's obvious awareness of her condition. This suggests that the new approach is less restrictive than the 1956 Act. Previously, the law was concerned with the disorder the complainant was suffering from. They tested the severity of that disorder and the awareness of the defendant. His ignorance to the fact may have given him a full defence to the act in question. However, the reformed law removes the need to prove a 'severe disability' and lack of consent which shifts the focus rightly to the defendant's intentions and exploitative actions. This is therefore a progressive and welcomed interpretation and application of section 30 that would be beneficial to all complainants.

[675] Candida Saunders, 'Making It Count: Sexual Offences, Evidential Sufficiency, and the Mentally Disordered Complainant' [2010] 31 *Liverpool Law Review* 177-206. 188
[676] Ibid.
[677] Curtice & Kelson (n 601) 262.
[678] Butterworths New Law Guide, Mental Capacity Act 2005 specific offences under Sexual Offences Act 2003, 1.
[679] *Hulme* (n 669)

The judgment was appealed on the grounds that the Court failed to address the second limb of s30(2) in that she was unable to communicate choice to the defendant. However the Court of Appeal determined that this was not a sound ground for appeal as it could only sensibly follow that by reason of her disorder she could not communicate choice and therefore there was no need to explore this part in detail.[680] The High Court was unduly restrictive in interpreting section 30(2)(b) inability to communicate. As the complainant had stated she did not know what to do, the 'sensible conclusion'[681] of the High Court was that she could not refuse by reason of her mental disorder. Arguably many complainants without a mental disability would not know what to do in the circumstances, especially where someone is intoxicated or otherwise incapacitated. It seems unclear why the judgment suggested her inability to refuse was a result of her condition.

The Court of Appeal ruling suggests that the ambit of 'inability to communicate by reason of a mental disorder or for any other reason' should be given a wide scope and appears to cover extensive circumstances. It could be argued that if this defendant had been charged with sexual touching within Sexual Offences Act 2003, the prosecution may have faced a more difficult challenge in proving lack of consent rather than inability to refuse. The interpretation of the wording in section 30 was later clarified in the case of *R v Cooper*.

The House of Lords decision of *R v Cooper*[682] is the primary authority for section 30.[683] In this particular case, the complainant had a long history of mental disability.[684] She had a schizo-affective disorder and an emotionally unstable personality.[685] On the day of the assault, the complainant visited a community health centre where the defendant later met her outside. The defendant offered to help her and invited her back to his house.[686] There he gave her crack cocaine and asked her to engage in sexual activity with him and she did so.[687] The complainant's evidence was that she 'felt unable to escape'[688] and said to herself

[680] Tracey Elliot, 'Cases in detail: R v C case comment' [2008] *Arcbold News* 5
[681] *Hulme* (n 669)
[682] *R v Cooper* [2009] UKHL 42 1033
[683] Blackstone's Criminal Practice, 'Sexual Offences against Persons with a Mental Disorder Impeding Choice' [2015] B3.167
[684] *Cooper* (n 682).
[685] Ibid.
[686] Ibid.
[687] *Cooper* (n 682)
[688] Dave Powell, 'Sexual Offences and Mental Capacity: case comment' [2010] 74(2) *Journal of Criminal Law* 104-108, 104.

'these crack heads can do worse to you' so she participated as she did not want to die.[689] At first instance, the defendant was convicted where the jury were directed that the words 'for any other reason' could encompass 'an irrational fear arising from her mental disorder.'[690] The defendant's appeal was allowed on the basis that the judge had incorrectly concluded that an irrational fear was capable of amounting to the inability to communicate her choice.[691] The Court of Appeal followed the civil law approach in delivering their judgment[692] that 'irrational fear that prevents the exercise of choice cannot be equated with lack of capacity to choose.'[693] The Court of Appeal also concluded that capacity to consent to sexual relations was neither person nor situation specific.[694] It was stated that a jury should consider whether a complainant had the capacity to consent to sex, referring to the civil law issue specific test.[695]

The Crown successfully appealed to the House of Lords where it was determined that the Court of Appeal was wrong to limit the scope of s30(2)(b) to a physical inability to communicate their choice.[696] In Baroness Hale's leading judgment, she set out 'the revolution in the attitude of the law'[697] by explaining the correct approach under section 30. She stated that the words 'for any other reason' were 'capable of encompassing a wide range of circumstances in which a persons' mental disorder might rob him of the ability to make an autonomous choice, even though he might have sufficient understanding of the information relevant to making it.'[698] This rightly recognises that there may be situations where someone with a disorder may not be able to recognise their inability to refuse and or understand their option to refuse. Baroness Hale accurately noted that so long as the other ingredients of the offence were met, and the reason stemmed from the mental disorder, the perpetrator would be guilty of section 30.[699] As she stated 'clearly the 'irrational' fear prevented [her] from being able to weigh the information… as she believed she had no choice.'[700]

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[689] *Cooper* (n 682).
[690] Ibid.
[691] Elliot (n 680).
[692] Ibid.
[693] *Cooper* (n 682).
[694] Ibid.
[695] Herring (n 598) 36.
[696] Powell (n 688) 105.
[697] Ibid.
[698] *Cooper* (n 682) 1041.
[699] Ibid.
[700] Powell (n 688) 107.

This interpretation appears to be in line with the intentions of the legislator by encompassing a wide range of scenarios. On the contrary, the Court of Appeal wrongly focused on the fact that she understood the mechanics of the act in question. As Powell argues, the Court of Appeal failed to acknowledge that her irrational fear prevented her from weighing and using that information,[701] which therefore equated with an inability to communicate her decision. It would appear to follow that an irrational fear alone could not equate with the inability to refuse. However, if that irrationality stems from a mental disorder and prevents the free exercise of choice, it must follow that that person was unable to refuse within the meaning of section 30. The terminology 'for any other reason' allows for a wide scope of circumstances that could fall within the definition.

The unanimous decision ruled the Court of Appeal was incorrect in limiting the inability to communicate to a physical inability.[702] The Court of Appeal had interpreted s30(1)(c) to mean incapable of communicating their refusal because of a physical inability to do so. Lord Rodger also referred to this incorrect interpretation of s30(1)(c) in his brief concurring judgment.[703] Inability to communicate could be for physical, emotional or psychological reasons.[704] Similarly, Lord Roger of Earlsferry agreed with this reasoning. He rightly stated that limiting s 30 to a physically inability to communicate would be an 'unsound'[705] interpretation. Moreover, section 75 of the Sexual Offences Act contains evidential presumption concerning consent. In particular section 75(2)(e) lists 'physical disability' as a reason why the complainant would not have been able to communicate her consent to the defendant. Therefore, it would seem pointless if s30 excluded reasons other than an inability to refuse because of physical disability. Hence it could be argued section 30 has met one of its primary aims by extending its definition to encompass circumstances other than a physical disability and others that may not be diagnosed as 'severe'. The definition now has a far wider ambit in that it extends to those with mild learning difficulties, and those whose disabilities may not permanently affect their decision making but may be transient and ever fluctuating.

[701] Ibid.
[702] *Cooper* (n 682).
[703] David Ormerod, 'R v C: sexual offences: Sexual Offences Act 2003 s30(2)- sexual touching- complainant suffering from mental disorder' [2010] *Criminal Law Review* 75-79, 78
[704] *Cooper* (n 682).
[705] Ibid.

The interpretation of s30 in the Supreme Court decision of *R v C* is a welcomed clarification of the legal position. As Clough suggests, 'this is a significant step away from viewing the question of capacity as a matter of setting the level of information required, in a resounding dismissal of a narrow, act-specific approach.'[706] As Rook and Ward rightly contend, the decision in *R v C* is welcome as 'it recognises the complexity of mental disorder, which is not always static.'[707] Considering these apparent progressive steps, it must now be considered whether in totality, section 30 has been a success.

3.2 SECTION 30- A SUCCESS?

On examining the facts of *R v C*, it could be argued that the complainant would not have fallen within the definition of 'defective' within the 1959 Act. She had suffered from an 'emotionally unstable personality' which would unlikely fall within the definition of severe in the 1959 Act. As in the earlier mentioned *R v Kimber*,[708] the complainant had a serious mental disorder and did not benefit from any extra protection from the law as she did not meet the threshold of the definition. Baroness Hale observed that s 30 of the Sexual Offences Act 2003 would be an easier alternative to a rape charge under section 1 of that Act.[709]

The first advantage of a s30 charge rather than s1 would be the difference in defendant's required mens rea.[710] Section 1 states that the defendant must reasonably believe that the complainant is consenting; all reasonable steps taken by the defendant to ascertain that belief are considered to determine the reasonableness of that belief.[711] The test is both objective and subjective. The test in section 30 is if the defendant could reasonably be expected to know of the complainant's mental disorder and that she would be likely to be unable to refuse.

[706] Clough (n 174) 379
[707] Rook and Ward on Sexual Offences: Chapter 7 - Sexual Offences against Those with a Mental Disorder, Overview of the Mental Disorder Offences 'Unable to Refuse' 7.22 (5th edition)
[708] R v Kimber [1983] 1 WLR 1118 (Court of Appeal)
[709] *Cooper* (n 682).
[710] Ormerod (n 703).
[711] Sexual Offences Act 2003 s 1

Although it is submitted that the test is not wholly objective,[712] it would arguably be easier to prove the defendant's knowledge where a complainant was obviously disordered. As Baroness Hale noted, the mens rea of s.30 puts a greater burden upon the defendant who ought to have known that the complainant was suffering from a mental disorder thereby making it easier to prove than s1. As Scott argues the subjective element of the defendant's awareness as to a complainant's condition offers a high level of protection, and in comparison to reasonable belief, is less stringent.'[713] This approach could therefore be similarly adopted for all individuals. The shifting of our perspective away from the complainant provides an opportunity to scrutinize the actions of the defendant. This in turn, may sway juror's minds away from stereotypical attitudes and myths regarding complainant's behaviour and instead demand that a defendant be aware of other's vulnerability. Arguably, this is the most progressive aspect of the s30 offence which could possibly be extracted and moulded to fit within a new offence through a vulnerability lens.

Despite the apparent appeal of using s30, as Saunders notes there are many downfalls too. She stated that initially 'the criminal justice professionals need to be aware of these offences. Secondly, those same professionals need to know that a complainant has a mental disorder and, for the purposes of sections 30–33, one which impedes choice. The third pre-requisite is that it is considered appropriate to so charge the offence in the instant case.'[714] Equally as Curtice and Kelson argue 'it may be difficult to establish that the defendant could reasonably be expected to have relevant knowledge, especially in cases where there are no external distinguishing features that might indicate mental disorder and the defendant had no pre-existing knowledge of the alleged victim.'[715] Therefore s30 may not always be the most appropriate route.

As noted, the focus for an ordinary rape charge is consent whereas s30 looks at the inability to consent. It could be argued that an inability to consent would be 'more readily established'[716] by reference to her disorder and furthermore testimony from the complainant is less likely to be needed.[717] It is worth noting that in *R v C* the defendants

[712] Ormerod (n 703).
[713] Scott (n 379) 35.
[714] Saunders (n 660) 195.
[715] Curtice & Kelson (n 601) 264.
[716] Ormerod (n 703) 79.
[717] Ibid.

were originally charged with rape but the charges were later substituted. Baroness Hale suggested that s30 is somewhat 'easier to prove.'[718] Arguably though, there is a noteworthy evidential limitation to the actus reus of section 30. As Saunders suggests, the prosecution must show that sexual activity took place. Whilst possible in cases concerning other sexual assaults, if a complainant cannot testify that sexual activity took place and the defendant denies the event, without further evidence, it is likely that there would be evidential difficulties for a prosecution under either section 1 or section 30. As suggested by Saunders, the relevant provisions of the SOA 2003 have done little to increase the protection afforded to mentally disordered complainants in sex cases.[719] Equally though, it could be argued that a jury may feel more comfortable making a finding of guilt under s30 rather than section 1 because of the stigma connected with the term 'rape'. It could be suggested that jurors are less likely to find a defendant guilty of rape because of the myths and stereotypes that surround this offence.[720] Arguably though, these myths and expectations may similarly affect s30 prosecutions.

The question must therefore be asked, why do we have a separate section? Is there a purpose to section 30? Moreover, section 30 has not enjoyed much usage. In 2018 on indictment only, sexual activity with a person with a mental disorder was proceeded against on 15 times in 2018, resulting in just 10 convictions.[721] Over the past 10 years, on average 23 cases were brought every year resulting in on average 12 convictions.[722] Including those cases that are triable either way the figures slightly increases to on average 43 cases a year with on average 26 convictions.[723]

This represents a welcomed increase in convictions yet a very low number of prosecutions. As Saunders articulates those who cannot consent for the purposes of section 30, presumably, cannot consent for the purposes of sections 1 through 4 either.[724] Arguably, in all of the aforementioned cases, convictions could have been secured under s1 rape charge through arguing the complainant merely did not have the capacity to consent. As Saunders argues, 'the conduct elements of the section 30 and the corresponding non-consensual

[718] *Hulme* (n 669)
[719] Saunders (n 660) 201.
[720] As explored in chapter 2
[721] Criminal Justice System statistics quarterly: December 2018: Outcomes of offence by data tool
[722] Ibid.
[723] Ibid.
[724] Saunders (n 660) 198.

offence are also indistinguishable.'[725] However, there is merit to s30 that should be acknowledged. The wording, including inability to refuse and awareness of the defendant as to the complainant's disorder, allows us to refocus on the defendant's actions. This is a positive step away from scrutinizing the behaviour of the complainant and might be a contributory reason as to why the percentage rate of convictions appears so high. However, as aforementioned, the symbolic nature of the wording of the legislation is quite problematic. Equally, perhaps, the rate of convictions merely reflects the stereotypical attitude that this with a mental disorder are 'childlike' and need protection. It is therefore not overly convincing that such an approach in isolation would adequately address the problematic issues of securing convictions for rape.

Moreover, as Clough suggests 'it is still problematic in that section 30 relies on proving the mental disorder, rather than external factors';[726] instead we should be looking to the exploitation of that vulnerability and indeed asking questions concerning the source of that vulnerability. Perhaps there is more harm done through the symbolic segregation of those with a mental disorder. This reinforces the idea that those with some form of a mental disability are different- they are othered. Through this othering, they do not receive equal treatment and instead are perceived as less than merely because of the existence of an underlying condition. This is something that the vulnerability theory seeks to challenge. As stated in *R v C* 'people with mental disorders and disabilities should be integrated into society, treated as much like anyone else as it was possible to do and enjoying the same rights.'[727] To achieve this perhaps we need to break down the boundaries that segregate those with a disability and remove our focus from the autonomy/protection binary. As Arstein-Kerslake has argued, although this section criminalises abuse of individuals with intellectual disabilities, 'the approach also forces the courts to treat that individual differently than it would treat an individual who does not have the label of disability.'[728] Moreover, she argues that it places such individuals in a separate category of 'person' where the law does not apply to her in the same way as it does to others.[729] This acts to justify legal intrusion into the lives of those with a mental disability, by categorising them as incapable or in *need* of protection. Moreover, it acts to support the notion that there is

[725] Ibid.
[726] Clough (n 174) 380.
[727] *Cooper* (n 682) 8.
[728] Arstein-Kerslake (n 639) 1467.
[729] Ibid.

some form of *ideal* person who can make autonomous independent choices. Thereby either placing responsibility on those who fail to conform to such *norms,*[730] or denying legal capacity when the Court deem fit. As Saunders rightly suggests the interpretation of s30 has been generous and has arguably secured convictions of defendants who might otherwise have escaped conviction. In her study she analysed cases analysed which relied on section 30 and noted it may be used by the prosecution as 'a device for manipulating and effectively bolstering the evidential strength of a case.'[731] Arguably, considering the difficulties in prosecuting rape contrary to section 1, it is understandable and perhaps even justified that section 30 is used to secure conviction.

Saunders further notes however that this 'expansive and inclusive approach' is objectionable as 'the threshold for the applicability of section 30 is virtually non-existent: a complainant's mental disorder impedes choice when factfinders say it does.'[732] Therefore, section 30 arguably treads a dangerous path. Although the rise in convictions is welcomed and the recognition of autonomy of individuals with a mental disorder is commendable, the reality is that the scope for determining capacity is open to interpretation. The approach still reinstates that those with a mental disorder are somehow different and in need of protection by segregating them in a separate section of the legislation. Instead we require a far more holistic approach which recognises the universal and fluctuating vulnerabilities of individuals, whilst acknowledging the source of vulnerability and exploitation and demanding State intervention.

As above, arguably the legal response to sexual offences concerning those with a mental disorder, has faced a difficult balancing act. The legal response has been torn between upholding the sexual rights of such *particularly vulnerable* individuals and denying their sexual freedom to prevent harm and exploitation. As outlined above, we have seen a move towards an acceptance of the sexual autonomy of those with a mental disorder. Yet the legal response still battles to acknowledge and support freedom whilst attempting to retain some form of protection. It would appear that in an effort to achieve this, the legislators have continued to afford those with a mental disorder as a special category of person. This placing of such individuals into a different group or category is apparently a means

[730] As we have seen in the previous chapter.
[731] Saunders (n 660) 199.
[732] Saunders (n 660) 189.

achieving this balancing act. However, as outlined above the affording of rights or categories to certain individuals does little if anything to ensure protection, and may in fact lead to myths, responsibilisation and a hierarchy of protections. We must therefore look to the Civil law, which has also faced this integral battle of balancing the autonomy and protection of those with a mental disorder. Although the test for capacity in civil law is not directly applicable to criminal law cases as seen in *R v A*,[733] we must look to the interpretation of capacity to determine whether any lessons can be learned moving forward. In particular, we can determine whether an approach with the underpinnings of the autonomy/protection binary can be effective.

4. THE CIVIL LAW APPROACH- LESSONS TO LEARN?

There is an abundance of literature of the rights to consent to sex at civil law.[734] However, the determination of capacity to consent is fraught with difficulties. As Series has rightly argued, the concept of 'mental incapacity' 'plays a twofold gatekeeping role in relation to sex.'[735] She continues 'it invalidates a person's consent, rendering sexual activity with them a criminal act, and it *also* renders lawful restrictions on their liberty and invasions of their privacy to prevent them from engaging in sexual activity.'[736] Likewise, Craig argues 'in delineating the legal boundaries of capacity to consent to sexual touching, law makers and jurists in every jurisdiction grapple with the tensions between sexual liberty, morality, sexual minority equality interests, and public safety.'[737] The question is whether the civil law has addressed this and found a balance between competing aims. This section seeks to briefly outline the introduction of the Mental Capacity Act 2005 to determine whether the tests formulated have indeed protected those with a disorder whilst promoting autonomy. Through this analysis it will be determined whether this thesis can adopt any measures that mirror that of the civil law approach when suggesting legal reforms through a vulnerability theory.

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[733] [2014] EWCA Crim 299; where the trial judge directed the jury as to the civil law standard for capacity which was overturned on appeal and held the adjudication of the Court of Protection would generally look to the future; the criminal law looked retrospectively to specific acts of the past.

[734] Some of the main academic commentators include Beverley Clough, Jonathan Herring, Jesse Wall, Lucy Series, Kirsty Keywood, Martin Lyden; see for eg. Clough (n 174); Jonathan Herring & Jesse Wall, 'Autonomy, Capacity and Vulnerable Adults: Filling in the gaps in the Mental Capacity Act' [2015] 35(4)*Legal Studies* 698-719; Series (n 640); Arstein-Kerslake (n 639); Hall (n 172) 61-94; Jonathan Herring & Jesse Wall, 'Capacity to consent to Sex' [2014] 22(4) *Medical Law Review* 620-630; Martin Lyden, 'Assessment of Sexual Consent Capacity' [2007]25(1) *Sexuality and Disability* 3-20.

[735] Series (n 640).

[736] Ibid.

[737] Elaine Craig, 'Capacity to consent to Sexual Risk' [2014] 17(1) *New Criminal Law Review* 103-134, 105

The Mental Capacity Act 2005 was introduced at civil law to provide a universal understanding as to how to determine 'capacity'. Section 2 refers to those who fall within the remit of the Act. It explicitly states that 'lack of capacity cannot be established merely by [his] age or appearance… or a condition of his... or an aspect of his behaviour 'which may lead to assumptions as to his capacity.'[738] This test has been praised 'for moving away from a generalized assessment of a person generally having or not having capacity towards an approach where a person has capacity to consider the particular issue at hand.'[739] Although the Act has been interpreted as a 'codification of the common law',[740] the reforms show a significant step away from the 'status' based approach of the previous law; it now appears that incapacity will no longer be assumed because of a disorder. The Act also recognises the fluctuating effects of disorders and includes those who suffer both 'permanent' and 'temporary' defects. This subsection extends the remit of the previous law that only covered 'severe' disorders. Arguably this is a positive step towards recognition that people other than those who have a permeant *defect* are *vulnerable* to exploitation. Yet its limitation still lies in the failure to acknowledge the universality of vulnerability, rather it's aims still focus on an autonomy-based approach.

As Herring and Wall have noted the courts have acknowledged the importance of the role of the MCA in protecting and promoting the autonomy[741] of individuals with a mental disability.[742] Yet as Series notes the MCA merely 'sets out the circumstances where a person's ordinary legal rights to make decisions may be denied, on grounds connected with their disability.'[743] Similarly as Arstein-Kerslake has argued the MCA provides significant opportunity 'to legally deny the decision-making of people with intellectual disabilities.'[744] The test for determining whether a person has the capacity to consent is contained in section 3(1) which states:

> *'For the purposes of section 2, a person is unable to make a decision for himself if he is unable— (a) to understand the information relevant to the decision, (b) to retain that information, (c) to use or weigh that information as part of the process*

[738] Mental Capacity Act (2005) s2
[739] Jonathan Herring & Jesse Wall, 'Capacity to Consent to Sex' [2014] 22(4) *Medical Law Review* 620, 635.
[740] *MB* [2006] EWHC 168 (Fam) Munby J
[741] Mental Capacity Act 2005: Code of Practice, issued by Lord Chancellor on 23rd April 2007 (London: TSO) foreword
[742] Jonathan Herring & Jesse Wall, 'Autonomy, Capacity and Vulnerable Adults: Filling in the gaps in the Mental Capacity Act' [2015] 35(4) *Legal Studies* 698-719, 699
[743] Series (n 640).
[744] Arstein-Kerslake (n 639) 1467.

of making the decision, or (d) to communicate his decision (whether by talking, using sign language or any other means).'

