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**Shifting Sands? Consent, Context and Vulnerability in  
Contemporary Sexual Offences Policy in England and Wales**

*Vanessa E. Munro*

Though the consent threshold remains fundamental to the demarcation of acceptable from unacceptable forms of behaviour within contemporary sexual offences law and policy, there has clearly been a shift in recent years in England and Wales towards more ‘contextual’ understandings and interpretations thereof. In many respects, this is a welcome development, which has the potential to at least partially redress the problematic assumption of a disembodied, individualistic and self-determining chooser, which critics maintain has underpinned many conventional (liberal) accounts of autonomy. At the same time, however, there are risks associated with this turn to context that require vigilance. More specifically, this shift has opened the door to greater reliance upon the often closely associated concepts of vulnerability and exploitation. In this article, I will argue that, while these concepts can be valuable in highlighting and challenging the constraining conditions under which (sexual) choices may be made, they can also be deployed in the service of moral and political interventions that entrench precariousness in the name of protection and / or increase surveillance in pursuit of responsabilisation. To assess their impact, therefore, it is necessary to explore the concrete implications of this turn for those most immediately involved. In the following discussion, I will do so first by highlighting some of its perhaps unintended, but certainly undesirable, effects in the specific contexts of sexual assault and sex work policy. Having done so, I will move on to explore what we might learn more broadly from this experience about the benefits, blindspots and backfire in using vulnerability as a lens and lever for the pursuit of social justice.

Keywords: Sexual Offences, Consent, Vulnerability, Neoliberalism, Protection

**Shifting Sands? Consent, Context and Vulnerability in  
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*Vanessa E. Munro\**

Whether or not one accepts George Fletcher's insistence that "no idea testifies more powerfully to individuals as a source of value than the principle of consent" (1996: 109), there can be scarcely any denying the centrality of the consent threshold in contemporary sexual offences law and policy. Historical frameworks that conceptualised women as a form of (sexual) property, that conferred an entitlement of conjugal sexual access upon husbands, and that required evidence of a non-spousal assailant's physical force overbearing the utmost resistance of the victim to establish a sexual assault, have been gradually replaced (at the level of doctrine at least) by regimes that centre on the existence of sexual consent. Although claims to a contentious notion of 'public interest' entail that there are still some forms of sexual activity beyond the reach of even the most capable and informed of consents (in relation to BDSM or HIV transmission, see Bamforth, 1994; Cowan, 2012; Weait, 2005, 2016), for the most part, this binary marker has been imbued with a 'moral magic' (Hurd, 1996) that transforms impermissible into permissible personal contact, and thereby provides those involved with a 'legal flak jacket' (Beyeveld and Brownsword, 2007: 6) against criminal liability.

But despite the import that hangs upon its operation, the conceptual foundations of consent have attracted considerable criticism. In particular, the ways in which it has often operated to reinforce an unduly abstract and individualistic understanding of social living and self-determination has been challenged. Without dismissing the diversity of approaches *within* and across the liberal tradition (Nussbaum, 1999; Chambers, 2008), critics have challenged the assumptions underlying prominent accounts (for example, Rawls, 1971; Dworkin, 1985) that there are spheres of social living in which people are genuinely 'free' to make their own choices, and that the world is populated by rational, detached and self-interested 'choosing' subjects (McLain, 1992; Ferguson, 1993; Okin, 1994, 2004; Cornell, 1998). On the contrary, the need to situate individuals within their

social environment has been highlighted as crucial to any adequate understanding of the ways in which relationships, norms and surrounding circumstances construct and constrain choice (MacIntyre, 1988, 1999; Sandel, 1982; Taylor, 1989). This critique has had particular traction amongst feminists, not only because it highlights the relevance of structural power relations legitimated on the axes of gender differentiation (MacKinnon, 1987, 1989), but because it speaks to the ways in which women's conventional association with care and connection – which is refracted in subtle but significant ways through an amalgam of cultural, familial and biological imperatives - has denied them the status of rational agent and ensured that their choices often lack the credibility attributed to those of men (Lacey, 1998; Friedman, 1989; Hekman, 1995; Frazer & Lacey, 1983).

In many respects, the substantial energy that has been devoted to reforming the law on sexual assault in England and Wales in recent decades can be seen as an acknowledgement of the need to redress these concerns, to take seriously the impact of social contexts, relationships, and power dynamics (Munro, 2008a; Cowan, 2007), and to provide a model of consent that imposes a greater responsibility for ensuring 'communicative sexuality' (Pineau, 1996; Cowling, 2003). The Sexual Offences Act 2003 provides, for the first time, a statutory definition of consent: a person consents when s/he agrees by choice and has the freedom and capacity to make that choice. In line with previous authority, it focuses attention on the presence of consent rather than the absence of dissent, but its specific mention of the need for freedom and capacity points to a fuller exploration of the surrounding power dynamics and conditions within which (sexual) choices can meaningfully be made. What is more, the Act provides a list of circumstances in which consent, and any relevant belief therein, will be presumed – conclusively or presumptively – to have been absent, which is designed to give an additional framework within which the meanings of choice, freedom and capacity can, and should, be discerned. Further, it stipulates that, in order to avoid liability, any mistaken belief in consent harboured by the defendant must have been not only honest but also reasonable in all the circumstances; and it specifically requires assessment of the steps that he took to ascertain consent in order to evaluate any claim to reasonableness. The driving rationale behind this

was to more fairly distribute responsibility for communicating sexual desire between victim and assailant, and whilst it marks a departure from conventional subjective criminal liability, it was generally felt that this could be justified given the import of what was at stake and the relatively minimal action required in order to ensure that sexual contact had been agreed upon (Temkin & Ashworth, 2004).

