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Mental Disorder and Sexual Consent: Williams and After

John Stanton-Ife

I. Introduction

‘Every offence’ warned Glanville Williams ‘has the effect of diminishing the liberty of the defendant but when a person is convicted on account of consensual activity the practical result is to restrict not only his liberty but that of the person with whom he acts.’ It is imperative that the criminal law should endeavour to fix the boundaries of consent correctly, no more so than in the specific context in which Williams was writing, namely sexual offences against the mentally disordered. Mistakes in this context, in which it is so difficult to say what constitutes consent, are a special concern. Criminalizing consensual sexual activity involving the mentally disordered, has the obvious unjust consequence of seriously restricting the liberty of the accused, who may or may not be mentally disordered him- or herself. It also—and this is Williams’ main point in the quoted sentence—seriously restricts the liberty of the putative mentally disordered victim. He quoted with approval the view of some doctors that ‘even severely impaired people have the right to express their sexuality and to enjoy tender and close relationships.’ ‘Mentally impaired men and women,’ he added, ‘sometimes marry each other, and together achieve a greater degree of independence than either could do unaided.’ Presumably his thought was something like this: criminalize certain conduct and the state impinges considerably on the availability of the option to persons in general. If sexual conduct involving mentally disordered adults is under certain conditions criminal, not only will that be a disincentive for anyone to engage in the conduct themselves. It will be a disincentive for third parties as well, for example staff at care homes, who may conclude they should not encourage such activity and should prevent it where they can. Consent, Williams was implying, has two functions: one protective, the other facilitative. As far as the first is concerned insisting, with the criminal law as backup, that sexual conduct be consensual protects the freedom of persons from wrongful interference. This point would be readily and widely acknowledged. But it is easier to forget the second function of consent, that wrongly or clumsily criminalizing what is or may in fact be

1 School of Law, King’s College London. I am grateful to Dennis Baker and Jeremy Horder, as well as to the (other) organizers of and speakers and participants in the conference on which the volume is based. I received some helpful comments from Antje du-Bois Pedain, Peter Glazebrook and Kiron Reid, to which I have not as yet been able to do full justice; I also benefited from helpful discussion of the subject matter of this paper with Grant Lamond and Susan Liebeschuetz and many discussions with Alan Bogg.
3 Williams, Textbook, p. 572.
consensual behaviour can interfere with persons’ freedom to engage in activity which is not wrongful and may be valuable. The attempt to protect persons may actually result in harm to their interests. For consent, properly drawn, facilitates freedom too.

A useful warning, one might say. Successive legislators should take note. However, for all that, Williams does not point to any grave problem if consent has in its essentials been correctly identified and deployed in the sexual offences involving mentally disordered persons. And this takes us to the question of what it would be to identify the minimum conditions for a valid consent. What are the minimum capacities necessary for it to be possible for a severely mentally disordered adult to give a valid consent? In asking this one immediately runs into the issue of where the threshold for consent should be set. If one fixes the threshold at a relatively low point, so more sexual activity counts as consensual one is likely to respect more fully the freedom of the mentally disordered persons in question, what we above called the facilitative aspect of consent, but may lose something of the effectiveness of the protective function. On the other hand if one fixes the threshold at a relatively high point, so less sexual activity counts as consensual one may achieve more protection at the cost of the sexual freedoms of the mentally disordered persons concerned. Williams favoured the former option: the threshold should be fixed at a relatively low point. The two reasons he gave for this in 1983 were ‘First, this is necessary to prevent men who have intercourse with willing but sexually innocent girls from being convicted of rape. Secondly, it is necessary in order not to forbid sexual expression to women of low intelligence.’ As we will see much has changed in the scope and nature of the sexual offences since Williams was writing. Williams refers in the just quoted passage only to the offence of rape, but s30 of the Sexual Offences Act 2003 takes in all potential sexual touching, from what would constitute rape to kissing and cuddling and everything in between. Moreover, while some ways of committing the offence under s30 can only be carried out by male defendants the offence in general can be perpetrated by persons of either sex. Victims can be of either sex. My main focus in what follows, with these changes and others in mind, is with Williams’ concern with the risk that the law wrongfully forbids sexual activity by means of a misplaced of the threshold for a valid consent.5

Below I examine four legal tests for attempting to fix the threshold at which a severely mentally disordered person can give a valid consent to sexual activity. I will have in mind the criminal law of England and Wales, though one of the four understandings I consider is from Australia. There are at least two common law understandings of the minimum conditions for consent which date back

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4 Williams, Textbook, p. 571.  
5 Because I believe that section 30 of the 2003 Act fails to fix the balance correctly between what are described above as the protective and facilitative functions of consent, emphasizing the former at the expense of the latter, my focus will exclusively be on the latter. That should certainly not be taken to imply that the protective function of consent is unimportant. Quite the reverse. For some disturbing figures on sexual offences against the mentally disordered see Peter Rook and Robert Ward, Sexual Offences: Law and Practice, 4th ed. (London: Thomson, Reuters 2010), pp. 331-332.
to the nineteenth century. Both focus on the relationship between humans and other animals. I shall label the first the ‘animal instincts’ test. It is derived from R v. Fletcher, and suggests that a consent can be produced by ‘animal instinct.’ The second I will call the ‘reasoning will’ test. Its origin is with the judgement of Palles CB in R v. Dee who emphasised the differences between humans and animals. In the Chief Baron’s words: ‘Consent is the act of man, in his character of a rational and intelligent being, not in that of an animal. It must proceed from the will….. sufficiently enlightened by the intellect to make such consent the act of a reasoning being.’ Far superior to any understanding developed in Victorian times was, at least in Williams’ view, a test that was Victorian in a different sense, namely that it emanated from the Supreme Court of Victoria in Australia. This was the test contained in Morgan, turning on knowledge of the physical facts of the sexual activity in question and knowledge of its sexual nature. As we will see Williams thought the test would improve with a modification. I will refer to it as the ‘physical facts’ test. The final test—I shall call it the ‘foreseeable consequences’ test—is the recent one laid down in section 30 of the Sexual Offences Act 2003. The most important component of this test is the notion of sufficient understanding of the nature and reasonably foreseeable consequences of what is being done in a specific act of sexual touching. The title of this paper refers to Williams and to what came after he wrote. It may seem odd then that three of the tests I am proposing to examine came before he was writing, two before he was born. However, I hope to show that there is something to be learned from the confrontation of the new thinking with the old, with Williams positioned somewhere in between.