Section 3 of the Mental Capacity Act 2005 has introduced the first ever test for capacity. It details a step by step process that a court must follow when determining whether a person has capacity to make a certain choice. The Act primarily considers situations such where a Local Authority may question a person's ability to make decisions for themselves. These include question such as the right to choose living accommodation, the right to marry and the right to consent to sexual relationships. Firstly, that person must be able to understand information relevant to the decision concerned. This may relate to the ability to understand the act in question and the potential risks of making that decision. That information must not only be understood but be used and 'balanced to arrive at a choice.'[745] As Clough states, this test focuses on 'the mechanistic aspects of sexual relations, primarily on whether the individual has a basic understanding of sex.'[746] As Series rightly notes, 'this may afford some people greater autonomy than status-based approaches to capacity.'[747] However, it may mean 'that decisions could be called into question in any area of their decision making, and repeatedly over time.'[748]

There is extensive case law[749] concerning the standard needed for capacity to consent to sexual relations at common law. This has provided for much interpretation and debate as to the test of capacity. The leading authority is the case of *Re M.*[750] In this case, the court was concerned with a complainant who had suffered an 'hypoxic brain injury, casing significant amnesia with moments of lucid thoughts, as a result of a cardiac arrest during surgery'. The complainant had previously cohabited with B. M's mother appealed denying Ms ability to consent to sexual relations. Her claim was dismissed because of their interpretation of s3 the Mental Capacity Act 2005. The Court of Appeal found that the judge was right to focus on the 'reasonably foreseeable consequences' test. It was found that because she had the capacity before her surgery and understood the risks associated with sexual relations, she fulfilled the test for capacity. This judgment therefore reveals the flexibility of the capacity test when it comes to sexual relations. There are many

[745] Re C (Adult: Refusal of Medical Treatment) [1994] 1 WLR 290
[746] Clough (n 174) 372.
[747] Series (n 640) 153.
[748] Ibid.
[749] Which is outside the scope of this section of this chapter to explore.
[750] Re M (An Adult) (Capacity to consent to sexual relations) [2014] EWCA Civ 37 Court of Appeal.

implications of this interpretation, arguably M's sexual autonomy has been promoted and protected. This is a recognised aim of the MCA. Alternatively, this could be interpreted as a failure to recognise the vulnerability of M leaving her open to potential exploitation. Moreover, the determination of her capacity may cause future evidential complexities if a criminal case was ever necessitated.

In the case of *Derbyshire CC v AC, EC & LC*[751] capacity to consent to sexual relations was also tested. In that particular case, 22-year-old AC had a significant learning disability and suffered from depression. She lived with her parents during the week and spent the weekend with her new boyfriend who was described by the police as a 'serial criminal.' She became pregnant and her child was removed from her care. An expert psychiatrist reported that AC was able to discuss the basic mechanics of sexual intercourse, understood the risk of pregnancy and STI's but was unable to demonstrate that she would be able to refuse to have sexual relations; he therefore concluded that her capacity was probably fluctuating but she had capacity to consent to sexual relations. The Local Authority made an application to the court as they felt that she required the necessary level of protection which could only be achieved by depriving her of her liberty in residential care. The Court found that she did have the capacity to consent to sexual relations but did not have capacity to make choices about future care and contact. This was determined on the basis she had a limited understanding of time and was 'clearly unable to judge the intentions of people with who, she comes into contact with which has led to her being repeatedly exploited and placed in potentially dangerous situations.'[752] It would therefore seem that in this particular case the bar was again set quite low in relation to capacity to consent to sexual relations. It seems quite bizarre that the court found she had capacity to engage in sexual relations but not as to other, arguably, less significant decisions. It would seem that the Court here determined AC had the capacity to engage in sexual relations without fulfilling the entire test of s3 namely- the ability to weigh and use that information. This may be because the common law aims to protect those future decisions rather than on specific occasions. It could be suggested that this approach together with the relatively low standard of understanding required for capacity to consent to sex may be seen as an effort of the courts to protect the positive sexual autonomy of such persons. This approach rightly recognises

[751] Derbyshire CC v AC, EC &LC [2014] EWCOP 38
[752] Ibid.

that mentally disordered persons do and should be able to engage in consensual sexual activity; the problem is determining how to afford that right whilst recognising their inherent vulnerability to exploitation. As Herring rightly argues 'the legal notion of capacity is typically taken as an all-or-nothing concept.'[753] Likewise, as Clough suggests this all or nothing approach in these cases 'constrains the ability to recognise or speak for broader issues.'[754]

Baroness Hale's judgment in *R v C* referred to the inadequacy of the civil law interpretation of capacity stating:

> 'the fact that a person either does or does not consent to sexual activity with a particular person at a fixed point in time, or does or does not have capacity to give such consent, does not mean that it is impossible, or legally impermissible for a court assessing capacity to make a general evaluation which is not tied down to a particular partner, time and place.'[755]

The civil law must strike a delicate balance in protecting the vulnerable from future exploitation whilst recognising and promoting self-determination. To do this, external situation specific factors could not be interpreted when determining a person's capacity to consent to future sexual relations.[756] This determination was made on a pragmatic basis. As the court of appeal held it would be 'totally unworkable'[757] to expect a Local Authority to conduct an assessment 'every time an individual over whom there was a doubt about his or her capacity to consent to sexual relations'[758] where there were signs of them experiencing a sexual encounter.

It has been argued that there should be one universal definition of capacity that is applicable in both criminal and civil law. There are many examples of this including as Roderic Wood J expressed in *D County Council v LS*[759] 'there should be a significant degree of conformity in the tests relevant to establishing capacity in both civil and criminal courts';[760] and in Regina v A the Court recognised the 'obvious desirability that civil and

[753] Herring & Wall (n 742) 713.
[754] Beverley Clough, 'New legal landscapes: (Re)Constructing the Boundaries of Mental Capacity Law' [2018] 26(2) *Medical Law Review* 246-275, 260
[755] *Re M (*An Adult) (Capacity to consent to sexual relations) [2014] EWCA Civ 37 Court of Appeal.
[756] Ibid [45].
[757] Ibid.
[758] Ibid.
[759] D County Council v LS [2010] *Medical Law Reports* 499
[760] Ibid.

criminal jurisdictions should adopt the same test for capacity to consent to sexual relations.'[761] Yet, as Series notes, the consequences the civil and criminal law are profound, 'rather than resulting in the punishment of sex offenders, the result may be the expansion of control and supervision over the potential victims, with far reaching consequences for their rights to privacy, relationships and – ultimately – liberty.'[762]

Yet, in a more recent decision determining capacity to consent to sex the grounds of appeal cited the 'failure to strike an appropriate balance between protecting incapacitous individuals, and protecting their personal autonomy.'[763] The focus was on awareness of the ability to consent to or refuse sexual relations is more than just an item of relevant information.[764] Despite apparent progressiveness of this decision it could be argued that in that instance the test was manipulated to ensure that incapacity was found. As Clough has argued, the presumption of capacity supports non-intervention which may lead 'vulnerable adults to be exposed to the risk of harm.'[765] In some instances, this may be because of professional misunderstanding or 'evidence suggests the principle has been deliberately misappropriated to avoid taking responsibility for a vulnerable adult.'[766] Either reasoning is concerning. It could be argued that the legal response has been framed and interpreted to favour capacity. This may be seen by many as a successful promotion and protection of the autonomous rights of individuals with a mental disorder. However, it may also be interpreted as a failure by the state to take adequate steps to prevent the exploitation of such individuals. Through this guise of the promotion of autonomous choice, non-intervention is encouraged, risking potential exploitation. In earlier chapters it was noted that the allocation of autonomy led to the responsibilisation of individuals and the denial of responsibility by the state. This autonomy-based approach to mental capacity may be as problematic and should therefore be cautiously applied in civil law and will not be used to inform potential legal reforms.

As Herring rightly states, the circumstances in which a person may have sex with someone is so varied that one cannot sensibly ask whether a person has capacity to consent to sex in

[761] *Regina v A* [2014] EWCA Crim 299 (Court of Appeal)
[762] Series (n 640) 160.
[763] *B v A Local Authority* [2019] EWCA Civ 913 at 33
[764] Ibid [51].
[765] Clough (n 754) 258.
[766] House of Lords Select Committee on the Mental Capacity Act 2005, Report of Session 2013-14: Mental Capacity Act 2005 Post Legislative Scrutiny (TSO 2014) [3] in Clough ibid.

the abstract.[767] Arguably, it follows that rendering someone incapable of consenting merely due to the existence of a disorder is itself ineffective. It seeks to answer a question in the abstract with no application or appreciation of other factors that may influence a decision. The grouping of such individuals does not afford them further rights but merely sends a message that these people are different and deserving of protection in comparison to others who brought their vulnerability upon themselves. This is the approach of both the civil law and the criminal law despite how the legislation might be framed. Therefore, we must look elsewhere to determine whether alternative approaches have addressed these inadequacies.

5. MOVING FORWARD- WHAT (NOT) TO DO

From the above analysis, it would appear that the law has made significant changes to the archaic discriminatory laws regarding mentally disordered individuals and sexual offences. The law no longer automatically criminalizes sexual activity with a mentally disordered individual. Although it has been argued that the legal response to mental disordered individuals is inadequate, mainly because the autonomy approach, there are still lessons to be learned from the legislation.

In particular, section 30 of the Sexual Offences Act 2003 appears to be progressive and a genuine effort to afford control to and protect individuals from harm. One key aspect of section 30 is that it refocuses our attention away from the complainant and onto the defendant. As Series rightly suggests, the legal response has moved away from 'control over the sexuality of people with intellectual disabilities' rather it is now 'framed in terms of their vulnerability to sexual exploitation, or to harmful social and emotional consequences arising from relationships, pregnancy, or health risks connected with sex.'[768] As Maher rightly notes 'if someone does not consent to it [sex] is wrong, no matter the cause of the lack of consent, and whether or not the lack of consent is due to a mental disorder.'[769] Yet the reality is we are vulnerable to sexual exploitation and the legal response should instead reflect the universality of vulnerability rather than segregating individuals which arguably may heighten their experience of their vulnerability. This

[767] Herring (n 598).
[768] Series (n 640) 150.
[769] Maher (n 668) 131.

change of focus may help to emphasise the defendants potentially exploitative actions in all sexual assaults. This is a useful starting position to help inform our suggested reforms.

Moreover, as Baroness Hale states, the correct interpretation of s30 is that such individuals should be treated as having capacity.[770] As abovementioned, the presumption of capacity is arguably a positive step towards the recognition of autonomy of individuals with a mental disorder. Yet as Herring rightly notes 'it is a terrible thing to be said to have capacity when you do not – to be left to cause yourself and those you love great harm on the basis that you know what you are doing and you are making your own choices, when in fact your decisions are not really yours.'[771] As Clough argues, the current response does not facilitate resilience and promote autonomy as it claims to do.[772] There are many dangers within this approach to capacity. By promoting non-interference, individuals are left responsible to avoid harm themselves. Herring also rightly recognised that the presumption of capacity 'denies the special obligations on the state to protect its most vulnerable members.'[773] Through a vulnerability theory we can challenge this autonomy approach which leads to othering. Through a vulnerability perspective we can demand protection equally for all rather than stigmatizing interventions and segregating groups of individuals.

This chapter has further strengthened the argument that the autonomy approach is at the core of the problematic response to sexual offences. It has revealed that those with a mental disorder were historically and currently are segregated in the legislation. The question must therefore be asked, why do we have a different section for those with a mental disorder? This has been identified as problematic as it assigns those with a mental disability as somehow different or unequal to other individuals. The autonomy approach has acted to justify intrusion onto the rights of those with a mental disorder through a guise of protection.

Until we realise the problems with an autonomy approach and acknowledge that all individuals are vulnerable, people will be treated differently depending on characteristics. Arguably, both the civil and criminal law approaches fail because they excessively focus on attempting to balance the tensions between sexual autonomy and protection. Therefore,

[770] *Cooper* (n 682).
[771] Herring & Wall (n 742) 698.
[772] Clough (n 174) 371.
[773] Herring & Wall (n 742) 698.

we require a shift in the foundations and aims of our legal response to those with a mental disorder. Rather than categorising those with a mental disorder as a different type of person, we must we must recognize our susceptibility to harm, and that such groupings distort the reality of our existence. We must ask difficult questions about the source of and experience of our vulnerabilities, rather than affording *rights* to those who we deem to be *different* based on characteristics. Arguably a potential source of these failures rests with the tension between autonomy and protection. These lessons can help inform our suggested reforms as we can realise that segregating or isolating individuals as vulnerable because of a characteristic is not a rights-baring exercise. It pits individuals against each other, fighting for rights, encouraging stereotypical attitudes and blame to determine who is most deserved of protection. We can therefore learn that we should not segregate individuals on the basis of apparent capacities, and instead we need a legal response that is holistic and universal and not a right baring exercise.

Overall, we can learn from this analysis that derogatory language, othering and the segregation of individuals should be avoided. We can also learn that shifting our focal point from the complainant onto the defendant may help to challenge stereotypes and myths and therefore could be used to shape our legal reforms. Most importantly, we can also learn that a legislative response, whether criminal or civil, cannot be effective where protection and autonomy are underpinning aims. It appears impossible to balance these competing aims, arguably the perfect balance is not achievable. Instead we need a completely different foundation that questions the source and experience of our vulnerability. Although this and previous chapters have argued that autonomy is at the core of the problem, all avenues must be explored. Therefore, we look to Canada to determine whether their 'progressive' legalisation with an autonomy lens has been effective. Therefore, the next chapter will look to Canadian law where an umbrella approach has been implemented. The legal response is not based on categories such as s75.s76 and s30 rather they have adopted a capacity umbrella approach. The following chapter will analyse this and other reforms that have been adopted in Canada to determine whether removing the boundaries of categorisation has in fact effectively changed the legal response.

Chapter 5

THE CANADIAN APPROACH TO CONSENT AND CAPACITY- AUTONOMY BASED REFORMS.

1. INTRODUCTION

The previous two chapters have clearly identified that there are several issues within the current legal response to sexual assault complainants. In particular, it has been argued that the definition and interpretation of consent lends itself to focus on the complainant's behaviour, thereby commonly invoking stereotypical attitudes and myths. Moreover, the determination of capacity has also been revealed as troublesome. The law in England and Wales wrongfully segregates individuals who share similar characteristics. Moreover, depending on how blameworthy the individual is deemed to be for their incapacity, protections vary accordingly. As we have seen in the previous chapters, this has led to 'othering', segregation of groups from society, unequal distribution of resilience and responsibilisation. It has been argued in the previous chapters that these failures stem from the underpinning concept of the liberal legal autonomous subject. It has also been argued that as autonomy is at the core of the legal response, the legislation is failing individuals and placing far too much responsibility on them to avoid harm. The potential of the theory of vulnerability to challenge these assumptions and reformulate our response to sexual offences has been alluded to previously. However, before we suggest a complete overhaul to the theoretical foundations, we must explore whether other reforms, with autonomy at their core, can address these issues without such a reformulation. Considering the identified issues, we must look to alternative reforms that might rectify the consent and capacity issues of English law. As Canadian sexual assault law has introduced models to address consent issues and remove capacity groupings, we must explore their approach to determine whether any lessons can be learned.

Canada has been hailed as a progressive State since it introduced many different reforms to the then 'rape laws' in 1982. Most noteworthy of these include the removal of the term 'rape' from legislation and replacing it with a gender-neutral definition of 'sexual assault.'[774] Many academics have discussed the pitfalls in English law that could possibly be addressed by reforming the law in light of the Canadian approach.[775] This chapter will examine the provisions of Canadian law and ask whether their approach more aptly protects all victims of sexual assault.

Firstly, the affirmative consent model as implemented by Canada will be analysed. Currently, in England and Wales, the definition of consent is somewhat vague and open to interpretation.[776] There is also arguably too much successful reliance on the defence of mistaken belief in consent where the both the defendant and complainant were intoxicated. It will therefore be asked whether this model of affirmative consent has successfully addressed the issues with communication of consent and reliance on the defence of mistaken belief in Canada, and whether anything could be learnt from such an approach.

Next, section 3 regarding 'incapacity' will be explored. In English law, those complainants who are incapacitated at the time of the assault are protected under different subsections of the legislation depending on the nature of their incapacity. As discussed in detail in chapters 3 and 4, the law provides different measures for those victims who were voluntarily intoxicated, involuntarily intoxicated or whose mental disorder rendered them incapable of refusing unwanted sexual advances.[777] Despite all being incapacitated at the time of the assault, these victims are unfairly offered unequal protection from exploitation. Hence, we look to Canada who have adopted an 'incapacity' section that acts as an umbrella term to encapsulate all forms of incapacitation. It will be asked whether such an approach can disperse ingrained stereotypes regarding complainant's behaviours and instead shift the focus onto the exploitative actions of the defendant.

In section 273.1(2) of the Canadian Criminal code, there is an intriguing presumption of non-consent where the defendant was in a position of trust, power or authority over the complainant. Although in English law there is a non-exhaustive list of presumptions under

[774] Elizabeth J. Shilton & Anne S. Derrick, 'Sex Equality and Sexual Assault' [1991] 11 *Windsor Yearbook of Access to Justice* 108-124, 119
[775] Gender neutrality of rape laws see Phillip S. Rumney, 'In defence of Gender Neutrality within Rape' [2007] 6(1) *Seattle Journal for Social Justice* 481-526.
[776] Ashworth (n 422) 902.
[777] Sexual Offences Act 2003 s. 30

section 75, no such explicit category exists.[778] It must therefore be asked whether this subsection has had much use in Canada and whether it in fact offers more protection to victims who are susceptible to exploitation. In light of the aforementioned analysis, it will be determined whether any lessons can be learned from the Canadian approach, and furthermore what should be avoided in future reforms in England and Wales.

2. THE AFFIRMATIVE CONSENT MODEL- 'A RADICAL SHIFT IN LEGAL THEORY'?[779]

2.1 THE REFORMS OF CONSENT

Since the introduction of the Sexual Offences Act 2003 in England and Wales, the definition of consent lies within section 74, which states that consent is 'if he agrees by choice, and has the freedom and capacity to make that choice.'[780] As discussed in depth in chapter 3, this definition has proved to be quite difficult to apply and interpret.[781] Moreover the legislation does not contain an definition of 'freedom', 'choice' or 'capacity' leaving the definition fraught by 'deep philosophical issues.'[782] Considering the issue of consent is at the core of a charge of rape and other forms of sexual assault, it is wholly unacceptable that its meaning remains unclear and open to interpretation.

In Canada, the law remained essentially unchanged from its first enactment in 1892 until key reforms made 90 years later. The year of 1982 saw a complete overhaul to the face and substance of the Canadian Criminal Code. Rape and indecent assault as earlier defined, were redefined. Instead, they were replaced with a single, gender neutral offence of 'sexual assault.'[783] The apparent purpose of this was to introduce one single offence of sexual

[778] Although specific and separate sections contain similar protections eg. sections 16-20 of Sexual Offences Act 2003 for children under 18 & sections 38-41 contain offences by care workers against those with a mental disorder.
[779] Nicholas J Little, 'From no means no to only yes means yes, the rational results of an Affirmative consent standard in Rape Law' [2008] 58 (4) *Vanderbilt Law Review* 1321-1364, 1350
[780] Sexual Offences Act 2003 s.74
[781] Finch & Munro (n 540) 315.
[782] As discussed in detail in chapter 3. Also see Ashworth (n 422) 902; Moreover, unclear definitions often leads to defendants successfully relying on their mistaken belief in consent even where they are intoxicated; such a belief is determined by its 'reasonableness' and according to the Judicial studies Board a defendant's belief is to be judged 'as if he were sober'.
[783] Shilton & Derrick (n 796).

assault and replace the several different categories that existed.[784] Arguably, the term 'rape' carries a burden of stereotypical understandings of its meaning.[785] When such a term is used many people relate it to a violent stranger attack, thereby dismissing marital rape cases and only believing cases where the victim had visible injuries.[786]

The Canadian law now states that 'everyone who commits a sexual assault… is liable to imprisonment for a term of not more than 10 years.'[787] Sexual assault is not offered a separate definition, however 'assault' is defined in section 265 of the code[788] and refers to its application to sexual assault. 'Assault' is essentially defined as applying, attempting or threatening to apply physical force directly or indirectly to someone.[789]

Consent to basic sexual assault and mistaken belief in consent to sexual assault were undefined until 1992. The new definition contained in section 273 of the Criminal code states it is 'voluntary agreement of the complainant to engage in the sexual activity in question'[790] which is determined by her subjective state of mind at the time of the alleged assault.[791] Through its wording, the definition appears to attempt to affirm sexual autonomy and self-determination.[792] As Vandevrot rightly notes, the change in definition of consent is like changing the focal point of a lens.[793] Considering its central importance to the offence, different definitions may lead to different outcomes, for example some facts that might be considered probative under one definition may be deemed irrelevant under

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[784] Janine Benedet & Isabel Grant, 'A Situational Approach to Incapacity and Mental Disability in Sexual Assault Law' [2011-2013] 43(1) *Ottawa Law Review*, 3-26, 5
[785] See chapter 2 on rape myths for an in-depth discussion.
[786] Susan Caringella-Mac Donald, 'Parallels and Pitfalls: The aftermath of Legal Reform for Sexual Assault, Marital Rape and Domestic Violence Victims' [1988] 3(2) *Journal of Interpersonal Violence* 174-189, 175.
[787] Criminal Code, S.C. 1953-54, c. 51, s. 140.
[788] 265(1) Assault - A person commits an assault when (a) without the consent of the other person, he applies force intentionally to that other person, directly or indirectly; (b) he attempts or threatens, by an act or gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.
[789] See above. Although the aim was to create one offence of sexual assault, the law instead created a three-tiered offence. Contained within s272 and s273, the first is the abovementioned basic sexual assault, the second is sexual assault with a weapon (which is punishable by up to 14 years imprisonment) and the third is aggravated sexual assault (which carries a sentence of up to life imprisonment). Therefore, although there may have been benefits to removing the term rape from legislation, it seems that the degradation of offences based on violence has reinforced those notions. Moreover, in an attempt to convey the seriousness of violent rapes by attributing them separate offences, and longer maximum sentences, the law has, perhaps inadvertently, reduced the seriousness of rapes that do not contain violence
[790] An Act to amend the Criminal Code (sexual assault) SC 1992, c38, s273
[791] R v Ewanchuk [1999] 1 S.C.R. 330
[792] Lucinda Vandervort, 'Affirmative Sexual Consent in Canadian Law, Jurisprudence and Legal Theory' [2012] 23 *Columbia Journal of Gender and Law* 395-442, 401
[793] Ibid 402.

another.[794] Therefore, although a seemingly simple introduction of a definition of consent, it has actually had a major impact on how the actus reus and mens rea are determined in practice. For example 'voluntariness' connotes that the agreement is not coerced,[795] and 'agreement' suggests to something 'in particular',[796] and while agreements can be terminated, so too can consent suggesting consent must be ongoing throughout the encounter.[797] Although very few cases discuss the meaning of voluntariness,[798] through an analysis of the case law below, the consensus appears to be that mere agreement alone is not sufficient and that agreement should be as a result of free choice.[799] It would appear that like the aims of the law in England and Wales, an autonomy based approach is at the core of the legislation. It must therefore be analysed whether, whilst retaining this protection of autonomy, but through a different model, the legal response can adequately and equally protect individuals from sexual assault. As will be discussed below, the interpretation of the reforms suggests that any consent given must be communicated clearly and throughout a sexual encounter, which has led to an implied standard of what has been referred to as 'affirmative consent'.

