



# Empowerment versus Protection:

## What should sexual consent look like for adults with Intellectual Disability?

EMNANI SUBHI, NEWCASTLE LAW SCHOOL

Our sexualities are a part of what makes us human [Vehmas, 2019].

Sexual expression, including the right to develop relationships, is protected by Article 8 of ECHR (right to a family and private life), and Article 12 of the Convention on the Rights of Persons with Disabilities or CRPD (the right to equal recognition before the law).

In mental capacity law, the two sides of autonomy – protection and empowerment – are in tension. The latter is insufficiently protected.

Section 30 of the Sexual Offences Act (2003) needs reform to ensure it is human rights-compliant and does not discriminate against people with intellectual disability (ID).

The legal threshold for consent needs to be **high** enough to punish perpetrators and **protect** those at greater risk of sexual abuse and exploitation, but **low** enough to avoid criminalising consensual activity and **empower** the lives of those who would benefit from sex and the extended joys of intimacy.

### Sections 30 – 33 Sexual Offences Act (2003)



Under the SOA, when someone is lacking the capacity to consent to sex due to a mental disorder, any sexual activity with that person is a crime under Sections 30-33.

These offences are committed when a person with a “mental disorder impeding choice”<sup>\*</sup> lacks the capacity to consent because of an insufficient understanding of the nature of the sexual activity, and its foreseeable consequences.

It is irrelevant, as far as the law is concerned, whether the sexual conduct was mutually desired.

In these provisions, the volitional component of sex is completely disregarded [Stanton-Ife, 2013].

<sup>\*</sup> as defined in s1 of the Mental Health Act 1983: ‘any disorder or disability of the mind.’

### RESEARCH QUESTIONS

- Where does Section 30 strike the balance between protecting people with ID from sexual abuse while also giving maximum recognition to their sexual freedom?
- Should the capacity to consent be based largely on an intellectual understanding of sexual activity and its consequences?
- Can ‘autonomy’, the role of ‘emotions’, and insights derived from recent developments in ‘vulnerability’ scholarship be used as potentially useful benchmarks for determining sexual capacity to move towards a truer standard of consent?

### RESEARCH DESIGN

#### INTERDISCIPLINARY APPROACH

Legal doctrinal analysis combined with socio-legal research to investigate capacity and related concepts

#### THEORETICAL FRAMEWORKS

**Sexual autonomy** as distinct from common notions of autonomy

**Agency** as a more useful notion than cognitive capacity

**Emotions** as playing an important role in sexual decision-making

**Vulnerability** as a concept to reframe autonomy

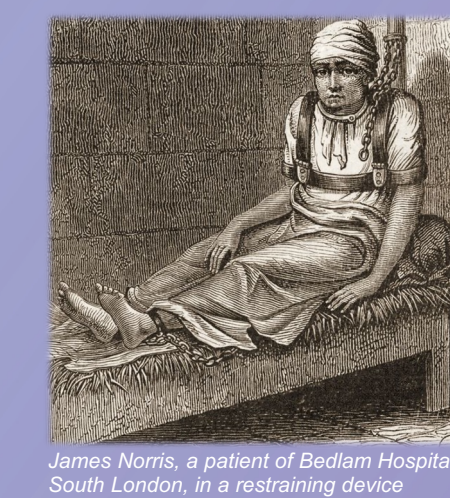
Scholarly perspectives & Feminist critique on Autonomy, Agency, Emotions and Vulnerability in the context of sexual capacity and decision-making

?

*In sexual relations, a lot of things are **coded**. It takes some level of experience to discern the difference between an affectionate caress and an erotic touch.*

*Vaginal sexual intercourse may lead to pregnancy, but what are the **‘reasonably foreseeable consequences’** of kissing?*

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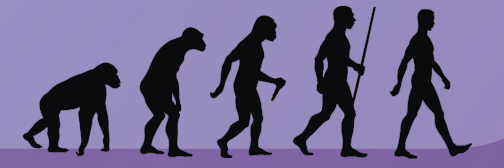
James Norris, a patient of Bedlam Hospital South London, in a restraining device

1774

The Madhouses Act 1774 set out the legal framework for the regulation of mental asylums or ‘madhouses’. People with cognitive impairments of all severities were detained in atrocious conditions.

1859

Darwin’s best-known work, ‘On the Origin of Species’, is published.



**R v Fletcher (1866)**

The ‘animal instincts’ of a severely learning-disabled woman was enough to provide the defendant with a defence to a charge of rape. The animal instinct doctrine set the bar low for capacity to consent.

1876

Henry Maudsley, a leading British psychiatrist, promotes the idea that ‘lunatics’ are by-products of evolution.



1913

The Mental Deficiency Act categorises people with learning disability and mental health issues as ‘idiots’, ‘imbeciles’ and ‘moral defectives’. The Act criminalised *all* sexual activity with a ‘female idiot or imbecile’ regardless of her ability or capacity to consent.

1907

The Eugenics Education Society is formed. Backed by Winston Churchill, the movement favoured the confinement, segregation and sterilisation of ‘feeble-minded’ people. This was based on the belief that they possessed a dangerous hypersexuality and would procreate at a faster rate than that of the general population.



1956

The Sexual Offences Act 1956 forbids sexual intercourse with a ‘defective’ woman in the knowledge of her learning disabilities.

1959

The Mental Health Act 1959 prohibited male staff employed in asylums and care homes from having intercourse with patients. The law seemingly offered protection, but legislation applied unevenly to men and women, were limited to individuals with severe mental impairments, employed archaic and demeaning language, and perpetrators were subject to very low sentencing.

The ‘Spastics Society’, an organisation promoting the rights of people with disability, felt it necessary to rebrand as ‘Scope’.

1994

**R v Jenkins (2000)**

**Care worker’s release on rape charge prompts CPS to seek review of law**

A care worker charged with raping a woman with a mental age of two years and eight months has walked free without standing trial, angering professionals working with people with severe learning disabilities who fear the law leaves such people with too little protection.

Clare Dyer, The Guardian, (2000) **The Guardian**

The hugely controversial case of R v Jenkins demonstrated that the animal instincts doctrine was still good law. A care worker was acquitted of the rape of a woman with severe learning difficulties, who fell pregnant despite her complete lack of understanding of the nature and implications of the sexual contact. This case was a major catalyst for legal reform.

2000

In response to Jenkins, the Home Office published the *Setting the Boundaries Review* which put forward proposals to reform the law on sexual offences against vulnerable people. It also stressed the need to promote their sexual freedom and that the criminal law ‘*should not intrude unnecessarily into the private life of adults.*’ (0.7)

**The Sexual Offences Act (2003)**

The definition of consent under s74 of the SOA provides that ‘a person consents if he agrees by choice, and has the freedom and capacity to make that choice.’

A shift is observed from the notion of consent to **capacity**.

CH v Metropolitan Council [2017] EWCOP 12

The long-term wife of a man with Down’s Syndrome was told that sex with him would constitute a criminal offence due to his limited understanding of sexually transmitted disease, even though they were in a committed and exclusive monogamous relationship.

Is this effective safeguarding or wrongful interference?



To read about another case that captures the difficulties balancing empowerment and protection, scan here →