Although regulated, for the most part, through different legal regimes, there has likewise been an increasing acknowledgment in recent prostitution policy of the role and relevance of context. In the midst of long-standing (and often hostile) debates over the legitimacy that can be afforded to tokens of consent to prostitution made by individual sex workers (see, for example, Jeffreys, 1997; O'Connell-Davidson, 1998; Phoenix, 1999, 2009; Campbell & O'Neill, 2006; Scoular, 2015) has been an acknowledgment on all sides of the complex conditions and constraints under which commercial sex is often sold. Though the act of selling sex itself continues to attract no criminal liability in England and Wales, there has been an increased policy preoccupation with the ways in which those who facilitate a person's prostitution and those who purchase sexual services might be held to higher account. As part of this process, there has been a growing emphasis placed upon the relationships, personal difficulties and structural dynamics that frame, and arguably undermine, any expression of choice or agreement that is tokened. Not coincidentally, this shift has been actualised amidst growing international anxieties over the phenomenon of contemporary 'sex trafficking' (and its associated challenges for border integrity, irregular migration and organised criminality), as well as the increased popularity of so-called 'Nordic' models of abolitionism within which prostitution is positioned largely unequivocally as a form of violence against women, to be eradicated via a dual targeting of supply and demand. Thus, section 14 of the Policing and Crime Act 2009 renders it an offence for anyone to purchase or promise to purchase sexual services from a prostitute who has been subjected by a third party to 'exploitative conduct of a kind likely to induce or encourage' their prostitution. The Home Office has confirmed, moreover, that this extends to situations in which a person's vulnerability - whether resulting from their young age, drug or alcohol dependency, history of victimisation, irregular immigration status, economic

disadvantage, social exclusion or personal relationship with the third party - is preyed upon in order to initiate or perpetuate their prostitution (2010).

In the rest of this article, I will explore in more detail the motivations that have driven these shifts, some of the tactics through which they have been operationalized, and their consequences for those people most immediately involved. While, in many respects, opening the door to context and inter-connection has been a positive step that promises a more existentially accurate (and enriching) conception of consent, and a more engaged and critical reflection with the question of constraint (Lacey, 1998; Cowan and Hunter, 2008; Munro, 2010), the aim of this article is to remind that it is far from without its dangers. Context is a duplicitous friend, and caution is required lest we submerge individuals' capacity for agency and resistance under the myriad relational, structural and disciplinary constraints within which they seek to chart the trajectory of their personal life narratives. At its root, of course, this is an age-old dilemma between structure and agency: over where to draw the boundaries between influence and abuse, or constraint and coercion; over how to engage with 'false consciousness'; and what do about 'adaptive preferences' (Friedman, 1987, 2003; Meyers, 1989; Chambers, 2008; Campbell, 2013). But I will argue that these debates have been given a unique flavour, as well as an urgency, in contemporary sexual offences policy, where the turn to context has increased space for discourses grounded in amorphous notions of 'vulnerability' and 'exploitation' and staked a battleground thereon for competing perspectives on the responsibility of the state, individual and 'moral community' to provide redress.

Focussing specifically on contemporary sexual assault and prostitution policy in England and Wales, I will first suggest that the potential within contextual approaches to provide a more nuanced analysis of the complexities of the interrelation between agency, control, and choice has too often been undermined by protectionist and neoliberal agendas that - in complex, sometimes contradictory, sometimes complementary ways - recast victim hierarchies on the basis of over-inclusive, but also highly conditional and precarious, conceptions of who counts as 'vulnerable'. Having done so, I will move on in later sections to

reflect more broadly on the implications of this analysis for current initiatives to increase reliance upon the concept of vulnerability as a lever for greater social justice and equality (Fineman, 2008, 2010; Turner, 2006; MacKenzie et al, 2014).

### Balancing Autonomy and Protection in Contemporary Criminal Justice Policy

In respect of consent to non-sexual assaults, Julia Tolmie has observed that, alongside the criminal law's conventional (albeit contentious) balancing of the social utility of an activity and the level of harm it has the potential to cause, contemporary responses have increasingly engaged in a further balancing of respect for personal autonomy *per se* with "concerns about its dilution because of the vulnerability of the victim and / or the circumstances of exploitation or abuse in which the activity takes place" (2012: 662). I have suggested above that a similar shift can be traced in sexual offences law and policy in England and Wales, prompted by and reflected within the turn to more contextual understandings of consent. The ways in which this has positioned vulnerability and exploitation in tension as much as in alignment with a broader commitment to personal autonomy has, however, only partially been acknowledged by policy-makers.