2.2 THE AFFIRMATIVE CONSENT MODEL

Canada appears to have advanced further towards a standard of affirmative consent than most other Anglo-American jurisdictions.[800] Its introduction reflected an 'effort in strengthening women's rights.'[801] Coined as the 'affirmative consent model', through its interpretation and application it seems positive and expressed agreement is the required standard. Moreover, this in turn has limited the reliance on the defence of honest but mistaken belief where 'reasonable steps'[802] were not taken to establish consent.[803] Although these legislative amendments apparently established statutory affirmative consent requirements, as will be discussed below, it was the 'judicial interpretations of

[794] Ibid.
[795] Ibid.
[796] Ibid and Kyla Barranco, 'Canadian Sexual Assault laws: A model for Affirmative consent on college campuses?' [2015-2016] 24(3) *Michigan State International Law Review* 801-840, 822
[797] Ibid.
[798] Isabel Grant, 'The Normal ones take time: Civil Commitment and Sexual Assault in R v Alsadi' [2012] 24(2) *Canadian Journal of Women and the Law* 439-457, 449
[799] R v Stender, [2005] 1 SCR 914, 2005 SCC 36 in ibid.
[800] Gotell (n 391) 871.
[801] Barranco (n 796) 821.
[802] Ibid.
[803] Ibid 824.

these provisions [that] proved critical in explaining the affirmative consent standard for sexual assault cases.'[804] This change moves the definition away from a forced-centred model to a consent based one.[805] In essence, this approach aims to shift the understanding from simply 'no means no' to 'only yes means yes';[806] hence reducing the circumstances upon which a defendant may rely on consent where the complainant may not have directly expressed voluntary agreement.

The model challenges understandings of sexual encounters, as Gotell states, 'normative heterosexuality founded on feminine acquiescence to seduction.'[807] Likewise, as Vandervort rightly suggests, Parliament was aware of the potential implications of the interpretation of the legislation.[808] Arguably, Parliament intended that judicial interpretation would shift the focus from express opposition to express willingness to participate in the sexual activity,[809] reflecting an effort to overcome 'the historical tendency by some judges to treat a complainant's silence or non-resistance as implied consent.'[810] Moreover, this sets an apparently higher bar[811] for those claiming the defence,[812] and puts more emphasis on the steps taken by the defendant in the circumstances to ascertain consent. This is an area which requires significant improvement in English and Welsh law as it appears from the analysis in chapters 3 and 4, there still remains an excessive focus upon the complainant's actions. Moreover, it has been argued that an affirmative standard would provide a more nuanced approach to understanding sexual consent; scholars have suggested that its introduction, hypothetically, marks women 'as full partners in a sexual encounter and their wishes given equal weight',[813] whilst affirming their 'right to bodily integrity.'[814] This promotion of the right to communicate a yes or no is a key element of this autonomy-based approach.

It could be argued that an affirmative consent model attempts to reinvigorate sexual encounters and tries to redistribute sexual power. The strongest arguments in support of the

[804] Ibid 825.
[805] Dan Subotnik, 'Copulemus in Pace: A Meditation on Rape, Affirmative Consent to Sex and Sexual Autonomy' [2008] 41 *Akron Law Review* 847-864, 848
[806] R v Park [1995] 2 S.C.R 836 (para 44).' *'Not* saying 'yes' is equivalent to saying 'no'.'
[807] Gotell (n 391) 868.
[808] Vandervort (n 792) 435.
[809] Ibid.
[810] Ibid.
[811] As discussed in section 3.
[812] Barranco (n 796) 825.
[813] Little (n 779) 1355.
[814] Vandervort (n 792) 405.

affirmative consent model, as suggested by Little, is that its introduction changes behaviour in men and women particularly in dating situations. [815] The standard, in essence, provides a tangible and clear standard[816] while promoting 'rational behaviour in seeking and providing clear consent;[817] and is allegedly a 'growing trend' in US College campuses.[818] Moreover, the model has established that consent must be 'an active on-going' process throughout a sexual encounter.[819] This creates a standard close to 'a communicative one' that requires an expression of affirmative 'consent and active steps to ensure agreement, when activities shift from one form of activity to another.'[820] Such a standard may empower victims to come forward where they may have initially agreed to sexual contact but as it progressed and changed they revoked their original consent. It also asserts to initiators that they cannot rely on initial consent for the duration and must be satisfied that the consent is continuous throughout. It is important to consider whether an autonomy-based approach is workable. It must be critically analysed whether the introduction of this 'affirmative consent' model has in fact successfully addressed these shortcomings, and whether there are any lessons to be learned for future reforms in England and Wales.

3. THE APPLICATION OF THE AFFIRMATIVE CONSENT MODEL

This section will explore the interpretation of the affirmative consent model to determine its success. It will be analysed whether the application of the affirmative consent model has been successful despite its foundations in the principles of autonomy, and whether it has successfully challenged the reponsibilisation that is linked with such a focus. It is important to explore how the legislative reforms have been interpreted in case law.

In *R v M (M.L.,)*[821] consent was distinguished from 'submission' where the Supreme Court held that the Court of Appeal 'acted in error in holding that a victim is required to offer some minimal word or gesture of objection and that lack of resistance must be equated

[815] Little (n 779) 1351.
[816] Barranco (n 796) 840.
[817] Little (n 779) 1351.
[818] Barranco (n 796) 832.
[819] Gotell (n 391) 875.
[820] Ibid 871.
[821] [1994] 2 SCR 3

with consent.'[822] It was also established that mens rea is not only satisfied when he knew she was saying no, but also when he knew she wasn't saying yes.[823]

There has been varied judicial interpretations of the legislative reforms, but it was *Ewanchuk* that was the first case to address the apparent affirmative standard of consent. Before this case, decisions on consent were 'unpredictable and inconsistent.'[824] The *Ewanchuk* decision found that 'implied consent is not consent' and that 'voluntary agreement' is to be expressed through words or conduct.[825] In that case the complainant initially verbally resisted his advances, but because she was afraid she did not take any further action to stop him.[826] The defence relied on her 'implied' consent considering she had failed to object further throughout the activity.[827] The defendant was not allowed to rely on his 'mistaken belief' as to her consent when there was no evidence of words or conduct that could have led him to believe in consent.[828] The decision brings the element of consent to the forefront both with respect to the actus reus and the mens rea requirements of the offence of sexual assault.[829]

The Supreme Court held that 'a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence'[830] and went on to confirm that an 'accused cannot say that he thought 'no meant yes.''[831] In criticising the Trial Judges' earlier decision, the Supreme Court stated:

> 'This error does not derive from the findings of fact but from mythical assumptions that when a woman says 'no' she is really saying 'yes', 'try again', or 'persuade me'… women's sexual autonomy and implies that women are 'walking around this country in a state of constant consent to sexual activity.'[832]

[822] R v M (M.L.) 2 S.C.R.3 Sopinka J
[823] R v Park [1995] 2 S.C.R 836 [39]
[824] Rakhi Ruparelia, 'Does 'No' Mean No Reasonable doubt? Assessing the Impact of Ewanchuck on Determinations of Consent' [2006] 25(1-2) *Canadian Women Studies* 167-171, 167
[825] R v Ewanchuk [1999] 1 SCR 330 at para 50
[826] Ibid [7].
[827] Ibid [31].
[828] Ibid [87].
[829] Michal Buchhandler-Raphael, 'The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power' [2011] 18(1) *Michigan Journal of Gender and the Law* 147-228, 171
[830] R v Ewanchuk [1999] 1 SCR 330 at para 51
[831] Ibid
[832] Ibid [87].

Hence, the Supreme Court asserted that this affirmative standard of consent must be express, clear and continuous[833] at every stage of the sexual encounter.[834] Raising the standard to 'only yes means yes,' consent is understood 'as an active and on-going process that can be withdrawn at any time.'[835] As rightly observed by Ruparelia, *Ewanchuk* 'has brought us a long way in protecting a woman's right to be free of unwanted sexual intrusions.'[836]

However, there appears to have been much difficulty in applying and interpreting the *Ewanchuk* decision.[837] Even where decisions have followed that of *Ewanchuk,* it appears that some judges and juries continue to rely on such stereotypes to inform discussions and decisions.[838] Vandervort's study analysed transcripts of judicial proceedings in the Canadian lower Courts which revealed 'erroneous interpretations and applications of the law of consent.'[839] It was also revealed that few of these cases of acquittal are appealed, noting 'traditional generalisations and misconceptions continues to ensure that the law of sexual consent is sometimes ignored [and] misinterpreted…'[840] Arguably this may be because the affirmative consent model fails to challenge the preconceptions of sexual activity, due to the conceptual underpinnings of autonomy. It might therefore be argued that if an affirmative consent model was introduced in England and Wales, it would unlikely challenge stereotypical attitudes towards complainants of sexual assault. Further analysis of the interpretation of the model below reveals its shortcomings in addressing myths and stereotypes.

For example, the initial ruling in *Flaviano*[841] is concerning. There the trial judge's original decision held that reasonable steps were taken to ascertain consent following the complainant's initial rejection of the defendant's advances,[842] despite his own claim that she said yes;[843] suggesting the defendant may have believed her to be consenting because

[833] It has since been confirmed in R. v. J.A. 2011 SCC 28 that a person can only consent when they are conscious throughout the activity
[834] Gotell (n 391) 871.
[835] Ibid 875.
[836] Ruparelia (n 824).
[837]Ibid 169 citing R v S.D.P [2004] N.J. No. 371 & R v O (M) [1999] 138 CCC 476
[838] Ruparelia (n 824) 170.
[839] Vandervort (n 792) 438.
[840] Ibid.
[841] R v Flaviano [2013] ABCA 219
[842] [2013] ABCA 219 Moldaver J
[843] Thereby not requiring reasonable steps to be taken to ascertain consent- Janine Benedet, 'Sexual Assault Cases at the Alberta Court of Appeal: The roots of Ewanchuk and the Unfinished Revolution' [2014] 52(1) *Alberta Law Review* 127-144, 143

'she was not a very verbal person.' The facts were 'strikingly similar'[844] to *Ewanchuk* with 'pronounced inequalities'[845] between the individuals. Unsurprisingly his defence attempted to discredit the complainant by suggesting she was a 'scheming prostitute' rather than a scared young girl. Although the court of first instance's decision was concerning, fortunately, the Court of Appeal overturned the decision and substituted a conviction which was later confirmed by the Supreme Court.

Similarly, in *R. v. Adepoju*,[846] the decision appeared to be informed by stereotypical myths. Here, despite the complainant's repeated struggle to reject the defendant's advances, the complainant eventually submitted to the accused 'to get it over with.'[847] Based on the fact the complainant had 'stopped saying no' and her 'body language said yes' the defendant was acquitted.[848] As Benedet rightly noted, the trial judge 'had erred in both ignoring all of the sexually assaultive behaviour that took place prior to the sexual intercourse, and in inferring that submission to sexual intercourse was consent.'[849] The trial judge's erroneous decision came just two weeks after the Supreme Court in *R. v. Hutchinson*,[850] where it ruled that '[c]onsent cannot be implied, must coincide with the sexual activity, and may be withdrawn at any time.'[851] The Court of Appeal overturned the acquittal and substituted a conviction finding several errors within the trial judge's decision, not least the equation of submission with consent.[852] Though overturned on appeal, the initial decisions of these recent cases highlight the fact that despite apparently progressive legislation, judicial interpretation appears to still be informed by stereotypical myths including 'no' means 'try harder'. Perhaps this may be to do with the expectations the requirement that promotes 'rational behaviour'[853] sets a standard expected response from individuals. This expectation to respond rationally promotes the idea of autonomous subjects who should/can react in a particular way. This approach fails to acknowledge the wider social and environmental facts that may impact on a person's ability to communicate consent or

[844] Ibid 142.
[845] Ibid 143.
[846] [2014] ABCA 100
[847] R. v. Adepoju [2014] ABCA 100
[848] Benedet (n 843) 143.
[849] Ibid.
[850] 2014 SCC 19
[851] *R. v. Hutchinson*, 2014 SCC 19
[852] [2014] ABCA 100 para 9, 10, 11, 12, 13
[853] Little (n 779) 1351.

lack thereof. We must therefore determine whether there is any merit in adopting a similar approach in England and Wales.

4. DOES YES REALLY MEAN YES?

At a glance, it could be argued that the affirmative consent model does appear to be somewhat progressive in that it attempts to shift the focus from the complainant to the defendant and tries to limit circumstances in which the 'honest but mistaken belief' in consent is relied upon. Despite some critiques that its introduction is an attack on intimacy'[854] and 'an onerous task',[855] the shift from 'no means no' to 'only yes means yes', can potentially offer an extra level of protection.[856] An apparently higher burden is placed on the initiator to take reasonable steps to ensure consent is freely given. As Gotell suggests 'the masculine gaze that has long defined the consent/coercion dichotomy is surely diluted.'[857]

However, as Little rightly suggests, it is 'not a radical shift in legal theory'[858] as the failure to ascertain consent does not per se equate to lack of consent.[859] Hence, the burden still lies on the prosecution to prove consent was not otherwise expressed, and nothing prevents a defendant from claiming a voluntary consent was clearly communicated.[860] Ultimately returning to a 'he said she said' debate where the complainant's credibility is open to scrutiny. Moreover, the burden would therefore still lie with the complainant to demonstrate non-consent.

Although Barranco suggests the standard establishes a platform for 'procedural fairness',[861] the reality is quite different, as despite its potential, many judicial decisions remain informed by stereotypical rape myths. This may be because the affirmative consent model is still based on the concept of autonomy. It (wrongly) presumes that individuals will be equal and capable of demonstrating their consent. Moreover, it responsibilises complainants to ensure a defendant does not perceive their actions as permission.

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[854] Ibid 1359.
[855] Ruparelia (n 824) 167.
[856] Vandervort (n 792) 405.
[857] Gotell (n 391) 872.
[858] Little (n 779).
[859] Ibid.
[860] Ibid.
[861] Barranco (n 796) 840.

Moreover, it does little to adequately shift our perspective from the complainant onto the defendant as there is still a substantial focus upon what the complainant has said or done. As Ruparelia has suggested, despite progress, 'ingrained stereotypes about complainants will be slow to disappear altogether.'[862] These stereotypes are ingrained in our understanding of sexual activity and our expectations on complainants because of this promotion of autonomy.

As suggested by Subotnik, a major goal of affirmative consent was to limit men's ability to exploit ambiguity in sexual matters,[863] one which it has arguably failed to holistically achieve. Forming judicial decisions based on stereotypes and myths rather than decisions that accurately reflect legislative requirements is problematic.[864] Any amendments, like this 'progressive' requirement for affirmative consent, will not be as effective if ill-informed judicial decisions continue. Unfortunately, the model does not go far enough in tackling the prevalence of these stereotypes and myths. It could in fact be suggested that the requirement of affirmative consent instead 'responsibilises' the subjects.[865] In effect, the presumption behind this model is that the individuals are fully autonomous 'rational calculating creatures'[866] who bear the full responsibility for their actions.[867] Indeed the language of consent 'both resumes and sustains the idea of an autonomous, knowing subject free from social norms and socialisation.'[868] This expectation of a particular response and communication placed on a complainant supports the picture of a rationale ideal autonomous subject.

Moreover, we must be challenge whether yes *does always* mean yes. Defining a standard that suggests 'yes means yes' appears to distort situations where the agreement has been otherwise obtained. Consent can arise in many circumstances i.e. from necessity,[869] fear or fraud. Although there are legislative provisions to account for circumstances upon which consent cannot be freely obtained, it must be asked whether a more careful approach would be only a free yes means yes. In other words, this would have to take into consideration the

[862] Ruparelia (n 824) 170.
[863] Subotnik (n 805) 858.
[864] Vandervort (n 792) 441.
[865] Gotell (n 391) 897.
[866] Ibid 874.
[867] Ibid.
[868] Hedda Hakvag, 'Does Yes Mean Yes? Exploring Sexual Coercion in Normative Heterosexuality' [2010] 28(1) *Canadian Women Studies* 121-126, 121
[869] Jane Campbell Moriarty, 'Rape, Affirmative consent and Sexual Autonomy: Introduction to the Symposium' [2008] 41 *Akron Law Review* 839- 846, 845

situational circumstances and the environment upon which choice is exercised. From a vulnerability perspective then we would look to the distribution of resilience, we would ask whether someone's vulnerability was being exploited in the circumstances.

The law therefore still appears to be based on this 'ideal victim',[870] now instead seen as responsible for managing her behaviour to minimise and avoid the risk of sexual violence.[871] This 'responsibilisation' is a dual sword, that acts both as a scrutiny of female behaviour and as a distraction from male predatory actions. There is an excessive focus on autonomy without the corresponding protection from exploitation which can distract from the particular situational circumstances. Unfortunately, the affirmative consent model merely reiterates our supposed free choice to engage, reject or indeed avoid sexual advances, whilst failing to acknowledge the unequal circumstances in which consent is apparently freely given. An alternative to this model would be to change the theoretical foundations upon which legislative reforms are based. It appears that most reforms are autonomy focussed, essentially leading to very similar outcomes. However, if we were to reimagine our understanding of our existence through a vulnerability lens, we could shift our focus away from a complainant. If we challenge our understanding of individuals as capable rational and independent, we can adopt our response accordingly. This model does, however, challenge the stereotype that suggest men are entitled to pursue sex until a woman physically resists[872] which is undoubtedly a positive step forward.

Indeed, we should look to the theory of vulnerability which offers a unique opportunity to reimagine legislative reforms. Rather than focus on how all subjects are independent and free agents, we should acknowledge our shared and inherent vulnerability to harm.[873] Once this is done, legislation can be drafted to reflect the potential for exploitation and shift focus from the complainant's actions onto the defendant, thereby focussing on the situational circumstances upon which consent was apparently given. Such an approach would arguably address these concerns and simultaneously reduce successful reliance on a mistaken belief in vague 'implied' consent circumstances.

Although appealing in principle, the affirmative consent model does little to address the ingrained stereotypical attitudes towards sexual relations and the expectations placed on

[870] Once seen as the gatekeepers of sexuality. Ibid 843.
[871] Gotell (n 391) 879.
[872] Moriarty (n 869) 843.
[873] Fineman & Grear (n 58) 16.

complainants. Considering this, it therefore appears that despite the apparent progressiveness of the model, its implementation has fallen short. It appears to reflect the approach of England and Wales despite the apparent differences. Because of the continued focus on complainant's behaviour and the complications with an only yes means yes model, it is unlikely that affirmative consent would be an appropriate route for reform in England and Wales. Yet, Canadian sexual assault law has been progressive in other ways. In particular, the Canadian legislation has avoided the segregation of 'incapacitated' individuals and has instead opted for a more inclusive approach. We must now analyse this approach to determine whether this umbrella approach has been progressive enough to challenge the stereotypical attitudes towards complainants and to shift away from responsibilising individuals.

5. THE 'INCAPACITY' UMBRELLA

As examined above, the affirmative consent model strives to place partners in equal positions of power to ensure voluntary and free consent is communicated between sexual agents; thereby placing both individuals on par with each other. Arguably though, this model fails to recognise the imbalance of power that often exists within sexual relationships that cannot be addressed merely by requiring consent to be clearly communicated. Although circumstances are more limited,[874] and a defendant cannot rely on his own self-induced intoxication, the defence of honest mistaken belief in consent is still open to a defendant[875] allowing for a claim that consent was indeed communicated. However, we must explore the complications that arise when a complainant is incapacitated at the time of the offence.