II. Setting a High Threshold: the Sexual Offences Act 2003

I begin with the most recent test, from section 30 of the Sexual Offences Act, the test that sets the threshold at the highest point of the four. This will first require a quick word about one of the other tests, the animal instincts test, which we examine more fully in Part VI. It is clear that one of the major motivations in including specific new provisions governing sexual offences against the mentally disordered in the general overhaul of sexual offences in 2003 was the desire to dispense with the Fletcher animal instincts test. This had much to do with the fact that the test appears to have been applied in the unreported case of R v Jenkins in January 2000, something which caused a degree of disquiet. Negatively at least Fletcher has influenced the current law.

R v Richard Fletcher (1859) Bell 63.
R v Dee (1884) 15 Cox CC 579 p 593.
And that of Munby J. in X City Council v MB, NA and MAB [2006] EWHC 168 (Fam) para. 73.
[1970] V.R. 337 (Supreme Court of Victoria)
In Jenkins the defendant was a support care worker at a residential unit providing supported housing for about one hundred adults with learning disabilities in London. He admitted having a sexual relationship with a woman said to have a mental age of under three after she was found to be pregnant and DNA testing had implicated him. He was charged with rape. The judge, it seems, ruled that there was no reason in law why a severely impaired woman should not consent to sex and that the woman could have consented by way of her animal instincts according to the Fletcher test. Speaking in the legislative branch of the House of Lords prior to the passing of the 2003 Act, Lord Adebowle argued that the facts in Jenkins plainly establish the lack of capacity to consent on the part of the learning-disabled woman. He concluded, ‘This case alone is a stark reminder of the need for new legislation and for laws to ensure that those who cannot consent have absolute protection of the law.’ Jenkins was alarming, his Lordship thought, ‘not only because it would allow abusers to claim that sexual relations are not abusive, but also because it dehumanises the person with a learning disability and robs them of their privacy and dignity.’

Moreover, according to the report of the Home Office Steering Committee published in 2002 which led to the Sexual Offences Act 2003, the failure of the prosecution in Jenkins established the importance of avoiding any use of ‘consent’ in the definition of any proposed new offence. In the words of the report:

‘The lack of a clear definition in law of capacity to consent to sex makes it particularly hard to prosecute the most serious sex offences such as rape (which rely on proving lack of consent) when the victim is severely impaired and where there is no definition of capacity to consent. The purpose of the law, to protect the most vulnerable, can be lost in consideration of whether or not actively expressing sexuality was actually consent. In one recent case (R v Jenkins), it was held that there was no reason in law why a severely impaired woman should not consent to sex. That is why those offences [i.e. those proposed for adoption in new legislation] intended to protect severely mentally impaired people do not require consent to be proved.’

Section 30 of the 2003 Act, was to dispense with the requirement that the prosecution prove a lack of consent on the part of the alleged victim. But I have here cited these words from the Home Office Steering Committee and, before that, those of Lord Adebowle in the House of Lords to illustrate the general hostility towards the animal instincts test. It is also interesting to note from the Home Office Steering Committee passage just cited that it takes the purpose of the law to be to protect the most vulnerable. We saw in the introduction to this paper that Williams wished to stress a further key purpose of the law of sexual consent, not only to protect but also to facilitate sexual freedom simply

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13 Setting the Boundaries: Reforming the Law on Sex Offences, Home Office, July 2002: 4.2.4. Emphasis in the original, last parenthesis added.
by refraining from criminalizing certain activity. Lord Adebowle also appears to leave this latter
issue out of consideration. Plainly he is right that the imposition of non-consensual sexual touching on
a learning disabled person is a robbery of privacy and dignity and is dehumanising. Unlike Williams,
however, he does not appear to notice that these consequences are also risked by forbidding certain
sexual activity to such people.

The Sexual Offences Act created a highly complicated series of offences relating to the mentally
disordered victim, contained in sections 30-41. Four offences relate to mentally disordered persons
who are ‘unable to refuse’ their consent; four relate to mentally disordered people who are able to
agree to sexual activity, but in circumstances in which the agreement is obtained by inducement,
threat or deception and the final batch concern offences perpetrated by care workers. I shall restrict
myself to a consideration of s.30, the first and most general of the offences against the mentally
disordered. In a nutshell, s.30 proscribes the sexual touching of mentally disordered persons who
are unable to refuse consent. My main aim in considering s.30 is to ask where it fixes the threshold
for valid consent on the part of a mentally disordered person. First it is important to note some
preliminary points. The wording of the main body of the offence is reproduced in footnote 16. The
title given to the offence in the statute is somewhat long winded: ‘Sexual Activity with a Person with
a Mental Disorder Impeding Choice’. It is also misleading. The words of the section itself make no
mention of choice being ‘impeded’ or of ‘impediments’ to choice. Moreover an impediment is an
obstruction, not a barrier; someone with a speech impediment is not someone who cannot speak at all.

By contrast the wording of the section is couched in terms of victims who are ‘unable to refuse’, i.e.
barred, blocked or precluded from consenting, not merely impeded. In other words the situation

14 To be fair the Home Office Steering Committee begins its chapter on ‘Vulnerable People’, with the following words ‘We
considered that vulnerable adults shared the universal right to a private life which is specifically protected by the European
Convention of Human Rights, and that private life can include a sexual life. On the other hand, those who are vulnerable to
exploitation have to be protected by the law Setting the Boundaries 4.1.3. However by the time we reach the passage from
that chapter quoted in the text the former consideration appears to have fallen entirely out of consideration.

15 For an account of the offences in general see Peter Rook and Robert Ward, Sexual Offences: Law and Practice, 4th ed.

16 According to s (30) (1) of the Sexual Offences Act, 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 relating 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.

S 30 (3) deals with sentences available to a judge on conviction:
A person guilty of an offence under this section, if the touching involved—
(a) penetration of B’s anus or vagina with a part of A’s body or anything else,
(b) penetration of B’s mouth with A’s penis,
(c) penetration of A’s anus or vagina with a part of B’s body, or
(d) penetration of A’s mouth with B’s penis,
is liable, on conviction on indictment, to imprisonment for life.