The Home Office's 'Setting the Boundaries Review,' which preceded and – in many senses – set the tone for the subsequent enactment of the Sexual Offences Act 2003, confirmed the centrality of sexual autonomy and maintained that its primary focus was on supporting personal freedom to engage in 'harmless' sexual activity (Home Office, 2000: 5). But in its wake, a number of commentators observed that, on its underside lay a rather different ideology grounded in the need to ensure 'protection' of 'the vulnerable' and to maintain a shared moral fabric (Lacey 2001; Munro 2007). As the Scottish Law Commission subsequently noted, whilst this 'protectionist principle' in many respects reinforces an autonomy-led response by underscoring the incapacity of some persons (for example, minors) to give transformative consent, it also creates the potential for considerable expansion, applying to persons who are capable of consent but whose surrounding circumstances cast doubt on its quality. As such, it "does not sit entirely easily with using consent" (2007: 8) (at least as narrowly defined) as

the sole threshold. Moreover, it is liable to generate particular tensions where transactions that might be seen to be overall beneficial to ‘victims’, at least vis-à-vis their ‘pre-transaction baseline’, are marked and prohibited as exploitative (for further discussion, see Munro 2008b; Wertheimer, 1996; Wilkinson, 2003), or where the perspectives of ‘the vulnerable’ are marginalised in the process of evaluating the presence, significance and severity of any purported harm.

While claims to exploitation tend to target *acts* of wrongful or improper use and claims to vulnerability are typically attached to *identities* marked by precariousness, they are fused, and often confused, for strategic purposes within contemporary sexual offences policy. Exploitation has become the amorphous abuse to which those deemed in need of protection are designated as vulnerable, and the language and lenses of vulnerability have in turn become increasingly powerful levers for initiatives that alter in myriad and complex ways the balance between freedom and coercion, autonomy and protection, self and other, and citizen and state. The deployment of constructions of ‘vulnerable’ citizens (Ramsay, 2008; 2010) and ‘vulnerable’ states (FitzGerald, 2012) in the justificatory service of a range of (often repressive) criminal justice interventions, including anti-social behaviour and control orders, for example, is increasingly well-documented. In the specific context of sexual offences, such constructions have also proliferated, and given the insistence in ‘Setting the Boundaries’ that freedom should be constrained in situations “*where society decides that children and other very vulnerable people require protection*” (2000: iv, emphasis added), they are clearly apt to produce controversial results. As discussed in the next section, the ways in which this can position the narratives of ‘the vulnerable’ against evaluations of their best interests, imputed to them by ‘society’ as a whole, and the potentially detrimental impact this can have in terms of both agency and security, are well-demonstrated in recent law and policy initiatives on sex work.

### *Context and Vulnerability in Contemporary Sex Work Policy*

Although the ‘Setting the Boundaries Review’ avoided any detailed discussion of sex work, it established the broader palette for 21<sup>st</sup> century UK sexual offences



regulation – grounded, as noted above, in a dual, but not necessarily harmonious, strategy of respecting personal freedom whilst protecting the vulnerable from exploitation – from which a slew of subsequent proposals, consultations and policy initiatives on regulating commercial sex were crafted (e.g. Home Office 2004, 2006, 2008; Home Affairs Committee, 2016). These initiatives were also marked, of course, by International developments, in particular the UN’s Protocol on People Trafficking and the Council of Europe Anti-Trafficking Convention, which require state signatories to prevent and punish the exploitative abuses of vulnerability seen to fuel transnational commercial sex markets, even where the underlying transactions are entered into with the apparent agreement of ‘victims’ (for further discussion, see Askola, 2007; Doezema, 2010; Fitzgerald, 2012).

In the past two decades, discourses of vulnerability have been laced through domestic policies on prostitution, with sex work and sex trafficking being drawn increasingly closely together and at times conflated (Carline, 2012; FitzGerald, 2011; Phoenix, 2009; O’Connell-Davidson, 2006; Brooks-Gordon, 2006). In the ‘Paying the Price’ consultation, for example, the UK government asserted that “vulnerability is the key” to young people’s and adult’s entry into prostitution, albeit acknowledging that its specific forms may differ since “for adults, economic vulnerability is likely to play as significant a part as emotional vulnerability” (Home Office, 2004: 33). Strikingly, this consultation, though in no way restricted in its substantive focus to youth prostitution, used a cover image of a young girl standing in front of a broken window: an image that, as I have previously argued, deliberately tokens vulnerability, both of the prostitute and of the local communities in which prostitution takes place (Munro and Scoular, 2012).



Under the Policing and Crime Act 2009 – legitimated via the rhetoric of promoting sex workers’ exit and quashing the demand for commercial sex that is seen to entrap them – a requirement has been imposed upon those convicted of soliciting to attend compulsory meetings with a ‘supervisor’, designed to encourage their desistance from prostitution. Though initially ‘offered’ in lieu of conventional sanction, critics note that this is a conditional diversion and unsatisfactory engagement with ‘rehabilitation’ raises the prospect of increased criminalisation (Melrose, 2006; Phoenix, 2008; Scoular et al, 2009). What is more, as noted above, this Act opens up to criminal liability any client who, knowingly or otherwise, purchases or promises to purchase sexual services from a prostitute who has been subjected to ‘exploitative conduct of a kind likely to induce or encourage’ her prostitution. Defending this strict liability intervention in the parliamentary debates that preceded the Act, Jacqui Smith (the then Home Secretary) insisted that “the mark of any civilised society is how it protects the most vulnerable” (HC Deb 2009, 524) whilst Fiona MacTaggart MP characterised those engaged in prostitution as “vulnerable young women with disturbed backgrounds,” insisting that “it was all too easy for such persons to fall under the influence of a dominant male, who exploits that vulnerability” (HC Deb 2009, 546; Carline, 2011).