[874] R. v. Cornejo, 2003 CanLII 26893 (ON CA) para 15 Judge held that 'moving her pelvis' 'was simply an insufficient basis to allow the defence [of mistaken belief] to go the jury.' The Judge also noted that the accused's 'giant leap of imagination 'did not have an 'air of reality' hence finding that he could not rely on less his own wilful blindness as to her consent.[874] The requirement that a mistaken belief must have 'an air of reality' was first alluded to in 1997 in *R. v. Esau* 2 S.C.R. 777 where MacLachlin J noted 'passivity without more is insufficient to provide a basis for the defence'.

[875] A defendant cannot rely on their mistaken belief if it arose from their self-induced intoxication see R. v. Cornejo (2003] CanLII 26893 (ON CA) & aftermath of *R v Daviault* [1994] 3 S.C.R 63. After national outcry through 'the feminist movement' concerns were raised about equality and violence against women, the Canadian Parliament had a 'quick legislative response' and imposed a legislative ban on the defence of intoxication via Bill C-72. Section 33.1 of the Code denies the intoxication defence if (a) the offence 'includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person;' and (b) the intoxication was self-induced…' See also Christopher P Manfreidi & Scott Lemieux, 'Judicial Discretion and Fundamental Justice: Sexual Assault in the Supreme Court of Canada' [1999] 47 *American Journal of Comparative Law* 489-513, 489.

To perhaps reflect that we are all not always 'free and independent' agents, the Canadian Code included section 273.1(2)[876] alongside the definition of consent that somewhat mirrors that of section 75 of the Sexual Offences Act 2003. One noteworthy distinction lies in the segregation of 'incapacities' within English law. Section 75(f) contains an evidential presumption for those who have been drugged or otherwise involuntarily intoxicated, whereas voluntarily intoxicated victims receive no such protections where they remain conscious; and in section 30, those with a mental disorder are offered separate protection.[877] As has been argued, the law is therefore distinguishing between groups of individuals by the means of their incapacitation, rather than their ability to engage freely in sexual activity at the particular time concerned.[878] As a result, incapacitated complainants are not offered proper protection from exploitation. It must therefore be asked whether the Canadian approach addresses inequality by avoiding this segregation and thereby encouraging an equal platform of protection through the umbrella of section 273.1(2)(b) which states consent is not obtained when 'the complainant is incapable of consenting to the activity'. Perhaps when we do not focus on the inherent nature of incapacity, we can look to the source of exploitation and shift our thinking away from grouping individuals as incapable. The determination of this incapacity approach must now be considered.

5.1 THE THRESHOLD OF 'INCAPACITY' IN PRACTICE

As aforementioned, the Code contains a very brief definition of consent as 'voluntary' but also lists circumstances where consent is vitiated. These provide an apparent safety net to instruct both judges and juries to tread carefully when determining the existence of capacity. Particularly, subsection (b) details that consent cannot be obtained when the complainant is 'incapable' of consenting. At a glance, such a statement seems uncomplicated and a logical deduction. Yet in practice, considering the legislation lacks any definitive guidelines, the meaning of incapacity and its threshold has caused insurmountable confusion and inconsistencies. We can therefore speculate that the

[876] Which states: (a) the agreement is expressed by the words or conduct of a person other than the complainant; *(b) the complainant is incapable of consenting to the activity; (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;* (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
[877] As explored in detail in chapter 4
[878] For a full discussion see chapter 3 and 4

Canadian approach is likely to encounter similar difficulties to that of England and Wales. Yet we may reveal some lessons to be learned through the capacity umbrella approach.

Case law has shown that 'incapacity' can be brought about through intoxication or mental disabilities.[879] Although not prescribed in the code, incapacity due to voluntary intoxication is included within this somewhat broad definition. In fact, in the bill leading to the reforms, the section stated, 'by reason of intoxication or other condition.'[880] After 'other condition' was criticised as being too vague, Canadian Parliament instead left it to judges to determine incapacity on a case by case basis. [881]

Like the English approach, incapacity has been described as an all or nothing concept in Canadian law.[882] However, in *R v JR*,[883] the judge suggested that lack of memory can evidence a lack of capacity. Although it was submitted that such submissions would be considered as indirect 'circumstantial evidence'[884] that may 'permit inferences'[885] relating to capacity to consent.[886] Yet in England and Wales, the courts fail to acknowledge this as evidence of severe intoxication and potential incapacitation; instead suggesting lack of memory and the existence of consent are two separate issues.[887] In *JR*, the complainant suffered an 'alcohol blackout' consequently leaving no memory of the incident. [888] Moreover, it was also submitted, and accepted as evidence, that the complainant would not have consented as the accused was her second cousin**.**[889] As the defendant did not testify, there was no evidence to give an 'air of reality' to any claim as to mistaken belief,[890] the conviction was upheld on appeal.[891] Such an approach would be favourably welcomed in

[879] Discussion of mental disabilities below.
[880] Don Stuart, 'Sexual Assault: substantive issues before and after Bill c-49' [1992-1993] 35 *Criminal Law Quarterly* 250-263, 250
[881] Ibid.
[882] Benedet & Grant (n 784) 10.
[883] R. v J.R. [2006] CanLII 22658 (ON SC)
[884] Ibid [20].
[885] Ibid.
[886] R. v. B.S.B [2008] BCSC 917
[887] See R v Bree [2007] EWCA Crim 804 where the Judge failed to direct as to the effect alcohol would have on the complainant's capacity, instead referring to the effect of intoxication on her credibility. See also R v Hysa [2007] EWCA 2046 where the Court found lack of memory does not mean the case should be dismissed as no case to answer.
[888] R. v. J.R, [2006] CanLII 22658 (ON SC) para 1.II (4)
[889] Ibid [59].
[890] Sheehy, E.A., 'Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious women' in Sexual Assault in Canada: Law, Legal Practice and Women's Activism, Sheehy (ed.) (University of Ottawa Press, June 2012) 512 available at SSRN: https://ssrn.com/abstract=2265526
[891] Ibid.

England and Wales considering the current application of capacity to consent. The interpretation in this instance arguably reduced the focus on the complainant's 'behaviour' and increased the attention on the defendant's awareness of her potential incapacity and focused on the potentially exploitative nature of their actions.

However, in most circumstances, 'short of unconsciousness',[892] it appears that judges are not likely to find incapacity when the complainant has been voluntarily intoxicated. This is evidenced by a survey of case law relating to incapacity through voluntary intoxication, as conducted by Benedet.[893] For example in *R v Jensen*[894] where the complainant was voluntarily intoxicated and testified to saying 'no', the Court of Appeal overturned the trial judge's decision and held that her intoxication was not so severe as to leave her unconscious or not in control of her body.[895] The Court found that capacity to consent[896] was a 'minimal state.'[897] This disappointing judgment shows the reluctance of judges to find incapacity as a result of voluntary intoxication. Moreover, as Benedet similarly argues, this case also highlights the difficulty of establishing a threshold for capacity to consent where the complainant remains conscious.[898]

Where the incapacity is as a result of involuntary intoxication, it appears that the judiciary are more comfortable with applying a capacity threshold short of unconsciousness. In *R v Daigle*[899] the acquittal of the defendants was overturned and replaced with a conviction where the 15-year-old complainant had involuntarily consumed PCP. Yet the trial judge's original decision is noteworthy considering it focused on the behaviour of the complainant leading up to the involuntary intoxication. The judge noted that she went alone to meet two stranger men, stating 'at some point, as it is often said, everyone is responsible for his own actions.'[900] It was found that the complainant could not have had capacity to consent where she was 'unable to control her actions'. However, upon appeal to the Supreme Court, the conviction was upheld, rather it was found that the accused could not rely upon mistaken belief where he did not take reasonable steps to do so. This decision essentially ignores the

[892] Benedet (n 549) 442.
[893] Benedet (n 549) 443.
[894] [1996] 90 OAC 183, 47 C.R
[895] Benedet (n 549) 445.
[896] Ibid.
[897] [1996] 90 OAC 183, 47 C.R at para 13
[898] Benedet (n 549) 445.
[899] [1998] 1 S.C.R. 1220
[900] [1997] 127 CCC at 134

intentional drugging and potential incapacity of the complainant and as Sheehy states, 'greatly understates the criminality of deliberately drugging a woman to rape her.'[901]

Like the approach in England and Wales, it appears that judges are far more willing to find incapacity where the complainant was unconscious or asleep during the assault, and especially if the complainant was asleep[902] before the sexual activity commenced.[903] For example, in *R. v. H* [904] the complainant blacked out from the voluntary consumption of alcohol and the accused raped her while she was unconscious. The judge had no hesitation in determining the complainant was 'extremely intoxicated' referring to the fact that she was 'falling down… vomiting and had to be put to sleep because of her condition.'[905] In light of her incapacity, it was held that 'given her condition, it could hardly be said he had an honest belief that the complainant was consenting rather it is apparent that S.H. saw an opportunity to take advantage of the complainant.'[906] It is important to note that the judge did not only refer to the fact she was unconscious, but her obvious incapacitated condition leading up to the assault was also detailed. Moreover, considering her state, it appears the judge disregarded the defendant's claim that he had an honest belief in her consent, by referring to her obvious drunken state and instead alluding to the exploitative nature of his conduct suggesting 'he saw an opportunity to take advantage of the complainant.'[907] Although this is not per se a higher standard of proof, it appears that the judge refused to entertain a reliance on an honest mistaken belief where the evidence suggested the complainant was so intoxicated that she could not have indicated consent; as such the judge successfully removed the focus from the complainant's actions onto the opportunistic exploitative actions of the defendant.

In contrast, in *R v Millar*[908] the trial judge held that the defendant was not aware of the complainant's intoxicated state[909] despite accompanying her over the evening where she consumed a substantial quantity of alcohol.[910] Moreover, the judge suggested that the complainant's angry reaction to the defendant's advances was fuelled through guilt for

[901] Elizabeth Sheehy, 'From Women's Duty to Resist' 20(3) [2000] *Canadian Women's studies* 98-104, 102
[902] R. v. Hernandez (1997), 209 A.R. 228 (C.A.);
[903] Benedet (n 549) 442.
[904] (S.L.), 2003 SKPC 148
[905] Ibid.
[906] Ibid.
[907] Ibid [27].
[908] [2008] CANL II 28225 Ont.SC
[909] Ibid [21].
[910] Ibid [4].

cheating on her boyfriend. As Benedet noted,[911] this statement relies and perpetuates myths and stereotypes regarding women's tendency to cry rape, while simultaneously ignoring the exploitative actions of the defendant in taking advantage of an obviously intoxicated vulnerable woman.

It is unsatisfactory that the test for when the threshold of capacity is met varies tremendously depending on whether the complainant was voluntarily or involuntarily intoxicated; it seems that often a complainant must be unconscious for the threshold to be fulfilled and, like England and Wales, there is some serious uncertainty concerning the point where a complainant is 'incapacitated' but remains conscious. Arguably, Canadian law has essentially a very similar approach to incapacitated complaints despite the apparent legislative differences. The capacity threshold remains uncertain and instead decisions are based on unfounded stereotypes rather than as Craig argues, focusing on 'the particular' as context is everything.[912] Instead we should be examining the circumstantial and situational evidence of the sexual encounter that might suggest exploitation. Despite covering all 'incapacitated' victims in one section, the application of the law appears to vary depending upon the circumstances upon which the incapacity arose. Therefore, although the section appeared to be initially encouraging, eg. by avoiding segregating groups based on shared characteristics, the law in practice has essentially undone this progression. As Benedet and Grant have rightly suggested, the challenge with this standard of incapacity is that those who do meet it are so intoxicated that they have no memory of the assault.[913] It follows that 'this 'catch-22' is also present for women with mental disabilities in that those women incapable of consent may also be incapable of giving evidence in court'[914] and moreover their accounts may be discredited and undermined due to inconsistent testimonies under pressured questioning. Therefore, the capacity umbrella approach would not address the concerns as outlined in the previous chapter. The othering and stereotypical expectations of individuals is still evident in its application despite the wording of the legislation. We must still look to the interpretation of capacity of those with a mental disorder to determine whether any lessons can be learned from the Canadian approach.

[911] Benedet (n 549) 451.
[912] Craig (n 737) 134.
[913] Benedet & Grant (n 526) 328.
[914] Ibid.

6. DRAWING THE LINE FOR THOSE WITH A 'MENTAL DISABILITY'

As aforementioned, Canadian courts have relied on the undefined incapacity provision for both intoxicated complainants and those with mental disabilities. In England and Wales, there is a separate provision under section 30 of the SOA 2003, which protects those with a mental disability or 'disorder' as the legislations states.[915] This section provides *extra* protection for such complainants as the mens rea requirement states that a defendant must know or ought to know that the complainant was suffering from a disorder at the time of the assault which may have affected their ability to refuse sexual advances. Unfortunately, despite these welcomed reforms in English law, prosecutors have not utilised this section often. Moreover, the symbolic nature of the segregating of those with a mental disorder is concerning. Therefore, we must look to Canada to analyse whether their approach of combining all complainant's lacking capacity resulted in equal and adequate protection from harm.

As explored in the previous chapter, it is widely accepted that women with mental disabilities experience high rates of sexual assault[916] and are noted as having particular difficulties in accessing the justice system.[917] This may be for many reasons, including historical perceptions of women with *mental disabilities* 'as childlike or asexual, or oversexed[918] and' indiscriminate in their choice of partner.'[919] Conversely, equality campaigners seek to have the rights of persons with disabilities to sexual relationships recognised equally.[920] Hence, there is a constant struggle between the desire to protect persons with disabilities from harm, whilst affording sexual autonomy. However, there appears to be a stronger focus upon rights of a person with a mental disability to engage freely in sexual activity. Although positive for autonomy and equality purposes, such an emphasis may disguise exploitative sexual encounters as voluntary ones. Perhaps placing

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[915] '(1)A person (A) commits an offence if—
(a)he intentionally touches another person (B), (b)the touching is sexual, (c)B is unable to refuse because of or for a reason related to a mental disorder, and (d)A knows or could reasonably be expected to know that B has a mental disorder and that because of it or for a reason related to it B is likely to be unable to refuse. (2)B is unable to refuse if— (a)he lacks the capacity to choose whether to agree to the touching (whether because he lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason), or (b)he is unable to communicate such a choice to A.'

[916] Janine Benedet & Isabel Grant, 'Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Mistaken belief' [2007] 52 *McGill Law Journal* 243-289, 243; and Shilton & Derrick (n 796) 123.

[917] Benedet & Grant Ibid 515.

[918] For more on stereotypes associated with women with mental disabilities see chapter 2 & ibid.

[919] Ibid 517.

[920] See generally UN Convention on the Rights of Persons with Disabilities

them under the legislative incapacity umbrella will recognise their fluctuating capacities instead of segregating by characteristics and relying on stereotypical presumptions regarding the sexuality of people with mental disabilities.

6.1 THE 'INCAPACITY' THRESHOLD FOR PERSONS WITH A MENTAL DISABILITY

It must therefore be asked whether this legislative wording has in practice afforded persons with mental disabilities sexual autonomy whilst simultaneously providing protection from exploitation. Unfortunately, the following analysis of the interpretation of capacity in Canada of those with a mental disability appears not to have achieved this aim. Instead, decisions appear to be informed by stereotypes, regarding such complainants as either over-sexed or childlike, hence undermining their credibility even where there appears to be evidence of exploitation.

For instance, the Crown typically concedes capacity to consent even where the 'mental age' of the complainant is fixed by experts below that of statutory consent.[921] In *R v Parsons*[922] the complainant had a mental age of 7 but the Court held she maintained capacity to consent.[923] Similarly, in the case of *R v Prince,*[924] the complainant was said to have the intellectual functioning of a 6-8 year old.[925] Although it was not clear whether the complainant explicitly said no, she was adamant in her testimony that she did not want the sexual activity to take place. In an interview with the police, the defendant admitted to 'using her' and said that she may have said no.[926] Despite this, the trial judge acquitted the defendant because of the complainant's behaviour and suggested that the complainant merely regretted her decision after consenting. This worrying judgement, informed by myths and stereotypes regarding women with mental disabilities as suggestible and unreliable, is an example of where the court places an excessive focus upon the

[921] Benedet & Grant (n 526).
[922] (1999), 170 Nfld & P.E.I.R. 319
[923] R v Parsons [1999] 170 Nfld & PEIR 319
[924] R v Prince (2008) 232 Man R (2d) 281, 2008 Carswell Man 479 (MBQB) *[Prince] as cited in* Benedet & Grant (n 784) 7.
[925] Benedet & Grant (n 784) 7.
[926] Ibid 7-8.

complainant and their actions, rather than as Benedet and Grant rightly stated focussing on the accused's behaviour in assessing her credibility.[927]

There are very few cases in which the prosecution has relied upon the complainant's incapacity to consent except where it is submitted that they have little or no knowledge of sexual mechanics,[928] and no appreciation of the sexual activity.[929] For example, the complainant had essentially no such understanding in *R v Parrott*[930] where she had Down's Syndrome and mental abilities similar to that of pre-school children. Similarly, incapacity has been relied upon in advanced Alzheimer's cases.[931] Even if incapacity is proved, there is a defence available to argue a mistaken belief as to capacity.[932] Although this is invoked more when relied upon for intoxication cases,[933] this may dissuade prosecutors from relying on this section.

This apparent reluctance to rely on incapacity by the prosecution may also be due to fears that such labelling would undermine the complainant's credibility; for example, this can lead to the introduction of evidence of sexual history and portraying her as 'child-like, unreliable or easily confused.'[934] Nevertheless, when considering a complainant with a mental disability, the common theme does appear to be a comparison with the intellectual abilities of a child, even where capacity is not in contention. For example, in *R v Harper*,[935] the complainant had Multiple Sclerosis which affected her mental and physical state. She lived in a care home, where she had incontinence problems and poor eyesight;[936] she was described as having a terrible memory and as childlike.[937] The defendant regularly attended the care home to visit his mother. Despite that incapacity was not discussed[938] the comparison to a child was heavily referenced. This coupled with her contradictory and incomplete testimony,[939] led the trial judge to find a reasonable doubt as to lack of consent. [940] This is another example of an excessive focus on the actions and credibility of the

[927] Ibid 8.
[928] Benedet & Grant (n 526).
[929] Benedet & Grant (n 784) 11.
[930] [2001] 1 S.C.R 178
[931] Benedet & Grant (n 526).
[932] Ibid.
[933] Ibid.
[934] Ibid.
[935] R v Harper [2002] YKSC 18
[936] Ibid [5].
[937] Ibid [7].
[938] Ibid [59].
[939] Ibid.
[940] Ibid [69].

complainant, rather than examining the inherent imbalances between the parties and the possibility of exploitation. The problem with non-consent is within its subjectivity. The credibility of the complainant's claim will be measured 'against their words and actions',[941] as what happened in this particular case. This subjectivity can not only distort the facts of the case but can also leave a gaping hole for jurors to fill with preconceived notions regarding such women's behaviour and sexuality. Despite the apparent requirements for affirmative and clear consent, it appears some courts still connect acquiescence with consent which causes serious problems for those with mental disabilities who, as Benedet and Grant suggest, may 'exhibit compliant behaviour' for which they are often rewarded.[942] Her testimony of non-consent may then be seen as inconsistent with her actions despite not wanting to engage in the sexual activity in question.

Moreover, the determination of 'capacity' for such complainants is arguably archaic. As we have seen above, courts tend to rely on the complainant's intellectual abilities which often leads to comparisons to children,[943] thereby fuelling stereotypical beliefs that undermines their credibility and reliability. Instead they posited Greenspan's suggestion which states that vulnerability to social and physical risks and ability to avoid harm should be used to determine whether someone with a mental disability has capacity to consent to sexual relations.[944] Although there is much merit in this argument, i.e. as Benedet and Grant argue, instead of focussing on the complainant's ability to do fractions we should look at their ability to avoid harm;[945] we could possibly progress this even further. As will be explored in the next chapter, a more nuanced approach would be to incorporate a theory of vulnerability in analysing the vulnerability of all complainants. As we are all vulnerable to harm and our ability to avoid that harm depends on the resources we have available. Our vulnerability to harm and ability to avoid risk fluctuates constantly, and to say one might be capable of avoiding harm one day does not necessarily mean they will be so able on another. Instead of segregating groups based on particular characteristics, the law should instead acknowledge our shared and universal vulnerability to harm for which equal protection should be provided. Despite removing the legislative wording to segregate

[941] Benedet & Grant (n 784) 7.
[942] Ibid 8.
[943] Benedet & Grant (n 526).
[944] Gruenspan, S.,'Foolish Action in Adults with Intellectual Disabilities: The Forgotten Problem of Risk Unawareness' (2008) 36 International Review of Research in Mental Retardation 147 at 187 cited in Benedet & Grant (n 784) 9.
[945] Benedet & Grant (n 784) 9.

groups of individuals, it appears that this othering and stereotypical attitudes still underpin the application and interpretation of the law. However, in an apparent effort to provide more protection to those 'most vulnerable' victims, Canadian legislation includes a presumption of non-consent where the defendant was in a position of power, trust or authority over the complainant.