(4) Unless subsection (3) applies, a person guilty of an offence under this section is liable—
(a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory
maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.
envisaged is not of someone who consents against the odds or consents with great difficulty; it is of someone who cannot consent at all. The term ‘impeding’ is thus best ignored.

The conduct element of the offence is met by the intentional touching of another person where the touching is sexual and where the person in question is unable to refuse because of or for a reason relating to a mental disorder. As briefly noted in the introduction the offence is extremely wide, covering any form of sexual touching. It is among the most serious it is possible to commit: a sentence of fourteen years can be imposed if the touching is not penetrative and up to life is available to the judge if the touching is penetrative. Though it contains some interesting issues I will not here consider the fault element, but turn now to the idea of ‘refusal incapability’.

III. Refusal-incapability

One of the most striking features of the offence in s30 is that consent is ushered off the scene and replaced with the idea of capacity to consent, or to use the actual terminology, capacity to refuse. Sexual offences, as Williams was certainly assuming, normally contain a clause requiring the absence of consent. The best known offences in the 2003 Act indeed follow this model. The offences of sexual assault, assault by penetration and rape all contain as part of their respective definitions, the clause: ‘A person (A) commits an offence if...(B) does not consent to the penetration/touching.’ In place of this s30, requires that (B) is ‘unable to refuse because of or for a reason relating to a mental disorder.’

What guidance is given by the Act as far as the meaning of refusal-incapability is concerned? According to s30 (2):

‘(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.’

Being ‘unable to refuse’, then, is glossed in terms of a lack of capacity to choose to agree. The section can be broken down into a set of conditions, each one sufficient, for refusal incapability in this sense.

‘(1) B is refusal-incapable if he lacks sufficient understanding of the nature of what is being done

(2) B is refusal-incapable if he lacks sufficient understanding of the reasonably foreseeable consequences of what is being done.

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17 But see Williams, *Textbook*, pp. 571-572 for comment on the fault element which would be pertinent also to section 30 of the 2003 Act.

18 *Sexual Offences Act*, ss. 1-3.
(3) B, though capable of choosing whether to agree to A’s touching, is unable to communicate such a choice to A

(4) B is refusal-incapable if he is unable to choose to agree for any (other) reason.’

(4) makes it clear, if it was not already, that (1) to (3) are sufficient conditions for refusal-incapability, not necessary conditions. The courts may find refusal-incapability for any (other) reason; that is left open. (3) makes it clear that while refusal-incapability is largely conceived as a question of the mental state of B, the complainant, it is not entirely so. For if A, the defendant, has no way of establishing B’s mental state even if B is in fact choosing internally to agree, A has no defence.

The conditions in (1) and (2) appear to be the most significant and I now consider how one might understand each of them.

IV. ‘Sufficient Understanding of the Nature of What is Being Done’

The requirement of sufficient understanding of the nature of the activity presumably relates to the sexual nature of the conduct. That the touching is sexual has—as we have seen—also to be established as part of the conduct element of the offence by virtue of 30 (1) (b); the present section makes clear that if B does not understand that what is proposed is sexual, nothing he or she does or thinks or wants can constitute capacity for consent. When does B understand sufficiently that what is being done is sexual? Are we to understand ‘sexual’ here in the same way as it is understood in 30 (1) (b) and in the Act in general? The general meaning of ‘sexual’ in the Act appears in s78:

‘...penetration, touching or any other activity is sexual if a reasonable person would consider that (a) whatever its circumstances or any person’s purpose in relation to it, it is because of its nature sexual, or (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.’

If we are simply to borrow this definition for the purposes of s30 (2), B will understand the (sexual) nature of the behaviour if a reasonable person would think it sexual. More subtly, where a reasonable person would be in some doubt as to whether the activity is sexual, but would think it a possibility that it is, B will need to be able to read the purposes of A and the circumstances of the touching. This may be especially difficult for a mentally disordered person. In Gosling, for example, A temporarily placed plastic bags over B’s head and took photographs of B, which he admitted was for his later sexual gratification.19 Had B been a mentally disordered person, there may be extra reason to doubt that she or he appreciated the nature of the activity. Again, it is usually clear to most adults what the

difference is between an affectionate caress and a sexual caress. As Roger Scruton puts it, ‘A caress of affection is a gesture of reassurance—an attempt to place in the consciousness of the other an image of one’s own tender concern for him. Not so, however, the caress of desire, which outlines the body of the recipient; its gentleness is not that of reassurance only, but that of exploration.’²⁰ Plainly it will take some degree of experience and mental capacity on the part of a mentally disordered person to discern the difference.

V. ‘Sufficient understanding of the reasonably foreseeable consequences of what is being done’

B, if mentally disordered, is refusal-incapable if she or he lacks sufficient understanding of the reasonably foreseeable consequences of what is being done. The phrase ‘reasonably foreseeable consequences’ suggest consequences as seen by the reasonable person, albeit only in ‘sufficient’ measure. What, then, are the reasonably foreseeable consequences of engaging in sexual touching?

In the case of penetrative, vaginal sex, one obvious consequence is the possibility of pregnancy. There has been much controversy in the last twenty years or so over the question of birth control for mentally disordered women with little or no understanding of the available options: be that the contraceptive pill, perhaps administered by another; or an implantable or injectable contraceptive involving procedures that need to be repeated periodically; or an intra-uterine device, the use of which may not be straightforward in someone who has not had children already; or, most controversially, sterilization.²¹ Presumably, sufficient understanding of the ‘reasonably foreseeable consequences’ of penetrative, vaginal sex must stretch to knowledge of the possibility of pregnancy and what that involves if the resulting foetus is brought to term. It would also need, presumably, to stretch to some minimal knowledge of the contraceptive possibilities, perhaps involving the help of another. More generally, another relevant consequence, particularly in relation to penetrative sex, but not of course restricted to cases where B is a woman, is the possibility of disease.