In a sense, of course, there is nothing new in this. Claims have been made in relation to sex workers’ vulnerability and exploitation since the time of Josephine Butler; and the empirical reality that selling sex – at least where it is an illicit

transaction within an unregulated industry – *is* often a dangerous activity, with a high prevalence of poverty, social exclusion and / or drug addiction amongst those sellers involved cannot be ignored. At the same time, however, the ways in which these concepts are being deployed in contemporary debates to justify the paternalistic disciplining of sexual citizens conjures up new challenges. There has been a tendency to infantilise all sex workers, and in form if not in practice, the law has demanded extremely high levels of freedom from them if their clients are to avoid criminalisation. And while the recent Home Affairs Select Committee Report might be seen to mark a shift in tone, underscoring the need to “discriminate between prostitution which occurs between two consenting adults, and that which involves exploitation” (2016: 27), the Court of Appeal’s position remains that someone holding out the “lure of gain or the hope of a better life” could in itself suffice to coerce a person into prostitution, thereby opening clients up to criminal liability (*R v Massey* (2007) EWCA Crim 2664, Toulson LJ at [20]).

This arguably over-inclusive approach can be – and indeed has been – criticised by those who emphasise the complexity of the socio-economic contexts within which sex work is entered into, the continuum of conditions of choice that may pertain therein, and the myth that any one of us has unconstrained freedom (Campbell, 2013; Phoenix, 2009; O’Connell-Davidson, 2006). Moreover, even for those who see inequality as etched upon the foundations of prostitution in a way that makes consent non-sensical, there is cause for concern regarding the extent to which conferral of the status of ‘vulnerable’ on broad constituencies of those who sell sex has promoted any significant reduction in their precariousness.

A contemporary focus on ‘quashing demand’ has had very limited impact in disrupting commercial sexual interactions (Kingston & Thomas, 2014), except to the extent that it has rendered the conditions in which those transactions are conducted more risky, since negotiations may be more hurried, and locations for soliciting increasingly hidden (Scoular & O’Neill, 2008). Meanwhile, raids and brothel closures premised on ‘rescuing’ trafficked persons have had far wider consequences for all sex workers, often producing displacements that increase rather than alleviate their vulnerability (Hubbard et al, 2008; Hubbard & Scoular,

2009; Sanders et al, 2009; Magin & Steinmetz, 2014). The pressure imposed on women convicted of soliciting to exit prostitution – through attendance at rehabilitation meetings – has continued the moral disciplining of sex workers, offering inclusion only to those who come to adopt ‘normal’ lifestyles (Phoenix, 2008; Scoular & O’Neill, 2007), and has often damaged relationships between sex workers and outreach organisations in the process (Scoular & Carline, 2014; Carline & Scoular, 2015). What is more, it has paid selective regard to the complex and often conflicting narratives of the women themselves in accounting for their involvement in prostitution, and placed the onus of exit on their shoulders, absolving the state of any responsibility for, or obligation to redress, the surrounding social conditions that facilitated their entry into sex work, and make leaving it so difficult (see, further, Munro & Scoular, 2012, 2013). Thus, as Campbell has also recently observed, “while the dualistic image of the sex worker as both moral offender and victim persist within modern discussion” (2013: 173), a preoccupation with her vulnerability and susceptibility to exploitation has dominated current law and policy debates, justifying interventions which, though aimed at protection, have often had counterproductive effects in terms of exposing sex workers to increased risk, deeper social exclusion and more victim-blaming.

### *Context and Vulnerability in Contemporary Sexual Assault Policy*

Though we should be cautious about drawing too many parallels across their distinct socio-political and regulatory contexts, I suggest in this section that a similar pattern to that identified above in relation to sex work may also be identified within contemporary responses to sexual assault in England and Wales.

Under the Youth Justice and Criminal Evidence Act 1999, a designation of ‘vulnerability’ carries a quite specific meaning, and entails eligibility for special measures protections that can significantly improve complainants’ experiences of giving testimony. Though such measures are not without their own operational challenges (Burton et al, 2007; Hunter et al, 2013), in this respect vulnerability can generally be seen as having acted as a progressive lever for empowerment and participation. However, the relative ease with which this language is invoked in

relation to special measures, together with the emphasis under the Sexual Offences Act 2003 on protecting 'the vulnerable' from sexual abuse or exploitation, has facilitated and disguised the application of this label in broader, and potentially more problematic ways, to actual, and potential, rape complainants. In its 'Toolkit for Prosecutors on Violence against Women and Girls involving a Vulnerable Victim', for example, the CPS acknowledges its intention to adopt a wide working definition, invoking the label of vulnerability to "describe the particular circumstances of a person, or a group, which might need to be addressed in order to ensure full and equal recourse from the criminal justice system" and / or to apply "to people who are at risk as a result of conditions, environmental or personal, which compromise their safety or security" (2015: 1).

In line with this, several feminist commentators have also begun to highlight the ways in which women's personal and circumstantial 'vulnerabilities' increase their precariousness to sexual assault. Stanko and Williams (2009), for example, having analysed – as part of a Performance Improvement Initiative - 677 rape complaints made to the Metropolitan Police in 2005, observed that 87% of complainants had at least one of four so-called vulnerabilities, defined in terms of exposure to rape plus disadvantage in relation to 'social believability', i.e. they were under 18 years old, under the influence of drink or drugs at the time of the incident, recorded as having 'mental health issues' or were partners / former partners of the alleged assailant. Whilst framing statistics in this way provides striking support for the authors' hypothesis that perpetrators prey on vulnerable women, who are often then doubly disadvantaged within the criminal justice process, it risks over-inclusivity. After all, it positions as vulnerable anyone who (1) is susceptible to rape (which means any of us) and (2) either is under 18, drinks alcohol, or has had a sexual relationship (which means pretty much any of us). To be clear, this is not to suggest that the complainants in this study had not been victimised, nor to deny that many of them were in positions that reduced their resilience and ought to have attracted greater protection, but – as in the context of prostitution - deploying the concept of vulnerability in this very broad way in respect of sexual assault may be problematic. More specifically, it risks robbing the concept of its critical edge, flattening different experiences and

degrees of precariousness, and skirting over the more complex ways in which situational and structural factors intersect to produce susceptibility to, and resilience against, abuse. What is more, as Cole has recently highlighted, this type of labelling strategy risks “muddling” a potentially important distinction between “those who are injurable and those who are already injured” (2016: 262).