7. ABUSE OF TRUST OR AUTHORITY

Within section 273.1(2) there is a presumption that consent will be vitiated where 'the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority.'[946] Its inclusion was reflective of an effort to provide extra protection for those complainants who met the 'capacity' threshold' but still warranted extra protection.[947] At a glance therefore, this section appears to encapsulate a wide-ranging variety of circumstances upon which a person (including those with a mental disability) may be coerced into engaging in sexual activity, for example teacher-student, doctor-patient etc. Section 75 of the Sexual Offences Act in England and Wales does not contain such a presumption. Instead there are separate sections elsewhere within the Act that protect children under 18 from adults in a position of power or trust as well as a different section protecting those with a 'mental disorder' from care workers. Considering the somewhat broad and vague language used in this section, the potential for protection of variable circumstances and coercive relationships is appealing. However, in determining its value, it must be explored as to whether this subsection has indeed enjoyed much use and if so to what extent its application reaches.

7.1 OPPORTUNITY LOST- THE RESTRICTIVE SCOPE OF 'POSITION OF POWER TRUST AND AUTHORITY'

In the case of *R v Gagnon*[948] the complainant agreed to have sex with her bus driver as she feared she would lose access to her adapted bus services if she refused. The prosecution

[946] s 273.1 (2)(c)
[947] For example, see R v DT 2011 ONCJ 213,85 CR (6th) 195 [DT] & Benedet & Grant (n 784).
[948] [2000] CanLll 14683 (QCCQ)

relied on non-consent and abuse of power or authority as in 273.1 (2)(c). The defence contested this position of power or authority and the Court found that no such relationship existed. Arguably, for effective protection, this section should be interpreted in light of the complainant's understanding of the meaning of power and their relationship with the defendant, rather than the subjective perspective of the court. Perhaps, it should have been interpreted that the complainant would not have engaged in the activity but for her subjective fear of losing her bus pass, which was of significant importance to her. Arguably such consent provided under these circumstances was not given voluntarily.[949]

In the case of *R v Alsadi*,[950] the Court again rejected the argument that a relationship of power and trust existed. In this case, the complainant had schizophrenia and bipolar disorder and was involuntarily committed to a psychiatric ward where the defendant was a uniformed security guard.[951] The defence submitted that the complainant had initiated the sexual activity despite her submission that she vehemently refused. The trial judge found that the defendant was not in a position of power as he was not authorised to 'restrain' the complainant. In his decision, he relied on many stereotypes regarding women with mental disabilities as 'impulsive',[952] and 'hypersexual.'[953] A retrial was ordered,[954] where the court of appeal found that the trial judge had failed to adequately address whether the position of 'trust held by the accused should preclude the accused from engaging in sexual contact with the complainant given her vulnerability to exploitation.'[955] Instead, the accused was depicted as the victim of the complainant's sexual aggression.[956]

This is yet another example of a judgment, which was informed by misconceptions and stereotypical understandings of women with mental disabilities, where a retrial was ordered to consider the possibility of the security guard being in a position of trust. As Grant and Benedet suggest, a 'more nuanced analysis'[957] of the particular circumstance and the inherent imbalance of power would have shown that the complainant lacked the capacity to give free and meaningful consent.[958] Specifically, the complainant was

[949] Benedet & Grant (n 784) 10.
[950] (27 July 2011), Vancouver 213734-2-C (BC Prov Ct).
[951] Janine Benedet & Isabel Grant, 'Sexual Assault and the Meaning of Power and Authority for Women with Mental Disabilities' [2014] 22 *Feminist Legal Studies* 131-154,145
[952] R v Alsadi (27 July 2011), Case no 213734-2-C, Vancouver (BC Prov Ct) in Grant (n 798) 442.
[953] Ibid.
[954] R v Alsadi, 2012 BCCA 183, 2012 Carswell BC 1202 (BCCA).
[955] Grant (n 798) 441.
[956] Ibid.
[957] Benedet & Grant (n 784) 25.
[958] Ibid.

involuntarily detained for psychiatric reasons,[959] and the defendant held a powerful position as a security guard. Instead, the trial judge referred and relied on the complainant's sexual relationship with her boyfriend, suggesting that her capacity to engage in sexual relations was constant and stable regardless of the particular situational circumstances; arguably inciting further myths and stereotypes.

In a similar case of *R v DT*, the complainant used a wheelchair and had significant physical and mental disabilities, with vision and speech impairments.[960] The defendant was her uncle who engaged in sexual activity with the complainant over many years despite alleged repeated requests for him to desist.[961] The trial judge found that the defendant 'exploited an overwhelming inequality to his own advantage, abused a position of trust and authority to influence and manipulate the complainant, thereby vitiating any consent the complainant may have given.'[962] Yet this decision was overturned on appeal where the Court held that 'the Crown must prove both the existence of the relationship of trust, power or authority and 'that the complainant's free will was effectively overborne by the impact and abuse of that position.'[963]As Benedet and Grant suggest this ruling overlooks 'the subtle nature of abuses of trust, which may develop over time.'[964] It seems to be in contrast with the intentions of the legislation to presume that this complainant freely consented considering the overwhelming imbalance of power, instead of exploring the exploitative actions of the defendant in taking advantage of his disabled niece.

Arguably section 273.1(2)(c) was drafted to protect vulnerable victims in circumstances which mirror that of the aforementioned cases; yet its interpretation has been 'unacceptably narrow.'[965] The courts have not listed relationships[966] which are inherently imbalanced. Arguably the inducement can be inferred from the nature of the potentially coercive relationship.[967] Benedet and Grant conducted an examination of the case law under this section which revealed an 'overly rigid' interpretation,[968] with just 14 of 54 cases

[959] Ibid
[960] 2011 ONCJ 213,85 CR (6th) 195 [DT] see also Benedet & Grant (n 764).
[961] Benedet & Grant (n 784) 23.
[962] Ibid.
[963] 2012 ONSC 2166 [25]
[964] Benedet & Grant (n 951).
[965] Shilton & Derrick (n 796) 122.
[966] Unlike USA where certain relationships are labelled as inherently coercive, i.e. in a psychiatric facility. Benedet & Grant (n 951) 149.
[967] Ibid.
[968] Ibid 143.

successfully invoking the section to vitiate consent.[969] Just four of those cases related to complainants with mental disabilities, two of which found consent was vitiated because of the nature of the relationship, and neither explored the section in detail.[970]

There are several problems with the law of sexual offences for women with disabilities. Misunderstandings of social norms can lead to 'consent',[971] or some complainants 'may exhibit compliant behaviour' for rewards.[972] Hence, the difficulty with the subjective consent standard is amplified where a complainant with a mental disability fails to recognise an exploitative situation or where they have difficulty in recalling,[973] or communicating[974] the assault. Presumably section 273.1(2)(b) and (c) were drafted to address potential abusive or exploitative experiences. Yet these cases are still the hardest sexual assaults to prosecute,[975] complainants are still expected to give robust testimonies and stand up to leading questioning.[976] The focus remains excessively on the complainant's actions and credibility. These are open to rigorous cross examination that may lead to inconsistencies which allow stereotypical preconceptions to distort the facts of the sexual assault.

As alluded to at the beginning of this section, the law is in a constant battle to protect people with disabilities from harm whilst affording them with the autonomy to engage in sexual activity. The reluctance to invoke the 'incapacity' argument suggests that the focus is on the latter. Yet in light of the above analysis, it must be asked whether such a preference is as beneficial as it may initially seem. Indeed, persons with mental disabilities should be entitled to exercise their right to sexual autonomy, but it is undeniable that such individuals are at a higher risk of exploitation due to the current distribution of resilience. As Benedet and Grant argue, sexual autonomy 'is a hollow value when there is no safe environment for it to be exercised.'[977] Moreover as they rightly suggest, protection from

[969] Ibid 144.
[970]One case R v Bergen [2011] ONCA 210; 18 year old complainant was a patient at mental health unit and defendant was 50year old social worker; R v Mianskum [2000] OJ no 5802 (QL) (SC),aff'd [2002] OJ no 3955 (QL) (CA) complainant 17years old with history of mental health issues, attended defendant's home for native healing: Benedet & Grant (n 951) 144.
[971] Benedet & Grant (n 784) 8.
[972] Ibid.
[973] Ibid.
[974] Janine Benedet & Isabel Grant 'Taking the Stand: Access to Justice for Women with Mental Disabilities in Sexual Assault cases' [2012] 50(1) *Osgoode Hall Law Journal* 1-45,5
[975] Ibid 4.
[976] Ibid 5.
[977] Benedet & Grant (n 916) 255.

exploitation should be a prerequisite for 'any meaningful autonomy.'[978] We should revolutionize our understanding of autonomy, by instead thinking of protection from harm as a 'precondition' rather than 'contradiction' to autonomous decision making.[979] Although there is potential scope for this section to be expanded to other complainants, it would unlikely be successful. If we were to reformulate our approach to general sexual offences to consider consent in the context of power imbalances, it is likely we would encounter difficulties. For example, if we were to consider this section with regards to sexual activity between a young *capable* woman and her employer, the actions and behaviour of the complainant would be scrutinized. Because this section is still underpinned by the liberal legal subject, arguably, expectations would be placed on the independent free woman to act in a certain way, disregarding the situational circumstances. Hence, the result would arguably be the same despite the change of wording. As the Canadian approach is still based on the 'ideal victim' through an autonomy lens, we can argue that there are very few lessons to be learned for England and Wales.

8. CONCLUSION- ANY LESSONS TO BE LEARNED?

There are many positives to the Canadian legislative approach to sexual assault law. The progressiveness of their approaches to governing sexual relations can be commended. Unfortunately, their efforts appear to be piecemeal and not properly implemented. On paper, the introduction of the affirmative consent model, places women as equal partners in sexual relations. Affording the right to revoke consent at any time, and discouraging reliance on 'implied consent', is most definitely a welcome reform. However, as earlier discussed, these provisions have done little, if anything, to challenge stereotypes regarding sexual relations and 'the ideal victim'. Moreover, the subjective nature of consent and the failure to define non-consent,[980] places an excessive focus on the complainant rather than examining the behaviour of the accused; this allows for stereotypes to distort the situational circumstances of the alleged assault. Despite legal errors in many decisions, 'the majority of sexual assault acquittals will not be appealed.'[981] Moreover it appears that arrest, indictment and conviction rates remained unchanged in the years following the

[978] Ibid 245.
[979] Ibid.
[980] Benedet & Grant (n 784) 7.
[981] Ruparelia (n 824) 170.

reforms.[982] The statistics published in 2017, revealed that between 2009 and 2014 reporting, prosecutions and convictions have remained very low.[983] Therefore it is unlikely that the affirmative consent model would address any of the issues in England and Wales as identified in the previous chapters.

We should, however, commend the introduction of 'incapacity' as an umbrella term that encapsulates all forms of 'incapacitation'. Using this term to capture a broad range of situations where one may be deemed incapable of consenting, carries a subliminal message of equality. Instead of segregating, and thereby isolating, groups of individuals based on common characteristics, the Canadian approach has instead acknowledged that there may be circumstances where any individual may lack capacity to freely engage in sexual activity and therefore deserve extra protection. In essence, the law is recognising that we are all free and capable agents, despite any pre-existing medical conditions, where autonomy can be exercised without restraint. However, as we have seen through its interpretation stereotypical attitudes and othering is still present despite removing the grouping of incapacities based on characteristics from the legislation. Therefore, the interpretation and application of the approach mirrors that of England and Wales revealing similar issues due to this promotion of autonomy.

Yet, for autonomy to be meaningful,[984] it must be exercised in a safe environment free from exploitation. Arguably this is what section 272(1)(2)(b) commendably intends to achieve. As earlier explored, it appears that because of the lack of a capacity threshold or definition, prosecutors have not relied on this subsection often. Moreover, judicial interpretation and application of the term has been extremely 'rigid', reserving its use for when a complainant is either 'unconscious'[985] at the time of the assault or where they 'have no knowledge or understanding of sexual mechanics'. Even if a capacity threshold was formally determined it is unlikely that the problems will be resolved. Within the requirement for voluntary affirmative consent, the law expects a complainant to be aware, capable and autonomous in both their decision making and risk avoidance. Hence it fails to

[982] Illene Sideman & Susan Vickers, 'The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform' [2005] 38 *Suffolk University Law Review* 467-491, 468
[983] 'All sexual assaults reported to and substantiated by police from 2009 to 2014, less than half (43%) resulted in a criminal charge being laid by police, around one in five (21%) went to court, and slightly over 1 in 10 (12%) led to a criminal conviction over the six-year period' available at https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/54870-eng.pdf
[984] Benedet & Grant (n 916) 245.
[985] Benedet (n 549) 442.

recognise our universal vulnerability to harm. It is likely that a threshold would be set too high, based on stereotypical notions and reinforcing myths and gender behaviour expectations.

Although the sexual assault laws have been described as 'quite adequate,'[986] they are far from ideal. As will be argued in the next section, reframing and reforming the law based on the same concept of autonomy and the ideal 'active subject',[987] will do little or nothing to change how it is implemented and applied. The law needs to be reformed, in light of a more nuanced concept of vulnerability. As Benedet and Grant argue the Canadian reforms have failed to 'reflect the subtle ways in which power operates and how relationships of inequality can be exploited.'[988] This theory offers us that opportunity. It acknowledges our inherent risk of harm, our dependency and need for resilience, our ever-fluctuating state of capacity and our need for protection. We should examine how sexual relations work in every situation, not just where the subjects meet the ideal autonomous independent criteria. We must examine how consent was obtained, in what environment and under what conditions- not just accept that it was given and ignore the pertinent potentially exploitative actions.

From an in-depth evaluation of the Canadian sexual assault laws, it is argued that nothing substantial can be taken and adapted into the law of England and Wales. We might learn from their terminology by instead describing those with 'mental disorders' as having a 'mental disability'. We might also welcome the umbrella term of incapacity and commend their vitiation of consent where a relationship of power or authority existed; but a clear revision and expansion of these protections would be needed. The removal of the term rape and replacement with a three tiered 'sexual assault' offence might reignite the *real* rape myth. As Sideman & Vickers suggested, there is an ambivalence about placing sanctions on 'non-violent' sexual assault without any visible injuries, and has argued that prosecutors and police are now confused about the boundary line between sex and rape.[989] In light of the above analysis, it is fair to state that the implementation of these apparently progressive laws has unfortunately fallen short, decisions continue to be distorted by stereotypes, hence victims of sexual assault are not afforded proper protection. Arguably this is because the roots of the legal response have retained a focus on autonomy. Perhaps the principal lesson

[986] Vandervort (n 792) 440.
[987] Benedet & Grant (n 951) 131.
[988] Ibid 132.
[989] Sideman & Vickers (n 982).

to be learned is that when reforms are made, the foundations upon which they lay must be changed too.

From the analysis of the progressive reforms in Canada, and the legislative reforms in England and Wales as explored in the previous chapters, the 'black letter law' approach to reform is failing. Legislation alone is unlikely to significantly change the way in which we respond to sexual offences, particularly, when those reforms are based on the promotion of autonomy which is unachievable. Therefore, what we require is widespread systemic change, both to the law but also to our understanding of our ontological and social existence. We must therefore look in depth at the theory of vulnerability to determine what it can offer in terms of changing our perspectives and reforming the legal response to sexual offences. The following chapter will analyse what a legal response might look like through a theory of vulnerability.

Chapter 6

Reforming the law- the creation of an 'unjustified sexual relations' offence.

1. INTRODUCTION

As was argued in the previous chapter, the Canadian approach has inadequately challenged the underpinning issues within the legislative approach to criminalising sexual assault. The 'affirmative consent model' fails to tackle the inherent biases contained within the law and continues to place undue focus upon the complainant and her behaviour. Similarly, the 'capacity umbrella' approach, while progressive in principle, has failed in practice to effectively change the hierarchy of protections and attributions of blame because of the conceptual underpinnings of autonomy.

The aim of this chapter is to consider how to reform the law using a vulnerability theory. To do this, it will examine Herring and Dempsey's argument that sexual penetration requires justification. It will build on these foundations to develop a new offence, titled 'unjustified sexual relations' that reflects the vulnerability of everyone and affords equal protections to all individuals.

Section 1.1 of this chapter will succinctly summarise the key issues that an autonomy focus brings. The focus of this section will be on whether it will be possible to remove autonomy from the core of sexual assault law considering its inextricable links with consent. Section 1.2 will then consider the true importance and role consent currently has. Throughout this thesis it has been suggested that an autonomy focus carries individual responsibility, othering and the retrospective response from the law. As has been argued an autonomy focus carries the presumption of capacity and consent. Instead, as this thesis has contended, a vulnerability lens requires an active and responsive State that does not differentiate between individuals and shifts the focus from the complainant onto the actions of the defendant. In section 3 we must consider what a legal response might look like through a vulnerability lens. For this we will look to Jonathan Herring and Michelle

Madden Dempsey's suggestions that attempts to reimagine how we perceive sexual relations.

Sections 2.1, 2.2 and 2.3 will explore how Madden and Herring's arguments can be expanded and developed through a theory of vulnerability, rethinking how we understand harm. These sections will advance their arguments and build on their vision by suggesting how a legal response would be framed in legislation in section 3. These sections will explore the potential actus reus, mens rea and defences of a new offence through their suggestions and a theory of vulnerability.

To conclude in section 4, it will be argued that to achieve systemic change and introduce progressive reforms, we must completely reconsider how we perceive sexual relations. The conclusion will summarise the legal reform suggested and address the likely challenges ahead.

1.1 IF AUTONOMY IS A MYTH- WHAT DOES THAT MEAN FOR CONSENT IN SEXUAL RELATIONS?

What this thesis argues is that the attempts to reform sexual assault legislation have been largely futile because they have all been based on the same legal theoretical underpinning, namely the autonomous liberal legal subject. As explored fully in chapter 2, the autonomous legal subject is the self-determining capable individual, fully independent and free to make choices without any outside inferences. Basing the law on an unrealistic notion on freedom will may lead to victim blame and individual responsibilisation. Such a framework places excessive pressure on individuals to avoid harm, to avoid being raped and to self-protect. As we have seen in Chapters 3, 4 and 5 the current autonomy focus of the law, and indeed its uncertainty and therefore malleability lends us to scrutinize complainants and blame victims for failing to exercise their autonomy to avoid harm.

What is therefore required is a complete uprooting of the current autonomous liberal legal foundations of the law. The pitfalls and promises for the decentring and potential unseating of autonomy will now be explored. Considering the inextricable links between consent and autonomy it must be asked whether vulnerability and autonomy can coexist, and indeed how the law might be reformed in this light. Attempts so far to achieve this balance have not been successful, and therefore we look to vulnerability to reform the law. Autonomy

has arguably become too tainted to play such a key role in sexual offences law. But it must be asked how might the law look without autonomy at its forefront? What shape might the legislation take if vulnerability were at the core? How might we perceive harm when protecting autonomy is no longer the aim of legislation? All of which will be explored below.

1.2 THE TIES OF CONSENT AND AUTONOMY

Consent was applied and understood in 'its ordinary meaning'[990] until the Sexual Offences Act 2003 introduced its statutory definition. The definition, which is still in use today, is based on liberal notions of capacity and free agreement.[991] The concept and its definition are malleable and open to manipulation.[992] Consequently, its application is inconsistent which leads to different results in like cases.[993] One of the key issues with an autonomy and consent focus is the apparent presumption of capacity and consent, leading to the excessive focus on the complainant's behaviour.

For sexual offences, it is evident that the law has traditionally protected vulnerabilities.[994] As aptly noted by Marvel, the US laws in response to rape and other sexual offences appear to be framed in a way to protect defendants from false allegations and unwarranted prosecutions:[995]

> the legal system has emphasized not the actions of the accused, but the victim's character, behavior, and words. Rather than examining the actions of the accused to establish the presence of a crime, as with other forms of assault, the focus shifts to determine whether or not the victim consented or led on the perpetrator on…[996]

Marvel then states the effect is that the laws presume female sexual availability resulting in the legal presumption of what she calls 'perpetual consent.'[997] This analysis is applicable in England and Wales too. The entire offence of rape rests on the non-existence of consent. Indeed, as has been highlighted through an examination of case law, often when capacity is

[990] R v Olugboja [1982] 1 QB 332
[991] As discussed in chapter 3.
[992] Tadros (n 48).
[993] Bethany Simpson, 'Why has the concept of consent proven so difficult to clarify?' [2016] 80(2) *The Journal of Criminal Law* 97-123, 122
[994] A full exploration of the law can be found in chapter 3
[995] Marvel (n 18) 2042.
[996] Ibid 2043.
[997] Ibid 2043.

shown consent is often presumed.[998] Adducing evidence to the contrary often resorts to a 'he said she said' debate where the credibility of the complainant is often scrutinized through evidence adduced regarding her behaviour before during and after the assault that does not conform to society's perception of a credible and rational victim.[999] However, with such a key transformative role in law in society, it must be asked whether we can envisage a legal response that does not solely rely on consent.

1.3 THE ROLE OF CONSENT

Considering the inextricable links between autonomy and consent, the role of consent through a vulnerability lens must be considered. First, we must determine the current role of consent to highlight its actual power as the central concept of sexual offences. This section will further highlight the problematic nature of a consent focus.

Placing excessive focus upon a subjective internal concept such as consent is arguably an unreliable emphasis. As Wertheimer suggests, consent must be both internal and external to become morally transformative and make A's actions to B 'permissible.'[1000] The inherent flaw with consent is this disparate focus upon the actions of the victim whether a subjective or objective approach is used. As will be explored below, many academics disagree as to the 'magic of consent.'[1001] We must consider these arguments to determine whether consent is as powerful and adequate a concept as the law currently affords.

As Munro rightly states, using consent to distinguish between what is right or wrong places a 'disproportionate focus upon the will and behaviour of the complainant rather than upon the conduct and intentions of the perpetrator.'[1002] The use of consent differs vastly from its original intentions of providing women with control over intercourse,[1003] and other sexual relations. Instead, as Tadros contends, such a focus is problematic as it encourages an examination of the complainant's conduct and sexual history rather than the actions of the defendant.[1004] By questioning the state of the complainant's mind, described as a

[998] As was discussed in detail in chapter 3
[999] Smith & Skinner (n 235) 458.
[1000] Wertheimer, A., *Consent to Sexual Relations* (Cambridge University Press, 2003) 146
[1001] As Hurd explains, consent is 'magical' as it affords rights to others, delineating the boundaries of what is permissible through this 'remarkable power of personhood'. Heidi M. Hurd, 'The Moral Magic of Consent' [1996] 2 *Legal Theory* 121-146, 121
[1002] Munro (n 107) 20.
[1003] MacKinnon (n 108) 174.
[1004] Tadros (n 48) 514.