A third relevant consequence is an especially wide-ranging one given the wide scope of s30, covering all sexual touching. It is the emotional vulnerability that comes with sexual relations of any sort. Most obviously when people begin to touch one another sexually both parties or one of them becomes vulnerable emotionally to how he or she is treated by the other. From being treated royally one day, one can be ignored the next. One can be exploited or toyed with in a variety of ways. All this is common human experience; one can be left confused, disorientated and severely depressed (or elated) by the subsequent behaviour of the person with whom one has engaged in sexual touching. When befalling those with very severe mental disorders, this familiar human phenomenon takes on a special poignancy. The section appears to imply that B must have the capacity to comprehend these

²¹I am grateful to Dr Susan Liebeschuetz of Newham Hospital, London for explaining some of the options.
common tendencies in order to have the capacity to consent. Apart from the most obvious aspect of emotional vulnerability—vulnerability to how A treats B—Nico Kolodny has pointed to a more subtle aspect of emotional vulnerability.

“To say that A is emotionally vulnerable to B…is to say, in part, that A is disposed to have a range of favourable emotions in response to A’s belief that B…has fared or will fare well, and a range of unfavourable emotions in response to A’s beliefs that B…has fared or will fare poorly. For example, A may feel content when B is well, elated when B meets with unexpected good luck, anxious when it seems that B may come to harm, grief-stricken when B does.’’

Autonomous adults are aware more or less explicitly of this possible consequence of sexual relations. Ordinary teenagers on the way to becoming fully autonomous learn for the most part that sexual touching brings with it such emotional vulnerability and in turn brings the power to exploit others. Teenagers as part of growing up learn, one hopes, not to exploit the power that comes with the emotional vulnerability of those with whom they are engaging in sexual touching. But how essential is understanding of emotional vulnerability in relation to the lighter forms of non-penetrative sexual touching? How much does it matter, in relation to this lighter touching in particular, whether a mentally disordered person understands, as a relationship becomes more intimate, that this opens her up to emotional vulnerability? Does it matter as much as s30 appears to imply, to the extent that this added intimacy ought not to be allowed to develop at all?

One could explore more potential candidates for ‘reasonably foreseeable consequences of engaging in sexual touching,’ such as an understanding of the offence that may be caused by carrying out sexual activity in public, but we should have said enough by now for it to be abundantly clear that the test is highly cognitive in nature. If a mentally disordered person does not have much in the way of understanding of the nature or reasonably foreseeable consequences of any form of sexual touching, he or she lacks the capacity to give, or as the statutory term has it, refuse a consent to it. Its cognitive nature becomes especially evident because the question being asked is not the usual one ‘did B consent?’ It is ‘did B have the capacity to consent (or refuse), which turns on what B understood, not what B wanted.

We have seen, then, that no official minimum threshold for consent is set by the s. 30 offence. Indirectly, however it is fairly clear where the boundary is. A mentally disordered person who does not have sufficient understanding of the nature or reasonably foreseeable consequences of a given form of sexual touching cannot issue a legally valid consent to sexual touching. If that person never has such understanding that person can never give a valid consent to any form of sexual touching. We mentioned at the outset Williams’ concern that ‘even severely impaired people have the right to

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express their sexuality and to enjoy tender and close relationships?²³ S 30, however, appears to have the implication that two mentally disordered persons who form an attachment with one another, but in which one or both lacks some of the understanding discussed above, are engaging in criminal behaviour. It seems to be irrelevant as far as the law is concerned whether or not the conduct is mutually desired. That A wishes to touch B and B wishes to be touched by A is neither here nor there if the understanding of one or the other is limited in one of the relevant ways.

Should the cognitive question of what is or is not understood have so much significance? In the case of mutually desired sexual touching of any sort between mentally disordered persons who may not have much of an understanding of the reasonably foreseeable consequences of the touching, it seems plausible to suggest that the key consideration should rather be whether such touching is in the best interests of the person concerned. It might, of course, not be. It may for example be exploitative, as where a group of males goad each other to see how far each can go sexually with a mentally disordered woman, who understands little but appears to be enjoying the attention. That is clearly different from Williams’s ‘tender and close relationship.’ It is a serious problem with s 30 that it does not mark the difference between these very different kinds of case; that it does not identify a form of behaviour that is itself wrong as opposed to wrong only if other elements not contained in the section, such as exploitation, are part of the story. The Home Office Steering Committee, as previously noted, remarked that “the purpose of the law, to protect the most vulnerable, can be lost in consideration of whether or not actively expressing sexuality was actually consent.”²⁴ But one might wonder if some important component of consent is itself being lost in consideration of what should be done to protect mentally disordered people. To consider this and other matters further let us now ask what Williams’s own view on where the threshold for consent should be set

VI. Low Threshold Tests: Williams and Animal Instinct

We have mentioned already that Williams thought the threshold for the sexual consent of a mentally disordered person ought to be set relatively low. Let us now spell out the test he himself supported. According to him the best test available in the common law was the Australian case of Morgan.²⁵

Morgan test: B must both know the physical facts and know that the [act] is sexual; failing either knowledge, B does not consent in law.

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²³ Williams, Textbook, p. 572.
²⁴ Home Office Setting the Boundaries: Reforming the Law on Sex Offences, July 2002: 4.2.4.
²⁵ [1970] V.R. 337 (Supreme Court of Victoria)
While he thought this the best test available he doubted the necessity of the second kind of knowledge mentioned in it, knowledge that the act is sexual.\textsuperscript{26} Understanding the physical facts alone should, Williams thought, be enough. Accordingly, he seemed to settle on the following, certainly minimal, test:

\textit{Morgan}-minus test: B must know the physical facts; failing such knowledge, B does not consent in law

We noted above the desire on the part of the Home Office Steering Committee to reject the low-threshold \textit{Fletcher} ‘animal instincts’ test. Williams too dismissed the \textit{Fletcher} test, as ‘not to the purpose’ and added that \textit{Morgan} was ‘greatly superior’.\textsuperscript{27} However, given it is the \textit{Morgan}-minus test that Williams appears to endorse, it is not at all clear how that test differs from the animal instinct test. For one thing Jennifer Temkin’s interpretation of the ‘animal instinct’ test in \textit{Fletcher} seems to be more or less identical to Williams’s \textit{Morgan}-minus test. A consent produced by animal instinct, according to Temkin (in the specific context of a charge of rape) meant:

‘… that no knowledge or understanding of the meaning or implications of sexual relations was necessary, provided that [B] appreciated that the defendant intended to insert his penis into her vagina.’\textsuperscript{28}