It is far from clear, moreover, that this approach will produce empowering results for the women involved, whether as actual or potential victims (Home Office, 2007). Despite the formal shift to a communicative model of sexual consent discussed above, traditional gender stereotypes that position men as sexual predators and women as sexual gatekeepers have barely been disrupted with the consequence that, in practice, responsibility for sexual assault and its avoidance continues to be borne heavily by women. In this context, positioning women as vulnerable to sexual attack has produced distinctly less than progressive consequences, as illustrated in this recent anti-rape campaign by Sussex Police.



Under the weight of considerable social media pressure, this first phase of the Sussex Force’s campaign was ‘foreshortened’, but the Head of Public Protection

remained at pains to point out that “Sussex police is determined to continue to raise awareness of this issue and ... target those who seek to exploit and abuse vulnerable people” (BBC, 2015). Of course, this poster quite emphatically did not target those who seek to exploit or abuse; and those who were targeted were designated as vulnerable, it would seem, simply by consequence of their being female and out in public. This provides a vivid illustration of the ways in which the label of vulnerability can be deployed to responsabilise and discipline women; and it is by no means an isolated example. The vulnerability of women who drink alcohol in the company of men has been an especially dominant theme but this acknowledgment of precariousness has done little to problematize constructions of ‘taking advantage’ of intoxication as an almost inevitable feature of heterosexual engagement (Cowan, 2008; Gotell, 2008; Ellison & Munro, 2009), let alone to increase protections afforded to complainants who were too drunk at the time of the incident to reason and communicate effectively, or to properly recollect events (Gunby et al, 2012, 2010; Rumney & Fenton, 2008; Finch & Munro, 2004; 2007; Angiolini, 2015). On the contrary, the primary effect to date has been the creation of a series of rape prevention campaigns targeting women’s drinking behaviour. In 2012, for example, West Mercia police launched the following poster campaign, communicating the message not only that intoxication makes young women vulnerable to rape, but that the victim’s contributory responsibility in getting drunk before any sexual attack should occasion retrospective regret.



Once again, under the weight of public criticism, West Mercia Police apologised for any distress caused by “the nature of the poster” but noted “what we are trying to do here is put information out showing potential victims how to avoid becoming vulnerable” (Telegraph, 2012). A failure to ‘drink sensibly and get home safely’ makes women ‘more’ vulnerable to attack, and thus an onus is placed on them to manage this risk more diligently, or be left to regret their recklessness. A similar sentiment also lay behind the SMART initiative, rolled out by police in Northern Ireland but inspired initially by an idea from Sussex police. Based on spurious assumptions about when, how and why the majority of rapes are committed, the message of this campaign maintains that if only women would drink less alcohol and stay with their friends when on a night out, then they wouldn’t get raped.

**Alcohol is the number one RAPE DRUG. How much have you taken already?**

**Be S-M-A-R-T**

West Mercia Police  
West Midlands Police  
DHSSPS

**Many rapes happen when people are drunk. Follow these steps to protect yourself.**

- Don't get so drunk you don't know what you're doing.
- Don't go alone to a stranger's house when you're drunk. Arrange to meet them when you're sober.
- Don't accept drink from someone you've just met and don't share drinks. Only leave your drink with someone you trust.
- Plan how you're going to get home. Don't walk home alone or go with someone you've just met. Stay with friends or get a taxi.

**Be S-M-A-R-T**

- \* **S**ay NO to any sex you don't want.
- \* **M**ake yourself clearly understood.
- \* **A**lcohol affects your judgement so watch what you drink.
- \* **R**ape stays with you for life.
- \* **T**ake care of each other and don't go off with someone you've just met.

Produced from an original idea by Sussex Police.

Again, in a sense, there is nothing new in these messages, but the fact that those providing the first line of response deem it appropriate to perpetuate and promote them tells us a great deal about the ways in which victim-blaming can be, and has been, legitimised by discourses of vulnerability and risk-management (Gotell, 2015). For women in general, these campaigns maintain a climate of fear of sexual



assault, whilst disciplining 'good' women to conformity with conventional feminine behaviours; for those who experience sexual assault, they invite self-recriminations over what she ought to have done differently – and, by implication, better – to avoid attack; and for the public, they vindicate an attribution of responsibility, if not blame, to those who experience sexual victimisation, distancing the perpetrator from view in ways that may prevent justice (Gotell, 2015; Bumiller, 2008; Munro, 2013; Gavey, 2005; Ellison & Munro, 2009).