'subjective mental state',[1005] consent looks for internal evidence i.e. their consent; the exploitative actions of the defendant are distorted. This concentration upon the conduct of the complainant allows stereotypes and myths to distract jurors from the legal question.[1006] Therefore, complainants often meet many barriers when attempting to access justice. [1007]

Yet, some liberal academics argue that it is only through consent that sexual offending can be regulated properly.[1008] The importance is on the free choice of the individual to consent to sexual activities rather than a paternalistic regulation of sexual conduct.[1009] As Hurd states: 'if autonomy resides in the ability to will the alteration of moral rights and duties, and if consent is normatively significant precisely because it constitutes an expression of autonomy, then it must be the case the consent is to exercise the will.'[1010] Considering this close tie between consent and autonomy,[1011] those who do not fit the criteria for either will fall outside the realm of protection. Arguably, the excessive focus on consent creates an all or nothing approach which fails to take into consideration alternative 'outside pressures'[1012] that may distort the true meaning of certain agreements.

The concept of consent is indeed very powerful, playing a 'legitimating role'[1013] to transform the illegal to legal or the impermissible to permissible. Supporters of the consent model endorse the concept as an essential basis on which the laws regarding sexual offences are formulated regarding it as 'morally transformative.'[1014] Other academics support consent as a general concept for law making- for example Heidi Hurd's perspective is evident in the very title of her article 'The Moral Magic of consent.'[1015]

[1005] Hurd (n 1001) 121.
[1006] Temkin & Krahé (n 2); Loiuse Ellison & Vanessa E. Munro, 'A stranger in the Bushes, or an Elephant in the Room? Critical reflections upon received rape myth wisdom in the context of a mock jury study', Fall [2010] 13(4) *New Criminal Law Review* 781-801; Ellison & Munro (n 295); Finch & Munro (n 274); Munro, V. & Finch E., 'Juror Stereotypes and Blame attribution in rape cases involving intoxicants' [2005] 45 *British Journal of Criminology* 25-38; Ellison & Munro (n 340).
[1007] As discussed in Chapter 2 on rape myths.
[1008] Knight (n 72) 138.
[1009] Ibid.
[1010] Hurd (n 1001).
[1011] Wertheimer (n 1000) ch 6
[1012] MacKinnon (n 108) 174.
[1013] Robin West, 'Sex, Law and Consent' [2008] Gerogetown law faculty working papers http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1073&context=fwps_papers accessed online on 01.12.2016
[1014] Wertheimer (n 1000*)* 119.
[1015] Hurd (n 1001).

Within her discussion, the focus is on the so called 'transformative nature'[1016] of consent to make immoral acts accepted ones through the exercise of autonomous decision making.

The actual power of consent to make 'the painful pleasurable',[1017] and to ensure actions are justified, is however, doubtful. Such a delegation of power to this 'internal phenomenon'[1018] distorts the situational contexts in which consent might be given or indeed taken. In essence, consent carries a significant burden; the concept is simply asked too much. As Schulhofer similarly argues 'consent is far from voluntary when given in response to extortionate threats or the persistent sexual demands of a woman's doctor, lawyer, or psychiatrist.'[1019] There may however be other reasons why consent is given or where it is given to a non-typically pleasurable act. But these reasons are not represented in the normative force of consent alone. Instead they act as background information informing that consent. What is instead suggested is that consent, together with other reasons for justification for an act, must be considered together.

Hence, focusing solely on consent as the distinction between sex and rape may paint an unreliable picture. It suggests that sex is only criminal when it is non-consensual,[1020] which does not identify the circumstances in which consent was apparently ignored. The law of rape presents 'consent as free exercise of sexual choice under conditions of equality of power without exposing the underlying structure of constraint and disparity.'[1021] Unfortunately, its purpose is not realistic or achievable, we ask too much of the lone concept consent without providing stabilisers to support such a task.

Herring and Dempsey have similarly questioned the power of the role of consent.[1022] They distinguish between the effect of normative requests and consent or non- consent to penetration.[1023] They suggest that a woman's request not to be penetrated creates an additional reason for non-penetration carrying 'normative force'. Whereas consent does not create additional reasons not to penetrate therefore carrying with 'no normative force whatsoever.'[1024] Non-consent therefore does not 'add to or alter the reasons which already

[1016] Paul Roberts, 'Philosophy, Feinberg, Codification and Consent' [2001] 5 *Buffalo Criminal law review* 173-25, 237
[1017] Knight (n 72) 138.
[1018] Jesse Wall, 'Justifying and Excusing Sex' [2019] 13 *Criminal law and Philosophy* 283-307, 284
[1019] Schulhofer (n 73).
[1020] Herring & Dempsey (n 99) 34
[1021] Herring (n 68) 54.
[1022] Herring & Dempsey (n 99) 30.
[1023] Ibid 33.
[1024] Ibid.

exist against sexual penetration.'[1025] They go on to further explain the difficulties that non consent creates for evidential reasons. They state considering non-consent is the requirement for a conviction, and non-consent means a lack of something, evidential rules should not require a complainant to demonstrate anything.[1026] This obviously creates difficulties in prosecuting an offence of rape where evidential rules require a complainant to prove she requested not to be penetrated within a legislative framework which merely requires lack of consent.[1027] Moreover, the lack of a demonstration of non-consent may be used by defence barristers and jurors to deny the assault.

Even at its strongest form, as Herring and Dempsey suggest, consent alone is still inadequate. In its 'richest sense' considering an individual who is 'socially empowered' giving voluntary free and fully informed consent, can only have the effect of 'granting an exclusionary permission.'[1028] Exclusionary permission is described as giving the penetrator the options not to conform to reasons against sexual penetration. Yet where an individual cannot give the most rich consent, which arguably is never achievable, Herring and Dempsey suggest that consent will not bear its 'full normative force', as the 'reasons affected by the woman's consent will be limited: it will not extend to *all* the reasons grounded in her self-interest'.[1029] Arguably, the problems with consent may also be because it lays within an autonomy framework. If we accept the above problems with a consent-based approach, we must ask how we can progress without consent at the core of sexual relations. We must determine whether it is possible and practical and what role consent might play. The argument is not that consent need be eradicated, but the focus should be shifted onto our shared inherent vulnerability. Herring and Dempsey argue that consent to sexual penetration is not enough and instead requires further justification. The following sections will explore their argument to determine why penetration requires more than just mere consent and how that position can be justified through a vulnerability lens.

[1025] Ibid.
[1026] Ibid.
[1027] Herring & Dempsey (n 99) 34.
[1028] Ibid 35.
[1029] Ibid 36.

2. MOVING FORWARD, RETHINKING THE LEGAL RESPONSE.

Having argued that consent is not enough on its own, the alternative must now be considered. To achieve our aims and to realise the key elements of a vulnerability theory, we must completely reimagine sexual relations. To do that, we look to Herring and Dempsey's arguments that sexual penetration requires justification. Their position starts from a completely different point, where sex is not a presumed good for individuals. As will be explored below, starting from this point, using Herring and Dempsey's arguments, can help address some of the issues that an autonomy and consent focus bring. From this standpoint there are many implications, many of which require a reimagination of our current legal response and how we conceptualise harm. Moreover, through a vulnerability theory, Herring and Dempsey's arguments can be developed further and expanded on to explore what a legal response might look like when both lenses are combined.

2.1 IS SEXUAL PENETRATION GOOD?

Both Herring and Dempsey have advocated a reformulation of our understanding of sexual penetration. It is currently accepted that sexual penetration is good and not prima facie wrong. Most legal reforms have been based on the 'orthodox view'[1030] that generally sex is something that is desired, desirable and good, and it is only the lack of consent that makes sexual penetration wrong or potentially harmful. Dempsey and Herring list some of the many supporters of this orthodox view including Victor Tadros, John Gardner and Sharon Campbell.[1031] These supporters suggest there is no reason not to have sex or against penetration,[1032] in that we can presume sexual penetration is permissible.[1033] There are significant moral and legal ramifications with this view. If we presume sexual penetration is good and generally permissible and welcomed as Wall suggests, a defendant is therefore 'engaged in a presumptively permissive activity.'[1034] Therefore, 'he or she has no need to seek permission to act, nor any need to act for any particular set of reasons.'[1035] From this starting point, arguably, it makes it very difficult for a complainant to demonstrate that the

[1030] Dempsey & Herring (n 54) 468.
[1031] Ibid.
[1032] Ibid 468.
[1033] Wall (n 1018) 289.
[1034] Ibid 291.
[1035] Ibid.

penetration was wrong, and that the defendant's actions were wrong. Arguably, starting from the point that penetration is good suggests the existence of perpetual consent. The presumption of this existence of perpetual consent then acts as a justification for the defendant's actions or a reasonable belief that their actions were in fact consensual.
It could be argued that this standpoint is because reforms have been based on this promotion of autonomy; suggesting adults are free to engage in sexual relations with whoever they choose, and indeed it is their right to sexual autonomy which the legislation seeks to protect. The rejection of the State in in the purported private realm to *promote* autonomy has acted to justify this position. Moreover, considering the current legal and moral positioning as to sexual penetration as good, the defendant 'is engaged in a presumptively permissive activity, he or she has no need to seek permission to act, nor any need to act for any particular set of reasons.'[1036] However, Herring and Dempsey have suggested convincing reasons for a departure from this norm understanding of sexual relations. If this position is accepted, the implications for such a starting point must now be considered. Moreover, as will now be explored, the potential of their suggestions can be realised even more so through lens of vulnerability.

2.2 SEXUAL PENETRATION REQUIRES JUSTIFICATION

In their article Herring and Dempsey list reasons why sexual penetration requires justification which are explored below. Together with a vulnerability lens, the potential for this standpoint for legal reforms will now be critically analysed to determine whether this starting point may be beneficial for addressing some of the concerns with the current legal response.

A key element of the argument that penetration is a prima-facie wrong is because of the harm and or risk of harm that sexual penetration carries.[1037] They suggest that penetration is force used against another,[1038] and typically any force you use against another person must be justified. Their argument suggests that any touching of another person is an infringement of that person's rights and must therefore be justified.

[1036] Ibid.
[1037] Herring & Dempsey (n 99) 31.
[1038] Dempsey & Herring (n 54) 474.

Moreover, they list many risk factors to justify this claim including physical harm, sexually transmitted diseases, psychological harm and pregnancy.[1039] Although they accept that not every sexual encounter carries those risk of harm, it is enough that an individual be exposed to a risk of that harm materialising to require justification. Albeit it is agreed that instances where an individual is not exposed to such risks are 'atypical',[1040] if we view the fact that penetration requires justification through a lens of vulnerability, we can further strengthen this argument. Moreover, another such criticism of the approach that sexual penetration requires justification is 'somewhat reductivist.'[1041] This argument is based on the fact that requiring justification for penetration lends to a focus on the physiological aspects of rape. Although addressed in Dempsey and Herrings argument,[1042] if we were to view the need for justification of penetration through a lens of vulnerability, we would be including the qualitative nature of rape. To address both issues though would require us to reconceptualise our understanding of harm to the individual in sexual offences which is discussed in the following section. Before considering this, we must consider the other reason why both Herring and Dempsey suggest penetration is a prima facie wrong requiring justification.

They suggest that the social meaning of sexual penetration can be construed as negative therefore requiring further justification.[1043] They have suggested that the social meaning of penetration constitutes a violation of the woman. Herring and Dempsey have argued that 'it is an act through which she is rendered less powerful, less human, whilst the male is rendered more powerful and more human.'[1044] They refer to the derogatory nature of the language used to describe the act of penetration 'fuck, bang, screw, rail, drill, smash, hit it, hump, let her have it, poke, shaft, slay, etc.'[1045]

The reasons listed are used to support their argument that even where justified, sexual penetration is still a prima-facie wrong. They coin this a justified prima-facie wrong rather

[1039] Herring & Dempsey (n 99) 32.
[1040] Ibid.
[1041] They refer to John Gardener's criticism of their approach as reductivist. Michelle Madden Dempsey and Jonathan Herring, 'Why Sexual Penetration Requires Justification' [2007] 27 (3) *Oxford Journal of Legal Studies* 467-491, 470
[1042] They justify their 'reductivist approach' of focussing on the physiological aspects of penetration by referring to the opportunities that such a lens provides; it allows them to question the wrongfulness of forms of penetration that may have otherwise not been recognised. Moreover, they refer to the fact that the law criminalizes the physiological act of penetration and not 'in terms of context'. Dempsey & Herring (n 54) 471.
[1043] Ibid 482.
[1044] Ibid 471.
[1045] Ibid 485.

than an all things considered justified act.[1046] They suggest that the act of penetration, even when it is justified 'leaves a moral residue of regret.'[1047] Unfortunately, this is the point of departure of this analysis, despite the authors' repeated deterrence from this temptation.[1048] Although it is accepted that there may be negative social connotations with the act of penetration, many of which are listed in their article,[1049] it is not accepted that these exist when justified. As identified by Herring and Demspey, the act of penetration can be a positive relationship confirming, love sharing and emotional experience where it is justified.[1050] Therefore, it will instead be argued that here an act of penetration is justified in light of all the circumstances, it will be considered a justified act not a prima-facie wrong that is justified. Their argument is appreciated and understood, but this point of departure is necessary to acknowledge as it should be accepted that the act of penetration can be justified all things considered. Perhaps a middle ground can be accepted. As Wall explains perhaps where a defendant relies on his misguided understanding that the penetration was justified, we could accept that his conduct was excused rather than justified.[1051]

Although this is somewhat of a departure from Herring and Dempsey's argument, the key concepts and elements of their theoretical standpoint remains endorsed. Both Herring and Dempsey rely on this idea of the social meaning of penetration as a strong basis for the justification required for penetration. However, if we combine this argument with the theory of vulnerability, we no longer require this emphasis and hence the point of departure is acceptable. This will however require us to reconceptualise the meaning of harm through a theory of vulnerability.

2.3 RETHINKING HARM THROUGH VULNERABILITY

The above sections have addressed a potential starting point to reimagine sexual offences using Herring and Dempsey's conceptualisation of sexual penetration. This starting point has many implications, and arguably its potential can be only be fully realised when it is coupled with a theory of vulnerability. This will therefore require us to continue to

[1046] Ibid 487.
[1047] Ibid.
[1048] Ibid 472.
[1049] Ibid 482.
[1050] Herring & Dempsey (n 99) 37.
[1051] Wall (n 1018) 293.

challenge our traditional understandings. In this section, we look at what harm is, and begin to reimagine what it could be through a theory of vulnerability. There is not yet any substantial literature exploring the conceptualisation of harm through a theory of vulnerability. This section will therefore attempt to reimagine how harm might be perceived to be through a lens of vulnerability.

As explored in chapter 1, it is quite difficult to conceptualise what the harm of sexual offences is to each individual. The law appears to conceptualise the harm of non-consensual sexual activity as a violation of sexual autonomy. Some victims might conceptualise their experience of sexual assault as a denial of their autonomous right to say no, although there may be a varied response and experience of rape. Equally then it could be argued considering the inextricable links with consent that the infringement of autonomy cannot be accurately reflect the harm of rape. As Rubenfeld supports this and suggests:

> 'Autonomy is the sort of thing that's "infringed." Rape is not a mere "infringement." We might as well explain torture as an infringement of the victim's "bodily autonomy"—his right to do what he likes with his own body. Some evils go beyond the infringement of autonomy. Their wrongfulness and harm cannot be captured in terms of non-consent, even though consent will typically be lacking.'[1052]

Moreover, if we are arguing to remove autonomy from the core of our response to sexual offences, we must consider how harm might be perceived. Considering the key concepts of the vulnerability theory as detailed in chapter 1 and throughout this thesis, we can accept that our vulnerability is inherent, universal and also particular. At different moments in our lifetime we may experience that vulnerability in a different light depending on our resilience at that time and the situational circumstances in which we are acting. Rather than being responsibilised to avoid harm, instead we could demand that individuals accept their moral duty not to exploit others vulnerability. It could be that we can conceptualise harm as an exploitation of our vulnerability. The knowledge and awareness that an individual was experiencing their vulnerability and knowingly exploiting that vulnerability. Moreover, this would create a responsibility on the State to provide resilience to avoid instances of the exploitation of vulnerability.

The harm of sexual offences is also experienced on an individual level and the focus on this is therefore arguably justified. However, we also recognise that one of the aims of the

[1052] Rubenfeld (n 148) 1425.

vulnerability theory is to shift away from a focus on the individual onto the responsibility of the State and its institutions. Together with this understanding of the harm of the exploitation of vulnerability, we could consider the violation of someone's vulnerability as it is experienced in society. As Brison notes, that all women's lives are restricted by sexual violence is indisputable[1053] societal harm. As Scholz explains, Brison argues that some of the harm experienced in the aftermath of rape and sexual assault is shaped by the social constructs in which we live.[1054] She further explains that 'as a result of their victimization, they often lose their jobs, their homes, their spouses— in addition to a great deal of money, time, sleep, self-esteem, and peace of mind.'[1055] Like Herring and Dempsey note, sexual penetration is perceived to be a degrading devaluation of a woman through its social meaning.[1056] We could then impose a collective responsibility as well as an individual responsibility not to exploit one another. Through this reconceptualization, we can demand that individuals owe each other, and society a duty not to exploit each-others' vulnerability. In terms of sexual offences, if we suggest that sexual penetration carries with it the potential for exploitation of vulnerability, we can further strengthen Herring and Dempsey's argument that sexual penetration requires justification. Moreover, as will be explored below, we could build on this argument and suggest that considering the risk of exploitation of vulnerability, any sexual touching, not just penetration, requires justification.

3. THE LEGAL RESPONSE IF SEXUAL PENETRATION REQUIRES JUSTIFICATION THROUGH A VULNERABILITY LENS.

Herring and Dempsey have suggested that a legal response to sexual offences would require reformulation if we start from a point where sexual penetration requires justification. This section will explore the strength of their argument where it is coupled with a vulnerability lens. In the above sections we have detailed the key elements of Dempsey and Herring's position. Although in their article, they state that their concern is not directly criminalisation.[1057] They do, however, begin to suggest how a legal response

[1053] Brison, S.J., *Aftermath: Violence and the Remaking of self* (Princeton: Princeton University Press:2001) chapter 1, 18
[1054] Sally J Scholz,' Book Reviews' [2004] 9(8) *Violence Against Women*, 1032–1036, 1034
[1055] Brison (n 1053) 11.
[1056] Dempsey & Herring (n 54) 488.
[1057] Ibid 467.

might be framed where sexual penetration requires justification. Building on these points, this section will now use the above-mentioned conceptualisation of harm with the aims of a theory of vulnerability to determine the potential legal response to sexual offences.

3.1 THE ACTUS REUS

The starting point for any criminal wrong deserving of sanction is determining the actus reus. We must look at an act and determine whether it is a wrong that is deserving of criminal sanction. It is that wrong act or the 'actus reus' that requires criminalisation. Presently, the actus reus of rape is composed of two elements, which is contained within s1 of the Sexual Offences Act 2003. The first element requires there to be penetration of the anus or vagina by a penis. Crucially, the second element is that penetration takes place without consent.

Herring and Dempsey began to suggest reforms to the actus reus of rape which only requires there to be penetration of the vagina or anus.[1058] They have suggested that the actus reus of an offence could start from this point if we agree that it is not 'justifiable… due to the restricted normative scope of consent'[1059] or the considerations regarding the social meaning which consent is incompetent to affect.'[1060] From a vulnerability perspective, it is agreed that consent is inadequate, and therefore this is a justified starting point. Moreover, considering our universal and particular vulnerability, the position that penetration requires justification fits neatly within our theoretical framework.

If we start from a position where the act itself is deemed to require justification, immediately our focus is shifted away from the complainant and onto the defendant. As explained by Herring and Dempsey, this is true of many offences including common law assault and Actual Bodily harm for example. It is presumed that the touching of another or imposition of physical force on another is wrong, unless there are reasons to justify that act. Generally, if someone strikes another, we would consider their actions wrong, and we would scrutinize their behaviour and their reasoning behind the strike. Therefore, we would not examine the behaviour of the victim in that situation unless reliance was sought on self-defence.

[1058] Herring & Dempsey (n 99) 42.
[1059] Ibid.
[1060] Ibid.

The actus reus would therefore no longer contain 'without consent' and would instead focus on the physical act of penetration. This position would recognise universal and inherent vulnerability of all individuals. Moreover, as a prima-facie wrong carrying risk of disease, physical harm and exploitation, the legal framework would reflect the potential harm of the act. The wrongdoing would therefore no longer rest on the lack of consent and would instead rely merely on the proof of penetration.

To build on this point, it might be possible to develop the actus reus of the offence to also include any sexual touching. Herring and Dempsey's argument focuses on sexual penetration. This may be for a range of reasons, including the explanation that the force required for penetration is the same as any other force onto another that requires justification or because of their argument that there is a negative social meaning attached to penetration. However, through a lens of vulnerability, and therefore widening the scope of the potential harms and the potential exposure to the risk of harms, it could perhaps be suggested that sexual touching carries the risk of exploitation. This argument may therefore be justifiably extended to cover all forms of sexual interactions, arguing that any intimate touching is a prima facie wrong and therefore requires justification. This extension may be more difficult to support, as the requirements for justification are admittedly not as robust as that for penetration. Nonetheless, the risk of exploitation of vulnerability still exists, and therefore warrants this development of the actus reus to cover other incidents beyond penetration. The current definitions of sexual as contained within the sexual offences act would be sufficient to cover these circumstances.[1061]

Therefore, through the lens of vulnerability and the requirement of justification for penetration, the actus reus of a new offence would be *the penetration, by a penis or other object, or the sexual touching of another.* It would be open to a defendant to deny that penetration or sexual touching took place and therefore deny the actus reus of the offence. Moreover, the prosecution would have to prove that the penetration or sexual touching took place together with the mens rea of the offence.