For many non-human animals, it would seem, can appreciate perfectly well, if non-linguistically, that some part of another entity’s anatomy is about to have some causal effect on its own. When my son plays rough-and-tumble with the dog, the dog is very much aware that his arms are about to grab around her neck; that is why she moves sharply and swiftly out of the way, so that he falls over and she can jump on him—all part of the game. Interestingly, as we saw was the case of \textsection30 of the Sexual Offences Act, the explanation of consent and the threshold for the capacity to consent is in \textit{Morgan} again couched in cognitive terms. What is to be understood is here much more modest, but still the focus is on understanding and not on something else such as desire. \textit{Fletcher}, as mentioned above, appeared to have been significant, if only as something to avoid, in the preparation and passage through parliament of the Sexual Offences Act. But with the exception of Temkin, whom we have just cited and Simester and Sullivan, whom we cite below, there seems to have been no attempt to state what ‘a consent produced by animal instinct’ could and might mean. It now also appears that Williams’ \textit{‘Morgan}-minus’ test may well come down to the same thing as the animal instinct test.

Let us now try then to examine this idea in more detail than is usual. In attempting to understand the idea it might be helpful to take its key words, ‘consent,’ ‘animal’ and ‘instinct’

\textsuperscript{26} Williams, \textit{Textbook}, p. 571, fn 2.
\textsuperscript{27} Williams, \textit{Textbook}, p. 571, fn 2.
\textsuperscript{28} Temkin, \textit{Rape and the Legal Process}, p. 113.
separately. It is surely the word ‘animal’ that has led to the vilification of the test we noted earlier. Simply stating the test with enough emphasis on ‘animal’ has been thought enough to establish what is wrong with it. Likening a mentally disordered human in any way to an animal, may seem insulting, hinting at a revolting belief that mentally disordered persons are sub-human, to be regarded and perhaps even treated as such. Of course if that is what the test implies, it deserves all the criticism it has received and a lot more besides. It is axiomatic that we owe equal concern and respect, in Ronald Dworkin’s famous phrase, to all. On the other hand, one might think such a reaction to Fletcher wide of the mark and over the top. Such a response might run in the following way. We are all animals. No human has ever escaped that fate. Besides, one loses nothing of the relevant sense of ‘a consent by way of animal instinct’ if we drop the term ‘animal’ altogether and speak instead of ‘a consent by way of human instinct.’ Again, quite apart from the fact that there is an appropriate way to view and treat all humans, there is an appropriate way to view and treat non-human animals and any hint to the contrary should also be resisted. In sum, attending to something like a consent by way of animal, more specifically human, instinct may well be a way of granting respect and concern to some aspect of a person that is worthy of respect and concern. It is to focus on the capacities and abilities, indeed the lives, of the individuals concerned.

As for the word ‘consent,’ it may seem out of place in any discussion of non-humans. It is interesting to note that Charles Darwin for one used the term in relation to non-human animals. Fletcher was decided in the same year (1859) as the publication of Darwin’s best known work, The Origin of the Species. In asking how the Fletcher test might be best interpreted, however, I am not asking the historical question of what those who devised the test might have meant by it—whether they were influenced by Darwinian or other ideas for example. But it is interesting to wonder, albeit briefly, what bearing classic Darwinian thinking might have on the question. One of Darwin’s many aims was to illuminate aspects of human behaviour by means of comparison with the behaviour of other animals. A consent by way of animal instinct is based on the idea that there are instincts shared by humans and animals. Together with animals, Darwin wrote in his later The Descent of Man, ‘[m]an has…some few instincts in common, as those of self-preservation, sexual love, the love of the mother for her new-born offspring, the power possessed by the latter of sucking, and so forth.’ As mentioned above, he also found nothing amiss in speaking of consent in relation to animal sexual activity, or of the ‘consenting party’ although as one would expect consent is not taken by him to have the normative role in the realm of non-human animals as it does for humans. Broadly, Darwinian theory understood animal sexual behaviour according to two models and one might loosely distinguish them by a notion of consent. Male animals, Darwin thought, seek to gain advantage over

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29 Ronald Dworkin Taking Rights Seriously (Harvard University Press, 1977) p. 180. Alternatively put, for those who do not believe in the intrinsic value of equality, we owe appropriate concern and respect to each and every person.


31 Darwin, The Descent of Man, e.g. in Chapter X1, ‘Summary and Concluding Remarks on Insects.’
other males of their own species in two different ways, now sometimes distinguished by ethologists respectively by the terms ‘intrastexual selection’ and ‘intersexual selection.’ First, a male may fight other males for access to females (intrastexual selection). Secondly males may compete indirectly with each other by means of displays made to females or by means of adornments (intersexual selection). The red deer illustrates the first model. Red deer stags grow antlers each year and directly challenge each other for ownership of females, which have no antlers and are herded into harems by successful males. ‘The females have little or no choice of sexual partner because the males defend their harems against possible rivals.’ The second model was conceived by Darwin as revolving around ‘choice exerted by the female’. Here the male seeks to attract the female through displays or adornments such as the enormous colourful tail of the peacock. Outside of the breeding season a male African Paradise bird, to give another example, looks much like the female; during the season the male, unlike the female, develops elaborate plumage.

On this Darwinian understanding, therefore, there can in a sense be both consensual—where a peahen rejects one peacock in favour of another—and non-consensual activity—where a red deer female is to have the attention of the dominant male whether wanted or not. As already mentioned the notion of consent is not intended by the ethologists in the normative sense in which it is used, as it must and rightly should be used in the human context, but it is interesting to note that even in this non-human context the notion of consent seems to have some clear limits. The activity in question cannot be unwanted and it needs to be with a specific other. Speaking of the Fletcher ‘animal instincts’ test, Simester and Sullivan suggest that it would be unacceptable for a defendant to be able to defend himself ‘by raising the possibility of sexual arousal’ on the part of a learning disabled person prior to the sexual activity in question. They are right that there is a grave danger in this context that defence counsel may harp on the undifferentiated arousal of the complainant in the hope of an unmerited acquittal. But an undifferentiated arousal is not consent by way of anything. It is surely a constraint on any account of sexual consent, including one based on instinct, that the consent must be to specific activity (A) with person (P) at time (T) in location (L). As Baroness Hale has recently stated:

‘Any particular choice to engage in sexual activity is, of course, both person-specific and occasion-specific; with you here and now, or not with you (although possibly with someone else), or not here, or not now.’