Discussing contemporary responses to violence against women in the US, Kirstin Bumiller has observed that “the victim-focused agenda has contributed to the growth of administrative power exercised over clients who experience sexual violence.... This generally involves ‘retraining’ women to protect themselves from future violence as well as to seek help from professionals who can guide them through the process of psychological recovery” (2008: 64). A similar trajectory can be seen in England and Wales, and the contexts of sex work and sexual assault, discussed above, provide particularly vivid illustrations of this. Of course, there are important differences in the issues at stake here, several of which flow fundamentally from the fact that, while there is contestation over the extent to which prostitution is inherently harmful, it is barely disputable that sexual assault constitutes an act of wrong-doing upon another. But in both arenas we find a blossoming reliance on the concepts of vulnerability and exploitation to justify protectionist interventions that sit on the underside of a formal commitment to sexual autonomy; we find over-inclusive applications of these labels in ways that contradict or at least disregard the complexities of the narratives provided by the individuals themselves; and we find initiatives launched under the auspices of empowering the ‘vulnerable’ that all too often have served to reduce individual’s safety, limit their alternatives, increase their marginalisation and / or offer an inclusion that is conditional on conforming to less transgressive gendered lives.

### Vulnerability: One Step Forward, Two Steps Back?

In a context in which several commentators renowned for their pursuit of progressive social justice have advocated greater use of analyses grounded in

vulnerability, I reflect in this section on some of the broader lessons that might be learned from the above experience in sexual offences policy regarding the benefits, blindspots and backfire involved in invoking this lens. More specifically, I suggest that this experience highlights the existence of two distinct but related junctions at which the progressive potential of the turn to vulnerability can be either furthered or frustrated: in relation to (i) the breadth of, and politics associated with, labelling ‘the vulnerable’, and (ii) the determination of responsibility for redress thereto. I argue that the ways in which these junctions are navigated in each concrete context is crucial, and must be subjected to sustained and critical scrutiny if the concept is to begin to fulfil its promise.

### *The Politics of Vulnerability; Or What’s in a Label?*

Despite attempts to theorise vulnerability and exploitation across a diversity of disciplines, it is widely acknowledged that they remain both “ambiguous” (Fineman, 2008: 9) and “open-textured” (Hill, 1993: 632) concepts. On the one hand, this has been cast in positive terms – as enabling a freedom for progressive interpretation. But there are, of course, risks associated with invoking loosely-defined concepts in law- and policy-making, particularly where they carry considerable normative force. These risks may be especially acute in respect of vulnerability, since, when applied in the context of policy-making, this concept acts as a label signifying a condition of precariousness and connection that can be experienced and identified at both the universal and particular level.

For many commentators, a key benefit of the vulnerability approach is its radical departure from the abstract, disembodied and disembedded conceptions of human experience that, as we have seen, many critics have maintained are central to conventional liberal accounts of subjectivity, agency and citizenship (Fineman, 2008, 2013; Anderson and Honneth, 2005; Kirby, 2006). In this vein, it is its universal dimension that is paramount – vulnerability is something shared by all humanity on account of the porosity of our embodiment, the interdependence and inter-connectedness of our existence, and the precariousness of our environment. What is more, it is something that must not only be lived with, since efforts at its

eradication are futile, but something to be valued for its capacity to foster empathy (Fineman, 2008, 2013; Turner, 2006; Butler, 2004). And yet, the ways in which vulnerability is experienced will be highly particular, framed by the unique contexts of individuals' lives, as well as by the variable resources for redress that are realistically available. In other words, vulnerability, though shared, is neither mutual nor symmetrical (Staslett, 2006), and some individuals or groups will be consistently more vulnerable than others (Chambers, 1989). At this - particularised - level, a designation of 'vulnerable' marks one out as existing in "a state of *high* exposure to certain risks and uncertainties", and with "a *reduced* ability to protect or defend oneself against those risks and uncertainties and cope with their negative consequences" (UN, 2003: 14 (emphasis added); Chambers, 1989). As such, while it brings back into view frameworks for identifying and challenging divergent experiences and degrees of vulnerability, that may be (temporarily at least) eclipsed by the universal focus, it 'others' the recipients of this label, marking them out as peculiar exceptions to the less precarious and more resilient norm, and often in ways that stigmatise and oppress, or further entrench their vulnerability. Moreover, when applied to groups, this label risks invoking a stereotyped and essentialist conception of their collective identity (Luna, 2009).

While slippage between its universal and particular dimensions has at times obscured the scale and consequences of these risks, as Butler reminds us, vulnerability cannot be thought of outside a differential field of power, and – more specifically – outside of the differential operation of norms of recognition, which label individual instances of vulnerability and – in so doing – "change the meaning and the structure of the vulnerability itself" (2004: 43). A critical interrogation of the structural conditions through which precariousness is instigated and maintained is crucial, but so too is close and respectful engagement with the narratives of 'the vulnerable' themselves (Brown, 2011). Vulnerability has both objective and subjective dimensions and any ethically defensible, holistic account "requires that the (law) engage with the question of how 'vulnerable adults' incorporate the issue at hand into the ways that they interpret, and ascribe meaning to, their lives" (Dunn et al, 2008: 252). The context of sexual offences regulation discussed above provides a striking illustration of the dangerous

consequences associated with deploying labels of vulnerability in the absence of this engagement. As we have seen, age-old binaries between 'good' and 'bad' women have continued to dominate the frame, and women's perspectives on the causes of, and solutions to, their precariousness have too often been sidelined or silenced. Thus, on the one hand, sex workers are portrayed as childlike, marginalised, and victimised; but where they refuse 'help', they are cast as deviant, corrupting and blameworthy (Munro & Scoular, 2012, 2013; Campbell, 2013). Meanwhile, 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 censure for a contributory role in her victimisation.