[1061] For the meaning of sexual see s78 Sexual Offences Act 2003

3.2 THE MENS REA AND THE POTENTIAL DEFENCES

The current mens rea of the offence of rape is that the defendant did not reasonably believe that the complainant consented.[1062] Considering the removal of consent from the actus reus of the offence this would also require reform. As Herring and Dempsey were not concerned with criminalisation, they have not detailed their perspective on the mens rea of a new offence. Perhaps, the mens rea of rape would refer to the facts that a defendant knowingly or recklessly exploited the vulnerability of another. If the prosecution could prove that penetration or touching took place, they would then need to show that a defendant did so with the intention of reckless to the fact, that their actions exploited the vulnerability of that individual. If these elements of the offence are fulfilled, then the offence would be satisfied. Therefore, the offence would be fulfilled where a defendant was aware or reckless that the penetration or touching exploited the vulnerability of another. Arguably then, the actus reus and the mens rea might be more fulfilled with more ease. The prosecution would only need to show that the defendant was aware of their actions and the potential consequences of their actions. However, there would be a defence available to the defendant to suggest that 'all things considered' their actions were justified.

3.3 EVIDENCE THAT THE COMPLAINANT WAS NOT EXPLOITED

Departing from Herring and Dempsey's argument, we can look to the defence as a way to suggest that what the defendants touching or penetration, was, all things considered, justified. It would be open to a defendant to rely on this defence to demonstrate that their actions did not amount to an exploitation of the individual's vulnerability, and instead they were justified in their sexual relations. As above explored, consent alone would not be enough to amount to a justification. As Dempsey and Herring suggest that a defendant could demonstrate his penetration was justified which would bear 'greater normative force' than consent alone.[1063] Of course, consent of the complainant could still be considered as an element of justification, and therefore form part of a *defence* rather than the *offence* of

[1062] S1(1)(c) Sexual Offences Act 2003
[1063] Herring & Dempsey (n 99) 42.

rape. As earlier explored, consent is problematic because it bears no normative force. Herring has also referred to the fact that consent, is merely an exclusionary permission given to the defendant, to take consent as an assessment of their well-being.[1064] Herring argues though, that such consent, given particularly in the heat of the moment, may not in fact reflect a true exercise of autonomy.[1065] Where the defendant personally gains from such an assessment, 'it is hard to resist the conclusion that D is acting for self-purposes rather than in the bests interests of V'.[1066] He therefore argues that if a defendant is aware that the apparent consent of the victim-survivors 'does not sit within their deeper values and decision' then arguably, the defendant cannot accept that consent as a genuinely autonomous decision. The question must of course then follow, should the Defendant be criminally responsible where he is aware that the apparent consent given, is not in fact in the best interests of the victim? In an ideal world, both sexual partners should be in equal positions both exercising freedom and self-determination. However, where one party may be less resilient than another, and the parties start from a somewhat unequal standpoint, is it realistic, or even desirable, to have criminal intervention? Arguable it is not, instead the criminal law should place different responsibilities on defendants, such as a positive obligation not to exploit someone. Take strangers at a party for example, is appropriate for D to take stranger's Vs current consent as being a sufficient assessment of their well-being? Moreover, the defendant does not know the victim, should we place him in a position carrying criminal responsibility if he fails to properly assess the victim's bests interests? Perhaps this leads us to consider the role of the criminal law.

Can we criminalise a defendant where he might be aware that the consent given, albeit valid, is not in the Vs bests interests? We must differentiate between what the criminal law considers wrongful and deserving of punishment, to issues of morality. If we were to criminalise such behaviour, there is a chance that we would be removing every aspect of individual responsibility. So long as a defendant can demonstrate that they did not exploit the vulnerability of the V, and that they were justified in their actions, the criminal law should not be concerned with whether or not the victim had flourished. This is not and should not be the role of the law. Instead, we look to the issues of exploitation, consent and justification. That said, when a jury are considering, whether all things considered the

[1064] Herring, J., 'Consent in criminal law: the importance of relationality and responsibility' in Reed and Bohlander (eds) General Defences in Criminal Law 63
[1065] Ibid.
[1066] Ibid.

Defendant was justified in their sexual touching, they may look to the victim's experience of the encounter. In doing so, the defendant's knowledge and awareness of the victim's experience, together with evidence of consent, may help inform their view as to whether a defendant's actions were, all things considered, justified.

As Wall made reference to Fletcher's argument that consent ought to be a 'justificatory offence.'[1067] This position that justification is not an element of the offence fits well within the actus reus and mens rea as suggested above. Consent would act as an integral part of a justification for the defendant's actions. To rely on this defence, consent would need to be evidenced. However, as aforementioned, consent alone is not enough to give normative force to the actions of the defendant and therefore some other reasons demonstrating justification would be required.

Together with evidence of consent, as Herring and Dempsey argue, a defendant could show how his actions were justified and did not dehumanize or downgrade the complainant.[1068] He could demonstrate how his touching or penetration was welcomed, reciprocated and done so where his actions brought about outcomes mutually desirable. This would be an optional evidence that could be adduced by a defendant to demonstrate justification for their actions.

Building on this point, together with the requirement of consent, it would be fundamental for a defendant to demonstrate that he did not exploit the vulnerability of the complainant. This would form a core part of a defence that would need to be evidenced for a defendant's actions to be determined as 'all things considered, justified.' Considering our universal and constant vulnerability, a defendant would need to be aware at all stages that there is potential for an individual's vulnerability to be exploited at any stage or situation. Moreover, with the knowledge that everyone's vulnerability is also fluid and particular, a defendant would need to be conscious of the particular situation in which penetration or touching would take place. The legislation might dictate certain circumstances in which it would be presumed that a defendant was aware that an individual would be experiencing their vulnerability, and therefore it would be for the defendant to disprove that that individual in those circumstances had enough resilience at the time, to not be exploited.

[1067] Wall (n 1018) 284 citing George P Fletcher *Rethinking Criminal Law* (Boston and Toronto: Little Brown, 1978) 707.
[1068] Herring & Dempsey (n 99) 42.

These circumstances could include where a defendant was in a particular position of power, trust or authority over the other individual. Moreover, these situations could also include circumstances where an individual's vulnerability was realised where their mental functioning was so affected by some factor, whether that be through an intoxicant, disability or environmental factor. The defendant could not argue his actions were justified where a particular incident arose where it would be clear that the complainant was experiencing their particular vulnerability; therefore, it would be presumed that a defendant knowingly exploited their vulnerability and therefore cannot justify the penetration or sexual touching.

The above defence suggestions are not intended to be exhaustive, but merely represent circumstances upon which a defendant may or may not be justified in their actions demonstrating that they did not exploit the vulnerability of the complainant. It is unlikely that a list of circumstances would be clearly detailed in legislation. One of the key elements of a vulnerability theory is to recognise our inherent, universal and particular vulnerabilities that are susceptible to change at any time. Therefore, we are moving away from a categorisation of people or groups as particularly vulnerable, and instead are encouraging a focus on the situational and a particular circumstances at a moment in time. This lens demands that a defendant examine the situational circumstances in which the complainant is apparently consenting to determine whether their actions would be justified. Moreover, this would require the defendant to be conscious of the potential exploitative nature of his actions. As the mens rea requires the defendant to knowingly or recklessly exploit another, his defence would have to demonstrate that he did not deliberately exploit another's vulnerability. This approach could address many of the concerns that exist within the current legal response, but this must be coupled with widespread systemic change.[1069]

4. THE LIKELY CHALLENGES AHEAD

This chapter has suggested that in light of the previous chapters, the legal response to sexual offences is inadequate. Consent alone is inadequate to afford proper protections to individuals, and instead a complete overhaul to the approach to sexual relations is required. Herring and Dempsey's position that sexual penetration requires justification has been

[1069] As detailed in the conclusion chapter

applied, extended and expanded to suggest a new offence and to include other forms of sexual assault. This argument has been strengthened through a vulnerability lens, by reimagining harm and using this position to encourage individuals to take responsibility to not harm each other.

4.1 SEX NEUTRALITY

Considering the historical significance of rape as a gendered crime perpetrated by a man against a woman, it is likely that the sex neutrality of the new offence of unjustified sexual relations might face some hesitancy. As outlined above, in contrast to the current heteronormative legal response to sexual offences, the law would not be framed in terms of gender. By including sexual touching, and removing the focus on penetration, both male and female perpetrators could be guilty of this offence. Moreover, like the current legislative response, both male and females could be victims of the offence too. The historical significance of the term 'rape' and keeping such an offence separate from female perpetrators has arguably lost its impact. As discussed in chapter 2, the term rape has become clouded in heteronormative assumptions and traditional expectations about gendered behaviour, which in turn carries responsibilisation and stereotypical attitudes. Although it is acknowledged, as the introduction outlined, the majority of perpetrators are male and the majority of victims of sexual assault are female, this would no longer serve as a justification for the segregation of protections. We should not make distinctions based on frequency.

It has been argued throughout the failings of the legislative response largely relate to the focus on autonomy and the responisbilation of individual victims. To avoid creating similar issues, we must remove any boundaries and segregations. We must acknowledge and respond to the universality of vulnerability. Our experience of vulnerability, and the potential to have that vulnerability exploited does not solely rest with gender. Our experience of our vulnerability is dependent on our resilience. It is our embedded position in society that effects our experience of our particular vulnerabilities. Instead of focussing on gender, we need to ask more difficult questions about the source and experience of particular vulnerabilities. It is argued that the gender- neutral offence of unjustified sexual relations, framed through a theory of vulnerability, can help us to respond accordingly.

4.2 THE BROADNESS OF THE OFFENCE

Flowing from the previous point on the gender neutrality of an unjustified sexual relations offence, it is likely that the broadness of this new offence might face criticism. As explored in earlier chapters, rape, sexual assault, causing another to engage in sexual activities, and assault by penetration are all contained within different sections of the Sexual Offences Act.[1070] In particular, non- consensual sexual touching and penetration not by a penis, do not fall within the definition of rape, and instead sit as separate offences under section 2 and section 3 of the act accordingly. Through this new offence, the actus reus of unjustified sexual relations covers any sexual touching or any penetration. Therefore, we must consider how the benefits of such an approach might outweigh any suggested shortfalls.

Historically, rape has been noted as a particularly heinous crime. However, we must consider whether this label of rape, and its traditional significance, remain as powerful today. Gardner and Shute have discussed why penetration is 'so special', and why such violations are considered particularly horrifying? The thinking is that rape is (particularly) terrible, but as Shute and Garner argue, this alone is not enough to justify its distinction.[1071] Moreover, they discuss the development of the meaning of rape, where it used to be considered in terms of female virginity or as property of their fathers/husbands.[1072] They argue its significance has 'changed drastically it has changed for the worse, creating scripts and expectations that are unrealistic'.[1073] Moreover, they go on to state

'The point is that the although the mere use of people is a timeless evil, the elevation of penetrative non-consensual violation to the status of a special paradigm is a longstanding but culturally conditioned application.'[1074]

Instead, Shute and Gardner suggest rape to be widened to include all forms of sexual touching.[1075] We take this point and agree that the elevation of rape as a particularly heinous crime retains is status merely symbolically. As explored in chapter 2, the term rape is problematic as it carries expectations of 'real' violent strange rapes, that in turns creates expectations and a hierarchy of protections. This also carries an expectation that penetration with a penis, indeed violent penetration as so often is expected with the term

[1070] S1-s4 Sexual Offences Act 2003.
[1071] Gardner, J., & Shute, S.,' The wrongness of rape' in Horder, J., *Essays in Jurisprudence* (Oxford, OUP, 2000) 209-210
[1072] Ibid.
[1073] Ibid.
[1074] Ibid.
[1075] Ibid 212.

rape, is particularly worse than other forms of sexual abuse. Of course, some might suggest, as Herring and Wall do,[1076] that penetration is a forceful act that carries risks of physical harm. The Sexual Offences Act does acknowledge the significance of penetration as both assault by a penis and other penetration, carry maximum life sentences.[1077] Whereas sexual assault is categorised as an either way offence carrying a term of up to 10 years on indictment.[1078] The distinction and justification for penetration appears to be based on the potential for physical harm.

Arguably, the experience of sexual assault and rape is wholly subjective and cannot be categorised or graded. The worst rapes do not necessarily mean the most violent ones. Arguably, it is the experience of the victim-survivor, and the particular exploitation of their vulnerability which should be the focus. Because of this subjective nature of sexual assault, we can and should differentiate it from other non-fatal offences against the person. For example, rape and sexual assault is not so clear cut as assault, actual bodily harm and grievous bodily harm. We cannot look to charging standards for guidance, or a particular wound to estimate the length of the healing process to reflect its severity. We cannot objectively determine its gravity, its healing time, or indeed the pain of suffering caused to the victim-survivor. Sexual violations go beyond just physiological harms, to differentiate based on the potential for physical harms is arguably reductivism. Moreover, as referred to in chapter 2,3 and 4, by differentiating between sexual violations, the law creates a hierarchy of protections, affording more protections to those we deem as most deserved, and thereby placing excessive responsibility on others to avoid harm. Therefore, it is argued, that the current legislative response is inadequate and unjustified. A more holistic, nuanced and broader offence of unjustified sexual relations should more accurately and fairly respond to sexual violations.

4.3 THE PROBLEMS WITH 'EXPLOITATION'

Another likely challenge lays within the meaning and understanding of the term exploitation. As a central concept to the above-mentioned offence of unjustified sexual relations, it is appropriate to consider what is meant by exploitation. In its simplest terms,

[1076] Ibid.
[1077] S1 & s2 Sexual Offences Act 2003
[1078] Sexual Offences Act 2003 s3

in our context, we take exploitation to mean the taking advantage of another's vulnerability. Whether taking advantage has to be wrongful, benefit the user or be unfair are just some of the issues which have been explored in literature.

There has been much discussion of exploitation as a concept with many academics struggling to agree a 'general theory of exploitation'.[1079] This may perhaps be due to the complex nature of what exploitation is, together with the different contexts in which exploitation might be applicable, eg financial versus intimate exploitation. There are many academics who have written widely on exploitation. Feinberg's understanding of exploitation is often a starting point 'how A uses B; what it is about B that A uses; and how the process redistributes gains and losses'.[1080] However, as Collins notes, this formula tends to raise more questions than it answers.[1081] It is not within the scope of this thesis to offer a definition or refined understanding of exploitation, but it is worth exploring the differing academic opinions on the concept to highlight the difficulties in conceptualising exploitation. Below is a brief exploration of the differing interpretations amongst some of the leading scholars.

Tea Logar questions whether defining exploitation is in fact possible. Logar explains, in its most basic of terms, we can understand exploitation to mean 'taking wrongful advantage of another's vulnerability'.[1082] Here, Logar suggests that the advantage taking be 'wrongful'.[1083] Indeed, Logar uses exploitation and wrongful use interchangeably.[1084] We must therefore explore what Logar means by 'wrongful' use, and under what circumstances is use acceptable. She designates wrongful use as a subset of wrongful treatment, distinguishing it from other forms of mistreatments such as 'neglect, oppression, discrimination'.[1085] She describes wrongful use as using a person as an object or an instrument.[1086] She further explores when is use wrongful, given that there are a variety of

[1079] Tea Logar, Exploitation as Wrongful use: Beyond taking advantage of Vulnerabilities' [2010] 25 *Acta Analytica* 329-346, 332
[1080] Joel Feinberg, 'The Moral Limits of the Criminal Law: Harmless Wrongdoing' [1988] 176-210, 179.
[1081] Jennifer Collins, 'Exploitation of Persons and the Limits of the Criminal Law' [2017] 3 *Criminal Law Review* 167-184, 175
[1082] Tea Logar, Exploitation as Wrongful use: Beyond taking advantage of Vulnerabilities' [2010] 25 *Acta Analytica* 329-346, 329.
[1083] Ibid.
[1084] Ibid at 331.
[1085] Ibid at 331.
[1086] Ibid at 331.

circumstances where people benefit from other's needs, citing that 'it is acceptable to trade food, medicine, and clothes for money'.[1087] In citing Goodin's understanding of exploitation, Logar states that context and circumstances will help determine when use is wrongful. Goodin relies on 'social norms, as he explains exploitation in terms of a violation of the norms governing certain social interactions'.[1088] Moreover, Goodin's theory of exploitation would not be applicable in our context. Through his traditional understanding of vulnerability, he understands exploitation as a failure to protect the vulnerable.[1089] He suggests someone is vulnerable when they are dependent on you and when they can be harmed by you.[1090] Goodin's basic understanding of exploitation is therefore grounded on a misunderstanding of vulnerability. Moreover, in the context of sexual offences, until our understanding of sexual relations reflects a more mutually beneficial experience, it is unlikely that we would take an approach where wrongful would be considered in light of social norms.

Logar further suggests that wrongful use is different and broader than taking advantage, as the latter requires some sort of benefit be obtained by the user. She disagrees with this interpretation and argues that someone can use someone without per se gaining benefit for themselves. Moreover, Logar criticises what is meant by benefit, it may be that objectively they have not in fact gained.[1091] Logar is particularly critical of the requirement of gain and or benefit for these reasons, ultimately stating it is not necessary to demonstrate exploitation.[1092] In the context of sexual offences however, with particular attention to the requirement demonstrating that the did not exploit the complainant, it may be beneficial to demonstrate that a defendant acted in such a way so as to benefit themselves through the use of another. It is therefore unlikely that the understanding of wrongful use as exploitation would be helpful for the purposes of sexual offences.
Ruth Semple understands exploitation differently. In her analysis she refers to exploitation as 'degradation'.[1093] She explains that seeing exploitation 'in terms of respect for

[1087] Ibid at 336.
[1088] Ibid at 337.
[1089] Goodin, R., E., *Protecting the Vulnerable* (The University of Chicago Press: Chicago, 1985) 112
[1090] Ibid
[1091] Tea Logar, Exploitation as Wrongful use: Beyond taking advantage of Vulnerabilities' [2010] 25 *Acta Analytica* 329-346,331.
[1092] Ibid at 332.
[1093] Sample, R., *Exploitation: What it is and why it's wrong* (Lanham: Rowman & Littlefield, 2003) 56

persons'[1094] helps us to understand our 'obligation not to exploit'.[1095] Moreover, she suggests the use of a vulnerability is a prerequisite for exploitation.[1096] Hence, she argues that making 'use of one's vulnerability for the sake of advantage is our basic way of understanding exploitation'.[1097] She refers only to 'genuine vulnerabilities' as capable of being exploited. Although within this umbrella concept she refers to more than just basic material but also to ideals such as self-respect, rights and liberties.[1098] Perhaps this conception of exploitation of vulnerability could be broadened through the vulnerability theory lens to incorporate a broader range of circumstances.

She further argues that the basic ideals of exploitation involve 'the interacting with another for the sake of advantage in a way that degrades or fails to respect the value in that being'.[1099] Her focus is therefore on (dis)respect. She states that there are three broad divisions of failing to respect a person, which include ensuring a flourishing life, taking advantage of an injustice and treating a person as an object.[1100] Arguably, Sample's analysis takes a moral standpoint, focussing on duties owed to each other to ensure a flourishing life.[1101] Logar criticises Sample's standpoint, suggesting that it is too narrow, as it focuses on needs and excludes the exploitation of desires.[1102]

More recently Collins has explored this concept of exploitation. She distinguishes between the mere use of a person and the use of a person as mere means.[1103] The former she describes as permissible, while the latter should be criminalised. She identifies the links between exploitation and criminalisation, whilst criticising the criminal law approach. She argues that the criminal law is limited in its abilities to in addressing 'the root of the power dynamics which may lead to exploitation'.[1104] Indeed, it is agreed that the criminal law is not necessarily the ultimate answer to address exploitation, however it is a necessary

[1094] Ibid.
[1095] Ibid.
[1096] Ibid at 83.
[1097] Ibid at 83.
[1098] Ibid at 74
[1099] Ibid.
[1100] Ibid at 57.
[1101] Ibid at 83
[1102] Tea Logar, Exploitation as Wrongful use: Beyond taking advantage of Vulnerabilities' [2010] 25 *Acta Analytica* 329-346, 329.
[1103] Jennifer Collins, 'Exploitation of Persons and the Limits of the Criminal Law' [2017] 3 *Criminal Law Review* 167-184, 170.
[1104] Ibid at 169.

element. Together with a change in societal attitudes of vulnerability, the responsibility of the State and an acceptance of our duties not to exploit one another, the criminal law play a key role in addressing exploitation.

The above is merely a brief overview of some of the differing opinions on the theory of exploitation. It is clear that there is no consensus as to what exploitation means. Indeed, it may prove difficult to define exploitation within legislation. Perhaps legislation would not attempt to define this difficult concept but instead include guidance as to what amounts to exploitation perhaps referring to the use of a person as a means, for the defendant's benefit with reference to elements of disrespect and using a person as an object. This may well be a challenge, coupled with the likely resistance of the requirement of justification for penetration.