33 McFarland, Animal Behaviour, p. 103.
34 Darwin, The Descent of Man ‘Choice exerted by the Female’ is a subheading of Chapter VIII ‘Principles of Sexual Selection.’
36 Simester and Sullivan
37 Cooper [2009] UKHL 42.
So much for ‘animal’ and ‘consent’; what of the term ‘instinct’ in the words ‘consent produced by animal instinct’. We observed earlier the condemnation of the animal instincts test from the Home Office, the legislative House of Lords and from Williams himself. Munby J also joined in the chorus of moral condemnation of the animal instincts test, saying it ‘disfigured’ the Victorian cases on sexual consent. While the moral condemnation may be over hasty, as I suggested above, Munby J also complained of the Victorian cases in general that they were not ‘illuminating’. The best reading of the ‘consent by way of animal instinct’ test, the reading that makes of it ‘the best it can be,’ takes it as an attempt to identify something in a severely mentally disordered human being that is worthy of respect. However, in the end I think the idea of instinct is indeed too unilluminating to help achieve this aim. For while the idea of instinct as something like unlearned behaviour is very much evident in the behaviour of animals, human and otherwise, so much behaviour is an admixture of learned and unlearned features. As the ethologists Aubrey Manning and Marian Stamp Dawkins write:

‘Instinct is often described as patterns of inherited, pre-set behavioural responses which develop along with the developing nervous system and can evolve gradually over the generations...to match an animal’s behaviour to its environment. It might be defined in a negative kind of way, as that behaviour which does not require learning or practice, but which appears appropriately the first time it is needed.’

The authors observe examples in the animal world. But they go on to suggest that while much animal behaviour can be understood in this way, too often the unlearned, instinctive behaviour is combined with learned behaviour. The passage continues:

‘This definition immediately suggests its converse and the other familiar way behaviour can become matched to circumstances. Animals may not have any pre-set responsiveness, but be able to modify their behaviour in the light of their individual experience. They can learn how to behave appropriately and perhaps practice or even copy from others to produce the response.’

The message is that while instinct, qua unlearned behaviour, is evident in the animal world it is commonly mixed with learning from experience. In fact sometimes when we speak informally about human instincts, the sense is not that the activity is exclusively unlearned. For example, one might hear a motorist report that she had ‘braked instinctively’ while driving, although driving was something that needed to be learned. The idea of instinct, then, is unlikely to be illuminating if understood as unlearned, unthought-out and so on, since so often such behaviour will be combined

38 X City Council v MB, NA and MAB [2006] EWHC 168 (Fam) para. 73.
39 X City Council v MB, NA and MAB [2006] EWHC 168 (Fam) para. 73.
42 Manning and Stamp Dawkins, An Introduction to Animal Behaviour, p. 42.
with learned behaviour. It seems moreover prohibitively complicated to operationalize in law any standard based on such instinct.

As far as the idea of a consent produced by animal instinct is concerned a few conclusions emerge. While the invocation of the ‘animal’ has been emotive in many of allusions made to the test, I have suggested that it could be as well rendered in terms of human instinct. Moreover, the best interpretation of the idea is of one that seeks to identify something worthy of respect in human beings who lack many of the standard capacities of most human beings. There is a sense of consent, we have noted, that has been used for example by Darwin to apply to the animal world. However, the stumbling block for the Fletcher understanding is the idea of instinct. It is simply too complex a matter to determine in animals, human or non-human, which aspects of their behaviour is learned and which unlearned for ‘instinct’ to lie at the centre of a workable legal test.

**VII. From Instinct to Agency**

Is there, in the present context, another route to identifying something worthy of respect in human beings who lack many of the standard capacities of most? What was the animal instincts test trying to capture? In our discussion of the 2003 Act we saw that the threshold for the capacity for consent was fixed cognitively, in terms of an understanding of the nature or reasonably foreseeable consequences of sexual activity. It appeared over-inclusive, taking in some forms of mutually desired sexual touching. This suggests that as well as focussing on cognitive questions of belief we should be focussing on volitional questions of desire. We have also seen that even in the case of non-human animals, Darwinians and others speak quite comfortably about choices and consent. Where I think this discussion is taking us is away from the notion of instinct and on to something else, namely agency. Though animals have sometimes been thought of as automatons, like the traditional Japanese Karakuri doll-like automaton that, when activated, shuffles forward, bows, and presents a cup of tea on a tray, automatism is now widely thought to be an untenable model for animal behaviour in general. Many animals, such as dogs or cats, appear to have agency: they have desires and beliefs and can make certain choices.

Galen Strawson has usefully blocked out the elements of the notion of agency. He is clear that on his understanding many non-human animals, such as dogs, are agents. On his account one is an agent if and only if one is:

1. Capable of forming beliefs of certain sorts
2. Capable of having desires of certain sorts

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3. Capable of self-change (e.g. self movement)
4. Capable of practical reasoning (in a realistically inclusive sense in which dogs and one-year-old children are capable of practical reasoning)\textsuperscript{44}

In trying to get to grips with the minimum conditions for sexual consent in the context of severe mental disorder, we should turn to such a notion of agency, instead of focussing exclusively on cognitive questions or on the complex unhelpful notion of instinct. I do not here have the space to go in to Strawson’s ‘realistically inclusive’ sense of practical reasoning. In saying more about the notion of agency, I will instead focus now primarily on the notion of desire. It is strange in the tests of sexual consent we have encountered so far to have seen so little of the idea of what is desired as opposed to not desired.