Acknowledging (some of) these concerns, Peroni and Timmer have recently drawn on Luna's conception of vulnerability as a 'layered' concept (2009) to urge that when judicial and legislative authorities invoke the label in its particularised sense, they must be more specific both about why a group is especially vulnerable and why an individual should be treated as a member of that group (2013: 1073). Though such clarity is crucial, it represents only the first step to improvement. Determinations not only of who counts as vulnerable, but of what constitutes an *abuse* of that vulnerability, of whose vulnerabilities *matter*, and of which vulnerabilities the state will seek to redress, are not made in a definitional vacuum. Unpicking these 'politics of vulnerability' also requires interrogation of the socio-political contexts in which the concept is invoked, the motives underlying its invocation, the power interests at stake and its concrete effects.

For women in particular, the focus on vulnerability as an integral component of our ethical lives raises further dilemmas. Recognition of men's, as well as women's, connection to others may loosen gendered associations that have assisted in relegating women to the private sphere or to low-value public roles, and as such may assist in generating progressive social change. But, it also undermines claims of women's access to a unique 'ethic of care' (see, further, Gilligan, 1982; Held, 1993; Noddings, 1994), and while critics of such claims may be right to caution that they are experientially questionable and / or unlikely to provide long-term empowerment (MacKinnon, 1987, 1989; West, 1988; Rhode,

1989), to the extent that they have afforded a measure of increased respect and standing to *some* women, the consequences of their dilution or, indeed, loss are likely to be complicated. Moreover, where the story that is told of women's vulnerability is pitched at the collective level, premised on a claim that it is "more systematically related to gender relations and is of greater magnitude" than men's (Young, 2009: 228), and this translates into a call for protection, anchoring our ethical lives around this concept may – paradoxically perhaps – have discriminatory ramifications. Indeed, on some accounts, the turn to vulnerability embeds women ever more deeply within familial and community networks that may nonetheless be the locus of their oppression. Kirby, for example, has maintained that one of the key contributions of a vulnerability-driven framework is "the reconstitution of strong social networks of belonging, such as the family" (2006: 191); but without significant reconstitution of the structures and meaning of 'family' itself, the progressive promise of this (for women) is questionable.

#### *Vulnerability and Responsibility: Hand in Hand or Pole Apart?*

Of course, the strengthening of civil society relationships need not be the sole contribution of the turn to vulnerability; an equally important consequence, it has been argued, will be a renewed and revived interaction between citizen and state. This brings us to the second junction highlighted above, at which the burdens of responsibility for redressing a condition of vulnerability are negotiated, distributed and discharged. It is at this junction, it might be argued, that vulnerability theorists attempt to "elaborate the path from acknowledging constitutive vulnerability to addressing concrete injustices"; a path that some critics have suggested has, to date, been inadequately charted (Cole, 2016: 262).

Watts and Bohle have argued that the prescriptive response to vulnerability is – or should be – "to reduce exposure, enhance coping capacity, strengthen recovery potential and bolster damage control" (1993, 45-6). For several theorists, including – perhaps most prominently – Martha Fineman, the state has a pivotal role to play in this respect, creating mechanisms whereby individuals can "accumulate the resilience or resources that they need to confront the social,

material and practical implications of their vulnerability” (2013: 19, see also 2010). In a context in which many critical commentators have been rather sceptical regarding the state’s entrenchment in, and collusion with, status quo power relations, Fineman’s approach here treads a now familiar (albeit, at times, still perilous) path of seeking to ‘use the master’s tools’ (Lorde, 2007) in order to action reform (see also Smart, 1989). Without denying that “institutions are simultaneously constituted by and producers of vulnerability,” and that they can be “captured and corrupted” or “compromised” by power dynamics and politics, Fineman maintains that a ‘responsive state,’ which makes it a priority to redress disproportionate precariousness and increase resilience, is not only a feasible ideal but an “asset” in the pursuit of social equality (2008: 18, 2010, 2013).

Others have cautioned against this somewhat optimistic appraisal, however. Philo has insisted that adopting a vulnerability lens “risks deflecting a more critical stance on responsibility, blame even, in our accounts of who is vulnerable to what, where, when and why” (2005: 443), whilst Edstrom has suggested it tends to “force the analysis back to individuals and their bodies....at the expense of power relations, accountability, structures and dynamics” (2010: 217). In line with Scully’s critical reflections in relation to international level responses to sexual violence (2009), I have suggested above that experience in the terrain of sexual offences regulation in England and Wales lends some support to these concerns. In respect of both prostitution and sexual assault at least, ‘vulnerable’ women have been subjected to increased surveillance that has (re)positioned them as responsible for managing their own safety, often in the absence of the resources with which to secure change. Not only have such interventions been experienced as repressive by the individuals involved, they have effectively absolved the state of the obligation to provide more meaningful forms of redistribution or redress.