4.4 LIKELY RESISTANCE

However, it is unlikely that these suggestions will be openly welcomed. Requiring the act of penetration to be justified on every occasion is likely to be perceived as onerous. In fact, Dempsey and Herring's proposal has already been critiqued. For example, Nicholas J McBride analysed Herring and Dempsey's suggestion regarding the wrongness of rape.[1105] He suggested that the courts should not adopt the standpoint that rape is unjustified sex.[1106] He rejects this argument because he suggests that the unjustified sex argument fails to account for the qualitative nature of the harm; as he cites Robin West,[1107] it does not account for the 'spiritual murder' of rape. To address this concern, it can be argued that by requiring justification for penetration through a vulnerability lens, we can consider other non-physiological wrongs. By rethinking the harm of sexual offences, as potential exploitation of vulnerability, we can consider that the potential harm of unjustified penetration encapsulates the potential abuse a complainant might experience.

It is unsurprising that liberal academics disagree with a legal stance requiring justification for penetration. Anthony Duff in particular, has argued that 'we should not have to answer,

[1105] Nicholas J McBride, 'Rape and Consent' [2012] (online) available at SSRN: https://ssrn.com/abstract=2489819
[1106] Ibid.
[1107] Robin West, 'Legitimating the illegitimate: a comment on "Beyond rape"' [1993] 93 *Columbia Law Review* 1442, 1448

to our fellow citizens through the criminal courts, for every act of sexual penetration.'[1108] As explored by Dsouza, for Duff, sex is presumptively consensual, and that it would be 'anti-liberal to demand that all persons engaging in sexual penetration should answer to the polity.'[1109] However, to engage with this argument we can suggest that the law currently does ask justification for penetration from individuals. The burden of such justification rests solely with consent, and as explored above and in chapter 3, consent alone is not powerful enough. Moreover, to demand a defendant to take more responsibility not to exploit others, is unlikely to be as burdensome as Duff maintains. Even through an autonomy lens, one could argue that autonomy might be more respected should we require justification for sexual penetration. We need to move away from a point of presumptive consent which arguably does not serve to protect the *autonomy* of individuals as it so claims. Instead we must start from a presumption of non-consent where penetration requires justification because of the potential exploitation of vulnerability.

As Wall has cited, Dempsey and Herring's view has been dubbed as 'alternative and extreme.'[1110] There will likely be much hesitation to accepting the view that both sexual penetration is a prima facie wrong and that sex requires more justification than consent alone. As Herring and Dempsey have cited, the orthodox view is that there is nothing wrong with sex.[1111] Therefore this starting position may be difficult to implement. As Wall explains, labelling sexual penetration as wrong therefore means 'there is prohibitory norm' against it.[1112] The law in labelling penetration as wrong would provide a protected reason not to do something. Having such a rule against sexual penetration would therefore remove the 'weighing up of reasons' for or against a scenario. As detailed by Wall 'whilst the law may prohibit an activity, and pre-emptively exclude countervailing reasons for action from the equation, the law may also provide justificatory defences, which permit a certain set of countervailing reasons for action to re-enter the equation.'[1113] Therefore, the wrongfulness of penetration can be, all things considered justified. Moreover, although categorising sexual penetration as initially *wrong* will no doubt cause controversy, we can arguably

[1108] R.A. Duff, Answering for Crime (Oxford: Hart Publishing, 2007), 209
[1109] Mark Dsouza, 'Undermining prima facie consent in the criminal law' [2014] 33 *Law and Philosophy* 489-524, 495
[1110] Wall (n 1018) 287 citing David Ormerod, Smith, Hogan, and Ormerod's (eds.) *Essentials of Criminal Law* (2nd ed.,Oxford: Oxford University Press, 2017) 279
[1111] Herring & Dempsey (n 99) 31 quoting Tadros, V. (2005) *Criminal Responsibility*, Oxford: Oxford University Press, 106.
[1112] Wall (n 1018) 292.
[1113] Wall (n 1018) 292.

justify this standpoint by suggesting that the wrongness lays in the potential for harm and exploitation. Moreover, we do need to reconsider the act of penetration as initially a wrong in order to demand that a defendant's actions be justified. This will help us to shift our focus from the complainant onto the actions of the defendant and help acknowledge, recognise and mitigate our vulnerabilities.

It is a radical overhaul to our current legal response to sexual relations especially considering the current autonomy-based approach. However, the leap to a point where penetration requires justification will be minimised when we reimagine our existence through a vulnerability theory. This theoretical framework has shaped the above suggested legal response. Arguably, it is unlikely that the offence as detailed above would be as effective through an autonomy lens. Moreover, for this legal response to be effective we would require widespread and systemic change to reflect the key components of a vulnerability theory. Institutional and societal change play a key role in the State's responsibility to address our universal and particular vulnerabilities. The law is a powerful tool and has a key position and in changing our approach to sexual offences. As Sabroe argues, 'laws are not neutral- they promote produce and reproduce particular understandings of how to be human of society of family of equality and inequality'[1114] and indeed it follows of capacities and incapacities. Equally, as Fineman states the 'law defines the circumstances under which an entity and its actions will be considered entitled to the special protection of law.'[1115] As a result, the law must be adapted around a complete, comprehensive understanding of the human experience if they are to work effectively for real-life subjects.[1116] As she articulates, 'law has agency, not just in its words but in its materiality and for the affect it has on human beings…[1117] the law is also the people and institutions that realise law.'[1118] Yet we must consider the implications of legal reform and how best to realise its potential. Therefore, the next chapter will conclude the overall thesis but will focus on how the vulnerability theory can be used to shape the societal response to sexual relations to bolster the potential of the suggested legal reform.

[1114] Jydbejerg (n 25).
[1115] Fineman (n 19) 6.
[1116] Ibid 10.
[1117] Jydbejerg (n 25).
[1118] Ibid.

Beyond the law

1. THE PROBLEMS AND POTENTIAL SOLUTIONS IDENTIFIED

This thesis has used a vulnerability theory to critique and unpick the legislation and its implementation in relation to sexual assault. It has been identified and argued that the current law is inadequate for many reasons. The following problems have been identified throughout this thesis.

Chapter 1 and 2 argued that problematic response to sexual assault complainants exists because of the inextricable links with the autonomy approach and the connotations and implications that such a lens carries, including responsibilisation and othering. It was also argued that consent as a foundational principle is unsuitable because it is vague, malleable and too open to manipulation by defence counsel. Moreover, the ways in which consent is framed and interpreted in the law is too subjective. This therefore encourages an undue focus on the complainant's behaviour. This arguably distracts jurors from considering the actions of the defendant.

Chapter 3 argued that protections for incapacitated complainants are inadequate. The presumptions contained within section 75 of the Sexual Offences Act 2003, focus primarily on the cause of the incapacitation rather than the individual's potential for exploitation. The differing protections of incapacitated individuals creates a hierarchy. The less blameworthy you are perceived to be for your incapacity the more protection you are ultimately awarded. In particular, those with a mental disorder are afforded the greatest protection, whereas those who become voluntarily intoxicated have the least legislative protections. Moreover, the determination of capacity and the implementations of the presumptions is problematic. Through an analysis of the case law it has been argued that if a voluntarily intoxicated complainant retains consciousness, they are often determined to have retained capacity. The autonomous decision to become voluntarily intoxicated is

linked to an acceptance of responsibility to avoid harm. This approach reinforces responsibilisation, stereotypical attitudes and victim blame.

Likewise, chapter 4 argued that the treatment of those with a mental disorder is also unsatisfactory. They are separated and othered by reason of the existence of a characteristic. The legal response fails to acknowledge the vulnerability of all individuals. Section 30 covers circumstances where a defendant has sexual intercourse with a person who has a mental disorder 'impeding choice.'[1119] This offence attempts to shift our perspective onto the defendant. It is a noteworthy attempt to balance sexual freedom and protection. Nonetheless, the constraints of an autonomy approach remain evident.

To help address the aforementioned issues with the legal approach in England and Wales, chapter 5 looked to the Canadian perspective to determine whether any lessons could be learned. In particular, the affirmative consent model and its implementation were critically examined. It concluded that the affirmative consent model would not bring about sufficient changes to address the issues as outlined in the previous chapters. It was argued that it fails to adequately address stereotypes because of its autonomy foundation which still leads us to responsibilise and place undue focus on the complainant's behaviour. Moreover, chapter 5 also examined the Canadian approach to the treatment of incapacities. The interpretation and application of this capacity umbrella approach unfortunately did not address the hierarchy of protections. It was argued that this failure was due to the approach still being informed through an autonomy lens.

Therefore, it was argued that the current legal response, as informed through an autonomy approach, is inadequate. Instead, what we need is a complete uprooting of the theoretical foundations of the law. It has been argued that a theory of vulnerability can take its place and alleviate the concerns addressed with the current legal and societal response to sexual assault complainants. Chapter 6 then considered what legislation might look like if it is based on a vulnerability foundation.

Through an analysis and expansion of Herring and Dempsey's arguments that sexual penetration is a prima facie wrong which requires justification, a new offence entitled 'unjustified sexual relations' was proffered. Chapter 6 detailed the new offence that is informed through a vulnerability lens. It suggested that the actus reus of the offence would

[1119] S30 Sexual Offences Act 2003

be sexual touching or penetration. The mens rea of the offence would refer to the defendant's knowledge or recklessness as to the exploitation of another's vulnerability. A defence would be available to a defendant to show that his actions were, all things considered, justified. He would have to demonstrate the consent of the complainant as well as evidence that he did not exploit the vulnerability of the complainant. Other circumstances could be evidenced to demonstrate that a defendant was justified in their actions.

It was argued that this offence may begin to alleviate the concerns identified in the previous chapters. Firstly, it would relocate consent from the heart of the offence to a contributing factor of a defence. Secondly, it would remove the hierarchy of protections through one single offence. There would no longer be different offences or protections available to certain individuals, instead the offence would include all individuals including incapacitated complainants howsoever caused. Having a single offence would therefore address the concerns of othering and responsibilisation and the hierarchy of protections. It would recognise our universal embodied and embedded vulnerability and not segregate or label individuals.

Most importantly, this new offence would help to shift our focus from the complainant onto the defendant. From a starting position where penetration requires justification, the onus, and therefore the lens, shifts onto the defendant to justify his actions and to demonstrate he did not exploit the vulnerability of the complainant. Demanding justification for an act of penetration places responsibility on individuals not to exploit others, rather than to avoid harm. This response would reflect our universal and particular vulnerabilities. Instead of starting from a presumption of capacity promoting autonomy and thereby responsibilising individuals, we would be recognising the reality of our vulnerability and accepting our susceptibility to exploitation. This would create both a legal and a moral duty not to exploit each-other's vulnerability. This shift means we could start to move from victim blaming and responsibilisation of complainants, away from reliance on stereotypical attitudes, expectations and myths.

This change may help address the stereotypical attitudes that affect complainants, particularly those who are voluntarily intoxicated. By switching our starting point through a theory of vulnerability, this will inform our understanding of sexual relations and arguably address the expectations that are currently placed on complainants.

The law is only ever one step in addressing issues. Although powerful, the law alone is not enough to change the deep-rooted issues within our response to sexual offences. To achieve substantive and effective change, we look to use vulnerability to challenge the role of the State and our societal attitudes. The vulnerability theory asks us to think more critically about our existence, our relationships with each other and with society. It asks us to take a step back, and to rethink everything we 'know' to be true. It makes us question the 'norms' we have accepted for so many years about responsibility, about the State role and about being 'autonomous'. Through vulnerability we can untangle these understandings, sourcing their root and questioning what if we were to start it all again? If we were to begin from a vulnerability perspective where would our focus lay, how would we perceive sexual relations? Where should our focus lay? In doing so, we can not only reimagine the law, but we can ask difficult questions of the State and society, to challenge how we perceive, understand and respond to sexual relations.

2. MOVING FORWARD: THE NEED FOR SYSTEMIC CHANGE

As previously discussed, we are vulnerable because of our embodiment as human beings. However, we must also recognise our vulnerability is embedded within our relationships with institutions and in society. As aforementioned, one of the aims of the vulnerability theory is to shift our perspective away from the individual onto the State. It asks us to look upward to determine the source of our vulnerability and question the distribution of resilience. Although the previous section has outlined the legal response to sexual offences through a vulnerability theory, we have still focussed on the individual. This is of course because sexual offences concern individuals; it is very difficult to imagine how you might create a legal response without considering individuals at the core. However, we still must address one of the aims of the vulnerability theory as a means of shifting our focus onto the State. It encourages us to move away from responsibilising individuals to demanding a State that is responsive to individuals' needs. As has been outlined in chapter 6, by reimagining harm through a vulnerability lens we look at the potential exploitation of our vulnerability as a source of harm, but also, we look at harm as a harm to societal norms. Moreover, by addressing the State's role in our experience of our vulnerability, we can demand a State that is proactive and responsible.

Through the aforementioned guise of the autonomy approach, the State has shifted its responsibilities onto its subjects. By recognising our vulnerability as constant, universal, fluctuating embedded and embodied in us, we need to demand a functioning and 'responsive' State. Martha Fineman proposes this idea of a Responsive State, responsible for providing us with the assets and tools to be 'resilient' when we experience our vulnerabilities in different lights. The concept of a Responsive State is intriguing and indeed a crucial component of the vulnerability theory; it demands that the State give equal regard to the shared vulnerability of all individuals, abandoning the traditional identity-based approach and recognising that the State must play an essential role in protecting against discrimination.[1120]

However, the terminology of 'responsive' used to describe the demand for State intervention, carries with it many dubious connotations. It is argued that describing a State as 'responsive' suggests harm must occur before the State's role and duties are activated. Moreover, it also suggests that the State plays some form of secondary part in our experience of vulnerability. It is in fact argued that the State currently has played a critical role in reinforcing and exacerbating our vulnerabilities through its failures to address our vulnerabilities and indeed in the creation of the hierarchies of protections and distributions of protections based on privilege. The State is always responding, but not necessarily in a proactive productive way. As Clough rightly contends, despite how the autonomy/paternalism binary currently works through the rejection of State interference, the State does already intrude in our lives through its various structures, institutions and norms.[1121] Yet this interference is often normalised and ignored by being made 'invisible.'[1122] We and indeed the State must recognise the State's involvement in aggravating and exposing our vulnerabilities. As Byes astutely recognises, 'disadvantage as well as privilege are not the product of individual choice but rather originate from unjust structural and institutional arrangements and therefore embody a failure of public responsibility.'[1123] Therefore, considering the role the State already plays in our lives, we

[1120] Fineman (n 19) 20.
[1121] Clough (n 21) 477.
[1122] Ibid.
[1123] Emese Byes 'imprisoned lives: expanding vulnerability to provoke sexual agency and inclusion in bodies labelled as intellectually disabled) *Workshop on vulnerability and Social Justice,* [2016] June 17-18 Leeds University.

should demand a State that monitors and adapts to our vulnerability to ensure institutions are structured justly.

Although the concept of the responsive State is persuasive, it is alternatively suggested we should describe the active State as a *Responsible State*; this instead suggests both the State's responsibility recognise the role it has played creating vulnerabilities and indeed its duty to be responsible to all its subjects equally. As Marvel argues 'the State must shoulder responsibility in creating the laws and social institutions that will prevent conditions of exploitation from occurring.'[1124] It is through access to these laws and institutions that we can as Martha Fineman coins 'build resilience' to confront our vulnerabilities. Although we cannot completely 'mitigate our vulnerability'[1125] resilience is what provides an individual with 'the means to recover from harm, setbacks, and the misfortunes that affect our lives.'[1126]

However, we are not born resilient,[1127] resilience is cumulative,[1128] and it also particular. Resilience is produced within institutions and relationships that confer power and privilege.[1129] We gather the tools to live a fruitful life through a range of social institutions, and it is, through a theory of vulnerability, the State's duty to provide us all with such resources. The State through its bodies should promote and foster resilience equally. Arguably individuals experience their vulnerability differently, this is often dependent on the quality and quantity of the resources they can access. This suggests that resilience depends on the how the State distributes access to resilience.[1130] Those who cannot command access are more likely to have their vulnerabilities exposed more often; this has been revealed through our analysis of the hierarchical protections of incapacitated rape complainants. It is this *inequality of resilience* that is at the heart of vulnerability 'because through unequal access to certain societal structures and or unequal allocations of powers'[1131] some individuals are deemed more deserving of protection. By dividing groups into categories, we ignore larger structural issues and instead focus on issues of identity rather than on access to resilience. This pursuit of individualised treatment through a

[1124] Marvel (n 18) 2045.
[1125] Fineman (n 21) 146.
[1126] Ibid.
[1127] Fineman [2014-2015] (n 21) 623.
[1128] Fineman (n 21) 146.
[1129] http://web.gs.emory.edu/vulnerability/about/definitions.html
[1130] As explored in chapter 1
[1131] Marvel (n 18) 2046.

rights-based framework results in resources being rationed accordingly. Once we recognise and welcome the universality of our vulnerability, we can reduce the stigma assigned to accessing State services, thereby demanding equal access to all.

Although imperative to the vulnerability theory the term 'resilience', it is argued, carries certain connotations. Arguably, 'resilience' in the ability to 'spring back into shape'[1132] from hardship suggests something quite individualistic, something experienced in isolation and independently; which is what the vulnerability theory seeks to avoid. Instead perhaps we should demand *access to resources* rather than resilience from the State, such terminology suggests a more universal and mutual approach to recovering from misfortunes. One such way in which the State can offer resilience to individuals is through the law. As we have explored above, the legal response can be moulded through a vulnerability theory. This approach will address the inequality of the distribution of resources and acknowledge our universal but also particular vulnerabilities. However, the law alone is not enough to tackle the challenges that exist within our current response to sexual offences, the State, through its other institutions as a duty to address our vulnerability.

The State has a duty to respond to our particular and universal vulnerabilities throughout all of its institutional frameworks. This would therefore require that current response to sexual offences in all areas would need to be reformed. Currently the State is failing by ignoring its responsibility and individually responsibilising its subjects. As we have seen through the analysis of the law, gaining a legal right does not necessarily allocate power but instead can burden and responsibilise. The State needs to use all measures available to rectify its failures and address its responsibility by promoting access to resources that promote a fruitful life for individuals. As Fineman argues 'it is inescapable that we are all impacted upon and shaped by social structures, institutions and discourses.'[1133] The challenge is, as Clough rightly recognises, to examine 'how these structures are working, and how they are impacting upon particular experiences.'[1134]

Once this is acknowledged through a theory of vulnerability, the State can make broad and wide-ranging institutional change. As aforementioned, the legal response could be shaped through a theory of vulnerability. As the law can help shape institutions and our societal

[1132] Oxford English dictionary definition
[1133] Fineman (n 19) 11.
[1134] Clough (n 21) 478.

response, we must look towards other measures to reimagine our ontological existence. One key issue of a lens of autonomy identified throughout this thesis is societal attitudes towards rape complainants. The expected behaviours, stereotypical attitudes and myths that many endorse creates significant barriers for complainants accessing justice. As discussed in detail in chapter 2, rape myths and attitudes affect complainants at every stage of the process. Therefore, we require a major shift in our attitudes towards sexual assault complainants. We need to reimagine sexual offences by reconceptualising our existence. Once we begin to think differently, we can start to do something differently. If we challenge our norms, we can challenge the expectations placed on victims of sexual assault. As alluded to in chapter 2, this is not achievable through a lens of autonomy because of the expectations that are interwoven within such a lens. Instead, the vulnerability theory can be used to tackle our understanding of our experience which could help to change our understandings and perceptions of sexual relations.

We require educative measures to be implemented to challenge traditional understandings of gender roles, stereotypes and myths about complainant and defendant's behaviour. This will require a shift from individual responsibility to State and relational responsibility. Such measures should reflect our universal and particular vulnerability. Campaigns on sexual assault should not be reinforcing ideas of women as vulnerable merely because of their gender and their being alone in public.[1135] Instead we should acknowledge that susceptibility to sexual violence may stems from a lack of resources and the failure of the State and its institutions. As Marvel rightly suggests our focus should be on 'an intersecting array of factors that include a lack of individual resources, legislative and judicial failures, and the limitations of institutional support.' [1136] This would require a tremendous shift in the current understandings and response to sexual assaults. In the current 'me too' climate there is an opportunity to use the theory of vulnerability as a new lens of analysing sexual relations; it is acknowledged that such a task would not be without its difficulties, but it is plausible. Public educative measures are essential but should be coupled with broader structural change to the bodies that currently respond to sexual offences. If the State acknowledges its responsibility both for creating vulnerabilities and in mitigating our vulnerability, the entire criminal justice system and its attitudes towards sexual assault complainants would need to be changed.

[1135] See chapter 2 for discussion.
[1136] Marvel (n 18) 2049.

Moreover, the lack of policing, police training, victim-survivor support and the nature of the judicial system would require reconsideration through a vulnerability lens. Clough examines how substantive reforms could improve the current position. She uses the theory to advocate for training and education that could reform and improve the justice system. She states

> '[f]ocusing through the lens of vulnerability emphasises the need for a range of responses. In the context of sexual vulnerability, this points to the need for education, training, access to justice, as well as services being augmented towards choice and control through positive risk taking.'[1137]

The current failures have all contributed to the exacerbation of vulnerabilities to sexual assault, and once responsibility is accepted there will be an opportunity to address its role through substantial reform. By combining the aforementioned legal reforms with widespread systemic societal and institutional change, we may potentially transform our attitudes and treatment of sexual assault complainants.

To conclude, a vulnerability analysis can assist us to reveal some of the many ways laws function to reproduce particular understandings of what it means to be human. When we reform the law through a vulnerability lens, it can have an impact on how we treat individuals who have experienced a sexual offence. We must use the vulnerability theory to reconceptualise our existence and societal understandings of sexual offences. To re-educate, to train and to understand our vulnerability and how to respond. We need widespread systemic change both to the law but also to the State, its institutions and individuals. Once we accept and welcome our vulnerability, and therefore our duty not to exploit each other, we can challenge the norms and distribute resilience equally.

[1137] Clough (n 174) 395.

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