On some philosophical views, something like the account of agency blocked out by Strawson is also sufficient for freedom. According to Thomas Hobbes, ‘a freeman is he that, in those things which by his strength and wit he is able to do, is not hindered to do what he has a will to do.’\textsuperscript{45} Hobbes more or less saw freedom in terms of getting what one wants,\textsuperscript{46} stating that his account of freedom applied ‘no less to irrational and inanimate creatures than to rational.’\textsuperscript{47} His account of free action is developed by means of an analogy with a set of scales:

\textquoteleft The objects, means, &c are the weights, the man is the scale, the understanding of a convenience or inconvenience is the pressure of those weights, which incline him now one way, now another; and that inclination is the will.\textsuperscript{48}

Richard Holton comments:

\textquoteleft Here we can see clearly the sense in which the decision-making process is passive: there is nothing more to the process of decision than letting the weight of one’s understanding of the desirability of the various options press upon one. Indeed it is tempting to think that the decision machinery has no role at all. But that would be a mistake. To press the analogy: we need well-working scales if we are to weigh fairly. The point then is not that the scales are redundant; it is rather that they fail to make any discretionary contribution to the output. This is the sense in which the inputs determine the output: once we know that the scales are true we know how the scales will move simply by knowing the weight of the objects put upon them. Things are parallel on the simple Hobbesian model of action.\textsuperscript{\textsuperscript{49}} Assuming that agents are well-functioning, their actions will be determined by the force of the inputs,\textsuperscript{\textsuperscript{50}}

\textsuperscript{44} Galen Strawson, ‘Free Agents’ in his \textit{Real Materialism} (Oxford: Oxford University Press, 2008) pp. 359-386. My interest in citing Strawson’s work is with his attempt to understand the ordinary notion of agency and to see what, if anything, such a notion of agency lacks if it is to be conceived as implying human freedom. I am not concerned with his sceptical arguments about free-will.
\textsuperscript{45} \textit{Leviathan}, Chapter XXI ‘Of the Liberty of Subjects’
\textsuperscript{47} \textit{Leviathan}, Chapter XXI ‘Of the Liberty of Subjects’
\textsuperscript{48} \textit{Questions concerning Liberty and Necessity}
where these consist of the agents’ understanding of the utility of the various options. There is no place for an independent contribution from an act of choice. There is just risk of malfunction.  

The Hobbesian account, as Hobbes himself thought, is wide-ranging; it can be applied to both humans and non-human animals. While we can talk about choice and by extension consent on the account, it is the inputs (the desires of the human or the animal based on an understanding of the options) that determine the choice or the consent. The will as Hobbes put it is the ‘last appetite in deliberating.’ It is something like this sort of account, I think, based on agency that the Fletcher test was really grasping at in trying to block out a minimum notion of consent, before invoking the unhelpful notion of instinct. In Fletcher itself the conviction of the accused was upheld. Witnesses had said that the clearly profoundly disordered victim, Jane Jones, had not offered resistance to Fletcher but had exclaimed that he was hurting her. The court concluded that Jones was not consenting; although a consent produced by animal instinct would have sufficed, this was not such a consent. Surely what is really doing the work here is that Jones did not want what Fletcher was doing to her. Could the kind of Hobbesian account we have discussed form the basis of an account of consent wide enough to take in both adult human beings free of any lack of capacity or any disorder and those humans with a severe mental disorder? Consent would turn on the presence of desire for the touching in question.

The answer, I believe, is certainly not. That would be to go too far, even if as I’ve been suggesting this seems to be the idea that the animal instinct test was really trying to capture. For as we have touched on before, a severely mentally disordered person might desire a form of sexual touching with a certain person at a certain time, in circumstances in which they are being gravely exploited or where the sexual touching is otherwise inappropriate. What should be done in those cases is a complex matter which requires independent discussion. But there remain cases of what we might call unopposed sexual desires for specific forms of sexual touching with specific people, in other words, Williams’ concern in speaking of the right of severely mentally impaired people to express their sexuality and enjoy tender and close relationships. Desire for the specific sexual touching could not be sufficient then for a valid consent. But in considering it, more modestly, as a necessary element in a still-to-be-fully developed account of the threshold of valid consent, we already move beyond the exclusively cognitive understanding of the threshold of refusal-capability under section 30 of the Sexual Offences Act. If A wishes to engage in sexual touching with B, where B wishes to be touched by A in the relevant way, it is no business of the law to criminalize this behaviour in the name of an alleged incapacity to refuse consent.

50 Hobbes, Leviathan Chapter XI.
51 R v Richard Fletcher (1859) Bell 63.
VIII. Must consent be Intellectual?

I have suggested that the ‘foreseeable consequences’ threshold of the 2003 Act leaves out important dimensions of agency, in particular the notion of (unopposed) desire, that the test that Williams himself endorsed—knowledge of the physical facts—was also too focussed on the cognitive and at such a limited level that it could not be said to take matters beyond the animal instinct test. The animal instinct test, I think, would be better rendered as a ‘human instinct’ test, to avoid the emotive noise of the word ‘animal’, but in any case the idea of ‘instinct’ is unhelpful. The *Fletcher* test is best understood, I have suggested, in terms not of instinct or automatism, but of agency, with the component capacities for belief, desire and minimal practical reason Strawson suggested. What I called unopposed sexual desires should form a necessary part of a fuller account of minimal consent, about which there are many more questions I do not pretend to have tackled here, while their presence should not be taken as sufficient for consent.

One might object that the notion of agency I have recommended at least as a starting point for an account of minimal consent is so minimal that it cannot genuinely form an account of any sort of human will worthy of respect. For it was developed in terms of a Hobbesian account of action; and while Hobbes himself thought his account explained the will and human freedom, it is not as if his view has swept all before it. On the contrary, it has decidedly underwhelmed many. In Holton’s comment cited above, it was pointed out that the Hobbesian view makes decision-making and choice (and we may add consent), essentially passive. There does not, one might claim, seem to be enough for the chooser or consenter to do. Strawson, moreover, after listing the essential aspects of our conception of agency on which I relied above for my interpretation of *Fletcher*, goes on to say pace the Hobbesian view that such agency is still short of what we understand to be human freedom. What is missing, he suggests, is some notion of *self-consciousness*. A dog can choose, say between eating some more food or playing with the neighbour’s dog who has just appeared. But the dog, lacking self-consciousness, does not know she can choose.

It seems to have been an objection of this kind that Palles CB was expressing in the fourth of our tests, what I referred to earlier as the ‘rational will’ test of *Dee*.