To this extent, the turn to vulnerability can be read as having been co-opted by neoliberal imperatives that exploit the idealised persona of the suffering victim for broader political and penal purposes (Garland, 2001: 143), support strategies of governance that focus on managing those failing to act as self-responsible citizens (Rose, 1999, 2012; Dean, 2009), and reformulate social and political

issues into personal or psychological ones (Brown & Baker, 2013: 13). Such tactics transform the meaning and parameters of responsibility itself – rather than conferring an obligation upon an active state to intervene, redistribute resources and restore resilience, responsibility imposes a requirement on individuals to “increasingly conduct moral evaluations of their actions in relation to their potential effects, calculating and designing their life courses in ways that attempt to mitigate harm and risk” (Trnka & Trundle, 2014: 139). Crucially, moreover, these enactments are staged “not only for the self but also with respect to a broader audience” in order to establish “reflexive prudence” (Trnka & Trundle, 2014: 139); or, in the specific context of sexual offences, ‘non-deservingness’. Thus, the suggestion that vulnerability provides a conceptual and experiential lever through which to compel the state’s assumption of an expanded responsibility for its citizens can be cast into doubt, leaving individuals to tread a delicate balance on a transgression / vulnerability nexus (Brown, 2011; 2014; 2015), with claims to responsibility providing a treacherous, victim-blaming baseline and little evidence of structural or socio-economic change on the horizon.

But this need not be the end of the story. To the extent that the turn to vulnerability may have struggled to navigate unscathed through this junction, it can be read, not so much as an inevitable consequence of its conceptual fluidity in the face of powerful neoliberal agendas, but as a failure to fulfil its promise to provide new frames within which to challenge and deconstruct the associated retraction of the state. Indeed, Robert Goodin has maintained that the strongest defence of a vulnerability analysis lies precisely in its ability to “clearly finger” those who are, or should be, particularly responsible for seeing to it that a person’s interests are protected (1986: 117). Much may depend here, however, on our understanding of responsibility, and more specifically, on whether it is conceptualised – as it typically has been – in a ‘fault’ model where attributions serve to absolve others, or in a ‘social connection’ model where it connotes a shared participation with others to positively reform social institutions (Young, 2013). Whilst a preoccupation at policy level with particularised experiences of vulnerability (and the politics of ‘othering’ often associated therewith) has encouraged fault-based logics, recalling the universal nature of human vulnerability may provide both a

balance and a temper to the more individualistic spirit of neoliberal responsabilisation. As such, in a context in which it has been noted that “a multiplicity of responsibilities can work with and against each other, sometimes reinforcing neoliberal responsabilisation and at other times existing alongside it or undercutting it” (Trnka & Trundle, 2014: 150), it could be argued that the potential identified by Fineman in relation to the ‘responsive state’, though not yet borne out in the context of UK sexual offences policy, is never entirely frustrated.

### Concluding Remarks: Back to The ‘Rough Ground’ of Consent

The shift towards a more contextual understanding of consent in contemporary sexual offences policy remains, broadly, to be welcomed. It has the potential to address a number of the shortcomings associated with several conventional, and typically more abstract, accounts, and to create a discursive and analytical space within which to engage reflexively with the ways in which structural conditions, societal expectations, and relational connections construct and constrain choice. In so doing, if accompanied by a respectful (albeit never uncritical) attentiveness to the narratives provided by those who seek to express their agency within, on the basis of, and sometimes despite, these conditions, it can offer a nuanced model that more meaningfully furthers the ideal of sexual autonomy. But this is fraught terrain and the challenges for the development of such progressive policy are significant. Claims to vulnerability and exploitation, which have always been a factor in determining the point at which freedom is overrun by brute coercion or incapacity, have burgeoned and proliferated in policy discourses as the space for contextual evaluation has been formally expanded and legitimated. And while these concepts can provide powerful resources with which to express the limits of one’s freedom, to highlight the implications of disempowerment, need and precarity, and to make an intelligible demand for redress, as we have seen in the above discussion, they can also be deployed in uncritical or over-inclusive ways to support paternalistic and protectionist agendas, and / or to shift the locus of responsibility from the state to those individuals who directly ‘abuse’ or exploit another’s vulnerability, or indeed to the vulnerable individual herself. In this



respect, these concepts and claims are themselves vulnerable, and must be handled - by feminist and other social justice reformers - with considerable care.

A number of prominent advocates of vulnerability theory have emphasised the ways in which it provides a radically different vision of human agency, community and flourishing from that afforded by autonomy-based alternatives. But the shift towards more contextual understandings of the consent threshold has begun to trouble this binary, compelling critical reflection on the ways in which the values of autonomy and vulnerability simultaneously challenge, complement and converse with one another. Indeed, as MacKenzie et al have recently argued, “taking ontological vulnerability seriously requires us to rethink, rather than discard, the concept of autonomy” (2014a: 16). More specifically, MacKenzie maintains that if initiatives to redress vulnerability are not tempered by “an overall background aim of fostering autonomy, wherever possible” (2014b: 41), they are at perpetual risk of creating additional (‘pathogenic’) vulnerabilities that imperil individuals in their efforts to overcome situational or inherent sources of precariousness. I have suggested in this article that recent policy in relation to sex work and sexual assault in England and Wales offers a compelling illustration of this risk and its consequences for the lives of individual women. The aspiration to protect sexual autonomy by operationalizing a more nuanced and contextualised understanding of consent is laudible, and vulnerability clearly has an important role to play in our evolving understanding of that context and of the ways in which the state can, and should, legitimately intervene. We should neither seek to jettison context nor to abandon the lenses of vulnerability and exploitation per se; but we must ensure that sexual offences law and policy is hemmed in by vigilance against political manipulation, a commitment to democratic participation, and a critical eye to its concrete effects upon the lives of those that it purports to protect.

\* Professor of Law, University of Warwick. [V.Munro@warwick.ac.uk](mailto:V.Munro@warwick.ac.uk). I am grateful to Leverhulme Trust for supporting this research via a Philip Leverhulme Prize.

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