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53 *R v Dee* (1884) 15 Cox CC 579 p 593.
54 *R v Dee* (1884) 15 Cox CC 579 p 593.
sketched above is insufficient for human freedom, which must be more richly conceived. Presumably on this ‘rational will’ test of minimum consent, what I called the unopposed desires of the mentally disordered would be neither here nor there as far as consent is concerned if not produced by the intellect or rational will. If the animal instincts test and Williams’s physical facts tests were low threshold tests, perhaps this should be classified together with the ‘foreseeable consequences’ threshold of the 2003 Act as a high threshold test. However this test, as I will now suggest, still falls well short in its implications of the foreseeable consequences test of the 2003 Act. Even if it is right that something like the Hobbesian notion of agency should have no place in an account of the minimum conditions of valid consent, it will not follow that the test ought to be the foreseeable consequences test of the 2003 Act. After stating then that the rational will test falls short of the foreseeable consequences test, I return finally to the objection that the notion of agency recommended above is just too thin to be of any use in the current context.

There are a lot of accounts in the philosophical literature of action and the will with which one might profitably compare Palles CB’s remarks. One, from R Jay Wallace draws a distinction between a motivated and an unmotivated desire. A ‘motivated desire’ says Wallace, ‘is one whose associated evaluative belief admits of a rationalizing explanation, where the desire is formed because the agent has arrived at the evaluative belief.’ When a person has a motivated desire, he suggests, it will always be possible to explain that desire in a way that shows it to be rationalized by other propositional attitudes that the person has. Thus psychological explanation of motivated desires will go beyond causal claims, about the states or conditions that trigger the onset of the desire. Here we can point to a contrast with the interpretation of the animal instincts test suggested above, which does seem to amount to causal claims that trigger the unopposed desires we were discussing. Those desires, it would seem, are triggered in a simpler way, they are caused, they percolate up inside persons so to speak. But in the motivated desire explanation it is being explicitly claimed that the explanation is not restricted to causal claims, about the states or conditions that trigger the onset of the desire. ‘Rather, motivated desires also (and necessarily) admit of a different kind of psychological explanation, in which the propositional content of the desire is shown to be rationalized or justified by the content of other of the person’s attitudes.’ Wallace allows that it is possible for one propositional attitude to be rationalized by other attitudes of the agent’s, without the rationalizing attitudes explaining the formation of the state that is rationalized; ‘a rationalizing explanation requires, more strongly,’ he says, ‘that the person should be in the rationalizing state because he has certain other attitudes that

rationalize the state.\textsuperscript{59} At this point we might yet again mention Williams’ concern that ‘severely impaired people…express their sexuality and …enjoy tender and close relationships.’\textsuperscript{60} The attitudes involved in tender and close relationships seem to furnish examples of potential rationalizing explanations, which nevertheless fall short of understanding the foreseeable consequences demanded in section 30 of the Sexual Offences Act. A may desire to touch and be touched by B because A finds B desirable and vice versa. An interesting film screened in the UK by Channel Four Television, entitled \textit{Richard is my Boyfriend},\textsuperscript{61} contained sensitive performances from actors playing two learning disabled adults embarking on a sexual relationship wanted by both. While the story was fictional it was based on real cases and was analysed in the film by real lawyers and medical professionals. One of the learning disabled characters in particular, Anna, had precious little understanding of the foreseeable consequences of the varying forms of sexual activity involved. But she desired the other character, Richard, and a set of discrete things constituting a ‘close and tender relationship’ in Williams’ phrase. Now the \textit{Dee} ‘rational will’ test requires that ‘the will [be] sufficiently enlightened by the intellect to make such consent the act of a reasoning being.’\textsuperscript{62} If that is to be interpreted in Wallace’s way as requiring that a (sexual) desire be formed because the agent has arrived at a relevant evaluative belief (‘Richard is desirable’ and so on), then comfortably more sexual desires will pass the test than would pass the foreseeable consequences test of the 2003 Act.

What, finally, of the objection we floated earlier to the suggestion I made that the idea of agency as described by Strawson and which can be understood in a Hobbesian manner should be our starting point for the development of an idea of the minimum threshold for consent? The objection, as we saw, was that the Hobbesian account is too impoverished to be an account of human freedom and the will in general. For one thing it lacks, as Strawson suggested, the notion of self-consciousness. I would answer this in two parts. First, one should simply concede the main point: the Hobbesian account is too impoverished to succeed as a general account of human freedom. Secondly, however, it does not follow that it can have no role in the current context of identifying a minimum threshold for sexual consent on the part of severely mentally disordered persons. As we saw in our discussion of the ‘rational will’ test in \textit{Dee} there may be a number of rationalizing explanations that the mentally disordered persons in question may have of their sexual desires that fall short of the foresight standards of the 2003 Act. But could there be cases where A wishes to touch B and B wishes to be touched by A (absent circumstances of exploitation and so on) where there is nothing in the way of a rationalizing explanation? The answer will depend of course on what is actually happening in reality.

\textsuperscript{60} Williams Textbook, p. 572.
\textsuperscript{61} Windfall Films, 2007. Commenting on the film, the charity \textit{Scope} remarked, very much in the spirit of Williams’ discussion, that much more thought is needed over how persons in Anna’s situation can be ‘empowered through supported living to help them make their own choices regarding relationships and sex.’ http://www.scope.org.uk/news/scope-statement-on-channel-4-docu-drama-%E2%80%9Careal-life-in-society%E2%80%9D (last visited 4 June 2012).
\textsuperscript{62} \textit{R v Dee} (1884) 15 Cox CC 579 p 593.
If there are such cases, it still seems wrong to me that such activity should be criminal in nature. What I called an unopposed sexual desire earlier can then be divided then into two different kinds. In the first kind, there exists some degree of self-consciousness or rationalized explanation of a disordered person’s sexual desire which is nevertheless short of understanding the reasonably foreseeable consequences of a specific act of sexual touching. In the second kind, there is no self-consciousness about the sexual desire, or no rationalized explanation. In either case surely the key question is not the cognitive one of the 2003 Act, it is the question of what is in the best interests of the mentally disordered person or persons in question.\textsuperscript{63} Williams’ ‘tender and close relationships’ may in given cases be an example of precisely that.

\textsuperscript{63} For the kinds of ways in which one can develop an understand the best interests of persons, see Derek Parfit, ‘What makes someone’s life go best?’ in his \textit{Reasons and Persons} (Oxford: Oxford University Press, 1986) pp. 493-502.